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EDITORIAL

COMMON CONSTITUTIONAL TRADITIONS

STATE- OWNED MARITIME PROPERTY USED FOR TOURIST AND LEISURE-ORIENTED BUSINESS PURPOSES

ECONOMIC PLANNING AND ADMINISTRATIVE TRANSFORMATIONS IN THE NGEU AND NRRP: A PARADIGM SHIFT

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1. European law crisis response

Sabino Cassese observes that the evolution of European law is the result of the passage from one crisis to another and, therefore, the endemic repetition of crises. The European integration process has emerged stronger and more advanced with each crisis.

Will this also be the case this time?

The coronavirus and Ukrainian emergencies have unquestionably been more disruptive than the empty chair crisis and the various economic and financial crises of the distant – and recent – past.

The pandemic has threatened the constitutional resilience of Europe's democratic orders. The war has affected the most precious asset in recent European history: peace, which had been broken in the previous seventy years only by the conflict in the former Yugoslavia. And it has dealt a further significant blow to globalisation, with a return to a geopolitical logic of opposing blocs between the United States and China, in which Europe constitutes the intermediate shard.

These dramatic scenarios have brought the inherent problems of the European order to the surface: suffice it to recall the issues of European governance, the weakness of European foreign policy, and the lack of a European defence system. Thus, at least the

pandemic crisis provided an opportunity to restart the integration process, primarily through the Next Generation European Union (NGEU) recovery plan.

In this respect, the European order seems to be showing enviable resilience and confirms its ability to fuel the integration process. This is especially true of the NGEU, which is an example of how the Union has the potential to face crises together and try to overcome them. It addresses them in the only way it knows how: through economics, at least when the crisis can be tackled using economic and financial means, which make it possible to develop and grow the technical expertise that is by now so well established in the European institutions.

But, the NGEU is certainly also a strong driving force in the direction of cohesion policies.

The fact is that the NGEU has produced a sharp paradigm shift as the resilient driver of not only economic but, above all, institutional and legal European recovery. All this has taken place under the lead of European administrative law as the NGEU has also entailed a significant transformation and further growth of administrative law, both at the European level and in the individual member States themselves.

2. The Revival of the European Integration Process through the NGEU

The NGEU has brought with it the issue of joint debt; the financing plan consisting partly of non-repayable grants, which meant that it was not only a financial operation but also a decidedly political one. Ultimately, it is an initiative that goes beyond the scope of international law or agreements between States. Unlike the previous sovereign debt crisis, it is wholly a matter for the European order, with a manifest revival of the Community method.

Obviously, the NGEU and, in particular, the Recovery and Resilience and Facility (RRF) are not the result of a sudden creative genesis. They fit into the furrow already traced by the financial policies of the last fifteen years. Indeed, the conditionality mechanism, already amply tried and tested in the US federal system, had already been employed through the instruments of financial assistance adopted in previous crises.

The link with the financial mechanisms of the European Semester is also nothing new. Thus, there has been no break with

the recent past in terms of forms and procedures, but the NGEU has been grafted onto a terrain, namely the financial one, that has already been tried before.

What is truly innovative and, in a sense, represents the new paradigm dictated by the RRF, is the collection of primary strategic objectives set out in the plan. These include ecological and digital transformation in the medium term, but also social and territorial cohesion, health and resilience, and policies for generational solidarity, and so on.

The close connection with innovation, sustainable development, and institutional and structural reform policies have led to innovation in the genesis and nurture of public policies. What has happened in practice is that a financial instrument, a European financing fund, has become the core instrument setting the direction and dictating the economic planning of the member States involved. We can therefore envisage a sort of return to economic planning in the nation States, albeit under the direction of the European institutions, especially the European Commission. The Commission has also been given substantial powers of control over how the single States implement the national plans and, in the event of non-compliance with the obligations undertaken or non-compliance with the principles of the rule of law, it may suspend the aid programmes and recover the funds disbursed.

3. The renewed centrality of the European Commission through the NGEU

The European Commission plays an absolutely pivotal role in the NGEU. Indeed, the Council has the critical task of approving the national plans when requested to do so by the Commission. However, it is the Commission that carries out the in-depth six-monthly periodical check on the state of implementation of the NGEU and especially on whether targets and milestones have been achieved, approving requests for payments coming from the States after consultations with the Economic and Financial Committee. The financial mechanisms are therefore functional to achieving major reform policies. If, on the one hand, we observe a process of financialisation in the sense outlined above, there is also a recovery of functionality concerning 'material' public interest through the prism of the two medium-term transition plans (ecological and digital) and the six major objectives identified by the NGEU.

It remains to be seen whether the European Commission's scrupulous control will continue to be strict and inflexible or will become more elastic and measured over the years. Some scholars tend to favour the latter hypothesis, especially if the markets continue to look favourably on these instruments.

4. The NGEU's organisational and functional effects of Italian government administration

In reality, European Commission control has already produced ripple effects on administrative law in the member States and, in particular, on the Italian system since ours is the State that benefits the most from NGEU funds. The member States must meet the prescribed targets and milestones to be considered to have achieved the six-monthly objectives set by the NGEU. This results in substantial changes in terms of structure, procedure, and administrative controls.

Concerning the first point, as we are all aware, a control room has been set up by the Presidency of the Council of Ministers, and the Presidency and the Ministry of Economy and Finance (and particularly the State General Accounting Office) have assumed an even more significant role than before. In many individual administrations then, mission units have been set up with the explicit purpose of implementing the NRRP, thus overlapping with the ordinary administrative organisation of the individual States. Their own personnel and resources work in close contact with the political leadership, coordinating and guaranteeing the pursuit of the planned goals within the established timeframe. We might, in fact, speak of a parallel administration.

As for activities and procedures, the fact that objectives must be realised within a contingent timeframe implies powerful planning capability and foresight, such as devising projects and investments that will be challenging in a few years' time. For several decades, this capacity for economic planning, if it existed in the past, has been 'mothballed' in our legal system, sacrificed in the name of previous European economic governance, which tended to leave the fundamental development choices to the regulated markets and economic operators.

On the other hand, there have been significant effects on execution methods as public administrations not only have to use the investments envisaged by the plan through standard tenders

and procedures, but they must also meticulously plan and implement – especially regarding timeframes – the multiple phases and numerous steps that come between one *tranche* of European funding and the next. In essence, failure to complete a procedure or a phase within the timeframe 'scheduled' in the agreements between the European Commission and the individual member States implies a breach of supranational obligations, with consequences which, at least in terms of formal severity, may prove to be extremely damaging to their economies.

There is, therefore, an outcome constraint linked to the length of the proceedings; it has now become central and decisive and perhaps even more important than the substantive outcome resulting from the actual impact of the investment or reform. The consequences are twofold: on the one hand, the NGEU, as an instrument related to economic policy, should enjoy greater freedom; otherwise, investment might be discouraged if caught in a legal stranglehold. On the other hand, it leads to 'bureaucratising' the proper performance of the action undertaken, which is measured in terms of processes and time rather than a concrete evaluation of the substance.

The fact is that the techniques of organisational science, corporate project management, and business engineering, which had previously made their way into the life of public administrations, have become absolutely fundamental in this emergency phase of recovery and resilience.

In particular, the techniques and models of project management, which have led to a transition from process-based to project-based organisation, have now come to be tools used by the public administrations during this transformation phase.

As a result, the legal, and therefore very structured and rigid rules and operating phases within the process, regarding the setup, the person responsible, the deadline, fact finding, the decision, and so on, are today flanked by the contemporary mechanisms of project-based organisation, based on flexibility and speed, supple personnel management, the ability to adapt to different needs, and a constant and regular reporting system. However, these mechanisms can also bring drawbacks, one of which is considerable stress within the organisations due to the strict, and frequent, deadlines running through the entire project. Another is focus on the individual project and the consequent risk of losing sight of the general picture, which must be recovered within the organisation

itself (by the general manager or office manager). Further drawbacks include the many projects that have to go ahead and that may actually prove incompatible (e.g., in the use of staff resources) and a relationship with the personnel linked to the completion of the project and with the person in charge of the procedure, who becomes a sort of project manager, with all the advantages and costs that this may entail.

Lastly, as far as administrative controls are concerned, the most significant new aspect is the relaunch and reinforcement of the Court of Auditors' external controls during implementation, whereby concomitant external controls have been added to internal management controls, resulting in constant monitoring of the implementation of NRP objectives. This transformation, however, seems to focus on achieving the objectives within the planned timeframe, so the question will be whether this in-progress effort will divert attention away from the verification of concrete results.

5. European administrative law as the driver of the integration process

Based on what has been said, we can gain a reasonable idea of the ability of these new instruments intervening in the economy to direct national economic development policies towards the pursuit of supranational policy objectives.

The result is a legal framework favouring increased integration, but its effectiveness will be tested in the coming years in terms of real-world implementation at national level.

The energy crisis could lead, among other things, to adopting other public investment mechanisms through public financing funds, gradually giving more stability to the instruments that were introduced 'in one shot'.

It seems reasonable to say that, in this phase, the NGEU has brought radical transformations not only in the European integration process, giving new impetus to the construction of the European project, but, through a ripple effect, it has also brought about a series of important changes to the structure of national institutions and administrations. This is undoubtedly a further demonstration of the extent to which European administrative law is the fundamental driver of the integration process.

THE ELI RESEARCH ON 'COMMON CONSTITUTIONAL TRADITIONS IN EUROPE': RESEARCH IN PROGRESS

Giacinto della Cananea

The IJPL is pleased to publish the reports elaborated in the framework of the research produced in the framework of the European Law Institute on a key topic such as the 'common constitutional traditions'.

It can be helpful to say one or two words about the choice made by ELI and its path. One of ELI's objectives is the elaboration and facilitation of research about European law. Thus far, it has accomplished this task mainly in the field of private law. The research initially proposed by Sabino Cassese and Mario Comba with a focus on common constitutional traditions is, therefore, innovative. When the research was approved, other members of ELI, including Piotr Bogdanowicz, Iain Cameron, Riccardo De Caria, Jörg Fedtke, Michele Graziadei, Francis Jacobs, Jeffrey Jowell, Andras Sajo, Guy Scoffoni and Takis Tridimas, have joined the proponents. Still others, including Daria De Pretis and Jacques Ziller, have been involved during the research and have taken part in various meetings and workshops. The research has thus been a truly transnational enterprise.

Few hints suffice to show why the new research is important both practically and theoretically. Practically, common constitutional traditions are included, together with the European Convention on Human Rights, between the sources of fundamental rights, which "shall constitute general principles of EU law", according to Article 6 (3) TEU. Moreover, although the Court of Justice of the EU is entrusted with the power to establish whether a certain tradition can be said to be common to national legal systems, this does not prevent national courts from taking the first step, through the preliminary reference procedure. The *Taricco II* saga (Case C-42/17) is instructive in this respect, as is the more recent case (Case C-481/97, *DB v Consob*) that is discussed in this issue of the *Journal*. Theoretically, an inquiry into common constitutional traditions cannot be concerned only with the study of legal norms, but must also be concerned with facts and, more broadly, with legal culture. Moreover, this inquiry not only shows that legal systems cannot be regarded as being self-contained, but it also raises the question whether the comparative approaches that must be used

within the European legal space can be the same that are applied, for example, in the study of the legal institutions that exist in the US and in Ethiopia. Last but not least, an inquiry into common constitutional traditions is also helpful for a better understanding of the meaning and significance of national identities, a recurring theme in recent legal literature, but not always treated in a perspicuous manner.

It remains to be said that, along the road, the research has taken more than one path. This is not surprising, because the advancement of knowledge normally implies the elaboration of new insight and the exploration of other areas, thus opening up the field for further innovation. There have been, first, various attempts to delineate the contours of common constitutions traditions, in the light of judicial decisions and existing scholarship. Some of these essays, elaborated at the beginning of the research, have been published on the *Rivista trimestrale di diritto pubblico*, n. 4/2017, while others are included in this issue of the IJPL. There is, second, a line of research focusing on freedom of expression, viewed as an exemplary common constitutional tradition. The final product of this line of research – a report - has been published by the ELI on its website ([1]), while some of the national reports are published in this issue of the IJPL. There is still another line of research that focuses on judicial independence. This is, by all means, an important topic, to which the IJPL has constantly devoted attention, in particular in the issue n. 2/2020, which focused on the rule of law.

This issue of the *Journal* thus includes both articles concerning the concept and nature of common constitutional traditions and national reports testing the conjecture that freedom of expression is a common tradition. Of course, several ramifications follow from this. Other contributions, hopefully, will follow on this and related subjects.

[1] The report is available at:
https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Freedom_of_Expression.pdf.

"COMMON CONSTITUTIONAL TRADITION" AS EUROPEANIZATION OF CONSTITUTIONAL CULTURE: THE FINNISH CASE

Tomi Tuominen[*]

Abstract

Finland acceded to the Council of Europe in 1989 and to the European Union in 1995. This signalled the Europeanization of Finnish law and legal culture. Nowadays, fundamental rights, as they are construed by the European Court of Human Rights in Strasbourg, play a major role in both the legislative process and judicial praxis in Finland. As the content of fundamental rights comes from Strasbourg, it is very difficult to distinguish anything very "Finnish" from Finnish constitutional law that could then contribute towards "the constitutional traditions common to the Member States" (Article 6(3) TEU). Some peculiarities can be distinguished from institutional constitutional law, but these, too, have been affected by Europeanization. Thus, Finland has been on the receiving end of Europe's common constitutional traditions.

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1. Introduction

The intention of this European Law Institute (ELI) project is to decipher what constitutes the "constitutional traditions common to the Member States"[1]. Specifically, the purpose of this project is to build on a bottom-up approach in deciphering the content of such a tradition, namely due to the reasons that if it is truly "common" then its shared content can only be discovered from the individual constitutional traditions of the Member States. Thus, this starting point methodologically rejects the approach that the Court of Justice of the European Union (CJEU) seems to have favoured in deciphering the meaning of Article 6(3) TEU, as the CJEU has adopted a top-down approach; the CJEU constructs the content of the "common constitutional traditions", as they relate to Article 6(3) TEU, from the sources it sees fit.

An issue closely related to common constitutional traditions, and one that is also highly topical, is that of "national constitutional identity"[2]. The European Union is to respect the Member States' national constitutional identities, "inherent in their fundamental structures, political and constitutional", as stipulated in Article 4(2) TEU. One reason for the existence of this national identity clause in the EU Treaties is to counterbalance the ever-broadening competences of the European Union and the primacy of EU law; there exists a core of national constitutional identity that the EU is not to tamper with, but actually has to respect.

There are various ways in which the content of what counts as a common constitutional tradition or a national constitutional identity can be defined. As there is yet only scarce case-law on both topics by the CJEU, many of these attempts have been rather theoretical. Such theoretical accounts are perhaps useful – or maybe even inevitable – in the current phase; they might be parts of an exercise in the political epistemology of European constitutionalism[3], which is tantamount for our self-reflection on the constitutional nature of the European Union. There are, however, also more practical approaches to exploring the

[1] See Article 6(3) TEU and Case C-11/70 *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para. 4.
[2] See Article 4(2) TEU and Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, paras. 83 and 92.
[3] See N. Walker, *European Constitutionalism in the State Constitutional Tradition*, 59 Current Legal Prob.s 51 (2007), 52.

genealogy of a particular Member State's constitutional tradition or national constitutional identity.

This project has adopted a practical approach, building on a questionnaire that focuses on both general features of the Member States' constitutional systems as well as three select fundamental rights. While providing rather schematized answers to these questions, in this country study on Finland I have to reject the proposed bottom-up approach. Instead, I argue that the content of constitutional law in Finland is so heavily influenced by Europeanization that identifying what constitutes the content of Finnish constitutional tradition is very much a top-down exercise. It is difficult to distinguish anything very "Finnish" from the content of fundamental rights in Finland. To the contrary, they have been introduced into Finnish constitutional law and legal praxis as a result of Europeanization. Moreover, current fundamental rights discourse and praxis in Finland is directly influenced by European, supra-national influences to a great extent. And it is not just the substantive issues (the content of fundamental rights) that have been affected by Europeanization, but also central elements of institutional constitutional law have changed due to Europeanization.

Section 2 provides background for the actual analysis by briefly explaining the constitutional history of Finland and the way in which constitutional review is conducted in the Finnish system. Section 3 discusses central elements of the Finnish constitutional system in light of what could count as a constitutional tradition or a national constitutional identity. Here, my point is to show what is meant by the Europeanization of the Finnish legal order in practice and why the bottom-up approach is thus unable to deduce anything very "Finnish", that could then contribute to the common European tradition. Section 4 contains discussion on freedom of speech, freedom of movement and judicial independence in Finland. Especially the first of these three topics further substantiates my top-down thesis of Europeanization. Section 5 concludes.

2. Two central aspects of the Finnish constitutional system

Before going into the substance of this study, two things about the Finnish constitutional system need to be explained, as they are

centrally related to the argument presented here and the substance of what counts as "constitutional tradition" or "national constitutional identity" in Finland. The first is the history of the Finnish state[4]. We can distinguish four different phases from Finland's constitutional past. *Swedish rule in Finland*, or the part of Scandinavia that we now call Finland, dates back to at least the 13th century. During the Swedish era, the principles of constitutional government and the rule of law (or the legalistic principle) were established as parts of the governing regime. The foundation of Finnish legal culture was established during this era. Some of the earliest codifications in Europe were enacted in Sweden during the 18th century. Take for example the Civil Code of 1734 (Swedish: *1734 års lag*). Parts of this codification were in force in Finland until the latter half of the 20th century.

In 1809 the Russians conquered Finland and *the Grand Duchy of Finland* was established as an autonomous region of the Russian Empire. The Swedish laws were kept in force in Finland despite Russian rule. These laws played a central part during the Russification attempts that started in 1899. Legalistic arguments – stemming from the way in which the Grand Duchy was established and the formal decision to uphold the laws from the Swedish era – were presented against attempts to annex Finland more strongly to the Russian Empire and subjugate Finland under the Tsar's rule. This legalistic tradition is according to many still reflected in the Finnish attitude towards constitutional norms.

Finland became independent in 1917 following the Great October Socialist Revolution by the Bolsheviks in Russia. Finland's development into a modern, Nordic welfare state begun after the Second World War. However, despite formal independence, Russia had a big influence on Finnish politics; politics was marked by what was called Finlandization (German: *Finnlandisierung*), which referred to politics that tried to appease Russian interests both when it came to Finnish foreign affairs and internal political questions. Somewhat due to this, Finland started to participate in European integration only at the end of the 1980s.

Finland acceded to the Council of Europe in 1989 and the European Convention on Human Rights (ECHR) became effective in Finland the following year. In 1995 Finland became a Member

[4] See J. Husa, *The Constitution of Finland: A Contextual Analysis* (2011), 11–27; I. Saraviita, *Constitutional Law in Finland* (2012), 19–28.

State of the European Union. These events marked the *Europeanization of the Finnish legal order*. The Constitution of Finland was modernized in parallel to this process. In 1995 a new bill of rights was adopted and in 2000 the old constitution, dating back to 1919 (Finnish: *Hallitusmuoto*; Swedish: *Regeringsform*), was replaced by the current Constitution (Finnish: *Suomen perustuslaki*; Swedish: *Finlands grundlag*)[5].

The second important thing to take into consideration is the way constitutional review is currently organized in the Finnish Constitution. The Finnish system has been categorized as a "hybrid" system in comparison to the centralised model in Germany and the decentralised model in the US[6]. *Ex ante* review of legislative proposals is carried out by the Parliament's Constitutional Law Committee (Finnish: *perustuslakivaliokunta*; Swedish: *grundlagsutskottet*) (Section 74 of the Constitution), while *ex post* review is carried out by all courts when deciding on individual cases (Section 106).

The Committee reviews Government Bills (proposals for laws) on the basis of the Finnish Constitution and international human rights treaties, mainly the ECHR. If the proposal is deemed unconstitutional, then it either needs to be amended, or the constitution needs to be amended to accommodate for such a law. Previously it was common to adopt such unconstitutional laws as exceptive acts; that is, normal laws that are contrary to the Constitution and thus need to be adopted in accordance with the requirements set for amending the constitution[7]. This procedure is no longer used. Adopting acts that breach the Constitution therefore requires to first amend the constitution, after which the law can then be adopted[8].

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[5] The Constitution of Finland (731/1999) and all of the other acts referred to in this study can be accessed in English at <http://finlex.fi/en/>.

[6] See K. Tuori, *Combining Abstract Ex Ante And Concrete Ex Post Review: The Finnish Model*, Venice Commission, CDL-UD (2010)011 (2010), 4.

[7] See J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 227–232; I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 45–48.

[8] The last time this happened was with the new Civilian Intelligence Act (528/2019), which sought to improve Finland's national security by giving the Finnish Security Intelligence Service various powers related to gathering intelligence information in the digital realm. See Government Bill HE 202/2017 vp and the Committee's statements PeVL 35/2018 vp (15 November 2018) and PeVL 75/2018 vp (27 February 2019). This issue is discussed below in Section 3.2.

Concrete *ex post* review was introduced into the Finnish system fairly recently, mainly due to the Europeanization of the Finnish legal order as a result of Finland acceding to the ECHR in 1989 and the EU in 1995[9]. The concrete *ex post* review power of courts means that they can set aside a norm of national law that is contrary to the constitution[10]. However, their decision to do so does not result in the law being declared null and void. The practical significance of such concrete review has been only minor, due to the high threshold set for such review: a court can give primacy to the Constitution only if the normal law is in "evident conflict" with the Constitution (Section 106)[11]. If the law has been reviewed *ex ante* and the Committee did not identify any constitutional issues in that specific part of the law, then a court is in practice barred from finding a breach with the Constitution.

Before deciding on an issue, the Committee hears experts on the Finnish Constitution and the matter in question. Most often these are constitutional law professors. Usually the Committee follows their opinion. If the experts' opinions on the correct interpretation of the Constitution differ, then there is more room for the Committee to construct its argument[12]. The work of the Committee in deciding issues has been described as being "characterized by a search for constitutionally well-founded interpretations and consistent use of precedents"[13]. Thus, the Committee seems to function, at least to a degree, in a manner similar to constitutional courts. Furthermore, the Committee's

[9] See J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 78–83; J. Lavapuro, T. Ojanen & M. Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, 9 Int'l J. Const. L. 505 (2011).

[10] There is a strict demarcation between normal courts and administrative courts in Finland. Normal courts function in three tiers (district courts, courts of appeals and the Supreme Court) whereas administrative courts in two tiers (regional courts and the Supreme Administrative Court). There are also several specialized courts (e.g. the Market Court and the Labour Court), from which there is a possibility to appeal either to the Supreme Court or the Supreme Administrative Court. All courts can utilize the *ex post* review power of Section 106.

[11] The Supreme Court has so far done this only in nine cases and out of these half relate to a very peculiar situation related to changes in the laws governing the validation of paternity.

[12] I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 161–162.

[13] T. Ojanen, *EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament*, 52 Scandinavian Stud. L. 203 (2007), 205. Similarly, see K. Tuori, *Combining Abstract Ex Ante And Concrete Ex Post Review: The Finnish Model*, cit. at 6, 4–5.

opinions on the interpretation of a given norm are *de facto* binding on courts when they are applying that norm[14].

This somewhat unique role of the Committee has certain benefits as well as setbacks. On the one hand, in Finland courts do not face strong public or academic criticism of "judicial activism" because the way that constitutional review is organized has meant that courts have had to decide very few controversial issues. Furthermore, the *ex ante* review powers of the Committee have enabled its participation to European level political and legal discussion to the degree that its opinions have been seen to have affected the outcome of European politics during the Eurozone crisis[15]. On the other hand, the fact that the Committee is neither a purely legal nor political institution has made it susceptible to criticism especially from politicians. For example, some high-profile Members of Parliament have argued that the Committee relies too heavily on the opinions of a few constitutional law professors. The criticism is that it is actually the professors and not the members of the Committee that are ultimately in charge of interpreting the Constitution. Furthermore, they argue that constitutional interpretation is not objective but always based on the subjective values of the interpreter, for which reason the power of interpretation should not be given to outside experts but should be retained by the Members of Parliament[16].

3. Finnish constitutional culture and the European, common constitutional tradition

What constitutes the "constitutional traditions common to the Member States"? What part of Finnish constitutional culture would count as part of this European heritage? In this section, I first explain how the terms constitutional tradition or constitutional identity are not part of the Finnish constitutional vernacular, but the term constitutional culture is used instead. Next, I discuss institutional and substantive issues of Finnish constitutional

[14] J. Husa, *Nordic Constitutionalism and European Human Rights - Mixing Oil and Water?*, 55 Scandinavian Stud. L. 101 (2010), 107–108.
[15] See Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (2014), 199.
[16] See I. Koivisto, *Experts and Constitutional Control in Finland: A Crisis of Cognitive Authority?*, 40 Retfaerd 24 (2017).

culture. Lastly, I make some conclusions on the theme of Europeanization of Finnish constitutional culture.

3.1. Foundations

In Finland, the term "constitutional tradition" is not used in any legal texts, by courts, or in academic writing. Instead, the term *constitutional culture* is used[17]. To be precise, Finnish law does not attach any specific legal significance to "constitutional traditions". The term as such, or anything resembling it, is not mentioned in the Finnish Constitution or in normal laws. Neither has it assumed any status in the doctrine of the two supreme courts. In the legal literature, the term "constitutional tradition" is used to cover both "constitutional traditions" as per Article 6(3) TEU and "national constitutional identity" as per Article 4(2) TEU[18].

The Finnish language version Article 6(3) TEU uses the term *valtiosääntöperinne*, which is a direct translation from the English term constitutional tradition (*valtiosääntö* = constitution; *perinne* = tradition). Etymologically, I see no distinction between the Finnish term *perinne* or the English term *tradition*. A comparison with the Swedish version of the Treaty on the European Union (Swedish being also an official language in Finland) verifies this conclusion, as it uses the term *konstitutionella tradition*. The connotation between the English (*tradition*), Swedish (*tradition*) and Finnish (*perinne*) versions of the term is the same.

While the term constitutional tradition is not used in Finnish constitutional law, *customary constitutional law* (or constitutional praxis) has a big role in Finnish constitutional law, especially in the functioning of the state institutions and their relations with each other. Many central elements concerning the functioning of the Finnish Parliament (Finnish: *eduskunta*; Swedish: *riksdag*) are based on custom. These include, for example, how the Government is formed after elections, how seats in the different Committees of the Parliament are divided, and who is elected as the Chairman of the Parliament. The development of such constitutional custom is based on political praxis, although these issues are often commented on in legal literature.

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[17] See J. Salminen, *Yhä Läheisempään Liittoon?: Tutkielmia valtiosäännön integraationormin sisällöstä ja vaikutuksista* (2015); J. Salminen, *Den konstitutionella identiteten, förändringen och Finland*, 37 Retfaerd 41 (2014).

[18] E.g., see K. Tuori, *Introduction to the Theme: Constitutional identity*, 37 Retfaerd 3 (2014).

Furthermore, the term "customary law" (Finnish: *maan tapa*; Swedish: *sedvanerätt*) has specific legal relevance. For example, in case of a lacunae in the written law, customary law may be used by the judge. In the Finnish doctrine on the sources of law (the norms that can and must form the basis of a judge's decision) "national custom" is listed as one element of strongly binding sources of law right after EU law, ECHR law and national law[19]. The position of customary law dates back to the Swedish codification of 1734, mentioned above.

The Finnish legal system makes a distinction between *objectives* that the legislation pursues and *principles* that are to be taken into consideration in the application of the law. To give an example, Section 1 of the Administrative Procedure Act (434/2003) states that the objective of the Act is, inter alia, "to promote the quality and performance of administrative services". To further these objectives, Section 6 of the Act lays down the legal principles of administration: the principle of equal treatment, the principle of legality, the principle of impartiality, the principle of proportionality, and the principle of protection of legitimate interests. Finnish laws or their *travaux préparatoires* do not usually refer to any values as such, although in Finland it is perceived that generally speaking the legal system as a whole is a reflection of certain societal values. These are most often associated with issues such as the Nordic welfare state and everything that it encompasses[20].

Defining what would count in Finland as a "constitutional tradition" under Article 6(3) TEU depends on the methodology used to define such constitutional traditions. As I have understood it, this legal concept is usually invoked as a justification in situations in which national law is in breach of EU law, *Omega* being the best known example[21]. However, as according to my interpretation the way in which the substance of fundamental rights is construed in Finland is heavily influenced by Europeanization, it is difficult to

[19] See A. Aarnio, *Essays on the Doctrinal Study of Law* (2011), 150–151.
[20] See H. J. Petersen, *Nordic Model of Welfare States*, in P. Letto-Vanamo, D. Tamm & B. O. G. Mortensen (eds.), *Nordic Law in European Context* (2019).
[21] C-36/02 *Omega Spielhallen*, ECLI:EU:C:2004:614. In its judgment, the CJEU saw the protection of human dignity as a legitimate objective under EU law since it stemmed from the Member States' common constitutional traditions. Therefore, Germany was allowed to breach free movement rules on the basis of protecting human dignity.

decipher anything very Finnish in this perspective, at least in that it would allow Finland breaching EU law. It is, though, possible to distinguish central elements of Finnish constitutional culture in general, and also how these have changed due to the Europeanization of the Finnish legal order. These issues, however, pertain to the functioning of state institutions and the legal system in general, and not to rights that could be applied by a court of law. The heavy European influence on the substantive construction of fundamental rights in Finland will be explored below.

When it comes to institutional issues, I would classify the way in which the Constitutional Law Committee carries out *ex ante* review as a central element of the Finnish constitutional tradition. This issue, though, does not have any relevance for EU law in the meaning of Articles 6(3) or 4(2) TEU in my view; it is difficult to imagine a case which would involve EU law and the position of the Constitutional Law Committee as the guardian of constitutionalism in Finland. As the Committee is not a court, it cannot make preliminary references under Article 267 TFEU and thus interact with the CJEU. Here, I refer to CJEU cases such as *Simmenthal* or *Melki and Abdeli*, which affected relations between national courts and how they can make references to the CJEU[22]. As the Committee is not a court and cannot make a reference, this doctrine by the CJEU cannot affect the position of the Committee within the Finnish constitutional system.

Furthermore, the devolution of the Åland Islands is also a matter which could be classified as part of the Finnish constitutional tradition[23]. Likewise, this issue, too, seems to have no relevance for EU law, at least not for the matter that is being discussed in this study.

Statutory and constitutional interpretation in Finland has been strongly influenced by international sources. Statutory interpretation is based on the work of Aulis Aarnio[24], who

[22] C-106/77 *Simmenthal*, ECLI:EU:C:1978:49; C-188/10 and C-189/10 *Melki and Abdeli*, ECLI:EU:C:2010:363. See M. de Visser, *Constitutional Review in Europe: A Comparative Analysis* (2014), 417–427.

[23] Generally, see S. Spiliopoulou Åkermark, S. Heinikoski & P. Kleemola-Juntunen, *Demilitarisation and International Law in Context: the Åland Islands* (2018).

[24] See A. Aarnio, *Essays on the Doctrinal Study of Law*, cit. at 19; A. Aarnio, *Reason and Authority: A Treatise On the Dynamic Paradigm of Legal Dogmatics* (1997); A. Aarnio, *The Rational As Reasonable: A Treatise On Legal Justification* (1986).

collaborated with Neil MacCormick and Rober Summers[25]. Constitutional interpretation by the Constitutional Law Committee, especially the doctrine on limiting fundamental rights, is essentially derived from the German Federal Constitutional Court[26]. Of German origin is also the habit of interpreting legislation in a fundamental rights friendly manner (German: *verfassungskonformen Auslegung*)[27]. Thus, it is difficult to distinguish anything very Finnish, as per the bottom-up approach, with regard to constitutional or statutory interpretation. Finally, one could also say that the legalist tradition, mentioned in the previous section, affects the undertone that interpretation takes: according to the prevailing view, interpretation is a science not an art[28]. With regard to constitutional law, this view emphasises legal constitutionalism as opposed to political constitutionalism. The tools for such interpretation, then, stem from the case-law of the European Court of Human Rights (ECtHR).

When it comes to the principle of proportionality, the two supreme courts do not seem to have an established doctrine on proportionality[29]. Under the prevailing European doctrine, proportionality consists of three limbs: suitability, necessity and proportionality *stricto sensu*[30]. Very few cases, however, contain a proportionality analysis that would contain all three stages, at least explicitly. Proportionality before the courts is most often discussed in relation to Section 6 of the Administrative Procedure Act (434/2003), according to which "[t]he acts of an authority shall be impartial and proportionate to the objectives sought". Yet, these cases neither seem to contain an explicitly formulated

[25] See D. N. MacCormick, & R. S. Summers (eds.), *Interpreting Statutes: A Comparative Study* (1991); D. N. MacCormick & R. S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (1997).
[26] See J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 198–200; I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 258–262.
[27] J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 196–198.
[28] See M. Scheinin, *The art and science of interpretation in human rights law*, in B. A. Andreassen, H.-O. Sano & S. McInerney-Lankford (eds.), *Research Methods in Human Rights* (2017). Scheinin is regarded as the leading expert in fundamental rights in Finland and he is often heard by the Constitutional Law Committee.
[29] E.g. in case KKO 2019:36 the Supreme Court first stated how notice must be had to ECtHR case-law and the Court's own precedents, and furthermore that "according to the principle of proportionality, the severity of the crime also affects the assessment". The Court did not, however, apply any specific proportionality analysis or weigh out the different interests at stake explicitly.
[30] See R. Alexy, *A Theory of Constitutional Rights* (2002), 66–69.

proportionality analysis[31]. However, as "the proportionality analysis that the ECtHR conducts in most cases does not strictly follow the three-pronged test"[32], it is perhaps not surprising that Finnish courts, which base their analysis on ECtHR case-law, are neither able to live up to the original German standards of this test.

Looking at it from the Finnish perspective, a constitutional tradition can develop in a fairly short period of time. Take, for example, the Europeanization of the Finnish legal order. It started about thirty years ago, and is nowadays *the* defining feature of Finnish constitutional culture. Conversely, what counts as constitutional tradition can emanate either from the current constitutional regime, or date back to preceding, historical regimes. Central elements of Finnish constitutional culture stem from the Swedish and Russian eras. One of these features is the existence of the Constitutional Law Committee[33]. Thus, some central elements of Finnish constitutional culture are clearly trans-regimic, while others have been established within a single constitutional regime.

Some elements of Finnish constitutional culture are broad concepts and ideas, whereas others are rather particular norms and precise rules. Similarly, if we think about, for example, the effects of Europeanization on Finnish constitutional culture, we can distinguish its effects at all three layers of law[34]. At the surface level of everyday legal practice, we can observe how ECtHR case-law is being cited often, even by district courts. At the level of legal culture, we notice how the primacy of EU law and the superior position of the ECHR viz national law has been accepted by all relevant legal actors. At the historically and culturally embedded level of the law's deep structure, we can trace the continuities emanating back to the Swedish and Russian era, while also Europeanization has sedimented certain conceptualization into it,

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[31] E.g. in case KHO 2018:85 the Supreme Administrative Court first explicitly explained what the principle of proportionality of Section 6 of the Administrative Procedure Act means, but although the judgment contains an implicit weighing of different interests, this exercise is not based on clearly expressed "limbs" or "stages" of analysis, as is often done by courts such as the ECtHR or the CJEU.

[32] Y. Arai-Takahashi, *Proportionality*, in D. Shelton (ed.), *The Oxford Handbook of International Human rights Law* (2013), 453.

[33] J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 11–27; I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 19–28.

[34] For the ontological view of the three layers of law, see K. Tuori, *Critical Legal Positivism* (2002). This understanding on the nature of law is widely accepted in Finland.

namely the openness towards European integration and the unreserved attitude towards supranational fundamental rights. We could perhaps say that Europeanization has proceeded to such an extent that it is nowadays part of the deep structure of Finnish constitutional culture.

3.2. Subject and content of constitutional traditions

When we think about elements of Finnish constitutional culture, we can discern both substantive issues and institutional arrangements. When it comes to the substantive aspect, namely fundamental rights, their content seems to coincide with the European framework. This can be established by just a cursory look at some recent judgments by the two supreme courts, in which reference has been made to fundamental or constitutional rights, or statements by the Constitutional Law Committee.

In its judgment KKO 2019:44, which dealt with the principle of legality in criminal law, the Supreme Court started its interpretation of the principle by referring to Article 49 of the Charter of Fundamental Rights of the European Union (EU Charter), Article 7 ECHR and Article 15 of the International Covenant on Civil and Political Rights (ICCPR). With this, the Supreme Court was signalling, that Paragraph 3 Section 1 of the Criminal Code (1889/39) on the principle of legality must be interpreted in light of these international norms. Next, the Court discussed how the principle is construed in the national *travaux préparatoires* and in its own previous precedents. Then, the Court discussed the CJEU's judgment in *M.A.S and M.B.* and the ECtHR's judgment in *C.R v. UK* and *Jorgic v. Germany*[35]. After having thus constructed the content of the principle of legality, the Court then moved to applying it to the case at hand.

The Supreme Administrative Court assessed an asylum seeker's, whose application had been rejected and who had been ordered to leave the country, right to basic social assistance in its judgment KHO 2019:62. In practice, the case concerned the interpretation of the national laws implementing the Reception Conditions Directive (2013/33/EU) and whether it was constitutional to grant asylum seekers, whose application had already been rejected, a lower level of basic social assistance than to

[35] See C-42/17 *M.A.S. and M.B.*, ECLI:EU:C:2017:936; *CR v. United Kingdom* (22 November 1995); *Jorgic v. Germany* (12 July 2007).

Finnish nationals. The Court came to the conclusion that denying basic social assistance in these conditions does not violate Article 3 ECHR. To this end, the Court cited *Hunde v. the Netherlands*[36].

Perhaps one of the most significant statements by the Constitutional Law Committee in recent years is the one it issued on the Government Bill concerning new surveillance powers to be given to the Finnish Security Intelligence Service[37]. Basically, the Bill aimed at giving the Intelligence Service broad surveillance powers that breached the right to privacy (Section 10 of the Finnish Constitution). The rational for such a Bill was to enable the Intelligence Service to use modern surveillance methods to counter terrorism and for other national security reasons. It was immediately clear that the proposed legislation was unconstitutional but as the will to adopt these laws was very broad, the Finnish Constitution was amended to enable the adoption of such unconstitutional laws[38].

In its extraordinary long and detailed statement, the Committee started its assessment of the issue by framing it in light of Article 8 ECHR and Article 7 EU Charter, and by discussing the case-law of both courts. There is no space here to go into detail on the Committee's argumentation. Instead, I will only list the cases cited by the Committee. From the Luxembourg court the Committee cited *Digital Rights Ireland*, *Schrems*, *Tele2 Sverige*, *Ministerio Fiscal* and *Comission v. Finland*[39]. From the Strasbourg court the Committee cited *Weber and Saravia v. Germany*, *Liberty v. the United Kingdom*, *Zakharov v. Russia*, *Szabó and Vissy v. Hungary*, *Centrum for Rättvista v. Sweden*, and *Big Brother Watch v. the United Kindgom*[40].

While these are of course just anecdotal examples, in my view the pattern is recurring throughout current praxis. Both the legislative process and the judicial practice of the two supreme

[36] *Hunde v. The Netherlands* (5 July 2016).
[37] PeVL 35/2018 vp (15 November 2018).
[38] Amendment 2018/817 and Government Bill HE198/2017 vp.
[39] C-293/12 and C-594/12 *Digital Rights Ireland*, ECLI:EU:C:2014:238; C-362/14 *Schrems*, ECLI:EU:C:2015:650; C-203/15 and C-698/15 *Tele2 Sverige*, ECLI:EU:C:2016:970; C-207/16 *Ministerio Fiscal*, ECLI:EU:C:2018:788; C-284/05 *Commission v. Finland*, ECLI:EU:C:2009:778.
[40] *Weber and Saravia v. Germany* (29 June 2006), *Liberty v. the United Kingdom* (1 October 2008), *Zakharov v. Russia* (Grand Chamber, 4 December 2015), *Szabó and Vissy v. Hungary* (12 January 2016), *Centrum for Rättvista v. Sweden* (19 June 2018), and *Big Brother Watch v. the United Kindgom* (13 September 2018).

courts takes ECtHR, and recently also CJEU, case-law as the point of departure. Leading fundamental rights experts are also consulted in cases that are being tried before lower courts, especially in case of politically motivated litigation. Good recent examples include the indigenous Sámi peoples' fishing rights[41] and exemptions from mandatory conscription[42].

The point that I am trying to make here is simple: the Europeanization of fundamental rights as such as well as fundamental rights discourse in Finland. For this reason, the formation of the content of fundamental rights in Finland has been, and continues to be, very much a top-down phenomenon – instead of the bottom-up approach that the ELI project has assumed as its hypothesis.

When it comes to institutional arrangements as part of Finnish constitutional culture, here we can distinguish something clearly Finnish. Janne Salminen has listed four issues that, according him, are central aspects of Finnish constitutional culture[43]. First, the legalistic and strongly positivistic attitude towards law and legal interpretation. This aspect was born as a reaction to the Russification attempts during the *fin de siècle*[44]. Second, we have the constant use of exceptive acts to enact normal laws that are contrary to the Constitution[45]. Third, emphasis on political constitutionalism as opposed to legal constitutionalism, which was clearly seen in how the Committee as a political organ and not the courts as judicial organs were in charge of interpreting and construing the content of fundamental rights[46]. Fourth, the presidential system[47].

These institutional features, too, have been transformed due to Europeanization. The central argument that Salminen makes in this regard is that the Finnish Constitution has become open to Europeanization and that Europeanization is now internalized into the Finnish Constitution; that Europeanization is now part of

[41] In English, see < https://yle.fi/news/3-10676003> (accessed 29 June 2022).
[42] In English, see < https://yle.fi/news/3-10089261> (accessed 29 June 2022).
[43] J. Salminen, *Yhä Läheisempään Liittoon?: Tutkielmia valtiosäännön integraationormin sisällöstä ja vaikutuksista*, cit. at 17, 171.
[44] See section 2 above.
[45] See fn. 7 above.
[46] See J. Lavapuro, T. Ojanen & M. Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, cit. at 9.
[47] See J. Nousiainen, *From Semi-presidentialism to Parliamentary Government: Political and Constitutional Developments in Finland*, 24 *Scandinavian Pol. Stud.* 95 (2001).

Finnish constitutional culture. The formal culmination of this process was the amendment of the Constitution in 2012. Now, Section 1 states that "Finland is a Member State of the European Union". Moreover, Sections 94 and 95 now specify how the "transfer of authority to the European Union" shall take place[48].

When we look at all of the abovementioned features of Finnish constitutional culture, we can see that all of them have undergone major changes starting from the end of the 20th century. The legalistic attitude towards law has changed, which is evident, for example, from the way in which national laws are now interpreted through the lens of international fundamental rights and EU law. Exceptive acts are no longer used, and in such situations the text of the Constitution itself is amended. The role of courts, both the supreme courts as well as lower level courts, in fundamental rights interpretation and application has increased. Finally, the role of the President of the Republic has been narrowed down considerably.

With regard to more specific issues, we can mention that there is a clear distinction between administrative and constitutional law in Finland. This can be seen both in the institutional setup of the legal system as a whole as well as in particular laws. The main constitutional institution is the Committee, whereas the main administrative law institutions are special administrative law courts. There are six regional administrative courts and the Supreme Administrative Court as an appellate body. Administrative actions by governmental and communal agencies are regulated by the Administrative Procedure Act (434/2003), while proceedings before administrative courts by the Administrative Judicial Procedure Act (586/1996)[49]. Administrative law and constitutional law are distinct subject matters also substantively speaking. There are specialized chairs for both topics in law schools as well as textbooks on the substance of these issues. There is of course some degree of overlap between the two, but this stems from the role of the Committee: administrative courts need to take the Committee's statements into consideration, but this applies also to all other areas of law in addition to administrative law.

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[48] Amendment 1112/2011, entry into force on 1 March 2012.

[49] See O. Mäenpää, *The Rule of Law and Administrative Implementation in Finland*, in K. Nuotio, S. Melander & M. Huomo-Kettunen (eds.), *Introduction to Finnish Law and Legal Culture* (2012).

3.3. Constitutional traditions and European influence

Finnish courts do not refer to "constitutional tradition" in the sense of Article 6(3) TEU when deciding on purely national issues. Courts may and do refer to "legal tradition", in the sense as explained above, but this is different from that which the Member States' common constitutional traditions as a concept pertains to. As most of the substantive issues of constitutional law are Europeanized (whereas the institutional issues which reflect Finnish idiosyncrasies are not the subject of court adjudication in the Finnish system as courts do not have jurisdiction on such institutional issues), therefore it is difficult to distinguish cases where national courts would rely on national constitutional tradition (or national constitutional identity) in their adjudication.

What about national engagement with European constitutional traditions? There is at least one (somewhat) recent judgment where the Supreme Court engages in a comparative constitutional discussion on common constitutional traditions. The substance of the case KKO 2014:93 concerned the *ne bis in idem* principle and whether a criminal sanction can be imposed in addition to a punitive tax increase as a result of tax evasion. One specific legal question pertained to whether states are obliged to allow for re-appeals in case the ECtHR finds the state to have breached the ECHR. In its judgment, the Supreme Court analysed ECtHR case-law on the question. Moreover, the Court also cited judgments by the Norwegian Supreme Court, the German Federal Constitutional Court, the French Constitutional Council, the Belgian Constitutional Council, the French Court of Cassation, the Irish Supreme Court, and the Supreme Court of Sweden. In my view, the Finnish Supreme Court's intention was to see whether a common European constitutional tradition has emerged with regard to the question at hand. But again, the Finnish Supreme Court's intention was to interpret the law in accordance with such a constitutional tradition; Europeanization is a top-down process, whereby the Finnish constitutional tradition is through interpretation brought in line with its European counterparts.

The Constitutional Law Committee often uses the term constitutional tradition (Finnish: *valtiosääntöperinne*), but this is most always in reference to the evolution of the Finnish

Constitution and constitutionalism[50]. When giving a statement on the European Commission's proposal for the Council Regulation on the European Union Agency for Fundamental Rights[51], the Committee stated, that since Article 3(2) of the Regulation only specifies that the duties of the Agency pertain to securing the functioning of fundamental rights as based on Article 6(2) TEU (the Member States' common constitutional tradition) and the ECHR, Article 3(2) of the Regulation should be amended to also refer to other international fundamental rights instruments[52]. Simply put, the Committee did not see the ECHR and the Member States' common constitutional traditions as encompassing enough when it comes to the landscape of fundamental rights.

Thus, it seems pertinent to conclude that the Europeanization of the Finnish legal system has progressed to the stage where Europeanization is now a central aspect of Finnish constitutional culture. In fact, Salminen has gone so far as to argue that politics that would actively strive for Finland's withdrawal from the EU would be against the Finnish Constitution now that membership is enshrined in Section 1 of the Constitution[53].

4. Examples of Europeanization… and some resistance

This section offers a glance at case-law and constitutional discourse on three specific rights in Finland. Most attention is given to the freedom of speech, while freedom of movement and judicial independence are only dealt with in a cursory manner. The first subsection further substantiates the Europeanization thesis put forth in the previous section.

4.1. Free speech

Freedom of speech is a classical liberty right that is crucial for the functioning of – if not the whole existence of – a polity. Just as

[50] For a recent example, see PeVM 4/2018 vp (21 September 2018), where the Committee explains how the enactment of the new Constitution in 2000 "did not significantly alter Finland's constitution's foundations, but the reform could be done in a manner that secures the continuation of the prevailing constitutional culture and further develops it".

[51] See COM(2005) 280 final, 30 June 2005, Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights.

[52] PeVL 57/05 vp (2 December 2005).

[53] See J. Salminen, *Yhä Läheisempään Liittoon?: Tutkielmia valtiosäännön integraationormin sisällöstä ja vaikutuksista*, cit. at 17, 135.

in Article 10 ECHR, freedom of speech is conceptualized as "freedom of expression" in the Finnish Constitution. According to Section 12 of the Constitution: "Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act."

The majority of cases on freedom of expression concern violations of personal privacy. According to Chapter 24 Section 8 of the Criminal Code (39/1889), a person who unlawfully, through the use of mass media or otherwise by making available to many persons, "disseminates information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced for *dissemination of information violating personal privacy* to a fine". The section then makes two reservations. First, in case of a person in politics, business, public office or public position, or in a comparable position, dissemination of private information does not constitute violating personal privacy, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for purposes of dealing with a matter of importance to society. Second, the presentation of an expression in the consideration of a matter of general importance shall also not be considered dissemination of information violating personal privacy if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not clearly exceed what can be deemed acceptable.

Two recent judgments by the Supreme Court addressed freedom of expression and violation of privacy. The case KKO 2018:51 concerned the following events. B had been found guilty of aggravated sexual abuse of a child. After B's conviction, his name and personal information had been publicized in various newspapers, as is customary in Finland. Four months later A had linked a newspaper article about B's conviction to a Facebook group dedicated to "exposing paedophiles" and also attached along a picture of B, which he had taken from B's public Facebook profile. A was charged of breaching B's privacy by making the Facebook post.

In applying the relevant legislation to the facts of the case, the Court's reasoning proceeded through the following three stages.

Has posting the picture caused damage and suffering to B? Has A acted unlawfully, or were his actions justifiable due to the general public's interest in the issue? Has A's act gone beyond what can be deemed acceptable? This is the normal pattern of reasoning followed by courts in such cases. The last step (whether the actions were "acceptable") constitutes essentially a proportionality analysis. The Supreme Court does not, however, use the term proportionality (Finnish: *suhteellisuus*) but instead talks about balancing (Finnish: *punninta*). Terminologically, this conveys well what the third limb of proportionality – proportionality *stricto sensu* – is really about.

Before initiating this analysis, the Court stated that in applying the relevant Section of the Criminal Code, "a court needs to balance out the violation of privacy with freedom of speech and has to strike a just balance between the two". The guidelines for this balancing, according to the Court, come from ECtHR case-law on freedom of speech. The Court then explained the ratio of *von Hannover v. Germany*[54] and also referred shortly to the CJEU judgment in *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*[55], apparently because the latter case later ended up before the ECtHR[56].

In its analysis, the Court first concluded, that the posting of B's picture to the Facebook group caused him damage and suffering. This was because sexual offenders are faced with "strong judgment and despise" and B's picture belonged to the "core of his privacy". Next, the Court concluded that even though the linked news article and B's picture were both publicly available on the internet, this did not mean that A had the legal right to post them on the Facebook group in the aforementioned manner.

Lastly, the Court came to the most difficult part of the judgment: whether A's actions *had gone beyond what is acceptable*, that is, whether they were proportionate. A's stated aim with the Facebook group had been to create public discussion on sexual crimes and to alert the public about sexual offenders. According to the Court, the public interest aspect could have been reached without posting B's picture online. In contrast, the Court also

[54] *von Hannover v. Germany* (No. 2) (Grand Chamber, 7 February 2012).
[55] C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECLI:EU:C:2008:727.
[56] See *Satakunnan markkinapörssi Oy and Satamedia Oy v. Finland* (Grand Chamber, 27 June 2017).

recognized that the right to privacy does not protect convicted criminals from the public reactions that severe crimes (such as the one in this case) understandably might raise. However, in this case, A's actions were primarily targeted towards B as a person and not towards the phenomenon of paedophilia generally, A's post lacked any editorial content, and instead the post just generated a heated debate within the Facebook group which also contained threats towards B. On this basis, the Court concluded that A had "clearly breached" that what can be deemed as acceptable and is thus guilty of violating B's privacy.

The case KKO 2018:81 concerned a situation in which A, with the assistance of B, had posted on YouTube a video about the police coming to take custody of his two underaged children. Although in parts of the video the children's faces were blurred, relatives and neighbours of the family could easily recognize the children from the video. The question was, whether posting the video violated the children's right to privacy, or whether there was a public interest concern that made posting the video legal. I will skip straight to the third stage of the Court's analysis.

The Court came to the conclusion that the video concerned an issue of public interest (how children are taken into custody and on what grounds). When it came to the acceptability of posting the video, the Court considered the following matters. Revealing the children's identity was not relevant for raising public discussion on the issue. The video revealed the identity of the children and the fact that they were taken into custody, furthermore the video conveyed the children's emotions as they tried to refuse being taken to custody; both of which are very private matters. The video had tens of thousands of views and despite being removed from YouTube, it can still resurface on the internet later. The Court concluded that, although posting the video served a legitimate public interest concern, in these specific circumstances A's and B's actions went beyond what is acceptable. Both were found guilty of violating the children's privacy.

A case also worth mentioning shortly is one that concerned the blog posts of Jussi Halla-aho, a Member of the European Parliament (2014–2019), the Finnish Parliament (2011–2014 and 2019–), and the former chairman of the Finns Party (2017–2021), formerly known in English as the True Finns. Halla-aho had published a blog post in June 2008 in which he criticized immigration and Islam, and wanted to participate to the discussion

on freedom of speech and limitations to it in the name of hate speech. He had been a candidate already in the national parliamentary elections in 2007, but the first time he was elected into a public office was in the communal elections in October 2008.

The post in which Halla-aho made the statements was titled "A few baits to Mika Illman"[57]. Illman was then a prosecutor at the Office of the Prosecutor General. He had in 2005 defended his PhD on hate crimes[58], and had also participated in the public discussion on hate speech. Halla-aho's intention was to participate in the public discussion on hate speech and limitations to freedom of speech with this blog post. Judging by the title of his post and the manner in which it was written, it was rather apparent that he wanted to see if charges would be brought against him and whether they would stand before a court.

Halla-aho had made the following statements in his blog post: "Prophet Muhammad was a paedophile, and Islam is a religion that sanctifies paedophilia, that is a paedophilic religion. Paedophilia is Allah's will"[59]. "Robbing passers-by and living on welfare like a parasite is a national, perhaps even a genetic, characteristic of the Somali people"[60]. Halla-aho based his first statement on the understanding according to which Prophet Muhammad had a bride, Aisha, who was 6 years old. The second statement was based on Finnish statistics on crime and social welfare benefits. Halla-aho argued that if these are facts, then his statements cannot be blasphemy or ethnic agitation as they are logical deductions from the aforementioned facts.

The public prosecutor brought two charges against Halla-aho. The first statement resulted in a charge for breach of the sanctity of religion (Chapter 17 Section 10 of the Criminal Code), which essentially constitutes blasphemy. The second statement resulted in a charge for ethnic agitation (Chapter 11 Section 10).

The Supreme Court ruled on the issue in case KKO 2012:58. The Court framed the issue in light of freedom of religion (Section

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[57] "Muutama täky Illmanin Mikalle", 3 June 2018, https://www.halla-aho.com/scripta/muutama_taky_illmanin_mikalle.html (accessed 29 June 2022). The below discussed parts of the post have since been removed from the post, but they are discussed in the Supreme Court's judgment.

[58] See M. Illman, *Hets mot folkgrupp* (2005).

[59] Finnish: "*Profeetta Muhammad oli pedofiili, ja islam on pedofilian pyhittävä uskonto, siis pedofiiliuskonto. Pedofilia on Allahin tahto.*"

[60] Finnish: "*Ohikulkijoiden ryöstely ja verovaroilla loisiminen on somalien kansallinen, ehkä suorastaan geneettinen erityispiirre.*"

11 of the Constitution and Article 9 ECHR) and freedom of speech (Section 12 of the Constitution and Article 10 ECHR). According to the Court, Halla-aho's actions need to be considered in light of his political activism, which means that the scope of accepted speech is broader than in non-political situations.

With regard to both charges, the Court first went through ECtHR case-law on the issue. When it came to blasphemy, the conclusion was that freedom of speech in such cases is broad, but not unlimited. The Court saw Halla-aho's statements on Prophet Muhammad and Islam as blasphemy because they were direct attacks on the religion as such. It would have been possible to participate in the public discussion on limitations to freedom of speech also with an otherwise worded blog post. In fact, according to the Court, such statements do not contribute to the discussion on religion and freedom of speech but just agitate hate against Muslims. The Court saw that Halla-aho had a specific intention to offend Muslims, which could be seen already from the way he had worded his blog post, especially the title.

When it came to ethnic agitation, the Court's conclusion from analysing ECtHR case-law was that criticism of immigration is not forbidden, but hate speech and ethnic agitation is. Again, Halla-aho could have participated in the public discussion on the topic in a manner that would not have required such ethnic agitation (insults towards and slander about the Somali people). According to the Court, Halla-aho's statements are to be classified as "hate speech" (Finnish: *vihapuhe*). Note, however, that the Finnish Criminal Code does not contain such a term. What the Court means is that since Halla-aho's statements classify as hate speech, therefore they do not enjoy the protection of freedom of speech.

The Supreme Court found Halla-aho guilty on both charges. Halla-aho did not appeal to the ECtHR.

The ECtHR's assessment of the acceptability of limitations to freedom of speech (freedom of expression) under Article 10 ECHR proceeds through the following steps: i) is the limitation prescribed by law, ii) is the limitation necessary in a democratic society, and iii) does the limitation aim to protect one of the enumerated public policy concerns. This second criterion is somewhat of a proportionality test, however, it is important to note that "[e]ven though classic elements of proportionality review (suitability, necessity, and a reasonable balance between the interests concerned) might be read into the formula, they are not explicitly

mentioned"[61]. Perhaps for this reason, the Finnish Supreme Court's proportionality analysis is not always the most explicit, as was already discussed in the previous section and as these example cases also demonstrate.

Overall, Finnish law, legal practice and legal culture on free speech seem to be convergent with the ECtHR's doctrine on the issue.

The following still needs to be stated shortly on more specific isues. There is no *lèse-majesté* or similar criminalization in the Finnish Criminal Code. Burning the national flag is not criminalized. Holocaust denial, or apology of a crime as such is neither criminalized in Finland. Commercial speech is covered by the right to freedom of speech, but it is not at the core of that right. The use of religious symbols is not legislated separately, neither is there any legislation on Islamic head scarfs or such.

Freedom of association is a separate constitutional right (Section 13 of the Constitution), but associations cannot misuse that right and thereby breach other constitutional rights. There was recently a case in which an association was deemed illegal due to it having a fascist and racist policy and was thus ordered to be dissolved[62]. The Supreme Court came to the same conclusion in in its judgment KKO 2020:68.

In Finland, there is in place a system of mandatory conscription for all men (6 to 12 months). Conscientious objectors have to participate to an equally long civil service. If they refuse, they are given a prison sentence of 173 days. This issue might change due to a recent decision by the Helsinki Court of Appeal, according to which the exception made for Jehovah's Witnesses is discriminatory in relation to other conscientious objectors[63].

4.2. Freedom of movement

Freedom of movement – whether it be that of goods, services, capital or people – is not that much debated in Finnish legal academia or politics in general. When looking at the issue in relation to non-EU countries, it seems not have been discussed in the legal literature; legal literature on international trade focuses on

[61] J. Gerards, *How to improve the necessity test of the European Court of Human Rights*, 11 International Journal of Constitutional Law 466 (2013), 467–468, footnotes omitted.
[62] In English, see < https://yle.fi/news/3-10712210> (accessed 29 June 2022).
[63] See fn. 42 above.

contract law issues such as the application of the United Nations Convention on the International Sale of Goods (CISG)[64] or the INCOTERMS clauses[65]. Most case-law by the two supreme courts seems to stem from intra-EU situations. This is despite the fact that about 40% of Finland's international trade is with non-EU countries[66].

When looking at the Finnish case-law on freedom of movement within the EU's internal market, two policy areas immediately stick out: importation of used cars and alcohol. As taxation of cars and alcohol is high in Finland in comparison to other Member States, after Finland's accession to the European Union people have started to import used cars and alcohol from cheaper Member States. Cars are mainly imported from Germany and Sweden, whereas alcohol from Estonia.

The CJEU has rule on several preliminary references from Finland concerning alcohol[67] and taxation of cars[68]. Moreover, the issue of car taxation has also been the object of many infringement proceedings against Finland[69].

Concerning taxation of imported used cars, the Finnish Government has faced several problems on the compatibility of the applied taxation practices with the prohibition of tax discrimination of Article 110 TFEU. Finland has had difficulties in adapting its national taxation with the ban on tax discrimination in such cases. It seems that even today, Finnish tax laws are based on the Government's fiscal interest as opposed to what is mandated by Article 110 TFEU. The Supreme Court has even ruled in KKO 2013:58 that the Finnish Government must compensate for the

[64] See B. Sandvik & L. Sisula-Tulokas, *Kansainvälinen kauppalaki* (2013).
[65] See L. Railas, *Incoterms® 2010: Käyttäjän käsikirja. 2, uudistettu painos* (2016).
[66] See < https://tulli.fi/en/statistics/key-figures-and-graphics> (accessed 29 June 2022).
[67] See C-394/97 *Heinonen*, ECLI:EU:C:1999:308; C-455/98 *Salumets*, ECLI:EU:C:2000:352; C-434/04 *Ahokainen and Leppik*, ECLI:EU:C:2006:609; C-75/15 *Visnapuu* ECLI:EU:C:2015:751; C-75/15 *Viiniverla* ECLI:EU:C:2016:35.
[68] See C-101/00 *Siilin*, ECLI:EU:C:2002:505; C-365/02 *Marie Lindfors*, ECLI:EU:C:2004:130.
[69] See C-232/*03 Commission v. Finland*, ECLI:EU:C:2006:128; C-10/08 *Commission v. Finland*, ECLI:EU:C:2009:171; C-144/08 *Commission v. Finland*, ECLI:EU:C:2009:348.

damage caused by the excessive taxation that has been in clear breach of the legal framework of the internal market[70].

When it comes to regulating the selling and importation of alcohol, it seems that the arguments that the Finnish Government uses to justify its restrictive measures against imports (a matter dealt with under Articles 34 and 36 TFEU) are somewhat contradictory in relation to its overall alcohol policy. On the one hand, Finland wants to restrict importation of alcohol due to public health reasons, while on the other hand, Finland maintains exceptions to the Government's monopoly on alcohol production and selling that seem to go against the public health concerns and, instead, seem to favour national production at the expense of imports from the internal market[71].

Does the fact that most freedom of movement cases are about cars and alcohol say something about the Finnish culture? Perhaps so, or at least to me as a Finn it would seem to be so. But I would not draw any conclusions from this with regard to Finnish law in general or Finnish constitutional culture in particular. High taxation of cars and alcohol is one feature of the Nordic welfare state, which naturally leads to people wanting to import these goods from those parts of the internal market where prices are lower. Perhaps some indices can be made from the stubbornness with which the Finnish Government has battled EU's free movement rules and sought to protect the national alcohol monopoly and system of taxation. But this is mainly a policy issue and no legal doctrine can be deduced from the Finnish courts' case-law.

A brief glance also needs to be accorded to the CJEU's decision in *Viking Line*[72]. In this heavily criticized judgment, which originated from Finland, the CJEU first concluded that the right to strike is a "fundamental right", which forms an "integral part of the general principles of Community law", and the observance of which the CJEU must ensure. However, the CJEU then came to the conclusion that the exercise of the right to strike may none the less

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[70] P. Määttä, *Suomen autoverojärjestelmän eurooppaoikeudelliset haasteet – Verosyrjintäkielto ja käytettyjen tuontiautojen verotus*. LL.M. thesis at the University of Lapland, 2016.

[71] E. Haataja, *Tuonnin määrällisten rajoitusten kielto ja Suomen alkoholin vähittäismyyntiä koskevan lainsäädännön sopivuus sisämarkkinoille*. LL.M. thesis at the University of Lapland, 2019.

[72] C-438/05 *Viking Line*, ECLI:EU:C:2007:772.

be subject to certain restrictions. The outcome of the case was, that the collective action taken by a Finnish trade union against the shipping company Viking Line was disproportionate and thus breached the free movement right of freedom of establishment (Article 49 TFEU).

After the CJEU had answered the preliminary reference, the case was settled between the parties, so we do not know how a Finnish court would have ruled on the issue[73]. There are, however, examples of situations in which EU law has affected the functioning of the Finnish collective labour market agreement system. Clauses in Finnish collective labour market agreements, which restrict the free movement of services contrary to EU law, may be deemed void. For example, in case TT:2009:90 the Labour Court came to the conclusion that a collective labour market agreement could not restrict the Finnish airline company Finnair's right to "wet lease" an aircraft and crew from a Spanish airline company. Such "wet leasing" is a service, and the free movement of services from one Member State to another cannot be restricted with such national measures[74].

The strong criticism that *Viking Line* has faced in the literature[75] is understandable from the Finnish perspective (although not everyone in Finland ascribes to this criticism), as the judgment concerned the Finnish system of collective labour market agreements and challenged the very essence of this system. But as was exemplified above, EU free movement rights do have primacy over Finnish labour law in practice. If one compares the first discussed issue of taxation of cars and alcohol with the issue of labour market regulation and especially collective agreements, it seems that in the former the clashes between the Finnish system and the EU system stem primarily from actions by the Finnish Government, whereas in the latter the Finnish system has been more receptive towards the EU system despite the heavy academic criticism. However, one should not draw any conclusions on the

[73] N. Bruun & A. von Koskull, Anders, *Työoikeuden perusteet* (2012), 164. To be precise, the preliminary reference was not sent from a Finnish court but from the Court of Appeal of England and Wales (Civil Division), although the parties to the proceedings were Finnish and the substance of the case concerned the Finnish labour market system.

[74] N. Bruun & A. von Koskull, Anders, *Työoikeuden perusteet*, cit. at 73, 164–165.

[75] For a list of critical commentary on the judgment, see D. Kukovec, *Law and the Periphery*, 21 Eur. L. J. 406 (2015), 412 fn. 29.

importance or policy preference between these two issue within the Finnish legal system based on this simple comparison.

Overall, Finnish legal practice on freedom of movement within the EU's internal market seems to be convergent with the prevailing doctrine of the CJEU. However, national policy choices are not always aligned with EU law, which causes some turmoil in the interaction between Finnish law and EU law, and how the specific rights granted by EU law are effectuated in Finland.

4.3. Judicial independence

The issue of judicial independence has come to the fore within the EU due to the democratic backsliding of Poland and Hungary; these two Member States do not seem to respect the rule of law principle any more. In Finland, judicial independence has not been discussed in the same meaning.

The impartiality of the judge viz the case at hand is regulated by the Code of Judicial Procedure (4/1734) and the issue has been addressed by the Supreme Court several times[76]. These cases concern the alleged bias of the judge towards the individual case. Chapter 13 Section 7 of the Code of Judicial Procedure lists several reasons that lead to the judge being disqualified from hearing the case. The reasons are rather similar to those that are generally followed in administrative procedures as well: no one shall be a judge in their own case or in a case concerning an issue on which they are known to have a strong public opinion.

According to surveys, 82% of the Finnish population see the judiciary as independent and trustworthy[77]. Independence refers here specifically to non-corruption and freedom from political interference. The independence of the judiciary has a strong basis in the Constitution. The separation of powers is prescribed in Section 3, according to which "judicial powers are exercised by independent courts of law". Linked to this is also Section 21, which contains a due process ("Protection under the law") requirement. Finally, Section 103 stipulates the right of judges to remain in office.

Also the procedure for selecting judges to ordinary courts aims to increase the independence of the judiciary. Appointments are made by the President of Finland, on the basis of a proposal by the Judicial Appointments Board (Courts Act (673/2016), Chapters

[76] Recent judgments include KKO 2017:97 and KKO 2015:39.
[77] Government Bill HE 136/2018 vp, 21.

11 and 20), which is an independent body. Members to the two supreme courts, however, are appointed by the President of Finland on the basis of a reasoned proposal from the supreme court in question (Chapter 11 Section 7). The procedure of appointing supreme court justices has been criticised for not being open, but it has not been argued that it would affect the independence of the two supreme courts.

The Venice Commission has presented slight criticism against Section 102 of the Finnish Constitution, which regulates the selection of judges only very briefly and superficially: "Tenured judges are appointed by the President of the Republic in accordance with the procedure laid down by an Act. Provisions on the appointment of other judges are laid down by an Act." The more specific rules are found in the above mentioned Courts Act from 2016.

According to the Venice Commission's opinion from 2008, special care has to be taken that appointment by the executive is always based on a nomination procedure in the hands of an independent and apolitical body. The Venice Commission raises the point, that if the Parliament would pass dubious legislation, which has also passed the *ex ante* review of the Committee, there should still be a genuine possibility of a court finding it unconstitutional when applying it in a concrete case, and thus utilising the *ex post* review power granted to courts under Section 106 of the Constitution. If judges are not independent enough, then they might be hesitant to use the power granted to them by Section 106, especially if their decision to set aside a normal law would run counter to the assessment made by the Committee during the adoption of the act in question[78].

The opinion of the Venice Commission was delivered with view to the forthcoming process of amending the Constitution of Finland. This was to be the first major amendment to the Constitution since its adoption in in 1999. The Constitution was eventually amended in 2011[79], but Section 102 on the appointment of judges was not made any more specific. The Venice

[78] Venice Commission, Opinion on the Constitution of Finland, Venice, 14–15 March 2008, CDL-AD(2008)010, para. 112 and 118.
[79] Amendment 1112/2011, entry into force on 1 March 2012.

Commission's opinion was not even mentioned in the *travaux préparatoires* of the new Court Act, adopted in 2016[80].

The independence of the judiciary as such has only very recently been discussed. This was in relation to the establishment of a new central agency in charge of courts (Finnish: *Tuomioistuinvirasto*)[81]. The Constitutional Law Committee assessed the Government Bill on establishing the new agency and stated that the independence of the judiciary would be increased if the administrative duties now taken care of by the Ministry of Justice would be moved to a new, independent agency. According to the Committee, no one shall give political guidance to the agency, but the agency itself should also not interfere with the independence of courts[82]. These discussions have mainly related to the functions and internal organization of the new agency. These discussions are rather formal and as such have no relevance in relation to the rule of law crisis of Poland and Hungary, or anything similar to that.

Lastly, a word on the Committee and judicial independence. As was explained in Section 2, due to the way in which constitutional review is split between the Committee and all courts, courts have not faced strong criticism of judicial activism or politicization, but the Committee has. The topic of judicial independence as such does not concern the Committee, as its members are elected politicians. However, the possibility of the ruling parties organizing a *coup d'état* of the Committee has been brought up in the constitutional commentary concerning democratic backsliding and populism. The fact that all parties get their share of seats in the Committee is just an established practice; the ruling parties that together have a simple majority in the Parliament and thus form a government could elect only their own representatives to the Committee. This would allow for them to deem all laws proposed by the Government as constitutional, and they would thus be acceptable by simple majority. All this would

[80] Government Bill HE 7/2016 vp. However, the Commission's report on Independence of the Judicial System (CDL-AD(2010)004) was briefly discussed with view to the position of judges in the reorganization of the judicial system. HE 7/2016 vp, 28.

[81] Government Bill HE 136/2018 vp, which resulted in the addition of Chapter 19a to the Courts Act (673/2016).

[82] PeVL 49/2018 vp (5 December 2018).

take place according to the letter of the Constitution[83]. This issue has not yet been discussed in the academic literature.

Overall, the procedures prescribed in the Court Act and how the new central agency participates to them seem to guarantee the independence of the judiciary in a way that fulfils the criteria set by the Venice Commission.

5. Concluding remarks

I have tried to argue that, when it comes to the common constitutional traditions of Europe, Finland is not among the states that contribute to it, but rather that the Finnish legal order has adapted to the content of this common tradition. I have done this by way of showing how ECtHR case-law affects the legislative process (the assessment of the Constitutional Law Committee) and the argumentation of the two supreme courts. While the thesis I have presented in relation to the common constitutional traditions might be novel, I believe, however, that it is based on a reading of the Finnish law and constitutional culture that is universally accepted in Finland. My analysis was based on general features of Finnish constitutional culture and three specific rights. A similar argument has been presented in relation to the development of the Economic and Monetary Union and the events following the Eurozone financial and debt crisis: that primarily "the Finnish constitution has been at the receiving end" of the process of constitutional mutation that occurred then[84].

Several reasons might explain why the top-down approach perhaps describes the Finnish experience better than the bottom-up approach that this ELI project has adopted as a working hypothesis. These reasons might include, for example, the size and relative political and economic influence of Finland, the way in which the Finnish Constitution channels politics within Finland and viz the European Union, or Finnish constitutional culture and academic sentiments more generally (how both are very European and pro-

[83] See two blog posts by J. Lavapuro, in Finnish: https://perustuslakiblogi.wordpress.com/2018/09/11/juha-lavapuro-ruotsidemokraattien-vaalimenestys-ja-oikeusvaltion-puolustus/; https://perustuslakiblogi.wordpress.com/2016/10/19/juha-lavapuro-ihmisoikeudet-suomi-ja-populismin-vaarat/ (accessed 29 June 2022).

[84] See Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis*, cit. at 15, 199.

integration). These issues are beyond the scope of this study, though.

Future research is still needed on the topic of common constitutional traditions and national constitutional identities. However, I firmly believe that their content should be crafted primarily by the democratic legislator, and in the second place by courts (and other institutions with constitutional review functions, for example the Committee). Academics can try to excavate the content of such fuzzy concepts from constitutional praxis, but as long as there is very little material to work which – especially material that would engage specifically and directly with such concepts – scholars should not draw too far-reaching conclusions on this issue.

ON ESTONIAN CONSTITUTIONAL TRADITIONS

*Madis Ernits**

Abstract

The article aims in four steps to identify Estonian constitional traditions at a large scale, the constitutional core, or the constitutional DNA. First, the background, i.e. the main origins of Estonian constitutional thinking at large, is scrutinised. Secondly, the five fundamental principles of the Constitution are briefly presented. Thirdly, the five general fundamental rights are outlined. And fourthly, the key elements of the institutional framework are briefly depicted. An annex is added to the basic text, presenting key developments in case law on two fundamental rights – freedom of expression and freedom of movement.

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1. Introductory remarks

The purpose of this paper is to present Estonian constitutional traditions that could serve as sources for common constitutional traditions (CCTs) under Article 6(3) TEU or preamble or Article 52(4) CFR. However, this task boils down to the task to find a needle in a haystack because it is unpredictable in which context a reference to the CCTs might become necessary in the opinion of the Court of Justice of the European Union (CJEU). It would be impossible to treat all imaginable cases, rules, principles and procedures. Therefore, the modified purpose is to present the most important aspects of Estonian Constitution, the constitutional core, or the constitutional DNA, that from the perspective of a member state would be the most suitable source for the CCTs.

Neither the Estonian legal language nor the case law of the Estonian Supreme Court (SC) knows a developed concept of constitutional tradition.[2] The Estonian translation of the Treaties

[2] I will concentrate myself to judgements (j) and rulings (r) of the SC en banc (SCeb), of the Constitutional Review Chamber of the SC (CRCSC) and of the

uses the term 'custom' (*tava*) and not 'tradition' (*traditsioon*).[3] However, the SC uses the term 'custom' rather in its usual sense.[4] The term 'tradition' is occasionally used in untechnical sense by the SC.[5] However, there are a few examples of using this term in a technical legal sense. The CRCSC, while controlling the constitutionality of the Clemency Procedure Act, referred inter alia to the traditions of Estonia's legal practice without specifying the meaning of the concept.[6] Elsewhere, the CRCSC referred to the traditions of legislative drafting while criticising the legal clarity of key norms of the Administrative Reform Act.[7] The ALCSC has referred to an Estonian legal tradition that allegedly consists in the exceptional nature of the compensation of a non-pecuniary damage.[8] This is a unique statement and the Chamber did not bother itself to present any proof that such a tradition exists. In dissenting opinions of other cases there has been one reference to

Administrative Law Chamber of the SC (ALCSC). Occasionally, judgements and rulings of the Criminal Chamber (CRCSC) and of the Civil Chamber of the SC (CLCSC) will be addressed. Selected Constitutional Review judgments and selected judgments of the Administrative Law Chamber are available in English: <https://www.riigikohus.ee/en/judgements>.

[3] Cf. to the Estonian usage of the term 'custom' R. Maruste, *Põhiõiguste harta Euroopa põhiseaduslikus lepingus [Charter of Fundamental Rights in European Constitutional Treaty]*, Juridica 656 (2004); U. Lõhmus, *Põhiõiguste kaitse kolmnurgas riik – Euroopa Nõukogu – Euroopa Liit [Protection of Fundamental Rights in the Triangle State – Council of Europe – European Union]*, Juridica 358 (2010); U. Lõhmus, *Põhiõigused ja Euroopa Liidu õiguse üldpõhimõtted: funktsioonid, kohaldamisala ja mõju [Fundamental Rights and General Principles of EU Law: Functions, Scope of Application and Impact]*, Juridica 640 (2011); A. Laurand, *Euroopa Liidu liitumine inimõiguste ja põhivabaduste kaitse konventsiooniga [Entering of the European Union into the European Convention on Human Rights]*, Juridica 677 (2013).

[4] E.g. CRSCj 05.03.2001, 3-4-1-2-01, para. 16: "the Court observes the custom not to interfere with the sovereign activities of the legislator, except in the cases when restrictions on rights and freedoms established by law are not necessary in a democratic society or distort the nature of the rights and freedoms restricted." This statement of the SC is for two reasons problematic. First, it does not involve legislative omissions, and second, it is not just a custom but a constitutional obligation of the SC not to interfere unless it is necessary for constitutional reasons.

[5] E.g. CRCSCj 15.12.2009, 3-4-1-25-09, para. 26 ("traditional company", "traditional proprietary benefit"); ALCSCj 11.04.2016, 3-3-1-75-15, para. 16 ff. ("untraditional means of payment", "traditional currencies").

[6] CRCSCj 14.04.1998, 3-4-1-3-98, para. II.

[7] CRCSCj 20.12.2016, 3-4-1-3-16, para. 113.

[8] ALCSCj 09.12.2015, 3-3-1-42-15, para. 29; 16.03.2017, 3-3-1-83-16, para. 25.

the tradition of states with written law[9] and one to the tradition originating from the socialist period[10].

The essence of the CCTs is a matter of comparative law, however, the CJEU has given methodologically not much guidance on how to identify a CCT.[11] One of the best known examples of the comparative method of the Court is an early judgement in the Algera case.[12] Although this judgement concerned administrative law questions and not fundamental rights, it made the reasoning of the Court transparent stating that it was "a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries."[13] What followed, was a rather detailed analysis of French, German and Italian law and a reference to Belgian, Luxembourgian and Netherlands law. Another example is the Hauer case which dealt with establishing the right to property and its limits in the Community Law.[14] The Court found first: "The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights."[15] To the limits the Court explained that "to answer that question, it is necessary to consider also the indications provided by the constitutional rules and

[9] Dissenting opinion of Justice Harri Salmann to the ALCSCr 25.11.1994, III-3/1-11/94.

[10] Dissenting opinion of Justice Eerik Kergandberg to the SCebj 17.03.2003, 3-1-3-10-02, para. 10.

[11] K. Neukamm, *Bildnisschutz in Europa*, cit. at 11, 37,44, 63. According to Katrin Neukamm, there are three possible theories for determination of the CCTs: the minimum fundamental rights standard, the maximum high level fundamental rights standard and the evaluative comparative law standard.

[12] ECJ 12 July 1957, *Algera and Others v. Assemblée commune*, C-7/56 and C-3/57 to C-7/57, EU:C:1957:7.

[13] Cf. K. Neukamm, *Bildnisschutz in Europa*, cit. at. 11, 45; K. Lenaerts. *The European Court of Justice and the Comparative Law Method.* – European Review of Private Law (2017), 299.

[14] ECJ 13 December 1979, *Hauer v. Land Rheinland-Pfalz*, C-44/79, EU:C:1979:290.

[15] A more recent example is significantly more laconical, Opinion of AG Kokott in Berlusconi and Others, C-387/02, C-391/02 and C-403/02, EU:C:2004:624 (rec. 156) and EU:C:2005:270 (rec. 68).

practices of the nine Member States."[16] The Court followed that the right to property may be subject to restrictions. However, above these two famous examples not much methodological guidance can be found.[17]

First a brief overview of the background of contemporary Estonian constitutional thinking shall be presented. Then the fundamental constitutional principles, some basic aspects of fundamental rights and of institutional questions shall be discussed.

2. Background – main origins of Estonian constitutional thinking at large

Identifying the origins of constitutional thinking is a tricky task. Evidently, it would be impossible to identify the origins of every theory and every thought. Therefore, I restrict myself to the origins at large to which hints can be found in constitutional literature or case-law.

First, we shall deal with a historical look back to the 1920s and 1930s. Secondly, we look briefly at the influence of the ECHR to the Estonian Constitution. Thirdly, constitutions of other European states, mainly the German *Grundgesetz* have played an important role. Fourth, we will take a closer look at elaborations of the SC on the general principles of law. Finally, the facticity of Soviet occupation has certainly also formed at least some constitutional interpretations.

[16] Cf. K. Neukamm, *Bildnisschutz in Europa*, cit. at 11, 45.

[17] In some later cases the opinions of the Advocate General give make the comparative trains of thought explicit, Opinions of AG Warner and of AG Sir Gordon Slynn in *AM & S v. Commission*, C-155/79, EU:C:1981:9 (sec. V) and EU:C:1982:17; Opinion of AG Mischo in *Hoechst v. Commission*, C-46/87 and C-227/88, EU:C:1989:73, rec. 49 ff. Cf. K. Neukamm, *Bildnisschutz in Europa*, cit. at 11, 45. A more recent example is significantly more laconical, Opinion of AG Kokott in *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2004:624 (rec. 156) and EU:C:2005:270 (rec. 68). Cf. K. Lenaerts, *The Court of Justice and the Comparative Law Method*, ELI Annual Conference 8 (2016). <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf>.

2.1. Estonian constitutional history

Main models of Estonian Constitution of 1992 were the Constitutions of 1920 and 1938.[18] The Constitution of 1920 has been named ultra-democratic[19]: The constitutional rights were positioned clearly in the foreground, the parliament was elected proportionally in one single electoral district, the government was based on the confidence of the Parliament, and there was no presidential institution separate from the government. Unfortunately, the first Constitution presupposed perhaps a too optimistic conception of a citizen and survived only thirteen years, having in this time 17 governments[20]. In 1932-33, there were three attempts to reform the Constitution and finally, the third, the most radical one succeeded and turned Estonia towards autocracy. In contrast to the first, the new Constitution of 1938 that was supposed to bring Estonia out of the autocracy was, however, a step into the opposite direction: the constitutional rights were still in the foreground but with significantly limited sphere of freedom, a strong presidential power with the right to install and to dismiss governments and to dissolve the Parliament was established and the Parliament became two chambers, whereas the size of the directly elected lower chamber was 20% reduced compared to the former single chamber Parliament. As one significant example, the second chapter that in the Constitution of 1920 was headed with 'On Constitutional Rights of Estonian Citizens' beared in the Constitution of 1938 the title 'The Rights and Duties of Estonian Citizens'. The added term 'duty' characterises best the changed approach.[21]

The Constitution of 1992 is an interesting mixture of the ideas of Constitutions of 1920 and 1938, whereas the liberal-democratic ideas of the Constitution of 1920 prevail.[22] However, the

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[18] M. Luts, J. Sootak, *Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe*, 53 Juristenzeitung 401 (1998); S. Raudsepp, *Vastab Põhiseaduse Assamblee juhataja Tõnu Anton [The President of the Constitutional Assembly Tõnu Anton Answering],* Eesti Jurist 120 (1992).

[19] K. Loewenstein, *Das Gleichgewicht zwischen Legislative und Exekutive: Eine vergleichende verfassungsrechtliche Untersuchung* (1938); H. Rausch (ed.). *Zur heutigen Problematik der Gewaltentrennung*, Darmstadt (1969).

[20] J. Toomla, *Valitud ja valitsenud [The Elected and the Regnants*] (1999).

[21] Cf. to the Constitutions of 1920 and 1938 in general M. Luts-Sootak, H. Siimets-Gross, *Eesti õiguse 100 aastat [100 Years Estonian Law]* (2019).

[22] The main author of the first draft of the Constitution of 1992 Jüri Adams explained by the presentation of the draft that it follows the spirit of the

Constitution of 1992 – while having the constitutional rights again clearly in the foreground – has corrected some crucial shortcomings of the Constitution of 1920, especially regarding political instability. The most important outcome is that the electoral system together with more stable coalitions guarantee more political stability while preserving the democratic essence of the political system.

2.2. European Convention on Human Rights

Already in *travaux préparatoires* of the Constitution the prominent role of the ECHR was emphasised[23] and the ECHR became one of the main models for the constitutional rights chapter of the Constitution. The influence of the ECHR on the Constitution of 1992 can be seen in the wording of many provisions of the constitutional rights (e.g. §§ 26, 43, 45, 47) and in the wording of several of the restriction clauses of the constitutional rights.[24] The SC used the ECHR as an interpretation argument even before Estonian accession to the ECHR[25] and has repeatedly done this after the accession.[26] The SC has underlined that "the European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an inseparable part of Estonian legal order and the guarantee of the rights and freedoms of the Convention is, under §14 of the Constitution, also the duty the judicial power."[27]

2.3. Comparative, mainly German law

Historically bound to the German legal culture, after regaining the independence in 1991 Estonia took again mainly an example of the German legal doctrine. The most influential model for reconstruction of vast parts of the Estonian legal order became

Constitution of 1920 (J. Adams, *Põhiseadus ja Põhiseaduse Assamblee [Constitution and Constitutional Assembly* (1997). I can only agree with this assessment.

[23] V. Rumessen, *Põhiseadus ja Põhiseaduse Assamblee [Constitution and Constitutional Assembly]* (1997).

[24] Cf. U. Lõhmus. Põhiõiguste kaitse kolmnurgas riik – Euroopa Nõukogu – Euroopa Liit [Protection of Fundamental Rights in the Triangle State – Council of Europe – European Union], cit. at 3, 355.

[25] CRCSCj 12.01.1994, III-4/1-1/94; cf. CLCSCj 12.12.1995, III-1/3-47/95.

[26] Cf. SCebj 06.01.2004, 3-1-3-13-03; 06.01.2004, 3-3-2-1-04; 18.03.2005, 3-2-1-59-04; 14.04.2009, 3-3-1-59-07, para. 32; 12.04.2011, 3-2-1-62-10, para. 48.4, 57.3, 62.2; CRCSCj 04.04.2011, 3-4-1-9-10.

[27] SCebj 06.01.2004, 3-1-3-13-03, para. 31; cf. CRCSCj 04.04.2011, 3-4-1-9-10, para. 54.

modern German law.[28] This applied already to the *travaux preparatoires* of the Constitution of 1992.[29] Furthermore, the President of the Constitutional Assembly Tõnu Anton mentioned apart from the German Constitution also Hungarian, Austrian, Swedish, Finnish and Islandic Constitutions as models.[30] However, the influence of the latter has been limited.

Wolfgang Drechsler and Taavi Annus have observed an immense influence of German doctrine to Estonian constitutional interpretation.[31] This can be explained first with similar fundamental structures of legal systems deriving from common history and similar thinking models deriving from common tradition, second with similar norm structures based on similar normative statements and third with universal quality of many German doctrines that eases their transferability.

2.4. General principles of law

Another important source for constitutional thinking have been the general principles of law. The CRCSC declared in 1994 in one of its best-known *obiter dictums*:

"In democratic states the laws and general principles of law developed in the course of history are observed in law-making as well as in implementation of law, including in the administration of justice. When creating the general principles of Estonian law the general principles of law developed by the institutions of the Council of Europe and the European Union should be taken into consideration alongside the Constitution. These principles have their origin in the general principles of law of the highly developed legal cultures of the member states. […] The validity of the principles of a state based on democracy, social justice and the rule of law means that in Estonia the general principles of law recognised within the European legal space are in force. Pursuant

[28] M. Luts, J. Sootak, *Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe*, cit. at 402.

[29] According to the main author of the first draft of the Constitution of 1992, Jüri Adams, the basis of his draft were both the German and the Austrian Constitutions (J. Adams, *Põhiseadus ja Põhiseaduse Assamblee [Constitution and Constitutional Assembly]*, cit. at 22.

[30] S. Raudsepp, *Vastab Põhiseaduse Assamblee juhataja Tõnu Anton [The President of the Constitutional Assembly Tõnu Anton Answering]*, cit. at 18, 120.

[31] W. Drechsler, T. Annus, *Die Verfassungsentwicklung in Estland von 1992 bis 2001*, 50 Jahrbuch des öffentlichen Rechts der Gegenwart NF 489 (2002).

to the Preamble of the Constitution, the Estonian state is founded on liberty, justice and law. In a state founded on liberty, justice and law the general principles of law are in force. Consequently, an Act which is in conflict with these principles is also in conflict with the Constitution."[32]

With the introduction of the general principles of law the SC paved the way for faster integration of those doctrines and structures into Estonian legal system that have been developed by states with advanced legal culture. With the help of the catalyst of the general principles of law the SC stimulated the development of particularly the following principles in Estonian constitutional review: legality[33], prohibition on retroactivity[34], legitimate expectations[35] and the even broader legal certainty[36] and the principle of equal treatment[37]. The principle of proportionality may also be considered to be a general principle of law deriving from legal systems of constitutional democracies with highly developed legal culture.[38]

The use of general principles of law in the reasons of early constitutional judgements represents a willingness to integrate the Estonian legal system that for a long time was locked behind the iron curtain into the (continental) European legal culture and to open it up to human rights-based values and to speed up the

[32] CRCSCj 30.09.1994, III-4/A-5/94. Cf. CRCSCj 17.02.2003, 3-4-1-1-03.

[33] CRCSCj 12.01.1994, III-4/1-1/94: According to the principle of legality, which is a generally recognised principle of (international) law and is established in §3 of the Constitution of the Republic of Estonia, fundamental rights and freedoms may be restricted solely on the basis of law".

[34] CRCSCj 30.09.1994, III-4/A-5/94.

[35] CRCSCj 30.09.1994, III-4/A-5/94; 30.09.1998, 3-4-1-6-98, para. II.

[36] CRCSCj 30.09.1998, 3-4-1-6-98, para. II.

[37] ALCSCr 24.03.1997, 3-3-1-5-97, para. 4.

[38] The ALCSC declared the principle of proportionality to a general principle of administrative law, ALCSCr 13.04.1998, 3-3-1-14-98, para. 3; ALCSCj 17.06.2002, 3-3-1-32-02, para. 21; 26.11.2002, 3-3-1-64-02, para. 10. Cf. the early defelopment in the case law of the CRCSC: CRCSCj 06.10.1997, 3-4-1-3-97, para. I; 14.04.1998, 3-4-1-3-98, para. IV; 30.09.1998, 3-4-1-6-98, para. III; 28.04.2000, 3-4-1-6-00, para. 13. Cf. to the contemporary development in the case law of the CRCSC: CRCSCj 06.03.2002, 3-4-1-1-02, para. 15; cf. CRCSCj 12.06.2002, 3-4-1-6-02, para. 12; 30.04.2004, 3-4-1-3-04, para. 31; SCebj 17.03.2003, 3-1-3-10-02, para. 30; 17.06.2004, 3-2-1-143-03, para. 20 ff.; 03.01.2008, 3-3-1-101-06, para. 27; 17.07.2009, 3-4-1-6-09, para. 21; 07.12.2009, 3-3-1-5-09, para. 37; 15.12.2009, 3-4-1-25-09, para. 24; 21.01.2014, 3-4-1-17-13, para. 32 ff.

transformation of the legal system. The SC has essentially succeeded in reaching this aim.

Furthermore, the SC has deduced from "general principles of law of a democratic *Rechtsstaat*" the right to self-regulation, i.e. "that the branches of state power and constitutional institutions must have autonomy in the exercise of the competencies given to them by the Constitution".[39] This is essentially a concretisation of the checks and balances principle. Later, the SC added the autonomy of local governments as "a general constitutional principle".[40] The autonomy is set out, as the principle of local self-government, in XIV Chapter of the Constitution. It is structurally similar to the autonomy of universities and research institutions (§38(2)) and the autonomy of the Bank of Estonia (§111 and §112) – all three are guarantees for the lower-level public law legal persons to decide some issues on their own responsibility. These two principles differ from the principles mentioned above because they belong to the law relating to the organisation of the state and they do not concern the relationship between the state and individuals. However, they have become important principles of the Estonian constitutional law as well.

2.5. Soviet law

Justice Eerik Kergandberg has made a reference to traditions stemming from the socialist era having in mind some neighbouring countries.[41] However, the influence of the Soviet era to Estonian constitutional thinking cannot completely be denied as well. The facticity of the Soviet occupation did not only influence the *travaux preparatoires* of the Constitution of 1992 but also some of its practice. Professors of University of Tartu Marju Luts and Jaan Sootak have called this phenomenon a dynamic doctrine of continuity[42] admitting that the *de facto* starting point of the transformation of the legal system in 1991/92 was the Soviet law. Estonia has made a lot to overcome the Soviet heritage, however, the Soviet legal thinking

[39] CRCSCj 14.04.1998, 3-4-1-3-98, para. IV.
[40] SCebj 19.04.2005, 3-4-1-1-05, para. 24.
[41] Dissenting Opinion of Justice Eerik Kergandberg, joined by Justices Jaak Luik and Hele-Kai Remmel, to the SCebj 17.03.2003, 3-1-3-10-02, para. 10 (referring to some practices in Russian Federation, Latvia and Poland).
[42] M. Luts, J. Sootak, *Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe*, cit. at 401.

can still be identified even in some reasons of judgements of the SC. The Soviet-like thinking can be found in the cases where the train of thought of the court cannot be rationally reconstructed.

As an example of the Soviet-like thinking may be considered the 'Traffic Act saga' cases.[43] In these cases the SC held legal provisions that foresaw a combination of misdemineour and administratice proceedings for constitutional. Namely, the police or a court that conducted the misdemineour proceedings for a traffic breach had only a right to impose a fine but not to suspend the right to drive. Once the decision in the misdemineour proceedings entered into force, it was forwarded to a separate administrative body that suspended the right to drive for a period of one to 24 months within three days. The latter adiminstrative body had no discretionary power, no hearing of the person took place, and the person had no effective legal remedy against the suspension of the right to drive. Despite that, the SC upheld these legal provisions and argued that "the facts necessary for formalising the suspension of the right to drive are, as a rule, correctly ascertainable without hearing a person […], and it is in very rare instances that the non-hearing of a person results in a wrong decision. […] The infringement is proportional because, as a rule, the non-hearing of a person does not result in an incorrect decision."[44] Furthermore, the SC explained: "Upon suspending the right to drive there is no proceeding in the [administrative body] on the merits, the role of the agency is confined to formalisation of the suspension of the right to drive."[45] If the statutory regulation may, in individual cases, well result in a false ruling and no proceedings on the merits are conducted in order to avoid false rulings then how can such proceedings be in accordance with the Constitution? These judgements have been heavily criticised in the literature[46] and the statutory provisions in question were corrected by the lelgislator even before the judgements of the SC from June 2005 were delivered[47].

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[43] SCebj 25.10.2004, 3-3-1-29-04; 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05; CRCSCj 10.12.2004, 3-4-1-24-04.

[44] SCebj 27.06.2005, 3-4-1-2-05, para. 37.

[45] SCebj 25.10.2004, 3-4-1-10-04, para. 19.

[46] Cf. M. Ernits, *An Early Decision with Far-reaching Consequences,* 12 Juridica International 28 (2007).

[47] '*Väärteomenetluse seadustiku, karistusseadustiku ja liiklusseaduse muutmise seadus*', passed on 16.06.2005 (RT I 2005, 40, 311).

Another example where the argumentation of the court is incoherent and which, thus, might have been influenced by the Soviet legal thinking was the 'Party financing case' where the SC stated: "Even if we admitted that the regulatory provisions […] are not perfect, this would not give rise to conflict with the constitution. Not everything imperfect is unconstitutional."[48]

[48] SCebj 21.05.2008, 3-4-1-3-07, para. 50. The case dealt with the question whether the control mechanism of the party financing was sufficiently effective and met the constitutionally required minimum. The SCeb summarised the core of the abstract norm control: "although the legislator has established legal regulation to check the sources of political party funding, it has chosen a mechanism which does not allow to ascertain the actual sources of political party funding." (para. 23) The SCeb observed that the Parliament select committee of the implementation of the Anti-corruption Act was composed of the representatives of the political parties represented in the Parliament and one of the tasks of this committee was to ensure the accessibility of election campaign funding. (para. 40, 47) The SCeb agreed "that in regard to a body formed on political party bases […] it is difficult to achieve the body's apparent independence through legal regulation." (para. 38) But the Sceb did not ascertain any unconstitutionality. The SCeb simply presumed that "political parties who politically compete with each other are interested that none of the political parties achieved a competitive advantage thanks to uncontrollable funds." It did not even discuss the possibility of a collusion. Furthermore, the SCeb stated despite the inquisitorial principle of the constitutional review proceedings that no evidence was presented to the SCeb "enabling the Supreme Court *en banc* to conclude that the described manner of setting up the committee does not guarantee the actual independence". "Instead, the documents of this court case tend to indicate that the 11th *Riigikogu*, and thus also the select committee of the implementation of Anti-corruption Act set up by the 11th *Riigikogu*, do have the interest of ascertaining the actual sources of political party funding. Namely, The Estonian People's Union faction, the faction of the Social Democratic Party, Estonian Green Party faction and Pro Patria and Res Publica Union faction consider the control mechanism of political party funding established in the Political Parties Act unconstitutional." (para. 40) Consequently, according to the Supreme Court, the control mechanism of the party financing was in accordance with the principle of democracy although the regulation did not ensure that all actual sources of political party funding were made public.

3. Fundamental constitutional principles

The Estonian constitutional order is determined by five fundamental constitutional principles: human dignity,[49] democracy,[50] rule of law,[51] social state[52] and Estonian identity[53].[54]

3.1. Human dignity

The Constitution only mentions human dignity in one place – in §10. According to the SC, the human dignity is the foundation of all fundamental rights and the goal of protecting fundamental rights and freedoms.[55] In the case-law of the SC, there are four main areas where the argument of human dignity has occurred in the reasons so far.

First, the SC has emphasised in several cases that the conditions of detention must not stay below a threshold beneath which they become violating the human dignity; the threshold is

[49] Judgement of the CRCSC (CRCSCj) 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49; ruling of the Administrative Law Chamber of the Supreme Court (ALCSCr) 04.05.2011, 3-3-1-11-11, para. 10.

[50] Supreme Court *en banc* judgement (SCebj) 01.07.2010, 3-4-1-33-09, para. 52, 67; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11. Cf. to the early case law J. Põld, B. Aaviksoo, R. Laffranque, *The Governmental System of Estonia* in N. Chronowski/T. Drinóczi/T. Takács (eds.), *Governmental Systems of Central and Eastern European States*, Warsaw: Wolters Kluwer Polska (2011)

[51] CRCSCr 07.11.2014, 3-4-1-32-14, para. 28. Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26,; 06.01.2015, 3-4-1-34-14, para. 33; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11 and to the early case law J. Põld, B. Aavikso, R. Laffranque, cit. at 50, 235.

[52] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

[53] CRCSCj 04.11.1998, 3-4-1-7-98, para. III.

[54] To the debate about fundamental principles of the Constitution see: W. Drechsler, T. Annus, *Die Verfassungsentwicklung in Estland von 1992 bis 2001*, cit. 31, 473; M. Ernits, *20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat*, in S. Hülshörster, D. Mirow (eds.). *Deutsche Beratung bei Rechts- und Justizreformen im Ausland: 20 Jahre Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit (IRZ)*, (2012); R. Maruste, *The Role of the Constitutional Court in Democratic Society*, 13 Juridica International 8 (2007); R. Maruste, *Democracy and the Rule of Law in Estonia*, 26 Review of Central and East European Law (2000), 311; J. Laffranque, *A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act*, 12 Juridica International 55 (2007); R. Narits, *About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia*, 16 Juridica International 56 (2009). See compilation of the sources in Estonian and presentation of the debate: M. Ernits, *Põhiõigused, demokraatia, õigusriik [Constitutional Rights, Democracy, Rule of Law]*, 5 Tartu, 23 (2011).

[55] ALCSCj 22.03.2006, 3-3-1-2-06, para. 10; 28.03.2006, 3-3-1-14-06, para. 11.

determined by several circumstances, particularly by the duration, the physical and psychological effects, special characteristics of the victim and the overall circumstances of the detention.[56] Secondly, the SC has connected the human dignity with the general right to government assistance in the case of need and explained that making the latter right fragmentary or application for the assistance unreasonably complicated violates human dignity.[57] Thirdly, the SC has followed the principle of individual guilt from the principle of human dignity requiring that "a person may be punished for a specific act but not more than required by the gravity of the offence committed".[58] Fourth, the SC has established a connection between the human dignity and the right to be heard in administrative proceedings.[59] Furthermore, the Criminal Law Chamber of the SC has also mentioned the legal equality of persons and the rights to identity and to informational self-determination as aspects of the human dignity.[60]

3.2. Democracy

According to the SC: "The democratic nature of the Estonian political order is a very important constitutional principle. […] Democracy is one of the most important principles of organisation of the Estonian state."[61] As a constitutional principle, the democracy is multifaceted and governs the entire process of legitimisation of the state power. The constitutional source of democracy are §1 and §10.[62] "The principle of democracy is aimed at the legitimacy of the public authority, containing formation, legitimation and supervision of public bodies, and affecting all stages of formation of a political will."[63] "The principle of democracy requires that a voter be able to choose between different election platforms and ideas, and the candidates and lists representing these. From the point of view of functioning of

[56] CRCSCj 20.06.2014, 3-4-1-9-14, para. 36; 31.12.2014, 3-4-1-50-14, para. 33.
[57] CRCSCj 05.05.2014, 3-4-1-67-13, para. 49. Cf. CRCSCj 21.01.2004, 3-4-17-03, para. 14.
[58] CRCSCj 23.09.2015, 3-4-1-13-15, para. 39.
[59] ALCSCr 08.10.2002, 3-3-1-56-02, para. 9.
[60] CLCSCj 26.08.1997, 3-1-1-80-97, para. I.
[61] SCebj 01.07.2010, 3-4-1-33-09, para. 52, 67.
[62] CRCSCj 14.10.2005, 3-4-1-11-05, para. 21.
[63] SCebj 12.07.2012, 3-4-1-6-12, para. 132.

democracy it is essential that different social interests be represented in the process of political decision-making […] as far as possible."[64] The essential content of the democracy principle can be summarised in the way that the formation process of the political will must be governed by rules of fair game.

The most important elements of the principle of democracy are the sovereignty of the people and the principle of representation. On the one hand, the "democracy implies the exercising of power with the people's participation and making important management decisions on a basis that is as broad and harmonized as possible".[65] On the other hand, the "democracy is representative democracy where political authority is indeed vested in the people but political authority is exercised by different public bodies under the people's authorisation."[66]

Estonian democracy is a political party democracy[67] where the political liability must be guaranteed[68]. "One of the most essential special rights of political parties is the right to participate in the elections to the *Riigikogu* and in local elections with their lists of candidates. Other persons and organisations do not have the possibility to submit lists of candidates."[69] "The more stable the composition of political forces standing as candidates, the more clear the political liability, because it is only in the next elections that the voters can express their judgment on the fulfilment of campaign promises made in the course of previous elections."[70]

The democratic nature of the Constitution is based clearly on the heritage of the Constitution of 1920, correcting, however, the previous mistakes. In legal literature, further elements of the principle of democracy have been identified[71] but the

[64] SCebj 19.04.2005, 3-4-1-1-05, para. 26.
[65] SCebj 12.07.2012, 3-4-1-6-12, para. 132; cf. CRCSCj 21.12.1994, III-4/1-11/94, para. I.
[66] SCebj 12.07.2012, 3-4-1-6-12, para. 132.
[67] CRCSCj 02.05.2005, 3-4-1-3-05, para. 31.
[68] SCebj 19.04.2005, 3-4-1-1-05, para. 26.
[69] SCebj 19.04.2005, 3-4-1-1-05, para. 40.
[70] SCebj 19.04.2005, 3-4-1-1-05, para. 26.
[71] Cf. M. Ernits, *Commentaries to §10, Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [The Constitution of the Republik of Estonia. A Commentary],* 4 ed. Tallinn 18 (2017); M. Ernits, J. Jäätma, *Põhiseaduse aluspõhimõtted ja riigikorraldusõigus [The Fundamental Constitutional Principles and State Organisation Law]* in J. Sootak (ed.), *Õigus igaühele*, Law for Everyone, 87 (2017); J. Põld, B. Aaviksoo, R. Laffranque, *The Governmental System of Estonia.* – in N. Chronowski/T. Drinóczi/T. Takács (eds.), *Governmental Systems of Central and Eastern European States*, cit. at 51, 239.

aforementioned shall suffice here. The fundamental sub-principle of free elections shall be treated below.

3.3. Rechtsstaat

Rule of law or more precisely *Rechtsstaat* is one of the fundamental principles of the Constitution anchored in §10 and determining the rules and principles for exercise of the state power.[72] The *Rechtsstaat* is the most complex principle of the Constitution containing further sub-principles like separation of powers and due checks and balances, supremacy of law, legal reservation and certainty of law, non-retroactivity, legitimate expectations, principle of proportionality, access to courts, effective remedy, judicial independence etc. Therefore, it has been called an 'umbrella principle'.[73] Five key elements of the *Rechtsstaat* principle can be identified: (1) restriction of the state power by constitutional rights and the principle of proportionality, (2) separation of powers and due checks and balances, (3) legal certainty, (4) legality and (5) access to courts, judicial independence and constitutional review. Subsequently, the proportionality, legal certainty, and the access to courts shall be presented. The legality, the separation of powers and due checks and balances, the judicial independence and the constitutional review shall be treated below under the institutional aspect.

3.3.1. Proportionality

The SC introduced proportionality requirement in 1997, without connecting it with any constitutional provision, holding a restriction of freedom of movement for justifiable "if it is proportional with the desired goal and it is impossible to achieve the desired goal by other means".[74] It therefore was first introduced essentially as a general principle of law. In 1998, the SC reformulated the core of the principle of proportionality deducing it from the *Rechtsstaat*: "Pursuant to the principle of proportionality, valid in a state based on the *Rechtsstaat*, the measures taken must be

[72] Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26.
[73] J. Põld, B. Aaviksoo, R. Laffranque, *The Governmental System of Estonia*, in N. Chronowski/T. Drinóczi/T. Takács (eds.), *Governmental Systems of Central and Eastern European States*, cit. at 51, 235.
[74] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.

proportional to the objectives to be achieved"[75] and delivered the following justification: "It is a principle of constitutional jurisdiction that when assessing the conflicting rights or competencies a solution has to be found that does not damage constitutional stability, that would restrict rights as little as possible, and would maintain the constitutional nature of law, and guarantee a justified and constitutional exercise of rights."[76] The next milestone was judgement of the SC from 2000, where the SC for the first time clearly applied the scheme of infringement and limits as well as all three levels of the principle of proportionality and stated: "Restrictions must not prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The means must be proportional to the desired aim […]. The legislators, as well as those who apply law, must take the proportionality principle into consideration."[77] In this decision the SC also connected for the first time the principle of proportionality with §11 of the Constitution. From 2002 on the SC has applied the fully developed three level principle of proportionality:

"The principle of proportionality arises from thesecond sentence of §11 of the Constitution, pursuant to which the restrictions on rights and freedoms must be necessary in a democratic society. The compliance with the principle of proportionality is reviewed by the courts on three consecutive levels – first the suitability of a measure, then the necessity of the measure and, if necessary, also the proportionality of the measure in the narrower sense, i.e. the reasonableness thereof. If a measure is manifestly unsuitable, it is needless to review the necessity and reasonableness of the measure. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability, a measure, which in no way fosters the achievement of a goal, is undisputedly disproportional. The requirement of suitability is meant to protect a person against unnecessary interference of public power. A measure is necessary if it is not possible to achieve the goal by some other measure which is less burdening on a person but is at least as effective as the former measure. In order to determine the reasonableness of a measure the extent and intensity of the interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed.

[75] CRCSCj 30.09.1998, 3-4-1-6-98, para. III.
[76] CRCSCj 14.04.1998, 3-4-1-3-98, para. IV.
[77] CRCSCj 28.04.2000, 3-4-1-6-00, para. 13.

The more intensive the infringement of a fundamental right the weightier the reasons justifying it have to be."[78]

3.3.2. Legal Certainty

The legal certainty is one of the five central postulates of the *Rechtsstaat* principle and it is intended to create order and stability in society.[79] The SC has stated: "The principle of legal certainty is based on §10 of the Constitution […] In the most general sense this principle should create certainty in regard to the current legal situation. Legal certainty means clarity regarding the content of valid norms (principle of legal clarity) as well as certainty that the enforced norms shall remain in force (principle of legitimate expectation)."[80] In addition to the two aforementioned, one further sub-sub-principle – prohibition of secret law – shall be analysed.

Legal clarity has in Estonian Constitution a double nature. First, it is as a fundamental right guaranteed by §13(2) of the Constitution, according to which "the law shall protect everyone from the arbitrary exercise of state authority".[81] Already in its early case law the SC proclaimed that "insufficient regulation upon establishing restrictions on fundamental rights and freedoms does not protect everyone from the arbitrary treatment of state power".[82] The classic meaning was given to the subjective legal clarity by the SC *en banc* in 2002: "Legal norms must be sufficiently clear and comprehensible, so that an individual could foresee the conduct of public power with certain probability and could regulate his or her conduct. A person "must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

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[78] Formulation from CRCSCj 17.07.2009, 3-4-1-6-09, para. 21 and 15.12.2009, 3-4-1-25-09, para. 24. Beginning with CRCSCj 06.03.2002, 3-4-1-1-02, para. 15; cf. CRCSCj 12.06.2002, 3-4-1-6-02, para. 12; 30.04.2004, 3-4-1-3-04, para. 31; SCebj 17.03.2003, 3-1-3-10-02, para. 30; 17.06.2004, 3-2-1-143-03, para. 20 ff.; 03.01.2008, 3-3-1-101-06, para. 27; 07.12.2009, 3-3-1-5-09, para. 37; 21.01.2014, 3-4-1-17-13, para. 32 ff.

[79] CRCSCj 30.09.1994, III-4/1-5/94; 23.03.1998, 3-4-1-2-98, para. IX.

[80] CRCSCj 02.12.2004, 3-4-1-20-04, para. 12; 15.12.2005, 3-4-1-16-05, para. 20; 20.03.2006, 3-4-1-33-05, para. 21; 31.01.2007, 3-4-1-14-06, para. 23.

[81] SCebj 28.10.2002, 3-4-1-5-02, para. 31; CRCSCj 20.03.2006, 3-4-1-33-05, para. 21; judgement of the Criminal Law Chamber of the SC (CLCSCj) 28.02.2002, 3-1-1-117-01, para. 12.

[82] CRCSCj 12.01.1994, III-4/1-1/94. See also Alexy 2001, p. 36.

Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable".[83]

Secondly, according to the SC the legal clarity also derives as an objective principle directly from the *Rechtsstaat* vested in §10 of the Constitution.[84] This objective obligation comes to application when the principle of legal clarity is applied in legal relations between exercisers of public authority.[85] In evaluating the legal clarity in legal relations between exercisers of public authority, the SC "proceeds from the fact that the addressees and implementers thereof are public servants with appropriate professional training, who must be capable to overcome – through interpretation – the possible ambiguities or implementation difficulties […]. What is also to be taken into account is the fact that the required level of legal clarity of these provisions is not the same regarding all the norms; instead, it depends on the consequences of application of these norms".[86]

Legitimate expectations include three subcategories: *nulla poena sine lege*, non-retroactivity and legitimate expectation in narrower sense.[87] First, the *nulla poena sine lege* rule (§23(1), (2)1) can be identified as *lex specialis* to the general principle of legitimate expectations. According to these provisions no one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed, and no one shall have a more severe punishment imposed on him than the one that was applicable at the time the offence was committed.[88]

The second element is the non-retroactivity which derives from the constitutional interpretation of the SC. The SC proclaimed already in its early case law in 1994: "One of the general principles

[83] SCebj 28.10.2002, 3-4-1-5-02, para. 31. In this decision the SC cites the judgment of the ECHR 26.04.1979, *Sunday Times v. United Kingdom*, para. 49; compare to CRCSCj 15.12.2005, 3-4-1-16-05, para. 22.
[84] SCebj 10.12.2003, 3-3-1-47-03, para. 30; CRCSCj 31.01.2007, 3-4-1-14-06, para. 22.
[85] The SC: "The Chamber points out the fact that local governments, being the exercisers of public authority, cannot invoke §13(2) of the Constitution. This provision, pursuant to which the law shall protect everyone from the arbitrary exercise of state authority, is in Chapter II "Fundamental Rights, Freedoms and Duties" of the Constitution. Chapter II primarily deals with the relations between persons and those who exercise public authority." (CRCSCj 19.03.2009, 3-4-1-17-08, para. 25.)
[86] CRCSCj 19.03.2009, 3-4-1-17-08, para. 27.
[87] Ernits, *supra note* 182, §10 p 3.4.3.2.
[88] Cf. SCebj 17.03.2003, 3-1-3-10-02; 28.04.2004, 3-3-1-69-03; 02.06.2008, 3-4-1-19-07.

of law is that as a rule, laws must not have retroactive effect."[89] Later, referring to its earlier case law, the SC specified that the legislator is entitled to issue legislation with retroactive effect not pertaining to criminal law, but it must thereby take into account the will of the people expressed in the Constitution, bear in mind the general public interests of the state, and consider the actual situation as well as the principle of legality.[90] The administrative law chamber of the SC stated even more precisely that the legislator may give retroactive force to a law if there is a well-founded need for that, it does not cause disproportional damage to legitimate expectations and the law is not surprising for the person concerned.[91] Since all by both chambers named aspects are included in the proportionality test, a retroactive effect is only legitimate if it is proportionate. Later the SC restricted its point of view: "It is generally inadmissible to increase obligations with a genuine legal instrument of retroactive force, which means that no legal consequences may be established on actions already performed in the past."[92] While this was an *obiter dictum* it remains to be seen whether the SC will use the proportionality test in the future to determine the legality of a retroactive law.

The third element of legitimate expectations is the legitimate expectation in narrower sense. In Estonian doctrine the legitimate expectation in the narrower sense concerns the non-genuine retroactive force: "Retroactive force is non-genuine if it concerns an activity that has started, but not yet ended by the time of the adoption of a legal instrument, to be more exact, if it establishes prospectively legal consequences on an activity that has started in the past."[93] The most important definition derives from 2004: "Pursuant to the principle of legitimate expectation everyone should have a possibility to arrange his or her life in reasonable expectation that the rights given to and obligations imposed on him or her by the legal order shall remain stable and shall not change dramatically in a direction unfavourable for him or her."[94] Thus, according to the principle of legitimate expectation in narrower sense "everyone has a right to conduct his or her activities in the

[89] CRCSCj 30.09.1994, III-4/1-5/94.
[90] CRCSCj 20.10.2009, 3-4-1-14-09, para. 50.
[91] ALCSCj 17.03.2003, 3-3-1-11-03, para. 33.
[92] CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.
[93] CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.
[94] CRCSCj 02.12.2004, 3-4-1-20-04, para. 13; 31.01.2012, 3-4-1-24-11, para. 49.

reasonable expectation that applicable Acts will remain in force. Everyone must be able to enjoy the rights and freedoms granted to him or her by law at least within the period established by the law. Modifications to the law must not be perfidious towards the subjects of the law".[95] If something is promised by law, the legitimate expectation that what has been promised shall be applied towards those who have started to exercise their rights.[96] "Thereby, the realisation of one's own rights, i.e. the exercise of the rights and freedoms granted to a person by law, requires acting on the basis of a legal provision, hoping that it will remain in force. It is possible to talk about the perfidiousness of the state if a person has with their activities fulfilled all the prerequisites, arising from which they have a right in the future to the application of legislation that is favourable to them."[97] "The principle of legitimate expectation does not mean that any restriction of persons' rights or withdrawal of benefits is impermissible. The principle of legitimate expectation does not require fossilisation of valid regulatory framework – the legislator is entitled to re-arrange legal relationships according to the changed circumstances and, by doing this, inevitably deteriorate the situation of some members of society. The legislator is competent to decide which reforms to undertake and which groups of society to favour with these reforms."[98] To determine whether the amendment corresponds with the legitimate expectation in narrower sense, the court that exercises the constitutional review must conduct balancing: "Sufficiency or reasonableness can be assessed taking into account the nature of the legal relationship under discussion, the extent of change of the relationship and the necessity of re-arrangement of the activities of addressees of norm arising from the change, and also by assessing whether the change in the legal situation was a predictable or unexpected one."[99] Lately, the SC has used another formulation: "Non-genuine retroactive force is admissible if the public interest

[95] CRCSCj 30.09.1994, III-4/1-5/94; 02.12.2004, 3-4-1-20-04, para. 13; 31.01.2012, 3-4-1-24-11, para. 49 and 50; cf. SCebd 16.03.2010, 3-4-1-8-09, para. 78.
[96] CRCSCj 17.03.1999, 3-4-1-2-99, para. II.
[97] CRCSCj 16.12.2013, 3-4-1-27-13, para. 50.
[98] CRCSCj 02.12.2004, 3-4-1-20-04, para. 14; cf. CRCSCj 31.01.2012, 3-4-1-24-11, para. 49; ALCSCj 29.03.2006, 3-3-1-81-05, para. 14.
[99] CRCSCj 02.12.2004, 3-4-1-20-04, para. 26.

in the amendment of the legislation overrides the legitimate expectation of persons."[100]

The rule that only published laws can be valid, or the prohibition of secret law plays in Estonian Constitution a central role – §3(2)2 states explicitly: "Only published laws have obligatory force." This norm can be considered as a reaction to the habits of Soviet occupant regime to apply from time to time secret laws. Especially the deportations in June 1941 which lead to expatriation and transportation to Siberia of more than 10,000 persons and in March 1949 which lead to expatriation and transportation to Siberia of more than 20,000 persons were based on secret Soviet law.[101] Above that, the *vacatio legis* principle can be considered as a part of the prohibition of secret law principle: "The requirement arising from the *vacatio legis* principle is that, prior to entry into force of amendments, persons concerned must have sufficient time for examining the new legislation and taking it into account in their activities."[102]

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[100] CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.

[101] The deportations of 1941 were based on an inofficial secret summary of the secret decision of the Central Committee of the Communist Party and of the Council of People's Commissars of the USSR No. 1299-526 "Concerning deportations of socially foreign elements from the Baltic republics, Western Ukraine, Western Byelorussia and Moldavia" from 14.05.1941 (Deportation from Estonia to Russia. Vol. 6: Deportation in June 1941 & Deportation in 1940-1953. Compiled by L. Õispuu. Tallinn 2001, p. 20 f., 235 <https://www.memento.ee/wp-content/uploads/2017/05/Memento-Raamat-6.pdf>) (in Estonian).
The deportations of 1949 were based on the secret regulation of the Council of Ministers of the USSR No. 390-138 (for organising the deportations of 29,000 families from the territories of Lithuania, Latvia and Estonia) from 29.01.1949 and on the secret regulations of the Council of Ministers of Estonian SSR No. 014 (on deportation of 3,824 families to faraway places of the USSR for good according to the annexed lists submitted by the executive committees of the counties) from 14.03.1949 and No. 015 (to deport additionally 128 families to the faraway regions of the USSR for good according to the annexed lists submitted to the by the executive committees of the counties) from 22.03.1949 (Võimatu vaikida [Impossible to Keep Silent]. Vol. 2. Compiled by H. Sabbo, Tallinn, 845 ss (1996); L. Õispuu, *Deportation from Estonia to Russia*, Vol. 4: Deportation in March 1949, Tallinn 39 - 43 (2003) <https://www.memento.ee/wp-content/uploads/2017/05/Memento-Raamat-4.pdf>) (in Estonian).

[102] CRCSCj 16.12.2013, 3-4-1-27-13, para. 51.

3.3.3. Access to courts and right to effective remedy

Access to courts and right to effective remedy result from §15(1) of the Constitution: "Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional." The guarantee – a constitutional right itself – is wide and strong and must be regarded as a core element of the *Rechtsstaat*.[103] As a matter of fact, it should be understood in a comprehensive and gapless manner, guaranteeing effective legal protection by any infringement of any right. Besides enhancing primarily the administrative court proceedings, it embraces the civil court proceedings, too. In the end, it enables the constitutional rights to make the *Rechtsstaat* fully justiciable, i.e. if there is an infringement of any constitutional right, which constitutes a violation of any of the sub-principles of the *Rechtsstaat*, the constitutional right is also violated.[104]

3.4. Social state

The social state dimension is mentioned in §10 whereas the general social right is embedded in §28(2)1 of the Constitution. According to the SC, the social state belongs to the fundamental principles of the Constitution,[105] i.e. legal rules that leave the right to state assistance in the case of need fragmentary or make its application unreasonably difficult touch the core of the Estonian constitutional order.[106] The SC stated 2004 in the fundamental judgement to social rights: "The concept of a state based on social justice and the protection of social rights contain an idea of state assistance and care to all those who are not capable of coping independently and sufficiently. Human dignity of those persons would be degraded if they were deprived of the assistance they need for satisfaction of their primary needs."[107] However, since such cases are rare where the issue consists in a not granted minimum, the yardstick for the distribution of social benefits is in

[103] Cf. CRCSCr 05.02.2008, 3-4-1-1-08, para. 3.
[104] The SC has also stressed the tight tie between the Article 6(1) of the ECHR and the §15(1) of the Constitution: "The violation of Article 6(1) of the Convention, found by the European Court of Human Rights, constitutes a violation of §15 of the Constitution, too." (SCebj 06.01.2004, 3-3-2-1-04, para. 27.)
[105] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.
[106] CRCSCj 05.05.2014, 3-4-1-67-13, para. 49
[107] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14.

most cases the equality principle.[108] The SC has also stressed several times that limited funds must not be distributed by violating the fundamental right to equality arising from §12(1) of the Constitution.[109]

Furthermore, the SC dealt with the question of social assistance briefly in a case, where the limits of the financial autonomy of local governments were concerned: "An important criterion for determiningthe minimum funding needs of local functions in the case of a specific local authority is that the level of the local public services of the local authority does not fall substantially below the general level of similar services in other local authorities in Estonia due to the lack of funds. For instance, according to the purpose of §28 of the Constitution, a situation where the secured main social fundamental rights, to the extent for which the local self-government is responsible, vary substantially in different regions of the state due to differences in the economic capacity of local authorities, is unacceptable. According to §14 of the Constitution, the guaranteeing of rights and freedoms is the duty of the legislature, the executive, the judiciary, and the local self-government. According to the said provision, the state cannot allow a situation where the availability of primary public services depends largely on what the economic capacity of the local authority of a person's residence or registered office is."[110] According to this judgement, the state has to consider the equality of social services by determining the financial support to the local governments.

3.5. Estonian identity and eternity clause

According to the preamble, the Constitution of 1992 embodies the inextinguishable right of the people of Estonia to national self-determination, forms a pledge to present and future generations for their social progress and welfare and must guarantee the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages. This expresses the existential concern of a small nation and explains one of the main motivators

[108] Cf. M. Ernits. The Principle of Equality in the Estonian Constitution. – European Constitutional Law Review 10 (2014), p. 444 ff.
[109] SCebj 07.06.2011, 3-4-1-12-10, para. 58; CRCSCj 27.12.2011, 3-4-1-23-11, para. 67; 03.12.2013, 3-4-1-32-13, para. 56; 02.02.2015, 3-4-1-33-14, para. 29, 35 ff.
[110] SCebj 16.03.2010, 3-4-1-8-09, para. 67.

of the Singing Revolution that preceded and aimed the restoration of the Republic of Estonia in 1991. Today the Estonian identity is commonly considered to be one of the fundamental constitutional principles.[111]

The most powerful expression of the idenitity principle is the eternity clause, which is included in §1(2): "The independence and sovereignty of Estonia are timeless and inalienable." It is one of the strongest sovereignty accentuations in Europe[112] and perhaps even worldwide. The main consideration behind its wording was the fear of a rollback to Soviet Union-type political entity.[113] However, the eternity clause should at least also be considered as the special emphasis of the wish of a small nation to preserve its traditional way of life and language,[114] mainly because under international and supranational structures, the traditional understanding of the independent statehood has lost a great deal of its original function to serve as the only and ultimate lawmaker.[115]

The substance of the principle of Estonian identity consists mainly in protection of Estonian language. The SC has emphasised that "the protection and use of the Estonian language are established as constitutional goals and the state power is to secure the achievement of the goal. Thus, the steps to ensure the use of the Estonian language are constitutionally justified."[116]

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111 R. Alexy, *Põhiõigused Eesti põhiseaduses [Constitutional Rights of Estonian Constitution]*, Juridica Special Issue 89 (2001); T. Annus, *Riigiõigus [Constitutional Law]*, 2. ed. Tallinn 116 (2006); J. Laffranque, *Sõltumatu ja demokraatlik õigusriik Riigikohtu praktikas. Eesti Euroopa Liidu liikmesuse kontekstis [Independent and Democratic Rule of Law in the Case Law of the Supreme Court. Estonia in the Context of the Membership of the European Union]*, Juridica 499 (2009).

112 A. Albi, *Estonia's Constitution and the EU: How and to What Extent to Amend It?*, 7 Juridica International 42 (2002); cf. the table in A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe,* Cambridge University Press (2005).

113 Cf. J. Raidla, *V. Peep (ed.). Põhiseadus ja Põhiseaduse Assamblee [The Constitution and the Constitutional Assembly]*, Tallinn 68 (1997).

114 Cf. R. Alexy, *Põhiõigused Eesti põhiseaduses, [Constitutional Rights of Estonian Constitution]*, cit. at 111, 89.

115 However, the SC has so far rather put emphasis on the institutional aspect, namely on the independent statehood (SCebj 12.07.2012, 3-4-1-6-12, para. 127 f.).

116 CRCSCj 05.02.1998, 3-4-1-1-98, para. II.

4. Constitutional rights

The Constitution of 1992 turned the independent but still Soviet type power structure into a liberal-democratic constitutionalist state not least because of an extensive catalogue of constitutional rights. This rather detailed catalogue of 48 provisions is provided in the 2nd Chapter of the Constitution. It is obvious that such a quantity of constitutional rights needs to be systematised in order to be accessible. Five general rights can be identified: general liberty right in §19(1), general equality right in §12(1), general right to state protection in §13(1), general right to organization and procedure in §14 and general social right in §28(2)1.[117] The chapter on constitutional rights is otherwise also rather comprehensive and detailed.[118] In addition, §10 opens the constitutional rights catalogue towards human rights and constitutes a constitutional rights development clause.[119] Constitutional rights are enforceable in courts. They are procedurally guaranteed by the general right to address a court in case of an alleged violation of a right in §15(1).

4.1. General right to freedom

The general right to freedom is one of the most important achievements of the liberal-democratic understanding of the relationship between an individual and the state. According to §19(1) of the Constitution: "Everyone has the right to free self-realisation." According to this principle, everything that is not prohibited is (*prima facie*) permitted.[120] The special freedom rights

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[117] This division was first introduced by Robert Alexy in the first systematic monograph concerning fundamental rights in the Estonian Constitution: R. Alexy, *Põhiõigused Eesti põhiseaduses, [Constitutional Rights of Estonian Constitution]*, cit. at 111 51 – 68, 73 -76.

[118] It contains classic rights and liberties like the right to privacy (§26), freedom to choose occupation (§29(1)), freedom of enterprise (§31), right to property (§32), inviolability of the home (§33), right to free movement (§34), freedom of schience and art (§38), freedom of religion (§40), secrecy of correspondence (§43), freedom of expression (§45), freedom of assembly (§47), freedom of association (§48) etc. as well as special social rights like e.g. the right to education (§37).

[119] P. Häberle, *Dokumentation von Verfassungsentwürfen und Verfassungen ehemals sozialistischer Staaten*, 43 Jahrbuch des öffentlichen Rechts der Gegenwart NF 177 (1995); R. Alexy. *Põhiõigused Eesti põhiseaduses [Constitutional Rights of Estonian Constitution]*, cit. at 111, 87; M. Ernits, *Põhiõigused, demokraatia, õigusriik [Constitutional Rights, Democracy, Rule of Law]*, cit. at 54, 140.

[120] Cf. fundamentally R. Alexy. *Põhiõigused Eesti põhiseaduses ,[Constitutional Rights of Estonian Constitution]*, cit. at 111, 51.

only guarantee specific spheres of freedom whereas the general right to freedom is a 'catch-all' fundamental basic right. Thus, in order to guarantee the individual freedom on constitutional level, principally the general right to freedom would suffice.

The general right to freedom protects e.g. the freedom of contract,[121] driving a motor vehicle,[122] hunting either with or without a gun,[123] and the right to acquire a firearm[124].

4.2. General right to equality

The general principle of equality is provided for in §12(1) of the Constitution being one of the general constitutional rights in Estonian constitutional rights catalogue.[125] Coming from an equality-oriented society the courts had some difficulties at first with the application of the principle of equality in the 1990s. Although several debates are still ongoing there is a general consensus that the general right to equality is "the right of a person not to be treated unequally"[126], i.e. a subjective right.

The principle of equality is in the first place a general *prima facie* right to legally equal treatment. The SC found first that the general principle of equality "means a requirement to implement valid laws in regard of every person impartially and uniformly."[127] Later the SC clarified that also "the legislator must observe the principle of equal treatment".[128]

4.3. General right to protection

According to the SC, "the general right to protection, established in §13 of the Constitution, is every person's right that must be guaranteed equally to everybody".[129] This right means the

[121] CRCSCj 30.04.2004, 3-4-1-3-04, para. 21.
[122] SCebr 28.04.2004, 3-3-1-69-03, para. 33.
[123] SCebj 11.10.2001, 3-4-1-7-01, para. 13.
[124] CRCSCj 11.10.2001, 3-4-1-7-01, para. 13; 26.03.2009, 3-4-1-16-08, para. 22; 14.12.2010, 3-4-1-10-10, para. 40; 26.04.2011, 3-4-1-2-11, para. 38.
[125] Cf. M. Ernits, *The Principle of Equality in the Estonian Constitution*, 10 European Constitutional Law Review 444 (2014).
[126] CRCSCj 03.04.2002, 3-4-1-2-02, para. 16.
[127] CRCSCj 03.04.2002, 3-4-1-2-02, para. 16.
[128] SCebj 30.06.2016, 3-3-1-86-15, para. 47; CRCSCj 20.03.2006, 3-4-1-33-05, para. 25.
[129] CRCSCj 31.01.2007, 3-4-1-14-06, para. 22.

the state is obliged to protect persons against attacks from third parties. The 'attack' has hereby to be understood broadly, i.e. it includes all kinds of infringements from third parties.

4.4. General right to organisation and procedure

The SC criticised already in 1993 the legislative failure to regulate the procedure by enacting the Taxation Act. The CRCSC stated: "Entitling a tax inspector to enter real or personal property under a person's control simply on the basis of his or her opinion, without requiring the existence of reasonable grounds or documentary evidence or factual basis, creates conditions for uncontrolled restriction of constitutional rights at the discretion of an official. […] Also, the procedure for solving disputes and the guarantees of the taxpayer have been established in an incomplete manner."[130] The reference to §14 of the Constitution was not yet included in this judgment. §14 was connected with the idea of a general constitutional right to organization and procedure in 1994, when the SC discussed the elements of the implementation of special measures of the police and the procedure, and stated that the law, which does not provide for all these elements, violates §14 of the Constitution. The SC deduced from this provision a positive obligation of the legislator: "The *Riigikogu* itself ought to have established the concrete cases and a detailed procedure for the use of special operative surveillance measures, as well as possible restrictions of rights related to the use of such measures".[131] Later the SC confirmed explicitly the fundamental rights' nature of §14: "Although §14 of the Constitution has been worded objectively, it also gives rise to subjective rights, including the general fundamental right to organisation and procedure".[132]

4.5. General social right

According to §28(2)1 of the Constitution: "Every citizen of Estonia is entitled to government assistance in the case of […] need." The SC has stressed the subjective nature of the social rights: "The right to receive state assistance in the case of need is a subjective right, in the case of violation of which a person is entitled

[130] CRCSCj 04.11.1993, III-4/1-4/93.
[131] CRCSCj 12.01.1994, III-4/1-1/94.
[132] CRCSCj 17.02.2003, 3-4-1-1-03, para. 12; 20.03.2014, 3-4-1-42-13, para. 43 f.

to go to court, and the courts have an obligation to review the constitutionality of an Act granting a social right."[133] Later the SC confirmed this key message once again and added: "As the general social fundamental right is the right to receive state assistance in the case of need a performance right which confers to citizens a subjective right to request assistance and imposes on the state a positive obligation to provide assistance in order to ensure the minimum necessary means for subsistence. An infringement of the performance right referred to in §28(2) first sentence occurs in case of a failure to grant the constitutionally required subsistence minimum."[134]

The SC restricts the right to state assistance in the case of need with the constitutional duty of the family to care for their needy members (§27(5)): "[…] it proceeds from the Constitution that the right of claim of a needy person under §28(2) of the Constitution is totally or partly excluded if he or she has family members, capable of caring for the needy members of family."[135] Furthermore, the SC stressed several times: "Upon ensuring social rights, the Legislature has an extensive right of discretion and the courts must not make social policy-related decisions in lieu of the Legislature. The exact volume of social fundamental rights also depends on the state's economic situation."[136] Thus, according to the SC the economic situation of the state limits the right to social assistance. The Administrative Law Chamber of the SC brought it to the point if it said that the state cannot grant more or no-one may request more than the state is capable to grant.[137] However, it is not clear from the case law of the SC how the collision of human dignity and the core of the Estonian constitutional order with the state's economic situation should be solved if the latter would not allow to satisfy the primary needs of needy persons.

[133] CRCSCj 21.01.2004, 3-4-1-7-03, para. 16.
[134] CRCSCj 05.05.2014, 3-4-1-67-13, para. 31.
[135] CRCSCj 21.01.2004, 3-4-1-7-03, para. 18; 05.05.2014, 3-4-1-67-13, para. 32.
[136] SCebj 07.06.2011, 3-4-1-12-10, para. 58; CRCSCj 27.12.2011, 3-4-1-23-11, para. 67; 03.12.2013, 3-4-1-32-13, para. 56. Cf. SCebj 26.06.2014, 3-4-1-1-14, para. 127; CRCSCj 21.01.2004, 3-4-1-7-03, para. 15 f.; 02.02.2015, 3-4-1-33-14, para. 29; ALCSCr 17.06.2004, 3-3-1-17-04, para. 32.
[137] ALCSCr 17.06.2004, 3-3-1-17-04, para. 32.

5. Institutional framework

Many of the above-mentioned principles more or less determine the institutional framework of the state, too. In following, the key principles closest to the institutional framework shall be taken under a closer look: separation and balance of powers, free elections, legality of administration, independence of judiciary and constitutional review.

5.1. Separation and balance of powers

Separation and balance of powers is a complex principle anchored in §4 in conjunction with §14 of the Constitution. Since legislative, executive and judicial branch have in certain sense opposing interests, they must be separated and balance each other mutually.[138] The separation of powers has functional, institutional or organisational and personal component.[139]

The functions of the legislative branch are more closely described in §65 of the Constitution that contains a quite detailed catalogue of legislative functions. Crucial is furthermore §3(1)1 of the Constitution that provides for: "Governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith." The functions of the executive branch are contained in the catalogue of §87 of the Constitution, the functions of the judiciary in §15(2) and §146 (to 'administer justice') of the Constitution and specified in §149 of the Constitution.

According to the principle of institutional separation of powers, "the branches of state power and constitutional institutions must have autonomy upon organising the exercise of the competencies expressly conferred to them by the Constitution".[140] The institutional separation of powers is for the legislative branch specified in §59 of the Constitution, for the executive branch in §86 of the Constitution, and for the judiciary in §146 first sentence, §149 and §152(2) of the Constitution.

According to the personal separation of powers: "If a person simultaneously fulfils the functions of two branches of state power and is remunerated by both, it may give rise to conflict of ethics and

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[138] Cf. CRCSCj 02.11.1994, III-4/A-6/94, para. 2.

[139] Cf. J. Põld, B. Aaviksoo, R. Laffranque. *The Governmental System of Estonia*, in N. Chronowski/T. Drinóczi/T. Takács (eds.). *Governmental Systems of Central and Eastern European States*, cit. at 51, 237.

[140] CRCSCj 02.05.2005, 3-4-1-3-05, para. 42.

interests between the functions of these powers to be fulfilled and, consequently, between the personal and public interests. A conflict of interests as a situation where a state official simultaneously implements essentially opposing functions and strives for opposing aims, may give rise to forfeiture in fulfilling his duties and may create preconditions for corruption. Conflicts of interests must be avoided in every state office."[141]

The balance of powers or checks and balances means that the powers must control and balance each other mutually. The biggest potential point of conflict is traditionally the boundary between the legislative and executive branch: "The general principle of subject to be established by law delimits the competence of the legislative and the executive powers. The Constitution does not exclude the legislator's possibility to delegate some of its legislative competence to the executive. The general principle of subject to be established by law prohibits the legislator to delegate to the executive those functions the performance of which is imposed on the legislator by the Constitution."[142]

5.2. Free elections

The principle of free elections, provided for in §60(1) and §156(1) of the Constitution, is one of the most important sub-principles of democracy. According to §60(1) the members of the *Riigikogu* are elected in free, general, uniform and direct elections in secret voting according to the principle of proportional representation. This corresponds to the universal principles of free and secret ballot and universal suffrage. The SC has several times stressed the importance of the free elections. "Democracy presumes that voters, by their preferences and votes, can influence the decisions of the public authority which are made in respect of them. […] The possibility to exercise the electoral rights is the main characteristic of democratic political order."[143] "Each elector and group of electors must be guaranteed a possibility to influence the formation of the composition of the representative body."[144] "It is presumed by the principle of democracy that voters have the possibility to make an informed choice between different election

[141] CRCSCj 02.11.1994, III-4/A-6/94, para. 2.
[142] CRCSCj 20.10.2009, 3-4-1-14-09, para. 32.
[143] SCebj 01.07.2010, 3-4-1-33-09, para. 39, 52.
[144] CRCSCj 15.07.2002, 3-4-1-7-02, para. 20.

programmes and ideas, and candidates and lists representing these programmes and ideas."[145] According to the Democracy Index 2018, Estonia shared the 23th position in the global ranking[146] – not a bad result for a small society that had to spend 50 years under the Soviet occupation.

5.3. Legality of administration

The rule that imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute derives from §3(1)1 of the Constitution, according to which: "The state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith." Several subprinciples derive from this norm. In the following, the two subprinciples most important in the present context shall be presented briefly.

According to the principle of parliamentary reservation, the legislator would have to regulate essential questions in law itself: "What the legislator is […] obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision."[147] This principle specifies the separation of powers principle, more precisely the division of powers between the legislator and the government as issuer of regulations: "The reservation by law principle delimits the competence of the legislative and executive powers."[148] Robert Alexy has called this aspect the democratic dimension of the principle of legislative reservation.[149] The SC stated that in regard to issues concerning fundamental rights all decisions essential from the point of view of exercise of fundamental rights must be taken by the legislator.[150]

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[145] SCebj 01.07.2010, 3-4-1-33-09, para. 67.

[146] See https://www.eiu.com/public/topical_report.aspx?campaignid=Democracy2018.

[147] CRCSCj 12.01.1994, III-4/1-1/94. Cf.: CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

[148] CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

[149] R. Alexy, *Põhiõigused Eesti põhiseaduses [Constitutional Rights of Estonian Constitution],* cit. at 111, 36.

[150] SCebj 03.12.2007, 3-3-1-41-06, para. 21; 02.06.2008, 3-4-1-19-07, p 25; cf. CRCSCj 24.12.2002, 3-4-1-10-02, para. 24.

According to the principle of legal basis, every infringement of any constitutional right needs a legal basis. "Pursuant to this principle an authorisation by the legislator is required for the restriction of fundamental rights by a body ranking lower than the legislator."[151] Only then is the public authority entitled to act if there is a legal basis or enabling act permitting to do so. The law must determine the conditions and the extent of every infringement.

Thus, the legislator has the obligation to define conditions and extent of restrictions of constitutional rights. The legislator is always obliged to decide the most important questions. The executive power is not entitled to infringe a constitutional right without the corresponding legal basis. However, the latter one is a principle and valid until there are no higher values that outweigh the previously named formal principles. The ALCSC maintained 1997 a regulation that imposed restrictions to the ownership of firearms to protect the right to life.[152]

5.4. Independence of judiciary

"The court as an institution has been arranged into the following instances: 1) county and administrative courts, 2) circuit courts, and 3) the Supreme Court that hear cases as courts of first instance, courts of appeal and a court of cassation."[153] The appointment procedure of the judges is laid down in §150 of the Constitution: "(1) The Chief Justice of the Supreme Court is appointed to office by the Riigikogu on a recommendation of the President. (2) Justices of the Supreme Court are appointed to office by the Riigikogu on a recommendation of the Chief Justice of the Supreme Court. (3) Other judges are appointed to office by the President on a recommendation of the Supreme Court." Thus, the only judge, whose selection procedure is political, is the Chief Justice of the SC. The selection procedure of other Justices of the SC is determined by the Chief Justice, the selection procedures of the judges of lower courts are mainly affected by their competence.

According to §146 second sentence of the Constitution the courts are independent and according to §147(4) the legal status of judges and guarantees for their independence are to be provided by

[151] CRCSCj 13.06.2005, 3-4-1-5-05, para. 9; 20.10.2009, 3-4-1-14-09, para. 34.
[152] ALCSCr 30.05.1997, 3-3-1-14-97, para. 1.
[153] SCebj 04.02.2014, 3-4-1-29-13, para. 44.1.

law. Furthermore, §147(1)–(3) provide guarantees of judicial indepence, containing appointment for life, the possibility to remove from office only by a court judgment, and prohibition to hold any other elected or appointed office. The SC held that salary is a constitutional guarantee for the independence of judges, too.[154]

The independence of a judge, of a court and of the entire judiciary have to be distinguished.[155] The SC stated that: "Upon ascertaining the extent of the guarantees for the independence of judges it is not only the Estonian legal order […] that [has] to be taken into account. What is to be considered is also what other democratic states mean by the guarantees for the independence of judges."[156]

This derives from the Šuvalov case. The following facts were underlying the case: Judge Šuvalov was suspended from his duties because criminal charges against him. He was suspected of accepting a bribe. Because of his suspension, the payments of his salary were suspended, too. He contested the suspension of salary. Lower courts dismissed his action because no legal act provided a possibility to pay salary to a judge in the case of removal from office for the period of criminal proceedings.

The SC declared the failure to pass such legislation, that would allow to pay a salary or other equivalent compensation to a judge, whose service relationship is suspended for the duration of a criminal proceeding, to be unconstitutional, and rendered a new judgment, satisfying the action of Mr. Šuvalov in part and requirying to pay him 50% of his salary for the period when his duties were suspended.[157] The SC stated that the Courts Act expressly and unambiguously precludes any other employment of judges except in teaching and research and because of that Mr. Šuvalov could not ensure his income by being employed elsewhere during the period of suspension from duties. Thus, the SC examined, whether the lack of the regulatory framework that would allow to pay salary or other equivalent compensation to Mr. Šuvalov is in conformity with the constitutional principle of the independence of judges.[158] The SC gave the judicial independence

[154] SCebj 14.04.2009, 3-3-1-59-07, para. 34 ff.
[155] Cf. J. Ginter, *Guarantees of Judicial Independence*, 1 Juridica International 75 (1996).
[156] SCebj 14.04.2009, 3-3-1-59-07, para. 31.
[157] SCebj 14.04.2009, 3-3-1-59-07, decision.
[158] SCebj 14.04.2009, 3-3-1-59-07, para. 29–37.

a twofold meaning. "[T]he independence of judges means, on the one hand, a privilege of each judge without which he or she would not be able to perform the role he or she is expected to perform and to act as an independent third person in solving social conflicts. […] On the other hand, in addition to the aforesaid, the independence of judges in the democratic states has a significantly broader meaning. Namely, the independence of judges also serves the interest of all those people who apply for and count on the fairness of the administration of justice."[159] The latter idea was founded with a reference to Article 6(1) ECHR. Thereafter, the SC considered, based on Article 6.1 of the European Charter on the Statute for Judges, "to be universally recognised that remuneration is one of the guarantees for the independence of judges."[160] Subsequently, the SC established: "Sufficient income guaranteed by the state to the judges while they hold the office of judge allows them to perform the role of judge as expected and, at the same time, constitutes a guarantee to participants in proceedings that their cases are heard by an independent and impartial tribunal. The Constitution does not allow for the conclusion that the guarantees for the independence of judges are not applicable to a judge during certain periods of time while he or she holds the office of judge, e.g. during the suspension of a service relationship."[161] The SC presumed that a judge whose service relationship is suspended lacks the means of subsistence and followed that the failure to pass legislation which would allow to pay a salary or other equivalent compensation to judges whose service relationship has been suspended for the period of criminal proceedings is in conflict with the Constitution.[162] For Mr. Šuvalov, it followed that he was entitled to receive a salary or other equivalent compensation for the whole period while the performance of his duties were suspended. However, the SC added one more aspect: "On the one hand, the judge's salary is a guarantee of his or her independence, on the other hand, the salary payable to a judge must be in elementary correlation to his or her actual work contribution."[163] In determining the amount of salary payable to a judge removed from

[159] SCebj 14.04.2009, 3-3-1-59-07, para. 32. Cf. CRCSCj 08.05.2018, 5-17-43, para. 40.
[160] SCebj 14.04.2009, 3-3-1-59-07, para. 33.
[161] SCebj 14.04.2009, 3-3-1-59-07, para. 34.
[162] SCebj 14.04.2009, 3-3-1-59-07, para. 36 f.
[163] SCebj 14.04.2009, 3-3-1-59-07, para. 43.

service for the duration of criminal proceedings, the SC let himself be guided by 'the principle of reasonableness' and stated that a reduction of salary by up to one half is not unreasonable.[164] Therefore, the SC required to pay to Mr. Šuvalov 50% of his salary.

The Šuvalov case is the most important case concerning the judicial independence. However, other important cases followed. The next one was the 'Judicial clerk case'.[165] The procedural law was amended with the possibility that requests for the determination of the amount of the procedural expenses can be decided by judicial clerks[166] instead of judges. A County Court challenged this provision with a request for concrete norm control. The SC established first, that the decision of the sum of the procedural expenses had to be considered as an administration of justice in the substantive sense. Then, it continued that only judges can be the special-type officials, whose main function is to administer justice and, thus, as the court, exercise state authority. Therefore: "Only judges, for the purposes of §§ 147, 150 and 153, have been secured constitutional guarantees, such as the appointment to office for life, removal from office only by a judgment, the requirement that the grounds and procedure for release of judges from office as well as the legal status of judges and guarantees for their independence are to be provided by law (§147 of the Constitution), incl. special procedure for appointment to office (§150 of the Constitution) and bringing criminal charges against judges (§153 of the Constitution)."[167] The SC pointed out the additional restrictions for judges, too, like the prohibition to hold any other elected or appointed office (§147(3)), and added: "The guarantees of independence of a judge can be deemed to cover their work on the basis of merely the Constitution and laws, in line with his or her conscience and judgments, which also ensure the required impartiality in respect of parties to proceedings."[168] Thus, because judges have been appointed to office and the guarantees and restrictions provided for in the Constitution apply to them,

[164] SCebj 14.04.2009, 3-3-1-59-07, para. 44.
[165] SCebj 04.02.2014, 3-4-1-29-13. Cf. SCebr 26.06.2014, 3-2-1-153-13.
[166] §125[1](1) of the Courts Act: "A judicial clerk is a court official who participates in the preparation for proceeding and in proceeding of cases to the extent prescribed in the court procedure law either independently or under the supervision of a judge".
[167] SCebj 04.02.2014, 3-4-1-29-13, para. 44.4.
[168] SCebj 04.02.2014, 3-4-1-29-13, para. 44.5.

presumably, the judge complies with the requirements for independence and impartiality. And therefore, in the court justice can be administered exclusively by a judge.[169] Since the judicial clerks were not judges in the constitutional sense, the rule that provided for the possibility that requests for the determination of the amount of the procedural expenses could be decided by judicial clerks was unconstitutional.[170]

The next case was the 'Pension case'.[171] As one of the afterplays of the economic crisis of 2009, the *Riigikogu* detached 2012 the pensions of former judges from the current salary of the judges. Thus, the pensions of already retired judges were to be smaller than they would have been under the former regulation according to which the pension was attached to the respective current salary of the judges. Some of the retired judges challenged the decision of the pension authority. The constitutional case was a concrete norm control, initiated by the Administrative Court, and the SC found a violation of the rights of the retired judges. As to the judicial independence, the SC established: "The judge's pension is one of the guarantees of the independence of judges and courts."[172] In the opinion of the SC, the pension was to reduce the risk of corruption and a compensation for the prohibition to hold other offices, too.

Finally, there was a 'Salary case' concerning the judges.[173] In this case some judges challenged a complicated formula stipulated by law, according to which the salary of all judges was decreased in the years of economic growth after the economic crisis of 2009 instead of being increased. Again, the constitutional procedure was a concrete norm control. The SC dismissed the application and maintained the formula. The key message of the SC concerning the judicial independence can be summarised as follows: The Constitution obliges the lawmaker to establish salary that would be sufficient in order to guarantee the independence, impartiality and expertise of judges and the Constitution establishes a subjective

[169] SCebj 04.02.2014, 3-4-1-29-13, para. 44.6.
[170] In another case the SC found that deleting a registered association from the register is no administration of justice and may therefore be carried out by an assistant judge (SCebj 02.10.2018, 2-17-10423, para. 35–38). Assistant judges (§§ 114–124 of the Courts Act) are no judges but court officials employed by the civil courts that fulfil different rather technical tasks.
[171] SCebj 26.06.2014, 3-4-1-1-14.
[172] SCebj 26.06.2014, 3-4-1-1-14, para. 96.
[173] CRCSCj 08.05.2018, 5-17-43. (Disclaimer: In my capacity as a judge, I was a member of the panel that initiated the concrete norm control in this case.)

right of judges that corresponds to this obligation.[174] However, according to the SC, the subjective right would only be infringed when the reduction of the salary would be so extensive that the remaining salary would not be sufficient anymore in order to guarantee the independence, impartiality and expertise of judges.[175] Since the reduced salary was still sufficient in the opinion of the SC, there was no infringement and, therefore, no need to assess the proportionality of the reduction of the salary. It remains to be seen whether this solution is a sustainable one. Compared to the former cases addressing the judicial independence, it seems to constitute a step backwards. Even if the SC indicated *inter alia* that it still holds itself to be competent to react to attempts to influence the judges through the salary,[176] the SC missed the opportunity to define the limits of judicial independence more precisely in order to more effectively prevent any influencing attempts in the future.

5.5. Constitutional review

The highest appeal court is the Estonian Supreme Court (SC), which unifies the functions of the final appellate instance of civil, criminal, and administrative jurisdictions, alongside with the constitutional review. This follows from §149 of the Constitution. The power of constitutional review can be exercised either by the CRCSC or, alternatively, by the SC *en banc*. The constitutional procedural law is regulated by the Constitutional Review Court Procedure Act (CRCPA)[177] which provides 14 different types of proceedings. The most important type of proceedings – the concrete norm control which may be initiated by any court that concludes that a law, on whose validity its decision depends, is unconstitutional – is provided for by §15(1)2 and §152(2) of the Constitution. However, neither the Constitution nor the CRCPA provides explicitly an individual constitutional complaint to the SC. In spite of that, there has been one successful precedent[178] and the

[174] CRCSCj 08.05.2018, 5-17-43, para. 42.
[175] CRCSCj 08.05.2018, 5-17-43, para. 43 f.
[176] CRCSCj 08.05.2018, 5-17-43, para. 44.
[177] *Põhiseaduslikkuse järelevalve kohtumenetluse seadus*. – RT I 2002, 29, 174; I, 07.03.2019, 1.
[178] SCebj 17.03.2003, 3-1-3-10-02 (Brusilov), especially para. 17. Cf. ALCSCr 10.11.2003, 3-3-1-69-03, and SCebr 28.04.2004, 3-3-1-69-03; ALCSCr 22.12.2003, 3-3-1-77-03, and SCebj 30.04.2004, 3-3-1-77-03.

SC has in several decisions stressed the possibility of the individual constitutional complaint deriving directly from §15(1) of the Constitution[179]. Nevertheless, it is still disputed in Estonian constitutional law theory whether the Constitution establishes a right to individual constitutional complaint to the SC or do all courts have the obligation to enforce constitutional rights and there remains no room for a direct complaint to the SC.[180] The author of this paper is of the opinion that there are far better arguments that support the necessity of the individual constitutional complaint. It is indispensable in order to meet the requirements of §15(1) of the Constitution. Without the individual complaint the constitutional review system cannot be considered being exhaustive and the bearers of constitutional rights would still lack the ultimate remedy to enforce their rights. Even more, the individual constitutional complaint may under certain circumstances be the only effective domestic legal remedy, e.g. in case of an imaginary extensive surveillance legislature.

6. Concluding remarks

The present overview of Estonian constitutional core or DNA is a small piece in the puzzle of the Constitutions of the Member States. Most of the principles, presented above, are positivised in the primary law of the EU, e.g. in Article 2 TEU. Nonetheless, every national tradition strengthens and helps to guarantee the national principles mutually. This reciprocal effect should not be underestimated.

The CCTs are for the CJEU a source for general principles of EU law that constitute one of the sources for fundamental rights. After entering into force of the Charter together with the Treaty of Lisbon the original function of the CCTs – to justify the existence of

[179] CRCSCj 09.06.2009, 3-4-1-2-09, para. 36; CRCSCr 23.03.2005, 3-4-1-6-05, para. 4; 09.05.2006, 3-4-1-4-06, para. 8 f.; 20.05.2009, 3-4-1-11-09, para. 5 ff.; 07.12.2009, 3-4-1-22-09, para. 7; 10.06.2010, 3-4-1-3-10, para. 13 f.; 23.01.2014, 3-4-1-43-13, para. 9; 27.01.2017, 3-4-1-14-16, para. 22.

[180] Cf. e.g., the materials of the 2013 conference on the Brusilov case (SCebj 01.01.2009, 3-1-3-10-02), (available in Estonian) http://www.oigus-selts.ee/konverentsid/kumme-aastat-brusiloviga-kuidas-edasi and a brief summary of the recent debate in M. Ernits, *The Use of Foreign Law by Estonian Supreme Court,* in G. F. Ferrari, *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems* (2019).

fundamental rights in the primary law of the EU – has been relativised. Today the primary law provides us a positivised catalogue of fundamental rights.

As we have seen, §10 of Estonian Constitution provides a fundamental rights development clause opening up the constitutional rights catalogue towards new unwritten rights. One possibility to increase the importance of the CCTs again would be to redefine the CCTs as fundamental rights development clause similar to §10 of Estonian Constitution. However, then the CJEU would only come last because, in order to establish a new right on the basis of all constitutional traditions, logically all Member States would come first. Therefore, this approach is unsatisfactory, too.

Consrequently, it remains to be seen which way the CJEU takes in order to rethink the CCTs. Or as Koen Lenaerts has formulated the core of the issue: "[F]inding a dynamic balance between those two competing elements [i.e. unity and diversity], without one always prevailing over the other as only the two together give real meaning to European integration."[181]

Annex: On two special liberty rights

Subsequently, the freedom of speech or rather freedom of expression (§45) and the freedom of movement (§34) will be presented as examples of the more concrete constitutional rights practice.

1.1. On free speech

Although society accepted the substantial turn of 1992 quickly and readily, the constitutional freedom of expression guaranteed by §45 of the Constitution[182] has not been applied so frequently in the

[181] K. Lenaerts, *The Court of Justice and the Comparative Law Method. – ELI Annual Conference*, cit. at 17,1. https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf.

[182] §45 of the Constitution: "(1) Everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be circumscribed by law to protect public order, public morality, and the rights and freedoms, health, honour and good name of others. This right may also be circumscribed by law in respect of public servants employed by the national government and local authorities, or in order to protect a state secret,

constitutional review proceedings. The numerous questions that have arisen have been solved mostly in lower level courts and mostly in civil court proceedings.

Estonian understanding of the constitutional notion of the freedom of expression has been deeply influenced particularly by two judgements of the European Court of Human Rights – both non-violation cases – the 'Tammer case' and the 'Delfi case'. These cases and their influence will be presented briefly. Thereafter the most important case of constitutional freedom of expression – the 'Political outdoor advertising case' – will be presented, too. Finally a brief overview of the rest of the noteworthy case-law will be given.

1.1.1. Tammer case

The first case, the 'Tammer case' arose from an interview of a journalist and editor (Enno Tammer) of one of the biggest daily newspapers in Estonia with another journalist who had helped a woman (L) – who was a former mistress and later wife of a very influential politician – to write her memoirs and had published them without her consent.[183] L had been the politician's assistant when he was Prime Minister and later Minister of Interior, and had had his child while he was still married to his first wife; she had left the child's upbringing to her parents. These matters were referred to in her memoirs. In the interview, Mr. Tammer used in one of his questions two Estonian words which characterised L as a marriage-breaker (*abielulõhkuja*) and an uncaring mother (*rongaema*). Mr. Tammer was convicted for these expressions of insulting her and fined 220 kroons (around 14 euros). His appeals were dismissed.

Particulary, the Criminal Chamber of SC confirmed the conviction of Mr. Tammer.[184] First, the SC emphasised the importance of the freedom of expression: "the principle of free speech including the journalistic free speech is an indispensable guarantee for the democratic arcitechture of the society and

trade secret or information received in confidence which has become known to the public servant by reason of his or her office, and to protect the family and private life of others, as well as in the interests of the administration of justice. (2) There is no censorship."

[183] ECtHR 06.02.2001, 41205/98 – Tammer v. Estonia.

[184] CRCSCj 26.08.1997, 3-1-1-80-97; cf. SCebj 09.04.1998, 3-1-2-1-98.

therefore one of the most important social values."[185] Then the SC postulated that there are no limitless constitutional rights in a society and stated: "The exercise of any constitutional right can only continue to this point, where the exercise of another constitutional right is not impeded. In a situation of competing constitutional rights, there will inevitably be a need to restrict constitutional rights."[186] Then, the SC found that at that time if the honour of a person was offended by value judgements – like in the present case – the criminal law resources were the only possible means to sanction a behaviour like that. Finally, the SC established that used expressions lead to a degrading and thus inappropriate treatment of L in public. The SC added that Mr. Tammer had the opportunity to eliminate the injustice by publishing an apologising article but he did not use this opportunity. An attempt to renew the proceedings, was held to be inadmissible.[187]

The European Court of Human Rights found unanimously that there had been no violation of Article 10 ECHR.[188] In the center of Courts reasoning was the criterion 'necessary in a democratic society'. The Court agreed that the use of the expressions was offensive and that they constituted negative value judgments. The Court found particularly that the use of the impugned terms in relation to L's private life was not justified by considerations of public concern and that they did not bear a general importance. The Court found that the Estonian courts fully recognised that the present case involved a conflict between the right to impart ideas and the reputation and rights of others and that it could not find a failure properly to balance the various interests involved in the case. The Court took into account the margin of appreciation and recalled that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account. In the case of Mr. Tammer, the fine imposed was relatively small. Recapitulating, the Court considered that the conviction and sentence of Mr. Tammer were not disproportionate to the legitimate aim pursued and that the reasons advanced by the domestic courts were sufficient and relevant to justify such interference.

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[185] CRCSCj 26.08.1997, 3-1-1-80-97, para. I.
[186] CRCSCj 26.08.1997, 3-1-1-80-97, para. I.
[187] SCebj 09.04.1998, 3-1-2-1-98.
[188] ECtHR 06.02.2001, 41205/98 – Tammer v. Estonia.

One of the main, although indirect results of this most famous insult was the abolishment of criminal liability for insults. By abolishing the criminal liability for insult entirely, the *Riigikogu* expressed indirectly its assessment that a criminal stigmatisation that Mr. Tammer was subjected to by his criminal conviction was an overreaction. The new Penal Code that entered into force on 1 September 2002 does not criminalise the general insult anymore. The Minister of Justice at that time, Märt Rask, made while defending the new approach in front of the *Riigikogu* an indirect reference to the Tammer case and explained the abolishment with sufficient efficency of private law means.[189] Parallel to that, the new Law of Obligations Act (LOA) that entered into force 1 July 2002 eliminated the shortcomings of the earlier civil law referred to in the Criminal Chamber judgement in the Tammer case and established civil liability for defamation for passing undue value judgements (§1046 LOA) and for disclosure of defamatory facts (§1047 LOA). Thus, the Tammer case paved the way to the contemporary, essentially private law oriented practice of freedom of expression in Estonia.[190]

1.1.2. Delfi case

The next important case is the 'Delfi case'.[191] Delfi AS is a public limited company which owns one of the largest Internet news portals in Estonia. In January 2006, a critical article concerning a ferry company was published on the portal, triggered by the ferry company's decision to change the route that some ferries took. Because of this change, the ferries had broken the ice where ice roads could have been opened in the near future. Ice roads are public roads over the frozen sea between the Estonian mainland and big islands that are opened by sufficient ice conditions and that are a cheaper and faster connection to the islands compared to the

[189] IX Riigikogu Verbatim Record, III Session, Wednesday, 03.05.2000, at 13:00 http://stenogrammid.riigikogu.ee/et/200005031300 (in Estonian). As a footnote, Märt Rask and Enno Tammer were members of the same coalition party – the Estonian Refom Party (*Eesti Reformierakond*).

[190] Cf. overview of the case law until 2007 by M. Ernits, *Põhiõigused, demokraatia, õigusriik* ,Constitutional Rights, Democracy, Rule of Law, Tartu 188–243 (2011).

[191] ECtHR (GC) 16.06.2015, 64569/09 – Delfi AS v. Estonia; cf. ECtHR 10.10.2013, 64569/09. To the latter cf. M. Susi. Delfi AS v. Estonia. – The Americal Journal of International Law 108 (2014), p. 295–302. Cf. CLCSCj 10.06.2009, 3-2-1-43-09.

ferry services. As a result, the opening of the ice roads was postponed for several weeks. Below the article, readers were able to add comments and to access the comments of other users of the site. Once posted on the news portal, the actual authors of the comments could not modify or delete their comments anymore. About 20 anonymous comments containing personal threats and offensive language directed against the major shareholder and member of the supervisory board of the ferry company (L) were posted underneath the article about the ferry company, like: 'burn in your own ship, sick Jew!', 'go ahead, guys, [L] into the oven!', 'knock this bastard down once and for all', '[L] very much deserves [lynching], doesn't he', 'a good man lives a long time, a shitty man a day or two', 'I pee into [L's] ear and then I also shit onto his head' etc. Six weeks after the publication, lawyers of L requested Delfi to remove the offensive comments and claimed 500,000 kroons (around 32,000 euros) as a compensation for non-pecuniary damage. Delfi complied immediately with the request for removal but refused to pay the compensation. Upon defamation lawsuit, Delfi was ultimately ordered to pay 5,000 kroons (around 320 euros) in damages.

The SC rejected Delfi's argument that, under Article 14 of the e-Commerce Directive,[192] its role as an information society service provider or storage host was merely technical, passive and neutral, finding that the portal exercised control over the publication of comments. The SC recognised that there was a difference between a portal operator and a traditional publisher of printed media, pointing out that the former could not reasonably be required to edit comments before publishing them in the same manner as the latter. However, both had an economic interest in the publication of comments and therefore both should be considered as a 'publisher/discloser' (*avaldaja*). The SC therefore held Delfi liable under the relevant domestic law, notably the Constitution, the General Part of the Civil Code Act and the Law of Obligations Act, finding that the portal had not only failed to prevent the publication of comments which degraded human dignity, contained threats and were thus clearly unlawful but also to remove the comments

[192] Directive 2000/31/EC of the European Parliament and of the Council of 08.06.2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), (OJ 2000 L 178, p. 1).

from its portal on its own initiative.[193] Delfi appealed to the European Court of Human Rights, complaining that holding it liable for the comments posted by the portal's readers infringed its freedom of expression.

The Delfi judgment of the European Court of Human Rights has a broader importance.[194] For Estonian understanding of the freedom of expression the interpretation of the criterion 'necessary in a democratic society' of the European Court of Human Rights was decisive. The main question before the Grand Chamber was whether the Estonian courts' decisions, holding Delfi liable for comments posted by third parties, were in breach of its freedom to impart information.

The Grand Chamber scrutinised four criterions: the context of the comments, the liability of the actual authors of the comments as an alternative to Delfi being held liable, the steps taken by Delfi to prevent or remove the defamatory comments, and the consequences of the proceedings before the national courts for Delfi.

First, regarding the context, the Grand Chamber agreed with the SC that although Delfi had not been the actual writer of the comments, it was responsible for their content because of its economic interest and because of the technical possibilities. First, the number of visits to the news portal depended on the number of comments; the revenue earned from advertisements published on

[193] Cf. the translation of the relevant reasoning of CLCSCj 10.06.2009, 3-2-1-43-09 in: ECtHR (GC) 16.06.2015, 64569/09, para. 31, and the summary of the SC judgement's reasoning in: Press Realease issued by the Registrar of the Court, ECHR 205 (2015), 16.06.2015 https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5110487-6300958&filename=Grand%20Chamber%20judgment%20Delfi%20AS%20v.%20Estonia%20-%20liability%20of%20Internet%20news%20portal%20for%20offensive%20online%20comments.pdf.

[194] Cf. M. Husovec, *General monitoring of third-party content: compatible with freedom of expression?*, 11 J. Intell. Prop. L. 17-20 (2016); L. Brunner, *The Liability of an Online Intermediary for Third Party Content. The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia*, 16 Human Rights Law Review 163–174 (2016); R. Spano, *Intermediary Liability for Online User Comments under the European Convention on Human Rights*, 17 Human Rights Law Review 665–679 (2017); J. Šidlauskienė, V. Jurkevičius, *Website Operators' Liability for Offensive Comments: A Comparative Analysis of Delfi as v. Estonia and MTE & Index v. Hungary*, 10 Baltic Journal of Law & Politics 46–75 (2017).

the portal, in turn, depended on the number of visits. Therefore, Delfi was interested in attracting a possibly large number of comments on news articles published by it. Secondly, once a comment was posted, only Delfi had the technical means to modify or delete the comment.

Secondly, Delfi had not ensured a realistic prospect of the authors of the comments being held liable. Since Delfi did not register the identity of the commentators, the measures to establish their identity remained uncertain.

Thirdly, the steps taken by Delfi to prevent or remove the defamatory comments once published without delay had been insufficient. The Grand Chamber established that Delfi had an automatic system of deletion of comments based on stems of certain vulgar words and it had a notice-and-take-down system in place, whereby anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose to bring it to the attention of the portal administrators. In addition, on some occasions the administrators removed inappropriate comments on their own initiative. Nevertheless, both the automatic word-based filter and the notice-and-take-down system had failed to filter out the manifest expressions of odious hate speech and speech inciting violence for six weeks. The Grand Chamber concluded that Delfi's ability to remove offending comments in good time was therefore limited. Furthermore, the Grand Chamber held the obligation of Delfi to remove from its website, without delay and even without notice, clearly unlawful comments, to be proportionate because the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments.

Finally, the Grand Chamber held that the consequences of Delfi having been held liable were small. The 320-Euro fine was by no means excessive for Delfi, one of the largest Internet portals in Estonia, and the portal's popularity with those posting comments had not been affected. Therefore, the measure did not constitute a disproportionate restriction on the Delfi's right to freedom of expression.

For Estonia, the Delfi judgement confirmed that the SC's interpretation of the freedom of expression was in accordance with the ECHR. Because of the SC judgement from 2009 Estonian courts started to declare the removal of offensive and/or insulting

comments to be a sufficient redress.[195] There is one further development in the field of internet comments that is worth mentioning. In this case an Estonian private limited-liability company operating in Sweden was blacklisted for its allegedly questionable business practices on the website of a Swedish employers' federation, attracting several hostile comments from its readers. These comments were addressed partly against the company but partly against its sole shareholder and sole member of the managing board (W) personally. The company and W brought an action before the Estonian courts against the Swedish federation complaining that the published information had negatively affected their honour, reputation and good name. They asked the Estonian courts to order that the Swedish federation rectify the information and remove the comments from its website. They also requested damages for harm allegedly suffered as a result of the information and comments having been published online. The County Court ordered that the claims of the company be severed from the claims of W. The proceedings against the company were subject to a preliminary reference.[196] They were finally terminated because the Estonian courts had no jurisdiction in this case.[197] The proceedings of W ended with a friendly settlement.[198] In this settlement the Swedish board obliged to remove offensive comments from its webpage but no compensation was awarded to W. This solution reaffirms once again the post-Delfi case-law that – except extreme cases – the obligation of the 'publisher/discloser' consists as a rule in the removal of defarmatory commentaries without undue delay.

[195] E.g. Judgment of the Tallinn Court of Appeal 21.02.2012, 2-08-76058; Judgment of the Tallinn Court of Appeal 27.06.2013, 2-10-46710. Cf. M. Kuurberg, *Euroopa Inimõiguste Kohtu suurkoja 16. juuni 2015. a otsus asjas Delfi vs. Eesti*, Juridca 592 (2015); ECtHR (GC) 16.06.2015, 64569/09, para. 43.

[196] CJEU 17.10.2017, C-194/16 – Bolagsupplysningen OÜ; cf. Opinion of AG Bobek 13.07.2017, C-194/16, and CLCSCr 23.03.2016, 3-2-1-2-16. CJEU interpreted Article 7(2) of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

[197] CLCSCr 21.12.2017, 2-16-4631.

[198] Ruling of the Harju County Court 08.10.2019, 2-15-14492. Cf. Judgement of the Harju County Court 21.08.2017, 2-15-14492; Judgement of the Tallinn Court of Appeal 29.03.2018, 2-15-14492.

1.1.3. Political outdoor advertising case

In the constitutional review proceedings, the freedom of expression has mainly been used to assess restrictions to different kinds of advertisements. In 2005 the SC had to decide whether a prohibition of advertising low-alcohol beverages by a local city council that extended to the whole territory of the local government was legal.[199] The Advertising Act of the Parliament prohibited the advertising of low-alcohol beverages in proximity to buildings housing a nursery school, school, other educational institution, children's or youth centre. The Act left the local governments the right to determine the areas which were deemed to be 'in proximity'. First, the SC identified an infringement of the freedom of expression and of the freedom of enterprise. Then, the SC analysed the extent of the purpose of the legal basis and found that the local government had exceeded the extent permitted.[200] Thus,

[199] CRCSCj 13.06.2005, 3-4-1-5-05.

[200] CRCSCj 13.06.2005, 3-4-1-5-05, para. 16–19: "[T]he "area in proximity to" the structures […], which is deemed to be a zone wherein advertising of low-alcohol beverages is prohibited, must be defined through the purpose of the provision delegating authority, that is, we should endeavour to find out the aim of the legislator upon authorising the local governments to determine the areas deemed to be in proximity to the objects referred to […] for the purpose of imposition of restrictions on advertising low-alcohol beverages. […] Neither the explanatory letter to draft Advertising Act nor the Riigikogu stenographs explain the aim of the restrictions on advertising. […] [T]he prohibition of advertising of low-alcohol beverages on educational, health-case and sports structures and in proximity thereof must guarantee that it will not be possible to associate the institutions engaged in educating and intended for restoration and fostering (public) health with advocating consumer habits damaging to health. […] [T]he Chamber considers it necessary to interfere in such cases when it is manifest that upon imposing restrictions on advertising of low-alcohol beverages the limits of the aim set by the legislator – to preclude the so called approving relationship between educational, health-care and sports structures and advertising of low-alcohol beverages – have been violated. […] The Chamber is of the opinion that when prohibiting the advertising of low-alcohol beverages on the whole administrative territory of the local government unit the local government has manifestly violated the limits of the provision delegating authority […] The term "area in proximity to" can not be defined in a manner which results in absolute prohibition on advertising low-alcohol beverages in a local government unit. [The corresponding provision] clearly indicates at the will of the legislator not to authorise local governments to prohibit the advertising of low-alcohol beverages on the whole territory of a local government unit. A restriction on freedom of enterprise and freedom of commercial speech as extensive as this one under discussion would have required a clear permission by law. Secondly, it appears from the map of [the] city, included in the materials of the case, that although

the local government regulation was found to be unconstitutional. As a matter of fact, it was a rather simple administrative law case which, because of the specifics of Estonian procedural law, had to be decided in the constitutional review procedure.

The only genuine constitutional review case in which the SC applied among other rights the freedom of expression explicitly is another advertisement case, i.e. a case that concerned the so-called political outdoor advertising.[201] In 2005, the *Riigikogu* amended several electoral acts with prohibitions of the 'political outdoor advertising' during active campaigning and put into effect misdemeanour sanctions in case of a violation of these prohibitions. The prohibition of the political outdoor advertising included the prohibition of commission, distribution and production of advertising as well as of presentation, exhibition and transmission of the advertising to the public. It was prohibited to advertise an independent candidate, a political party or a person standing as a candidate in the list of a political party or their logo, another distinctive mark or programme on buildings or structures or on the inside or outside of means of public transport or taxis. It was completed by a general clause prohibiting 'other political outdoor advertising'. During active campaigning meant the period from the last day for the registration of candidates until the election day, i.e. the last 45 days prior to elections. In short, a complete ban of political advertisement in public sphere for the last one and a half months before elections was put into effect.

After a four-and-a-half-year public dispute about the constitutionality of these prohibitions, the Chancellor of Justice initiated 2009 an abstract norm control in the SC. The SC, sitting the case *en banc*, decided to dismiss the request of the Chancellor of Justice.

First, the SC reflected extensively upon the infringement of rights and found that the prohibitions infringed the right to vote, the right to stand as a candidate in conjunction with the freedom of expression, the right to engage in enterprise, the freedom of property and the freedom of activity of political parties. The SC established particularly: "Political outdoor advertising may be one of the channels for the communication of information to voters

educational, health-care and sports structures are dispersed over the city […], there are still areas on the administrative territory of the city which can by no means be deemed to be in proximity to these structures."

[201] SCebj 01.07.2010, 3-4-1-33-09. Cf. CRCSCj 18.05.2017, 3-4-1-3-17.

regarding political parties, election coalitions and independent candidates and their views. By the establishment of restrictions regarding political outdoor advertising, the legislature shapes the conditions for the exercise of the right to vote. If substantial information on political intentions is communicated through outdoor advertising, a prohibition thereon during the period of active campaigning restricts the possibility of voters to receive information for forming their election decision. By performing the obligation to create the necessary conditions for the periodical exercise of the right to vote, the legislature has also infringed the freedom to receive information for forming the election decision, which is included in the right to vote."[202] Furthermore, the SC established: "Primarily, the right to stand as a candidate provides protection from the preconditions or censuses established regarding standing as a candidate. Upon standing as a candidate for a representative body, the freedom of a candidate to disseminate and introduce his or her views is important. […] In conjunction with the freedom of expression provided for in §45 of the Constitution, the right to stand as a candidate also includes the right of candidates to introduce their political views to voters and to participate in political discussion. The prohibition on political outdoor advertising which is one of the conditions for the exercise of the right to stand as a candidate, restricts the right of candidates to introduce themselves and the association they represent. Therefore the prohibition infringes the right to stand as a candidate […] in conjunction with the freedom of expression."[203]

In the next step, the SC scrutinised the criterion of legal clarity and stated that there is no legal definition for political outdoor advertising. However, the SC emphasised that the National Electoral Committee and courts have repeatedly applied the prohibition concerned. It concluded that: "With reasonable effort and applying different ways of interpretation, state bodies applying the prohibition are able to determine a functioning code of behaviour from these provisions and the objectives of the prohibition, for the ignoring of which, a punishment is prescribed or, for the violation of which, it may be necessary to assess the impact of the violation on the election results. […] With the help of court practice and by applying different ways of interpretation,

[202] SCebj 01.07.2010, 3-4-1-33-09, para. 30.
[203] SCebj 01.07.2010, 3-4-1-33-09, para. 31.

state bodies and courts are, also in ambiguous situations, able to determine which activity is permitted and which prohibited."[204] The SC concluded that regulations providing for the prohibition on political outdoor advertising could not be considered 'so unclear' as to constitute a reason for considering the prohibition to be in conflict with the constitutional principle of legal clarity.

Subsequently, the SC turned to the principle of proportionality. The SC found that the objective of the prohibition on political outdoor advertising was, primarily, to ensure the equality of political parties and individual candidates through reduction of the expenses incurred by political parties on election campaigns and the role of money in the achievement of political power. In addition, the SC established that the objective to reduce the inappropriate influencing of voters (manipulating the will of voters without communicating substantial information on the political programme and intentions, without involving voters in the discussion) with the influencing methods used in outdoor advertising may also be seen behind the prohibition.[205]

Thus, the case had to be decided with the help of the proportionality test. Concerning the suitability, the SC established: "[T]he prohibition on political outdoor advertising is appropriate in order to reduce the role of money in the achievement of political power by reducing election campaign expenses, to increase the role of substantial political debate, to free the public space from excessive outdoor advertising which may cause public resentment towards political advertising and politics as a whole, and to reduce the inappropriate influencing of voters."[206]

As alternative measures, the SC considered restrictions on political outdoor advertising and establishment of a ceiling for election expenses. However, the SC was of the opinion that the general uniform prohibition was necessary for achieving the established objectives. The SC agreed that a detailed restriction would restrict rights less. However, it was of the opinion that a detailed restriction would be also less effective because: "First, […] imposition of a uniform prohibition is simpler and cheaper. Secondly, the specified restrictions do not facilitate, to the same extent, the reduction of campaign expenses or freeing of the public space from political advertising with the objective of reducing the

[204] SCebj 01.07.2010, 3-4-1-33-09, para. 48 f.
[205] SCebj 01.07.2010, 3-4-1-33-09, para. 51.
[206] SCebj 01.07.2010, 3-4-1-33-09, para. 54.

resentment of voters towards political advertising and politics as a whole."[207] Furthermore, relating to the setting a ceiling for election expenses the SC expressed doubts whether a ceiling could ever be as effective as the general ban and put it aside as well.

As to the proportionality in the narrower sense, the SC balanced the infringed rights with countervailing reasons. Essentially, it found that both the intensity of the infringement and the efficiency of the means taken were unclear. It established: "The prohibition only directs political discussions into other channels where there is more likelihood that they become more substantial than the slogans and pictures displayed in outdoor advertising. At the same time, in these channels, there are less possibilities to influence voters inappropriately."[208] It emphasised that "the right to vote and the right to stand as a candidate, the freedom of activity of political parties, and the freedom of political expression as fundamental rights without which democracy would be impossible, have been restricted in the interests of exercise of the same rights in order to ensure better functioning of the democratic decision-making processes."[209] And it came to the conclusion that the established objectives were so weighty that they justified the restrictions in question.

Compared to the argumentation concerning the prohibitions, the justification of the sanctions was scarce. The SC simply noted that "a punishment for a misdemeanour upon violation of the prohibition is a necessary sanction in order to ensure adherence to the prohibition" and that "[t]he legislature has a wide margin of appreciation upon imposition of punishments corresponding to offences".[210] Thus, according to the SC, the sanctions were constitutional, too.

This judgement deserves a criticism that cannot be elaborated thoroughly here. Therefore, only a few brief remarks shall be made. First and foremost, as we saw above, the principle of legal certainty requires that the individual addressee of a prohibition has to be able to foresee the conduct of public power with certain probability and to regulate his conduct correspondingly. Therefore, not the perspective of the authorities applying the sanctions was decisive but that of the individuals. And the latter was not considered at all.

[207] SCebj 01.07.2010, 3-4-1-33-09, para. 57.
[208] SCebj 01.07.2010, 3-4-1-33-09, para. 63.
[209] SCebj 01.07.2010, 3-4-1-33-09, para. 67.
[210] SCebj 01.07.2010, 3-4-1-33-09, para. 73.

At least the general clause prohibiting 'other political outdoor advertising' could possibly meet the legal clarity criterion. Secondly, it was methodologically erroneous to scrutinize all the infringements of different rights in one bundle because in this way particularly the specific infringenement of the freedom of expression remained in the background. Thirdly, the arguments presented to support the verdicts of necessity and proportionality in the narrower sense were not convincing because of the methodological issue. Furthermore, the total ban of political advertisement from public places in a democratic society rather seems to cause more problems than to solve any. The main problem was not the posters in public places as such but the size of the posters. The last months before the election day enormous posters with faces of politicians covered the public sphere. As a result, the campaign costs became enormous, it became for individual candidates almost impossible to attract public attention and the substantive debate about the election platforms was pushed into the background. However, restriction of the size of the posters were reachable simply restricting the size of the posters. Therefore, it remains at least doubtful whether the prohibitions really were necessary and whether they were proportionate. As an afterplay, the *Riigikogu* restored the original situation, abolished all restrictions of the political advertisement completely and allowed the campaign posters even on the election day.[211] *Riigikogu* justified the turn firstly with the lacking evidence that the quality of the political debate had been improved, secondly, that the expected reduction of campaign costs did not occur, and thirdly, that the advertisement had moved into other channels like the Internet and therefore still being omnipresent in the pre-election period. The abolition of the prohibition of campaign posters on the election day that had existed since 1994 was justified with the argument of equality: since ever more voters use one of the early-voting methods (in 2019 nearly 40%), the conditions of the voting should be equalised.[212] Thus, the pendulum has swayed from one extreme

[211] '*Euroopa Parlamendi valimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse, Riigikogu valimise seaduse, rahvahääletuse seaduse ja karistusseadustiku muutmise seadus (valimispäeval valimisagitatsiooni piirangu ja välireklaami keelu kaotamine)*' was passed 11.12.2019 (RT I, 03.01.2020, 2).

[212] Cf. the explanatory report to the draft of the '*Euroopa Parlamendivalimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse, Riigikogu valimise seaduse, rahvahääletuse seaduse ja karistusseadustiku muutmise seadus (valimispäeval*

to the other and the judgment of the SC seems to have left no effect whatsoever.

1.1.4. Criminal liability cases

So far, the SC has decided one genuine hate speech case. In this case a young man (K) wrote and published on Internet a text with the title 'Our Fight' that was directed against jews, christians and democracy, e.g.: "Since the Christianity must vanish from Estonia, the only possibility to reach this goal is to liquidate all Christians and Jews and to destroy the churches." Furthermore, the text included an appeal to armed terror. He was accused of having committed the incitement of hatred (§151 of the Penal Code)[213]. The Court of Appeal convicted him, however, the SC acquitted him in 2006, founding the result essentially to the assumption that there was no concrete danger caused by this act.[214] Furthermore, the SC criticised the lower courts that they had not analysed whether the text might have been meant sarcastically.[215] Indeed, the accused had not taken any further action to reach his declared goal. But the narrow interpretation of the SC was still somewhat surprising and it is questionable whether the SC would decide a similar case in the same way today. E.g. a City Court had earlier found that racist graffiti was punishable according to the same provision.[216]

Another noteworthy criminal case is a more recent one. In this case a novelist wrote and published on the Internet in 2014 a text that described in great detail fictitious rapes and other kind of violent activities against children. However, several experts confirmed that the text as such had a literary value. The novelist was accused of having committed the manufacture of works involving child pornography and making child pornography

valimisagitatsiooni piirangu ja välireklaami keelu kaotamine)' 51SE from 09.09.2019 <https://www.riigikogu.ee/download/9b673cd1-c336-4314-88fa-4b6df0c51801> (in Estonian).

[213] §151(1) of the Penal Code: "Activities which publicly incite to hatred, violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status if this results in danger to the life, health or property of a person is punishable by a fine of up to three hundred fine units or by detention."

[214] CRCSCj 10.04.2006, 3-1-1-117-05, para. 28.

[215] CRCSCj 10.04.2006, 3-1-1-117-05, para. 23.

[216] Judgement of the Narva City Court 17.06.2003, 1-291/03 (the accused sprayed following words to the wall: 'White Power' and its abbreviation 'W.P.', '88', 'Juden tod toten kopf', 'Juden raus! Troll', 'Panzer Division SS', 'Skinheads wake up! 88', 'SS').

available (§178 of the Penal Code)[217]. However, the courts acquitted him.[218] The main reason for acquittance of the novelist was not the fictious character of the text but the fact that he had written the final version of the text abroad (in the USA) and published the work on a foreign server that was located in England, and the publication of such a text was neither punishable in the USA nor in England. Thus, according to the Court of Appeal, Estonian authorities lacked the competence to try the novelist. From the reasoning of the Court of Appeal can be followed that otherwise the court would probably have sentenced him.[219] The Court of Appeal even brought the freedom of expression into play but found that punishing a novelist for writing a novel like that would be in accordance with the freedom of expression.[220] However, the latter is a very disputable statement. The Court of Appeal drew a parallel with a total ban of the visual child pornography where the absolute prohibition is clearly justified with rights of concrete children. However, in the present case the situation was different and there was no victim. The story was purely fictitious and, according to some experts, had even literary value. In case like that, the freedom of expression must clearly prevail, otherwise it would be a crime of opinion.

There have been some further criminal liability cases.[221] However, because of the mostly Civil Law based remedies against alleged violations of privacy and honour, the case-law is not very numerous. E.g., the author did not find a single case where someone would have been punished for burning a flag of a foreign state or international organisation.[222]

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[217] §178(1) of the Penal Code: "Manufacture, acquisition or storing, handing over, displaying or making available to another person in any other manner of pictures, writings or other works or reproductions of works depicting a person of less than eighteen years of age in a pornographic situation, or a person of less than fourteen years of age in a pornographic or erotic situation, is punishable by a pecuniary punishment or up to three years' imprisonment."

[218] Judgment of the Harju County Court 16.05.2017, 1-15-11024; Judgement of the Tallinn Court of Appeal 13.09.2017, 1-15-11024.

[219] Judgement of the Tallinn Court of Appeal 13.09.2017, 1-15-11024, para. 20.

[220] Judgement of the Tallinn Court of Appeal 13.09.2017, 1-15-11024, para. 21.

[221] Cf. to the earlier case law M. Ernits, *Põhiõigused, demokraatia, õigusriik, [Constitutional Rights, Democracy, Rule of Law]*, cit. at 54, 188–243.

[222] §249(1) of the Penal Code: "A person who tears down, damages, profanes or otherwise defames the national flag, national coat of arms or any other official symbol of a foreign state, or an official symbol of an international organisation, or defames the national anthem of a foreign state, is punishable by a pecuniary

1.1.5. Civil liability cases

The main part of the case-law concerning the freedom of expression has so far been produced by civil courts. The Civil Chamber of the SC has continued to consider the freedom of expression fundamental for the democratic society: "[T]he freedom of communication is one of the preconditions for the functioning of the democratic society and the law-abiding press must not be restricted or prevented from publishing information."[223]

One of the most noteworthy cases was the ban of the movie 'Magnus' which was released in 2007. The plot was based on true events. In the center of the movie was a father-son relationship and the suicide of the son. The mother of the boy was depicted rather negatively. The actor that played the father in the movie was the real father of the boy. In the beginning the film participated in numerous film festivals and even won a couple of prizes.[224] It was *inter alia* the first Estonian movie ever that was selected for the official program of the Cannes Film Festival.[225]

Based on the claim of the divorced mother of the deceased boy, courts forbade the publication and distribution of the movie in 2010 until the end of 2025. Unfortunately, the judgments of the County Court and of the Court of Appeal have not been published at all in order to protect the private life of the parties to the proceedings.[226] From the judgment of SC[227] only a very small part of the reasons has been published. Therefore, the reasons can be reconstructed only on the bases of the plentiful media coverage from the time of the court proceedings.[228] According to the press,

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punishment or up to one year's imprisonment." Damaging of the Estonian flag is not punishable in Estonia.

[223] CLCSCj 05.12.2002, 3-2-1-138-02, para. 9.

[224] Cf. page of the film in the Estonian Film Database: <https://www.efis.ee/en/film-categotries/movies/id/775>.

[225] Cf. Cannes Film Festival press releases: <https://www.festival-cannes.com/en/69-editions/retrospective/2007/actualites/articles/the-camera-d-or-selection>; <https://www.festival-cannes.com/en/69-editions/retrospective/2007/actualites/articles/un-certain-regard-magnus-by-kadri-kousaar>.

[226] Judgement of the Harju County Court 12.05.2008, 2-07-10586; Judgements of the Tallinn Court of Appeal 09.02.2009 and 27.04.2010, 2-07-10586.

[227] CLCSCj 09.12.2009, 3-2-1-104-09.

[228] Cf. in English: Controversial Film Ban Decision Appealed. – ERR 06.08.2010 <https://news.err.ee/97589/controversial-film-ban-decision-appealed>;

the plaintiff sought ban of the film for 30 years. The County Court first upheld the action in part and banned the movie in Estonia, EU and elsewhere for 7 years. A very small part of the reasons of this judgment has been published in a weekly newspaper.[229] According to the County Court, the mother and her family were recognizable in the characters. However, the depiction used in the film was negative and endangered the right to self-expression of the real mother. The County Court held it for sufficient when the persons and their family life were recognizable for the family members and the circle of acquaintances. The identity of a person includes her name, appearance, emotions and thoughts, her past, religion and other beliefs. Human dignity means the value of a person in itself, of being a goal and not a means, the personality. The Constitution protects the right to human dignity, freedom of expression and the right to express oneself in society or not to express oneself. It therefore includes the right to portray oneself in public. There was a conflict of countervailing constitutional rights in this case. The spheres of privacy rights can be divided into the individual sphere, the private sphere and the intimate sphere. Sensitive personal data belongs to the intimate sphere of a person and showing it in a way that enables the person to be identified is a particularly serious violation of the general right to privacy. Undoubtedly identifiable serious violations of privacy rights cannot be justified by the artistic freedom. This was the most exhaustive publicly available substantive justification for the ban of the film.

The Court of Appeal first set aside the judgment of the County Court and dismissed the action. The SC dismissed the judgement of the Court of Appeal and sent the case back to the Court of Appeal which finally banned the movie in Estonia, EU and elsewhere until the end of 2025.

The main problem connected with the 'Magnus case' is that although this case could have had central importance for the interpretation of the freedom of expression in Estonia, the reasons

Controversial Film to Stay Banned. – ERR 02.09.2010 <https://news.err.ee/97739/controversial-film-to-stay-banned>; Banned Film Director Vows to Fight On. – ERR 24.01.2011 <https://news.err.ee/98974/banned-film-director-vows-to-fight-on>.

[229] T. Jõgeda, *Miks kohus keelas "Magnuse" näitamise? [Why the Court forbade showing 'Magnus'?],* Eesti Ekspress 15.05.2008 <https://ekspress.delfi.ee/kuum/miks-kohus-keelas-magnuse-naitamise?id=27677793> (in Estonian).

of the judgments are not publicly accessible. It is doubtful whether such an approach is in accordance with the constitutional principle that judgments must be pronounced publicly (§24(4) of the Constitution).[230] The SC missed regretfully the opportunity to define the limits of the freedom of expression for the future.[231] However, the outcome of the case seems to be balanced out. At least, based on the publicly available excerpt of the judgment of the County Court, the court balanced countervailing constitutional rights and the time-limited ban takes the interests of both sides into account.

There are relatively many other civil cases concerning the freedom of expression that have been decided by the Civil Chamber of the SC in the past 15 years where the main justification has been published.[232] However, it is not possible to analyse them all here. The presented examples shall suffice for a picture of the situation concerning the freedom of expression in Estonia. To conclude, one more important aspect shall be underlined. The SC has stated repeatedly: "When exercising the freedom of speech, including the freedom of press, pursuant to §19(2) of the Constitution, the rights and freedoms of other people must be respected and taken into account and the law must be observed."[233] This statement illustrates that the SC, while scrutinising claims to restrict the freedom of expression, always uses the balancing of countervailing rights scheme. As a matter of fact, the cases concerning the freedom of expression are the main examples of the *Drittwirkung* of constitutional rights to which the §19(2) of the Constitution makes a reference to.

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[230] Even if this article provides the possibility to restrict the principle of publicity ('except in cases where the interests of a minor, a spouse, or a victim require otherwise'), the main line of legal reasoning and the main justification of the operative part of the judgment must remain accessible to the public.

[231] Cf. Advokaat: "Magnuse" keeld sisulist lahendit ei toonud [Advocate: The Ban of 'Magnus' Did Not Give Any Real Answers]. – ERR 05.09.2010 <https://www.err.ee/409413/advokaat-magnuse-keeld-sisulist-lahendit-ei-toonud> (in Estonian).

[232] Cf. CLCSCj 10.10.2007, 3-2-1-53-07; 18.02.2008, 3-2-1-145-07; 13.01.2010, 3-2-1-152-09; 26.11.2010, 3-2-1-83-10; 09.12.2010, 3-2-1-127-10; 21.12.2010, 3-2-1-67-10; 20.06.2012, 3-2-1-169-11; 09.01.2013, 3-2-1-166-12; 26.06.2013, 3-2-1-18-13; 25.09.2013, 3-2-1-80-13; 18.02.2015, 3-2-1-159-14; 15.04.2015, 3-2-1-24-15; 17.12.2015, 3-2-1-144-15; 29.03.2017, 3-2-1-153-16; 19.03.2019, 2-17-17140.

[233] CLCSCj 05.12.2002, 3-2-1-138-02, para. 9; 26.06.2013, 3-2-1-18-13, para. 14.

1.2. On free movement

Compared to the freedom of expression, the freedom of movement guaranteed by §34 of the Constitution[234] has occurred only rarely in the case-law of the SC. It had great importance after regaining the independence and at the end of the Soviet occupation. E.g., the Soviets had declared the big islands in the Western part of the country entirely to a border zone and the entering of these islands required a permit, called in everyday speech an 'island-visa'. This requirement was abolished promptly after the Constitution entered into force. Later, the free movement inside the borders of the country became quickly self-evident, moving suddenly back to the spotlight again in the crisis of Wuhan-virus in 2020. However, there are no cases yet concerning the latter.

Although mentioned already in 1994,[235] the first and the most important case where the SC applied the freedom of movement was the 'Valga curfew case'.[236] Valga is a small border town near to Latvia. In 1996, Valga City Council issued a municipal by-law that forbade persons under the age of 16 to be in public places from 11 p.m. to 6 a.m. if they were unaccompanied by an adult. In 1997 a 15-year-old boy (Z) was found by police on the streets without any adult company and punished for the misdemeineour. Z challenged the sanction in the court and the court initiated a concrete norm control. The SC declard the by-law invalid.

Since there was no legal basis for the restriction of the right to move freely, it was a rather simple administrative law case. However, considering that in 1997 the legal system was still in the transformation process, the judgement has a broader importance. The SC found that there was an infringement of the freedom of movement because: "A person exercises his freedom of movement both in time and in space. If we presume that the restrictions on the freedom of movement do not embrace the possibility to restrict a

[234] §34 of the Constitution: "Everyone whose presence in Estonian territory is lawful has the right to move freely in that territory and to choose freely where to reside. The right to freedom of movement may be circumscribed in the cases and pursuant to a procedure which is provided by law to protect the rights and freedoms of others, in the interests of national defence, in the case of a natural disaster or a catastrophe, to prevent the spread of an infectious disease, to protect the natural environment, to ensure that a minor or a person of unsound mind does not remain unsupervised, or to ensure the proper conduct of a criminal case."

[235] CRCSCj 21.12.1994, III-4/A-11/94, para. II.

[236] CRCSCj 06.10.1997, 3-4-1-3-97.

person's stay in certain places at certain hours, this would mean that it would be impossible to legally assess the imposition of official closing time or a curfew on the basis of § 34 of the Constitution. This would hardly be compatible with the purpose of § 34 of the Constitution."[237] Then, the SC found that there must be a legal basis which did not exist in the present case: "Even if prevention of the leaving of a minor without supervision is a local issue, the local government may not impose restrictions on minors' freedom of movement, because §34 of the Constitution unambiguously states that the right to freedom of movement may be restricted solely in the cases and pursuant to procedure provided by law."[238] Thus, the case was actually solved. However, the SC added an *obiter dictum* that *inter alia* makes a statement concerning the essence of the freedom of movement: "Freedom of movement is an accepted and legally protected value in a democratic society, and it is closely related to other constitutional values, such as personal liberty, public security and order, rule of law and the rights and freedoms of other people."[239]

While scrutinising the 'Traffic Act saga' cases,[240] the SC established *inter alia* an infringement of the right to move freely, too.[241] The SC emphasised: "It has […] to be born in mind that the freedom of movement established in §34 of the Constitution is a fundamental right subject to qualified reservations by law. Thus, the freedom of movement may be restricted only in the cases enumerated in the second sentence of §34 of the Constitution."[242] Based on its earlier judgements,[243] the SC stated that the suspension of the right to drive was a punishment in the substantive sense. Then, it established that the aim was covered by the statutory reservation of §34 and argued that the prohibition to drive is a common type of punishment, that is effective for traffic violations and that the punishment is not manifestly excessive. The SC concluded that the suspension of the right to drive without any right of discretion did not amount to a disproportionate infringement of the freedom of movement. This is the only case

[237] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.
[238] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.
[239] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.
[240] Cf. above.
[241] SCebj 27.06.2005, 3-4-1-2-05, para. 56–61.
[242] SCebj 27.06.2005, 3-4-1-2-05, para. 56.
[243] SCebj 25.10.2004, 3-4-1-10-04, para. 20; 25.10.2004, 3-3-1-29-04, para. 17.

where the SC has actually performed a proportionality test in order to assess an infringement of the freedom of movement. However, the reasoning of the SC was – concerning the freedom of movement – in this case rather scarce. The SC did not consider at all the lacking prior hearing of the person, the impossibility of an effective remedy against the suspension of the right to drive etc. Therefore, the assessment of proportionality was rather a declaration than a well-reasoned conclusion.

In further cases the SC has made clarifying statements towards the scope and infringements of the freedom of expression and has given guidelines for using the proportionality test. Concerning the scope the SC has established: "The right to freedom of movement first and foremost protects the right to reach a destination."[244] Concerning the infringement, the SC found "that the preventive measure – signed undertaking not to leave place of residence – applied in the criminal proceeding infringed the appellant's rights arising from the Constitution to move freely and choose a place of residence (§34 of the Constitution) and the right to leave the country (§35 of the Constitution)."[245] On the other hand, it has also stated that the Population Register Act does not restrict the right to move freely and to choose freely the place of residence.[246] The latter is a rather questionable assessment. Finally, as to the guidelines, the SC has established: "The right to freedom of movement is an essential expression of the individual right to self-determination and individual physical freedom"[247].

[244] CRCSCj 22.12.1998, 3-4-1-11-98, para. IV.
[245] SCebj 22.03.2011, 3-3-1-85-09, para. 133.
[246] CRCSCj 26.03.2019, 5-19-15, para. 18.
[247] CRCSCj 22.12.1998, 3-4-1-11-98, para. IV.

COMMON CONSTITUTIONAL TRADITIONS: REPORT IN RESPECT OF THE CZECH REPUBLIC

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1. Historical background[2]

Having regard to the history of the country, the Czech Republic aims to distance itself from the communist regime. Even though the current Czech Constitution is characterized by discontinuity with the communist regime, it is, nevertheless, inspired, in its approach to some issues by the Socialist Constitution. It is so in the area of the constitutional position of the president of the Republic, in particular, as regards his competences and his (ir)responsibility[3]. It is, though, mostly the tradition of the so-called First Czechoslovak Republic which existed from 1918 to 1938 and even the Austro-Hungarian tradition that is followed[4].

It is undisputed that the Constitution has been inspired particularly by the constitutional charter of the Czechoslovak Republic of 1920, hereafter "Constitution 1920"[5]. The reasons for such a strong inspiration by the Constitution 1920 are rather prosaic. The decision was largely influenced by lack of time for the preparation of a new constitution of the newly formed independent Czech Republic. It was also the idea of an ideal document of idyllic times that led to an extensive inspiration by the Constitution 1920. It is also unclear to what extent the Constitution 1920 which served as inspiration has been subject to critical reception and to what extent it was just mechanically copied[6]. It is also virtually impossible to research and reconstruct the process of the preparation of the Constitution as only very little activity of the preparatory commission has been documented.[7]

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[2] For a detailed overview of the Czechoslovak constitutional and political history, break-up of socialism and restoration of pluralistic democracy see V. Pavlíček, M. Kindlová, *The Czech Republic*, in L. Besselnik et al. (eds.) *Constitutional Law of the EU Member States* (2014).

[3] V. Pavlíček, *Teoretická koncepce Ústavy ČR.*, in P. Mlsna et al. (eds.), *Ústava ČR – vznik, vývoj a perspektivy* (2011).

[4] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, 8 *The Lawyer Quarterly* 4 (2008).

[5] V. Pavlíček, *Ústavní právo a státověda. II. Díl* (2008).

[6] J. Kysela, *Prosincová Ústava v kontextu diachronní komparatistiky*, 156 *Právník* 12 (2017).

[7] For further details regarding the preparation of the Constitution, see J. Filip, *Zapomenuté inspirace a aspirace Ústavy ČR (K 10. výročí přijetí Ústavy ČR). Časopis pro právní vědu a praxi, [online] (IV)*, 295 (2002), available at: *https://journals.muni.cz/cpvp/article/view/8211*, and K. Marková, *Obraz první Československé republiky při projednávání Ústavy ČR.*, 18 (2-3) Středoevropské politické studie 197 (2016).

The preamble of the Constitution in its current wording refers to the *"good old traditions of the statehood of the Lands of the Czech Crown and the Czechoslovak statehood"* and declares the loyalty of the citizens to such traditions. Even though the preamble does not enact any specific rights and obligations, it does serve as an interpretative tool and serves to better understand the sources and origins of the text of the Constitution[8]. The explanatory report to the Constitution further specifies that the traditions having their origins in the era of the First Republic are to be followed. The question remains what such traditions encompass.

2 General issues

3 Foundations

3.1.1 Does your legal system have a specific term for 'constitutional tradition'? If yes, does the term used in the national version of the TEU differ from the English term 'tradition'? If no, do legal traditions exist in other areas of your system (private, criminal or administrative law)? Does your system draw distinctions between values, principles and traditions? What can constitute a constitutional tradition in your legal system – parts of a constitutional text, case law, legal theory, conventions, collective constitutional experience and/or long-standing public perception?

"Legal principles" are, in general, basic rules of a specific law, a body of law or a legal order as a whole[9] . They may be explicitly enshrined in written law, may stem implicitly from the written law or may have a source in an extra-legal system such as morality, ethics or politics[10]. Legal principles are typically abstract, broad and unspecific. That is why unlike norms which are mutually exclusive and, thus, the same one always prevails over another, legal principles are complementary. They may clash and be balanced against each other. In each case, one of the principles prevails to some extent and the other is, thus, to some extent limited. When deciding which of the two principles that clash prevails, the conclusion may be different, considering different factual background, even though the same two principles are at stake.

The typical examples of constitutional principles are human rights. The clash of two human rights is a clash of two principles.

[8] L. Bahýľová et al., *Ústava České republiky: Komentář* (2010).
[9] Z. Kühn, J. Boguszak, *Právní principy*, 999 Pelhřimov Vydavatelství 91 (1999).
[10] J. Wintr, *Říše principů. Obecné a odvětvové principy současného českého práva* (2006).

For a resolution of such clash, the proportionality test is usually used[11]. The CCC has taken into account, in its case-law, even unwritten legal principles inferred from the Constitution. The typical example of such principles is the principle of legal certainty or the principle of protection of legitimate expectations which are not enshrined explicitly in the Constitution but were inferred from the Article 1 of the Constitution and applied by the CCC in its decisions (Pl. ÚS 53/10).

Turning to the core question of the research of how is the notion of the constitutional tradition used in the Czech Republic, how is it understood and whether it is given (within the Czech legal practice) any autonomous meaning in the context of the EU law, it is to be noted at the outset that unlike (apparently) in some other European cultures, in the Czech legal system the notion of constitutional traditions, does not have an unambiguous meaning. It is therefore impossible to come up with an exhaustive, indisputable and generally accepted definition of the Czech constitutional tradition or a list of Czech national constitutional traditions.

The notion of a "constitutional tradition" mostly refers, in the Czech legal theory, to a broader concept or framework and denotes a certain legacy of earlier times which is followed. The constitutional tradition manifests itself in different rules, written or unwritten, binding or not, which are part of the constitutional order or constitutional and political culture. A certain constitutional tradition is often claimed to be a reason for enshrinement of a particular provision in the Constitution[12] especially in cases where there is no apparent reason for such provision and any explanation lacks in the explanatory report. It is also referred to when a particular (constitutional) rule is respected; even though it is not explicitly enacted in any relevant legislation[13] Constitutional

[11] J. Wintr, *Principy českého ústavního práva* (2018).

[12] M. Tuláček, *Vliv Senátu na veřejné rozpočty*, 8 Správní parvo 144 (2018). In his paper, Tuláček claims that it is the Czech federative constitutional tradition that is at the origin of a provision according to which Senate may not adopt a state budget in the form of a "legal measure", a specific form of a law that Senate may otherwise adopt in times when the Chamber of Deputies is dissolved.

[13] I. Pospíšil, *Sledování souladu legislativy s ústavním pořádkem při tvorbě práva*. 3 Správní parvo 4 (2017). Pospíšil asserts (in line with the case-law of the CCC, see below) that the principle of proportionality used in the decision-making of the CCC has its origins in the European constitutional tradition.

traditions are also indicated as a reason for a certain approach of the State to a certain social phenomenon[14].

At the time of the ratification of the Treaty of Lisbon, several academic papers commenting on the relevance and effect of the Article 6 of the consolidated version of the Treaty on European Union (hereafter "TEU") appeared in the Czech Republic. Jan Komárek asserts in his paper that the constitutional traditions common to the Member States are yet another source of fundamental rights besides those enshrined in the Charter of Fundamental Rights of the European Union (hereafter "CFR") and the founding treaties. He further notes that some international academics interpret Article 6 para. 3 TEU as an empowerment of the Court of Justice of the European Union (hereafter "CJEU") to creatively formulate new rights based on the listed sources but mainly on the common constitutional traditions of Member States[15]. Other authors were, nonetheless, of a different view.

Jindřiška Syllová claims that, on the contrary, the notion of constitutional traditions common to Member States serves to a possible restrictive interpretation of the CFR and the rights enacted therein. She alleges that the notion has been enshrined in the cited article in to satisfy the Eurosceptic Member States and imposes an obligation to interpret the human rights in line with the constitutional traditions of the Member States. Once certain constitutional tradition has been recognized (in principle by the CJEU) as common to the Member States, the rights enshrined by the EU law should be interpreted in compliance with such tradition[16].

Miluše Kindlová and Ondřej Preuss, in their paper concerning conscientious objections in the context of compulsory vaccination touch upon the topic of the relevance of the constitutional traditions common to the Member States in cases of an unclear scope and content of a particular fundamental right enshrined in the Charter. It is precisely the case of Article 10 para. 2 of the CFR which has a

[14] For example, Kateřina Šimáčková claims that two different constitutional traditions which have been established within Europe are behind different approaches to religions and religious symbols in Europe. She further notes that any future European constitutionality should allow for both traditions to complement. K. Šimáčková, *Česká ústavnost jako hodnotový rámec integrace cizinců*, 2 Acta Universitatis Carolinae/Iuridica, Karolinum 20 (2018).

[15] J. Komárek, *Česká „výjimka" z Listiny základních práv Evropské unie*, 9 Právní rozhledy 322 (2010).

[16] J. Syllová, *„Scope of the Treaty", dekrety a český polisabonský protocol*, 20 Právní rozhledy 743 (2010).

slightly different meaning in different official language versions. Whereas the German or the Czech version only refers to conscientious objection in the context of mandatory military service, other versions, such as the English, French or Italian one, do not specify any restriction to a particular context in which the right to a conscientious objection applies. Having regard to the explanatory note to the CFR which states that "the right enshrined in the para. 2 corresponds to the constitutional traditions of Member States", the authors note that it is possible that the notion of a conscientious objection may, in the Anglo-Saxon context be associated exclusively with military service[17]. It would be, hence, necessary to know the constitutional traditions of different Member States to establish the scope and the content of the right to a conscientious objection as enshrined in the Charter.

3.1.2 What is the relationship between constitutional traditions and customary constitutional law?

Constitutional convention *(ústavní zvyklost)*, sometimes but rather rarely also denoted as a constitutional tradition *(ústavní tradice)*[18] describes a certain manner in which the competences of a certain national authority or more specifically a constitutional authority, i.e. an authority established by the constitution,[19] is ordinarily (customarily) carried out. Those are, therefore, specific procedures that are spontaneously and universally respected for a certain amount of time by those holding a certain function (typically ever since the specific situation first occurred since a constitution entered into force).

A dispute regarding the question whether a constitutional convention is or is not binding persists; the role and the position of the constitutional conventions in the Czech legal system remain, thus, unclear[20]. The CCC itself referred to constitutional conventions in several cases it dealt with. Those cases mostly concerned competences of constitutional authorities (Pl ÚS 36/17;

[17] M. Kindlová, O. Preuss, *Výhrada svědomí v kontextu povinného očkování a mimo něj*, 3 Jurisprudence 17 (2017).

[18] For example, in the dissenting opinion of judges Holländer and Kurka to the plenary judgment of the CCC of 20 June 2001, no. Pl. US 14/01.

[19] The notion of "constitution" (with a lower-case letter) is used for any constitution in general, whereas the notion of "Constitution" (with an upper case letter) is used for the Constitution of the Czech Republic currently in force.

[20] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, 8 (4) The Lawyer Quarterly 521 (2008).

Pl. ÚS 14/13; Pl. ÚS 47/10). In these cases, constitutional conventions were regarded as important, yet not binding and served as an instrument of interpretation. It, therefore, follows that the courts admit that constitutional conventions may influence their decisions. Henčeková[21] asserts that the same decisions would be rendered without the existence of such conventions. In my opinion, it is rather questionable whether it would be the case. It is to be emphasised in this context that in all of the cited cases, the CCC ruled in compliance with the established constitutional convention. Having regard to the existing long-standing case-law of the Constitutional Court,[22] it would probably be far-fetched to argue for a legal normative force of the conventions[23]. However, different judges of the CCC expressed, over the time, in their concurring or dissenting opinions their conviction that constitutional conventions are indeed a binding source of constitutional law which should be applied and followed in the proceedings before the CCC[24].

According to Miluše Kindlová[25], it is just as ambiguous *'what prerequisites must be fulfilled before the existence of a convention is recognised, how long a required practice must last and whether its existence requires the following of the same practice by constitutional bodies with different persons in office (e.g. two Presidents of the Republic), whether they are sources of constitutional law and in what ways courts can employ them in their decision-making'* (p. 521). It is, moreover, unclear whether a certain practice formed under a previous constitution may be relevant.

The relation and difference between constitutional conventions and customs *(obyčej)* are just as confusing. Some use

[21] S. Henčeková, *The Normative Force of the Factual, As Derived from Examples in Czech Case-Law*, 1(4) SSRN Electronic Journal 7 (2019).

[22] Even though the question of constitutional conventions had been only addressed in a handful of cases, the position of the CC had not changed over time.

[23] S. Henčeková, *The Normative Force of the Factual,* cit. at. 7.

[24] K. Klíma and J. Jirásek (eds.) *Ústavní principy, ústavní konvence a ústavní inženýrství* (2008), and M. Kindlová, *Ústavní zvyklosti jako součást ústavy (komparace commonwealthského přístupu a judikatury Ústavního soudu*, in K. Klíma and J. Jirásek (eds.), *Pocta Jánu Gronskému* (2008).

[25] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, cit. at. 521.

both terms as synonyms[2627] whereas others see a constitutional convention as having an important but informal role in the legal order and a custom as a binding rule. The latter view complies with the general approach of a Czech legal theory which defines custom as a binding unwritten rule. A custom is not created by the State who only recognises it in the process of the application of the law. It is usually considered to be the oldest source of law and is characterised by two elements: 1) *usus longoevus*, i.e. its long-term use and 2) *opinion necessitatis,* i.e. necessity of the existence of a general conviction that the customary rule is binding[28]. The term custom is, though, mostly used in the context of customary international law or when referring to the Anglo-Saxon legal system. The term of a constitutional custom is not, hence, attribute with a specific definition or content.

3.1.3 Can institutional arrangements, for example a bicameral legislature or a federal infrastructure, be an expression of constitutional tradition in your system? Can legal techniques such as constitutional and statutory interpretation or – within the principle of proportionality – a balancing of clashing interests qualify as a constitutional tradition in your system?

In its judgment of 16 October 2001, no. Pl. US 5/01, the CCC stated that even though the Czech Republic had not been a Member State of the EU at the time, the case-law of the CJEU had been relevant for the decision-making of the CCC. It held, in particular, that one of the sources of the EU law are legal principles excerpted from constitutional traditions common to the Member States containing basic values common to all Member States, i.e. fulfilling the concepts of the rule of law, including the fundamental rights and freedoms and a right to a fair trial. The CCC proclaimed in this connection that it endorses the European legal culture and its traditions.

In its judgment of 29 September 2005, no. III. US 350/03,[29] the CCC (Pl. ÚS 33/97) reiterated that it had repeatedly applied the

[26] M. Kindlová, *Formal and informal constitutional amendment in the Czech Republic*, cit. at. 521.

[27] See also the dissenting opinion of judges Holländer and Kurka to the plenary judgment of the CCC of 20 June 2001, no. Pl. US 14/01.

[28] M. Škop, P. Machač, *Základy právní nauky* (2011).

[29] The constitutional appeal has been lodged before the Czech Republic became an EU Member State but the judgment has been only delivered afterwards.

principle of proportionality, a modern constitutional unwritten rule accepted in European legal culture. In the cited judgment (unlike in the original one in which the principle has been first introduced to the case-law of the CCC), the CCC further stated that by applying the relevant principle, it endorses the European legal culture and its traditions. The CCC has, thus, implied that it considers the principle of the proportionality to be part of the constitutional traditions common to the Member States.

It follows from the cited case-law of the CCC that both institutional arrangements and legal techniques may form part of the constitutional tradition.

3.1.4 How does time factor into constitutional traditions in your system? The phrase (and especially the term used in the German text of the Treaty on European Union (Überlieferung) suggests that constitutional traditions are of some vintage – but how old must they be? A comparison between the English and German texts of the TEU raises the question whether traditions can develop (and possibly end) within a single constitutional regime. The English response is very likely to be positive, given the absence of clear breaks in English constitutional history over the past several centuries, while the German notion of Überlieferungen indicates that something may have to pass on from one regime to the next (or survive some other form of regime change or transition) in order to be an Überlieferung. What is the response to this question in your legal system? Must constitutional traditions be rooted both in history and in contemporary law?

Constitutional traditions are delimited by core values stemming from the history of the State but may evolve as to its content. The tradition itself forms throughout the history of the State, or in case of the constitutional traditions common to the Member States throughout the history of the EU but the separate elements that are part of it may be quite recent.

3.1.5 How detailed are constitutional traditions in your system (broad concepts and ideas, particular norms and precise rules, or both)?

A constitutional tradition is understood to be more of a general frame recalling historical tradition upon which the current constitutional system is built. It encompasses different

constitutional rules, norms, conventions, principles (including legal techniques), and institutional arrangements that form the core aspects of the specific constitutional tradition, define it. It does not have a stable and definite content.

3.1.6 Are constitutional traditions considered typical, distinctive or unique to your system?

Some are whereas others are not. For example in its judgment no. Pl. US 42/2000 concerning changes to the existing system of parliamentary elections, the CCC referred to the Czechoslovak constitutional tradition when explaining the origins of the proportional electoral system typical for the Czech Republic. On the other hand, in its judgment no. III. US 350/03, the CCC stated that the principle of proportionality is a modern constitutional unwritten rule accepted in European legal culture.

3.2 Subject/content of constitutional traditions

3.2.1 What is the subject/content of constitutional traditions in your system? Are they limited to the area of human rights protection or can they include institutional arrangements? Can you list the principles that are considered to be part of the constitutional traditions, and provide a short description of them?

The Czech constitutional order is based in several elementary principles which are characteristic for the Czech Republic and any change of the provisions encompassing such principles would not be seen as a mere amendment of the Constitution but rather as it revision. Those are: the democracy, respect for human rights and freedoms, the form of a republic, the principle of a parliamentary democracy, the principle of the rule of law, the protection of property, the form of a unitary state, the principle of a social state and the openness towards international and supranational law[30].

Having regard to the conception of the Constitution 1920, the preamble of the current Constitution,[31] as well as the Czech

[30] J. Filip, *Ústavní právo České republiky. Základní pojmy a instituty. Ústavní základy ČR.* (2011).

[31] The Preamble reads as follows (bold added by the author of the present paper): *"We, the citizens of the Czech Republic in Bohemia, in Moravia, and in Silesia, At the time of the restoration of an independent Czech state, Faithful to all good traditions of the long-existing statehood of the lands of the Czech Crown, as well as of Czechoslovak statehood, Resolved to build, safeguard, and develop the Czech Republic in the spirit of the sanctity of human dignity and liberty, As the homeland of free citizens enjoying equal rights, conscious of their duties towards others and their responsibility towards the*

constitutional law theory and the history of the Czech constitutionalism, I assert that the Czech constitutional tradition may be characterised by several elements:

- the Czech Republic is a democratic, liberal, social state;
- the Czech Republic is a pluralistic society;
- the Czech Republic is governed by the rule of law;
- the Czech Republic respects human rights;
- the Czech Republic is a parliamentary democracy;
- the Czech Republic has a poly-legal and rigid constitution.

I do not allege that such a list is exhaustive or undisputable. On the contrary, I doubt that any such list may be produced in respect of the Czech Republic. Not only there would most probably be certain disagreement among both academics and practitioner as to what qualifies as part of a Czech constitutional tradition, moreover, in my view, the tradition necessarily evolves as time passes. And it is particularly so in the area of fundamental human rights. As reiterates Eliška Wagnerová[32], the concept of human rights has significantly shifted from the concept of rights accorded to citizens by the sovereign to a naturalistic concept having consequences not only for the list of rights enacted but particularly for their significance and effectivity of legal guarantees. That being said, hereafter I aim to give a short overview and a brief definition of the elements listed above that are, in my opinion, core to the Czech constitutional tradition.

3.2.1.1 Democratic state

The Czech Republic is often defined as a *democratic, liberal and social state governed by the rule of law*[33]. A democratic state relies on the sovereignty of its people and is based on the principle of the rule of the majority. The people are the source of all state power. All state representatives are elected directly or indirectly by the people[34]. The democratic nature of the Czech Republic has its basis

community, As a free and democratic state founded on respect for human rights and on the principles of civic society, As a part of the family of democracies in Europe and around the world, Resolved to guard and develop together the natural and cultural, material and spiritual wealth handed down to us, Resolved to abide by all proven principles of a state governed by the rule of law, Through our freely-elected representatives, do adopt this Constitution of the Czech Republic."

[32] E. Wagnerová, *Základní práva*, in M. Bobek, P. Molek, V. Šimíček, (eds.), *Komunistické právo v Československu. Kapitoly z dějin bezpráví* (2009).

[33] J. Wintr, *Principy českého ústavního parvo*, cit.

[34] J. Wintr, *Principy českého ústavního práva*, cit. at 10, 26-27.

in Art. 2[35] and 6[36] of the Constitution as well as Art. 21 of the Czech Charter of Fundamental Rights and Freedoms (hereafter "Charter")[37].

3.2.1.2 Liberal state

The democracy is closely connected with the characteristics of a liberal state safeguarding that the rule of the majority does not become a tyranny of the majority; the minority is, hence, protected. The Czech Republic as a liberal state is characterised, in particular, by separation of powers, respect for fundamental human rights and freedoms and institutional measures giving the minority the possibility to influence decision-making process[38]. Such measures are, among others, the necessity to reach a qualified majority for adoption of certain decisions, necessary consent of both chambers of the Parliament for adoption of certain decisions and possibility of a minority to lodge a constitutional complaint in order to review the decision of the majority[39].

3.2.1.3 Separation of powers

The state powers in the Czech Republic are separated; their separation is though not absolute. Legislative, executive and judicial powers are independent; it is reflected in the structure of the Constitution. The separation of powers is complemented by the system of checks and balances. In the Czech Republic, which is a parliamentary republic, the separation of legislative and executive

[35] Article 2 of the Constitution reads as follows: "*(1) All state authority emanates from the people; they exercise it through legislative, executive, and judicial bodies. (2) A constitutional act may designate the conditions under which the people may exercise state authority directly. (3) State authority is to serve all citizens and may be asserted only in cases, within the bounds, and in the manner provided for by law. (4) All citizens may do that which is not prohibited by law and nobody may be compelled to do that which is not imposed upon them by law.*"

[36] Article 6 of the Constitution reads as follows: "*Political decisions emerge from the will of the majority manifested in free voting. The decision-making of the majority shall take into consideration the interests of minorities.*"

[37] Article 21 of the Charter reads as follows: "*(1) Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives. (2) Elections shall be held within terms not exceeding statutory electoral terms. (3) The right to vote is universal and equal and shall be exercised by secret ballot. The conditions under which the right to vote are exercised are set by law. (4) Citizens shall have access to any elective and other public offices under equal conditions.*"

[38] J. Wintr, *Principy českého ústavního parvo*, cit. at 10, 74.

[39] J. Wintr, *Principy českého ústavního parvo*, cit. at 67.

power is weakened. The legislative power is represented by a bicameral Parliament consisting of Chamber of Deputies and Senate. The bicameralism serves as one of the checks, ensuring that the rule of the majority does not become the tyranny of the majority. Each of the chambers has a different election period and the members are elected in different electoral system[40]. The executive power is represented by the Government and the President. The Government is the supreme authority of the executive. The president, on the other hand, has a moderating role and is rather a symbol of the State[41].

The judiciary is represented by the system of general courts and the Constitutional Court. The organisation of justice is based on the principle of the independence of both the courts and judges. The independence is ensured by the impossibility to dismiss a judge, the principle of incompatibility of functions and by the specific procedure of their appointment governed by a strong requirement of professionality and independence of judges. As emphasised by the CCC (Pl. ÚS 13/99), the remuneration is also one of the important and strong guarantees of the independence of judges.

3.2.1.4 Parliamentary republic

The Czech Republic is a parliamentary democracy.[42] The Parliament is the centrepiece of the political system. Even after the amendment of the Constitution (No. 71/2012 Coll.) by which the direct election of the President and modification of his competences were enacted, the Czech Republic still fulfils most of the characteristic elements of a parliamentary republic. It is characterised by a dualistic executive power and the Prime Minister is appointed by the President. The Government must have the confidence of the Chamber of Deputies. The President is not politically responsible and most of his acts must be countersigned. The legislative and executive powers are interconnected; the

[40] J. Wintr, *Principy českého ústavního parvo*, cit. at 86.
[41] J. Filip, *Ústavní právo České republiky*, cit. at. 78.
[42] Recently it is, though, discussed whether the Czech Republic is or is not moving towards a semi-presidential republic as the position of the President had considerably strengthened having regard to the introduction of the direct election of the President in 2013 and to the way the current President exercises his powers (A. Gerloch, *Ústava a ústavnost v České republice po dvaceti letech*, in A. Gerloch, J. Kysela, (eds.), *20 let Ústavy České republiky. Ohlédnutí zpět a pohled vpřed* (2013).

President may dissolve the Chamber of Deputies which may, on the other hand, vote on no-confidence in the Government. The system of checks and balances is in place not only between different powers but also within the Parliament between the Senate and the Chamber of Deputies[43].

3.2.1.5 Respect for human rights

In the Czech Republic, the catalogue of human rights is not enshrined directly in the Constitution but is enacted in a separate document, the Charter, which is part of the constitutional order. Apart from the Charter, all international conventions on human rights are also part of the constitutional order of the Czech Republic, hence being just as relevant source of human rights (Pl. ÚS 36/01). These international conventions amend and supplement the catalogue of human rights as provided for in the Charter. The judgment in which the CCC adopted such interpretation of the Constitution has been criticised by some academics (Kysela, 2002, pp. 199-215) but has been cited and followed in the case-law of the CCC ever since[44] and such interpretation has, thus, become undisputed.

The conception of human rights in the Czech Republic refers to their natural character. Therefore, the legislator used in the Charter the formulation "is/are guaranteed" rather than "the State guarantees" to introduce provisions on human rights, thus emphasising that the fundamental rights and freedoms are not a result of a power decision and their origins lie elsewhere. Our constitutional system is based on principles of a pluralistic society built on respect to every human being and her freedom, dignity and equality[45]. Furthermore, having regard to the analysed case-law of the CCC in respect of the constitutional traditions (see above), a right to judicial review and a right to an independent tribunal should also be emphasised.

As follows from the introductory provisions of the Charter (Art. 1-4) titled as "General Provisions", the equality, dignity and

[43] J. Filip, *Ústavní právo České republiky*, cit. at. 77.

[44] The CCC quashed different decisions of lower courts and also provisions of laws based on human rights enshrined in the international conventions (e.g. Pl. ÚS 45/04).

[45] K. Šimáčková, *Česká ústavnost jako hodnotový rámec integrace cizinců*, cit. at. 9.

freedom are the core values on which the rest of the Charter is based. Also, further basic principles of the Charter follow from the general provisions. Fundamental human rights are inherent, inalienable, illimitable, and irrepealable. Democracy, religious neutrality and prohibition of all totalitarian ideologies as well as discrimination are also highlighted. Freedom, dignity and equality may be, thus, underlined as core constitutional values.[46] Having regard to the totalitarian history of the state, the Czech Republic highly values these rights. The CCC repeatedly stated that it considers the human dignity to be the core value of the whole legislation on fundamental rights and freedoms (Pl. ÚS 7/15). In its judgment no. Pl. US 83/06, the CCC stated that human dignity is in the very centre of our legal order and represents the very essence of the "humanity" itself. The principle of equality in dignity and rights is the basis of the recognition of the value of each human being irrespective of his or her characteristics[47].

The Czech Republic is also defined as a social state. It ensures social rights for its citizens, i.e. right to work, social security, health care and education. Those are, though, only typical for the period after the Second World War and, thus, do not stem from the tradition of the Constitution 1920[48]. They do, nevertheless, form an integral part of the human rights respected nowadays by the Czech Republic.

3.2.1.6 Rule of law

The principle of the rule of law is enshrined in the Art. 2 paras 3 and 4 of the Constitution. The rule of law is characterised by the obligation of the State to follow its law and by the complementary rule that citizens may do anything that is not explicitly prohibited by law. The State does not have full power over the law. It is also subject to the law and must respect it. Even though it may change the law, it may only do so in a predetermined manner (Škop and Machač, 2011, p. 15). The law defines when the state power may

[46] Similarly Jan Wintr alleges that the fundamental rights are mostly derived from the principles of the protection of integrity, privacy, dignity and freedom (J. Wintr, *Principy českého ústavního parvo*, cit. at 149) and Jan Filip asserts that the values that form the basis of the respect for human rights are dignity, freedom, equality and solidarity (J. Filip, *Ústavní právo České republiky*, cit. at. 41).

[47] Similarly E. Wagnerová, *Čl. 17: Svobodný projev a právo na informace*, in E. Wagnerová (eds.), *Listina základních práv a svobod: Komentář* (2012).

[48] J. Wintr, *Principy českého ústavního parvo*, cit. at 67.

intervene, to what extent and by which measures. The core of the rule of law is the principle of legal certainty characterised, in particular, by the requirement of clarity and foreseeability of law, by the protection of rights acquired and by the protection of legitimate expectations[49]. Any law must also be general – i.e. not targeted on a specific person or group of persons (Pl. ÚS 27/09.), clear and non-contradictory (Pl. ÚS 77/06), publicly accessible (I. ÚS 420/09) and may not be retroactive (Pl. ÚS 22/13).

3.2.2 Does your system draw a clear distinction between administrative and constitutional law given that concepts such as proportionality, distinct techniques of statutory interpretation or principles of judicial review developed in administrative law but have crept into and strongly affected constitutional thinking over time?

Yes. Even though the administrative law is sometimes referred to as "concretized constitutional law" both branches of law are clearly distinguished both in theory and practice.

3.3 Constitutional traditions and society

3.3.1 What is the relationship between traditions and national identity?

The concept of national (or constitutional) identity of the Czech Republic is not used by the CCC in its case-law and it is rarely discussed in the Czech legal doctrine. Two papers on the Czech constitutional identity were published by David Kosař and Ladislav Vyhnánek[50]. The authors put forward three possible concepts of the Czech constitutional identity based on a) the Eternity Clause as developed by the CCC; b) a theoretically founded concept of the substantive core of the Constitution which is similar but broader and less defined than the Eternity Clause as interpreted by the CCC and c) a completely distinct concept. According to the authors the first two concepts (referred to as "legal concepts" by the authors) encompass protection of fundamental rights, sovereignty of the State, foreseeability of case-law, prohibition of retroactivity, principle of general validity of law,

[49] J. Wintr, *Principy českého ústavního parvo*, cit. at 20, 24.

[50] D. Kosař, L. Vyhnánek, *Ústavní identita České republiky*, 157(10) Právník 854, and D. Kosař, L. Vyhnánek, *Constitutional Identity in the Czech Republic: A New Twist on the Old Fashioned Idea? MUNI Law Working Paper Series*, [online] (2017.05). Available at: http://workingpapers.law.muni.cz/dokumenty/42064 (2017).

sovereignty of people, principle of representative democracy, certain basic principles of electoral law, achieved level of the procedural protection of fundamental law and possibly certain other principles.

It may, thus, be summed up that the Czech national identity is based on the Czech national traditions and may serve as a certain counterbalance to the constitutional traditions common to the Member States.

3.4 Practical application of national constitutional traditions and European influence

3.4.1 Do courts in your system utilize constitutional traditions when dealing with purely national disputes? If so, in what types of cases/disputes? Why?

The notion of constitutional tradition is used both in the context of the resolution of purely national issues as well as in the context of the EU law. The CCC referred to constitutional traditions both in cases where it adopted principles commonly accepted among the Member States, as well as in cases where the Czech (or Czechoslovak) constitutional tradition served as an argument for specific distinct legislation; to underline the specific situation of the State, having regard to its history.

On three occasions, the CCC used the notion of "constitutional tradition" in a completely EU unrelated context. In its judgment no. Pl. US 42/2000 concerning changes to the existing system of parliamentary elections, the CCC referred to the Czechoslovak constitutional tradition when explaining the origins of the proportional electoral system. Similarly, in its judgment no. Pl. US 5/12, the CCC criticised the CJEU for failing to take into account the constitutional traditions the Czech Republic shares with Slovakia after more than 70 years of a common history. In one case, the term "constitutional tradition" was only referred to in a dissenting opinion and the term was used as a synonym to a constitutional convention[51].

[51] See dissenting opinion of judges Holländer and Kurka to the plenary judgment of the CCC of 20 June 2001, no. Pl. US 14/01.

3.4.2 Are the constitutional traditions recognized in your system purely national concepts or (also) the result of European influence (Council of Europe/ECHR or EU)? Is it possible to keep these two levels apart after decades of interaction and cross-pollination between systems?

The CCC views the notion of constitutional traditions common to the Member States as referring to what is common to different traditions of different European countries and not what is inherent to a specific constitutional tradition of different Member States. It sees the notion as a unifying criterion, comparable, in my view, to a "European consensus" within the meaning of the long-standing case-law of the ECtHR. It is, therefore, decisive whether such understanding of a certain principle, right, value or convention is shared among all (or most) the Member States. It, however, recognises as well certain national constitutional traditions which stem from the history of our country.

3.4.3 Have courts referred to Art. 6 (3) TEU or the jurisprudence of the CJEU on constitutional traditions?

The term constitutional tradition was used in 54 different judgments of the CCC. However, in two of them, the notion only appeared in the summary of the arguments raised by one of the (third) parties to the proceedings and, thus, has not been referred to by the CCC itself. Moreover, in another 39 judgments, the notion was contained in a standardised copy-pasted paragraph enclosed in judgments concerning the lack of jurisdiction of the CJEU to decide preliminary questions in cases unrelated to the EU. It these judgments the notion of constitutional traditions only figured as a part of the citation of the Article 6 TEU without any specific relevance for the cases and, thus, without any further explanation or application of the notion. Similarly in its judgment on antidiscrimination law (Pl. ÚS 37/04), the CCC only referred to the constitutional traditions common to the Member States without further working with the notion. Those were excluded from the analysis.

Among the remaining 12 judgements working with the relevant notion, five concerned a similar issue of the application of the principle of proportionality. The four later ones, thus, only cited a paragraph containing the notion of a "constitutional tradition" used in the first judgment. For this paper, it, therefore, suffices to examine the original judgement containing the repetitive

paragraph. There are, hence, eight judgments to be analysed. In three of the analysed judgments the term constitutional tradition has been used when referring to EU legislation or CJEU judgment and in six of them, the term was used in a different context. In those judgments, either a definition or examples of "constitutional traditions common to the Member States" within the meaning of Article 6 para 3 TEU and/or Article 52 para 4 CFR were given.

3.4.4 Have national constitutional traditions been used by courts as an argument to protect the system from European influence or referred to as a driver of integration, or both?

As follows from the above-cited judgments, the CCC referred on several occasions to constitutional traditions common to the Member States and explicitly stated that it has adopted certain principles to its case-law to endorse the European legal culture and its traditions (III. ÚS 350/03). On the other hand, the CCC also called for taking into account the specific and unique constitutional tradition of the Czech Republic (Pl. ÚS 5/12.)

4 Selected Fundamental Rights

4.1 Free speech

4.1.1 Is free speech subject to a proportionality analysis? What are the constitutional standards of scrutiny for free speech?

The right to a free speech is enshrined in Article 17 of the Czech Charter of Fundamental Rights and Freedoms (hereafter "Charter").[52] A general para 1 guaranteeing the freedom of expression is specified in the para 2 which specifically states that such right is not limited to freedom of speech but encompasses all other forms of expression – verbal or non-verbal, oral or written. Para 3 then reacts on the communist era when massive censorship of all media existed. Article 17 para 4 mentions certain limits of

[52] Article 17 reads as follows: "*(1) The freedom of expression and the right to information are guaranteed. (2) Everyone has the right to express her opinion in speech, in writing, in the press, in pictures, or any other form, as well as to seek, receive and disseminate freely ideas and information irrespective of the frontiers of the State. (3) Censorship is not permitted. (4) The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morals. (5) State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law.*"

freedom of expression. It may only be limited by law and the Charter foresees five different aims that may be sought by such limitations: 1) protection of the rights and freedoms of others, 2) protection of the security of the State, 3) protection of public security, 4) protection of public health and 5) protection of morals. Such measures must be necessary in a democratic society.

Freedom of speech is subject to a proportionality analysis. It is regularly balanced, in decisions and judgments of the Czech Constitutional Court (hereinafter "the CCC"), against other fundamental rights with which it clashes and which fall within the categories listed above. The approach of the CCC is largely similar to the one adopted by the European Court for Human Rights (hereinafter "the ECtHR"). As in case of the clash of most fundamental rights or a fundamental right with a public interest, the CCC uses the proportionality analysis similar to the one established in the case-law of the ECtHR. Permissibility of an interference with the fundamental right at issue depends on the following circumstances: 1) whether it was in compliance with law; 2) whether it followed a legitimate aim; 3) whether the interference constituted a measure suitable for achieving such aim; 4) whether the interference was necessary (i.e. whether no less intrusive measure existed); 5) whether it is appropriate to give priority to achieving such legitimate aim over the protection of the fundamental right at issue (II. ÚS 577/13, § 22).

4.1.2 Are there any particular types of speech that enjoy special protection? Or on the other hand, are there any types of speech that are ruled out by the law or by the constitution? Are there limitations of free speech due on ethical grounds?

4.1.2.1 Special protection of particular types of speech

In the Czech Republic, political speech enjoys enhanced protection. According to Article 27 para. 2 of the Constitution, deputies and senators may not be prosecuted for their speeches in the Chamber of Deputies or the Senate or bodies thereof. They may only be subject to the disciplinary authority of the chamber of which they are a member. According to Article 65 of the Constitution may not be prosecuted while in office. Hence, it is impossible to prosecute him for any speech. Similarly, according to Article 86 of the Constitution, judges of the CCC may be prosecuted only with the consent of the Senate. Consequently, consent of a Senate would be necessary to prosecute a judge of the CCC for any statement.

However, the politicians and judges may be sued in civil proceedings for their statements. Senators and deputies may also be prosecuted for any speech outside of the Chamber of Deputies or the Senate and the bodies thereof.

According to the established case-law of the CCC, the aim of the Parliamentary immunity aims at providing to the elected members certain guarantees for an effective exercise of their democratic mandate without fear of being prosecuted (I. ÚS 3018/14). The elected member of the Parliament should not fear to be punished by powerful for bringing up uncomfortable subjects[53]. Under no circumstance should the immunity be interpreted as any kind of personal privilege of deputies and senators (Venice Commission, 2014). The CCC inferred that the protected speech (or rather expressions) must fulfil the following conditions:

1. communication of information in writing, orally, by an image or any other way;

2. on the meeting of the Chamber of Deputies and the Senate or of the committees, subcommittees and commissions thereof, on the common meeting of both chambers of the Parliament;

3. directed at the participants of the meeting and not merely at television viewers or radio listeners; reportages given to media at the meetings are, therefore, not covered (Kysela, 2015, p. 836).

4.1.2.2 Types of speech limited or ruled out by law

First of all, it is to be emphasised that the CCC – just like the ECtHR (*E.S. v. Austria*) recognises two categories of speech. Those categories are value judgments and statements of facts. Statements of facts are amenable to proof; the existence of facts can be demonstrated. The CCC does not award any protection to knowingly false statements of facts (I. ÚS 453/03). Value judgments are not susceptible to proof; the requirement to prove the truth of a value judgment is impossible to fulfil. Even value judgments do not, though, enjoy unlimited protection since even a value judgment without any factual basis to support it may be excessive.[54]

[53] J. Kysela, *Glosa k výkladu čl. 27 Ústavy Nejvyšším soudem*, 5 Státní zastupitelství 29 (2013).

[54] Whereas in its earlier case-law the CCC stated that value judgments are completely unchallengeable (I. ÚS 367/03), in its later judgments the CCC clarified, in line with the case-law of the ECtHR, that even value judgments must have a certain factual basis (I. ÚS 823/11).

Therefore, any value judgments having purely defamatory purpose are not covered by the freedom of speech[55].

Freedom of speech may be limited for the sake of the protection of other fundamental rights which may, under a particular circumstance, prevail. According to Article 17 para. 4 of the Charter, freedom of speech may also be "*limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morals.*" There are several provisions in different acts that effectively limit the freedom of speech pursuing different aims, e.g.:

−protection of personality rights;

The CCC decided a number of cases concerning civil proceedings[56] in which one of the parties sought protection of his or her personality rights (allegedly) damaged by a defamatory statement (II. ÚS 357/96; I. ÚS 156/99; I. ÚS 367/03; IV. ÚS 146/04, II. ÚS 94/05, IV. ÚS 1511/13, I. ÚS 2051/14; II. ÚS 2296/14 or I. ÚS 4022/17).[57] Moreover, defamatory statements may also be qualified, under certain circumstances, as crimes. According to Article 184 of the Criminal Code whoever makes a false statement about another capable of significantly threaten his/her reputation among fellow citizens, especially harm him/her in employment, disrupt his/her family relations or cause another serious detriment, shall be sentenced to imprisonment for up to one year. If such a statement is made publicly accessible in mass media the offender may be sentenced to up to two years of imprisonment.

When deciding such cases, the CCC takes into account the following criteria (I. ÚS 2051/14): a) nature of the statement (value judgment or statement of facts)

b) content of the statement (political, commercial, artistic etc.)

c) form of the statement (decent, expressive, vulgar etc.)

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[55] E. Wagnerová, *Čl. 17: Svobodný projev a právo na informace*, in E. Wagnerová (eds.), *Listina základních práv a svobod: Komentář* (2012).

[56] According to Article 81 of the Civil Code "*[p]ersonality of an individual including all his natural rights is protected. Every person is obliged to respect the free choice of an individual to live as he pleases. Life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy and expressions of personal nature enjoy particular protection.*"

[57] Judgments of the CCC of 10 December 1997, No. II. ÚS 357/96; of 8 February 2000, No. I. ÚS 156/99; of 15 March 2005, No. I. ÚS 367/03; of 4 April 2005, No. IV. ÚS 146/04, of 7 May 2008, No. II. ÚS 94/05, of 20 May 2014, No. IV. ÚS 1511/13, of 3 February 2015, No. I. ÚS 2051/14; of 14 April 2015, No. II. ÚS 2296/14 or of 11 June 2018, No. I. ÚS 4022/17 etc.

d) position of the criticised person (politician, public figure etc.)

e) whether the statement comments on a private or public sphere of life of the criticised person

f) conducted of the criticised person (whether the statement at issue was a reaction provoked by the criticised person, whether the person herself provided certain information, a reaction of the criticised person etc.)

g) position of the originator of the statement (journalist, politician, public figure, ordinary citizen etc.)

h) other circumstances of the statement (what information the originator of the statement had or could have had etc.).

–presumption of innocence;

The notion of a presumption of innocence has in the Czech law much broader meaning that how it is interpreted by the ECtHR. The principle of presumption of innocence under Article 6 § 2 of the Convention applies to persons subject to a "criminal charge". It may also apply to court decisions rendered in proceedings that were not directed against an applicant as "accused" but concerned and had link with criminal proceedings simultaneously pending against him or her, when they imply a premature assessment of his or her guilt (*Böhmer v. Germany*, § 67; *Diamantides v. Greece (no. 2)*, § 35; *Ismailov and Others v. Russia*, §§ 162-167; *Eshonkulov v. Russia*, § 74-76). According to the Court's case-law, the presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged (*Allen v. the United Kingdom* [GC], § 94).

Whereas in the case-law of the ECtHR the presumption of innocence is mainly interpreted as one of the guarantees of a fair trial, in the Czech Republic the role of the principle in protection of personality rights is seen as equally important.[58] In the Czech Republic, the presumption of innocence does not only oblige the authorities to consider everyone innocent until it is proven otherwise, but it also encompasses obligation for every person, such as the obligation to inform about ongoing criminal proceedings in

[58] In the ECtHR case-law such cases are rather handled under Article 8 of the Convention (see e.g. *Mikolajová v. Slovakia*).

a manner that does not excessively interfere with personality rights of the suspect. The principle of the presumption of innocence is one of the recognized reasons for limitation of the freedom of speech (II. ÚS 577/13).

–protection of the security of others;

The freedom of speech may also be limited for the sake of the security of others which is the aim of the criminalisation of certain types of speech. Czech Criminal Code enshrines the following crimes limiting free speech:

a) abetment to crime which was later committed (Article 24 para. 1 of the Criminal Code);

b) defamation (Article 184 of the Criminal Code)

c) incitement to, approval of or praise of an act of terrorism (Article 312e para.1 of the Criminal Code);

d) threats to commit an act of terrorism (Article 312f para. 1 of the Criminal Code);

e) threats of death, bodily harm or extensive damage (Articles 352 and 353 of the Criminal Code);

f) defamation of nation, race, ethnic or another group of people (Article 355 of the Criminal Code);

g) incitement to hatred towards a group of people or suppression of their rights and freedoms (Article 356 of the Criminal Code);

h) establishment, support and promotion of movement aimed at suppression of human rights and freedoms (Article 403 of the Criminal Code);

i) expressing sympathies for movements seeking to suppress human rights and freedoms (Article 404 of the Criminal Code);

j)denial, impugnation, approval and justification of genocide (Article 405 of the Criminal Code).

–an effective exercise of certain professions.

Certain professionals, such as lawyers (Art. 21 para 1 Act on the Legal Profession), judges (Art. 81 Act on Courts and Judges) or doctors (Art. 51 Act on Health Services) must keep confidential they learnt in the course of the exercise of their profession.

4.1.3 To what extent is anonymous speech protected? Is commercial speech an autonomous category?

Neither anonymous nor commercial speech enjoys specific protection (broader or narrower) but (as in case of any other speech)

such circumstances may be important when deciding whether specific speech should be protected. For example in its recent judgment no. II. ÚS 3212/18, the CCC dealt with the issue of free speech in the context of business. The case concerned a hotel on which its managers posted an announcement that any citizens of Russia would only be accommodated on condition that they sign a proclamation that they disagree with the occupation of Crimea. An administrative authority qualified such conduct as discrimination of a consumer and obliged the company to pay a fine of 50 000 CZK (approx. 2 000 EUR). The fine was further reduced in the course of proceedings before administrative courts to 5 000 CZK (approx. 200 EUR).

The CCC then found in favour of the applicant company (the hotel). It concluded that the hotel had not discriminated any consumer because the reasons for which it conditioned the accommodation were not prohibited by law, hateful, degrading or irrational but, on the contrary, clearly motivated by a direct reaction to an unlawful act of the annexe of Crimea and the applicant aimed to demonstrated its disagreement with the occupation. The CCC took into account the time frame (immediacy of the reaction), the fact that the annexe of Crimea had been conducted clearly in breach of international law, that the condition was foreseeable, that there were a number of other hotels of similar category in the proximity and that the formulation of the condition had not been hateful or degrading. The CCC, though, emphasised the unique circumstances of the case and it follows that any similar expressions would have to be assessed in the context of all relevant circumstances. The judgment provoked strong reactions and has been criticised and also largely misinterpreted[59] by many.

[59] Pejchalová Grünwaldová, V. (2019). Co se stalo a co se může stát – několik poznámek k nálezu Ústavního soudu ČR II.ÚS 3212/18 [online] *Česká justice*. Available at: https://www.ceska-justice.cz/blog/se-stalo-se-muze-stat-nekolik-poznamek-k-nalezu-ustavniho-soudu-cr-ii-us-321218/ [Accessed 15 Aug. 2019].

4.1.4 Does free speech prevail over minority rights? Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc.)? How is the interplay fleshed out between free speech and anti-discrimination law?

It is neither the freedom of speech nor minority rights that prevail in general. Minority rights are, just as the freedom of speech, protected by the Charter (Art. 24-25) and discrimination is prohibited (Art. 1 Charter). It is, therefore, to be determined on a case by case basis which of the rights prevail in specific circumstances. The proportionality analysis is used to balance these rights. Even though hate speech is not explicitly excluded by the Constitution from the right to free speech, it would not be protected having regard to the relevant provisions of the criminal law (as described above) which, in compliance with Article 17 of the Charter, limit freedom of speech.

4.1.5 Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or a religion?

As follows from the above list of criminalised speeches limiting the freedom of expression, certain crimes of opinion exist in the Czech Republic. Those would be approval of or praise of an act of terrorism, expressing sympathies for movements seeking to suppress human rights and freedoms and denial, impugnation, approval and justification of genocide. The blasphemy is, however, not criminalised since 1950. On the other hand, according to Articles 355 and 356 of the Criminal Code, defamation of or incitement to hatred towards a group of people, *inter alia*, on the grounds of their religion constitutes a crime. The threshold is though stricter than in case of a crime of blasphemy as commonly understood.

As follows from the absence of any mention of religion in the preamble of the constitution, the Czech Republic is a secular state[60]. It is to be noted at the outset that our country is the most atheist one in Europe and one of the most atheist in the world (Win-gallup International, 2012). Lately, a theatre performance in which Jesus

[60] (Bahýľová, L. et al (2010). *Ústava České republiky: Komentář.* Praha: Linde, 2010, p. 23)

Christ raping a Muslim woman had been depicted caused strong emotions. Cardinal Dominik Duka had filed an action seeking for protection of personality rights. The court, however, dismissed his action stating that the State may not privilege any religion and the faith in Jesus Christ should be respected just as the decision not to believe in Jesus Christ.

4.1.6 Is apology of a crime in itself a crime?

An approval or praise of certain most serious crimes (such as an act of terrorism or genocide) is considered a crime (see above).

4.1.7 How is holocaust denial handled?

Holocaust denial is criminalised under Czech law and a sentence of up to 3 years of imprisonment may be imposed (Art. 405 Criminal Code).

4.1.8 How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc.? How is conscientious objection handled?

It is to be noted at the outset that matters concerning religious expression fall under Article 15 of the Charter which enshrines the freedom of thought, conscience and religious conviction and under Article 16 of the Charter which guarantees the right to freely manifest religion or faith, rather than under Article 17 of the Charter (freedom of speech). Cases concerning religious symbols and other religious issues as well as cases concerning conscientious objections would not, hence, be handled as free speech matters.

As mentioned above, the Czech Republic is one of the most atheist countries in the world. Religious matters, such as display of religious symbols, do not, therefore, receive much attention. However, a case of a Muslim girl who had not been allowed to wear a hijab at nursing school attracted a lot of attention. The girl sued the school for discrimination, but the courts dismissed her action. The appellate court stated that the prohibition to wear a hijab in the school had been justified because the Czech Republic is a secular state and schools must remain neutral.

Turning to the conscientious objections, two types of cases arose in the Czech Republic. First, at the time of compulsory military service, several cases of men opposing to it were handled by the CCC (under Article 15 of the Charter). According to the CCC,

the right to refuse to military service for conflict with one's conscience or religious conviction is part of a *forum externum* of the right to freedom of thought, conscience and religious conviction and as a *forum externum* may, hence, be limited by law in line with general principles set by the Constitution and the Charter (Pl.ÚS 18/98).

Lately, several cases of conscientious objection against compulsory vaccination emerged. The CCC ruled that compulsory vaccination is an interference which is necessary in a democratic society for the protection of public security, health and rights and freedoms of others. However, the obligation to be vaccinated may not be absolute. One of the reasons justifying a refusal to undergo vaccination is the conscientious objection (III. ÚS 449/06). In its later judgment no. I. ÚS 1253/14, the CCC formulated a test of the legitimacy of a secular conscientious objection. Four criteria must be fulfilled: 1) the content of the conscientious objection must be relevant for the constitutional law; 2) the arguments put forward must be overriding; 3) the conviction of the person must be consistent and persuasive and 4) social impacts must be taken into account. Refusal of compulsory vaccination must, however, remain a restrictive exception and may be applied in extraordinary cases only. Several Czech applications before the ECtHR concerning conscientious objections against vaccination await decision (*Vavřička and Others v. the Czech Republic)*.

4.1.9 What is the interplay between free speech and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?

Freedom of speech and freedom of association are separate fundamental rights enshrined in different Articles of the Constitution (Art. 17 and 20 Constitution). Both of the rights are classified as political rights and are, therefore, connected to some extent.

4.1.10 Is burning the national flag, foreign flags or a political party's flag allowed?

Burning the national flag is not allowed in the Czech Republic. According to Article 13 of the Act No. 352/2001 Coll., on the use of state symbols of the Czech Republic and the amendment of other acts, anyone who misuses, degrades, destroys, damages or alienates Czech state symbol (including the Czech national flag) may be

imposed a fine of up to 30 000 CZK (approx. 1 200 EUR). The use of foreign flags or political party's flags is not explicitly regulated by Czech law. Burning of a foreign flag could, however, amount to certain crimes, such as incitement to, approval of or praise of an act of terrorism, defamation of nation, race, ethnic or other group of people or incitement to hatred towards a group of people or to suppression of their rights and freedoms, having regard to the circumstances of such act.

4.1.11 How have new technologies shaped the evolution of free speech law?

The new technologies had rather only begun to shape the evolution of freedom of speech. Freedom of expression on social media is an international issue that has not yet been resolved and is evolving spontaneously.[61] These issues may not, though, be approached from a national point of view only as social media know no borders.

Nonetheless, the national courts must in the meantime take a position on cases brought before them. The CCC is no exception; it already dealt with several cases concerning speech on internet platforms. In its judgment of 30 October 2014, No. III. ÚS 3844/13, the CCC dealt with a case of a fine imposed on an applicant for his private posts on his Facebook profile in which he used vulgarisms towards a police officer. The CCC found the fine unconstitutional having regard to the private nature of the applicant's post and to the fact that a post on the Facebook may not be seen as offensive conduct *in the course of criminal proceedings* for which such fine could be imposed.

In another case (No. I.ÚS 3018/14; 16 June 2015) the CCC dealt with the question whether a deputy's post on Facebook may fall within the protected political speech. The CCC concluded that such expression does not fall within the scope of protected political speech because it is directed exclusively outside of the Parliament and not towards other participants in the debate.

[61] See for example a great and exhaustive paper on social media as garants of free speech: M. Hanych, *M. Pivoda, Facebook, Twitter a YouTube jako garanti svobodného projevu? Kritika současného systému notice-and-takedown*, 8(16) Revue pro právo a technologie 177 (2017).

4.1.12 Have there been any particular "hard cases" that have helped define the scope of this right?

Several judgments of the CCC helped to shape the understanding of the freedom of speech. Some of the most important were cited in the paper. To sum up, an overview of some of the key judgments follows:

–Vondráčková vs Rejžek (I.ÚS 367/03)– balancing free speech and personality rights of public figures

– I. ÚS 2051/14 – criteria to be taken into account when resolving cases concerning clash of personality rights and free speech

–I. ÚS 823/11 – value judgments and statements of facts

–I. ÚS 3018/14 – the protection of political speech and its limits

–Pl. ÚS 18/98 – the right to refuse compulsory military service on grounds of a conviction

–I. ÚS 1253/14 – the test of the legitimacy of a secular conscientious objection

–II. ÚS 3212/18 – the right to free speech in the context of business

4.1.13 Are there other areas covered by free speech?

As described above, freedom of speech is closely connected with the right on information and prohibition of censorship.

4.1.14 Can you say on which of these questions in your country there is an established legal tradition? How would you state in normative terms the legal traditions in this area?

Having regard to the above, it may be concluded that in the Czech Republic free speech:

–is understood as one of the fundamental political rights closely connected with the right to information and the prohibition of censorship;

–may be balanced against other fundamental rights with which is clashes using the proportionality assessment which consists of the following steps:

- whether it was in compliance with the law,
- whether it followed a legitimate aim,
- whether the interference constituted a measure suitable for achieving such aim,

- whether the interference was necessary,
- whether it is appropriate to give priority to achieving such legitimate aim over the protection of the fundamental right at issue;

–may be limited by law in order to achieve the following aims:

- protection of the rights and freedoms of others,
- protection of the security of the State,
- protection of public security,
- protection of public health,
- protection of morals;

–does not encompass religious expressions which are covered by different Articles of the Constitution (Article 15 and 16) which are *lex specialis* to the freedom of speech;

–enjoys enhanced protection when it qualifies as political speech, i.e. when the following conditions are fulfilled:

- communication of information in writing, orally, by an image or any other way,
- on the meeting of the Chamber of Deputies and the Senate or of the committees, subcommittees and commissions thereof, on the common meeting of both chambers of the Parliament,
- directed at the participants of the meeting and not merely at television viewers or radio listeners;

–is more limited in case of statements of facts (which the originator must be able to prove accurate) than in case of value judgment (which merely must have at least some factual basis);

–may clash with personality rights in which case the following criteria must be taken into account:

- nature of the statement (value judgment or statement of facts)
- content of the statement (political, commercial, artistic etc.)
- form of the statement (decent, expressive, vulgar etc.)
- position of the criticised person (politician, public figure etc.)
- whether the statement comments of a private or public sphere of life of the criticised person
- conducted of the criticised person (whether the statement at issue was a reaction provoked by the criticised person, whether the person herself provided certain information, a reaction of the criticised person etc.)
- position of the originator of the statement (journalist, politician, public figure, ordinary citizen etc.)

- other circumstances of the statement (what information the originator of the statement had or could have had etc.);

–is limited by several provisions of the Criminal Code according to which the following types of speech are criminalised:

- abetment to crime which was later committed,
- defamation,
- incitement to, approval of or praise of an act of terrorism,
- threats to commit an act of terrorism,
- threats of death, bodily harm or extensive damage,
- defamation of nation, race, ethnic or another group of people,
- incitement to hatred towards a group of people or suppression of their rights and freedoms,
- establishment, support and promotion of movement aimed at suppression of human rights and freedoms,
- expressing sympathies for movements seeking to suppress human rights and freedoms,
- denial, impugnation, approval and justification of genocide;

–is limited in case of exercise of certain professions.

4.2 Freedom of movement

4.2.1 Is freedom of movement subject to a proportionality analysis? What are the constitutional standards of scrutiny for this right?

In the Czech Republic, freedom of movement is enshrined in Article 14 of the Charter.[62] The cited Article guarantees freedom of movement and residence. It concerns both movement within the borders of the Czech Republic and over the boarders and applies (to a different extent) to citizens and foreigners. It also provides for justifiable reasons for interference with this right which are as follows: a) the security of the state, b) the maintenance of public order, c) the protection of the rights and freedoms of others or d)

[62] Article 14 reads as follows: "*(1) The freedom of movement and residence is guaranteed. (2) Everyone who is legitimately staying within the territory of the Czech and Slovak Federal Republic has the right freely to leave it. (3) These freedoms may be limited by law if such is necessary for the security of the state, the maintenance of public order, the protection of the rights and freedoms of others or, in designated areas, to protect nature. (4) Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave her homeland. (5) An alien may be expelled only in cases specified by the law.*"

the protection of nature. Freedoms guaranteed by Article 14 of the Charter may only be limited by law. The enshrinement of the right of the citizens to leave and to return to the Czech Republic (Article 14 para. 2 and 4) is mostly a reaction to the totalitarian socialist history of the Czech Republic[63].

The freedom of movement is subject to a proportionality analysis. It may be balanced against other fundamental rights with or public interests with which it clashes and which fall within the categories listed above. As in the case of the clash of most fundamental rights or a fundamental right with a public interest, the CCC uses the proportionality analysis.[64]

4.2.2 What scope is left for the national regulation of this right, considering the EU's competence on the subject?

The scope for national regulation of this right is currently highly limited given the EU's competence. There are, however, still quite a few issues left to be covered by national legislation:

–movement from and to foreign countries outside of the EU;

–movement of non-EU citizens on the territory of the Czech Republic;

–conditions of expulsion and deportation (criminal and administrative) and extradition;

–limitation of the freedom of movement within the Czech Republic in the following situations:

- state of emergency – freedom of movement may be limited in a designated area (Art. 5 c) Crisis Act),
- risk of infection – infectious persons may be subject to isolation and quarantine (Art. 64 a) Act No. 258/2000 Coll.),
- domestic violence – expulsion from common home (Art. 44 Act No. 273/2008 Coll.; Art. 76b Civil Procedure Code,
- endangering of health or life – prohibition to enter certain premises (Art. 15 Act No. 553/1991 Coll.,
- protection of nature – limitation of access to national parks and reservations (Art. 14 and 64 Act No. 114/1992 Coll.,
- imprisonment and house arrest (Criminal Code);

[63] P. Molek, *Čl. 14: Svoboda pohybu a pobytu*, in E. Wagnerová et al. (eds.), *Listina základních práv a svobod: Komentář* (2012).

[64] For details, see 4.1.1 above where proportionality analysis used by the CCC is explained.

–prohibition to leave the Czech Republic for the sake of criminal proceedings.

4.2.3 Are there different standards between goods/services/capital/people?

In the Czech Republic, only freedom of movement of people is explicitly enshrined in the Constitution. Freedom of movement of goods, services or capital may be to some extent deduce from it but is rather mostly regulated by the EU law and related regular (not constitutional) national acts. The different standards of movement between these areas all reflect their respective regulations by EU law.

4.2.4 How is the subject handled towards non-EU countries?

Non-EU citizens do not have a right to enter the Czech Republic guaranteed by the constitutional law and they neither enjoy right of residence on the territory of the Czech Republic. Only those who are legitimately staying on the territory of the Czech Republic enjoy the right to freely move within it and to freely leave it.

4.2.5 Are there any forms of resistance to the supranational push towards an EU-wide guarantee of freedom of movement? On what ground? What other constitutional provisions are invoked to resist the widespread protection of this right?

There are no forms of resistance against the EU-wide guarantee of freedom of movement. Whereas the Czech society is very critical towards migration from outside of Europe, especially from Muslim countries, there are no strong emotions regarding free movement within Europe.

4.2.6 How are social and environmental considerations factored in the freedom of movement jurisprudence? Are there rules in place against the so-called social dumping or eco-dumping?

There is no specific legislation covering these issues.

4.2.7 Are there rules in place against industrial relocation abroad? Are these rules compatible with the constitution?

No, any company may relocate abroad if such relocation does not contradict public order (Art. 139 Civil Code)

4.2.8 Are there any sectors where the freedom of movement is not applied? Are there rules in place protecting the so-called national champions in certain economic areas? Are there rules in place preventing foreign capitals to take control of so-called strategic businesses? Are these rules constitutional (or would they be)?

No.

4.2.9 Have there been any particular "hard cases" that have helped define the scope of this right?

–Constitutionality of legislation providing for the possibility of deprivation of liberty of a foreigner in the view of her expulsion (Pl. ÚS 10/08): The CCC found the contested legislation constitutional. It noted that the Convention in its Article 5 para. 1 f) explicitly provides for such possibility.

–Refusal to issue a passport for a criminally prosecuted citizen (Pl. ÚS 18/07 and Pl. ÚS 12/07): In its two judgments the CCC found unconstitutional two different provisions then in force which set conditions under which a criminally prosecuted citizen was refused to be issued a passport but did not provide for effective judicial review of the proportionality of such measure.

–Limitation of the possibility to change permanent residence in the view of influencing elections (Pl. ÚS 6/11 Pl. ÚS 59/10): The CCC stated that the regional courts when reviewing whether the change of permanent residence of a significant number of citizens immediately before elections rendered the electoral result invalid must take into account the following: 1) what was the aim of the change of permanent residence; 2) whether there is a causal link between the contested conduct of the citizens before elections and the electoral result and 3) whether the change of residence has been driven by the aim of bypassing the law and the intensity of the interference.

4.2.10 Are there other areas covered by freedom of movement?

The right to freedom of movement under Czech law is not limited to the movement to/from the territory of the State (see the answer concerning the scope above).

4.2.11 Can you say on which of these questions in your country there is an established legal tradition? How would you state in normative terms the legal traditions in this area?

In the Czech Republic, the constitutional freedom of movement is primarily understood as a freedom of each individual who stays legally on the territory of the Czech Republic to freely move within its borders and to freely leave it at any time. It also encompasses the right of the citizens to return to the Czech Republic once they left it. Only freedom of movement of people is explicitly enshrined in the Constitution. Freedom of movement of goods, services or capital may be to some extent deduce from it but is rather mostly regulated by the EU law and related regular (not constitutional) national acts. Freedom of movement may only be limited by law and in the view of justifiable reasons which are as follows: a) the security of the state, b) the maintenance of public order, c) the protection of the rights and freedoms of others or d) the protection of nature.

4.3 Judicial Independence

4.3.1 How are judges selected, at the various levels? Is there room for political interference in the process?

The basis of the selection process is set in the Constitution itself. As for the Constitutional Court, according to Article 84 of the Convention, judges of the CCC are appointed by the President of the Republic with the consent of the Senate for the term of 10 years. The appointed person assumes her duties by taking the prescribed oath (Article 85 of the Convention). Having regard to the nature of the appointment process involving the President and the Senate, it is to be seen as highly political. According to Article 84 para. 3 of the Constitution, any citizen who has a character beyond reproach, is eligible for election to the Senate,[65] has a university legal education, and has been active in the legal profession for a

[65] According to Article 19 para. 2 of the Constitution, any citizen of the Czech Republic who has the right to vote and has attained the age of forty is eligible for election to the Senate.

minimum of ten years, may be appointed a judge of the Constitutional Court.

The whole process (especially the consent-giving part in the Senate) is very complex and changes to some extent with each new president. For example, the first President of the Czech Republic, Václav Havel, established a commission which helped him to search for and to assess the suitability of the candidates[66]. The choices of the second President, Václav Klaus, the choices were more political; he deliberately decided to proceed differently than the first president[67]. The third President, Miloš Zeman, declared at the very beginning his intention to consult his choices with the President of the CCC, Pavel Rychetský and he consulted also with presidents of the Supreme Court and the Supreme Administrative Court. However, it is to be noted that the influence of Pavel Rychetský on the president significantly decreased over the years[68].

Several factors may come into play in the Senate when deciding whether to consent or not to the appointment of a particular candidate suggested by the President of the Republic. According to a brilliant and comprehensive analysis of Štěpán Janků[69] those were, in the past, as follows: 1) philosophical and political background (membership in political party, political engagement, conduct during the first term served as judges of the CCC), 2) their communist past, 4) their professional qualification, 5) their expertise and erudition, 6) their past and their professional and personal failures, 7) their approach to the interpretation of law, 8) requirement of the variability of the CCC and 9) their personal qualities/characteristics.

As for the ordinary courts, according to Article 93, judges are appointed to their office for an unlimited term by the President of the Republic. They assume their duties upon taking the oath. According to Article 93 para. 2 of the Constitution, any citizen who has a character beyond reproach and a university legal education may be appointed a judge. Further qualifications and procedures shall be provided for by statute. However, it is to be noted that even though formally it is the Minister of Justice who selects judges and the President of the Republic who appoints them, in the reality, the

[66] J. Kysela, K. Blažková, J. Chmel, *Právnický Olymp* (2015).
[67] P. Rychetský, T. Němeček, *Diskrétní zóna* (2012).
[68] J. Kysela, K. Blažková, J. Chmel, *Právnický Olymp*, cit. at. 241.
[69] Š. Janků, *Ústavní soudce v očích Senátu: souhlas jako pouhá formalita, důsledný filtr?* (2018).

court presidents have increasing power in this area[70]. It is the court presidents of regional and high courts who pick the judges for the courts within their jurisdiction. This allows the court presidents to significantly influence the jurisdiction as they may pick the candidates who share their views. The newly appointed judges may, moreover, feel that they owe loyalty to the court president who picked them[71].

Judges are assigned to a particular ordinary court by the Minister of Justice; in order to be assigned to a regional or a high court, the judge must have exercised legal profession for at least 8 years and in order to be assigned to the Supreme Court, the judge must have exercised legal profession for at least 10 years (Art. 67 para. 1 Act on Courts and Judges. A similar condition is set for the judges of the Supreme Administrative Court, the Code of Administrative Justice, however, further specifies that the experience must be gained in the area of constitutional, administrative or financial law and explicitly stipulates that the profession may have been of practical, scientific or pedagogical nature (Art. 121 para. 2 Code of Administrative Justice). This discrepancy may be explained by the fact that at the time when the Act on courts and judges was adopted, the Supreme Administrative Court had not yet existed.

4.3.2 What remedies are in place against the attempt of the political bodies to interfere with the selection and with the day-to-day activity of the courts?

There are general measures in place which aim at guaranteeing the judicial independence but there are no specific formal remedies in place against the attempts of the political bodies to interfere with the selection and with the day-to-day activity of the courts. The general measures are as follows: 1) the judges (with the exception of the judges of the CCC) are appointed for an unlimited term (Art. 93 para. 1 Constitution); 2) they may not be dismissed (with the exception of specified most serious disciplinary offences); 3) they may be transferred to another court only with their consent (Art. 82 para. 2 Constitution); 4) the incompatibly of

[70] D. Kosař, L. Vyhnánek, *Constitutional Identity in the Czech Republic: A New Twist on the Old Fashioned Idea? MUNI Law Working Paper Series*, [online] (2017.05). Available at: http://workingpapers.law.muni.cz/dokumenty/42064 (2017).
[71] A. Blisa, D. Kosař, C*ourt Presidents: The Missing Piece in the Puzzle of Judicial Governance*, 19(7) *German Law Journal* 2031 (2018).

the office of the judge with any other public office or any paid work, apart from pedagogical, scientific etc. (Art. 83 para 3 Constitution, Art. 74 Act on Courts and Judges and Art. 4 Act on the Constitutional Court); 5) material security (Art. 75 Act on Courts and Judges); 6) immunity of the judges of the CCC.[72]

In January 2019, several judges of the CCC and the President of the Supreme Administrative Court spoke publicly about the attempts of the President of the Republic to influence them in their decision-making. There are no measures to be employed in such situations, the Czech legal order is based on the assumption that the general measures should suffice to prevent the judges from being influenced by any such attempts.

4.3.3 Are some judges selected through an election process? If so, how is the campaign regulated? How about, in particular, the issue of campaign finance for judicial elections?

Judges are not elected in the Czech Republic.

4.3.4 What instruments can outside groups legitimately employ to exert pressure on courts?

Under circumstances specified by law, third parties may express their opinion in the proceedings. The status of the third party is usually accorded to those who are not parties to the proceedings but have a legitimate interest in the result of the proceedings (Art. 93 Civil Procedure Code; Art. 27 para 2 Code of Administrative Justice; Art. 76 para 3 Act on the Constitutional Court). The Czech legal order does not explicitly provide for the institute of the *amicus curiae* but both the Supreme Administrative

[72] Article 86 of the Constitution reads as follows: "*(1) A Justice of the Constitutional Court may be criminally prosecuted only with the consent of the Senate. If the Senate withholds its consent, such criminal prosecution shall be foreclosed for the duration of the mandate of the Justice of the Constitutional Court. (2) A Justice of the Constitutional Court may be arrested only if he has been apprehended while committing a criminal act or immediately thereafter. The arresting authority must immediately inform the President of the Senate of the arrest; if within twenty-four hours of the arrest, the President of the Senate does not grant consent to hand the detained Justice over to a court, the arresting authority is obliged to release him. At the very next meeting of the Senate, it shall make the definitive decision as to whether he may be criminally prosecuted. (3) A Justice of the Constitutional Court has the right to refuse to give evidence as to facts about which she learned in connection with the performance of his or her duties, and this privilege continues in effect even after she has ceased to be a Justice of the Constitutional Court.*"

Court[73] and the CCC[74] have, in the past, accepted the filing of documents of such nature.

There are no other instruments that may be used to exert pressure on courts. On the contrary, Article 18 para. 2 of the Charter explicitly prohibits to use a petition as an instrument to put pressure on courts.

4.3.5 Is a guarantee of judicial independence explicitly provided for in the constitution or can it be derived from other provisions?

Judicial independence is explicitly provided for in the constitution, namely in Articles 81 and 82 para 1 of the Convention and in Article 36 para 1 of the Charter. It is also stated in Article 1 (institutional independence of courts) and Article 79 (personal independence of judges) of the Act on the courts and judges.

4.3.6 Are there special rules in place when the constitutional court (or equivalent body, for that matter) adjudicates disputes involving the highest authorities of the state? Do such authorities enjoy special constitutional guarantees?

No, there are no specific rules or guarantees in place for cases involving the highest authorities of the State.

4.3.7 Is the subject particularly topical, or the matter is relatively settled, with no relevant developments in recent years?

The subject is very topical in the Czech Republic. In 2015, the renowned Czech constitutional lawyer, David Kosař, has received an ERC grant and he, subsequently, established a research department called Judicial Studies Institute, at the Faculty of Law, Masaryk University. The team of academics conducts research focusing on judicial self-governance and judicial independence.

[73] The Supreme Administrative Court stated, in its judgment No. 5 As 65/2015-52 that an *amicus curiae* is acceptable as long as it expresses a legal opinion and does not comment on the facts of the case.

[74] In its decision no. IV. ÚS 1378/16, the CCC refused to grant a group of people the status of a third party as it found that they do not have any legal interest in the case at issue but suggested that they may lodge an *amicus curiae*.

4.3.8 Have there been any particular "hard cases" that have helped define the scope of this guarantee?

Yes, those are, in particular, the following judgments of the CCC:

–series of judgments concerning salaries of the judges (Pl. ÚS 13/99; Pl. ÚS 18/99; of 3 July 2000; Pl. ÚS 16/2000; Pl. ÚS 11/02; Pl. ÚS 34/04; Pl. ÚS 43/04; Pl. ÚS 9/05; Pl. ÚS 55/05; Pl. ÚS 13/08; Pl. ÚS 12/10; Pl. ÚS 16/11; Pl. ÚS 33/11; Pl. ÚS 23/09 and Pl. ÚS 28/13, 10);

The first set of judgments concerned withholding and reduction of additional salaries. In this respect, the CCC found in its first judgment a violation of the principle of judicial independence which requires material security of judges. In its second judgment, it eased its approach and found the withholding of the additional salaries constitutional. Nevertheless, the CCC concluded that an interference with judicial remuneration must not be arbitrary and established a three-step test to assess the constitutionality of any such interference. The test was then followed in the CCC's following ruling on that matter. However, the CCC later abandoned this mitigated approach and in the following judgment found the withholding of additional salaries again unconstitutional. In its following judgment, the CCC adopted more comprehensive reasoning and clarified that prohibition of arbitrary interference with judicial remuneration excludes the possibility of improper pressure exerted by the legislature on the judiciary. Any reduction of judicial remuneration must, therefore, comply with the three-step proportionality test.

The second set of judgments concerned salary freezes, salary reductions and reductions of the coefficient for calculation of salaries. In the case of freezes of salaries, the CCC found that as the salaries were not decreased such freeze is constitutional and stated that there is no guarantee of a permanent annual increase in salaries. In its judgments on a reduction of salaries, the CCC found repeatedly violation of the principle of independence. In its judgments, the CCC stressed that the reductions were aimed at judiciary only and not at the whole public sector. Also, a reduction of the coefficient for the calculation of judicial salaries was found unconstitutional. The latest judgment concerned the fact that judges were no longer entitled to salary during sick leave. Such

amendment was not seen by the CCC as a restriction of salaries and it had not granted it any constitutional protection.[75]

–periodic assessment of professional competence of judges: In its judgment no. Pl. Pl. ÚS 7/02, the CCC found unconstitutional a provision of the Act on courts and judges which prescribed periodic assessment of professional competence of judges. Based on the result of such assessment judge could have been dismissed from his function.

–internships of judges on the Ministry of Justice and terms of presidents and vice-presidents of courts: On 6 October 2010 the CCC issued the judgment no. Pl. ÚS 39/08 which dealt with several crucial issues of the legislation on the judiciary. In the cited judgment, the CCC found unconstitutional the possibility to temporarily assign a judge to the Ministry of Justice. The judges were assigned to the Ministry to help with the drafting of laws which they later applied and interpreted as judges. Such practice was found in breach of the principle of separation of powers and the principle of judicial independence. The CCC further found constitutional that the term of presidents and vice-presidents of the courts has been limited but concluded, on the other hand, that the possibility to repeatedly assigned the same judge to the office of (vice-)president of the court unconstitutional;

–dismissal of the President of the Supreme Court by the President of the Republic: On 11 July 2006, in its judgment no. Pl. ÚS 18/06, the CCC found unconstitutional the dismissal of Iva Brožová, judge and president of the Supreme Court, from her office of the president by the President of the Republic, Václav Klaus. According to the Act on courts and judges, the presidents and vice-presidents of the courts might have been dismissed for a serious breach of her obligations set by law by the person who appointed her. The CCC found the dismissal of a President of the Supreme Court by a member of executive power unacceptable and annulled the President's dismissal of Iva Brožová from her function of President of the Supreme Court.

[75] For a comprehensive analysis of the CCC's case-law on judicial salaries, see A. Blisa, *Judicial Salaries as a Component of Judicial Independence*. *Diploma thesis*, Available at: https://is.muni.cz/auth/th/i5igf/ (2016).

4.3.9 Are there other areas covered by judicial independence?

No.

4.3.10 Can you say on which of these questions in your country there is an established legal tradition? How would you state in normative terms the legal traditions in this area?

In the Czech Republic, judicial independence is understood as an institutional principle, a guarantee of the rule of law and separation of powers, as well as a procedural right of an individual to have a case adjudicated by an independent tribunal which is a procedural safeguard aiming at ensuring a fair trial.

The general measures in place securing judicial independence are as follows:

1) the judges (except for the judges of the CCC) are appointed for an unlimited term;

2) they may not be dismissed (except for specified most serious disciplinary offences);

3) they may be transferred to another court only with their consent;

4) the office of the judge is incompatible with any other public office or any paid work (apart from pedagogical, scientific etc.);

5) material security of judges is ensured;

6) the judges of the CCC enjoy immunity.

COMPARATIVE CONSTITUTIONAL TRADITIONS PROJECT-REPORT ON IRELAND

Ciarán Burke[*]

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1. Foundations. Common constitutional traditions. General questions

Does your legal system have a specific term for 'constitutional tradition'? If yes, does the term used in the national version of the TEU differ from the English term 'tradition'? If no, do legal traditions exist in other areas of your system (private, criminal or administrative law)?

The English language is one of the official languages in the Republic of Ireland. Thus, the terminology is the same.[1]Does your system attach a specific legal significance/concept to constitutional traditions?

In a common law jurisdiction like Ireland, the principles and the doctrines which develop from the traditions can be considered to form a body of precedent which is 'traditionally' followed. Therefore, such traditions are legally significant due to their binding nature upon lower courts.

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[1] Article 8.2 Irish Constitution

Does your system draw distinctions between values, principles and traditions?

Values can be perceived as more general visions found within the Constitution when it is read and analysed as a whole instrument and not analysed piece by piece and divided into individual principles. Values can be, per example, specifically discerned from the preamble.

The Preamble of the Irish Constitution reads as follows:

"In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution."

The Preamble is written from the perspective of those in a divided country…the Preamble is sectarian: it speaks of "centuries of trial" endured by our fathers, and their "heroic and unremitting struggle to regain the rightful independence of our Nation" As Doyle has pointed out, this version of "We, the People of Eire" is exclusionary,[2]and would be more so in the context of a united Ireland. Thirdly, the Preamble is very religious and—though arguably Christian—is understood to be settling out the ambitions and aspirations of a Catholic state.[3]

Traditional approaches to certain provisions can be discerned from the principles that develop from the provisions. In that sense principles and traditions are similar conceptually. The decision of the Irish Supreme Court in *State (Burke) v Lennon [1940] IR 136* provided a clear indication of the potential of the new

[2] O. Doyle, *The Irish Constitution: A Contextual Analysis* (2018) 14.

[3] "For example, the cardinal virtues of Prudence, Justice and Charity are arguably more related to Catholic theology than other Christian traditions." See D. Kenny, *The Irish Constitution, a united Ireland, and the Ship of Theseus: Radical constitutional change as constitutional replacement* (2019), 10-11.

Constitution in the sphere of judicial review. The decision established the power of the judiciary to declare legislation unconstitutional. As Eoin Daly has pointed out, "…this simply describes the institutional status quo in Ireland since the enactment of the 1937 Constitution, which explicitly grants the superior courts the power to invalidate unconstitutional legislation…"[4]

What can constitute a constitutional tradition in your legal system – parts of a constitutional text, case law, legal theory, conventions, collective constitutional experience and/or long-standing public perception?

Paul Gallagher noted that the Irish Constitution is treated "as a living document falling to be interpreted in accordance with contemporary circumstances…" and there is "recognition of the Constitution as an organic set of rules which can, in certain circumstances, be interpreted differently at different times…". Paul Gallagher made these comments in reference to declarations of unconstitutionality by the courts and noted "that at a point in time a constitutional challenge might be rejected which 20 or so years later will succeed (although not, of course, where a reference under Article 26 has been upheld)." [5]

Long-standing public perception will necessarily allow the evolution of the tradition which will be interpreted by applying the derived principles in a different manner. In that sense the tradition of judicial supremacy enshrined explicitly in the Constitution, is acted upon through the doctrine of unconstitutionality. The principle brings the tradition to life. But the principle itself depends upon the societal dynamics of the time in which it is used for the ultimate outcome.

"It is perhaps this in-built capacity to evolve through judicial interpretation that gives the Constitution its lasting strength and its capacity to achieve justice and to protect the dignity and freedom of the individual-ideals specifically mentioned in its Preamble."[6]

Judicial interpretation of the Constitutional text will necessarily build upon legal theories when looking to develop per

[4] E. Daly, *Reappraising judicial supremacy in the Irish constitutional tradition* in L. Cahillane, J. Gallen and T. Hickey (eds), *Judges, Politics and The Irish Constitution* (2017) 29.

[5] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, 45 Irish Jurist (N.S.) (2010) 22, 49.

[6] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 32.

example the values outlined in the Preamble and apply these to specific cases. Denham J. in *A v Governor of Arbour Hill Prison* expresses the following view:

"Many of the principles set out in the Constitution of 1937 were ahead of their time. It was a prescient Constitution. Thus, the Constitution protected fundamental rights, fair procedures, and gave to the superior courts the role of guarding the Constitution to the extent of expressly enabling the courts to determine the validity of a law having regard to the provisions of the Constitution. Over the succeeding decades international instruments, such as the United Nations Charter and the Universal Declaration of Human Rights, proclaimed fundamental rights and fair procedures…"[7] The ideals represented in the majority of international human rights conventions would, taking into account the timing of the writing of the Constitution, necessarily be already reflected within its provisions to some extent.

What is the relationship between constitutional traditions and customary constitutional law?

There is no clear distinction between the two.

Can institutional arrangements, for example a bicameral legislature or a federal infrastructure, be an expression of constitutional tradition in your system?

Ireland has a bicameral legislature but does not know federalism. Moreover, the bicameral structure of the Oireachtas is not part of Ireland's constitutional tradition, as the matter was put to a referendum to amend the constitution in 2015, with the aim of transforming the parliament into a unicameral legislature. The referendum ultimately failed, but bicameralism, is not a constitutional tradition as much as a concept holding symbolic value. [8]

Can legal techniques such as constitutional and statutory interpretation or – within the principle of proportionality – a balancing of clashing interests qualify as a constitutional tradition in your system?

The term "unique" is perhaps most appositely applied to the 1937 Constitution not with reference to its individual provisions as such, but with reference to the vision and balance it demonstrated in the legal, political and social context which prevailed

[7] *A v Governor of Arbour Hill Prison* [2006] 1 4 1.R. 88,145-146.
[8] J. Kelly, *The Irish Constitution* (1980) 120.

internationally at the time of its adoption, and with reference to the remarkable fact that it enshrined, as early as 1937, many principles which did not take root internationally until later. The Constitution's provision for judicial review of the constitutionality of legislation can be considered an example of this.[9]

How does time factor into constitutional traditions in your system? The phrase (and especially the term used in the German text of the Treaty on European Union (*Überlieferung*) suggests that constitutional traditions are of some vintage – but how old must they be?

A common law jurisdiction like Ireland relies on the passage of time for the emergence of a legal or constitutional tradition: Time is necessarily an important factor due to the need for a repetitive approach to develop surrounding a reading or application of a certain Article or the consolidation of a certain precedent.

Kearns P. has made reference to the notion that repetition over time of an approach gives an act necessary legal force.[10] Hogan J has expressly qualified the attributions one should make to an act before it is considered a tradition and such necessarily here implies the passage of time in which the tradition may be repeated.[11] However, the position is less clear with regard to constitutional law. For example, while some elements of the 'crown prerogative', such as 'treasure trove' have been argued to have endured from English law, others have clearly been extinguished.[12]

A comparison between the English and German texts of the TEU raises the question whether traditions can develop (and possibly end) within a single constitutional regime**.** The English response is very likely to be positive, given the absence of clear breaks in English constitutional history over the past several centuries, while the German notion of *Überlieferungen* indicates that something may have to pass on from one regime to the next (or survive some other form of regime change or transition) in order to be an *Überlieferung*. What is the response to this question in your legal system?

Having due regard to the 81 year lifespan of the Irish Constitution, although certain traditions may be seen to have been

[9] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 29.
[10] *Director of Public Prosecutions v Fitzsimons* [2015] IEHC 403
[11] *Kennedy v Judge Gibbons* [2014] IEHC 67 [26]
[12] *Webb v Ireland* [1987] IESC 2, [1988] IR 353

carried over time from British colonial times and the 1922 Constitution, the originality of the 1937 Constitution means that most of what is now considered traditional practice has been in fact developed within its own lifespan using its own provisions.

Must constitutional traditions be rooted both in history and in contemporary law?

The extent to which a link with history is necessary is a complicated question. As an example, the Irish Constitution provision for judicial review of the constitutionality of legislation was building on existing foundations in this regard. The 1922 Constitution expressly provided, in Art.65, for constitutional judicial review. "However, provision for amendment of that Constitution by the legislature significantly diminished that protection.".[13] Sutherland has noted in relation to judicial review and the 1922 Constitution: "The judges of the time, trained in a positivist tradition, were not yet ready to fully entertain, let alone develop, the concept of judicial review ... The Constitution the Irish people now enjoy ... has proved to be a far more formidable protector of basic rights and freedoms than its predecessor".[14] Further, the courts have noted: "The power to review the constitutionality of legislation expressly given by the Constitution to the superior courts was a novel aspect of the Constitution in 1937. No such power existed expressly elsewhere in Common Law jurisdictions, such as the United Kingdom, Australia, or Canada."[15]

In conclusion, it could be asserted that the futuristic visions in the 1937 Irish Constitution means that in its relatively short history, the Articles and governing principles which may be deemed traditional to the system were later expanded upon and developed through the judiciary and common law: as such, the traditions must be understood both in terms of their historical roots but also their development through contemporary practice.

In this regard, it is germane to refer to Murray C.J's statement in *A v Governor of Arbour Hill*, namely that the Constitution must be viewed as a living document.[16] The same judge, in *Sinnott v Minister for Education*, expressed the view that the Constitution: " ... [F]alls

[13] Cited in P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 29.
[14] Sutherland, *The Influence of United States Constitutional Law on the Interpretation of the Irish Constitution*, 28 St. Louis University Law Journal (1984) 41, 41-42.
[15] *A v Governor of Arbour Hill* Prison [2006] 1 4 1.R. 88, 146.
[16] *A v Governor of Arbour Hill* [2006] 4 I.R. 88, 129.

to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores".[17]

How detailed are constitutional traditions in your system (broad concepts and ideas, particular norms and precise rules, or both)? Broad concepts such as Judicial Supremacy and Popular Sovereignty exist, but the rules or traditional approaches developed under each are relatively detailed. Judicial review of legislation, and wide interpretations of the Articles in the Constitution allow for the reading of unenumerated rights into the text.

Are constitutional traditions considered typical, distinctive or unique to your system?

Irish courts have never really identified a set of distinctive constitutional traditions that are unique to the Irish legal system, and thus absent in other constitutional regimes. Even when Ireland stood as an outlier in protecting the life of the unborn within the constitution (Article 40.3.3. as introduced by the Eighth Amendment to the Constitution in 1983) to the point of banning abortion *tout court*, the Irish judiciary never explicitly articulated the point that this represented a unique constitutional tradition. The point however was made by the European Court of Human Rights in *A., B., and C. v Ireland*, where it upheld the Irish abortion ban as compatible with Article 8 ECHR, despite a contrary European consensus, arguing that this was based:

"on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then."[18]

With the repeal of the Eighth Amendment of the Constitution in May 2018, and the ensuing legalization of abortion, however, the alleged uniqueness of the Irish legal system in protecting the right to life of the unborn has been removed, so the matter above is moot. Of passing interest is the fact that the Supreme Court of the Irish Free State did identify unique constitutional traditions deriving from provisions of the 1922 Constitution. However, such provisions do not form part of the 1937 Constitution's text, so this point too, is now moot.[19]

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[17] *Sinnott v Minister for Education* [2001] 2 I.R. 545, 680.

[18] *A., B. and C.* par 226

[19] *The State (at the prosecution of Jeremiah Ryan and Others) v Captain Michael Lennon, Governor of the Military Detention Barracks, Arbour Hill, Dublin, Colonel Frank Bennett and Others, The Members of the Constitution (Special Powers) Tribunal ; and*

2. Subject/content of constitutional traditions

What is the subject/content_of constitutional traditions in your system? Are they limited to the area of human rights protection or can they include institutional arrangements? Can you list the principles that are considered to be part of the constitutional traditions, and provide a short description of them?

Judicial Supremacy in the Irish constitutional tradition.[20]

The role of the Irish Supreme Court in the decision in *State (Burke) v Lennon [1940] IR 136* provided a clear indication of the potential of the new Constitution in the sphere of judicial review. The decision established the power of the judiciary to declare legislation unconstitutional.

It was held that the provision allowing "internment without trial" under the Offences against the State Act 1939 was repugnant to Article 40.4 of the Irish Constitution providing for the right "not to be deprived of personal liberty save in accordance with the law". This landmark decision was given in the Hugh Court by Duffy J and upheld on appeal by the Supreme Court. As noted by O'Dell, "…this simply describes the institutional status quo in Ireland since the enactment of the 1937 Constitution, which explicitly grants the superior courts the power to invalidate unconstitutional legislation…"[21] The widespread support for judicial supremacy is also rooted in historical experience. In fact, the 1922 Irish Free State Constitution turned out to be a dead letter since in the politically unstable climate of 1920s/1930s it was abusively amended through its flexible amendment procedure, and thus the Constitution proved quite ineffective in safeguarding civil liberties. In contrast 1937 Constitution precluded possibility of extended flexible amendment procedure paving way for period of judicial rights based judicial activism in 1960s/1970s.

2.1 Popular Sovereignty (and Natural Law)

Another constitutional tradition is the tension between popular sovereignty and natural law. As Doyle has noted: "Some

in the Matter of the Courts of Justice Act 1924 and in the Matter of the Constitution of Saorstát na hÉireann [1935] 1 IR 170

[20] E. Daly, *Reappraising judicial supremacy in the Irish constitutional tradition*, cit. at 4, 29.

[21] E. Daly, *Reappraising judicial supremacy in the Irish constitutional tradition*, cit. at 4, 29.

people say that the Irish constitutional order derives its authority from the fact that it embodies the will of the people. Accordingly, all enactments endorsed by the people are valid. Others say that the constitutional order derives its authority from the natural law and that enactments of the people must comply with the precepts of the natural law in order to be valid."[22]

This has been the subject of discussion by the courts. In *McGee v Attorney-General*[23], Walsh J noted: "Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection."[24] In *Byrne v. Ireland,* the same judge observed: "[The State is the creation of the people and is to be governed in accordance with the provisions of the Constitution which was enacted by the people and which can be amended by the people only, and ...the sovereign authority is the people."[25]

Article 1 of the Constitution provides: "The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of government, to determine its relations with other nations and to develop its life, political, economic, and cultural, in accordance with its own genius and traditions." This has been described as referring to "popular sovereignty in its undiluted form."[26] Ireland is described in Articles 5 and 6 as "a sovereign, independent democratic", state in which "all powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good."

In the case law, the principle has been invoked almost exclusively in relation to the people's role in the constitutional-amendment process. The constitutional referendum a hallmark of popular sovereignty. Further, popular sovereignty has been

[22] O. Doyle, *Legal Validity: Reflections on the Irish Constitution*, 25 Dublin University Law Journal 56 (2003), 58.
[23] *McGee v Attorney-General* [1974] I.R. 284.
[24] *McGee v Attorney-General* [1974] I.R. 310.
[25] *Byrne v Ireland* [1972] I.R. 241, 263.
[26] V.T.H. Delany, *The Constitution of Ireland: Its Origins and Development*, The University of Toronto Law Journal, Vol. 12, No. 1 (1957), 1-26.

interpreted, in practical terms, as meaning that the people's right of constitutional amendment is substantively unfettered. Unusually in European terms, this means that no constitutional principle is unamendable or immutable[27]. As such, Ireland does not know the concept of unconstitutional constitutional amendments. The Supreme Court has conflated popular sovereignty with constitutional amendment" "the Constitution … was enacted by the people and … can be amended by the people only [as] the sovereign authority"[28]. Popular sovereignty has consistently been invoked to reject various challenges to constitutional amendments that were alleged to have violated supposedly immutable or essential constitutional principles, particularly the principles of natural law[29]". Thus, the Supreme Court has rejected the argument that even "natural" human rights in the Constitution are immutable or unamendable, reasoning that "the people intended to give themselves full power to amend any provision of the Constitution[30]". Thus "a proposal to amend the Constitution cannot per se be unconstitutional[31]". Similarly it has been said "there can be no question of a constitutional amendment properly before the people and approved by them being itself unconstitutional[32]".

Does your system draw a clear distinction between administrative and constitutional law given that concepts such as proportionality, distinct techniques of statutory interpretation or principles of judicial review developed in administrative law but have crept into and strongly affected constitutional thinking over time?

Ireland in this respect is in a peculiar position. On the one hand, being a common law country, it doesn't really know a body of administrative law which is treated separately (including by a separate order of jurisdiction) like it happens in continental jurisdictions. Indeed, as it was stated:

"In UK and Ireland the distinction between individual and general administrative acts is almost irrelevant because the law of administrative acts is mostly a law on the procedure, not on

[27] J Casey, *Constitutional Law in Ireland*, (2000) 709.
[28] *Byrne v Ireland* [1972] IR 241, 262,
[29] *Finn v Attorney General* [1983] IR 154; *Riordan v An Taoiseach* (No.1), [1999] 4 IR 321.
[30] *Finn v Attorney General* [1983] IR 154, 163
[31] *Slattery v An Taoiseach* [1993] 1 IR 286.
[32] *Riordan v An Taoiseach* (No.1), [1999] 4 IR 321, 330

substance or in the generality or singularity of those affected by the act. In UK and Ireland the courts have only recently started to look into substantive aspects of administrative decisions. Previously their focus of interest was almost exclusively whether or not the public authorities had followed a due procedure (i.e. based on well-established court case law principles) to shape their decisions[33]".”[34]

On the other hand, however, contrary to the UK, Ireland has a written constitution, so it has a body of constitutional norms which have higher status than simple administrative law principles and practice.

3. Constitutional traditions and society

What is the relationship between constitutional traditions and societal values in your system? Can the two fall apart over time if a constitutional text (and, possibly, case law) continues to uphold and enforce a particular idea or approach whereas contemporary society is moving away from it? Conversely, can a constitutional tradition survive formal constitutional amendment and a changing jurisprudence if a large part or even a majority of society continues to believe in it?

Gallagher notes that the Irish Constitution is treated "as a living document falling to be interpreted in accordance with contemporary circumstances…" and there is "recognition of the Constitution as an organic set of rules which can, in certain circumstances, be interpreted differently at different times…". Gallagher made these comments in reference to declarations of unconstitutionality by the courts and noted "that at a point in time a constitutional challenge might be rejected which 20 or so years later will succeed (although not, of course, where a reference under Art.26 has been upheld)." [35]

The dynamic interaction of constitutional principles and societal values is itself a feature of the accepted nature of the Irish Constitution, in that the evolution of its principles are welcomed and expected within its provisions. There exists a factual symbiosis of constitutional interpretation and changes in societal values

[33] W. Rusch, *Administrative Procedures in EU Member States* (2009) 13.
[34] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 22-24.
[35] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 49.

through which evolution in society beliefs can be exported into the reading of the Constitution.

At the same time, as mentioned before, a core principle of the Irish Constitutional system is popular sovereignty, which manifests itself through referenda amending the Constitution. In this respect, Ireland has a long track record of frequent popular ballots to amend the constitution, to reflect changing social norms and perceptions. In the last decade, in particular, the Constitution has been amended several time inter alia to allow gay marriages, legalize abortion, and decriminalize blasphemy – a reflection of the profound social transformation in the fabric of society which have resulted directly into a popular change of the constitutional text.

What is the relationship between traditions and national identity?

The Constitution does not seem to draw its inspiration from distinctively republican thought. Instead, it refers to "natural" rights –partly of religious origin – as well as national identity that is defined in Gaelic and Christian traditions, as is notable from the preamble.[36]

4. Practical application of national constitutional traditions and European influence

Do courts your system utilize constitutional traditions when dealing with purely national disputes? If so, in what types of cases/disputes? Why? Yes. This is evident in the judicial Interpretation of unenumerated rights, in order to recognise rights which were not deemed readily ascertainable in the Constitution (see below).

Are the constitutional traditions recognized in your system purely national concepts or (also) the result of European influence (Council of Europe/ECHR or EU)? Is it possible to keep these two levels apart after decades of interaction and cross-pollination between systems?

In Ireland, foreign law and foreign cases can have persuasive authority on the national courts. Moreover, English law continues to be highly influential, foreign law still serves as precedent in sectors of the Irish legal system (e.g. contracts, property and tort) and it would be customary for national courts to consider

[36] E. Daly, "*Republican themes in the Irish constitutional tradition*", Études irlandaises, 41-2 (2016) 163-184 [12].

judgments delivered by courts in the UK as well as in other jurisdictions around the world which originate out of the English common law. Finally, judgments of the ECJ have binding authority on the national courts, if they are relevant to the case, and Irish courts have a solid tradition of referring preliminary references to the ECJ and duly following its decisions, as well as duly implementing the rulings of the ECtHR.

The case of *A v Governor of the Harbour Hill Prison*[37] followed on from the Supreme Court's striking down of a section of the Criminal Law (Amendment) Act 1935 in the CC case. Here, the Chief Justice placed great emphasis on foreign law in resolving the extremely difficult question of the effect of a declaration of unconstitutionality on convictions pursuant to a particular piece of legislation.[38] It is perhaps noteworthy that the first non-common law system to which the Chief Justice had regard was the European Court of Justice. Thereafter, the Chief Justice cited a decision of the European Court of Human Rights. (and the Supreme Court of India's judgment in *Orissa Cement Ltd v State of Orissa.* Gallagher notes: "He noted "a substantial correspondence" between the pertinent articles of the Indian Constitution and Arts 15.4 and 50.1 of the Irish Constitution. Only then were United States authorities discussed, followed by Canadian authorities.)"[39] However, the effect in such cases is that foreign law can be persuasive, rather than prescriptive.

As previously noted, many of the constitution's directive principles reflect more modern concepts of justice. Although expressed in language which seems old-fashioned today, they incorporate some of the ideals subsequently enshrined in the provisions of the Charter of Fundamental Rights of the European Union. Article 45.4.20 provides: "The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength." This mirrors Article 31(1) of the Charter, which provides that, "every worker has a right to working conditions which respect his or her health, safety and

[37] *A v Governor of the Harbour Hill Prison* [2006] 4 I.R. 88

[38] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 42-43.

[39] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 43.

dignity", resonates with this provision, and Article 32, which prohibits the employment of children. Article 34(1) of the Charter, which provides that the Union recognises and respects the entitlement to social security benefits and social services, resonates with the State's pledge in Article 45 to: "safeguard with especial care the economic interests of the weaker sections of the community and, where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged". There are numerous other examples, reflecting a strong degree of cross-pollination.

The above has been reinforced by judicial interpretation. Gallagher notes that: "*Ryan*[40] resulted in a conclusion that the general guarantee in that section was not confined to the personal rights specified in Art.40 but extended to other unspecified personal rights. This in turn led Denham J. 30 years later in *Re a Ward of Court (No.2)* to hold that one of the unspecified rights of the person under the Constitution was the right to be treated with dignity-a right which by then had a distinct international flavour…It is worth noting that art. 1 of the EU's Charter of the Fundamental Rights specifically refers to the need to respect and protect human dignity. Article 3 of the same Charter recognises everybody's right to "physical and mental integrity". The right to bodily integrity was, of course, explicitly recognised in the Ryan case. The right to life in art.2 of the Charter is explicitly protected in Art.40.3.2. The Charter in fact resounds with rights… All these rights, or a variation of them, are recognised expressly or implicitly in the Irish Constitution."[41]

Have courts referred to Art. 6 (3) TEU or the jurisprudence of the CJEU on constitutional traditions? This does not appear to have occurred. However, Fennelly J. in *MJELR v. Stapleton*[42] and cited by Denham CJ in *Minister for Justice and Equality -v- Busby*[43] may a reference *en passant* to Article 6, and by inference, Article 4(2) TEU: "It follows, in my view, that the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, 'respect … human rights and fundamental

[40] *Ryan v Attorney General* [1965] I.R. 294, 314, 333-334.
[41] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 32-33.
[42] *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 IR 669
[43] *Minister for Justice, Equality and Law Reform v Busby* [2014] IESC 70

freedom'. Article 6.2 provides that the Union is itself to 'respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the Member States, as general principles of community law."[44]

Have national constitutional traditions been used by courts as an argument to protect the system from European influence or referred to as a driver of integration, or both? The European influence has been broadly accepted in the development of Ireland's constitutional tradition. It has certainly been seen as a driver of integration.

However, it has been stressed that constitutional and contextual distinctions between Ireland and other countries may militate against the application of foreign constitutional law to any particular case. As noted by MacMenamin J. in *McNally v Minister of State for Community, Rural and Gaeltacht Affairs:* " ... observations as to foreign law should be approached with an appropriate level of diffidence and care ... Reference to foreign case law (no matter how eminent the provenance) must have due regard to the institutional and contextual distinctions which exist between all states".[45] In this regard, Gallagher notes that "…authorities would … appear to suggest that the more unique the national constitutional context, the less important the role that foreign law can play in the interpretation of the same."[46]

Is free speech subject to a proportionality analysis? What are the constitutional standards of scrutiny for free speech?

Any restrictions upon the constitutionally guaranteed freedom of speech must pass either one of the two standards of review as developed by the Irish Courts.

Article 40.6.1(i) of the Irish Constitution of 1937 prescribes that the right of free expression may be exercised "subject to public order and morality". The middle sentence of the Article allows restrictions on the "rightful liberty of expression" of the "organs of public opinion" to ensure that they are not "used to undermine public order or morality or the authority of the State". The last sentence regulates "utterances of seditious, or and indecent matter,

[44] *Minister for Justice, Equality and Law Reform v Busby* [2014] IESC 70 [18]
[45] *McNally v Minister of State for Community, Rural and Gaeltacht Affairs* , High Court, December 17, 2009, at paras 105-106.
[46] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 41.

in that both shall be offences "punishable in accordance with law". It is further accepted that the exercise of Constitutional rights "may be regulated by the Oireachtas when the common good requires this" and Article 40.6.1.(i) "can, in certain circumstances, be limited in the interests of the common good"[47]. The freedom of autonomous communication, as derived from Article 40.3.1, is explicitly guaranteed "as far as practicable". This right may also be limited in the interest of the common good.

The tension between a prescribed constitutional right that may be limited by ordinary legislation is noted by Hall: "Freedom of speech is one of the Irish Constitution's most majestic guarantees. The guarantee, however, is not one of absolute majesty. This is so because Article 40.6.1.i of the Irish Constitution provides that the State guarantees liberty for the rights of the citizens to express freely their convictions and opinions, subject to public order and morality. Specifically, that provision in the Constitution provides that organs of public opinion such as the radio and the press must not be used to undermine public order or morality or the authority of the State. In effect, prior restraint receives constitutional sanction."[48]

Since the mid-1990s, the Irish Courts have developed two categorical standards of review concerning restrictions of rights. The first entails a proportionality test; the second is a rationality test.

The doctrine of proportionality was first elaborated by Costello J in *Heaney v Ireland*[49], providing that the objective of a provision that challenged a constitutionally protected right must be "of sufficient importance to warrant over-riding" it and the objective must be viewed as "pressing and substantial in a free and democratic society." The Irish proportionality test is then set out as follows: the said objectives must: "be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; impair the right as little as possible, and be such that their effects on rights are proportional to the objective..."[50]

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[47] *Murphy v Irish Radio and Television Commission* [1999] 1 IR 12, 25, [1998] 2 ILRM 360, 373.

[48] E.G., *The Majestic Guarantee: Freedom of Speech, The Non-Renewal of the "Section 31" Order*, The Western Law Gazette (University College, Galway) Issue No. 9 (1995).

[49] *Heaney v Ireland* [1994] 3 IR 593.

[50] *Heaney v Ireland* [1994] 3 IR 607.

The first requirement of a rational connection means that the pressing and substantial issue put forward by the State cannot be arbitrary, unfair, or based on considerations that are considered irrational. Restrictions deemed "unreasonable", "unnecessary" or "impermissibly wide" are adjudged as disproportionate. The requirement interprets the weakness or strength of the reason for which the State imposes a restriction. The less pressing the reason, the less likely it is that it will be found to be proportional. Conversely a more substantial issue will be more likely to be found proportionate.[51]

The second requirement of minimal impairment means that the interference must not stray beyond what is necessary to answer the pressing and substantial issue in question, with the burden placed on the right being as small as possible. As such, minimal intrusions upon rights have been held to be proportionate.[52]

The final requirement asks for a proportional effect, so that the pressing and substantial reason is proportional to the effect it will have on the right it burdens. It has been described as assessing the strength or weakness of the burdened right for which there exists a pressing and substantial reason for restriction. If the restricted activity is far from the core of the right, then it is more likely to be found proportionate.[53]

This articulation of the doctrine has been explicitly endorsed in the Irish Supreme Court and applied in the context of freedom of political expression in Article 40.6.1 (i) and of the freedom of autonomous communications in Article 40.3.1 of the 1937 Constitution.[54]

A substantial amount of deference is generally afforded to the Irish Parliament (known as the Oireachtas) when applying the three steps of the proportionality test. Such judicial restraint was commented on by O'Sullivan J in the case of *Colgan v Independent Radio and Television Commission* to the extent that it "may be an application of the presumption of constitutionality". This is a rule

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[51] E. O'Dell, *Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation* 17 (2) QUT Law Review (2017) 46, 58.

[52] E. O'Dell, *Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation* cit. at 51, 46-58.

[53] E. O'Dell, *Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation* cit. at 51, 58.

[54] *Murphy v IRTC* [1999] 1 IR 321; *Colgan v IRTC* [2000] 2 IR 490; *Mahon v Post Publications* [2007] 3 IR 338.

which the courts have developed over time when testing statutes for constitutionality. In *Pigs Marketing Board v Donnelly*[55], Hanna J stated: "When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representative of the people, is presumed to be constitutional unless and until the contrary is clearly established."[56]

The second standard of review has been developed in cases where the Supreme Court chooses not "to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."[57]

The second standard is the rationality test, and it has been used almost interchangeably with the proportionality test[58], without "any real judicial explanation as to why these choices…are justified"[59]. Commentators have interpreted the courts' statements on the matter to amount to a possible invocation of this standard in the absence of a personal right being vindicated by the Statute in which case State interest or constitutional duty alone may suffice to invoke the rationality test standard.[60] It was suggested that the rationality and proportionality tests were two complimentary standards and both should be used in each instance,[61] however it has been argued that no law could fail rationality and pass proportionality and therefore such an endeavor is ineffectual[62]. The relationship between the tests remains unresolved and requires renewed attention from the Irish Courts.

Does free speech prevail over minority rights?

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[55] *Pigs Marketing Board v Donnelly* [1939] IR 413.
[56] *Pigs Marketing Board v Donnelly* [1939] IR 417.
[57] *Touhy v. Courtney* [1994] 3 I.R. 1 at 47
[58] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* (5th ed, 2018) 1505
[59] B. Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, 2008) 130.
[60] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 1501,1502.
[61] *King v Minister for the Environment* [2007] 1 IR 296 at 309, [25]
[62] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 1506.

Free speech in the context of the right to communicate under Article 40.3.1., as one of the unspecified rights of the citizen, or the freedom of political expression in the right "to express freely… convictions and opinions" contained in Article 40.6.1 (i), is placed under only one significant statutory limitation that may be viewed as vindicating the rights of minorities in Ireland, namely the Prohibition of Incitement to Hatred Act 1989 ("the 1989 Act").

The Act is limited in terms of its protection of groups. By only naming race, colour, nationality, religion, ethnic or national origins, membership of the Travelling community (a gypsy group, since defined as a distinct ethnicity in Irish law) and sexual orientation, the Act may be criticized as ignoring incitement to hatred against other groups, most obviously disabled people, intersex and transgender people, asylum seekers and refugees, and, arguably, the Roma community.

Further criticism relates to the vagueness of terms used in the Act and the lack of definition of key terms, making it difficult to discern the meaning of 'stir up' or 'threatening, abusive or insulting'. The statute lacks measures to address general denigration of minority groups, such as the lack of explicit mention of face-to-face abuse or "drive by shoutings". The inadequacy of the legislation is further evident from the low number of prosecutions and convictions under the Act since its enactment. [63]

Aside from the 1989 Act, the Criminal Justice (Victims of Crime) Act 2017 is the only other piece of legislation addressing so-called hate crime, and only in a limited manner, addressing the needs of victims specifically. The absence of further hate crime legislation has been criticized.[64] However, it may be noted that other legislation such as the Video Recordings Act 1989, the Criminal Justice (Public Order) Act 1994, the Offences Against the State Act 1939, the Equal Status Act 2000 and the Employment Equality Act 1998 deal with hate speech in a broad sense. The fact that the present legislative base does not deal with abusive employment of freedom of speech against minorities means that in practice, constitutionally protected free speech (subject to certain limitations) prevails over minority rights in Ireland.

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[63] A. Haynes & J. Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland*, Irish Council for Civil Liberties, (2017)

[64] A. Haynes & J. Schweppe, '*LGB and T? The Specificity of Anti-Transgender Hate Crime*' in A. Haynes, J. Schweppe and S. Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (2016) 126.

Is hate speech excluded from the area of constitutionally protected speech, or is it included? As noted above, so-called hate speech is not explicitly included in the area of constitutionally protected speech.

If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc.)?

To the extent that hate speech does not fall within the 1989 Act, it may still be actionable as defamation. However, the relevant legislation may be seen as protecting individuals rather than groups, and as such is clearly not designed to deal with hate speech. The Defamation Act 2009 sets out the "tort of defamation", which consists of "the publication, by any means, of a defamatory statement concerning a person to one or more than one person". A "defamatory statement" is defined as one "that tends to injure a person's reputation in the eyes of reasonable members of society". An actionable defamatory statement is comprised of three elements, all of which must be proven by the plaintiff, namely: (1) It must be published; (2) It must be defamatory;[65] and (3) The plaintiff must be identifiable.[66]

How is the interplay fleshed out between free speech and anti-discrimination law?

Article 40.1 of the Irish Constitution guarantees that "All citizens shall, as human persons, be held equal before the law". The Employment Equality Acts (EEA) 1998-2004 and the Equal Status Acts (ESA) 2000-2018 are the principal pieces of anti-discrimination law in Ireland. They cover the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion, and membership of the Traveller Community, and a final ground relating to housing assistance (that is only applicable in cases concerning accommodation).

There is currently no legislation in Ireland requiring a court to take a bias motivation, or a demonstration of bias, into account when determining the appropriate sanction to impose in a given case. However, An Garda Síochána (the police force) have adopted the practice of recording what they refer to as "discriminatory motives" in relation to standard offences. Garda HQ Directive No 04/2007 states that any incident which is perceived by "the victim or another person" – for example the police officer, a witness, or a

[65] That is to say it undermines the reputation of the plaintiff.
[66] N. Cox & E. McCullough, *Defamation Law and Practice*, (2014) 4-01.

person acting on behalf of the victim – as having a racist motivation should be recorded as such.[67] The Court of Appeal has indicated that it may be appropriate for a racist hate motivation to be considered an aggravating factor at sentencing, but there is no requirement on the sentencing courts to treat it as such. The same circumstances seem to apply to discrimination against persons with disabilities. Overall, it may be stated that the interplay between free speech and anti-discrimination law is underdeveloped, with most cross-fertilization occurring at the sentencing stage in individual cases.

Do crimes of opinion exist in your country? In particular, how about blasphemy? Contempt of the authorities or of a religion?

The expression of opinion is a constitutionally protected right subject to constitutional and legislative limitations. Article 40.6.1. (i) is held to protect the dissemination of information and the expression of convictions and opinions.[68] In *The Irish Times v Ireland*, Barrington J stated that "the right of the citizen to "express freely their convictions and opinions" guaranteed by Article 40 of the Constitution is a right to communicate facts as well as to comment on them."[69]

Until comparatively recently, blasphemy had been proscribed by the Constitution. However, in 2018, the Thirty-seventh Amendment removed the offence of publishing or uttering blasphemous matter from Article 40.6.1. The offence is still criminalised by the Defamation Act 2009, passed to enforce the requirement of the 1937 Constitution, though there is presently legislative action to repeal the relevant sections, and to remove the offence from Irish law.

Section 36.2 of the Defamation Act 2009 clarified that a person publishes or utters blasphemous matter if such is "grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion." Contempt of a religion, as it was previously dealt with through criminalisation of blasphemy, will cease to be a criminalised offence when the new legislation is passed, along with the removal of all related legislation noted in the General Scheme of the Repeal of Offence of Publication or Utterance

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[68] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2604.

[69] *The Irish Times v Ireland* [1998] 1 IR 359 at 405, [1998] 2 ILRM 161 at 192-193.

of Blasphemous Matter Bill 2018.[70] However, an attack on religion could still constitute an offence under section 2 of the 1989 Act. This section criminalises actions likely to stir up hatred towards a group of people, inter alia, on the basis of their religion.

Freedom of expression, guaranteed by Article 40.6.1, is subject to restrictions on the basis of public order, and the authority of the State is further repeated in the specific context of the media. Article 40.6.1 (i), expressly grants unto the "organs of public opinion, such as the radio, the press, the cinema" the right of expression which includes "criticism of Government policy" insofar as this is not "used to undermine public order or morality or the authority of the State."

The right to criticize the Government is adequately protected in Ireland and a provision allowing for such criticism is viewed as central to the right of free speech[71]. It follows that statements insulting the Government cannot be regarded as an attack on the authority of the State[72] and in that context the contempt of the authorities is not a crime.

Is apology of a crime in itself a crime? Apology of a crime is not a crime in itself in Ireland. How is holocaust denial handled? There are no enacted laws criminalizing the denial of the holocaust in Ireland.

Is commercial speech an autonomous category? Commercial speech is not an autonomous category. There are no Irish decisions on whether the guarantee under Article 40.6.1 protects commercial speech. An inference can be drawn that some forms of commercial speech may receive protection, from the decision of Barrington J in *The Irish Times v Ireland* where a reference was made to advertisements; however the issue was not directly addressed. It has been noted that, despite the central focus of the right being on the human personality, the courts have held that the right can be engaged with commercial communication restrictions of varying kinds and therefore this type of communication is less likely to fall outside of the ambit of the Article. Are there any particular types of

[70] Repeal of Offence of Publication or Utterance of Blasphemous Matter Act (2018).
[71] D. Barrington, *The Irish Constitution – VIII: Freedom of Speech and Free Association*, Irish Jesuit Province 80 (1952) 951.
[72] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2073.

speech that enjoy special protection? Or on the other hand, are there any types of speech that are ruled out by the law or by the constitution? The second paragraph of Article 40.6.1 makes a direct reference to State Power in relation to organs of public opinion. Academic opinion in the area leans towards the interpretation that the specific reference must mean that appropriate and balanced legal protections which recognize the unique features of media speech activities are mandated by the Constitution. The Irish Courts have shown themselves to be very reluctant to inhibit the freedom of expression of the media. It is accepted at common law that the courts will not impose prior restraint on the media publications, save for exceptional circumstances, with many cases taken for this end failing on the basis of being adjudged a disproportionate interference with press freedom.[73] However, in the recent decision of *O'Brien v RTE*[74] an interlocutory injunction was granted, as this freedom was balanced against the plaintiff's right to privacy and reputation.

Several areas of speech are made unlawful by legislation in Ireland. The Offences Against the State Act 1939 has active provisions in place that relate to unlawful organisations and documents. Section 10 (1) provides that it is unlawful to "set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document: which is or contains or includes an incriminating document…a treasonable document…a seditious document." Section 10 (2) makes it unlawful to publish any communication on behalf of an unlawful organisation. Section 11 makes it unlawful to import newspapers containing seditious material. The repeal of these sections was recommended in the Report of the Committee to Review the Offences Against the State Acts 1939-1998[75] on the grounds of being outdated in the modern era and effectively unenforceable. Further, it is questionable whether, having regard to the breadth of these provisions, they are constitutional or compatible with the European Convention on Human Rights, though they have yet to be challenged on such grounds.

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[73] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2068.

[74] *O'Brien v RTE* [2015] IEHC 397

[75] Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters, Ireland, *Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters* (Stationery Office, 2002) 298.

Section 4 (1) of the Offences Against the State (Amendment) Act 1972 expressly states "any public statement made orally, in writing or otherwise…that constitutes an interference with the course of justice shall be unlawful." This section has also been recommended for repeal.

Section 41 (4) of the Broadcasting Act 2009 makes it unlawful to broadcast an advertisement which addresses the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation. Broadcasting of political advertising i.e. of an advertisement with a political end, is banned in section 41 (3) of the Broadcasting Act 2009. The definition for an advertisement with a "political end" was given by O'Sullivan J in *Colgan v Independent Radio and Television Commission*[76], to the degree that it is interpreted as such "if it is directed towards furthering the interests of a particular political party or towards procuring changes in the laws of this country or… countering suggested changes in those laws, or towards procuring changes in the laws of a foreign country or countering suggested changes in those laws or procuring a reversal of government policy or of particular decisions of governmental authorities in this country or… countering suggested reversals thereof or procuring a reversal of government policy or of particular decisions of governmental authorities in a foreign country or countering suggested reversals thereof."[77] How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc.? How is conscientious objection handled? The display of religious symbols has recently come to prominence in public discussion in the context of banning the Islamic face veil in Ireland. However, no legislation has been enacted in this area. With regards to educational institutions, an official guideline was sent to 450 Roman Catholic secondary schools in Ireland, in 2010, to prohibit Muslims from wearing a face veil at school. An exemption was made for religious symbols or garments which do not cover the face, such as headscarves.[78] This guideline is not a legal ban; it did however

[76] *Colgan v Independent Radio and Television Commission* [2002] 2 IR 490, [1999] 1 ILRM 22.
[77] *Colgan v Independent Radio and Television Commission* [1999] 1 ILRM 22 at 37.
[78] S Caldwell, *Ireland's Catholic Schools Ban Full Muslim Veil*, The Telegraph (24 September 2017)

reportedly cause a large number of Catholic schools to ban the face veil with numbers and names remaining unclear.[79]

The Education (Admission to Schools) Bill 2016 and the Equal Status (Admission to Schools) Bill 2016 offer legal protection providing remedies for restrictions on access on religious grounds which are of a discriminatory nature. It is as yet unclear as to whether the measures will be successful in preventing schools from restricting access for children from non-Catholic backgrounds.[80]

With regards to employment, Article 44.3 of the Constitution provides that the "State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status", and the Employment Equality Acts 1998-2015 make it illegal to discriminate against employees on religious grounds, including "religious belief, background, outlook or none."[81] The Irish Prime Minister (Taoiseach), Leo Varadkar has stated that the government has no plans to force hospitals owned by religious orders to remove religious symbols.[82]

In terms of conscientious objection, the only mention made of this concept in Irish law is in the recent Health Act 2018, dealing with termination of pregnancies, adopted after the May 2018 referendum which legalized abortion in Ireland. It provides that medical practicioners, nurses and midwives are not obliged to carry out a termination in circumstances in which they have a conscientious objection thereto. What is the interplay between free speech and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?

Free speech and freedom of association are regulated as separate constitutional rights. The "right of the citizen to form associations and unions" is a constitutionally separate right under Article 46.6.1 (iii) of the Irish Constitution. It is one of the State guaranteed rights, grouped together under Article 46.6.1, together with freedom of expression and freedom of assembly. It is subject

[79] Claire Hogan, *Accommodating Islam in the Denominational Irish Education System: Religious Freedom and Education in the Republic of Ireland*, 3 Journal of Muslim Minority Affairs 31(4) (2011) 554–73.
[80] Open Society Justice Initiative, '*Restrictions on Muslim Women's Dress in the 28 EU Member States: Current law, recent legal developments, and the state of play.*' (2018)
[81] Citizens Information, "Equality in the Workplace".
[82] Paul Cullen, *No plans to force hospitals to remove crucifixes, says Taoiseach Varadkar: publicly-funded hospitals need to recognise not everyone is Catholic.* The Irish Times (February 28 2019)

to the same constitutional restrictions, set out in Article 46.6.1. with limitations in the interest of public order and public morality.

One limitation for this provision is specifically noted in sub-paragraph (iii), which states that "Laws…may be enacted for the regulation and control in the public interest of the exercise of the foregoing right". The right is further protected in that discrimination in regulatory laws is expressly unconstitutional under Article 40.6.2: "Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination."

Is burning the national flag allowed? and about foreign flags? or a political party's flag?

No provision of Irish law directly deals with flag burning. A report published by the Department of the Taoiseach, presents non-statutory guidelines for dealing with the Irish flag. It is expressly stated that there are no statutory requirements dealing with handling of the flag and observance of the guidelines is a matter for each individual person to observe and the department's role in the matter is merely advisory. Section 14 of the guide refers to the "proper disposal of a worn or frayed National Flag". Here it states that when the flag is "no longer fit for display" it should "not be used in any manner implying disrespect. It should be destroyed or disposed of in a dignified way."[83] If the burning of the flag were carried out in a respectful manner in order to dispose of a flag considered unusable, then such burning would be seen to follow the aforementioned guidelines. No references have been made to the burning of foreign flags nor to flags representing political parties in Irish law.

How have the new technologies shaped the evolution of the free speech law?

The general consensus is that the law regarding online communication regulation remains outdated and largely unregulated in Ireland. Member of Parliament (Deputy) Aindrias Moynihan, commented in 2018: "Ireland is completely behind the curve in enacting regulatory legislation for the online and social media spheres."[84] There has been no update in this area since 1951.

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[83] Department of the Taoiseach, "*The National Flag*" (2018)

[84] Dáil Éireann debate - Wednesday, 31 Jan 2018 https://www.oireachtas.ie/en/debates/debate/dail/2018-01-31/28/ accessed 14 May 2022

Despite efforts to catch up, advances in technology continue to outpace the law.

Online platforms, once notified, are required to remove content when it is a criminal offence to spread such material. Examples may include material containing incitement to violence or hatred, or to commit a terrorist offence, or offences concerning child sexual abuse material.

To what extent is anonymous speech protected?

As defined by both the General Data Protection Regulation (GDPR) and the Irish Data Protection Act 2018, personal data that has been anonymised does not require compliance with data protection law. In theory, that means such data can be kept indefinitely and used for other purposes than that for which it was originally obtained.

Anonymous speech rights are limited in Ireland by the possibility of receiving a court order that will enforce the discovery of the identity of the anonymous wrongdoer by requiring a third party to disclose the information. These types of orders are called Norwich Pharmacal orders (NPOs). The Irish Supreme Court recognized NPOs in *Megaleasing U.K. Ltd v. Barrett*[85]. The court, in a bid to recognize the balance of rights to privacy stated that such orders should be "used sparingly" and the courts should be aware of and prevent that such orders are abused. Moreover, it was noted that their application "requires a balancing of the requirements of justice and the requirements of privacy." NPOs may only be granted in the High Court in Ireland. The order will be granted at the courts' discretion in circumstances in which "the plaintiff applying has established 'very clear proof' of wrongdoing; the defendant is 'mixed up' in the wrongdoing, though may not itself be liable; the plaintiff seeks the identity of the wrongdoers; the defendant is in a position to provide the information sought; and the plaintiff has no other means of ascertaining the information sought."[86] The order is usually made against Internet platforms, which will be required to disclose the IP address from which abusive comments were made and against Internet Service Providers (ISPs) to identify the subscriber who is linked to that IP address. Notably, Irish law fails to ensure that Internet users are notified of attempts to identify them and given an opportunity to

[85] *Megaleasing U.K. Ltd v. Barrett* [1993] I.L.R.M. 497.

[86] Gráinne Murphy, *Norwich Pharmacal Orders in Ireland: Case Law So Far,* LK Shields (2016).

oppose the application. In most Irish cases, the users are dependent on the ISP or Internet platform to make a case on their behalf.[87]

At a broader level, it should be noted that it is generally the case in Irish law that the right to have justice administered in public outranks the right to one's good name and to privacy in the hierarchy of rights.[88]

Are there limitations of free speech due on ethical grounds?

Limitations are placed upon the freedom of expression in the interest of the right to life. Section 2(2) of the Criminal Law (Suicide) Act 1993 provides that a person who counsels another to commit suicide or to attempt to commit suicide will be guilty of an offence and liable on conviction on indictment for a term of imprisonment of up to 14 years.

Kelly J commented on the issue in *Foley v Sunday Newspapers Ltd,* where a plaintiff sought an interlocutory injunction on the basis that the material the defendant sought to publish endangered his life, health and privacy: "[The defendant's freedom of expression] is an important right … however, it cannot equal or be more important than the right to life. If therefore the evidence established a real likelihood that repetition of the material in question would infringe the plaintiff's right to life, the court would have to give effect to such a right." [89]

Have there been any particular "hard cases" that have helped define the scope of this right?

A number of prominent cases have helped to shape the scope of the right to free speech in Irish law. The scope has been held to include not only protecting the dissemination of information but also the expression of convictions and opinions.

In the *Irish Times v Ireland,* Barrington J acknowledged that Article 40.6.1 confers rights onto organs of public opinion and said: "These rights must include the right to report the news as well as the right to comment on it…[90] ." In the same case, the Supreme Court held that judges have an inherent power to restrict press reporting of criminal cases in order to vindicate the right to a fair trial under Article 38.1. However, according to Morris J, such a

[87] F. Crehan, *Making threats over the internet is a crime, but sometimes anonymity is needed'* The Journal (2013)
[88] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 1678.
[89] *Foley v Sunday Newspapers Ltd* [2005] 1 IR 88 [42].
[90] *The Irish Times v Ireland* [1998] 1 IR 359, [1998] 2 ILRM 161.

restriction could only be imposed when a judge is satisfied: " (a) that there is a "real risk of an unfair trial" if contemporaneous reporting is permitted, and (b) that the damage which such improper reporting would cause could not be remedied by the trial Judge either by appropriate directions to the Jury or otherwise."[91]

In *Attorney General for England and Wales v Brandon Book Publishers Ltd*[92], Carroll J held that the restriction in the second paragraph of Article 40.6.1. (i) on freedom of expression in the interests of public order or morality or State security could only apply in reflection of the interests of this State, and in any other case the onus rests on persons seeking to restrict this freedom to establish the case.

In *Marine Terminals Ltd v Loughman and ors*[93], Feeney J noted: "The use of the term "scab" and the use of terms such as "crimes against Irish workers" are strong and forceful language but they were used in circumstances where it must be recognised that they represented the entitlement of the persons expressing such views to express their view in relation to the matters in issue."[94]

Are there other areas covered by free speech?

The courts have inferred a right to silence from the guarantee of the freedom of expression, with any abridgment of this right having to pass the proportionality test.

Keane J in *D.P.P. v. Finnerty* referred to: "the more general constitutional and legal dimensions of what has come to be called "the right of silence"…"[95] Barrington J in *Re National Irish Bank Ltd* noted: " …the right to silence [is] not absolute but might in certain circumstances have to give way to the exigencies of the common good provided the means used to curtail the right of silence were proportionate to the public object to be achieved."[96]

Can you say on which of these questions in your country there is an established legal tradition?

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[91] *The Irish Times v Ireland* [1998] 1 IR 359, [1998] 2 ILRM 161, [31].

[92] *Attorney General for England and Wales v Brandon Book Publishers Ltd* [1986] IR 597, [1987] ILRM 135.

[93] *Marine Terminals Ltd v Loughman and others* [2009] IEHC 620.

[94] *Marine Terminals Ltd v Loughman and others* [2009] IEHC 620.

[95] *D.P.P. v. Finnerty [*1999] IESC 130 (17th June, 1999) [16].

[96] *Re National Irish Bank Ltd. (under investigation),* [1999] IESC 18; [1999] 1 ILRM 321 (21st January, 1999) [26].

The proportionality analysis and rationality test apply in the context of standards of review upon restrictions placed on constitutionally protected rights.

In terms of balancing of constitutional rights, against each other, in *People (Director of Public Prosecutions) -v- Shaw*[97], Kenny J stated: "There is a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail....." This expresses the view that there is not an immutable loss of precedence of rights that can be formulated.

CJ Finlay in *X* expressed view that an attempt was being made to reconcile the right to life and the right to travel but where such reconciliation is not possible, the court will establish a priority of rights. "There are instances, however, I am satisfied, where such harmonisation may not be possible and in those instances I am satisfied, as the authorities appear to establish, that there is a necessity to apply a priority of rights."[98] However, these areas have been developed by case law, and the notion of an established constitutional tradition may be something of a stretch.

How would you state in normative terms the legal traditions in this area?

The right to free speech took some time to attract the support of the courts. Daly notes that "…the right lay dormant for the first 45 years of its existence and, despite a promising beginning to its analysis by the High Court in The State (Lynch) v Cooney[99] in 1982, subsequent case law left the right marginalised, misunderstood, synthetically partitioned, and frequently trumped." Daly further posits that "received wisdom holds that the traditional failure by the domestic courts to develop a strong free speech right is primarily due to the "weak and heavily circumscribed"[100] text of Article 40.6.1 °(i), "which does not compare favourably with its counterparts in other constitutions and international human rights instruments."[101] However, the fact is that the temporal provenance of the 1937 Constitution makes it somewhat misleading to compare its wording with much later human rights treaties, and in more

[97] *People (Director of Public Prosecutions) -v- Shaw* , 1982 IR
[98] *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992) [52]
[99] *The State (Lynch) v Cooney* [1982] 1 IR 337 (HC, SC)
[100] *Report of the Constitution Review Group* (Pn 2632, 1996) at 291.
[101] T. Daly, *Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1 (I) of the Constitution*, 31 Dublin University Law Journal 228 (2009), 228.

recent years, the courts have treated the Constitution as a living instrument.

Ó Caoimh J in *Hunter v Duckworth and Co Ltd* (31 July 2003) HC at p45 expressed view that there was no essential difference between the provisions of Article 40.6.1 (i) and art 10 of the Convention and that the courts could have regard to the latter in interpretation of the former.[102]

"…the Irish courts' frosty attitude to free speech [has been seen to] thaw considerably, greater protection of the right has been achieved, not by interpreting Article 40.6.1 °(i) more generously, but by sidelining it altogether. Rather than directly addressing the difficulties posed by the constitutional text and case law, the courts appear to have begun circumventing them in free speech cases by reference to Article 10 ECHR, on the basis of the European Convention on Human Rights Act 2003 which incorporated the Convention into Irish law."[103]

In *Paperlink*[104] Costello J identified "the very general and basic human right to communicate", as one of the personal unspecified rights of the citizen protected by Article 40.3.1, and stated that this right must also be regarded as a basic function of free speech. He stated that the right to communicate must inhere in the citizen by virtue of his human personality, illustrating the human and social dimension of the right to communicate. However, he differentiated the right to communicate from the right to express freely convictions and opinions guaranteed by Article 40.6.1.i, a rather confusing conclusion, though the two are undoubtedly closely related.[105]

4. Freedom of movement

Is freedom of movement subject to a proportionality analysis? What are the constitutional standards of scrutiny for this right?

[102] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2121.
[103] T. Daly, *Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1 (I) of the Constitution*, cit. at 102, 228
[104] *AG v. Paperlink,* [1984] ILRM 373.
[105] E.G., *The Majestic Guarantee: Freedom of Speech, The Non-Renewal of the "Section 31" Order*, cit. at 48.

The right to personal liberty, granted through Article 40.4, includes the right to move inside the country as well as outside of it. Having been upheld both as a tenet of the right to liberty, and as an unenumerated right in itself, it is subject to the constitutional restrictions placed on rights in those articles. In Article 40.3 the rights guaranteed will be respected, defended and vindicated "as far as practicable" and Article 40.4 expressly allows for restrictions of the right to personal liberty "in accordance with the law." The proportionality analysis applies to the right to travel in Ireland and to another state, insofar as any restriction thereupon is concerned.

As was outlined in the context of freedom of speech, the Supreme Court in Ireland has adopted the proportionality approach in the vindication and restriction of the majority of constitutional rights, stating that there must be "a proper proportionality in between any infringement of the citizen's rights with the entitlement of the State to protect itself…"[106]

In terms of balancing the right to travel against the right to life, the Supreme Court was confronted with such analysis in the seminal case of *A.G. v. X*[107]: the case centred around the right to life of the unborn (inserted into the Irish Constitution by the 8th Amendment, since repealed by the 37th Amendment), and was triggered by the effort by the public prosecutor to prevent an underage girl who had become pregnant as a result of rape and showed suicidal tendencies from traveling to England to obtain an abortion. In this case, the High Court held: "Notwithstanding the very fundamental nature of the right to travel and its particular importance in relation to the characteristics of a free society… if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel..."[108]

The High Court injunction was appealed to the Supreme Court, which overturned it by a majority of four to one in March 1992. The majority opinion (Finlay C.J., McCarthy, Egan and O'Flaherty J.J.) held that a woman had a right to an abortion under Article 40.3.3 if there was "a real and substantial risk" to her life. However, the Supreme Court's judgment did not take issue with the balancing exercise carried out by the High Court. Although the

[106] *Heaney v Ireland* [1996] 1 IR 580, 590.
[107] *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992)
[108] *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992) [53]

constitutional prohibition of abortion has since been repealed, it would appear as though freedom of movement – as part of the right to travel – will be subject to a proportionality analysis vis-à-vis other constitutional rights.

What scope is left for the national regulation of this right, considering EU's competence on the subject?

Section 2 of the ECHR Act 2003 obliges the courts to interpret "any statutory provision or rule of law" in a manner compatible with the Convention. However, the courts retain significant control in this regard, and the Act has not had a very significant impact on domestic rights-related jurisprudence, with the courts instead relying on the Constitution's fundamental rights protections. Incompatibility with such rights is fatal to legislation, with superior courts being empowered to strike down such laws.[109]

Each of the three branches of government can be seen to have taken an active approach to defining the scope of this right in Ireland. The courts have interpreted the scope of the right to travel by reading it into two Articles in the Constitution. The right to travel outside of the state was explicitly considered in *The State (M) v Attorney General*, as "commonly accepted as dividing States which are categorized as authoritarian from those which are categorized as free and democratic…I have no doubt that a right to travel outside the State in the limited form …is a personal right of each citizen…subject to the guarantees provided by Article 40 although not enumerated."[110]

Are there any forms of resistance to the supranational push towards a EU-wide guarantee of freedom of movement? On what grounds? What other constitutional provisions are invoked to resist the widespread protection of this right?

Ireland is not party to the EU border-less Schengen free movement zone, mostly because the UK decided not to participate, and Ireland wished to allow borderless movement between Ireland and the UK within the so called Common Travel Area.

In a study concluded in 2019, Ireland was one of the six countries where the portion of people who expressed positive attitudes towards EU immigration was above 50%. Euro-scepticism in the context of immigration and social conservatism has virtually

[109] F. de Londras, *Declarations of Incompatibility Under the ECHR Act 2003: A Workable Transplant*?"=, Statute Law Review, Volume 35, Issue 1, February (2014), 50–65.

[110] *The State (M) v Attorney General* [1979] IR 73, 81.

no presence within parties elected to sit in the Oireachtas, though some small fringe groups exist.[111] Eurosceptic arguments of the minority centre around the EU undermining Irish sovereignty, lacking democratic legitimacy and in its neoliberalism working to benefit elite business and threatening Irish neutrality.[112].

How are social and environmental considerations factored in the freedom of movement jurisprudence? Are there rules in place against the so called social dumping or eco- dumping?

When two rights come into conflict as in *A.G. v. X*[113] and cannot be reconciled, a priority of rights as will be considered, although per Egan J no "immutable list of precedent of rights" can be formulated. Indeed, in *A.G. v. X* itself, the justices diverged on whether and in what circumstances the right to life of the unborn could be trumped in favour of the right to travel. Generally, it may be stated that the hierarchy of rights is weighed up in the sphere of social values and a balance is struck.

The period of the "Celtic Tiger", together with the influx of large scale immigration to Ireland with the expansion of the EU in the 2000s, forced Ireland to develop the country's labour market regulations.[114] Employers in Ireland engaged in social dumping practices during this period.[115] In 2005 Irish Ferries attempted to replace 500 Irish nationals with Latvian immigrants who were proposed half the ordinary wage; this was unsuccessful due to Trade Union protests, but a fear of social dumping set in.[116] This case gave Ireland the momentum needed to address weaknesses in Irish employment law. The ICTU, the umbrella organisation for trade unions, moved to issue guidelines which would protect migrant workers from exploitation. SIPTU, the largest trade union in Ireland, cooperated with the Migrant Rights Centre of Ireland and other migrant support groups to successfully implement Registered Employment Agreements (REAs) to protect rates of pay.

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111 The National Party, '*Overview of Mass-Immigration in Ireland: Part III – Citizenship Ceremonies'*, (2018) https://nationalparty.ie/overview-of-mass-immigration-in-ireland-part-iii-citizenship-ceremonies/ accessed 16 May 2022.

112 B Laffan & J O'Mahony, '*Ireland and the European Union*' (2008) 87–88.

113 *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992)

114 G. Hughes, *Free Movement in the EU The Case of Ireland* (2011) 5

115 T. Krings, *Varieties of social dumping in an open labour market: the Irish experience of large-scale immigration and the regulation of employment standards.* ETUI Policy Brief European Economic, Employment and Social Policy N° 6 (2014) 4.

116 T. Krings, *Varieties of social dumping in an open labour market: the Irish experience of large-scale immigration and the regulation of employment standards,* cit. at 116, 4.

These were challenged in the case of *McGowan v Labour Court Ireland*[117], in 2013 and the Supreme Court struck out Part III of the Industrial Relations Act in which they were contained, and deemed the REAs unconstitutional and incompatible with Article 15.2.1. of the Constitution. The reasoning was based upon the arrangements' infringement upon the separation of powers doctrine. This is a continual issue in low wage regulation as similarly Employment Regulation Orders (EROs), set by the Joint Labour Committee (JLC) which also provided employment conditions, under part IV of the 1946 Act were declared unconstitutional in 2011 in the case of *John Grace Fried Chicken Ltd v Catering Joint Labour Committee*[118]. The Government stepped in to prevent complete abolition of the JLC and reforms ensued instead.

A decline in union density in the hospitability sector between 1994-2004, meant that immigrants were arriving to a union free workplace, though the widespread knowledge of the Minimum Wage Act 2000 amongst immigrants prevented the "race to the bottom". On March 4th 2019, the Employment (Miscellaneous Provisions) Act 2018 was commenced. The Bill had been described by the Minister for Employment Affairs and Social Protection as containing "the most significant changes for working conditions in a generation".[119] The measures imposed will directly affect all those working in the hospitality areas, improving security and predictability of working hours with the possibility of criminal sanctions.[120]

In relation to eco-dumping, customs duty is applied per the TARIC rules. The Irish Revenue department outline excise duty rates.[121] VAT charges are imposed in same manner as on goods sold in country and may be increased by "the amount of any Customs Duty, Anti-Dumping Duty, Excise Duty (excluding VAT) payable in relation to their importation, any transport, handling and

[117] *McGowan v Labour Court Ireland* [2013] IESC 21.
[118] *Chicken Ltd v Catering Joint Labour Committee* [2011] IEHC 277.
[119] Department of Employment Affairs and Social Protection, *Employment Bill: One of the Most Significant Pieces of Workforce Legislation in a Generation – Minister Doherty.* (2018).
[120] A. Dennehy, *The Employment (Miscellaneous Provisions) Act 2018 - what employers need to know* (2019) https://www.lexology.com/library/detail.aspx?g=4aac6671-f29b-40e1-9d50-24b33d18dba6 accessed 17 May 2022.
[121] Revenue, Irish Tax and Customs, *A Guide to Customs Import Procedures December* (2018) 11.

insurance costs between the place of introduction into the EU and the State and onward transportation costs to the place of final destination, if known, at the time of importation."[122] Ireland enforces the anti-dumping duty as imposed by the European Commission.

Are there different standards between goods / services / capital / people? Beyond the standard EU distinctions in this regard, there do not appear to be any *sui generis* Irish differences between goods, services, capital and people. However, it should be noted that Ireland is not a member of the Schengen area, and it may be argued that the recent large influx of immigration has given rise to a higher standard of regulation where people are concerned.

How is the subject handled towards non-EU countries? Entry into the State by non-nationals is principally regulated by the 'permission to land' regime in the Immigration Act 2004.[123] For this purpose, non-nationals from many prescribed states are required to hold a valid Irish visa.[124] Generally, persons who are in the State without such permission are 'unlawfully present', but this is not in itself an offence.[125] Provision is made for registering most categories of non-EU nationals who are lawfully in the State, with particulars of their place of residence, if they wish to stay beyond 3 months. Failure to duly register is an offence.[126]

Non EEA nationals who visit the State can be granted a maximum of 90 days Visitor Permission at the port of entry. This applies to both non visa required nationals and visa required nationals. Generally, this period will not be extended. For nationals requiring a visa, this must be sought in advance. A (unilateral) visa waiver programme for non-nationals from many prescribed states who hold a valid UK visa has been in place for a number of years, and this looks set to continue.

Are there rules in place against industrial relocation abroad? Are these rules compatible with the constitution? For a long time under Irish law, the writ of *ne expat regno* enabled a court to prohibit a person from leaving the country. However, it is somewhat

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[122] Revenue, Irish Tax and Customs, *A Guide to Customs Import Procedures December* (2018) 12

[123] Immigration Act 2004 s4.

[124] Immigration Act 2004, s 17, Immigration Act 2003, so 1(1) and 2 (1)(c) and Immigration Act 2004 (Visas) Order, S.I. 417/ 2012.

[125] Immigration Act 2004 s5

[126] M. Forde and D. Leonard, *Constitutional Law of Ireland* (3rd edn, 2013), 15.47.

uncertain whether it remains part of Irish law; there is no reference to it in the Rules of the Superior Courts. In 2002, what is described as an ex parte 'Bayer' order was made restraining persons from leaving the State. Such orders were discussed by the English courts in *Byankov v Ministerstvo na vatreshnite raboti,* with a significant rider, namely that persons entitled to EU law free movement rights cannot readily be prohibited from leaving one Member State to go to another such state[127]." A similar position appears likely in Ireland.

Preventing industrial relocation of a company if not for fraudulent purposes as expressed above is impermissible in Irish law. Such an order would be considered an unconstitutional restriction on the freedom of movement, and would also interfere with the right to property, which is also the subject of direct constitutional protection.

Are there any sectors where the freedom of movement is not applied? Are there rules in place protecting the so called national champions in certain economic areas? Are there rules in place preventing foreign capitals to take control of so called strategic businesses? Are these rules constitutional (or would they be)?

The freedom of movement is seen as one of the most fundamental rights of the person and no arbitrary restriction on that freedom will be held constitutional. The Irish courts have adopted a strict approach to when the freedom of movement may be lawfully restricted: In *Lennon v Ganly and Fitzgerald*, it was held that that constitutional rights should not be restricted without clear and proper cause.[128] However, the *Campus Oil* case demonstrates that past Irish governments have attempted to exercise and maintain control of key industries, though this practice has diminished significantly in the face of rulings by the ECJ.[129]

In the past, a policy of economic nationalism was pursued by Irish governments until the late 1960s (when the state applied for EEC membership). This was largely due to its vulnerability to British tariff barriers and the idea of self-sufficiency was seen as attractive in this context. However, this policy was a failure, resulting in severe poverty and a lack of development. This became apparent in the 1960s. As Neary notes, "The special circumstances

[127] *Byankov v Ministerstvo na vatreshnite raboti* (Case 241/11) [2013] QB 423.
[128] Irish Human Rights Commission, *Observations on the Passports Bill* (2006) 2.
[129] *Campus Oil Limited and Others v. Minister for Industry and Energy and Others* ECLI:EU:C:1984:256

of the preceding decades - world depression and world war - no longer applied, and the rest of Europe began to grow at extremely rapid rates. But Ireland failed to share in this prosperity."[130] The legacy of this era weighs heavily on Irish political consciousness, and has led to an highly globalised and open economy.

Have there been any particular "hard cases" that have helped define the scope of this right?

In recognition of the importance of a passport to the exercise of fundamental rights, in the case of *State (M) v. Attorney General* the Irish High Court recognised that the right to travel outside the State is an unenumerated right under Article 40.3 of the Constitution. In that case, Finlay J held that "A citizen has, subject to the obvious conditions which may be required by public order and the common good of the State, the right to a passport permitting him or her to avail of such facilities as international agreements, existing at any given time, afford to the holder of such a passport."[131] However, it is clear that such a right is subject to restrictions by law, and Section 12 of Passports Act 2008 now outlines instances in which issue of passport may be refused.

As noted earlier, one basis for restricting the right to travel abroad is where a person is restrained from leaving the jurisdiction in the interests of the proper administration for justice.[132]

Attorney General v X[133] raised issues regarding rights derived from EU law concerning freedom of movement and on foot of this case, the Government committed to propose constitutional amendments, which were put before the people in November of 1992. These amended the Constitution to ensure that Article 40.3.3 would neither "limit freedom to travel between the State and another State" nor "limit freedom to obtain or make available, in the State information relating to services lawfully available in another State."[134] This gave specific protection to both free movement of persons and free movement of services.

Are there other areas covered by freedom of movement?

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[130] Peter Neary, *The Failure of Economic Nationalism*, The Crane Bag, Vol.8 No.1 , *Ireland: Dependence & Independence* (1984) 68-77, 69.
[131] *State (M) v. Attorney General* [1979] IR 73.
[132] Irish Human Rights Commission, *Observations on the Passports Bill* (2006) 2.
[133] *Attorney General v X* [1992] 1 IR 1, [1992] ILRM 401.
[134] Constitution of Ireland 1937, art. 40.3.3.

Freedom of movement may also include the right to move within the state. Kenny J referred specifically to the "right to free movement within the State", albeit *obiter*, in *Ryan v Attorney General* , as one of those rights to be read from Article 40.3 according to the "Christian and democratic nature of the State". However, it should be noted that this case was decided in 1979, in the context of the Cold War, and that Kenny's pronouncement was not part of the *dispositif*.

Can you say on which of these questions in your country there is an established legal tradition?

In terms of established legal traditions, beyond the cases already discussed on free movement and the balancing with other constitutional rights, it is worth mentioning that Ireland now has an explicit constitutional provision protecting free movement overseas. One principle that has firm roots is that constitutional rights should not be restricted without clear and proper cause.[135].

How would you state in normative terms the legal traditions in this area?

Assessing the normative impact of the legal traditions in this area represents a complex question. Upon independence, Ireland chose to preserve the applicability of the English common law, albeit subject to a normatively superior Irish constitution. The current (1937) constitution is Ireland's second, and although judges have gotten to grips with a standard of judicial review wholly alien to the UK, it is nonetheless the case that the traditions in the areas discussed have roots that are perhaps less well developed than other European jurisdictions, as they result from the relatively novel phenomenon of common law clashing with a written constitution of a higher order.

5. Judicial independence

How are judges selected, at the various levels? Is there room for political interference in the process?

From a formal point of view, political interference in judicial appointments in Ireland is not a mere aspect of selection. Rather, the process has always been political. The process is provided for by the Constitution via articles Article 35.1, Article 13.9 and Article 13.11. Judges are appointed by the President upon recommendation of the Government, and it is the Government of the day that

135 *Lennon v Ganly* [1981] ILRM 84.

effectively chooses the candidate to be appointed. It has been recorded that in practice the Taoiseach, together with the Minister for Justice and Attorney General would have a final decision prepared and present this nomination to the Cabinet.[136] In this manner the appointment processes were viewed as "partly a facet of party political patronage exercised by the government".[137]

The discretion of the Government in the selection process, however, has been constrained to a limited degree by the Judicial Appointments Advisory Board (hereafter "the Board"), established pursuant to the Courts and the Courts Officers Act 1995. The Board is composed of eleven members: Judges hold five positions on the Board, with the Chief Justice as chair and the President of each of the courts (Court of Appeals, High Court, Circuit Court and District Court) sitting ex officio. Moreover, the Board also includes the Attorney General and representatives of the Bar Council and Law Society bringing the total of independent members to eight persons[138]. As a result, the Ministerial nominees are only three in number. However, given the fact that the board's members were themselves the beneficiaries of political patronage, doubts as to whether a more meritocratic model might emerge from this model are clear.

The Board is required to submit names of persons applying for the vacancies and recommend at least seven candidates to the Minister for Justice.[139] This is however a strictly 'advisory' role and the Government is not required to appoint persons submitted by the JAAB, as it disposes of a constitutional right to appointment. However, generally the Government is unlikely to appoint a person whom the Board has not recommended. In 1998 the majority on the Board threatened resignation upon hearing the Government's proposal to appoint a person declined by the Board.[140] When making a judicial appointment, the government may select from the

[136] J.C. MacNeill, *The Politics of Judicial Selection in Ireland* (2016) 105-6, P Bartholomew, '*The Irish Judiciary*' (1971) 31-3.
[137] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland*, German Law Journal Vol 19 No.7 (2019) 1879.
[138] § 13(2) of the 1995 Act, as amended by § 12(b) of the 2014 Act.
[139] § 16(5) of the 1995 Act.
[140]D. Gwynn Morgan, *Selection of Superior Judges*, Irish Law Times 22 (2004), 42.

list of seven or more names but it is not required to do so.[141] The government is not required to provide reasons for its decision.[142]

It should be borne in mind, however, that in Ireland, like in most common law jurisdictions, judges are mostly drawn from senior members of the bar. Contrary to continental jurisdictions, there are no judicial training schools or curricula. Hence it would be common practice to appoint as judges senior barrister who have distinguished themselves in their career.

In terms of difference between higher and lower court appointments, at least at District Court level, political interference and use of political connections has been prevalent, with commentators noting candidates would even lobby for positions. These connections are, however, deemed less significant as one moves up the court hierarchy to more senior appointments.[143] The Government retains full discretion in appointments of judges to the Supreme Court, as such appointments are generally chosen from serving judges and the JAAB does not play a role in this regard.

In an interviews in 2012, Mr Justice Peter Kelly, President of the Association of Judges in Ireland stated that the JAAB does not work: 'We all know cases of people who would be excellent judicial appointments and are passed over in favour of people who are not so well qualified.'[144] Thus it would appear that political favouritism is still a problem and the current system does nothing to prevent this. A study of the Irish judiciary carried out in 2004 which involved interviewing superior court judges, concluded that the general view among members of the judiciary was that the JAAB was good in theory but in practice it had made little difference to the political patronage system of appointments in Ireland[145].

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[141] Regarding an incident in 1998 where the board threatened to resign when the government attempted to appoint a person deemed unsuitable. See D Gwynn Morgan, *Selection of Superior Judges,* Irish Law Times 22 (2004), 42.

[142] L. Cahillane, *Judicial appointments in Ireland: the potential for reform* in L. Cahillane, J. Gallen and T. Hickey (eds), *Judges, Politics and the Irish Constitution* (2017) 125

[143] J, Carroll MacNeill, *The Politics of Judicial Selection in Ireland* (2016), 107 and 137-8.

[144] S. Gilhooly, *The Peter Principles,* The Parchment (2012) 30.

[145] J. Carroll, *You Be the Judge Part II – The politics and Processes of Judicial Appointments in Ireland,* Bar Review 11 (2005) 186.

Efforts to reform this area are ongoing[146], with calls on the government to declare that, in future, political allegiance 'would play no part in the selection for appointment of the judiciary'[147]. In fact, the former Chief Justice of the Supreme Court of Ireland repeatedly made the case in favour of establishing a Judicial Council, to strengthen the independence of the judiciary including on matters of judicial appointments.[148] However, a bill on judicial appointments, proposed by an independent minister in the current minority government, has been delayed for over a year in the upper house of parliament by a coalition led by senior members of the legal profession, presumably keen to protect the current system of patronage.[149]

The modalities for the appointment of national judges have been replicated also in the field of appointment of judges for international courts and tribunals, although, in recent years, Ireland has published open competitions for judicial positions e.g. at the European Court of Human Rights, though these have not always resulted in transparent procedures.

What remedies are in place against attempt of the political bodies to interfere with the selection and with the day-to-day activity of the courts?

With regard to the day-to-day activities of the courts, despite deep partisan divisions, there are only slight ideological differences in the reasoning of the major parties in Ireland. As such, partisanship could only ever have a restricted effect on the judicial decisions.[150]

The Irish judiciary has historically defended its own independence through its judgments. A prime example is the *Abbeylara* case[151] where the courts found that the function of finding

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[146] D. Kenny, *Market, diversity and interpretative communities: the (non-party) politics of judicial appointments and constitutional adjudication* in L. Cahillane, J.Gallen and T, Hickey (eds), *Judges, Politics and the Irish Constitution* (2017) 137.

[147] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1877.

[148] K. Holland, *Chief Justice calls again for judicial council to be set up*, Irish Times, 25 May 2012

[149] Judicial Appointments Commission Bill (2017) s25, s64.

[150] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1879.

[151] *Maquire v Ardagh* [2001] 1 IR 385. A referendum to reverse this decision was held at the same time as the referendum on judges' pay but was rejected by the people.

of facts was strictly judicial, and the Oireachtas was not permitted to infringe in any way upon this right. In *Crotty*, the courts defended the people's role in a democratic state by holding that when EU treaty amendments bring about major changes to national laws, a referendum is required.[152]

Patrick O'Brien has commented that Ireland has a robust culture of de-facto judicial independence despite having no internal structure for self-governance. However, the system has historically relied on good relations between politics and the judiciary.[153] The only action that the Oireachtas may officially take to discipline the judiciary or interfere in any manner is impeachment under Article 35.4.1 of the Constitution. This process requires a vote in both houses of the Oireachtas. No judge has ever been impeached under the present constitutional regime.[154]

Beyond this right there are no formal paths to "interfere" with judicial function or even discipline judges for behaviour that wouldn't warrant impeachment. The Minister, Chief Justice or District Court President may investigate the behaviour of District Court judges but this power cannot be qualified as disciplinary, is rarely instigated,[155] and is restricted only to cases concerning the District Court judiciary.[156]

The often fraught relationship between the judiciary and the executive over the last few years in Ireland has placed in the spotlight the issue of how far the "great restraint" to be exercised by judges in public pronouncements about matters of policy laid down in the Bangalone Principles,[157] and historically considered

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[152] *Crotty v An Taoiseach [*1987] IESC 4; [1987] IR 713.

[153] "The Committee was formerly known as the Judicial Studies Institute and was established to fulfil a very limited mandate to train judges provided for in the Courts and Court Officers Act 1995 (§§ 21 and 48 of the Act)", P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1877.

[154] "Information from interviews. The advisory power is contained in § 6(f) of the 1998 Act. For an example of innovation on the part of the Service see http://www.irishsentencing.ie [last accessed 15 September 2017]", P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1877.

[155] R. Byrne et al, *'The Irish Legal System',* (2014), 189; L. Cahillane, *Ireland's System for Disciplining and Removing Judges* 38 Dublin University Law Journal (2015) 55.

[156] Courts of Justice (District Court) Act 1946, § 21, Courts (Supplemental Provisions) Act 1961, §§ 10(4) & 36(2).

[157] United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), 96, at

part of the common law via the Kilmuir Rules, should extend. However, there has been an increasing – and worrying – tendency of present and former Irish judges to speak out on matters of direct concern to them, such as judges' pay and judicial appointments in recent years.

Are some judges selected through an election process? If so, how is the campaign regulated? How about, in particular, the issue of campaign finance for judicial elections? There is no quasi-democratic election process for the judiciary. What instruments can outside groups legitimately employ to exert pressure on courts?

People who wish to voice their disapproval at judicial conduct may enforce rights provided in the Constitution to stage a peaceful public protest. The right derives chiefly from the right to freedom of assembly in Article 40.6.1.ii and the right to freedom of expression found in Article 40.6.1.i. It involves the exercise of a range of other rights including the right to take part in the conduct of public affairs, the right to freedom of thought, conscience and religion and the right to participation in cultural life.

Protestors considered to be breaching the public peace without lawful authority or reasonable excuse or to be causing harassment, alarm or distress may be restricted. The Criminal Justice (Public Order) Act 1994 gives police a broad power to 'move on' individuals when there is reasonable concern for the maintenance of the public peace. The fact that the Act applies to behaviour "likely to" cause alarm etc. means that there need not be an actual victim.[158]

Courts may impose reporting restrictions on certain proceedings, with violations thereof punishable on the basis of contempt of court. One more modern question concerns the use of social media and contemporaneous reporting of proceedings. This has been discussed in media outlets and in the relevant court in the trial of a number of people for false imprisonment. In that case, members of the public and the accused were seen to be tweeting about the case from inside the courtroom.[159] Subsequently the Courts Service of Ireland published a discussion paper on

www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

[158] S. Nolan, *ICCL calls for immediate legislation for safe zones around abortion clinics* (2019) https://www.iccl.ie/tag/right-to-protest/ accessed 21 May 2022

[159] C. Keena, *Jobstown trial struck a modern, and very disturbing, tone,* The Irish Times, 30 June 2017.

guidelines for the use of social media in the courts, while the Law Reform Commission will also shortly address this issue.

Is a guarantee of judicial independence explicitly provided for in the constitution or can it be derived from other provisions?

Judicial independence may be derived from the separation of powers doctrine. The 1937 Constitution does not expressly prescribe a separation of powers; it does however enumerate three distinct powers of government; legislative, executive and judicial. In *Calley v Moylan,* in a joint judgment, Clarke and O'Donnell JJ noted that the "principle of separation of powers while fundamental must itself be deduced from the language and structure of the Constitution. Article 6 merely describes, rather than prescribes, the principle. The nature of the separation of powers required under the Irish Constitution, therefore, must be deduced from the terms of the constitutional text, the constitutional structure, and the functions of government envisaged by it." [160] In *O'Byrne v Minister for Finance*[161], Lavery J stated that the separation of powers doctrine is "imperfect" regarding legislative and executive powers but was described as "definite" in respect of judicial power. However, the Supreme Court in *Abbey Films Ltd v Attorney General*[162] said that "the farmers of the Constitution did not adopt a rigid separation between the legislative, executive and judicial powers."[163] There exists therefore a certain degree of independence between the powers which facilitates the operation of a system of checks and balances.

At times the doctrine has been enforced to promote Article 34 and reinforce the extent of judicial power. For example, in *Deaton v Attorney General*[164], it was held that a law allowing the Revenue Commissioners to choose the penalty tax offenders would face was declared unconstitutional on the grounds that only judges may make such a decision.

Judicial independence is not absolute and the judiciary is not immune from the control of the Oireachtas. Both court structure and procedure are prescribed by statute, which the Oireachtas may modify. No mechanism could prevent the Oireachtas from effectively nullifying a court's decision in a case by retrospectively

[160] *Calley v Moylan [2014]* IESC 26 at [41]
[161] *O'Byrne v Minister for Finance* [1959] IR 1, (1960) 94 ILTR 11.
[162] *Abbey Films Ltd v Attorney General* [1981] IR 158.
[163] *Abbey Films Ltd v Attorney General* [1981] IR 171.
[164] *Deaton v Attorney General* [1963] IR 170

changing the law. As a counterbalance, the 1937 Constitution expressly established a Supreme Court which holds a power of judicial review over legislation.

Are there any significant differences between low- and high-level courts, or between ordinary courts and the court exercising judicial review / constitutional justice?

Ireland has a unitary judicial system, with decentralized judicial review of legislation – every court being entitled to strike down a Statute which is incompatible with the Constitution. Articles 34 to 37 of the Irish Constitution explain the administration of justice and outline the structure of the courts system. Article 34.1 states that: "Justice shall be administered in courts established by law...". The four primary courts i.e. the District Court, the Circuit Court, the High Court and the Supreme Court, as well as the additional Special Criminal Court and the Court of Appeal are established by the Courts (Establishment and Constitution) Act 1961. The 1961 Act also enables the creation of special courts in the interest of justice, per example, the Children's Court.

The Supreme Court, the Court of Appeal, and the High Court are considered higher-level courts and are the only courts expressly provided for in the Constitution (with other courts established on the basis of ordinary legislation, some of which predates the foundation of the state, being remnants of the inherited common law). The Supreme Court generally hears appeals only on points of law, and its interpretation is final. All three of the higher courts have authority to interpret the Constitution. Both civil and criminal cases regarded as very serious will be heard in the High Court. This court also hears appeals from lower courts. The Court of Appeal was established in 2014 and may be regarded as the newest of the higher level courts, hearing civil appeals from the High Court and taking over the appellant jurisdiction of the Supreme Court and hearing criminal appeals from the High Court and Circuit Court, taking over from the former Court of Criminal Appeal.[165]

Cases which require a jury are heard before the Circuit Court and matters to be tried summarily are brought before the District Court. A military tribunal and special court are established by law. Here, serious crimes may be heard without a jury. It should be

[165] G. Butler, *The Road to a Court of Appeal – Part I: History and Constitutional Amendment*, Irish Law Times, Vol. 33, No. 14 (2015)

noted that the inherent powers of superior courts are significantly more extensive than those of lower courts established by law.

Are there special rules in place when the constitutional court (or equivalent body, for that matter) adjudicates disputes involving the highest authorities of the state? do such authorities enjoy special constitutional guarantees?

Since Ireland does not have an *ad hoc* court specializing on constitutional matters, disputes involving other branches of government are regularly adjudicated in the ordinary courts' system. The highest authorities if the state enjoy special constitutional guarantees at the outset of a case. The presumption of constitutionality has been developed by the courts over time and is now steadily grounded in case law though it is not to be found in the Constitution itself.

Hanna J in *Pigs Marketing Board v Donnelly*[166], stated that it is an axiom that "a law of the Oireachtas…is presumed to be constitutional unless and until the contrary is clearly established".[167] The legislature is further afforded the rule of avoidance, also articulated by the courts as the principle of "self-restraint". This rule is developed primarily concerning judicial review of legislation and it limits such action to instances where it is necessary having regard to the specific issue before the court. It was asserted in *Gilligan v Special Criminal Court*[168], that addressing this issue last in any given case is now a "well settled"[169] practice. This is considered an aspect of the presumption of constitutionality that the constitutionality issue should only be assessed where such an assessment is unavoidable. It was described by Henchy J in *The State (P Woods) v Attorney General*[170] as an "inherent limitation of the judicial process" without which the judiciary would be creating gaps in the law that it was incapable of plugging without infringing upon the power of the legislature.

Is the subject particularly topical, or the matter is relatively settled, with no relevant developments in recent years?

There are two recent reform movements in the area to create a new independent mechanism for appointing judges and to create

166 *Pigs Marketing Board v Donnelly* [1939] IR 413.
167 *Pigs Marketing Board v Donnelly* [1939] IR 417.
168 *Gilligan v Special Criminal Court* [2005] IESC 86, [2006] 2 IR 389.
169 *Gilligan v Special Criminal Court* [2005] IESC 86, [2006] 2 IR 407.
170 *The State (P Woods) v Attorney General* [1969] IR 385.

a Judicial Council with a significant role in disciplining the judiciary.

The Judicial Appointments Commission Bill 2017 is currently (as of June 2019) being debated at Committee Stage. This Bill proposes to create a Judicial Appointments Commission (JAC) which would recommend only three names to the Government. The bill places an emphasis on principles of merit and diversity in the appointment process. The Committee also proposes a smaller fraction of legal representation with only three ex officio members of the judiciary; the Chief Justice and the Presidents of the Court of Appeal and High Court with six lay members and a lay chair. Further, there would only be two judicial members on the decision panels.[171] The JAC will be held accountable to the Oireachtas through the lay chair. Judges will be protected from being held accountable for court proceedings and other exercises of their judicial function.[172] The Government is required only to "first consider" the JAC recommendations (as was the case with the 1995 Act) and therefore commentators have eluded that at least formally the Government "will retain an almost unconstrained discretion to appoint a candidate of their choice."[173]

The second legislation currently (May 2019) in its fourth stage before the Seanad Eireann, the Judicial Council Bill 2017 aims to create a Judicial Council which would grant control to judges over training, organization, representation and discipline. The council would be made up of every judge automatically and chaired by the Chief Justice. The Bill proposes to create the Judicial Conduct Committee which will be capable of hearing disciplinary complaints and refer such to a panel of lay persons as well as judges, issue reprimands or direct judges towards extra training. Mirroring the set-up of the Courts Service, this Council would be held accountable to the Oireachtas but through a secretary who will not be required to speak for the judges' exercise of their judicial functions.[174]

Have there been any particular 'hard cases' that have helped define the scope of this guarantee?

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171 Judicial Appointments Commission Bill (2017) s12, s13.
172 Judicial Appointments Commission Bill (2017) s12, s13.
173 P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1881.
174 Judicial Council Bill (2017) s20.

The Irish road to judicial reform of any kind, including that of the appointment of judges has historically been heavily dependent on the political climate. Patrick O'Brien has commented that Ireland does have a robust de facto culture of judicial independence despite the lack of de jure self-governing structures. However all and any reforms to the system can be directly linked and attributed to controversies or personal projects of senior judges and politicians thriving off of their good will and investment. The lack of regulation of discipline has lead Ireland into near constitutional crisis twice in the past two decades and as such these cases are landmarks for attempted albeit unsuccessful reform movement in the area. The first involved the intervention by a Supreme Court judge with the County Registrar for Dublin, seeking that a case be relisted for modification of sentence. A sequence of highly unusual and procedurally improper actions followed. The Registrar first invited Sheedy's solicitor to apply for the case to be relisted for modification of sentence. In November 1998, the case then came not before the original trial judge but before Judge Cyril Kelly. Kelly had no power to alter a sentence handed down by another judge, and made multiple procedural errors in the hearing itself. In particular, Kelly asked Sheedy's solicitor to have a medical report prepared on Sheedy so that it placed on file after the hearing, apparently to justify his decision to suspend the rest of the sentence. This would in effect falsify the record.[175] An investigation was launched, resulting in scathing criticism. Following a brief negotiation with the Government, both judges and the registrar resigned. The Government, grateful that a constitutional crisis had been avoided and cautious about judicial independence, secured the passage of special legislation to provide for pensions for all three.[176] The Sheedy Affair led directly to proposals for reform. The Department of Justice proposed the creation of a Judicial Council to manage judicial discipline. This proposal had been foreshadowed several years earlier in a report by the Constitutional Review Group, which recommended that the Constitution should be

[175] It is not clear if this second report was ever in fact put on the record. On the Sheedy affair, see J. O'Dowd, *The Sheedy Affair*, Contemporary Issues in Irish Law and Politics 3 (2000), 103. See also F. O'Toole, *Unanswered questions about the Sheedy affair cannot be buried a second time*, The Irish Times, 24 June 2000.

[176] Shortly afterwards the Oireachtas (legislature) enacted special legislation to provide for pensions for O'Flaherty, Kelly and the registrar: Courts (Supplemental Provisions) (Amendment) Act 1999.

amended to create a judge led Judicial Council that would be responsible for judicial discipline.[177] This has not yet come to pass, but legislation has been recently proposed on the subject, though the Council's powers would be severely restrained absent constitutional amendment.

A second case arose a few years later. A Circuit Court Judge, Brian Curtin, was charged with possession of child pornography in 2002 but acquitted when it transpired that the key evidence against him – his personal computer – had been seized pursuant to an invalid search warrant. The fact that his acquittal was on the basis of a technicality made it look as though he was guilty. The Oireachtas began to go about impeaching him, the first time something like this had been attempted, requiring the crafting of a fresh procedure. Special legislation was enacted in order to give Oireachtas staff immunity from prosecution concerning the handling of criminal material, and to compel Curtin to testify.[178] Curtin delayed the process wherever possible, challenging the request to produce his computer in the courts. The Supreme Court ultimately rejected his arguments, holding that power to impeach a judge in Article 35 of the Constitution included a power to assess his fitness for office.[179] Curtin then sought further delays on grounds of ill health. When this was refused, he resigned, having just served just long enough in his post to qualify for his pension. The Curtin case was the closest Ireland had come to judicial impeachment, and revealed significant problems concerning judicial discipline. O'Brien notes: "A process involving the Government and the interim Judicial Council began in 2013 but produced a Bill only in 2017. This coincided with an unflattering report from the GRECO organization of the Council of Europe criticizing the delay in legislating for a Judicial Council, which appears to have provided some impetus for finalizing the proposals."[180]

Are there other areas covered by judicial independence?

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[177] Report of the Constitutional Review Group, April 1995.

[178] Amendment to § 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997.

[179] *Curtin v. Clerk of Dáil Éireann* [2006] IESC 14, [2006] 2 IR 556.

[180] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1891-1892.

There are no other significant legislative provisions covering judicial independence. Can you say on which of these questions in your country there is an established legal tradition?

In terms of judicial independence, it has been noted elsewhere that "Political interference with the judiciary by the Stuart Monarchs in England is the historical source of the Constitutional concern for judicial independence in the Anglo-American tradition. It spread throughout the common law world, and into Ireland, though the Act of Settlement in 1701. In Alexander Hamilton's Federalist Papers one finds the modern formulation of the separation of powers that has been influential in the subsequent establishment of modem democratic orders, including the Irish regime."[181] As such, the roots of this tradition are very deep indeed.

[181] For example, according to Lavery J, "[i]t is demonstrable that the founders of the State and the framers of the Constitution were inspired by the same ideas which actuated the founders of the United States of America which are enshrined in the Declaration of Independence and in the Constitution of the United States." Statement of Lavery J in *O'Byrne v Minister for Finance* [1959] IR 1, at 39. See C.E. Kelly, *Ireland and Judicial (In)dependence in Light of the Twenty-Ninth Amendment to the Constitution*, 18 Trinity College Law Rev. 15 (2015) 20.

FREEDOM OF EXPRESSION UNDER EU LAW

Sven Kaufmann[*]

Abstract

After some introductory remarks relating to national constitutional standards in the context of the EU fundamental rights system and an emphasis on the proportionality test as a general mandatory requirement for limitations of EU fundamental rights, this contribution seeks to provide an overview of the current state of freedom of expression under EU law in the light of the CJEU's case-law.

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[*] Legal Secretary at the ECJ. This contribution solely reflects the personal opinion of the author and draws on research conducted as part of a research project focusing on national constitutional traditions.

1. Introductory remarks on national constitutional standards in the context of the EU fundamental rights system

With regard to the interaction between constitutional traditions common to the Member States and Charter rights and, more specifically, to the possibility of taking national constitutional standards into account when interpreting EU fundamental rights, due regard must be had to the framework provided by EU law to that effect and, in particular, by the Charter itself and the Explanations relating to it[1]. Several aspects should be taken into account in this respect.

First, the Court repeatedly held that the fundamental rights now enshrined in the Charter draw inspiration from the constitutional traditions common to the Member States.[2] It should be noted, however, that the wording chosen in the context of this case-law differs from the Court's earlier case-law, rendered before the Charter entered into force, which stated that "in safeguarding [fundamental] rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States".[3] This seems to suggest that the entry into force of the Charter has strengthened the autonomy of fundamental rights enshrined in it as a written document.[4]

Secondly, under Article 6(3) TEU, "[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". According to this provision, which embodies longstanding case-law stating that "fundamental rights form an integral part of the general principles

[1] Explanations relating to the Charter of Fundamental Rights (OJ 2007, C 303, p. 17).

[2] See, most recently, 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623, para 59, 29 July 2019, Pelham and Others, C-476/17, EU:C:2019:624, para 61, and 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, para 44 and the case-law cited. According to this case-law, Charter rights also draw inspiration from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.

[3] See, e.g., 14 May 1974, Nold v Commission, 4/73, EU:C:1974:51, para 13, 13 December 1979, Hauer, 44/79, EU:C:1979:290, para 15, and 18 December 2008, Sopropé, C-349/07, EU:C:2008:746, para 33

[4] According to Article 6(1) TEU, the Charter has the same legal value as the treaties.

of law"[5], both the ECHR and constitutional traditions common to the Member States are recognized as sources of law for EU fundamental rights.[6] It is hence apparent that EU law does not bar the Court from providing fundamental rights protection beyond the scope of the Charter by referring to general principles of law, provided of course this proves compatible with the principle of subsidiarity.[7] The content of these principles may thus be determined, in principle, by having recourse to common national constitutional standards.

Thirdly, Article 52(4) of the Charter provides that "[i]n so far 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". Within its scope, this rule of interpretation explicitly calls for a comparative law approach when interpreting fundamental rights provided by the Charter. With regard to the level of fundamental rights protection under EU law, it should be noted that the Court repeatedly held in its early case-law that, since it is bound to draw inspiration from constitutional traditions common to the Member States, "measures which are incompatible with the fundamental rights recognised by the constitutions of those States are unacceptable in the [Union]".[8] If read alongside the Explanations on Article 52 of the Charter, which state that "the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in

[5] See, e.g., 14 May 1974, Nold v Commission, 4/73, EU:C:1974:51, para 13, and 13 May 2014, Google Spain and Google, C-131/12, EU:C:2014:317, para 68.

[6] Whereas general principles of law are, just as the Charter, to be considered as a legal source in a formal sense, the ECHR and the constitutional traditions common to the Member States may be referred to as legal sources in a material sense (as corresponding to the distinction, commonly drawn in German legal terminology, between "*Rechtsquelle*" and "*Rechtserkenntnisquelle*").

[7] Such examples can be found notably in the field of procedural safeguards, see, e.g., 9 November 2017, Ispas, C-298/16, EU:C:2017:843, paras 26 et seq. (protection of the rights of the defense outside the scope of Articles 41 and 48 of the Charter), 20 December 2017, Spain v Council, C-521/15, EU:C:2017:982, paras 88 et seq. (right to good administration invoked by a Member State), and 24 June 2019, Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531, paras 48 and 49 (effective judicial protection of individuals' rights in the context of Article 19 TEU).

[8] 14 May 1974, Nold v Commission, 4/73, EU:C:1974:51, para 13, 13 December 1979, Hauer, 44/79, EU:C:1979:290, para 15, and 11 July 1989, Schräder HS Kraftfutter, 265/87, EU:C:1989:303, para 14.

harmony with the common constitutional traditions", this could be understood as a requirement to align EU standards with high, maybe even the highest, national standards. Such a requirement could however not constrain the autonomy and flexibility of the EU fundamental rights protection system, since the Court has also emphasised that the protection of fundamental rights must be ensured within the framework of the structure and objectives of the Union.[9]

Fourthly, according to the rule of interpretation provided by Article 52(3) of the Charter, "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention". Even though this provision does not affect, as such, the autonomy of EU law, it intends to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR.[10]

Since all EU Member States are parties to the ECHR, there should hardly be any tension between the paragraphs 3 and 4 of Article 52 of the Charter. However, it seems clear from the wording and the general scheme of the two provisions that the ECHR should be used as a matter of priority before recourse is had to common national standards in application of Article 52(4) of the Charter. More specifically, Article 52(4) of the Charter seems likely to apply with regard to Charter rights that stem from constitutional traditions common to the Member States, but are not guaranteed as such by the ECHR.[11]

In light of the foregoing, it would seem that constitutional traditions common to the Member States may be given consideration within the EU fundamental rights system provided for by the Charter notably in three circumstances: (1) to the extent that a Charter right is based solely on the constitutional traditions common to the Member States; (2) to the extent that the content of the Charter rights deviates from equivalent provisions of the ECHR, or at least may deviate from it; and (3) to the extent that fundamental rights based on general principles of law deviate, or

[9] 17 December 1970, Internationale Handelsgesellschaft, 11/70, EU:C:1970:114, para 4.

[10] 28 July 2016, JZ, C-294/16 PPU, EU:C:2016:610, para 50.

[11] This should apply regardless of Article 52(3) of the Charter allowing for EU law to provide more extensive protection that the ECHR. To date, there does not seem to be any significant judicial application of Article 52(4) of the Charter.

at least may deviate, from the level of protection granted by the Charter.

2. Proportionality as a general barrier for limitations of EU fundamental rights

Article 52(1) of the Charter provides for general requirements with regard to the limitation of all Charter rights and reads as follows:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

This provision hence lays down the conditions in which restrictions may lawfully be brought to the rights and freedoms recognised by the Charter, as "fundamental rights are not absolute rights but must be considered in relation to their social function".[12] To that effect, it provides, *inter alia*, for the mandatory requirement of a proportionality test for limitations on all Charter rights and freedoms[13], thereby codifying the Court's case-law prior to the entry into force of the Charter on limitations of fundamental rights.[14] Although the exact scope of the proportionality test may vary according to the fundamental rights concerned, it is a general requirement under EU fundamental rights law.

It is settled case-law that this principle requires that an interfering measure does not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued by said measure or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous,

[12] 10 July 2003, Booker Aquaculture and Hydro Seafood, C-20/00 et C-64/00, EU:C:2003:397, para 68.

[13] It should be noted that the principle of proportionality itself amounts to a general principles of EU law, see, e.g., 11 April 2019, Repsol Butano and DISA Gas, C-473/17 and C-546/17, EU:C:2019:308, para 39.

[14] 13 December 1979, Hauer, 44/79, EU:C:1979:290, para 23, and 11 July 1989, Schräder HS Kraftfutter, 265/87, EU:C:1989:303, para 15.

and the disadvantages caused must not be disproportionate to the aims pursued.[15]

To that effect, the EU's or a Member State's interest in attaining the relevant objectives must be balanced against the interference with the rights of the beneficiaries concerned.[16] Where several rights and freedoms protected by the EU legal order are at issue, the assessment of the possible disproportionate nature of a provision must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them.[17] In making that assessment, it is necessary to take into account all the protected interests involved[18], with a view to reconcile the various interests at stake.[19]

3. The current state of freedom of expression under EU law

Freedom of expression was first recognised as a fundamental right under EC law in 1989 in a public service dispute concerning the Commission's refusal to establish the two applicants as officials.[20] Today, it is well established that freedom of expression is a "fundamental pillar of a democratic society"[21] and an "essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU is based".[22] It constitutes a fundamental right guaranteed by Article 11 of the Charter, which reads as follows:

"Freedom of expression and information

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[15] On the proportionality of Union acts, see, e.g., 26 April 2022, Poland v Parliament and Council, C-401/19, EU:C:2022:297, para 65. On the proportionality of Member State acts, see, e.g., 22 March 2017, Euro-Team and Spirál-Gép, C-497/15 et C-498/15, EU:C:2017:229, para 40.

[16] 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, para 77.

[17] 22 January 2013, Sky Österreich, C-283/11, EU:C:2013:28, para 60.

[18] 10 March 2005, Tempelman and van Schaijk, C-96/03 and C-97/03, EU:C:2005:145, para 48.

[19] 9 June 2016, Pesce and Others, C-78/16 and C-79/16, EU:C:2016:428, para 74.

[20] 13 December 1989, Oyowe & Traore v Commission, C-100/88, EU:C:1989:638, para 16.

[21] 6 March 2001, Connolly v Commission, C-274/99 P, EU:C:2001:127, para 53.

[22] 6 September 2011, Patriciello, C-163/10, EU:C:2011:543, para 31, 21 December 2016, Tele2 Sverige et Watson and Others, C-203/15 and C-698/15, EU:C:2016:970, para 93, and 23 April 2020, Associazione Avvocatura per i diritti LGBTI, C-507/18, EU:C:2020:289, para 48.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected."

Despite its relatively minor importance in the Court's case-law to date[23], a number of statements can be made with respect to freedom of expression under EU law, taking into account also the relevant ECtHR case-law.

3.1 General principles

Freedom of expression under EU law has two main dimensions of protection and its content is largely determined by the equivalent provision of the ECHR.

3.1.1 Protective dimensions of freedom of expression under EU law

One the one hand, freedom of expression has an objective dimension, which aims at ensuring diversity of opinion as such. Freedom of expression may thus justify restrictions on the fundamental freedoms under primary law, as the maintenance of press diversity, which helps to safeguard freedom of expression, may constitute an overriding requirement justifying a restriction on free movement of goods[24], as well as the protection of the freedom of expression of protesters.[25] The same applies to a cultural policy with the aim of safeguarding the freedom of expression of the various (in particular, social, cultural, religious and philosophical) components of a Member State, which may constitute an overriding requirement relating to the general interest justifying a restriction of the freedom to provide services.[26] Freedom of expression and,

[23] This is due both to the relatively small number of legal acts likely to raise problems relating to the interpretation of the freedom of expression and, more generally, to the limited powers of the EU to legislate in the areas concerned. It should be recalled that, according its Article 52(2), the Charter does not extend the field of application of EU law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

[24] 26 June 1997, Familiapress, C-368/95, EU:C:1997:325,), para 18. See also 3 February 1993, Veronica Omroep Organisatie, C-148/91, EU:C:1993:45, para 10.

[25] 12 June 2003, Schmidberger, C-112/00, EU:C:2003:333, paras 74 et seq.

[26] 25 July 1991, Collectieve Antennevoorziening Gouda, C-288/89, EU:C:1991:323, paras 22 and 23, 13 December 2007, United Pan-Europe

more specifically, freedom of the media thus permit and justify, to a certain extent, Member State regulation in the field of media that otherwise would be contrary to fundamental freedoms under EU law.

One the other hand, freedom of expression has an individual dimension and grants a right of defence against EU or Member State interference, which can only be restricted within reasonable limits.[27] In this respect, it is interesting to note that, where a Member State relies on overriding requirements in order to maintain press diversity and to justify national rules which are likely to obstruct the exercise of fundamental freedoms, such justification must also be interpreted in the light of fundamental rights and, *inter alia*, freedom of expression.[28]

3.1.2 Equivalence between Article 11 of the Charter and Article 10 of the ECHR

As is clear from Article 52(3) of the Charter and the Explanations on Article 11 and Article 52, the freedom of expression and information laid down in Article 11 of the Charter has the same meaning and scope as Article 10 of the ECHR[29], which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from

Communications Belgium and Others, C-250/06, EU:C:2007:783, para 41, and 11 December 2019, TV Play Baltic, C-87/19, EU:C:2019:1063, para 38.

[27] 13 December 1989, Oyowe & Traore v Commission, C-100/88, EU:C:1989:638, para 16, and 6 March 2001, Connolly v Commission, C-274/99 P, EU:C:2001:127, para 129.

[28] 26 June 1997, Familiapress, C-368/95, EU:C:1997:325, paras 24 et seq: A prohibition on selling publications offering the chance to take part in prize games competitions, which may detract from freedom of expression, must be proportionate to the aim of maintaining press diversity. See also 25 March 2004, Karner, C-71/02, EU:C:2004:181, paras 50 et seq.

[29] 17 December 2015, Neptune Distribution, C-157/14, EU:C:2015:823, para 65, and 4 May 2016, Philip Morris Brands and Others, C-547/14, EU:C:2016:325, para 147. See also General Court, 31 May 2018, Korwin-Mikke/Parliament, T-352/17, EU:T:2018:319, para 39 : "(…) equivalence between the freedoms guaranteed by the Charter and those guaranteed by the ECHR has been formally expressed in relation to freedom of expression (…)".

requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Therefore, the interpretation and application of Article 11 of the Charter may, in principle and without prejudice to the requirements of an autonomous interpretation of EU law, draw on the ECtHR case-law on Article 10 of the ECHR. Although Article 52(3) of the Charter specifically states that EU law shall not prevented providing more extensive protection than the rights laid down in the ECHR, it would seem that such equivalence entails that there is only little room for the application of both Article 6(3) TEU and Article 52(4) of the Charter in the field of freedom of expression within the scope of EU law.

However, certain noteworthy differences between the two provisions cannot be dismissed out of hand.

First, as opposed to Article 10 of the ECHR, Article 11 of the Charter does not cover the freedom of the arts and sciences, which is specifically enshrined in Article 13.

Secondly, the Explanations on Article 11 of the Charter make clear that limitations which may be imposed on the freedom of expression are without prejudice to any restrictions which EU competition law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR. The Charter could therefore lead to more stringent requirements for Member States, for example in the area of state aid prohibition under Article 106 TFEU, which provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, these States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties.

Thirdly, the most noteworthy difference between the two provisions lies in the express recognition of the freedom and

pluralism of the media in Article 11(2) of the Charter.[30] Since freedom of the media and of the press is also protected by Article 11 of the ECHR, the question therefore arises as to the extent to which the Charter differs in content from the ECHR. In the context of an autonomous interpretation of the Charter, this could also be of interest for a possible recourse to national constitutional standards, since Article 52(3) applies only in so far as the two provisions are identical in substance. In the absence of relevant case-law in this respect, this question must remain open. However, the Explanations on the Charter in particular suggest that the EU legislator did not intend to create a fundamental right separate from the ECHR, but wanted to emphasize the particular importance of freedom and pluralism of the media in EU law.

3.2 The scope of Article 11 of the Charter

3.2.1 Scope ratione materiae

3.2.1.1 Freedom of expression and information [Article 11(1) of the Charter]

Article 11(1) of the Charter distinguishes, on the one hand, freedom of holding opinions and imparting information and ideas, and, on the other hand, freedom to receive information and ideas.

It is likely that, whereas "ideas" and "opinions" refer, in substance, to value statements[31], "information" refer to statement of facts.[32] Relying on relevant ECtHR case law, the Court has stated that, based on the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society",

[30] The fact that this provision only provides that freedom and pluralism of the media shall be "respected" instead of, e.g., "guaranteed", leaves some doubt as to its exact scope.

[31] In its judgment of 6 September 2011, Patriciello (C-163/10, EU:C:2011:543), para 32, the Court considered that "opinion" for the purpose of Article 8 of the Protocol (no 7) on the privileges and immunities of the European Union must be understood in a wide sense to include remarks and statements that, by their content, correspond to assertions amounting to subjective appraisal.

[32] According to the ECtHR, in order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (23 April 2015, Morice v France [GC], no 29369/10, para 126).

freedom of expression applies not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.[33] This allows to conclude that, in principle, all kind of communications contents fall within the scope of Article 11 of the Charter, without regard to the quality of the speech.[34]

Relying on a broad understanding of the scope *rationae materiae* of freedom of expression, the Court hence found, for example, that freedom of expression covers the dissemination of information about therapeutic or prophylactic properties of a product[35], the publication of information concerning names, addresses and family relationships of individuals[36], demonstrations seeking to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles[37], and statements made by an individual in a radio programme to the effect that he would not wish to work with homosexual persons[38]. The same should also apply to listings uploaded by users to eBay's marketplace.[39]

As far as lawyers' freedom of expression is concerned, this freedom protects not only the substance of the ideas and information expressed by lawyers in their written and oral submissions but also the form in which they are conveyed, so that, although it is not unlimited, it is only in exceptional circumstances that a restriction of the freedom of expression of defence counsel can be accepted as necessary in a democratic society.[40]

Commercial speech, such as television advertising, falls within the scope of Article 11 of the Charter.[41] The same applies to

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[33] 6 March 2001, Connolly v Commission, C-274/99 P, EU:C:2001:127, para 39. See also ECtHR, 7 December 1976, Handyside v United Kingdom, no 5493/72, para 49.

[34] In the light of, e.g., ECtHR, 3 April 2012, Gillberg v Sweden [GC], no 41723/06, para 86, a negative right to freedom of expression is also likely to be protected.

[35] 28 October 1992, Ter Voort, C-219/91, EU:C:1992:414, paras 31 and 36.

[36] 6 November 2003, Lindqvist, C-101/01, EU:C:2003:596, paras 13 and 86.

[37] 12 June 2003, Schmidberger, C-112/00, EU:C:2003:333, paras 65 and 77.

[38] 23 April 2020, Associazione Avvocatura per i diritti LGBTI, C-507/18, EU:C:2020:289, paras 47 et seq.

[39] Opinion of Advocate General Jääskinen in L'Oréal and Others, C-324/09, EU:C:2010:757, para 49.

[40] General Court, 14 July 2021, DD/FRA, T-632/19, EU:T:2021:434, para 153.

[41] 23 October 2003, RTL Television, C-245/01, EU:C:2003:580, para 68, 25 March 2004, Karner, C-71/02, EU:C:2004:181, para 51, and 2 April 2009, Damgaard, C-421/07, EU:C:2009:222, para 23 (dissemination of information on medicinal

the use by a business, on the packaging and labelling of tobacco products, of certain indications provided for under EU law.[42]

The scope of Article 11 of the Charter finds some limits in the prohibition of abuse of rights under Article of 54 of the Charter[43], which, as is apparent from the Explanations on this provision, corresponds to Article 17 of the ECHR. It should therefore be assumed that, in the light of relevant ECtHR case-law, freedom of expression under Article 11 of the Charter cannot be relied on, in principle, in order to perform, promote and/or justify acts amounting to or characterised by violence, hatred, xenophobia or another form of intolerance[44], racial discrimination[45], anti-Semitism[46] and islamophobia[47], terrorism and war crimes[48], negation and revision of clearly established historical facts, such as the Holocaust[49], contempt for victims of the Holocaust, of a war and/or of a totalitarian regime[50], as well as totalitarian ideology and other political ideas incompatible with democracy[51]. The General Court has held that, whereas statements made in the political context are, in principle, particularly well protected by freedom of expression, that does not apply to acts constituting an incitement to violence, hatred and intolerance.[52] On the other hand,

products). See also ECtHR, 13 July 2012, Mouvement raëlien suisse v Switzerland [GC], no 16354/06, para 61.

[42] 4 May 2016, Philip Morris Brands and Others, C-547/14, EU:C:2016:325, para 147.

[43] "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."

[44] ECtHR, 15 October 2015, Perinçek v Switzerland [GC], no 27510/08, para 230. In order to determine whether statements made as a whole may be so qualified, attention must be paid to the words used, the manner in which the statements were made and the context in which they were broadcast, see ECtHR, 6 July 2010, Gözel and Özer v Turkey, nos 43453/04 and 31098/05, para 52.

[45] ECtHR, 16 July 2009, Féret v Belgium, no 15615/07.

[46] ECtHR, 20 February 2007, Pavel Ivanov v Russia (dec.), no 35222/04.

[47] ECtHR, 10 July 2008, Soulas and Others v France, no 15948/03.

[48] ECtHR, 15 January 2009, Orban and Others v France, no 20985/05.

[49] ECtHR, 23 September 1998, Lehideux and Isorni v France [GC] 24662/94; 13 December 2005, Witzsch v Germany (no. 2) (dec.), no 7485/03.

[50] ECtHR, 24 July 2012, Fáber v Hungary, no 40721/08.

[51] ECtHR, 13 February 2003, Refah Partisi (the Welfare Party) and Others v Turkey [GC], nos 41340/98 et al.

[52] General Court, 14 July 2021, Cabello Rondón/Council, T-248/18, EU:T:2021:450, para 117.

the uttering of a mere vulgar, indecent, obscene and repulsive term is not excluded from the scope of freedom of expression.[53]

Freedom of expression covers any form of expressing opinions, both through conduct and verbal expression[54], and may therefore also apply, e.g., to the display of vestimentary symbols.[55] In addition, freedom of information covers any means of receiving and imparting information.

On several occasions, the Court ruled on aspects of freedom of expression and the Internet. It is commonly accepted that ideas, opinions and information may be expressed, received and imparted via the Internet and any means of electronic communication.[56] Interpreting substantial EU law on copyright and related rights, the Court emphasised that the Internet is in fact of particular importance to freedom of expression and of information and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information.[57] In contrast, the publication on a website without the authorisation of the copyright holder of a work which was previously communicated on another website with the consent of that copyright holder does not contribute, to the same extent, to that objective.[58]

According to the ECtHR, Article 10 of the ECHR applies when the relations between employer and employee are governed by private law, and that the State has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals.[59]

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[53] General Court, 9 March 2012, Cortés del Valle López v OHMI (¡Que buenu ye! HIJOPUTA), T-417/10, EU:T:2012:120, para 26, and 14 November 2013, Efag Trade Mark Company v OHMI (FICKEN), T-52/13, EU:T:2013:596, paras 34 and 40.

[54] ECtHR, 17 July 2018, Mariya Alekhina and Others v Russia, no 38004/12, para 21.

[55] ECtHR, 8 July 2008, Vajnai v Hungary, no 33629/06, para 47.

[56] 24 November 2011, Scarlet Extended, C-70/10, EU:C:2011:771, para 50, 8 April 2014, Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, para 28, and 21 December 2016, Tele2 Sverige and Watson and Others, C-203/15 and C-698/15, EU:C:2016:970, para 101.

[57] 8 September 2016, GS Media, C-160/15, EU:C:2016:644, para 45, and 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, para 81.

[58] 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634, para 40.

[59] ECtHR, 5 November 2019, Herbai v Hungary, no 11608/15, para 47.

3.2.1.2 Freedom and pluralism of the media [Article 11(2) of the Charter]

The Court has emphasised the particular importance of the freedom of the media in the areas of radio and television broadcasting.[60] In particular, freedom of the media includes the freedom of the press, both print and online[61]. Article 11(2) of the Charter highlights the importance of freedom and pluralism of the media in EU law and contains a general provision in favour of diversity of opinion, which may justify restrictions on economic activities and, more specifically, the freedom of media operators.[62] In order to distinguish this provision from Article 11(1) of the Charter, it should be assumed that only media-specific services are protected. In this regard, the Court held that, in the context of journalism, not only publications but also the preparatory steps to a publication, such as the gathering of information and the research and investigative activities of a journalist are inherent components of the freedom of the press.[63]

According to the Explanations on Article 11 of the Charter, freedom of the media under Article 11(2) of the Charter is based in particular on the Court's case-law regarding television[64], Protocol (no 29) on the system of public broadcasting in the Member States annexed to the Treaties, and what is now the Audiovisual Media Services Directive[65].

In respect of journalistic reporting on political issues and other matters of public concern, notably in the audiovisual media, the ECtHR has stated that the protection of the right of journalists to impart information on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual

[60] 22 January 2013, Sky Österreich, C-283/11, EU:C:2013:28, para 52.
[61] 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, para 45.
[62] See 26 June 1997, Familiapress, C-368/95, EU:C:1997:325, para 18, and 3 September 2020, Vivendi, C-719/18, EU:C:2020:627, para 57.
[63] 15 March 2022, Autorité des marchés financiers, C-302/20, EU:C:2022:190, para 68.
[64] 25 July 1991, Collectieve Antennevoorziening Gouda, C-288/89, EU:C:1991:323, according to which freedom the media may constitute an overriding requirement relating to the general interest justifying a restriction of a fundamental freedom.
[65] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010, L 95, p. 1).

basis and provide reliable and precise information in accordance with the ethics of journalism; or in other words, in accordance with the tenets of responsible journalism. Given the influence wielded by the media in contemporary society and the vast quantities of information circulated via traditional and electronic media, monitoring compliance with journalistic ethics takes on added importance.[66]

According to the ECtHR, it is "(…) incumbent to [the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (…). Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society (…)."[67] Therefore, it is up to the Member States to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting, inter alia, the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the Member States' margin of appreciation.[68]

3.2.2 Scope ratione personae

Any natural person, both EU citizens and third country nationals, may invoke freedom of expression under Article 11 of the Charter. This also applies, in principle, to legal persons. Whereas EU officials may rely on freedom of expression even in areas falling within the scope of the activities of their employing institution and even if their opinion is contrary to the latter's position on a specific topic[69], the Court has stated that Member States cannot rely on their

[66] ECtHR, 22 April 2022, NIT S.R.L. v Moldova [GC], no 28470/12, paras 180 and 181. In this respect, see, most instructively, General Court, 27 June 2022, RT France v Council, T-125/22, EU:T:2022:483, paras 186 et seq.
[67] ECtHR, 8 July 1986, Lingens v Austria, no 9815/82, paras 41 and 42.
[68] ECtHR, 17 September 2009, Manole And Others v Moldova, no 13936/02, para 100.
[69] 6 March 2001, Connolly v Commission, C-274/99 P, EU:C:2001:127 para 43

officials' freedom of expression to justify an obstacle to free movement of goods and thereby evade their own liability under EU law.[70]

It should also be noted that, although Article 16 of the ECHR specifically allows for restrictions on the political activity of aliens, it is apparent from the Explanations on Article 52 of the Charter that EU citizens of the European Union may not be considered as aliens within the scope of EU law, because of the prohibition of any discrimination on grounds of nationality.

3.3 Limitations to freedom of expression

3.3.1 General principles

In order to assess whether there has been an interference with the exercise of freedom of expression, and in accordance with the wording of Article 10(2) of the ECHR, the ECtHR takes into account any kind of formality, condition, restriction or penalty, bearing in mind the context of the facts of the case and of the relevant legislation.[71] This corresponds with the Court's approach, which generally takes into account any legal or factual measure affecting, directly or indirectly, the freedom of expression.[72]

With regard to the possibility of justifying restrictions to the freedom of expression, the Court recalled that, as is apparent from Article 52(1) of the Charter, freedom of expression is not an absolute right and its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that right and the principle of proportionality, namely if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[73] In addition, the Explanations on Article 11 of the Charter make clear that limitations which may be imposed on the freedom of expression must not exceed, in principle, those provided for in Article 10(2) of the ECHR.[74]As stated above, the equivalence of

[70] 17 April 2007, AGM-COS.MET, C-470/03, EU:C:2007:213, para 72.
[71] ECtHR, 28 October 1999, Wille v Liechtenstein [GC], no 28396/95, para 43.
[72] See, e.g., 28 October 1992, Ter Voort, C-219/91, EU:C:1992:414, para 36.
[73] 23 April 2020, Associazione Avvocatura per i diritti LGBTI, C-507/18, EU:C:2020:289, para 49.
[74] Before the Charter entered into force, the Court examined restrictions on freedom of expression in the light of Article 10(2) of the ECHR, see 2 April 2009, Damgaard, C-421/07, EU:C:2009:222, paras 25 et seq. (freedom of expression)

Article 10 of the ECHR and Article 11 of the Charter with respect to the freedom and pluralism of the media is not yet clearly established.

Sitting as a Grand Chamber, the General Court recently summarised the principles applicable when justifying restrictions on the freedom of expression. It held that, in the light of the fundamental importance of freedom of expression, interferences with the freedom of expression are permitted only if they satisfy four conditions. First, the limitation must be "provided for by law", in that sense that measures liable to restrict a natural or legal person's freedom of expression must have a legal basis to that effect. Secondly, the essence of freedom of expression must not be impaired. Thirdly, the limitation in question must be intended to achieve an objective of general interest, recognised as such by the EU. Fourthly, the limitation must be proportionate. [75]

Limitations may be considered as provided for by law only if the provision is formulated with sufficient precision to be predictable in its effects and to enable the persons addressed to adjust their conduct accordingly.[76]

With regard to the respect for the essence of the freedom of expression in the specific context of restrictive measures adopted by the Council, the General Court noted the temporary and reversible nature of these measures and the fact that they do not prevent any activity inherent in the freedom of information and expression.[77]

As is apparent from Article 10(2) of the ECHR, measures may be considered as intended to achieve an objective of general interest when taken in the interests of national security, territorial integrity

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and 12 September 2006, Laserdisken, C-479/04, EU:C:2006:549, para 64 (freedom of information). See also 25 March 2004, Karner, C-71/02, EU:C:2004:181, para 50: "(…) freedom of expression is (…) subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."

[75] General Court, 27 June 2022, RT France v Council, T-125/22, EU:T:2022:483, para 145.

[76] General Court, 31 May 2018, Korwin-Mikke v Parliament, T-352/17, EU:T:2018:319, para 44; 27 June 2022, RT France v Council, T-125/22, EU:T:2022:483, para 150.

[77] General Court, 27 June 2022, RT France v Council, T-125/22, EU:T:2022:483, para 154, 157 and 159.

or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. In addition, may also be taken into account, e.g., the pluralism of the media as mentioned in Article 11(2) of the Charter[78], as well the objective of safeguarding EU competition law rules. The objective of protecting the reputation or rights of others may, for example, include the protection of religious opinions and beliefs of individuals[79], or the rights of an EU institution that that are charged with the responsibility of carrying out tasks in the public interest with a view of preserving the relationship of trust which must exist between the institution and its officials or other employees.[80]

Regarding the principle of proportionality, the limitation of freedom of expression must be appropriate and necessary, and all interests involved must be weighed, having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.[81] In this respect, the discretion enjoyed by EU and national authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question.[82] When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference.[83] On the

[78] 26 June 1997, Familiapress, C-368/95, EU:C:1997:325, para 26, and 22 December 2008, Kabel Deutschland Vertrieb und Service, C-336/07, EU:C:2008:765, para 38 (preservation of the pluralist nature of a television channel service).
[79] ECtHR, 31 January 2006, Giniewski v France, no 64016/00, para 40.
[80] 6 March 2001, Connolly v Commission, C-274/99 P, EU:C:2001:127, paras 44 and 46.
[81] 12 June 2003, Schmidberger, C-112/00, EU:C:2003:333, para 81.
[82] See General Court, 27 June 2022, RT France v Council, T-125/22, EU:T:2022:483, paras 192 et seq, concerning the prevention of forms of expression aimed at justifying and supporting an act of military aggression, perpetrated in violation of international law.
[83] 25 March 2004, Karner, C-71/02, EU:C:2004:181, para 51, 12 December 2006, Germany v Parliament and Council, C-380/03, EU:C:2006:772, para 155, and 2 April 2009, Damgaard, C-421/07, EU:C:2009:222, para 27.

other hand, it is settled case-law of the ECtHR that there is little scope under Article 10(2) of the ECHR for restrictions on debate on questions of public interest.[84]

According to the ECtHR, the justification of a restriction to the freedom of expression should depend on whether a statement of fact or a value judgment is at stake. Whereas the existence of facts can be demonstrated, the requirement to prove the truth of a value judgment is impossible to fulfil and infringes Article 10 of the ECHR. However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient "factual basis" for the impugned statement and, if there is not, that value judgment may prove excessive.[85]

3.3.2 Specific case-law

A large amount of discretion, entailing only limited judicial review, is recognised in the field of the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising.[86] The Court has also acknowledged that freedom of expression plays a role in trademark law and must be taken into account when applying relevant provisions of EU law in order to reject and application for registration of a word sign as a EU trade mark.[87] The same applies to copyright law, where a balance between intellectual property protected under Article 17 of the Charter (Property) and freedom of expression has to be guaranteed, for example in cases concerning the embedding, in a third party's website, of a copyright-protected work by means of the process of framing[88], the downloading of a file containing a protected work via a peer-to-peer network[89], and the liability of video- and file-sharing platform operators for infringements of intellectual property rights by its users.[90]

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[84] ECtHR, 12 February 2008, Guja v Moldova [GC], no 14277/04, para 74.
[85] ECtHR, 23 April 2015, Morice v France [GC], no 29369/10, para 126.
[86] 2 April 2009, Damgaard, C-421/07, EU:C:2009:222, para 27 ; see also General Court, 16 March 2016, Dextro Energy v Commission, T-100/15, EU:T:2016:150, para 81.
[87] 27 February 2020, Constantin Film Produktion v EUIPO, C-240/18 P, EU:C:2020:118, para 56.
[88] 9 March 2021, VG Bild-Kunst, C-392/19, EU:C:2021:181, para 54.
[89] 17 June 2021, M.I.C.M., C-597/19, EU:C:2021:492, para 58.
[90] 22 June 2021, YouTube et Cyando, C-682/18 and C-683/18, EU:C:2021:503, para 138. See also 26 April 2022, Poland v Parliament and Council, C-401/19, EU:C:2022:297.

In the field of data protection, restrictions to the freedom of expression may be justified with regard to other fundamental rights, in particular Article 6 (Liberty and security), Article 7 (Respect for private and family life) and Article 8 (Protection of personal data) of the Charter, for example concerning the disclosure of fiscal data for journalistic purposes[91], data retention[92], data transmission for the purpose of the safeguarding of national security[93], and the online publication of video recordings[94]. Relying on relevant ECtHR case-law, the Court recalled that, in order to balance the right to privacy and the right to freedom of expression, a number of relevant criteria must be taken into account, *inter alia*, contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and the manner and circumstances in which the information was obtained and its veracity.[95]

Concerning political debate in the context of the European Parliament, it is apparent from Article 8 of the Protocol (no 7) on the privileges and immunities of the European Union[96] that Members of the European Parliament may rely on the freedom of expression, provided that the connection between the opinion expressed and parliamentary duties is direct and obvious.[97] Drawing largely on ECtHR case-law, the General Court held that in a democracy, Parliament or such comparable bodies are the essential fora for political debate, and that very weighty reasons must therefore be advanced to justify interfering with the freedom of expression exercised therein. Accordingly, interferences with the

[91] 16 December 2008, Satakunnan Markkinapörssi et Satamedia, C-73/07, EU:C:2008:727, paras 52 et seq.
[92] 21 December 2016, Tele2 Sverige et Watson e.a., C-203/15 et C-698/15, EU:C:2016:970, 6 October 2020, La Quadrature du Net et al., C-511/18, C-512/18 and C-520/18, EU:C:2020:791, 2 March 2021, Prokuratuur (Conditions of access to data relating to electronic communications), C-746/18, EU:C:2021:152, and 5 April 2022, Commissioner of An Garda Síochána e.a., C-140/20, EU:C:2022:258.
[93] 6 October 2020, Privacy International, C-623/17, EU:C:2020:790.
[94] 14 February 2019, Buivids, C-345/17, EU:C:2019:122.
[95] 14 February 2019, Buivids, C-345/17, EU:C:2019:122, para 66.
[96] "Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties."
[97] 6 September 2011, Patriciello, C-163/10, EU:C:2011:543, para 35.

freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the courts.[98]

With regard to EU civil service disputes, Article 17a of the EU Staff Regulations provides that officials have the right to freedom of expression, with due respect to the principles of loyalty and impartiality. It is settled case-law that the duty of allegiance to the EU imposed on officials cannot be interpreted in such a way as to conflict with freedom of expression.[99] In particular, this provision permitting, in exceptional cases, to refuse a request to publish writings dealing with the work of the EU potentially interferes to a serious extent with freedom of expression and must therefore be interpreted restrictively.[100]

However, in a case concerning disciplinary measures taken against a civil servant for publishing a critical work without prior authorization, the Court held that it is also legitimate in a democratic society to subject public servants, on account of their status, to certain obligations which are intended primarily to preserve the relationship of trust which must exist between the institution and its officials or other employees. The scope of those obligations must vary according to the nature of the duties performed by the person concerned or his place in the hierarchy, and this issue is subject to strict judicial review by the EU courts.[101] In this case, the Court found the restriction to the official's freedom of expression justified because he did not only express a dissentient opinion, but because he had published, without permission, material in which he had severely criticised, and even insulted, members of the Commission and other superiors and had challenged fundamental aspects of Community policies which had been written into the Treaty by the Member States and to whose implementation the Commission had specifically assigned him the responsibility of contributing in good faith. In those circumstances, the official committed an irremediable breach of the trust which his employing institution was entitled to expect from its officials' and, as

[98] General Court, 31 May 2018, Korwin-Mikke v Parliament, T-352/17, EU:T:2018:319, paras 45 and 46.
[99] 13 December 1989, Oyowe & Traore v Commission, C-100/88, EU:C:1989:638, para 16.
[100] General Court, 15 September 2017, Skareby v SEAE, T-585/16, EU:T:2017:613, para 81.
[101] 6 March 2001, Connolly v Commission, C-274/99 P, EU:C:2001:12744, paras 44, 45 and 48.

a result, made it impossible for any employment relationship to be maintained with the institution.[102]

In the context of restrictive measures providing for the freezing of funds and economic resources, restrictions to the freedom of expression of targeted persons may be justified by the objective of consolidating and supporting democracy and the rule of law.[103] This also applies to the objective of protecting public order and security in the EU, as well as to the objective of preserving peace, preventing conflict and strengthening international security.[104]

Concerning the freedom of the media, it is settled case-law that the purpose of the freedom of the press, in a democratic society governed by the rule of law, justifies it in informing the public, without restrictions other than those that are strictly necessary.[105] For example, restrictions to the freedom of the media may be justified if aiming at ensuring the financial sustainability of regional and local television broadcasters.[106]

Whereas, as stated above, fundamental rights may justify restrictions to the freedom of the media, the freedom of the press may, in turn, command a large interpretation of the "media privilege" under EU law, according to which Member States provide for exemptions and derogations from data protection requirements for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression.[107] In the light of the freedom of the press, the exercise

[102] 6 March 2001, Connolly v Commission, C-274/99 P, EU:C:2001:12744, para 62.
[103] General Court, 14 July 2021, Cabello Rondón/Council, T-248/18, EU:T:2021:450, para 122.
[104] General Court, 27 June 2022, RT France v Council, T-125/22, EU:T:2022:483, paras 161 and 163 (restrictive measures against media outlets engaged in propaganda mounted by the Russian Federation).
[105] 1 December 2011, Painer, C-145/10, EU:C:2011:798, para 113, and 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, para 72.
[106] 3 February 2021, Fussl Modestraße Mayr, C-555/19, EU:C:2021:89, paras. 81 et seq.
[107] 16 December 2008, Satakunnan Markkinapörssi et Satamedia, C-73/07, EU:C:2008:727, para 56, 14 February 2019, Buivids, C-345/17, EU:C:2019:122, para 51, and 15 March 2022, Autorité des marchés financiers, C-302/20, EU:C:2022:190, para 66. See Article 9 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995, L 281, 31, and Article 85 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of

of the right to freedom of expression of users of a work protected by copyright may be favoured over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public.[108] More generally, the ECtHR has developed a sophisticated case-law in this field, underlining the vital role of the press as "public watchdog"[109] and emphasizing that, where freedom of the press is at stake, national authorities have only a limited margin of appreciation to decide whether restrictions can be justified under Article 10(2) of the ECHR.[110] As far as audiovisual media are concerned, media pluralism may justify severe restrictions to the ownership rights of cable network operators, which are required, under EU law, to provide access to their cable networks to all television programmes allowed to be broadcast terrestrially.[111] The same reasoning applies with respect to national rules that aim to prevent that financial resources available to the national broadcasting organizations to enable them to ensure pluralism in the audio-visual sector be diverted from that purpose and used for purely commercial ends.[112] However, a national rule requiring foreign broadcasters to use certain national companies to produce their programmes cannot be justified on grounds of media pluralism[113].

natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016, L 119, 1).

[108] 1 December 2011, Painer, C-145/10, EU:C:2011:798, paras 134 and 135, as well as 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623, para 60.

[109] For instance, ECtHR, 7 February 2012, Axel Springer v Germany [GC], no 39954/08, para 79.

[110] ECtHR, 10 December 2007, Stoll v Switzerland [GC], no 69698/01, para 105.

[111] 22 December 2008, Kabel Deutschland Vertrieb und Service, C-336/07, EU:C:2008:765, paras 28 et seq.

[112] 3 February 1993, Veronica Omroep Organisatie, C-148/91, EU:C:1993:45, para 11.

[113] 25 July 1991, Commission v Netherlands, C-353/89, EU:C:1991:325, para 31.

FREEDOM OF EXPRESSION UNDER GERMAN LAW

Sven Kaufmann[*]

Abstract

This contribution seeks to provide an overview of the current state of constitutional standards relating to freedom of expression under German law. To that effect, the specifics of freedom of expression protected under Article 5(1) of the Basic Law will be presented within the framework of the general constitutional system of fundamental rights.

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1. Introductory remarks

Article 5 of the Basic Law for the Federal Republic of Germany (the 'Basic Law') provides constitutional protection for a number of fundamental rights and reads as follows:

"(1) Every person shall have the right freely to express and disseminate her opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution."

Alongside the "cultural rights" mentioned in Article 5(3), Article 5(1) of the Basic Law protects so-called "communication rights". These rights may be divided in freedom of expression (first phrase), freedom of information (first phrase), and media freedoms (second phrase), more specifically freedom of the press and freedom of reporting by means of broadcasts and films. It should be noted that these rights are not necessarily mutually exclusive.

The following comments, which focus on the freedom of expression as guaranteed under the first phrase of Article 5(1) of the Basic Law[1], are based primarily on the interpretation of this provision by the Federal Constitutional Court (the 'FCC'). In fact, the scope of freedom of expression has to a very large extent been shaped by the FCC's case-law. Without any claim to completeness, some of the most notable cases are:

- Judgment of 15 January 1958, 1 BvR 400/51 (*Lüth*): Scope of general laws within the meaning of Article 5(2) of the Basic Law (doctrine of interaction);

- Order of 25 January 1984, 1 BvR 272/81 (*Springer/Wallraff*): Freedom of opinion also covers the dissemination of unlawfully obtained information;

[1] This contribution draws on research conducted as part of a research project limited to certain aspects of freedom of expression and focusing on national constitutional traditions.

- Order of 13 April 1994, 1 BvR 23/94 (*Auschwitz-Lüge*): Freedom of expression does not include manifestly untrue statements of facts;
- Order of 10 October 1995, 1 BvR 1476/91 et al. (*Soldaten sind Mörder*): The scope of the concept of opinion has to be interpreted largely;
- Judgment of 12 December 2000, 1 BvR 1762/95, 1 BvR 1787/95 (*Benetton*): Shock advertising is in principle protected by freedom of expression;
- Order of 4 November 2009, 1 BvR 2150/08 (*Wunsiedel*): Restrictions to freedom of expression with regard to Germany's Nationalist Socialist past.

2. Constitutional standards with regard to legal scrutiny for freedom of expression

In accordance with general standards under German constitutional law, legal scrutiny for freedom of expression as enshrined in Article 5(1) of the Basic Law is systematically carried out in three consecutive steps: i) Applicability (scope *rationae personae* and *rationae materiae*); ii) Interference; iii) Justification.

Any interference may be subject to justification under the conditions laid down in Article 5(2) of the Basic Law, which provides that freedom of speech finds its limits: i) in the provisions of general laws; ii) in provisions for the protection of young persons, and; iii) in the right to personal honour.

In order to be justified under German constitutional law, any limitation of a fundamental right must be proportionate and therefore meet the following requirements: i) the interference must pursue a legitimate aim and constitute a legitimate means to that effect; ii) the interference must be suitable for achieving that aim; iii) the interference must be necessary to that effect, i.e. no less intrusive measure may exist; iv) it must be appropriate to give priority to achieving the above-mentioned aim over the protection of the fundamental right at stake. The FCC has shaped this proportionality test with regard to freedom of expression and its limitation by general laws by requiring that any interference to freedom of expression has to be subject to an intensified proportionality test under the so-called "doctrine of interaction" (*Wechselwirkungslehre*). Under this test, the interaction between a general law and the right to free expression itself must be taken into

account specifically. Both the conditions laid down in a provision which qualifies as a general law and the application of said provision itself, in the circumstances of a specific case, must be assessed in the light of freedom of expression on a **strict case-by-case basis**. Therefore, the proportionality test constitutes a strict counter-limitation ("*Schranken-Schranke*") to any interference in Article 5(1) of the Basic Law.[2] The same also applies to the prohibition of censorship mentioned in this provision, which prohibits any state-conducted interfering measures prior to the production or dissemination of an intellectual work, in particular aby measures requiring an official preliminary examination and the approval of its content.[3]

3. Scope of freedom of expression

3.1. Scope *ratione personae*

Both German and foreign nationals may rely on freedom of expression under Article 5(1) of the Basic Law, as well as legal persons, since freedom of expression is by its nature applicable to them.[4] However, public officials may not invoke this provision if they are acting in an official capacity.[5]

3.2. Scope *ratione materiae*

3.2.1. Concept of "opinion"

The constitutional protection of opinions provided under Article 5(1) of the Basic Law is based on the distinction between value judgments and statements of facts. The concept of opinion within the meaning of said provision must be interpreted broadly and includes value judgments, irrespective of whether they are true or false, reasoned or not, emotional or rational, valuable or worthless, dangerous or harmless.[6] In principle, even insults and slurs are included.[7]

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[2] FCC, Judgments of 15 January 1958, 1 BvR 400/51, and of 4 November 2011, 1 BvR 2150/08. For example, criminal liability for an ambiguous statement is excluded if this statement may somehow be understood in a way that is exempt from punishment (FCC, Order of 29 July 1998, 1 BvR 287/93).

[3] FCC, Order of 20 October 1992, 1 BvR 698/89.

[4] FCC, Order of 28 July 2004, 1 BvR 2566/95.

[5] Federal Administrative Court, Judgment of 18 April 1997, 8 C 5/96.

[6] FCC, Order of 22 June 2018, 1 BvR 2083/15.

[7] FCC, Order of 10 October 1995, 1 BvR 1476/91 et al. (a criminal conviction for disparaging remarks about soldiers - "Soldiers are murderers" - was overturned).

Article 5(1) of the Basic Law also protects, in principle, statements of facts, because and insofar they constitute the basis of independent opinion[8], unless they prove to be clearly untrue and therefore cannot add whatsoever to the process of opinion making.[9] Contrary to value judgments, statements of facts are amenable to proof.

When balancing the freedom of expression on the one hand and the legal interest protected by a general law within the meaning of Article 5(2) of the Basic Law, a presumption in favor of free expression applies to opinions, whereas this does not apply in the same way to statements of facts.[10] This approach is based on the well-established finding that freedom of expression aims to protect not only individuals but also the democratic order and the shaping of public opinion.[11]

Freedom of expression also covers the dissemination of unlawfully obtained information.[12]

Whether Article 5(1) of the Basic Law protects a specific opinion or statement has to be determined on a strict case-by-case analysis.[13] Therefore, hate speech is not, as such, excluded from the area of constitutionally protected speech. It may however be punishable as a criminal offence, in particular under Section 126 (Disturbing public peace by threatening to commit offences), Section 130 (Incitement of masses)[14], and Section 130a (Instructions

[8] FCC, Order of 22 June 1982, 1 BvR 1376/79.

[9] FCC, Orders of 13 April 1994, 1 BvR 23/94, and of 22 June 2018, 1 BvR 2083/15. To that effect, it must be possible to establish the accuracy or not of the statement within a very short period of time.

[10] FCC, Order 13 April 1994, 1 BvR 23/94.

[11] FCC, Orders of 26 June 1990, 1 BvR 1165/89, and of 9 October 1991, 1 BvR 1555/88.

[12] FCC, Order of 25 January 1984, 1 BvR 272/81.

[13] FCC, Order of 10 October 1995, 1 BvR 1476/91 et. al. The question whether freedom of expression prevails over minority rights depends on the circumstances of the specific case and the balancing of competing rights the context of an assessment of proportionality. The same applies with respect to the interplay between freedom of expression and the principle of equality before the law under Article 3 of the Basic Law.

[14] Paragraph 1 of Section 130 of the Criminal Code reads: "(1) Whoever, in a manner which is suitable for causing a disturbance of the public peace, 1. *incites hatred* against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or 2. violates the human dignity of others by insulting, maliciously maligning or defaming one of the

for committing criminal offences) of the Criminal Code. In particular, hate speech may be punishable as insult under Sections 185 et seq. of the Criminal Code.

For a defamatory statement to no longer being protected under Article 5(1) of the Basic Law, therefore amounting to insult without any balancing, it has to amount to i) a violation of human dignity[15]; ii); to a willful insult entirely disconnected from any opinion making process (*Formalbeleidigung*)[16]; or to defamatory criticism (*Schmähkritik*). These categories, which are to be interpreted most strictly, may in some cases overlap. Defamatory criticism in that sense is a statement which, taking into account the occasion and context, is be beyond polemical and exaggerated criticism because the focus is no longer on the substance of the matter but solely on defamation of a specific person.[17] As rare examples, calling a member of the German resistance during the Nazi era a "traitor to the country"[18] or considering the chairman of the Central Council of Jews in Germany as belonging to a "foreign ethnic minority" or can be mentioned.[19] Within those limits, statements are, therefore, constitutionally protected regardless whether they are ethical or not. Due to the particularities of German history, statements related to the holocaust and the Jewish community in Germany are, however, a case apart.[20]

In this context, the issue of distinguishing satire from insult has found itself at the centre of public debate in Germany, as Turkish President Erdoğan was granted a prohibitory injunction against a German television presenter for spreading a satirical diatribe, entitled "defamatory criticism" (*Schmähkritik*), which consisted of mainly sexually connoted abuses and political

aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population."

[15] FCC, Orders of 3 June 1987, 1 BvR 313/85 (depiction of a well-known person as a copulating pig), and of 24 September 2009, 2 BvR 2179/09 (election poster of a far-right party warning of allegedly greedy Polish immigrant workers).

[16] FCC, Order of 19 May 2020, 1 BvR 2397/19 (in particular the use of scatological language).

[17] FCC, Order of 14 June 2019, 1 BvR 2433/17; Federal Labour Court, Judgment of 5 December 2019, 2 AZR 240/19.

[18] Federal Court of Justice, Judgment of 6 May 1958, 5 StR 14/58.

[19] Higher Regional Court of Celle, Judgment of 18 February 2003, 22 Ss 101/02.

[20] See below under "Apology of a crime".

assertions about Mr Erdoğan ("Böhmermann Affair").[21] The civil court hearing the case held that freedom of expression in general and freedom to express satirical contributions in particular protect the expression of criticism in a pointed, polemical and exaggerated way. This protection presupposes, however, that the utterance really does constitute a criticism, and that it contains elements that are related to the object of the criticism. The further the content of an utterance is removed from the object of criticism and focuses, without reference to it, on the mere defamation of the person in question, the lower the weight of freedom of opinion in dispute for the utterer in relation to the weight of the general right of personality of the person affected by the utterance.[22] The public utterance of several parts of the diatribe was thus considered illegal. This judgment was upheld by the FCC.[23]

3.2.2. Forms of communication and anonymity

Constitutional protection under Article 5(1) of the Basic law is granted without consideration to a specific form of communication. Many issues linked to new technologies and media, often with regard to the protection of personality rights or net neutrality, remain unsolved. However, the general rules do apply and so far, there seems to have been no structural impact of new technologies on the scope of freedom of expression. Yet, there is no doubt that the number of cases involving new technologies and media and relating to freedom of expression is likely to increase. Several Higher Regional Courts have ruled that the rights and obligations of the private-law operator of a social network toward its users are, in principle, to be balanced against freedom of expression of the users under Article 5(1) of the Basic Law. Such an operator may therefore be obliged to delete posts containing hate speech or block the user account, in accordance with relevant community standards.[24]

[21] The presenter explicitly distanced himself from the content presented and, for the purpose of satire, specified that he only wanted to show what kind of speech would be considered illegal.
[22] Higher Regional Court of Hamburg, Judgment of 15 May 2018, 7 U 34/17.
[23] FCC, Order of 26 January 2022, 1 BvR 2026/19.
[24] Higher Regional Court of Karlsruhe, Orders of 25 June 2018, 15 W 86/18, and of 28 February 2019, 6 W 81/18; Higher Regional Court of Dresden, Order of 19 November 2019, 4 U 1471/19.

It may nevertheless be of interest that, in 2017, the German legislator reacted to the increasing spread of hate crime and other punishable content, especially in social networks, and passed the Network Enforcement Act of 1 September 2017[25], which imposes a number of obligations on telemedia service provider, in particular social networks. Providers must keep track of and report complaints about illegal contents. Illegal contents within the meaning of this act are defined as contents which meet the criteria of certain criminal offences, *inter alia*, Section 86 (Dissemination of propaganda material of unconstitutional organisations) and Section 130 (Incitement of masses) of the Criminal Code. One particular interest of the Network Enforcement Act is that providers must remove or block access to illegal content under its Section 3(2) No 2 and No 3.[26]

Article 5(1) of the Basic Law also protects **anonymous speech,** because the obligation to express a particular opinion by name would create the risk that individuals might choose not to express their opinion for fear of reprisals or other negative consequences, which would amount to self-censorship.[27] Although the extent to which anonymous communication is thus protected, in particular with regard to the protection of personality rights of persons concerned by such statements, remains largely open, it is settled constitutional case-law that state measures must not lead to a self-restriction of freedom of expression through intimidation ('chilling effect').[28]

It should be noted that, according to Section 19(2) No 2 of the Telecommunications Telemedia Data Protection Act[29], telemedia service providers must enable the use of telemedia anonymously or under a pseudonym. This provision is based on the assumption that the success of the Internet is based, *inter alia*, on the possibility of anonymous use and payment. In addition to concretizing the data avoidance requirement, it explicitly serves the protection of freedom of expression.

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[25] Netzwerkdurchsetzungsgesetz (BGBl. I 2017, p. 3352), as amended.
[26] Manifestly illegal content must be removed within 24 hours, other illegal content immediately, normally within seven days of receipt of the complaint.
[27] Federal Court of Justice, Judgment of 23 June 2009, VI ZR 196/08.
[28] FCC, Order of 13 May 1980, 1 BvR 103/77.
[29] Telekommunikation-Telemedien-Datenschutz-Gesetz (BGBl. I 2021, p. 1982), as amended.

3.2.3. Specific categories of speech

3.2.3.1 Political speech

Political speech made during the exercise of a political mandate and within Parliament does not fall within the scope of freedom of expression under Article 5(1) of the Basic Law, but enjoys enhanced protection because parliamentary freedom of speech does not protect individuals against the State, but directly serves to fulfill the latter's constitutional duties. Parliamentary freedom of speech therefore falls exclusively within the scope of Article 38(1) of the Basic Law, which provides, *inter alia*, that Members of the *Bundestag* shall not be bound by orders or instructions and be responsible only to their conscience.[30] In order to ensure parliamentary freedom of speech, Article 46 of the Basic Law grants parliamentary immunity and provides that, at no time, a Member of the *Bundestag* may be subjected to court proceedings or disciplinary action or otherwise called to account outside the *Bundestag* for a vote cast or a remark made by him in the *Bundestag* or in any of its committees. Parliamentary immunity does however not prevent Members of the *Bundestag* to be subject to disciplinary measures under the Parliamentary Rules of Procedure. In addition, parliamentary immunity is not granted for defamatory insults, i.e. acts punishable under Section 187 (Defamation) or Section 188 (Malicious gossip and defamation in relation to persons in political life) of the Criminal Code. The same applies to acts of physical violence.[31]

3.2.3.2 Commercial speech

Commercial speech and advertising are covered by freedom of expression under Article 5(1) of the Basic law (or freedom of the press under paragraph 3), provided it has a judgmental, opinion forming content and may therefore be regarded as an opinion within the meaning of this provision.[32] In addition, freedom the press enables press organisations to publish adverts in their advertising section.[33]

Limitations to commercial speech may be justified under general laws within the meaning of Article 5(2) of the Basic Law,

[30] FCC, Order of 8 June 1982, 2 BvE 2/82.
[31] Federal Administrative Court, Judgment of 23 April 1985, 2 WD 42/84.
[32] FCC, Judgment of 12 December 2000, 1 BvR 1762/95, 1 BvR 1787/95 (graphic pictures showing a shocking content).
[33] FCC, Order of 26 February 2008, 1 BvR 1602/07 et al.

e.g. rules and regulations on unfair competition or on advertising of a medicinal product, which must, in turn, be interpreted in the light of freedom of speech.

Recent attention has been drawn to the criminal liability of medical practitioners for advertising abortion under Section 219a of the Criminal Code.[34] Following a legislative reform in March 2019, the mere reference to the fact that a practitioner terminates pregnancies according to the law or to information about terminating a pregnancy provided by competent public authorities is not punishable any more. As of July 2022, criminal liability for detailed references to the medical procedures used by the practitioner has also been abolished.

4. Limitations to freedom of expression

4.1. General principles

As already stated above, any interference in Article 5(1) of the Basic Law must be justified according to Article 5(2) on a case-by-case approach, in particular based on the provisions of a general law within the meaning of the latter provision. Such provisions must aim to protect either a sufficiently important public interest or rights and interests of third parties that are worthy of appropriate protection.[35] They are to be determined according to formal criteria and must not prohibit an opinion and its intellectual consequences as such, but aim to protect a higher legal interest while keeping a strict neutrality towards specific opinions.[36] In other words, a general law cannot target specific opinions.[37]

In addition to the above-mentioned private law rules and regulations on unfair competition and on advertising, the following provisions may be of interest regarding criminal liability under the German Criminal Code:

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[34] This provision is aimed at whoever publicly, in a meeting or by disseminating material, for a pecuniary benefit or in a grossly offensive manner, offers, announces or extols i) their own or others' services for terminating pregnancies or supporting such terminations or ii) the means, objects or procedures which are suitable for terminating pregnancies, making reference to this suitability.

[35] FCC, Order of 11 March 2003, 1 BvR 426/02. The right to personal honour mentioned in Article 5(2) of the Basic Law falls under the latter category.

[36] FCC, Judgments of 15 January 1958, 1 BvR 400/51, and of 4 November 2009, 1 BvR 2150/08.

[37] Any special legislation (*Sonderrecht*) would be unconstitutional. For a notable exception, see below under "Apology of a crime".

- Dissemination of propaganda material of unconstitutional organisations (Section 86);
- Use of symbols of unconstitutional organisations (Section 86a);
- Disparagement of the Federal President (Section 90);
- Disparagement of the state and denigration of its symbols (Section 90a);
- Anti-constitutional disparagement of constitutional organs (Section 90b);
- Disparagement of symbols of the European Union (Section 90c)
- Desecration of flags and state symbols of foreign states (Section 104);
- Disturbing public peace by threatening to commit offences (Section 126);
- Incitement of masses (Section 130);
- Instructions for committing criminal offences (Section 130a);
- Revilement of religious faiths and religious and ideological communities (Section 166);
- Disturbance of exercise of religion (Section 167);
- Insult (Section 185);
- Malicious gossip (Section 186);
- Defamation (Section 187);
- Malicious gossip and defamation in relation to persons in political life (Section 188);
- Defiling memory of dead (Section 189).

Other justified limitations may be found in regulations on professional secrecy (violations are punishable under Section 203 of the Criminal Code as violation of private secrets).

Protection of young persons within the meaning of Article 5(2) of the Basic Law is provided, *inter alia*, under Section 18 of the Youth Protection Act[38], which prescribes the indexation of certain media considered as harmful for young persons.

4.2. Specific aspects

4.2.1. Crimes of opinion

German law provides a number of criminal offenses related to crimes of opinion, targeting specific categories of opinions or statements (but not specific opinions or statements as such), in

[38] Jugendschutzgesetz (BGBl. I 2002, p. 2730), as amended.

particular disparagement, incitement of masses, insult and defamation.

Chapter 11 of the second part of the Criminal Code covers offences relating to religion and ideology and contains, *inter alia*, Section 166, which punishes "Revilement of religious faiths and religious and ideological communities". This provision applies to whoever publicly, in a manner that is suitable for causing a disturbance of the public peace, either reviles the religion or ideology of others or reviles a church or other religious or ideological community in Germany or its institutions or customs. It must however be noted that this provision does not protect religious beliefs or individual feelings, but public peace. Although Section 166 of the Criminal Code must be interpreted strictly in the light of freedom of expression, a specific statement may be punishable under this provision if, from an objective point of view, it merely aims to express malicious contempt towards a religious belief.[39]

Furthermore, Section 167 of the Criminal Code punishes "Disturbance of exercise of religion" and is aimed at whoever either intentionally and seriously disturbs a religious service or an act of religious worship of a church or other religious community in Germany or commits defamatory mischief in a place which is dedicated to the religious worship of such a religious community.

With regard to the offence of insult or similar offences under Sections 185 et seq. of the Criminal Code, it should also be noted that Article 193 of said Code (Safeguarding legitimate interests) states that critical opinions about scientific, artistic or commercial achievements, similar statements which are made to exercise or protect rights, or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors against their subordinates, official reports or judgments by a civil servant and similar cases only entail criminal liability to the extent that the existence of an insult results from the form of the statement or the circumstances under which it was made.

4.2.2. Apology of a crime

[39] District Court of Cologne, Judgment of 10 August 2016, 523 Ds 154/16; Regional Court of Münster, Judgment of 29 March 2017, 13 Ns - 81 Js 3303/15 - 15/16, 13 Ns 15/16.

In line with the general requirement that limitations to freedom of expression may not target specific opinions, apology of a crime is not, as such, punishable under German Law.[40]

Due to the particularities of German history, one important exception exists, however, with respect to holocaust denial and, more generally, offences related to Germany's National Socialist past, which are punishable as incitement of masses under Article 130 of the Criminal Code. In this very specific context, interferences in freedom of expression may rely on provisions that do not meet the threshold of a general law under Article 5(2) of the Basic Law.[41] The FCC has explicitly underlined the exceptional nature of this approach and has stressed that it is not transposable to situations others than those related to Germany's Nationalist Socialist past. It also stressed that the Basic Law does not prevent the dissemination of Nationalist Socialist ideas as such. The European Court of Human Rights has accepted this position and confirmed that references to the Holocaust must be assessed in the specific context of the German past.[42]

Hence, Section 130(3) of the Criminal Code punishes whoever publicly or in a meeting approves of, denies or downplays acts of genocide committed under the rule of National Socialism in a manner which is suitable for causing a disturbance of the public peace. This offence specifically includes holocaust denial and may be committed, for example, by publicly exhibiting a tattoo reminding of concentration camps[43] or uploading videos denying the holocaust.[44] The act of denying is generally defined as disputing established historic facts that are considered to be true.[45] In this specific context, the National Socialist genocide of European Jews is deemed a manifest historic fact, without there being any need to consider more evidence. Therefore, Holocaust denial as a manifestly untrue statement of fact does not fall, as such, within the

[40] Criminal prosecution may however be considered under Section 111 (Public incitement to commit offences) of the Criminal Code.
[41] FCC, Orders of 4 November 2009, 1 BvR 2150/08, of 22 June 2018, 1 BvR 673/18, and of 22 June 2018, 1 BvR 2083/15. In other words, such circumstances allow for special legislation targeting a specific opinion.
[42] ECtHR, Judgment of 8 November 2012, no 43481/09, PETA Deutschland v. Germany.
[43] Higher Regional Court of Brandenburg, Order of 12 April 2017, (1) 53 Ss 17/17 (13/17).
[44] Federal Court of Justice, Order of 6 August 2019, 3 StR 190/19.
[45] Federal Court of Justice, Order of 3 May 2016, 3 StR 449/15.

scope of freedom of expression under Article 5(1) of the Basic Law. If however the person's statement is based on her own research and conclusions thereof, criminal liability must be assessed in the light of freedom of expression and the principle of proportionality. In both situations, the FCC has deemed criminal liability under Article 130(3) of the Criminal Code compatible with Article 5(1) of the Basic Law.[46]

Furthermore, Article 130(4) of the Criminal Code punishes whomever publicly or in a meeting disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule incurs a penalty of imprisonment for a term not exceeding three years or a fine.

Certain statements may also be punishable under Section 186 (Malicious gossip) and Section 189 (Defiling memory of dead) of the Criminal Code. Displaying National Socialist items or symbols may be punishable under Section 86a (Use of symbols of unconstitutional organisations) of the Criminal Code.

4.2.3. Desecration of state symbols

Burning of the **national flag** in punishable under Section 90a of the Criminal Code (Disparagement of state and denigration of symbols). Section 90a(2) of the Criminal Code punishes whoever removes, destroys, damages, renders unusable or defaces, or commits defamatory mischief on a flag of the Federal Republic of Germany or of one of its *Länder* which is on public display or a national emblem which has been mounted in a public place by an authority of the Federal Republic of Germany or of one of its *Länder*.

Moreover, Section 90a(1) No 2 of the Criminal Code punishes whoever publicly, in a meeting or by disseminating relevant material, denigrates the colours, flag, coat of arms or the anthem of the Federal Republic of Germany or of one of its *Länder*. Denigration within that meaning is understood as an act of particular contempt, notably acts which qualify as insult or similar offences under Sections 185 et seq. of the Criminal Code. However, on account of their constitutionally guaranteed freedom of expression, citizens remain free to question fundamental appraisals of the constitution or to demand the amendment of fundamental principles.[47]

[46] FCC, Order of 22 June 2018, 1 BvR 673/18.
[47] FCC, Order of 15 September 2008, 1 BvR 1565/05.

As for foreign state symbols, Section 104 of the Criminal Code punishes whoever removes, destroys, damages or defaces, or commits defamatory mischief on a flag of a foreign state which has been put on public display as required by legal provisions or a recognised custom or a national symbol of such a state which has been mounted in a public place by a recognised mission of such a state. Since 2020, disparagement of symbols of the European Union is punishable under Section 90c of the Criminal Code.

The issue of insult to foreign heads of state was intensively discussed in the context of the above-mentioned Böhmermann Affair, as the presenter in question was also prosecuted under Section 103 (Insult to organs and representatives of foreign states) of the Criminal Code. The proceedings were however discontinued and, owing to severe public criticism related to the case, this criminal offence was repealed in 2017.

4.2.4. Display of religious symbols

Although some forms of display of religious symbols may also fall within the scope of freedom of expression, this issue is mostly assessed with regard to freedom of faith and conscience, protected under Article 4 of the Basic Law.[48] Whereas freedom of expression may be restricted, notably, by general laws within the meaning of Article 5(2) of the Basic Law, interferences to freedom of faith under Article 4 of the Basic Law may only be justified by other provisions of the Basic Law itself, in particular conflicting fundamental rights of third parties, or other constitutional interest, such as the State's educational mission. In such a case, freedom of faith and other conflicting rights or interests must be carefully balanced by means of practical concordance (*praktische Konkordanz*).

In both public and private sectors, the freedom of faith of persons wishing to wear religious symbols in the workplace generally takes precedence over conflicting interests. Recent constitutional case law tends towards a liberalization of the right to wear religious symbols, allowing a ban only when there is a concrete risk of harm to significant interests, determined on a case-by-case basis.

Therefore, in the civil service, a ban on wearing religious symbols, adopted on a sufficiently precise legal basis, is possible in

[48] According to Article 4(1) and (2) of the Basic Law, freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable and the undisturbed practice of religion shall be guaranteed.

the presence of a concrete risk of harm either to the neutrality of the State or to other significant interests linked to the civil service concerned, such as peaceful coexistence in schools. This approach stems from an appropriate balancing of the teacher's positive freedom of faith, on one side, and the students' negative freedom of faith, the right of parents to raise their children, and the educational mission of the State, which must be exercised with respect for confessional neutrality, on the other. Thus, the FCC has deemed unconstitutional several provisions banning teachers from wearing headscarves in state schools[49] or day-care centres[50]. Even though there is no settled case-law on this issue yet, similar decisions can be found concerning a pupils who was ordered to remove her niqab in school.[51] In contrast, the ban on wearing headscarves on trainee lawyers while performing official duties in court was upheld on the basis of the principles of ideological and religious neutrality of the state and the functioning of the administration of justice as well as the negative freedom of faith of third parties.[52] In the same vein, the state-ordered affixing of crosses or crucifixes in state compulsory schools is incompatible with the principle of religious neutrality stemming from Article 4 of the Basic Law.[53]

As regards private employment relationships, the wearing of religious symbols may be prohibited by an employer only in the presence of a proven economic risk constituting an effective infringement of entrepreneurial freedom.[54] This is not the case in an enterprise with a religious leaning, which may require compliance with rules of dress on the basis of a specific obligation of loyalty.

4.2.5. Conscientious objection

The right to conscientious objection is granted under Article 4(3) of the Basic Law, which guarantees the freedom of faith and conscience, and provides that no person shall be compelled against her conscience to render military service involving the use of arms.

[49] FCC, Judgment of 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10.
[50] FCC, Judgment, 18 October 2016, 1 BvR 354/11
[51] Superior Administrative Court of Hamburg, Order of 29 January 2020, 1 Bs 6/20.
[52] FCC, Judgment of 14 January 2020, 2 BvR 1333/17.
[53] FCC, Judgment, 16 May 1995, 1 BvR 1087/91.
[54] Federal Labour Court, Judgment of 24 September 2014, 5 AZR 611/12.

5. Conclusive remarks: Are there legal traditions in the area of freedom of expression?

In the absence of a clear definition of what can be considered a legal tradition, it is difficult to differentiate between situations of settled case-law on the sole basis of the Basic Law of 1949, and situations which may be linked to legal traditions, a concept that is not to be found, as such, in the Basic Law.[55]

A connecting factor may be a certain degree of constitutional continuity in the area of free speech, since freedom of expression, freedom of press, prohibition of censorship as well as freedom of art, science and teaching can be traced back to the Constitution of the German Empire of 1848 and the Weimar Constitution of 1919, although the precise content of these rights under the Basic Law has been solely defined by the FCC and other national courts. In this context, it may be of interest that the concept of general laws within the meaning of Article 5(2) of the Basic Law already existed in the Weimar Constitution of 1919, so that the concept of limitations to freedom of expression under this provision could be considered a legal tradition of German constitutional law.[56] To a certain extent, this reasoning could also apply to the FCC's approach towards Germany's Nationalist Socialist past, which allows for an exception to the overall system regulating limitations to freedom of expression.

More generally, under the FCC's case-law, the principle of proportionality has become a decisive substantial requirement in the area of the constitutional principle of the rule of law and a cornerstone of German law as a whole.

[55] A notable exception can be found in Article 33(5) of the Basic Law, which refers to traditional principles of the professional civil service (according to the FCC, this refers to the core of structural principles that have been generally or predominantly recognized and upheld as binding over a longer, tradition-building period, at least under the Weimar Constitution of 1919, Order of 2 December 1958, 1 BvL 27/55).

[56] But without there necessarily being a connection in terms of substantive content of these rights, as it is the case for instance in the area of state-church law, where the Basic Law directly refers to several provisions of the Weimar Constitution.

THE "SOCIAL PRINCIPLE" FRACTAL: THE ITALIAN CONSTITUTIONAL TRADITION AND THE REPRODUCTION OF THE ECONOMIC CONSTITUTION IN THE AREAS OF FREE SPEECH AND NATIONAL SOVEREIGNTY

Riccardo de Caria[*]

Abstract

This article investigates the Italian constitutional tradition and focuses specifically on one of its quintessential features (arguably its most peculiar and relevant one), i.e. what it proposes to refer to as "the social principle". Such principle encompasses the principle of equality, the labour principle, and the principle of solidarity, and is also closely connected to the anti-fascist principle.

After outlining some methodological guidelines to account for the criteria followed in selecting the materials, it makes the case that the centrality of the social principle is such as to ripple and spill over neighbouring, but apparently unrelated areas. It is submitted that such degree of protection is so high that it somewhat uniquely influences all the other parts of the constitution. Arguably, the social principle, enshrined in the economic (part of the) constitution, is a pattern that reproduces itself self-similarly in all the remaining articles, similarly to the recursive repetition of a basic unit in fractals.

The article considers extensively the areas where the social principle has arguably its most distinctive impact, namely free speech (and religious freedom) and the way in which national sovereignty is conceived. The conclusion also factors in the anti-fascist birth of the Italian constitution and offers some final remarks in order to strengthen my case on the "fractal" nature of the social principle[**].

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1. Introduction

This article investigates the Italian constitutional tradition and focuses specifically on one of its key features, arguably its most peculiar and relevant one, i.e. what I propose to refer to as "the social principle". This work is part of a broader study of common constitutional traditions in Europe, and particularly on the Italian tradition. Against the background of the European Law Institute's research project on common constitutional traditions, in this report on Italian constitutionalism I try to identify what stands out in the Italian constitutional tradition, what are its defining features[1].

define the most typical feature of the selected countries' national constitutional traditions, a first step towards a comparative effort trying to define what is actually common to Eu Member States' national constitutional traditions). They all provided me with extremely insightful comments and suggestions. The usual disclaimer applies.

[1] In its original version, the paper also featured a quantitative analysis that was published as a self-standing piece in this Journal, and which is meant to be considered as closely connected to the present one: R. de Caria, *The Use of National and Common Constitutional Traditions in Italian Legal Scholarship and High-Level Courts*, 12 Italian Journal of Public Law 448 (2020).

Prominent Canadian scholar Patrick Glenn referred to legal tradition as information that «involve(s) the extension of the past to the present», and that needs to «hav(e) been continuously transmitted, in a particular social context». In order to convey his idea of tradition as a repository of information that flows from the past to the present, he famously used the vivid image of a conceptual bran-tub[2].

To a certain extent, this work attempts to capture from the Italian "bran-tub" those principles that can be identified as typical of the Italian legal tradition, and in particular of the Italian constitutional tradition[3]. In this effort, I always bear in mind that «what can be properly termed German, French, English or Italian law is actually only a fraction of what currently goes under that name. To a great extent, these legal systems share a common stock of rules, institutions, legal concepts and ideas. None of them is wholly and exclusively German, French, English or Italian»[4]. I will therefore cautiously provide an overview of what appears to be the backbone of the Italian tradition, through the analysis of some relevant scholarship and most of all case-law. This analysis is intended to be part of a joint comparative effort, meant to juxtapose similar analyses conducted with regard to different national traditions, in order to identify what they share, what is "common", to use the wording of Art. 6 TEU[5].

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[2] P.H. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (2000), 11.

[3] Some very noble antecedents might be identified in the works by T.G. Watkin, *The Italian Legal Tradition* (1997); and, previously, J.H. Merryman, *The Italian Style*, *I: Doctrine*, *II, Law*, *III: Interpretation*, all published in 18 Stanford Law Review, respectively Nos. 2 (1965), 39-65; 3 (1966), 396-437; and 4 (1966), 583-611.

[4] M. Graziadei, *Comparative Law, Legal History and the Holistic approach to legal cultures*, 7 Zeitschrift für Europäisches Privatrecht 530, 539 (1999). See also the reflections by T. Duve, *Legal traditions: A dialogue between comparative law and comparative legal history*, 6 Comparative Legal History 15 (2018).

[5] It is worth recalling from the outset that Italy seems to have a certain "tradition" of openness towards "common" principles and theories that were spreading in Europe (although I submit that more ambiguities have emerged in this respect: see *infra* par 3.2). Let me just mention the abolition in 1865 of the special tribunals having jurisdiction on controversies between the citizens and the public administration, that was derived from the Belgian constitution of 1831, on its turn influenced by the British model, but also the same introduction of a Constitutional court in the 1947 constitution, drawing on previous experiences by other European countries, notably Austria; cf. G. della Cananea, *Silvio Spaventa e il diritto pubblico europeo*, available on the website of Giustizia Amministrativa.

In § 2, I will first of all submit a few methodological guidelines to account for the criteria followed in selecting the materials, and to explain why some fundamental rights and principles (different from the "social principle") can arguably be kept out of the picture, and only the social principle in its current version should be considered in my analysis.

My contention is first of all that the most distinctive character of Italian constitutionalism is what I think is best defined as the "social principle"[6], that encompasses the principle of equality, the labour principle, and the principle of solidarity, and is also closely connected to the anti-fascist principle, on which I will come back in the final paragraph.

In fact, this is rather uncontroversial: hardly anyone would dispute that the Italian constitution is centered around what can be termed as the social principle. It is indeed commonplace to identify a very high level of protection for social rights in the Italian constitution and the resulting constitutional jurisprudence, and to consider this one of their distinguishing features (so I will consider granted to take this assumption as a given).

However, I make a further case here, namely that the centrality of the social principle is such as to ripple and spill over neighbouring, but apparently unrelated areas. What I submit is that such degree of protection is so high that it somewhat uniquely influences all the other parts of the constitution. Arguably, the social principle, enshrined in the economic (part of the) constitution[7], is a pattern that reproduces itself self-similarly in all the remaining articles, similarly to the recursive repetition of a basic unit in fractals.

In § 3, I will turn to examine the areas where I believe the social principle has its most distinctive impact. I will focus on two in particular, in order to put my thesis to test, namely free speech (and religious freedom), on the one hand, and the way in which national sovereignty is conceived, on the other. I chose to extensively deal with the two areas identified because the analysis of the case-law,

[6] To be sure, the expression is not per se original (for instance, it is the title of book by H. Holley, published in New York by Gomme, 1915), but it does not seem to have been used in the meaning it is used here, at least in the legal scholarship in English concerning Italy.

[7] On which suffice it to refer to G. Bognetti, *La costituzione economica italiana* (1995[2]).

far beyond what can be accounted for in this article, made them stand out distinctively.

Finally, in § 4, I will build on the analysis, also considering the anti-fascist birth of the Italian constitution, and offer some conclusive remarks in order to strengthen my case on the "fractal" nature of the social principle (§ 4.).

2. The construction of the national "constitutional tradition": the social common denominator

In spite of the lack of comprehensive and thorough reflections by the top Italian courts, at least as it emerges from a textual search[8], it is nonetheless arguably possible to identify the underpinnings that build up the Italian constitutional tradition, especially in the case-law of the Constitutional Court (on which I will focus almost exclusively).

2.1. The reasons to exclude other fundamental rights and principles

I have anticipated above that the first step of my argument is that the social principle is an essential component of the Italian constitutional tradition. As I explained *supra* par. 1, claiming its importance for Italian constitutionalism is straightforward.

It is common knowledge that equality represents the most frequently invoked parameter in the process judicial review of legislation. The Italian constitution provides for the protection of equality under Art. 3[9], which is traditionally said to identify two forms of equality: a "formal" one, roughly corresponding to the principle of non-discrimination (first paragraph), and a "substantial" one, that entails the intervention by the public authorities in order to effectively improve the material condition of disadvantaged citizens (second paragraph).

The principle of (substantial) equality makes up a common bloc with the principle of solidarity, explicitly mentioned in Article

[8] I am referring here to my article for this Journal: R. de Caria, *The Use of National and Common Constitutional Traditions*, cit. at 1.

[9] «1. All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. 2. It is the duty of the Republic to remove the economic and social obstacles which by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country».

2 of the constitution[10], and with the "labour" principle, an overarching value that runs across the whole (first part of the) constitution and compels the government to bring about the protection of workers. Finally, substantial equality is also arguably connected to the constitutional principles on taxation, that in Italy tend to be meant as a justification of this coercive power of the state, rather than as a limitation of this power[11]. In order to encompass all these strands in one single expression, I have proposed to synthetically refer to all of them jointly by using the phrase social principle.

My first contention is that not only is the social principle important, it rather is the most distinguishing feature of Italian constitutionalism. This less straightforward statement implies leaving out from this paramount position some fundamental freedoms such as freedom of the press, or freedom of association, or freedom from unlawful arrests, or right to a fair trial, and so on.

Let me now spend some time illustrating the reason for such exclusion, which is two-fold: first of all, these fundamental rights, that are typically "negative" rights according to a traditional classification (i.e. they require government to avoid interfering with these rights, without requiring a positive behaviour on its part), are part of a broader constitutional tradition, not typically Italian. Admittedly, if one looks at how most guarantees are formulated at the European level, he will be able to trace some piece of the Italian constitutional tradition, at least from the Albertine Statute era, if not from even before. In fact, such rights also do belong to the constitutional traditions common to the Member States, but they are now part of a broader consensus, and thus fall outside the scope of this analysis, that tries to identify what is typically, characteristically national in this respect[12].

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[10] «The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled».

[11] Broadly on the constitutional framework of taxation from a comparative angle, R. de Caria, *Taxes* (entry), in R. Grote, R. Wolfrum and F. Lachenmann (eds.) *Max Planck Encyclopedia of Comparative Constitutional Law* (2018). On the problematic relationship between the Italian constitutional framework on taxation and fundamental human rights, M. Greggi, *Human Rights and Taxation*, Itax Papers on Taxation, No. 6 (2017).

[12] The conceptual premise of this choice is very well captured in the following passage by B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law* (2007), 48,

Secondly, basically all these rights undergo a substantial exercise of balancing under the Italian constitutional system, which significantly relativizes their reach. From the analysis in the following paragraphs, I believe it will emerge why this conclusion is applicable for instance to respectively economic rights and free speech, but arguably the same holds true with regard for instance to guarantees in matters of criminal law and criminal procedure.

To make just a few examples, the fascist era code of criminal procedure was indeed replaced by a new one more respectful of individual safeguards only in 1988-89; the Constitutional Court even struck down some of the most relevant new guarantees with the so called "*svolta inquisitoria*" ("inquisitorial turnaround")[13] of 1992[14], which made it necessary for the Parliament to amend the Constitution in order to reaffirm these rights[15]; more recently, it was only after an important judgment of the European Court of Human Rights condemned Italy for violation of the prohibition of double jeopardy (*ne bis in idem*)[16], that the Constitutional Court was persuaded to go down a similar road[17], and more recently it has even paved the way for a potential, partial backtrack[18], in light of a new course of the ECtHR[19]; or, in another very important case, concerning the confiscation of property in the absence of a criminal punishment, the Constitutional Court was even able to induce the

in the paragraph titled "How 'common' are our common values?": «[T]here can be little doubt that many of the core rules found in England, France, and Germany – to mention but three countries only – differ substantially as far as notions of democracy, judicial review, and human rights are concerned. Despite their undisputed similarities, European legal cultures are thus still far apart in many ways, and judges who have to determine (and then utilize) the common constitutional traditions of these 25 societies face a truly daunting task».

[13] On this series of events, see P. Ferrua, *Il giusto processo* (2012[3]), 3 ff.

[14] Constitutional Court, judgments 22-31 January 1992, No. 24; 28 May-3 June 1992, Nos. 254 and 255.

[15] This happened with the introduction in Article 111 of the Constitution of 5 new paragraphs entrenching the so called 'fair trial' guarantees.

[16] ECtHR, judgment 4 March 2014 (18640/10 and others), *Grande Stevens and Others v. Italy*.

[17] Constitutional Court, judgment 21 July 2016, No. 200. From this point of view, the Italian Constitutional Court's order in the *Taricco* case (on which see *infra* par. 3.2), where it took a much more convinced step in favour of procedural guarantees in the criminal field, does not seem nearly enough to allow us to identify in Italy a fundamental "tradition" of protection of individual rights in the criminal sphere.

[18] Judgment No. 43/2018.

[19] *A. and B. v. Norway*, judgment 15 November 2016.

ECtHR to overturn a previous judgment of theirs, in the sense of finding such practice legitimate[20]. Finally, the Constitutional Court upheld both some limitations to the fundamental principle of retroactive application of the more lenient penalty[21], as well as the legitimacy of the criminal punishment provided for the people placed under special police supervision who did not abide by the requirement «to lead an honest and law-abiding life and not give cause for suspicion»: the Italian Court found that this requirement did not run afoul of the principle of legal certainty[22], whereas more recently the Strasbourg Court went down the opposite road[23].

In summary, in spite of the fact mentioned in the previous paragraph that this is the area where the reference to common constitutional traditions is more frequent, we can observe a relatively frequent divergence between the national constitutional tradition and the European standards, that usually require higher standards: this advises me to exclude such field from the subjects considered in this paper, because the lower threshold might even be an Italian feature, but it almost certainly does not contribute to defining a European constitutional tradition, that seems instead headed in a different direction (with *Taricco* as a notable exception).

2.2. Some current trends in the evolution of the social principle

Having presented my arguments on why principles other than the social principle should be kept outside the essential ingredients that define the Italian constitutional tradition, let me now move to describe a little bit more in detail how the social principle has evolved in recent years. It goes beyond the scope of this work to outline all the details of the social principle, a laborious task that would probably require at least a full-length book to be accomplished: I will therefore focus on some particularly emblematical aspects, with particular reference to the current evolution (this topic is also part of the broader issue of the

[20] The relevant rulings are the following: ECtHR, Second Section, judgment 29 October 2013, Application No. 17475/09, *Varvara v. Italy*; Constitutional Court, judgment 26 March 2015, No. 49; ECtHR, Grand Chamber, judgment 28 June 2018, Applications nos. 1828/06 and 2 others, *G.I.E.M. S.R.L. and Others v. Italy*.
[21] Constitutional Court, judgment 19 July 2011, No. 236.
[22] Constitutional Court, judgment 23 July 2010, No. 282.
[23] ECtHR, Grand Chamber, judgment 23 February 2017, Application No. 43395/09, *De Tommaso v. Italy*.

relationship between the Italian legal system and the European one, to which par. 3.2 is devoted, *infra*).

The Italian model of protection of economic rights is quite original from a comparative perspective, and it involves their subordination to the social principles. As the constitutional wording puts it: «Private-sector economic initiative is freely exercised. It cannot be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity» (Art. 41, paras. 1-2); «Property is publicly or privately owned. Economic assets belong to the State, to entities or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired and enjoyed as well as its limitations so as to ensure its social function and make it accessible to all» (Art. 42, paras. 1-2).

The key notions, closely connected to each other, are "social usefulness" and "social function". Such expressions allowed indeed the so-called functionalization of economic rights by the legislator[24]. According to the late prominent constitutional scholar Giovanni Bognetti, this was not in fact the model envisaged by the drafters of the constitution, nor the one promoted by the Constitutional Court; to be sure, it was almost averse to it. However, the Constitutional Court was not equipped to counteract the legislator's push towards the highly socially-oriented interpretation of this clause[25], and as a result the legislator was virtually unbound in promoting its social agenda in the implementation of Article 41 and 42.

One might not share Bognetti's thesis. For instance, a possible objection is that the Constitution itself was lacking a formal protection of the competition principle, or the explicit acknowledgement of a general principle of freedom in the economic field[26], and that these was already some unambiguous choices made by the constituent assembly towards a socially-oriented economic model. Nonetheless, the fact remains that property and freedom of initiative are not part of the Italian constitutional tradition, if not in their "functionalized" version: to

[24] R. de Caria, *Appunti sulla giurisprudenza costituzionale in materia di proprietà (con cenni di diritto comparato)*, IUSE Working Paper, 2017-1/24-ECLI (one of the latest judgments on the freedom of initiative and the right of property is the one on the ILVA case, No. 58 of 2018. Also interesting is the Court of Cassation's ruling No. 20106 of 2009 on the abuse of right).

[25] G. Bognetti, *Costituzione economica e Corte Costituzionale* (1983).

[26] Such a principle was more recently introduced by decreto legge No. 138 of 2011.

be sure, what makes up the constitutional identity is once again the social principle, as argued in the previous paragraph, that prevails over economic freedoms, to the point of casting doubt on their configuration as *fundamental* rights[27].

This scenario has been subject to a partial upheaval as a result of the influence of European Union law over the Italian legal system (as well as, to a lesser extent from a quantitative point of view, but still very importantly, of the European Convention of Human Rights system[28]). I will consider this aspect in the following paragraph. As far as the issue of economic rights is concerned, however, certainly European law has led Italy to some major openings to the market economy. Arguably, a reference to the protection of competition was eventually included in the text of the Constitution[29] due to the long evolution brought about by the European institutions, even though even the 2001 reform the fell short of introducing an outright competitive principle.

In this vein, Italy has experienced significant economic reforms due to acts such as the *Bolkestein* directive, or in the field of state aid[30]. However, this highly remarkable changes do not seem to have affected the fundamental principle of solidarity and equality. The Constitutional Court has recently reaffirmed that

[27] This thesis was famously advocated, with regard to the right of economic initiative, by M. Luciani, *La produzione economica privata nel sistema costituzionale* (1983), and with regard to the right of property, by S. Rodotà, *Il terribile diritto*, *Studi sulla proprietà privata* (1981). Other authors disagree; the question does not appear to be settled in either sense in the scholarship and in the case-law of the Constitutional court, but the very existence of the debate is evidence of the controversial extent of protection of economic rights in the Italian tradition.

[28] The most prominent example is probably the case of judgments Nos. 348 and 349 of 24 October 2007, that eventually aligned Italy with the standards required by the Strasbourg Court, the latest time in the case *Scordino*, Grand Chamber, judgment of 29 March 2006, application No. 36813/97, as regards the entity of the award of monetary compensation for the cases of expropriation. Instead, in the already mentioned case of confiscation without a criminal judgment, the Italian Court in judgment No. 49/2015 was reluctant to adhere to the standards imposed by the ECtHR in its *Varvara* judgment, by alleging its case-law in point was not enough "consolidated", and the ECtHR has recently found itself obliged to reaffirm its precedent as far as the issue of violation of property is concerned (while departing from it, as recalled above, on the issue of violation of Article 7 ECHR).

[29] Art. 117, par. 2: «The State has exclusive legislative powers in the following subject matters: […] e) competition protection […]».

[30] R. de Caria, *La libertà economica in Italia? Si decide in Europa*, Agenda Liberale (2013).

social rights cannot yield to economic ones[31], state aid is still a typical feature of Italian economic policies, with the endorsement of the Constitutional Court[32], and in general this evolution does not seem too difficult to be reversed by ordinary legislative acts, thus not amounting to anything traditional[33].

Against this background, a chronic Italian problem has been the difficulty to reconcile the need to keep the state budget under control, and the political will to foster social rights. This issue has been subject to some careful consideration by the Constitutional Court, whose case-law has also evolved over time. For several years, many social rights, at the level of the "material constitution", were found to be "financially conditioned", namely their exercise was possible within the limits posed by the available resources[34]. To be sure, this conclusion was reached not for the sake of keeping the budget under control – I would argue, in fact, that the balanced budget has never been an Italian constitutional tradition, despite its passionate advocacy by Luigi Einaudi[35]–, but rather with the goal of safeguarding the discretionary powers of the legislator.

However, during the recent years of crisis, the question has arisen whether social rights and budgetary constraints can be played, or balanced, against each other.

For example, the Court did not shy away from deciding that a certain pension scheme, designed to improve the budget situation, was unconstitutional, even if this implied about 5 to 10 billion euros of further deficit to cope with. This declaration of unconstitutionality of the pension reform, that had suspended the adjustment for inflation of certain entitlements, was based on several of the above-mentioned parameters, combined: «the fundamental rights pertaining to the pension relationship, which are rooted in unequivocal constitutional parameters – namely the proportional nature of the pension, understood as deferred remuneration (Article 36(1) of the Constitution) and its adequacy (Article 38(2) of the Constitution) – have been violated. The pension

[31] Judgment No. 58/2018 on the ILVA case.

[32] Constitutional Court, judgment No. 270 of 2010 on the Alitalia case.

[33] Within the Italian scholarship in English on the subject, cf. above all G. de Vergottini, *The Italian economic constitution: Past and present* (2012), available at Researchgate.net.

[34] This was explicitly affirmed with regard to Article 38 (right to labour), and even before to Article 32 (right to health).

[35] Su cui v. P. Silvestri, *Il pareggio di bilancio. La testimonianza di Luigi Einaudi: tra predica e libertà*, 47 Biblioteca della libertà, No. 204 online (2012).

relationship must be construed as a certain, albeit not explicit, assertion of the principle of solidarity enshrined in Article 2 of the Constitution, and at the same time as a manifestation of the principle of substantive equality enshrined in Article 3(2) of the Constitution»[36].

So far, there have been no cases where the Court has been directly called to a balancing between the economic principles of fiscal restraint deriving from the Eu legal systems, and the social principle enshrined in its Constitution. What has come closest to such a balancing was a judgment on the constitutional legitimacy of a regional statute granting some rights to the disabled people «with regard to the phrase ", subject to the financial resources allocated within annual budgetary laws and registered under the relevant expenditure item,"»[37]. In other words, the Court refused to allow the social principle to be balanced with the need for sound public finances[38], and this is probably a good indication of what it would do also whether Eu legislation came under scrutiny, in that case likely triggering also the counter-limits[39].

[36] Judgment 10 March 2015, No. 70, § 10 of the *Conclusions on points of law*. Unless otherwise specified, the translations of Constitutional Court rulings are (like in this case) the ones appearing on the website of the Constitutional Court (the rules were subsequently reapproved and this time passed the constitutional scrutiny).
[37] Judgment 16 December 2016, No. 275.
[38] The issue was considered by several judgments of the Constitutional court: for an overview before the judgment No. 275 of 2016, for instance M. Midiri, *Diritti sociali e vincoli di bilancio nella giurisprudenza costituzionale*, in AA.VV. (Eds.), *Studi in onore di Franco Modugno*, III (2011), 2235-2275. After the judgment No. 275 of 2016, for instance M.C. Paoletti, *Diritti sociali e risorse finanziarie: la giurisprudenza della Corte Costituzionale*, available at www.diritto.it (2018); see also the literature referenced therein.
[39] A case in this direction is made by L. Cavallaro, *I diritti sociali come controlimiti. Note preliminari*, 2 Labor: Il lavoro nel diritto 149 (2017). More broadly on the constitutional consequences of the financial crisis, T. Groppi, *The Impact Of The Financial Crisis On The Italian Written Constitution*, 4 Italian Journal of Public Law 1 (2012). On the "counter-limits" doctrine, among many contributions of the Italian scholarship in English on the subject, see one of the most recent, D. Paris, *Limiting the 'counter limits'. National constitutional courts and the scope of the primacy of EU law*, 10 Italian Journal of Public Law 205 (2018). This doctrine was introduced by the Italian and German constitutional courts, respectively with judgments *Frontini* (18 December 1973, No. 183) and *Solange I* (29 May 1974, BVerfGE 37, 271 [1974]), as a response to ECJ's judgment in *Internationale Handelsgesellschaft*, the ruling where the European Court first introduced the notion of CCTs.

Other judgments have offered an apparently different picture, as I will explain *infra* par. 3.2, where I will offer my proposal on how to make sense of and reconcile this seeming contrast.

3. The reproduction of the social principle in apparently unrelated areas

In the previous paragraph, I explained why I submit that some constitutional rights, in spite of their importance *per se*, should not be considered an essential element of the Italian constitutional tradition. To be sure, one could even argue that, if anything, restrictions to these rights – *i.e.*, the operation of balancing them with other constitutional principles, such as equality, which is in fact part of the Italian identity – are what constitutes a part of the Italian constitutional tradition. From this point of view, however, they arguably do not constitute a typically Italian feature, also given the ECtHR's case-law in point[40], therefore I will not investigate them further.

Let me now move to the second step of my argument, namely that the social principle has a "fractal" feature in the Italian constitutional tradition.

3.1. Freedom of expression and its restrictions in light of the social principle (plus a brief note on religious freedom and the relationship with the Catholic Church)

First of all, let me consider freedom of speech. Such right is undoubtedly an important part of the new constitutional order established in 1948, but it is not nearly as protected as for example in the United States (where I would definitely argue it is a bedrock, if not the bedrock of the American constitutional tradition[41]): the

[40] Cf. the factsheet on *Hate speech* prepared by the Court itself, updated in March 2020, available at www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf; I have made this point in R. de Caria, *"Le mani sulla legge". Il* lobbying *tra* free speech *e democrazia* (2017), 255 and 298, where I maintained that the case *Perinçek v. Switzerland* (Grand Chamber, 15 October 2015, application no. 27510/08) did not change the Court of Strasbourg's traditional stance against the protection of hate speech, which was an indication of a different level of protection of free speech in Europe, than the "absolute" one it enjoys in the Us. I believe two subsequent cases have corroborated my position: *Annen v. Germany (nos. 2 to 5)* (V, 20 September 2018, application Nos. 3682/10, 3687/10, 9765/10 and 70693/11), and *E.S. v. Austria* (V, 25 October 2018, application no. 38450/12).

[41] I made this point in R. de Caria, *"Le mani sulla legge": il* lobbying *tra* free speech *e democrazia*, cit. at 40, in particular at 54 ff. and 294 ff.

Constitutional Court is comfortable with the enduring existence not only of crimes of criminal solicitation, directed towards both ordinary citizens (art. 414 of the penal code)[42] and members of the military (art. 266 of the penal code)[43], but even of outright crimes of opinion, such as the defamation of the Republic, of the constitutional bodies, and of the Armed Forces (art. 290 of the penal code)[44], or the defamation of a religion by way of offence to a person

[42] See judgment 4 May 1970, No. 65: «freedom of speech, guaranteed by art. 21, first paragraph of the Constitution, finds its limits not only in the protection of morality, but also in the need to protect other important constitutional assets, and in the need to prevent and stop disturbances of public safety, the protection of which constitutes an immanent purpose of the system (judgments No. 19 of 8 March 1962, No. 87 of 6 July 1966, No. 84 of 2 April 1969)».

[43] See judgment 27 February 1973, No. 16: «A coarse manifestation of thought, meant as a protest against the social order, propaganda for more free customs, etc., can be found in any crime, and the materiality of some crimes, such as defamation, insult, contempt of a public official, offence, always presupposes a summary judgment of value and is constituted, typically, by a rough expression of thought. In the final analysis, the crimes of instigation or apology always result from an act of thought. But this does not mean at all that, only for this, the respective incriminating norms are unconstitutional, because they are contrary to art. 21 of the Constitution. Freedom of thought cannot be invoked when the expression of thought is implemented through an offense to goods and rights that deserve protection. The instigation of a military to infidelity, or to betrayal, in all the forms provided for by art. 266 of the penal code (disobeying laws, violating the oath given or the duties of military discipline, or other duties inherent to one's own status), offends and threatens an asset to which the Constitution recognizes a supreme value and grants privileged protection, in accordance with all modern constitutions, whatever the ideology that inspires them, and whatever political-social regime expresses them. […] Compared to the incriminating provision of art. 266 of the penal code, the freedom guaranteed by art. 21 of the Constitution can allow modes of manifestation and propaganda for universal peace, non-violence, the reduction of the draft, the admissibility of conscientious objection, the reform of discipline regulation or others, which never materialize in an instigation to desert (as in one of the cases for which a question was raised), to commit other crimes, to generally violate the duties imposed on the military by the law. In fact, instigation is not a mere manifestation of thought, but is action and direct incitement to action, so that it is not protected by art. 21 of the Constitution».

[44] See in particular judgment 30 January 1974, No. 20: «Concerning the complaint of unconstitutionality relating to Article 21, first paragraph of the Constitution, this Court has repeatedly stated that the protection of morality is not the only limit to freedom of expression of thought, since there are instead other - implicit - limits dependent on the need to protect different assets, which are also guaranteed by the Constitution (judgments Nos. 19 of 1962, 25 of 1965, 87 and 100 of 1966, 199 of 1972, 15, 16 and 133 of 1973), thus in this case, the investigation must be aimed at identifying the asset protected by the contested provision and

ascertaining whether or not it is considered by the Constitution capable of justifying a discipline that to some extent may appear to be limiting the fundamental freedom at issue. So, the Court considers that it must be affirmed that, among the constitutionally relevant assets, the prestige of the Government, of the Judicial Order and of the Armed Forces should be included, in view of the essentiality of the tasks entrusted to them. The need arises for these legal institutions to be guaranteed the general respect, also in order for the accomplishment of the aforementioned tasks not be jeopardized. In reference to the particular complaint outlined in the order of the Venice Corte d'Assise, it certainly cannot be denied a constitutional foundation for the protection of the Armed Forces. Suffice it to note that, due to a series of explicit precepts, their organization is preordained, outside of political qualifications, to the defense of the Fatherland, through the participation of the citizens, called to fulfill a duty that the Constitution, significantly, qualifies as sacred (art. 52). Moreover, it is not excluded that, in a democratic regime, criticisms are allowed, with even severe forms and expressions, to the institutions in force, and both from the structural point of view and from the functional one […]. This freedom of criticism is not trampled by the provision, as a crime, of the offensive conduct subsumed in art. 290 of the penal code, in one or more of the various forms that it may take. According to the common meaning of the term, the offence [*vilipendio*] consists in considering vile, in denying any ethical or social or political value to the entity against which the manifestation is directed, so as to deny any prestige, respect, trust, in a way suitable to induce the recipients of the communication […] to the contempt of the institutions or even to unjustified disobedience. And this with evident and unacceptable disruption of the political-social system, as it is provided for and regulated by the current Constitution. Which, for the aforementioned reasons, does not exclude that we can, but with very different manifestations of thought, advocate for the changes that are deemed necessary». This approach was recently confirmed by Cass., judgment No. 28730/2013.

(art. 403 of the penal code)[45], as well as of the criminalization of hate speech[46], in spite of the "declamation" that freedom of speech

[45] See judgment 8 July 1975, No. 188: «the religious sentiment, as it lives in the intimate of the individual conscience and also extends to more or less numerous groups of people bound together by the bond of the profession of a common faith, is to be considered among the constitutionally relevant assets, as is shown by coordinating the arts. 2, 8 and 19 of the Constitution, and is also indirectly confirmed by the first paragraph of art. 3 and by art. 20. Therefore the offence [*vilipendio*] to a religion, especially if brought into being through the offence to those who profess it or a respective minister, as in the hypothesis of art. 403 of the penal code, which is of interest here, can legitimately limit the scope of operation of art. 21: as long as, of course, the offensive conduct is circumscribed within the right boundaries, marked, on the one hand, by the very etymological meaning of the word (which means "to hold to vile", and therefore to point out to the public contempt or derision), and on the other hand, by the need – mentioned above – to make the penal protection accorded to the asset protected by the norm in question compatible with the widest freedom of expression of one's thought in religious matters, with specific reference to which, not by coincidence art. 19 anticipates, in very explicit terms, the more general principle of art. 21. […] Instead, it is an offence, and therefore excluded from the guarantee of art. 21 (and of article 19), the contumely, the mockery, the offense, so to speak, as an end in itself, which at the same time constitutes an insult to the believer (and therefore an injury of his personality), and offence to the ethical values which substantiate and nurture the religious phenomenon, objectively observed».

[46] Usually, reference is made to judgments 16 January 1957, No. 1, and 25 November 1958, No. 74, that in some way circumscribed the constitutional legitimacy of the criminalization of the fascist manifestations of speech, however these rulings did not rule out this criminalization as such; similar conclusions can be reached with regard to judgments 3 July 1957, No. 120, and 14 February 1973, No. 15, that similarly limited the punishment of seditious speech; again in the same vein is judgment 5 April 1974, No. 108, that rewrote article 415 of the penal code in the part prohibiting the incitement to class hatred, by providing that such crime was compatible with the freedom of speech only as long as it only punished behaviours that brought a threat to public safety and peace. According to these rulings, hate speech prohibitions must be carefully crafted in order not to infringe on the freedom of speech, but as long as this requirement is met, they are constitutionally permissible.

enjoys the inviolability status[47], or is the "cornerstone of the democratic order"[48].

Recently, an interesting case has been the *Taormina* case (*NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*), involving an Italian lawyer – who was also a famous politician – who declared in a radio interview that he was not willing to hire homosexuals in his law firm. He was found guilty of discrimination – a civil offence punished by Decreto Legislativo 9 July 2003, No. 216, that transposed Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation – by both the Tribunale di Bergamo[49] and the Corte d'Appello di Brescia[50]: the judges rejected the lawyer's contention that his conviction violated his freedom of speech, in line with the "constitutional tradition" that I have (not) identified above. Currently, the lawyer has challenged his conviction before the Court of Cassation, again alleging a violation of his freedom of speech; the Court referred the question for a preliminary ruling to the Court of Justice of the EU[51], but the CJEU did not find a conflict between a Directive, on the one hand, and freedom of expression, on the other, protected by both the EU Charter of Fundamental Rights and the Italian constitution[52]. To date, no question of constitutionality has been raised in front of the

[47] See for instance judgment 26 March 1993, No. 112: «This Court has consistently affirmed that the Constitution, in art. 21, recognizes and guarantees everyone the freedom to express their thoughts by any means of dissemination and that this freedom includes both the right to inform and the right to be informed (see, for example, judgments Nos. 202 of 1976, 148 of 1981, 826 of 1988). Article 21, as the Court has been able to clarify, places the aforementioned freedom among the primary values, assisted by the clause of inviolability (Article 2 of the Constitution), which, by reason of their content, in general are translated directly and immediately in the subjective rights of the individual, of an absolute nature». In fact, the judgment goes on, immediately after this passage: «However, the implementation of these fundamental values in the relationships of life involves a series of relativizations, some of which derive from precise constitutional constraints, others from particular appearances of the reality in which those values are called to be implemented».

[48] Judgment 2 April 1969, No. 84, § 5 of the *Conclusions on points of law*.

[49] Trib. Bergamo, order 6 August 2014, No. 791.

[50] C. App. Brescia, judgment 11 December 2014-23 January 2015, No. 529/2014.

[51] Cass., order 20 July 2018, No. 19443.

[52] CJEU, judgment 23 April 2020, C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*.

Italian Constitutional Court concerning the legitimacy of the Italian law transposing the EU Directive.

The point I would like to make is that this overview, however brief, indicates first of all that the Italian tradition on free speech is in harmony with the European tradition of protecting it as far as it is instrumental to the fostering of democracy; most of all, it shows that the Italian tradition seems to go even further, by reconstructing free speech as a right worthy of protection inasmuch as it does not collide with the superior social dimension of democracy.

Moving on with the analysis, a case like *NH v Associazione Avvocatura per i diritto LGBTI – Rete Lenford* is relevant also as an indication of the Italian constitutional "climate" in the field of civil rights, and in the connected one of the so-called ethical issues. Here, I believe some conflicting indications come from both the normative and the judicial formant. For instance, after many years of debate, and the intervention of the Constitutional Court[53], Italy has recently passed a law recognizing civil unions for gay people (although falling short of introducing gay marriage)[54]; the case-law, especially of the Court of Cassation, has gone as far as to recognize the so-called stepchild adoption[55]; abortion has been legal for 40 years, after the Constitutional Court had partially paved the way for its legalization[56]; the Constitutional Court has also declared that the Constitution requires the law to let parents transmit also the mother's family name to a child[57]; however, the same Court has recently found that is it is not unconstitutional to prevent gay people from requesting their last name to be changed into their partner's when they enter into a civil union[58]; also, the issue of the display of the crucifix has been mostly handled by the

[53] Constitutional Court, judgment 11 June 2014, No. 170.
[54] Legge 20 May 2016, No. 76.
[55] See in particular judgment 22 June 2016, No. 12962, and order 31 May 2018, No. 14007.
[56] Constitutional Court, judgment 18 February 1975, No. 27, declaring article 546 of the criminal code unconstitutional «in the part in which it does not provide that the pregnancy may be interrupted when the further gestation implies damage, or danger, of a serious nature, and medically established in the terms explained in the reasons for the judgment, and not otherwise avoidable, for the health of the mother»: the court affirmed that «there is no equivalence between the right not only to life but also to health of someone who is already a person, like the mother, and the protection of the embryo that has yet to become a person».
[57] Constitutional Court, judgment 21 December 2016, No. 286.
[58] Constitutional Court, judgment No. 212/2018.

government[59] and the courts[60] in the sense of not finding the laws mandating such display unconstitutional.

These partially contradictory elements offer me the chance to briefly reflect on another potential strand of the Italian constitutional tradition, i.e. the special relationship with the Catholic Church. In summary, the above line of cases leads me to conclude that Italy is long past the "constitutional" influence of the Catholic Church, but that some important traces of this constitutional tradition still have a hold on the Italian constitutional framework.

As is well known, the Italian constitution explicitly regulates the relationship between the State and (only) the Catholic Church[61], that has traditionally enjoyed a special place in the Italian legal order, as witnessed by several elements: from some of the above-mentioned cases, to other judicial rulings, also from the Constitutional Court[62], from also some legislative choices[63], to some other constitutional ones: for instance, the constitutional definition of the family as «a natural society founded on marriage» (Art. 29), and the structuring of "ethical and social relations" (Title II of Part I) on the basis of the family (thus defined), as the foremost "social group" (Article 2), is certainly a tribute to the Catholic tradition.

However, there are many other indications that instead point in the direction of a robust secularization of the Italian constitutional tradition: besides the cases on free speech, some constitutional judgments, such as the 2014 one on gay unions[64], or the simultaneous one on the IVF[65], or the recent ruling on

[59] See the briefs in the famous *Lautsi* case of the ECtHR, judgment 18 March 2011.
[60] Council of State, Section II, Opinion 27 April 1988, No. 63; Council of State, Opinion 15 February 2006, No. 556; TAR Veneto, Section I, Order 14 January 2004, No. 56, and Council of State, judgment of 13 February 2006 (judgments in the *Lautsi* case); Cass, SS.UU. (*Tosti* case) 14 March 2011, No. 5924.
[61] Article 7: «The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are governed by the Lateran Pacts. Changes to the Pacts that are accepted by both parties shall not require a constitutional amendment».
[62] For instance, judgment 15 April 2010, No. 138, on the gay wedding (in spite of its recognition of "homosexual unions" as a "social group" under Article 2).
[63] Typically, on the so-called ethical issues, such as euthanasia, gay rights, divorce, abortion, IVF, scientific research involving the use of human embryos.
[64] Judgment 11 June 2014, No. 170.
[65] Judgment 10 June 2014, No. 162.

euthanasia[66], are all cases in point[67]. Moreover, one could argue that the secularization of family law has its roots in a different Italian tradition, the secular one dating back to the Risorgimento and the republicanism. This tradition has coexisted for a long time with the someway opposed Catholic one, thus leading me to find confirmation for my contention that we are dealing with something that lies in itself outside the core of the Italian constitutional tradition, and most importantly that also religious freedom is reconstructed from a "social" perspective: rather than framing it as an individualistic liberty, the Constitution tends to protect the social dimension of religion.

3.2. National sovereignty towards the inside (territorial indivisibility) and the outside (international law and the European legal system)

The other area where I have identified a spillover of the social Leitmotif is the one of national sovereignty. I will consider it both towards the inside and the outside.

As for the former, what comes into question is the principle of territorial indivisibility, and the constitutional prohibition of secession. Article 5 of the Constitution stipulates that Italy is "one and indivisible", and a fairly recent judgment by the Court derived from this rule a prohibition to hold a consultative referendum on the prospect of a secession of a Region (Veneto) from the rest of the country.

The key aspect of my contention is what the Court wrote in 2015 (in a judgment written by Marta Cartabia): «The consultative referendum provided for under Article 1 does not concern solely *fundamental choices on constitutional level*, which are as such precluded from the scope of regional referendums according to the case law of the Constitutional Court cited above, but seeks to subvert the institutions in a manner that is inherently incompatible with the *founding principles of the unity and indivisibility of the Republic* laid down in Article 5 of the Constitution. *The unity of the Republic is*

[66] Judgment 22 November 2019, No. 242.

[67] To a certain extent, also the judgments finding illegitimate the privilege granted to the Catholic religion in relation to the crimes of offence, go in the same direction: see judgments 13-20 November 2000, No. 508, on Art. 402 of the penal code; 1-9 July 2002, No. 327, on Art. 405; 29 April 2005, No. 168, on Art. 403. It is worth underlining that offence to religion *per se* were not found to be against free speech.

an aspect of constitutional law that is so essential as to be protected even against the power of constitutional amendment (see Judgment no. 1146 of 1988). There is no doubt – as this Court has also recognised – that the republican order is also based on principles including social and institutional pluralism and territorial autonomy, in addition to an openness to supranational integration and international law; however, these principles must be developed within the framework of the Republic alone: "The Republic, which is one and indivisible, shall recognise and promote local government" (Article 5 of the Constitution). According to the settled case law of this Court, pluralism and autonomy do not permit the regions to classify themselves as sovereign bodies and do not permit their governmental organs to be treated as equivalent to the representative bodies of a nation (see Judgments no. 365 of 2007, no. 306 and no. 106 of 2002). *A fortiori*, the same principles cannot be taken to extremes so as to result in the fragmentation of the legal order and cannot be invoked as justification for initiatives involving the consultation of the electorate – albeit only for consultative purposes – concerning prospective secession with a view to the creation of a new sovereign body. Such a referendum initiative [that, like the one at issue, contradicts] the unity of the Republic could never involve the legitimate exercise of power by the regional institutions and would thus lie *extra ordinem*»[68].

It appears to me that this is quintessential discourse on what constitutes an Italian constitutional tradition. The judgment even goes as far as to say that such a policy initiative would be precluded even if brought about with a constitutional law, which would be on its turn unconstitutional, thus defining a non-negotiable aspect of the Italian constitutional identity. To some extent, this approach was indirectly reaffirmed, more recently, in two other cases concerning different questions, but again involving the Region Veneto, the one where the centrifugal forces are the strongest: one concerned a decree-law issued by the national government to impose some new nation-wide vaccination obligations, that was

[68] Constitutional Court, judgment 25 June 2015, No. 118, § 7.2 of the *Conclusions on points of law* (emphasis added) (only the part within brackets is mine). It is interesting to note that the law at issue was struck down on the grounds that it violated four different articles: 5 (on the indivisibility of the Republic), 114 (on the territorial subdivision of the Republic), 138 (on the constitutional amendment procedure), and 139 (on the limits to the amendment power).

unsuccessfully challenged by the Region Veneto[69], and the other a law by the same Region «classifying the "Veneto people" as a national minority under the international Framework Convention for the Protection of National Minorities», that was struck down by the Constitutional Court[70].

I believe one point is crucial in this regard. The principle of territorial indivisibility is important *per se*, but should arguably be read in light of the social principle. The above-mentioned 2015 judgment did not take a position on this point, because a violation had already been bound in relation to article 5 of the Constitution, and the other potential violation of Article 3 was thus absorbed and not examined.

However, the point that a state breakup runs against the core principles of the republic because was raised in the complaint of the Italian government: the law of the Region Veneto was allegedly unconstitutional because it would have likely led to the strengthening of «movements that, instead of fostering social solidarity, can give rise to centrifugal tendencies or selfish claims in economic policy»[71]. Although this claim was not picked up in the Court's ruling, this is actually the very aspect that makes territorial indivisibility so undisputable: going against it threatens the social solidarity, and therefore it partakes its fundamental character within the Italian constitutional tradition.

Finally, one could still inquire into "how Italian" is the principle of territorial indivisibility. First of all, it is worth mentioning that this is one case where Italy has certainly contributed directly to the creation of a Europe-wide constitutional tradition: Article 5 of the Italian constitution was indeed explicitly taken as a model for Article 3 of the European Charter of Local Self-Government[72].

Moreover, from the opposite point of view, one could argue that this principle indivisibility is shared with several other constitutional traditions. Admittedly, a right to secede is explicitly provided only in very limited circumstances: the most typical example is Art. 4, § 2 of the Constitution of Liechtenstein; and only a minority of others seem to admit it (the United Kingdom, and

[69] Constitutional Court, judgment 18 January 2018, No. 5.
[70] Constitutional Court, judgment 20 April 2018, No. 81.
[71] § 1 of the *Facts of the case*.
[72] On which see G. Boggero, *Constitutional Principles of Local Self-Government in Europe* (2017).

some ex-socialist republics): the right to self-determination tends to be constructed under international law as being triggered only by situations of physical threat to a population within a territory perceived as foreigner. Italy thus seems to share indivisibility with countries such as France, or Spain, and in fact be part of a broader tradition. However, I maintain that the prohibition of secession is a distinctive Italian feature for at least two reasons: firstly, because indivisibility is affirmed in the part on the fundamental principles of the Italian constitution, and not in its organizational part, something that underlines its core importance in the Italian constitutional order; secondly, the above-mentioned connection to the principle of equality makes it enjoy a position that is not comparable to the one this principle has in other traditions, except maybe for the Spanish one. Taken in this perspective, it seems to meet very well my criterion of selecting the distinctive features of the Italian order that are potentially common to a large extent with most other Member States, but where the Italian tradition has something particularly original to contribute.

Moving on to the external side of national sovereignty, and particularly to the relationship between national law and Eu law, this issue has been subject to particularly intense debate between the Italian Constitutional Court and the (now called) Court of Justice of the EU, a story so important that it has partly contributed to reshape the Italian constitutional tradition. The openness to the international order has indeed been a very distinctive feature of the Italian constitution since the beginning[73], that eventually, after an initial stance in the opposite direction[74], the Constitutional Court has fully embraced[75], and that was reaffirmed in the 2001 major reform, with the already evoked rewording of Article 117 in order to explicitly recognize the supremacy of the Eu and of the international legal order[76].

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[73] Articles 10, par. 1 («The Italian legal system conforms to the generally recognised rules of international law»), and 11 («Italy […] agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organisations furthering such ends»).

[74] The very well-known *Costa v. Enel* judgment, No. 14 of 1964.

[75] The famous *Granital* judgment, No. 170 of 1984.

[76] Article 117, par. 1: «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». On its turn, the landmark judgments, already mentioned, Nos. 348 and 349 of 2007 affirmed that, under the

However, in several other crucial instances, the Italian Constitutional Court seems to have maintained the ultimate bulwark of national sovereignty, refusing to give the Eu, or the international legal order for that matter, complete leeway. This case-law is at a certain level connected to the one on the territorial indivisibility: the "gray area" we find in the field of international relations is due to the fact that openness to the international organizations, including the Eu, seems always balanced with a principle that the Constitutional Court has never seemed ready to sacrifice, i.e. national sovereignty. This reading of national sovereignty, on its turn, is coherent with a constitutional interpretation of Article 5 as prohibiting any legitimate form of secession, or any other peaceful form of state break-up.

Some of the most significant backlashes to the "traditional" Italian approach have occurred in recent years, in response to the push towards more integration, arguably as an attempt to defuse more radical reactions by the growing nationalist movements.

The first judgment I would like to mention is the 'historical' ruling on the issue of state immunity[77], where the Court for the first time actually activated the so-called counter-limits[78]. The case concerned the claims brought forward by some victims of Nazi crimes. After the Italian Court of Cassation had awarded these claimants an indemnification, sentencing the Republic of Germany liable for the crimes committed during the Third Reich and thus disregarding the principle of state immunity, Germany had challenged this judgment in front of the International Court of Justice, that had upheld this action. Italy had complied with this ruling by passing a new law that mandated the Italian judges to

new wording of Article 117, violations of the European Convention, as interpreted by the Strasbourg Court (a specification only partially restricted by judgment 49/2015), amounted to an indirect violation of the Italian constitution. On the adaptation of Italian law to international human rights law, see the annual publication by Padova University Press, *Annuario italiano dei diritto umani*; on the relationship between fundamental European rights and Italian constitutional rights, U. De Siervo, *I diritti fondamentali europei e i diritti costituzionali italiani (a proposito della «Carta dei diritti fondamentali»)*, in G. Zagrebelsky (Ed.), *Diritti e Costituzione nell'Unione Europea* (2003), 258 ff.

[77] Constitutional Court, judgment 22 October 2014, No. 238. It was immediately defined 'historical' by L. Gradoni, *Corte costituzionale e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile* (2014), available at www.sidiblog.org.

[78] See *supra* footnote 39.

always abide by the principle of state immunity, but this law was challenged before the Constitutional Court. And the Court agreed that such law was unconstitutional, because no principle of international law can ever lead to sacrificing the fundamental principles of the Italian constitutional order[79].

Moreover, this judgment deserves attention also because of its passage on the role of the Italian (and Belgian) courts in redefining the contents of the international custom on State immunity from civil jurisdiction, limiting it to the acts committed *iure imperii* and excluding the ones committed *iure gestionis*: this is an example of Italian tradition that has contributed to (re)shaping a common one, that goes even further the European borders.

Other two rulings concern the so called *Taricco* saga, another case where the Italian Constitutional Court threatened to activate the "counter-limits" (even without explicitly mentioning them)[80].

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[79] § 3.2. of the *Conclusions in Point of Law*: «As was upheld several times by this Court, there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a "limit to the introduction (…) of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, par. 1 of the Constitution" (judgment No. 48/1979 and No. 73/2011) and serve as "counter-limits" [controlimiti] to the entry of European Union law (*ex plurimis*: judgments No. 183/1973, No. 170/1984, No. 232/1989, No. 168/1991, No. 284/2007), as well as limits to the entry of the Law of Execution of the Lateran Pacts and the Concordat (judgments No. 18/1982, No. 32, No. 31 and No. 30/1971). In other words, they stand for the qualifying fundamental elements of the constitutional order. As such, they fall outside the scope of constitutional review (Articles 138 and 139 Constitution, as was held in judgment No. 1146/1988). […] Moreover this Court has reaffirmed, even recently, that it has exclusive competence over the review of compatibility with the fundamental principles of the constitutional order and principles of human rights protection (Judgment No. 284/2007). Further, precisely with regard to the right of access to justice (Article 24 Constitution), this Court stated that the respect of fundamental human rights, as well as the implementation of non-derogable principles are safeguarded by the guaranteeing function assigned to the Constitutional Court (Judgment No. 120/2014)»; see G. Boggero, *Without (State) Immunity, No (Individual) Responsibility*, 5 Goettingen Journal of International Law 375 (2013).

[80] Constitutional Court, order No. 24/2017. Among the vast amount of Italian scholarship on it, see the following works in English on this case: before the order, see G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16 German Law Journal 1449 (2015); after the order, M. Bassini and O. Pollicino, *When Cooperation Means Request for Clarification, or Better for "Revisitation". The Italian Constitutional Court request for a preliminary ruling in the Taricco case*, 7 Diritto Penale Contemporaneo 206 (2017); the symposium on 4 Questions of International Law Journal (2017), with articles

The issue involved the punishment of tax fraud against the financial interest of the Eu: in a previous judgment, the CJEU had mandated the Italian authorities to disregard the statute of limitations when such interests were involved, but the Italian Court reacted to this imposition, by resubmitting a reference to a preliminary ruling to the CJEU, in which it practically urged it to reconsider its previous ruling, because it run afoul of the fundamental principle of legality, of which the statute of limitations was expression[81]. Order No. 24/2017 is rich of references to common constitutional traditions, that in the Court's perspective should be constructed as coherent with the national constitutional tradition protecting the principle of legality; more importantly, the decision reaffirms the specificity of the core principles of the national constitutional tradition, even above and against Eu law[82].

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by A. Tancredi, *Of direct effect, primacy and constitutional identities: Rome and Luxembourg enmeshed in the* Taricco *case*, 1 ff., D. Paris, *Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco*, 5 ff., and G. Rugge, *The Italian Constitutional Court on* Taricco*: Unleashing the normative potential of 'national identity'?*, 21 ff. After the judgment 115/18 that followed the new ruling by the CJEU, see also G. Piccirilli, *The '*Taricco *Saga': the Italian Constitutional Court continues its European Journey*, 14 *European Constitutional Law Review* 814 (2018). See also the following blog posts: D. Tega, *Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds*, in I-CONnect Blog, 2017; and the following entries on Verfassungsblog: On Matters Constitutional, all between January and April 2017: M. Bassini and O. Pollicino, *The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution*; D. Sarmiento, *An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)*; P. Faraguna, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*; L.S. Rossi, *How Could the ECJ Escape from the Taricco Quagmire?*.

[81] The CJEU eventually backed out with judgment *M.A.S. and M.B.*, C-42/17, which was followed by a new judgment by the Constitutional Court, No. 115/2018, in this case with no reference to CCTs or national constitutional traditions.

[82] The key passage from our perspective is the following, concerning the underlying crucial issue of the interpretation of the statute of limitation as a substantial or procedural rule: «It is well known that certain Member States by contrast embrace a procedural conception of limitation, to which the judgment given in the Taricco case is closer, based also on the case law of the European Court of Human Rights; however, there are others, including Spain (STC 63/2005 of 14 March), which adopt a substantive concept of limitation that does not differ from that applied in Italy. It is useful to note that, in the European legal context, there is no requirement whatsoever for uniformity across European legal systems regarding this aspect, which does not directly affect either the competences of the Union or the provisions of EU law. Each Member State is therefore free to

In my opinion, this ambiguity in the relationship with Eu law was indirectly confirmed also by a peculiar judgment declaring that a law authorizing Italian universities to activate courses taught only in English should be interpreted as constitutionally admissible only if the courses activated were not wholly and exclusively given in English, but provided for at least some courses to be offered both in Italian and in English[83]. Even though, declamation-wise, the Court professes its unwillingness to limit the internationalization of Italian universities, this judgment is in fact a setback for this process. And it is based on a reaffirmation of the Italian constitutional tradition, of which the Italian language is declared to be an essential component[84].

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conceptualise the limitation of criminal offences in either substantive or procedural terms, in accordance with its own constitutional tradition. This conclusion was not placed in doubt by the judgment given in the Taricco case, which limited itself to excluding limitation from the scope of Article 49 of the Nice Charter, but did not assert that the Member States must disregard any of their own constitutional rules and traditions that prove to be more beneficial for the accused compared to Article 49 of the Nice Charter and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955. Moreover, this would not be permitted within the Italian legal system where these assert a supreme principle of the constitutional order, as is the case for the principle of legality in criminal matters throughout the substantive area of law to which it applies» (§ 4 of *The facts of the case and conclusions on points of law*).

[83] Constitutional Court, judgment No. 42/2017.

[84] § 3.1. of the *Conclusions on points of law*: «Given its official status, and thus its primacy, the Italian language is a vehicle for conveying the culture and traditions inherent within the national community, which are also protected by Article 9 of the Constitution. The progressive supranational integration of legal systems and the erosion of national boundaries as a result of globalisation may undoubtedly undermine that function of the Italian language in various ways: multilingualism within contemporary society, the use of a particular language in specific areas of human knowledge and the dissemination on a global level of one or more languages are all phenomena which have now permeated into the constitutional order and coexist alongside the national language in a variety of areas. However, such phenomena must not relegate the Italian language to a marginal status: on the contrary, and in fact precisely by virtue of their emergence, the primacy of the Italian language is not only constitutionally unavoidable but indeed – far from operating as a formal defence of a relic from the past, which is incapable of appreciating the changes brought by modernity – has become even more crucial for the continuing transmission of the historical heritage and identity of the Republic, in addition to safeguarding and enhancing the value of Italian as a cultural asset in itself».

Finally, another extremely important case in point is another 2017 judgment, again written by Marta Cartabia, that needs to be mentioned not because of its conclusion, but because of already classical *obiter dictum* that has given way to an incredible amount of speculation[85]. In § 5.2 of the *Conclusions on points of law*, the Court reconsidered the relationship between national law and Eu law, especially from the point of view of the choice of the judicial remedies to be activated in case of a violation of both a national constitutional principle, and a European fundamental right. In a partial reversal from its past openness, the Court established that: «where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the Charter of Fundamental Rights of the European Union in those contexts where EU law applies, the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE». I believe this *obiter dictum*, reaffirming the subsidiarity in the enforcement of fundamental rights, proves my point that this openness to the Eu legal order is an area of ambiguity, and not part of the Italian constitutional tradition, meant in the way I explained above. This conclusion does not seem to be contradicted by the more recent judgment No. 20 of 21 February 2019, and even more recent order No. 117 of 10 May 2019: both rulings make significant references to common constitutional traditions, signaling a trend towards a renewed popularity of this notion within the Court, but aside from not contributing particularly to a deeper understanding of this notion, they also fall short of "overruling" judgment No. 269/2017. Admittedly, they partially mitigated its potential effects, but without substantially departing from the holding of that *obiter dictum*, that remains therefore an inevitable reference in the shaping of the relationship with the European legal order.

Because of the mixed picture that one can draw in this area, the spillover of the social common denominator is less immediately clear here, but it is arguably present as well. I believe indeed that the case-law of the Constitutional Court can be read in the sense

[85] Constitutional Court, judgment 14 December 2017, No. 269. In a recent judgment (No. 12108/2018), the Court of Cassation has played down the relevance of this *obiter dictum* (see F. Ferrari, *Giudici (di Cassazione) renitenti alla Corte costituzionale* (2018), in www.lacostituzione.info), but it remains to be seen what its impact will be.

that openings towards the Eu, and particularly Eu-mandated budgetary restraints, are coherent with a (maybe just implicit) assumption that the Eu will promote social rights, or anyway that responsible budgetary policies will create the best conditions for their implementation[86], whereas backlashes indicate a concern that market integration might prevail over them[87].

In other words, I believe that even the ambiguities shown by the Constitutional Court in this domain, that I already underlined *supra* par. 2.2[88], can be explained and reconciled in light of the existence of an overarching social principle, that might drive to apparently diverging conclusions (in favour or against budgetary concerns, from case to case), but that is very coherent at its core: even when budgetary constraints prevail, this is still made in order to prevent a fiscal crisis that would affect the enforcement of social rights even worse, thus confirming the underlying assumption of this work about the "fractal" nature of the social principle.

4. A tentative conclusion: trying to capture the Italian constitutional tradition through the "fractal" nature of its social principle

In my analysis, I have tried to wade through the bran-tub of the Italian constitutional tradition, and catch the distinctive, constitutive elements of the Italian constitutional identity, its 'genotypical' components, to use the terminology introduced into the legal studies by Rodolfo Sacco[89].

The well-known story of the Italian constitution is the story of the so-called constitutional compromise between the different ideological and political forces that were present in the constituent assembly[90]. The constitutional compromise produced a distinctive

[86] Some judgments in this direction are Nos. 325/2010 (written by Gallo), 10/2015 (written by Cartabia), 127/2015 (written by Sciarra).

[87] Some judgments in this direction are the already mentioned Nos. 70/2015 (written by Sciarra) and 275/2016 (written by Prosperetti).

[88] And that I believe emerge very clearly in judgment No. 178/2015 (written by Sciarra).

[89] R. Sacco, *Introduzione al diritto comparato*, in R. Sacco (Ed.), *Trattato di diritto comparato* (1992[5]), 27 ff.

[90] See, among many, L. Pegoraro and J.O. Frosini, *The Italian Constitution: text and notes* (2007), 7 ff. More broadly, for scholar works in English on Italian constitutionalism, see, for example: M. Einaudi, *The Constitution of the Italian Republic*, 42 American Political Science Review 661 (1948); J.C. Adams and P. Barile, *The Implementation of the Italian Constitution*, 47 American Political Science

document, that is grafted in the Western constitutionalism, but with some characteristic features.

I have argued that, among the features of such tradition, one stands out in particular, *i.e.* the social principle (encompassing substantial equality, solidarity, and the labour principle). Such principle is so important in the Italian constitutional tradition, that, even though it was apparently dictated in order to regulate economic relationships, it permeates all parts of the Constitution, and reproduces itself like a fractal in such parts too. This reproduction is particularly manifest in the realms of the free speech jurisprudence and in the construction of national sovereignty.

Let me now make an additional point. Coherently with the historical background that I have just briefly recalled, the social principle also encompasses another principle underpinning the Italian constitution, *i.e.* the anti-fascist principle[91]. The repudiation of the infamous twenty-year fascist rule is an important premise of the current constitution, and is formally expressed in the prohibition to reorganize the Fascist Party[92]. However, such fundamental choice was declined not much in favour of the classical liberal approach, expressed by Liberal Party that only won a minority of the seats in the constituent assembly, but rather in favour of a combination of the Catholic and socialist-communist doctrines. The centrality of the social principle is arguably coherent with the Marxist focus on the economic relationships within a

Review 61 (1953); G. Bognetti, *Political Role of the Italian Constitutional Court*, 49 Notre Dame Law Review 981 (1974); Id., *The American Constitution and Italian Constitutionalism: an Essay in Comparative Constitutional History* (2008); G. Amato, *The Constitution*, in E. Jones and G. Pasquino (Eds.), *The Oxford Handbook of Italian Politics* (2015), 71 ff.; S. Ilari, *About the Genesis of the Italian Republican Constitution*, 69 Il Politico 28 (2018).

[91] On the issue, see among many J.C. Adams and P. Barile, *The Italian Constitutional Court in Its First Two Years of Activity*, 7 Buffalo Law Review 250 (1958); M. Luciani, *Anti-fascismo e nascita della costituzione*, 22 Politica del Diritto 191 (1991); C. Pinelli, *The 1948 Italian Constitution and the 2006 Referendum: Food for Thought*, 2 European Constitutional Law Review 329 (2006); G. Martinico, B. Guastaferro and O. Pollicino, *The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?*, in A. Albi and S. Bardutzky, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019) 493 ff., 495.

[92] XII transitory and final provision, par. 1: «It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party».

society, a decisive element to address in order to overturn the current balance of power.

The anti-fascist strand of the social principle contributes to making it an overarching principle, and to be sure the quintessence of the Italian constitution. A case in point, among the most recent, is the one decided with order 8 February 2018 by the Tribunale Amministrativo Regionale of Brescia[93], later confirmed by the Council of State[94], where the administrative judges declared that it was legitimate to ask an openly neo-fascist movement to repudiate fascism, in order to be assigned some public spaces granted to other groups[95].

Moreover, the anti-fascist matrix properly explains and encompasses other constitutional features that might be considered to amount to an actual tradition, such as the role of political parties (under Articles 1 and 49), its connection to the right to vote (Article 48), the granting of the latter also to "Italians abroad" (for whom an ad hoc «constituency […] shall be established»), and maybe even the provision of "life senators" (Article 59), whose role can be construed as a repository of wisdom also against all the potential attempts to reinstate the fascist regime.

Ideally, the next steps of the analysis would involve connecting the research conducted here on the Italian constitutional tradition with other national traditions, and investigating whether and to what extent the Italian constitutional tradition influenced the emergence of Eu-wide traditions. This has in fact happened on some notable cases of fundamental rights.

If, for example, one could argue that the Italian principle of the "fair proceedings" (*giusto procedimento*) developed belatedly[96],

[93] T.A.R. Lombardia, Brescia, Section II, order 8 February 2018, No. 68.

[94] Council of State, Judgment 9 May 2018.

[95] See the comments by F. Paruzzo, *Il Tar Brescia rigetta il ricorso di CasaPound: l'anti-fascismo come matrice e fondamento della Costituzione*, 6 *Osservatorio AIC* 475 (2018).

[96] Along the lines of Vezio Crisafulli's famous case note to the judgment of the Italian Constitutional court 2 March 1962, No. 13, that denied constitutional relevance to this principle: V. Crisafulli, *Principio di legalità e «giusto procedimento»*, 7 Giur. cost. 130 (1962). Cf also, among many, P. Lombardi, *Le parti del procedimento amministrativo. Tra procedimento e processo* (2018), especially Chapter I, *Giusto procedimento e giusto processo tra ordinamento europeo e nazionale: "Il punto logico di partenza"*, 1 ff.; L. Buffoni, *The constitutional level of "due process" and the archetype of "court proceeding"*, 29 Quad. Cost. 277 (2009); G. Colavitti, *Il "giusto procedimento" come principio di rango costituzionale* (2005), in www.associazionedeicostituzionalisti.it.

the tradition on the interim legal protection (*tutela cautelare*) towards administrative acts is on the same foot as other legal systems, as made clear in Tesauro's opinion in *Factortame I*[97]. As far as the topics here discussed are concerned, the mentioned ELI project's national reports on freedom of expression seem to show that the Italian tradition is mostly in line with the majority of other national traditions: no distinctively Italian influence emerges, but there is certainly a commonality (while freedom of religion offers a more nuanced picture)[98].

As for territorial indivisibility, it seems to be common enough[99], while the approach towards the Eu and international legal orders has certainly had an impact on other European jurisdictions[100].

My final point is a reminder that even traditions change over (a long) time. They are by definition something stable, but nonetheless in continuous, slow, but steady movement[101]. Fifteen years ago, Glenn expressed some optimistic remarks on the openness of national legal traditions[102]: the world seemed destined to progressively remove barriers and borders, and national legal traditions appeared like harmless repositories of "local" wisdom, good to water down the otherwise unstoppable convergence towards supranational legal standards. The past years, though, have painted a considerably different picture: nationalist tendencies are on the rise again[103].

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[97] Opinion of Mr Advocate General Tesauro delivered on 17 May 1990, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Case C-213/89.
[98] See now ELI, *Freedom of Expression as a Common Constitutional Tradition in Europe* (2022).
[99] Cf. R. de Caria, *I referendum indipendentisti*, 16 Diritto Pubblico Comparato ed Europeo 1611 (2014).
[100] Cf. broadly M. Cartabia, *The Legacy of Sovereignty in Italian Constitutional Debate*, in N. Walker (Ed.), *Sovereignty in Transition* (2003), 305 ff.
[101] One cannot but cite C. Mortati, *La costituzione in senso materiale* (1940).
[102] P.H. Glenn, *La tradition juridique nationale*, 55 Revue Internationale de Droit Comparé (2003), 263, 278: «*En s'ouvrant la tradition juridique nationale augmente ses ressources et augmente sa normativité. Il y a donc lieu d'être optimiste quant à l'avenir des traditions juridiques nationales*».
[103] To put it Martin Belov's words, we could say that the Westphalian Constitutional Law has not given in to the challenges posed to it by global constitutionalism: M. Belov (Ed.), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (2018).

From this point of view, national constitutional traditions might be construed as a counterpoint to CCTs[104], as a tool to wield[105] when something in the international relations, and particularly in the Eu order, no longer resonates with us, an identity defense to allow us to somehow cherry-pick what we decide to accept and what we do not, with potentially disruptive consequences[106]. In hindsight, probably Glenn would no longer be so optimistic today about national legal traditions!

[104] See on this point the reflections by M.E. Comba, *Common Constitutional Traditions and National Identity*, 67 Rivista Trimestrale di Diritto Pubblico 973 (2017); see also O. Pollicino, *Metaphors and Identity Based Narrative in Constitutional Adjudication: When Judicial Dominance Matters*, *IACL-AIDC Blog* (2019); and, more broadly, E. Cloots, *National Identity in EU Law* (2015).
[105] See the expression used by P. Faraguna, *Constitutional Identity in the EU–A Shield or a Sword?*, 18 German Law Journal 1617 (2017).
[106] See the study by H. Hofmeister (Ed.), *The End of the Ever Closer Union* (2018).

COMMON CONSTITUTIONAL TRADITIONS TAKEN SERIOUSLY: THE RIGHT TO REMAIN SILENT IN ADMINISTRATIVE PROCEDURES

*Giacinto della Cananea**

TABLE OF CONTENTS

1. Introduction

The concept of "common constitutional traditions" in Europe has been the subject of much comment in recent years. My intent here is not to provide a general overview of the topic. My own views on this matter have been set out on an earlier occasion. The aim of this paper is to focus more closely on a tradition that has just been included by the Court of Justice of the EU among common constitutional traditions; that is, which is designated by the maxim *nemo tenetur se detegere*. It raises, however, some doubts about the conclusion reached by the Court. The paper is divided into four parts. The first section will briefly illustrate the emergence of the concept of common constitutional traditions. The following two sections will analyse the legal relevance and significance of the maxim *nemo tenetur se detegere* in criminal proceedings and administrative procedure, respectively. This will be followed by an

* Full Professor, Bocconi University. This is a revised version of the paper presented at the workshop in honour of Jacques Ziller at the University of Pavia (2022). It is the fruit of research undertaken on the "common core of administrative laws in Europe" (ERC advanced grant no. 694967). I wish to thank Sabino Cassese and Mario Comba for inviting me to join the ELI research on common constitutional traditions, as well as Marta Cartabia and Daria de Pretis for their comments on an earlier draft presented at the ELI workshop in Vienna. I remain, of course, solely responsible for any errors or omissions.

evaluation of the recent ruling of the European Court of Justice (ECJ) in *DB v Consob*. It will be argued that this jurisprudence can help us to understand both why a recognition of this maxim is acceptable in principle and why, nevertheless, such claim should be verified from a scientific perspective.

2. "Common constitutional traditions" in the European Union

It may be helpful for the sake of clarity to make clear how the phrase common constitutional traditions has been used to denote the existence of some fundamental norms of public law which are shared by the legal orders of EU Member States, as well as the consequences that follow from ascribing a certain norm within such traditions.

Although the Treaty of Rome (1957) entrusted the ECJ with the broad mission of ensuring the respect of the law in the interpretation and application of its provisions[1], it referred to common constitutional traditions for the first time in 1970, when it was asked to assess the legality of European Community (EC) law on a preliminary ruling by a German administrative court. The referring court had hypothesised the violation of the guarantees provided for by German constitutional law, including control over the proportionality of restrictive measures on rights[2]. Advocate General Dutheillet de Lamothe reiterated the constant concern to avoid a misalignment of interpretations concerning EC law. However, he outlined a new perspective, emphasising that the Community order was not limited to the provisions of the founding treaties and those of the secondary sources, but rather included a common substratum of values and legal principles, ultimately attributable to a vision of the person and of society ("*le patrimoine commun des Etats membres*"). Consistent with this perspective, the Court of Justice excluded that the control over the legality of the acts of the Community institutions could be based on this or that national law. However, it stated that such common traditions form part of the principles of which it is required to ensure the

[1] Treaty establishing the European Economic Community (EEC Treaty), Article 164 (1).

[2] Case 11/70, *Internationale Handelsgesellschaft*, Judgment of the Court of 17 December 1970.

observance[3]. It adhered constantly to this orientation in subsequent pronouncements[4].

A further impulse came from the Maastricht Treaty, which in Article F made reference to both common "constitutional traditions" and the European Convention on Human Rights. That reference was initially mainly in relation to the European Convention on Human Rights. In this, the means to overcome what was perceived as an intolerable deficiency of the European constitution was identified: the absence of a declaration of rights. This reconstruction, however, did not fully grasp what was new and original in the recognition – resulting from case law and codified by the treaty – of the existence of a body of common constitutional traditions. This recognition is of a precise importance for more than one reason. It confirms the double opening of the national legal systems, that is, horizontally and vertically, towards the European order. It reaffirms the existence, alongside the written principles, of the unwritten ones, including those that have been elaborated and refined by the courts. Moreover, Article 6 attributes to the common constitutional traditions the rank of general principles of Union law, which prevail on EU legislation[5].

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[3] *Ibid*, paragraph 4. For a retrospective, see M. Graziadei, R. De Caria, *The "Constitutional Traditions Common to the Member States of the European Union" in the Case law of the European Court of Justice: Judicial Dialogues at its Finest,* 4 Riv. Trim. Dir. Pubbl. 949 (2017).

[4] Advocate-General Warner referred to "shared patrimony" in Case 63/79, *Boizard v. The Commission*, regarding the protection of legitimate confidence and, in English culture, to estoppel. See also B. Stirn, *Vers un droit public européen* (2015), at 84 (using the expression "*socle commun*", that is, common ground). On the concept of "constitutional convention", see G. Marshall, *Constitutional Conventions: the Rules and Forms of Political Accountability* (1984), for the thesis that conventions are the "critical morality" of the constitution and they "will be the end whatever politicians think it".

[5] See S. Cassese, *The "Constitutional Traditions Common to the Member States" of the European Union,* 4 Riv. Trim. Dir. Pubbl. 939 (2017) observing that traditions are based on history but are not immutable. But see also J. Fedke, *Common Constitutional Traditions*, paper presented at the workshop organized by the ELI in Turin, on November 2018 (observing that the German version of Article 6 TEU - *gemeinsame Verfassungsuberlieferungen der Mitgliedsstaaten* – is backward-looking). The ELI comparative research has given rise to a document concerning free speech: European Law Institute, *Freedom of Expression as a Common Constitutional Tradition in Europe*, (2022), available online at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Freedom_of_Expression.pdf.

3. *Nemo tenetur se detegere* in criminal proceedings

Like the maxim *audi alteram partem,* so too does the maxim *nemo tenetur se detegere* originate from criminal law. Both serve to reinforce the individual's freedom against the power of public authority. However, while *audi alteram partem* can certainly be counted among those that are part of the *acquis communautaire,* the other is of more recent recognition.

The nature and effects of the precept designated by the maxim *nemo tenetur se detegere* is a matter on which opinion can differ. Certain predominant lines of thought can, however, be delineated. There is diversity of view as to whether it constitutes either as a manifestation of the right to a due process of law or as an institutional guarantees in the sense indicated by Carl Schmitt in his *Verfassungslehre*; that is, as an institution which receives constitutional protection in order to prevent its "elimination … by way of simple legislation", due to its connection with the preservation of the *Rechtsstaat*, without being intrinsically related to the idea of liberty, such as the prohibition of criminal statutes with retroactive force and *ex post* facto laws[6].

With these different views in mind, we can now examine the normative and factual data. The Fifth amendment to the US Constitution has an emblematic value, by virtue of which no one "can be obliged in any criminal case to testify against himself". In the jurisprudence of the Supreme Court, this prohibition – often called privilege against self-incrimination - has acquired a central importance. It has been affirmed by the Warren Court in its famous *Miranda* ruling, in relation to a phase prior to the criminal trial, i.e., investigations carried out by the police[7]. This has been a strongly

[6] C. Schmitt, *Verfassungslehre* (1925), Eng. transl. by J. Seitzer, *Constitutional Theory* (2008), at 208-219 (including among such institutional guarantees, distinguishable from basic rights, also the independent administration of local affairs, the prohibition of exceptional courts, the protection of civil servants' rights and the 'right of access to ordinary courts'). For a different view of Schmitt's beliefs and ideas about public law, which emphasises his account of the relationship between legality and emergencies, see A. Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1095 (2009).

[7] US Supreme Court, *Miranda v. Arizona* (1965). For further analysis, see F. Schauer, *The Miranda Warning*, 88 Wash. L. Rev. 155 (2013); A.W. Alschuler, *A Peculiar Privilege in Historical Perspective: the Right to Remain Silent*, 94 Mich. L. Rev. 2625 (1996), (arguing that the privilege included in the Bill of Rights in 1791 differed from that enforced by the courts in English law); G.C. Thomas, *A Philosophical Account of Coerced Self-Incrimination*, 5 Yale J.L. & Human. 79 (1993) (discussing the concept of coercion in the light of various strands in philosophy).

contested issue in subsequent years, for some argued that such safeguard was essential for a liberal democracy, while others criticized it for its negative impact on the action of police forces aiming at preventing and repressing crimes. It is therefore extremely significant that, in a very different cultural and political climate, a third of a century later, the chief justice Rehnquist stated that the Miranda warnings "have become part of our national culture"[8]. This assessment is important in itself, concerning the persisting validify of the *Miranda* doctrine. It is important, moreover, because it confirms that constitutional traditions arise from a complex of elements, also not of a strictly legal nature, extended to culture in a broad sense.

There is a similarity between the interpretation elaborated by the US Supreme Court and an important norm adopted by the international community more or less in the same years in the context of the International Covenant on Civil and Political Rights (ICCPR), a multilateral treaty (1966) that commits the contracting parties to respect the civil and political rights of citizens and other persons, "recognizing that these rights derive from the inherent dignity of the human person", as the preamble affirms. This norm is laid down by Article 14 (3), according to which "everyone charged with a criminal offence shall be entitled to the following minimum guarantees, in full equality: g) not to be compelled to testify against himself or to confess guilt". The meaning of the norm is clear, in the sense that none can be obliged to admit anything that may give rise to criminal sanctions against him or her, and so is its ambit or scope of application, that is, criminal trials.

For all its moral and political significance, the ICCPR is binding only on the States that have ratified it, including those that form part of the EU (but not the UK). The case of Italy can be instructive, as it is in its legal system that the dispute concerning the existence of a constitutional convention has arisen. Article 24 of the Constitution, which recognises and guarantees the right of defence, is interpreted coherently with the international norm just mentioned. This interpretation appears to be confirmed by the "living law", in particular by Articles 63 and 64 of the Code of Criminal Procedure. Italian courts have had little difficulty in recognizing the existence of a prohibition of any kind of norm imposing self-incrimination. They

[8] US Supreme Court, *Dickerson v. US* (2000), with the dissenting opinion of Justice Antonin Scalia.

have, however, shown considerably more reluctance to accept that such prohibition is part of the law outside the field of criminal law. For example, in a proceeding concerning a municipality the Court of Auditors has asserted that the obligation to report financial losses, concerning both public expenditure and revenue, includes that to make all information available to the prosecutors' office[9]. One of the objectives of this paper is to examine whether this reluctance is justified or not, from a European perspective and this requires a brief analysis of the case law of EU courts.

4. *Nemo tenetur se detegere* in administrative procedures: the opinion of European courts

The first case brought before an EU court was *Mannesmanrohren*[10]. The facts were as follows. The Commission initiated an investigation procedure aiming at ensuring the respect of competition rules. It carried out inspections at the premises of some firms. It then sent to one of those firms a request for information in which it asked questions regarding presumed infringements of the competition rules. The firm replied to certain of the questions, but declined to reply to others. The Commission argued that this infringed the duty of cooperation established by EU law. The firm replied that Article 6 ECHR not only enables persons who are the subject of a procedure that might lead to the imposition of a fine to refuse to answer questions or to provide documents containing information, but also establishes a right not to incriminate oneself. The Court of First Instance was reluctant to endorse this argument. It observed that it is essential that the authorities that exercise administrative powers can effectively remedy unlawful conduct. Accordingly, those who – in various capacities –are active in the market must cooperate with the Commission. By taking this line of reasoning to its logical conclusion, operators cannot avail themselves of the right to remain silent. In order to reach this conclusion, the CFI had to exclude the existence of an "absolute right to silent"[11]. Moreover, being aware of the

[9] Court of Auditors, plenary panel, judgment of 30 January 2017, no. 2, on a question of principle referred by the first central appeal section relating to the Municipality of Naples.
[10] Case T-112/98, *Mannesmanrohren Werke v. Commission*, Judgment of the Court of First Instance (First Chamber, extended composition) of 20 February 2001.
[11] *Ibid*, paragraph 66.

possibility that the information could be used in criminal proceedings, the Court decided to resolve the problem by stating that the operators have plenty of opportunity to defend themselves there, attaching a different meaning to the attested facts. This was perhaps the least convincing part of an argument for which it is axiomatic that the collective interest has absolute priority over the right of defence and, therefore, prevents the administrative procedure being compared to the criminal trial.

The difficulties and dysfunctional consequences that derive from this argument can be better understood from the perspective of the ECHR. The European Court of Human Rights has followed an interpretative approach very similar to that followed by the Supreme Court. It did so in a dispute concerning the Swiss tax administration, which had ordered a taxpayer to make available the documentation relating to his assets and the relationships with the banks that looked after them[12]. The imposition of a pecuniary sanction was linked to the taxpayer's refusal. The Swiss administrative judge and the federal court had rejected the appeals of the person concerned. The Strasburg Court affirmed the applicability of Article 6 to administrative tax proceedings[13]. It also reiterated that, although Article 6 does not explicitly mention it, the right to remain silent is part of the generally recognised rules of international law that are at the heart of the notion of "due process". It stressed that the recognition of this right prevents the administrative authorities from trying to obtain documents through coercion or undue pressure[14]. It distinguished the case under consideration from a previous case, marked by the unlawful conduct of the applicant. It thus came to the conclusion that the respondent state had violated the person's right not to incriminate himself[15]. This conclusion must, however, be qualified. What is incompatible with the ECHR is the use of coercion or oppression that undermines the very essence of the right to remain silent and thus infringes Article 6. But the States retain their

[12] *Chambaz v. Switzerland*, Judgment of the European Court of Human Rights of 5 April 2012

[13] *Ibid*, paragraph 39.

[14] *Ibid*, paragraph 52, with references to various precedents of the European Court of Human Rights: *John Murray v. United Kingdom,* 8 February 1996, paragraph 45; *Saunders v. United Kingdom,* 17 December 1996, paragraphs 68-69; *Serves v. France,* 20 October 1997, paragraph 46. Later judgments are illustrated in the ruling issued by the Privy Council of the UK, on 17 June 2019, *Volaw Trust Ltd. v. the Comptroller of Taxes (Jersey)*.

[15] *Ibid*, paragraph 58.

margin of appreciation and can thus authorize their public authorities to use evidence obtained without coercion.

The soundness of the interpretation elaborated by the lower EU court was put into doubt by the Italian Court of Cassation, which raised the question whether such domestic legislation, interpreted in that manner, was constitutionally admissible and asked the Constitutional Court (ICC) to judge on its constitutionality. The ICC had two options: it could either decide directly or do so after involving the ECJ, through the preliminary reference. It chose the latter option. Its reasoning was based on both Article 13 of the ICCPR and Article 6 of the ECHR, and raised the issue whether EU norms, as interpreted by the CFI, infringed the right of defence[16]. Before examining the ruling adopted by the ECJ, three quick remarks are appropriate. First, for the ICC as well as for legal scholarship, there is no doubt that the financial regulator is an administrative authority, though characterized by a high level of autonomy, and that its procedure is administrative in nature. The question that thus arises is whether the maxim *nemo tenetur se detegere*, though initially elaborated and applied in the field of criminal law, applies to such procedure. Second, the argument elaborated by the ICC refers to such maxim from the angle of common constitutional traditions[17], though it is also grounded on the ICCPR. Last but not least, the ICC has chosen to pursue the dialogue with the ECJ, similarly to what it has previously done in the *Taricco II* case, with the result of neutralizing an issue potentially disruptive[18].

The opinion elaborated by Advocate General Pikamae was critical of some of the ways in which the preliminary question was presented, but showed a clear awareness of the relevance of the problems and of the existence of appropriate solutions to remedy them, as well as of the importance of the homogeneity clause in Article 52(3) of the Charter of Fundamental Right[19]. The AG thus suggested that the distinction between natural and legal persons could be helpful to clarify why the privilege against self-incrimination may be invoked by the former, unlike the latter.

[16] Constitutional Court, order no. 117 of 2019.
[17] *Ibid*, paragraph 2 and 10.2.
[18] Case C-42/17, *MAS,* Judgment of the Court (Grand Chamber) of 5 December 2017 in disagreement with the opinion of Advocate General Bot. The case ended with the judgment no. 115/2018 of the ICC.
[19] Case C-481/19, *DB v. Consob*, Opinion of the Advocate General Pikamae, delivered on 27 October 2020,

Following this distinction, in his view, Member States are not required to punish persons who refuse to answer questions put by the supervisory authority which could establish their responsibility for an offence liable to incur administrative sanctions of a criminal nature.

The ECJ endorsed the view of its AG[20]. It then reiterated its holding that, though the ECHR has not been formally incorporated into the EU legal order, the rights it recognizes constitute general principles of EU law and must be interpreted coherently with the meaning and scope they have under the Convention[21]. It was, however, more cautious than the Strasbourg Court, as it pointed out that the right to silence "cannot justify every failure to cooperate with the competent authorities", for example by failing to appear at a hearing planned by those authorities[22]. That said, even though the sanctions imposed by the Italian financial regulator (CONSOB) on DB were administrative in nature, a financial penalty and the ancillary sanction of temporary loss of fit and proper person status, such sanctions appeared to have punitive purposes and showed a "high degree of severity". Moreover, and more importantly, the evidence obtained in those administrative procedures could be used in criminal proceedings[23]. For the Court, this justified an interpretation of EU legislation that does "not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature"[24].

After this ruling, the ICC found that the Italian legislation was unconstitutional, on grounds that it did not recognize any opportunity for affected individuals to remain silent within the administrative procedure. However, it excluded any contrast with EU law[25]. The case has thus been settled without a conflict between national law and EU law. Both courts have discharged the function which, in a liberal democracy, is proper to them: to actively seek and try to translate into reality all the potential inherent in the

[20] Case C-481/19, *DB v Consob*, Judgment of the Court (Grand Chamber) of 2 February 2021.
[21] *Ibid*, paragraph 36.
[22] *Ibid*, paragraph 41.
[23] *Ibid*, paragraph 44.
[24] *Ibid*, paragraph 55. See also paragraph 58.
[25] ICC, judgment of 13 April 2021, n. 84/2021.

constitutional and legislative provisions of which they must ensure the respect. More specifically, the principle which is expressed by the maxim *nemo tenetur se detegere* does not protect against the making of an incriminating statement per se, but against the obtaining of evidence by coercion or oppression. It is a shield against an invasive power. At a theoretical level, however, the question that arises is whether a common constitutional tradition does exist in the field of administrative law. While the preliminary question sent by the ICC adopted the concept of common constitutional traditions, the ECJ preferred to resolve it on the terrain of EU law and the ECHR. But even if the ECJ had affirmed that the maxim *nemo tenetur se detegere* can be regarded as a common tradition, it would still remain to be seen whether this characterization is convincing.

5. A "factual" analysis

The question with which we are thus confronted can be summarized as follows: is the maxim *nemo tenetur se detegere*, in one way or another, shared by the administrative laws of EU Member States. The question will be discussed on the basis of the results of a recent comparative inquiry concerning European administrative laws.

One word or two might at the outset be helpful in order to clarify the assumption on which such comparative research is based, the methodology it has employed and its appropriateness in the field of public law. The assumption is that, although in the history of European law several scholars have used either the contrastive and the integrative approach, which emphasize diversity and similarity, respectively[26], both approaches are incomplete descriptively and prescriptively. The descriptive validity of both traditional approaches is undermined by the fact that it chooses only a part of the real and neglects the other. Prescriptively, the force of the point adumbrated above is even stronger in view of the realization that the supranational legal systems that exist in Europe acknowledge the relevance and significance of both national and common constitutional traditions. Methodologically, the main difference between the traditional approach and the current comparative inquiry is that the latter follows the approach

[26] R.B. Schlesinger, *The Past and Future of Comparative Law*, 43 Am. J. Int'l L. 477 (1995).

delineated by the American comparatist Rudolf Schlesinger; that is, it is a factual analysis. The distinctive trait of the method elaborated by Schlesinger in the 1960's, with the intent to identify the common and distinctive elements of the legal institutions of a group of States, is precisely this: instead of seeking to describe such legal institutions, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved[27]. As a result of this, the problems "had to be stated in factual terms"[28]. Concretely, this implied that, using the materials concerning some legal systems, Schlesinger and his team formulated hypothetical cases, in order to see how they would be solved in each of the legal systems selected. And it turned out that those cases were formulated in terms that were understandable in all such legal systems. Last but not least, this method is particularly appropriate in the field of administrative and public law. On the one hand, while the less recent strand in comparative studies put considerable emphasis on legislation (under the aegis of *legislation comparée*), such emphasis was and still is questionable with regard to administrative law, because it has emerged and developed without any legislative framework comparable to the solid and wide-ranging architecture provided by civil codes. The first lines of research have confirmed the existence not only of innumerable differences, but also of some common and connecting elements concerning, among other things, judicial review of administration and the liability of public authorities[29]. On the other hand, an attempt must be made to ascertain whether there is common ground not only among written constitutional provisions but also among constitutional conventions.

We have thus included a hypothetical case concerning the maxim *nemo tenetur se detegere* in a questionnaire concerning the relationship between general principles and sector specific rules. The hypothetical case is very similar to that which was at the heart of the dispute that arose in Italy. We suppose that a young stockbroker in a top financial firm, during a casual conversation with an old friend,

[27] R.B. Schlesinger, *Introduction*, in R.B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* (1968).
[28] M. Rheinstein, *Review of R. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems*, 36 U. Chi. L. Rev. 448 (1969).
[29] See G. della Cananea, M. Andenas (eds.), *Judicial Review of Administration in Europe: Procedural Fairness and Propriety* (2021); G. della Cananea, R. Caranta (eds.), *Tort Liability of Public Authorities in European Laws* (2021).

obtains some inside information about the likely increase, in the near future, of the value of a corporation's share. He reveals this information to his boss, who places an order to buy the corporation's shares, making a huge profit. Sometime later, officers from the financial regulatory authority request the stockbroker s to reveal what he knows about these facts. Whilst being ready to collaborate with public officers, the stockbroker affirms that he is unwilling to reveal everything he knows about those facts, because he's afraid that he could incriminate himself. The officers reply that within the sector-specific legislation there is no rule allowing him to keep silent and warn him that, if does so, his license may not be renewed. The stockbroker challenges the order before the competent court. The question that thus arises is whether the court would be willing the existence of a general principle such as a sort of privilege against self-incrimination or *nemo tenetur se detegere* and the like.

Turning from the hypothetical case to the research findings, a mixture of the expected and unexpected can be observed, as is often the case in this type of research[30]. Comparatively, three options emerge. The first is centred on general legislation on administrative procedure. Germany provides an enlightening example, because according to the general legislation adopted in 1976 the involved persons have to contribute to the gathering of the relevant elements of fact. However, therein there are no duties to reveal those facts which may be susceptible to lead to the imposition of criminal sanctions. Only the sector legislation has established such duties and they are subject to a scrutiny of strict proportionality before administrative courts and the Constitutional Court. The second option is that the maxim *nemo tenetur se detegere* is included among the general principles elaborated by the courts in order to control the exercise of discretionary powers by public authorities.

Thus, for example in the UK, there is a distinction between common law and statutory law. The right to silence exists at common law, unless Parliament expressly legislates to override the right in specific areas or matters. The third option is that no such principle exists. Thus, for example in France, while in the field of

[30] R.B. Schlesinger, *The Past and Future of Comparative Law,* cit. at 27, 49. On national legal traditions, see F. Nicola, *National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union*, 64 Am. J. Comp. L. 865 (2016).

criminal law the right to remain silent is said to be included within the *droit de la defense*, in the field of administrative law the existence of such right is uncertain. It has never been recognized as such by the administrative judge. It is even unclear where it might be recognized in certain circumstances. In sum, while there is a wide area of agreement between those legal systems from the perspective of the right of the defense, particularly as regards the other maxim *audi alteram partem*, there is an area of disagreement concerning the possibility to invoke what American jurisprudence and scholarship call the privilege against self-incrimination.

This conclusion should, however, be qualified in more than one way. The area of disagreement is considerably narrowed if one takes into consideration not only the maxim *nemo tenetur se detegere* but also a host of other principles and doctrines, some of which are not limited to the imposition of pecuniary sanctions, but concern more generally the reviewability of any measure adversely affecting the individual, such as reasonableness. If, for example, of two different rules governing similar administrative procedure one affirms that maxim and the other does not, higher jurisdictions may be requested to review their consequences from the viewpoint of the principle of equality. Moreover, the existence of areas of agreement and disagreement should be considered in a dynamic manner, as opposed to a static one. On the one hand, studies concerning fundamental rights regard it as historically demonstrated that certain process rights that initially develop in one field are subsequently generalized, as a result of the consolidation of process values[31]. On the other hand, as domestic administrative laws are increasingly intertwined with EU law, the contrast between the former may decrease in the light of the jurisprudence of the ECJ examined in the previous section.

6. Conclusion

No attempt will be made to summarize the entirety of the preceding argument. The problem which has been analysed within this paper is one which most legal systems, though not necessarily all, have to tackle; that is, whether the individual has the right to remain silent within an administrative procedure, if it can be

[31] O. Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) (holding that constitutional values are ambiguous, in the sense that they can have various meanings, and evolve, as they are given operational content).

reasonably assumed that the consequences that follow from testifying or producing evidence include – at least potentially – the imposition of criminal sanctions. The recognition by both the ICC and the ECJ that there can be cases in which the individual can exercise the right to remain silent within an administrative procedure is to be welcomed and it is to be hoped that this view will be endorsed by other higher courts. However, David Hume's well-known caveat applies, in the sense that it is not correct to derive an 'ought' from an 'is'[32]. In this paper, I have reiterated the reasons that lead to consider as unduly limiting and misleading the theoretical approach which, in examining procedural requirements within the European legal area, overly emphasises – depending on the case – the common or distinctive aspects. The positive indication that can be drawn from these considerations is, above all, that, in order to make the comparison more rigorous, it is essential to take both into account. Moreover, though we cannot hide the difficulties that the full application of the maxim *nemo tenetur se detegere* meets, this needs to be viewed from a dynamic rather than static perspective.

[32] D. Hume, *A Treatise of Human Nature* (1739), Book III, Part. I, Section I (observing that "For as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it").

CONCESSIONS RELATING TO STATE-OWNED MARITIME PROPERTY WITHIN THE CONTEXT OF FREE MOVEMENT: REFLECTIONS ON THE *PROMOIMPRESA* JUDGMENT

*Maria Eugenia Bartoloni**

Abstract

In Promoimpresa and Melis judgment, the Court of Justice did not hesitate to assert that concessions of State-owned maritime property for tourist and leisure-oriented business purposes "concern a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities so that the situations at issue in the cases in the main proceedings fall, by their very nature, within the scope of Article 49 TFEU". This legal classification not only provides the necessary premise for limiting the scope of EU law, but is also helpful in fully appreciating the Court's reasoning in which primary law intersects with secondary law. The parameters offered respectively by the former and the latter are not neutral or equivalent. On the contrary, the consequences resulting from the application of one or the other parameter seem to be rather significant for the residual room for manoeuvre of the Member States.

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1. Introduction: freedom of establishment as the reference standard for assessing legislation regulating the grant of concessions of State-owned maritime property

In its judgment in the *Promoimpresa* and *Melis* cases,[1] the Court of Justice did not hesitate to assert that concessions of State-owned maritime property for tourist and leisure-oriented business purposes "concern a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities so that the situations at issue in the cases in the main proceedings fall, by their very nature, within the scope of Article 49 TFEU".[2]

This legal classification not only furnishes the premise necessary in order to limit the scope of EU law, to the exclusion of other bodies of rules,[3] but is also useful in fully appreciating the Court's reasoning within which, as will be seen below, primary law intersects with derived law and where the provisions of each are mutually exclusive.

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[1] ECJ, judgment of 14 July 2016 in Joined Cases C-458/14 and C-67/15. See, on the judgment, D. Dero-Bugny, A. Perrin, *Cour de justice, 5e ch., 14 juillet 2016, Promoimpresa srl e.a. c/ Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro e.a., aff. C-458/14 et C-67/15, ECLI:EU:C:2016:558*, in *Jurisprudence de la CJUE 2016*, *Décisions et commentaires* 95 (2017); A. Cossiri, *La proroga delle concessioni demaniali marittime sotto la lente del giudice costituzionale e della Corte di giustizia dell'UE*, 14 Federalismi 23 (2016); L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga* ex lege, 3-4 *Riv. It. Dir. pubbl. com.* 912-926 (2016); V. Squaratti, *L'accesso al mercato delle concessioni delle aree demaniali delle coste marittime e lacustri tra tutela dell'investimento ed interesse transfrontaliero certo*, 2 *European Papers* 767 (2017); M. Magri, *Direttiva Bolkestein e legittimo affidamento dell'impresa turistico balneare: verso una importante decisione della Corte di giustizia U.E.*, 4 *Riv. Giur. Edil.* 359 (2016); F. SANCHINI, *Le concessioni demaniali marittime a scopo turistico-ricreativo tra meccanismi normativi di proroga e tutela dei principi europei di libera competizione economica: profili evolutivi alla luce della pronuncia della Corte di Giustizia resa sul caso Promoimpresa v. Melis*, 2 *Riv. Reg. merc.* 182 (2016). On the direct effect of the Directive, see M. Manfredi, *L'efficacia diretta della "direttiva servizi" e la sua attuazione da parte della pubblica amministrazione italiana: il caso delle concessioni balneari*, in 1 *JUS* 63 2021; F. Ferraro, *Diritto dell'Unione e concessioni demaniali: più luci o più ombre nelle sentenze gemelle dell'Adunanza Plenaria? Diritto dell'Unione e concessioni demaniali*, in 3 *Dir. soc.* 359 (2021); E. Cannizzaro, *Demanio marittimo. Effetti in* malam partem *di direttive europee? In margine alle sentenze 17 e 18/2021 dell'Adunanza Plenaria del Consiglio di Stato*, in *Giustiziainsieme* (30 dicembre 2021); R. Mastroianni, *Il Consiglio di Stato e le concessioni balneari: due passi avanti e uno indietro?*, in 1 *Eurojus* (2022).

[2] *Promoimpresa* judgment, cit., para. 63.

[3] E.g. services concessions; see the *Promoimpresa* judgment, cit., para. 47.

It is therefore useful to start with an (albeit brief) analysis of the reference legal framework.

As is known, freedom of establishment manifests itself essentially in the right for a citizen of a Member State (or, *mutatis mutandis*, a legal person) to pursue activities as a self-employed person stably within the territory of another Member State.[4] Whilst the self-employed nature of the relevant activity delineates the operational scope of freedom of establishment from that of the free movement of workers,[5] the "stable and continuous" nature[6] of the activity establishes the dividing line between the scope of freedom of establishment and freedom to provide services,[7] which are generally temporary and occasional in nature.

As far as its substantive content is concerned, in order for freedom of establishment to be realised as a right, all legislative and regulatory obstacles imposed by the Member States on the exercise of that freedom must be removed (so-called "negative integration"). That obligation not only entails, first and foremost, the right to free movement and to reside throughout the EU, but also implies a prohibition on the subjection by Member States of access to or the conduct of self-employed activity within their respective territories to measures that discriminate on the grounds of nationality or the Member State of establishment. That prohibition is clearly apparent from the wording of Article 49(2) TFEU: "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and

[4] On freedom of establishment, see P. Craig, G. de Búrca, *EU Law*, 6th edition (2015); V. Hatzpopoulos, *Regulating Services in the European Union* (2012); S. Van den Bogaert, A. Cuyvers, I. Antonaki, *Free Movement of Services, Establishment and Capital*, in *The Law of the European Union* (2018); H.-J. Blanke, S. Mangiameli (eds), *Treaty on the Functioning of the European Union - a commentary* (2021).

[5] Under this latter scenario, workers perform work as employees and under the direction of another person.

[6] There is a copious body of case law regarding this issue. See, *ex multis*, the historic judgments of 21 June 1974 in Case 2/74, *Reyners*, para. 21, and of 30 November 1995 in Case C-55/94, *Gebhart*, para. 25.

[7] See Articles 56 et seq TFEU. On the Relation of freedom of services and freedom of establishment see R.C. White, *Workers, Establishment and Services in the European Union* (2004); A. Tryfonidou, *Further steps on the road to convergence among the market freedoms*, in 1 *Eur.Law. Rev*. 36 (2010); H.-D. Jarass, *A Unified Approach to the Fundamental Freedoms*, in M. Andenas, W.-H. Roth (eds), *Services and Free Movement in EU law* (2002); P. Oliver, W.-H. Roth, *The Internal Market and the Four Freedoms*, in *Comm. Mark. Law Rev.* 407 (2004); M. Poiares Maduro, *Harmony and Dissonance in Free Movement*, in *Cambridge Yearbook of European Legal Studies* 315 (2001)

manage undertakings, (…), under the conditions laid down for its own nationals by the law of the country". It may be useful to note that, since the *Reyners* judgment,[8] the Court of Justice has taken the view that the prohibition on discrimination on the grounds of nationality has direct effect and may therefore be relied on by individuals against the Member States, even if there are no implementing measures at national or supranational level.

It has also been clarified within the case law that the prohibition on discrimination covers both direct discrimination[9] as well as indirect discrimination, that is measures that apply *de iure* without distinction both to citizens and non-citizens, but that *de facto* entail greater burdens or reduced benefits for the latter compared to the former.[10] In relation to freedom of establishment, the negative integration provided for under the Treaty also entails a prohibition on the adoption by the Member States of merely restrictive measures, that is measures that, whilst not entailing any discrimination on the grounds of nationality or the country of establishment, are nonetheless liable to hinder, discourage or even present the exercise of freedom of establishment guaranteed under the Treaty.

At the same time, the Treaty provides that these various prohibitions may be subject to a number of derogations, which may be express[11] or tacit, in order to enable the Member States to pursue self-standing objectives that are deemed to be worthy of protection. These include so-called *overriding reasons relating to the public interest*. These are tacit derogations, introduced by the Court of Justice, and may apply only to measures that are not discriminatory. In a similar manner to express derogations, a Member State invoking overriding reasons relating to the public interest must demonstrate that the contested measures are not only

[8] Judgment of 21 June 1974 in Case C-2/74, cit.

[9] Directly discriminatory measures are those that "affect a foreign national *qua* foreign national" and where the prerequisite for their application is the relevant person's foreign nationality. See, *ex multis*, judgment of 18 June 1985 in Case C-197/84, *Steinhousen*, paras. 17 and 18.

[10] National legal systems contain provisions that, whilst being applicable without distinction to foreign nationals and to citizens, thus depending upon a prerequisite different from nationality, *de facto* cause concealed discrimination against the citizens of other Member States. See, *ex multis*, judgment of 17 November 1992 in Case C-279/89, *Commission v. United Kingdom*, para. 42.

[11] See Article 52 TFEU.

capable of achieving those objectives, but are also proportionate in relation to them.[12]

In addition to the requirements of negative integration – which, whilst being essential, may not be sufficient to eliminate the overall impediments to freedom of establishment – the Treaty has established another instrument for guaranteeing the effective exercise of freedom of establishment within the internal market: the adoption by EU lawmakers of harmonised measures seeking to achieve convergence amongst the various national laws (so-called "positive integration"). The purpose of harmonised measures is precisely to eliminate, either entirely or in part, differences between national legislation that prevents the proper operation of the internal market. Consequently, Member States can no longer invoke the express derogations or overriding reasons relating to the public interest that have been found within the case law to deserve protection in order to adopt national measures that depart from harmonised rules. This harmonised rulebook in fact becomes the parameter with reference to which it is assessed whether the Member States have exercised their legislative powers properly. On the other hand, the provisions of primary law continue to apply to all scenarios that are not governed by harmonised legislation. Accordingly, the relationship between primary and secondary law may be conceptualised as a relationship between *lex specialis* and *lex generalis*.[13]

2. The two parameters: harmonised rules; primary law

In view of the above, in the *Promoimpresa* judgment the Court was first required to identify the applicable law, and to verify whether the facts at issue in the cases before it fell within the scope of harmonised law, i.e. Directive 123/2006 on services in the

[12] See below section 4.2.

[13] On this topic see I. MALETIĆ, *Trade Regulation and Policy in the EU Internal Market. An Assessment through the Services Directive*, Elgar Studies in European Law and Policy, Elgar Publishing, 2021.

internal market,[14] or whether on the contrary they fell within the scope of primary law.[15]

It is important to note in this regard that the parameters offered by primary law and derived law respectively are not neutral or equivalent. On the contrary, the consequences resulting from the application of one or the other appear to be quite significant for the Member States' residual scope for manoeuvre.

As regards primary law, it is sufficient to note that, thanks to the mechanism of either the express derogation or overriding reasons relating to the public interest, Member States retain a certain degree of legislative discretion, and may enact legislation to derogate from the rules laid down by Articles 49 TFEU et seq.[16]

On the other hand, where harmonised legislation has been adopted, the margin of discretion of the Member States becomes more limited, and may eventually disappear entirely, depending on the extent to which harmonisation has been achieved by derived law. In this regard, it is possible to identify a range of harmonisation

[14] In OJEU L 376 of 27 December 2006, pp. 36-68. This is known as the "Bolkestein" Directive, the aim of which is to establish general provisions in order to facilitate the exercise of the rights to freedom of establishment and free movement of services. See within the literature, *inter alia*, M. Klamert, *The Services Directive: Innovation and fragmentation*, in *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (2014); G. Davies, *The Services Directive: extending the country of origin principle, and reforming public administration*, in 32 *Eur. Law Rev.* 232 (2007); P. DELIMATSIS, *Standardisation in services - European ambitions and sectoral realities*, in 41 *Eur. Law Rev*. 513 (2016); J. Monteagudo, A. Rutkowski, D. Lorenzani, *The economic impact of the Services Directive: A first assessment following implementation*, in 456 *Ec. Papers*. 2012; C. Barnard, *Unravelling the Services Directive*, in 45 *Comm. Mark. Law Rev.* 323 (2008); J. Wolswinkel, *Concession Meets Authorisation: New Demarcation Lines under the Concenssions Directive?*, in 12 *Eur. Proc. Publ. Priv. Partn. Law Review* 396 (2017); D. Diverio, *Limiti all'accesso del mercato dei servizi* (2019); M. Condinanzi, A. Lang, B. Nascimbene, *Cittadinanza dell'Unione e libera circolazione delle persone* (2006); F. Bestagno, L. Radicati di Brozolo, *Il mercato unico dei servizi* (2007), G. Fonderico, *Il Manuale della Commissione per l'attuazione della direttiva servizi*, in 8 *Giorn. Dir. Amm.* 921 (2008). With respect to the case of the concessions of State-owned maritime property see F. Capelli, *Evoluzione, splendori e decadenza delle direttive comunitarie. Impatto della direttiva CE n. 2006/123 in materia di servizi: il caso delle concessioni balneari* (2021).

[15] See M.E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018).

[16] See below section 4.2.

"models".[17] These include both *partial* harmonisation, where national provisions regulate different aspects from those expressly regulated under EU law,[18] as well as *full* or *exhaustive* harmonisation. In such cases, since the EU law regulates a sector exhaustively, the Member States do not have any ability to intervene. *Exhaustive* or *full* harmonisation involves the replacement of a variety of national legislative provisions with a uniform European *standard*, which does not permit the adoption of any rules, whether divergent or not, by national lawmakers.[19]

Within this perspective, since the Member States cannot adopt "measures other than those expressly provided for",[20] "more restrictive" measures[21] or "unilateral" measures[22] of any type, unless expressly provided for under derived law,[23] the exhaustive nature of the harmonisation essentially deprives the Member States of any power to legislate.

3. The first parameter: Directive 123/2006/EC and the degree of harmonisation achieved by it

The Court of Justice operated precisely within this conceptual framework, verifying first and foremost whether Directive 123/2006 was applicable,[24] including in particular Article 12, to

[17] See regarding this issue A. Arena, *Il principio della* Preemption *in diritto dell'Unione europea* (2013); P.J. SLOT, *Harmonisation*, in 21 *Eur. Law Review* 378 (1996).

[18] See e.g. the judgment of 21 December 2016 in Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)*, para. 29-33.

[19] The prohibition also in fact extends to neutral measures; see E. Cross, *Preemption of Member State Law in the European Economic Community: A Framework for Analysis*, in 29 *Comm. Mark. Law Rev.* 459 (1992).

[20] See e.g. the judgment of 26 May 1993 in Case C-52/92, *Commission v. Portuguese Republic*, para. 19.

[21] E.g. judgment of 5 April 1979 in Case C-148/78, *Criminal proceedings against Tullio Ratti*, para. 27.

[22] See e.g. the judgment of 13 December 1983 in Case C-222/82, *Apple and Pear Development Council v. K.J. Lewis Ltd and others,* para. 23.

[23] See e.g. the judgment of 29 January 2013 in Case C-396/11, *Radu*, para. 36.

[24] Cit. See within the literature, U. Stelkens, W. Weiß, M. Mirschberger (eds.), *The Implementation of the EU Services Directive Transposition, Problems and Strategies* (2012); M. Wiberg, *The EU Services Directive - Law or Simply Policy?* (2014); E. Faustinelli, *Purely Internal Situations and the Freedom of Establishment Within the Context of the Services Directive,* in 44 *Leg. Iss. of Ec. Int.* 77 (2017); J. Krommendijk, *Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situation*s, in 18 *German Law Journal* 1359 (2017); W.

concessions of State-owned maritime property as well as the degree of harmonisation established by it.

In stating that Article 12 "concerns the specific case in which the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity",[25] the Court was called on as a preliminary matter to clarify the concept of "authorisation", at the same time verifying whether the prerequisites of "scarcity of available natural resources" had been met. The Court did not have any difficulty in concluding that - "concessions granted by public authorities of State-owned maritime and lakeside property relating to the exploitation of State land for tourist and leisure-oriented business activities"[26] were equivalent to authorisations under Article 12. Since the authorisation regime covers "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof",[27] the Court stated that the concessions to which the references for a preliminary ruling related "may therefore be characterised as 'authorisations' within the meaning of the provisions of Directive 2006/123 in so far as they constitute formal decisions, irrespective of their characterisation in national law, which must be obtained by the service providers from the competent national authorities in order to be able to exercise their economic activities".[28] On the other hand, the task of verifying the additional requirement laid down by Article 12, i.e. the need to authorise a limited number of concessions on account of the scarcity of natural resources, was left to the national court.[29] Clearly, if this additional prerequisite were also met, Article 12 would be applicable to concessions of State-owned maritime property.

The Court then went on to examine the provisions laid down by Article 12 in order to establish whether the national legislation

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Lewandowski, *Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice*, in *Utrecht Law Review* 57 (2022).

[25] *Promoimpresa* judgment, cit., para. 37. See A. Sanchez-Graells, C. De Koninck, *Shaping EU Public Procurement Law: A Critical Analysis of the CJEU Case Law 2015–2017* (2018).

[26] *Ibidem*, para. 40.

[27] *Ibidem*, para. 38.

[28] *Ibidem*, para. 41.

[29] *Ibidem*, para. 43.

was compliant with it. As is clearly stated, where the number of authorisations is limited because of the scarcity of available natural resources, Article 12 subjects their issue to "a selection procedure between potential candidates which must ensure full guarantees of impartiality and transparency, including, in particular, adequate publicity".[30] Considerations related to the protection of legitimate expectations of the holders of authorisations may only be taken into account subject to compliance with those prerequisites of impartiality and transparency, and thus at the time when the rules for the selection procedure are determined and within the ambit of those rules.[31] Consequently, national legislation such as that at issue in the main proceedings that provides for a statutory extension of authorisations, and does not enable an impartial and transparent selection procedure to be organised, does not enable divergent interests to be taken into account.[32] A justification grounded in the principle of legitimate expectations "cannot therefore be relied on in support of an automatic extension enacted by the national legislature and applied indiscriminately to all of the authorisations at issue".[33]

Ultimately, in the light of the analysis carried out by the Court in accordance with the parameter established by the Directive, the national legislation was found to be incompatible with EU law. In addition, since the Directive, including in particular Articles 9 to 13, provides for exhaustive harmonisation,[34] the Court did not hesitate to reiterate that "a national measure in a sphere which has been the subject of full harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty".[35]

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[30] *Ibidem*, para. 49.

[31] *Ibidem*, paras. 52-54. See within the literature S. Bastianon, *La tutela del legittimo affidamento nel diritto dell'Unione europea* (2012); W. LEWANDOWSKI, *Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice*, cit., at 70.

[32] *Ibidem*, paras. 50, 51 and 55.

[33] *Ibidem*, para. 56.

[34] *Ibidem*, para. 61; see by analogy the judgment of 16 June 2015 in Case C-593/13 *Rina Services and others*, paras. 37 and 38). V. I. Maletic, *Servicing the Internal Market: The Contribution of Positive Harmonization Through the Services Directive and Its Interaction with Negative Integration*, in 48 *Legal Issues of Economic Integration* 252 (2021).

[35] *Promoimpresa* judgment, cit., para. 59. See also the judgment of 30 April 2014 in *UPC DTH*, C-475/12, para. 63 and the case law cited.

It is clear that, under the framework described above, exhaustive harmonisation deprives the State of the opportunity to rely on the express derogations provided for under primary law, as well as the overriding reasons recognised within the case law, as justification for measures that will have a restrictive effect on activities or services that have been subject to harmonisation. Within this perspective, full harmonisation has similar effects to those resulting from the recognition of exhaustive competence for the EU.[36]

In fact, this approach underlies the view that, once full and exhaustive legislation has been adopted at EU level, the interest in maintaining the uniform standard established by that legislation prevails over any other requirements: Member States are thus obliged to eliminate at root any instance of disharmony at national level.

4. The second parameter: primary law

On the other hand, primary law comes back into play where the Directive is not applicable to the main proceedings. Under such a scenario, the *lex generalis* will reappropriate its space and revert to its function as a parameter for establishing the conformity of State legislation.

In its judgment in the *Promoimpresa* case, the Court applied this paradigm in an absolutely unobjectionable manner: "in so far as the questions referred for a preliminary ruling concern the interpretation of primary law, those questions arise for consideration only if Article 12 of Directive 2006/123 is not applicable to the cases at issue in the main proceedings, which it is for the referring courts to determine, (…)".[37]

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[36] Cf. L. Daniele, *Diritto dell'Unione Europea* (2014): "[W]here the Union to choose to adopt full and detailed provisions to regulate a certain area falling under concurrent competence, the Member States would be precluded any ability to establish rules. In cases of this type, the Union's competence – originally concurrent – would in actual fact become exclusive (a phenomenon that can be defined as depletion or pre-emption)"; see also R. Baratta, *Le competenze interne dell'Unione tra evoluzione e principio di reversibilità?*, in 3 *Il Diritto dell'Unione Europea* 527 (2010); G. Gaja, A. Adinolfi, *Introduzione al diritto dell'Unione europea* (2012); S. Weatherill, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in D. O'keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* 14 (1994).

[37] *Promoimpresa* judgment, cit., para. 62.

4.1. The cross-border interest

Since the provisions on freedom of establishment only apply where there is a cross-border element, as is also the case for other fundamental market freedoms, the Court first ascertained, as a preliminary matter, whether the concessions at issue in the main proceedings, which concerned a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities,- had a "certain cross-border interest".

It is important to note that it is the cross-border or trans-national aspect that engages EU law, that brings the case within the scope of EU law and that triggers the application of its rules.[38] In other words, the cross-border element is a notion that that can be used to distinguish between situations in which free movement between Member States is not at stake and those (which may even be similar or identical) in which by contrast there is a risk of prejudice to free movement rights. The purpose of the notion is to delineate the practical scope of the rules on free movement.[39] Within this perspective, any Member State legislation that restricts free movement will not be prohibited *per se*, but only insofar as it interferes with intra-Community movement.

Traditionally, the Court has taken particular care to identify an international element, i.e. at least one cross-border aspect, before engaging the provisions of the Treaty on free movement, also in situations where it is not immediately apparent that EU law is relevant. Even where it is tenuous, not significant or even artificial, the cross-border element in any case performs an essential function

[38] For an overview of the notion, see N.N. Shuibhne, *The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?*, in P. Beaumont, C. Lyons, N. Walker (eds.), *Convergence and Divergence in European Public Law* 194 (2002).

[39] See M. Mislav, *Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market*, in *Col. Publ. Law. Res.* 36 (6 February 2009). According to the author, "[t]he internal situation rule has been developed by the European Court of Justice with the same values in mind, attempting to determine the proper scope of the internal market provisions of the EC Treaty and the amount of elbow room they leave to Member States. The case law on internal situations narrows the scope of EC provisions by excluding cases which seem to have little to do with the internal market, allowing Member States to subject these situations entirely to their own law".

in establishing whether a given situation triggers the rules on free movement.[40]

Within this perspective, the cross-border element has been construed in various ways within the case law of the Court. As well as consisting in a factual element, it may also manifest itself in the normative dimension. The term "normative transnationality" refers to the presence, within a given situation, of aspects that are of relevant for EU law not due to any cross-border circumstances or aspects within the facts of the case, but rather having regard to the *transnational goals* of the Treaty provisions on free movement.[41] The emphasis is in fact placed on the relationship between the national measure applicable to the specific facts and EU internal market rules in order to establish whether the national law may have potentially restrictive effects on free movement.

In referring to a "certain cross-border interest", the Court thus used a normative linking criterion, detaching the transnational element from the factual dimension. In fact, although the facts of the case within which the preliminary reference was made were circumscribed to within one single Member State, it was governed by national law that was clearly capable of producing effects that would not be limited to that Member State. In such an eventuality, "having regard, in particular, to the geographic location of the public property and the economic value of that concession",[42] it cannot be excluded that citizens of other Member States may have an interest in exercising their right to freedom of establishment. The Court clearly provided several criteria for establishing whether there is a certain cross-border interest. Specifically, it referred to "the financial value of the contract, the place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned".[43]

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[40] For an example, see ECJ judgments: of 6 June 2000 in Case C-281/98, *Angonese*; of 2 October 2003 in Case C-148/02, *Garcia Avello*; of 11 July 2002 in Case C-60/00, *Carpenter*; and of 19 October 2004 in Case C-200/02, *Zhu and Chen*.

[41] See B. Lebaut-Ferrarese, *Dans quelle situation, le droit de l'Union européenne trouve-t-il à s'appliquer en droit interne?*, in 97 *Petites affiches* 7 (17 May 2005). See also R.E. Papadopoulou, *Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?*, in 38 *Cahiers de droit européenne* 95 (2003).

[42] *Promoimpresa* judgment, cit., para. 67.

[43] *Ibidem*, para. 66.

4.2. Overriding reasons in the public interest

Having established a certain cross-border interest, the Court held that legislation permitting the award of a concession "without any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession and which are located in other Member States".[44] That legislation thus gave rise to a difference in treatment, which is as a general principle prohibited by Article 49 TFEU.[45] The Court thus held that the Italian law was incompatible with the provisions of primary law on freedom of establishment.

However, in the light of the conceptual framework set out briefly above, the existence of so-called "*overriding reasons*" at the same time constitutes an obstacle to the full exercise of fundamental freedoms.[46] This category was elaborated by the Court of Justice for the purpose of identifying measures that, whilst interfering with interests that are protected under EU law, may be justified on the basis of Member State requirements.[47] An overriding reason subsists whenever a national measure that interferes with a freedom guaranteed by the Treaty pursues an objective of general interest for the Member State's legal system, provided that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it. Accordingly, within the case law of the Court, the assessment of the legitimacy of measures aimed at furthering a Member State's general interests is based on three aspects: the significance of the interests pursued by the state action; the reasonableness of the standard of protection for the interests that the Member State intends to pursue; and the tolerability of the interference with legal interests derived from the Treaty. By combining these parameters, and applying the proportionality principle, it is thus possible to counterbalance two requirements: the Member States' need to maintain a reasonable

[44] *Ibidem*, para. 65.
[45] *Ibidem*, para. 70.
[46] See the famous judgment of 20 February 1979 in Case C-120/78, *Cassis de Dijon*, in which the Court launched its line of case law recognising Member States' powers to interfere with free movement of goods due to "overriding reasons.
[47] See on this issue P. Pescatore, *Variations sur la jurisprudence "Cassis de Dijon", ou, la solidarité entre l'ordre public national et l'ordre public communautaire*, in *Etudes de droit communautaire européen 1962-2007* 961 (2008).

level of legislative discretion and the need to ensure the efficacy of the freedoms guaranteed by the Treaty.[48]

Whilst the Court has not encountered any difficulty when applying this framework in qualifying the need to respect the principle of legal certainty as an objective of general interest for the Member State legal system,[49] the same cannot be said as regards the suitability of the Member State measure for securing the attainment of that objective. Although the extensions provided for under the Italian law seek to enable concession holders to recoup their investments, they "were awarded when it had already been established that contracts with certain cross-border interest were subject to a duty of transparency".[50] In reaching this conclusion the Court thus held that, as they had been awarded at a point in time that came after the assertion of the requirements of transparency, the concessions could not be considered to be suitable and proportionate, and in consequence could not be regarded as legitimate under EU law.

5. Concluding remarks

In the light of the overall argumentation contained in the *Promoimpresa* judgment, it is difficult to avoid the impression that national lawmakers only have very limited room for manoeuvre in order to protect the legitimate expectations of the holders of concessions of State-owned maritime property. This must be concluded both for concessions that fulfil the prerequisites for the application of Directive 2006/123/EC (and which consequently fall within its scope) as well as for concessions that, whilst not fulfilling the prerequisites, are subject to the rules set out in the Treaty. In fact, legitimate expectations can only be relevant within the regulatory context of a directive if the prerequisites of impartiality and transparent procedural rules, which must by definition be established in advance, have been met. Similarly, within the context

[48] For a critical examination of the method used by the Court, see N. Reich, *How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ*, in H.W. Micklitz, B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* 83 (2012).

[49] *Promoimpresa* judgment, cit., para. 71. See W. Lewandowski, *Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice*, cit., at. 72.

[50] *Ibidem*, para. 73.

of primary law, legitimate expectations can only be taken into account in accordance with more general requirements of transparency, which are not specified in any greater detail. In any case, irrespective of which specific reference parameter is relevant, since a statutory derogation (or automatic renewal) is in its very essence incompatible with requirements of transparency, it will not comply with EU law on free movement, and is therefore not a suitable instrument for protecting legitimate expectations.

Whereas, as things currently stand, it would thus appear difficult to identify a solution that was capable of reconciling automatic extensions with the requirements laid down by EU law, it must also be noted that this conclusion is only mandated in relation to concessions of State-owned maritime property that have some relevance for EU law. Conversely, if a concession violated the principle of free movement but had exclusively national effects, the rule prohibiting automatic extensions would no longer apply. This solution would arise in the event that the cumulative prerequisites that enable a Member State measure to fall within the scope of EU law were not met. This would be the case for any concession concerning natural resources that are not scarce (within the meaning of the Directive), and that do not in turn engage a certain transnational interest (within the meaning of primary law).

It is thus reasonable to conclude that considerations related to the protection of the legitimate expectations of the beneficiaries of automatic extensions can be taken into account solely and exclusively in the event that the concession falls outside the category of concessions that, in one way or another, lie within the reach of EU law.

It is only within this limited and perhaps unrealistic spaces that Member State legislation can be applied in full without being subject to the constraints imposed by EU law. *Tertium non datur*.

ITALIAN BEACH CONCESSIONS: TOWARDS A SUSTAINABLE EPILOGUE FOR THE NATURAL HERITAGE AND THE COASTAL ECONOMY?

*Angela Cossiri**

Abstract

This article illustrates recent developments in the law applicable to concessions of State-owned maritime property in Italy, highlighting issues of constitutional significance. It focuses first of all on the relationship between national law and EU law, following the "twin judgments" adopted by the Plenary Session of the Council of State in November 2021. By applying a consolidated framework, these decisions appear to have brought national law into line with the *Promoimpresa* judgment of the European Court of Justice, issued in 2016. The essay will then analyse the proposed reform approved by the Council of Ministers on 15 February 2022, considering whether it strikes a balance between competition and other public and private fundamental interests engaged. The author argues that this reform would not only resolve the contrast with EU law but might also provide an opportunity for promoting the sustainable development of national coastal areas, within a context of re-established legal certainty.

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1. Concessions of State-owned maritime property for tourist and leisure-oriented businesses before the courts

The Member States have competence to regulate property rights and the regime applicable to public ownership.[1] In Italy, the award of a concession of State-owned maritime property for tourist and leisure-oriented purposes establishes the right to carry on economic activity on public land on an exclusive basis in return for the payment of a licence fee. For this reason, EU law requires that beach concessions must be issued following the completion of a selection procedure that is open to any candidates that may be interested in operating on the market. Member States are not permitted to adopt statutory extensions for existing concessions. Despite the prohibition under European law, for more than a decade, national lawmakers have repeatedly enacted rules to this effect. This has given rise to still unresolved conflicts between the EU, regions and beach undertakings.[2]

[1] As there is no EU competence over property law, or in particular over State-owned property, each coastal Member State has established its own individual system for awarding licences to use public spares. Cf. G. Cerrina Feroni, *La gestione del demanio costiero. Un'analisi comparata in Europa*, in 4 *federalismi.it* 21 (2020), which compares experiences in Spain, Portugal, France and Greece, and A. Monica, *Le concessioni demaniali marittime in fuga dalla concorrenza*, in 2 *Riv. It. Dir. pubbl. com.* 437 (2013). On Italian law, from a constitutional law perspective, see M. Esposito, *I fondamenti costituzionali del demanio* (2018).

[2] The complex issue of concessions of State-owned maritime, lakeside and waterway property for tourist and recreational purposes came to the fore around ten years ago. The national provisions in this area have given rise to a wide array of conflicts, most of which are still unresolved, involving the State, the EU, the regions, the local authorities and beach undertakings. This issue has been considered from various academic perspectives, which have highlighted its inevitable technical complexity. Amongst the most recent studies, see M. Conticelli, *Il regime del demanio marittimo in concessione per finalità turistico-ricreative*, in 4 *Riv. Trim. dir. pubbl.* 1069 (2020); A. Gianniccari, *Stessa spiaggia, stesso mare. Di concessioni demaniali marittime e (assenza di) concorrenza*, in 2 *Merc. Conc. Reg.* 307 (2021); R. Rolli, D. Granata, *Concessioni demaniali marittime: la tutela della concorrenza quale Nemesi del legittimo affidamento*, in 5 *Riv. Giur. Edil.* 1624 (2021); G. Sorrentino, *L'insostenibile proroga delle concessioni del demanio marittimo tra tutela della concorrenza ed esigenze di ripartenza*, in 2 *amministrativamente.com* (2021); N. Romana, *Alcune osservazioni su recenti provvedimenti legislativi in tema di concessioni demaniali per finalità turistico-ricreative*, in 19 *Riv. Dir. econ. Trasp. Amb.* 35 (2021); C. Tincani, *L'illegittimità costituzionale della proroga delle concessioni demaniali marittime stabilita dalla Regione Liguria*, in 28 *Riv. it. Dir. tur.* 48 (2020); F. Mazzoni, *Le spiagge italiane e le concessioni demaniali marittime tra normativa interna e principi comunitari: la tela di Penelope,* in 1 *Munus* 175 (2020).

The most recent extension of concessions was provided for under Article 1(682) and (683) of Law no. 145 of 30 December 2018 (Budgetary Law for 2019), which was followed by Decree-Law no. 34 of 19 May 2020 (so-called "relaunch" decree), converted into Law no. 77 of 2020 containing necessary measures following the COVID-19 epidemiological emergency. The legislator has confirmed the validity and efficacy of the extension, as previously provided for, until 2033.[3]

The justification for the new extension has been disputed first by the EU Commission and subsequently by the administrative courts. The legislation was found by the Council of State to be dysfunctional having regard to its stated objective of containing the economic consequences of the epidemiological emergency.

The judgments of the Plenary Session of the Council of State issued on 3 November 2021 concerning concessions of State-owned maritime property[4] applied a consolidated framework as regards relations between EU law and national law.[5] Through these decisions, Italian law has been brought into line with the ruling of

[3] Criticisms of the extensions granted under this measure have been voiced within the literature by E. Cavalieri, *Le misure a sostegno della cultura e del turismo nella seconda fase dell'emergenza sanitaria*, in 1 *Giorn. Dir. Amm.* 30 (2021). Cf., more generally, A. Lazzari, *Le concessioni demaniali marittime tra principi comunitari e ordinamento interno: gli attuali sviluppi normativi e giurisprudenziali. Quali prospettive?*, in 1 *Il dir. mar.* 21 (2021); S. Trancossi, *La sentenza 118/2018 della Corte costituzionale: tra tutela della concorrenza e confini di competenza in materia di concessioni demaniali marittime*, in 2 *Il dir. mar.* 320 (2019). A general overview is provided by S. Gobbato, *Ten Years of State Beach Concession in Italy*, in 13 *Eur. Proc. Pub. Priv. Partn. Law Rev.* (2018); A. Giannaccari, *The Italian Marine Concessions: A History of Defective Competition*, in 2 *Merc. Conc. Reg.* 307 (2021); J. Wolswinkel, *Concession Meets Authorisation*, in 4 *Eur. Proc. Pub. Priv. Partn. Law Rev.* 396 (2017); F. Prada, *Proroga* ex lege *della durata delle concessioni demaniali marittime: tra diritto europeo e nazionale*, in 22 *Riv. it. Dir. tur.* 45 (2018).

[4] Council of State, Plenary Session, judgments nos. 17 and 18/2021 published on 9 November 2021 concerning the applications filed as R.G. nos. 14 and 13.

[5] The duty incumbent upon the public administration not to apply any national law that is incompatible with EU law (insofar as it is self-applying) is consolidated within European and national case law. Cf. Council of State, judgment no. 452/1991, *F.lli Costanzo*; Constitutional Court, judgment no. 389/1989 (cf. G. Grasso, *La disapplicazione della norma interna contrastante con le sentenze della Corte di Giustizia dell'Unione Europea*, in 2 *Giustizia civile* 525 (2017)).

the EU Court of Justice[6] in the *Promoimpresa* judgment from 2016[7] as well as the position stated by the European Commission in its letter of formal notice of 3 December 2020,[8] which has not been officially acted upon, and is thus presumably still the object of institutional dialogue.

The *Promoimpresa* judgment recognised the self-executing nature of the EU law invoked. As such therefore, there is no scope for any margin of interpretation: this rule has been enshrined within both European and national case law since the 1990s.[9]

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[6] On the alignment with EU law within the decisions of the Council of State, see the very interesting discussion in E. Cannizzaro, *Demanio marittimo. Effetti* in malam partem *di direttive europee? In margine alle sentenze 17 e 18/2021 dell'Adunanza Plenaria del Council of State*, in *Giustizia Insieme* (30 December 2021). The author argues that the Council of State adopted an innovative solution that did not feature within the *Promoimpresa* judgment, consisting in direct effect *in malam partem* by imposing on concession holders the adverse consequences of the State's failure to implement the Directive. The adoption of solutions of this type without making a preliminary reference "could undermine the formal authority and substantive authoritativeness of this legal principle". For one of the first commentaries on the twin judgments, see also R. Caroccia, *Maritime Concessions in Italy: The New Perspective After the Twin Rulings of the Council of State*, in 1 *Slov. Yearbook of EU Law* 59 (2021).

[7] CJEU, 5th Chamber, judgment in *Promoimpresa and Melis*, 14 July 2016 in Case C-458/14 and C-67/15. On which see L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga* ex lege, in 3-4 *Riv. it. Dir. pubb. com.* 912 (2016); V. Squaratti, *L'accesso al mercato delle concessioni delle aree demaniali delle coste marittime e lacustri tra tutela dell'investimento ed interesse transfrontaliero certo*, in 2 *Europ. Papers* 767 (2017); M. Magri, *Direttiva Bolkestein e legittimo affidamento dell'impresa turistico balneare: verso una importante decisione della Corte di giustizia U.E.*, in 4 *Riv. giur. Edil.* 359 (2016); F. Sanchini, *Le concessioni demaniali marittime a scopo turistico-ricreativo tra meccanismi normativi di proroga e tutela dei principi europei di libera competizione economica: profili evolutivi alla luce della pronuncia della Corte di Giustizia resa sul caso Promoimpresa v. Melis*, in 2 *Riv. reg. merc.* 182 (2016).

[8] See C(2020)7826 def.

[9] Council of State, judgment no. 452 of 1991, *F.lli Costanzo*; Constitutional Court, judgment no. 389/1989: "all subjects competent within our legal system to implement the law (as well as acts with the force or value of law) – whether, as judicial bodies, they have powers to declare what the law is or whether, as administrative bodies, they do not have any such powers – are legally required to disapply any national provisions that are incompatible with provisions" of EU law as interpreted by the Court of Justice. See recently, specifically in relation to concessions, Council of State judgment no. 7874 del 2019, which held that all State bodies, thus including also administrative bodies, are obliged to disapply any internal law that contrasts with harmonised EU law. This judgment has since been followed within various judgments of regional administrative courts, with the sole exception of the Regional Administrative Court in Lecce, the rulings of

The Court of Justice applied a two-stage argument. It specified those cases in which EU law is applicable to concessions of State-owned maritime property for tourist and leisure-oriented businesses, limiting the scope of EU obligations.

First of all, concessions are "authorisations" within the meaning of Directive 2006/123:[10] in granting concessions, the national authorities consent to the private usage of property for business purposes. The national courts have competence to establish whether there is any "scarcity of natural resources", which is a prerequisite for the applicability of the Services Directive. If natural resources are available, the requirement for a public selection procedure no longer applies. However, if the Services Directive is not applicable, it is necessary to apply the general Treaty rule on freedom of establishment: this is specifically the promotion on the adoption by Member States of measures that discriminate directly or indirectly in favour of national undertakings and against undertakings from other EU Member States.[11] Under such a scenario, in order to fall within the scope of this Treaty rule there must be some cross-border interest. If there is no such interest, the matter falls definitively outside the scope of EU law.[12]

If there is such a transnational element, the ECJ has held that the scope of the constraints imposed by EU law are not absolute:

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which were challenged in proceedings that resulted in the twin judgments of the Council of State examined in this paper.

[10] On the Directive see *inter alia* M. Klamert, *The Services Directive: Innovation and fragmentation*, in M. Klamert, *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (2014); G. Davies, *The Services Directive: extending the country of origin principle, and reforming public administration*, in *E.L. Rev.*, 2007, p. 232 et seq; P. Delimatsis, *Standardisation in services - European ambitions and sectoral realities*, in 32 *Eur. Law Rev*. 513 (2016); U. Stelkens, W. Weiß, M. Mirschberger (eds.), *The Implementation of the EU Services Directive Transposition, Problems and Strategies* (2015), reviewed by A. Usai, in 52 *Comm. Law. Mark. Rev.* 870 (2015); M.R. Botman, *The EU Services Directive - Law or Simply Policy?* (2014), reviewed by M. Wiberg, in 1 *Comm. Mark. Law Rev.* 311 (2017).

[11] On freedom of establishment, see P. Craig, G. de Búrca, *EU Law* (2015); V. Hatzpopoulos, *Regulating Services in the European Union* (2012); S. Van den Bogaert, A. Cuyvers, I. Antonaki, *Free Movement of Services, Establishment and Capital*, in *The Law of the European Union* (2018); H.-J. Blanke, S. Mangiameli (eds), *Treaty on the Functioning of the European Union - a commentary* (2021).

[12] See M.E. Bartoloni, *Le concessioni demaniali marittime nel contesto delle libertà di circolazione: riflessioni sulla sentenza Promoimpresa*, in A. Cossiri (eds.), *Coste e diritti. Alla ricerca di soluzioni per le concessioni balneari* (2022).

the difference in treatment may be justified, but only by "overriding reasons relating to the public interest". These include, for example, the need to respect the principle of legal certainty. For example, provision may be made for a transition period for an old concession, which enables the parties to the contract to wind down their respective relations under conditions that are acceptable in financial terms, thus protecting the outgoing concession holder's legitimate expectation to recoup the investments made.

In the wake of this ruling by the European Court, in a dispute between the Italian State and the regions concerning legislative competence over beach concessions, the Constitutional Court used its power to decide how the issues were to be dealt with. However, it did not specify whether the regional legislation violated EU law, but limited itself to disputing the regions' encroachment on the State's exclusive competence over competition law. Nonetheless, the special link between national law and EU law was still stressed, as the competitive structure of the market is also protected under EU law.

In the face of the uncertainties shared by the public administrations and the administrative courts,[13] in November 2021 the Council of State became involved, with the Plenary Session issuing two "twin judgments". The supreme administrative court held that the extension violated both Article 49 TFEU, which prohibits the Member States from imposing restrictions on freedom of establishment, as well as Article 12 of the Services Directive, which requires transparency within procedures for selecting concession holders.[14]

The Council of State held that there was both a cross-border interest (a necessary prerequisite for falling within the scope of Article 49) as well as scarcity of natural resources (a prerequisite for the application of Article 12, even if the relevant case involves purely internal matters).[15]

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[13] On the uncertainties within the case law before the ruling by the Plenary Session, see S. Agusto, *Gli incostanti approdi della giurisprudenza amministrativa sul tema delle concessioni del demanio marittimo per finalità turistico ricreative*, in 5 *Riv. it. Dir. pubbl. com.* 648 (2020).

[14] On the direct effect of the Directive, see M. Manfredi, *L'efficacia diretta della "direttiva servizi" e la sua attuazione da parte della pubblica amministrazione italiana: il caso delle concessioni balneari*, in 1 *JUS* 63 (2021).

[15] On the application of the provisions concerned also to situations that are purely internal, cf. CJEU, Grand Chamber, judgment of 30 January 2018 in Joined Cases C-360/15 and C-31/16. For a detailed discussion of this complex yet unavoidable

This is a ruling that the national legislator is competent to review, exercising its discretion in a responsible fashion, within the context of a reform of the overall system for awarding concessions, whether in a manner compatible with EU law, or even outside of its scope. The State legislator could entirely overhaul the system for managing and allocating these public spaces, for example by no longer making them exclusively available to private undertakings and withdrawing them from the market, creating new management models that involve civil society and local government bodies.[16]

In any case, EU law does not require national legislators to afford absolute priority to competition, entirely sacrificing any other countervailing interest. Even within the scope of EU law, competition is only one of many fundamental interests protected. This is apparent both from the preamble as well as from Article 12(3) of the Services Directive.[17] The reference to "overriding reasons relating to the public interest, in conformity with Community law", which was interpreted by the Court of Justice and the Constitutional Court, opens up scope for the exercise of legislative discretion that is anything but limited in. The task of

issue, see M.E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018). With reference to the specific sector of freedom of establishment, see E. Faustinelli, *Purely Internal Situations and the Freedom of Establishment Within the Context of the Services Directive,* in 44 *Leg. Iss. Ec. Int.* 77 (2017).

[16] Cf., *inter alia*, A. Lucarelli, *Il nodo delle concessioni demaniali marittime tra non attuazione della Bolkestein, regola della concorrenza ed insorgere della nuova categoria "giuridica" dei beni comuni (Nota a C. cost., sentenza n. 1/2019)*, in 1 *Dirittifondamentali.it* (2019); A. Lucarelli, *La democrazia dei beni comuni. Nuove frontiere del diritto pubblico* (2013); M.C. Girardi, *Principi costituzionali e proprietà pubblica. Le concessioni demaniali marittime tra ordinamento europeo e ordinamento interno*, in 1 *Dir. pubbl. eur. Rass. Online* (2019); A. Lucarelli, L. Longhi, *Le concessioni demaniali marittime e la democratizzazione della regola della concorrenza*, in 3 *Giur. Cost.* 1251 (2018); L. Longhi, *Concessioni demaniali marittime e utilità sociale della valorizzazione del patrimonio costiero*, in 1 *Riv. cort. Conti* 184 (2019); see recently A. Lucarelli, B. De Maria, M.C. Girardi (eds.), *Governo e gestione delle concessioni demaniali marittime. Principi costituzionali, beni pubblici e concorrenza tra ordinamento europeo e ordinamento interno* (2021).

[17] I. Maletic, *Servicing the Internal Market: The Contribution of Positive Harmonization Through the Services Directive and Its Interaction with Negative Integration*, in 48 *Leg. Iss. Ec. Int.* 521 (2021); U. Stelkens, W. Weiß, M. Mirschberger (eds.), *The Implementation of the EU Services Directive Transposition, Problems and Strategies* (2015), reviewed by A. Usai, in 52 *Comm. Law. Mark. Rev.* 870 (2015); M.R. Botman, *The EU Services Directive - Law or Simply Policy?* (2014), reviewed by M. Wiberg, in 1 *Comm. Mark. Law Rev.* 311 (2017).

lawmakers is thus to strike an appropriate balance, with reference both to domestic principles of constitutional law, as well as the requirements of pan-European harmonised rules. It is necessary to avoid affording absolute priority to competition,[18] elevating its miraculous effects to mythical status, and rather to comply with the model of the social market economy,[19] which takes account of the interests of local communities, the socio-economic systems of which are closely linked to the beach tourism industry.[20]

2. Towards a sustainable epilogue? The Government's initiative

Following the judgment by the Council of State, a negotiation round was launched between the Government and sectoral associations with a view to drafting legislation to overhaul the law applicable in this area.

On 15 February 2022, the Council of Ministers approved a proposal to amend the annual markets and competition bill for 2021,[21] which was currently under consideration before the Senate. It is possible that the decision to amend draft legislation that had already been tabled in Parliament was made in order to push

[18] Regarding the fundamental interest in competition under constitutional law, see *ex multis* G. Amato, *Corte Costituzionale e concorrenza*, in 3 *Merc. Conc. Reg.* 425 (2017); A. Morrone, *La concorrenza tra Unione Europea, Stato e Regioni*, in M. Ainis and G. Pitruzzella (eds.), *I fondamenti costituzionali della concorrenza* (2019); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); F. Trimarchi Banfi, *Il "principio di concorrenza": proprietà e fondamento*, in 1-2 *Dir. amm.* 15 (2013); F. Trimarchi Banfi, *Ragionevolezza e bilanciamento nell'attuazione dei principi costituzionali. Il principio di concorrenza nei giudizi in via principale*, in 4 *Dir. amm.* 623 (2015); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); R. Bin, *Il governo delle politiche pubbliche tra Costituzione ed interpretazione del giudice costituzionale*, in 3 *Le Regioni* 509 (2013).

[19] See for a particularly clear account B. Caravita, G. Carlomagno, *La proroga* ex lege *delle concessioni demaniali marittime. Tra tutela della concorrenza ed economia sociale di mercato. Una prospettiva di riforma*, in 20 *federalismi.it* (2021), the conclusions to which set out a series of balanced normative solutions that could offer alternative ways forward for national lawmakers that are not at odds with EU law.

[20] Cf. G. Di Plinio, *Il Mostro di Bolkestein in spiaggia. La "terribile" Direttiva e le concessioni balneari, tra gli eccessi del* Judicial Italian Style *e la crisi del* federalizing process, in 2020 *federalismi.it* (2020).

[21] Acts of the Senate 2469.

through new rules as quickly as possible. It was necessary not only to bring the European Commission's infringement procedure to a halt but also to take account of the deadline set by the Council of State for all existing concessions that, thanks to the extensions, had been awarded without competitive procedures.

Article 2-ter(1) of the Government's amendment provides that the proposed amendment will seek to ensure a more rational and sustainable usage of State-owned maritime property, to favour its public usage and to promote greater competitive dynamism within the sector, in accordance with EU law as well as the requirement for environmental and cultural heritage protection.

Thus, although the provisions appear within draft legislation on competition, the Government appears to consider it necessary to balance out the different interests at stake.[22]

In line with the judgments of the Council of State, the bill provides that concessions currently benefiting from extensions will remain valid until 31 December 2023 and that public tendering procedures for their award will be held sufficiently in advance of their expiry.

The proposed amendment includes a provision authorising the Government to simplify and rearrange the law applicable to concessions of State-owned maritime, lakeside and waterway property for tourist and recreational purposes (including those awarded to non-profit entities), as well as concessions relating to the management of facilities intended for pleasure boating. The Government will issue one or more legislative decrees within six months of the law's entry into force. These decrees will contain details of the reform. However, it is already possible to identify the direction of travel. The delegation of authority to issue secondary legislation refers to a series of general principles and criteria, which the Government must comply with.

[22] In the opinion examining the draft legislation, which was requested by the examining parliamentary committee and concerned in particular public services, A. Lucarelli recalls an aspect of constitutional significance deserving attention, as a perspective that is also relevant for concessions of State-owned property: the relevant applicable constitutional principles constitute an indispensable substrate for reflections. "In particular, it must be recalled that the principles of solidarity and equality, which are rooted also in the economic provisions of the Constitution (Articles 41-43), cannot and must not in any way be upset by the need to identify efficient and effective management methods […]" (Opinion, p. 1, in senato.it).

It is possible that amendments may be tabled in Parliament and it remains to be seen what specific form the final text will take.

2.1. Competition and other public interests: environmental and social sustainability

Under the terms of EU law, concessions must be awarded on the basis of transparent public tendering procedures, as required by the European Commission and as established by the Council of State. However, the requirements of competition appear to be suitably balanced against other interests. It is important to consider these interests in greater detail.

First of all, the need for there to be some balance between those areas of State-owned maritime property that are granted under concession and those parts that can be freely used, subject to a right of access to the foreshore along the entire coastline, is reasserted. The provision creates a protected space both for natural and landscape resources in and of themselves, and also for the local community, for which the area is first and foremost a public space. As such, it must remain freely accessible, at least in part, also for those who choose not to use remunerated services.

As regards areas that are granted under concession, the idea underlying the reform is lay down "from the centre" uniform rules to govern selective award procedures.

As regards the procedure for approving the legislation, in accordance with the principle of loyal cooperation the legislative decrees will only be adopted after agreement has been reached within the Standing Conference for relations between the State, the regions and the autonomous provinces of Trento and Bolzano and following the issue of an opinion by the Council of State. The draft legislative decrees will then be subject to parliamentary scrutiny, involving the issue of opinions by the parliamentary committees with substantive competence, and as regards financial aspects.

There appears perhaps to be only one limit to the legislative changes proposed: it will establish shared, uniform rules applicable in different geographical, natural, social and economic circumstances, which in some cases are highly disparate; these rules are likely to be fairly detailed and also to impinge upon regional competence. From this perspective, it is hoped that the Standing Conference will provide its own input. However, considering the current situation (i.e. impending infringement proceedings, no detailed inventory of existing concessions or available coastal

natural resources, and the absence of any cross-border interest in participating in a specific tendering procedure), it would appear to be difficult to provide for different rules.

As regards the public interests at stake in this area, it is specified that the reform will have to take account of social policy objectives, the health and safety of employees, the protection of the environment and the preservation of cultural heritage. This criterion reflects the general clauses set out in Article 12(3) of the Services Directive: these clauses specifically indicate interests that are recognised at both national and supranational level. They may therefore be legitimately offset at both levels against the interest in competition, which is also recognised as fundamental in both Italian and EU law.

More specifically, the protection of the public interest operates along two axes.

First of all, from the viewpoint of environmental sustainability and the interests of future generations - both of which are now relevant under constitutional law - the legislator intends to ensure that the impact on the landscape, the environment and the ecosystem is kept to a minimum, and has established here a preference in favour of initiatives involving non-fixed and fully removable facilities. This aspect appears to represent a significant safeguard against beach development plans that have permitted the overbuilding of beaches, in some cases entirely unchecked. It also provides that a portion of the licence fee must be reserved for coastal defence projects and the related natural capital.

Secondly, placing significant emphasis on the social dimension to sustainability, the legislator appears to have fully understood the characteristics of a *sui generis* community system, which is typical of Italian coastal areas. At least in some local areas, this system is undoubtedly fragile due to the small sizes of the micro-enterprises involved. Action is thus required to protect both the overall tourist hospitality system as well as the interest of local communities, which have been built up also (or in some cases exclusively) around the wider economy surrounding beach undertakings.

It will therefore be necessary to establish the prerequisites for dividing up areas of State-owned maritime property that are granted under concession in into smaller lots, as well as the circumstances under which this is possible, in order to favour the broadest level of participation by micro and small enterprises. This

is an important corrective measure by the public authorities, which takes account of the prevalent economic structure of traditional Italian beach undertakings. In addition, according to the criteria underpinning the reform, the prerequisites for admission will have to favour the broadest level of participation by undertakings, including small enterprises and third sector entities. As well as encouraging competition according to rules that should not leave small enterprises behind, but should rather support them, the reference to third sector undertakings could enable the maintenance and the emergence of new forms of civic management of common goods.

In order to protect the market access of small and micro-enterprises, in accordance with the principles of adequacy and proportionality, the reform also provides for the stipulation of a maximum number of concessions that can be held directly or indirectly by one single concession holder at municipal, provincial, regional or national level, subjecting awarding bodies to reporting obligations as regards the areas granted under concession.

Premium criteria will also be introduced into tendering procedures for undertakings holding gender equality certification, including those owned predominantly or entirely by young persons.

As regards the protection of sectoral workers, the reform should incorporate social clauses aimed at promoting the employment stability of staff working in the operations of the outgoing concession holder, in accordance with principles of EU law and having regard to the promotion and guarantee of social policy objectives related to the protection of employment.

There is one significant new aspect within the legislator's approach: the two fundamental public interests affected in this area - protecting the environment and protecting the local socio-economic system - are pursued through measures that are not anti-competitive, and which are thus not open to challenge on the grounds that they violate EU law. The latter public interest is supported even through the introduction of pro-competition measures.

The legislative instruments currently identified were also available in the past. This shows that the reason for the normative uncertainty, which blocked one of the country's key economic sectors for more than a decade, was not the European Union but rather the lack of political will within the national legislature.

The reform's interest in consumer protection is focused on vulnerable classes of user, who are moreover an important target of beach tourism, due both to the beneficial effects on health of heliotherapy and thalassotherapy, as well as the general ageing of the European population.[23] When choosing the concession holder the quality of and conditions applicable to the service offered to users will also have to be assessed in the light of the action plan presented by the bidder with the aim of improving access to and usage of State-owned maritime property also by persons with a disability. It is likely that the merely aspirational nature of this measure will not impair its efficacy and potential impact, as competitors will have a strong interest in submitting highly competitive projects.

2.2. Economic public interests

The investigation by the Court of Auditors, which was concluded by a ruling of 21 November 2021,[24] found that the State Exchequer must be able to manage coastal resources efficiently, given that the revenues generated have been even lower than the respective forecasts, due amongst other things also to inefficient data management; it also indicated that it would be appropriate to review the level of licence payments based on the potential profitability of the areas granted under concession. The unconditional ability to grant sub-concessions in itself demonstrates the existence, at least in some cases, of excessive and disproportionate profit margins, which should be recovered.

In order to enhance public revenues from State-owned property, the reform provides that concessions should not be any longer than the period of time necessary in order to ensure that the concession holder is able to recoup the amounts invested, in addition to fair remuneration for investments authorised by the awarding body when granting the concession.[25] The duration must

[23] Cf. I. Pauhofova, G. Dovalova, *Potential of silver economy in the European Union (selected views)*, in *European Scientific Journal* (2015); M. Zsarnoczky, L. David, Z. Mukayev, R. Baiburiev, *Silver tourism in the European Union*, in *GeoJournal of Tourism and Geosites* (2016).

[24] Cf. resolution no. 20/2021/G granting approval, along with the indications stated, for the Report on the *Management ore Revenues from State-owned maritime property*, based on the investigation launched in 2018, available at cortedeiconti.it.

[25] See also recital 62 to the Services Directive, which refers to a proportionality principle in the balancing of the interests of the market and undertakings against the interest in fair remuneration: "the duration of the authorisation granted

in any case be determined having regard to the scale and economic significance of the works to be carried out, with an express prohibition on extensions and renewals, including automatic extensions and renewals.

It will also be necessary to define uniform criteria for quantifying annual licence fees that take account of the natural prestige and effective profitability of State-owned property granted under concession, as well as the usage of those areas for sporting or recreational activities, or activities related to local traditions, whether carried out by individuals or non-profit associations, or for public interest purposes.

Finally, provision should be made for a share of the licence fee to be reserved to the awarding body in order to carry out coastal defence works and to enhance the usability of free State-owned property.

2.3. Competition and private interests: incumbent beach undertakings

As regards the protection of the private interests of existing undertakings, the delegation stipulates that, when awarding concessions, adequate consideration will have to be given to investments, the business value of the undertaking along with any tangible and intangible assets as well as the expertise acquired.

Specifically, two types of initiative are envisaged on this front.

The first involves the consideration during tendering procedures of the position that the existing undertaking presumably has. This will involve an assessment in particular of the technical experience and expertise already accumulated in relation to the activity covered by the concession, or the management of similar public assets, according to the criteria of proportionality and adequacy, and in any case in such a manner as not to prevent new operators from entering the market. The assessment will also cover the position of those operators that have used the concession as their predominant source of income, both for themselves and for

should be fixed in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to achieve a fair return on the capital invested". Within the literature, on the relationship between duration and effective management, see A. Salomone, *La concessione dei beni demaniali marittimi* (2013), and B. Tonoletti, *Beni pubblici e concessioni* (2008).

their immediate families, over the five years prior to the launch of the tendering procedure. Here too, it is important to note the balancing operation involving a social aspect, which is indissolubly linked to the economic reality: a family that lives predominantly from the income generated by the beach undertaking.

The second type of initiative concerns outgoing concession holders, and operates downstream from tendering procedures. The reform will have to identify uniform criteria for quantifying the compensation that the incoming concession holder must pay to the outgoing concession holder.[26] This compensation will cover two aspects: a) the failure to recover any investments made during the course of the concession relationship that were authorised by the awarding body; and b) the value of the goodwill associated with commercial operations or those of tourist interest. Both of these aspects were called for by associations of beach undertakings. A requirement for the incoming concession holder to cover the residual cost of investments not yet recouped as well as the intangible value of the business transferred does not appear to raise any problems in terms of compatibility with EU law as it is a measure that would not impair the entry into the market of new operators. In fact, they should effectively receive the respective benefits by virtue of being granted the concession.

Should any critical issues arise in relation to this aspect with the European Commission, it must in any case be considered that

[26] The Constitutional Court has also ruled on the issue of compensation, which may act as an obstacle to the entry of new operators into the reference market. See, *inter alia*, judgments nos. 40/2017, 109/2018 and 222/2020. Within the literature, cf. M. Conticelli, *Effetti e paradossi dell'inerzia del legislatore statale nel conformare la disciplina delle concessioni di demanio marittimo per finalità turistico-ricreative al diritto europeo della concorrenza*, in 5 *Giur. Cost.* 2475 (2020).

[26] Regarding the fundamental interest in competition under constitutional law, see *ex multis* G. Amato, *Corte Costituzionale e concorrenza*, in 3 *Merc. Conc. Reg.* 425 (2017); A. Morrone, *La concorrenza tra Unione Europea, Stato e Regioni*, in M. Ainis and G. Pitruzzella (eds.), *I fondamenti costituzionali della concorrenza* (2019); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); F. Trimarchi Banfi, *Il "principio di concorrenza": proprietà e fondamento*, in 1-2 *Dir. amm.* 15 (2013); F. Trimarchi Banfi, *Ragionevolezza e bilanciamento nell'attuazione dei principi costituzionali. Il principio di concorrenza nei giudizi in via principale*, in 4 *Dir. amm.* 623 (2015); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); R. Bin, *Il governo delle politiche pubbliche tra Costituzione ed interpretazione del giudice costituzionale*, in 3 *Le Regioni* 509 (2013).

the Italian State can avoid requiring the incoming concession holder to pay compensation, or at least some of it, but that it must nonetheless ensure redress out of its own financial resources for outgoing concession holders whose concessions were extended. In fact, the State cannot decline to compensate market operators for effects *in malam partem* resulting from the failure by public bodies (legislature, courts and public administrations) to comply with EU law.

3. Concluding remarks

The most appropriate way of dealing with a question that affects a significant sector of the national economy, has a significant impact on local social systems and impinges upon the environment and the interests of future generations is evidently the long-awaited reform of State legislation, duly adopted following consultation with local government bodies.

The reform is limited to changing the rules governing the public selection of concession holders, harmonising procedures at national level. Were this framework to be maintained also after passage through Parliament has been completed, regional lawmakers would retain residual scope for intervention within the areas falling under their own competence, which interact with the cross-cutting competence under Article 117(2)(e) of the Constitution.

The Government has chosen not to provide for different selection arrangements for different parts of the country, and based on the different characteristics of each individual concession, but to opt under all circumstances for competitive procedures. Different treatment was one available option, although was certainly more problematic in terms of the relationship between the State and the EU as well as the relationship between the State and the regions, and also due to the current lack of information on which such a decision could be based.

In fact, the Court of Justice has held that it is legitimate to assess the existence of a cross-border interest on a case-by-case basis, having regard to "the financial value of the contract, the place where it is to be performed or its technical features".[27] The Council

[27] Paras. 66 et seq of the *Promoimpres*a judgment, cit.: "First of all, it should be noted that the existence of certain cross-border interest must be assessed on the basis of all the relevant factors, such as the financial value of the contract, the

of State did not take this approach, and considered the foreign interest in general terms, considering the attractiveness of Italy's coastal resources overall.[28] Where there is no cross-border interest and no scarcity of available natural resources – although such a conclusion can only be reached with reference to mapping work that has not yet been carried out[29] as well as a review of the scale of demand that the resources could generate amongst potential

place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned (see, to that effect, judgments of 14 November 2013 in Belgacom, C-221/12, EU:C:2013:736, paragraph 29 and the case-law cited, and 17 December 2015 in UNIS and Beaudout Père et Fils, C-25/14 and C-26/14, EU:C:2015:821, paragraph 30)". In its ruling, the Court of Justice identified differences between the two cases before it for examination, *Promoimpresa and Melis*.

[28] Para. 16: "the public administration provides private concession holders with a complex body of State-owned property which, considered overall in a unitary fashion, is one of the most famous and most attractive natural assets (in terms of coastline, lakes and rivers, and the related marine, lakeside or waterway areas) in the world. It is sufficient to note that estimated revenues for the sector are around fifteen billion euros per year […]. The economic attractiveness is enhanced by the ability to grant sub-concessions", which have been possible in a general fashion and without any time limits since 2001. The ability to grant sub-concessions also demonstrates that the licence fees set for concessions are inadequate, as in some cases they leave an evidently disproportionate profit margin to private operators. This is another aspect that has led to calls for the adoption of rules. The judgment continues: "moreover, the importance and economic potential of the national coastal heritage must not be diminished by artificially breaking it up into small units in an attempt to assess the cross-border interest in the individual areas of State-owned property granted under concession. Any such fragmentation would not only distort the unitary nature of the sector, but would also be at odds with those very same national legislative provisions (which, when providing for extensions, have always done so without distinction for all operators, and not in relation to individual concessions following a case-by-case assessment) and above all would result in unjustifiable and absolute differences in treatment, enabling only some (but not all) to continue under the regime of statutory extensions".

[29] The annual markets and competition bill for 2021, which was tabled in Parliament on 3 December 2021, authorised the Government to adopt a legislative decree within six months of the law's entry into force concerning the establishment of a permanent information gathering system for concessions granting rights to the exclusive use of public property to either private or public entities. The objective of this general census, which has not previously been carried out, is to guarantee transparency within concession relationships as well as appropriate revenues from publicly owned assets. However, it would also enable a snapshot to be taken of differences between local territorial, entrepreneurial and socio-economic situations that could justify particular legal treatment.

competitors from other EU Member States – there will be no EU law constraints on award according to public procedures as the matter would fall outside the scope of EU law, and thus under exclusive Member State competence.

The proposed reform appears to take account of the many public and private interests at stake in this area and to balance them out in a proportional manner.

If this position were to be confirmed after passage through Parliament has been completed, it could mark a new departure both for municipalities as well as for beach undertakings. Against a backdrop of renewed certainty, it will be necessary to deploy creative and innovative project expertise with a view to making the best sustainable usage of local coastal resources.

THE CONSTITUTIONAL COURT AND BEACH CONCESSIONS

Giovanni Di Cosimo[*]

Abstract

Italian Regional laws on State-owned maritime concessions protect the interests of current concessionaires. However, the Constitutional Court considers, on the first hand, that the national legislator has the competence on competition matter and, on the second hand, that the protection of this constitutional interest prevails over regional matters. The essay reviews this case-law and highlights its limits.

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1. Introduction

The desire on the part of the regions to favour concession holders is apparent throughout the constitutional case law on beach concessions. On the other hand, the Government is more sensitive to the need to protect competition, and thus also to the interests of potential new operators. Nonetheless, the State's overall position appears to be rather ambiguous, as the legislator has recently extended, yet again, concessions over the State-owned maritime property.

The case law of the Constitutional Court starts from the premise that the issue of beach concessions involves the intersection of matters under respectively State and regional competence. However, the Court takes the view that protection of competition, over which the State has competence, is without doubt more weighty than other interests, and this argument has inevitably led

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it to conclude that the respective regional legislation is unconstitutional.

The Constitutional Court's case law also takes account of the Services Directive, which aims to remove barriers to the freedom of establishment for service providers and obstacles to the free movement of services within the European Union[1]. These are rules that also apply to the beach concessions sector[2].

2. Beaches and the pandemic

Holders of concessions over State-owned maritime property granted for tourist and recreational purposes have also been eligible to benefit from the packages adopted in Italy to support

[1] For an up-to-date discussion of the issues, see M. Conticelli, *Il regime del demanio marittimo in concessione per finalità turistico-ricreative*, 4 Riv. trim. dir. pubbl. 1069 (2020); F. Gaffuri, *La disciplina nazionale delle concessioni demaniali marittime alla luce del diritto europeo*, 3 Ceridap 37 (2021); A. Giannaccari, *Stessa spiaggia, stesso mare. Di concessioni demaniali marittime e (assenza di) concorrenza*, 2 Mercato Concorrenza Regole 307 (2021); R. Rolli, D. Granata, *Concessioni demaniali marittime: la tutela della concorrenza quale Nemesi del legittimo affidamento*, 5 Riv. giur. ed. 1624 (2021); G. Sorrentino, *L'insostenibile proroga delle concessioni del demanio marittimo tra tutela della concorrenza ed esigenze di ripartenza*, 2 Amministrativamente.com (2021). For an overview of the choices made in various countries see G. Cerrina Feroni, *La gestione del demanio costiero. Un'analisi comparata in Europa*, 4 Federalismi.it 43 (2020); A. Monica, *Le concessioni demaniali marittime in fuga dalla concorrenza*, 2 Riv. it. dir. pubbl. comunit. 437 (2013).

[2] The Court of Justice of the EU has held that "Article 12(1) and (2) of Directive 2006/123/EC (…) must be interpreted as precluding a national measure (…) which permits the automatic extension of existing authorisations of State-owned maritime and lakeside property for tourist and leisure-oriented business activities, without any selection procedure for potential candidates" (judgment of 14 July 2016 in Joined Cases C-458/14 and C-67/15). On this issue see M.E. Bartoloni, *Le concessioni demaniali marittime nel contesto delle libertà di circolazione: riflessioni sulla sentenza Promoimpresa,* in A. Cossiri (ed.), *Coste e diritti. Alla ricerca di soluzioni per le concessioni balneari* (2022); L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga* ex lege, 3-4 Riv. it. dir. pubbl. comunit. 912 (2016); V. Squaratti, *L'accesso al mercato delle concessioni delle aree demaniali delle coste marittime e lacustri tra tutela dell'investimento ed interesse transfrontaliero certo*, 2 *European Papers* 767 (2017); A. Cossiri, *La proroga delle concessioni demaniali marittime sotto la lente del giudice costituzionale e della Corte di giustizia dell'UE*, 14 Federalismi.it 1 (2016); M. Magri, *Direttiva Bolkestein e legittimo affidamento dell'impresa turistico balneare: verso una importante decisione della Corte di giustizia U.E.*, 4 Riv. giur. ed. 359 (2016); F. Sanchini, *Le concessioni demaniali marittime a scopo turistico-ricreativo tra meccanismi normativi di proroga e tutela dei principi europei di libera competizione economica: profili evolutivi alla luce della pronuncia della Corte di Giustizia resa sul caso Promoimpresa v. Melis*, 2 Riv. reg. merc. 182 (2016).

economic sectors particularly affected by the pandemic. In particular, one regional law extended the duration of concessions until 2033 with the stated purpose of combatting the epidemiological emergency[3].

However, the Government challenged the regional legislation before the Constitutional Court on the grounds that it violates the principle of protection of competition, which falls under exclusive State jurisdiction pursuant to Article 117(2)(e) of the Constitution. The Court allowed the challenge brought by the State, confirming its settled case law according to which extensions and automatic renewals of beach concessions impinge upon the protection of competition in "hindering the entry of other potential economic operators into the relevant market" (Judgment no. 139/2021).

The problem therefore lies with the instrument chosen in order to support this economic sector. Had regional lawmakers chosen a simple financial subsidy, rather than extending concessions, this would not have violated the principle of protection of competition. As such, the suspicion that the actual objective of the regional legislation was to favour current concession holders, rather than supporting the economic sector during the pandemic, appears to be well-founded.

3. Duration of concessions

As is shown by the Friuli Region legislation, the regions have a tendency to extend the duration of beach concessions, thereby favouring the current holders to the detriment of new concession holders[4]. Regional legislation has pursued this goal in various ways.

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[3] Friuli-Venezia Giulia Regional Law no. 8/2020 entitled "Urgent measures to combat the COVID-19 epidemiological emergency with regard to the State-owned maritime and watercourse property".

[4] M.C. Girardi, *Principi costituzionali e proprietà pubblica. Le concessioni demaniali marittime tra ordinamento europeo e ordinamento interno*, 1 DPER online 238 (2019). On the November 2021 judgments of the Plenary Session of the Council of State, which held that the legislative extensions breached the EU law requiring a selection procedure amongst potential interested candidates, see A. Cossiri, *L'Adunanza plenaria del Consiglio di Stato si pronuncia sulle concessioni demaniali a scopo turistico-ricreativo. Note a prima lettura*, 2 DPER online 232 (2021); A. Monica, *Il futuro prossimo delle "concessioni balneari" dopo il Consiglio di Stato*: nihil medium est?, 1 Ceridap 63 (2022); Vv.Aa., *La proroga delle "concessioni balneari" alla luce delle*

First of all, regional laws may provide for the automatic renewal of concessions[5]. The Court objects that any such automaticity "gives rise to unequal treatment between economic operators in breach of the principles of competition, as those who have not previously managed the State-owned maritime property do not have any opportunity, upon the expiry of the concession, to replace the old concession holder, unless the latter fails to seek an extension or applies for one without presenting a valid investment programme" (Judgment no. 180/2010)[6]. In such cases, provision is made for the renewal of existing concessions according to transitory rules, pending the adoption of a comprehensive municipal beach plan. The Court objects that such forms of renewal end up "being exempt from public tendering procedures in accordance with principles, endorsed under Community and State law, on the protection of competition laid down in relation to the grant of new concessions, thus *de facto* permitting the simple continuation of

sentenze 17 e 18 del 2021 dell'Adunanza Plenaria, 3 Dir. & soc. (2021); L. Vitulli, *La cessazione delle concessioni balneari in essere al 31 dicembre 2023 nelle sentenze dell'Adunanza plenaria n. 17 e 18 del 2021*, Diritticomparati.it (2021); M. Timo, *Concessioni balneari senza gara ... all'ultima spiaggia*, 5 Riv. giur. ed. 1596 (2021); A.M. Colarusso, *Concessioni demaniali: le "relazioni pericolose" tra illegittimità comunitaria e il giudicato amministrativo sui rapporti di durata. Spunti a margine delle sentenze dell'Adunanza Plenaria del Consiglio di Stato, nn. 17 e 18/2021*, 4 Amministrativamente.com (2021).

[5] One critical aspect is that the renewal was ordered in general terms by a law rather than by the administrative authorities following an assessment of the specific circumstances (see A. Giannelli, *Il rinnovo in favore del concessionario uscente quale forma di tutela del valore identitario di determinati locali "storici": dalla dittatura della concorrenza alla dittatura della cd. eccezione culturale?*, 1 Dir. proc. amm. 186 (2019).

[6] The judgment (commented on by M. Esposito, *La triade schmittiana* à rebours, 3 Giur. Cost. 2167 (2010); C. Benettazzo, *Il regime giuridico delle concessioni demaniali marittime tra vincoli U.E. ed esigenze di tutela dell'affidamento*, 25 Federalismi.it 16 (2016)) states that "this case concerns an extension of a concession that had already expired, and therefore there was no legitimate expectation to be protected in terms of the need to have sufficient time to recoup the costs incurred in order to obtain the concession because, at the time it was issued, the concession holder was already aware of the period of time it could expect to have in order to recoup the investments, on which it was able to rely". This approach is confirmed by judgment 340/2010 (commented on by G. Lo Conte, *Rinnovo di concessione di beni demaniali e tutela della concorrenza: un matrimonio impossibile*, 2 Gazzetta amministrativa 32 (2011)) and by judgment 213/2011 (on which see A. Greco, *Il legislatore interviene (ancora) in materia di demanio marittimo. Problemi di costituzionalità e "tenuta comunitaria" nel bilanciamento tra tutela dell'affidamento, libera concorrenza e parità di trattamento*, 4 Federalismi.it 6 (2011)).

existing concession relations, with extensions being essentially automatic – or in any case not subject to competition law – for existing concession holders" (Judgment no. 10/2021)[7].

Secondly, regional laws may transform seasonal concessions into concessions that last for a number of years. The Constitutional Court has also held that such arrangements violate the principle of the protection of competition as the transformation results in concessions of indefinite duration "for one single holder, who is thus unjustifiably privileged over and above any other potential interested party" (Judgment no. 10/2021).

Thirdly, regional laws may grant an extension to concessions in the event of storm surges and/or exceptional weather events that cause damage to beach resorts, to State-owned property or to the respective immovable property built on State-owned maritime property[8]. The Court has held that any such measure will violate the constraints imposed by EU law on the freedom of establishment and the protection of competition. In addition, a measure of this type results in "different treatment for different economic operators, in breach of Article 117(2)(e), as those who have not been managing the State-owned maritime property will not have any opportunity to replace the previous concession holder upon expiry of the concession". In addition, "it prevents the entry of other potential economic operators into the market, imposing entry barriers liable to distort competition" (Judgment no. 171/2013).

Fourthly, regional laws may extend the duration of concessions with the aim of creating "appropriate guarantees for the maintenance of the right to continuity of concessions"[9]. The Constitutional Court's response is that the purpose of protecting "the legitimate expectations of and legal certainty for local operators cannot offset the violation caused by the provision under examination of the State's exclusive competence over the protection of competition" (Judgment no. 1/2019)[10]. This judgment also recalls

[7] On the judgment, see B. Caravita, G. Carlomagno, *La proroga* ex *lege delle concessioni demaniali marittime. Tra tutela della concorrenza ed economia sociale di mercato. Una prospettiva di riforma*, 20 Federalismi.it 1 (2021); M. Romeo, *La Corte costituzionale interviene nuovamente in merito alla disciplina della proroga delle concessioni demaniali marittime da parte di leggi regionali, pronunciandosi sulla legge della Regione Calabria n. 46 del 25 novembre 2019*, Dirittiregionali.it (2021).

[8] Liguria Regional Law no. 24/2012, Article 1.

[9] Liguria Regional Law no. 26/2017, Article 1.2.

[10] A. Lucarelli, *Il nodo delle concessioni demaniali marittime tra non attuazione della Bolkestein, regola della concorrenza ed insorgere della nuova categoria "giuridica" dei*

European law in noting that the excessive duration of the concessions in place entailed a tangible risk of inefficient management.

Fourthly, regional legislation may grant an extension even to operators who do not fulfil the statutory prerequisites. According to the Constitutional Court, this legislation violates the EU law principles of free competition as well as Article 117(1) of the Constitution, which provides that State and regional laws must respect the constraints imposed by European law. "In particular, in permitting the automatic renewal of the concession, the regional provision violates the principle of competition in that those who have not previously been managing the State-owned maritime property are not allowed any opportunity to replace the previous concession holder upon expiry of the concession" (Judgment no. 233/2010).

Under all of these circumstances, the Court has clearly objected to the extension of beach concessions in the name of free competition. However, in some cases it would have been appropriate for the constitutional review to have assessed whether the legislation providing for the extension was reasonable and proportionate, with the aim of favouring a gradual move to a competitive regime based on public tendering procedures, as is required under EU law[11].

4. Economic benefits

In some cases, the regions have directly protected the economic interests of concession holders. For example, a law enacted by Tuscany Region provided that the incoming concession holder was obliged to pay compensation to the outgoing concession holder. The Court ruled that provision unconstitutional on the grounds that it violated the principle of the protection of competition on the grounds that it interfered with "the ability to

beni comuni (Nota a C. cost., sentenza n. 1/2019), 1 Dirittifondamentali.it 1 (2019); L. Longhi, *Concessioni demaniali marittime e utilità sociale della valorizzazione del patrimonio costiero*, 1 Riv. Corte dei conti 184 (2019); G. Dalla Valentina, *La proroga* ope legis *delle concessioni demaniali marittime dalla sent. 1/2019 della Corte costituzionale al Decreto Rilancio,* 5 Le Regioni 1196 (2020).

[11] S. Agusto, *Gli incostanti approdi della giurisprudenza amministrativa sul tema delle concessioni del demanio marittimo per finalità turistico ricreative*, 5 Riv. it. dir. pubbl. comunit. 648 (2020).

access the relevant market and that market's uniform regulation, as it may establish a disincentive for undertakings other than the outgoing concession holder to participate in tendering procedures leading to the award" (Judgment no. 157/2017)[12].

In another case, regional lawmakers had relied on an economic argument to justify extending the duration of concessions, as the provision referred to the period of time necessary for the cost of investments to be recouped in addition to a fair return on the capital invested. The Court however struck down this legislation on the grounds that it concerned a "matter reserved to the exclusive competence of the State legislator, which alone has authority to adopt uniform provisions to govern the arrangements applicable to and the limits on protection for the legitimate expectations of existing concession holders within selection procedures for the award of new concessions" (Judgment no. 1/2019)[13]. In a similar case, the challenge brought by the Government noted that the provision allowed for the prolonged usage of a scarce resource, thereby limiting competition, which proved to have a "particularly regressive effect, as against the requirements to enable the amounts invested to be recouped in full along with a full return on the capital invested by the concession holder", which underpinned the regional law. Judgment no. 109/2018 endorsed this view, and declared the regional provision unconstitutional[14].

5. Other benefits

The regions have also favoured concession holders in other ways. For example, one regional law purported to create the notion

[12] This approach is confirmed by judgment 109/2018 and by judgment 222/2020 (commented on by M. Conticelli, *Effetti e paradossi dell'inerzia del legislatore statale nel conformare la disciplina delle concessioni di demanio marittimo per finalità turistico-ricreative al diritto europeo della concorrenza*, 5 Giur. cost. 2475 (2020), who argues that the compensation paid to the outgoing concession holder "interferes with the ability to access the reference market and its uniform regulation, as it may constitute a disincentive for undertakings other than the outgoing concession holder against participating in the competition that establishes the legitimate expectation".

[13] The judgment is commented on by A. Lucarelli, *Il nodo delle concessioni demaniali marittime,* cit. at 10.

[14] On the judgment, see A. Lucarelli, L. Longhi, *Le concessioni demaniali marittime e la democratizzazione della regola della concorrenza*, 3 Giur. cost. 1251 (2018).

of "Ligurian beach undertaking", i.e. those which, "in characterising the coastal landscape, constitute part of the historical and cultural heritage and social fabric of the Region"[15]. The problem was that, as a result, award procedures favoured those undertakings that were already operating on the Ligurian coast, which "are the only beach undertakings 'characterising the coastal landscape', and that (…) can be imputed to the 'historical heritage' and cultural fabric of Liguria" (Judgment no. 221/2018)[16].

Another example concerned a regional law governing situations in which concessions no longer complied with a municipal coastal plan. The law safeguarded concession holders in two ways: either by changing the area covered by the concession in order to compensate them for the part that had been withdrawn owing to the failure to comply with the plan "or by geographically moving the concession entitlement, entailing its outright transfer to an area different from that originally granted". Judgment no. 40/2017 held that such a measure was tantamount to the issue of a new concession and violated the principle of protection of competition as it would be adopted without having followed an open and transparent public tendering procedure among economic operators[17].

In a third example, a regional provision required municipalities to guarantee that the issue of new concessions would not "interfere with the legitimate expectations of beach operators that hold concessions"[18]. This provision was struck down by the Court as it allowed the municipalities to decide, at their discretion, whether to adopt measures that would interfere "with the protection of free competition and equal treatment for all aspiring concession holders" (Judgment no. 118/2018).

6. Conclusions

The constitutional case law on beach concessions features two main aspects. First of all, it is apparent that regional lawmakers

[15] Liguria Regional Law no. 25/2017.

[16] The judgment is commented on by G. Dimitrio, *Stato, regioni e fascia costiera: un mercato unico nazionale per le "imprese balneari"*, 4 Giorn. dir. amm. 478 (2019).

[17] On the judgment, see M. Esposito, *Corte di giustizia UE e Corte costituzionale sottraggono allo Stato italiano la competenza sul regime della proprietà*, 1 Giur. cost. 370 (2017).

[18] Abruzzo Regional Law no. 30/2017, Article 3.3.

have consistently paid attention to existing concession holders as a group, which are protected through a wide variety of mechanisms, whereas the same regional lawmakers do not appear to have any awareness of issues relating to free competition among economic operators. Secondly, the Court has ascribed a central role to the protection of competition. However, the Constitutional Court has not explained why this matter under exclusive State competence should prevail over others, for example over matters under residual regional competence, such as tourism.

In actual fact, a recent decision has thrown this issue into sharp relief in asserting that "the significance of protection of competition cannot be considered to be so pervasive as to preclude any scope whatsoever for action by the regions in this area" (Judgment no. 161/2020). The judgment sets out a criterion: regional competence "must take second place behind the exclusive competence of the State over competition only where the substance of the legislation ends up affecting the manner in which the contracting party makes its choices, where it interferes with the competitive structure of the market to such an extent as to impair the free conduct of entrepreneurial initiatives". Nonetheless, all of the regional laws referred to the Court to date interfere more or less directly with the manner in which a contracting party makes its choices. As such, this criterion does not appear to be capable of significantly altering the approach taken within constitutional case law.