

## World Law Congress, Opening Session

### Barcelona, 7 July 2020: Will the Rule of Law Survive in Europe?

#### The relation between national constitutional courts and the ECJ

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1. My first point is that both **contribute to the rule of law in Europe**.

The constitutional courts protect the fundamental rights and freedoms guaranteed by the national constitutions. The ECJ ensures that in the interpretation and application of the European Union Treaties and of the Charter of Fundamental Rights of the European Union , the law is observed , both by the European institutions and by the Member States implementing EU law

2. My second point is that a **significant interaction** has been taking place and still takes place **between the constitutional courts and the ECJ**. The (German and Italian) constitutional courts have forced the ECJ to establish its jurisdiction for fundamental rights review. And hereby, the ECJ has taken into account the constitutional traditions of the Member States, as well as the human rights treaties, especially the European Convention for the Protection of Human Rights .

Several constitutional courts, such as the Spanish and Belgian ones, interpret the fundamental rights enshrined in their national constitutions in light of the corresponding provisions of the human rights treaties. Therefore, constitutional courts often cite and quote the ECJ's and the

ECtHR's jurisprudence. In so doing, they speak 'the same language' as these supranational courts, and this facilitates judicial dialogue.

But the most important and direct instrument for judicial dialogue is the preliminary reference procedure to the ECJ.

3. My third point is that, through their case-law, the constitutional courts have contributed to the “**constitutionalization of Europe**”, by fostering the principles and values of constitutionalism in EU law, such as respect for the principle of proportionality (M. Claes & B. De Witte). European courts and national constitutional courts should rather be seen as **natural allies** in protecting fundamental rights and basic principles and values against political bodies. Together, they are the guardians of the values of constitutionalism in Europe (idem).

4. But the relation between the ECJ and constitutional courts is **not free from frictions**. This is my fourth point. The ECJ has established its jurisprudence concerning the primacy of EU law in the sixties, and has also vested its trust for its enforcement in the ordinary judge. Whereas the ECJ derives that primacy from the EU law itself, the constitutional courts derive the same principle from the national constitutions, which may limit that primacy.

Fortunately, real tensions are very limited in number. Personally, I think that priority must be given to the most far-reaching rights protection, even when this results from the national Constitution, unless in cases where the ECJ can prove that this threatens the unity and the effectiveness of EU law. The constitutional courts should, when such

problems arise, first enter into a dialogue with the ECJ through the preliminary reference procedure.

5. My fifth and last point concerns the relation between the national constitutional courts, the ECJ and the ECtHR, which has been described as **“a multilevel cooperation of the European constitutional courts”**(or as **“ ein Europäische Verfassungsgerichtsverbund”** ). All courts involved must interpret, apply and protect “their” part of the compound constitution in an ongoing judicial dialogue.

But this relation on an equal footing can only work if all courts involved play their role correctly. When they don't, the ECJ is allowed to play its role as the guardian of the values upon which the EU is founded, such as democracy, the rule of law, and respect for human rights.

The ECJ has, rightfully, played this role in recent cases, for example against Poland. The guarantees of judicial independence and impartiality are linked to the interpretation and application of EU law which must be assured by the national judges under the control of the ECJ. Because of this case law, I believe that the rule of law will survive in Europe.