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PRIMACY OF THE EU LAW TO NATIONAL (CONSTITUTIONAL) LAW

/Case law of the Constitutional Court of Bulgaria /

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1. Constitutional regulation.

The relationship between European law and national constitutional law still remains a debated issue in the national constitutional space. The core of the relationship concerned is the primacy of European law to any provisions of national law that run counter it. For Bulgaria the effect has been achieved through the Second Amendment to the Constitution of the Republic of Bulgaria (CRB), through jurisprudence of the Constitutional court of the country and through amendments to the Bulgarian legislation.
Also after the mentioned Second amendment the CRB does not explicitly stipulate the primacy of EU law, but there are three "constitutional pillars", on which the legitimation of the EU law primacy is worked on. In Art. 85 of the CRB a new item 9 has been added: it introduced among the types of international instruments signed on behalf of the Republic of Bulgaria, which are to be ratified/confirmed by the National Assembly, a new type of international treaties, conferring to the European Union powers ensuing from the CRB. Thus, in making the necessary constitutional amendments, the Bulgarian legislator preferred the approach adopted also by other Member States, namely explicit referral to the European Union in the new constitutional regulations in contrast to those, concerning the international organizations, where the latter are not explicitly named. This approach illustrates the necessary distinction of the EU as a supranational sui generis community from the international organizations and makes it possible to highlight the relationship between European law and national law as a special legal space. It empowers for the signing of such international instruments with the European Union whereby to the EU powers, ensuing from the Bulgarian Constitution are conferred. With the Treaty for accession to the European Union the Republic of Bulgaria has joined a union which is different from the classical international organizations. Every Member State becomes a party to the Treaties on which the EU is founded, as amended, having voluntarily acceded to transferring some of its constitutional powers in certain spheres, where competent to make policy are the institutions of the EU, as regulated in these Treaties. The ratification of such treaties with the EU shall be adopted by a qualified majority of not less than two-thirds of all members of the Parliament - Art. 85(2)), in contrast to the majority of the votes cast required to adopt a ratification law for any international treaty. So from the sparing amendment to Article 85 of CRB it follows that since the European Union is conferred with powers belonging to the Bulgarian constitutional organs and this is explicitly provided for in the CRB, this means that the supranational, direct and universal effect of the EU law in the Republic of Bulgaria has legitimacy. Upon collision of national and European law, the latter will have primacy, i.e. the directly applicable European law automatically makes inapplicable any provisions of Bulgarian law which run counter it. Primacy originates from the sui generis supranational nature of the EU and the European law what predetermines the need for it to be applied uniformly in all Member States.

The second constitutional pillar is the provision of Art. 5 (4) which belongs to the original text of the CRB (1991) : "International treaties, which have been ratified in accordance with the constitutional procedure, promulgated and have come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provisions of the domestic legislation." We shall come back to this provision later.

The legitimation of the primacy of European law to colliding national law has affected a thirth structure of the CRB – Article 4, which contains the Rule of law principle. A new paragraph 3 has been inserted: "The Republic of Bulgaria shall participate in the building and development of the European Union". Originally, a similar text was proposed to be included in the preamble of the Constitution, among the fundamental values and goals of the State. Being included in the Rule of law provision, this text has acquired independent meaning as a"provision-principle", meaning that: the Republic of Bulgaria shall participate in the functioning of the European Union,

including in the preparation and implementation of its acts, but it shall participate in a capacity of a Rule of law State with the components and elements pertaining to this capacity – legal stability but also justice, legality, hierarchy of the legal norms, etc. The fact that the supranational commitment of the Bulgarian State covers also its capacity of a Rule of law State, is accepted as an evidence of awareness and a dictate to the legislator to do the necessary, so that the harmony of Bulgarian national law and European Union law be realized, as well as the primacy of European law to any conflicting Bulgarian law.

2. The interpretation given by the Bulgarian Constitutional Court.

This economical amendment legitimizing at constitutional level the primacy of European law has been arrived at through interpreting and rationalizing Bulgaria's EU membership, the essence of this special supranational community and its law with its direct effect and privacy over national law. The substantiation of new legal structures, i.e. the primacy concerned, is fundamentally a task of the doctrine. The Constitutional Court of the Republic of Bulgaria has undisputable contribution for the substantiation of the primacy of European law in the Bulgarian legal space. It gave rules by Decision No. 3/2004, exercising its powers to give mandatory interpretations of the Constitution, in this case – interpretation of a set of constitutional structures which were to be affected by the necessitated constitutional amendments in relation to the coming /at that time/ EU membership, and in the first place – on the transfer of powers and the primacy of EU law.
The interpretation was requested on formal grounds, which, however, have high substantive value – whether the constitutional amendments in connection with the EU membership are to be made by a Grand National Assembly as they concern the established forms of state structure and form of government (Article 158 3)), or in the general order provided for amendments to the effective Bulgarian Constitution – by an (ordinary) National Assembly according to a sophisticated procedure (Articles 153-156).
The Constitutional Court gave clear rules to the effect that the constitutional amendments concerned, which were necessitated in relation to Bulgaria's EU membership, would not represent change in the form of state structure or form of government and, therefore, they could be made by the National Assembly according to the established procedure for constitutional amendments, i.e. without a Grand National Assembly. The Court gave rules, inevitably touching on the fundamental issue of the primacy of European law over any colliding national legislation, in the following sense: "By the signing of the EU accession treaty and its ratification, promulgation and coming into force, the Republic of Bulgaria becomes a party to the treaties on which the European Communities and the European Union are founded (as amended and supplemented) and accepts their content, which represents the primary Community legislation regulating comprehensively the institutions and bodies of the Union and their competences and acts". The acts of the primary European Union legislation represent international treaties within the meaning of Article 5(4) of the Constitution and under the conditions laid down in the Constitution their provisions become part of the domestic law of the Republic of Bulgaria. The European Union adopts also the so-called secondary legislation. According to Article 249(1) of the Treaty establishing the European Community, the institutions of the European Union make regulations and issue directives, take decisions, make recommendations or deliver opinions. ... These acts are adopted on the grounds of explicit provisions of the primary legislation. A major characteristic of the secondary legislation is that its acts are not international treaties within the meaning of Article 5(4) of the Constitution and are not subject to ratification by the national parliaments after their adoption. However, they also have direct effect and do not need to be expressly transposed in the national legislation. According to the Constitutional Court, this is so, because the institutions of the European Communities act within their competences with directly bounding legal effect in respect of the institutions and the citizens of the Member States. At the same time, however, it has to be born in mind that the methods and mechanisms for adoption of acts of the secondary legislation, as well as the scope of the latter are determined by the primary legislation, which constitutes international treaties that are subject to mandatory ratification.
Nevertheless, during the preparation for EU membership to the fore moved the question of whether the adoption of a constitutional provision giving authority to the bodies of the EU to exercise powers belonging to national government bodies and to adopt acts with direct effect with respect to the Republic of Bulgaria, for which no ratification is required, does not threaten the sovereignty of the State. The Court provided the following answer to this question: "In the Constitution in force, the principle of commitment of the Republic of Bulgaria to the promotion of "a just international order" (Art. 24(2)) is expressly set out as one of the fundamental principles on which the State is founded. This constitutional dictate for the promotion of "a just international order" provides the framework and the basis for country's accession to united Europe and for the adoption of the supranational, direct and universal effect of the European acts with respect to the Republic of Bulgaria. This is stated in the provisions of Art. 5(4), Art. 85(1)9 and (2), as well as of Art. 149(1)4 of CRB. The Constitutional Court concludes about openness of the Bulgarian state to international law with the ensuing option for constitutional conferral of acts and implementation of measures towards the building of united Europe.

The amendments to the Bulgarian Constitution, called for by the need to bring it in line with the requirement for full EU membership of the Republic of Bulgaria, do not infringe upon its sovereignty, rules the Constitutional Court and argues: according to Article 1(2) of the Constitution, "the entire power of the State shall derive from the people. The people shall exercise this power directly and through the bodies established by this Constitution". Consequently, the people may, of its own will and through the National Assembly it has elected, delegate part of its sovereign rights in accordance with the requirements of an international treaty to which the Republic of Bulgaria is a party. Bulgaria joined the European Union upon ratification by the National Assembly of its accession treaty. This ratification is an expression of the will of the people. The ensuing membership in the European Union is in protection of country's sovereignty and national security. Considering the nature of the integration process, there is shared exercise of sovereignty whereby the Member States perform jointly some of their tasks and thus they exercise jointly their sovereignty. The sovereignty of the Republic of Bulgaria is not threatened because the adoption of decisions by the bodies of the European Union and the created legal acts with their supranational, direct and universal effect will be performed with the participation of the Republic of Bulgaria. The partial delegation by the National Assembly of competences concerning its legislative activities is performed with respect to institutions that are not alien to this activity. The country participates in their formation and in the creation of the acts they adopt. In this case, the functions conferred upon the National Assembly by the Constitution are not changed and the National Assembly is not divested of its fundamental powers. It is and remains the national legislator that will continue to perform the basic legislative activity. The abovementioned direct effect of acts of the European Union does not take away from but adds to the normative competence of the National Assembly. The joint exercise of the sovereignties of the Member States is closely related to the primacy of European law over the national legislations of the Member States ; it provides the source and the grounds of this fundamental rule.

3. The primacy of the EU law and the national constitutional law.

In principle, this relationship is loaded with tension: the interaction of two legal orders is affected, each having precedence, respectively supremacy, over conflicting norms.

3.1. The Treaties do not regulate the primacy of European law over national law as a fundamental principle. However, the primacy has long been established (since 1964) in the case law of the European Court of Justice (ECJ) as a leading rule, "a cornerstone principle of Community law" and a logical requirement associated with three characteristics of the European legal order: the special nature of the EU based on the joint exercise of the sovereignties of the Member States; the autonomy and unity of European law on the idea that Community norms must not be paralyzed by different national norms. According to the primacy rule, a national law preceding a Community norm is unopposable after the latter comes into force. A subsequent law cannot be validly adopted in the existence of a conflicting Community norm and must not be applied /CJCE, 9 mars 1978, Simmenthal, aff. 106/77/. However, ECJ does not have competence to sanction a national norm contradicting a Community one and cannot go beyond establishing the obligations ensuing from European law and eventually establishing non-fulfilment of these obligations by the Member State, leaving to the bodies of the latter to take the necessary measures.
Later, the draft Treaty establishing a Constitution for Europe provided that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States" (Art. I-6). Thus for the first time the primacy of European law over national law was to be explicitly provided in a legal norm, reflecting the existing ECJ case law. However, the Treaty establishing a Constitution for Europe did not come to fulfilment. Nevertheless, the primacy clause "survived" in Declaration No. 17 as part of the Lisbon Treaty (still not in effect), although outside the corpus of the treaty : "The Conference recalls that, in accordance with the well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on éconditions laid down by the said case law".
The reference in Declaration No. 17 to the case law of the ECJ is made without any reservation whatsoever. The Declaration recognizes the principle of primacy "under the conditions laid down by the said case law". This means that provisions of national constitutions, even such regarding fundamental rights, cannot be applied in contravention with the Treaties and the law adopted by the Union – European law overrides national law in case of conflict.
Declaration No. 17 to the Lisbon Treaty expressly refers to the term "primacy" (primauté – Fr.) of European law. However, the legal doctrine, including in Bulgaria , often uses "supremacy" as a synonym for the relationship between European law and national law. It deserves noting that in the ECJ case law the term "supremacy" (suprématie – Fr.) appears rarely in this context – it is incidentally met in Advocate General opinions, used carefully and cautiously.

In fact, the etymology of "supremacy" gives birth to definitions containing the idea of hierarchy and always in the superlative degree. However, "supremacy" belongs to modern Bulgarian constitutionalism – Art. 5(1) of CRB provides: "The Constitution shall be the supreme law and no other law shall contravene it." Therefore, supremacy belongs to the Constitution by definition. Furthermore, there is a tradition in Bulgaria in favour of the so-called staircase structure of normative acts (Stufenbau der Rechtsordnung, Ger.) – the existing Bulgarian Law on Normative Acts explicitly contains it.

"Primacy/precedence" means the state or condition of being prime or first, as in time, place, rank, hence excellence, supremacy. Therefore, the definition of "primacy/precedence" itself contains the notion of "supremacy" as a dimension, a stratum. "Precedence" also belongs to modern Bulgarian constitutionalism – Art. 5(4) of CRB explicitly provides: "International treaties, which have been ratified in accordance with the constitutional procedure, promulgated and have come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provisions of the domestic legislation." This provision is from the original text of the Constitution (1991) and introduces the rule of moderate monism in the relationship between international law and national legislation, establishing precedence in application in case of collision between domestic and international law, however without affecting the Constitution.

The term "primacy" (primauté – Fr.) with respect to the EU law and national law can be found in ECJ decisions; the English "precedence", the verb "override", etc. are also used. The draft Treaty establishing a Constitution for Europe used the term "primacy". Now Declaration No. 17 to the Lisbon Treaty uses the same term. Thus the terminology used leaves no doubt that since "supremacy" implies more an idea of hierarchy, the term "primacy/precedence" is the better one, considering that the ECJ case law hereto has never touched the validity of national law and has never pointed to any hierarchy or ranking of norms between European law and national law, constitutional law in the first place.

Among other things, the primacy of European law over national constitutional law is still contested to some extent even in our days . Over the years, ECJ continues to confirm and establish its view that without strict compliance to the rule of primacy of European law such primacy cannot exist and be applied. This view does not change even in cases where the national norm that runs counter the European law is a provision of the national Constitution (decision on case 11/70 Internationale Handelsgesellschaft, 1970,ECR,1125). Some national courts, notably the Federal Constitutional Court of Germany, have appeared to be reluctant to accept an unconditional primacy of European law as far as it concerns fundamental rights and the degree of their protection. Some years ago, within the control as to constitutionality exercised in some Member States in relation to the ratification of the Treaty establishing a Constitution for Europe, the Constitutional Tribunal of Spain and the Constitutional Council of France had to take a position on the primacy concerned. The position undeniably supports the primacy of European law, but at the same time it makes a conceptual distinction between supremacy on one part and primacy on the other part: "supremacy" is the concept inherent to the national constitution as the fundamental law of the country within a hierarchy of normative acts, whereas "primacy" simply reflects the fact that European law "overpowers"/dominates over national law in case of collision, without the necessary implication of a hierarchy between European law and national constitutional law. This position meets with support in the doctrine.

3.2. Bulgaria is a (new) EU member and the EU law enjoys in the Bulgarian space a universal and direct effect and has precedence over national law in case of collision. Towards this situation, legal theory, legislation and jurisprudence in Bulgaria have made conceptual contributions, tabling convincing arguments like "shared sovereignty", "open statehood", etc. The aim was and still is to reconcile the supremacy of national constitutional law with the primacy/precedence of EU law without which the EU would not be able to perform its functions. An important conclusion was made – many of the arguments and concepts proved to have been primordially laid down in CRB, so they only had to be brought to the fore, which explains the economical amendments to the Constitution with regard to the primacy and the direct effect of European law.

The Bulgarian constitution does not provide expressly the primacy of EU law over national constitutional law in case of collision. However, the primacy exists and stems from the transferred constitutional competences in favour of the EU (Art. 85(1)1), from the fundamental principles of CRB (Art. 4 and 5(4)), and from the existing legislation – "If a normative act is in contradiction with an European law regulation, the regulation shall be applied" (Art. 15(2) of the Law on Normative Acts).

There are cautious attempts nationally and at European level to introduce nuances in the undisputable disposition about the primacy of European law over national constitutional law. Notable is the fact that neither on European nor on national level is the slogan "European law breaks national (constitutional) law" being advanced as a replica to the famous provision of the Fundamental Law of Germany "Bundesrecht bricht Landesrecht." (Art. 31) concerning country's federal state structure. Nuances are sought in the basic strata of the relationship concerned; a conclusion is made that an equilibrium is needed, in particular in the field where the subsidiarity principle is applicable – in case of changes to primary European law, the Member States will make themselves the respective required amendments to the national constitutional law, whereby equal application of European law will be

achieved and at the same time the dignity of national constitutions will be preserved. Constitutions are amended in order to meet the requirements of European law, and European law is created by authorized representatives of Member States in which the supremacy of the Constitution is a fundamental principle. Therefore, the relationship between European Union law and national constitutional law is one of continuous dynamics, reciprocal effect and mutual enrichment, a process in which national constitutional law is being "Europeanized" and European Union law is enriched with constitutional features.

Considering the uncertain future of the Lisbon Treaty, nevertheless expecting positive developments, legal theory and jurisprudence have a mission: to bring closer to the European citizens, including Bulgarian nationals, the values and functions of European constitutionalism and to facilitate their realization. The traditional constitutional terminology developed over the centuries for the national statehood is still in use but fails to reflect the sui generis nature of the EU as a supranational community. Consequently, there are often misunderstandings. Therefore, raising the issue of precise notions and terms is not a play upon words; it is a task of the legal doctrine, European as well as national, to develop new terminology for the European constitutionalism (although without a constitution) that is intrinsic, proper and facilitative of the new ideas and structures already in application.

4. The Constitutional Court of Bulgaria has given rules on the EU law even before the country became a member of the Union (Decision No. 5/2005 ; Decision No. 4/2007, ; Decision No. 11/2007 , ; Decision No. 1/ 2008 ; Decision No. 6/2008.). However, both before and after the EU accession such rulings are still rare.

The case-law of Bulgarian Constitutional Court (CC) in the first two years after Bulgaria's accession to the European Union reveals two important trends, regarding the application of European law in Bulgaria. The first one is related to the fact that parties to constitutional proceedings, as well as the Constitutional Court in the reasoning of its decisions, step more often and in a more insistent fashion upon European law. A tool petitioners often use is the claim that the impugned national legislative provision is contradictory not only to the Constitution, but also to a European law norm. On the other hand, the defenders of the constitutionality of the impugned national provision frequently use arguments, deriving from European law, and maintain that the respective provision reproduces the latter or is in harmony with it. The Constitutional Court itself also weaves into its reasoning more and more often norms of Community law, still avoiding, though, to rely for its decisions mostly or primarily on such norms.

The second trend, or conclusion, which could be drawn from the case-law of the Bulgarian Constitutional Court, is that it avoids ruling on some of the most important and decisive legal issues, defining the relation between the constitutionality control, exercised by the CC, and the control over the conformity with Community law, exercised by Bulgarian courts and the European Court of Justice. One criticism towards the CC is that it seems extremely cautious every time national legal order touches upon Community legal order, as well as that it has abstained so far from addressing a reference for preliminary ruling to the ECJ. This is so, even though the CC has had cases, where such a reference would have been appropriate and even advisable.

Is the CC competent to rule upon the conformity of Bulgarian laws with European law? This is an issue of extreme importance for the Bulgarian constitutional process, both in terms of setting the scope of competence of the CC and in terms of the correct and responsible application of European law in Bulgaria.

In constitutional case (c.c.) № 10 of 28 February 2008 the CC was approached by 53 Members of Parliament pursuant to Art. 149, par. 1, item 2 of the CRB. MP's petition the Court to pronounce unconstitutional Art. 3, par. 2 of the Law on the Value Added Tax (LVAT) in its part containing the expression 'as well as the exercise of freelance activity, including such of a private executor or notary public', which provides for levying VAT on the services of attorneys and notaries, as well as of private executors. It is maintained that those provisions contradict the Preamble, Art. 4, par. 1, Art. 6, par. 2, Art. 19, par. 2, Art. 56 and Art. 134 of the Constitution, as well as the principles of proportionality and equality, consistently upheld by the acquis communautaire.

On the other hand, the defenders of the constitutionality of the impugned provision claim that the LVAT is fully harmonised with Sixth Council Directive 77/388/EEC, as well as that the case-law of the ECJ requires the levying of VAT on the services of the above professions. Petitioners counter that EU directives, related to VAT, do not have priority over the Constitution and do not contain a specific requirement for VAT taxation of the above professions.

In other words, apart from the contradiction between the above provision of the LVAT and the Constitution, the parties also dispute its conformity with European law. In this sense, one question should be clearly raised: whether the CC is competent to rule on the conformity of the impugned provision not only with the Constitution, but also with European law.

In its decision, the CC avoided answering this question by stating that it had been approached within the framework of the abstract norm control (Art. 149, par. 1, item 2 of the Constitution) with a petition to pronounce a law unconstitutional. Despite of that, the CC recalled that, when approached pursuant to item 4 of Art. 149, the Court would also control over the conformity of the Bulgarian law with international treaties.

Based on the above, the CC decided to abstain from answering whether it was competent to exercise control over the conformity of Bulgarian legislative acts with EU law, motivated by the fact that it had been approached under Art. 149, par. 1, item 2 and not under item 4 of the same provision.
Despite not answering this question, the Constitutional Court left the door open, if approached under Art. 149, par. 1, item 4, to potentially make such a ruling. Whether the CC would decide that it is competent to rule upon the conformity of a legal norm with Community law, depends much on the very interpretation of Art. 149, par. 1, item 4 of the Constitution, according to which the Constitutional Court rules upon 'the conformity of laws with international treaties, to which Bulgaria is a state party'. If this constitutional provision is to be understood widely, the Constitutional Court would be competent to rule upon the conformity of Bulgarian laws with Community law. In this case the reference for preliminary ruling to the ECJ would most often be required in terms of clarifying the meaning of Community law.
It is the prevalent view that the exclusion of Community law from the control, which the CC exercises over Bulgarian legislative acts, would not be a proper step in terms of jurisprudence. Firstly, it would not properly reflect today's legal reality, where Community law determines to an ever growing extent the law making of Member States. Secondly, it would greatly diminish the role of the Constitutional Court. This is so, because thus the CC could sanction a law only if it contradicts the Constitution, while every other national court, from the regional court in the small town of Devnya to the Supreme Administrative and Supreme Cassation Courts, can and should refuse to apply a legislative provision, if it contradicts Community law. Thirdly, excluding Community law from its view, the CC would risk pronouncing unconstitutional a law, reproducing Community law provisions, thus controlling indirectly the constitutionality of Community law itself, which is inadmissible.
Therefore, the proper solution is – to accept that it is competent to rule upon the conformity of a legislative act with Community law pursuant to Art. 149, par. 1, item 4 (regardless of whether it has been approached under that provision or under item 2).
At this point the Bulgarian CC does not exclude from its view the relevant Community law, which is a positive trend in itself. Nevertheless, the CC limits itself, for the time being, to only mentioning or outlining certain Community law provisions, without drawing all proper legal consequences.
Of course, the application of Community law by constitutional jurisdictions is not and cannot be an objective in itself. Community law creates rights and obligations for Bulgarian citizens and legal persons, as well as for the Bulgarian state. The compliance with those rights and obligations would not be full, and even less so effective, if they are not reflected in the case-law of the Bulgarian Constitutional Court, which, apart from a custodian of Bulgarian Constitution, is also a Community court, together with all Bulgarian courts and the ECJ. In its mission as Community court, the CC could fully use the opportunities, offered by the proceedings for preliminary ruling under Art. 234 TEC. It is so because the rights of Bulgarian citizens and legal persons, deriving from Community law, could only be fully and successfully guaranteed through close and responsible cooperation between national courts and the ECJ.

5. As a national constitutional jurisdiction, the Constitutional Court of Bulgaria draws its power from the national Constitution and is aimed to protect its supremacy. As a court of an EU Member State, the Constitutional Court of Bulgaria applies European law, however not exceeding the competences it has been vested with by the Constitution, encouraged but also criticized by the doctrine. The criticism is levelled at the reserved position of the Constitutional Court of Bulgaria, in particular at the fact that over the past two years since Bulgaria became an EU member, the Constitutional Court of Bulgaria has not formulated requests for preliminary ruling to ECJ. In answer to that, we note the following: the existing Bulgarian law does not contain special positive regulation on the application of requests for preliminary ruling within the constitutional process as they are expressly regulated within the penal (Art. 628-633 of PPC) and the administrative process (Art. 144 of APC). However, this fact in no way precludes the Constitutional Court of Bulgaria from formulating requests for preliminary ruling to ECJ because in such cases the court will apply major principles of law and will directly apply European law, the grounds for which are provided by the working Constitution of Bulgaria in an environment of EU membership. It is a matter of time and practice.

So the European law turns to be a constitutive element in the parameter for constituality, implemented in the case-law of the Bulgarian Constitutional court.

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