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NATIONAL LEGAL SYSTEMS AND THE EU LAW: REALITY AND FUTURE CHALLENGES IN A COMPARATIVE PERSPECTIVE

Key words: Dutch and Latvian perspectives, relationship between the EU legal order and national law, openness to international law, basic principles of EU law, principle of loyal cooperation, General Data Protection Regulation, Court of Justice of the European Union, European Central Bank, Constitutional Court of Latvia, Supreme Court of Netherlands, recent case law, fundamental rights, European Convention on Human Rights, "Self-executing" provisions

Summary

This article examines the interaction between national legal systems and European Union law from a comparative Latvian and Dutch perspective. It argues that, despite different constitutional arrangements, constitutional and supreme courts perform a common function: translating the European legal acquis into the national legal order while ensuring effective protection of fundamental rights.

The Latvian perspective is illustrated through the principle of loyal cooperation, as applied in the case law of the Constitutional Court of Latvia, particularly in cases concerning data protection under the General Data Protection Regulation and the duty to consult the European Central Bank. The Dutch perspective demonstrates how an open constitutional approach to international law, including self-executing treaty provisions and the European Convention on Human Rights, enables courts to address issues of constitutional significance despite the formal prohibition of constitutional review.

Latvian and Dutch perspectives offer a separate yet convergent view on the interaction between national legal systems and EU law. The EU law principle of loyal cooperation has found its application in the recent case law of the Latvian Constitutional Court leading to protection of individual fundamental rights. The constitutional arrangements in the Netherlands offer a neighbouring perspective – Dutch openness towards international law, including EU law, offers practical solutions for safeguarding fundamental rights. The role of constitutional

and supreme courts is best revealed in translating the international acquis for the benefit of the national legal order and offering effective judicial protection to its citizens.

The article concludes that the relationship between EU law and national law is not defined by hierarchy alone, but by cooperation, constitutional dialogue and mutual translation between legal orders. In this context, the Latvian and Dutch experiences show how national institutions of constitutional review may act as a hinge between domestic legal orders and the European legal space, safeguarding both the effectiveness of EU law and the protection of individual fundamental rights.

Introduction

The aim of this study is to address jointly the interaction between national legal systems and EU law from the Latvian and Dutch perspective. This comparative approach is particularly relevant because both the Constitutional Court of the Republic of Latvia and the Supreme Court of the Netherlands have actively contributed to the development of a common European legal space. This shared commitment is reflected in the conference of the Court of Justice of the European Union and the constitutional courts of the Member States, *EUnited in Diversity*, whose first edition was established in Riga and whose second edition was held in The Hague. The conference has become an important forum for exchange on the role of national courts in safeguarding the European Union's founding values, the rule of law and human rights.

First, the article focuses on the principle of loyal cooperation – a crucial principle governing the interaction between national legal systems and EU law. This principle has been elaborated by the Constitutional Court of Latvia both at the national and supranational levels. Constitutionally derived principle of mutual loyalty between state institutions requires respecting each institution's competences, promoting mutual respect, and ensuring good-faith cooperation in the interests of the state.

From the Dutch perspective, a comparative examination of the relationship between the EU legal order and national legal systems is, obviously, a fairly broad, multifaceted and complex undertaking. The relationship between the domestic legal order and the EU legal order obviously depends on the specific constitutional arrangements of the country concerned – and it is superfluous to state that a great diversity in these arrangements exists throughout Europe. Therefore, in the second part a few particularities of the Dutch constitutional order will be explained, which in turn will explain why this legal order can be characterised as having a very 'open' attitude towards European law.

1. Duty of loyalty in EU law

The obligation of sincere or loyal cooperation derives from membership to the Union and not merely from compliance with agreed commitments, it is more

than merely a written treaty provision. It goes beyond the conventional framework set out today in the Article 4 paragraph 3 of the Treaty on European Union.

The Court of Justice of the European Union has pointed out already in 1996, in case Brasserie du pecheur[1] that the principle of loyal cooperation is "inherent" in the EU legal order – perhaps it hinted at the autonomous character[2] of this principle which would apply even in the absence of a written provision.[3] The principle of loyal cooperation characterises the legal order of the European Union, endowing it with its "identity".[4]

This principle functions in three dimensions: First, the European Union must respect the interests and competences of the Member States and may not implement measures that would cause them harm.[5]

Second, the Member States must refrain from any actions that would jeopardise the achievement of the Union's objectives[6] and must ensure the effective implementation of EU law, including through the work of their national courts, which are required to guarantee effective judicial protection of individuals in relation to EU acts.[7]

Third, the Member States must cooperate with each other and avoid taking steps that could hinder another Member State in attaining its aims within the European Union. Cross-border cooperation in judicial matters serves as a clear example of this dimension.[8]

2. Duty of loyalty in the case law of the Latvian Constitutional court

One of the core duties of the Constitutional Court is to uphold the person's fundamental rights.[9] Here are two examples, where compliance with the principle of loyal cooperation was the aspect of the dispute, and where absence of intervention from the Constitutional Court, could breach our EU legal obligations, and equally lead to an infringement on a private person's fundamental rights.

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1 Judgment of 5 March 1996, Brasserie du pecheur and Factortame C-46/93 and C-48/93, para. 39.

2 Klamert M. Article 4 TEU. In: Kellerbauer M., Klamert M., Tomkin J. (eds.). The EU Treaties and the Charter of Fundamental Rights: A Commentary. Oxford: Oxford University Press, 2019, p. 47.

3 Pescatore P. Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen [The Interaction between the Community Legal Order and the National Legal Orders]. Europarecht, Vol. 5, No. 4, 1970, p. 322.

4 On the "transformative" nature of this principle, see Klamert M. The Principle of Loyalty in EU Law. Oxford: Oxford University Press, 2014.

5 Judgment of 9 July 2020, Czech Republic v. Commission, No. C-575/18 P, para. 73.

6 Judgment of 14 March 2024, Commission v. Latvia (European Electronic Communications Code), No. C454/22.

7 Judgment of 1 April 2004, Commission v. Jego-Quere, No. C-263/02 P, para. 32.

8 Judgment of 29 July 2024, Breian, No. C-318/24 PPU, para. 93.

9 Judgment of the Latvian Constitutional Court of 19 October 2011, No. 2010-71-01, para. 14.

In both cases, the Constitutional Court applied directly[10] the principle of loyal cooperation, recognising it not only as being an obvious part of the European Union law but also as a shining element in the domestic constitutional law constellation.

The first case concerned public disclosure of salaries of employees in State and local government institutions.[11] Every salary paid in the public sector had to be published and accessible on the internet. And here Court was expected to answer the question – may the Parliament adopt a text knowing, that after the national law is voted, there will be a new EU regulation,[12] with higher requirements for data protection?

The Constitutional Court recognised that it was at odds with the basic principles of EU law.[13] The moment when the contested law was being debated in the Parliament coincided with the period when the General Data Protection Regulation was adopted. The law entered into force during the transitory period when the Member States had been given time to take the necessary legislative measures to align the national legal provisions with the provisions of the Data Regulation. Thus, the Constitutional Court observed that the Parliament, abiding by the principle of loyalty had to take into account that the principles laid down in the future General Data Protection Regulation will apply *inevitably*.[14]

The Constitutional Court recognized that, from the moment when the Data Regulation entered into effect, persons had the right to expect that the Data Regulation would become applicable in the set term. The Constitutional Court pointed out that a Member State's obligation to refrain from taking such measures that could seriously hinder attaining the results, envisaged in an EU legal act.

The second case, a recent one,[15] affects many private individuals in the context of fluctuations in Euribor rates. The case is still pending as the Constitutional Court has referred several preliminary questions to the Court of Justice of the European Union.[16] The duty of loyal cooperation in this case relates to the obligation of the legislator to consult with the European Central Bank,[17] before legislating on a matter concerning the competence of this EU institution. Even though, the Latvian legislator had sought advice from the European Central Bank, it was

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[10] Judgment of 5 February 1963, Van Gend & Loos, No. 26/62.

[11] Judgment of the Latvian Constitutional Court of 6 March 2019, No. 2018-11-01.

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016 L 119, p. 1).

[13] Judgment of the Latvian Constitutional Court of 6 March 2019, No. 2018-11-01, para. 18.4.1.

[14] Ibid.

[15] Decision of the Latvian Constitutional Court of 31 March 2025 to refer a question to the Court of Justice of the European Union for a preliminary ruling, No. 2024-09-01.

[16] Pending case, SEB Banka, No. C242/25, for the English summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice.

[17] Article 127(4) TFEU.

argued, that it did so at such a late stage of the legislative procedure, that there was no realistic possibility to hold a meaningful debate on the opinion provided by the EU institution.[18]

There is little doubt for the Constitutional Court, that the principle of sincere cooperation may impose also for a negative obligation upon Member State to refrain from taking any actions that might be detrimental for the interests of the European Union. However, the Constitutional Court is in the opinion, that there should be a further clarification whether the conclusions of the general case law of the Court of Justice on notifications to EU institutions, and especially the consequence that a failure to send a notification results in the inapplicability of the national act, should be also applying in the case of consultations with the European Central Bank.[19]

These two examples, indicate that we strive to achieve a fair balance between effectiveness of a national regulation and the highest level of protection for individual fundamental rights. This involves, in authors' opinion, an effective cooperation of different stakeholders on the national and European Union level. It is possible, only if national legal systems and the shared legal space of the European Union are within common and harmonious constellation of loyal cooperation.

3. The Netherlands: Constitutional arrangements and its open approach to international law

The Netherlands is the only Council of Europe Member State in which the Constitution prohibits constitutional review of acts of parliament.[20] Article 120 of the Dutch Constitution states that "[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts". Such a prohibition of constitutional review by the courts can already be found in the 1848 version of the Netherlands Constitution. The rationale behind this provision is (a strict interpretation of) the doctrine of supremacy of Parliament and the need to guarantee democratic legitimacy of norms having impact on citizens. It was not considered acceptable that courts – allegedly lacking democratic legitimacy[21] – would be competent to set aside legislation because of its incompatibility with the Constitution. No

[18] Opinion of the European Central Bank of 11 December 2023, on a temporary mortgage loan borrower protection fee payable by credit institutions, (CON/2023/42).

[19] Judgment of 6 June 2002, Sapod Audic, No. C-159/00, EU:C:2002:343, para. 49 and 50.

[20] Council of Europe, European Commission for Democracy through Law (Venice Commission), Netherlands – Opinion on the Legal Protection of Citizens, 15–16 October 2021, No. CDL-AD(2021)031-e, para. 125.

[21] The authors of the current article have always found that argument unconvincing given the involvement of the House of Representatives in the appointment procedure of justices of the Supreme Court, but also because of the principle of a public administration of justice and the requirement to give reasoned judgments. The argument that the judiciary "lacks" democratic legitimacy is, therefore, in their opinion, a misrepresentation of reality (although the argument is – again – rather popular in some political quarters).

constitutional court was established in the Netherlands. The Constitution is considered by many commentators as a document of little practical value.[22]

Although this constitutional set-up was maintained in 1983 when a major revision of the Constitution took place, the prohibition of constitutional review has been the subject of a lively debate in the Netherlands for decades.[23] In 2002, a member of Parliament (Femke Halsema, GroenLinks) presented a private member's bill to the Lower House proposing that all Dutch courts should be competent to review the compatibility of Acts of Parliament with the fundamental rights provisions included in the Constitution. The proposal was accepted in 2004 by the Lower House and in 2008 by the Senate in its first reading. However, in order to amend the Dutch constitution a second reading by parliament after a general election is required. As the proposal did not receive sufficient support it was withdrawn in 2018.[24] The most recent development is that the previous government in the Netherlands proposed to abolish the prohibition of constitutional review (and to establish a separate constitutional court).[25] However, that government has fallen and none of the main political parties expressed a similar policy aim in the electoral campaign.

So, at present Dutch courts (including the Supreme Court) do not explicitly check the constitutionality of laws. This means that even if a court reaches the conclusion that the law that it has to apply is (flagrantly) unconstitutional, it still will be obliged to apply that law.

In practice, the situation is considerably more nuanced. The Advisory Division of the Council of State provides *a priori* advice on the constitutionality of draft legislation (although it will not be systematically asked for advice on later amendments in Parliament).

More importantly, Articles 93 and 94 of the Netherlands Constitution provide for direct applicability of international legal norms. Rules of international law are part of the law of the land as soon as they become binding on the Kingdom of the Netherlands. Self-executing provisions of treaties have priority – in the event of conflict – over national legislation, including Acts of Parliament and even our Constitution.

In respect of matters relating to fundamental rights, it is important to note that the provisions of the European Convention on Human Rights are considered to be such "self-executing" provisions. As a result, Convention standards may be

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[22] See, for example, Gerards J. H. The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It. Revue interdisciplinaire d'etudes juridiques, Vol. 77, No. 2, 2016, pp. 207–233.

[23] In 1966, a working group of experts in constitutional law proposed the abolition of this provision Proeve van een nieuwe grondwet (Suggestion for a New Constitution). Similar proposals were made by various advisory committees established by the government (so-called Staatscommissies): Staatscommissie-Cals/Donner (1971), Commissie-Franken (2000), the Nationale Conventie (2006) and Staatscommissie-Thomassen (2010).

[24] See Kamerstukken II, 2001/02, 28331, No. 2 (introduction of the proposal) and Kamerstukken II, 2018/19, 32334, No. 13 (withdrawal).

[25] Letter of 21 February 2025 by the Minister of the Interior and Kingdom Relations and the Minister for Justice and Security (Contourennota constitutionele toetsing).

invoked by a party before any domestic court and every Dutch court is empowered to disapply a legal provision or declare such a provision nonbinding if it is in conflict with higher law, such as the Convention. In doing so, the Dutch judge applies the so-called 'incorporation doctrine', meaning that the norm (i.e. a provision of the Convention) is interpreted as it has been interpreted by the Strasbourg Court. It is therefore not decisive whether the Court judgment was against the Netherlands or against a third country (*de facto erga omnes* effect).

This openness to international law has allowed the courts – despite the existing prohibition of constitutional review – to address major (constitutional) issues and perform constitutional tasks. To name just a few examples, in 2010 the Supreme Court gave a ruling which effectively ended the possibility for a political party to ban women from representative functions.[26] In 2016, the Supreme Court ruled that the manner of imposing life sentences in the Netherlands at the time was in violation with the prohibition of inhuman or degrading treatment or punishment.[27] In 2019 the Supreme Court gave a ruling on the reduction of greenhouse gas emissions in the Netherlands on account of the risk of climate change that could also have a serious impact on the rights to life and well-being of residents of the Netherlands.[28]

In conclusion, many issues which would be considered as constitutional issues in other countries, are solved in the Netherlands via the application of international standards. And this is obviously – and increasingly – also true for EU law.

4. The need for constitutional and supreme courts to act as a hinge between both legal orders

Despite the diversity in the arrangements we've just described, the task of all constitutional and supreme court judges throughout Europe is a common one: 'translating' the international acquis for the benefit of the national legal order and thereby offering effective judicial protection to its citizens.

Such a "translation" can sometimes be very difficult – it is not always easy to ensure that the international standard "fits" into the national legal culture. However, in the authors' experience, it is rarely a head-on collision – it just takes careful navigation.

In a more general sense, for the authors of the current article, that is the role of the highest courts in a national legal order. They are, as it were, a Google Translate: they try to translate the (not always easily understandable) European acquis into the national legal order, while providing guidelines to the other stakeholders in

[26] HR 9 April 2010, ECLI:NL:HR:2010:BK4549, NJ 2010/388 (Staat en SGP v. Clara Wichmann et al.).

[27] HR 5 July 2016, ECLI:NL:HR:2016:1325, NJ 2016/348, m.nt. T. Kooijmans.

[28] HR 20 December 2019, ECLI:NL:HR:2019:2007 (The State of the Netherlands v. Stichting Urgenda).

the national legal order on how that international standard should be "translated" into everyday practice. Moreover, at the same time they try to convey messages to the European courts as to the complications that national courts encounter in the loyal application of the European acquis. In this way, they are the "hinge" in that layered legal order.

In most cases, a solution may be found by choosing a treaty-compliant interpretation of a given domestic provision. Sometimes, the Netherlands Supreme Court opts for a "temporal" solution. Here is a brief example. Dutch criminal law allows the judge to impose a life sentence. Unlike other jurisdictions, that really means for *life*. Clearly, there is case law of the ECtHR in this regard. In 2016, the Dutch Supreme Court dealt with a case in which the court of appeal had imposed a life sentence. It noticed that – contrary to European case law – Dutch law at the time did not provide for a possibility to review the life sentence after it had been imposed. *If* the law would introduce such a review mechanism, Dutch law would no longer be incompatible with the requirements of Article 3 of the Convention. Introducing such a mechanism was, however, not for the judiciary, but the legislator. The Supreme Court decided to adjourn the case for fourteen months in order to enable the government and the political decision-makers to make the necessary adjustments, and this is what happened. Subsequently, the Supreme Court held that the *imposition* of a life sentence would no longer be considered incompatible with Convention standards. However, it also warned the authorities: if future cases would demonstrate that – despite the new review mechanism – life sentences *de facto* were never reduced, the Supreme Court might reconsider its position as regards the imposition of life sentences.

In the context of the current study, the example demonstrates how a constitutional jurisdiction may play its role: (a) carefully examining what *exactly* the international standard requires, (b) identifying how to best fit that in into the domestic legal order, while (c) respecting the constitutional relations between the various institutional actors.

Conclusions

- The relationship between the domestic legal order and the EU legal order depends significantly on the specific constitutional arrangements of the country concerned – and a great diversity in these arrangements exists throughout Europe.
- Despite the diversity in these arrangements – the task of all constitutional and supreme court judges throughout Europe is a common one: "translating" the international acquis for the benefit of the national legal order and thereby offering effective judicial protection to its citizens.
- Offering such a "translation" can sometimes be very difficult, also in light of the need to respect the constitutional relations between the various institutional actors.

- The overarching principle when making this translation is the duty of (inter-institutional) loyalty towards EU law in the constellation of the protection of individual fundamental rights.

As it was argued here, this task is not always an easy one. And therefore, it is so important for European courts to learn from each other's experiences and to exchange views on how to overcome these difficulties. In that regard, it is worthwhile mentioning that the Latvian Constitutional Court and the Supreme Court of the Netherlands have regular bilateral meetings to discuss issues of common interest. In addition, there are various multilateral initiatives such as the *EUnited in Diversity* conferences providing an opportunity to have a dialogue between representatives of the European courts with representatives of the constitutional courts of the EU Member States with a view to guaranteeing a harmonious relationship between the EU legal order and those of its Member States. The first conference took place in 2021 in Riga; the second one was hosted by the Supreme Court in The Hague.

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