COUR DE CASSATION

UNIVERSITÉ TOULOUSE 1 CAPITOLE — EUROPEAN SCHOOL OF LAW TOULOUSE

The role of the judge and the co-development of law

A panel discussion held on 28 March 2022 focused on the law-making role of judges. The panel was formed by three legal professionals, who had all worked as a judge and in another legal function. They each agreed to represent a legal profession, meaning that the discussions revolved around the views of judges (Ms Maugüe), academics (Ms Nussberger) and lawyers (Ms von Galen), based on German, European and French law.

They started by discussing the relationship between the separation of powers and collaborative law-making. They all acknowledged that these two concepts could validly co-exist, as the judicial interpretation of the law was how courts collaborated, at all levels (constitutional, international or ordinary). Ms Nussberger inferred theoretical support for judicial law-making from Montesquieu's system of checks and balances.

However, the law-making role played by judges was subject to limits, to ensure that it remained subordinate to the written law. Various methods of interpretation were used to safeguard this hierarchy, such as ascertaining the intention or purpose of the legislator, interpreting laws in accordance with international law or respecting the predefined framework of legislation. However, they were not completely watertight, and judges could still take direct action to thwart public policy choices made by legislators or treaty signatories or fill the void left by the absence of such choices, making rules reflecting their own choices that were not necessarily popular with the general public. They were not incompatible with a watered-down form of judicial activism, where judges warned the legislator from time to time that it needed to intervene.

The panel then went on to discuss the complex, varying hierarchical ranking in which judicial law-making took place, depending on whether the judgment was issued by a supranational court, a constitutional court or an ordinary court. In both Germany and France, a spirit of judicial dialogue was generally prevalent in the national courts.

However, cooperation between European and national judges could sometimes be undermined by the constitution, due to its position at the very top of the hierarchy of norms.

The discussions did, however, reveal a major difference between French administrative judges and German federal constitutional judges, in this two-way relationship. Ms Maugüe emphasised the strong commitment to the collaborative approach used by the French Supreme Administrative Court (*Conseil d'Etat* - CE). In 2007, in the Arcelor case, the CE adopted a method of reasoning called the method of equivalent protection (or guarantee) to be used in cases where the application of a European directive by the authorities was alleged to be unconstitutional. Using this method, the CE could freely give precedence to EU law in cases where its guarantees were equivalent to that of the body of constitutional rules and principles and, conversely, safeguard the constitution in cases where the guarantees were not equivalent. On 21 April 2021, in the French Data case, the CE reinforced its highly conciliatory view of the joint construction of law with European judges, by deciding not to take a confrontational approach to the European institutions, in the form of an *ultra vires* review. On 15 December 2021, in a case debating the application of the Working Time Directive 2003/88/EC to police officers (*gendarmes*), the CE noted that the constitutional safeguard approach was optional whilst also attempting an intricate balancing act to reconcile constitutional law and European law. The CE's position was also in line with the stance taken by the French Constitutional Council. Admittedly, it gave examples (several negative and one positive) of the components of the constitutional identity concept introduced by it in 2006, for the very first time on 15 October 2021 in the Air France case. However, as was emphasised by its president on 6 January 2022, it has "intentionally" been careful not to rush into an *ultra vires* review.

This was not the case in Germany, where there was no formal method of reasoning for this reconciliation. Moreover, two separate exceptions had been carved out. The *Bundesverfassungsgericht* had used both the concept of constitutional identity and also *ultra vires* to occasionally uphold the superiority of the constitution. It used the second exception to refuse to apply a decision issued by the CJEU, for the very first time on 5 May 2020 (in the PPSP case decided by its second division). This refusal was criticised by many German legal scholars.

The panel then turned to the issue of the joint construction of law through interactions between the judiciary, academics and lawyers. Ms von Galen, the only panel member to have worked as both a judge and a lawyer, started by proposing solutions to streamline basic training and continuing professional development and bridge the gap between the practice of these two professions. Her recommendations went far beyond the French practice of appointing academics to the Supreme Courts or the trend for supreme court judges to join law firms (but not vice versa). The express reference to academic writing in the decisions of the *Bundesverfassungsgericht* and the importance it gave to law professors was also a matter for further thought.