French Presidency of the European Union - Conference of Presidents of Supreme Courts of Member States of the European Union

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Introductory note for the workshop organised by the Constitutional Council "Courts faced with new public health, technological and environmental challenges"

INTRODUCTORY ELEMENTS

*The "European jurisdictional system" is the group formed by the national jurisdictions and the European courts themselves (European Court of Human Rights, and the Court of Justice of the European Union). It is unified through a wide variety of ties between its varied jurisdictions.

The courts within the European Union as a whole share a specific mission of protection of a large common foundation of fundamental rights. To accomplish this, they use their own diverse mechanisms in order to ensure the convergence of case law to allow them to provide this protection. Moreover, within the European Union, they share the responsibility of uniformly applying European Union law, within the framework defined by Article 4 of the Treaty on European Union, under the terms of which "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.*"

In this system, court dialogue is carried out through various channels. Ordinarily this dialogue can take place with or without words.

The ties between the courts within the European Union are therefore very strong, but the national jurisdictions still possess their specific differences. Each of these national jurisdictions serves to ensure compliance with a certain number of specific national rules. The architecture of the national jurisdictional systems and, within them, the characteristics of the duties of the jurisdictions can vary significantly, a result of the institutional history of each of the Member States.

Consequently, to provide an image of this "European jurisdictional system", we are tempted to use the expression provided by President Andreas Vosskuhle in January 2014, during the solemn hearing to mark the beginning of the judicial year for the European Court of Human Rights, who defined the system as strongly resembling a Calder mobile. Even though this mobile has a fixed purpose, it still is a mobile that is constantly in movement, with its component elements' movements evolving together.

*If structural ties in this way coordinate the courts, making this mobile move like a living being, it could be interesting to consider (in a more contingent manner) how certain current challenges that the courts face contribute to consolidating these ties, or if the challenges impact these ties in some way. This could be patterned after the way the Member States and European societies themselves face these challenges.

Without claiming to be exhaustive, the public health, technological and environmental challenges are part of the considerable challenges of our day, and their dimension exceeds the national scope.

There again, each court understands these challenges, as part of its duties, in the light of a certain diversity of standards. The intensity with which European Union law understands these challenges varies significantly from one domain to another: it is stronger in the environmental area or in the area of protection of personal data, than in the area of bioethics or, as was recently illustrated in the Covid-19 crisis in the area of public health. This same crisis showed that solutions provided at the national level can vary significantly, at least in the short term, when facing these types of difficulties.

It does seem that these three challenges foster in European citizens and litigants new expectations of the European courts as a whole, as well as of political authorities. This is evidenced by increased litigation in these three areas.

Therefore, while calls on the court system varied in intensity from one Member State to the next during the current public health crisis, it now appears that many jurisdictions within the European Union are being called on, specifically in the domain of fundamental rights, to rule on very adjacent questions concerning the legality of restrictions on public freedom with the justification of contributing to the goal of protecting public health or, more recently, concerning vaccination requirements. In its 2020 annual Rule of Law Report, the European Commission saw the pandemic in this respect as "a stress test for rule of law resilience" within the European Union[3]. The 2021 edition of this report showed that the national systems, overall, were very resistant when faced with this public health emergency[4].

Concerning the technological dimension, it is striking to note that, even when legislators constantly seek to regulate the effects of scientific advances, such as laws relating to bioethics, the courts are often called on to decide questions that these legislative texts had not yet entirely understood due to the rapidity of advances in technology.

[3] Communication from the European Commission COM(2020) 580 final of 30 September 2020, "2020 Rule of Law Report", p. 6.
[4] Communication from the European Commission COM(2021) 700 final of 20 July 2020, "2021 Rule of Law Report", conclusion.

Concerning environmental challenges, in 2019, Constitutional Council President Laurent Fabius addressed the question, during the solemn hearing to mark the beginning of the judicial year of the European Court of Human Rights, of the role of guardian of fundamental rights, pointing out that *"in protecting the environment, we are also protecting human rights, namely the rights to health, safety and, beyond these, human dignity. The European Court of Human Rights has understood this very clearly. Since its 2009 judgment in the case of Tatar against Romania, it has acknowledged the right to live in a safe and healthy environment and, in so doing, has joined a more general movement to enshrine environmental law at the highest level of the hierarchy of laws. As environmental threats worsen and certain politicians demonstrate a lack of ambition, we can all sense that human-rights litigation as applied to the environment will grow in importance, making the courts, even more than they are at present, major players in the construction of environmental justice.*

Among the common traits of the three types of challenges that have just been covered, it should be specifically noted that they put before the courts the issue of how to account for the cross-border dimensions of the phenomena at work. They can also put before the courts questions that are relatively new regarding the time frame of their decisions: either they are called on to insert their decisions in a short time frame as a public health emergency, or inversely, for a much longer time frame in which questions of protecting future generations arise.

GOAL, SCOPE, AND ISSUES OF THE DEBATES

The goal of the workshop is to identify common questions through dialogue and exchange of experience, and if applicable, to identify the differences of approaches between the supreme courts of the Member States when faced with new public health, technological, and environmental challenges.

In order to structure the discussion, for collective reflection, it is suggested that we concentrate the exchanges more precisely on three series of questions. These questions should be formulated in a general manner, concerning the various problems surrounding recognising public health, technological, and environmental challenges, going from the most specific question to the most general. While we understand that the basic rules that are applicable in these domains may vary from one Member State to another, it could be of interest that the courts that participate in the workshop indicate their own case law solutions.

In order to facilitate exchanges, and with the understanding that the delivery of the work resulting from the workshop will be made in plenary session once the workshop is finished, it would also be important that the courts participating in the workshop agree to add written contributions (prior to the meeting) to the file, even if those contributions are brief, on the

aspects that they would like to develop. These contributions will of course be communicated to all of the participants so that they can fully benefit from the information.

3. <u>The question of expertise on which the court can rely</u>

In the areas being studied, the court is called on to rule in light of the different elements of expertise to which it has access, which are not necessarily consistent. It can happen, on a given question, that the expertise becomes more precise, or even that it changes over time. It can also happen that the litigants do not understand the available data from the expertise in the same way.

In what way do the new public health, technological, and environmental challenges renew the courts' relationship with expertise?

Beyond strict compliance with the adversarial principle, what about the tools or methods that the court can use to deal with the uncertainty and scalable nature of technical and scientific expertise?

Does the existence of uncertainty necessarily bring about a form of self-limitation on the part of the court in carrying out its duties?

4. <u>The question of taking into consideration the spatial and temporal dimensions of public health, technological, and environmental phenomena</u>

*Current public health, technological, and environmental challenges all have a cross-border dimension. Even if in principle the legislator is responsible for determining how the standards that they adopt to respond to such challenges must take into consideration this reality and if these standards form the framework where the courts consequently intervene, this cross-border reality may come before the court even independently of the standards defined by the legislator.

To what point are the courts, as part of their duties, likely to understand the cross-border, and even global dimension of the phenomena at play? What tools do they have at their disposal in this regard?

- These three challenges also share a common element in that they have to be understood both in the short term, and even the very short term for emergencies, without overlooking that they require action over a longer period.

To what extent does the duality (between the short time span of emergencies and the long time span for the occurrence of certain phenomena at play in the three areas) impact the court carrying out its duties?

In what way can the courts take the interests of future generations into consideration?

3. <u>The place of the court in regulating the new issues brought about by public health, technological, and environmental phenomena</u>

Does the relative brutality of certain public health, technological, and environmental emergencies run the risk of impacting the articulation of the respective offices of the legislator and the court, leaving to the latter an increased role in the creation of positive law?

Do the difficulties that the competent public authorities may have in handling such challenges not have an impact on the courts?

If so, is there a risk that, in the eyes of citizens, or even public leaders, the proper perception of the role of the court in the Rule of Law would become unclear?

To what point is the conjunction of such challenges analysed as a stress test for the Rule of Law itself?