

CONSTITUTIONAL PLURALISM AND CONSTITUTIONAL CONFLICTS

DISCUSSION LEADERS

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IV. CONSTITUTIONAL PLURALISM AND CONSTITUTIONAL CONFLICTS

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The materials for this session address the following question: what do judges, when adjudicating a particular issue, do—and what ought judges to do—when confronted with competing rules? This question differs from classic conflicts of norms in two ways: first, each constitutional order claims final authority to adjudicate the matter; second, each constitutional order has previously expressed an openness to the claims of the other legal order and is in a position to be affected, but also to affect, the other.

The label, “constitutional pluralism,” has now become the standard for describing this situation (of competing claims of final authority over a particular legal issue). Constitutional pluralism also entails a variety of related theoretical and normative perspectives, which attempt to make sense of contemporary reality and to legitimate the openness that pluralism brings into the law.

As the materials demonstrate, it is rare for courts to explicitly acknowledge the issue of constitutional pluralism. Yet the cases also demonstrate the enormously important, practical effects of pluralism, not only on the relationships between legal orders (and their respective courts) but also within a legal order. Constitutional courts may still portray the national constitution as the sole source of ultimate authority but, at the same time, judges now routinely labor to minimize the risks of conflict with supra-national or international order claiming competing authority. As the Czech Constitutional Court case excerpted below demonstrates, constitutional pluralism also affects the relationship between different courts within a state.

Constitutional pluralism is, therefore, not simply about the relationship between different constitutional courts or their respective constitutional orders. It is also about what changes develop in domestic constitutional law by reason of constitutional pluralism.

The materials highlight three forms of interaction between constitutional orders in a context of constitutional pluralism: evasion, confrontation, and accommodation. In the first, a court attempts to avoid the constitutional conflict by deploying techniques of evasion, for example, through distinguishing the facts of a case or the scope of the applicable rules. In the second, a court recognizes the conflict and claims ultimate authority to resolve it. In the third, a court develops various forms of accommodation, ranging from assuming an equivalence between the competing constitutional rules to constructing the national constitution so as to require reception from the external source. The materials also reflect the fact that many courts do not use one approach exclusively but, instead, choose a mix of different approaches. Moreover, within Europe, states do not take the same

approach, resulting in asymmetrical vertical relationships with supra-national courts.

Hence, questions emerge. How are categories of competence constructed? What values are argued as the basis for insisting on distinctive answers, and with what costs? What explains the variations in employing different strategies to deal with the risks of constitutional conflicts? How does constitutional pluralism compare with the approaches described in Chapter III on *(Dis)Uniformity of Rights*? What other judicial techniques exist to deal with such conflicts? And what guides judges in deciding how to respond?

These questions highlight the relationship between constitutional pluralism and the evolving nature and legitimacy of the judicial role. Approaches to constitutional pluralism also implicate differing views on the role of constitutional courts in a particular political community. The orthodox view is that a constitutional court is under a duty to defend the hierarchical superiority of the constitution with respect to any other set of legal norms, and that all other national courts are required to respect the constitutional court's efforts to do so. Yet as national courts—and not just constitutional courts—have gradually incorporated the European Convention on Human Rights (ECHR), and accepted the supremacy of European Union law, this orthodoxy is challenged. As discussed in the readings, for some national courts, the ECHR is the “real” constitution, when it comes to rights adjudication. In such situations some judges appear to conceive of themselves as embedded in two political communities.

How do and how should judges balance these competing commitments? To what extent should they defer to the political process of their own national community in making such accommodations? When should judges address this issue directly and why do judges rely on ambiguity as they respond to these tough questions. Further, as the German Constitutional Court Judgment in the *Lisbon Treaty Case* (also discussed in Chapter VI on *Law's Futures(s)*) demonstrates, taking a position of conflict towards a foreign constitutional claim may lead a court to determine the meaning of the national political processes. Similarly, deference showed towards an external constitutional claim may serve to strengthen the power of the domestic courts with respect to the domestic political process.

DIALOGUES AND DISTINCTIONS

Miguel Poiares Maduro

*Three Claims of Constitutional Pluralism**

The starting point of constitutional pluralism is empirical. Constitutional pluralism identifies the phenomenon of a plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts that are not hierarchically regulated. More broadly, it refers to the expansion of relevant legal sources, the multiplication of competing legal sites and jurisdictional orders, and the existence of competing claims of final authority. In EU law, where the current movement started, constitutional pluralism also mapped what is usually described as a discursive practice between the European Court of Justice and national constitutional courts, aimed at reducing the risks of constitutional conflicts and accommodating their respective claims of final authority.

I would summarize the core empirical claim of constitutional pluralism as follows: constitutional pluralism is what best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them. . . . [W]e can conceive of the EU and national legal orders as autonomous but part of the same European legal system. For those practising law in Europe, this European legal system implies a commitment to both legal orders and imposes an obligation to accommodate and integrate their respective claims. . . .

The empirical thesis assumes that both the European Court of Justice and national constitutional courts are aware of their competing constitutional claims and act accordingly, by accommodating their respective claims so as to minimize the risks of constitutional conflicts. The most well known example of this regards the fundamental rights jurisprudence of the national constitutional courts and the European Court of Justice. . . .

The current reality is better understood as one where EU and national legal orders can be construed as normatively autonomous but also institutionally bonded by the adherence of their respective actors to both legal orders. The latter bond is institutionally operated but founded on a normative commitment to

*Excerpted from Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, in CONSTITUTIONAL PLURALISM IN EUROPE AND BEYOND 67 (Matej Avbelj & Jan Komárek eds., 2012).

European constitutionalism that has important consequences. In particular, it requires a coherent and integrated construction of the European legal system by all those different actors.

Empirically, the open question remains open. The examples of a discursive practice among courts acknowledging this situation abound. This does not involve courts using the language of constitutional pluralism. Constitutional pluralism does not require courts to talk about constitutional pluralism in their decisions. It does not even require for courts to engage expressly with other courts. Those that say that courts do not endorse constitutional pluralism, because they neither talk about constitutional pluralism nor cite decisions of other courts, miss the point. The fact that courts continue to narrate the law according to the internal viewpoint of their legal order does not mean that such viewpoint has not been altered by reason of constitutional pluralism. The primary example is how many national courts have interpreted their constitutions so as to incorporate the demands arising from the supremacy claim of EU law without formally accepting, in most cases, such supremacy. The narrative is still the national constitution but the script has changed. What constitutional pluralism claims, in this respect, is that judicial actors have changed the internal perspective of their legal order in order to accommodate the claims of the other legal order. As such, the new internal perspective is informed by constitutional pluralism. . . .

While the empirical thesis of constitutional pluralism limits itself to stat[ing] that the question of final authority remains open, the normative claim is that the question of final authority ought to be left open. Heterarchy is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of final authority. This normative thesis implies, in practice, another: that those competing constitutional claims are of equal legitimacy or, at least, cannot be balanced against each other in general terms. . . .

The thicker normative claim of constitutional pluralism is that, in the current state of affairs, it provides a closer approximation to the ideals of constitutionalism than either national constitutionalism or a form of EU constitutionalism modelled after state constitutionalism. In this way, the pragmatic concern that has dominated earlier writings on constitutional pluralism is turned upside down. Constitutional pluralism is not simply a remedy for the risks of constitutional conflicts of authority; it's the best representation of the ideals of constitutionalism for the current context of increased pluralism and deterritorialization of power. . . .

To understand, however, both the promise and challenges of constitutional pluralism it is important to note that the paradoxes of constitutionalism embody

two opposing pulls of modern constitutionalism. One, towards pluralism, linked to the values of freedom, diversity and private autonomy. The other, towards unity or hierarchy, linked with the ideals of equality, the rule of law and universality. Modern constitutionalism success has been founded on its capacity to reconcile both at the level of the state.

These opposing pulls are reflected in a tension between the political project of pluralism endorsed by constitutionalism and its legal emphasis on hierarchy and primacy. They are, however, mutually dependent. Pluralism is ordered through democracy and in order to fulfil the idea of self-government requires a unified and closed political space. This entails, in turn, an ultimate source of political authority. State constitutionalism in its modern form made that political authority reside in the people. The people are both the site and source of pluralism and the unified entity upon which rests ultimate political authority. This is also linked to a conception of constitutionalism as providing a comprehensive social ordering. . . .

The most powerful challenge to constitutional pluralism departs therefore from the association made between the values of constitutionalism and the existence of an ultimate source of political authority expressed, in legal terms, in the absolute primacy of the Constitution. These links are considered essential to protecting the constitutional values of the rule of law, equality and universalism.

This challenge comes in two very different forms, however. A set of authors argues that the incompatibility between certain constitutional values and pluralism requires abandoning pluralism altogether and returning to either monism or dualism. Another set of authors argues that the solution is to be found, instead, in radically departing from constitutionalism as we know it. . . .

The problem occurs when, as in the postnational context we currently live in, it is difficult to continue to talk about unified and closed political spaces subject to an ultimate source of political authority. We can still do it in conceptual terms by artificially closing and insulating national polities under a self-referential notion of political authority that extends so far as the legal hierarchy and claim of supremacy of the constitutional order itself claims to extend. But this is a purely circular reasoning. More importantly, trust in political integrity will gradually erode as the purported coherence and universality of any particular legal order is increasingly challenged, in practice, by its interaction with other legal orders.

In this respect, constitutional pluralism does nothing more than adapt constitutionalism to the changing nature of the political authority and the political

space. The challenge is to adapt it while protecting political integrity and the correspondent ideals of coherence and universality of the legal order.

Wojciech Sadurski

*'Solange, Chapter 3': Constitutional Courts in Central Europe—
Democracy—European Union**

One of the most important themes in the grand narrative of the emergence of EU law as the supreme law of EU-land, prevailing over national legal systems, is (what may be called generically) a *Solange* story: a story about national constitutional courts resisting a straightforward surrender of national legal sovereignties, and insisting on their own role as guardians of any further transfer of powers from the national to the European level. This resistance is based on their distrust both of the democratic legitimacy at the above-national level, and of the EU's ability to provide a degree of protection of the principles of the rule of law and human rights, at least equivalent to that of the most elevated standards of the relevant national communities.

The story, as developed here, borrows of course its name from two judgments of the German Constitutional Court. *Solange I*, in 1974, established that since European law had not yet reached a level of protection of fundamental rights equivalent to that provided by national constitutional law, as well as a similar level of democratic legitimacy for its law-making powers, the court would keep reviewing secondary Community law according to the standards of the national constitution. *Solange II*, in 1986, expressed in turn a satisfaction that such a level had been reached by Community law, and 'as long as' (*solange*) the European Communities, primarily through the case-law of the European Court of Justice, kept ensuring an effective protection of fundamental rights, the Federal Constitution Court would no longer carry out a review of secondary Community legislation, according to national-constitutional standards (though it would retain the power to review the general regime of fundamental rights protection afforded by the EC). These developments have been replicated in several other countries where a number of constitutional courts have adopted a stance not unlike that of the German Court.

*Excerpted from Wojciech Sadurski, *'Solange, Chapter 3': Constitutional Courts in Central Europe—Democracy—European Union*, 17 EUR. L.J. 1 (2008).

[T]he *Solange* story was well suited to be taken up in Central and Eastern Europe [CEE] after accession, for two powerful reasons. First, in nearly all post-communist European states, constitutional courts established themselves as powerful, influential, activist players, dictating the rules of the political game for other political actors, and were certainly not burdened with any self-doubt as to their legitimacy in striking down laws under very vague constitutional terms. While the powers of the constitutional courts in CEE largely resemble (and often exceed) those of their Western European counterparts, the other branches of CEE states are weaker, more chaotic, disorganised and inefficient compared to those in Western Europe. The relative positions of constitutional courts are therefore probably much weightier than is the case in the 'older Europe.' Accession to the EU provided these courts with yet another opportunity to reinforce their own powers—an opportunity not to be missed: they could easily (taking their cue from West European courts, and thus abiding by the 'follow the well tried model' type of legitimacy) assert a right to establish and enforce criteria of democracy, rule of law and human rights protection, which would inform the relationship between the European and national constitutional orders. Such a power would further increase their position vis-à-vis the political branches in their countries, by delineating those aspects of the supremacy of European law which they deemed unacceptable, or by dictating the need to carry out constitutional amendments if certain dimensions of supremacy were to be accepted, etc.

The second reason why the *Solange* story almost begged for a recurrence in CEE stemmed from the strong sovereignty concerns which were felt and expressed in CEE states prior to accession, and persisted after joining the EU. . . .

[T]he reasons for the willingness by constitutional courts of a number of the new Member States to replay the *Solange* story in their own states after accession to the EU are almost entirely related to their domestic, both political and legal, context: they have less to do with the EU and more with purely local matters. But here is a delightful (or disturbing, depending on one's perspective) paradox. One of the main rationales for CEE states joining the EU was about consolidating democracy and the protection of human rights. . . .

So it would be truly ironic if the constitutional courts were now to build democracy-based arguments against the supremacy of EU law in new Member States. It would be perhaps even perverse if the courts of the very countries which entered the EU, inter alia, to consolidate their democracy and human rights protection, were to erect barriers against a smooth integration within the EU legal framework on the basis of their uncertainty as to the outcome, both in terms of democratic—and rights—protection, of such an integration (i.e. of the supremacy of EU law over national constitutional laws).

The EU is thus perceived both as a source for the promotion of democracy and as a threat to democracy (through a transfer of powers to European institutions, whose democratic legitimacy is put in doubt). . . .

[T]he initial concerns put forward by the German or the Italian courts back in the 1970s ('Chapter 1' of *Solange*) were eventually dispelled, based on the fact that the protection of rights by the EU had reached a satisfactory level ('Chapter 2'). Thus, the CEE constitutional courts entering the scene as the subsequent authors of the same serial novel, with a claim that they now have to protect their citizens from the erosion of their rights protection (an erosion resulting, as the argument goes, from the supremacy of EU law over national constitutional orders), appear like a return to Chapter 1, while we have already been through Chapter 2. This is the double irony.

And yet, despite the apparent improbability—due to the double irony just noted—of 'Chapter 3,' it is now being written, and its co-authors are the three by far most activist and powerful constitutional courts in CEE: that of the Czech Republic, Hungary and Poland. These are respectable, eminent authors, with strong audiences and sympathetic reviewers, and they are likely to be followed by others. Their contribution to the majestic narrative of *Solange* is rather complex and somewhat confusing. They speak with different voices and their concerns are not exactly the same, but the cumulative effect of their respective discourses leads to the conclusion that the *Solange* story, begun some 30 years ago, is alive and well, and that the last chapter has not yet been written.

In a reference made to the European Court of Justice, Case C-399/09, *Landtová* (2009), the Czech Supreme Administrative Court had asked the Court of Justice to decide whether special pension increments that the Czech Constitutional Court had ordered to be paid to Czech citizens but not to Slovak citizens (all of whom were affected by the dissolution of Czechoslovakia in 1992) were compatible with EU law. In its *Landtová* judgment, issued in June of 2011, the ECJ, while not declaring the granting of the special pension increments in themselves contrary to EU law, stated that they could not be granted if done in a discriminating manner as between Czech and Slovak nationals. This judgment was applied by the Czech Administrative Court. On appeal to the Czech Constitutional Court, that Court declared, for the first time, that a decision of the ECJ was *ultra vires* and, therefore, non-binding.

Jan Komarek

Playing with Matches:

*The Czech Constitutional Court's Ultra Vires Revolution**

When the Czech Constitutional Court (CCC) declared [in No. Pl. ÚS 5/12] the Court of Justice of the European Union's [CJEU] judgment in C-399 *Landtová* (2009) “*ultra vires*,” one of my colleagues commented: “giving *Solange* into their hands was like to let children play with matches.” I am afraid it is the adequate description of the decision, which is difficult to explain in legal terms and which in my view has much more to do with the psychology of the Court and its individual judges, although other domestic actors, the Supreme Administrative Court and the Government, also played an important role.

[F]rom the point of view of EU law it was an ordinary case, decided by the Fourth Chamber, concerning the interpretation of Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (“the Regulation”). Only at a closer look one could reveal an interesting dimension to it: the Czech Supreme Administrative Court (the SAC) was challenging the CCC's case law concerning special pension increments that the CCC ordered to be paid to the Czech citizens, who were affected by the dissolution of Czechoslovakia in 1992. . . .

The SAC . . . initiated a protracted conflict with the CCC. . . . The SAC argued, among other things, that the special increment was incompatible with E.U. law. . . .

The CCC rejected these arguments . . . without having asked preliminary reference to the CJEU [T]he CCC stated that its interpretation of the regulation shall prevail in the case regardless of the outcome of the CJEU's ruling, so to await its results violated the rights to a fair trial of the petitioner in question.

On the reference from the SAC, the CJEU ruled that while the special increment did not violate the Regulation as such, “the documents before the Court show[ed] incontrovertibly that the [CCC's] judgment discriminate[d], on the ground of nationality, between Czech nationals and the nationals of other Member States.”

*Excerpted from Jan Komarek, *Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution*, VERFASSUNGSBLOG (Feb. 22, 2012), <http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution>.

[T]he reaction of the Czech authorities, however, was not to the CCC's pleasing. First, with a specific reference to the CJEU's ruling the Parliament adopted an act which prospectively excluded the possibility of paying the special increment to everyone.

For the SAC the response of the CJEU was somewhat precarious. While the CJEU confirmed that it was right in considering the special increment unlawful, the former did not exclude that it can be granted to Mrs. Landtová. In the concrete case at hand the SAC was therefore supposed (or at least not prevented by EU law) to grant the increment to Mrs. Landtová.

Instead, the SAC came up with a different interpretation: because the CCC created the special increment in violation of EU law—and in particular the violation of its duty to refer preliminary question to the CJEU, its case law cannot be binding on the SAC, the SAC argued. . . . The SAC challenges the CCC even further, stating it of course did not undermine the CCC's role as the final arbiter of constitutionality. But the only possibility for the CCC, the SAC stressed, would be to find that the relevant provisions of EU law violated the material core of the constitution. The SAC therefore provoked the CCC to call revolution, if it wanted to stick to case law.

[I] did not expect the CCC would do so. It did.

The fact that a constitutional court of a Member State of the EU declared a judgment of the CJEU "*ultra vires*" is not something I would automatically condemn. I have always found presumptuous the writings that stressed the post-communist Member States' courts' need to "learn," or which reacted to some of their judgments, which did not correspond to the CJEU's orthodoxy, with suspicions concerning the competence of the respective judges, who were said to have "misunderstood" what it entailed to be the EU. The way in which the CCC justified its move, however, is most insulting—not only to the CJEU, whose accommodating gesture was returned by the CCC with a slap in the face, but to anybody who cares about the constitutional arrangements in the EU in general, and the Czech Republic's place therein in particular.

[T]he CCC found the very application of the Regulation inappropriate. In its view, "the provisions of Annex III are from the point of view of EU law of declaratory nature only, they are not constitutive; the key consideration for the application of the Regulation is the nature of the legal relationships concerned, which must contain the so called foreign element." This foreign element was lacking, according to the CCC, since "the periods of employment during the

existence of Czechoslovakia cannot be viewed, retroactively, as periods of employment abroad.”

The key passage of the judgment, trying to explain why the CCC considered the CJEU’s ruling *ultra vires* is the following:

Not to distinguish legal arrangements following from the dissolution of a state with a single social security system from the arrangements concerning the consequences for social security systems of the free movement of persons in the European Communities, or the European Union, amounts to the failure to respect the European history, it means to compare the incomparable. For this reason it is not possible to apply European law, ie. the regulation, to the Czech citizens’ claims stemming from social security. Following the principle explicitly stated in its judgment it is not possible to do otherwise than to find in relation to the consequences of the [CJEU’s judgment in the *Landtová* Case] for similar cases that in its [the CJEU’s] case the situation where an act of an institution of the EU exceeded the competences transferred to the EU by virtue of Article 10a of the Czech Constitution occurred, that an act *ultra vires* was occurred.

First, the CCC’s assertion that “the provisions of Annex III are from the point of view of EU law of declaratory nature only” is plainly wrong. . . .

Such a misunderstanding could be perhaps understandable, if it did not lead to the finding of *ultra vires* ruling on the part of the CJEU. While the CCC ornamentally refers to the BVerfG’s (the German Constitutional Court) rulings concerning the possibilities of its intervention, everybody who has ever had a look at these decisions would know that they are quite different—if only because the BVerfG suggested that it would firstly send a preliminary reference to the CJEU before finding its ruling *ultra vires*. As one of my colleagues commented on this, well-behaving people firstly try to talk to each other before pressing the trigger. Not the CCC.

Well, the CCC wanted to invent its own way of talking to the CJEU; instead of submitting a preliminary reference the Court sent a letter to the CJEU, where it wanted to explain its case law, as it saw that it was not be properly defended by the Government. The Registry, however, sent the letter back to the CCC, explaining that “according to what is established practice, the members of the CJEU do not exchange correspondence with third parties concerning the cases submitted to the CJEU.”

[O]ne possibility I proposed . . . was to await the change in the CCC's composition, which is due in the course of this and the following year and try to postpone decisions in cases that deal with the same problem until this change. Some people suggest that the SAC should either simply ignore the CCC or to send another reference to the CJEU asking it on the effect of the CCC's finding that the former's ruling was ultra vires (what could the CJEU say?) It remains to be seen what (if anything) the reaction of the EU will be.

Following the Czech Constitutional Court's judgment in Pl. ÚS 5/12, the Czech Supreme Administrative Court has referred the case to the European Court of Justice. One of the questions submitted to the ECJ (whose decision was pending as of June 2012) is:

Does EU law prevent a national court, which is the supreme court in the field of administrative law and against the decisions of which there are no remedies, to be bound, in conformity with national law, by the determinations of law provided by the Constitutional Court, if it appears that these determinations are not in conformity with the law of the EU, as interpreted by the Court of Justice of the EU?



Le Palais, Court of Justice of the European Communities, City of Luxembourg, Luxembourg, 1973.

Architects: Jean-Paul Conzemius, François Jamagne, and Michel Vander Elst. Photograph reproduced courtesy of the Court of Justice of the European Communities (now the Court of Justice of the European Union).



Interior of the Great Courtroom of the Court of Justice of the European Union, 2008.

Photograph: G. Fessy, © Court of Justice of the European Union.

Lisbon Treaty Case
German Constitutional Court
2 BvE 2/08 (2009)

208. The standard of review of the Act Approving the Treaty of Lisbon is determined by the right to vote as a right that is equivalent to a fundamental right. The right to vote establishes a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. . . .

216. The principle of democracy is not amenable to weighing with other legal interests; it is inviolable. . . . The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The Basic Law thus not only assumes sovereign statehood but guarantees it. . . .

219. [T]he empowerment to embark on European integration permits a different shaping of political opinion-forming than the one that is determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inalienable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law.

220. The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action. . . .

231. The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organisations. The empowerment to exercise supranational competences comes, however, from the Member States of such an institution. They therefore permanently remain the masters of the Treaties. . . .

233. The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently

establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence. Also a far-reaching process of independence of political rule for the European Union brought about by granting it steadily increased competences and by gradually overcoming existing unanimity requirements or rules of state equality that have been decisive so far can, from the perspective of German constitutional law, only take place as a result of the freedom of action of the self-determined people. According to the constitution, such steps of integration must be factually limited by the act of transfer and must, in principle, be revocable. For this reason, withdrawal from the European union of integration (*Integrationsverband*) may, regardless of a commitment for an unlimited period under an agreement, not be prevented by other Member States or the autonomous authority of the Union. This is not a secession from a state union (*Staatsverband*), which is problematical under international law, but merely the withdrawal from a *Staatenverbund* which is founded on the principle of the reversible self-commitment. . . .

235. What corresponds to the non-transferable identity of the constitution, which is not amenable to integration in this respect, is the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties. Within the boundaries of its competences, the Federal Constitutional Court is to review, if necessary, whether these principles are adhered to. . . .

[F]or borderline cases of what is still constitutionally admissible, the German legislature must, if necessary, make arrangements with its laws that accompany approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop. . . .

264. An unacceptable structural democratic deficit under Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action, and the degree of independent formation of opinion on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for instance the legislative competences, which are essential for democratic self-determination, were exercised mainly on the level of the Union. If an imbalance between character and the extent of the sovereign powers exercised and the degree of democratic legitimisation arises in the course of the development of the European integration, it is for the Federal Republic of Germany due to its responsibility for integration, to work towards a change, and if the worst comes to the worst, even to refuse to further participate in the European Union. . . .

295. Mere participation of the citizens in political rule which would take the place of the representative self-government of the people cannot be a substitute for the legitimising connection of elections and other votes and of a government that relies on it: The Treaty of Lisbon does not lead to a new level of development of democracy. The elements of participative democracy, such as the precept of providing, in a suitable manner, the citizens of the Union and “representative” associations with the possibility of making their views heard, as well [as] the elements of associative and direct democracy, can only have a complementary and not a central function when it comes to legitimising European public authority. . . .

298. As regards its competences and its exercising these competences, the European Union, as a supranational organisation, must comply as before with the principle of conferral that is exercised in a restricted and controlled manner. Especially after the failure of the project of a Constitution for Europe, the Treaty of Lisbon has shown sufficiently clearly that this principle remains valid. The Member States remain the masters of the Treaties. In spite of a further expansion of competences, the principle of conferral is retained. . . .

339. The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, an institution conferred under an international agreement, i.e. a derived institution which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This connection of derivation is not altered by the fact that the institution of the primacy of application is not explicitly provided for in the Treaties but has been obtained in the early phase of European integration in the case-law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that at any rate if the mandatory order to apply the law is evidently lacking, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. This establishment must also be made if within or outside the sovereign powers conferred, these powers are exercised with effect on Germany in such a way that a violation of the constitutional identity, which is inalienable pursuant to Article 79.3 of the Basic Law and which is also respected by European law under the Treaties, namely Article 4.2 sentence 1 TEU Lisbon, is the consequence.

Lisbon Treaty II
Czech Constitutional Court
Pl. ÚS 29/09 (2009)

110. [T]he petitioners state that, “unfortunately the Constitution does not precisely define the essential requirements for a democratic state governed by the rule of law.” According to the petitioners the Constitutional Court “has already addressed that principle several times . . . it too has not given a complete, comprehensive, and conclusive interpretation, that would in future be resistant to immediate political pressures and ad hoc interpretations influenced by cases at issue at a particular time.” . . . [T]he petitioners ask the Constitutional Court to set “the substantive limits on the transfer of powers,” and . . . they attempt to formulate these themselves, evidently inspired by the decision of the German Constitutional Court dated 30 June 2009. . . .

111. However, the Constitutional Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine “substantive limits on the transfer of powers,” as the petitioners request. It points out that it already stated in [its *Lisbon Treaty I* (2008) judgment], that “these limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion.” Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have been made on the political level. . . .

113. The Constitutional Court believes that it is specific cases that can provide it a relevant framework, in which it is possible, case by case, to interpret more precisely the meaning of the term “sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.” . . . The attempt to define the term “sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens” once and [for] all (as the petitioners, supported by the President, request) would, in contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures. . . .

135. [As regards the question of democratic deficits of decision-making procedures in the European Union,] the Constitutional Court does not overlook the tendency toward the strengthening of the position of the parliaments of the Member States in decision-making procedures at the European Union level, of which the Treaty of Lisbon is an example. . . .

136. Finally, the Constitutional Court adds that it is precisely the essence of the transfer of powers of the authorities of the Czech Republic that, rather than Parliament (or other authorities of the Czech Republic), it is the international organization to which these powers were transferred that exercises them. . . .

138. The Advocate-General of the European Court of Justice, [Miguel] Poiares Maduro, has recently stated a similar opinion:

Democracy has a number of forms, especially in the European Community. At the level of the Community, democratic legitimacy has two main sources: it is either ensured in the Council, where it comes from the European nations through the positions taken by their governments, under the control of their national parliaments, or it is ensured by the Parliament, which is a European body with direct representation, and the Commission, which is directly answerable to the Parliament. Direct democratic representation is indisputably a relevant measure of European democracy, but it is not the only one. European democracy also involves a delicate balance between national and European dimensions of democracy, without either one necessarily outweighing the other. . . .

139. [I]n other words, the democratic processes on the Union and domestic levels mutually supplement and are dependent on each other. . . .

140. For similar reasons, one cannot see a conflict between Article 14(2) of the TEU, which governs the number of the members of the European Parliament, with the principle of equality set forth in Article 1 of the Charter, as the petitioners claim. . . . As pointed out above, the European Parliament is not the exclusive source of democratic legitimacy for decisions adopted on the level of the European Union. That is derived from a combination of structures existing both on the domestic and on the European level, and one cannot insist on a requirement of absolute equality among voters in the individual Member States. . . .

148. Insofar as the president argues with this definition of sovereignty by claiming that “the concept of shared sovereignty has been used relatively frequently recently, but only in non-rigorous debate,” and according to the president this concept is “a contradiction on terms” because, as the president believes, “not only does our legal order not know the term ‘shared sovereignty,’ but neither does the law of the European Union,” the Constitutional Court considers it appropriate to point out the text of the memorandum attached to the Czech Republic’s application to join the European Union:

The Czech nation has only recently reacquired full state sovereignty. However, the government of the Czech Republic has irrevocably reached [the same] conclusion as that reached in the past by today's Member States, that in modern European evolution, the exchange of part of one's own state sovereignty for a share in a supra-state sovereignty and shared responsibility is unavoidable, both for the prosperity of one's own country, and for all of Europe. . . .

150. [T]he Constitutional Court also stated in [the *Lisbon Treaty I*] judgment:

- it generally recognizes the functionality of the EU institutional framework to ensure review of the scope of exercise of transferred powers; however, its position may change in the future if it appears that this framework is demonstrably non-functional. . . .
- the Constitutional Court of the Czech Republic will (may)—although in view of the foregoing principles—function as an *ultima ratio* and may review whether an act by Union bodies exceeded the powers that the Czech Republic transferred to the European Union pursuant to Article 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences.

M. v. Germany

European Court of Human Rights (Fifth Section)

App. No. 19359/04 (2010)

1. The case originated in an application against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr M. . . .

2. The applicant alleged a breach of Article 5 § 1 of the Convention on account of his continued preventive detention beyond the ten-year period which had been the maximum for such detention under the legal provisions applicable at

the time of his offence and conviction. He further claimed that the retrospective extension of his preventive detention to an unlimited period of time had breached his right under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence. . . .

6. The applicant was born in 1957 and is currently in Schwalmstadt Prison. . . .

9. On 5 October 1977 the Kassel Regional Court, applying the criminal law relating to young offenders, convicted the applicant of attempted murder, robbery committed jointly with others, dangerous assault and blackmail and sentenced him to six years' imprisonment. . . . Having regard to a report submitted by expert D., the court found that the applicant suffered from a pathological mental disorder, with the result that his criminal responsibility was diminished.

10. On 8 March 1979 the Wiesbaden Regional Court convicted the applicant of dangerous assault, sentenced him to one year and nine months' imprisonment and ordered his subsequent placement in a psychiatric hospital under Article 63 of the Criminal Code. The applicant had injured a prison guard by throwing a heavy metal box at his head and stabbing him with a screwdriver after having been reprimanded. As confirmed by expert D., the applicant suffered from a serious pathological mental disorder, with the result that his criminal responsibility was diminished.

11. On 9 January 1981 the Marburg Regional Court, on appeal, convicted the applicant of assault of a disabled fellow prisoner following a discussion as to whether or not the cell window should remain open. . . . [It] upheld the order for the applicant's placement in a psychiatric hospital. In the proceedings, an expert found that there were no longer any signs that the applicant suffered from a pathological brain disorder. . . .

12. On 17 November 1986 the Marburg Regional Court convicted the applicant of attempted murder and robbery and sentenced him to five years' imprisonment. It further ordered his placement in preventive detention (*Sicherungsverwahrung*) under Article 66 § 1 of the Criminal Code. It found that when the conditions of his detention in the psychiatric hospital where he had been detained since October 1984 had been relaxed, the applicant had on 26 July 1985 robbed and attempted to murder a woman who had volunteered to spend a day with him in a city away from the hospital. Having regard to the report of a neurological and psychiatric expert, W., the court found that the applicant still suffered from a serious mental disorder which could, however, no longer be qualified as pathological and did not have to be treated medically. He therefore

had not acted with diminished criminal responsibility, however, he had a strong propensity to commit offences which seriously damaged his victims' physical integrity. It was to be expected that he would commit further spontaneous acts of violence and he was dangerous to the public. Therefore, his preventive detention was necessary. . . .

26. On 26 November 2001 the applicant, represented by counsel, lodged a complaint with the Federal Constitutional Court against the decisions ordering his continued preventive detention even on completion of the ten-year period. . . .

27. On 5 February 2004 a panel of eight judges of the Federal Constitutional Court, having held a hearing at which it also consulted psychiatric experts and several prison governors, dismissed the applicant's constitutional complaint as ill-founded. In its thoroughly reasoned leading judgment (running to 84 pages) it held that Article 67d § 3 of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, was compatible with the Basic Law.

28. The Federal Constitutional Court held that preventive detention based on Article 67d § 3 of the Criminal Code restricted the right to liberty as protected by Article 2 § 2 of the Basic Law in a proportionate manner. . . .

30. Preventive detention did not serve to avenge past offences but to prevent future ones. Therefore, the *Länder* had to ensure that a detainee was able to have his or her detention conditions improved to the full extent compatible with prison requirements.

31. The Federal Constitutional Court further held that Article 67d § 3 of the Criminal Code, taken in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, did not violate Article 103 § 2 of the Basic Law. The absolute ban on the retrospective application of criminal laws imposed by that Article did not cover the measures of correction and prevention, such as preventive detention, provided for in the Criminal Code. . . .

37. Weighing the interests involved, the Federal Constitutional Court concluded that the legislator's duty to protect members of the public against interference with their life, health and sexual integrity outweighed the detainee's reliance on the continued application of the ten-year limit. As Article 67d § 3 of the Criminal Code was framed as an exception to the rule and in the light of the procedural guarantees which attached to it, its retrospective application was not disproportionate.

38. The Federal Constitutional Court further found that a person's human dignity as enshrined in Article 1 § 1 of the Basic Law did not impose a constitutional requirement that there be a fixed maximum period for a convicted person's preventive detention. . . .

69. According to the information and material before the Court, the member States of the Council of Europe have chosen different ways of shielding the public from convicted offenders who acted with full criminal responsibility at the time of the offence (as did the applicant at the relevant time) and who risk committing further serious offences on release from detention and therefore present a danger to the public.

70. Apart from Germany, at least seven other Convention States have adopted systems of preventive detention in respect of convicted offenders who are not considered to be of unsound mind, in other words, who acted with full criminal responsibility when committing their offence(s), and who are considered dangerous to the public as they are liable to re-offend. . . .

73. In many other Convention States, there is no system of preventive detention and offenders' dangerousness is taken into account both in the determination and in the execution of their sentence. On the one hand, prison sentences are increased in the light of offenders' dangerousness, notably in cases of recidivism. In this respect it is to be noted that, unlike the courts in the majority of the Convention States, the sentencing courts in the United Kingdom expressly distinguish between the punitive and the preventive part of a life sentence. The retributive or tariff period is fixed to reflect the punishment of the offender. Once the retributive part of the sentence has been served, a prisoner is considered as being in custody serving the preventive part of his sentence and may be released on probation if he poses no threat. . . .

92. The Court is called upon to determine whether the applicant, during his preventive detention for a period exceeding ten years, was deprived of his liberty in accordance with one of the sub-paragraphs (a) to (f) of Article 5 § 1. It will examine first whether the applicant's initial placement in preventive detention as such falls under any of the permissible grounds for detention listed in Article 5 § 1. If it does not, the more specific question whether the abolition of the maximum duration of ten years for a first period of preventive detention affected the compatibility with Article 5 § 1 of the applicant's continued detention on expiry of that period need not be answered. . . .

98. The Court notes that according to the Government, the sentencing court had ordered the applicant's preventive detention without reference to any

time-limit and that it was for the courts responsible for the execution of sentences to determine the duration of the applicant's preventive detention. . . .

99. The Court is not convinced by that argument. It is true that the sentencing court ordered the applicant's preventive detention in 1986 without fixing its duration. However, the sentencing courts never fix the duration, by virtue of the applicable provisions of the Criminal; as the Government themselves submitted, the sentencing courts have jurisdiction only to determine whether or not to order preventive detention as such in respect of an offender. . . .

100. The Court observes that the order for the applicant's preventive detention was made by the sentencing court in 1986. . . . Without that change in the law, the courts responsible for the execution of sentences would not have had jurisdiction to extend the duration of the applicant's preventive detention. Therefore, the Court finds that there was not a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continued deprivation of liberty beyond the period of ten years in preventive detention, which was made possible only by the subsequent change in the law in 1998. . . .

102. The Court shall further examine whether the applicant's preventive detention beyond the ten-year point was justified under any of the other sub-paragraphs of Article 5 § 1. It notes in this connection that the domestic courts did not address that issue because they were not required to do so under the provisions of the German Basic Law. It considers that sub-paragraphs (b), (d) and (f) are clearly not relevant. Under sub-paragraph (c), second alternative, of Article 5 § 1, the detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence." In the present case the applicant's continued detention was justified by the courts responsible for the execution of sentences with reference to the risk that the applicant could commit further serious offences—similar to those of which he had previously been convicted—if released. These potential further offences are not, however, sufficiently concrete and specific, as required by the Court's case-law . . . as regards, in particular, the place and time of their commission and their victims, and do not, therefore, fall within the ambit of Article 5 § 1 (c). This finding is confirmed by an interpretation of paragraph 1 (c) in the light of Article 5 as a whole. Pursuant to paragraph 3 of Article 5, everyone detained in accordance with the provisions of paragraph 1 (c) of that Article must be brought promptly before a judge and tried within a reasonable time or be released pending trial. However, persons kept in preventive detention are not to be brought promptly before a judge and tried for potential future offences. . . .

104. The Court further observes that the present application raises an issue in terms of the lawfulness of the applicant's detention. It reiterates that national law must be of a certain quality and, in particular, must be foreseeable in its application, in order to avoid all risk of arbitrariness. It has serious doubts whether the applicant, at the relevant time, could have foreseen to a degree that was reasonable in the circumstances that his offence could entail his preventive detention for an unlimited period of time. It doubts, in particular, whether he could have foreseen that the applicable legal provisions would be amended with immediate effect after he had committed his crime. However, in view of the above finding that the applicant's preventive detention beyond the ten-year period was not justified under any of the sub-paragraphs of Article 5 § 1, it is not necessary to decide this question.

105. Consequently, there has been a violation of Article 5 § 1 of the Convention.

106. The applicant further complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time violated his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence. He relied on Article 7 § 1 of the Convention, which reads:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

107. The Government contested this allegation. . . .

122. The Court shall thus examine, in the light of the foregoing principles, whether the extension of the applicant's preventive detention from a maximum of ten years to an unlimited period of time violated the prohibition of retrospective penalties under Article 7 § 1, second sentence.

123. The Court observes that at the time the applicant committed the attempted murder in 1985, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for ten years at the most. Based on the subsequent amendment in 1998 of Article 67d of the Criminal Code, read in conjunction with

section 1a (3) of the Introductory Act to the Criminal Code, which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in 2001, the applicant's continued preventive detention beyond the ten-year point. Thus, the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence—and at a time when he had already served more than six years in preventive detention.

124. The Court, having regard to the criteria established in its case-law, therefore needs to determine whether the applicant's preventive detention constitutes a “penalty” within the meaning of the second sentence of Article 7 § 1. . . .

129. The Court agrees with the findings of both the Council of Europe's Commissioner for Human Rights and the CPT that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support. The achievement of the objective of crime prevention would require, as stated convincingly by the CPT, “a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option.” The Court considers that persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible. The Court does not lose sight of the fact that “[w]orking with this group of inmates is bound to be one of the hardest challenges facing prison staff.” However, in view of the indefinite duration of preventive detention, particular endeavours are necessary in order to support these detainees who, as a rule, will be unable to make progress towards release by their own efforts. It finds that there is currently an absence of additional and substantial measures—other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes—to secure the prevention of offences by the persons concerned. . . .

131. As regards the procedures involved in the making and implementation of orders for preventive detention, the Court observes that preventive detention is ordered by the (criminal) sentencing courts. Its execution is determined by the courts responsible for the execution of sentences, that is, courts also belonging to the criminal justice system, in a separate procedure.

132. Finally, as to the severity of preventive detention—which is not in itself decisive—the Court observes that this measure entails detention which,

following the change in the law in 1998, no longer has any maximum duration. Moreover, the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will commit further (serious) offences, a condition which may be difficult to fulfil (see to that effect also the Commissioner for Human Rights' finding that it was "impossible to predict with full certainty whether a person will actually re-offend"). Therefore, the Court cannot but find that this measure appears to be among the most severe—if not the most severe—which may be imposed under the German Criminal Code. It notes in this connection that the applicant faced more far-reaching detriment as a result of his continued preventive detention—which to date has been more than three times the length of his prison sentence—than as a result of the prison sentence itself.

133. In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention.

137. In view of the foregoing, the Court concludes that there has been a violation of Article 7 § 1 of the Convention. . . .

For These Reasons, The Court Unanimously

1. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
2. *Holds* that there has been a violation of Article 7 § 1 of the Convention;
3. *Holds* . . . that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 50,000 (fifty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be paid into his lawyer's fiduciary bank account. . . .

Mork v. Germany
European Court of Human Rights (Fifth Section)
App. Nos. 31047/04 & 13386/08 (2011)

5. The applicant was born in 1955 and is currently detained in Aachen Prison.

6. Between 1978 and 1981 the applicant was convicted, among other offences, of numerous counts of joint burglary committed in companies and shops and was imprisoned from March 1980 until February 1985.

7. In 1986 the Dortmund Regional Court convicted the applicant of trafficking in drugs (hashish and cocaine) and sentenced him to eight years' imprisonment. The applicant was in pre-trial detention and served his sentence from August 1985 until June 1993.

8. In December 1996 the applicant was arrested and placed in pre-trial detention on suspicion of drug trafficking; he has remained in prison since then. . . .

9. In a judgment dated 9 February 1998 the Aachen Regional Court convicted the applicant of unauthorised importing of drugs and of drug trafficking committed in 1996 and involving some 280 kilos of hashish. It sentenced him to eight years and six months' imprisonment. It decided not to order the applicant's preventive detention under Article 66 of the Criminal Code as it was not convinced that the applicant was dangerous to the public owing to a disposition to commit serious offence. . . .

11. In a judgment dated 14 November 2001 a different chamber of the Aachen Regional Court ordered the applicant's (first) indefinite preventive detention pursuant to Article 66 § 1 of the Criminal Code. Having consulted a psychiatric expert and having regard to the applicant's personality and his previous convictions, the court considered that the applicant had a disposition to commit serious offences, was likely to commit further serious drug offences and was thus dangerous to the public. . . .

13. On 24 June 2002 the applicant, without being represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court against the two judgments of the Regional Court and the judgment and the decision of the Federal Court of Justice. He complained, in particular, that preventive detention was incompatible with his right to liberty under Article 5 § 1 of the Convention, which did not cover such a preventive measure. It further violated the prohibition of retrospective punishment under the Basic Law and Article 7 of the Convention because it was incompatible with the principle of legal certainty and because his preventive detention had been ordered without a maximum duration of ten years, which had been the maximum penalty at the time he committed his offences. Furthermore, his right to a fair trial had been breached in that the domestic courts had not subsequently respected the deal struck with the Regional Court that he

would not further contest the court's finding of facts in exchange for the court not ordering his preventive detention.

14. On 11 March 2004 the Federal Constitutional Court declined to consider the applicant's constitutional complaint. . . .

28. On 4 May 2011 the Federal Constitutional Court delivered a leading judgment concerning the retrospective prolongation of the complainants' preventive detention beyond the former ten-year maximum period and about the retrospective order of the complainants' preventive detention respectively. The Federal Constitutional Court held that all provisions on the retrospective prolongation of preventive detention and on the retrospective order of such detention were incompatible with the Basic Law as they failed to comply with the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law, read in conjunction with the constitutional right to liberty.

29. The Federal Constitutional Court further held that all provisions of the Criminal Code on the imposition and duration of preventive detention at issue were incompatible with the fundamental right to liberty of the persons in preventive detention because those provisions did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (*Abstandsgebot*). These provisions included, in particular, Article 66 of the Criminal Code in its version in force since 27 December 2003.

30. The Federal Constitutional Court ordered that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation and until 31 May 2013 at the most. In relation to detainees whose preventive detention had been prolonged or ordered retrospectively, the courts dealing with the execution of sentences had to examine without delay whether the persons concerned, owing to specific circumstances relating to their person or their conduct, were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder. As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of "persons of unsound mind" in Article 5 § 1 sub-paragraph (e) of the Convention made in this Court's case-law. If the above pre-conditions were not met, those detainees had to be released no later than 31 December 2011. The other provisions on the imposition and duration of preventive detention could only be further applied in the transitional period subject to a strict review of proportionality; as a general rule, proportionality was only respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

31. In its judgment, the Federal Constitutional Court stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to an international and European dialogue between the courts, but was, on the contrary, its normative basis in view of the fact that the Constitution was to be interpreted in a manner that was open to public international law (*völkerrechtsfreundliche Auslegung*). In its reasoning, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention made by this Court in its judgment in the case of *M. v. Germany* (2010). . . .

48. The Court refers to the fundamental principles laid down in its case-law on Article 5 § 1 of the Convention, which have been summarised in relation to applications concerning preventive detention in its judgment of 17 December 2009 in the case of *M. v. Germany* and in its judgment of 21 October 2010 in the case of *Grosskopf v. Germany*.

49. It reiterates, in particular, that for the purposes of sub-paragraph (a) of Article 5 § 1, the word “conviction” has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium* (1982) and *M. v. Germany*). Furthermore, the word “after” in sub-paragraph (a) does not simply mean that the “detention” must follow the “conviction” in point of time: There must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Stafford v. the United Kingdom* (2002); *Kafkaris v. Cyprus* (2008); and *M. v. Germany*). However, with the passage of time, the causal link between the initial conviction and a further deprivation of liberty gradually becomes less strong and might eventually be broken if a position were reached in which a decision not to release was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives (see *M. v. Germany*). . . .

51. In determining whether the applicant was deprived of his liberty in compliance with Article 5 § 1 during that preventive detention, the Court refers to its findings in its recent judgment of 17 December 2009 in the case of *M. v. Germany*. . . .

52. Having regard to these findings in its judgment in the application of *M. v. Germany*, from which it sees no reason to depart, the Court considers that the preventive detention under Article 66 of the Criminal Code of the applicant in the present case was based on his “conviction,” for the purposes of Article 5 § 1 (a), by the Aachen Regional Court on 14 November 2001. However, the Court

emphasises that unlike the applicant in the *M. v. Germany* case, the applicant in the present case was not in preventive detention for a period beyond the statutory ten-year maximum period, applicable at the time of his offence, at the time of the domestic court decisions here at issue.

53. [B]oth the order for the applicant's preventive detention by the sentencing Aachen Regional Court in November 2001 and the decision of the Bochum Regional Court, responsible for the execution of sentences, of July 2007, confirmed on appeal, not to release the applicant, were based on the same grounds, namely to prevent the applicant from committing further serious drug offences, similar to those he had previously committed, on release. There is nothing to indicate that the assessment, that the applicant was likely to reoffend in that manner, which the domestic courts had reached after having consulted a psychiatric and psychotherapeutic expert on that point, was unreasonable in terms of the objectives of the initial preventive detention order by the sentencing court.

54. The applicant's preventive detention was also lawful in that it was based on a foreseeable application of Article 66 § 1 and Article 67c § 1 of the Criminal Code. The Court takes note, in this connection, of the reversal of the Federal Constitutional Court's case-law concerning preventive detention in its leading judgment of 4 May 2011. It welcomes the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level.

55. The Court further observes that the Federal Constitutional Court, in its said judgment, considered, inter alia, Article 66 of the Criminal Code in its version in force since 27 December 2003 not to comply with the right to liberty of the persons concerned. It understands that the applicant's preventive detention, when reviewed in the future, will be prolonged only subject to the strict test of proportionality as set out in the Federal Constitutional Court's judgment. It notes, however, that the applicant's preventive detention here at issue was ordered and executed on the basis of a previous version of Article 66 of the Criminal Code. In any event, Article 66 of the Criminal Code in its version in force since 27 December 2003 was not declared void with retrospective effect, but remained applicable and thus a valid legal basis under domestic law, in particular, for the time preceding the Federal Constitutional Court's judgment. Therefore, the lawfulness of the applicant's preventive detention at issue for the purposes of Article 5 § 1 (a) is not called into question.

56. There has accordingly been no violation of Article 5 § 1 of the Convention.

For most of the past fifty years, Italian courts did not apply the European Convention on Human Rights (ECHR) directly. In the past decade, the Italian Supreme Court (*Cassazione*) began treating the Convention as binding and directly applicable when the ECHR establishes precise legal obligations that do not depend upon national implementing measures to be enforced.

On October 24, 2007, and following a string of findings by the European Court of Human Rights, the Italian Constitutional Court, for the first time, declared a national law (on compensation for expropriation) unconstitutional on grounds that it violated the ECHR (Protocol No. 1, right to private property). The Italian Court's ruling requires national judges to interpret national law, as far as is possible, in conformity with the ECHR; when such interpretation proves impossible, judges are to refer the matter to the Constitutional Court for a ruling on constitutionality.

In its decision, the Court distinguished EU law—which is now directly applicable by judges under certain circumstances—and the ECHR, whose relationship to the Italian Constitution is to be mediated by the Court, principally under Article 117 of the Constitution, requiring national law to be compatible with treaty law. The Court may void a national legal provision found to be in conflict with the ECHR, but it may also refuse to do so if it finds that the duty to respect Article 117 is outweighed by other values found in the Italian Constitution. Some ordinary courts have proceeded as if the ECHR were directly applicable and precluded application of conflicting national law, and done so without a reference to the Constitutional Court.

Italian Constitutional Court
No. 348-2007 (2007)

[4.7] The arguments set out above do not imply that the ECHR, as interpreted by the Strasbourg Court, acquires the force of constitutional law and is therefore immune to assessments by this court of its constitutional legitimacy. It is precisely because the provisions in question supplement a constitutional principle, whilst always retaining a lower status, that it is necessary that they respect the Constitution. The special nature of these provisions, which are different from both

EC and treaty law, means that the examination of constitutionality cannot be limited to the possible violation of fundamental principles and rights or of supreme principles, but must extend to any contrast between “interposed rules” and the Constitution.

The requirement that the provisions which supplement the constitutional principle themselves respect the Constitution is absolute and non-derogable in order to avoid falling into the paradox of a legislative provision being declared unconstitutional on the basis of another interposed provision, which in turn breaches the Constitution. In all questions flowing from claims of incompatibility between interposed rules and internal ordinary legislation, it is necessary to establish at the same time that both respect the Constitution, and more specifically that the interposed rule is compatible with the Constitution, as well as the constitutionality of the contested provision in the light of the interposed rules.

Where an interposed source is found to be in breach of a provision of the Constitution, this court has a duty to declare the inability of the Constitution to supplement that principle, providing, according to established procedures, for its removal from the Italian legal order.

Since, as mentioned above, the provisions of the ECHR live through the interpretation given to them by the European Court, the examination of constitutionality must give consideration to the norm as a product of interpretation, and not the provisions considered in themselves. It must also be emphasised that the judgments of the Strasbourg Court are not unconditionally binding for the purposes of the verification of the constitutionality of national laws. Such controls must always aim to establish a reasonable balance between the duties flowing from international law obligations, as imposed by Article 117(1) of the Constitution, and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution.

In summary, the complete effectiveness of interposed rules is conditional on their compatibility with the Italian constitutional order, which cannot be modified by external sources, especially if these are not created by international organisations in relation to which limitations on sovereignty have been accepted such as those provided for in Article 11 of the Constitution.

CONCEPTUALIZING THE EXCHANGES

Ricardo Lorenzetti

Global Governance: Dialogue Between Courts^{*}

When Argentina approved the American Convention on Human Rights (Pact of San Jose, Costa Rica) in 1984, it recognized “the competence of the Inter-American Commission on Human Rights and on the jurisdiction of the Inter-American Court of Human Rights.”

In “*Giroidi, Horacio David*,” decided on April 7th, 1995, the Court unanimously held that the Constitution includes not only the treaties on human rights, but also the case-law of international tribunals, since the interpretations of those tribunals indicate the conditions under which the international instruments are “in force.” The Court pointed out that, “the cited jurisprudence should serve as a guide for the interpretation of the convention in the manner in which the Argentine State recognizes the competence of the Inter-American court in all cases relative to its interpretation and application of the American Convention.”

[I] would like to present a case on “constitutional pluralism” that arose in the trial of a “crime against humanity,” which will illustrate the relationship between the Inter-American Court of Human Rights and the Argentinean Supreme Court.

The first case I would like to talk about is “*Arancibia Clavel, Enrique Lautaro*” decided on August 24th, 2004. The facts of the case: Arancibia Clavel was accused of being involved in the car-bombing which killed the Chilean General Carlos Prats and his wife, in Buenos Aires in 1974. An Argentine federal tribunal sentenced him to life imprisonment for his participation in a criminal association. The National Court of Criminal Cassation partially reversed the lower court ruling and declared that the conviction for criminal association was barred by statutory limitations. The Supreme Court reversed the judgment and held that the conduct of Mr. Arancibia Clavel had to be considered as a *crime against humanity* and as such, it was not time-barred. According to the Court, these constitute crimes against humanity since the group of which Arancibia Clavel formed part had as its purpose the persecution of Pinochet’s political opponents by means of homicides, forced disappearances and torture with the acquiescence

^{*}Excerpted from Ricardo Lorenzetti, President of the Supreme Court of Argentina, Presentation at the International Summit of High Courts, Global Governance: Dialogue Between Courts (Nov. 1-3, 2010), available at <http://www.summitofhighcourts.com/docs/papers/argentina.pdf>.

of government officials. To support that assertion, the judges cited the Rome Statute of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide, the Inter-American Convention on the Forced Disappearance of Persons, and some decisions of the Inter-American Court of Human Rights. In addition, the Court stated that crimes against humanity were against the law of nations as stipulated in article 118 of the National Constitution. Having established that these are crimes against humanity, the majority went on to say that the applicable law governing the statute of limitations is the 1968 United Nation's Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had acquired constitutional hierarchy by law No. 25.778. . . .

The second important case is "*Simón, Julio Héctor*," decided on June 14th, 2005. Julio Héctor Simón, a former officer of the Federal Police, was indicted for the crimes against humanity of illegal arrest, torture and forced disappearance of José Poblete Roa and his wife, and for the appropriation of their daughter Claudia. . . . The defense of Julio Simón argued that they benefited from the immunity from prosecution established in the so-called "due obedience law" and "full-stop law."

The Supreme Court, by a majority of 7-1, confirmed the lower-court decisions and held that the amnesty laws were null and void and unconstitutional. . . . In light of the fact that the full stop and due obedience laws were passed to "forget" past human rights abuses, they are in stark contradiction with the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights. The majority also based its decision on the rulings of the Inter-American Court of Human Rights, in particular, the *Barrios Altos v. Perú* (2001) case, in which the Court held that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

[T]aken these cases into account, we can identify a plurality of sources: the Rome Statute of the International Criminal Court; the Convention on the Prevention and Punishment of the Crime of Genocide; the United Nation's Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; the International Covenant on Civil and Political Rights; the law of nations; the Inter-American Convention on the Forced Disappearance of Persons; the decisions of the Inter-American Court of Human

Rights; the National Constitution; some previous cases of the Supreme Court; the American Convention on Human Rights.

This is a nice picture of what “constitutional pluralism” really means: the Court needs to decide the case with different sources of law, coming from different levels: national and international; and, in many situations, they are in a non hierarchical order.

In other times, the rationality of the legal system was “a priori” and was defined by the Congress. In our times, the rationality is “a posteriori,” set by the judge, and case by case.

All in all, dialogue between sources of law, in front of a case, is the real challenge of the judicial decision.



Inter-American Court of Human Rights, San Jos., Costa Rica, circa 1960; expanded in 2004.

Reproduced courtesy of the Secretariat of the Inter-American Court of Human Rights.

Víctor Abramovich

*From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System**

The Inter-American System of Human Rights (ISHR), during the last decade, has influenced the process of internalization amongst the legal systems in various countries in Latin America. During this period, more countries have accepted the jurisdiction of the Inter-American court (such as Mexico and Brazil) and have given the American Convention constitutional status, or higher, compared to the laws of their judicial systems. Lawyers, judges, legal practitioners, officials and social activists have learned much about the workings of the ISHR and have begun to use it in a manner that is no longer extraordinary or selective. In addition, they have begun to cite its decisions and ground arguments in its precedents both in the local courts and in the public policy debates. This led to the gradual application of ISHR jurisprudence in constitutional courts and national supreme courts, and most recently, although to a lesser degree, in the formulation of some state policies. This process of incorporating international human rights law at the national level led to important institutional changes.

For example, the legal standards developed by the jurisprudence of the Inter-American Commission (IACHR or Commission) and of the Inter-American Court (IACHR Court or Court) about the invalidity of the amnesty laws pardoning gross violations of human rights, gave legal support to the transparency of trials against those charged with crimes against humanity, in Peru and Argentina. . . .

This process, however, is not linear. It encounters problems and obstacles and has also suffered some setbacks. The ISHR, furthermore, finds itself in a period of intense debates that seek to define its thematic priorities and logic of intervention, in a new regional political environment of deficient and exclusionary democracies, different from the political landscape in which it was born and took its first steps, with the South American dictatorships in the 1970s and the Central American armed conflicts of the 1980s. . . .

The ISHR . . . interprets certain procedural rules that define the criteria for its intervention in such a way that the autonomy of the states is respected. . . .

*Excerpted from Víctor Abramovich, *From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System*, 6 SUR INT'L J. HUM. RTS. 7 (2009).

The first rule, of “prior exhaustion of domestic remedies,” although it is procedural in nature, is a key factor in understanding the working dynamic of the Inter-American system and especially its subsidiary role. By requiring that parties exhaust all remedies available in the state’s national judicial system, it gives each state the opportunity to resolve conflicts and remedy violations before the matter is considered in the international arena. . . .

The second rule, known as the “fourth recourse,” functions as a kind of deference to national judicial systems, because it allows them the autonomy to interpret local norms and decide individual cases, subject to the exclusive condition that they respect procedural due process guarantees established in the Convention. . . .

A focal point of the ISHR’s new agenda is to address issues relating to the functioning of judicial systems, which have an impact on or connection with the promotion of human rights. This includes procedural due process guarantees of the accused in criminal proceedings, as well as the right of certain victims, harmed by structural problems relating to the impunity of crimes committed by the state (by police and prison officials), to have equal access to the justice system. . . .

The ISHR’s jurisprudence has had a considerable impact on the jurisprudence of the national courts that apply the norms of international human rights law. . . . This *globalization of human rights standards*, while not attaining the same level of development through the entire region and while subject to the precariousness of the national systems, has undoubtedly had a positive effect on the transformation of these same judicial systems, and has generated greater attention amongst the state authorities in regard to the ISHR’s developments. . . .

The influence of the ISHR, however, does not limit itself to the impact of its jurisprudence on the jurisprudence of local courts. Another important avenue for strengthening democratic institutions in the states stems from the ISHR’s ability to influence the general direction of some public policies, and in the formulation, implementation, evaluation and oversight of those same policies. It is thus common that individual decisions adopted in one case generally impose upon states the obligation to formulate policies to redress the situation giving rise to the petition, and the duty to address the structural problems that are at the root of the conflict analyzed in the case.

The imposition of these positive obligations is generally preceded by a review of the legal standards, implemented policies, or lack of action (omission) of the state. These obligations may include changes in existing policies, legal

reforms, the implementation of participatory processes to develop new public policies and often the reversal of certain patterns of behavior that characterize the actions of certain state institutions that promote violence. This includes police violence, abuse and torture in prisons, the inaction of the state when confronted with domestic violence, policies of forced displacement of the population in the context of armed conflicts, and massive displacement of indigenous peoples from their ancestral lands.

Furthermore, in the context of individual cases, the ISHR, especially the Commission, promotes friendly settlements or negotiations between the petitioners and the states, where the latter will often agree to implement these institutional reforms or create mechanisms to consult with civil society in the formulation of policy. Consequently, in the context of amicable solutions, some states have changed their laws. . . .

The IACHR also makes recommendations about public policy in its country reports. In these reports, it analyzes specific situations where violations have taken place and makes recommendations to guide state policies based on legal standards. . . .

Finally, the Inter-American Court of Human Rights may issue advisory opinions, which are used to examine specific problems that go beyond the contentious cases, and set the scope of state obligations deriving from the Convention and other human rights treaties applicable at the regional level, such as the legal status of migrant workers, and the human rights of children and adolescents. In these advisory opinions, the Court has sometimes tried to establish legal frameworks for policy development. For example, Advisory Opinion 18 seeks to define a set of principles that should orient states' immigration policies, in particular the recognition that undocumented immigrants should enjoy certain basic social rights. In Advisory Opinion 17, the Court seeks to influence policies aimed at imposing limits on criminal provisions directed at children. . . .

The authority of the decisions and of the jurisprudence of the System depends in part on their social legitimacy and on the existence of a community of engaged actors who monitor and disseminate their decisions and standards. It does not exert its influence through coercive mechanisms, which it lacks, but through a power to persuade that it should build upon and preserve. . . .

Many countries in Latin American ratified human rights treaties and joined the ISHR as they transitioned to a democratic regime, as a kind of antidote to reduce the risk of a return to authoritarianism, tying their legal and political systems to the "mast" of international protection. Subjecting human rights issues

to international scrutiny was a functional decision made in furtherance of institutional consolidation during the transition period, as it served to fortify fundamental human rights protection in a political system hamstrung by military actors with veto powers, and still powerful authoritarian pressures. . . .

While in the last decade countries in the region have made considerable progress incorporating international human rights law into their national legal system, the Court's jurisprudence is seen as a guide, even an "indispensable guide" for the interpretation of the American Convention by local judges, the process is not linear and there are dissident voices.

Recent decisions of appellate courts in the Dominican Republic and Venezuela have downplayed the forcefulness of the Court's decisions and sought to give national courts the power to review its decisions (a legality test), to assess the compatibility of the international organ's decision with the country's constitution. This is an on-going debate amongst the continent's different judicial systems, where resistance to the incorporation of international human rights law in national legal systems still carries considerable weight, and many argue for greater national autonomy in this area.

Alec Stone Sweet

*Trustee Courts and the Evolution of International Regimes:
The Politics of Majoritarian Activism in the ECHR,
the EU, and the WTO**

The European Court of Human Rights [ECTHR] performs three governance functions. It renders justice to individual applicants beyond the state (a justice function); it supervises the rights-regarding activities of all national officials, including judges (a monitoring function); and it determines the content of Convention rights (a law-making function). . . .

In the European Convention on Human Rights [ECHR] (as in all national constitutions adopted in Europe since the end of WWII), important fundamental rights are "qualified" by limitation clauses. States may limit the enjoyment of rights associated with privacy and family life (Article 8), conscience and religion (Article 9), expression (Article 10), and assembly and association (Article 11)

*Excepted from Alec Stone Sweet, *Trustee Courts and the Evolution of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO* (Working Paper 2012).

when “necessary” to achieve certain purposes. In the standard formula, states may “interfere with” or “restrict” the “exercise” of a Convention right, but only when such interferences are “prescribed by law,” and “are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” The ECTHR has developed a version of the proportionality framework to test “necessity.”

The ECTHR typically uses necessity analysis to determine how much discretion—the size of the “margin of appreciation”—states possess when they act under limitation clauses. If the Court finds that a state measure under review is “necessary” to achieve its goals under one of the headings, the state will maintain its regulatory autonomy. If the Court finds that a national law or other general measure is the source of a violation, then the state will be subject to repetitive petitions and findings of violation until it changes its law. Most important for our purposes, the Court uses necessity analysis to determine when the scope of a right deserves expansion. . . . The Court will typically raise the standard of protection in a given domain when a sufficient number of states have withdrawn public interest justifications for restricting the right. Put differently, the margin of appreciation afforded states to strike an appropriate balance will shrink as state consensus on higher standards emerges. . . .

In order to assess how the Court determines if a new consensus among states has emerged, we examined rulings rendered between January 1, 1999 and January 28, 2010, focusing on individual petitions pleading a right contained in Articles 8-11. . . . Since the entry into force of Protocol No. 11, Grand Chambers have issued 246 rulings on the merits, finding violations in 179 cases (73%). Individuals pleaded one or more rights contained in Articles 8-11 in 91 of these rulings, 54 (59%) of which found violations.

In 26 (29%) of the 91 cases involving Articles 8-11, Grand Chambers used one or more techniques of gauging state consensus within necessity analysis. In these cases, the crucial moment occurs when the Court assesses the level of state consensus. Cases are won or lost, and precedents are reassessed, at this point in the ruling. As a result, petitioners, the defendant state, and third-parties (NGOs and states filing as *amici*) collect and report evidence of state practice to the Court; and the Court often undertakes its own investigations. This evidence can take the form of: (1) a count of states that restrict (or no longer limit) a right in a particular way, through of a survey of relevant national legislation, case law, and administrative practice; (2) EU law and Council of Europe positions, as evidence of European consensus; and (3) international conventions to which states are parties. The ECTHR may also treat, as pertinent to the analysis, the rulings

outside the regime, such as Canada and South Africa, and the Inter-American Court of Human Rights. The Court often blends evidence from these various sources to arrive at a conclusion. It is important to stress that sections process the vast bulk of these cases and they to routinely engage in “consensus analysis” when evaluating the “necessity” of state measures.

To illustrate, consider the response to discrimination against homosexuals. In the 1980s, the Court found that laws criminalizing homosexual acts violated Article 8 (privacy), decisions that opened the door to the review of *all* national law that denied homosexuals equal rights. The Court has taken an activist and majoritarian stance, steadily raised protection in this field, as social mores have evolved. In 1999, a section held that the UK’s prohibition against gays and lesbians serving in the military violated Article 8; the judges rejected the claim that the ban was necessary to preserve morale in the armed forces, stressing that the UK’s position was a distinctly minoritarian one. The UK, after further inquiry, rescinded the ban. In 2010, a section found a violation of Article 11 (assembly), 13 (access to justice), and 14 (non-discrimination) in three cases involving the recurrent refusal of Russian authorities to permit “Gay pride” parades. Russia claimed a wide “margin of appreciation” when “homosexual behavior” spilled from the private into the public domain, which the section rejected on the grounds of solid state consensus to the contrary. In 2008, a Grand Chamber held that France could not withhold authorization from a lesbian woman attempting to adopt a child, although the judges could count only 10 states permitting the practice. Since the Grand Chamber stressed that the French Council of State had based its decision on the woman’s homosexuality, the ruling could be considered to be an application of settled case law. The oracular nature of the ruling, however, was obvious, and France changed its law.

Majoritarian activism also applies to negative cases. If the Court finds that state consensus on extending the scope of rights protection has not emerged, or has not yet been consolidated, it will balk at extending the scope of a right. In a 2010 case, for example, a Grand Chamber decided an Article 8 case involving same-sex marriage in these terms:

The Court [finds] that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, [thus] States ... enjoy a margin of appreciation in the timing of the introduction of legislative changes.

The finding of non-violation indicates that laggard states will not be able to maintain the *status quo*. In 2011, the Court rejected a challenge to Austria's ban on *in vitro* fertilization using donated genetic material. A section declared that although "there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging, but not yet consolidated, 'consensus.'" In these and many other rulings, states may have survived a challenge, but they have been put on notice that change is coming.

In sum, consensus analysis, staged within the necessity test of the proportionality framework, often determines how Convention rights will evolve. The Court treats rights as both substantively and temporally incomplete norms, to be constructed dynamically as social mores evolve. Although the Court regularly overturns precedent to raise standards of rights protection under the Convention, the Court has never reversed a precedent in order to reduce the level of protection. Once national regulatory autonomy has been lost in a given field, states have never regained it.

Alec Stone Sweet

*A Cosmopolitan Legal Order: Constitutional Pluralism and Rights
Adjudication in Europe*^{*}

A cosmopolitan legal order [CLO] is a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship. In Europe, a CLO has emerged with the incorporation of the European Convention on Human Rights [ECHR] into national law. The system is governed by a decentralized sovereign: a community of courts whose activities are coordinated through the rulings of the European Court of Human Rights [ECTHR]. While imperfect and still maturing, the regime meets significant criteria of effectiveness. It routinely succeeds in raising national standards of rights protection; it has been crucial to the success of transitions to constitutional democracy in post-authoritarian states; and it has steadily developed capacity to render justice to fall people that come under its jurisdiction, even those who live, and whose rights are violated, outside the territory of the Convention. . . .

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By *rights cosmopolitanism*, I mean the recognition of a legal duty to provide justice under the cosmopolitan constitution. A CLO is a legal system in which all public officials bear an obligation to respect the fundamental rights of every person within their jurisdiction. . . . The ECHR occupies a central strategic position in the CLO, given that individuals have an unfettered right to petition the Court once national remedies have been exhausted.

Constitutional pluralism is a structural characteristic of a legal system. Within the domestic constitutional order, the term refers to a situation in which two or more sources of judicially-enforceable rights co-exist. In many national legal systems, three such sources—national constitutional rights, EU rights, and the ECHR—overlap. Individuals have a choice of which source to plead, and judges have a choice of which right to enforce. These choices have consequences, as when national judges prefer to apply European rights, rather than their own constitution law, as a means of raising standards of protection.

The term, *constitutional pluralism*, also refers to systemic features of the CLO. The fact that ECHR maps onto rights found in national systems undergirds the notion of a multi-level constitutionalism: no act taken by any public authority, at any level of governance, can be considered lawful if it violates a fundamental right. . . . The structure of authority within this presupposed constitution is pluralistic, in that the system is comprised of discrete hierarchies, national and Treaty-based, each of which has a claim to autonomy and legitimacy. In Europe today, judges intensively interact with one another across jurisdictional boundaries with reference to questions of rights adjudication that they collectively confront.

[The] construction of a pluralistic, constitutional system [is] a momentous outcome given legacies of the past. In Europe, traditional models of the juridical state are grounded not in notions of legal pluralism, but *sovereignty*. These models depict the legal system as hierarchically organized, with one organ positioned to defend the integrity of the hierarchy of norms that constitutes it. This organ is considered to be the repository of *centralized sovereignty*, to the extent that it possesses a monopoly on the authority to resolve certain legal questions. In the archetypal cases, a constitutional court (under rights-based constitutionalism) or a parliament (under a regime of legislative sovereignty) are considered to possess the ultimate authority to resolve issues involving the validity of, or conflict among, legal norms within the system.

A CLO is a legal system in which fundamental rights are enforced by a “decentralized sovereign” The regime is not hierarchically constructed with one jurisdiction positioned to render a “final word” on questions of legal validity

at each level of governance. From an internal perspective given by the Convention, the European Court is the authoritative interpreter of Convention rights. The Court, however, does not possess the authority to invalidate national measures that conflict with the Convention. If and how the Court's rulings are "implemented" in the national legal order depends entirely on the decision-making of national officials under national rules. What makes the system "constitutional" is an overarching normative structure: the code of rights that officials are under a legal duty to enforce; and a set of shared techniques that judges, in particular, have developed to adjudicate rights. . . . In Europe, states have pooled and then distributed sovereignty in such a way as to create a layered set of "nodes" of judicial authority to protect rights. Each of these nodes is autonomous; yet the cosmopolitan order exists only in so far as national judges credit their roles in a common project. . . .

In the CLO, overlapping competences count as a good in so far as individuals (a) have multiple points of access to the decentralized sovereign, and (b) healthy competition among nodes of authority serves to upgrade, rather than reduce, a collective commitment to rights protection.

The CLO in Europe is comprised of three interlocking elements. First, individuals are able to plead fundamental rights, including the Convention, before national judges. Although the ECHR does not require incorporation into the domestic order, all 47 states have now done so, in ways that make it binding on all public authorities and enforceable by national judges. . . . Second, national systems of rights protection are formally linked to a realm of rights adjudication beyond the state: every individual, regardless of citizenship, possesses an unfettered right to petition the European Court, once national remedies have been exhausted. Third, the ECHR comprises an autonomous source of rights doctrine. The Court treats the Convention as a "living" instrument, which is interpreted and applied in order to secure the effectiveness of rights, as society evolves. . . .

[Below] I describe the development of constitutional pluralism within the *domestic* order, a process that removed obstacles to the emergence of the CLO. Most important, it destroyed the constitutional dogmas associated with legislative sovereignty, crucially, the prohibition of judicial review of statutes.

Constitutional pluralism first emerged in Europe with the consolidation of the doctrines of the *direct effect* and *supremacy* of EU law, announced by the European Court of Justice (ECJ) in the 1960s. . . .

Supremacy challenged the prohibition of judicial review in that it required judges to refuse to apply any norm, including statutory provisions, found to be in

conflict with EU law. By 1989, every high court in the EU had accepted supremacy, and the courts of new member states quickly joined them. The result: all judges acquired the power of judicial review of statute, albeit only in areas governed by EU law, authority otherwise denied to most courts under national constitutional law. In systems in which a constitutional court defends the primacy of the constitution and rights, the ECJ's case law fatally undermined the presumed monopoly of the constitutional judge to determine the conditions under which the ordinary (non-constitutional) could refuse to apply relevant statute.

While it may be argued that the supremacy doctrine constituted a sovereignty claim on the part of the ECJ, no national constitutional court has accepted supremacy as the ECJ understands it. The ECJ, in effect, holds that all national judges are agents of the EU legal order, not the national order, whenever they act in domains that fall within the scope of EU law. The ECJ further asserts that it alone possesses the ultimate authority to determine the compatibility of EU law with fundamental rights. National constitutional courts assert that EU law—including the doctrine of supremacy—enters into national law through their own constitution, and does not deprive them of their own “final word” on the constitutionality of EU acts. . . . On the ground, most ordinary courts, including supreme courts, routinely behave as faithful agents of the EU order when they adjudicate EU law. Some go further, overtly leveraging the ECJ in order to expand their own authority and to subvert that of the domestic constitutional order.

[P]rotocol No. 11 confers upon the Court compulsory jurisdiction over individual petitions that claim a violation of Convention rights, after exhausting national remedies. If the Court finds a violation, it may award monetary damages. Unlike a national constitutional court, the Court has no authority to invalidate a national norm that conflicts with the Convention. . . . Under Protocol No. 11, the number of petitions exploded. In 1999, the Registry of the Court received 8,400 complaints, a figure that has increased every year thereafter. In 2010, the Court registered 61,300 applications. Although some 96% of all petitions will be ruled inadmissible for one reason or another, the Court is overloaded. The annual rate of judgments on the merits shows a similar trend. . . . In 1999, it rendered 250 judgments; 1,200 in 2005; and 1,607 in 2010. Under Protocol No. 11, the Strasbourg Court is the most active rights protecting court in the world.

The CLO is a product of Protocol No. 11 and the incorporation of the ECHR into domestic legal orders. [D]omestication of the Convention proceeded via different routes: express constitutional provision (Austria, many post-Communist states); judicial interpretation of constitutional provisions related to treaty law generally (most states in Western Europe); or special statutes (UK,

Ireland, and Scandinavian states). With incorporation, all national courts in the system are capable of enforcing the Convention: individuals can plead the ECHR at national bar against any act of public authority; judges are under a duty to identify statutes that conflict with Convention rights, and to interpret statutes in lights of the ECHR to avoid conflicts whenever possible; and virtually all courts may refuse to apply statutes that conflict with Convention rights, with the notable exception of those in the UK and Ireland.

Incorporation is an inherently constitutional process: it subverted centralized sovereignty at the national level, while provoking dynamics of systemic construction at the transnational level. The Convention quickly developed into a “shadow,” or “surrogate,” constitution in every state that did not possess its own judicially-enforceable charter of rights (including original signatories, Belgium, France, the Netherlands, Switzerland, and the UK). In the 1990s, Finland, Norway, and Sweden enacted new Bills of Rights, closely modeled on (and invoking) the ECHR, in order to fill gaps in their own constitutions.

In those states that possess, at least on paper, relatively complete systems of constitutional justice, incorporation provides supplementary protection. We find this situation in Germany, Greece, Ireland, Italy, Portugal, Spain, Turkey, and in the post-Communist states. The Spanish Constitutional Tribunal, for example, enforces the ECHR as quasi-constitutional norms. The Tribunal will strike down statutes that violate the Convention as *per se* unconstitutional; it interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the ordinary courts to abide by the Strasbourg Court’s jurisprudence as a matter of *constitutional* obligation, including case law generated by litigation not involving Spain. If the judiciary ignores the Court’s jurisprudence, individuals can appeal directly to the Tribunal for redress. Nonetheless, the Tribunal insists that in the event of an irreconcilable conflict between the ECHR and the Spanish Constitution, the latter will prevail—a common position among constitutional courts. In many post-Communist states, as well, constitutional judges invoke the Strasbourg Court’s jurisprudence as authority, in order to enhance the status of fundamental rights—and hence their own positions—in the domestic context.

Strikingly, some states give the Convention constitutional rank (e.g., Albania, Austria, Slovenia); and, in the Netherlands, the ECHR enjoys supra-constitutional status. In Belgium, the Constitutional Court has determined that the ECHR possesses supra-legislative but infra-constitutional rank, while the Supreme Court holds that the ECHR possesses supra-constitutional status, thereby enhancing its autonomy *vis à vis* the Constitutional Court.

One could continue in this vein, but the basic point has been made. The incorporation of the ECHR generated constitutional pluralism and inter-judicial competition within the national order; it destroyed doctrines that underpinned centralized sovereignty (e.g., legislative supremacy, the monopoly of constitutional courts over the domain of rights protection); and it enhanced judicial power with respect to legislative and executive power.

Constitutional pluralism expands the discretionary authority of courts. Many judges will now refuse to apply law that conflicts with the Convention; at the same time, they are rapidly abandoning traditional methods of statutory interpretation. Instead of seeking to discern legislative intent, judges increasingly favor the purposive construction of statutes in light of fundamental rights jurisprudence. In systems in which multiple, functionally-differentiated, high courts co-exist (the majority of states), pluralism means that the supreme courts of ordinary jurisdiction may assume the mantle of *de facto* constitutional courts whenever they review the *Conventionality* of statutes. France, which for two centuries famously embraced and propagated the dogmas of the General Will (legislative sovereignty and the prohibition of judicial review), is now a robust example of pluralism. From the point of view of the rights claimant, the Supreme Civil Court (*Cour de Cassation*) and the Council of State (the supreme administrative court) function as the “real” constitutional courts; and litigants and judges treat the Convention as the “real” charter of rights. The outcome is dictated by the fact that individuals have no direct access to the Constitutional Council²⁸; and it is the European Court, not the Constitutional Council, that supervises the rights-protecting activities of the civil and administrative courts. Today, three autonomous high courts protect fundamental rights on an on-going basis; and there is no formal means of coordinating rights doctrine, or of resolving conflicts, among these courts. Without revising the constitution or exiting the ECHR, French officials are now locked into a pluralist system of rights protection.

Some of the most powerful states in Western Europe have had the greatest difficulty incorporating the ECHR to permit judges to enforce it against statute. In legal terms, the structural problem concerns the fact that in so-called “dualist” systems—including original signatories, Germany, Ireland, Italy, Sweden, Norway, and the UK—constitutions confer upon treaty law the same rank as statute. In such systems, conflicts between statutes and treaty provisions are expected to be resolved according to the rule, *lex posterior derogat legi prioris*. The rule is anathema to a CLO, since legislation adopted after the transposition of the ECHR into national law would normally be immune from review under the

²⁸ In 2008, the French Constitution was revised to permit the Supreme Court and the Council of State to refer laws to the Constitutional Council for review, in the context of ongoing litigation.

Convention. What is critical for the emergence of the CLO is that, in these states, the rule has been relaxed or overridden altogether.

In Italy, at least until the late-1960s, “Italian courts refused to apply the Convention . . . considering its provisions to be merely programmatic.” In the past decade, courts incorporated the Convention, destroying the *lex posterior* rule and producing a pluralist order. In 2004, the Supreme Court (*Cassazione*) began treating the Convention as directly applicable, while in 2007, the Italian Constitutional Court (ICC) struck down a statute (concerning expropriation) as unconstitutional on the grounds that it violated property rights under the Convention. In its decision, the ICC held that Italian judges are required to interpret national law in light of the ECHR and, where a conflict is unavoidable, to refer the matter to the ICC. Some judges have chosen to ignore this jurisprudence. In 2008, for example, a court of appeal decided on its own authority to refuse to apply a controlling statute on grounds that it was incompatible with the Convention. The situation has given rise to a fierce debate: does the ECHR enjoy supra-legislative but infra-constitutional rank (the ICC’s position) or constitutional status (the position of some civil courts and scholars)? This is yet another example of constitutional pluralism in action.

In Germany, overcoming the *lex posterior* rule has been tortuous. . . . In its *Görgülü* decision (2005), the [German Federal Constitutional Court (GFCC)] repudiated the “traditional theory” according to which the Strasbourg’s Court’s judgments did not bind the domestic organs of government, including the courts. The ruling establishes a strong presumption that judges are to apply the Court’s jurisprudence when it is on point, except in “exceptional” circumstances, namely, when “it is the only way to avoid a violation of the fundamental principles contained in the Constitution.” As important, the GFCC’s ruling expanded the constitutional complaint procedure: individuals can now challenge (as a violation of their constitutional rights) judicial rulings that ignore or fail to properly take into account the European Court’s case law. While *Görgülü* significantly bolstered the status of the ECHR within the domestic order, the GFCC also noted that it would settle any conflict between the Basic Law and the ECHR in terms of the former.

In 2011, the GFCC declared that the ECHR and the European Court’s case law comprise interpretive “aids for the determination of the contents and scope of the fundamental rights and of rule-of-law principles enshrined in the Basic Law.”

Like *Görgülü*, the GFCC’s *Preventive Detention* ruling ended a convoluted saga involving a direct conflict between the German courts and the European Court. In 2009, in *M v. Germany*, the Strasbourg Court had held that

German law allowing the further detention of convicted criminals after they had served their prison sentences violated the ECHR. The GFCC had upheld the constitutionality of the relevant statute in 2004, in so far as such detention was deemed necessary to protect public security. When the GFCC appeared reluctant to change its position following the *M* judgment, the European Court issued a series of rulings finding the same violation. In *Prevention Detention*, the GFCC overturned its 2004 ruling, on the grounds that the Strasbourg's court's case law had constituted a significant "change in the legal situation." The Court then went on to ground the Basic Law's "openness" to the Convention in Article 1.2 of the Basic Law (which recognizes human rights as foundational principles). As a result, all organs of the state are under a duty "not only to take into account" the ECHR in their decisions, but "to avoid conflict" between it and national law. "The openness of the Basic Law," the GFCC stated, "expresses an understanding of sovereignty that not only does not oppose international and supranational integration, it presupposes and expects [integration]."

By formally recognizing the overlapping nature of fundamental rights in Europe, the GFCC has taken a cosmopolitan position. In *Görgülü*, the GFCC had already declared that its own rights protecting role is exercised "indirectly in the service" of the Convention, an engagement that both protects Germany from findings of violations and "contributes to promoting a joint European development of fundamental rights." In *Preventive Detention*, the GFCC acknowledged a dialogic relationship with the Strasbourg Court, without abandoning its position on the primacy of the Basic Law: "The fact that the German constitution has the final word is not incompatible with an international and European dialogue between courts, rather it [comprises the dialogue's] normative foundation." In June 2011, two months after *Preventive Detention*, the European Court responded favorably, finding no violation in a related case, *Mork v. Germany* (2011). The Court noted: "In its judgment, the GFCC stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to . . . dialogue between the courts," and that "in its reasoning, [the GFCC] relied on the interpretation . . . of the Convention made by this Court in its judgment in the case of *M. v. Germany*." The outcome illustrates one basic mechanism—dialogue among autonomous courts—through which decentralized sovereignty can increase the effectiveness of the ECHR.

In two states—Ireland and the UK—the *lex posterior* rule has also been relaxed, although no judge is authorized to set aside legislation conflicting with the Convention. . . . In Norway and Sweden, which incorporated the ECHR through human rights statutes in the 1990s, the courts must give primacy to the Convention when in a conflict with legislation. In the past decade, Norwegian

courts in particular have positioned themselves to become active participants in the development of Convention rights.

While the dynamics of incorporation are heavily mediated by constitutional provisions and doctrine, important strategic interests have been catalysts. In the 1990s, incorporation constituted a formal means for post-Communist states to signal their commitment to the massive institutional reforms being demanded by Western states. As a growing scholarly literature has shown, the ECHR has played a crucial role in democratic transitions after 1989. New bills of rights were modeled on the ECHR, with an eye towards future membership in the EU and the Council of Europe; and some states even signed the ECHR prior to ratifying new constitutions (including Albania, Armenia, Azerbaijan, Georgia, Poland, Slovakia, and Ukraine). For the core states of Western Europe, folding the post-Communist states into the ECHR also fulfilled important strategic interests. Protocol No. 11 reconstructed the regime, making it an extraordinarily efficient mechanism for monitoring the functioning of post-Communist states. For Western states, the cost of Protocol No. 11 is enhanced supervision of their own rights-regarding activities, a cost they have thus far been willing to pay. . . .

The Court routinely generates new rights and expands the scope of existing ones, placing even powerful states out of compliance with the Convention. . . . Most of the original signatories of the Convention assumed that the treaty enshrined minimalism, thereby affording substantial latitude in how states would balance public interests and rights. One might also suppose that a transnational court would have weaker political legitimacy in comparison with national courts. After all, the typical national judge is embedded in a liberal democratic order, and s/he is a native of the legal system in which the rights conflict has taken place. The transnational judge's gaze, in contrast, is an alien presence. Why has this situation not led to a jurisprudence of rights minimalism?

The answer lies in how decentralized sovereignty operates. Three factors deserve emphasis. First, the Court expends great resources to convince its audience that it fully understands the richness and particularity of the dispute, as well as variation in the relevant national law across the regime. In its rulings, the Court carefully traces the process through which individuals exhausted remedies, and it dwells on the arguments briefed by the defendant state and others filing as *amici*. Findings of violation may not convince states, but it is not plausible to argue that the Court has ignored domestic law and context. The practice also helps the Court provide guidance on how violating states should change their laws, which it now does routinely when the source of a violation is a general legal norm or practice.

Second, the Court has developed a doctrinal framework—proportionality analysis (PA)—to adjudicate virtually all Convention rights, and it insists that all national courts use it as well. [H]ow any qualified right is actually enforced will always be contingent upon local law and context, while the state that would infringe a right bears the burden of justifying the necessity of the means chosen. What is common across the national systems that comprise the CLO is not a list of norms defined in a lowest-common denominator manner, but a mode of argumentation, and justification: the proportionality framework.

The Court uses PA, in part, to determine how much discretion—the “margin of appreciation” in the jargon—states should have in infringing a right for public purposes. In practice, the Court combines PA with a simple comparative method for determining when the scope of a Convention right has expanded. Typically, the Court will raise the standard of protection in a given domain of law when a sufficient number of states have withdrawn public interest justifications for restricting the right. The margin of appreciation thus shrinks as consensus on higher standards of rights protection emerges within the regime, shifting the balance in favor of future applicants. ...

Third, the incentives facing national judges push them toward implementing the Court’s progressive rulings, as well as raising standards on their own. Simplifying a complex topic, there are several basic logics at work. The first is an “avoidance of punishment” rationale: enforcing Convention rights will make the state—in practice, the judiciary—less vulnerable to censure in Strasbourg. This logic is especially pronounced in national systems that otherwise prohibit the judicial review of statute, or do not have a national charter of rights. A second dynamic is embedded in domestic politics. Individuals and NGOs may seek to leverage the ECHR to alter law and policy, and national judges may work to entrench Convention rights in order to enhance their own authority with respect to legislators and executives. Third, as the CLO gains in effectiveness, the interest high courts have in using the Convention, and seeking to influence the evolution of the ECHR, increases. Even for a court that is relatively jealous of its own autonomy, constructive engagement is more likely to constrain the Court than the more costly alternatives: defection and open conflict. With regard to domestic arrangements, exercising power within the CLO may well be more attractive than submitting to the authority of the legislature or constitutional court. Friction among national authorities, and between national courts and the European Court, has been an important catalyst for the regime’s progressive development.

A cosmopolitan legal system was instantiated by Protocol No. 11 to the ECHR and the incorporation of the Convention into national legal orders. At the regime level, states have steadily strengthened the supervisory capacities of the

European Court, an organ that, arguably, now functions as a transnational “constitutional” court. Within national systems, elected officials and judges have gradually abandoned centralized sovereignty while institutionalizing complex forms of rights pluralism. . . .

The CLO imperfectly protects rights. The European Court—overloaded and often overwhelmed—is activated, after all, by the inadequacies of national protection. It is obvious that judges, other officials, and the Court itself routinely fail to meet obligations to fulfil the fundamental rights of all persons that come under their jurisdiction. What is important is that they are now positioned to do so. . . .

Last, I have not addressed legitimacy concerns, beyond the implicit assertion that the CLO is both a product and a source of rights-based constitutionalism and jurisgenerativity. If the protection of fundamental rights is a core value of pan-European constitutionalism, then the CLO is good for Europeans. Of course, the principles associated with parliamentary democracy are also core values. The evolution of rights pluralism, however, has undermined the models that officials and scholars have long used to describe, and normatively circumscribe, how state organs, including parliament and the courts, function. Traditional notions of sovereignty, separation of powers, the hierarchy of norms, the monist/dualist dichotomy, representation, and so on, are no longer up to the task. It may be that such notions are in the process of being adapted to cosmopolitan precepts and realities. But it also may be that the discursive battles between the values of rights cosmopolitanism and those of classic statist conceptions of the legal system have barely begun.