Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 2491 (2023)[1]
Provisional version

European Convention on Human Rights and national constitutions

Parliamentary Assembly

1. The Parliamentary Assembly recalls that one of the aims of the Council of Europe is the achievement of greater unity between its member States, based on common values, including the creation of a common European space for human rights. There can, however, at times be the perception of a conflict between national constitutional provisions and the requirements of the European Convention on Human Rights (ETS No. 5, "the Convention"). Further potential conflicts can also exist between the Convention, national constitutional systems, and European Union law.

2. Full respect of the Convention and the national constitutional order is not antithetical but fully complementary. The Assembly considers that the priority in the Council of Europe should be the reinforcement of the legal and moral authority of the Convention. As such it is incumbent on the instances of the Council of Europe to seek out innovative tools necessary to ensure the uniform application of the Convention, while taking into account the principles of subsidiarity, the margin of appreciation and mutual respect for national constitutional systems. Member States enjoy a margin of appreciation in applying the Convention standards at the national level, subject to the supervisory jurisdiction of the European Court of Human Rights ("the Court"), whose task is to interpret the Convention and ensure the observance of the engagements stemming from it by the Contracting States.

3. The Assembly considers that there is not any hierarchy between the European Court of Human Rights, the Court of Justice of the European Union (CJEU) and national supreme or constitutional courts, or between the Convention, the European Union law and national constitutions, in the sense of a traditional approach to the hierarchy of norms within a constitutional framework. Indeed, any attempt to impose such a hierarchy would be problematic and unhelpful. However, the Assembly considers that there does need to be a constructive dialogue between the judicial instances and that the different jurisdictions do need to respect and acknowledge each other's respective roles, competences, and spheres of expertise.

4. The Assembly also considers that it is not necessary to seek to entirely avoid potential conflicts or conflicting interpretations between different jurisdictions; in general such conflicts, while appearing difficult at the time, can add to the development of judicial thinking and reasoning. Moreover, when solutions are sought following constructive dialogue, the focus is usually on resolving the legal issue at hand rather than on anything resembling an attack on one system.

5. The Assembly recalls that such a system of mutual respect and deference functions well if there is an overlapping consensus at the three levels – Council of Europe, European Union and national level. However, this does not function when serious tensions arise. Tensions have for example arisen in what is sometimes referred to as the rule of law crisis in certain States. Some may also arise where significant political tensions exist in seeking to determine what is the best outcome to help citizens of a country overcome important economic, societal or environmental challenges, or challenges to existing power structures. These are often

1. *Assembly debate* on 25 April 2023 (11th sitting) (see Doc. 15741, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr George Katrougalos). *Text adopted by the Assembly* on 25 April 2023 (11th sitting).

inherently political issues. Due to the lack of a constitutional hierarchy between the different sets of legal norms (national, Convention, European Union), there is a subsequent lack of formal avenues for handling and deciding disagreements, which in turn becomes a legal problem.

6. Indeed, conflicts have been well publicised in the past as between national constitutional provisions and the requirements of European Union law and the case law of the CJEU. The reasoning and approach applied in seeking to resolve conflicts between the CJEU's interpretation of European Union law, and European Union member States, can thus be instructive as inspiration for potential tools in resolving conflicts at the Convention level. Moreover, potential conflicts could arise as a result of the accession of the European Union to the Convention, not least given some of the specific requirements of the European Union institutions following Opinion 2/13 of the CJEU, and these matters will need to be grappled with as part of the ongoing work toward accession of the European Union to the Convention.

7. The Assembly considers that a new kind of synergetic legal order has emerged in Europe, through the European integration project, both at the level of the European Union and the Council of Europe. This is sometimes called multilevel constitutionalism or co-ordinate constitutionalism. It essentially implies that there is not a strict hierarchy among the different constitutive elements of this order – the European Union, the Convention and national constitutions, as well as their respective (apex) courts – the CJEU, the European Court of Human Rights and national supreme or constitutional courts. Whilst each of these courts can be supreme in its own legal order, their decisions just as their legal orders can intersect and interact. As part of multilevel constitutionalism, each defers to the other's decisions in its sphere of competence, provided those decisions respect mutually agreed fundamental essentials. The Assembly favours such an approach based on complementarity and mutual respect.

8. The Assembly notes that there are many different constitutional models, and even more ways that human rights are given effect, in practice, within member States. This is not a problem. Different models (both monist and dualist) can be successful in giving effect to human rights obligations. Within the Council of Europe, we have many different constitutional models and approaches. The Assembly encourages steps towards increased mutual understanding of, and mutual respect between, these different constitutional models, noting that when dealing with matters of a constitutional nature, many different factors need to be borne in mind in understanding the institutional, cultural, legal and historical context of a given system.

9. The Assembly considers that it is important to find ways to ensure that national and supra-national instances can effectively collaborate and communicate, rather than seek a single, uniform solution to complex constitutional issues. However, the Assembly notes that this does not mean that the Council of Europe should accept that national constitutional courts defend departures from the human rights standards required by the Convention, as interpreted by the European Court of Human Rights.

10. The Assembly underlines the clear and unambiguous nature of the obligation on member States to comply with final binding judgments of the European Court of Human Rights under Article 46, paragraph 1, of the Convention and underlines that domestic legal or constitutional issues are not a valid excuse for a failure to comply with such judgments. The Assembly calls on national governments, parliaments and courts to approach such matters in a constructive fashion in order to find timely, practical solutions to any potential legal differences.

11. The Assembly recalls that, in general, tensions tend to relate more to the interpretation and application of Convention rights by the European Court of Human Rights and by national courts in a given case, rather than to disagreements over the Convention rights in and of themselves. The Assembly suggests that national constitutional and supreme courts should seek, where possible, to align their human rights analysis as closely as possible with the analytical approach taken by the European Court of Human Rights. Such an approach can be a useful tool in ensuring a consistent approach between the jurisdictions and in avoiding unnecessary conflicts. The Assembly considers that an approach by domestic courts that seeks, as far as is possible, to harmonise conflicting provisions through interpretation is to be preferred over any strict hierarchy of norms that seeks to disapply either domestic law or the Convention.

12. The Assembly considers that more might be done to improve the knowledge and familiarity of domestic judges with the case law of the European Court of Human Rights, and to improve the extent to which domestic judges – and in particular superior jurisdictions – actively engage with the case law of the European Court of Human Rights when interpreting and applying Convention rights in the national context. Not only would that improve the uniform application of Convention rights throughout the Council of Europe area, but it would also ensure that the correct legal considerations are being taken into account by domestic courts, with their deeper understanding of the factual, legal, cultural and contextual circumstances in their State. This is important because the European Court of Human Rights' reasoning often needs to be applied in a highly

contextualised way to the particular circumstances of the domestic legal order. Moreover, such an approach serves to improve the level of judicial dialogue and therefore the quality of judgments of both the European Court of Human Rights and of national courts, whilst ensuring that such exchanges are based on mutual respect. In this light, the Assembly recalls the usefulness of provisions such as that contained in section 2 of the British Human Rights Act, that require courts to "take into account" the case law of the European Court of Human Rights that is relevant to the matter before them. Such an approach can assist domestic courts in resolving human rights matters effectively and swiftly at the national level, with the correct application of the European Court of Human Rights' reasoning, and thus requiring less recourse to the supervisory jurisdiction of the European Court of Human Rights. Such an approach makes it easier for the European Court of Human Rights to be satisfied that the correct legal analysis is being followed by the national courts, thus assisting the European Court of Human Rights in its margin of appreciation analysis. It can also lead to improved judicial dialogue between the domestic courts and the European Court of Human Rights and thus can help to avoid potential conflicts between them.

13. The Assembly reiterates the importance of mutual respect between the various judicial instances, and the importance of judicial dialogue in continuously improving the quality of judicial reasoning and in ensuring constructive solutions to any potential conflicts between jurisdictions. In this context, the Assembly notes the importance of both formal judicial dialogue, in the form of judgments by the respective courts, as well as informal judicial dialogue to improve mutual understanding and respect.

14. The Assembly recalls in particular the positive developments with the establishment and functioning of the Superior Courts Network as a unique forum for dialogue and knowledge sharing on Convention case law and comparative law, and welcomes further reflection from superior national courts as well as from the European Court of Human Rights on how to make the best use of this network. The Assembly encourages the development of training activities (conferences, webinars, study visits and secondments) to ensure improved mutual understanding between the European Court of Human Rights and national superior courts, so that the respective courts are able to understand the context and perspective of each others' judgments and to find the appropriate accommodations to align judicial understanding. It welcomes the recent opening of the Superior Courts Network to the CJEU and regional human rights courts as observer courts and encourages further developments in this regard.

15. The Assembly welcomes the system of advisory opinions of the European Court of Human Rights envisaged under Protocol No. 16 to the Convention (CETS No. 214) as a useful tool in resolving potential conflicts between highest national courts and the European Court of Human Rights, and in improving judicial dialogue. It regrets however that only 19 member States have ratified the Protocol and that only seven requests for advisory opinion have so far been submitted by national courts.

16. The Assembly recalls the useful role that is played by the European Commission for Democracy through Law (Venice Commission) in resolving potential conflicts, especially those relating to constitutional law or provisions of a constitutional nature. The Assembly recognises the expertise of the Venice Commission in relation to constitutional issues, including the composition of courts and the election of judges, and calls on all actors to make best use of the opinions of the Venice Commission in approaching such complex issues.

17. The Assembly is aware of the ongoing work towards the accession of the European Union to the Convention and, in the context of that work would like to stress the importance of mutual respect and dialogue between the European Court of Human Rights and the CJEU. It notes that matters of interpretation of the Convention rights must in the end be determined by the European Court of Human Rights whereas the CJEU has the final word on the interpretation of European Union law.

18. The Assembly calls on Council of Europe member States to:

18.1. abide by, and take all necessary steps to implement, swiftly, the final judgments of the European Court of Human Rights, in line with the clear unconditional obligation under Article 46, paragraph 1, of the Convention;

18.2. comply with any interim measures issued by the European Court of Human Rights, in accordance with the obligations stemming from Article 34 of the Convention;

18.3. refrain from taking any steps which could exacerbate any potential conflict between the national constitutional order and the European Court of Human Rights;

18.4. develop mechanisms designed to encourage mutual understanding, mutual respect and judicial dialogue between national and European courts, in particular in relation to constitutional provisions, whilst emphasising that such systems should be designed to assist in developing judicial thinking and reasoning, following constructive dialogue focussed on resolving specific legal issues, rather than creating the impression of an attack on the legal system in question as a whole;

18.5. consider developing improved mechanisms to ensure that domestic courts appropriately engage with the case law of the European Court of Human Rights, thus ensuring that the correct legal considerations are being applied by domestic courts, with the benefit of their deeper understanding of the factual, legal, cultural and other contextual circumstances in relation to that State;

18.6. work with the Council of Europe on embedding the application of the Convention in national judicial practices, including co-operation with the Organisation on developing and implementing new tools for integrating Convention knowledge within national judicial practices;

18.7. ratify Protocol No. 16 to the Convention, as soon as possible, as a useful tool in resolving potential conflicts between national courts and the European Court of Human Rights, and in improving the quality of judicial dialogue, and if they have already done so, make the best use of this tool;

18.8. support judicial dialogue and knowledge sharing on Convention issues through the Superior Courts Network and other existing tools, including by making voluntary contributions to the relevant Council of Europe programmes aimed at strengthening the Superior Courts Network and making the European Court of Human Rights' knowledge-sharing platform available in non-official languages;

18.9. make the best use of the expertise of the Venice Commission, especially in constitutional matters, in order to seek to pre-empt potential difficulties, or to seek to find constructive solutions to potential problems.