

Juridification in Europe

The balance of powers under pressure?

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(editor)



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Preface

The European integration process has since its inception transformed the role of the nation state. The European Union is not only a framework for political cooperation, it is also a *Rechtsgemeinschaft*, or a community of law, as the first president of the European Commission Walter Hallstein characterised the European Economic Community in 1974.¹ According to Hallstein, the European Community was to be considered a creation of law, unlike nation states with borders inspired by territorial claims, history and culture. To this day, the debate on how Hallstein's dichotomy affects the role of the EU vis-à-vis the member states is ongoing. *Juridification* in Europe is a valuable contribution to this discussion. It shows the centrality of the law and legislative power in decision-making of the EU and its member states.

The word *Rechtsgemeinschaft* also comprises respect for the rule of law, a fundamental principle of the European Union. Although the value of this principle has not been put in question by this volume, it offers an opportunity to reflect on the meaning of 'rule of law'. A natural tension exists between legislative and judicial powers under the democratic rule of law. They complement each other, with legislators initiating laws and the judicial representatives administering and interpreting them. Tension occurs when the law is being interpreted in a way not envisaged by the legislator, or when the legislator seeks to initiate laws which conflict with provisions already in force. What does political decision-making look like in an institutional arrangement designed to respect the rule of law, while simultaneously staying true to the principles of democracy? How is the balance between the branches of the *Trias Politica* safeguarded?

This book provides an insight into the practical functioning of the institutions of the legislative, judicial and executive branches of five EU member states. It shows the relation between 'juridification', a trend by which the law and judicial power seems to play an increasingly prominent role in European societies and politics, and the balance of powers in a liberal constitutional democracy. By the publication of this edited volume, the European Liberal Forum enriches the liberal tradition of respect and support for the foundations of liberal constitutional democracy. I would like to thank the Teldersstichting (the Netherlands), Inštitut NOVUM (Slovenia), Atvira visvomenė ir jos draugai/Open Society and its Friends (Lithuania), and the Friedrich Naumann Foundation for Freedom/Liberal Institute (Germany) for initiating and coordinating this project.

Alexander Graf Lambsdorff MEP
President of European Liberal Forum

¹ W. Hallstein, *Die Europäische Gemeinschaft*, Düsseldorf and Vienna, 1974, pp. 33-39.

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Introduction

I. An introduction to ‘juridification’

Charlotte Maas

The definition

The phenomenon of ‘juridification’ has been discussed in numerous books and studies. Not only the problems related to this phenomenon, but also its definition varies significantly in these publications.

In the introduction to *The Global Expansion of Judicial Power*, a book published in 1995 with contributions from scholars all over the world, the editor chooses to use the word ‘judicialization’ with a two-fold meaning. First, this definition refers to a process of increasing influence of courts and judges on the making of public policies, at the expense of the legislative and executive institutions. Second, this definition refers to the process by which quasi-judicial rules and procedures increasingly dominate the negotiations or decision-making in society.¹

In *What is juridification?*, published in 2005, the Norwegian authors Lars Blichner and Anders Molander describe the various meanings of this word. One of these meanings is the increasing judicial power compared to the legislative power. This might be the case when the law itself is vague and leaves room for interpretation by judges. The word ‘juridification’ is also used to point out a trend in society and social relations, when the law regulates an increasing amount of activities that may not have been legally regulated before. Besides, Blichner and Molander write about juridification as a process by which conflicts are increasingly solved by reference to the law, or when people increasingly think of themselves as legal subjects.²

In his book *The Perils of Global Legalism* from 2009, the American professor of law Eric Posner analyses a certain view on the central role of law in political decision-making and conflict settlement, which he calls ‘legalism’. Amongst politicians, policymakers and scholars, Posner recognises a specific way of thinking about law by which law seems to become an end in itself, thus losing its instrumental function in society. This way of thinking can be perceived in (international) decision-making and conflict resolution. These processes, according to Posner, are being dominated by existing legalistic procedures, laws and treaties. Politicians, policymakers and diplomats tend to forget that these procedures, laws and treaties are to serve a politically defined goal. They will have to be treated and valued as such. In case legal rules, laws or treaties do not succeed in meeting these goals, or in case politicians (i.e. the legislator) change their opinion on the desired

¹ C. Neal Tate, ‘Why the Expansion of Judicial Power?’, in: C. Neal Tate and T. Valinder, *The Global Expansion of Judicial Power*, New York and London, 1995, p. 28.

² L.C. Blichner and A. Molander, ‘What is juridification?’, *Arena Centre for European Studies Working Paper*, 2005, no. 14, p. 5.

goal, the law should be regarded as being able to change as well.³

The definitions ‘legalism’, ‘juridification’ and ‘judicialization’ certainly do not mean exactly the same. ‘Legalism’ refers to a way of thinking about the position law has in our society, whereas ‘judicialization’ mainly refers to the increasing influence of the judicial power in the domains of the legislator and the executive power of the public administration. ‘Juridification’ is being used as an ‘umbrella’ definition for references of increasing influence of the law, legalistic rules and the legalistic power of courts and judges on society in general and politics in particular.

Assessing the problems of a cultural trend

Because of its general character, we limit ourselves in this book to the usage of the English word ‘juridification’ and leave other definitions for similar phenomena aside. The choice for this definition, however, has one disadvantage. ‘Juridification’ refers to both a trend in social relations and in politics. This notion may, unjustly so, create the impression that the increasing influence of the judicial power in political decision-making should be the logical consequence of a more dominant presence of the law, including legalistic rules and procedures, in society in general.

Previous studies of juridification have shown that it would not be correct to attribute the supposedly increasing influence of jurisprudence on the legislative power to the central role law has in modern Western democratic society. Research on the origins of juridification and the conditions this phenomenon occurs in, point first and foremost to the legislator itself who gives rise to juridification.⁴ For example, politicians may choose to stay away from regulating certain sensitive matters, which require public policies, but are at the same time highly unlikely to be rewarding in terms of popular votes. Matters like these are for example the anti-smoking policy, abortion or euthanasia regulations. Consequently, the legal regulation in these fields is (partly) done by judges who are asked to specify the vaguely formulated laws in individual situations. In these cases, it is not a surplus of legalistic rules, but rather a lacuna in the existing legislation, which is the immediate cause of the juridification in public policymaking, i.e. of the increasing judicial power in legislative activities.

Another reason for the juridification of legislative tasks is the weak legal quality of legislation. Weak legal quality of new legislation can be noticed when the legislator fails to convince how the (proposed) law fits within the complete set of laws that have already taken effect. It can also be noticed when the (proposed) law does not seem to be in accordance with the principles of the liberal constitutional state, such as the principle of legal security or the principle of legal equality. This legal inadequacy can be a reason for courts to rule that the proposed law cannot

³ E.A. Posner, *The Perils of Global Legalism*, Chicago, 2009, pp. xi-xiii.

⁴ C. Neal Tate, ‘Why the Expansion of Judicial Power?’, pp. 27-33.

take effect or that the law should be recalled. Presumably, the legal quality weakens as the legal knowledge of the legislator decreases. It may also happen when laws are created more rapidly, in response to current events in society. In short, both a lacuna in existing legislation as well as poor legal quality of (proposed) legislation are possible reasons for the increasing influence of courts on public policies.

It is not an easy task to assess the problems of juridification. Interest groups that challenge democratically taken decisions in court, relatively insignificant conflicts between citizens that have to be settled in court, bureaucracy that impedes the work of entrepreneurs or professionals in health care and education for instance, and the increasing influence of the judicial power in public policymaking – these phenomena may all be ranged under the umbrella of 'juridification'. Although we may accept the presupposition that law has a growing role in society, paradoxically we also have to take account of the fact that poor legal knowledge or the lack of regulation can be a drive for further juridification in the sphere of political decision-making.

There is another reason why it is not easy to estimate the seriousness of juridification in society. A peculiar feature of the phenomenon of juridification is the fact that those who experience the burden of juridification at one moment, may well be the ones that profit from this same phenomenon at another moment.⁵ The various stakeholders in the process of juridification are citizens, first of all. On the one hand, they have an interest in the principles of a liberal constitutional state and public administration that acts accordingly. Legal protection of the individual freedom, participation in public decision-making, and the right to lay an appeal against a decision of the public administration are three of these principles. On the other hand, when practically these principles result in dead-end democratic decision-making and, for example, infrastructural projects are not to be realised in a decent timescale, these very principles can even become a burden for citizens themselves. As individuals with private preferences, citizens have an interest in juridification, whereas being part of a social community with a public interest, juridification can become a burden.

A second category of stakeholders in the phenomenon of juridification is composed of entrepreneurs and professionals in the public domains who face the problems of bureaucracy. On the one hand, bureaucracy distracts these stakeholders from their actual work, which is to innovate, to teach or to take care of patients. On the other hand, this group has an important interest in detailed regulation and detailed description of their responsibilities, especially in a society where people tend to quickly refer to a court in order to settle a conflict or to claim a reimbursement for suffered damage.

Thirdly, public administrators as well as members of (local) parliaments have

⁵ Wiebenga et.al., *Onbetwistbaar recht? Juridisering en het evenwicht tussen rechtsstaat en democratie (Indisputable Law? Juridification and the balance between the rule of law and democracy)*, report 113 of the Prof.mr. B.M. Teldersstichting, Den Haag, 2012.

an interest in the mitigation of juridification, but they are also among the drivers of this phenomenon. A swift democratic decision-making process, which is not being hampered by long procedures of appeal, is in their interest. Furthermore, public administrators and members of parliament do not have an interest in increasing influence of the judicial power, at the expense of their own position in the balance of the judicial, legislative and executive powers. However, as described above, sometimes it is particularly the legislator that seems to profit from the legislative features of the judge's work. Politicians, with a view on their voters, may be reluctant to mould the law in a certain way, whereas judges can safely interpret the law without risking to lose their own power.

Finally, also judges themselves can be understood to have a paradoxical interest in juridification. On the one hand, they might have an interest in forcing back this phenomenon. Not only does their work load possibly increase, their judgments might also risk to become subject of public debate. A public debate on jurisprudence is in itself not problematic. However, it can become a problem when the public debate leads to public questioning of the legitimacy of the judicial power in a liberal constitutional state with separated powers. On the other hand, as long as that discussion is not taking place, juridification can be advantageous for judges as their judgments become more central in social relations and gain power vis-à-vis the position of the legislator or the public administrator.

In conclusion, as a cultural trend, it is hard to assess the problems of juridification. When people increasingly think of themselves as legal subjects, social relations between citizens and between citizens and the state are increasingly determined by law. This has both positive and negative effects. Moreover, there is not a clear proof that the increasingly central role of law in social relations also accounts for the increasing role of courts in political decision-making or the interpretation of the law. It may very well rather be the inverse: a lack of legal knowledge within the institutions of the legislative and executive powers and the lacuna of legislation in certain fields may encourage further juridification.

Juridification and the balance of powers

In spite of these difficulties with the definition and the assessment of the related problems, we will address the question to which extent juridification is a problem for politicians, policymakers and judges. This question will be approached from a particular perspective: what is the effect of juridification on the balance between the powers in a liberal constitutional democracy?

From a liberal perspective, this limitation of the research topic is a relevant one. Historically, liberals have always highly valued the foundations of the liberal constitutional democracy, such as the independence of the judicial power and legal protection for citizens. However, how far should the scope of this legal protection reach when interest groups challenge a democratically taken decision that is embraced by the citizens directly affected by the decision? Also, liberals endorse the counterweight of an independent judge to the members of parliament

and the public administrators. The most distinctive feature of the rule of law in a constitutional state is the fact that the state institutions themselves are subject to the law, just as the state citizens are. This independent judicial power protects individual citizens from arbitrariness and infinite state power. At the same time, the liberal constitutional state is a democratic state, meaning that the substance of the law is determined by the democratic legislator in the first place. The judicial testing or review should therefore be exercised only moderately. Should, as a result of juridification, the influence of judges on activities that are primarily legislative indeed increase, then this would be an undesirable development from a liberal perspective.

Charles Montesquieu (1689-1755) detested absolute state power and tyranny. In his writings, he explains why the legislative, executive and judicial powers should be separated from each other in order to prevent either of these from having too much power. However, the separation of these powers of the *Trias Politica* has not been established to the fullest in the institutions of the liberal constitutional state. It is a formal task of the independent judges to apply the law to individual situations and to interpret the law. Judicial interpretation is by its nature legislative, which means that the judicial power will never be strictly separated from the legislative power. Similarly, the legislative and the executive powers are not strictly separated from each other. Rather, these powers relate to each other within a mechanism of checks and balances. The study of this book will therefore not aim at showing to what extent juridification affects the separation of powers, but instead to what extent the process of juridification affects the balance of these powers.

The first part of this book contains a series of country studies in which the phenomenon of juridification is examined. Studies of Spain, Slovenia, Lithuania, the Netherlands and the United Kingdom provide an overview of the various forms of juridification and the various problems related to it. The differences between the European countries, for example in terms of the constitutional balance between the legislative, judicial and executive institutions or the historical experience with democracy, may account for differences between the problems of juridification these countries face. In the second part of this book, the authors further elaborate on the international dimension of juridification. Focus is on the question in what way the rulings of the European Court of Human Rights and the European Court of Justice demarcate the space for (national) democratic policymaking in fields like immigration policy or social security.

An insight into the phenomenon of juridification, this book aims at offering policymakers, politicians and judges throughout Europe liberal ideas on finding and protecting the balance between the powers of the *Trias Politica*.

Country studies

II. Controlled juridification in Spain. Case study of the Spanish Constitutional Court's Declarations on the Maastricht and Lisbon Treaties¹

Pablo José Castillo Ortiz

I. Presentation

Juridification is a term doubtlessly increasingly used in social and legal sciences; however common, the very term has a wide variety of meanings. In their piece on the matter, Blichner and Molander approached the term from five different dimensions: 'First, constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects.'²

This essay focuses on the third and particularly the fourth dimensions of the concept. In the following pages, we offer a qualitative study of two specific episodes of Spanish political life in which, on the occasion of the ratification of two European Union treaties, the Constitutional Court was 'invited' to intervene in the scenario. Our aim is trying to describe how and why juridification works in specific episodes; the approach, being the unit of analysis relating to specific judicial cases and not courts or countries in general, will allow us to analyze the phenomenon in greater detail.

In his masterpiece on the judicial politics of the French Constitutional Council, *The Birth of Judicial Politics in France*, Alec Stone Sweet analyzes and describes

¹ This work partially rests on a previous article 'La política judicial del Tribunal Constitucional español en los procesos de ratificación de Tratados de la Unión Europea: aproximación desde un nuevo realismo jurídico', under review at the Spanish *Revista de Estudios Políticos*.

² L.C. Blichner and A. Molander, 'What is juridification?', *Arena Centre for European Studies Working Paper*, 2005, no. 14.

the evolution of the Council's powers of review and its increasing role in French politics. In particular, he emphasises how, after a reform allowing the members of the opposition to initiate reviews before the Council, the activity of the institution dramatically increases and with it, also the juridification of French political life.³ According to this example, juridification – understood as judicialization of political life – seems to be, above all, a strategy that serves political oppositions: when opposition groups or parties cannot influence public policy in the parliamentary arena, they turn to the judicial arena in order to judicialize political processes. The intervention of one more actor, a court, would be a final opportunity to overturn public policies and to block the action of parliamentary majorities and parties in power. In this sense, juridification would be a weapon of political minorities. However, this explanation misses a point. In some cases, it is not minorities but parties in power who initiate reviews of legislation before the courts. The former explanation does not fit this category of juridification. What interest could a majority in power have in initiating a process of judicial review of its own legislation? Furthermore, why should a majority in power risk its own action by initiating a process of judicialization of its own policy?

This is exactly what happened in Spain with the cases of the Maastricht Treaty and the Constitutional Treaty. In these cases, the governments respectively of Felipe Gonzalez firstly, and of José Luis Rodríguez Zapatero secondly, initiated reviews of the constitutionality of the Treaties before the Spanish Constitutional Court, despite the fact that they and their cabinets strongly supported their ratification. In doing so, the Constitutional Court gained an important role: it became one of the actors intervening in the process of treaty ratification, with a voice which could be heard even in the European arena, thus judicializing the whole processes of ratification. Indeed, in the first case, the Constitutional Court ended by declaring the unconstitutionality of the Maastricht Treaty.

The main hypothesis of this chapter is that, in the Spanish cases for the Maastricht and Lisbon Treaties, we assisted in an episode of controlled juridification. If the governments initiated the reviews before the Court, it was because they knew that they could enjoy at least a certain degree of control over both the process of decision-making of the Court and the outcome of the procedures. In the next lines we will try to empirically demonstrate this. After this introduction (I), we will enter into the detail of our particular cases (II), by describing the content of the Declarations of the Constitutional Court (II.a), and the ways in which the government had control over the Court in three aspects: the object of review through control of the claim (II.b), the composition of the Constitutional Court through control of nomination of justices (II.c), and the outcome of the processes through the capacity to overturn decisions of the Constitutional Court (II.d). In the last section (III) we will briefly offer some conclusions.

³ A. Stone Sweet, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective*, Oxford, 1992.

II. Declarations 1/1992 and 1/2004 of the Spanish Constitutional Court

a. The content of the Declarations

Declaration 1/1992 on the Maastricht Treaty and Declaration 1/2004 on the Constitutional Treaty had opposite outcomes. While in the first case the Spanish Constitutional Court declared the unconstitutionality of the Treaty, in the latter case the Court found the text to be in conformity with the Spanish Constitution, thus giving the green light to its process of ratification. In both cases, however, the Spanish Constitutional Court followed a similar strategy: the Court declared its incapacity to make an *ex officio* pronouncement – that is: on its own initiative – on the question, and restricted its answer to the points raised by the parties. At the same time, the Court reiterated that its decisions, even when not ‘rulings’ in the usual sense of the term, but ‘Declarations’, as stated by its regulatory statute, are binding.

In the case of Declaration 1/1992 on the Maastricht Treaty, the core part of the decision related to the right to suffrage of EU national citizens in local elections in Spain, which the Court found to be contrary to the Spanish Constitution. The Maastricht Treaty had recognised in its article 8B1 the right of any national of the EU countries to vote and be elected in the local and European elections in every state of the Union. However, suffrage in the Spanish Constitution had a more strict regulation. Article 23 of the Spanish Constitution regulates the core aspects of the right to vote, recognizing every citizen’s right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage, as well as the right to accede under conditions of equality to public functions and positions, in accordance with the requirement laid down by the law.

However, at the time of the Maastricht Declaration, article 13 of the Constitution complemented the regulation of article 23 by explicitly stating that such right should correspond to ‘only Spaniards’. This very article made an exception to the exclusivity of the entitlement in ‘the cases established by a treaty or by a law’ and subject to the principle of reciprocity, but the exception was limited to the right to vote, and not the right to be elected. In order to declare the unconstitutionality of the Treaty, the Constitutional Court largely reflected on the content and scope of article 93 of the Constitution, which foresees that powers derived from the Constitution can be transferred to an international organization or institution. According to the Court, this article truly opened the internal legal system to the influence of a supranational organization, and thus constituted the basis for the transfer of powers to the European Union. However, this openness of the Spanish legal system did not equate to leaving the way open for the Spanish authorities to ratify the Treaty, independently of its content, which may be contrary to the

Constitution.⁴ In this case, although the Maastricht Treaty could be ratified, and although article 93 was the adequate constitutional basis for such ratification, the contradiction between article 8B1 of the Maastricht Treaty and article 13 of the Spanish Constitution – the right of EU citizens to be elected in Spanish local elections – had first to be solved through the means of a constitutional amendment.

While the main and most important part of the reasoning of the Court for Declaration 1/1992 consisted in clarifying the content and scope of the right to suffrage of nationals of EU member states, in the case of Declaration 1/2004 the focus of the Court was mainly on the principle of primacy of European Union law and its compatibility with the supremacy of the Spanish Constitution. As we know, through a pretorian case law⁵, the European Court of Justice had for decades been declaring the primacy of European Union law over the internal legal systems of the member states⁶, and the Constitutional Treaty for the first time tried to embody the principle of primacy into the text of one of the constituting treaties of the European Union. However, in its article 9.1, the Spanish Constitution declares its own supremacy by stating that all the citizens and the public authorities are bound by the Constitution and by the rest of the legal system. In this case, instead of declaring the unconstitutionality of the Constitutional Treaty, the Spanish Constitutional Court built up a complex doctrine which was soon received with curiosity by scholars throughout the whole continent. According to this doctrine, the supremacy of the Constitution and the primacy of European Union law were different and not incompatible things. Drawing on Kelsenian concepts, the Court found that the primacy of European Union law referred mainly to the application of rules, while the supremacy of the Constitution refers to the validity of rules. Thus, in giving primacy to the law of the European Union, the supremacy of the Constitution is not annulled, but it continues being the foundation of the legal system. Seen from the viewpoint of internal law, it is the Constitution which allows for the preferent application of rules from the European Union. It is in this part of its argumentation that the Court enters into the question of its own *Kompetenz-Kompetenz*, placing itself as an ultimate defender of the constitutional order even vis-à-vis European Union law, in line with the doc-

⁴ A. López Castillo, 'A propósito de la proyectada articulación de una cláusula europea en la CE (Propuestas y apuntes para el debate)', in: F. Rublio Llorente and J. Álvarez Junco (eds.), *El informe del Consejo de Estado sobre la reforma constitucional. Texto del informe y debates académicos*, Madrid, 2012.

⁵ For the first time in its *Costa/ENEL* decision of 1964, and later through a comprehensive case law in which the Court first extended and ultimately precisely defined and detailed the content of the 'primacy' of EU law.

⁶ M. Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?', *European Law Journal*, 2011, no. 6, pp. 744-763; R. Kwiecien, 'The Primacy of European Union Law over National Law Under the Constitutional Treaty', *German Law Journal*, 2005, no. 11, pp.1479-1496.

trine of the German Constitutional Court in its Maastricht decision⁷, although with a more subtle and moderate phrasing and with a doubtlessly respectful attitude towards the European Court of Justice. As for the rest, on the one hand the Court finds the Charter of Rights of the European Union compatible with the Fundamental Rights embodied in the Spanish Constitution and, furthermore, reminds us that the latter should be read in the light of the interpretative criteria provided by the international treaties subscribed by the Spanish state. On the other hand, the Court acknowledges again that article 93 of the Spanish Constitution provides a sufficient constitutional basis for the ratification of the Treaty.

b. Controlling juridification at its source: the content of the claim

As said above, the Spanish Prime Minister was the actor bringing the question of the compatibility between treaties and Constitution before the Constitutional Court in both cases. In some riddles, part of the answer resides in the very question. And in asking why the Spanish Prime Minister brought the case before the Court, thus endangering the process of ratification of the Treaty, we should remember that this very fact gave the Spanish authorities control over the points that were to be assessed by the Constitutional Court. As the very Court recognised in its Declarations, it is outside the scope of its powers to initiate *ex officio* a review of any legal rule, including international treaties. In addition, in reviewing them, the Court had to limit its answer to the questions raised by the petitions of the government.

Reconstructing the sequence followed by the government before initiating the review may be interesting to better understand the details of the cases. In both of them, the Declarations of the Spanish Constitutional Court were preceded by two resolutions (*Dictámenes*) by the Spanish Council of State, in which this institution made an overview of the content of the treaties and discussed their constitutionality with a non-binding nature. Declaration 1/1992 was preceded by the Dictamen 421/92 of the Council of State on the Maastricht Treaty. The Council of State also widely discussed the compatibility of article 8B.1 of the Treaty with the Spanish Constitution although, unlike the Constitutional Court, it concluded that no contradiction existed. Therefore, constitutional reform was not deemed neces-

⁷ See *inter alia*: N.D. Griffith, “Deja Vu All Over Again:” Constitutional Economics and European Legal Integration’, *Constitutional Political Economy*, 2006, no. 1, pp.15-29; T. Lock, ‘Why the European Union is Not a State. Some Critical Remarks’, *European Constitutional Law Review*, 2009, no. 3, pp. 407-420; D. Grimm, ‘Defending Sovereign Statehood against Transforming the European Union into a State’, *European Constitutional Law Review*, 2009, no. 3, pp. 353-373, R. Bieber, ‘An Association of Sovereign States’, *European Constitutional Law Review*, 2009, no. 3, pp. 391-406; G. Beck, ‘The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor’, *European Law Journal*, 2011, no. 4, pp. 470-494.

sary.⁸ However, the Council of State recommended that the government submit the question for review to the Constitutional Court. The government then followed the recommendation of the Council of State, and asked the Constitutional Court whether article 8B.1 of the Maastricht Treaty, the right to suffrage of EU citizens, is compatible with article 13.2 of the Spanish Constitution, the regulation of the right to suffrage in the Spanish Constitution. The government further asked whether article 93 of the Constitution is enough to ratify the Treaty, adding that ‘in the view of the government, this is the procedure that better fits the question raised’. However, in the case of a negative answer, the government asked the Court – more as a suggestion than a question – whether the interplay between articles 13.2 and 11 of the Spanish Constitution, the latter regulating the acquisition, conservation and loss of Spanish nationality, constituted an alternative way to proceed to treaty ratification. Finally, if it was proved not possible to declare the constitutionality of the treaty, the government asked what would be an adequate way to amend the Constitution.

In this sense, it is important to underline a number of questions. Firstly, for Declaration 1/1992 the government had the possibility of restricting the content of the claim to only certain aspects of the compatibility between the Maastricht Treaty and the Spanish Constitution. In particular, only the question of suffrage was at stake in this case. Any other questions, following the statement of the Council of State, were removed from the petition. Moreover, the claim avoided the question of the contradiction between article 8B.1 of the Maastricht Treaty and article 23 of the Spanish Constitution. Unlike article 13, which is the one on which the question of the government rests, article 23, also regulating suffrage, is protected under the rigid procedure of constitutional reform. Thus, a declaration of unconstitutionality with regard to this latter article could have had different, more grave, consequences for the development of the process of ratification, as will be seen in detail below. Although the government mentioned article 23 in its petition, it quickly made clear that in its view a constitutional conflict regarding this article does not exist. Secondly, the government had the possibility of suggesting to the Constitutional Court different ways to justify the constitutionality of the Treaty, i.e. the resource of article 93 or the interplay between articles 13.2 and 11 of the Constitution. Although the Constitutional Court was, of course, not bound by these suggestions by the government, at least it had the chance to try to lead the debate within the Court through less ‘risky’ paths.

Things were different with regard to Declaration 1/2004 on the Constitutional Treaty. In it, the process was similar to that of Declaration 1/1992, with the Council of State issuing in the first place a Dictamen 2544/2004 on the compatibility between the Treaty and the Constitution. Yet in this case, the Council of

⁸ J.F. López Aguilar, ‘Maastricht y la problemática de la reforma de la Constitución (Unión Europea, derechos de los extranjeros y reforma constitucional: teoría y case study)’, *Revista de Estudios Políticos*, 1992, no. 77, pp. 57-93.

State took a slightly wider approach in which the Council made an assessment of the compatibility with the Spanish Constitution of the system of competences established in the Treaty, the Charter of Rights, and the principle of primacy of European Union law. Also on this occasion, following the recommendation of the Council of State, the government brought the case before the Constitutional Court, asking in particular whether the principle of primacy of article I-6 of the Constitutional Treaty and articles II-111 and II-112 of its Charter of Rights were constitutional, whether article 93 of the Spanish Constitution was enough to ratify the Treaty, and which procedure of constitutional amendment was to be applied in case of unconstitutionality. Politically bound by the resolution of the Council of State, in this case the content of the petition of the government dealt with issues protected under the rigid procedure of constitutional amendment. Had the Court declared the unconstitutionality of the Treaty, its ratification would have become problematic. However, the government had other means to keep the situation under control. We will see what these were.

c. Controlling juridification within the Court: Court's composition

One of those means dealt with the institutional design and composition of the Court. As we know, one of the most important aspects of a Court's institutional design relates to the nomination and selection of justices, since political involvement in decisions of this kind are indubitable.⁹ In the case of the Spanish Constitutional Court, and according to article 159.1 of the Constitution, selection of justices follows an intricate procedure: four justices are selected by the lower chamber (the *Congreso de los Diputados*) by a three-fifths majority, four more are selected by the upper chamber (the *Senado*) by a three-fifths majority, two of them are selected by the government, and two more are selected by the *Consejo General del Poder Judicial* (General Council of the Judicial Power), the organ of government of the judiciary. This procedure of selection allows for great control by politicians over the composition of the Court, to the extent that it is usual to talk about 'progressive' and 'conservative' blocks within it, corresponding to the main political parties: the centre-left PSOE and the centre-right PP. There was no

⁹ M.L. Volcansek, 'Appointing judges the European way. (Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges)', *Fordham Urban Law Journal*, 2007, nr. 1, pp. 363-385.

exception to this at the time in which Declarations 1/1992 and 1/2004 were to be issued.¹⁰

Table 1. Composition of the Spanish Constitutional Court for Declaration 1/1992

Justice	Sector	Dissenting opinion	Content of the dissenting opinion
Francisco Tomás y Valiente (President)	Progressive	No	
Francisco Rubio Llorente	Progressive	No	
Fernando García-Mon y González-Regueral	Progressive	No	
Carlos de la Vega Benayas	Progressive	No	
Eugenio Díaz Eimil	Progressive	No	
Miguel Rodríguez-Piñero y Bravo-Ferrer	Progressive	No	
Jesús Leguina Villa	Progressive	No	
Luís López Guerra	Progressive	No	
José Luis de los Mozos y de los Mozos	Conservative	No	
Alvaro Rodríguez Bereijo	Progressive	No	
Vicente Gimeno Sendra	Progressive	No	
José Gabaldón López	Conservative	No	

Sources: *El País* (18 February 1996, 19 December 2004, 6 March 2008), *La Vanguardia* (30 May 2008), *ABC* (21 December 1986, 27 June 1992).

¹⁰ There is a vast literature on political involvement in the design of Courts. On general questions, see E.S. Herron and K.A. Randazzo, 'The relationship between Independence and Judicial Review in Post-Communist Courts', *Journal of Politics*, 2003, no. 2, pp. 422-438; C.M. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis', *The American Journal of Comparative Law*, 1996, no. 44, pp. 605-626; A.P. Melone, 'Judicial Independence and Constitutional Politics in Bulgaria', *Judicature*, 1997, no. 6, pp. 280-285; G. Vanberg, 'Establishing Judicial Independence in West Germany. The impact of opinion leadership and the separation of powers', *Comparative Politics*, 2000, no. 3, pp. 333-356. On particular features, such as the length of mandate of justices, their liability to dismissal, and renewal, see R. La Porta, F. López-de-Silanes, C. Pop-Eleches and A. Shleifer, 'Judicial Checks and Balances', *Journal of Political Economy*, 2003, no. 2, pp. 445-470; S. Ishiyama and J. Ishiyama, 'Judicial Activism in Post-Communist Politics', *Law and Society Review*, 2002, no. 4, pp. 719-742.

Table 2. Composition of the Spanish Constitutional Court for Declaration 1/2004

Justice	Sector	Dissenting opinion	Content of the dissenting opinion
M ^a Emilia Casas (President)	Progressive	No	
Guillermo Jiménez Sánchez	Conservative	No	
Vicente Conde	Conservative	No	
Javier Delgado	Conservative	Yes	Unconstitutional
Elisa Pérez Vera	Progressive	No	
Roberto García-Calvo	Conservative	Yes	Unconstitutional
Eugenio Gay Montalvo	Progressive	No	
Jorge Rodríguez-Zapata	Conservative	No	
Ramón Rodríguez Arribas	Conservative	Yes	Unconstitutional
Pascual Sala	Progressive	No	
Manuel Aragón	Progressive	No	
Pablo Pérez Tremps	Progressive	No	

Sources: *El País* (11 April 2004, 19 October 2007), *ABC* (16 June 2004, 14 March 2008) *El Periódico de Catalunya* (17 April 2010).

The political composition of the Court ensured ‘responsible’ behaviour by the justices. As can be seen in Tables 1 and 2, the whole composition of the Constitutional Court corresponded to justices politically close either to PSOE or to PP, the two main parties in the legislative. At the time of both Declarations, PSOE was the governing majority and PP was the main opposition party. However, both of them agreed on the need to proceed with treaty ratification. This had a relevant consequence in order to answer the question of why the Spanish government submitted the text before the Constitutional Court: to some point, it could trust that the processes of review would not have unexpected consequences, since the justices shared a certain political ‘common sense’ with the parties.

While this is true, however, two questions arise. The first is why, despite its composition in which the majority of justices were close to the party in government, the Court declared the unconstitutionality of the Treaty. Two answers arise to this question. The short and legalistic answer is that, of course, there was a legal contradiction between the Constitution and the text of the Treaty. The long answer is that, in addition to that, declaring the unconstitutionality of the Maastricht Treaty with regard to article 13.2 of the Constitution was relatively unproblematic: the ordinary procedure of constitutional amendment was available and

was feasible. We will see this issue in detail in the next sub-section.

The second question refers to the three dissenting opinions issued for Declaration 1/2004 on the Constitutional Treaty. In them, three justices developed a line of argumentation which largely contradicted the opinion of the majority of the Court, and according to which the primacy of European Union law was irreconcilable with the supremacy of the Spanish Constitution. One can do no more than speculate in relation to this second question. One point that has to be taken into account is that all of the dissenting justices belonged to the conservative block. On the one hand, the government at that moment was progressive, with José Luis Rodríguez Zapatero being its President. The centre-right *Partido Popular*, although it had officially defended the ratification of the Treaty, had been accused of ‘scarce enthusiasm’ by the ruling PSOE. On the other hand, the three dissenting justices could easily defend a negative position towards the Treaty, knowing precisely that such a position would be simply the position of a minority. Their view, the need to declare the unconstitutionality of the primacy principle, would not finally be that of the Court as a whole, so no serious risks would arise.

d. Controlling juridification in the outcome: the possibility of constitutional amendment

In the preceding lines we have occasionally referred to the procedure of constitutional amendment. Probably, the core of the explanation about the behaviour of both the government and the Court is related to the kind of problems and solutions associated with the procedure of constitutional amendment. As was said by Closa and Castillo, when participating in processes of ratification of European Union Treaties, national Constitutional Courts are given a quasi-veto right.¹¹ When a Court finds one of the treaties unconstitutional, the only way to proceed with ratification is to resort to the procedure of constitutional amendment. But the utilisation of such procedures usually does not come without negative consequences, if they impose excessive burdens or if recalcitrant players block them.

Nevertheless, Court decisions which may be easily overturned without political costs are not dangerous, even when they declare the unconstitutionality of the Treaties. That was the case of the Maastricht Declaration. As we saw above, the question by the government was limited to the issue of suffrage of European Union nationals, dealing with article 13.2 of the Spanish Constitution, protected under the ordinary procedure of constitutional amendment. This procedure, article 167 of the Spanish Constitution, only requires a three-fifths majority of both chambers and a referendum in cases where 10 per cent of deputies or senators so request. This qualified majority could be easily achieved. After the Court found the Treaty unconstitutional, a constitutional amendment (the first amendment of the Spanish Constitution of 1978) was carried out. Thus, the Treaty was ratified.

¹¹ C. Closa and P.J. Castillo, *National Courts and the Ratification of the EU Treaties: Assessing the Impact of Political Contexts in Judicial Decisions*, Berlin, 2012.

The situation was different for Declaration 1/2004 on the Constitutional Treaty. In this case, the content of the claim referred to two issues protected under the rigid procedure of constitutional amendment: the supremacy of the Spanish Constitution and the fundamental rights of citizens were at stake. The rigid procedure of constitutional amendment imposes grave burdens. According to article 167 of the Constitution, in order to carry out such a reform, not only do three-fifths majorities in both chambers have to be achieved, but, afterwards, new elections have to take place, with three-fifths majorities being achieved again in the new parliament, after which the constitutional amendment must be submitted to a referendum.

Thus, the main difference between Declarations 1/1992 and 1/2004 is the degree of control by the government and by Europeanist parties of the procedure for constitutional amendment. In the case of the second Declaration, even if none of the many players participating in the procedure of constitutional amendment would have vetoed it, the political costs of carrying out such an amendment were high. New elections, including the formation of a new government, would have been a disproportionate burden in order to ratify the Treaty. Indeed, the very Court chose the easy way. Unlike in the case of the Maastricht Treaty, for which constitutional amendment was easy and feasible, in the case of the Constitutional Treaty the Court decided that it was constitutional, despite the opinion of three of the members of the Court and one of the 'fathers' of the Constitution, Miguel Herrero de Miñón.¹² This is not to question the normativity of the second decision of the Constitutional Court. From a doctrinal perspective, declaring the constitutionality of the Constitutional Treaty was probably one of the possible interpretations of the Constitution. However, from a political perspective, it was the least dangerous interpretation.

III. Conclusions: a not too dangerous juridification

In Book XI of his *The Spirit of Laws*, Montesquieu (1689-1755) formulated his doctrine of the separation of powers, which is nowadays considered one of the references *par excellence* of modern democratic theory. In it, he paid particular attention to the judicial power by stating that: 'Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.'¹³

In the present chapter, we have presented a case in which a breach of the

¹² Real Instituto Elcano, 'El proyecto de Constitución Europea', *Nota de Prensa*, 2004, no. 3.

¹³ C. de Montesquieu, *The Spirit of Laws*, Book XI, 1748, online at http://www.constitution.org/cm/sol_11.htm (accessed on 30 March 2012).

principle of separation of powers could have been observed in a dual direction: on the one hand, in the form of the juridification of a political process; on the other hand, in the form of the politicization of a judicial institution. We began by describing the presence of a judicial player¹⁴ in the processes of ratification of European Union treaties. From a certain perspective, a suspicious observer could have argued that the presence of the Constitutional Court on the scene was superfluous. Processes of ratification of European Union treaties are political processes where what is at stake is the political reform of European institutions, and thus the momentum is only for politics and politicians. This would, however, be a strict and to some point old-fashioned view on the matter. It ignores the fact that the evolution of modern democracies has driven us to what many authors call 'neo-constitutionalism', in which Constitutional Courts are given a prominent role in political processes in order to guarantee the supremacy of the constitution and, precisely, such principles as that of the separation of powers.¹⁵ However, assessments in this regard would be a matter of opinion.

What mattered, however, was that, under what appeared to be a moderate and questionable juridification of a political process, there was the underlying, clear and unquestionable phenomenon of the politicization of a judicial institution. As we have seen, the government in two cases initiated a review before the Constitutional Court which may have posed difficulties for its goal of ratification of the treaties. However, the situation was largely under control. The government had control over the content of the assessment, over the composition of the Court, and over the outcome of the overall process. Inconvenient questions could be avoided in the petition, at least for the Maastricht case. Justices had been nominated by political parties which shared with the government the goal of an easy and unproblematic ratification of the treaties. The government had indeed the possibility of overturning the Court's decisions of unconstitutionality where problematic, at least in the case of the Maastricht Treaty. Where the procedure of constitutional amendment may have posed higher burdens, the Court showed responsible behaviour and avoided decisions of unconstitutionality. As the Spanish cases have shown, the juridification of politics and the politicization of justice seem to be two sides of the same coin in contemporary politics.

¹⁴ In a strict sense, the Spanish Constitutional Court does not belong to the judicial power. The Spanish Constitution regulates the judicial power in its Title VI and, in a different and separated place, Title IX, it regulates the institution of the Constitutional Court. Nevertheless, it is clear that the Constitutional Court is a judicial-type organ, and in these pages it has been treated as such.

¹⁵ See A. Stone Sweet, 'The Politics of Constitutional Review in France and Europe', *I-CON*, 2007, no. 1, pp. 69-92; M. Aragón Reyes, 'La constitución como paradigma', in: M. Carbonell (ed.), *Teoría del neoconstitucionalismo*, Madrid, 2007.

III. Juridification in Slovenia.

Transforming the political role of the courts

Matej Accetto

Introduction

While the epithet of juridification addresses a broader phenomenon of the surge of law into the realm of politics and its appropriation – for better or worse – of the political domain¹, this delicate interplay of law and politics is so closely linked to the significance of the (constitutional) judiciary as the legal branch of government in the ordering of the political system based on the separation of powers that the extent of juridification is at least illustrated, if not defined, by the role of the courts.

Accordingly, the presentation below focuses mostly on the transforming role of the (constitutional) courts in the operation of the Slovenian legal order. The analysis starts with the somewhat paradoxical experience of the former Yugoslav system, rejecting the separation of powers doctrine in favour of the concentrated political power, and yet one of the first countries in Europe to institute a proper system of constitutional review. This is followed by remarks on the transition to the new constitutional order in the 1990s, and concluded with a brief consideration of the application of EU law in the Slovenian legal order.

The constitutional system and the role of the courts in the former Yugoslav system

In the socialist regime of post-war Yugoslavia, the judiciary played a very limited role in the fashioning – or maintaining – of the constitutional order.² Unlike the doctrine of separation of powers, the Yugoslav order was premised on a socialist concept of the *unity of powers*, vested and concentrated in the federal parliamentary assembly as representing the sovereignty of the people, which precluded

¹ See e.g. L. Trägårdh and M.X. Delli Carpini, 'The Juridification of Politics in the United States and Europe', in: L. Trägårdh (ed.), *After National Democracy: Rights, Law and Power in America and the New Europe*, Oxford, 2004, pp. 41-78, at pp. 41-43.

² The issues discussed in this section are dealt with in more detail in M. Accetto, 'On Law and Politics in the Federal Balance: Lessons from Yugoslavia', *Review of Central and East European Law*, 2007, no. 2, pp. 191-231.

the judiciary from performing its functions as a co-equal branch of government.³ As the federation travelled through its several constitutional refurbishments (the 1946 Constitution, the Constitutional Act of 1953, the 1963 Constitution, and the 1974 Constitution, as well as significant sets of amendments both leading up to the last constitution and preceding the ultimate dissolution of Yugoslavia), the tensions between its constituent units were addressed in the political process as a federal bargain to be struck, rather than as a legal dispute amenable to a legal resolution via the judicial process. Notably, the re-negotiated federal balance would be evidenced in the changing delimitations of legislative competence and more or less strictly enumerated legislative powers of the federation.⁴

At the same time, however, Yugoslavia was a major exception among the Eastern European countries in that it set up a system of constitutional judicature in 1963, decades before Poland and other socialist states slowly set up a meaningful system of constitutional review.⁵ Constitutional courts were established both at the level of the republics and that of the federation, with the crucial support of Tito, who stated that disputes and controversies should not be resolved politically but by means of ‘an objective and legal arbitration’, and with federalism cited as one of the primary reasons for the creation of the federal Constitutional Court.⁶ The circle still needed to be squared – i.e., it needed to be shown that the idea of a court with the power to review the constitutionality of legislative acts would not run afoul of the principle of the unity of powers. The Constitutional Commission drafting the text of the 1963 Constitution argued that the Constitutional Court would ‘contribute to an effective protection of the constitutionality and the legality of all acts, including the acts of the Assembly’, thereby only reinforcing the unity of powers;⁷ and Edvard Kardelj, Yugoslavia’s leading ideologist, similarly claimed that the Constitutional Court was ‘more a part of the parliamentary sys-

³ See the discussion in W.M. Fisk, ‘A Communist *Rechtstaat*? – The Case of Yugoslav Constitutionalism’, *Government and Opposition*, 1970, pp. 41-53, at pp. 45-48.

⁴ Accetto, ‘On Law and Politics in the Federal Balance’, pp. 205-207.

⁵ For Poland, see Z. Czeszejko-Sochacki, ‘The Origins of Constitutional Review in Poland’, *St Louis-Warsaw Transnational Law Journal*, 1996, pp. 15-31, at pp. 24-29; for the analysis of other states at the time, notably Czechoslovakia and Romania, where constitutional courts had been established on paper from the late 1960s onwards but only operated since the early 1990s, see G. Brunner, ‘Development of a Constitutional Judiciary in Eastern Europe’, *Review of Central and East European Law*, 1992, pp. 535-553.

⁶ See J. Đorđević, *Društvo i politika: Prilog novoj demokratskoj političkoj teoriji (Society and Politics: A Contribution to a New Democratic Political Theory)*, Belgrade, 1988, pp. 127-129.

⁷ P. Stambolić, ‘O oblicima političkog sistema i o organizaciji federacije’ (‘On Forms of Political System and on Organization of the Federation’), in: *O ustavnom sistemu Socijalističke Federativne Republike Jugoslavije (On the Constitutional System of the Socialist Federal Republic of Yugoslavia)*, Belgrade, 1963, p. 112.

tem than a traditional judicial institution'.⁸

The practice of the constitutional judiciary subsequently reflected this uneasy positioning of its role between a servant to the political branches of government and the arbiter of legal disputes, all the more once a number of its initial competences (including the possibility of the protection of fundamental rights and liberties by way of a direct constitutional complaint⁹) were reduced or removed. It was never short of work: in the first twenty years of its existence, the federal Constitutional Court handled 8,346 cases and the constitutional courts of the republics further 29,376 cases.¹⁰ However, the constitutional judiciary was not envisioned as a significant player in the fashioning of the political order, including the fragile federal balance, with no hierarchical relationship between the federal Constitutional Court and its counterparts in the republics, and with divergent but predominantly very limiting doctrinal and political views on the scope of the 'constitutional interpretation' it was to be allowed.¹¹ In short, while the constitutional court had the formal powers to try and influence the political life of the polity, the political system disfavoured an independent judiciary and the climate was hostile to judicial activism so that overzealous members of the judicial branch might all too easily be perceived as trumping the popular sovereignty manifested in the federal parliamentary assembly and subsequently have their judicial and personal wings clipped.

Little wonder, then, that for a long time the federal Constitutional Court in Yugoslavia isolated itself from the controversial constitutional issues and instead spent most of its time handling the hundreds of less important cases with no or little systemic implications. This did not make it devoid of any practical significance – it was vested, for instance, with an important duty to ensure the functioning of the Yugoslav common market much like the European Court of Justice in the EU context¹² – but it largely avoided tackling difficult issues concerning the operation of the Yugoslav constitutional order. Even when it finally did enter the political stage, in the last throes of a dying federation, it did so ineffectively and more as just another tool of the political power rather than a separate branch performing

⁸ E. Kardelj, 'Nova ustava socialistične Jugoslavije' ('The New Constitution of the Socialist Yugoslavia'), in: *Ustava Federativne socialistične republike Jugoslavije: Predosnutek (Constitution of the Federal Socialist Republic of Yugoslavia: A Pre-Draft)*, Ljubljana, 1962, pp. 97-211, at p. 190.

⁹ See e.g. the optimistic early account in W. Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries*, Cambridge, 1967, pp. 273-278.

¹⁰ As cited by Ivan Franko in M. Vučković (ed.), *Uloga i mesto ustavnog sudstva u društveno-političkom sistemu (The Role and Placement of Constitutional Judiciary in the Socio-Political System)*, Belgrade, 1986, p. 488.

¹¹ Accetto, 'On Law and Politics in the Federal Balance', pp. 210-213.

¹² See, by way of example, Decision U-363/86 of 7 December 1988, Official Gazette of SFRY 2/89, pp. 98 and 99.

its own role in the system of checks and balances.¹³

The reticence of the federal court was also mirrored in the republican judicature. In the practice of the Slovenian Constitutional Court from this era, an early exception to the rule can be found in its 1970 decision on an initiative lodged by 681 inhabitants of a nationally mixed North-East area of Slovenia (close to the border with Hungary) to review the constitutionality of a legislative act that established mandatory bilingual education in that area. The applicants, parents of Slovenian nationality, asserted that the act violated their children's constitutional right to education in their own mother tongue and imposed disproportionate burdens on them in the course of their education process, posing a difficult challenge of reconciling the proper respect for – and integration of – a minority group with the burdens thereby imposed upon the majority population. The Court's final decision, now entirely forgotten, was not just controversial but quite unique – it was adopted with five votes in favour and four against, with the majority approving the regulation as the 'most appropriate form' of ensuring 'the realization of the constitutional principles and provisions on an equal coexistence of the Slovenian nation and the Hungarian nationality', and with the minority publishing a dissenting opinion.¹⁴ The issue was important, difficult and openly contested in a sharply divided Court with two vocal camps, with both the narrow majority and the minority putting their opinions on paper. Albeit envisioned in the rules, this was not a common occurrence in the life of the Slovenian constitutional court – the next time a dissenting opinion was published was in 1991.

The new Slovenian constitutional order and constitutional judicature: between judicial activism and political questions

Upon its independence and adoption of a new constitution in 1991, Slovenia adopted the parliamentary model of government with a limited role for the directly-elected President and predicated its constitutional order on the separation of powers doctrine.¹⁵ This entailed the role of the courts as a fully co-equal branch of government, with the constitutional review centralised in a bolstered constitutional court as the ultimate guardian of the rule of law, opting for an abstract and (with the exception of reviewing the conformity of international treaties with the Constitution prior to their ratification) *ex post* control of constitutionality.¹⁶ With

¹³ For the role of the federal Constitutional Court in the dissolution of Yugoslavia, see Accetto, 'On Law and Politics in the Federal Balance', pp. 216-225.

¹⁴ See Decision U-31/69 of 30 June 1970, Official Gazette of SRS 27/70, pp. 539-542.

¹⁵ For a general overview of the Slovenian constitutional order and the role of the courts therein, see M. Accetto, Š. Mežnar and M. Trop, *Slovenia*, in: A. Colman (ed.), *Encyclopedia of International Commercial Litigation*, Alphen aan den Rijn, 2006, pp. 1-16.

¹⁶ For an overview of the features of the Constitutional Court, see M. Mihelj Plesničar and M. Modic, 'The Constitutional Court of the Republic of Slovenia', *Slovenian Law Review*, 2007, no. 1 and 2, pp. 287-307. For doctrinal commentary of its work, see M. Pavčnik and A. Mavčič (eds.), *Ustavno sodstvo (Constitutional Judicature)*, Ljubljana, 2000.

regard to the previous era, the new system thus required not so much the organisational setting up of the structures of government, but rather the institutional reimagining of their respective roles. The Slovenian doctrine and constitutional practice accordingly had to address the question long facing those polities with a strong judiciary – how to reconcile proper constitutional adjudication with the fundamental tenets of parliamentary democracy¹⁷

The Slovenian Constitutional Court, comprised of nine members elected for a non-renewable term of nine years by the National Assembly upon nomination by the President, does not form part of the regular judiciary but is specifically vested with powers to decide on the constitutionality and legality of general legal acts, review constitutional complaints, decide jurisdictional disputes and control the constitutionality of the political process – the operation of political parties, confirmation of seats in the parliament and impeachment proceedings, as well as admissibility of proposed legislative referenda.

In terms of applications lodged, the Constitutional Court's docket is as extensive as, if not more than, that of its Yugoslav antecedents, although its growth was somewhat inverse: while the federal Constitutional Court of the 1960s was flooded with applications almost immediately after its inception, with 4,141 such applications – mainly from bereaved individuals hoping for a review of individual acts affecting them adversely – lodged in the first two years of its operation,¹⁸ the Slovenian Constitutional Court post-1991 enjoyed a few years of relative calm before a notable growth of the docket that reached alarmist levels in the years 2006-2008, when on average some 3,650 new applications were received each year, with the bulk comprised of individual constitutional complaints.¹⁹ As the Constitutional Court cannot employ a filtering mechanism, for instance such as the *certiorari* system of the US Supreme Court, such an influx threatened to render the Court's work impracticable and gave rise to calls for reform. The first such reform was introduced with the 2007 amendments to the 1994 Constitutional Court Act, which notably narrowed the possibility to lodge a constitutional complaint.²⁰ The second was a more ambitious project started in 2008 to reform the competences and the procedure of constitutional review by amending the Constitution, including the transfer of certain competences of review to the regular courts and

¹⁷ For a relatively early analysis of this very issue, see B. Bugarič, 'Ustavno sodstvo in (ali) parlamentarna demokracija: O doktrinah pravnega interesa in političnih vprašanj' ('Constitutional Judicature and (or) Parliamentary Democracy: On Standing and Political Question Doctrine'), *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani*, 1995, pp. 43-66.

¹⁸ V. Žnidaršič, 'Pet godina ustavnog sudovanja' ('Five Years of Constitutional Adjudication'), *Zbornik radova Pravnog fakulteta u Splitu*, 1968, pp. 115-127, at pp. 119-123.

¹⁹ See the data in the 2011 Annual Report of the Constitutional Court, available at <http://www.us-rs.si/media/letno.porocilo.za.letno.2011.pdf>, pp. 62 and 63.

²⁰ It had some effect, with the workload dropping to a little below 1,900 new applications in each of the last three years, of which some three-quarters were still constitutional complaints.

introducing a discretionary right of the Constitutional Court to select which constitutional complaints and petitions it would take under consideration.²¹ In 2011, the National Assembly declined to consider the proposal to amend the Constitution, so at least for the time being this reform has been suspended.

That does not mean, however, that the Constitutional Court would shy away from the style and substance of constitutional adjudication familiar to the common law systems with the strong precedential role of the pronouncements from the high courts. On the contrary, while the jurisprudence of regular courts still largely adheres to the positivistic approach to adjudication as legal syllogism, the Constitutional Court has adopted a judicial style and value-based reasoning familiar to common law (including the common occurrence of dissenting opinions promoting alternative reasoning to the Court's majority). As a consequence, it has also become an important player in the shaping of the political order and its constitutional set-up.

In so doing, the Slovenian constitutional jurisprudence as well as legal doctrine had to confront the same challenge that the fledgling US Supreme Court already addressed in 1803 in its seminal *Marbury v. Madison* case when it considered the limits of its role: "The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court."²²

It is a common question regarding the limits of the political role of the judicial branch or the positioning of the (constitutional) judicature between the realms of law and politics, which in the US debate has become delineated by the terms 'judicial (self) restraint' and 'judicial activism'. While the judicial behaviour it depicts is older, the terminology itself is relatively recent: 'judicial activism' was only introduced to significant attention after the Second World War and then became truly popular during the 1990s – between 1990 and 2003, the terms 'judicial activism' and 'judicial activist' appeared in no fewer than 5,632 scholarly articles in law reviews and journals, some 400 articles each year.²³ In the early days, the term sometimes had a positive connotation, but since the mid-1950s it has generally been given a negative one.²⁴

Unsurprisingly, when faced with the inevitable reimagining of the political space upon the adoption of the separation of powers doctrine, the debate on the same tension between the realms of law and politics also emerged in the Slovenian

²¹ See the materials and commentary in I. Kaučič, P. Pavlin and S. Bardutzky (eds.), *Ustavna reforma ustavnega sodstva (Constitutional Reform of Constitutional Judicature)*, Ljubljana, 2011.

²² *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), p. 170.

²³ K.D. Kmiec, "The Origin and Current Meaning of "Judicial Activism"", *California Law Review*, 2004, pp. 1441-1477, at pp. 1442 and 1446.

²⁴ *Ibidem*, pp. 1451-1452.

doctrine, and particularly so with regard to the Constitutional Court. Driven primarily by those authors (and presumably those Constitutional Court justices) with comparative experience or insight into the US legal system, it shared many features with the US debate. While the Constitutional Court was posited as a legal counter-balance to the two political branches of government, it was recognised that its role was inevitably also political.²⁵ At least initially so, the Slovenian debate was also reminiscent of the US experience, in that ‘judicial activism’ was often used with a positive connotation. Thus for example Cerar, while criticizing the Court as acting too politically in certain of its early decisions (such as certain decisions on denationalization issues,²⁶ the decision on the national payments agency²⁷ and the decision on the elections referendum²⁸), nevertheless distinguished between the negative and positive political activism – with the former denoting those cases in which the justices themselves act politically or in favour of a political interest – and found that ‘[t]he Slovenian Constitutional Court may in general be designated an “activist court” in a positive sense as its decisions generally do not signify a capitulation before politics’.²⁹

Cerar’s observation can also be seen as more evidence of a shift away from the previous system – on those rare occasions when the federal Constitutional Court was labelled as ‘political’ in former Yugoslavia, the label denoted that it was (in fear of) becoming yet another lever of the political power or another forum for the confrontation of political forces in the federation.³⁰ In contrast, in the US debate and ever more so in the Slovenian debate, the judiciary has been described as ‘political’ when it confronted the political branches of government on disputed turf, i.e. when it addressed issues that arguably fell outside the proper purview of the courts. The ‘political questions doctrine’ was slowly developed by the Supreme Court until it laid down a comprehensive standard in *Baker v. Carr*, holding that there are a number of categories of ‘political questions’ (rather than ‘political cases’) that should not be resolved via judicial process.³¹ Although the

²⁵ M. Novak, *Ravnovesje med politiko in pravom z vidika funkcij državne oblasti* (*Balance Between Politics and Law from the Point of View of the Function of State Authority*), Ljubljana, 2001, pp. 279 and 283.

²⁶ Decision U-I-121/97 of 23 May 1997, Official Gazette of RS, No. 34/97, and OdlUS VI, 69; Decision U-I-25/92 of 4 March 1993, Official Gazette of RS, No. 13/93, and OdlUS II, 23.

²⁷ Decision U-I-158/94 of 9 March 1995, Official Gazette of RS, No. 18/95, and OdlUS IV, 20.

²⁸ Decision U-I-12/97 of 8 October 1998, Official Gazette of RS, No. 82/98, and OdlUS VII, 180.

²⁹ M. Cerar, ‘(Ne)političnost ustavnega sodstva’ (‘(Non)political Nature of Constitutional Judicature’), in: Pavčnik and Mavčič (eds.), *Ustavno sodstvo*, pp. 349-389, at pp. 357, 383 and 384 (original footnote omitted).

³⁰ See e.g. B. Smerdel, ‘Komparativni problemi primjene federalnog modela’ (‘Comparative Issues in the Application of the Federal Model’), in: M. Jovičić (ed.), *Federacija i federalizam* (*Federation and Federalism*), Niš, 1987, pp. 55-63, at p. 59.

³¹ *Baker v. Carr*, 369 U.S. 186 (1962), at 217.

doctrine has largely disappeared from the jurisprudence of the Supreme Court in the subsequent decades,³² it still persevered in the political and legal debate and echoed in the Slovenian doctrine as well. Building on the US example, Bugarič identified three decisions of the Constitutional Court in its early years, all concerning local self-government, in which the political question doctrine could be applied.³³ He highlighted in particular two decisions on the constitutionality of ordinances regulating the referendum on the urban municipality of Koper (itself the sixth biggest city in Slovenia, located on the Adriatic coast), where the Court based its decisions to repeal the challenged ordinances on the argument that they would allow for the establishment of a municipality not in line with the constitutional conception of a municipality.³⁴ Agreeing with the dissent of Justice Krivic who wondered whether there were any objective criteria that could be used to determine this elusive 'constitutional conception of a municipality', Bugarič criticised the Court for entering the political slippery slope on an issue that was not amenable to judicial adjudication and called for an acceptance of some version of the political question doctrine in the Slovenian constitutional practice.³⁵

While the issue has not been entirely neglected, it has certainly not resulted in a principled position of the Constitutional Court, which has continued to – and was often pushed to – address controversial issues that led to criticisms of unnecessary forays into the realm of politics. One notable recent example actually concerned the same issue as the cases referred to above: in an ongoing saga concerning the delineation of the Koper urban municipality, with one of its districts wishing to become an independent municipality, the Constitutional Court ultimately provided for an establishment of this new municipality with a judicial pronouncement of its own,³⁶ despite article 139(3) of the Constitution stipulating that municipalities are to be 'established by law' (i.e., by the legislature rather than a judicial process). Even more controversially, a few months later³⁷ it repealed an ordinance of the Ljubljana municipality renaming one of Ljubljana's streets as *Titova cesta* (*Tito Street*) after the long-time leader of socialist Yugoslavia Josip Broz Tito, holding that such a reintroduction of a street bearing his name constituted a glorification of the communist totalitarian regime, in contravention of human dignity embodied in several constitutional provisions as a fundamental constitu-

³² See e.g. R.F. Nagel, 'Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine', *University of Chicago Law Review*, 1989, pp. 642-669; M. Tushnet, 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine', *North Carolina Law Review*, 2002, pp. 1203-1235. (See also Chapter VII of this edited volume, footnote 100, p. 93.)

³³ Bugarič, 'Ustavno sodstvo in (ali) parlamentarna demokracija', pp. 17-22.

³⁴ Decision U-I-90/94 of 20 May 1994, Official Gazette of RS, No. 29/94; Decision U-I-144/94 of 7 July 1994, Official Gazette of RS, No. 45/94.

³⁵ Bugarič, 'Ustavno sodstvo in (ali) parlamentarna demokracija', pp. 20 and 21.

³⁶ Decision U-I-114/11 of 9 June 2011, Official Gazette of RS, No. 47/2011.

³⁷ Decision U-I-109/10-11 of 26 September 2011, Official Gazette of RS, No. 78/2011.

tional principle. The Court could not ignore the political connotation of such a decision that divided the population, but seems to have wanted to send a determined signal underlining its pivotal role in defining the contours of the Slovenian constitutional order: the decision was adopted unanimously (hopeful echoes of *Brown v. Board of Education*?³⁸), even if seven of the nine justices put forward five separate concurring opinions.

Slovenian legal order and EU law

EU law has not – at least not yet – exerted any significant influence on the operation of Slovenian judiciary or on the respective role of the courts vis-à-vis the political branches of government in the fashioning of the Slovenian constitutional order. Nevertheless, it did pose the usual challenge for the national legal system in trying to meet the demands imposed by EU law and its fundamental doctrines (direct effect, supremacy and the duty of loyal cooperation) on the national authorities to ensure the full effectiveness of its legal order.

Reviewing the eight years of Slovenian judicial practice post-EU accession, it is not particularly difficult to find several examples of courts that apply EU law. In particular, there are relatively many cases concerning judicial cooperation, such as recognition and enforcement of judgments,³⁹ proceedings involving the European Arrest Warrant⁴⁰ or those concerning the European Enforcement Order,⁴¹ but more substantive issues have also arisen. When the courts do apply EU law, they normally do so correctly and often with commendable confidence, be it in the confirmation of duties imposed by EU law on national courts,⁴² the review of national law for compliance with EU legislation⁴³ or the interpretation of national provisions in light of EU law.⁴⁴

On the other hand, there may be many more cases in which EU issues are neglected or ignored, and as always in such cases one may merely speculate about the extent of such ‘disapplication’ of EU law. Certainly, the prevailing sentiment among the EU-conscious members of the legal community and in particular of

³⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954), a landmark case with a unanimous decision of the Supreme Court declaring segregation unconstitutional even as majority opinion was in favour of it.

³⁹ Such as Supreme Court orders III Ips 164/2008 of 3 February 2009; Cp 13/2009 of 18 February 2010; Cpg 5/2009 of 9 March 2010; Cpg 3/2010 of 6 July 2010; Cpg 4/2010 of 13 July 2010; Cp 7/2010 of 31 January 2011.

⁴⁰ Such as Supreme Court order I Ips 123/2005 of 19 May 2005; judgment I Ips 284/2008 of 28 August 2008; judgment XI Ips 5/2009 of 22 January 2009; order I Ips 57323/2010-172/2010 of 23 September 2010.

⁴¹ Such as the order Cpg 2/2010 of 20 April 2010.

⁴² See e.g. judgment I Up 365/2007 of 14 November 2007.

⁴³ Such as judgments VIII Ips 125/2008 of 9 February 2010 and X Ips 569/2008 of 2 December 2010.

⁴⁴ Such as judgment VIII Ips 431/2008 of 9 November 2010; cf. judgment VIII Ips 353/2008 of 6 September 2010.

the bar is that the Slovenian courts often do not accept arguments made under EU law, or look for ways to render them irrelevant to the resolution of the case before them. One reason might well be the unease of the (senior) judicial bench unfamiliar with EU law, a fact readily admitted by the Slovenian judges when quizzed on the reluctance to put preliminary references to the ECJ during the 2009 visit of the Vice President of the European Parliament.⁴⁵ Indeed, the first reference, concerning the interpretation of Brussels II regulation, was only made in late 2009,⁴⁶ later followed by two more submitted by the Administrative Court.⁴⁷ But while the numbers are low, it is somewhat double-faced of the EU officials to be overly critical of the Slovenian judiciary in this regard, as not only are the numbers of preliminary references dramatically low in *all* member states and thus betraying the myth of a systemic judicial dialogue in the EU (accounting for size and years of membership, all of Slovenian judiciary should make less than one preliminary reference per year to reach the annual average of other member states such as Germany and Italy), but such low numbers are also silently favoured by the ECJ already swamped by the growing workload.⁴⁸

Be that as it may, the Slovenian courts seem to accept the fundamental doctrines of EU law, including the supremacy of EU law over conflicting national law. The Constitutional Court confirmed as much in a decision adopted soon after the accession, reiterating the duty to ensure a proper application of EU law even if it means disapplying conflicting national provisions.⁴⁹ It referred to article 3a of the Constitution (introduced via constitutional amendment precisely for the purpose of acceding to the EU and NATO), which provided not only for a transfer of the exercise of certain sovereign rights but also for EU legislation to be applied domestically in accordance with the requirements of the EU legal order, the latter provision arguably providing a constitutional validation of EU law's fundamental tenets and demands on national law.⁵⁰ The Constitutional Court was also early to accept the duty of consistent interpretation,⁵¹ later confirming it along with a more general duty of loyal cooperation,⁵² and sometimes even took note of the

⁴⁵ More on this in M. Accetto, '(Ustavno)sodna presoja in predhodno odločanje v pravu EU' ('(Constitutional) Judicial Review and Preliminary Rulings in EU Law'), *Pravna praksa*, 2011, no. 11, pp. 24-26.

⁴⁶ ECJ Case C-403/09 (*Detiček*) [2009].

⁴⁷ ECJ Case C-536/09 (*Omejc*) [2011] and Case C-603/10 (*Pelati*), not yet resulting in a judgment by the ECJ.

⁴⁸ See M. Accetto, 'The Past and Possible Futures of European Union Judicature', *Czech (& Central European) Yearbook of Arbitration*, 2011, pp. 3-22, at pp. 18-20.

⁴⁹ Decision Up-328/04/U-I-186/04 of 8 July 2004.

⁵⁰ F. Testen, 'Tretji odstavek 3.a člena: res (pre)velika razpoka v ustavi?' ('Article 3a(3): Is it Really a(n) Overly) Big Cleft in the Constitution?'), *Podjetje in delo*, 2003, no. 6, pp. 1484-1493, at p. 1486.

⁵¹ Decision U-I-321/02 of 27 May 2004.

⁵² Decision Up-2012/08 of 23 September 2008.

‘soft law’ of the EU.⁵³

The only principled controversy with regard to this loyal cooperation seems to entail the status of the Constitutional Court as a ‘European’ court vested with the duty to review the lawfulness of national rules vis-à-vis EU law. While the Constitutional Court seems to have taken the position, in an early case,⁵⁴ that it could be considered a ‘court or tribunal’ under article 267 TFEU (Treaty on the Functioning of the European Union) and thus could make a preliminary reference to the ECJ if this were warranted, it holds that it is not competent to review the compliance of national rules with EU directives, as this competence is not listed among the competences in the relevant provision of the Constitution.⁵⁵ Presumably, the implication of its reasoning is that this duty should be carried out by the regular judiciary, but it does not state so explicitly, thus creating the unnecessary impression that violations of obligations for the state derived from EU directives might go unchecked by the Slovenian judiciary. In any event, the Constitutional Court could (and I believe should) understand this duty also as one deriving from article 3a of the Constitution and thus ‘translate’ the issue into one of compliance with the domestic constitution which clearly falls within its purview. It appears that such an understanding was also shared by the drafters of article 3a.⁵⁶

Conclusion

Slovenian (constitutional) judicature has indeed had a chequered journey: first set up as the arbiter of constitutionality in the 1960s in a political system that denied its role as a co-equal branch of government but its practical relevance stifled soon thereafter; then fully emancipated with the new democratic order in the 1990s and taxed with the delicate task of walking the line between aggrandizing judicial activism and excessive judicial restraint; and finally faced with the new realities of EU law that threaten not only to undermine the sanctity of the very constitution it is called upon to safeguard, but also to force yet another reimagining of its proper role in the polity.

In a way, however, the desired destination of this journey has already been reached, and especially so with regard to the role of the Constitutional Court: in its role as the guardian of the Constitution, it is also often called upon to marshal the political process (e.g. by having to pronounce on the admissibility of proposed legislative referenda), defining the contours of the constitutional order and the dividing lines between law and politics as much as respecting them. The daily life of Slovenian politics is no longer merely at the mercy of Ackerman’s transformative

⁵³ See Decision U-I-146/07 of 13 November 2008, including the reference to (at the time non-binding) Charter of Fundamental Rights.

⁵⁴ Decision U-I-113/04 of 8 July 2004.

⁵⁵ For the first time in Decision U-I-188/04 of 8 September 2005 and then – as a lead-ing case confirmed several more times – in Decision U-I-32/04 of 9 February 2006.

⁵⁶ Testen, ‘Tretji odstavek 3.a člena’, at p. 1492.

constitutional moments⁵⁷, but also dependent on the constitutional minutiae of a juridified polity.

⁵⁷ See the discussion in the US context in B. Ackerman, *We the People: Transformations*, Cambridge, 2001, pp. 87 and 88, 409 and 414-420.

IV. Juridification in Lithuania.

Goals and principles versus an adherence to the 'letter of the law' in the activities of business supervising agencies

Eglė Mauricė-Mackuvienė

Annotation

This article discusses how business supervising and regulatory agencies are performing and should perform their activities, what the goals of these governmental bodies are, and how these goals are being achieved. The reform of the functions of business supervision, which is being carried out by the fifteenth government of the Republic of Lithuania (2008-2012), is analysed in this regard. Phenomena such as a proliferation of legal acts and technical regulations imposed on entrepreneurs and businesses, also the practices of inspectors adhering strictly to the 'letter of the law', are identified as a negative side of juridification. On the other hand, an active role on the part of business supervising and regulatory agencies that operate in accordance with the principles of proportionality, non-discrimination and efficient service to the people could be marked as a positive form of juridification.

I. Inspectorates and regulatory agencies: their place and role in the society

The essence of the law manifests throughout two main features of the phenomenon: its normative and its binding nature. Law could be understood as rules that a particular society recognises and accepts as binding ones.¹ Normativity means that legal principles and rules are norms that guide actions for natural persons and legal entities. The binding aspect of the law is ensured through the system of sanctions incorporated within the law and through the institutional system that has the authority to impose these sanctions.

There are special institutions, called regulators, agencies or inspectorates, that function in every modern state and supervise how businesses and people involved in economic activities comply with the legal requirements, such as to pay taxes, to

¹ 'The law is what we in our society ought to obey', A. Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law*, New York, 2007, p. 173. Also see the chapter 'Moral and Legal Obligation' in: H.L.A. Hart, *The Concept of Law*, Oxford, 1961, pp. 167-179.

ensure food safety, to protect the environment, to inform consumers properly, etc. These institutions have the authority to impose sanctions of an economic nature, e.g. fines or restraints on activity, in order to ensure that things are in compliance with legal requirements. Sanctions are not the only, nor the best, way to ensure that subjects behave according to the law. Nevertheless, there are many inspectors who perceive their duties first of all as controlling and punishing activities. This attitude and commensurate practice has serious consequences for the majority of society, so the question of business controlling (supervising) agencies definitely needs to be addressed.²

These business supervising institutions have a special, often not clearly-defined status within the legislative-executive-judicial triangle:

1) Agencies and inspectorates are usually a part of the *executive branch*, as they function under and are accountable to the government or competent ministry. However, this is not always the case. Some of the regulators are distinctly independent (e.g. the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways of Germany, the Competition Council of the Republic of Lithuania); some are created by and are accountable to the legislative power (e.g. the State Language Inspectorate and the Radio and Television Commission of Lithuania are accountable to the parliament of Lithuania).

2) Supervising agencies are not considered to be of a *legislative nature*, although some of them do write out and adopt technical regulations that are obligatory for all subjects performing a particular activity. Some agencies explicate the laws (e.g. the State Tax Inspectorate of the Republic of Lithuania used to explicate the Taxing Laws).

3) Agencies and inspectorates do not belong to the *judicial branch* either. Nevertheless, all of them investigate particular situations, decide whether or not legal rules are being violated and enact decisions that affect significantly the rights and duties of third parties – as do the courts. But the dissimilarity from the courts is rather significant: the courts are exclusively impartial and do not initiate the processes themselves, while agencies play an active role in starting the investigation, choosing which ‘cases’ to solve. Some of them have special branches that solve the disputes within their area of competence, therefore performing ‘quasi’ court functions. For example, the Labour Inspectorate participates in disputes between employer and employee, the Non-Food Inspectorate or the Consumer Protection Agency participates in disputes between consumer and salesperson, and the Tax Inspectorate in the first instance investigates the complaints of taxpayers.

At the same time, with procedures used by supervising agencies and regulators, procedural guarantees of third parties are not regulated as clearly or in such detail as judicial ones or those of repressive structures (the Police or the Prosecutor’s Office). There are various controlling institutions that inspect businesses in

² The terms ‘business controlling institutions’, ‘business supervising agencies’, ‘supervising entities’ and ‘inspectorates’ are used synonymously in this article.

the state whose status differs and whose competence is defined in different legal acts. This creates a situation where inspectorates and agencies, acting in the name of the state and in the name of the law, start to live lives of their own and are not cautious enough about other members of society.

The main goal of administrative control is to increase the level of protection of important social goods such as the health of people, the security of processes, a sustainable environment, fiscal order or the protection of consumers. Yet in their everyday activities, controlling institutions supervise many requirements of minor importance, and the amount of legal regulation is constantly increasing.³ Inspectors sometimes inspect formally and the 'rule of law' principle turns into the dominance of the 'letter of the law'. Sometimes non-risky economic activities are inspected, although they do not cause harm to people or the environment.

The negative side of *juridification* in this context manifests as follows: there are too many legal requirements and technical regulations for businesses, and there are too many business supervising institutions that possess the authority to punish them 'in the name of the law' without clear procedures in today's modern legal society. Two untoward outcomes follow. First, the main goals of the state administrative control are not achieved properly and state resources for administrative control are not used efficiently. Secondly, a significant burden on businesses is observed, as the freedom for individual economic activity, an important human freedom,⁴ is disproportionately restricted.

When regulators, agencies or inspectorates start to live their own lives, implement laws 'blindly' and are not cautious enough about other members of society, primarily about businesses that create jobs and GNP, the time has come to review the goals, tasks and procedures of this specific area.

Reforms in the field of the performance of business supervision were implemented or are still being pursued in a variety of countries; to name but a few: Australia, the United Kingdom, Spain, the Netherlands, Croatia, Latvia, Lithuania, Mongolia, Ukraine, Azerbaijan and Kyrgyzstan.⁵ These reforms are named reforms of the inspection system, reviews of the functions of business supervision

³ Here one could mention the initiatives of Deregulation and Better Regulation that governments used to launch during the last decades, but the results are not very significant in this regard.

⁴ For example, see article 46 of the Constitution of the Republic of Lithuania: 'Lithuania's economy shall be based on the right of private ownership, freedom of individual economic activity and initiative', <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>.

⁵ F. Blanc, *Assessing business inspections' effectiveness and burden: Perspectives on a peculiar 'regulatory object' from the World Bank Group perspective*, Papers of the 6th ECPR Conference, Reykjavik, 2011. Accessible at <http://www.ecprnet.eu/MyECPR/proposals/reykjavik/uploads/papers/2136.pdf>; C. Cordova and T. Sahovic, *Approaches to reforming inspection systems in emerging and development countries*, Papers of the 6th ECPR Conference, Reykjavik, 2011. Accessible at <http://www.ecprnet.eu/MyECPR/proposals/reykjavik/uploads/papers/1204.pdf>.

or reforms of enforcement activities, and are usually part of the wider regulatory reforms aimed at reducing the administrative and regulatory burden on businesses. Although OECD, EU and post-Soviet countries differ with regard to their institutional formation, historical background, traditions of democracy and rule of law, the problems that are being solved in these countries have much in common. 'Regulatory burdens consist of more than just administrative costs. Entrepreneurs also consider compliance costs (the cost of investments to comply with the law), poor public services and too many inspections as regulatory burdens'⁶, the official site of the government of the Kingdom of Netherlands says. 'Regulation has grown at an unprecedented pace in Australia over recent decades. As in other advanced countries, this has been a response to the new needs and demands of an increasingly affluent and risk averse society and an increasingly complex (global) economy. This regulatory accretion has brought economic, social and environmental benefits. But it has also brought substantial costs. Some costs have been the unavoidable by-product of pursuing legitimate policy objectives. But a significant proportion has not. And in some cases the costs have exceeded the benefits. Moreover, regulations have not always been effective in addressing the objectives for which they were designed, including regulations designed to reduce risk'⁷, the Productivity Commission from the Australian government reports. 'Administrative subjects supervising businesses perform a huge amount of inspections, do not co-ordinate their actions and do not care about the duration of inspections. Such business supervision creates a burden for businesses and hampers them in performing their regular economic activities. The system of economic sanctions is oriented towards punishment of economic subjects. This system does not motivate them to fulfil the requirements'⁸.⁸ These and other problems are identified in the Resolution from the government of Lithuania.

Experts from the World Bank Group's International Finance Corporation usually assist in starting the reforms, actively participating and providing expert assistance to governments, but this is not always the case. The reform in Lithuania was initiated in 2009 exclusively by the fifteenth government of the Republic of Lithuania and by two ministers particularly: the minister of Justice and the minister of Economics.⁹ The experts from the World Bank Group were invited to join the reform group later. Aspiration to economic growth, the protection of private

⁶ <http://www.government.nl/issues/reducing-the-regulatory-burden/regulatory-burden-for-enterprises>, accessed on 22 April 2012.

⁷ Australian Government Productivity Commission, *Identifying and Evaluating Regulatory Reforms*, Melbourne, 2011. Accessible at <http://www.pc.gov.au/projects/study/regulation-reforms/report>, accessed on 28 April 2012.

⁸ *Conception on Basic Provisions for the Activity of Business Supervising Subjects*, adopted by the government of the Republic of Lithuania, Resolution no. 836, 22 July 2009.

⁹ The fifteenth government (2008-2012) is a coalition cabinet; the minister of Justice was delegated from the liberals (Liberal Movement of the Republic of Lithuania), the minister of Economy was delegated from the conservatives (Homeland Union and Christian-Democrats of Lithuania).

property rights, and the notion of de-bureaucratisation were driving factors for launching the reform.

II. Reform of the supervision system in Lithuania: from *ad hoc* practices to general principles

The main thesis of this paper is as follows: general legal (constitutional) principles, as well as practices based on main goals and priorities, should be the thrust in situations where phenomena of juridification manifest undesirable forms and result in negative consequences.

This is true for business supervision systems as well. Inspectorates should orient their activities towards main goals and should act according to constitutional principles, *inter alia* the principle of the freedom of individual economic activity and initiative. Formal adherence to the letter of the law, supervision of non-risky economic activities, enforcing the implementation of every non-substantial legal requirement, – this is not the proper way to perform business supervision functions. Inspectorates should orient their activities towards the prevention of the most hazardous consequences, towards the supervision of the most risky economic activities. Even more: inspectorates and regulators, as state institutions, should serve the people as well as private legal entities. ‘State institutions shall serve the people’, article 5 of the Constitution of the Republic of Lithuania, as many other modern constitutions, proclaims. Inspectors should first assist and consult businesses on how to implement legal requirements, and should use their authority to punish only as *ultima ratio*.

The inspection reform called *Optimization of Functions of Supervisory Authorities*, carried out in Lithuania during recent years, is based on principles and priorities as well. The procedures and measures of the reform are discussed further in this section.

Until 2010 there was no uniform regulation on business supervision in Lithuania. Every agency, regulator or inspectorate was functioning in its own way without clear guidelines on the goals and principles of supervision functions. The situation changed when amendments to the Law on Public Administration were enacted by the parliament of Lithuania on 22 June 2010. A new chapter on the Supervision of Activities of Economic Entities was introduced into the law and the principles of supervision of activities of economic entities were incorporated into the Lithuanian legal system. These principles are:

1) *a burden of minimum and proportional supervision*. This principle shall mean that supervision-related activities of supervising entities must be proportional and adequate in order to achieve a pursued goal, proportionate to the size and administrative capacity of economic entities and carried out seeking to create the least possible hindrance to the activities of economic entities.

2) *non-discrimination*. This principle shall mean that supervising entities cannot conduct the supervision of activities of economic entities in a way that would discriminate economic entities on grounds of their form of ownership, citizen-

ship, place of residence or the state in which an economic entity is established, or on grounds of other objective characteristics of these entities, provided that other conditions influencing the degree of risk of the activities of the economic entity are essentially the same.

3) *planning*. This principle shall mean that the supervision of activities of economic entities must be planned. The requirement for planning shall apply to the following activities of supervision: 1) provision of consultations on the issues of the competence of a supervising entity as well as the carrying out of preventive actions intended to preclude possible violations of legal acts, 2) inspections of the activities of economic entities, 3) evaluation of information received in accordance with the procedure laid down by legal acts about the activities of economic entities. The activity pertaining to ‘application of sanctions in respect of economic entities in accordance with the procedure laid down by laws and other legal acts adopted on the basis thereof’, as well as indices of such activities (a number, extent, value of sanctions), cannot be the subject of planning.

4) *publicity*. This principle shall mean that information about the principles, procedures and results of the execution of the supervising activities shall be available to the public. This principle shall not apply if the disclosure of information hinders the achievement of the goals of the supervision, or if other requirements of confidentiality set in other legal acts may be violated.

5) *provision of methodological assistance*. This principle shall mean that supervising entities cooperate with economic entities, provide consultations to economic entities on the issues of the competence of a supervising entity, implement other preventive measures that help economic entities to meet the requirements of legal acts, and apply sanctions as an *ultima ratio* measure.

6) *functional separation*. This principle shall mean that the activities pertaining to the ‘inspection of activities of economic entities’ and the ‘application of sanctions in respect of economic entities in accordance with the procedure laid down by laws and other legal acts adopted on the basis thereof’ are each carried out by different officials of a supervising entity or units of a supervising entity, or that the above-mentioned functions are each assigned to different entities of public administration.

Procedures for inspecting activities are also determined. The head of an entity conducting inspections or a collegial institution of a supervising entity shall approve the criteria for drawing up lists of economic entities planned to be inspected, the rules embedding the procedure and duration of conducting routine inspections, as well as a list of economic entities that are planned to be inspected at a set time, the grounds, procedure and duration of non-routine inspections, and the rules embedding the criteria of the selection of economic entities that are being inspected on a non-routine basis. The law requires that, during the first year following the beginning of activities of an economic entity in respect of which an inspection is conducted, sanctions relating to the limitation of activities of the economic

entity (suspension or revocation of operation licences or permits) cannot be imposed on the said entity. Upon the establishment of the fact of non-compliance with or improper application of the requirements of legal acts, a reasonable time (generally at least one month) shall be set for the economic entity to correct the violations. The stipulation concerning the non-application of sanctions and setting of a reasonable time to correct violations shall not be applied if the sanctions are necessary and unavoidable in order to prevent the occurrence of damage to the public or the interests of other persons or the environment. After having issued a licence or permit to an economic entity, the supervising entity issuing licences or permits shall not conduct routine inspections of this entity for six months, with the exception of cases where the licence or permit has been issued to the entity without an inspection.

In order to ensure the presumption of innocence and not injure the inspected enterprise's reputation, information about a conducted inspection shall not be reported to the mass media or to other persons who are not involved in the inspection until the inspection is completed. During a period of investigation, the law only allows the inspectorate to confirm or deny, upon a request from journalists for example, that a particular investigation is being conducted. The law also defines what information a supervising entity shall announce on its website and in the annual reports on activities. Consequences of an inaccurate consultation are also regulated.

In order to ensure inspectors do not require a disproportionate or unreasonable amount of information from businesses, the law determines that economic entities shall submit only such documents as must be prepared in compliance with the requirements of legal acts, as well as any other information in the form possessed by an economic entity. A supervising entity may not request that an economic entity submit data or documents in a concrete requested form, if the preparation of these data or documents is not provided for in legal acts. This would require the creation of documents or information media and therefore would involve disproportionately high labour costs and a great deal of time. An economic entity shall enjoy the right not to submit documents to a supervising entity if it has already submitted the same documents to at least one supervising entity.

The law also includes basic provisions on the evaluation of the activities of supervising entities and their responsibility. For example, the law prescribes that the number of imposed sanctions, the size of sanctions or other indices related to the imposition of sanctions on economic entities cannot be the criteria for evaluating the effectiveness and efficiency of the activities of supervising entities and officials, other civil servants or employees of these entities. The results of the assessment of activities or persons should first be associated with positive developments in the particular sphere of supervision, such as quantitative reduction of accidents or outbreaks of disease, or an increase in tax collection amounts.

Sometimes inspectors would say that they inspect non-essential, formal re-

quirements because ‘the law requires this’, although they themselves recognise that some legal requirements are disproportionate or unreasonable. Such situations are prevented by stating that, at the end of a calendar year, supervising entities shall prepare and submit to the superior entities of public administration annual reports on activities that, *inter alia*, comprise information about legal acts proposed to be amended or adopted, emphasising the measures through which loopholes in the legal regulations are eliminated, more effectively organised supervision, and the burden of supervision is reduced for economic entities. In the case of doubts regarding whether the requirements of legal acts are reasonable, supervising agencies shall not wait until the end of a reporting period, but shall provide the information to a superior administrative body. This means that business supervising agencies take a more active role in lawmaking, indicating which legal acts are to be changed and how. Such an active role would be a benefit for the whole legal environment if proposals from supervising and regulatory agencies were in line with the principles of proportionality, non-discrimination, and efficient service to the people. This would be a positive aspect of *juridification*.

The Lithuanian government, while reforming inspecting agencies between 2009 and 2012, also implemented various organisational measures to ensure that new legal provisions are successfully implemented on the ground. These measures are fixed in the form of government Resolutions, Decisions of Cabinet Meetings, and Recommendations, adopted as Decrees from the minister of Justice and the minister of Economy for example.

The guidelines concerning the effectiveness of inspectorates were embedded in a government Resolution of 4 May 2010, *On Optimization of Supervision Functions Performed by Institutions*. In general, the objective of this reform is as follows: first, business supervision must be more effective; secondly, compliance with the most important requirements, thus ensuring the protection of the most valuable goods by imposing the least burden on businesses with the lowest expenses for state institutions being guaranteed; thirdly, a business supervisor must be a consultant, not a punisher.

The continuity of the reform of supervision functions was set out in *The 2012 government Priorities and Activities* approved by a government Resolution of 12 October 2011. In order to improve the business environment, to promote entrepreneurship, and to reduce the burden of business supervision, the following advanced methods for supervising institutions are introduced:

- 1) to develop, install and use in practice *risk assessment systems* (firstly in the areas of food and non-food products, veterinary services, public health, environmental protection, fire safety, territory planning and construction, tax, and labour safety);
- 2) to prepare and introduce in practice business ‘friendly’ *questionnaires (check-lists)* of finite, inspected aspects;
- 3) to ensure a *uniform over-the-phone consultation*.

A few words need to be said on each priority measure.

On *risk assessment systems*. This measure is oriented towards eliminating situations where: a) the supervision of a business is not directed towards identifying the biggest risk sources and giving this the focus of main attention; b) not necessarily the most dangerous activities are inspected; c) the resources of supervising institutions are not used in the most efficient way; and d) the principle of effective service to the people is not observed.

The supervision system based on risk assessment is organisational and the technical measures are installed in the supervising institutions. These measures enable the institutions to determine the risk possibility that economic entities do not follow the requirements of legal acts, to determine the extent of damage that has occurred or may occur, and to plan supervision actions accordingly.¹⁰

A risk-based approach is increasingly more-frequently emphasised in European Union legislation.¹¹ Risk assessment and the establishment of priorities is a prerequisite for effective and efficient public administration. Such an approach is consistent with the principles of supervision of economic entities enshrined in the Law on Public Administration and the provisions of the Constitution. One of these principles is the principle of a burden of minimum and proportional supervision, which holds that weighty sanctions are imposed on bigger offenders and needless inspections of low-risk and compliant business entities is avoided. Other principles are the principles of non-discrimination and equality before the law, which mean that a supervising entity, in order to avoid subjectivity, should apply equal standards when determining the economic entity's risk and selecting measures of response. The principles of non-discrimination and equality also mean that all inspectors should equally assess the same situations. Lastly, the principle of freedom of individual economic activity can be mentioned here. This principle holds that less-dangerous activities and properly-functioning business entities should be supervised less intensively.

On 'friendly' *questionnaires (check-lists)*. This measure is oriented towards solving such problems as situations where, due to a huge amount of applicable legal requirements, it is not clear how to follow them and which of them are the most important. The abundance of requirements and the uncertainty encourages businesses to replace compliance with the requirements to illegal payment. Also, an inspector usually verifies requirements chosen by himself optionally. He does not always choose the most important ones. Furthermore, he inspects formally and

¹⁰ *Guidelines on Risk Based Supervision of Activities of Economic Entities*, adopted by the Commission of Experts for Optimization of Supervisory Functions of Institutions, Lithuania, 2011. http://www.ukmin.lt/web/en/business_environment/reform_of_business_supervisory_institutions.

¹¹ For example, according to Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), all EU member states refocus their insurance supervision from static rule-based supervision towards risk-based supervision, involving dynamic assessment of the risk of the insurer (reinsurer) and the quality of the risk management system.

has the possibility to search for insignificant details.

A check-list is a document approved by the head of supervising institutions that allows inspection as to whether or not the most important requirements of legal acts within certain areas are being followed by carrying out the on-site inspection. The main part of the questionnaire contains questions which must be clear and important. Check-lists are officially published, announced on a single website, and presented in advance to the economic entity subject to inspection. Inspectors for violations which are not included in the check-list shall not apply sanctions to the inspected entity (fines, activity restriction and the like) and shall provide a period of time for implementing their remedies. Exceptions are exclusive cases when economic entities deliberately do not comply with the instructions of inspecting officers or invoke real danger to persons or the environment. Check-lists standardise the procedure of inspection, increase the transparency and efficiency of inspections, improve business awareness, promote compliance with strictly-formulated requirements, and ensure that the most important requirements are verified. They decrease hostility between the inspecting and the inspected person. The principle of 'all persons shall be equal before the law, the court, and other State institutions and officials', article 29 of the Constitution of the Republic of Lithuania, is thus also implemented.

On *uniform over-the-phone consultation*. This measure is oriented towards solving the problem whereby businesses do not get uniform and operative information from supervising institutions on how to follow the requirements. Different employees of supervising institutions (inspectors) consult differently on the same questions.

Uniform and unambiguous over-the-phone consultations, where conversations are recorded and the supervisory institution assumes liability for consulting, is the goal. This is already implemented in a few Inspectorates in Lithuania: the State Tax Inspectorate, the State Food and Veterinary Services, the State Labour Inspectorate, the State Non-Food Products Inspectorate, and the State Consumer Rights Protection Authority. The recording of over-the-phone consultations by using technical means helps achieving the following objectives: 1) the supervisory institution has the possibility of assessing the quality of consultations (by listening to some randomly-selected conversations) and improving them accordingly; 2) by recording conversations, the institution may assume responsibility for the provision of consultations and, in case of a dispute, the recorded consultation may be relied on; 3) the recording of a conversation increases the level of politeness (both of the caller and of the respondent). The attitude that the requirement to comply with legal acts can be ensured only by applying sanctions and penalties should be changed. The supervising agency should redistribute its resources so that meeting the consulting need of economic entities is ensured.

To compare Lithuanian supervisory reform with international practice, one could observe that the well-known Hampton principles of inspection and enforcement, which are the cornerstones of regulatory reform in the United King-

dom, indicate the very same points:¹²

- 1) Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most.
- 2) Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.
- 3) All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted.
- 4) No inspection should take place without a reason.
- 5) Businesses should not have to give unnecessary information, nor give the same piece of information twice.
- 6) The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions.
- 7) Regulators should provide authoritative, accessible advice easily and cheaply.
- 8) When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed.
- 9) Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work.
- 10) Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.¹³

Conclusions

Charles Montesquieu stated in his *The Spirit of Laws* (1748): ‘The decline, corruption of every government generally begins with that of the principles.’¹⁴ Activity based on proper goals, principles and priorities, as was discussed, is the way the business supervising agencies should function:

¹² P. Hampton, *Reducing administrative burdens: effective inspection and enforcement*, The Hampton Review – Final Report, London, 2005, p. 7. Accessible at <http://www.berr.gov.uk/files/file22988.pdf>.

¹³ One more example: requirements of a regulatory system set out by the New Zealand government in the Workplace Health and Safety Strategy to 2015: 1) standards are relevant, effective, clear and understood by all; 2) support and guidance information is easily accessible and specific to hazards and industries; 3) enforcement is targeted at the worst offenders, including those responsible for the greatest number and severity of work-related illnesses and injuries; 4) regulators deal with offenders effectively, fairly and visibly, raising the expectation of appropriate but inevitable enforcement; 5) regulators use a flexible approach to intervention, depending on the motivations and responses of individual employers. Department of Labour, *Workplace health and safety strategy for New Zealand to 2015. Rautaki mō te Haumarū me te Hauora o te Wāhi Mahi mō Aotearoa ki te 2015*, Wellington, 2005. Accessible at <http://www.dol.govt.nz/whss/strategy/whss-strategy-june05.pdf>, accessed on 28 April 2012.

¹⁴ C. Montesquieu, *The Spirit of Laws*, Book VIII, Chapter 1, Lawrence, Kansas, 2010 (1748), p. 108.

- The goal of supervision is to achieve positive developments in the particular sphere of supervision (e.g., quantitative reduction of accidents or outbreaks of disease, an increase in tax collection amounts, an increased percent of entrepreneurs and consumers that are contented with the services of state agencies). The goal is also to increase the level of compliance with the most important requirements of legal acts. The goal is not to inspect more or to punish businesses more.
- Principles that supervising agencies should follow are: proportionality, minimum burden of supervision, non-discrimination, equal treatment, planning based on risk assessment, publicity and transparency, clarity of functions and procedures, efficiency in using resources, provision of methodological assistance, and liability for quality of consultations.
- Activity based on priorities is the practice when a supervising institution's goal is to prevent the most significant risks for people and the environment. This institution does not waste resources for investigations of insignificant or formal violations of 'the letter of the law', and allocates a sufficient amount of resources to risk analysis and to the consultation of businesses.

Goals, principles and priorities should prevent situations where various inspectorates and agencies, acting in the name of the state and the law, implement the 'letter of the law' blindly and are insufficiently cautious about people who produce goods and provide services. These are negative consequences that phenomena of juridification create in the context of a supervision system. Principles and goals help when the supervising institutions exercise their functions responsibly and accountably to society, recognise that a key element of their activity is to encourage economic progress, set priorities and do not hide behind the formal letter of the law. These are positive consequences that phenomena of juridification create. The content of the principles is of particular importance in order to prevent the decline or corruption of this governmental sector.

V. Juridification in the Netherlands. The effects of a social trend on politics and justice¹

Charlotte Maas

Juridification: on the role of regulations, procedures and laws in Dutch society

In the Netherlands, juridification is frequently understood to be the consolidation of regulations and, as such, is mentioned in one breath with red tape and overregulation. Bureaucracy has been considered an urgent problem by Dutch citizens and the Dutch political body for decades. Citizens are subject to red tape when applying for licences, entrepreneurs are, for example, inconvenienced by complex legislation in the field of safety, and administrators experience that the government itself has also become indecisive as a result of the enormous density of regulations. This sometimes results from European and international regulations, such as the desire to tighten migration regulations or change environmental policy, fields in which European law is now also applicable. So red tape leads to frustration among citizens, limitations in scope for innovation and high costs for business people. As a result of the lack of decisiveness, the public administration risks losing the faith of citizens. The latter see that the government is not always able to deliver its services because of prolonged decision-making procedures.

Anyone wanting to solve problems such as red tape and overregulation, will not only have to ask themselves how the *number* of laws can be reduced or how regulations can be simplified. The question of how the law is *used* or *applied* will also have to be examined. After all, the aforementioned problems also have to do with the question of the place regulations, procedures and laws (that is, law in the general sense) have in Dutch society. In the Netherlands, relatively small disputes between neighbours are submitted to the courts, whereas mediation might have sufficed. If parents disagree with a decision made by their child's school to have him or her repeat a year, judicial means are deployed against the school. Judges complain about heavy workloads. When it comes to administrative law, citizens have an extensive package of legal protection at their disposal, enabling them to carry out long procedures against government decisions; and this package is frequently used.

¹ This chapter is an adaptation of Wiebenga et.al., *Onbetwistbaar recht? Juridisering en het evenwicht tussen rechtsstaat en democratie (Indisputable Law? Juridification and the balance between the rule of law and democracy)*, report 113 of the Prof.mr. B.M. Teldersstichting, Den Haag, 2012.

Juridification in the Netherlands can best be seen as a cultural trend: people are losing track of the instrumental function of the law and focus on existing laws, regulations and procedures instead when looking for solutions to social, political or private problems. The applicable law is, as it were, envisaged by citizens, politicians, public administrators and the judiciary as an objective in itself. Besides practical problems, such as extra costs, prolonged decision-making processes and an indecisive administration, this trend also causes a fundamental problem: the citizen's faith in the institutions of the democratic rule of law is at stake.

This chapter shows the juridification taking place in the Dutch democratic process and the Dutch judiciary. The first sections handle the trend of juridification in relation to domestic law. Later on we look at juridification in relation to European and international law, while continually bearing in mind the effect of juridification on the relationship between the powers in the Dutch democratic rule of law.

The effect of juridification on the democratic process in the Netherlands

Administrative pressure on the local and regional administration in the Netherlands

The trend of juridification in the Netherlands is noticeable in the relationships between the various layers of government – the central government level on the one hand and the local and regional levels of provinces, municipalities and water boards on the other.² Municipalities and provinces are largely responsible for the execution of the central government's plans, but also form an autonomous level of government. This twofold position of the local administration causes a tense relationship between the central government's administrative level and the local and regional authorities.

The position of the local and regional administration relative to the central administration is characterised by 'asymmetry in discretionary power between the facets policy, execution, supervision and control'.³ The execution lies with the local and regional authorities while the central government remains the responsible party and therefore also carries out the quality assurance. This yields an administrative burden for municipalities in the form of obligations relating to controls, accountability and the duty to disclose information. Local and regional authorities are managed strictly in accordance with their performance. 'In essence, perfor-

² A water board or authority is a local government level which is typically Dutch; it is responsible for the water management in a specific region. Its duties include the maintenance of water defences and the management of the quantity and quality of ground and surface water. The management of drinking water may also be included among the tasks of a water board.

³ Raad voor het openbaar bestuur, *Slagvaardig bestuur. Advies over integraliteit en vertrouwen in het openbaar bestuur*, Den Haag, 2009, p. 43.

mance-related management in the inter-administrative relationships boils down to vertical management. The formulation of objectives, output criteria and performance agreements takes place at the top and activities in the field of monitoring and evaluation are exercised on the shop floor, that is, in the municipalities.⁴

The pressure on local and regional administration in the Netherlands is high. This pressure comprises not only an excess of regulations which this layer of government has to put into effect, but also conflicting provisions it is expected to execute. An example of the situation is the care, by municipalities, of asylum seekers who have exhausted all the appeals. The Association of Netherlands Municipalities, the municipalities' representative, had made an agreement with the central government that the locations for emergency accommodation for asylum seekers who have exhausted all legal means would be closed as from 1 January 2010. Nevertheless, the municipality of the city of Utrecht, for example, continues to provide these people with accommodation. Another law, the Social Support Act (Wmo), gives municipalities an obligation known as the duty of care. They are expected to make provisions for people who are homeless, even though the central government's policy is not to provide these people with accommodation any longer.

In the event of inconsistencies between statutory provisions at the local and regional level, it is the judge who decides whether accommodation may be provided for asylum seekers who have exhausted all the appeals. So an administrative consideration is juridified, that is, interpreted in terms of legal rules. The central government was premature with regard to its objective of closing the accommodation in question on 1 January 2010, because the central legislator failed to adapt the applicable law in such a way as to enable the new regulations to be carried out. The central government should now therefore live up to its responsibilities (adapt the law where necessary and, at the same time, ensure that the central government's policy is complied with) in order to put a stop to the further juridification of this matter.

In the juridified society, the political issue seems to revolve around the question of how the applicable law regulates current social concerns. The idea that, on the contrary, it is the politicians who should be asked to provide solutions for these concerns is, in this way, pushed to the background.

The expansion of powers for regulatory authorities

The Netherlands has a great many regulators which supervise compliance with the legislation and regulations, the quality of products, the execution of tasks by authorities, or market forces. Organisations such as companies, educational institutions, care institutions and public service broadcasters are all monitored by

⁴ F. Fleurke, *Brief van de gemeente aan het Rijk. Over de bestuurlijke verhouding tussen het Rijk en de gemeente* (Letter from the municipality to the central government. On the administrative relationship between the central government and the municipality), Den Haag, 2004, p. 16.

one or more authorities.⁵ Well-known examples of regulatory organisations are the Labour Inspectorate, De Nederlandsche Bank, the Education Inspectorate, The Netherlands Competition Authority, the Healthcare Inspectorate, and the Food and Consumer Product Safety Authority. There are, however, many dozens of other regulatory organisations.⁶

Regulators are appointed by the government, as neutral third parties, to assess whether the education is still of sufficient quality, market forces are not impeded or food products meet the quality standards. They are organisations that are intentionally not governed by politicians or professionals from the sector itself so that they are free from interests which may form an obstacle to their independence. A regulator is, furthermore, appointed and not elected, just as a judge is appointed with an eye to his or her independence.

After the credit crisis of 2008, the powers of the Netherlands Authority for the Financial Markets (AFM) were subject to a good deal of consultation. The AFM wanted more statutory powers to enable it to keep an eye on the development of new financial products by banks and insurers. The chairman of the AFM argued that the AFM needed more powers to be able to ensure that financial institutions put the interests of the customer first when thinking up new products such as savings accounts, mortgages or insurances.⁷

It is not surprising that the debate on the expansion of the AFM's powers started up after the outbreak of the financial crisis and the economic crisis that followed. It became apparent that complex financial instructions, which neither customers nor bankers understood, were at the basis of these crises. Today's prevailing feeling is to increase the supervision of financial institutions, and particularly of companies which, in times of crisis, have received state assistance.

However, the expansion of powers for regulators, in this case the AFM, ought to arouse a certain degree of suspicion among liberals. If the regulator is given more powers, there is a danger that it will step into the shoes of the legislator. The separation of powers may be at stake if the AFM interprets its powers too broadly. In practice, principle-based legislation, as it is known, is fleshed out with concrete guidelines. The standards supervised by the AFM should be arrived at demo-

⁵ To summarise briefly, it has been laid down that the regulatory organisation appointed by the government has three core competences. Firstly, the regulator collects information from the organisations under its supervision concerning certain practices within the organisations. Secondly, the regulator forms an opinion on the question of whether these practices meet statutory requirements. Thirdly, the regulator is authorised to intervene in the organisations in question if the aforementioned opinion gives reason to do so. Articles 5:15-5:20 Law of 4 June 1992, containing the general rules of administrative law (Algemene wet bestuursrecht).

⁶ Ministry of Finance, *Van schaven naar sturen (From planing to governing). Bedrijfsvoering. Rapport brede heroverwegingen (Management. Report: broad reconsiderations)*, Den Haag, 2010, p. 56.

⁷ <http://www.afm.nl/nl/professionals/afm-actueel/nieuws/2011/feb/kbc-bij-banken-verzekeraars.aspx>. Last consulted on 1 June 2011.

cratically and not be drawn up by an apolitical body. If a standard is too vaguely formulated, the AFM should not have to interpret this itself, but ‘go back to the party responsible for drawing up that standard’, according to the Confederation of Netherlands Industry and Employers (VNO-NCW), a Dutch employers’ organisation.⁸

An answer to the question of what a good mortgage is contains political considerations. The way in which a good mortgage is defined has consequences for the housing market, for the scope starters have to conclude a mortgage, for the freedom we give to citizens themselves to take responsibility for their financial situation and for the freedom we give entrepreneurs to develop innovative products to launch on the market. Although, from the point of view of consumer protection, it is desirable that financial products meet a certain quality standard and that this quality can be monitored by an independent expert, it is easy to forget that, if the financial regulator’s powers are greatly increased, the work of the regulator takes on political implications. We then run the risk that the desired democratic control on decisions which are political in nature will be limited or even lost altogether.

The effect of juridification on the judiciary in the Netherlands

The effect of juridification on the Dutch democratic process can be recognised by the pressure on the local and regional administrative levels and the shift from legislative powers to apolitical regulators. Later in this chapter we will be paying attention to the question of the influence of European and international law on the Dutch democratic process. In this section we will look at how juridification can also be identified within the Dutch judiciary.

Juridification has consequences for the foreseeability of the law. Because of the growth in the number of laws and the increase in the number of court decisions, law is becoming less foreseeable, less accessible and less conceivable. In 2010, 9,477 formal laws were applicable in the Netherlands, not including conventions and EU laws. Every year, 29,000 court decisions, which can be deemed relevant new case law, are published.⁹ Both the influx of new cases and the total production at the different courts number 1,9 million cases annually.¹⁰ Nobody knows

⁸ ‘AFM is te veel wetgever’ (‘AFM is too much of a legislator’), *Het Financieele Dagblad*, 18 March 2011.

⁹ Symposium ‘Rechterlijk Activisme’ (‘Judicial Activism’) on 1 April 2011 in Amsterdam.
<http://www.recht.nl/artikel/index.html?nid=4da21d15452dbf46042>. Last consulted on 1 June 2011.

¹⁰ In 2003 that number was slightly more than 1.5 million cases. Raad voor de rechtspraak, *Jaarverslag 2010*, Den Haag, 2010, pp. 51-56.

all these laws, not even the judges.¹¹ Judges are given the opportunity to keep up with relevant developments in their field by means of post-academic education.

'Finding law' takes some doing. A great many regulations may be applicable to the same situation. When performing his or her duties, a judge uses his freedom of interpretation. With this freedom, the judge can refine the meaning of statutory provisions and the area of application of the provisions in more detail. His or her power to render justice not only means that he or she applies the applicable law to specific situations, but that he or she also supplements the work carried out by the legislature. Without this freedom of interpretation he or she would be unable to carry out this work.

If the law becomes less known, it is also possible that the judge's freedom of interpretation will grow. The clearer the statutory regulations, the less the judge has to 'find law'. In this case, he is primarily someone who *administers* the law. The greater the number of regulations (which are often not complementary but conflict with one another) that apply to a situation, the more the judge becomes a 'finder of law'.

The growing role of the judge as a law finder is a development which reinforces itself in a juridified society. The darker the forest of laws, the more striking the law finder's torch will shine. Put simply, if, indeed, nobody knows all the laws, then those who administer the law will ultimately have the last word. We will need the judge to take more and more decisions in all kinds of domains of society. We will also tend to turn increasingly to the courts for the judge's interpretations.

Contrary to legislative and executive power, judicial power is not under democratic control. Judicial independence is a fundamental building block of our democratic rule of law. The authority of the judge is not based on democratic legitimacy but on neutrality. This is why a judge cannot be called to account without reason. We need neutral judicial power in the constitutional system of balances, not only to settle civil conflicts, but also, and especially, as a safeguard against the abuse of legislative and executive powers.

A particular characteristic of neutrality is that it is not demonstrable, but at most, plausible. Once a judge's neutrality is questioned, it is exceptionally difficult for that judge to defend him or herself. The concept of 'neutrality' is, therefore, only usable if we make an agreement about it: that is to *assume* neutrality. In order for our democratic rule of law to function, the neutrality of the judge can and must be assumed *a priori*.

In practice, judicial neutrality comes down to a tacit assumption. Given the fact that the power of the judge reaches further than simply being the mouthpiece of the law, it is important to realise, for example by speaking about it, that the neutrality of the judge is not a given but an assumption and that the judge does not fall under democratic control. If we keep silent about the judge's place in this

¹¹ 'Niemand kent alle wetten en regels' ('Nobody knows all the laws and regulations'), *NRC Handelsblad*, 9 and 10 April 2011.

power balance, the fact that it is possible for him or her, either intentionally or unintentionally, to step into the shoes of the politician remains concealed. It may, therefore, be desirable to seize his or her court decisions as reasons for political debate, particularly if a judicial ruling leads to controversy.

The effect of juridification on the Dutch democratic process in respect of European law

Dutch Parliament and shared European power

National parliaments are able to say what they think during the European decision-making process. By means of what is known as the yellow and orange card procedure, they are able to check a European ruling in the making against the principle of subsidiarity. The procedure entails sending a 'reasoned opinion' (legislative recommendations) to the Commission, the Council and the European Parliament. If at least a third of the national parliaments in the EU draw a yellow card for a proposal by the European Commission, indicating that it is better to regulate the matter in question nationally rather than at a European level, the Commission reconsiders the proposal. If the proposal is upheld, the Commission has to clarify why the proposal is necessary. If more than half of the national parliaments deem the Commission's proposal undesirable, the orange card procedure goes into operation. The Commission then has to consider dropping the proposal altogether. If the Commission continues nonetheless, a majority of the European Parliament or the Council of Ministers, with 55% of the votes, can scrap the proposal.

The annual report of the European Commission on the relationship between the Commission and national parliaments shows that the Dutch parliament hardly makes any use of the opportunities available to become involved in the European legislative process. There is a trend visible in this report which indicates an increase in the number of legislative recommendations submitted by member states in 2010. There were 387, to be precise, an increase of 60% compared with 2009. The Dutch share was, however, minimal. Whereas in 2009 the Dutch parliament (the Upper and Lower Houses together) brought out 15 recommendations, in 2010 that number dropped to 6. Although it must be said that 2010 was a year of dissolution of the Chambers, elections and a new installation of the Lower House, the difference with countries such as Germany and the Czech Republic is still remarkable. The parliaments of these member states both submitted 29 recommendations.¹²

This report shows that Dutch parliamentarians are reticent about getting actively involved with the European Commission with respect to European legislative proposals. This may be due to a failure to recognise the means available to the Dutch parliament in the European legislative process. Shared powers are based

¹² European Commission, *Annual report 2010 on relations between the European Commission and national parliaments*, COM(2011) 345 final, Brussels, 2011.

on the assumption that national parliamentarians monitor what is going on in Brussels in the policy domains in question, so that parliaments are not surprised by proposals that may run counter to national interests. National parliaments also have a role to play *after* the submission of a legislative proposal by the Commission, that is, in calling to account the ministers involved in the negotiations in Brussels.

In the Netherlands, a leading department is designated for each dossier. This department is then responsible for negotiations in Brussels. The Dutch Lower House is informed about the legislative proposal by means of fiches (information sheets) from the Working Group for the Assessment of new Commission Proposals (BNC).¹³ These fiches provide the Lower House with more succinct information than those intended for the internal use of the ministries.¹⁴ In 2005, the Council of State wrote: 'As regards issues that are on, or soon to be placed on, the agenda in Brussels, parliament has made itself dependent on the information delivered by the ministries. The BNC fiches – which are provided when the decision-making process has already been going on for some time – do not contain the political assessment of the topics that are being discussed in Brussels'.¹⁵ The involvement of the Dutch parliament in European draft legislation is, in short, very modest. Those involved with the domestic democratic process appear to see European law as somewhat 'strange'.

Juridification and the European Court of Justice

When the Rutte cabinet, which was ultimately to fall in April 2012, took office in October 2010, there was a great deal to do with regard to the feasibility of this cabinet's plans for tightening immigration regulations. 'Less immigration is empty slogan' and 'EU corset limits scope of immigration policy', the headlines shouted.¹⁶ It is a fact that the scope the government has for implementing the intended policy is delineated by international and European provisions. However, it is remarkable, at the very least, that such coverage does not mention the fact that legislation and regulations are, in principle, realised in the political arena of

¹³ BNC stands for Working Group for the Assessment of new Commission Proposals (Beoordeling Nieuwe Commissievoorstellen).

¹⁴ B. Steunenberg, 'De hartkwaal van de Nederlandse politiek: mythes over de invloed van Europa' ('The heart problem of Dutch politics: myths about Europe's influence'), *RegelMaat*, 2008, no. 5, pp. 172-173.

¹⁵ The Raad van State (Council of State) is the most important advisory body of the Dutch government and also the highest administrative court. Raad van State, *Adviesaanvraag over de gevolgen van de Europese arrangementen voor de positie en het functioneren van de nationale staatsinstellingen en hun onderlinge verhouding* (Request for advice on the consequences of the European arrangements for the position and the functioning of national state institutions and their mutual relationships), Den Haag, 2005.

¹⁶ 'Minder immigratie is loze kreet' ('Less immigration is empty slogan'), *NRC Handelsblad*, 6 October 2010 and 'EU-korset beperkt ruimte immigratiebeleid' ('EU corset limits scope of immigration policy'), *NRC Handelsblad*, 27 May 2010.

the legislature and that law, including EU law, is not invariable.

It is not only publicists or politicians in the opposition who maintain this image of EU law as being totally separate from political debate. By way of illustration, we give below a summary of two court decisions in which guidelines in the field of European immigration policy are interpreted by the European Court of Justice with striking political implications.

On 17 February 2009, the Court answered a preliminary question from the Dutch Council of State in the *Elgafaji/the Netherlands* ruling on Council Directive 2004/83/EC, the Asylum Qualification Directive.¹⁷ The European Court of Justice was asked to explain article 15 of this Directive in more detail. The Directive defines the conditions under which an asylum seeker, if he or she cannot receive the status of refugee, is eligible to become a beneficiary of subsidiary protection by the EU member state. So far, the Dutch government had interpreted article 15 of this Directive in accordance with article 3 of the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), ECHR. This meant that a person who, as a result of his personal circumstances, would be exposed to violence on returning to his or her land of origin would be entitled to protection. Article 15(c) was, however, interpreted by the Court as a supplement to, and therefore, relaxation of, article 3 of the ECHR. It let go of the individuality criterion, that is: 'the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances'.¹⁸ Although this, according to the Court, could only apply by way of exception, this ruling did have political implications. The ruling meant a relaxation of the interpretation the Dutch government had given to the Directive up till then. Incidentally, in the emergency debate following this ruling, Van der Staaij, member of parliament for a small Christian party, aptly noted that this ruling raised even more questions regarding interpretation because 'how exceptional is exceptional?'¹⁹ He deemed disappointing the fact that, in this respect, the Court's ruling did not actually clarify the situation and wondered whether this was an example of undesirable juridification.²⁰

A second ruling that illustrates the political implications of asylum judgments is the *Chakroun* ruling of 4 March 2010. In this ruling, Council Directive 2003/86/EC, the Family Reunion Directive, was further explained in response

¹⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Asylum Qualification Directive).

¹⁸ ECJ Case C-465/07 (*Elgafaji/the Netherlands*) [2009].

¹⁹ *Handelingen II (Proceedings II)* 2008/09, 57, p. 4643.

²⁰ *Ibidem*.

to a preliminary question from the Council of State.²¹ In this ruling, the Court gave an opinion on two elements of the Dutch family reunion policy. The first was the income requirement for family reunification. The second was the distinction in Dutch legislation between family *reunion* and family *formation*, in connection with which other requirements are laid down with respect to the income of the person in the Netherlands who wishes to bring a member or members of the family to the Netherlands (the sponsor). The Court judged, pursuant to article 7, paragraph 1 opening words and subparagraph c of the Directive, that the income requirement that the Netherlands lay down for the sponsor, that is, 120% of the minimum wage, was too high. The power of the Netherlands to take into account national minimum wages and pensions is not without limitation. According to the Court, a reference sum may, it is true, be laid down, but not without the individual situation of the applicant also being assessed in concrete terms. Furthermore, the fact that the Netherlands also count additional assistance in determining the reference amount is not permissible either. The Court duly came to the conclusion that the income requirement is too high. Moreover, the Court does not see any justification in article 7, paragraph 1, opening words and subparagraph c for distinguishing according to how the family relationship arises (reunification or formation), as a result of which this distinction was also declared unlawful.²² This ruling therefore also entails a delineation of the powers of the Netherlands and other EU member states.

To a certain extent, the Court can be blamed for endangering the balance between judicial and legislative power if, in rulings, it does not show that it should only use its freedom of interpretation circumspectly and, as a result, takes decisions that should, in essence, be left to politicians. The danger of the power balance becoming disturbed is also reinforced if politicians simply accept the rulings of the European Court of Justice, even though the latter have enormous political implications, and when, in principle, they have the powers and means to change them. If politicians are not aware of their powers, EU law takes on an apparently inevitable and unchanging character.

The effect of juridification on the Dutch democratic process in respect of international conventions

Abstract notions such as human rights and social justice are laid down in international conventions because the contracting states recognise that they are universal values and principles which are not bound by national borders. In fact, international conventions reflect a certain portrayal of mankind of people who, as autonomous individuals, are members of a society and in which certain shared moral

²¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive).

²² ECJ Case C-578/08 (*Chakroun*) [2010].

and politico-philosophical principles are laid down. Indeed, the rights, freedoms and principles which are protected in various international conventions are generally considered of universal value. It is therefore attractive and tempting to deem these as objectives in themselves.

When we have to apply these abstract freedoms and rights in concrete situations, the circumstances are often such that the two values or principles must be balanced against one another. The British judge Lord Hoffmann writes as follows about the application of universal values such as human rights: ‘Their application requires trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system’.²³ Whereas, at the abstract level, values and principles are recognised as universal, in practice they often cannot be applied quite as universally. They are tested against concrete situations – and may conflict with one another – and in practice, therefore, cannot ever be seen as objectives in themselves.

The more international conventions in the field of social justice apply, the clearer the contrast becomes between abstract values, which we hold as universal, and the concrete situations in which these values must be expressed. Abstract provisions in conventions relating to social justice, such as the United Nations (UN) Convention on the elimination of all forms of discrimination against women or the UN Covenant on economic, social and cultural rights, define the scope for policymaking for contracting states in their national legislation. Convention provisions are, furthermore, usually so abstract that they do not indicate clearly what is, and is not, permissible for individual situations within the limits of the convention.²⁴

The probability that national legislation will conflict with international conventions has increased along with the growth in the number of UN conventions. Criticism of the austerity plans of the Dutch government is, for example, founded on references to international conventions. Critics of the raising of tuition fees see this measure as a violation of the right to education. The International Labour Organisation (ILO), a UN agency, recently criticised the Work and Income (Capacity for Work) Act (WIA), an existing Dutch law. The threshold for disabled persons to be eligible for benefits – 35% incapacity for work – is, according to the ILO, too high and violates the ILO Convention 121.²⁵ Since provisions of international conventions are so abstract, it is not difficult to find one to substantiate some form of violation by a national law or legislative proposal. It is then easy to

²³ Lord Hoffmann, ‘The Universality of Human Rights’, *Judicial Studies Board Annual Lecture*, 19 March 2009, p.8.

²⁴ H.F. Zachner, ‘Juridification in the Field of Social Law’, in: G. Teubner (ed.), *Juridification of Social Spheres. Comparative analyses in the areas of labor, corporate, antitrust and social welfare law*, Berlin/New York, 1987, p. 406.

²⁵ ‘FNV verwacht aanpassing arbeidsongeschiktheidswet na kritiek ILO’ (‘Dutch Trade Union Confederation expects changes in General Invalidity Benefit Act after criticism by the International Labour Organisation’), *Het Financieele Dagblad*, 8 March 2011.

pass over the fact that the public administration must anticipate changing social developments, such as the need for austerity measures or changing social support for the regulation of social security. A convention thus changes from an instrument for the promotion of international order, peace and safety into a corset that limits administrative scope.

Conclusion and recommendations

In the introduction of this book, it has been shown that ‘juridification’ should be understood as an ‘umbrella’ definition. It is used in academic literature to refer to various phenomena of increasing influence of the law, legalistic rules and the judiciary on society in general and politics in particular. In the Netherlands, juridification can best be understood as a social trend: the tendency to lose sight of the instrumental function of the law and to focus on existing laws, regulations and court judgments instead when looking for solutions to social, political or private problems. The applicable law is then envisaged, as it were, as an objective in itself, or as separate from political debate.

The effects of this trend on the democratic process and justice in the Netherlands have been studied in this chapter. We can conclude that, as a result of juridification, the balance between the legislature and the judge in the Dutch democratic rule of law is in danger of becoming disturbed. As a result of juridification, the administrative and democratic weighing up required to define the public interest is being carried out by the judge or an apolitical inspectorate.

The balance between the legislature and the judge in the Netherlands can be restored or maintained in various ways. More dialogue could be organised between the chairpersons of regulatory organisations (inspectorates) and the Dutch parliament. In addition, the Dutch legislator should more often shoulder its responsibilities and solve social problems, not only by means of new legislation but also by the requisite adaptation of existing legislation. The Dutch parliament should be more active in initiating debates about judicial rulings, which may be final decisions in individual cases, but do not have to be construed as the end of the political discussion on the desired interpretation of the law. Now, in our juridified society, with the growth of the judge’s role of law finder, for the sake of the power balance, it is also desirable that court decisions are discussed in a democratic environment.

Furthermore, with regard to European draft legislation, the Dutch parliament will have to pay more heed to the powers and means that it has. To this end, a cultural paradigm change is needed in the way Dutch politicians look at legislation and case law. The relevant question is not how the Netherlands has to respond to

the increasing European influence on national policy, but the reverse: how does the Netherlands influence European decision-making?²⁶ The same applies to the approval of international conventions. The parliament can, for example, draw up a guide to the interpretation of the convention in question and add this to the Approval Act. Sunset clauses or provisions may also be valuable with regard to both Dutch and European legislation and international conventions.²⁷ A sunset clause in a law provides that the law in question shall cease to have effect after a specific date. If, at that point in time, a decision is not taken to extend the law, it will automatically be rendered inoperative.

²⁶ J.G.C. Wiebenga, lecture 'Het Publieke Sector Debat' ('The Public Sector Debate'), Wassenaar, 14 May 2009.

²⁷ Sunset clauses are not appropriate for all legislation, particularly that which lays down powers. They are suitable for laws with specific objectives intended for a certain period of time.

VI. Juridification in the United Kingdom.

Expanding the judiciary's sphere of influence

Michael C. Tolley

Introduction

Myriad laws on employment, labour relations and workplace conditions enacted over the past fifty years or so have changed the nature of the employer-employee relationship in the United Kingdom (herein UK) and elsewhere. Today nearly every aspect of this relationship is subject to regulation and the trend toward more regulation shows no signs of abating. For example, the introduction of new regulations on age discrimination in employment provides a glimpse into the causes and consequences of juridification in the UK.

Age discrimination is now contrary to European Union (herein EU) and UK law. Council Directive 2000/78/EC established the general framework for equal treatment in employment built upon the distinction between direct and indirect discrimination.¹ Article 6 of the Directive permits a justification for discrimination where, in the context of national law, it is 'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.' In 2006, the UK transposed the Directive into domestic law with its Employment Equality (Age) Regulations.² These new regulations were substantially re-enacted into the Equality Act (2010),³ which now defines how employers must treat their older workers.

The judgments of the Court of Justice of the European Union (herein ECJ) and UK courts also define the relationship between employers and older workers. Recent ECJ cases have identified two broad categories which can be accepted as legitimate aims for direct discrimination on the basis of age: inter-generational

¹ European Council Directive 2000/78/EC (27 November 2000) Establishing a General Framework for Equal Treatment in Employment and Occupation. *Official Journal of the European Communities*, 2 December 2000 L 303/16-22.

² Employment Equality (Age) Regulations (2006), Statutory Instruments, 2006, No. 1031, available at www.legislation.gov.uk/ukSI/2006/1031/contents/made.

³ Equality Act 2010, Chapter 15, available at www.legislation.gov.uk/ukpga/2010/15/contents.

fairness and preserving the dignity of older workers.⁴ The UK's membership in the EU requires that it give effect to EU law and to the decisions of the ECJ. In *Sheldon v. Clarkson Wright and Jakes* (2012), a case raising the issue of direct age discrimination, the Supreme Court of the United Kingdom (herein UKSC) carefully considered the multiple sources of legal authority on this matter:

'[t]he United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it.'⁵

In the words of Lady Hale, justice of the UKSC, '[a]ge is a relative newcomer to the list of characteristics protected against discrimination.'⁶ Over the past few years, new age discrimination regulations emerged imposing the formality of law and legal decisions on an area of private economic activity which had not been regulated before. The desire to protect individuals against age discrimination may be in response to changes in society, such as the desire of individuals to work longer than they did in the past or the realisation that discrimination on the basis of age was just as much an affront to the dignity of individuals as discrimination on the basis of race, religion, or gender, but the mode of governance used to regulate this aspect of modern social and economic life exhibits many of the characteristics of the phenomenon known as juridification.

Juridification is described in the literature as the proliferation of rules and legal formalities in previously unregulated sectors of society.⁷ Since this new mode of governance expands the sphere of influence of the judiciary and replaces informal norms and practices with the formality of law and legal decisions, it affects both the political system and the democratic life of the nation. Some of the consequences of juridification include 1) the expansion of the power of courts vis-à-vis parliament and the executive, 2) the trend toward converting social, political, and economic issues into legal issues and turning to courts for their resolution, and 3) increases in the regulation of social relations and private economic activity. The legal and political developments in the UK that contributed to this phenomenon are the subject of this chapter. These developments include the expansion of judicial review as a check on administrative action, the UK's engagement with Eu-

⁴ ECJ Case C-411/05 (*Placios de la Villa*) [2007]; Case C-88/08 (*Hütter*) [2009]; Case C-555/07 (*Kucukdeveci*) [2010].

⁵ *Sheldon v. Clarkson Wright and Jakes*, [2012] UKSC 16, at para. 55.

⁶ *Ibidem*, at para. 2.

⁷ See generally L.C. Blichner and A. Molander, 'Mapping Juridification', *European Law Journal*, 2008, no. 1, pp. 36-54; C. Neal Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power*, New York, 1995; G. Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*, New York, 2009; and G. Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, Berlin, 1987.

rope as a result of treaty obligations flowing from membership in the Council of Europe and in the European Communities/Union (herein EC/EU), and the rise of a new more rights-based constitutionalism after the enactment of the Human Rights Act (herein HRA) (1998).⁸ My aim is twofold: to describe how the rise of the modern administrative state and the development of a multi-layered constitutional system after the Second World War set the stage for the introduction of new juridical features into UK politics and society, and to determine whether the resulting juridification can be reconciled with democratic theory.

Expansion of judicial review of administrative action

The growth and expansion of the modern administrative state created the need for checks on government decision making. Beginning in the 1960s, courts responded by expanding judicial scrutiny of the work of government at all levels of the UK political system. In the following passage, Malleeson describes the effects of this change:

‘The development of judicial review over the last 30 or 40 years has transformed a small element of the courts’ work into an extensive field of law. Successive areas of public life have been brought within the scrutiny of courts to the point where no field of government activity is off-limits. The publication of a guide to civil servants in 1987 and updated in 1995 entitled *The Judge over your shoulder* illustrates the extent to which the judges have come to oversee the work of government in its broadest sense.’⁹

Three decisions by the House of Lords¹⁰ in the 1960s boldly asserted the judiciary’s new role in scrutinizing the exercise of public power over individuals. They established the legal foundation for judicial review, the procedure in UK administrative law allowing individuals to challenge the exercise of power by public authorities on various grounds including procedural irregularity, irrationality, and illegality. In *Ridge v. Baldwin* (1963),¹¹ the Law Lords allowed the principles of natural justice to be used as a basis for review of administrative decisions. The local police authority dismissed Ridge, who was chief constable, without providing him an opportunity to explain his actions or to counter the charges against him. Ridge initiated an action for judicial review of the police authority’s decision arguing that his dismissal was unlawful and seeking reinstatement of his pension, back salary, and damages. Lord Reid and the court majority concluded that the police authority had violated Ridge’s right to procedural fairness and, in doing

⁸ Human Rights Act 1998, Chapter 42, available at www.legislation.gov.uk/ukpga/1998/42/contents.

⁹ K. Malleeson, *The New Judiciary: The Effects of Expansion and Activism*, Aldershot, UK, 1999, p. 7.

¹⁰ The Appellate Committee of the House of Lords, as it was known officially then, was the final court of appeal for the UK. The name was changed to the Supreme Court of the United Kingdom as a result of the Constitutional Reform Act (2005).

¹¹ [1963] 2 All E.R. 66; [1964] AC 40 (HL).

so, imposed the legal formalities associated with principles of natural justice on administrative action:

‘Before attempting to reach any decision they were bound to inform him of the grounds on which they proposed to act and give him a fair opportunity of being heard in his own defence. [...] The principle *audi alteram partem* goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority. In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist.’¹²

Protecting individuals from the harmful effects of government decisions is one of the primary purposes of administrative law. The significance of the *Ridge* decision to the future development of administrative law in the UK was explained by De Smith: ‘*Ridge v. Baldwin* assumes first-rate importance [...] because of the further reason given by Lords Reid, Morris and Hodson for holding the committee’s decision to be invalid. Even if the exercise of the disciplinary power had not been fettered by the procedural code, it would still have been exercised invalidly because the resolution to dismiss had been taken in disregard of the rules of natural justice. The importance of their Lordships’ view of the matter lies not in their detailed analysis of the proceedings before the watch committee [...] but in the proposition that a duty to observe the rules of natural justice arose by implication from the nature of the power conferred.’¹³

The natural consequence of requiring procedural fairness on administrative action was increased juridification. Complaints by individuals of government bodies abusing their power from this time forward would be evaluated by the legal formalities imposed by courts.

In the second case, *Conway v. Rimmer* (1967),¹⁴ the House of Lords asserted the power of courts to override the government minister’s view of the public interest. Conway, an ex-police officer, sued for wrongful prosecution and sought disclosure of some police files. The Home Secretary claimed public interest immunity for all such files and refused to release them. On appeal, the House of Lords overturned the Home Secretary’s decision ruling that it was the responsibility of courts to examine the documents and order disclosure if the public interest in the administration of justice outweighed the government’s assertion of the need for confidentiality. Lord Reid outlined the considerations used in his weighing and balancing of the competing interests in this case: ‘I do not think that it is possible to limit such documents by any definition; but there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the

¹² *Ridge v. Baldwin*, [1964] AC 40 (HL).

¹³ S.A. de Smith, ‘The House of Lords on Natural Justice’, *Modern Law Review*, 1963, no. 5, pp. 543-547, at pp 543-544.

¹⁴ [1968] 1 All E.R. 874; [1968] AC 910 (HL).

proper test to be applied is to ask [...] whether the withholding of a document because it belongs to a particular class is really “necessary for the proper functioning of the public service.”¹⁵

Completing the famous House of Lords trilogy expanding judicial review of the work of government authorities is *Anisminic v. Foreign Compensation Commission* (1968).¹⁶ In this case, the House of Lords established the principle that any error of law made by a public body will nullify its decision. Extending to courts the power to nullify government decisions increased considerably the supervisory role of courts in the modern administrative state.

The rise of judicial review in the UK has been thoroughly documented by scholars such as Malleston, Sterett, and Wade and Forsyth.¹⁷ An elaborate system of judicial review as a remedy available to individuals disappointed by decisions of public authorities emerged from the foundations laid in the 1960s. The result was the imposition of greater legal formality over the work of public bodies and the expansion of judicial control over disputes between government and individuals arising from the implementation of the policies and programs of the modern administrative state. Juridification in this area may have been inspired by courts at the beginning, that is, the consequence of judicial decisions extending law and legal norms to new situations, but later parliament’s enactment of the Supreme Court Act (1981)¹⁸ made sure that it would continue. The Act clarified the remedy of judicial review available for public law disputes. In *O’Reilly v. Mackman* (1982), Lord Denning explained that as a result the statutory applications for judicial review would become ‘the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty.’¹⁹

The UK’s engagement with Europe

Writing in 1994, Sunkin predicted that judicial expansion into matters that had previously been the purview of parliament ‘is likely to become a more important feature of the system as the impact of Community law grows.’²⁰ To use the famous metaphor of Lord Denning, Community law has come rushing in like the ‘in-

¹⁵ [1968] AC 910 (HL).

¹⁶ [1969] 1 All E.R. 208; [1969] 2 AC 147 (HL), decided 17 December 1968.

¹⁷ K. Malleston, *The New Judiciary: The Effects of Expansion and Activism*; S. Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales*, Ann Arbor, Michigan, 1997; Sir W. Wade and C. Forsyth, *Administrative Law*, Oxford, 1995.

¹⁸ Supreme Court Act 1981, Chapter 54. Now cited as the Senior Courts Act 1981 by virtue of the Constitutional Reform Act 2005, Chapter 4, available at www.legislation.gov.uk/ukpga/1981/54.

¹⁹ [1983] 2 AC 237 (HL).

²⁰ M. Sunkin, ‘Judicialization of Politics in the United Kingdom’, *International Political Science Review*, 1994, no. 2, pp. 125-133, at p.125.

coming tide, flowing into the estuaries and up the rivers,²¹ and the result has been as Sunkin predicted: increased juridification.

The juridification resulting from the UK's engagement with Europe resembles the increase in the use of law and legal formalities to govern the disputes individuals may have with public bodies over the exercise of government power. The two European courts that have spurred juridification are the European Court of Human Rights (herein ECtHR or Strasbourg Court) and the ECJ. I shall begin by examining the consequences of the UK's engagement with the ECtHR and the European Convention on Human Rights (herein ECHR) followed by the UK's engagement with the ECJ and EC/EU law.

Engagement with the ECtHR

The UK played a prominent role in the creation of the Council of Europe and in the drafting of the ECHR.²² Though the UK was one of the first countries to ratify the Convention, it did not accept the optional protocol allowing individuals to take cases to the Court. Successive conservative governments from the time of ratification opposed the right of individual petition. On 7 December 1965, Prime Minister Harold Wilson announced in the Commons that the government supported a change to this policy.²³ In 1966, the UK accepted the optional protocol and since that time individuals could seek relief for alleged violations of the ECHR from the Strasbourg Court.²⁴

Not all individual petitions are found admissible. From 1966 to 2010, 443 of the 14,460 cases brought by individuals against some governing authority in the UK were accepted for review.²⁵ The Strasbourg court found violations in 271, covering nearly every provision of the Convention.²⁶ Article 6 dealing with the right to a fair trial turned out to have been the Convention right violated the most followed by article 8, dealing with the right to private and family life, and article 5 protecting the right to liberty and security. Adverse ECtHR decisions require the offending law or practice to be changed. European human rights law intervened into many different areas of UK law and society as a result of these remedial actions. But even when violations of the law of other countries were detected, the ECtHR's decisions had an indirect effect on UK law by requiring governing au-

²¹ *Bulmer v. Bollinger*, [1974] 2 All E.R. 1226.

²² Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 9 March 1953, available at www.conventions.coe.int/treaty/en/treaties/html/005.htm.

²³ UK parliament, *Hansard*, HC Debates, 7 December 1965, Vol. 722, c. 235.

²⁴ In 1998, the right of individual petition was made compulsory for all Council of Europe members.

²⁵ A. Donald, J. Gordon and P. Leach, *The UK and the European Court of Human Rights*, Research Report 83 of the Equality and Human Rights Commission, London, 2012, p. 33, available at www2.lse.ac.uk/humanRights/articlesAndTranscripts/2012/ECHR83ECtHR.pdf (accessed May 31, 2012).

²⁶ *Ibidem*, pp. 33, 41.

thorities to conform to the emerging human rights principles.

Prior to the formal adoption of the HRA (1998), which incorporated the ECHR into domestic law, European human rights law and principles had infiltrated many areas of UK law.²⁷ References to the ECHR appeared in judgments at all levels of the UK judiciary leading to suggestions of incorporation through the back door. Nevertheless, the frequency of ECtHR citations in the case law clearly indicated that the Convention was being considered by UK judges. The question, which arose in the 1970s and was subject of considerable controversy among judges and legal commentators, was the extent to which an un-incorporated treaty, such as the ECHR, could affect UK law. Some took the position that the Convention could have no effect, while others argued that there may be occasions when it could be used by judges as an aid in interpretation of cases where there are gaps in the meaning of statutes or uncertainties in the common law.

Lord Scarman advocated early on for greater use of the ECHR. He rejected the largely ambivalent attitude toward the Convention held by most British judges at the time, and in *Abmad v. Inner London Education Authority* (1978), he clarified his views on the subject: '[T]he United Kingdom has accepted international obligations designed to protect human rights. [...] Today, therefore, we have to construe and apply section 30 [of the Education Act (1944)] not against the background of the law and society of 1944 but in a multi-racial society which has accepted international obligations and enacted statutes designed to eliminate discrimination on grounds of race, religion, colour and sex. Further, it is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles wherever possible, so as to reach a conclusion consistent with our international obligations.'²⁸

Lord Scarman's legal and policy arguments concerning the ECHR may have been resisted initially, but over time they eventually prevailed. In *Abmad* he found himself in the minority when he argued in favour of giving full effect to article 9 of the ECHR (guaranteeing freedom of religion) in interpreting section 30 of the Education Act (which provided that teachers shall not be disadvantaged by reason of their religious opinions or practices). Until quite recently, the judges who shared Lord Scarman's views rarely commanded a majority. The majority view then of the status of the ECHR in English law was expressed in Lord Denning's judgment:

'The convention is not part of our English law, but [...] we will do our best

²⁷ See generally Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights', *Public Law*, 1992, pp. 397-410 and N. Grief, 'The Domestic Impact of the European Convention on Human Rights as Mediated through Community Law', *Public Law*, 1991, pp. 555-567.

²⁸ [1978] 1 All E.R. 574 (CA).

to see that our decisions are in conformity with it. But it is drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation. As so often happens with high-sounding principles, they have to be brought down to earth. [...] I see nothing in the European Convention to give Mr Ahmad any right to manifest his religion on Friday afternoons in derogation of his contract of employment.²⁹

Without a domestic remedy for violations of fundamental rights and freedoms, individuals were forced to go to Strasbourg for relief. This would later become the *raison d'être* for the passage of the Human Rights Act (1998). *Rights brought home* was both the title of the Labour government's White Paper on the incorporation of the ECHR and the slogan used in the campaign for this reform to the UK constitution.³⁰

Golder v. United Kingdom (1975) was the first decision of the ECtHR finding the UK in breach of the rights of the Convention.³¹ Golder was accused of having assaulted a prison officer during a prison disturbance. His attempt to contact a solicitor in order to bring a defamation action against the officer and to clear his record was denied by the Home Secretary. After exhausting his appeals in UK courts, Golder petitioned the European Commission on Human Rights, which then determined which cases would go on to the Strasbourg Court. The matter eventually came before the ECtHR which ruled that the Home Secretary's decision denied Golder his article 6 right of access to court. As a result of this decision, the government changed its policy, abolishing the requirement that an inmate petition the appropriate Secretary of State for leave to consult legal counsel.

The policy changes as a result of the *Golder* decision were the first of many to follow. The Strasbourg court's decisions in *Tyrer v. United Kingdom* (1978),³² *Dudgeon v. United Kingdom* (1981),³³ and *Chahal v. United Kingdom* (1996)³⁴ resulted, respectively, in changes in the forms of punishment that may be used in schools, in the criminal law concerning prosecution of homosexuals engaging in consensual sexual activity, and in the immigration procedures used to determine the status of asylum seekers. The cumulative effect of these decisions, bringing the requirements of European human rights law to bear on UK law and policy, was increased juridification in the education, criminal justice, and immigration systems. Churchill and Young showed how the UK's response to Strasbourg court decisions had introduced many ECHR principles into UK law well before the Convention

²⁹ [1978] 1 All E.R. 574 (CA).

³⁰ Great Britain Home Office, *Rights Brought Home: The Human Rights Bill*, Command Paper CM 3782, London, 1997.

³¹ ECtHR no. 4451/70 (*Golder/United Kingdom*) [1975].

³² ECtHR no. 5856/72 (*Tyrer/United Kingdom*) [1978].

³³ ECtHR no. 7525/76 (*Dudgeon/United Kingdom*) [1981].

³⁴ ECtHR no. 22414/93 (*Chahal/United Kingdom*) [1996].

was formally incorporated in 1998.³⁵ As I will explain in a later section (The HRA and the New Constitutionalism), the juridical influences of the Convention on UK law were stepped up after the HRA (1998) went into effect in October 2000.

Engagement with the ECJ

Unlike its experience with the ECHR, where it played an active role in drafting the human rights treaty and was one of the first countries to ratify, the UK declined to join as a founding member of the European Communities. It was not until 1972 that the UK signed the treaty, passed the European Communities Act, and accepted the conditions set out in the treaty.³⁶ The UK did not hold a referendum on the matter of accession until 1975. The result of the national referendum on whether the UK should maintain its membership in the EC was a two to one vote in favour (Yes 67 percent; No 33 percent). There is always some uncertainty in discerning the meaning of votes, but, in this instance, the outcome suggested that voters decided that the benefits of membership outweighed the costs of new legal obligations.

Entry into the EC, and later the ratification of the various EU treaties, introduced an additional layer of political and legal complexity. The result, as I will explain in this section, was the extension of EC/EU laws and regulations into areas of UK social and economic life that had either been unregulated or regulated only by domestic law.

In 2001, 50 years after the signing of the Treaty of Rome and the expansion of the original six-country European Coal and Steel Community into a political and economic organisation with 15 member states known as the European Union (EU), only 10 agencies had been created to help administer various Community programs. Over the past decade, both the number of EU member states and European agencies increased. Today, there are 27 member states and 26 agencies including among others the European Aviation Safety Agency, the European Chemicals Agency, the European Environment Agency, and the European Medicines Agency.³⁷ These new agencies have begun to exercise regulatory authority over a wider range of activities, including environmental law, health and safety

³⁵ R.R. Churchill and J.R. Young, 'Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the United Kingdom, 1975-87', *British Yearbook of International Law*, 1991, no. 1, pp. 283-346.

³⁶ European Communities Act 1972, Chapter 68, Section 2 (1): 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly [...].' Available at www.legislation.gov.uk/ukpga/1972/68/introduction.

³⁷ 'EU Agencies and Decentralised Bodies', www.europa.eu/agencies.

law, and social policy.³⁸

The EC/EU treaties created a multi-layered constitutional arrangement consisting of sources of legal authority at the European level and at the level of the member states. The main pillars supporting this framework are the principles of the primacy of EC/EU law over national law and of the direct effect of European law in member states. In *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963)³⁹ and *Costa v. ENEL* (1964),⁴⁰ the ECJ set out the theoretical bases for these two principles which extended EC/EU law and regulations to all member states.

National courts of member states are required to uphold EC/EU law over conflicting domestic law. The reference procedure provided for in article 267 of the Treaty on the Functioning of the EU (formerly article 234 EC Treaty), whereby cases with EC/EU law issues could be referred to the ECJ, helped to enforce the supremacy of EC/EU law. In a series of landmark decisions stemming from the dispute over the registration of fishing vessels and the enforcement of fishing quotas, the UK's highest court affirmed the supremacy of EU law and set aside for the first time an act of parliament. In *Regina v. Secretary of State for Transportation, ex parte Factortame, Ltd* (1990), the House of Lords held that the Merchant Shipping Act (1988) and its regulations which imposed restrictions on the Spanish fishing vessels owned by Factortame conflicted with the EU's Common Fisheries Policy, and was thus void as contrary to EU law.⁴¹

EU law and regulations have come to play an even more significant role in the legal and political systems of member states. There is hardly any field of national law that is untouched by EU law. Take, for example, the regulation of age discrimination in employment, described in the introduction to this chapter. EU law spurred changes in domestic law. When a dispute arose, the matter may have been decided in national courts, but the decision was influenced by both national law and the principles on EU law developed by the ECJ. The ECJ and member state judiciaries have helped to promote the extension of EU law and regulation into national law. Since the process involved the imposition of new EU law and legal formalities on more areas of national law, the results have been increased juridification.

³⁸ See generally, R.H. Van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in: D.M. Curtin and R.A. Wessel (eds.), *Good Governance and the European Union*, Antwerpen, 2005, pp. 125-152; D. Geridan, 'The Development of European Regulatory Agencies: What the EU Should Learn from American Experience', *Columbia Journal of European Law*, 2005, pp. 1-52.

³⁹ ECJ Case 26/62 (*Van Gend en Loos*) [1963].

⁴⁰ ECJ Case 6/64 (*Costa/ENEL*) [1964].

⁴¹ ECJ Case C 213/89 (*Factortame*) [1990]; [1991] 1 AC 603 (HL).

The HRA and the new constitutionalism

The enactment of the HRA (1998) represented a profound departure in the way rights were historically protected in the UK. Notwithstanding the care to which the architects of the HRA sought to maintain parliamentary supremacy and preserve the mechanisms for safeguarding rights through political, not legal, processes, the responsibility for recognizing and protecting human rights was clearly shifted to courts. The transfer of this function to courts was a gradual process, occurring first as a result of the expansion of judicial power in the area of administrative law in the 1960s, and then as a result of the UK's treaty obligations to Europe. By enacting the HRA and 'bringing rights home', parliament ensured that the late-20th century trend toward the increased use of European human rights law and principles in domestic law and judicial decision making would continue into the next century.

The HRA transferred power and responsibility over a wide range of policy matters to courts. In this section I will examine the juridical influences of the HRA on just two areas of policy: national security and immigration.

National Security Policy

Antiterrorism legislation in the UK has developed over time largely in response to the problems in Northern Ireland. At about the same time relations improved in Northern Ireland, the threat of terrorism from global networks of Islamic militants began to increase. The government decided, based largely on the findings of Lord Lloyd in the *Inquiry into Legislation against Terrorism* (1996) that the time had arrived to put antiterrorism legislation on a 'permanent footing'.⁴² The result was the Terrorism Act (2000),⁴³ which broadened the definition of terrorism to include the new threats, prohibited fundraising on behalf of designated terrorist organisations, and increased law enforcement's powers to stop and search, arrest without warrant, and detain individuals suspected of terrorist activities.

Parliament reacted to the 9/11 attacks on the United States in two ways. First, it introduced and passed with great speed, a new law, the Anti-terrorism, Crime and Security Act (2001),⁴⁴ which strengthened the Terrorism Act (2000), especially in the area of immigration controls. Secondly, it took the action necessary to derogate from its obligations under article 5 of the ECHR. Derogation from article 5, which guarantees the right to liberty and prohibits detention without trial, was believed to be necessary since the new act's most controversial provision (Section 23) was going to give the Home Secretary the power to detain suspected terrorists indefinitely without charge or trial.

⁴² Lord Lloyd of Berwick and P. Wilkinson, *Inquiry into Legislation against Terrorism*, Command Paper no. 3420, London, 1996.

⁴³ Terrorism Act 2000, Chapter 11, available at www.legislation.gov.uk/ukpga/11/contents.

⁴⁴ Anti-terrorism, Crime and Security Act 2001, Chapter 24, available at www.legislation.gov.uk/ukpga/24/contents.

Suspected Al Qaeda members were rounded up and detained in Belmarsh Prison. Their challenge to the government's power to detain was appealed to the House of Lords. In *A and Other v. Secretary of State for the Home Department* (2004), the Law Lords ruled that Section 23 of the Anti-terrorism, Crime and Security Act (2001) violated articles 5 and 14 of the ECHR.⁴⁵ They issued a 'declaration of incompatibility' under section 4 of the HRA and referred the matter to parliament which then had to decide if and how the law should be amended.

Lord Bingham wrote the lead judgment in this landmark case. He reasoned that the fatal flaw in the government's detention policy was the way it discriminated against foreign nationals. He began his judgment by describing the appellants and nature of their legal claims:

'The appellants share certain common characteristics which are central to their appeals. All are foreign (non-UK) nationals. None has been the subject of any criminal charge. In none of their cases is a criminal trial in prospect. All challenge the lawfulness of their detention. More specifically, they all contend that such detention was inconsistent with obligations binding on the United Kingdom under the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998.'⁴⁶

In concluding his analysis of appellant's claim of discriminatory treatment, Lord Bingham wrote: 'The appellants were treated differently from both suspected international terrorists who were not UK nationals but could be removed and also from suspected international terrorists who were UK-nationals and could not be removed. There can be no doubt but that the difference in treatment was on grounds of nationality or immigration status (one of the proscribed grounds under article 14).'⁴⁷

The judgments of Lord Bingham's colleagues identified other problems with the government's detention policy. Several expressed concern with the government's claim that the threat of terrorism today requires extraordinary powers. Lord Nicholls questioned whether the circumstances were exceptional enough to justify actions which were 'anathema in any country which observes the rule of law.'⁴⁸

Once the House of Lords declared the government's detention policy incompatible with human rights, the matter shifted to parliament. Parliament responded by enacting the Prevention of Terrorism Act (2005).⁴⁹ This act introduced 'control orders' which empowered the Home Secretary to restrict a suspected person's freedom of movement and rights to associate and communicate with others. This new scheme was soon challenged in UK courts.

In 2007 the House of Lords ruled in a series of cases that the most restrictive

⁴⁵ [2004] UKHL 56.

⁴⁶ [2004] UKHL 56, at para. 3.

⁴⁷ [2004] UKHL 56, at para. 51.

⁴⁸ [2004] UKHL 56, at para. 74.

⁴⁹ Prevention of Terrorism Act 2005, Chapter 2, available at www.legislation.gov.uk/ukpga/2005/2/contents.

aspect of ‘control orders’,⁵⁰ an 18-hour per day home curfew, and the provision that allowed intelligence-based evidence to be withheld from terrorist suspects and their lawyers, breached the right to liberty and the right to a fair trial, respectively. However, the Law Lords upheld the broad outlines of the ‘control orders’ regime and ruled that none of the existing control orders needed to be changed.

The HRA required high court judges to scrutinise the boundaries of the UK’s new antiterrorism legislation and make sensitive human rights-based decisions on the lawfulness of such measures in ways which would have been unheard of 40 years ago. The Belmarsh prison case and the challenges to the ‘control order’ provisions that followed reveal the increasing influence of law and human rights norms on this area of policy.

Immigration Policy

The protections of the rights of asylum seekers in the UK are found in the relevant statutes governing immigration,⁵¹ in the historical protections of liberty existing in the common law, and in the HRA. Even without an explicit constitutional provision for the right of asylum, UK courts have upheld the rights of asylum seekers on many occasions. Keyes found that this special regard for the plight of refugees existed before the HRA went into effect in 2000, and had been strengthened afterwards:

‘The British courts have a tradition of judicial activism in the development and interpretation of asylum law. Even prior to the passage of the Human Rights Act, the courts were willing to assert the rights of asylum-seekers in the legal system. [...] This movement to protect human rights has been greatly fortified by the 1998 Human Rights Act.’⁵²

R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer (2000)⁵³ is an example of the judicial expansion of the rights of asylum seekers in the UK. In this case, the House of Lords held that Somali and Algerian asylum applicants could not be returned to France and Germany on safe third country grounds because both states did not grant protection to those in fear of ‘non-state’ agent persecution. The Law Lords reasoned that France and Germany were not ‘safe’ countries to which the Home Office could readily return asylum seekers who passed through them in transit to Britain. One of the two cases consolidated in this appeal was brought by Lul Adan, who fled Somalia in 1997 because her clan

⁵⁰ *Secretary of State for the Home Department v. JJ and Others*, [2007] UKHL 45; *Secretary of State for the Home Department v. MB*, [2007] UKHL 46; and *Secretary of State for the Home Department v. E and Another*, [2007] UKHL 47.

⁵¹ The Asylum and Immigration Appeals Act (1993) incorporated the UN Refugee Convention into British law and the most recent statute on the subject is the Immigration, Asylum and Nationality Act (2006).

⁵² E. Keyes, ‘Expansion and Restriction: Competing Pressures on United Kingdom Asylum Policy’, *Georgetown Immigration Law Journal*, 2004, no. 2, pp. 395-426, at pp. 411-412.

⁵³ [2001] 2 AC 477 (HL).

was being persecuted by an armed group that had overthrown the government. She first went to Germany, where she claimed asylum, but her application was turned down. She then travelled to Britain, where her plea for asylum was again rejected. In February 1998, the home secretary ordered her to be sent back to Germany, the ‘safe third country’ from which she had arrived.

The other case in this appeal was brought by Hamid Aitseguer, an Algerian who claimed that Islamic fundamentalists opposed to the government had threatened to kill him and his family. He, too, was ordered to be returned to France, where he had landed en route to the UK and where his first claim for asylum was made. Both Adan and Aitseguer had strong asylum cases since both had well-founded fears of persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Instead of granting them refugee status and allowing them stay in the UK, the home secretary decided to send them back to the ‘safe’ countries from which they had reached the UK.

The problem, the House of Lords ruled, was that in this context France and Germany were not safe countries. A safe country was one which would not in turn deport an asylum seeker except in accordance with the UN Refugee Convention. Because France and Germany interpret the Refugee Convention to mean that only persecution by the state warrants protection under the convention, the fact that the fear of persecution in these cases was from unofficial groups meant that applicants would be returned to Somali and Algeria. The House of Lords concluded that, under the circumstances, the Home Secretary’s decision violated the UK’s international law obligations.

Evidence of this same, expansive approach to asylum rights can be found in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (2010).⁵⁴ In this case, the UKSC granted asylum to two gay men who feared persecution in their countries of origin for their sexual orientation. ‘The essential question in these cases,’ writes Lord Walker, ‘is whether the claimant has a well-founded fear of persecution as a gay man if returned to his own country, even if his fear (possibly in conjunction with other reasons such as his family’s feelings) would lead him to modify his behaviour so as to reduce the risk.’⁵⁵ The court was unanimous in its decision that homosexuality was ‘membership within a particular social group’, one of the conditions required by the UN Refugee Convention for refugee status, and that the appropriate test of fear of persecution was one that assumed homosexuals would be living their lives openly.

The HRA altered the balance of power between courts, parliament, and the executive by thrusting courts into more areas of policy. As I have tried to demonstrate in this section, the result of the expansion of the judiciary’s sphere of influence into matters of national security and immigration has been the imposition of new international human rights constraints on the executive.

⁵⁴ [2010] UKSC 31.

⁵⁵ [2010] UKSC 31, at para. 96.

On the democratic nature of juridification

Juridification is the process whereby a political system comes to rely more on law and courts than ordinary politics as a mode of governance. Can this development in the UK be reconciled with parliamentary sovereignty and democratic theory? Critics often point to the turn toward courts for the resolution of many new issues and the resulting expansion of the sphere of influence of the judiciary as manifestations of juridification's undemocratic nature. In short, more governing by judges means less governing by the democratically elected bodies.

As explained in this chapter, juridification emerged in response to domestic and international changes, namely the rise of the modern administrative state and the UK's engagement with Europe. By expanding the judiciary's sphere of influence and giving rise to a more rights-based constitutional system than had ever existed before, these juridical influences put pressure on the principle of parliamentary sovereignty. Despite the historical scepticism towards rights-based constitutionalism and the preference for political protections of rights through parliament,⁵⁶ the emergence of a more rights-based political system with courts playing a greater role may not be as great a threat to democracy in the UK as some critics maintain.

The domestic and international forces that led to greater juridical influences on UK law and politics were subject of considerable debate in parliament. The legislation that resulted casts doubt on the critics' charge that these developments were engineered solely by courts without democratic input. The rise of judicial review of administrative action may have been inspired initially by courts, developed through the common law by judges in the 1960s who introduced new administrative law protections for individuals in their relationship with an expanded welfare state, but it ultimately received the imprimatur of parliament when it codified the judicial review procedure in the Supreme Court Act (1981).

Unlike the juridification in the field of administrative law, which was at first court inspired, the juridification resulting from the UK's engagement with Europe was inspired initially by parliament. Parliament made the commitment to join the EC when it enacted the European Communities Act, and it was subsequently affirmed and extended by courts. Each step in the UK's engagement with Europe, including also the decisions to ratify the ECHR and to accede to the various treaties of the EC/EU, was the result of democratic debate and collective action. In accepting the duties and responsibilities that came with membership in the Council of Europe and the EC/EU, the people's representatives in parliament effectively sanctioned the imposition of European law and regulations on matters that had previously been the subject only of UK law.

Not only did each development in UK law and politics which led to increased juridification receive democratic approval, but survey data indicate that courts are

⁵⁶ F. Davis, 'The Human Rights Act and Juridification: Saving Democracy from Law', *Politics*, 2010, no. 2, pp. 91-97.

trusted institutions in society. Based on data collected for the Standard Eurobarometer, trust in UK courts over time has been consistently higher than trust in parliament and trust in the government. In 2001, 49 percent of the people said they trust courts compared with 34 percent for parliament and 31 percent for government. In the most recent survey, trust in courts remained at roughly the same level (50 percent), but trust in both parliament and the government slipped to 27 percent and 28 percent, respectively.⁵⁷ If the trend toward increased juridification was unpopular, one would expect trust and confidence in courts to be low. But since public trust in the work of courts has been consistently higher than trust in parliament and the government, four decades or so of increased juridification in the UK does not appear to be eroding the public's confidence in courts. Juridification occurs and endures because the representatives of the people in parliament choose to have policies resolved by the formalities of law and legal decisions.

Conclusion

In *Mapping Juridification*,⁵⁸ Blichner and Molander identified five dimensions of the phenomenon. All five dimensions of juridification were evident in the UK case, but the one the authors call 'constitutive juridification', best captures the reasons for the development in UK law and politics. Constitutive juridification is the 'process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system'.⁵⁹ As I have tried to explain in this chapter, juridification in the UK was the result of three constitutive acts: the expansion of judicial review as a check on administrative action, the UK's engagement with Europe as a result of treaty obligations flowing from membership in the Council of Europe and in the EC/EU, and the rise of a new more rights-based constitutionalism after the enactment of the HRA (1998).

The trend toward increased juridification in the UK is not likely to be abated. Juridification became a mode of governance introduced in response to forces both domestic and international that arose in the second half of the 20th century: the rise of the modern administrative state and the emergence of a supranational governance framework for Europe. Over the past several decades, this development altered some basic features of the country's constitutional arrangements. Though some of these changes were inspired initially by courts, they all eventually received the imprimatur of parliament. As long as the people are satisfied with having more matters resolved by legal processes and legal formalities, juridification likely will continue into the 21st century.

⁵⁷ Standard Eurobarometer 55 (October 2001) (Annexes), pp. B.8-B.9; Standard Eurobarometer (Summer 2005), p. 42; Standard Eurobarometer 74 (February 2011) (Annex), pp. 44 and 51.

⁵⁸ L.C. Blichner and A. Molander, 'Mapping Juridification', *European Law Journal*, 2008, no. 1, pp. 36-54.

⁵⁹ *Ibidem*, p. 38.

The international dimension of juridification

VII. The influence of EU law on national legal systems

Matej Accetto

Introduction: Europe juridified

Relatively soon after its establishment, Walter Hallstein, the first president of the European Commission and a professor of law, called the original European Economic Community ‘a community of law’ (*eine Rechtsgemeinschaft*) and a ‘phenomenon of law’, by which he also wanted to signify that, lacking the proto-national substrate of people and territory familiar to the genesis of a classical nation-state, it was also a *creation of law*.¹ Constitutional debates ensued over whether this really rendered it different from the traditional state, in particular in Germany.² In contrast, no one seems to have argued over the second prong of Hallstein’s designation – that it was a community based on the respect for the rule of law. In fact, the more acute issue seems to have been the question of whether it is anything more than a legal community. Dieter Grimm, a former judge of the German Federal Constitutional Court (during the time of its famous *Maastricht-Urteil*³ judgment, denying unbridled supremacy of EU law over national orders), feared that without a social substrate giving it unity, the European Community could exist *only* as a legal community.⁴ Ulrich Everling, a former judge at the European Court of Justice, similarly pondered on the significance and role of the ECJ as a ‘reliable pillar of integration’, stating that the Community was a legal community without power which could ‘only be held together through the authority of law’.⁵

Partly, the significance of law for the operation of the European Union may have to do with an increasing significance of legal considerations at the national level as well: ‘The history of the modern nation-state can be described as a history of juridification. Law was to develop into one of the most important instruments of governance at the disposal of the welfare states which emerged in the industrial countries after the Second World War and satisfactorily attained such goals of

¹ W. Hallstein, *Die Europäische Gemeinschaft*, Düsseldorf and Vienna, 1974, pp. 33-39.

² A. von Bogdandy, ‘A Bird’s Eye View on the Science of European Law’, *European Law Journal*, 2000, no. 3, pp. 208-238, at pp. 226 and 227 and works cited in footnotes 120 and 121 in that article.

³ *Brunner v European Union Treaty*, BVerfGE 89, 155 (1993), [1994] 1 C.M.L.R. 57.

⁴ D. Grimm, ‘Does Europe Need a Constitution?’, *European Law Journal*, 1995, no. 3, pp. 282-302, at p. 289.

⁵ U. Everling, ‘Zur Begründung der Urteile des Gerichtshofs der Europäischen Gemeinschaften’, *Europarecht*, 1994, no. 2, pp. 127-143, at p. 143.

governance as security, prosperity, democratic legitimacy and collective identity.⁶

The important role for law could also stem from its (necessary) role in achieving social integration,⁷ even though it has long been shown that law partakes in the dynamic of integration and disintegration familiar to the European project.⁸ The notion that the construction of the European political community was largely built with the tools of legal integration and through the development of EU legal order has long since gained traction in the legal community.⁹

At times, it seems that the legal community has already prevailed on the literal weight of its arguments alone, evidenced by monthly shipments of meter upon meter of relevant professional literature to law libraries that could afford it,¹⁰ swamping any major new amendment to the existing EU legal order with some upon some of more-or-less expert commentary.¹¹

In that respect, it may not even be particularly important whether it was the Court of Justice that despite its 'integrative radicalness' managed to 'hegemonize' the interpretative community¹² or that a sufficiently homogenous legal community managed to homogenise all other interpretative communities,¹³ as any homogeneity in the legal community would have been greatly influenced by the ECJ judges and other members of EU institutions: their significance has been evidenced in the disproportionately high number of contributions (often by judges of the ECJ writing extra-judicially) published in leading European journals and promoting their understanding of EU law¹⁴ as well as their reputation as the vanguard in the development of the European legal doctrine.¹⁵ It is no coincidence

⁶ M. Zürn and D. Wolf, 'European Law and International Regimes: The Features of Law Beyond the Nation State', *European Law Journal*, 1999, 3, pp. 272-292, at p. 272.

⁷ J. Habermas, *Between Facts and Norms*, Cambridge, 2001, pp. 82-84.

⁸ See e.g. J. Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic', *Oxford Journal of Legal Studies*, 1996, no. 2, pp. 231-253, at pp. 140-152.

⁹ G. Gaja, P. Hay and R.D. Rotunda, 'Instruments for Legal Integration in the European Community – A Review', in: M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience*, Vol. 1.2, Berlin and New York, 1985, pp. 113-160, at p. 115 et seq.

¹⁰ See e.g. anecdotal information in Bogdandy, 'A Bird's Eye View on the Science of European Law', p. 209.

¹¹ Cf. J.H.H. Weiler, 'Amsterdam, Amsterdam', *European Law Journal*, 1997, no. 4, pp. 309-312, at p. 309.

¹² As per J.H.H. Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', *Journal of Common Market Studies*, 1993, no. 4, pp. 417-446, at p. 420.

¹³ As per H. Schepel and R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', *European Law Journal*, 1997, no. 2, pp. 165-188, at p. 169.

¹⁴ See data Ibidem, pp. 171-176.

¹⁵ See the list of authors whose contributions serve as contacts between national debates in Bogdandy, 'A Bird's Eye View on the Science of European Law', p. 212.

that the illustrative quotations at the beginning have been provided by lawyers and judges directly dealing with EU law. They were at the helm of those who tied their fate to the success of the European project and who continue to determine the development of its legal order. In 2003, Bo Vesterdorf, who was President of the Court of First Instance (now the General Court) at the time, offered this assessment of the importance of the ECJ: '[T]he Court of Justice's judicial activity has been of the most fundamental importance to the development of the Communities. It is its case law which has ensured that in the Communities, now the European Union, the full rigours of rule of law have been established at a Community level, as have been a number of principles of fundamental importance to the citizen whilst a high degree of unity and coherence in the interpretation and application of Community law throughout the European Union has, for the most part, been assured.'¹⁶

To a legal mind, it is easy to see that a coherent interpretation and application of EU law is essential to a proper respect for the rule of law and related fundamental principles of any legal order. However, it is also easy to understand why such integration through law could be met with national resistance, inasmuch as it was even aware of the Court's work, as described in an oft-cited passage from a seminal article published in 1981: 'Ticked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.'¹⁷

National legal systems Europeanised

Europeanisation, the adaptation of the law and institutions of member states to the demands of EU law and political realities of the emerging new polity, is a process that transcends the limited legal debate.¹⁸ Nevertheless, in line with the theme of this book, I will limit my discussion to the important role played in that respect by the European Court of Justice, which can be said to have succeeded in Europeanizing the national legal orders by 'domesticating' EU law.

In a way, the story of its transformative effect is epitomised in the two speeches given upon the swearing in of the Court's first judges in December of 1952. First, Massimo Pilotti, the Court's first president, put forward a straightforward understanding of the Court's role as the guardian of legality: 'The task imposed upon this Court is extensive and difficult – our task is to guarantee to the parties concerned, whether they be states, enterprises, or humble individuals, protection

¹⁶ B. Vesterdorf, 'The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities', *European Law Review*, 2003, no. 3, pp. 303-323, at p. 309.

¹⁷ E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, 1981, no. 1, pp. 1-27, at p. 1.

¹⁸ For a more general account from a political science perspective, see R. Ladrech, *Europeanization and National Politics*, Basingstoke, 2010.

against encroachment beyond those limits within which the organs of the Community must act.¹⁹

Then, a short statement was also given by Jean Monnet as the first president of the High Authority, in which he offered a glimpse of his greater political project: ‘The formation of the Court marks the supreme authority of law in the Community. [...] For the first time there has been created a sovereign European Court. I foresee in it also the prospect of a supreme federal European Court.’²⁰

At the very start, a more reticent approach seemingly prevailed, as evidenced in the first judgment delivered by the Court (after the first four cases were withdrawn) in 1954. To someone reading with eyes accustomed to more recent decisions of the Court, it is striking how faithfully the Court’s reasoning follows the text of the Treaty, and it includes the following passage on the Court’s restraint: ‘It is not for the Court to express a view as to the desirability of the methods laid down by the Treaty, or to suggest a revision of the Treaty, but it is bound, in accordance with article 31, to ensure that in the interpretation and application of the Treaty as it stands the law is observed.’²¹

In subsequent years (and decades), however, the Court’s jurisprudence betrayed a much more ambitious role. While it has not (at least not explicitly so²²) suggested Treaty revision, its jurisprudence was itself a means of revising the Treaty arrangements.

At times, it would extend the scope of certain Treaty provisions through interpretation, like for example in cases like *Meroni*²³ (with a wide interpretation of grounds for challenging the general acts of the High Authority), *ERTA*²⁴ (with a broad concept of a Community ‘act’ for the purposes of judicial review), *Cassis de Dijon*²⁵ (with a broad conception of measures having effect equivalent to quantitative restrictions of interstate trade) or *Marshall*²⁶ (with a broad conception of the ‘state’ for the purposes of directly invoking provisions of a directive).

At other times, it even seemed to directly override the text of the Treaty, like for example in cases like *Van Duyn*²⁷ (where despite the seemingly clear wording of the article 189 EEC (now article 288 TFEU) it extended direct effect to direc-

¹⁹ D.G. Valentine, *The Court of Justice of the European Communities, Vol. 1: Jurisdiction and Procedure*, London, 1965, p. 4.

²⁰ Ibidem.

²¹ ECJ Case 1/54 (*France/High Authority*) [1954].

²² Opinion 2/92, [1996] ECR I-1759, can also be read as an implicit instruction to the member states to amend the Treaty in order to enable EU’s accession to the ECHR. See K. Lenaerts, ‘Respect for Fundamental Rights as a Constitutional Principle of the European Union’, *Columbia Journal of European Law*, 2000, pp. 1-25, at pp. 1 and 2.

²³ ECJ Case 9/56 (*Meroni*) [1958].

²⁴ ECJ Case 22/70 (*Commission/Council*) [1971].

²⁵ ECJ Case 120/78 (*Cassis de Dijon*) [1979].

²⁶ ECJ Case 152/84 (*Marshall*) [1986].

²⁷ ECJ Case 41/74 (*Van Duyn*) [1974].

tives), *Hauer*²⁸ (where, with no basis in the Treaty, it established human rights as general principles of EU law) or *Les Verts*²⁹ (where it allowed actions to be lodged against the European Parliament despite the then article 173 EEC restricting this possibility to actions against the acts of the Council and the Commission).

This is not to say that such decisions of the Court were not substantiated or indeed often welcomed (at least retroactively) as a daring jurisprudential leap that had to be taken – we can hardly imagine EU law to have functioned all these years without a respect for fundamental rights, for instance, even if they were introduced in EU law by the judicial back-door as ‘unwritten principles of EU law’. However, the Court’s track record shows just how strong and important its role was in pushing integration further, rather than merely checking executive or legislative abuses of power.

All that is most evidently underscored by the fact that the two most significant doctrines of EU law, the pillars of its supranational character which have truly led to EU law being properly domesticated in the national legal orders and member states systems, as a consequence, thoroughly Europeanised, have been entirely the product of the Court of Justice. The story is well known and needs little repeating. First, in 1963 *Van Gend en Loos*³⁰ established the doctrine of direct effect, whereupon provisions of EU law capable of producing such effect can be directly invoked by individuals before their national courts and must be protected by national courts. Then, in 1964 *Costa v. ENEL*³¹ added the second prong by establishing a doctrine of supremacy, rendering any national law incapable of hindering the effectiveness of EU law. The first doctrine rendered EU law ‘law of the land’, the second made it the ‘higher law of the land’.³²

Together, they thus combined to make EU law a ‘new legal order of international law’, its supranational character making it not only different from either national or international law and thus, per paradigmatic account, autonomous,³³ but also an effective legal order that had to be observed. EU law was accordingly seen to leave behind the purgatory of an uncertain status inhabited by the classical public international law³⁴ and move up on the ‘legal-quality continuum’ between national law and international law.³⁵ One of the pre-eminent advocates general of recent times hailed the doctrine of direct effect as fundamental in ‘transforming the treaty from a classical instrument of international law into (or towards)

²⁸ ECJ Case 44/79 (*Hauer*) [1979].

²⁹ ECJ Case 294/83 (*Les Verts*) [1986].

³⁰ ECJ Case 6/62 (*Van Gend en Loos*) [1963].

³¹ ECJ Case 26/64 (*Costa/ENEL*) [1964].

³² J.H.H. Weiler, ‘The Transformation of Europe’, *Yale Law Journal*, 1991, pp. 2403–2483, at p. 1415.

³³ Shaw, ‘European Union Legal Studies in Crisis? Towards a New Dynamic’, at p. 245.

³⁴ See e.g. F.V. Kratochwil, ‘Is International Law “Proper” Law?’, *Archiv für Rechts- und Sozialphilosophie*, 1983, no. 1, pp. 13–46.

³⁵ Zürn and Wolf, ‘European Law and International Regimes: The Features of Law Beyond the Nation State’, p. 282.

the constitution of a quasi-federal organism'.³⁶ The consequence of this constitutionalization, however, is also the unstoppable influence of EU law on national legal systems that has been decried as an unstoppable 'incoming tide'³⁷ or even a destructive 'tidal wave',³⁸ leading to an ever greater expansion of EU competences in various fields unforeseen by the national legal systems that has often been described as 'competence creep'.³⁹

The force of EU law was not particularly hindered by critics⁴⁰ pointing out that its fundamental doctrines were nothing new to international law: direct effect was used by the Nuremberg Court already in the 1940s,⁴¹ as well as by American and British military tribunals,⁴² and it echoes an advisory opinion, albeit of a different era of limited government intervention in the economies, of the Permanent Court of International Justice in 1928 on the jurisdiction of the courts of Danzig.⁴³ Similarly, the doctrine of supremacy was said to have added nothing to *pacta sunt servanda*, the traditional principle of international law expressed in the decisions of the Permanent Court in the 1930s⁴⁴ whereunder municipal law cannot prevail over treaty obligations; other than, that is, a tribute to state sovereignty unlike that recognised by classical international law.⁴⁵ True as these critiques may be, they do not diminish the fact that member states show a much greater obedience to EU law than to international law,⁴⁶ or that the European Court of Justice exerts a much greater influence over national legal systems than its international-law counterpart, the International Court of Justice.

Perhaps, the prudent respect for state sovereignty so decried by Spiermann

³⁶ F. Jacobs, 'The Evolution of the European Legal Order', *Common Market Law Review*, 2004, pp. 303-316, at pp. 307 and 308.

³⁷ *Bulmer v Bollinger*, 2 All. E.R. 1226, 1231 (C.A. 1974).

³⁸ Lord Denning's introduction to G. Smith, *The European Court of Justice: Judges or Policy Makers?*, London, 1990, p. 8.

³⁹ See e.g. S. Weatherill, 'Competence Creep and Competence Control', *Yearbook of European Law*, 2004, pp. 1-57.

⁴⁰ See the forceful argument in O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order', *European Journal of International Law*, 1999, no. 4, pp. 763-789.

⁴¹ *US, France, UK and USSR v. Göring and others*, 1 Trial of the Major War Criminals 171, at 223.

⁴² Spiermann, 'The Other Side of the Story', pp. 767 and 768.

⁴³ Advisory Opinion on the Jurisdiction of the Courts of Danzig, 3 March 1928, PCIJ, ser. B, no. 15. See Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', pp. 9 and 10.

⁴⁴ Spiermann, 'The Other Side of the Story', p. 772. Spiermann adds that the same point was clearly expressed by article 27 of the Vienna Convention on the Law of Treaties. Although, having been adopted in 1969, VCLT cannot in itself be used as an argument against the novelty of *Costa v. ENEL*, except to the point that it can claim to merely having codified a pre-existing rule of customary international law.

⁴⁵ *Ibidem*, p. 781.

⁴⁶ Cf. Bogdandy, 'A Bird's Eye View on the Science of European Law', p. 221.

actually helped the ECJ in getting its jurisdictional claims and judicial authority recognised by the national actors. Based on the general duty of loyal cooperation that the Court recognised in former article 10 EC⁴⁷ (now explicitly enshrined as the principle of sincere cooperation in article 4 TEU), the Court of Justice developed a number of other general principles directed at national judicial authorities (such as the duty to disapply conflicting national provisions,⁴⁸ the duty to provide (and devise) remedies for the protection of EU rights⁴⁹ or the duty of consistent interpretation⁵⁰) to ensure that EU law is effectively and uniformly applied across the EU.

The acceptance, however, was not always smooth and without rebellion on the part of the national authorities, in particular the (highest) national courts as the foremost guardians of the national constitutional orders (and, sometimes, their own prerogatives). This story, again, is well known, from the limits on the limitation of Italian sovereignty (the *controlimiti*) imposed on EU law by the Italian Constitutional Court, to the long-standing saga of arm-wrestling over the issues of Treaty mastery and sovereignty of the national constitutional orders by the German Federal Constitutional Court in its many judgments from *Solange* to the judgment on the Treaty of Lisbon, as well as several other national examples,⁵¹ all evidence of a never entirely resolved jurisdictional struggle over *Kompetenz-Kompetenz*, the power to decide one's own jurisdictional limits.⁵² But even the rebellious national courts usually relented and accepted the effectiveness of EU law, and many (lower) national courts would go on to use the doctrines of direct effect and supremacy themselves.⁵³ The success of European supranationality may thus at least partly also rely on the legal (through the courts) and political (through individuals' rights) domestication of EU law.⁵⁴

With this, we are returned to the initial issue of locating the proper 'role of the courts'. Above, I have listed examples of the Court's active development of EU law through its jurisprudence, an important role whose onset largely coincided with (and might at least in some small measure also be a cause for, but subsequently

⁴⁷ See J. Temple Lang, 'General Report: The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10 EC Treaty', *Report for the XIX. F.I.D.E. Congress*, Vol. 1, Helsinki, 2000, pp. 373-426.

⁴⁸ ECJ Case 106/77 (*Simmmenthal*) [1978].

⁴⁹ ECJ Case C-213/89 (*Factortame I*) [1990].

⁵⁰ ECJ Case 14/83 (*Von Colson*) [1984], and Case C-106/89 (*Marleasing*) [1991].

⁵¹ A recent example was the decision of the Czech Constitutional Court of 31 January 2012, Pl. ÚS 5/12, declaring the judgment of the ECJ in Case C-399/09 (*Landtová*), June 22, 2011, to be *ultra vires*.

⁵² For a slightly dated account covering a number of national systems, see A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts: Doctrine and Jurisprudence*, Oxford, 2000.

⁵³ Jacobs, 'The Evolution of the European Legal Order', p. 311.

⁵⁴ Zürn and Wolf, 'European Law and International Relations: The Features of Law Beyond the Nation State', p. 283.

also a consequence of) the political crisis in mid-1960s over the majority decision-making leading to the political stagnation of the Luxembourg compromise. In 1988, at the time when the European political project was reinvented with the Single European Act, Hjalte Rasmussen, one of the pre-eminent critics of the judicial activism of the ECJ, wrote that '[n]o régime is likely to accept important political powers wielded by an isolated judicial corps free of political restraints.'⁵⁵ In 2004, Christiaan Timmermans, then a judge at the ECJ, took exception to this statement by claiming that ECJ was not free of political restraints: on the one hand, the Court could no longer escape the vigilant eyes of the national actors who might call for a political curtailment of its powers;⁵⁶ and, on the other hand, its interpretation of EU law has been influenced by the decisions of the national courts.⁵⁷ Notwithstanding the undisputed success and vast influence of the ECJ on the development of EU law, both arguments ring true, as I have attempted to show above – but they seem to reinforce Rasmussen's observation rather than disprove it. As I read Rasmussen's text, he was not claiming that some (political) curtailment of the powers of the Luxembourg Court can never occur, but rather wondered why, by 1988, it has not yet occurred. The fact that political proposals aimed at restraining the Court's active jurisprudence as well as a reinvigorated judicial dialogue with the national courts began during the drafting and upon adoption of the Treaty of Maastricht is thus best understood as Rasmussen's prediction coming true.

Despite its authority recently coming under such challenges from national quarters, however, the European Court of Justice continues to play a central role in guaranteeing the full effectiveness of EU law, and its main challenges of recent times may in fact be the direct result of its success – grappling with an ever-increasing caseload, it is faced with a constant struggle to adjudicate on open issues of EU law in a timely manner without jeopardizing the very principles of the rule of law, the protection of vested rights and legality that it is called upon to protect, and a more thorough reform of the EU judicial system (possibly involving a greater role for the national courts) may well be needed for that reason alone.⁵⁸

Be that as it may, this section has painted the general picture of the pro-integration role adopted by the European Court of Justice in chaperoning not only the general development of EU law, but also its relationship with the national legal systems. In the next, we turn by way of an example to an area that has largely been shaped or reshaped by the developments of EU law and the impact of the ECJ jurisprudence on national orders – the area of freedom, security and justice, with recent examples in the fields of Union citizenship and irregular migration.

⁵⁵ H. Rasmussen, 'Between Self-Restraint and Activism: A Judicial Policy for the European Court', *European Law Review*, 1988, no. 1, pp. 28-38, at p. 30.

⁵⁶ C. Timmermans, 'The European Union's Judicial System', *Common Market Law Review*, 2004, pp. 393-405, at p. 396.

⁵⁷ *Ibidem*, p. 397.

⁵⁸ For more on this see M. Accetto, 'The Past and Possible Futures of European Union Judicature', *Czech (& Central European) Yearbook of Arbitration*, 2011, pp. 3-22.

Testing the borders of Europe: from Union citizenship to migration

The ‘area of freedom, security and justice’ (AFSJ) is a compilation of a number of policies designed to regulate (and enable) the free movement of persons within the EU while ensuring their security: from substantive provisions on Union citizenship, free movement, asylum and immigration, to rules on judicial, police and customs cooperation, from measures against discrimination to initiatives to fight cross-border crime.⁵⁹ It combines the three policy areas which are evidently laudable on their own (who would not wish to have freedom, security or justice) but make for ‘slightly unlikely bedfellows’ when read in combination.⁶⁰ While formally introduced as AFSJ with the Treaty of Amsterdam as part of reorganizing the original pillar structure (with justice and home affairs) introduced at Maastricht,⁶¹ actions in this area were brought on by the success of the ‘single market project’,⁶² even if it now sometimes acts as a check of – or challenge to – the traditional economic freedoms.⁶³ In the following sections I provide a few pertinent examples of the delicate ways in which AFSJ is affecting national boundaries.

From *Casagrande* to *Carpenter*: Extending the limits of free movement

The first is a (comparatively) old tale of how the original concept of the free movement of workers has expanded over the years through the jurisprudence of the Court of Justice, thereby encroaching on areas of member state competence that should normally be considered to fall outside EU competence. Weiler called this ‘absorption’, a form of jurisdictional mutation,⁶⁴ and illustrates it with the judgment of the ECJ in *Casagrande*.⁶⁵ In it, the ECJ held that article 12 of the once-famous Regulation 1612/68 EEC on free movement of workers⁶⁶ entitled the son

⁵⁹ For a recent account, see S.D. Coutts, ‘The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration’, *Croatian Yearbook of European Law and Policy*, 2011, pp. 87-107.

⁶⁰ E. Sharpston, ‘The Area of Freedom, Security and Justice (AFSJ) in the EU: The Story So Far and (Some of) the Challenges Ahead’, in: E. Ligere (ed.), *Lincoln’s Inn Lectures on European Law and Human Rights*, London, 2010, pp. 101-127, at p. 105. Sharpston underscores the point about the terms’ innocuousness by mentioning that one of her colleagues rechristened AFSJ as the ‘Area of Peace, Love and Understanding’. Ibidem, p. 104.

⁶¹ N. Fennelly, ‘The Area of “Freedom, Security and Justice” and the European Court of Justice – A Personal View’, *International and Comparative Law Quarterly*, 2000, pp. 1-14, at p. 3.

⁶² Sharpston, ‘The Area of Freedom, Security and Justice (AFSJ) in the EU’, p. 108.

⁶³ N. Nic Shuibhne, ‘The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?’, in: C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law*, Oxford, 2009, pp. 167-195, at p. 194.

⁶⁴ Weiler, ‘The Transformation of Europe’, pp. 2438 et seq.

⁶⁵ ECJ Case 9/74 (*Casagrande*) [1974].

⁶⁶ Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19 October 1968, p. 2.

of Italian migrant workers, who was residing and attending school in Germany, to apply for a government educational grant despite the Bavarian law excluding all non-Germans except stateless persons and asylum seekers. EU law ‘absorbed’ national educational policy, even though the EU (or rather the Community, as it then was) had no competence in the area.⁶⁷

Such aggrandisement of EU law at the expense of national prerogatives continued, in particular with the broad interpretation of the concept of the ‘free movement of workers’ where each of the three terms was extended to the limits of its logic. *Casagrande* was premised on the idea that movement cannot really be *free* if migrant workers would have to leave their family members behind, and that their family members subsequently had to enjoy certain rights (such as access to education or social security) in the host state – the logic of the argument is morally sound, of course, but the practice of the concept showed (as in the *Casagrande* example) how it inevitably led to EU law impinging on national law beyond its delimited competences. Similarly, the concept of *worker* was early on held to be an autonomous concept of EU law⁶⁸ and was extended beyond the notion of a formal employment contract.⁶⁹ Finally, even *movement* was understood to apply in broad terms and covered the facts of *Carpenter*,⁷⁰ a case in which the person concerned did not relocate to another country, but was held to have exercised his free movement rights by occasional business trips abroad and by providing services to nationals of other member states.

Of course, all this was accentuated with the shift in the understanding of free movement rights from ‘workers’ to ‘persons’ and the adoption of Directive 2004/38/EC,⁷¹ and all the more still with the growing import of Union citizenship, to which I now turn.

From *Rottmann* to *Zambrano*: The ‘coming of age’ of Union citizenship

When introduced with the Treaty of Maastricht, the Union citizenship was largely seen to be a symbolic expression of an intended shared identity and its desired added value rather than a notion of substantive legal importance – its rushed introduction leading to tales of a PR stunt designed to ‘sell’ the ambitious project of the European Union to the member state nationals.⁷² Indeed, initially Union citizenship served as a – relatively bare-boned – political statement, more so than an autonomous legal source of rights for its bearers.

⁶⁷ Weiler, ‘The Transformation of Europe’, p. 2440.

⁶⁸ ECJ Case 75/63 (*Hoekstra*) [1964].

⁶⁹ See e.g. R.C.A. White, ‘Revisiting Free Movement of Workers’, *Fordham International Law Journal*, 2010, pp. 1563-1587, at pp. 1565-1568.

⁷⁰ ECJ Case C-60/00 (*Carpenter*) [2002].

⁷¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30 April 2004, p. 77.

⁷² J.H.H. Weiler, ‘To Be a European Citizen: Eros and Civilization’, *Journal of European Public Policy*, 1997, no. 4, pp. 495-519.

However, once the bare bones of the concept were assembled, inevitably flesh was then slowly added to them through the concrete issues springing up in judicial review, and the *legal* relevance of Union citizenship grew in several guises ranging from issues of name registration to electoral rights.⁷³ The traditional notions of free movement and prohibition of discrimination on the grounds of nationality were bolstered by reasoning⁷⁴ that Union citizenship should now suffice – in lieu of requiring a genuine link with the national community – to justify access to welfare rights.⁷⁵ The growing jurisprudence of the ECJ led to increasing criticisms that Union citizenship was pushed by the Court as a legal concept beyond its political foundations.⁷⁶

In 2010, the ECJ handed down the judgment in *Rottmann*,⁷⁷ a case concerning an Austrian national who moved to Germany following an investigation into alleged fraudulent activities, obtained the German nationality (thereby, under the rules still in force in Austria at the time, relinquishing his Austrian one), but had his nationality revoked when it transpired that he omitted to disclose the fact of being wanted in Austria in the course of the naturalization proceedings. As a consequence, he became a stateless person. As this also had the consequence of losing the (ancillary) Union citizenship, the issue before the Court of Justice arose as to whether EU law precludes such a revocation of a member state nationality. The ECJ held that it was not contrary to EU law, but the operative part of its judgment included a ‘sting in the tail’: while nationality competence in principle remains with the member states, they must exercise it in accordance with the (EU) principle of proportionality, which seems to go some way to actually reversing the relationship, making decisions on member state nationality dependant on the consideration of implications they will have for the enjoyment of Union citizenship rights.⁷⁸

Despite its strong implications, *Rottmann* still allowed member states considerable leeway and seemed to confirm that considerations of Union citizenship

⁷³ For an account of the development of EU citizenship with a particular focus on electoral rights, see J. Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, Cambridge, 2007; cf. H. de Waele, ‘EU Citizenship: Revisiting its Meaning, Place and Potential’, *European Journal of Migration and Law*, 2010, pp. 319-336.

⁷⁴ E.g. Opinion of AG Maduro in ECJ Case C-499/06 (*Halina Nerkowska*) [2008], para. 23.

⁷⁵ See discussion in A. Cygan, ‘Citizenship and fundamental rights’, *International & Comparative Law Quarterly*, 2009, no. 4, pp. 1002-1012, at pp. 1004-1008.

⁷⁶ N.N. Shuibhne, ‘Three Paradoxes of EU Citizenship’, *European Law Review*, 2010, no. 2, pp. 129 and 130, at p. 130.

⁷⁷ ECJ Case C-135/08 (*Rottmann*) [2010].

⁷⁸ For criticism along these lines, see H.U. Jessurun D’Oliveira, ‘Court of Justice of the European Union decision of 2 March 2010, Case C-315/08 *Janko Rottman v Freistaat Bayern* Case Note 1: Decoupling Nationality and Union Citizenship?’, *European Constitutional Law Review*, 2011, no. 1, pp. 138-149, at p. 139 and pp. 144-148.

would, like the long-standing understanding of Union rights in general, continue to be premised on the existence of some cross-border mobility.⁷⁹ After all, Mr Rottmann's troubles were directly predicated on his movement between two member states.

And yet, the following year these goalposts have also been moved. In *Zambrano*,⁸⁰ the Court of Justice had to rule on the question of whether Mr Zambrano, a Colombian national unsuccessfully seeking asylum in Belgium, nevertheless obtained the right of residence due to the fact that two of his children, born during the family's stay in Belgium, obtained Belgian nationality by virtue of the *ius soli* principle. The particular twist was that the two children in question have not yet exercised their freedom of movement, so the case could easily have been understood as a purely internal situation that does not invoke EU law. In a terse judgment,⁸¹ the Court of Justice nevertheless found that EU law prohibits a refusal of the right of residence in the case of an individual whose minor children depend on him and where it might force them to leave the territory of the Union and thus deprive them 'of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.⁸² While this pronouncement was left adequately ambiguous to leave us wondering about the exact scope of the Court's ruling,⁸³ and the Court has since taken a step back – albeit arguably not a big one⁸⁴ – in *McCarthy*,⁸⁵ it is a further move to consolidating the Union citizenship as a prominent source of fundamental rights and reshaping the economic community into a political union.

From *Kadzoev* to *El Dridi* and beyond: Tackling the restrictive immigration policies

The judgment in *Zambrano*, although it concerned the rights of an unsuccessful asylum seeker, hinged on the question of his children's possession of Union citizenship. Had it not been for the children, however, the issue would fall under the heading of irregular immigration, another area that has recently been at the forefront of EU's concerns as epitomised by the adoption of the 2008 Returns

⁷⁹ T. Konstadinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality from the Perspective of EU Citizenship', *European Law Review*, 2010, no. 3, pp. 401-414, at p. 404; similarly Shuibhne, 'Three Paradoxes of EU Citizenship', at p. 130.

⁸⁰ ECJ Case C-34/09 (*Zambrano*) [2011].

⁸¹ As is often the case in such delicate cases, the opinion of AG Sharpston was much more comprehensive and substantiated.

⁸² ECJ Case C-34/09 (*Zambrano*) [2011], para. 42.

⁸³ See a thorough analysis in A. Lansbergen and N. Miller, 'European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)', *European Constitutional Law Review*, 2011, no. 2, pp. 287-307.

⁸⁴ Thus A. Wiesbrock, 'Disentangling the "Union citizenship puzzle"? The McCarthy Case', *European Law Review*, 2011, no. 6, pp. 861-873, at pp. 867 and 868.

⁸⁵ ECJ Case C-434/09 (*McCarthy*) [2011].

Directive.⁸⁶ The Returns Directive and its drafters – including, since it was the first instrument concerning immigration to be adopted via the ordinary (co-decision) procedure, the European Parliament⁸⁷ – have been severely criticised for sacrificing the expected level of human rights protection at the altar of the desired restrictive immigration policies, aiming to remove illegal immigrants from the European Union.⁸⁸ Yet while the primary aim of the Directive may have been to facilitate cooperation in curbing irregular migration, recent cases before the ECJ show that it can also serve to provide greater procedural guarantees for the irregular immigrants concerned.⁸⁹

In the 2009 *Kadzoev* case,⁹⁰ the ECJ had to rule on the application of the Returns Directive to a case in Bulgaria, which at the time had already transposed the relevant provisions of the Directive (the deadline for the transposition of the Directive was December 2010), but which involved a long detention that originated before the transposition. Mostly because of operational difficulties in procuring his travel documents and effecting his removal, Mr Kadzoev had been detained for almost three years, whereas the Directive introduced a system under which the member states should either effectuate a timely return of irregular immigrants or regularise their stay, and as a consequence allowed detention to last up to six months and in exceptional reasons up to eighteen months. The Court, while trying to distinguish between detention for the purposes of return (given a somewhat undefined ‘reasonable prospect of removal’) and detention occurring in the course of asylum proceedings (governed by other EU and international legal instruments on asylum and not counted as detention under the Returns Directive), held that the maximum periods of detention for the purpose of removal, including those antecedent to the effectiveness of the Directive, may not exceed 18 months and that any detention whose objective is removal may not be based on national public policy or security grounds. Although merely following the text of the Returns Directive, the judgment was hailed as significant in that the first case involving the

⁸⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, [2008] OJ L 348, 24 December 2008, p. 98.

⁸⁷ D. Acosta, ‘The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly?’, *European Journal of Migration and Law*, 2009, pp. 19-39.

⁸⁸ For a critical analysis see A. Baldaccini, ‘The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive’, *European Journal of Migration and Law*, 2009, pp. 1-17.

⁸⁹ See to this effect e.g. G. Cornelisse, ‘Case C-357/09 PPU *Proceedings Concerning Said Shamilovich Kadzoev (Huchbarov)*, Judgment of the European Court of Justice (Grand Chamber) of 30 November 2009’, *Common Market Law Review*, 2011, pp. 925-945, at pp. 926-929.

⁹⁰ ECJ Case C-357/09 (*Kadzoev*) [2009].

Directive centred on the rights of the illegal immigrant.⁹¹

Similarly, in the 2011 *El Dridi* case,⁹² the Court of Justice had to review Italian legislation criminalizing non-compliance of irregular immigrants with a removal order requesting voluntary departure. Mr El Dridi was given such an order and, when later found on the national territory, sentenced to one year's imprisonment. On preliminary reference from the appellate court, the ECJ held that the relevant provisions of the Returns Directive (which had not been transposed) had direct effect, that they applied in the case despite the criminal sanctions exception provided by article 2(2)(b) (because the underlying premise for the removal was an administrative decision based on the very fact of irregular immigration), and that while criminal measures were allowed by article 8 of the Returns Directive as a tool to enforce the return decision, they must not be used so as to in effect frustrate its objective.⁹³ Unlike *Kadzoev*, the *El Dridi* judgment was thus actually premised not on the rights of the individual migrant, but on the primary objective of the Returns Directive, promoting an effective EU returns policy; nevertheless, however, the judgment is bound to have significant implications on member state policies, in particular in Italy which will need to revamp its use of criminal law in return and expulsion proceedings.⁹⁴

The story, of course, does not end there. New cases involving such⁹⁵ and similar issues on immigration and asylum continue to enter the Court's docket and its jurisprudence will grow accordingly. For instance, in a judgment from the very end of 2011,⁹⁶ the Court of Justice had to rule on the common policy on asylum whereunder, if a third country national has applied for asylum in a member state which the 'Dublin II' Regulation⁹⁷ does not indicate as the State responsible, the Regulation provides for a procedure for transferring the asylum seeker to the member state responsible. The facts of the joined cases concerned the inability of Greek authorities in dealing with its overloaded asylum system, which was alleged to have led to systemic deficiencies in the procedure and the reception condi-

⁹¹ See the comments in Cornelisse, 'Case C-357/09 PPU *Proceedings Concerning Said Shamilovich Kadzoev (Huchbarov)*', pp. 935 et seq.

⁹² ECJ Case C-61/11 (*El Dridi*) [2011].

⁹³ Ibidem, paras 45-49 and 55-60.

⁹⁴ For a more thorough analysis of the case and particularly its implications for Italy, see R. Raffaelli, 'Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case', *European Journal of Migration and Law*, 2011, no. 4, pp. 467-489.

⁹⁵ E.g. ECJ Case C-329/11 (*Achughbabian*) [2011], largely confirming the *El Dridi* reasoning.

⁹⁶ Joined ECJ Cases C-411/10 and C-493/10, (*N.S. v. Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*) [2011].

⁹⁷ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50, 25 February 2003, p. 1.

tions. As the ECJ held, although (or precisely because) based on the principle of mutual confidence, the Regulation precludes a ‘conclusive presumption’ that the member state responsible observes the fundamental rights of the EU, and that the transfer may not be effected where the authorities know that there is a real risk of the asylum seeker being subjected to inhuman or degrading treatment within the meaning of article 4 of the Charter of Fundamental Rights.⁹⁸

As per that apocryphal old Chinese curse, irregular immigrants live in interesting times.

Conclusion

There is no need, I imagine, for a lengthy conclusion summarizing the discussion, but we should conclude by posing ourselves one final question informed by it: how do we, in light of everything that has been said above, evaluate the process of juridification in – and beyond – EU law?

On the one hand, it is easy to understand reservations – or even outrage – at some instances of judicial aggrandisement and the dominant role in marshalling development of EU law sometimes adopted by the Court of Justice. Concerns over a politically or ideologically motivated high court are understandable and long known to national constitutional orders, in particular in common law systems with an accentuated role for the courts that often witness arguments on judicial activism⁹⁹ and the ‘political question’ doctrine.¹⁰⁰ Of course such concerns, while less frequently discussed, are even more present in the civil-law tradition of continental Europe. Ideally, we would wish our courts to apply the law rather than create it, to interpret legal provisions – if they must – without transforming their meaning. The European Court of Justice, by introducing a common-law mentality to a civil-law system,¹⁰¹ presents an uneasy challenge to this perception that is no longer hidden out of sight.

Yet on the other side, are we truly dissatisfied with (all) the results that came out of this judicial aggrandisement on the part of the ECJ? In the judgments cited above, the Court’s activism typically came to the rescue of individual rights, of (regular or irregular) migrants otherwise left at the mercy of restrictive or protectionist national policies. Would we prefer for the Court *not* to have developed the doctrine of fundamental rights as the ‘unwritten’ general principles of EU law, even if it almost did conjure it out of thin air at a time when the politically

⁹⁸ Joined ECJ Cases C-411/10 and C-493/10, paras 99 and 104.

⁹⁹ E.g. K.D. Kmiec, ‘The Origin and Current Meaning of “Judicial Activism”’, *California Law Review*, 2004, pp. 1441-1477.

¹⁰⁰ See e.g. R.F. Nagel, ‘Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine’, *University of Chicago Law Review*, 1989, pp. 642-669; even if there are claims that the doctrine has lost traction in recent years: M. Tushnet, ‘Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine’, *North Carolina Law Review*, 2002, pp. 1203-1235.

¹⁰¹ S. Goldstein, ‘The Odd Couple: Common Law Procedure and Civilian Substantive Law’, *Tulane Law Review*, 2003, pp. 291-306, at pp. 305 and 306.

stagnant community of member states was not able to introduce them via Treaty revision? Put differently: if we had the choice – and possibility – to either accept the entire body of law developed (rather than merely safeguarded) through the jurisprudence of the Court of Justice or to retroactively see it erased *in toto* from the law books and the concrete cases to which it pertained, which would we prefer?

Of course, the choice is not an all-or-nothing ‘take it or leave it’, and there is no need to accept all of judicial aggrandisement if we find some of it morally justified and commendable. But the moment we acknowledge that *some* of the Court’s activist jurisprudence has indeed been most welcome, we shift the premise of the argument: it can no longer be disposed of by denouncing the activism of the ECJ or the juridification of EU law as such, but becomes more focused on the debate about specific judicial outcomes and cases. Coupled with an appreciation of the flaws in the EU political process, it becomes clear that it may be necessary to view policy considerations in the EU, as well as the impact of EU law and related instruments of international law on national legal systems, as inevitably the outcome of an inter-institutional dialogue (or multilogue) in which the Court of Justice will play an important role, not just in the judicial dialogue with its counterparts in the member states, but also in relation to the political branches of government at the EU level, such as they may be. Some of its judgments may provide a check on political initiatives, others may encourage them or even effect them; some of them may be good, some of them dubious and some of them bad; but they all are and should remain hard to ignore.

VIII. International law as instrument or objective in itself?

Case study: juridification and the European Convention on Human Rights¹

Charlotte Maas

National interests in international law

International law has more specific limitations than law which comes about within the borders of a state. Once enacted (after political considerations and – in liberal democracies – after parliamentary approval), domestic law also applies to those who opposed the realisation of this law. International conventions come about on the basis of consent, that is, signing and ratification by the contracting states. International law only applies in the states that have approved the provisions in question. Compliance with this law can be monitored within the states that have agreed with these international provisions, but not in states which have not enacted them. Contrary to national law, international law generally lacks the political and judicial bodies, such as courts of law and an international police, to uphold and enforce the law.²

Despite the limitations in the nature and scope of international law, there are many thousands of conventions or bilateral agreements worldwide.³ As long as a contracting state appreciates the added value of an international agreement it will want to commit to it. If it does not recognise this added value, the state concerned will not wish to become a signatory to it. It may want to change the agreement or even withdraw altogether. And the greater the number of states participating in the negotiations, the more difficult it will be to arrive at an agreement, seeing as each of them wants to promote its own specific interests.

¹ This chapter is an adaptation of Wiebenga et.al., *Onbetwistbaar recht? Juridisering en het evenwicht tussen rechtsstaat en democratie (Indisputable Law? Juridification and the balance between the rule of law and democracy)*, Den Haag, 2012, pp. 101-121. Special thanks to Tom Zwart, professor of human rights at Utrecht University, for his ideas and guidance during the writing process.

² E.A. Posner, *The perils of global legalism*, Chicago, 2009, p. xiii.

³ In addition to international criminal law, conventions such as the International Labour Organisation, Conventions concerning working conditions or the UN Convention on the elimination of all forms of discrimination against women have arisen within the framework of the United Nations. The UN Framework Convention for Climate Change also belongs on this list.

On the one hand, international law lays down fundamental rights and liberties, the universal value of which is acknowledged by the states involved. On the other, we have to conclude that international law is an instrument for the objectives jointly laid down by the contracting states of these conventions – that is, only those that endorse the provisions. Elevating international law to a universal good may be at odds with the fact that international law also has an instrumental function. This chapter shows this on the basis of a case study of the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), ECHR.

Global legalism

The American Professor of Law Eric Posner⁴ refers to the development of a vision on international law which he calls ‘global legalism’. He states that some European and American politicians, civil servants and academics view international law as an objective in itself. Global legalists have dropped the idea that international law is based on the political will of sovereign states. On the contrary, it is supposed to transcend the interests of individual states.⁵

Posner mentions a number of characteristics of legalism. For example, in this vision, a powerful role is conferred on judges. Judges enjoy prestige because they are outside the political arena and are, therefore, deemed able to resolve conflicts impartially. Legalism is also associated with liberalism in the sense of the furthering of individual freedom. The liberal rule of law preserves citizens from the whims of political leaders and protects their liberty and autonomy. To put it in a nutshell, legalism represents the vision that ‘the law’ (irrespective of the content of the provisions) can enforce order and is the solution to political problems.⁶

Global legalists advocate broader jurisdiction for international courts. Domestic political institutions should be bound to international statutory obligations. According to Posner, they see the growth of international law as an unavoidable trend; a by-product of larger historic forces over which individual states have no control.⁷ Global legalism is an attractive theory in so far as it appeals to the enormous value that certain international conventions have in the opinion of many. However, this vision has a downside, too. Eric Posner calls global legalism ‘excessive faith in the efficacy of international law’.⁸

In the first instance, if we imagine international law as an objective in itself, we risk a situation in which the law holds the community in its grip. Regulations

⁴ Eric Posner works for the University of Chicago and is author of various books and articles on topics such as international, constitutional and administrative law. He is the editor of the magazine *Journal of Legal Studies* and studied at Yale College and Harvard Law School.

⁵ Posner, *The perils of global legalism*, pp. xi-xiii.

⁶ Ibidem, pp. 19-21.

⁷ Ibidem, pp. 24-25.

⁸ Ibidem, p. xii.

are drawn up to solve problems or to regulate dealings between people. A political procedure precedes it. International law does not differ fundamentally from this. The important thing here is the joint tackling of cross-border matters or provisions that express a shared vision. This is also preceded by a political procedure of negotiations, and law only becomes law if states approve it. In short, law is law as long as the political body does not change it. Some provisions are fundamental for our society and are, therefore, more difficult to change than others, such as constitutional provisions or conventions. But there are amendment procedures for the Constitution and conventions, too. If we fail to appreciate the instrumental character of law and see it as elevated above the political process instead, it could eventually get in the way of the community or international society instead of serving them. What do we do if new problems arise and the applicable law is inadequate? What do we do if opinions in society shift such that amendments to provisions are considered desirable? Lifted above the political procedure, law would bring democratic decision-making to a standstill. In the case of international law, things are even more likely to grind to a halt because conventions and international provisions are, generally speaking, difficult to change. This is usually only possible by means of a unanimous vote. The alternative – stepping down as contracting state of a convention – is perhaps rather too drastic. Posner writes: ‘Indeed, global legalists have long since dropped the conventional view that international law is based on the consent of states; international law transcends the interests of states and holds them in its grasp’.⁹

The second point that should be made regarding the elevation of international law concerns the neutrality of the judicature. The supposed neutrality of judges is relative. Just as the separation between executive and judicial powers is not absolute in practice – after all, administrators do have co-legislative powers – in practice, judges also have powers which are not strictly limited to administering the law. When judges apply statutory provisions, they also interpret these provisions – and they have the freedom to do so. The law thus comprises not only the provisions the legislature has enacted, but also customs and case law, the interpretation of the law in individual cases. Judges, therefore, also create law. The vaguer and more abstract the provisions are, as is the case in the Constitution or in international conventions on fundamental matters such as human rights, the greater this liberty – and power – are. It is not rare in actual cases for abstract provisions in the Constitution or a human rights convention to conflict with one another. It is then up to the judge to make the necessary choices to resolve the conflict. Judges may be the designated persons for this, but we must be aware of the fact that there are no controls on this power. And, once the judge has made a decision in a case, it is seldom subjected to any more discussion. After all, the judge has ‘administered the law’. Nonetheless, responding to a decision from the judge by silence conceals the fact that what has taken place was based on an *interpretation* of the law. The

⁹ Ibidem, p. xii.

judge could perhaps have used his or her freedom of interpretation to make other choices. In short, the judicature does, in a way, have society in its grasp, and that is, to a certain extent, desirable. It brings about order – and enforces it. Politicians sometimes like to make use of this, by allowing the judicature to decide on politically sensitive cases. But too much faith in (international) law can be dangerous if it means that the judge gets more and more freedom of interpretation – and thus unchecked power – or if we never question court decisions because we are no longer aware of the freedom that judges had when making their decisions.

Finally, there is a third critical remark that should be made with regard to the elevation of international law. Those who build their vision on faith in the intrinsic value of international law, will also have to explain why this belief is justified. Without answering the question of what legitimates law – it would be going too far to discuss this at the moment – it is good to point out that law is only found to be legitimate if a majority is of the opinion that it is ‘worthy’ to be law.¹⁰

We cannot, therefore, ignore the vision that international law may, indeed, lay down fundamental and universal values, but is, at the same time, also instrumental in nature. In essence, in a democratic liberal state under the rule of law, the law serves the interests of the citizens in that society. The law is the outcome of the debate on their vision of a just society. If, in the course of international negotiations, we are searching for an answer to the question of what a dignified existence is or what justifies violation of national sovereignty for the purposes of international safety, it is difficult to deny that it is *people* who are doing so. Disconnecting these standards and values from the actors in international negotiations seems a more or less superfluous trick to grant international law an elevated objective. We can simply assume that national interests are determined in a confrontation with conflicting standards – which are perhaps even purely intuitive or based on a faith in intrinsic dignity – without having to conclude that international law is intrinsically valuable. Sometimes national economic interests are indeed subordinated to human rights or to considerations in connection with sustainable development. Even so, this does not alter the fact that we can and should continue to speak in terms of interests. After all, in the process of negotiations, the matters in which government leaders and diplomats are most *interested* become obvious.

The paragraphs below will explain how the aforementioned view of international law, in which treaty provisions are placed more or less separately from political considerations and which Eric Posner describes as ‘legalism’, can be seen in relation to the ECHR. It shows the difficulties that arise from the dual character of the Convention’s provisions, on the one hand considered of universal value, but on the other hand regarded as instrumental for the internal policymaking in the member states.

¹⁰ Ibidem, p. 35.

High-profile cases at the European Court of Human Rights

The European Court of Human Rights in Strasbourg has been making a lot of noise lately with high-profile cases. High-profile, because its decisions are received in the contracting states concerned with a certain degree of indignation by the interested parties. For example, there was the *Lautsi/Italy* case.¹¹ This case was about the Italian order that there had to be a crucifix in all classes in publicly-run schools. This order was declared unlawful by the Court pursuant to article 2 of Protocol I to the ECHR. This article reads: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’¹² The objective of this provision is to protect parents from compulsive secularism from the state. In the *Lautsi/Italy* case, however, it was used as a principle of secularism. So, whereas the article was originally intended, and was earlier interpreted, as protection against state secularism, in *Lautsi/Italy*, the Court interpreted it more as an order to secularise. Political parties across the entire political spectrum in Italy, where crucifixes are seen by many as inherent to the Italian culture, expressed their incomprehension with regard to this decision.

In the *Hirst/United Kingdom* case (no. 2)¹³ in 2005, the Court ruled that the British practice of automatically depriving detainees of their right to vote is in breach of article 3 of Protocol I to the ECHR.¹⁴ The British legislature has so far refused to implement the Court’s decision in British legislation, which, in November 2010, induced the Council of Europe to ask the government of the United Kingdom to do so after all. A big debate followed in the British House of Commons. The British parliamentarian for the Conservative Party and Secretary of State for Justice Kenneth Clarke spoke on 26 and 27 April 2011, prior to the conference of the Council of Europe about the future of the Court, the following words: ‘The UK has always been a strong supporter of the European Court of Human Rights. But, at times, the court has been rather too ready to substitute its own judgment for that of national courts, without giving enough weight to the strength of the domestic legal system or allowing for genuine differences of national approach’.¹⁵

The cases on crucifixes in Italian classrooms and detainees’ right to vote in the United Kingdom sketch a picture of the Court in Strasbourg as one which

¹¹ ECtHR no. 30814/06 (*Lautsi/Italy*) [2009].

¹² Protocol I, article 2 European Convention on Human Rights.

¹³ ECtHR no. 74025/01 (*Hirst/United Kingdom*) [2005].

¹⁴ Protocol I, article 3 European Convention on Human Rights reads: ‘The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.’

¹⁵ <http://www.independent.co.uk/news/uk/politics/justice-secretary-warning-over-echr-judgments-2274962.html>, last consulted on 26 April 2011.

places itself outside the social reality of the contracting states. The large majority of Italians appear to attach value to the traditional crucifixes in Italian schools. In the United Kingdom, the decision which wiped the floor with the prohibition on detainees' right to vote, was perceived as a violation of national sovereignty and identity.

Not only was the judgment of the Court in both cases far removed from the prevailing opinions and customs in the contracting states in question but, in both cases, the Court interpreted the provisions in Protocol I of the ECHR in a somewhat obscure manner. As mentioned earlier, it is remarkable that a provision intended to protect citizens from the imposition of secularisation or another ideology or philosophy of life by the state, is interpreted as just the opposite: a secularism principle. After the controversy, this case was brought before the Grand Chamber of the Court. On 18 March 2011, the Grand Chamber ruled that the decision of November 2009 did not stand up to scrutiny. The Grand Chamber did not see any indoctrination or a violation of article 2 Protocol I in compulsory crucifixes in Italian classrooms. The *Lautsi/Italy* case was, thus, corrected. With regard to the British case on detainees' right to vote, the Court interpreted a broadly-formulated provision in such a way that the scope for the contracting states' policy-making is more limited than the United Kingdom itself had assumed. The Court allowed itself a great deal of freedom of interpretation in interpreting the provisions the way that it did.

The European Convention on Human Rights as a living document

The ECHR is viewed as a living document. It must be interpreted in the light of contemporary circumstances. The judges in Strasbourg apply a dynamic method of interpretation based on the thought that the ECHR must also be applicable to cases in circumstances which were not relevant at the time at which the ECHR was written. This might include matters relating to human rights that have arisen due to developments in, for example, information technology or medical science. Although the dynamic interpretation method can be functional, it also carries the risk that the judge him or herself shifts the objectives of the ECHR too much. A dynamic method of interpretation means a greater degree of freedom for the judge. It is possible that he or she uses this freedom to read objectives into the ECHR that were not placed in it by the legislator 60 years ago and which the contemporary legislator would not want to place in it today, either.

In addition to the dynamic method of interpretation, the Court also makes use of the consensus method when interpreting the ECHR. In brief, this method means that if, in a contracting state, the practice on which the Court has been asked to make a judgment deviates greatly from what is usual in other contracting states, this practice can be declared unlawful. In such a case, the more visible the consensus in the other contracting states, the greater the probability that the deviating practice in the contracting state in question will be declared unlawful by the Court in Strasbourg, even though the literal text of the ECHR does not say

anything about the practice concerned. In the case of *Dudgeon/United Kingdom* in 1981, a Northern Irish law in which homosexuality was still punishable, whereas in most contracting states homosexuality no longer constituted an offence, was declared inoperative.¹⁶ The consensus formed the basis for the designation of a European standard – homosexuality is not a criminal offence – whereupon the Northern Irish law could be abolished, even though this standard is not actually laid down in the text of the ECHR.

There are various disadvantages attached to the consensus method. Firstly, the prevailing interpretation in the majority of contracting states is not necessarily the most desirable from the human rights point of view. A consensus is, furthermore, a vague concept. It is not possible to say precisely when we have a consensus, or how many of the 47 contracting states have to have similar practices in order to be able to conclude that we have one. Moreover, if practices correspond in practically all of the contracting states, but a small number of contracting states have a practice which is diametrically opposed to the others, can we still call this a consensus? It is, in itself, desirable to regard the more than 60-year-old ECHR as a living document, so that it is also meaningful in the present day. But the method judges use in interpreting the ECHR is open to improvement.

The European Court of Human Rights' Workload

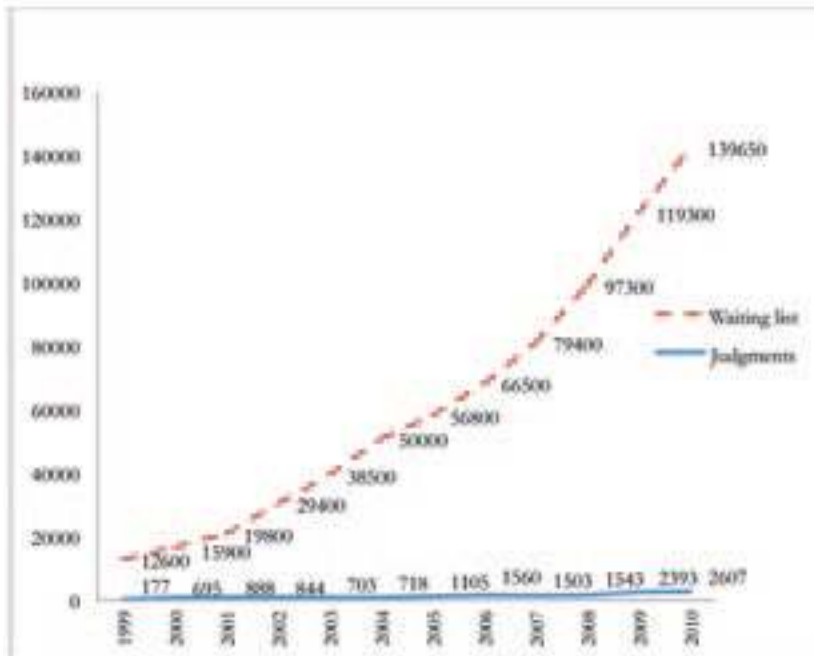
As a result of the number of cases pending, the Court is no longer able to give judgment within a reasonable length of time. At the end of 2009, there were 119,300 cases pending while, in the same year, judgment had 'only' been delivered 2,393 times.¹⁷ Legal protection itself is at odds with the enormous workload of the judges in Strasbourg. As from 1 June 2010, the 14th Protocol to the ECHR went into force, whereupon the method of operation of the Court was altered in an attempt to reduce the workload. The 'pilot judgment procedure' was, for example, established, enabling a single judgment for similar cases.¹⁸

¹⁶ ECtHR no. 7525/76 (*Dudgeon/United Kingdom*) [1981].

¹⁷ European Court of Human Rights, *Annual Report 2009*. Provisional edition, Strasbourg, 2010, pp. 11, 135-137, 147.

¹⁸ M. Lemmens, *De ondraaglijke werklast van de rechter (The unbearable workload of the judge)*, Amersfoort, 2009.

Number of cases per year in which judgment is delivered compared to the number of cases on the waiting list¹⁹



The ECHR as an objective in itself

At the end of his career in 2009, the British judge Lord Hoffmann criticised the working of the Court.²⁰ He objected to the way in which the broadly formulated, abstract provisions in the ECHR were applied to concrete situations. Lord Hoffmann's view is that although human rights, as philosophical concepts, are, indeed, universal values, their actual application is a national matter. Ultimately, it is the governments of sovereign states that have signed the ECHR. Pursuant to article 32 ECHR, it is true that application and interpretation belong explicitly to the jurisdiction of the Court, but, at a national level, the rights laid down in the ECHR have primarily to be interpreted in the making of policy for the problems

¹⁹ Joint judgements have been delivered since 2009; these are rulings which are applicable to groups of similar cases. In the graph: the 'judgments' line for 2009 and 2010 corresponds with the number of cases for which rulings have been given, irrespective of whether these rulings are contained in a joint judgement. European Court of Human Rights, *Annual Report 2009*. Provisional edition, Strasbourg, 2010, p. 12 and European Court of Human Rights, *Analysis of Statistics 2010*, Strasbourg, 2011, pp. 4 and 7.

²⁰ Lord Hoffmann is a retired judge who has worked in various capacities including those of Lord of Appeal in Ordinary, Law Lord and as a member of the Court of Appeal.

the national public administrations are trying to regulate.

Lord Hoffmann feels that it is unavoidable that even states which are equally dedicated to the abstract values of human rights apply these human rights in different ways in their national law and make different choices between human rights which, in practice, conflict with one another. Lord Hoffmann writes: 'Because, for example, there is a human right to a fair trial, it does not follow that all the countries of the Council of Europe must have the same trial procedure. Criminal procedures in different countries may differ widely without any of them being unfair.'²¹

The Court in Strasbourg has admitted, to a certain extent, that although human rights are universal at an abstract level, their application takes place at the national level. To this end, Strasbourg uses the 'margin of appreciation'. Differences in the application of the same abstract provisions by contracting states is accepted up to a point. Lord Hoffmann is of the opinion that the Court does not take this margin of appreciation far enough and that, moreover, it is used inconsistently and that there is no pure comprehension of this doctrine. In his farewell address, the former judge said: 'It [the Court] has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States.'²²

Lord Hoffman quotes the example of the *Hatton/United Kingdom* ruling from 2001.²³ After investigation and consultation, in 1993, the British government decided to change the night flight regime at Heathrow Airport. Objections from people living in the vicinity led to a 'judicial review' which laid down that the government had to demonstrate that it was justified in weighing up the economic interests of the country against the nuisance caused to those living in the area. Hoffmann commented that this is, in essence, a political consideration about a matter which, furthermore, on the face of it, is very remote from human rights violations, as those who drew up the ECHR in the years after the war had intended. Responsible politicians are elected (indirectly) to do this work. However, in the first instance, Strasbourg ruled that this was a case of a violation of the right to privacy and family life (article 8 ECHR). In addition, according to the Court, article 13 ECHR, the right to an effective means of redress, had also been violated because a judicial review is not an adequate means for people who complain that their human rights are being violated. The Grand Chamber of the Strasbourg Court did, it is true, reverse the ruling of the violation of article 8 ECHR, but the violation of article 13 ECHR was upheld. Apparently, the Grand Chamber also judged that a judicial review was an inadequate means of redress as protection against an administrative decision. What is more, the Grand Chamber did not deny that it was one of the duties of the Court to assess the substance of an administrative decision which had been arrived at in a democratic fashion, as had

²¹ Lord Hoffmann, 'The Universality of Human Rights', *Judicial Studies Board Annual Lecture*, 19 March 2009, p. 12.

²² *Ibidem*, p. 14.

²³ ECtHR no. 36022/97 (*Hatton/United Kingdom*) [2001].

this one.

So judicial power is growing at the cost of administrative, democratically legitimated power. And human rights themselves are *en passant* in danger of eroding. After all, with rulings such as *Hatton/United Kingdom*, an increase in nuisance from air traffic is seen as a violation of a fundamental human right, that is, the right to respect for one's private and family life. In many conflicts, and certainly when the ECHR, as a living instrument, is interpreted rather too broadly, there will always be some aspect which can be viewed as having something to do with human rights as broadly formulated in the ECHR. The question of whether noise nuisance can indeed be deemed a violation of a human right, requires discussion. This is not a task for the judge, but an eminently suitable task for politicians and the democratic legislature.

Recommendations and concluding remarks

The imminent loss of balance between the powers prompts us to consider ways in which the Court's methods can be improved; this section elaborates on three different ideas.

Firstly, we look for an alternative to a consensus as a criterion in human rights cases which arise in circumstances not covered by the ECHR. After all, it is difficult to lay down unequivocally when there is a consensus, which means that the judge has a great deal of liberty in determining whether this is the case. It is open to doubt whether the existence of a consensus is reason to read a standard into the ECHR at all. In a speech in 2005, Justice Scalia, an American judge at the Supreme Court, talked about the disadvantages of interpreting the American Constitution as a living instrument. He said: '[...] to read either result into the Constitution is not to produce flexibility, it is to produce what a constitution is designed to produce — rigidity'.²⁴ Like the Dutch Constitution, the American Constitution is a document which is more difficult to change than other types of laws. The Constitution is fairly rigid because it is intended as a foundation for the democratic rule of law. But it is not impossible to change it. If there is sufficient (in accordance with the standards stipulated) political will to do so²⁵, it is within the power of the legislator to change the Constitution. If, however, construing the Constitution as a living instrument, the judge reads a right into it, he or she may deprive the legislator of this flexibility and the Constitution of its rigidity. The same can be said of the ECHR.

An alternative to the consensus criterion is to revert to the original meaning of the provision when the ECHR was drawn up. Justice Scalia advocates this method, which is known as 'originalism'. When determining the original meaning of the provisions, he uses reports of parliamentary discussions which took place at

²⁴ http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm, accessed on 1 June 2011.

²⁵ For the Constitution of the Kingdom of the Netherlands, these have been laid down in sections 137-142.

the time they were drawn up. In this way, the judge uses a method of interpretation, based on verifiable sources, which is more transparent and more objective than when he bases his ruling on a consensus which is difficult to establish. This method reduces the risk that the judge interprets provisions differently from how they were intended and that he reads rights into the ECHR about which nothing has been said.

By investigating the original meaning of the provisions, the judges in Strasbourg would also be better able to judge whether the Court is the designated institution to rule on particular cases. If so, they would then be able to apply the original meaning to new developments. Originalism is an approach to the provisions of the ECHR which in no way excludes the application of the ECHR to new circumstances.

A second way to restore the balance between the powers is a more active involvement of politicians. The Committee of Ministers of the Council of Europe can pronounce on the meaning of the ECHR in resolutions.²⁶ The Court should involve such documents in the interpretation of the ECHR and has done so in the past. Agreements laid down between contracting states on the content of provisions do, after all, have the status of an amendment in accordance with ECHR law. Besides this, the ECHR could be enhanced by political and academic circles throughout Europe. Minutes of discussions held by these groups could become a handbook for judicial interpretation. This could also be facilitated by the Council of Europe.

A third way to restore the balance between the powers in Strasbourg would be to apply the margin of appreciation, as described by Lord Hoffmann, more strictly. The Court should give the contracting states more leeway to elaborate on the details and nuances of national legislation. The ECHR is a suitable standard with which to measure the agreement of national legislation with human rights, but we must not ignore the fact that it was the contracting states themselves which drew up the ECHR. The ECHR is, in the first place, an instrument which, at the political level, is a standard for the contracting states. If the Court makes too many pronouncements on details of national legislation, the ECHR changes from being a useful instrument into an objective in itself. This could lead to more social dissatisfaction over the ECHR and even the risk of the ECHR being undermined.

In this chapter we have shown how a certain view of international law, in which treaty provisions are placed more or less separately from political considerations and which Eric Posner describes as 'legalism', can be seen in relation to the ECHR. One could notice a process of juridification in the sphere of national policymaking in member states of the European Convention on Human Rights. We have also seen the difficulties that arise from the dual character of the Convention's provisions, on the one hand considered of universal value, but on the other

²⁶ 'Bied dat mensenrechtenhof weerwerk' ('Stand up to the European Court of Human Rights'), *NRC Handelsblad*, 17 January 2011.

hand regarded as instrumental for the internal policymaking in the member states.

The current issues around the European Court of Human Rights cannot be reduced to a simple discussion on powers. The Court needs freedom of interpretation to be able to do its work. The important thing is, therefore, not whether, but how, it interprets the ECHR. Politicians do not have to stay silent about the Court's interpretations. The ECHR is not an objective in itself, any more than other international conventions are. It is a policy instrument – and an important one at that. Politicians can, therefore, discuss the required interpretation of the ECHR in the Committee of Ministers of the Council of Europe. In any case, politicians should, indeed, deem a ruling by the Court as the end of a judicial process, but not as the end of a democratic process. Politicians and ministers of member states are allowed to discuss judges' rulings – and should do so more often.

Conclusion

IX. Overview and general concluding remarks

Charlotte Maas

The word ‘juridification’ is used for divergent developments in society in general and in the political decision-making process in particular. We may encounter the term as a reference to the growing role of the judiciary as compared to the legislature, when there is great room for judicial interpretation, or the court in itself assumes substantial leeway, which then means the court will have increased political influence. ‘Juridification’ is also applied to illustrate a trend in society as a whole, which means the law will regulate an increasing amount of a variety of activities, either or not through intervention by the court, which previously were not regulated through the law. We may think here of settling quarrels between citizens or laying down all sorts of agreements. These are activities which need not necessarily be regulated through the law; consultations between parties may suffice in some cases. Juridification also refers to a process where, to an increasing extent, citizens regard themselves as parties having legal personality, as persons enjoying certain rights.

This book is in keeping with the definition of ‘juridification’ as set out by Lars Blichner and Anders Molander in their paper *What is juridification?*.¹ It is a type of umbrella term for various developments and trends in society and politics. The term has hardly been defined for this book and purposefully so. The objective of this book is not to determine the ‘true’ definition of juridification nor does it aim to show how the different developments and trends the term refers to mutually relate to one another. In the first instance, this book is meant to gain insight in which way juridification is present in the various member states of the European Union. Subsequently, all contributions revolve around the pivotal question as to what extent juridification in its divergent forms constitutes a possible risk to the legislative, executive and judicial powers in the democratic European states under the rule of law.

In his case study of *Spain*, Pablo Castillo Ortiz shows that a form of juridification of the political process could be observed in the ratification of both the Treaty of Maastricht as well as the Treaty of Lisbon. At the same time, it may also be stated that a process of politicization took place within and surrounding the Spanish Constitutional Court, which for both treaties provided a response to the

¹ L.C. Blichner and A. Molander, ‘What is juridification?’, *Arena Centre for European Studies Working Paper*, 2005, no. 14, p. 5.

question as to whether the Spanish Constitution represented an impediment for ratification of these treaties. This may be considered as a form of juridification of a political process and, as such, of an impairment of the strict distinction between the legislative and judicial power. However, Castillo Ortiz points out that in many modern democracies it is not unusual to award prominent positions to constitutional courts in political processes, particularly for the purpose of protecting the principles of the separation of powers as these have been arranged in detail in constitutions.

According to Castillo Ortiz, politicization occurred because the Spanish government indirectly controlled the activities of the constitutional court, for instance through its manner of questioning the Court. Moreover, the judges here proved to have strong ties with political parties. The author suggests that politicization of judicial institutions and juridification of a political process are two sides of the same coin. He illustrates that not so much a strict separation of powers deserves protection, as does the balance between the powers.

The Constitutional Court of another EU member state, *Slovenia*, has been discussed by Matej Accetto. In the nineteen-nineties, the Court in this young democratic state under the rule of law, was balancing between judicial activism and judicial curtailment. After the country's accession to the EU in 2004, the Slovenian Constitutional Court was forced into finding a new role in the constitutional order, next to the institutions of the European Union. Accetto believes that in a certain sense, the Court has by now reached its functional destination as guardian of the Slovenian Constitution. The Court draws the outlines of the constitutional order and sets the dividing line between the law and politics.

Eglė Mauricė-Mackuvienė describes a process in *Lithuania*, where regulatory authorities are inclined to implement the 'letter of the law' in too strict a manner, resulting into organisations being obstructed in their economic activities. This might be referred to as a negative consequence of juridification. Regulators need to acknowledge that their objective is not to conceal themselves behind the literal formulations of the law, but rather to advance and strengthen the economic process. Mauricė-Mackuvienė advocates clear objectives, principles and priorities, based on which regulatory authorities may perform their activities. Examples of these principles are proportionality, non-discrimination, transparency and equal treatment. According to the author, juridification may have a positive consequence if these principles effectively serve as principles for regulatory activities and are considered as protection from corruption.

In *the Netherlands* juridification may be considered a social trend: the tendency to lose sight of the instrumental function of the law and to focus on existing laws, regulations and court judgments instead when looking for solutions to social, political or private problems. In the Netherlands there also is some form of

juridification, which is evident in relation to regulators, where the administrative and democratic assessments are taken over by an apolitical regulator. With a view to maintain the balance between the legislative and executive forces, Charlotte Maas pleads for more dialogue between the chairs of the various regulatory authorities and the Dutch parliament.

In the Netherlands, a growing role is also noticeable for judges in matters on which extensive democratic debates have been spent already. In part, this is provoked by the legislator itself, when a court ruling fills the void left by poor quality legislation. In part, however, the court in itself assuming too much leeway in interpreting legislation cannot be ruled out, particularly when the interpretation of broadly formulated international treaty conditions is concerned. For the protection of the balance of power, parliament should be more active in starting a debate on court rulings. Indeed, these may mean the definite end of a legal dispute, but they need not be the end of a public and political discussion on the central theme of the matter. Moreover, for the benefit of the balance between Dutch parliament and the legislative and executive powers in the European Union, Dutch members of parliament might assume a more active role in the drafting of European legislation and regulations.

The phenomenon ‘constitutive juridification’ in the *United Kingdom* has been discussed by Michael Tolley. It is about the ‘process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system.’² Tolley points out three causes of this form of juridification in the United Kingdom: the expansion of judicial review as a check on public administration, the obligations of the UK ensuing from the Council of Europe and EU memberships and the rise of ‘right-based constitutionalism’ following the Human Rights Act taking effect. The author shows that juridification is a development that has changed public administration and the ‘constitutional arrangements’ of the UK. The rise of a supranational administrative framework in Europe has enhanced this development.

The manner in which international human rights treaties and the European unity are (or have been) driving forces behind juridification, has been elaborated on in the chapters *The influence of EU law on national legal systems* and *International law as instrument or objective in itself?*, a case study on the European Convention on Human Rights. These chapters distinguish themselves from the rest of this book in so far as that a thematic approach has been adopted here, rather than a country study. Juridification, as it is depicted in these chapters, may be construed as a trans-boundary phenomenon.

In *The influence of EU law on national legal systems* Matej Accetto writes that concerns over a politically or ideologically motivated European Court of Justice are understandable. Ideally the Court will only apply the law and interpret the

² L.C. Blichner and A. Molander, ‘Mapping Juridification’, *European Law Journal*, 2008, no. 1, pp. 36-54.

legal provisions without transforming the meaning thereof. However, through far-reaching rulings in its jurisprudence, the European Court of Justice has sometimes contributed to the direction of the European process of integration instead. Accetto questions as to whether we are actually discontent with all the results that emanated from the active or activist Court. Obviously, we are not required to accept every form of judicial activism, but from the moment we acknowledge that the Court in some rulings has been a welcome addition to the European legislator, we can no longer consider the judicial activism of the ECJ (the juridification) as a completely inappropriate development. Given the balance of powers, one ruling will be considered more appropriate than the other. However, argues Accetto, a total disregard for an active or activist Court is no option.

In the chapter *International law as instrument or objective in itself?* Charlotte Maas has done a case study of the question in which way broadly formulated treaty conditions, such as those of the European Convention on Human Rights, may turn out to be too restrictive for the national legislator. For the balance of powers problems arise from the dual nature of human rights provisions, which on the one hand are presumed to have universal value, yet on the other hand are 'merely' instrumental in policy-making. Eventually, these must indeed be respected in specific policy-making on a national level, but the purpose of the policy measures often lies beyond human rights in itself, for instance in regulating matters such as immigration, funding for higher education or social security. The Strasbourg Court requires freedom of interpretation in order to perform its duties. Without the Court, the Treaty would be a dead letter, offering no protection of human rights to citizens, something which is very much-needed in all parts of Europe. This does not mean, however, that politicians may not react following a court ruling which obstructs a democratically realised national policy measure. A ruling by the Court constitutes the end of the specific judicial process, where a conflict between citizen and state is resolved, but said ruling does not need to constitute the end of a democratic process, in which the scope of human rights provisions can and must be discussed.

As long as the public is content with matters being solved by judicial processes and formalities, it may be expected that the trend of juridification will continue in the 21st century, according to Michael Tolley. From the contributions in this book it appears that juridification in itself is a neutral development, which may have both positive as well as negative consequences pertaining to the balance of powers. We determine that juridification in a certain respect may be a continuation of, rather than a threat to the democratic state under the rule of law and the balance of powers. The development of the role of the Constitutional Court in the young democracy of Slovenia is an example of this. The chapter on Lithuania shows that regulatory authorities, form a protection against corruption, provided they operate in accordance with judicial principles such as proportionality, transparency and equal treatment. As such, juridification may be considered a positive development.

However, when the court or apolitical regulatory authorities gain more influence over the way in which matters of a political nature are decided, juridification may also put the balance of powers at risk. In case national legislation, which is based on a fully fledged democratic process, is obstructed by the European Court of Human Rights, indignation over this is understandable. It may then possibly be established that the instrumental function of the law is lost sight of, whilst its guarantee function is overrated. As Matej Accetto suggests, it is not an option to label a Court in its entirety as undesirable, because it has been too activist in certain cases (in the eyes of some). In other cases we regard the very same Court, the ECJ, the Strasbourg Court or the national court as the indispensable protector of civil rights. However, some cases will continue to require a democratic debate, even after the court's ruling. In such cases, politicians should not feel restrained to conduct such debate, for in the end all powers of the Trias Politica bear the responsibility to maintain the balance between legislator, judiciary and executive power. This is not a task exclusively vested in the court.

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About the European Liberal Forum

Founded in the fall of 2007, the European Liberal Forum, asbl (ELF) is the non-profit European political foundation of the liberal family. ELF brings together liberal think tanks, political foundations and institutes from around Europe to observe, analyse and contribute to the debate on European public policy issues, as well as the process of European integration. These objectives, it is believed, can be achieved through education, training, research, and the promotion of active citizenship within the European Union.

The role of the European Liberal Forum is to host European conferences, seminars and workshops, issuing publications and conducting studies on policy issues of liberal interest. Of particular interest is the active participation of young European citizens. The ELF is ambitious in informing and involving the public in the construction of a united European democracy.

<http://www.liberalforum.eu/>



About the Prof.mr. B.M. Teldersstichting

The Prof.mr. B.M. Teldersstichting (Telders Foundation) is the Dutch liberal think tank, affiliated to the political party VVD. The foundation is named after Benjamin Telders, a lawyer and philosopher who was chairman of the Liberal State Party (a predecessor of the VVD) and who during World War II was arrested by the German (nazi) occupiers; he died shortly before the liberation in concentration camp Bergen-Belsen. The Telders Foundation was founded in 1954 as a completely independent think tank. In 1972 the Telders Foundation established a link with the VVD, but as organisation and in policy formulation the think tank remained independent.

The Telders Foundation publishes policy papers and books on all kind of political and societal topics, liberal philosophy and history. Besides several conferences, the Telders Lecture is held annually. This lecture aims at stimulating public debate in the Netherlands with profound liberal insights from an authoritative scientist or politician from abroad. The quarterly journal of the Telders Foundation is *Liberaal Reveil* and every two months the electronic newsletter *Vrijpostig* is being published online.

The Telders Foundation does not choose for one exclusive variant of liberalism, but the classical thinkers of liberalism always appear to be an important source of inspiration. For us, the freedom of the individual is most fundamental. Therefore, we consider it essential that a free and democratic society, in which there is no accumulation of power and public power is always democratically controlled and legitimised (checks and balances), will survive. It is not the American type of liberalism (that is: as it has developed in the latest decades) that we embrace, but a liberalism that is vigorously opposed to socialism, religiously based politics and other kinds of communitarism.

<http://www.teldersstichting.nl/>



About Inštitut NOVUM

The NOVUM Institute for strategic and applicable research is a non-profit, educational and policy research organisation established in Ljubljana, Slovenia. Its aims include support to political decision-making, democracy promotion, to foster public dialogue, communicating new policy ideas and developing new methods and approaches in political advertising.

The Institute pursues high standard of research and discourse. Through its activities which range from conceptual studies, public education, to administrative and technical assistance, the Institute contributes to the stock of knowledge available to political parties, policy-makers and the interested public in Slovenia and abroad.

We promote and protect liberal values which include democracy, the rule of law, good governance, respect for and protection of human rights, economic and social development, and sustainable development.

The Institute disseminates its research findings through its website, the media, publications, seminars, round tables, workshops, forums and conferences.

The Institute is registered as an NGO under the Slovenian law. Its board consists of 13 members with economic, political, public and scientific background, which makes Novum a powerful advocacy group.

<http://www.inovum.si/>



About the VŠĮ ‘Atvira visuomenė ir jos draugai’

Who we are

Founded in 2005, the VŠĮ ‘Atvira visuomenė ir jos draugai’ (Open Society and its Friends) is a non-profit organisation which aims to spread liberal ideas and values, stimulate the growth of the open civil society, extend and deepen democratic traditions, promote citizenship, and strive for more private sector involvement in the public administration.

Apart from the implementation of various projects and initiatives, we mainly aim to provide an opportunity for other people and organisations to reach their mutual goals together. Therefore, our organisation is often a supporter of ideas and initiatives as well as a partner in projects. However, we always hold on to our goals and before we consider participating in any initiative, we ask ourselves the following questions:

- Will it spread the liberal ideas and values?
- Will it promote citizenship?
- Will it strengthen a culture and consciousness of democracy?
- Will it encourage public and political activity?
- Will it build up political intelligence?

What we do

The organisation is continuously involved in dispersing liberal ideas and their implementation. With our goals in mind, we initiate research on important social, political and public issues, create concepts for liberal reforms, organise conferences, discussions and public lectures for society, carry out opinion polls, and finance the publication of academic literature.

<http://www.atviravisuomene.lt/>



About the Friedrich-Naumann- Stiftung für die Freiheit

The Friedrich Naumann Foundation for Freedom – established in 1958 by the first president of the Federal Republic of Germany, Theodor Heuss, and a group of committed liberals – is an independent, non-profit, non-governmental organisation that is committed to promoting liberal policy and politics in Germany, Europe and worldwide. Based in Potsdam, Germany, the foundation has seven offices in Germany and more than 40 offices worldwide through which it promotes its core concepts such as the protection of human rights, civil society, market economy, free trade and rule of law.

Over the last 51 years the activities of the foundation have expanded beyond their original civic educational task in the young Federal Republic of Germany. A scholarship programme, a think tank (the Liberal Institute), a press and media department was established and the engagement in international politics became an important part of the foundations assignments. Together with our partners, which include liberal political parties as well as non-governmental organisations, we support the development of constitutional and democratic institutions as well as the civil society.

Aims and methods

The main objectives of our international work are: to spread liberal ideas and concepts in all political areas; to strengthen civil society, particularly liberal organisations and parties; to bring into German political discussion liberal approaches and solutions from abroad. Our activities are as varied as our cooperation partners or the regions we work in. They are based on long-standing experience and are constantly evolving.

Political education aims at helping increasing numbers of people to become involved in political and social processes. Political dialogue offers politicians and civil society representatives the opportunity to exchange experiences, learn from each other and find solutions to conflicts. Political consultancy provides liberal political decision-makers with skills, knowledge and experiences that are important for strengthening political parties and implementing liberal policies.

<http://fnf-europe.org/>

