

NEW
MILLENIUM
CONSTITUTIONALISM:
PARADIGMS
OF REALITY
AND CHALLENGES

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NEW MILLENNIUM CONSTITUTIONALISM: PARADIGMS OF REALITY AND CHALLENGES

Published on the Initiative and with a Foreword of Dr. G.G. HARUTYUNYAN



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FOREWORD

Dear reader,

The birth of this Volume is due to the demand for new solutions, which would ensure the natural process of public life in our restless reality. Unfortunately, everyday bloodshed, irreconcilability, malice, and hatred have become our escalating concomitants, while terrorism, political, economic and value-system upheavals have become their direct satellites. How should one confront these? How should one foster the positive qualities of human welfare? How should one project dynamic harmony onto development and ensure the most propitious environment for a human being to live and create? The answer to these questions must be sought in every domain of our existence. Nevertheless, they are conditioned with the fundamental qualities of our collective existence, with the axiology that underlies the basis of constitutionalisation of public life.

Today the constitutional law doctrine faces an issue of extreme importance: how to overcome the deficit of constitutionality in social reality and make the Constitution a living reality; how to overcome the distortions of national and supranational constitutionality, strengthen the immune system of the public organism and, with its help, convey sustainable dynamism to its development. These issues have attained universal human inclusion, and their solution demands a complex scientific approach in putting forward algorithms. The aim of this Volume, a result of combined efforts of scholars with international reputation in

constitutional law doctrine and thorough knowledge of real life, is to direct scientific concepts towards the search of new solutions and convey necessary value system qualities to political and public legal conscience.

I would like to express gratitude to all colleagues who shared my concerns, agreed to put aside many urgent commitments, and contributed to the creation of this Volume. I am certain that their contribution is extremely important and will be duly appreciated by the reader. Although the best acknowledgement will be the fact that the conceptual approaches raised here will be brought to life, aid in overcoming social cataclysms, and provide safeguards for making people happier through social well being.

The contributions are published in author's original and are accompanied with trilingual abstracts in Russian, German and French languages. Contributions submitted in German or French are accompanied with abstracts in English.

I would like to thank Alvina Gylumyan, Judge of the European Court of Human Rights, and my young colleagues Vladimir Vardanyan and Anahit Manasyan for their assistance in compiling this Volume.

On behalf of the authors, I would like to express gratitude to the Centre of Constitutional Law of the Republic of Armenia, the Yerevan Office of the German organization GIZ, and the "Arpimed" company for assisting in the publication of this Volume.

Gagik Harutyunyan

**AXIOLOGICAL SUBSTANCE AND CHARACTER
OF THE MATERIALIZATION
OF MODERN CONSTITUTIONALISM**

CONSTITUTIONALISM: FOUNDATIONS FOR THE NEW MILLENNIUM

Michel ROSENFELD, András SAJÓ

Though constitutions have come and gone in the last millennium, constitutionalism lives on in this one. Institutions dedicated to the protection of rights are growing in size and number. Movements for constitutional government are sprouting up in lands where despots once reigned.

Constitutional decision-makers are ‘internationalizing’, increasingly looking to internationally shared principles and foreign sources when setting up institutions and interpreting constitutional texts. One reason is increased domestic diversity, another one is increased international interdependence. Societies which seemed to have achieved a certain cultural, linguistic, religious and ethnic homogeneity or harmony, and therefore had a constitution that was based on either homogeneity or harmony among certain groups, have welcomed an increasing number of people who may not share the constitution’s foundational value assumptions. At the same time as human migration changes the composition of national polities, citizens are increasingly interacting with actors outside the physical borders of their nations, stretching the reach of traditional forms of governance and challenging national cohesion, in part because of the Internet, in part due to global economic and cultural integration. Our age is witnessing a dynamic interface between constitutional rights and the digital realm. This and future generations will confront new challenges involving online privacy, cyber terrorism and digitally assisted terrorism, intellectual property, and enforcement of the rule of law across borders.

This situation presents a central problem in judging the fortunes of constitutionalism in the new millennium: how can the foundational regime of legal standards remain both solid and flexible enough to meet the needs of the times? This dilemma is not new. To have some sense of the current landscape – of the phenomenon of internationalization, the balance between majority rule and minority rights, and the role of constitutionalism in the welfare state – it is worth examining how we arrived at this point.

1. AN OVERVIEW OF CONSTITUTIONALISM

Is it possible for constitutionalism to be relevant in the new millennium? After all, constitutionalism is closely linked to traditional nineteenth century liberalism, which always escaped textbook definitions and resisted positive description. At first glance both liberalism and constitutionalism exist primarily as a negation. But at those unique times of

creating new political, social or national structures, importance and problematic nature of fundamental choices become clear. In Eastern Europe, and in parts of Asia, the constitutional foundation began in 1989 when communism collapsed in the region. About the same time Latin American states moved away from authoritarian forms of government, and South Africa moved away from apartheid towards constitutional democracy. It was in this process that one had to learn how easy formal democracies might and will become corrupt in the absence of a constitutional culture. Preaching that democracy justifies all sorts of political action is misleading and offers cheap excuses. One has to understand that it is not true that democratic decisions are acceptable in all circumstances. Constitutionalism is intended to serve as a limit to democracy running amok. Constitutionalism is a kind of monomaniac. It asks all the time: Is this governmental arrangement; is this decision of the power holders, curtailing freedom? Is it preventing the curtailment of liberty? Constitutionalism derives from a modern understanding of democracy as much as democracy flows from a constitutional form of government.

“Constitutionalism” cannot be equated with “constitution,” though the two concepts are linked. At present, most countries – and numerous subnational political units, such as the states in the U.S., the Länder in Germany, and the cantons in Switzerland—have constitutions, but not all such constitutions satisfy the requirements of constitutionalism. Whether a country has a constitution is a question of fact, easily answered in most cases—particularly in those where an institutionalized, written constitution is involved. In contrast, whether a constitution conforms to the dictates of constitutionalism cannot be determined without some kind of normative evaluation. Constitutionalism is an ideal that may be more or less approximated by different types of constitutions and that is built on certain prescriptions and certain proscriptions. Determining whether a particular constitution approximates the ideal of constitutionalism, and to what extent, depends on an evaluation of how the institutions and norms promoted by the constitution in question fare in terms of the constitutionalist ideal.

The function of constitutions is to tame as well as protect and enrich democracy and popular and state sovereignty. However, constitutionalism, and the constitution serving it, is more than simply a promise. It requires a set of institutional arrangements, and there is more than one governmental structure that satisfies the centralization of power.

Constitutions - since the basic laws of the Greek city-states (polis) until today - concern the relationship of the state’s fundamental organs and its institutions. If during the process of creating this basic arrangement the principles of constitutionalism are kept in mind, these relations establish a system of limits that allow the freedom of the citizenry to prevail. Constitutions are about power; a constitution impregnated with the ideas of constitutionalism is about limited power.

Constitutions are structured in different ways, implemented through various means and imposed on those subjected to their prescriptions through distinct devices. Beyond that, the importance of a constitution can vary significantly from one setting to another. In some countries, including the U.S., the constitution plays a central role in the definition of the nation's identity, while in others it is a minor factor. Consequently, varying constitutional models and the different relationships between a constitution and the society in which it is embedded are bound to affect the nexus between constitutional and extra-constitutional norms.

Constitutions no longer seem confined to the nation-state or a subnational unit, such as a state in a federation, but may cover transnational entities, such as the European Union, or over even the whole world, as in international law. How should a constitution be linked to the law, society, and democracy? What is the role of a constitution in mediating between society and the state? Should a constitution be confined to the relationships among citizens and the state, or should it also regulate certain relationships among citizens?

Constitutions that serve constitutionalism are not born to foster illusions and promises of revolutionary utopias. Nor do they prescribe a future society's creation. It is not a bright future that such constitutions convey. Instead, they reflect the fears originating in, and related to, the previous political regime. If a constitution has a vision, it should concern a different exercise of power than the past one, which is to be avoided.

Alexis de Tocqueville rejected the invention of the "modern age," namely, that of the Jacobins and utilitarians: the absolute power of the majority. He held that the power of the majority cannot be unlimited because in the moral world, humanity, reason, and justice stand above the majority, while in the political world inalienable rights prevail.

Tocqueville warns us about making rash decisions that the accidental winners of democratic election lotteries, conscious of their mission, and those who simply wish to become rich as a result of an election victory are prone to make. Tocqueville lived in the first half of the nineteenth century. Modern democracy must handle states that are larger and socially more complex than those existing before. Now states face social problems that are more dynamic and require more nimble answers than the states known to Tocqueville. In the age of electronic markets, a stock exchange can collapse in less than ten minutes, taking with it national economies and the world economy. It stands to reason that constitutional decision-making mechanisms should satisfy the new demands of efficiency, too. The 19th century concept of constitutionalism did not endorse equality; today, exclusion of groups based on race, gender, religion or ethnicity, and, increasingly, on sexual orientation, has become unacceptable. Constitutionalism had to learn that democracy could entail equal respect and political rights for all citizens.

Constitutionalism is the restriction of state power in the preservation of public peace. It seeks to cool current passions without forfeiting government efficiency. This definition is obviously inadequate, but the imperfection is comforting. Using a slightly counterintuitive logic, one could say that, as constitutionalism cannot be molded into a given shape by giving it exhaustive conditions, it is clearly a rather conservative concept or value. Constitutionalism is a matter of taste, and taste oscillates around a hard core. Constitutionalism is not merely a legal prescription or prudence elevated to the rank of prescription. Law cannot be a substitute for morality, tradition, or everyday common sense.

Constitutionalism can be called the genius of the people, or the nation's intellect, or justice, or a reasonable tradition, without which the written constitution is just a mere collection of words. But it would be a mistake to conclude from what has been said thus far that the legal side of constitutionalism is irrelevant and that law does not count where the spirit of the age makes itself felt. The spirit of the age may need formal support, and the legal factor is especially important where the "spirit of the age" has not yet taken shape, where there is simply no constitutional practice or justice. The question is, as Bruce Ackerman frames it, how do we "construct enduring forms of political order? The fate of revolutionary liberalism will depend on many things besides constitutional creativity; culture, economics, and geopolitics will make a tremendous difference. Nonetheless, the creative role of constitutionalism is easy to underestimate."¹ Law and constitutionalism, written into law, cannot replace the cement of society, but they are important additives. Sometimes it is the state's role to integrate society, and in such cases, these additives become particularly important.

We recognize constitutionalism, or rather its violation, primarily by experience. We learn from experience that the absence of certain conditions and given practices, after a time or under great hardships, leads to the restriction of freedom and oppression. It is generally not one sign that calls attention to this but a host of signs.

Constitutionalism is a storehouse of experiences, including unsuccessful and despotic governments, but it is not a collection of recipes. It cannot give concrete prescriptions for a constitution and the governmental practices woven around it, but it can trigger outraged loathing. Our attitude toward constitutionalism is similar to that of Augustine's attitude toward God. The would-be saint bishop said that he could not define God, but he knew what sacrilege was. There is no satisfactory definition of constitutionalism, but one does not only feel when it has been violated, one can prove it. What brings about this almost instinctive antipathy toward certain acts of government differs from country to country and from age to age. The doctrine of constitutionalism was the answer given to oppression during and after the French Revolution, and it was related to concrete forms of abuse and

¹ Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992), 3 (emphasis added).

usurpation. Constitutional ideas and constitutionalism in all ages refer to abuses of power because they exist in the collective memory. The constitutional text, where it exists, can help us to recognize these abuses. It is relatively easy to recognize interpretations that deviate from the possible meaning of the text and practices that violate it. Frederick Schauer likens the interpretation of the text of a constitution to the frame of a picture. From the interpretation, it is possible to establish what went outside the frame, even though the canvas gives us no guidance as to what to put within it.²

Even well-defined constitutional fears subside and change with time. For those living in peace and democracy, constitutionalism may become a comforting knowledge taken for granted; the routine of a constitutional state is the source of renewed self-confidence and practical compliance.

2. MAJORITY RULE VERSUS MINORITY RIGHTS

The constitutional acceptance of human differences or, for that matter, the guarantee that individuals can differ, indicates that living in a constitutional order does not only mean that citizens are given protection against government power. Constitutionalism means further that citizens and their fundamental elementary communities are protected from the rule of the majority, or the strongest. Providing protection against the majority is especially important if the state in question is democratic and if the constitution institutionalizes representative government, which, from the point of view of the protection of citizens and in order to let their political will prevail, would otherwise be desirable.

Since the end of the eighteenth century, constitutions have been prepared to protect citizens from threat by the state. But in order to be able to protect oneself from the state – at least within certain limits – it was necessary to define in the constitution how the will of the state is determined by the citizen's community. The state does not function in a vacuum. Citizens are threatened not only by the insecurity and almightiness of government but by the tyranny of the majority or by small groups that refuse to recognize the rights of others. In the struggle for power among groups, without constitutional precaution no attention would be paid to public welfare.

Madison considered the tyranny of factions as equal in importance to the tyranny of the state:

By faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interested, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

² Frederick Schauer, "An Essay on Constitutional Language," *UCLA Law Review* 29 (1982): 797, 828.

* * *

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such common motive exists, it will be more difficult for all who feel it to discover their own strength.³

Putting aside the inequitable distribution of property, religious denominations presented the greatest threat to the division of society when the U.S. Constitution was drafted. The First Amendment to the U.S. Constitution, asserting anti-factionalism, completely separated the state from the church, despite the fact that the political elite as well as the majority of citizens considered religion a moral obligation. The laws of the state must be formulated so that that the state protects its citizens from group oppression while not becoming a tool in their hands.

According to the Madisonian view, the bipartisan, clear majority-producing system does not favour constitutionalism as a minority-protection program. The single block majority can be merciless with the minority on all points, and if there are two parties in the legislative body, these groups can also leave those not having any representation out in the cold. It might be justified to restrict the formation of a two-party or two-pole system by constitutionally prohibiting the exclusion of small parties. The prevailing trend, which accommodates non-governability and efficiency concerns, moves in the opposite direction; thresholds are constitutionalized, prohibiting the representation of smaller constituencies in parliament. But governmental efficiency can be ensured through different, alternative devices.

The prevention of social groups from monopolizing political power has gained new constitutional significance and meaning after the collapse of authoritarian systems. This is why the German Basic Law institutionalized the principle of *militant democracy*. With the same idea in mind, immediately following the fall of the communist systems, constitutions were amended everywhere, prohibiting any one party or organization from gaining exclusive governmental power.

Old struggles continue to play out in our new millennium, as constitutionalism is at the center of political debates over the apportionment of resources. According to classical constitutionalism, constitutional regulation means the submission of state institutions to the law to ensure that they do not interfere with liberty. Constitutionalism requires that freedom as self-government shall be institutionalized through the formation of branches of power that are accountable to the citizenry. In the twentieth century, when state benefits became important, it was expedient to include the fundamentals of welfare services

³ The Federalist Papers No. 10: Madison 78.

regulation in the constitution. There was a simple and logical reason for this. It was necessary to clarify the compatibility between the institutionalization of public welfare services and the limits on government authority, which was the original constitutional objective. Since until the late-nineteenth century no one imagined that the state would undertake a wide range of social tasks, constitutions gave it a free hand, thinking that a minimum of protection of basic rights was sufficient for liberty. On the other hand, new constitutional requirements were formulated with an eye to the state's new activities. Social groups that had an interest in the new activities sought to elevate these functions into constitutional rights and duties. The constitution and constitutionalism came to a crossroads. If one takes the restriction of state activity and limits to government too seriously, the prohibitions on intervention and regulation, which ensure the state's neutrality and protect individual rights, will conflict with the new requirements of the state as social service provider, making the institutions protecting legal rights the insurmountable obstacles to welfare services. Consequently, twentieth century constitutions had to find forms that would facilitate constitutional monitoring of the welfare state's activities, but at the same time, they had to reconcile the right to benefits with the classical civil rights and liberties that are endangered by the demand for benefits. Indeed, the dependence on benefits, recognized as a social right, presents the new threats to individual autonomy and may undermine the conditions for participation in the establishment of democratic state organizations and the definition of their democratic functions. Without a certain level of protection, on the other hand, citizens may not be able to make independent choices concerning good life.

When reading modern constitutions, one has the sense that they are not about the basic principles of governing and the institutional limits of power. There is perhaps more concern about organizing and guaranteeing the basic institutions of the social structure. Contemporary constitutions are full of special arrangements pertaining to the state's operations and services and the privileges of certain groups. In the socialist constitutions the predominance of a visionary social order was quite obvious. Such constitutions were blueprints for the future and sketchy descriptions of the Potemkin-like functioning of state bodies. A programmatic nature was one of the characteristic dogmas of socialist constitutions. Such visionary distortion, as shown by the state-socialist constitutional structures, threatens freedom at its roots. Classic liberal constitutions did not consider partisan, ideological particularism to be their task. Apart from universal liberties, which were taken as a given, the liberal draftsmen did not want unity on a moral basis, nor did they prescribe daily politics, because politics went beyond the constitution, which simply provided the structure of government. According to this liberal conception, the state is by and large neutral, at least at the constitutional level. Political philosophies that advocate social engineering perceive the state and the government as the means to further-

ing and achieving certain social objectives. Separation of the public and private spheres disappears, or at least it becomes blurred, as do the parliamentary institutions and the political responsibility that goes with parliamentarism. Such separation is considered an indication of the inefficient management of affairs and an obstacle to integration. Compared with the “simple” and spontaneous solutions of direct-interests representation, the negotiations of classical constitutional and parliamentary deliberation flounder.

3. THE CONSTANCY OF CHANGE

By themselves, a constitution’s normative nature and the fact that it is made legally binding say very little. To have the ability to determine the legal system, a constitution must be above all other legal rules. It is the starting point and the closing argument of a legal system.

In England, the laws guaranteeing constitutionalism, where these principles have been written down in laws at all, can be amended at any time by other laws. In other political cultures such malleability would render constitutionalism hardly sustainable. The supremacy of the constitution as legal regulation has to be ensured with the help of legal, technical means.

In the new millennium, constitutions will change with the times, but their stability is no less a source of their force. No matter how technical it may seem, amending a constitution is an essential element of the document itself and of constitutionalism. In the absence of rigorous amendment procedures, a constitution can become the victim of incidental considerations at any time, if any one of its prescriptions were to obstruct a current legislative improvisation or a prevalent legislative interest. Techniques of constitutional stability are particularly important in times of populism. The blessed self-restriction dictated by the constitution would cease to exist, even though it is the task of the constitution to ensure it. With an easily amendable constitution all its guarantees would cease, too. The intimate relationship with the people’s sovereignty, which was so important when it was created, would discontinue. The legitimacy of the whole political system would be threatened if the content of the constitution were to appear as, or become part of, the ordinary political bargaining process.

Of course, constitutions are not immutable. In the name of democratic justification, Thomas Jefferson held that all generations should have the opportunity to amend their constitution; because what they inherited was not formulated with their participation, and earlier generations had no right to determine how future generations should live. Obviously, Jefferson’s ideas did not win the day. The U.S. Constitution has proved one of the most stable texts in legal history. New generations simply grow into its neutral order, which can adapt to changes not only through amendment (a rare occurrence),

but also by judicial and administrative practice (with support from Congress) without having to modify the text. In contrast, during the second half of the twentieth century, the German Basic Law underwent several major amendments and changed in over one hundred points. In the same time-period, the Austrian Constitution was amended and supplemented with hundreds of constitutional laws. While it is not always easy to draw a firm line between constitution-making and amending the constitution, from a formal standpoint constitutional amendments are readily identifiable inasmuch as constitutions themselves prescribe how they may be amended.

In contemporary rule-of-law states, the constitution is binding as the state's fundamental law because of the manner of its making or ratification. The popular mandate of the draftsmen or the subsequent ratification procedures make the constitution the most general expression of popular will and the nation's highest ranking legal norm. But this popular-social compact, or at least the acceptance of submission, is not without its problems, because a respectable constitution is made respectable not only by its super-legitimate adoption but also by its aging. Contrary to Jefferson's opinion, use will consolidate a constitution. But even if there is no popular revision of the old constitution, it needs current application and practice (in the form of judgments) to give it strength and contemporary meaning.

A rule-of-law state accepts that its constitution has normative binding force, but because of the differing views on the structure of the legal system and the function of the courts, widely differing meanings are attributed to its normative character. In countries where judicial review is an accepted practice, the application of the constitution means by and large that a court hearing a given case may examine whether the law to be applied corresponds to the prescriptions of the constitution. Further, in the absence of other concrete and applicable legal prescriptions, and in cases of direct applicability of the constitution, the relevant provisions of the constitution will be applied as the basis for decision-making.

A constitution, which creates legal rights and obligations, is bound to raise questions of interpretation and enforcement much like any ordinary law. Moreover, as constitutional provisions are often more general and open-ended than typical statutory provisions, arguably they allow far greater interpretive latitude than do their statutory counterparts. Generally, stated constitutional rights to privacy and equality and freedoms of speech and religion are open to multiple and often contradictory interpretations.

To the extent that constitutions grant legally enforceable rights and impose legally binding obligations, it seems logical to submit constitutional disputes to judicial resolution. Most countries with written constitutions provide for constitutional adjudication by courts or court-like institutions; but some have not. One such constitutional democracy is the Netherlands.

Even in countries in which courts can adjudicate cases involving constitutional issues, questions may arise concerning whether such courts may invalidate ordinary laws conflicting with the constitution but enacted after the constitution's adoption; whether constitutional interpretations rendered in the course of adjudications are authoritative and binding on other branches of the government, such as the legislative or executive branch; and whether courts ought to have the final word when it comes to interpreting the constitution.

INTERNATIONALIZATION

As the world becomes increasingly interdependent, and as the challenges constitutional law face expand beyond national boundaries, national courts responsible for constitutional adjudication will look more frequently to their counterparts in other countries for ideas and guidance.

Interest in comparative constitutional law has palpably increased in recent decades, because of, among other developments, (1) the proliferation of new constitutions and transitions to constitutional democracy in various parts of the world, such as Eastern Europe, sub-Saharan Africa, Latin America, and now the Middle East, and (2) the internationalization of fundamental rights, begun after World War II. Even earlier, by the end of World War I, a large number of national constitutions had already clearly recognized fundamental rights of individuals. In the aftermath of World War II, upon the creation of the United Nations in 1945, and its proclamation of the Universal Declaration of Human Rights in 1948, the trend toward the internationalization of fundamental rights was decidedly on its way. Although the 1948 Declaration wielded no legally binding force, it clearly thrust the kinds of rights promoted by the French Declaration of the Rights of Man and of the Citizen of 1789 and the American Bill of Rights of 1791 to the forefront of the international arena. The 1948 Declaration was followed by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which became binding, after ratification by a sufficient number of states, in 1976, ten years after initial adoption by the UN; and several more specific human rights instruments followed. Concurrent with this, several regional charters for the protection of human rights emerged, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its African, American and Asian counterparts. Although both international and regional schemes for the protection of human rights emanate from international treaties rather than constitutions and often differ significantly in application and implementation from rights enshrined in domestic constitutions, transnational rights share much with many of their domestic counterparts in terms of content and scope. Moreover, in some cases, such as the rights protected by the ECHR, judicial enforcement is akin to what is generally available under many domestic constitutions. For instance, an aggrieved individual in a country party to the ECHR may pursue claims arising under the Convention before the

European Court of Human Rights (ECtHR), seated in Strasbourg, France.

In more recent times, contact among judges from different countries has increased sharply, and foreign judicial decisions have become more readily available through the Internet. Moreover, interest in, and opportunities for, exchanges among constitutional scholars from different parts of the world have risen in recent years.

Notwithstanding these evolving trends, comparative legal studies in general and comparative constitutional law in particular are subject to special challenges and objections. Possible objections, concerning the feasibility, desirability, and utility of meaningful comparative analysis, concentrate around the danger of misinterpreting foreign legal and constitutional materials by taking them out of context, or imposing one's own standards, often implicitly, on "the other." Legal norms and institutions are embedded in particular socio-political and cultural developments, and their meaning and import are linked to these. Accordingly, to the extent that the comparativist is unfamiliar with the context of foreign materials examined for purposes of comparison, he or she may misinterpret apparent similarities or misunderstand the import of apparent differences, or may impose a specific bias on the subject. Critics of the comparative approach may ask how does separation-of-powers problems or solutions in a presidential democracy, such as the U.S., can be relevant for a parliamentary democracy, such as Germany or India? Or, how does the teaching of religion in public schools in a country where it is clearly constitutionally permissible, such as Germany, bear any useful relation to the same issue in countries with constitutions committed to the separation between religion and the state, such as France or the U.S.? These questions will not disappear, but by the same token, the comparative approach will likely continue in the face of such challenges.

CONCLUSION

According to democratic principles, a government can function only if it has the approval of those governed. The most perfect form of approval is where the citizens themselves apply self-government, obeying laws they created for themselves. "Self-government" may take the form of representative or direct democracy. Democratic government for the people is realized by the people, with the laws embodying the wishes of the people.

Constitutionalism is suspicious of democracy, but this does not necessarily mean that there is animosity. Putting aside what its individual representatives thought of popular power, constitutionalism is basically neutral on this issue so long as democracy does not threaten to become despotism. In general, modern constitutions expressly recognize equal and universal voting rights as the basis of the political system and of the legitimate exercise of political power. Constitutions and constitutionalism cannot simply disregard the most popular legitimizing theory of our age—namely, democracy. Nevertheless, exercising

democratic power could also pose a threat to liberty and basic rights. Constitutionalism, though it has adopted under modern conditions some of the elements of the democratic political process, attempts to tame the people's democratic rule. Constitutionalism offers such institutions for the exercise of power, which prevent, to a certain extent, democracy's despotic inclinations. By doing this, constitutionalism is not an enemy of democracy, though it does not adulate it. According to Leo Strauss, "...the reason why we cannot allow ourselves to be the bootlickers of democracy is because we are its friends and allies."

Constitutionalism considers certain basic rights and values to be inviolable, as opposed to the majority principle of the sovereignty of people, which claims the supremacy of laws passed by the majority. The constitution, instead of declaring the sovereignty of people, settles on the appropriate restrictive institutions. What powers constitutional institutions do have was vested in them by the people. On the other hand, the sovereignty of the people does not mean that those who exercise this sovereignty may make sovereign decisions on the individuals' existence.

The rule of the majority, be it a faction in the parliament of a majority social group, can only be acceptable if the minority has a chance under the prevalence of the majority rule to become part of the majority at least when it so wants, and if being in the majority does not lead to the oppression of the minority. If the minority has no chance of success in the long run, the system will be unacceptable to them. If the minority's status is unbearable, then there may be a revolt, because for them there is nothing to lose. The constitution is to provide guarantees of the social peace, which is its own prerequisite. Among other reasons, constitutions must protect minorities in order to maintain peace. A constitution should guarantee, therefore, partly by electoral provisions, that the minority's status be endurable and, in theory, that it be only temporary.

To a certain degree, protecting fundamental rights does this, and certain group rights and minority-protection privileges can be added to this. But, completely excluding all disadvantages—all (ab)use of majority power—is impossible. Consequently, constitutions offer institutional and procedural solutions in an effort to protect minorities. Such institutional protection may be provided by constitutional adjudication, if the court enforcing the constitution supplements the legislation's enactment with the minority's concerns left out of consideration by the legislative majority. It is no wonder, then, that the majority-representation principle is not considered, or violated, when constitutional adjudication is established. Separation of powers also serves as a majority-restricting constitutional solution insofar as it is not the same majority that prevails in all branches.

The principles that have underlain constitutionalism for hundreds of years must continue to do so in the future. Constitutionalism is about limiting power. So long as power exists, so too should a robust commitment to constitutionalism, in this millennium and those to come.

Согласно демократическим принципам правительство может функционировать только при наличии согласия управляемых. Наиболее совершенным видом такого согласия является осуществляемое гражданами самоуправление, когда они сами следуют созданным для себя законам. «Самоуправление» может осуществляться посредством представительной или непосредственной демократии. Учрежденное для народа демократическое правительство осуществляется народом посредством законов, закрепляющих волю народа.

Соотношение конституционализма и демократии нельзя считать однозначным, однако это не обязательно означает, что между ними существует противоречие. До тех пор пока отсутствует угроза превращения демократии в деспотизм, конституционализм по сути нейтрален в вопросе о том, что отдельные представители народной власти думают о последней. Современные конституции, как правило, четко устанавливают равное и всеобщее избирательное право как основу политической системы и легитимной политической власти. Конституции и конституционализм не могут просто игнорировать самую популярную теорию легитимации нашего времени, а именно, демократию. Тем не менее осуществление демократической власти также может представлять угрозу для свободы и основных прав. Несмотря на то, что в современных условиях конституционализм охватывает некоторые элементы демократического политического процесса, в то же время он пытается уменьшить демократическую власть народа. Конституционализм предлагает такие институты осуществления власти, которые в определенной степени препятствуют проявлению так называемых деспотических наклонностей демократии. В ходе этого он не выступает в качестве врага демократии, но и не “льстит” ей. По словам Лео Штрауса, “... мы не можем позволить себе быть льстецами демократии, как раз потому, что мы ее друзья и союзники”.

Конституционализм рассматривает некоторые основные права и ценности как неприкосновенные, но не принципы большинства и суверенитета народа, которые предполагают верховенство законов, принятых большинством. Более того, Конституция, вместо признания суверенитета народа, основывается на имеющих ограничивающее значение соответствующих институтах. Полномочия конституционных институтов предоставляются им народом. Однако суверенитет народа не означает, что реализующие его субъекты могут принимать суверенные решения относительно всех аспектов человеческого бытия.

Правление большинства (будь то фракция социальной группы, составляющей

большинство в парламенте) может быть приемлемым, только если меньшинство в условиях действия принципа большинства имеет возможность стать частью большинства, по крайней мере, когда оно этого желает и, будучи в большинстве, не начинает подавлять меньшинство. Система будет неприемлемой для меньшинства, если в конечном итоге оно не имеет возможности на успех. И если положение меньшинства станет невыносимым, то может вспыхнуть волнение, так как представителям обсуждаемой группы будет нечего терять. Конституция должна устанавливать гарантии социального мира, который является предпосылкой для нее самой. Следовательно, в числе других причин, конституции защищают меньшинств, также в целях поддержания мира. Таким образом, Конституция должна гарантировать, частично посредством положений относительно избирательных прав, серьезный статус меньшинств, и чтобы теоретически он был лишь временным.

Защита основных прав в некоторой степени служит этому. Вместе с этим она может быть дополнена определенными групповыми правами и привилегиями по защите прав меньшинств. В то же время следует отметить, что полное исключение всех недостатков - всех случаев злоупотребления властью большинства - невозможно. Именно по этой причине конституции устанавливают соответствующие институциональные и процессуальные средства в целях защиты меньшинств. Такая институциональная защита может быть предоставлена посредством конституционного правосудия, когда суд, рассматривая вопросы относительно реализации Конституции, обеспечивает действие законодательства, учитывая интересы меньшинств, которые не были приняты во внимание парламентским большинством. Не удивительно, что с созданием института конституционного правосудия принцип представительства большинства не учитывается или даже нарушается. Разделение властей также служит выявлению конституционного решения по ограничению прав большинства постольку, поскольку одно и то же большинство не является преобладающим во всех отраслях.

Принципы, лежащие в основе конституционализма в течение столетий, должны быть таковыми и в будущем. Конституционализм служит ограничению власти. До тех пор пока существует власть, должна существовать строгая приверженность конституционализму как в этом, так и в будущих тысячелетиях.

Gemäß demokratischen Prinzipien kann eine Regierung nur mit Zustimmung der Regierten funktionieren. Die vollkommenste Art einer solchen Zustimmung ist die Selbstverwaltung der Bürger, wenn sie den Gesetzen folgen, die sie für sich geschaffen haben. Die «Selbstverwaltung» kann durch eine repräsentative oder unmittelbare Demokratie realisiert werden. Die für das Volk etablierte demokratische Regierung wird vom Volk mittels der Gesetze ausgeübt, in denen der Wille des Volkes verankert ist.

Das Verhältnis zwischen dem Konstitutionalismus und der Demokratie kann nicht als eindeutig bewertet werden, dies bedeutet indes nicht, dass es einen Widerspruch zwischen den beiden gibt. Solange keine Gefahr der Ausartung der Demokratie in die Despotie droht, ist der Konstitutionalismus neutral hinsichtlich der Frage, was die einzelnen Vertreter der Volksmacht von dieser halten. Die modernen Verfassungen legen in der Regel ein gleiches und allgemeines Wahlrecht als Grundlage des politischen Systems und der legitimen politischen Macht fest. Die Verfassungen und der Konstitutionalismus können die populärste Legitimationstheorie unserer Zeit, d. i. die Demokratie, nicht ignorieren. Nichtsdestoweniger kann auch die Ausübung der demokratischen Macht eine Gefahr für die Freiheit und die Grundrechte darstellen. Obwohl der Konstitutionalismus unter gegenwärtigen Bedingungen einige Elemente des demokratischen politischen Prozesses erfasst, versucht er gleichzeitig die demokratische Macht des Volkes zu reduzieren. Der Konstitutionalismus bietet solche Institute der Machtausübung, die das Eintreten so genannter despotischer Neigungen der Demokratie einigermaßen verhindern. Dabei handelt er nicht als ein Feind der Demokratie, aber er «schmeichelt» ihr nicht. Leo Strauss meinte, dass man sich nicht erlauben kann, der Demokratie zu schmeicheln, gerade weil man ihr Freund und Verbündeter ist.

Der Konstitutionalismus betrachtet einige Grundrechte und Werte als unantastbar, aber nicht die Prinzipien der Mehrheit und der Souveränität des Volkes, die den Vorrang der von der Mehrheit angenommenen Gesetze voraussetzt. Mehr noch, statt die Souveränität des Volkes anzuerkennen, gründet sich die Verfassung auf die Institute, die eine beschränkende Bedeutung haben. Die Befugnisse der Verfassungsinstitute werden diesen vom Volk eingeräumt. Aber die Souveränität des Volkes bedeutet nicht, dass die Subjekte, die diese realisieren, souveräne Entscheidungen über alle Aspekte des menschlichen Seins treffen können.

Die Regierung der Mehrheit (etwa der Fraktion einer sozialen Gruppe, die die Mehrheit im Parlament hat) kann nur akzeptabel sein, wenn die Minderheit unter Bedingungen der Geltung des Mehrheitsprinzips eine Möglichkeit hat, ein Teil der Mehrheit zu

werden, mindestens wenn sie es wünscht, und, indem sie zur Mehrheit gehört, die Minderheit nicht zu unterdrücken beginnt. Das System wird für die Minderheit inakzeptabel, wenn sie im Endergebnis keine Erfolgchancen besitzt. Und wenn die Lage der Minderheit unerträglich wird, kann es zu einer Auflehnung kommen, denn die Vertreter dieser Gruppe haben dann nichts zu verlieren. Die Verfassung muss Garantien des sozialen Friedens festsetzen, der eine Voraussetzung für die Verfassung selbst ist. Auch deswegen, d. h. zur Erhaltung des Friedens, schützen die Verfassungen die Minderheiten. Die Verfassung muss also einen bedeutenden Status der Minderheiten schützen, zum Teil durch die Vorschriften über Wahlrechte.

Der Schutz der Grundrechte dient einigermaßen dazu. Gleichzeitig kann dieser Schutz durch bestimmte Gruppenrechte und Vorrechte für den Schutz der Rechte der Minderheiten ergänzt werden. Es wäre aber auch zu bemerken, dass es unmöglich ist, alle Fälle des Machtmissbrauchs durch die Mehrheit auszuschließen. Gerade deswegen etablieren die Verfassungen entsprechende institutionelle und prozessuale Mittel zum Schutz der Minderheiten. Ein solcher institutioneller Schutz kann durch die Verfassungsgerichtsbarkeit gewährt werden, wenn das Gericht, das die Fragen betreffend die Realisierung der Verfassung behandelt, die Geltung der Gesetzgebung gewährleistet und dabei die Interessen der Minderheit berücksichtigt, die die Mehrheit im Parlament nicht beachtet hat. Es ist nicht weiter erstaunlich, dass mit der Einrichtung der Verfassungsgerichtsbarkeit das Prinzip der Vertretung der Mehrheit nicht berücksichtigt und sogar verletzt wird. Auch die Gewaltentrennung dient insoweit zur Ermittlung der verfassungsmäßigen Entscheidung über Beschränkung der Rechte der Mehrheit, als ein und dieselbe Mehrheit nicht in allen Bereichen dominiert.

Die Prinzipien, die bereits jahrhundertlang dem Konstitutionalismus zu Grunde liegen, müssen auch in der Zukunft aufrecht bleiben. Der Konstitutionalismus dient zur Beschränkung der Macht. Solange es Macht gibt, muss dem Konstitutionalismus Treue gehalten werden, in diesem Millennium und in späteren Millenniumen.

RÉSUMÉ

Selon les principes de la démocratie, le gouvernement ne peut fonctionner qu'avec le consentement des gouvernés. Le mode le plus parfait d'un tel consentement est l'autogestion des citoyens quand ils se conforment aux lois établies par eux-mêmes et pour eux-mêmes. «L'autogestion» peut être mise en œuvre au travers de la démocratie représentative ou directe. La gouvernance démocratique, mise en place pour le peuple, est exercée par le peuple par le biais des lois qui transcrivent la volonté du peuple.

Le rapport du constitutionnalisme et de la démocratie n'est pas univoque, mais cela ne suppose pas nécessairement qu'il y a une contradiction entre eux. Tant que la menace de la transformation de la démocratie en despotisme ne se pose pas, le constitutionnalisme est essentiellement neutre sur la question de ce que certains représentants du pouvoir du peuple pensent de celle-ci. Les Constitutions modernes, en règle générale, définissent clairement le droit égal et universel de vote comme base du système politique et du pouvoir politique légitime. Les Constitutions et le constitutionnalisme ne peuvent pas simplement ignorer la théorie de légitimation la plus populaire de notre temps, à savoir, la démocratie. Toutefois, la mise en place d'une gouvernance démocratique peut aussi représenter une menace pour la liberté et les droits fondamentaux. Dans les circonstances actuelles le constitutionnalisme, tout en englobant un certain nombre d'éléments du processus politique démocratique, tente de réduire le pouvoir démocratique du peuple. Le constitutionnalisme propose de telles institutions de gestion, qui dans une certaine mesure, empêchent la manifestation de tendances soi-disant despotiques de la démocratie. Dans ce processus, il n'agit pas comme un ennemi de la démocratie, mais ne la flatte pas non plus. Selon Leo Strauss, «... nous ne pouvons pas nous permettre d'être des flatteurs de la démocratie, justement parce que nous sommes ses amis et ses alliés».

Le constitutionnalisme traite un certain nombre de droits et de valeurs fondamentaux comme étant inviolables, mais cela ne concerne pas les principes de la souveraineté et de la majorité du peuple qui supposent la suprématie des lois, adoptées par la majorité. En outre, la Constitution, au lieu de reconnaître la souveraineté du peuple, se base sur les institutions appropriées ayant un effet limitatif. Les pouvoirs des institutions constitutionnelles leur sont accordés par le peuple. Cependant, la souveraineté du peuple ne veut pas dire que les sujets qui réalisent cette souveraineté peuvent prendre des décisions souveraines sur tous les aspects de l'existence humaine.

La gestion par la majorité (qu'il s'agisse d'un groupe social ayant la majorité au parlement) ne peut être acceptable que si la minorité, dans les conditions de l'action du principe de la majorité, a la possibilité de faire partie de cette majorité, au moins quand elle le souhaite, et étant dans la majorité, ne réprime pas la minorité. Le système sera inacceptable pour la minorité si celle-ci, en fin de compte, n'a pas de capacité de réussir. Et au cas où la situation de la minorité devient insupportable, une révolte s'éclate, puisque les représentants du groupe susdit n'ont rien à perdre. La Constitution doit définir les garanties de la paix sociale qui est la condition de base pour l'existence d'elle-même. Par conséquent, les Constitutions protègent les minorités, entre autres raisons, aux fins de la maintenance de la paix. Ainsi, la Constitution doit garantir, en partie à travers les dispositions concernant le droit de vote, un statut sérieux aux minorités, et théoriquement, ce statut ne peut être que temporaire.

La protection des droits fondamentaux sert, dans une certaine mesure, à cela. Mais il faut la compléter par quelques droits et privilèges de groupe concernant la protection des droits des minorités. En même temps il convient de noter que l'élimination complète de tous les défauts, de tous les cas d'abus de pouvoir par la majorité, est impossible. C'est pour cette raison que les Constitutions définissent des moyens institutionnels et de procédure appropriés aux fins de la protection des minorités. Une telle protection institutionnelle peut être mise à disposition à travers la justice constitutionnelle, quand la Cour, examinant les questions relatives à la mise en œuvre de la Constitution, garantit l'action de la législation, en tenant compte des intérêts des minorités qui n'ont pas été pris en considération par la majorité parlementaire. Ce n'est pas donc étonnant qu'avec la création de l'institut de la justice constitutionnelle le principe de la représentation de la majorité n'est pas pris en considération, voire il est violé. La séparation des pouvoirs sert également à l'identification des solutions constitutionnelles de restriction des droits constitutionnels de la majorité dans la mesure où la même majorité n'est pas dominante dans tous les domaines.

Les principes qui sont à la base du constitutionnalisme au cours des siècles, doivent nous conduire aussi dans l'avenir. Le constitutionnalisme sert à la restriction du pouvoir. Tant que le pouvoir existe, un strict respect du constitutionnalisme doit exister dans le présent aussi bien que dans le prochain millénaire.

CONSTITUTION AND CONSTITUTIONALISM IN THE CONTEXT OF CONSTITUTIONAL CULTURE OF THE NEW MILLENNIUM

Gagik HARUTYUNYAN

An opinion prevails in legal literature that the initial meaning of the verb to constitute (initiate, found) implies neither limiting political power for the sake of individual liberties, nor inducing the government to abide by common ethical norms.¹ To constitute first and foremost means to “establish”, “set up”. McIlwain claims that Cicero’s phrase “Haec constitutio” was the first reference to the notion of “constitution” as applied to a form of governance.² Citing historical background S. Holmes concludes: “the primary function of ancient constitutions was not to limit existing power, but create power out of the lack thereof”.³

Under this epistemological chain of thought the notion of constitution (*constitutio* – establishment, setting-up, organization) is traditionally characterized as the Supreme Law of a **state**, endowed with highest legal force, the main features of which are determined by the fact that it establishes:

- the bases of state order;
- safeguards to protect the rights and fundamental freedoms of man and citizen;
- a system of state power, the functions, principles and the order of organization thereof;

1 See Стивен Холмс, Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, N3(88), - P. 61 (Many valuable works on problems of contemporary constitutionalism have been published in the USA, where the problems of constitutionalism are mainly considered in the context to factual constitutional restriction of power. See. Holmes S. Constitutions and Constitutionalism // The Oxford Handbook of Comparative Constitutional Law /Ed. by M. Rosenfeld, A. Sajó/. Oxford University Press, 2012; Michel Rosenfeld, Comparative Constitutionalism: Cases and Materials, (2d. Ed., West 2010) (with Baer, Dorsen, and Sajó); American Constitutionalism: From Theory to Politics. Book by Stephen M. Griffin. Princeton University Press, 1996; Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism. Book by Robert Justin Lipkin. Duke University Press, 2000; The Supreme Court and American Constitutionalism. Edited by Bradford P. Wilson and Ken Masugi. The Ashbrook Series on Constitutional Politics Rowman & Littlefield. 1997 Softcover; Progressive Constitutionalism. Book by Robin West. Duke University Press, 1994; Constitutionalism: The Philosophical Dimension. Book by Alan S. Rosenbaum. Greenwood Press, 1988; Liberalism, Constitutionalism and Democracy. Book by Russell Hardin. Oxford University Press, 1999; American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History. Book by George Ethan Bellies. Greenwood Press, 1990; Progressive and Conservative Constitutionalism. Journal article by Robin West, M. TechNet, R. Epstein, Rail Berger, Robert Bork. Michigan Law Review, Vol. 88, 1990; American Constitutionalism: From Theory to Politics. Stephen M. Griffin. One of Choice’s Outstanding Academic Books of 1997; The Paradox of Constitutionalism. Constituent Power and Constitutional Form. Edited by Martin Laughlin and Neil Walker. Oxford University Press, 2008 and others).

2. See McLain Ch. H. Constitutionalism Ancient and Modern. Ithaca, NY: Cornell University Press, 1947, P. 25.

3 Ibidem, p. 62.

- a legal framework for the exercise of political power, as well as individual political, economic, social rights and freedoms.

Topical discussions in international forums and scientific literature evolve around such subjects as “Axiological aspects of the development of the Constitution,” “Political basis of constitutionalism,” “Development trends of liberal constitutionalism,” “Constitution in the context of expressions of constitutional culture,” “Characteristic features of European constitutionalism and constitutional culture,” “Patterns of expression of supranational constitutionalism,” etc.⁴ We also intend to approach these problems exactly from the viewpoint of revealing the axiological essence and interdependence of fundamental notions of constitution, constitutional culture and constitutionalism, **placing our understanding of these notions in the context of Armenian historical reality.**⁵

A study of Armenian legal thought, especially in the wake of the adoption of Christianity as a state religion in 301 A.D., opens up unique opportunities for revealing epistemological, axiological, spiritual and ethical essence of these notions.

From the point of view of legal axiology the emergence of constitutional culture is determined by the extent to which **“constituting relations” are evaluated in the legal sense, become commonly accepted rules of behavior**, irrespective of the fact whether they are customary or universally binding behavioral rules.⁶ In literature the Constitution itself is often deemed a cultural phenomenon only in the event when it is realized, becomes a living reality that is perceived and recognized, rather than remaining a compilation of pleasing language and smart ideas.⁷

In the Armenian language the notion “Constitution” first and foremost implies an act of not just merely constituting, but of **setting borders**. It is not incidental that in 1773 Ha-

4 See Стивен Холмс, Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, №3(88), - pp. 56-84; Кутафин О.Е. Российский конституционализм. - М., 2008; Танчев Е. Возникающий над-национальный конституционализм и современные системы конституционного контроля // Сравнительное Конституционное Обозрение, 2007, №4, p. 78-94; Розенфельд М., Шайо А. Распространение либерального конституционализма: изучение развития прав на свободу слова в новых демократиях // Сравнительное Конституционное Обозрение, 2007, №1. - pp. 102-120; Современный конституционализм и государство Израиль // Современный конституционализм, 2006, №2. - pp. 50-54; Теория конституционализма и философия государства в ФРГ // Закон и право, 2001, №5. - pp. 39-47; The Twilight of Constitutionalism?. Series Editors: Martin Loughlin, John P. McCormick, and Neil Walker. Oxford University Press, 2010; The Constitution in 2020. Edited by Jack M. Balkin, Reva B. Siegel. Oxford University Press, 2009; Constitutional Cultures. Ed. by M. Myrzykowski. Warsaw, ISP, 2000; Constitutional Cultures: The Mentality and Consequences of Judicial Review. Robert F. Nagel. University of California Press, 1993; Collection Science and technique of democracy, N 37; European and US constitutionalism. G. Nolte (Editor). European Commission for Democracy through Law. Council of Europe Publishing, 2005.

5 See Gagik Harutyunian, Epistemological nature of constitutionalism in the context of historical evolution of constitutional culture // The legal philosophy of the Pentateuch, edited by A. A. Husseinov and E. B. Rashkovskiy, Moscow, 2012, pp. 70-82...

6 See Политико-правовые ценности: история и современность / Edited by B. C. Пересеянц. - М., 2000. - p. 5-30.

7 See Book Review – Höberle and the World of the Constitutional State, <http://www.germanlawjournal.com/print.php?id=227>.

kob and Shahamir Shahamirians entitled their Constitution for the yet-to-be independent Armenia *The Entrapment of Vanity*. This implied outlining the “ultimate limits” not only of freedom, but also vanity. The authors of this unique historical document emphasized: “...We need a great measure of kindness to restrain our lives with the law and freedom, in order to become worthy of Lord’s esteem.”⁸ These laws, in turn, had to be prescribed “in harmony with human nature, according to the desire of our rational soul”⁹.

At the same time, **in the origins of Armenian constitutionalism, the notion of constitution possessed, above all, an axiological-systemic denomination.**¹⁰

The authors of the *New Dictionary of the Armenian Language*, published in Venice in 1837, provided a brilliant insight into the axiological nuances of constitution. They precede the relevant entry with multilingual equivalents, such as *determinatio, constitutio, statutum, dispositio*. Then follow with an exceptionally remarkable phrase: “**Regulatory determination of borders and Divine Providence.**”¹¹ It is evident that we deal here not only with a supreme “determination” of constituting nature and, hence, with legal regulation of such a scale, but that **it is based upon divine perception, a system of values granted from above, ultimate Providence.**

It is obvious that the dictionary in question covers a broad scope for the notion of constitution, departing from a number of important components:

- it is a decision, order, statute;
- it possesses determining significance, precluding “decisions” that evade or are over and above it;
- the phrase “Divine Providence,” while augmenting the determining and ultimate nature of the “decision,” adds a particular emphasis to the existence of its underlying perpetual values that are “granted from above”. The semantic scope of this language originates in spiritual, ethical, philosophical, cognitive and Weltanschauung roots of the Armenian legal mind.

The elements of constitutionalism have come about in the course of a lengthy historical period, in the Armenian reality they were expressed with a particular persistence, especially, as it was already noted, **following the adoption of Christianity as a state religion, in conditions of the need for establishing coordinated, uniform rules for secular and ecclesiastical lives.** Mesrop Mashtots (362-440), Yeznik Koghbatsi (circa 380-450), Yeghishe (410-475), Movses Khorenatsi (circa 410-495) and many other outstanding Medieval Armenian thinkers have reflected on issues of law, right, justice, in-

8 See *The Entrapment of Vanities*, Yerevan, 2002, p. 38 (in the Armenian language).

9 *Ibidem*, p. 71.

10 See G. Harutyunyan. *Constitutional Culture: the Lessons of History and the Challenges of Time*. Yerevan, 2009.

11 See Նոր Բառապիք Հայկազյան Լեզվի, Երևան 1981, p. 688.

evitability of punishment, recovery commensurate with the guilt, interdependence of the concepts of “reason” and “law,” and the role of all of the above in human life, governing a state and ensuring the stability of the society. By separating divine justice from human, they underscored that the law of kings was to punish the criminals, while the Almighty punished both the criminals and the people. It punished the criminals as the Lawmaker, and it punished the people as the Seer. One of the characteristic features of this period is that great significance was ascribed to the role of the law and justice in affirming public solidarity, assuring the sustainable development of the state.

Movses Kaghankatvatsi recounts: “During the years of the Aghvan King Vachagan there were many conflicts between lay people and the bishops, priests and suffragans, the nobles and the commons. The king desired to convene a populous assembly in Aghven, which took place on the thirteenth day of the month of May”.¹² The outcome of that assembly was the adoption of the **Canonical Constitution**. Historiography dates this constitution, which contained 21 articles, to the year of 488 A.D.

In this respect, we would like to isolate the following considerations:

1. A situation had matured in the Armenian milieu by the middle of the 5th century, when attempts were made to address emerging “conflicts” between various strata of the society not through the dictate of force or “administrative” means (including royal decrees or the use of the stick), but through legal means, by enacting constitutional laws, based on fundamental spiritual values.
2. The adoption of the Constitution by the Constitutional Convention, an amazingly progressive occurrence for the time, comes to prove that the **regulation of social relations was based on spiritual principles, ethical values and principles of social accord**.
3. No other modifier than constitutional is used to characterize the canons, affording them a special status, recognizing the supremacy of norms established through national consensus over any other norm or canon.

Evidently only that society is progressive and stable, which is based on ethical values and spiritual roots of legal perception. After the adoption of Christianity as a state religion, when the rules of ecclesiastical and secular lives were jointly set on the basis of common Christian Weltanschauung, one of the most characteristic and noteworthy circumstances was that **the factor of social accord had become the foundation for legal regulation**. Relations within the society were regulated by an agreement forged at an assembly, rather than imposed through force by a sole dictator. For example Movses Khorenatsi, referring to the Ashtishat Council of 365 A.D., states that in the third year of the reign of Arshak, Nerses the Great, son of the supreme Patriarch Atanagines, “sum-

¹² See Мовсес Каланкатвацци. История Агвена. - Ереван, 1969. - р. 65.

moned a Council of bishops in concert with the laity, by canonical constitution he established mercy, extirpating the root of inhumanity.”¹³ The Council prohibited wedlock between close relatives; it condemned treachery, intrigues, greed, gluttony, usurpation, homosexuality, gossip, fervent alcoholism, lying, prostitution, and murder. It also bound the nakharars (princes) to treat their workers with mercy, and the servants to obey their masters. It was decided to build hospitals for the feeble, orphanages and asylums for orphans and widows, hotels for aliens and guests, and levies and taxes were imposed to support all these.

In the first half of the 5th century the **Council of Shahapivan** was convened, where, according to historical chronicles: “there came 40 bishops and many priests, deacons, ardent ministers and the entire clergy of the holy church, all princes, provincial governors, supreme justices, treasurers, generals, intendants, village chiefs, noblemen from various regions.”¹⁴ The senior Nakharars of the Armenian land, who were zealous defenders of laws and sanctities, said this: “Restore the law and order established by Saints Grigor, Nerses, Sahak and Mashtots, and establish by your own will other goodly things, and we shall willingly and lovingly accept. Since the church’s law and order has dwindled, and people have reverted to unlawfulness. You shall define laws pleasing for God and useful in calling the church to life, and we shall adhere to them and keep them strong.”¹⁵

The Council of Shahapivan enacted 20 canons, pertaining to such important, fundamental for their time, issues of Armenia’s internal life, as regulation of matrimonial relations, the operation of the clergy and control over it, struggle against sectarianism, etc.

In order not to “justify heresy with ignorance,” Armenian Medieval history provides other testimonies with an emphasis on adherence to spiritual-legal rules that are the result of public accord. Most salient among these is the **“Armenian Book of Canons” by Catholicos Hovhannes Odznetsi (Hohvan Imastaser Odznetsi), which was endorsed at the Third Council of Dvin in 719 A.D.** Odznetsi was among the first in the world after Byzantine emperor Justinian the Great (482-565) and the first in Armenia to systematize the Armenian *Corpus Juris Canonici*, a compilation of laws which was promulgated by the head of hierocracy, the Catholicos, and contained the canons adopted and ratified by Armenian ecclesiastical councils.¹⁶

One of the specific features of the Armenian Book of Canons is exactly in that it was a **corpus of canonic constitutions**, that had been adopted in the Armenian reality since 365 A.D. and, which is remarkable, they emphasize the divine nature of a reasonable

13 See Мовсес Хоренаци. История Армении. – Ер., 1997. – р. 224-225.

14 See Авакян Р.О. Памятники армянского права. – Ер., 2000. – р. 42-43.

15 Ibidem, p. 43.

16 See Армянская книга канонов. - Ереван, vol. I - 1964, vol. II – 1971.

being. A human being, with his spiritual origin, dignity and the social role, is viewed as the ultimate value and the bearer of legal regulation. As emblematically noted by R. A. Papayan, “The framework of natural law had been established **before the creation of man**, since for not a single moment he should have existed in legal vacuum.”¹⁷

An unshakeable value for Armenian reality was the understanding that “the loss of the soul when one deviates from the spotless and straight faith of the Father, the Son and the Holy Spirit, professed by the apostles, is more than the loss of the body.”¹⁸ A thousand years ago, Grigor Narekatsi in his *Book of Lamentations* brilliantly condensed the spiritual perception of the Armenian identity: when referring to our various passions, he underlines that human sins, however many and diverse, are the misfortune, rather than the guilt, of an individual. Delivering “an ultimate prayer to God” through the lips of the Armenian people, Narekatsi begs Him to guide man towards the right path and a decent life. He deemed this possible in conditions of accord and justice in the society that abides by the laws and “is healthy in spirit,” where justice cannot, however “waning, disappear altogether” or “the scale of the law to become too light, making heavier the scale of lawlessness.”

It was profoundly understood that a single good law or statute was not sufficient; it was necessary for the people to embrace the need of living by these laws, and for this attitude to be based on the confidence anchored to stable virtuous values prescribed by the reasonable essence of man. This is why Nerses Shnorhali (Nerses the Fourth Klayetsi) in the 12th century addressed his words not only to God, but also, through his “Encyclical” (1166), addressed his commandments to the ministry, the “princes of the world” and the people. This was his first encyclical, an epitome of his prose writing, and it has exceptional significance also in terms of studying legal and constitutional culture. This document is unique in its conceptual-programmatic scope, value system generalization, and harmony between norm-objectives, norm-principles and “behavioral” norms. Establishing canons and guidance addressed to all strata of the society, that were based on high spiritual and moral grounds, Shnorhali was certain that one might expect to succeed only through abiding by those requirements, overcoming the perils of “evil and polyarchy” and proceeding by the “sprouts of justice.” He advised the lay people not to perform evil deeds, not to deprive, not to use wicked agents, not to judge unfairly, to protect the widows and the poor, not to cut the pay of the worker, to treat everyone with an even eye, not to abandon the spiritual for the sake of the bodily. “...Those who profess God only in words but not deeds, have stillborn faith.”¹⁹

17 See Папаян Р.А. Христианские корни современного права. – М.: “НОРМА”, 2002.- р. 210.

18 See Товма Арцруни и Ананун. История семьи Арцрунианц. – Ереван, 1999 – р. 123.

19 See Авакян Р.О. Памятники армянского права. – Ер., 2000. – р. 186.

One may, without exaggeration, acknowledge that the Encyclical contains numerous norms on human rights and the competences of the authorities. In “To the princes of the world” he, in particular, advised: “not to treat your subjects unlawfully by levying heavy and cumber some taxes, but judge everyone by law, commensurate to his capacity,” “Do not deprive anybody and do not further divest the poor and the disenfranchised,” “Do not appoint wicked and lawless administrators and governors over your domains,” “Do not judge anyone lawlessly, but adjudicate rightly,” “Do not ignore the rights of widows and the poor,” etc. Shnorhali’s approaches to judging only by the law, the retroactive effect of law, the degree of responsibility, proportionality of sentence and other fundamental legal issues are remarkable (“never rule prompted by anger or unfair law, punishing someone or sentencing to death, since the New law does not allow for this, whereas the Old law, although it allowed to rule for punishment or death sentence, but not unduly, only in accordance with the gravity of the crime”). Moreover, **the substrate of all commandments is the human being, with the acknowledgment of the need to meaningfully organize his moral shape, rational existence and spiritual pureness.**

It invariably follows from the testimony quoted here, that **the act of constituting social relations, the establishment through common consent of universally binding rules of behavior first and foremost emanate from the system of socio-cultural values of the society in question, the spiritual-moral origins of its behavior, and hence shape the appropriate level of constitutional culture.**

As mentioned in literature “...a value orientation is common to every constitution. Any constitution is rooted in basic provisions recognized by the authorities as values within the civilization in question, and it enshrines the former to this or that extent.”²⁰ **Regardless of the dimension of time, the culture of every nation boils down to its conscious existence, cognizant presence in time.** It is this very cognizant presence, which, at a particular level of development, leads to the act of constituting the social behavior of man and the authorities. As stated by a corresponding member of the Russian Academy of Science Ye. A. Lukasheva, “the socio-normative complex and the values generated by the social interaction of people are important components of culture.”²¹ It is with a notice to the value-systemic nature of constitutional legal regulation that professor Michele Rosenfeld and Andras Sajó underscored the topical nature of the problem of the **impact of transplanting liberal constitutional norms** on the propagation and strengthening of liberal constitutionalism.²²

20 See Конституция в XXI веке: сравнительно-правовое исследование: монография /Edited by В.Е. Чиркин/. – М.: Норма: ИНФРА-М, 2011. – р. 22.

21 See Лукашева Е.А. Человек, право, цивилизация: нормативно-ценностное измерение. - М.: Норма, 2011. - р. 12.

22 See Мишель Розенфельд, Андраш Шайо. Распространение либерального конституционализма: изучение развития прав на свободу слова в новых демократиях // Сравнительное Конституционное Обозрение. 2007. N1, - р. 102.

Constitutional culture is not an abstract notion; it is expressed in all spheres of social existence on the sound substrate of spiritual and material values and ideals that were developed, suffered through and honed through many centuries, irrespective of the existence of a written constitution or the will of the rulers.²³ That is why a Constitution may not be commodity that yields itself to being exported or imported. And any transplanted element must be adequate to the host organism. On the other hand, as emphasized from a pragmatic point of view by Lech Garlicki, every national constitution proclaims a certain set of values that determine the significance of its provisions. Since no clear distinction between values, principles and norms exists there, all constitutions contain a number of fairly general notions, which may serve as a basis in the process of interpreting its provisions.²⁴

In the light of the current achievements of civilization the principal characteristic of constitutional culture is that **a country's Supreme Law must include the whole system of in-depth, enduring values of the society and guarantee their stable protection and reproduction.** These values, in turn, are formed in the course of centuries, each generation re-thinking them and, through its own additions, securing the continuity of development. Success accompanies those countries and nations, wherein this chain remains unbroken or is not seriously disrupted. Therefore **the notion of constitutional culture in a broader sense may be characterized as the specific stable, historically formed system of values, enriched by the experience of generations and the whole mankind, which underlies the social existence, contributes to the definition and realization of principal rules of behavior on the basis of their spiritual and ethical intellectual absorption.**

The constitution itself must embody this system of values, become a product of cognizant presence of the society in question at the specific historical phase of its development, **become a result of social accord around fundamental values of social behavior of the state and the citizen.** This is the ideal one has to pursue. But, as emphasized by Professor Stephen Holmes, "So far no constitution has delivered on the promise of democratic constitutionalism or adjusted the interests of the rulers to those ruled over."²⁵ We shall return, in due course, to the reasons for this, at the same time it is necessary to mention that this conclusion spells the conceptual need for a method of approach to the constitution itself as the fundamental law of the **state** or as the **basic law of the society in question.**

²³ For more details see Gagik Harutyunyan. *Constitutional Culture: the Lessons of History and the Challenges of Time.* - Yerevan, 2009.

²⁴ Лех Гарлицкий. "Конституционные ценности" и Страсбургский суд. A collection of communications "Конституционные ценности в теории и судебной практике". - М., 2009. - p. 221.

²⁵ See Стивен Холмс. Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, N3(88). - p. 59.

In the contemporary world the dialectic link between real social life and the constitution is expressed through the prism of relevant features of constitutionalism in the society in question. It seems obvious to us that the presence of a constitution does not determine the level and essence of constitutionalism in the society. One could not agree more with Peter Barenboim over the following: “The causative relation and interdependence between implemented and bookish utopian ideas is one of the crucial issues in understanding utopianism as an important movement in the constitutional and socio-political discourse through the last three millennia.”²⁶

But constitutionalism does not boil down to utopian perception of ideas on the need for constitutional regulation of social relations. Constitutionalism is perceived as a systemic and intellectually absorbed existence of constitutional values in real social life, which is what the entire legal system is based upon. The normative features of this principle assume the existence of necessary and sufficient legal guarantees for a cognizant exercise of rights and freedoms throughout the system of law and social relations. In a rule of law state any legal norm shall express itself as an element of constitutionally agreed system of legal and ethical behavior of man and state.

We also agree with the opinion of professor N. S. Bondar: “...the value judgments on the constitution that prevail in the social conscience, the level of constitutional culture in the society and the state, the potency of ideas of constitutionalism are predominantly determined not by the fact per se of the existence or absence in a society of a legal constitution (basic law), neither, for that matter, by its “age”: there exist far more important and profound, that is: socio-cultural origins of constitutionalism.”²⁷

The system of baseline legal categories, concurrently with socio-cultural evolution, acquires a new appearance and new features. In this system the notion of **constitutionalism as a general legal principal of societal behavior acquires a fundamental significance**. This notion is inalienably anchored to the constitutionalization of social relations and **qualitatively new incarnations of constitutional culture**.

With a view to the above, we believe that the **notion of constitutionalism shall be perceived not as one of the basic principles of constitutional law, but as a fundamental principle of the law as such**. One may paraphrase the well-known Latin phrase “*ubi societas ibi ius*” (if there’s a society, law will be there) and claim “**where there is constitutionalism, there will be a rule of law state.**” **Constitutionalism determines the essence of coordinated behavior of the society, the character of its cognizant existence in time, the level of maturity of social relations and legal regulation thereof.**

²⁶ See Баренбойм П.А. 3000 лет доктрины разделения властей. Суд Сьютера. – М., 2003. - р. 75.

²⁷ See Бондарь Н.С. Судебный конституционализм в России в свете конституционного правосудия. – М.: Норма; ИНФРА. 2011. - р. 24.

This, first and foremost, is the ideal of civilized self-regulation, which the society must pursue.

Within this approach **contemporary constitutionalism equals the presence of fundamental rules of democratic and legal behavior, set by social accord, that exist as an objective living reality in social life, in civic behavior of each individual in the exercise of governance powers.**

The problem does not merely boil down to the implementation of the Constitution, but rather to the formation of a social system in which constitutional axiology is enforced by every cell of the system **as a prerequisite for its own existence. This is the only time-tested safeguard for the implementation of constitutional premises and for the stable development on the basis of social accord.**

Genuine constitutionalism, as an incarnation of legal matter, is inherent to social systems that have attained a certain evolution of recognizing and guaranteeing social freedoms and social accord on the basis of appropriate system of socio-cultural values. A condition for the legal effect of a system of norms is in that the pertinent norms are generally socially potent, that is they are socially actual.²⁸ As fairly stated by professor Robert Alexy, a doctor of public law and legal philosophy, in a developed system the legal effect of norms is based on a constitution, whether written or unwritten, which determines the conditions under which a certain norm becomes part of the legal system and is therefore deemed legally effective.²⁹

Any deformation of constitutionalism implies distortion of fundamental constitutional values in a society, departure from public accord over a system of socio-cultural values of co-existence, from “supreme Providence,” which, upon reaching a certain “critical mass”, will invariably lead to social calamities.

Only through calling Constitution to life, affirming constitutional-normative values as real-life rules, one may guarantee the supremacy of law and systemic stability. **The harmonization of social life realities with constitutional solutions based on the supremacy of law was and remains an über-objective.**

The **notion of constitutionalism** is currently associated with a number of legal phenomena, such as:

- the commonality of principles, rules of operation and structural mechanisms that are traditionally used with a purpose of limiting state power;³⁰

28 See Kelsen H. *Reine Rechtslehre*. 2. Aufl. Wien, 1960. S.219 (Russian edition: Чистое учение о праве Ганса Кельзена / A collection of translations. Issue. 2. М., 1988. - p. 91).

29 See Роберт Алекси. Понятие и действительность права (ответ юридическому позитивизму). Translated from German - М., 2011. - С. 109-110.

30 See Шайо А. Самоограничение власти (краткий курс конституционализма). - М., 1999.

- the constitutional means for the establishment of limits on state power;³¹
- a national-scale supra-partisan consolidating ideology;³²
- a political-legal regime, one of the features of which is the introduction of essentials of harmony and justice into the society;³³
- the existence of constitutional form of governance, state authority that is restricted by a constitution;³⁴
 - self-restraint of the state;³⁵
 - supremacy of law in all areas of socio-political life, implying priority of human rights and guaranteeing mutual responsibilities of individuals and the state;³⁶
 - theory and practice of state and social life organization in conformity with the Constitution, or a political system leaning on a Constitution;³⁷
 - a principle of the rule of law, which assumes restriction of the powers of the leaders of the state and public authorities;³⁸
 - the existence of a Constitution (written or unwritten), its active impact on the political life of the country... constitutional regulation of the state system, the political regime, constitutional recognition of human rights and freedoms, the legal character of relations between citizen and state.³⁹

Many authors also emphasize the supra-state components of constitutionalism.⁴⁰ Attention is drawn to expressions of exogenous and endogenous factors that affect political decision-making. Professor Stephen Holmes underscores that "...constitutionalism only emerged in the era of democratic revolutions over the last three decades of the 18th century. The principle of constitutionalism assumed not just a possibility to organize political life, but a certain ideal form thereof that subjected top politicians to a higher law,

31 See Barendt E. Introduction to Constitutional Law. - Oxford Univ. Press, 1998.-P. 14.

32 See Нерсесянц В. С. Конституционализм как общегосударственная идеология // Конституционно-правовая реформа в Российской Федерации. Сб. ст. / Edited by Ю. С. Пивоваров. - М., 2000. - pp. 6-8.

33 See Сонина Л. В. Конституционализм в Российской Федерации как политико-правовой режим: автореф. дисс. ... канд. юрид. наук. - Екатеринбург, 2001. - p. 7-8.

34 See Пуздрач Ю. В. История российского конституционализма IX-XX веков. - СПб., 2004. - p. 7.

35 See Шайо А. Транснациональные сети и конституционализм // Сравнительное конституционное обозрение. 2008. N 5 (66). - p. 123.

36 See Ромашов Р.А. Современный конституционализм: теоретико-правовой анализ. <http://www.lawlibrary.ru/disser2000401.html> (09.03.2009).

37 See <http://dic.academic.ru/dic.nsf/enc-law/1027/>.

38 See Рассел Г. Конституционализм: опыт Америки и других стран – <http://www.infousa.ru/government/dmpaper2.htm> (09.03.2009).

39 See Кутафин О.Е. Российский конституционализм. - М., 2008. - p. 47. We also believe that in this phrase the term 'human being' would be more appropriate instead of the term 'person.'

40 See Neil Walker /University of Edinburgh/- Taking Constitutionalism Beyond the State. POLITICAL STUDIES: 2008 VOL 56, 519–543; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) CDL-STD (2003)037, European and U.S. Constitutionalism, UniDem Seminar organized in Göttingen on 23-24 May 2003.

which they were emphatically forbidden to modify at their discretion.⁷⁴¹ Developing this idea further, the author proposes a hypothesis, according to which "...constitutional restrictions appear and survive in cases when they cater to the interests of not all citizenry, but the members of society who comprise dominating social structures."⁷⁴²

One may come up with other interpretations of the notion of constitutionalism. What matters most in all of these approaches is that they span the theory and practice of constitutional law per se. We believe that **constitutionalism is the expression of particular constitutional culture commensurate to the cognizant existence of the society in question; it is the systemic, intellectually absorbed existence of constitutional values in real social life, upon which is based the entire legal system, this is the fundamental principle of contemporary law.**

It would be appropriate to recall Hegel's discourse on the substance of *das Recht*, whereupon he mentions that a concept and its existence constitute two separate conditions which are only jointly sufficient for actuality.⁴³ Moreover, there must be a certain harmony between constitutional perceptions and social realities. Harmony between the desired and the real, between that which has acquired public acceptance, became a basic behavioral value and the actual behavior.

In rule of law state the existence of *das Recht* as a necessary form of freedom, equality and justice in the social life, as a basis for co-existence in a dynamic social milieu acquires a new significance in human life. Academician V. S. Nersessiants defines the essence of law as formal equity, which is interpreted and spelled out as a universal and equal measure of freedom and justice in the social turnover of men.⁴⁴ Historical evolution has led to the emergence of the Libertar Legal Comprehension Theory under which *das Recht* is the universal and necessary form of freedom of men, whereas freedom in social life is only possible as the law and in the form of the law.⁴⁵ In his turn academician S. S. Alexeev states: **"mankind has no other way or medium to address global challenges and problems that jeopardize its existence than to install contemporary law right in the centre of peoples' lives."**⁷⁴⁶

Naturally, the essence of the rule of law state is exactly in the recognition of the supremacy of law and guaranteeing freedom through limiting power by the law. This theoretical premise acquires real substance when the society, in full realization and

41 See Стивен Холмс, Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, N3(88). - p. 59.

42 Ibidem, p. 61.

43 See Гегель Г. Философия права: Пер. с нем. - М., 1990. - p. 59.

44 See Нерсесянц В.С. Философия права. -М.: НОРМА, 2008. - p. 3.

45 Ibidem, p. 30.

46 See Алексеев С.С. Восхождение к праву. Поиски и решения. – М.: НОРМА, 2001. – p. 710.

upon public accord, intends to live and create pursuant to this principle and the value-systemic criteria that it generates. The combination of the latter provides the foundation for the constitutional order of every society. **In a rule of law state the expressions of *das Recht* both as an essence and as a phenomenon are exactly characterized by the relevant level of constitutionalism.** This also determines the dialectics of the law and *das Recht*, the relation of constitutionalism to the Constitution as the Fundamental Law of the society. **Constitutionalism, like the law, is an objective social reality, the expression of the essence of civilized cohabitation, which possesses the necessary intrinsic potential for dynamic and stable development.** At a certain level of society's development constitutionalism, as a fundamental principle of law, **acquires a systemic and universal character of legal regulation**, expresses and specifies the legal content of guaranteeing and assuring the supremacy of law and the direct effect of human rights, appears as the criterion of lawfulness of the behavior of the subjects of law, becomes the baseline for lawmaking and implementing activity, epitomizing the historical development of a society in question.

We shall also attempt in this paper to briefly lay down our conceptual approaches towards the formation of institutional and functional foundations for legal regulation that will assure sustainable expressions of constitutionalism and appropriate constitutional culture on the basis of continually effective systemic constitutional monitoring, a safeguard for stability and dynamic development of the society.

The discourse above boils down to the following primary premises:

1. Every nation's culture is its cognizant existence, intellectually absorbed presence in time. Constitutional culture is perceived as the specific stable, historically formed system of values, enriched by the experience of generations and the whole mankind, which underlies the social existence, contributes to the definition and realization of principal rules of behavior on the basis of their spiritual and ethical intellectual absorption.

Systemically constitutional culture becomes incarnate at a particular level of development of civilization, when a **cognizant need** arises to establish, through public accord, basic principles and rules of behavior as universally binding legal norms. In the legal respect this need has led to the emergence of constitutions and constitutional regulation of social life.

Constitutional culture acquires a new quality in social-state systems where, **alongside constitutions there also exists constitutionalism**, where the constitution is not a tool in the hands of public authority, but rather a **Fundamental Law of the civil society**, the means to assure harmonious and stable development thereof, which not only sets basic

behavior rules, but establishes limits on power, restricting it by the law. In such cases we deal with the notion of **Democratic constitutional culture**, which is characteristic of democratic social systems, where features of national and mainstream global cultures converge.

In a rule of law state the notion of constitutional culture is seen as a **particular value system, representing the axis of public awareness, of historically formed, stable convictions, perceptions, legal insight, legal consciousness, enriched by the experience of generations and the entire mankind, that are the basis for the establishment and safeguarding, through public accord, of principal rules of society's democratic and legal conduct.**

2. In this context **contemporary constitutionalism is the existence of fundamental rules of society's democratic and legal conduct, established through public accord, as an objective living reality in public life, in each individual's civic behavior, in exercising state powers.**

Constitutionalism is the expression of particular constitutional culture that is commensurate to the cognizant existence of the society in question; it is the systemic, intellectually absorbed existence of constitutional values in real social life, upon which is based the entire legal system.

3. The normative characteristics of constitutionalism assume the existence of necessary and sufficient legal guarantees for cognizant exercise of rights and freedoms through the entire system of law and social relations. In a rule of law state every norm of the law must be expressed as an element of a constitutionally endorsed system of legal conduct of man and state.

4. **The notion of constitutionalism shall be perceived not as one of the basic principles of constitutional law, but as a fundamental principle of the contemporary law as such.** One may paraphrase the well-known Latin phrase “ubi societas ibi ius” (if there is a society, law will be there) and claim “**where there is constitutionalism, there will be a rule of law state.**” Constitutionalism determines the essence of coordinated behavior of the society, the character of its cognizant existence in time, the level of maturity of social relations and legal regulation thereof. This, first and foremost, is the ideal of civilized self-regulation, which the society must pursue.

5. In rule of law state the existence of *das Recht* as a necessary form of freedom, equality and justice in the social life, as a basis for co-existence in a dynamic social milieu acquires a new significance in human life. Naturally, the essence of the rule of law state is exactly in the recognition of the supremacy of law and guaranteeing freedom through limiting power by the law. This theoretical premise acquires real substance

when the society, in full realization and upon public accord, intends to live and create pursuant to this principle and the value-systemic criteria that it generates. The combination of the latter provides the foundation for the constitutional order of every society. In a rule of law state the expressions of *das Recht* both as an essence and as a phenomenon are exactly characterized by the relevant level of constitutionalism. **This also determines the dialectics of the law and *das Recht*, the relation of constitutionalism to the Constitution as the Fundamental Law of the society.**

6. Constitutionalism, like the law, is an objective social reality, the expression of the essence of civilized cohabitation, which possesses the necessary intrinsic potential for dynamic and stable development. At a certain level of society's development constitutionalism, as a fundamental principle of law, acquires a systemic and universal character of legal regulation, expresses and specifies the legal content of guaranteeing and assuring the supremacy of law and the direct effect of human rights, appears as the criterion of lawfulness of the behavior of the subjects of law, becomes the baseline for lawmaking and implementing activity, epitomizing the historical development of a society in question.

7. The main mission of constitutionalism in the new millennium is exactly in ensuring the stability and dynamism of social development, strengthening morality in social relations, overcoming conflict-prone situations in intergovernmental and domestic relations.

Surmounting the deficit of constitutionalism is the throughway for preventing the accumulation of negative social energy to its critical mass, **whereupon social calamity becomes inevitable.**

8. Constitutionalism, as an incarnation of legal matter, is inherent to social systems that have attained a certain evolution of recognizing and guaranteeing social freedoms and social accord on the basis of appropriate system of socio-cultural values. Any deformation of constitutionalism implies distortion of fundamental constitutional values and principles in a society, departure from public accord over a system of socio-cultural values of co-existence.

9. In the contemporary world the so-called regressive reality is a result, first and foremost, of a systemic disruption of constitutional balance in social practice that was not identified and rectified on time. The existence of **systemic deficit of constitutionalism** or a distortion thereof is obvious. This, in turn, means that the supremacy of the Basic Law of the land is not ensured. Whatever is being endeavored today by the constitutional courts, the über-importance of their mission notwithstanding, is **still fragmented and sporadic**, failing to ensure the necessary persistence and systemic continuousness in identifying,

assessing and redressing skewed constitutional balance in the society, assuring constitutionalism in conformity with the constitutional culture of the new millennium.

As rightfully noted by Professor E. Tanchev: “the problem of implementation of constitutional norms possesses at least two aspects. On the one hand, it pertains to the possibility of implementation of constitutional provisions, depending on their position in the body of the fundamental law and the content of other norms of law. On the other hand, of preponderant significance is the question whether the social reality allows for complying with all the requirements of the constitution”.⁴⁷ Professor Dick Howard, in his turn, identifies the following basic values of constitutionalism:⁴⁸

- 1) popular consent, acquired through representative institutions, free organization of political parties, free access to voting and unencumbered discussion of political issues;
- 2) limiting the powers of government through the separation of branches thereof;
- 3) open society;
- 4) inviolability of a person;
- 5) equality and impartiality;
- 6) constitutional continuity combined with adjusting to new conditions, whether through amending language or by judicial interpretation.

With a view to the basic values of constitutionalism as identified by various authors, we have analyzed and revealed the main characteristics of deformation of the fundamental constitutional principles and values in social reality. This was done on the level of the Constitution per se (including the systemic deformations at the stage of choosing the form of governance and inconsistencies thereof), of deformations in the general legal system, as well as distorted perception and implementation of fundamental constitutional values and principles on the level of law-enforcement practice⁴⁹.

We have arrived at the conclusion that, especially in conditions of societal transformation, deformations of constitutionalism become the main factor contributing to instability and social calamity. Overcoming these requires the existence of viable and systemic constitutional monitoring, based on targeted and continual constitutional diagnostics. This is the lesson taught by history, as well as the challenge of time, requiring urgent attention and adequate action.

47 See Евгений Танчев. Социальное государство (всеобщего благосостояния) в современном конституционализме // Сравнительное Конституционное Обозрение. 2007, N4. – p. 63.

48 See Дик Ховард А.Е. Конституционализм // Верховенство права: Collection: translated from English. - М.: Прогресс -Универс, 1992. – p. 53-65.

49 See Международный альманах “Конституционное правосудие в новом тысячелетии”. – Ереван: “Нжар”, 2005. - pp. 137-155; 2008. – pp. 27-36; 2009. – p. 40-47; Monthly Конституционное правосудие, КС РФ и ООО Publishers “Юрист”. М., 2010, N3 (15). - pp. 34-36; Евразийский юридический журнал, N 7 (26), М., 2010. - pp. 5-9; Gagik Harutyunyan - Modern Challenges to Systemic Development of Constitutional Control (Armenia) // CONSTITUTIONAL LAW REVIEW, April 2012, N5, p. 173-179.

Our main conclusions converge on the following:

1. The existing models of constitutional review and supervision fail to fully ensure the systemic and uninterrupted nature of revealing, assessing and redressing disrupted constitutional balance in social practice, thus failing to address adequately the challenge of time.

2. The failure to restore, in a timely manner, disrupted constitutional balance, leads to the accumulation of negative social energy to its critical mass, which culminates in social explosions and instability.

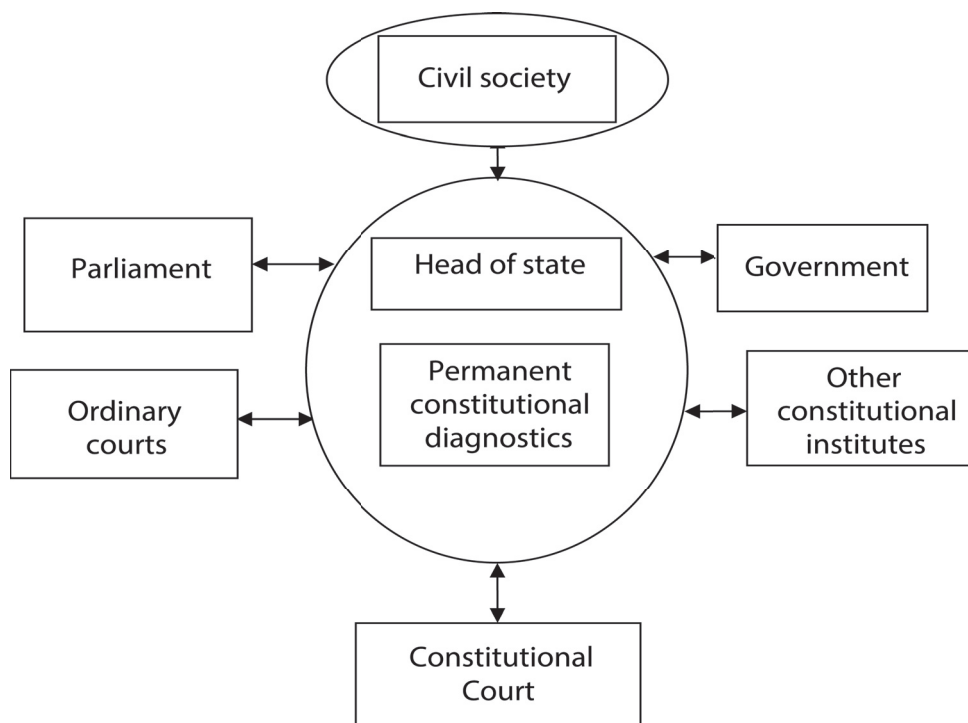
3. There is a lack of systemic and organic interaction in the functional operation of institutes of power in ensuring the supremacy of the constitution.

4. Until the government recognizes and ensures the exercise of the individual right to constitutional justice, it would be impossible to guarantee realistically the supremacy of law.

5. The systemic nature and continuousness of constitutional review are only possible upon the introduction of a holistic system of permanent constitutional diagnostics and monitoring.

The introduction of the fifth premise assumes that the preceding ones have been adequately addressed through legal solutions. Of axial significance here is penetrating the essence of institutional and functional support of systemic and continuous constitutional monitoring.

Below is a schematic of such possible monitoring:⁵⁰



⁵⁰ See Арутюнян Г.Г. Конституционализм: уроки, вызовы, гарантии. – Киев: “Логос”, 2011. - р. 53.

The following are, in particular, the **main purposes** of constitutional monitoring in conditions of social transformation:

- identification and assessment of the deficit of constitutionalism in the political behavior of the society;
- assessment of intra-constitutional deformations, identification of the causes thereof and development of mechanisms to overcome these;
- surmounting distorted perception of fundamental constitutional values and principles in the society, increasing the level of constitutional awareness;
- ensuring the necessary level of constitutionalization of political behavior of institutes of power, as well as of individual behavior;
- removal of deficit of constitutionalism in legislature and other sectors of lawmaking;
- prevention of distortion of constitutional values and principles in the practice of implementation of laws;
- systemic assurance of constitutionality of public governance;
- identification and tracking of transnational criteria for the evaluation of social behavior of individuals and the authorities.

A comparative analysis of constitutional lawfulness in the countries of not only new, but also traditional democracies demonstrates that a certain systemic nature is lacking in addressing these challenges. They end up as a subject of political scheming, rather than legal regulation.

An analysis of the scope of these problems has lead us to the conclusion that ensuring the systemic nature and comprehensiveness of constitutional monitoring may only be possible, if the following factors were to be profoundly considered:

1. The functioning of the social system, as a holistic organism, possesses a multilayered hierarchic character, based upon ensuring and guaranteeing the supremacy of law.
2. The main mission of the immune system of the social organism is in preserving the function of constitutional balance and stability, since failure to restore disrupted balance leads to accumulation of negative social energy to its critical mass, whereupon social calamity becomes inevitable.
3. The control system of constitutional diagnostics and monitoring must function in its inherent regime of continuousness and relative independence, based on clear normative regulation.
4. Any social pathology must trigger and launch into action the entire system of constitutional self-defense.

We are convinced that this would constitute a new level of guaranteeing the supremacy of the living Constitution, when the entire system is based not on abstract constitutional norms, but their real incarnation in the society, **ensuring intellectually absorbed existence of fundamental constitutional values and principles in real social life.**

What is the difference between the notions of constitutional review and constitutional monitoring? We believe that the system of constitutional review, of which judicial constitutional review is one of the main components, may be viewed as a complete system of constitutional monitoring only at a certain level of systemic and continual operation. In this context ‘review’ is the function, ‘monitoring’ is the form of its implementation, and ‘diagnostics’ is the mechanism for the implementation of this function. Essentially **the review is currently implemented through discrete juxtaposition of the object with the Constitution itself, whereas the monitoring implies systemic and continual identification of the real state of constitutionalism in the society.**

This system, in turn, requires a substantial revision of constitutional relations between the institutes of power, redefining the functional and institutional foundations of the operation of systemic and continual constitutional monitoring. In the proposed doctrine the emphasis, first and foremost, is on the **role of the head of state in the system.** The president is the political guarantor of the supremacy of the Constitution. Which is why it is necessary, in particular, to charge with real constitutional-legal substance such constitutional provisions, as: “The President shall monitor compliance with the Constitution,” (see Constitutions of France (Article 5), Poland (Article 126, clause 2), the Republic of Armenia (Article 49); “The President shall be the guarantor of the Constitution,” (see the Constitution of the Russian Federation (Article 80, clause 2); “The President shall ensure the normal functioning of constitutional organs or democratic institutions” (see Constitutions of Portugal (Article 120), Slovakia (Article 101, clause 1), etc.

In a rule-of-law state the main function of the President is exactly in guaranteeing progressive development of constitutionalism in the country. Considering the circumstance, that resolving this issue also assumes systemic identification, assessment and rectification of disrupted constitutional balance on the basis of legal mechanisms, the President becomes a principal link in the chain of the societal organism’s immune system. We maintain that, with a view to this circumstance, one needs to provide constitutionally for the power and the duty of the President to conduct continual constitutional diagnostics,⁵¹ considering the functional powers of other institutes of government. Current generally accepted functional powers, as well as checks and balances at the disposal of the Head of State, including on the plain of relations between the Parliament and the President regarding lawmaking policies, as well as his powers of the initiator of constitutional amendments or a subject eligible to apply to the Constitutional Court are insufficient to assure the full involvement of the President in the general process of constitutional monitoring. Currently, especially in the countries of young democracy, there exist informal, shadow mechanisms of constitutional diagnostics, which is very dangerous and

51 See Арутюнян Г. Роль конституционной диагностики в обеспечении устойчивости общественного развития // Конституционное правосудие, 2010, N4. - pp. 28-42.

is incompatible with the principle of the rule of law state. **The Constitution must bind the President to take care of conducting continual constitutional diagnostics, with a full consideration to the functional roles of constitutional subjects.** This shall also result in the Head of State assuming an active position in conducting abstract judicial constitutional review.

We would also like to emphasize in this paper the functional role of other institutes of power with regard to the operation of the system of continual constitutional monitoring.

First and foremost, the Parliament and the Government, alongside their traditional functions, must continually, and not only in lawmaking, consider the results of constitutional diagnostics and the legal positions of the Constitutional Court, moreover, based on their respective powers, they shall carry out the required control over the process of constitutionalization of social relations. From passive institutes of constitutional review they must transform into more proactive institutes of constitutional monitoring, keeping in mind the fact that the fundamental human rights and freedoms do define the meaning, substance and enforcement of laws and other legal acts, the performance of legislative and executive branches of power. All of the above requires enshrining, on the level of constitutional provisions, concrete functional powers of the lawmaker and the executive in carrying out constitutional monitoring.

A special role in this concept is reserved for general jurisdiction courts and the Constitutional Court.

General jurisdiction and specialized courts are supposed to uphold constitutional rights, guaranteeing access to the judiciary, effectiveness of litigation and uniform application of the law. It is judicial practice that is called upon to intercept existing inconformities between the Constitution and the current legal system in general. This, to begin with, means that the courts must play a more active role in the general system of constitutional review and, secondly, that their case law will become an important object of constitutional diagnostics.

Constitutional courts, in their turn, may fully deliver on their key mission of upholding constitutionalism in the country, provided the following is in place:

1. On the level of the Constitution, one needs to guarantee systemic conformity between the functions and the powers of the Constitutional Court. The main function of the Constitutional Court is to guarantee the supremacy and direct effect of the Constitution. This may become possible if the following is ensured: the self-sufficiency of the Constitution; direct effect of fundamental human rights and freedoms; constitutionality of legal acts; and resolution of political disputes and disputes concerning constitutional competence on the legal plain.

Today in the world there exist a mere handful of Constitutional Courts (in Germany, Austria and some other countries), whose balance of functions, powers and procedural grounds for operation answer the current challenges of constitutional monitoring.

2. The viability of judicial constitutional review largely depends on the systemic completeness and effectiveness of the functioning of the entire system of constitutional review and control. In the proposed doctrine guaranteeing the systemic nature of continual constitutional monitoring is of preponderant importance.

3. The head of state, as the guarantor of effective functioning of the entire system of constitutional monitoring, must also become the guarantor of enforcement of the decisions of the Constitutional Court. A classical example of this is provided by Article 146 of the Austrian Constitution, which states: “The enforcement of judgments pronounced by the Constitutional Court on claims made in accordance with Article 137 is implemented by the ordinary courts. The enforcement of other judgments by the Constitutional Court **is incumbent on the Federal President.**”

4. The procedural mechanisms for judicial constitutional review must be fully adequate to the powers and functional role of the Constitutional Court in upholding the supremacy and direct effect of the Constitution. This problem is especially topical in the countries of young democracy.

This concept also assumes that the civil society shall play a crucial role in the development of constitutionalism in the country. This means, first and foremost, that the people, as the principal source and the bearer of power, are the main guarantor of compliance with constitutional values and principles. Every alert originating in the civil society with respect to any distortion of these values and principles must become the object of constitutional monitoring. One of the main ways to do this would be to recognize and guarantee the individual right to constitutional justice.

We believe that, with the purpose of implementing systemic constitutional monitoring, one must introduce in constitutional practice an adequate system of continual constitutional diagnostics.

The notion of diagnostics is of Greek origin (*διαγνωστικά/diagnosticos*), it characterizes a **specific process for identifying the systemic completeness and functional viability of the object of study, with consideration given to the comparability of main parameters of its operation to the basic criteria of the intended and natural state thereof.**

In **medicine** the notion of diagnostics implies the process of arriving at a **diagnosis**, i.e. a conclusion on deviations from established norms, revealing the essence of the disease and the patient’s condition, expressed in accepted medical terms.

In **technology** this notion covers an area of knowledge that includes data on the methods and means of evaluating the technical condition of **machines, mecha-**

nisms, equipment, structures and other technical objects.

Also in **economics** diagnostics implies the process of identifying and expressing a problem through recognized terminology, that is: determining deviations of the object or process in question from their normal state.

The notion of constitutional diagnostics covers the entire process of evaluating the state of constitutionality in the society, identifying conformity of real social relations with constitutionally prescribed norms and principles. Constitutional diagnostics provides the means and the possibility to determine the degree of constitutional-functional viability of the social organism as a whole. It is first and foremost necessary for **revealing the actual state and development trends of constitutionalism in the society.**

The **object of constitutional diagnostics** is the entire social turnover, the state of constitutionally established functional balance and, in particular, the functioning of the institutes of power.

The **subjects of constitutional diagnostics** are: the people, as the source and the bearer of power; organs of state power and local administration; all institutes of the civil society; every individual.

The **main purposes** of constitutional diagnostics, especially in conditions of societal transformation or instability of constitutional balance, are, in particular, the following:

- identifying disrupted constitutional balance;
- evaluating the character and the form of disruption through multi-faceted assessment of the situation;
- revealing the causes of disruption and recommending toolkits for restoring the broken constitutional balance.

Constitutional diagnostics shall be based on the following fundamental principles:

- identifying, in a mode of continual operation, any disruption of constitutional equilibrium;
- determining the character of disruption;
- proposing mechanisms and means for restoring the constitutionalism;
- in restoring functional equilibrium, guaranteeing the impermissibility of further disruption.

In order to conduct persistent constitutional diagnostics one needs to single out a **set of indicators** that would comprehensively capture the constitutionality of social relations being examined. A system of such indicators is often used by international organizations. A good example may be the annual survey of development trends in constitutional democracy around the world by the American Freedom House Institute. We have attempted to present an academic method of such analysis, the essence of which is primarily in the

following. Firstly, evaluation indicators must be selected. Secondly, one must choose a model approach towards a systemic comparison of these indicators with normative parameters (reference samples) and, considering the deviations, arrive at a well-reasoned diagnosis of the system.⁵²

As mentioned above, various approaches exist to integrated evaluation of the sustainability of human development.⁵³ The main idea is that, based on a system of sustainable development indicators, a determination is made of the general characteristics of constitutional equilibrium in the society. The difficulty is in designing an integrated indicator of comparative evaluation of sustainable development that would not only consider legal parameters, but also, in summary, economic, social, environmental, socio-political and other dimensions.

We believe that for a comprehensive assessment of sustainability and identification of constitutional equilibrium of a social system one may need system of indicators on the following levels:

- social characteristics of the society;
- indicators of embracing democratic values in a society;
- indicators of legal safeguards of the Constitution, human rights and freedoms.

We believe that for effective review of the state of constitutionality in a country one needs to, by the end of every year, apply the indicators listed below in order to reveal the real standing of the implementation of fundamental constitutional values and principles in the society, making the findings transparent for the public, a subject of multi-faceted analysis and a basis for a programmatic policy to improve the situation.

By using, for example, the American Freedom House organization's methodology,⁵⁴ every indicator may be assessed on a scale of 0 to 7, where 0 corresponds to a better situation, while 7 is the worst.

Our studies indicate that the average ratio of constitutionalism in post-communist countries has been displaying descending trends in recent years. This attests to the deepening of legal, political and social crises and the great potential of accumulation of an explosive critical mass of social energy.

We do not aspire, within the limits of this paper, to present detailed outcomes of this analysis, suffice it to mention that the real assessment of the state of constitutionalism in a country must be carried out not only on a governmental level, but also by the civil society, on the basis, for example, of the following system of indicators:

⁵² For more details on the methodology, see Gagik Harutyunyan, A. Mavčič - The Constitutional Review and its Development in the Modern World (A Comparative Constitutional Analysis). - Yerevan Ljubljana, 1999, p. 385-392.

⁵³ Also see Indicators of Sustainable Development. The Wuppertal Workshop, 15-17 Nov. 1996.

⁵⁴ See <http://www.freedomhouse.org/>.

1. Characteristics of a rule of law state:

- the existence of necessary and sufficient prerequisites for ensuring the supremacy of law;
- safeguards to ensure the supremacy of the Constitution;
- the existence of actual separation of powers;
- the degree of real independence of the judiciary;
- the degree of merger between political, economic and administrative powers;
- the degree of corruption;
- the level of shadow economy;
- the degree of legal awareness of the population;
- the criminogenic situation.

2. Characteristics of democratic developments:

- the level of development of parliamentarism;
- the degree of confidence in the electoral system;
- the level of maturity of political parties;
- freedom of press;
- freedom of internet;
- freedom of assembly;
- freedom of association;
- the level of civic activity and maturity of civil society institutes;
- transparency of government;
- the level of viability of democratic state institutions;
- religious freedoms;
- the level of protection of ethnic minority rights;
- the level of pluralism;
- the level of tolerance;
- the level of non-discrimination.

2. Social characteristics:

- the level of unemployment;
- the level of migration;
- the level of price stability (level of inflation);
- average annual per capita growth of the gross national product;
- ratio of subsistence minimum to the minimum wage;
- ratio of pensions to average wage;
- the level of social protection of intellectual and creative work;
- proportion of the population with incomes below minimal consumption basket, per 100,000 people;

- ratio of annual income of the 10 richest percent of the population to the income of the remaining 90 percent;
- ratio of annual income of the 10 richest percent of the population to the annual budget appropriations for the social sector;
- ratio of annual salaries of the officials in the legislative, executive and judicial branches of power to their total declared income in the same reporting period;
- ratio of total declared annual income of leaders of political parties to the national average wage;
- dynamics of assets of the members of the political elite while holding public office.

The latter indicators highlight the level of oligarchization of power, which in turn reflects the real status of the separation of powers. Our studies, in particular, indicate that when the average wage accounts for more than 80 to 90 percent of the annual income of officials in the legislative, executive and judicial branches of power, the peril of merger of the political, economic and administrative potentials is reduced to a minimum, and there exist real prerequisites for actual separation of powers. It is important that in conditions like these, what really motivates holders of office is the effective implementation of their functions. Whereas, when the compensation for exercising the functions of public office descends below 50 percent of his/her income, it becomes obvious that the function in question is merely a smokescreen for the exercise of the activities, securing their principal income. In some countries this ratio in the judiciary branch amounts to 55-60 percent, in the executive it is 35-40, and in the legislative it gets down to 2-3 percent. Such a situation boils down to a litmus test, highlighting systemic metastases and dangerous distortions of fundamental constitutional values and principles.

It is also common knowledge that in many new sovereign states overall privatization has been accompanied by numerous corrupt practices, which subsequently led to other negative reproducible consequences. Therefore, in order to capture the real state of constitutional distortions in these countries, it is important to estimate the ratio of incomes of political leaders, officials in the legislative, executive and judicial branches of power (in combination with the incomes of their family members) within the last 20 years to the average annual growth of the national budget revenues. This may provide a peculiar indicator of the scale of the shadow sector. Our estimates indicate that even in countries where the level of the shadow economy is valued at 40 to 50 percent, the value of the ratio referred to above is higher than 2.5 or 3. In reality this attests to the higher level of the shadow sector, and consequently to rampant corruption in the system.

For a comprehensive academic analysis and multi-factor evaluation of the real state of constitutionalism it is important to juxtapose all of the features referred to above, as well as define on their basis an integrated summary indicator. The quantitative certainty of such an indicator may allow highlighting the bottlenecks that distort constitu-

tionalism and launch a targeted programmatic policy in order to fix them.⁵⁵

The **integrated indicator** is calculated out of the indicators proposed above, with due notice paid to correlations between certain indicators, and it looks as follows:

$$U_i = \sum_{j=1}^m \left[\frac{(X_{ij} - X_j^{(\Theta)})}{\sigma(X_j)} \prod_{\substack{\beta=1 \\ \beta \neq j}}^m (1 - \gamma_{\beta j}) \right],$$

Where U_i - represents the integrated level of constitutional stability;

X_{ij} - represents the 'j' indicator of country (or group) 'i';

$X_j^{(\Theta)}$ - is the reference indicator;

$\gamma_{\beta j}$ - are coefficients of correlation pairs.

The proposed methodology also allows resolving the issue of manageability of processes, determining the impact of each indicator on the integrated level of actual constitutionalism.

Along with the methodological reflection on the issue, we consider it necessary to consider in this paper certain aspects of conducting constitutional diagnostics that pertain to **maintaining, in dynamics**, of the functional equilibrium of power. This largely depends on functional constitutional powers, checks and balances at the disposal of the institutes of power in maintaining constitutional functional equilibrium in the real life, and also on the real capacity of the civil society to exercise the general social potential of restricting and limiting authority. Professor Stephen Holmes has beautifully described the function of constitutional equilibrium, stating that: "the US Constitution, enacted in the 18th century, is based on three basic principles that remain valid to this day: 1) all people, including rulers, err; 2) all people, especially rulers are loathe to admit their mistakes, and; 3) all people, especially rulers currently in opposition, are delighted to point out the mistakes of their rivals. Constitution tries to make these principles serve their goals, assigning the right to make mistakes to one branch and the right to correct mistakes to the other two branches, as well as to the free press and to the electorate at large."⁵⁶

Upon the emergence of the first constitutions the fundamental objective of constitutional architecture was and still remains to ensure the functional separation and the balanced nature of state power. As emphasized in Article 16 of the 1789 French Declaration

⁵⁵ More on this in Арутюнян Г.Г. Конституционализм: уроки, вызовы, гарантии. – Киев: "Логос", 2011. - pp. 99-100.

⁵⁶ See Стивен Холмс. Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, N3(88). - p.68.

of the Rights of Man and Citizen “**A society in which the observance of the law is not assured, nor the separation of powers defined, has no Constitution at all**”.

Present-day liberal democracy is also based on three whales: the supremacy of law, the principle of the separation of powers and sovereignty of the people. Their balanced expression in social practice determines the nature of constitutionalism in a society.

One also needs to acknowledge that among dozens of various doctrinal approaches to specific constitutional models of separation of powers the only unanimously endorsed and incontestable one boils down to the theoretical admission of the need for separating and balancing powers. The specific approaches, forms and methods and, moreover, practical solutions vary distinctively in each constitutional system.

We must admit that one of the highest achievements of American constitutionalism is that in the Fundamental Law of the USA the doctrine of separation of powers has acquired systemic completeness and, with the introduction of the system of checks and balances it afforded the Constitution a quality of dynamic regulation of social relations, transferred the constitutional system onto the tracks of developing state of equilibrium.

How does one resolve the issue of separation and equilibrium of powers in our days, considering the recently emerged global objective reality of specialized state institutions, which are called upon to guarantee the supremacy and direct effect of the Constitution?

We are convinced that, by and large, nothing of essence has changed, and the American doctrine of constitutional separation and balancing of powers remains fully viable these days as well. The main requirements towards the effective functioning of this system, in our opinion, are embodied in the following prerequisites:

Firstly, the separation of powers is first and foremost a functional, rather than institutional process, which often becomes a matter of confusion on the level of constitutional solutions. Certain separating constitutional-legal functions may be implemented by different constitutional institutions.

Secondly, the main objective of constitutional architecture is to ensure, first and foremost, the balanced nature of the system **function-institute-powers**.

Thirdly, the question of clearly-cult separation of functional, checking and balancing powers of constitutional institutes of government and ensuring their optimal equilibrium is of principal importance.

Fourthly, an urgent task of contemporary constitutionalism is the introduction of viable and effectively functioning mechanism of intra-constitutional self-defense, in order to guarantee timely intercepts, assessment and redress of functional constitutional bal-

ance in dynamics. This is essentially the main objective of constitutional diagnostics and the goal of constitutional review in general.

The following represent the main criteria-worthy features that guarantee the conditions mentioned above:

1. ensuring the functional independence of branches of power;
2. guaranteeing the completeness and functional adequacy of the powers of constitutional institutes;
3. ensuring the continuity and inviolability of the functioning of constitutional balance in dynamics, in real social life, which, in turn, implies the impermissibility of the so-called alienation of the Constitution from actual life.

The study of constitutions of many countries of young democracy demonstrates that formally the rule of law state, rule of the people, supremacy of the law, human dignity, freedom, constitutional democracy, separation of powers, social accord, equality, tolerance, pluralism, solidarity and other commonly recognized values have become, in their organic unity, the basis for constitutional solutions at their level. However, the actual reality in these countries is different; it ended up in another dimension. In the majority of these countries the self-sufficiency of the Constitution is not fully ensured, and **there exists a significant rupture between basic constitutional values and principles and the social reality**. The latter is characterized by a low level of constitutional culture, systemic incompleteness of the mechanisms to assure the rule of law, the existence of deformed, intrinsically contradictory legal system, lack of a common value system based understanding of social bearings for the society's development.

One may illustrate this with many examples. A structural analysis of the constitutions themselves may provide one such insight. In our opinion, from the point of view of functional balance, the Constitution of Armenia, for example, is illogical and inconsistent. The chapters on foundations of the constitutional order and human rights are followed by those on the constitutional institutes of the President, the Parliament, the Government and, alongside these; the judiciary is singled out in a separate chapter. This not only violates the structural logic of the Constitution itself, but the functional system of the judiciary in it includes institutes that do not administer justice. Such a structural inconsistency also exists in the Constitutions of Bolivia, Greece,⁵⁷ Bulgaria, Croatia, Georgia, Uzbekistan, the Russian Federation, Japan and a number of other countries. Alongside this there also exist a number of countries, which not only constitutionally enshrined a clear functional structure of the separation of powers, but devoted a stand-

⁵⁷ One should keep in mind that Article 26 of the Greek Constitution stipulates that the lawmaking functions shall be implemented by the Parliament and the President of the Republic, the executive functions shall be implemented by the President of the Republic and the Government, and the judicial function shall be implemented by the courts, the rulings of which shall be enforced in the name of the Greek people.

alone article or chapter of the Constitution to spelling out the nature of the separation of powers. A good example is Article 49, Chapter one, Title three of the Constitution of Mexico, which states that the supreme power of the Federation is divided, for its exercise, into legislative, executive, and judicial branches. Two or more of these powers shall never be united in one single person or corporation, nor shall the legislative power be vested in one individual except in the case of extraordinary powers granted to the Executive, in accordance with the provisions of Article 29. In no other case, except for those provided by paragraph 2, Article 131, the executive may be given extraordinary powers of promulgating laws.

In the event of a clearly defined constitutional language on the essence of the separation of powers the safeguards for the practical realization of this doctrine significantly increase. We maintain that, notwithstanding the selected form of governance and the level of development of constitutionalism, a better choice was made by those countries, which based their constitutional structure on either the institutional approach (Italy, Portugal, Belgium, Poland and others), or the functional one (Austria, Brazil, Slovakia and others).

Nevertheless for many countries the main problem is in the existing antagonism between the Constitution and the general legal reality.

We believe that the following are common negative features of systemic transformation in countries of transition:

- volatility and uncertainty in the social development and the deepening of the crisis of confidence;
- serious shortfalls and drawbacks in the implementation of value-system transformations;
- inadequacy of the formation of the civil society;
- disparity between the social bearings of the public at large and constitutionally proclaimed democratic-legal values, that is the existence of a significant deficit of constitutionalism;
- low level of functional and institutional viability of the institutes of power;
- antagonism between politics and the constitutionality of decisions that are taken;
- as a result of all of the above, accumulation of certain negative social energy, which, at times may result in a multicolored social-political explosion with inevitable tragic consequences.

Constitutionalism as a basis of civil society may not develop progressively in conditions of weak viability of democratic state structures and deformations of political institutes. As rightfully mentioned by Daniel Smilov, in conditions of social transformation

quasi-constitutionalism and intensive propagation of political populism prevail.⁵⁸

One of the characteristic features of constitutional deformation in countries of new democracy is the insufficient independence of the judiciary power. As noted by Stephen Holmes in the paper quoted above, already Montesquieu had stated that a king acting as judge and thus violating the constitutional separation of the executive from the judiciary, could easily fall prey to bad faith witnesses and other participants of litigation attempting to subject public authority to unlawful private or corporate interests: “The laws are the eye of the prince; by them he sees what would otherwise escape his observation. Should he attempt the function of a judge, he would not then labour for himself, but for impostors, whose aim is to deceive him”.⁵⁹

Another extreme peril lies in the total oligarchization of power. I have entitled one of my articles, written in 2006, “The perils of corporate democracy”.⁶⁰ I stated in it that “corporate democracy” (oligarchization of all branches of power) poses a bigger hazard for the social system than the totalitarian system, which nevertheless has its own rules however irrational it may be in essence. But it is at least not built on constitutional values that are distorted in social practice. The main peril of corporate democracy is exactly in that it consistently deforms democratic values, they undergo mutations and eventually lose their significance, not only become unacceptable for the society, but downright dangerous. This is further exacerbated by the low level of legal awareness of the general public, grave social conditions, high level of unemployment, etc. In conditions of shadow economic relations the individual appears not as a full contractual subject endowed with natural rights, but as a medium of production, dependent on the will and alms of the employer. This quality, a feature of feudal relations, in conditions of quasi-constitutionalism acquires a new form and tint through democratic packaging.

One of the biggest perils of corporate democracy is also the fact that mutated values, in conditions of failure of the immune system of the society, become reproducible. This is a more dangerous phase, when irrational developments acquire a progressive feature and rule out the restoration of the system’s viability through the evolutionary path, while genuine values are no longer claimed. This is taking place, to varying degrees, in the countries where political institutes are formed along the principles of corporate democracy, where, in parallel with the shadow economy, political structures also succumb to the shadows, where the judiciary system is not an independent branch of power, but rather a lever in the hands of the authorities, where the press lets go of the freedom of speech, transforming instead into an instrument of political terror. The total oligarchization of

58 See Даниель Смилов. Конфликт конституционализма и демократии в Восточной Европе: за пределами парадигмы переходного периода // Сравнительное конституционное обозрение, N4(89).2012. – pp. 29-44.

59 See Montesquieu. *Spirit of the Laws* / Trans. by Th. Nugent. New York: Hafner Press, 1975. Vol. I. Bk. 6. Ch. 4. p. 73.

60 See *Международный вестник “Конституционное правосудие”*, 2006г., N3. - pp. 38-46.

the authorities leads to the total criminalization of the social system, especially in the cases when high officials and the political elite become the richest people in the state.

The main way to avoid these perils would be to ensure real separation of powers, excluding the merger of political, economic and administrative authorities, creating the necessary prerequisites for the natural maturing of society's political and civic structures. James Madison has stated a long time ago that the constitutional equilibrium of conflicting and competing interests may restrain authorities and guarantee freedom.⁶¹

Current trends in global and European constitutional developments allow making a number of principal generalizations, among which the following merit particular attention:

- 1) democracy, which has no alternative as a value of social existence, dictates its own criteria and approaches to legal regulation of social relations;
- 2) constitutional democracy exists there and to that extent, where and to which extent there prevails real separation and balance of powers, optimal decentralization of political, economic and administrative powers, independent judiciary system, free press, guaranteed free and fair electoral processes, authorities controlled by the civil society;
- 3) establishment of constitutionalism without reliable guarantees of the supremacy of the Constitution remains in the realm of wishful thinking;
- 4) ensuring the rule of law entails due consideration of national security issues and the need for certain harmony between individual and public interests;
- 5) constitutional development processes may not be viewed without a proper systemic assessment of the growing role of global and regional legal systems;
- 6) without the creation of necessary and sufficient prerequisites and a certain value-based environment of constitutional democracy, with a profound and comprehensive evaluation of particular features of systems in transition, it would be impossible to overcome the momentum of systemic deformations and guarantee real constitutional development through the so-called "democracy import."

Currently one of the axial issues in transitology is how to consider the above trends as applied to social systems in transformation, so that constitutional development would provide a basis for society's progress, rather than fall prey to momentary political interest. In new democracies the main expressions of irrational processes in constitutional practice are the following:

- distorted perceptions on democracy and the value system of the rule of law state;⁶²
- abuse of said values as an excuse to enforce the will of the authorities;

61 See Рассел Г. Конституционализм: опыт Америки и других стран – <http://www.infousa.ru/government/-dmpaper2.htm> (09.03.2009).

62 This is also attested to by such skewed notions, most recently used by some politicians and scholars, as "transitional democracy," "national democracy," "partial democracy," etc

- efforts to turn institutes of power, the press and the media into levers of the authorities;
- merger of politics, power and the shadow economy and, on the basis thereof, transformation of corruption into the authorities' main capital on the one hand, and, on the other, politicization of the shadow economy;
- formation of a new and most dangerous environment of limiting the human and civil rights and freedoms through the emergence of an atmosphere of fear, distrust, despair and impunity, the rooting of political and bureaucratic cynicism presented in democratic packaging.

All of the above is not just limited to specific acts, but is pervading into all corners of power, acquiring lawmaking and structured properties, engulfing the entire state machinery.

The perils of oligarchization of the state power are what already Aristotle had eloquently and convincingly laid out in his typology of oligarchy:⁶³

First type – when moderate rather than substantial property is in the hands of the majority, as a result the proprietors enjoy access to state governance, and since there are large numbers of such people, the ultimate power is in the hands of the law, not people;

Second type of oligarchy – the number of people with property is less than in the first case, whereas their assets are larger and, possessing more power, these proprietors present bigger claims, hence they are the ones who pick from among other citizens those who are granted access to governance, nevertheless not being powerful enough to rule without laws, they set laws to their convenience;

Third type – if tensions increase, that is the numbers of proprietors dwindle, while their assets grow, the third type of oligarchy emerges: all public offices concentrate in the hands of the proprietors, moreover, the law prescribes that their offspring inherit the office;

Fourth type – when their assets grow beyond every proportion and they acquire a whole mass of associates, dynasties emerge, close to a monarchy, individual people rule instead of the law, and this is the fourth type of oligarchy.

Several millennia down the road, in many post-communist countries these processes are replicated under the guise of constitutional democracy. In some countries supreme power is already in the hands of individuals, rather than the law. Those who concentrate the main economic, political and administrative power become or attain the status of rulers. The social hazard of this situation is that, firstly, the potential of democratic change in the society is abused for the purpose such mergers. And, secondly, these processes unfold upon the existence of a Constitution, which proclaims commitment

⁶³ See Аристотель. Этика. Политика. Риторика. Поэтика. Категории. – Мн.: Литература, 1998. – p. 561 (in title “Politics”, book four).

to democracy, rule of law, rule of the people and other fundamental values, which, in conditions of distortions of the principle of separation of powers and the establishment of 'corporate democracy' do completely degrade in actual life.

Preventing such a merger is easier than overriding it. The latter requires tremendous efforts, time and systemic restoration of degraded realities. In order to avert such a situation the main goal of successful social transformation should be the persistent constitutionalization of social relations and overcoming conflicts between the Constitution, the legal system and its implementation practice. Only this may secure the necessary viability of the system of separation and balance of powers, guarantee the desired stability and dynamism of social development. We believe that this may be accomplished **through the introduction of continually conducted systemic constitutional monitoring and diagnostics.**

РЕЗЮМЕ

Вданной статье на основе гносеологического и аксиологического анализа понятий "конституция", "конституционная культура", "конституционализм" автор приходит к выводу, что элементы конституционализма формировались в течение длительного исторического периода и в армянской действительности проявились с особой последовательностью, особенно **после принятия впервые в мире христианства как государственной религии, в условиях необходимости установления взаимосогласованных, единых правил светской и духовной жизни.**

К середине V века в армянской действительности сформировалась атмосфера, в которой была сделана попытка разрешить возникшие между различными слоями общества "противостояния" не силой или "административными" методами (в том числе указом Царя или дубинкой), а правовым путем - принятием конституционного закона, в основу которого заложены основополагающие духовные ценности. Фактически, принятие Учредительным собранием Конституции, начиная с 365 года - удивительно прогрессивное для своего времени событие - свидетельствует, что **в основу правового регулирования общественных отношений положены духовное начало, нравственные ценности и принципы общественного согласия.** Принятые каноны характеризовались не иначе как конституционные, получая особый статус, с признанием верховенства установленных национальным согласием норм над любыми другими нормами и правилами.

Понятие "конституция" в армянском языке, в первую очередь, подразумевает не просто "установление", а **"установление границы"**. Не случайно, что Акоп и Шаамир Шаамирянны свою Конституцию 1773 года для будущей независимой

Армении назвали “Западня тщеславия”. Этим подразумевалось, что были поставлены “предельные границы” не только свободы, но и “тщеславия”.

Блестяще восприняли аксиологические нюансы конституции еще авторы изданного в 1837 году в Венеции Словаря нового армянского языка. Вначале приводятся разноязычные эквиваленты, как, например, *determinatio, constitutio, statutum, dispositio*. Далее дается исключительно интересная и ценная формулировка: **“Пределозначимые решения и Провидение Божие”**. Очевидно, что мы имеем дело не только с высшим “решением” конституирующего значения, значит с праворегулированием подобного характера, но и **в его основе лежит Божественное познание, данная свыше ценностная система, Высшее провидение.**

На основе сравнительного конституционного анализа автор приходит к выводам, что:

1. Культура каждого народа – это его осознанное бытие, осмысленное присутствие во времени. А конституционная культура представляется как исторически сложившаяся, стабильная, обогащенная опытом поколений и всего человечества определенная ценностная система, лежащая в основе общественного бытия, способствующая установлению и реализации основополагающих правил поведения на основе их интеллектуального, нравственного и духовного осмысления.

Конституционная культура системно проявляется на определенном этапе цивилизации, когда возникает **осознанная потребность** в установлении общественным согласием основных принципов и правил поведения как общеобязательных правовых норм. В правовом аспекте эта потребность привела к возникновению конституций и конституционному регламентированию общественной жизни.

Конституционная культура приобретает новое качество в тех общественно-государственных системах, где **наряду с Конституцией существует конституционализм**, где Конституция является не орудием в руках государственной власти, а **Основным Законом** гражданского общества, средством гарантирования гармоничного и стабильного развития этого общества, не только устанавливая основные правила поведения, но и ставя пределы власти, ограничивая ее правом. В подобном случае речь идет о понятии **“демократическая конституционная культура”**, характерной для демократических общественных систем, в которых сочетаются также качества национальной и общечеловеческой культур.

В правовом государстве понятие “конституционная культура” представляется как **составляющая стержень общественного познания определенная ценностная система исторически сформировавшихся, стабильных, обогащенных**

опытом поколений и всего человечества убеждений, представлений, правосознания, которая является основанием для установления и гарантирования общественным согласием для социального общества основных правил его демократического и правового поведения.

2. В приведенном контексте современный конституционализм является наличием установленных общественным согласием фундаментальных правил демократического и правового поведения, их существования как объективной и живой реальности в общественной жизни, в гражданском поведении каждого индивидуума, в процессе осуществления государственно-властных полномочий.

“Конституционализм” – это проявление определенной конституционной культуры, адекватной осмысленному бытию данного социума, это системное и осознанное наличие конституционных ценностей в реальной общественной жизни, на чем базируется вся правовая система.

3. Нормативные характеристики конституционализма предполагают наличие необходимых и достаточных правовых гарантий для осознанной реализации прав и свобод во всей системе права и общественных отношений. В правовом государстве любая норма права должна проявляться как элемент конституционно взаимосогласованной системы правового поведения человека и государства.

4. Понятие конституционализма необходимо воспринимать не как один из основных принципов конституционного права, а как фундаментальный принцип современного права в целом. Можно перефразировать общеизвестную римскую формулу “Где общество, там и право” следующим образом: **“Где конституционализм, там и правовое государство”.** Конституционализм определяет суть взаимосогласованного поведения социума, характер его осмысленного существования во времени, уровень зрелости общественных отношений и их правового регулирования. **Это, в первую очередь, идеал цивилизованной саморегуляции, к чему должно стремиться общество.**

5. В правовом государстве существование права как необходимой формы свободы, равенства и справедливости в общественной жизни людей, как основы их существования в динамичной социальной среде приобретает новую роль в жизни человека. Естественно, суть правового государства заключается именно в признании верховенства права и гарантировании свободы посредством ограничения власти правом. Данная теоретическая постановка приобретает реальное содержание, когда социальное общество осознанно и с общественного согласия намеревается жить и творить на основе этого принципа и исходящих из него ценностно-системных критериев. Их совокупность является основой конституционного

строя каждого конкретного общества. В правовом государстве проявления права как сущности и как явления характеризуются именно соответствующим уровнем конституционализма. **Этим обусловлена также диалектика закона и права, соотношение Конституции и конституционализма.**

6. Конституционализм, как и право, - объективная социальная реальность, проявление сущности цивилизованного общежития, имеющая необходимый внутренний потенциал динамичного и стабильного развития. Конституционализм как фундаментальный принцип права на определенном уровне развития общества приобретает системообразующий и универсальный характер правовой регуляции, выражает и конкретизирует правовое содержание гарантирования и обеспечения верховенства права и непосредственного действия прав человека, выступает критерием правомерности поведения правосубъектов, является исходным началом правотворческой и правоприменительной деятельности, основополагающей характеристикой социокультурного развития данного общества.

7. Конституционализм как образ правовой материи присущ таким социальным системам, которые достигли определенной эволюции признания и гарантирования социальных свобод и общественного согласия на основе соответствующей системы социокультурных ценностей. Любая деформация конституционализма - это искажение основополагающих конституционных ценностей и принципов в обществе, отход от всеобщего согласия в отношении системы социокультурных ценностей общежития.

8. Так называемая регрессивная реальность в современном мире, в первую очередь, - результат системного нарушения конституционного баланса в общественной практике, что своевременно не выявляется и не восстанавливается. Очевидно **наличие системного дефицита конституционализма** или его искаженное проявление. А это означает, что практически не обеспечивается верховенство Основного Закона страны. То, что делается конституционными судами сегодня, несмотря на архиважность этой миссии, все-таки **носит дискретный, фрагментарный характер**, не обеспечивает необходимой последовательности и системной непрерывности в выявлении, оценке и восстановлении нарушенного конституционного баланса в обществе, обеспечении конституционализма в соответствии с конституционной культурой нового тысячелетия.

9. Основная миссия конституционализма в новом тысячелетии заключается именно в обеспечении стабильности и динамизма общественного развития, укреплении нравственности в социальных взаимоотношениях, преодолении конфликтогенности в межгосударственных и внутригосударственных отношениях.

Преодоление дефицита конституционализма - основной путь недопущения накопления отрицательной общественной энергии до формирования критической массы, при которой неизбежны социальные катаклизмы.

Автор приходит к выводу, что **особенно в условиях общественной трансформации деформации конституционализма становятся главным фактором дестабильности и социальных катаклизмов.** Их преодоление требует наличия действенного и системного конституционного мониторинга на основе целенаправленной и непрерывной конституционной диагностики.

Основные заключения сводятся к тому, что:

- действующие в мире модели конституционного контроля и надзора не в полной мере обеспечивают системный и непрерывный характер в выявлении, оценке и восстановлении нарушенного конституционного баланса в общественной практике и не в полной мере отвечают вызовам времени;

- несвоевременное восстановление нарушенного конституционного баланса приводит к накоплению отрицательной общественной энергии, что, набирая критическую массу, приводит к социальным взрывам и дестабильности;

- нет системного и органического взаимодействия в функциональной деятельности институтов власти по обеспечению верховенства конституции. Пока государство не признает и не обеспечивает право человека на конституционное правосудие, невозможно реально гарантировать верховенство права;

- системность и непрерывность конституционного контроля возможны лишь при внедрении целостной системы постоянной конституционной диагностики и мониторинга.

Основными задачами конституционного мониторинга в условиях общественной трансформации, в частности, являются:

- выявление и оценка дефицита конституционности в политическом поведении социума;

- оценка внутриконституционных деформаций, выявление причин этих деформаций и разработка механизмов их преодоления;

- преодоление деформированного восприятия основополагающих конституционных ценностей и принципов в обществе, повышение уровня конституционного правосознания;

- обеспечение необходимого уровня конституционализации политического поведения институтов власти и социального поведения личности;

- устранение дефицита конституционности в сфере законодательства и других формах правотворческой деятельности;

- недопущение деформаций конституционных ценностей и принципов в правоприменительной практике;

- системное обеспечение конституционности государственного управления;
- выявление и учет транснациональных критериев оценки социального поведения человека и власти.

Выявляется функциональная роль институтов власти в отношении функционирования системы постоянного конституционного мониторинга.

Автор считает, что гражданское общество играет принципиальную роль в развитии конституционализма в стране. Это, в первую очередь, означает, что народ как основной источник и носитель власти является основным гарантом соблюдения конституционных ценностей и принципов. Любой отклик, исходящий от гражданского общества в отношении всякой деформации этих ценностей и принципов, должен стать объектом конституционного мониторинга. Одной из основных форм реализации этой задачи является признание и гарантирование права человека на конституционное правосудие.

Рассматривая методические аспекты системной конституционной диагностики, автор считает, что **основными задачами** конституционной диагностики, особенно в условиях общественной трансформации или нестабильного конституционного баланса, в частности, являются:

- выявление нарушенного конституционного баланса;
- оценка характера и форм проявления данного нарушения на основе многофакторной оценки ситуации;
- выявление причин этих нарушений и предложение инструментариев восстановления нарушенного конституционного баланса.

Конституционная диагностика должна базироваться на следующих основных принципах:

- в режиме непрерывного функционирования выявление любого нарушения конституционного равновесия;
- определение характера нарушения;
- предложение механизмов и способов восстановления конституционности;
- гарантирование недопущения нового нарушения при восстановлении функционального равновесия.

Анализируя процессы становления конституционализма в странах новой демократии, автор приходит к выводу, что конституционализм как основа гражданского общества не может развиваться прогрессивно в условиях слабой дееспособности государственных демократических структур и деформированности самих политических институтов. Самая большая опасность для этих стран - это тотальная олигархизация власти. Установление так называемой “корпоративной демократии” (олигархизация всех ветвей власти наряду с повсеместным слия-

нием политических, экономических и административных сил) более опасна для общественной системы, чем тоталитарная система. Основная угроза корпоративной демократии заключается именно в том, что демократические ценности последовательно деформируются и впоследствии мутируются, теряют свое значение, становятся для общества не только неприемлемыми, но и опасными. Тотальная олигархизация властей приводит к тотальной криминализации социальной системы, особенно в тех случаях, когда самыми богатыми людьми в государстве становятся высшие государственные чины.

Основной путь во избежание подобных угроз – обеспечение реального разделения властей и исключение слияния политических, экономических и административных сил, создание необходимых предпосылок естественного становления политических и гражданских структур общества. Главная задача успешного осуществления общественной трансформации - это последовательность в конституционализации общественных отношений с преодолением конфликта между Конституцией, правовой системой и правоприменительной практикой в целом. А этого можно достичь с помощью внедрения предлагаемого автором непрерывно действующего системного конституционного мониторинга и диагностики.

ZUSAMMENFASSUNG

In dem Aufsatz kommt der Verfasser auf Grund einer gnoseologischen und axiologischen Analyse der Begriffe «Verfassung», «Verfassungskultur» und «Konstitutionalismus» zum Schluss, dass sich Elemente des Konstitutionalismus im Laufe einer langen historischen Periode herauskristallisiert haben und in der armenischen Wirklichkeit besonders konsequent zum Ausdruck gekommen sind, **namentlich nachdem in Armenien zum ersten Mal in der Welt das Christentum zur Staatsreligion erhoben wurde und es notwendig geworden war aufeinander abgestimmte einheitliche Regeln des weltlichen und kirchlichen Lebens einzuführen.**

Gegen Mitte des 5. Jh. war in der armenischen Wirklichkeit eine Atmosphäre entstanden, in der der Versuch unternommen wurde, die Konfrontation zwischen verschiedenen Schichten der Gesellschaft nicht mit Gewalt oder «administrativen» Methoden (u. a. mit königlichen Erlässen oder dem Knüppel), sondern durch Recht, und zwar durch Verabschiedung eines Verfassungsgesetzes, das auf grundlegenden geistigen Werten beruhte. Dass die konstituierende Versammlung schon im Jahre 365 eine Verfassung verabschiedete – was ein für jene Zeit erstaunlich fortschrittliches Ereignis war – zeugt davon, dass **geistige Grundsätze, moralische Werte und Prinzipien des gesellschaftlichen**

Konsens der rechtlichen Regelung der gesellschaftlichen Verhältnisse zu Grunde gelegt wurden. Die eingeführten Regeln waren nicht anders als verfassungsmäßig zu bezeichnen, sie erhielten einen besonderen Status, den Normen, die im nationalen Konsens angenommen waren, wurde Vorrang vor allen anderen Normen und Regeln zuerkannt.

Das armenische Wort für «Verfassung» bedeutet nicht einfach «Festlegung», sondern **«Festlegung einer Grenze»**. Es ist kein Zufall, dass Hakop und Schahamir Schahamirjan die von ihnen für das zukünftige unabhängige Armenien im Jahre 1773 geschriebene Verfassung «Falle der Eitelkeit» nannten. Dies sollte bedeuten, dass hier Grenzen nicht nur der Freiheit, sondern auch der «Eitelkeit» gesetzt wurden.

Die axiologischen Feinheiten der Verfassung fanden eine vortreffliche Auslegung im Wörterbuch der neuen armenischen Sprache, das 1837 in Venedig erschien. Dort werden zunächst fremdsprachige Äquivalente angeführt, z. B. determinatio, constitutio, statutum, dispositio. Danach findet sich eine überaus interessante und aufschlussreiche Formulierung: **«Grenzsetzende Entscheidungen und Gottes Vorsehung»**. Wir haben es hier offensichtlich nicht nur mit der höchsten «Entscheidung» von konstituierender Bedeutung, d. h. mit einer rechtlichen Regelung derartigen Charakters, zu tun; es kommt hier zum Ausdruck, dass diese Entscheidung auf der **göttlichen Erkenntnis beruht, dass ein von oben gegebenes Wertesystem, die Höchste Vorsehung ihr zu Grunde liegen**.

Im Ergebnis einer vergleichenden Analyse von Verfassungen zieht der Verfasser folgende Schlussfolgerungen:

1. Die Kultur eines jeden Volkes ist sein bewusstes Sein, sein sinniges Dasein in der Zeit. Und die Verfassungskultur (konstitutionelle Kultur) stellt sich als ein bestimmtes historisch entstandenes, stabiles, um die Erfahrungen der Generationen und der ganzen Menschheit bereichertes Wertesystem dar, das dem gesellschaftlichen Sein zu Grunde liegt, die Etablierung und Realisierung grundlegender Verhaltensregeln auf der Grundlage ihres intellektuellen, moralischen und geistigen Verständnisses fördert.

Die Verfassungskultur tritt in einem bestimmten Stadium der Zivilisation systemhaft zutage, namentlich als ein **bewusstes Bedürfnis** nach Festlegung im gesellschaftlichen Einvernehmen grundlegender Prinzipien und der Verhaltensregeln als allgemein verbindlicher Rechtsnormen. In rechtlicher Hinsicht hat dieses Bedürfnis zur Entstehung von Verfassungen und zur konstitutionellen Reglementierung des gesellschaftlichen Lebens geführt.

Die Verfassungskultur bekommt eine neue Qualität in den gesellschaftlich-staatlichen Systemen, **wo neben der Verfassung der Konstitutionalismus besteht**, wo die Verfassung kein Werkzeug in Händen der Staatsmacht ist, sondern **das Grundgesetz**

der Zivilgesellschaft, ein Mittel der Gewährleistung einer harmonischen und stabilen Entwicklung, indem sie nicht nur die grundlegenden Verhaltensregeln festlegt, sondern auch der Macht Grenzen setzt, sie durch das Recht begrenzt. In solchen Fällen handelt es sich um den Begriff **«Demokratische Verfassungskultur»**, der für demokratisches Gesellschaftssystem charakteristisch ist, in denen sich auch Eigenschaften nationaler und allgemein menschlicher Kultur vereinigen.

Im Rechtsstaat stellt sich der Begriff «Verfassungskultur» als ein bestimmtes axiologisches System der **historisch entstandenen, stabilen, um die Erfahrungen der Generationen und der ganzen Menschheit bereicherten Überzeugungen, Vorstellungen, Rechtsauffassungen, das den Kern der gesellschaftlichen Erkenntnis und eine Grundlage für Festlegung und Gewährleistung durch gesellschaftlichen Konsens der Grundregeln des demokratischen und rechtmäßigen Verhaltens der sozialen Gesellschaft bildet.**

2. In dem angegebenen Kontext handelt es sich **beim modernen Konstitutionalismus um durch gesellschaftlichen Konsens festgelegte grundlegende Regeln des demokratischen und rechtmäßigen Verhaltens, um deren Existenz als einer objektiven und lebenden Realität im gesellschaftlichen Leben, im staatsbürgerlichen Verhalten eines jeden Individuums, im Prozess der Ausübung der hoheitlichen Machtbefugnisse.**

Der **«Konstitutionalismus» ist die Manifestation einer bestimmten, dem bewussten Sein des betreffenden Soziums adäquaten Verfassungskultur, es ist ein systemhaftes und bewusstes Vorhandensein von konstitutionellen Werten im realen gesellschaftlichen Leben, worauf das ganze Rechtssystem beruht.**

3. Die normativen Charakteristika des Konstitutionalismus setzen die Existenz notwendiger und ausreichender Garantien für eine bewusste Realisierung der Rechte und Freiheiten im ganzen System des Rechts und der gesellschaftlichen Verhältnisse. Im Rechtsstaat muss sich jede Norm des Rechts als ein Element des konstitutionell abgestimmten Systems des rechtmäßigen Verhaltens des Menschen und des Staates.

4. **Der Begriff des Konstitutionalismus soll nicht als eines der Grundprinzipien des Verfassungsrechts, sondern als das fundamentale Prinzip des modernen Rechts im Ganzen aufgefasst werden.** Die allgemein bekannte Formel der alten Römer «*ubi societas, ibi ius est*» (Wo es eine Gesellschaft gibt, gibt es ein Gesetz) lässt sich wie folgt neuformulieren: **«Wo es den Konstitutionalismus gibt, gibt es den Rechtsstaat».** Der Konstitutionalismus bestimmt das Wesen des abgestimmten Verhaltens des Soziums, den Charakter seiner bewussten Existenz in der Zeit, den Grad der Reife der gesellschaftlichen Verhältnisse und ihrer rechtlichen Regelung. Das ist in erster Linie das Ideal einer zivilisierten Selbstregelung, nach der die Gesellschaft streben soll.

5. Im Rechtsstaat erlangt die Existenz des Rechts als der notwendigen Form von Freiheit Gleichheit und Gerechtigkeit im gesellschaftlichen Leben der Menschen, als der Grundlage ihrer Koexistenz im dynamischen sozialen Milieu eine neue Rolle im Leben des Menschen. Das Wesen des Rechtsstaates besteht selbstverständlich gerade in der Anerkennung des Vorrangs des Rechtes und der Gewährleistung der Freiheit mittels der Begrenzung der Macht durch das Recht. Diese theoretische Fragestellung bekommt einen realen Inhalt, wenn die soziale Gesellschaft bewusst und mit gesellschaftlichem Konsens auf der Grundlage dieses Prinzips und der axiologischen Kriterien, die sich daraus ergeben, zu leben und zu schaffen bereit wird. Ihre Gesamtheit bildet die Grundlage der Verfassungsordnung jeder konkreten Gesellschaft. Im Rechtsstaat charakterisieren sich die Manifestationen des Rechts gerade durch das entsprechende Niveau des Konstitutionalismus. **Damit ist ebenfalls die Dialektik des Gesetzes und des Rechts, das Verhältnis zwischen Verfassung und Konstitutionalismus bedingt.**

6. **Der Konstitutionalismus ist wie auch das Recht eine objektive soziale Realität, eine Manifestation des Wesens eines zivilisierten Gemeinschaftslebens mit dem notwendigen inneren Potential einer dynamischen und stabilen Entwicklung.** Der Konstitutionalismus als das fundamentale Prinzip des Rechts erlangt bei einem bestimmten Entwicklungsstand der Gesellschaft den systembildenden und universellen Charakter der rechtlichen Regelung, er drückt den rechtlichen Inhalt der Gewährleistung und Sicherstellung des Vorrangs des Rechts und der unmittelbaren Geltung der Menschenrechte aus und konkretisiert sie, tritt als ein Kriterium der Rechtmäßigkeit des Verhaltens von Rechtssubjekten zutage, ist der Ausgangspunkt der Tätigkeit der Rechtssetzung und Rechtsanwendung und das Grundcharakteristikum der soziokulturellen Entwicklung der Gesellschaft.

7. **Der Konstitutionalismus als eine Gestalt der Rechtsmaterie ist solchen sozialen Systemen eigen, die einen bestimmten Grad der Evolution der Anerkennung und Gewährleistung sozialer Freiheiten und des gesellschaftlichen Konsens auf der Grundlage des entsprechenden Systems soziokultureller Werte erreicht haben. Jede Deformation des Konstitutionalismus ist eine Verzerrung der grundlegenden Verfassungswerte und-prinzipien in der Gesellschaft, eine Abkehr von dem allgemeinen Konsens hinsichtlich des Systems soziokultureller Werte des Gemeinschaftslebens.**

8. Die so genannte regressive Realität in der modernen Welt ist in erster Linie das Ergebnis einer systemhaften Störung des konstitutionellen Gleichgewichts in der gesellschaftlichen Praxis, die nicht rechtzeitig aufgedeckt wird; auch wird das gestörte Gleichgewicht nicht wiederhergestellt. **Ein systemhaftes Defizit des Konstitutionalismus** oder eine verzerrte Erscheinungsform desselben liegt offensichtlich vor. Dies bedeutet aber, dass der Vorrang des Grundgesetzes des Landes praktisch nicht gewähr-

leistet ist. Was die Verfassungsgerichte heute tun, trägt, obwohl diese Mission überaus wichtig ist, hat einen **diskreten, fragmentarischen Charakter, sichert nicht die notwendige Konsequenz und systemhafte Kontinuität bei der Aufdeckung, Bewertung und Wiederherstellung des gestörten konstitutionellen Gleichgewichts in der Gesellschaft, die Gewährleistung der Konstitutionalismus in Übereinstimmung mit der Verfassungskultur des neuen Millenniums.**

9. Die Hauptmission des Konstitutionalismus im neuen Millennium besteht gerade darin, die Stabilität und den Dynamismus der gesellschaftlichen Entwicklung sicherzustellen, die Sittlichkeit in den sozialen Verhältnissen zu festigen, die Gefahr der Entstehung von Konflikten in zwischenstaatlichen und innerstaatlichen Verhältnissen abzuwenden.

Die Überwindung des Defizits am Konstitutionalismus ist das Hauptmittel, eine Ansammlung der negativen gesellschaftlichen Energie nicht zuzulassen, die eine kritische Masse erreicht, welche soziale Katastrophen unvermeidlich macht.

Der Verfasser kommt zum Schluss, dass **besonders unter Bedingungen der gesellschaftlichen Transformation die Deformationen des Konstitutionalismus zum Hauptfaktor der Destabilisierung und der sozialen Katastrophen werden. Ihre Überwindung erfordert die Existenz eines wirksamen und systemhaften konstitutionellen Monitorings auf der Grundlage einer zielgerichteten und durchgehenden konstitutionellen Diagnostik.**

Die wichtigsten Schlussfolgerungen lassen sich wie folgt formulieren:

- Die weltweit bestehenden Modelle der Verfassungskontrolle und –aufsicht sichern nicht in vollem Umfang den systemhaften und kontinuierlichen Charakter der Aufdeckung, Bewertung und Wiederherstellung des gestörten konstitutionellen Gleichgewichts in der gesellschaftlichen Praxis und entsprechen nicht in vollem Maße den Herausforderungen der Zeit.

- Eine ausbleibende rechtzeitige Wiederherstellung des gestörten konstitutionellen Gleichgewichts führt zur Ansammlung der negativen gesellschaftlichen Energie, die, wenn sie eine kritische Masse erreicht, soziale Katastrophen und instabile Zustände unvermeidlich macht.

- Es fehlt an einem systemhaften und organischen Zusammenwirken in der funktionalen Tätigkeit der Institutionen der Macht, die auf die Gewährleistung des Vorrangs der Verfassung gerichtet ist. Solange der Staat das Recht des Menschen auf Verfassungsgerichtsbarkeit nicht anerkennt und garantiert, kann der Vorrang des Rechts unmöglich tatsächlich garantiert sein.

- Der systemhafte Charakter und die Kontinuität der Verfassungskontrolle sind nur

möglich, wenn ein ganzheitliches System einer durchgehenden konstitutionellen Diagnostik und eines solchen Monitorings eingeführt wird.

Das konstitutionelle Monitoring unter Bedingungen der gesellschaftlichen Transformation hat insbesondere folgende Hauptaufgaben:

- Aufdeckung und Bewertung des Defizits des Konstitutionalismus im politischen Verhalten des Soziums;
- Bewertung innerkonstitutioneller Deformationen, Aufdeckung der Ursachen dieser Deformationen und Entwicklung von Mechanismen für deren Behebung;
- Überwindung der deformierten Wahrnehmung der grundlegenden Verfassungswerte und –prinzipien in der Gesellschaft, Erhöhung des Niveaus des konstitutionellen Rechtsbewusstseins;
- Gewährleistung des notwendigen Niveaus der Konstitutionalisierung des politischen Verhaltens der Institutionen der Macht und des sozialen Verhaltens der Menschen;
- Behebung des Defizits der Verfassungswerte und –prinzipien im Bereich der Gesetzgebung und in anderen Formen der Tätigkeit der Rechtssetzung;
- Ausschließung der Deformationen der Verfassungswerte und –prinzipien in der Praxis der Rechtsanwendung;
- systemhafte Sicherstellung der Verfassungsmäßigkeit der staatlichen Verwaltung;
- Aufdeckung und Berücksichtigung transnationaler Kriterien der Beurteilung des sozialen Verhaltens des Menschen und der Machthaber;
- Aufdeckung der funktionalen Rolle der Machtinstitute hinsichtlich des Funktionierens des Systems des durchgehenden konstitutionellen Monitorings.

Der Verfasser ist der Ansicht, dass die Zivilgesellschaft eine prinzipielle Rolle bei der Entwicklung des Konstitutionalismus im Lande spielt. Dies bedeutet in erster Linie, dass das Volk als die Hauptquelle und der Träger der Macht der Hauptgarant der Beachtung der Verfassungswerte und –prinzipien ist. Jede Resonanz aus der Zivilgesellschaft hinsichtlich jeder Deformation dieser Werte und Prinzipien muss zum Objekt des konstitutionellen Monitorings gemacht werden. Eine der Hauptformen der Erfüllung dieser Aufgabe ist die Anerkennung und Garantie des Rechts des Menschen auf Verfassungsgerichtsbarkeit.

Der Verfasser betrachtet die methodischen Aspekte der systemhaften konstitutionellen Diagnostik und zieht daraus die Schlüsse, dass die konstitutionelle Diagnostik unter Bedingungen einer gesellschaftlichen Transformation insbesondere folgende Hauptaufgaben hat:

- Aufdeckung des gestörten konstitutionellen Gleichgewichts;
- Beurteilung des Charakters und der Erscheinungsformen dieser Störung auf der Grundlage einer Einschätzung der Situation unter Berücksichtigung zahlreicher Faktoren;
- Aufdeckung der Ursachen dieser Störungen und Empfehlungen über das mögliche

Instrumentarium für die Wiederherstellung des gestörten Gleichgewichts.

Die konstitutionelle Diagnostik soll auf folgenden Grundprinzipien beruhen:

- durchgehende Aufdeckung der Störungen des konstitutionellen Gleichgewichts;
- Feststellung des Charakters der Störung;
- Empfehlungen über mögliche Mechanismen und Verfahren der Wiederherstellung der Verfassungsmäßigkeit;
- Garantie der Ausschließung einer neuen Störung bei der Wiederherstellung des funktionalen Gleichgewichts.

Auf Grund einer Analyse der Prozesse der Etablierung des Konstitutionalismus in den neuen Demokratien kommt der Verfasser zum Schluss, dass sich der Konstitutionalismus als die Grundlage der Zivilgesellschaft unter Bedingungen einer schwachen Funktionsfähigkeit der demokratischen staatlichen Strukturen und der Deformation der politischen Institutionen nicht progressiv entwickeln kann. Die größte Gefahr, die diesen Staaten droht, ist die totale Oligarchisierung der Macht. Die Etablierung der so genannten «korporativen Demokratie» (Oligarchisierung aller Zweige der Macht) ist für ein Gesellschaftssystem gefährlicher als das totalitäre System. Die Hauptbedrohung, die von der korporativen Demokratie ausgeht, besteht gerade darin, dass sich die demokratischen Werte kontinuierlich deformiert werden und in der Folge mutieren, an Bedeutung verlieren, für die Gesellschaft nicht nur inakzeptabel, sondern auch gefährlich werden. Die totale Oligarchisierung der Macht führt zur totalen Kriminalisierung des sozialen Systems, besonders wenn die höchstgestellten Staatsbeamten zu den reichsten Menschen im Staat werden.

Der wichtigste Weg der Abwendung solcher Gefahren besteht in der Sicherstellung einer realen Gewaltentrennung und der Ausschließung des Zusammenwachsens politischer, ökonomischer und administrativer Kräfte, in der Schaffung der unverzichtbaren Voraussetzungen für die Etablierung politischer und staatsbürgerlicher Strukturen der Gesellschaft. Die Hauptaufgabe, die für eine erfolgreiche Verwirklichung der gesellschaftlichen Transformation zu lösen ist, besteht in der konsequenten Konstitutionalisierung der gesellschaftlichen Verhältnisse, wobei es gilt, den Konflikt zwischen der Verfassung, dem Rechtssystem und der Praxis der Rechtsanwendung zu überwinden. Dies kann aber nur erreicht werden, wenn das vom Verfasser vorgeschlagene durchgehende systemhafte konstitutionelle Monitoring und die entsprechende Diagnostik eingeführt werden.

Sur base d'analyse gnoséologique et axiologique des concepts de «constitution», «culture constitutionnelle» et «constitutionnalisme», l'auteur en tire la conclusion que les éléments de la constitutionnalité étant formés lors d'une vaste période historique apparaissent dans la réalité arménienne avec une cohésion particulière, **notamment suite à l'adoption par l'Arménie du christianisme comme religion d'Etat et dans les conditions de la nécessité d'établissement de règles homogènes et mutuellement acceptées de la vie laïque et spirituelle.**

Vers le milieu du Ve siècle, dans le monde arménien a émergé la tentative de résoudre «...les confrontations» apparues entre différentes couches de la société, non par la force ou les méthodes «administratives» (y compris le décret royal ou la «matraque»), mais par une procédure légale et de droit, à travers l'adoption d'une loi constitutionnelle fondée sur des valeurs spirituelles fondamentales. En fait, l'adoption de la Constitution par l'Assemblée constituante en 365, un événement progressif surprenant pour l'époque, **vient de prouver que la régulation juridique des relations sociales a été basée sur les valeurs spirituelles et éthiques (morales) et le principe de l'accord social.** Les règles adoptées, en se caractérisant comme Constitution, ont acquis le statut spécial avec la reconnaissance de la suprématie des normes adoptées par l'accord nationale sur toutes autres normes ou lois.

Dans la langue arménienne, le terme de «constitution» implique au-delà de l'idée «de constituer», celle «de constituer (établir) les limites». Quand en 1773, Hagop et Shahamir Shahamirian ont intitulé leur Constitution pour la future Arménie indépendante «Piège de la vanité», ce choix n'a pas été un hasard. Ce choix a souligné que les «limites ultimes» ont été établies non seulement à la liberté, mais aussi à la vanité, voire aux ambitions.

Les nuances axiologiques du terme de constitution ont été brillamment décrites par les auteurs du Nouveau Dictionnaire de la langue arménienne, publié à Venise en 1837. D'abord sont cités les équivalents multilingues tels que *determinatio, constitutio, statutum, dispositio*. La formule exceptionnellement remarquable et précieuse suit: «**Les décisions réglementant les limites et la Providence Divine**». Evidemment, à part la «**décision**» suprême de signification constituante, à savoir la réglementation juridique d'une telle nature, **elle est fondée sur la perception divine, le système de valeurs donné d'en haut, sur la Providence.**

Sur base d'une étude comparative constitutionnelle, l'auteur conclut que:

1. La culture de chaque peuple c'est sa mode consciente d'existence, sa présence réfléchie dans le temps. La culture constitutionnelle, dans se sens, est perçue comme un système de valeurs déterminé, historiquement révolu, stable, enrichi par

l'expérience des générations et de l'ensemble de l'humanité, qui se trouve à la base de l'existence de la société, contribuant à l'établissement et à la réalisation des règles fondamentales de comportement en partant de leur perception intellectuelle, morale et spirituelle.

La culture constitutionnelle se manifeste en tant que système à une étape déterminée de la civilisation, quand surgit le **besoin conscient** d'établir, par accord commun, les principes fondamentaux et les règles de comportement en tant que normes obligatoires pour tous. Dans l'aspect juridique, ce besoin a conduit à l'émergence des constitutions et à la réglementation constitutionnelle de la vie sociale.

La culture constitutionnelle acquiert une nouvelle qualité dans les systèmes socio-étatiques où au même titre **existent la Constitution et le constitutionnalisme**, où la Constitution n'est pas un instrument du gouvernement, mais **la Loi Fondamentale de la société civile**, un moyen de garantir le développement harmonieux et durable de ladite société, non seulement en fixant les règles de base du comportement, mais en établissant les limites au pouvoir, en le délimitant par le droit. Dans ce cas, il s'agit «de la culture constitutionnelle démocratique» propre aux systèmes sociaux démocratiques, où sont réunies les qualités des cultures nationale et universelle.

Dans un Etat de droit la culture constitutionnelle se présente comme **un système de valeurs définis, représentant l'axe de la perception par la société des convictions, des conceptions, de la conscience du droit et de la perception du droit historiquement établie, stables, enrichies par l'expérience des générations et de l'ensemble de l'humanité, qui est à la base de la création et de la sauvegarde, par accord commun, des règles fondamentales de la conduite démocratique et juridique de la société.**

2. Dans ce contexte, **le constitutionnalisme moderne c'est la mise en œuvre des règles fondamentales de conduite démocratique et juridique de la société, établies par accord commun, leur existence en tant qu'une réalité objective et vivante dans la vie sociale, dans le comportement civique de chaque individu, dans l'exercice des pouvoirs de l'Etat.**

Le «**constitutionnalisme**» est l'expression de la culture constitutionnelle particulière, adéquate à l'existence consciente de ladite société, c'est la manifestation consciente des valeurs constitutionnelles conçues comme système dans la vie sociale réelle, sur laquelle repose le système juridique dans son ensemble.

3. Les caractéristiques normatives du constitutionnalisme supposent la présence des garanties juridiques nécessaires et suffisantes pour la réalisation consciente des droits et des libertés dans tout le système des droits et des relations publiques. Dans un Etat de droit, tout acte de droit doit se révéler en tant qu'un élément du système constitutionnellement concerté du comportement juridique de l'être humain et celui de l'Etat.

4. La notion de constitutionnalisme doit être considérée non comme l'un des principes fondamentaux du droit constitutionnel, mais comme le principe fondamental du droit contemporain dans son ensemble. Il est tout à fait légitime de reformuler le proverbe romain *Ubi societas, ibi jus* (La société suppose le droit), par «**Le constitutionnalisme suppose un Etat de droit**». Le Constitutionnalisme définit l'essentiel du comportement mutuellement concerté de la société, la spécificité de son existence dans le temps, le niveau de maturité des relations sociales et de leur régulation par le droit. **C'est, en premier lieu, l'idéal d'autorégulation civilisée auquel toute société doit aspirer.**

5. Dans un Etat de droit, l'existence du droit, en tant que forme indispensable de liberté, d'égalité et de justice dans la vie sociale, en tant que base de la coexistence des personnes dans un environnement social dynamique, acquiert un nouveau rôle dans la vie de l'homme. Naturellement, l'essence d'un Etat de droit consiste en reconnaissance de la suprématie du droit et de la garantie de la liberté à travers la restriction du pouvoir par le droit. Cette constatation théorique prend un sens réel lorsque la société, consciemment et avec l'accord de tous, a l'intention de vivre et de créer en se fondant sur ce principe ainsi que les critères systémiques et de valeurs qui en découlent. Leur ensemble constitue le fondement du régime constitutionnel de chaque société concrète. Dans un Etat de droit, les manifestations du droit comme essence et comme phénomène se caractérisent précisément par le niveau du constitutionnalisme. **La dialectique de la loi et du droit, la corrélation de la Constitution et du constitutionnalisme sont conditionnées par le susdit.**

6. Comme le droit, le constitutionnalisme est une réalité sociale objective, une manifestation de l'essence de la coexistence civilisée qui a un potentiel intérieur nécessaire pour le développement dynamique et stable. Le constitutionnalisme, comme un principe fondamental du droit, acquiert, à un certain niveau de développement de la société, un caractère systémique et universel de régulation juridique, il exprime et concrétise le contenu de garantie et de sauvegarde de la suprématie du droit et de l'action directe des droits de l'homme et sert d'indicateur de la légalité du comportement des sujets de droit, étant un point de départ pour légiférer et appliquer le droit, une caractéristique du développement social et culturel de ladite société.

7. Le constitutionnalisme en tant qu'une matière juridique, est propre aux systèmes sociaux qui ont atteint une certaine évolution dans la reconnaissance et la garantie des libertés sociales et le consensus collectif, sur base du système de valeurs socioculturelles appropriées. Toute déformation du constitutionnalisme est une altération des valeurs et des principes fondamentaux constitutionnels en vigueur dans la société, un retrait de l'accord commun sur le système des valeurs socioculturelles de la communauté.

8. Dans le monde moderne cette réalité dite régressive est, en premier lieu, le résultat de la violation systémique de l'équilibre constitutionnel dans la pratique sociale non

repérée et non corrigée en temps opportun. Le **déficit de constitutionnalisme d'ordre systémique** ou sa manifestation déformée est évidente. Pratiquement, cela veut dire, que la prééminence de la Loi Fondamentale du pays n'est pas assurée. Quant à l'activité actuelle des cours constitutionnelles, malgré la plus haute importance de cette mission, **elle a un caractère discret, fragmentaire**, elle n'assure ni le suivi nécessaire, ni la continuité de la divulgation, de l'évaluation et du rétablissement de l'équilibre constitutionnel rompu au sein de la société et de la sauvegarde du constitutionnalisme en conformité avec la culture constitutionnelle du nouveau millénaire.

9. L'assurance de la stabilité et du dynamisme du développement social, le renforcement de la moralité dans les relations sociales, la maîtrise des conflits dans les relations inter et intra-étatiques font partie de la mission principale du constitutionnalisme du nouveau millénaire.

La maîtrise du déficit de constitutionnalisme est le principal moyen d'empêcher l'accumulation de la masse critique d'énergie négative sociale, responsable des cataclysmes sociaux inévitables.

Du susdit l'auteur tire la conclusion que surtout lors de la **transformation sociale, les déformations du constitutionnalisme apparaissent comme facteur majeur de déstabilisation et de cataclysmes sociaux**. Pour les surmonter, s'impose un suivi constitutionnel efficace et systémique basé sur le diagnostic constitutionnel constant et ciblé.

Les principales conclusions tirées sont les suivantes:

- les modèles de contrôle et de supervision constitutionnels en vigueur dans le monde n'assurent pas pleinement la divulgation, l'évaluation et le rétablissement systémiques et continus de l'équilibre constitutionnel rompu dans la pratique sociale et ne répondent pas pleinement aux défis du temps ;

- le rétablissement inopportun de l'équilibre constitutionnel rompu conduit à l'accumulation de la masse critique d'énergie sociale négative et aboutit aux explosions sociales et à la déstabilisation ;

- l'interaction systémique et organique est absente dans les activités fonctionnelles des institutions du pouvoir, assurant la prééminence de la Constitution. Tant que l'Etat ne reconnaît et n'assure pas le droit d'accès de tout homme à la juridiction constitutionnelle, la garantie réelle de la prééminence du droit est impossible.

- la systématisme et la continuité du contrôle constitutionnel ne sont envisageables qu'en cas de la mise en œuvre d'un système intègre et constant de diagnostic et de suivi.

Les objectifs principaux du suivi constitutionnel dans les conditions de transformation sociale sont en particulier:

- l'identification et l'évaluation du déficit de la constitutionnalité dans le comportement politique de la société;

- l'évaluation des déformations intra-constitutionnelles, la mise au jour des causes de ces déformations et l'élaboration de mécanismes pour les surmonter;
- la correction des perceptions déformées des valeurs et des principes constitutionnels fondamentaux dans la société, l'augmentation du niveau de la conscience du droit constitutionnel;
- l'assurance du niveau nécessaire de la constitutionnalité dans la conduite politique des institutions et dans le comportement social de l'individu;
- l'élimination du déficit constitutionnel dans le domaine de la législation et dans d'autres domaines de l'activité juridique;
- la prévention des déformations des valeurs et des principes constitutionnels dans la pratique juridique;
- le contrôle systémique de la constitutionnalité de l'administration publique;
- l'identification et le listing des critères transnationaux d'évaluation du comportement social de l'homme et du pouvoir.

Ainsi le rôle fonctionnel des institutions du pouvoir se déploie dans les rapports avec l'activité constante du système de suivi constitutionnel.

L'auteur estime que la société civile joue un rôle majeur dans le développement du constitutionnalisme dans le pays. Cela signifie, avant tout que le peuple, comme source et porteur du pouvoir, est le garant principal du respect des valeurs et des principes constitutionnels. Toute réponse de la société civile à une déformation de ces valeurs et principes doit faire objet du suivi constitutionnel. La forme principale de réalisation de cet objectif est la reconnaissance et la garantie du droit d'accès de l'individu à la juridiction constitutionnelle.

En examinant les aspects méthodologiques du diagnostic constitutionnel systémique, l'auteur estime que **ses principaux objectifs**, notamment dans les conditions de transformation sociale ou d'instabilité de l'équilibre constitutionnel, sont en particulier:

- l'identification de l'équilibre constitutionnel violé;
- l'évaluation de la nature et des formes de cette violation sur base d'une évaluation multifactorielle de la situation;
- l'identification des causes de ces violations et la proposition des instruments de rétablissement de l'équilibre constitutionnel.

Le diagnostic constitutionnel doit reposer sur les principes fondamentaux suivants:

- l'identification ininterrompue de toute violation de l'équilibre constitutionnel;
- la détermination de la nature de la violation;
- la proposition des mécanismes et des moyens de rétablissement du constitutionnalisme;
- la garantie d'interdiction de nouvelles violations au moment du rétablissement de l'équilibre fonctionnelle.

En analysant les processus d'établissement du constitutionnalisme dans les nouvelles démocraties, l'auteur aboutit à la conclusion que le constitutionnalisme comme base de la société civile ne se développe pas progressivement dans les conditions d'handicap des structures démocratiques et de déformation des institutions politiques. La menace majeure pour ces pays est l'usurpation totale du pouvoir par l'oligarchie. L'établissement de la soi-disant «démocratie corporative» (l'établissement d'oligarchie dans toutes les branches du pouvoir avec la fusion totale des forces politiques, économiques et administratives) est plus dangereux pour le système social que l'établissement du totalitarisme. La principale menace de cette démocratie corporative réside dans le fait que les valeurs démocratiques se déforment et, par la suite, mutent, perdent leur signification, deviennent inacceptables et même dangereuses pour la société. L'établissement d'oligarchie dans les pouvoirs conduit à la criminalisation totale du système social, surtout quand les hauts fonctionnaires d'Etat deviennent les personnes les plus riches du pays.

La voie qui permet d'éviter ces menaces c'est l'assurance de la séparation réelle des pouvoirs et l'interdiction de la fusion des forces politiques, économiques et administratives, la création des conditions d'établissement naturel des structures politiques et civiques de la société. L'objectif principal d'accomplissement heureux de la transformation sociale consiste en la constitutionnalisation scrupuleuse des relations publiques à travers la maîtrise du conflit entre la Constitution, le système de droit et la pratique juridique. Il est possible d'atteindre le susdit au travers de la mise en œuvre du diagnostic et du suivi constitutionnel continu systémique proposés par l'auteur.

ON PERCEPTION OF CONSTITUTIONAL LAW: A THEORETICAL APPROACH TO CONSTITUTIONAL JUSTICE

Egidijus KŪRIS

INTRODUCTION

This narrative is a theoretical one. An academic bureaucrat preoccupied with the task to attribute scholarly articles in law to a specific field, or branch, of legal science depending on which problems examined therein dominate should classify this article as one pertaining to theory of law rather than to constitutional law proper. In this article, I do not deal with what would correspond to the titles of chapters of a typical textbook in constitutional law such as specific constitutional principles, models of government, structures of state power, judicial review, elections and referenda, or human rights. In addition, although the narrative is heavily concentrated on constitutional jurisprudence, I do not discuss constitutional case law of specific countries, including my own. Rather I discuss the perception of constitutional law at large, or the perception of constitutional law as a legal phenomenon. I am positive that constitutional law (and the perception thereof) deserves to be treated as a phenomenon per se and not only as an element of ‘bigger’ phenomena of law or of constitutionalism. The reader will find no references to what concrete decisions regarding concrete constitutional issues were made in concrete countries. Instead, one will find the substantiation, from a systemic theoretical point of view, of what place constitutional law does occupy or shall occupy in the system of law.¹ This substantiation can be drawn, apart from other sources (the great legal theoretical treatises etc.), from the ongoing experience of states who emerged or re-emerged on the rubble of the Berlin Wall wherein, due to their history of being subjected to the Leninist experiment of ‘overcoming of law’, constitutional law until recently performed only a minor, or symbolic, function as, in these countries, constitutions were mere façades designed to camouflage such political practices that were based on the presumption that law was nothing more than the formalization and legalization

¹ I distinguish ‘system of law’ from ‘legal system’. The two wordings often are used interchangeably. However, in the strict sense, the latter includes not only law per se, i.e. law as a normative reality, but also other legal phenomena such as legal institutions, legal culture or legal behavior. I concentrate on law in the Kelsenian sense (and consequently, the system thereof) as something which is central to any subsystem of a social system which can be labeled legal system but which by no means makes the whole of the latter. Reliance on Kelsen in this respect, by itself, does not mean that I subscribe to all his opinion on the contents and functions specific legal categories. For instance, I hold a different view on what he called individual norms and on the delineation between law and morality, and on the essence of interpretation of law (which is especially identifiable in this narrative), and on the essence of Rechtsstaat. But, having been unable to find a competing theory as consistent and convincing as his doctrine of the essence of the constitution, I do subscribe to his view on the latter.

of the political will or even diktat. More specifically, I aim to show: (i) that in these states the role of constitutional law is undergoing, and in some has already undergone, a remarkable change, or at least has the potential for such undergoing; (ii) that this development goes hand in hand with the radical transformation of the very perception of constitutional law which I call the paradigm of constitutional law; and (iii) that the principal tool for, and the catalyst of, the said transformation is the establishment and the functioning of judicial constitutional review, that is, the activities of constitutional courts. Having been, in the recent past, myself the constitutional judge, I still do not attribute the latter thesis solely to my own experience in judicial constitutional review because, put this personal experience aside, the influence of constitutional justice on the transformation of the paradigm of constitutional law still would have to be emphasized. However, I have to acknowledge that my own experience of constitutional judgeship, indeed, was instrumental in prompting me to put special emphasis on the role of constitutional courts in drawing the route from how constitutional law was perceived before the said transformation took place to how it is perceived today.

At large, and from the theoretical point of view, this transformation of the paradigm of constitutional law amounts the ‘joint materialization’ of such legal theoretical postulates as Hans Kelsen’s notion of the constitution as Grundnorm, the idea of universal justifiability as developed by Aharon Barak, and the idea of politics governed by law as advocated by Louis Favoreu. Of course, such transformation cannot come to completion—if it is at all allowed to speak, without a strong reservation, of ‘completion’ of any idea—at the same time in different so-called new, or young, democracies (whatever politics this title is ascribed to). To compare, countries who institutionalized constitutional justice in the beginning of the so-called third generation, or wave, of constitutional courts (as Hungary or Poland) have reached, to a greater or lesser extent, the said result earlier than those where constitutional justice was institutionalized in 1990s or even later. In addition, constitutional optimism, or idealism, must not be naïve. It has to include realism. In the same way as not so few authoritarian regimes can (and virtually do) make use such on-the-surface democratic procedures as, e.g., referenda, they can (and do) exploit the form of constitutional justice. In some of the new polities whom political correctness and wishful thinking induce to call ‘democracies’ despite their fragility or even obvious failure, the newly established institutions of constitutional justice (as well as political communities in general) are faced with political dependency, de facto subordination or other extra-legal constraints of various sort which have replaced the earlier ones that were based on the approach to law as being subordinated to political will alone. These constraints, still present in some of the so-called new democracies, prevent constitutional courts from always (if at all) acting as absolutely independent umpires capable of testing whether the challenged legal acts (which are political decisions put in legal clothes)

are or are not in correspondence with the requirements of a constitution of a respective state. Besides, as constitutional jurisprudence is not a heavenly revelation but a human product, even in states where constitutional justice does not experience any direct political pressure, not necessarily all constitutional court decisions signify the triumph of constitutional (and legal) reasoning; some of them sometimes leave intellectuals, legal professionals not excepting, to wish that certain cases better were never initiated before the constitutional court or even that this court, in future, revises its position.

Nevertheless, the general trend, so far, is that not merely the role of constitutional law has increased (or is increasing) but that the essence of constitutional law, as an operational legal category, has undergone (or is undergoing) the most radical change. Moreover, not only the previous paradigm of constitutional law gave up place to the new one (which I deal with in subsequent pages) but also the perception of the structure of the whole system of law has acquired a somewhat new shape. The rise of the role of constitutional law has been well described in numerous publications pertaining to the science of constitutional law proper, as well as to political science and to the science of history, i.e. to different fields of scholarly knowledge important parts of which put together aggregate the wonderful amalgam of constitutionalism. However, this development calls not only for descriptive analysis but for conceptualization in normative terms, too. The former often overshadows the latter. Still, the general theory of law, by definition, aims at explanation of the whole system of law. One may reasonably ask if such general theory of law wherein constitutional law did perform only a symbolic function of a declaration (provided that the constitution was not a sheer sham) or a façade still holds or maybe the general theory of law has also undergone (or is in the process of) certain transformation (and if so, to what extent) due to the fact that one of its elements, constitutional law, has found for itself a new, much more important, place in the system of law. My impression and belief, which I try to substantiate below, are that this transformation has taken (or is taking) place and that the earlier perception of constitutional law, despite certain remnants and inertia, does not hold any longer.

THE PARADIGM INHERITED

Most textbooks do not live very long. Sooner or later they become outdated and have to be replaced by new textbooks on the same subject that deal with changes that took place since earlier textbooks were published. This is especially true about law textbooks, and even more so about textbooks dealing with law of states that are undergoing critical transformation. Good examples of this lack of longevity are presented by the Central and Eastern European states, especially those that once were called ‘Soviet republics’. If one undertook to study a textbook of, say, civil or administrative, or financial, or labor, or criminal, or penitentiary law published two decades ago or even less he or she would

learn very little or almost nothing about the law which is valid today in a specific country belonging to this area. As so much has changed, this is a commonplace statement, though. The once valid law—not only its definite norms but also principles thereof—went into oblivion, and so did the textbooks wherein this law of the past was analyzed. Bookstores do not sell them, libraries dispose of them, students do not read them anymore, professors get rid of them, and maybe the only readers who still may want to extract something useful out of them are those doing research in legal history. True, there are remarkable exceptions from this regularity. But exceptions do not negate the general rule.

However, in one remarkable respect outdated law textbooks may be very instrumental. They reveal not only what once was the content of legal regulation of a specific field of human activity and social life but, also, how, at a certain time in a certain social system or culture, legal provisions and institutions were perceived. Even a purely technical text about law as one contained in a handbook tells a student not only what legal norms and principles of law are (or were) valid but what is (or was) perceived by the legal community and the society at large as a legal norm or a principle of law. It reveals the perception of law as such and, hence, of its functions, system and taxonomy. It reveals not only the legal ideology prevalent in the polity, if there is one, but also the concept of law by which not only the author of the text but the professional community that he or she represents is (or was) guided (again, there may be important exceptions, especially when the author resists the mainstream). One (especially if he or she does not support the Kelsenian view that the theory of law must seek ‘purity’ or—coming closer to the domain of constitutional law—the Wechslerian view that the principles of constitutional law must be perceived as ‘neutral’) can rightfully say that ‘in real life’ legal ideology and the concept of law are interdependent and that these two aspects of perception of law as a unity can be disjoined only in a mental exercise. Nevertheless, such mental separation serves important analytical reasons. The first aspect pertains to what law must or must not regulate and, therefore, is value-oriented; the second one is an attempt to explain what law can or cannot (and, consequently, does and does not) regulate and, hence, is value-neutral. The first one is in the focus of the philosophy of law (and the philosophy of morality, too); the second one is the object of the theory of law. However, given the interdependence of the two aspects of the same phenomenon (perception of law as a unity), it may well be so that a critical transformation of one induces that of the other, whichever comes first.

In this respect, constitutional law textbooks published in the Central and Eastern European states’, including the former ‘Soviet republics’, in the wake of the revolutionary change of the regime or in the first years after this change (even those that uncritically replicated the most orthodox dogmas of the Soviet façade pseudo-constitutionalism), do not deserve to be dropped off from library shelves completely. They testify of the

paradigm of constitutional law prevalent in these countries not so long ago. In most of these states, even the wording ‘constitutional law’ with its explicit emphasis on the constitution as the unique and exceptional source of law was not used; rather it was substituted by the so-called ‘state law’ which de facto meant the same but did not have the connotation of the law stemming from the supreme law of the land. Therefore, ‘state law’ was constitutional law in disguise. Below, in order not to complicate the narrative, I prefer to call that ‘state law’ ‘constitutional law’, too. Politics and ideology put aside, it is interesting to look into how that constitutional law and its place in the system of law were perceived by the legal science as well as the legal profession on the whole. It is important to emphasize from the outset that in most cases definitions of constitutional law in the first years after the collapse of the Soviet colossus did not differ a lot from definitions presented in the textbooks published prior to that collapse (despite the fact that ‘state law’, almost in an eye blink, was re-named to ‘constitutional law’). Although constitutional law per se, i.e. its content, changed quickly as the so-called new democracies, both real and nominal, adopted new constitutions or substantially modified the existing ones, it took some years for the first changes in the definition of constitutional law to take place. Definitions of constitutional law were inherited from the recent past because inherited was the perception thereof.

To take a typical wording, constitutional law was defined as the branch of law which ‘regulated the most important social relations’ and ‘established the fundamentals of political, economic and social systems’, ‘the order of formation of state organs [i.e. institutions] and the powers thereof’, and ‘fundamental rights, freedoms and duties of citizens’ (or persons). To a certain extent, definitions varied. For instance, some authors included in the list of objects established by constitutional law the bases of budgetary process, some saw it necessary not to skip the territorial administrative division of the state, and some mentioned bases of foreign policy and/or state defense, which technically was correct because most constitutions did establish all these, too. On the other side, some authors did not present an exhaustive list of objects regulated by constitutional law but supplemented the ‘core list’ with formulas like ‘and other most important issues of state life’ or the laconic ‘etc.’ In terms of sequence, as if someone wanted to reveal statist ideological priorities, human rights (and duties), as a rule, were enumerated after political, economic and social systems and state ‘organs’; however, from the point of view of perception of the system of law this is irrelevant. What really mattered was that constitutional law had its subject matter (or, more precisely, several of them), just as any branch of law, criminal, administrative, civil or other.

Thus, what was characteristic of this paradigm of constitutional law was that this field of law was perceived as one of the branches of law and, at the same time, such a branch that ‘regulated the most important social relations’. The latter quality was

not in line with the very notion of branches of law as comprehended in the theory of law. Law is divided into branches according to the subject matter regulated by a set of norms and principles. This subject matter is homogeneous or, at least, uniform, to a greater or lesser extent. Thus, one draws a relatively clear distinction between civil, administrative, criminal, financial law and other branches of law because it is quite easy to distinguish between corresponding subject matters. True, there is (and always was) an ongoing discussion among legal theorists, as well as lawyers representing various fields of legal profession regarding what branches of law should be singled out, and how they relate to each other. But whenever one talks of branches of law he or she singles them out on the basis of the subject matter of legal regulation and not on the basis of such indeterminate and wishy-washy criteria as ‘importance’ of social relations or ‘fundamentality’ of citizens’ rights, freedoms and duties. All of these ‘most important’ social relations are regulated by legal norms and principles of law pertaining to some branch of law, and many of the ‘fundamental’ rights, freedoms and duties of citizens belong to a certain group of subjective rights, freedoms and duties and, therefore, can be treated as being regulated by the respective branch of law. For instance, all constitutions of the Central and Eastern European states (however façade) did consolidate (and do consolidate now) the right to work the norms and principles regulating which, according to the subject matter, surely must be attributed to labor law; all of them did (and do) consolidate the right to health care which is the subject matter of health law; all these constitutions did (and do) consolidate the right to elect and to be elected (here, the fictitiousness of elections is not an issue), as well as the procedure of elections which are the subject matter of electoral law; and so on. If, say, relations pertaining to the right to work are characteristic of a great level of homogeneity or uniformity and, therefore, should be treated as the subject matter of labor law, how one could explain that some of them were picked out and were regarded as ‘most important’ and were attributed not to labor law but to constitutional law as a branch of law different from labor law whereas other relations pertaining to the (same) right to work were left for labor law proper? Still, theoreticians seemed not to be much bothered by this contradiction. On the other hand, if all such sets of social relations had treated as subject matters of branches of law other than constitutional law, what social relations, then, would have been left for the constitutional law proper? Not much, to say the truth, except for the most general principles such as non bis in idem or equality of persons, or that ignorance of the law shall not exempt one from liability, or that a respective state was (is) a republic. But even those had to be concretized and laid out in detail in codes and other statutes, as well sub-statutory legislation. This sub-constitutional legislation was comprehended as a set of sources of a respective specific branch of law but not that of constitutional law (e.g., although some of these

general principles, such as *non bis in idem*, were developed in *inter alia* criminal codes a criminal code, probably, never was defined as a source of constitutional law but rather as that of criminal law).

This brings me to another characteristic trait of the earlier–inherited–paradigm of constitutional law. Constitutional law did not differ from any other branch of law in terms of the system of sources of law. Theory of law presents a long list of sources of law such as (to name a few) customs, treaties or contracts, case law (including court decisions containing constitutional or statutory interpretation) and precedents, legal doctrines, and, of course, normative acts, the queen of the sources of law in this region. Normative acts are classified according to their legal force into statutes and various sub-statutory acts, which allow singling out a constitution because written codified constitutions are normative acts, too. In the time under consideration, any textbook dealing with any branch of national law of a respective country did list all sources of law that the Marxist doctrine allowed to (which means that such normative systems as, say, religion were not considered to be sources of law, although they may be such and are such—of course, to a limited extent—even in a secular state). Thus, a textbook in, say, labor or financial law would list sources of this branch of law in the following order: constitution, then codes and other statutes, then various sub-statutory acts (differentiated according to the diversity of sub-statutory law-making institutions and to the legal force of these acts), then legal customs, then court precedents or (typically) court practice (the euphemism meaning case-law), and then, occasionally, legal doctrine. The textbook in civil law or administrative law, or agrarian law, or criminal procedure law, or any other branch of law would present exactly the same list of kinds of sources of law; of course, concrete titles of codes and other statutes, as well as sub-statutory acts, were different. Constitutional law was no exception. A textbook in constitutional law would list the same sources of this ‘branch’ of law. Constitution, although mentioned first, was only one of the sources.

Yet one characteristic feature of that inherited paradigm of constitutional law was that the system of its sources almost totally lacked acts containing official interpretation of the constitution. This statement needs some elucidation. Scholarly constitutional interpretation, however politically constrained, was there. But this was unofficial interpretation, whereas the official was missing. This was true both for interpretation performed by the legislator and for the one performed by the judiciary. In theory, constitutional interpretation performed by a political authority (*inter alia* the legislator) was considered to be the supreme form thereof. Still, in the façade constitutionalism, the function of acts containing interpretation of constitutional provisions was served by legislation, statutory and sub-statutory, as a ‘natural extension’ of the constitution. Judicial constitutional interpretation was regarded as being subordinated to the legislative one. But it was missing, too. True, in books, court precedents, or, more pre-

cisely, ‘court practice’ were not excluded from the list of sources of constitutional law. Some authors would even regard them, in theory alone, as quite important sources of constitutional law whereas others would diminish their significance by equating them to mere acts of application of law. No big difference, though, as, in reality, these sources were not existent. It could not be otherwise as judicial constitutional interpretation is the natural and indispensable ‘side effect’ of judicial constitutional review, and the latter could not and was not tolerated in the pseudo-constitutionalist system. The idea that legislation could contradict a constitution, albeit plausible in theory, was politically and ideologically unacceptable. Thus, there were no procedural or institutional mechanisms allowing for check of constitutionality of legislation. That pseudo-constitutionalism, with very few exceptions,² did not embrace constitutional review, judicial, quasi-judicial or, at least, non-judicial, hence, it also did not allow for the slightest possibility of an ongoing constitutional interpretation which otherwise would have been the most creative tool for constitutional development. To that pseudo-constitutionalism, such concept as ‘the living constitution’ was utterly unknown. In the absence of constitutional review and constitutional interpretation, constitutional law was static, stiff, and stagnant.

IMPETUS FOR TRANSFORMATION

The third generation, or wave, of constitutional courts started even before the Berlin Wall went down. Yet in 1983, the Hungarian Parliament passed a law, which provided for the establishment of the Constitutional Council, a quasi-judicial institution; in 1989–1990, this weak form of constitutional review was replaced by the strong one, and the full-fledged Constitutional Court was established. Even earlier, in 1985, the Constitutional Tribunal was established in Poland. From 1990, constitutional courts were established (or re-established, as in Czechoslovakia) in all Central and Eastern European states, including most of the former ‘Soviet republics’.³ It is needless to recount that the activities of constitutional courts made a profound influence upon the development of constitutional democracy, and, hence, democracy at large, in these states. True, some regimes do not feel shy to manipulate the newly established constitutional courts while, at the same time, preserving the form and the visibility of constitutional justice. A couple of too unsubmissive constitutional courts were either dispersed or ‘reformed’ into something more pliable. In a few cases, even in countries otherwise democratic enough, the executive failed, in due time, to nominate new justices to the bench, thus, respective constitutional courts were

² The exception was Yugoslavia (and its constituent republics) which introduced judicial constitutional review yet in 1963. Post World War II constitutions of Czechoslovakia, one of the pioneers of the European model of judicial constitutional review, did not provide for a constitutional court until its re-introduction in 1968. However, it was not established until 1991. USSR, before collapsing, established the Committee of Constitutional supervision, a quasi-judicial body. On Poland and Hungary see below, Impetus for Transformation.

³ Latvia introduced Constitutional Court in 1997, following the constitutional amendment of 1994. Estonia established not a separate constitutional court but a Constitutional Chamber within the Supreme Court.

temporarily deactivated because they, for some time, fell short of quorum. Also, as a most radical political counteraction to too activist—in the eyes of the political establishment—jurisprudence of constitutional courts, there were instances of curtailing the scope of their jurisdiction and powers, including those explicitly consolidated in constitutions (the new Hungarian Constitution of 2011 being the latest and probably the most inventive instance). Still, in general, losses are outbalanced by gains. The influence of constitutional courts on the development and quality of the rule of law in the so-called new democracies, both real and nominal, are described in many thousands of pages of academic literature. My concern, though, is how the establishment and activities of constitutional courts, in the countries under consideration, facilitated the transformation of the paradigm of constitutional law inherited from the epoch of absence of constitutional justice.

Following Kelsen, constitutional courts are often called ‘negative legislators’. This apt metaphor, however, does not reveal neither fully enough the role of constitutional courts in the system of legal institutions or institutions of state power nor the role of their case law in the system of sources of law. True, constitutional courts are meant to interfere into the process of law-making not upon their own initiative but only in the ‘negative’ way when they are petitioned, according to the procedure established by law, to investigate whether acts of ordinary, i.e. sub-constitutional, law are or are not in conformity with the constitution (and, in some jurisdictions, also whether acts of ordinary law of lower legal force are or are not in conformity with acts of ordinary law of higher legal force, e.g., whether acts of the executive are in conformity with statutes). In this sense, ‘negative law-making’ amounts to nothing else but recognition of unconstitutionality of the challenged provision of ordinary law. Thus, ‘negative law-making’ is no ‘making’ of law at all. It is the cancellation of the power of law already ‘made’, however, ‘made’ ultra vires in disregard of the supreme law of the land. It is the destruction of what itself signifies the encroachment upon the hierarchy and consistency of the system of law.

It has already been hinted, and is worthwhile repeating, judicial constitutional review presupposes constitutional interpretation. Above, I called the latter ‘the natural and indispensable ‘side effect’ of judicial constitutional review’. But, in essence, it is more than that. Constitutional review and constitutional interpretation are two sides of the same coin. Constitutional interpretation is an inseparable companion to the function of ‘negative law-making’ even in cases when the constitution itself does not directly mention it, and in most cases it does not. True, some constitutions, in fact, very few of them, explicitly entitle constitutional courts with a power to interpret the constitution in abstracto, that is, in no relation with any legal dispute. In my opinion, this function does not make sense because, in cases when the constitution is interpreted in no relation with a dispute between parties in a case representing different or even opposing opinions on what the constitution says on a specific matter, constitutional courts do not act as

jurisdictional bodies of legal dispute resolution but somewhat remind of scholarly departments engaged in a theoretical activity, with that only difference that their opinion is binding whereas scholarly opinions are not. Strictly speaking, constitutional interpretation in abstracto is not constitutional review. As if such constitutional interpretation in abstracto was not enough, some constitutions go as far as to entrust constitutional courts with powers to interpret, upon petitions of other courts (of general or specialized jurisdiction), statutory legislation. Such expansion of competence is even less reasonable. It is hardly possible to rationally explain under what criteria courts of general or specialized jurisdiction do the job of statutory interpretation themselves in some cases decided by these other courts but may resort to petitioning a constitutional court regarding interpretation of statutory provisions to be applied in other cases from their own docket. I do not think that there can be any unambiguous criteria for choosing one alternative rather than the other. Constitutional courts were not meant for interpreting statutory provisions (unless they are challenged vis-à-vis constitution); neither they were meant for interpretation of constitutions in abstracto. Interpretation in abstracto digresses from the purpose for which constitutional courts were ‘invented’. If interpretation in abstracto—of the constitution, but especially of statutes—constitutes a big share of the constitutional court’s jurisprudence, the system wherein the function of judicial constitutional review is performed by the court of ultimate instance of general jurisdiction (supreme court) is much more preferable. So far, none of the constitutional courts that are entitled with the power to interpret the constitution in abstracto, has been overloaded with the burden of this type and exercise this power only on an occasional basis.

This objection to constitutional interpretation in abstracto upon petition of courts of general or specialized jurisdiction does not mean that constitutional courts that interpret provisions of a respective constitution only when such a need arises from the investigation of constitutionality of an act of ordinary law under challenge should avoid an abstract, a purely theoretical reasoning. Quite on the contrary, they should not and, I fact, they do not. Many constitutional provisions are worded in a rather abstract way as ‘magniloquent phrases’,⁴ therefore, they call for abstract interpretation. In addition, a constitution is not a casual combination of clauses. It is a normative reality wherein all provisions are interrelated, a system of norms and principles that have the highest legal force and, consequently, the supreme official value. This systemic quality of a constitution invokes the need, for any interpreter (not only a judge), to generalize on the values and ideas underlying the whole system of the supreme law and, by extension, the system of all national law. Constitutional interpretation in abstracto and abstraction in interpretation of constitutional provisions are two different phenomena. The former was, in fact, invented (or, better to say, imported from university experience where it is part and par-

⁴ Hart, H. L. A. *The Concept of Law*. Oxford: Clarendon Press, 1961, p. 12.

cel of academic activity) and introduced into some constitutional jurisdictions by some authors of some constitutions and, if it were decided so, could be recalled; the latter is unavoidable because abstraction and general theoretizing are commanded by the very essence of constitutional interpretation. For instance, texts of some constitutions do not explicitly mention certain principles, e.g., secular character of state or separation of powers, or the rule of law (as a general slogan), or prospectivity of laws, or proportionality, or the right to legal defense in case of being accused (the latter three being manifestations, out of many, of such broad notion as the rule of law), nevertheless, systemic and consistent interpretation of a set of constitutional provisions allows or even compels courts charged with the function of constitutional interpretation to hold and proclaim, in their decisions, that separation of powers or secularity of a respective state, or rule of law etc. are fundamental principles underlying the whole constitutional system. Formulation of such most general principles, even if texts of respective constitutions keep silent about them, is a result of abstraction in any constitutional interpretation, and such abstraction is inevitable not only when constitutions are interpreted in abstracto but also when they are interpreted in relation with a legal dispute between the parties in a case, that is in concreto. Even a constitutional court interprets the constitution in concreto, the result of interpretation is not only the resolution regarding the constitutionality of the challenged act (or part thereof) of ordinary law but also the substantiation of this resolution. The former is stated in the resolving part of the constitutional court decision and is what the petitioner has exactly asked for; the latter is formulated in the part of reasoning of the decision and is something what the petitioner gets extra to what he has directly asked for. However, it is not only the petitioner who gets this ‘bonus’ but also all constitutional law and all system of law, hence, the whole legal community. This ‘bonus’ is the new fragment of the official constitutional doctrine which supplements, enriches and expands the laconic phrases of a constitution. By ‘official’ I mean imperious, or commanding, and, in this sense, ultimate; to compare, academic constitutional doctrines may be more persuasive than the one formulated by a constitutional court but they lack what is essential to law – imperiousness; they are mere professional opinions, however authoritative, which may be concurrent with the official constitutional doctrine or alternative to the latter. All constitutional courts produce official constitutional doctrine, i.e. the volume of constitutional interpretation which, being cleaned from concrete circumstances of respective cases, serves as a theoretical commentary to the constitution. In other words, the official constitutional doctrine is constitutional court’s jurisprudence freed from the specification of concrete cases in which it was formulated. In the continental legal tradition (or civil law tradition, as it is often called), such official constitutional doctrine is sufficient (of course, with direct quotes from the text of the constitution itself) for a textbook in constitutional law.

Regardless of whether constitutional courts are obliged to provide constitutional interpretation in abstracto, all constitutions of the so-called new democracies—most often implicitly, but sometimes explicitly—not only allow but even command for constitutional interpretation in concreto. There is no other method to establish if the challenged act of ordinary law is or is not in conflict with the constitution than to interpret both the provisions of the said act and those of the constitution, and then to compare them. Further, equality of persons, which is consolidated in all modern constitutions (irrespective of political regime), presupposes that similar cases shall be treated alike. Although which cases should be perceived as ‘like’ and which should not is an eternal philosophical question and may be regarded as an essentially contested concept⁵ (because nothing is absolutely ‘like’ in the social world), this maxim requires that uniformity and continuity of jurisprudence is ensured.

Continuity of jurisprudence has a lot to do with predictability of constitutional court decisions, which ensures legal certainty, legal clarity and, consequently, is a legal value in itself. Constitutional courts are bound by their previous decisions, i.e. official constitutional doctrine formulated therein. This reminds of stare decisis. To treat stare decisis as something which alien to continental legal tradition and is characteristic of common law tradition only would be an unjustified contraction of the general idea that a court precedent has such legal force (and, hence, significance) which exceeds its force in a concrete case wherein it was created. Most, if not all, continental jurisdictions do not officially recognize stare decisis but they recognize the role of the so-called jurisprudence constante (which in different teachings and different jurisdictions may be called differently) in rendering court decisions in civil, administrative, criminal or other cases. It is habitual to juxtapose and contrast jurisprudence constante and stare decisis. It is said that the main difference between the two is that in stare decisis a single court decision on a specific subject matter acquires the quality of a precedent binding on lower courts and also of self-binding precedent on the court which created it (unless, as in the case of US Supreme Court, the court itself does not feel as being bound by its own precedents) whereas in jurisprudence constante such quality (often called ‘persuasive authority’) can be acquired only by series of court decisions on the same subject matter. What constitutes this ‘series’ and how it can be ‘quantitatively measured’ (in numbers of court decisions, and if so, what are these numbers and how they relate, if at all, to the importance or even landmark character of decisions, or in length of respective court practice, and if so, has this practice to be universal and uninterrupted or not) is an open question. Anyway, the contrast between stare decisis and jurisprudence constante seems to be quite fundamental. Nevertheless, this contrast must not be overestimated, especially when analyzed not from the point of view of comparative law but from that of the theory

⁵ Gallie, W. B. ‘Essentially Contested Concepts’, in Proceedings of the Aristotelian Society, 1956, vol. 56.

of law. From this perspective, there is much more what brings *stare decisis* and *jurisprudence constante* together than what estranges them. Both *stare decisis* and *jurisprudence constante* signify that, in the end, that legislator's will as expressed in the legal act applied in a case becomes, in fact, subordinated to court practice and to the reasoning which has determined the specific application thereof. Legislation is but a lifeless letter unless imperiously interpreted and applied, and the way it is interpreted and applied depends on bodies, which imperiously interprets and applies it, which, under the rule of law, are courts. It is unquestionable that a legislator dissatisfied with the way courts interpret and apply legislation has all sovereign power to amend legislation; such legislator should only be aware that, after all, the new legislation will also be imperiously interpreted and applied by no one else but courts. But before legislation (interpreted and applied in a way so unsatisfactory to the legislator) is amended, court precedents hold. Both *stare decisis* and *jurisprudence constante* emphasize the legal force of the court precedent. In this respect, *jurisprudence constante* can be regarded as a softer version of *stare decisis*, or, vice versa, *stare decisis* may be regarded as *jurisprudence constante* reduced to one single decision.

In judicial constitutional review such weak version of *jurisprudence constante* wherein a single court decision on a specific subject matter, however important or even landmark, does not, by itself, acquire the quality of self-binding precedent but such quality can be acquired only by series of court decisions on the same subject matter is less preferable than its much stronger version wherein a single constitutional court decision amounts to a 'promise' that, in future (when other cases regarding the same subject matter are decided in that constitutional court), there will be built such *jurisprudence constante* (on the respective subject matter) which will use this first single decision as a cornerstone. This is so due to many reasons of which, here, I briefly mention only three. First, a typical constitutional court case is a case, which is much more politically sensitive than most cases decided by courts of general and specialized jurisdiction. Therefore, inconsistency in a constitutional court's *jurisprudence* could give raise to suspicion that the respective constitutional court is (or was) not politically neutral or that it is (or was) coerced or otherwise manipulated to adopt a decision which is not in conformity with its own practice, or that its decisions are circumstantial. Next, *jurisprudence constante* in its weak form wherein not a single constitutional court decision but only a series of decisions acquires the quality of self-binding precedent is insufficient for judicial constitutional review because of what could be called limited quantity of decisions on a specific subject matter. As a rule, constitutional courts investigate less cases and pass less decisions than regular courts, therefore, to achieve a 'series' of decisions on a specific subject matter may take an indefinitely and unpredictably long time. This means that the constitutional court's *jurisprudence* is less (if at all) predictable. Third, one has to bear in mind

that constitutional jurisprudence deals with the interpretation of the supreme law of the land. Inconsistency in interpretation of ordinary law, as well as unpredictability of its application, however undesirable, is a lesser evil because it does not encroach upon the very fundamentals of the system of law. This is quite opposite in case of inconsistency of interpretation of law consolidated in constitution and application thereof. All these factors (together with other not mentioned here) speak in favor of the binding character of constitutional court decisions. This applies not only to the resolving parts of the decisions which reveal the constitutional court's position, or stance, that provisions of ordinary law of a certain type (in terms of content or form, or structure, or wording, or legal force etc.) have to be recognized as being in conflict or not in conflict with the constitution but also to the parts of reasoning of these decisions wherein arguments and motives that substantiate such position are laid down. The power of resolving parts of the constitutional court decision is retrospective while that of the part of reasoning is also prospective because it obviously has a potential to be repeated in subsequent cases. Thus, it is possible to distinguish between constitutional precedents in terms of resolution of constitutional disputes and doctrinal precedents, the latter being statements containing interpretation of constitutional provisions. On the one hand, this is an analytical distinction, not more. On the other hand, doctrinal precedents live the life of their own which they do when the same constitutional court relies on them in cases, which have a different subject matter than the case in which these doctrinal statements were formulated. A doctrinal precedent formulated in a case wherein constitutionality of, say, a tax statute was challenged, may be resorted to and cited in a case wherein constitutionality of a law on public administration is investigated, or a doctrine formulated in a constitutional court case related to, say, civil law may be used in a constitutional court case related to labor law or civil procedure law. There must be, at least in theory, some limits to this export and import of doctrinal statements but these limits probably are so wide that constitutional courts usually have a very wide discretion in using, in subsequent cases, doctrinal precedents formulated in previous cases. In this transmigration of doctrinal statements, even the boundaries between public law and private law can be (and are) easily crossed because both public law and private law consolidated in statutes and sub-statutory legislation must comply with the constitution which, as the stereotype holds, itself is part of public law but being superior to all ordinary legislation is also a basis of private law. In the process of transmigration, the magnificent structure of constitutional jurisprudence and the official constitutional doctrine formulated therein is constructed. This structure is never completed because judicial constitutional review is an ongoing and unceasing process. Moreover, this process of construction of the structure of constitutional jurisprudence is uneven because, in any constitutional jurisdiction, some parts of constitution receive more doctrinal explanation than other ones due to that fact that

constitutional courts (just like all courts) do not set agenda for themselves but depend on what issues are brought before them by petitioners. Constitutional jurisprudence grows by fragments. The latter are constitutional court's position, or stance, regarding application of constitution, but, more important, they also embrace doctrinal statements formulated by the constitutional court on a case-by-case basis. Constitutional jurisprudence grows like a coral, layer after layer, and some sides of its structure have many layers whereas others have less. This is especially visible when constitutional justice is in its first years or decades. It is more than clear that consistency of constitutional jurisprudence is a necessary precondition not only for bringing its fragments together but also for ensuring that the process of construction goes on and is not degraded to such process where new layers are built not on the existing ones but instead of them. This would amount not to construction but to re-construction.

In the real world of judicial constitutional review, though, there are many instances of jurisprudential inconsistency. Sometimes the official constitutional doctrine formulated in previous constitutional court decisions is modified to meet the so-called challenges of life that is new conditions that were not present at the time when these decisions were adopted. In some cases, modification may result from disappointing mistakes. Sometimes the previous doctrine simply has to be corrected because it appeared to wrong. In other instances, highly unwanted, constitutional courts modify their doctrine under pressure of either political establishment or public opinion, or both (in the last two decades, there have been more than one 'court packing plan' in some of the Central and Eastern European states, and not all of them were implemented also due to some 'flexibility' of the judiciary). There may be (and are) many explanations as to why constitutional courts deviate from the line which they have taken, often on good reasons, in previous cases. From a normative point of view, most unwelcome are situations where a constitutional court declines to follow its own doctrine solely due to the fact that its composition has changed and the new people on the bench have different professional attitudes regarding interpretation of certain constitutional provisions. This contrasting of the new composition of the constitutional court to previous ones is not only disrespectful; it is absolutely shortsighted and destructive because—if there prevails such attitude that the new composition of the constitutional court may allow itself to interpret anew what has already been interpreted in a different way by previous compositions of the same constitutional court—the innovations of this new composition, too, risk to be written anew by subsequent compositions. But such things do happen. From the normative point of view, they should not. However, this is a descriptive statement, not a normative one.

POSITIVE LAW-MAKING' AND BEYOND

Whatever are the zigzags in the growth of the official constitutional doctrine and however contradictory and uneven this process can be, the importance of the official constitutional doctrine (and constitutional jurisprudence at large) must not be overestimated. In the process of judicial constitutional review, constitutional courts not only interpret the document called 'constitution'; they also re-interpret their own doctrine, and do it constantly. Here, by 're-interpretation' of the official constitutional doctrine I mean not modification of the existing doctrine but revelation of such aspects of constitutional regulation, explicit or implicit, that are absolutely compatible with the existing doctrine but were not revealed in previous cases (usually because there was no need to exploit them neither as ratio nor as dicta). In this respect, re-interpretation of the official constitutional doctrine (which does not amount to modification thereof) is not a revolution; it is an element of constitutional evolution. By re-interpreting the official constitutional doctrine, constitutional courts repeat, emphasize, refine, clarify, and strengthen doctrinal statements formulated in previous cases. Re-interpretation of the constitutional doctrine—much more than a one-time interpretation of some constitutional provision—amounts to sending repeated signals ('warning' would probably be a too pretentious word but, in essence, a rather pointed one) to the legislator that ordinary law shall be made in such a way that it is in conformity with the constitution as interpreted by the constitutional court. The legislator may have his own views regarding the meaning of constitutional regulation. However, just as it was said about the need for the legislator to be aware that any legislation that amends the one on the basis of which courts build their jurisprudence is subject to imperious judicial interpretation and application, he must be aware that any constitutional amendment that he may pass in order to make a constitutional court to start anew with one or few of its doctrines and to interpret respective constitutional provisions in a different way than before is also subject to constitutional court's interpretation. Even if the legislator undertakes the so-called authentic interpretation of such constitutional amendment it can be materialized only in a legal act which, in its turn, is also subject to judicial interpretation. Thus, constitutional courts always have the last word on what a constitution says on any matter. This is not an authorization of such activist judicial constitution making by means of constitutional interpretation, which openly or in some resourceful roundabout way distorts the real meaning of constitutional provisions. By the way, such distortion of the content of constitutional regulation could provoke such reaction not only from the political establishment from the community at large, which would undermine independence or even the very existence of the respective constitutional court. Hence, constitutional courts must be extremely reasonable and prudent not to interpret constitutions contrary to their real meaning. Judges are not free to inscribe into the official constitutional doctrine such provisions which

they would have written into the respective constitution had they been given a chance to be its fathers or to cross out such constitutional provisions (especially explicit ones) that they would have omitted had they participated in the creation of that constitution. This is a moral responsibility and a judicious imperative; what is even more important in the legal sense that this is also a judicial mandate. Constitutional court judges are appointed to their position to interpret constitutions and not to change them. Most judicial constitutional review systems include the whole set of protectors of ethical, institutional and procedural character which prevent constitutional courts from such distortion of the respective constitution where it is substituted by official constitutional doctrine which is contrary to the real meaning of constitutional regulation. Such protectors which are not necessarily explicitly consolidated in statutes regulating constitutional courts' activities embrace procedures of constitutional court decision drafting, ethical standards of conference room discussion, possibility for judges to file dissenting opinions or—probably most important!—collegiality both in hearing cases and adopting decisions, to mention just a few. Still, in the legal sense, the question what is its 'distortion' and what is not presupposes establishing what is the 'real' meaning of a constitutional provision and what is not. Thus, both questions may be imperiously and authoritatively answered only by a legal institution of legal dispute resolution, which, typically, is a court, and the only court, which has the power to officially establish the 'real' meaning of constitutional provisions, is the constitutional court. The circle closes.

Therefore, it is worthwhile to repeat that the importance of the official constitutional doctrine must not be overestimated. Many theories of law (including that of Kelsen wherein the very idea of constitutional justice was substantiated) do not grant doctrinal interpretive provisions the same status of law (if any) as that of constitutional, statutory, or sub-statutory provisions, which these doctrinal provisions interpret. However, these doctrinal interpretive provisions, in fact, amount to extension of provisions, which they interpret. The former give guidance as to which of possible alternative meanings of the latter is the 'real' one. They eliminate or, at least, reduce ambiguity of the legal text. Moreover, sometimes doctrinal interpretive provisions provide constitutional, statutory or sub-statutory provisions with the meaning which they may (and sometimes do) lack. It would be naïve to assert that every legal provision has some unambiguous original meaning, especially given the facts (but not only due to these facts) that many of them are products of collective law-drafting and law-making which go hand in hand with compromises and that any participant in these compromises may have his or her own understanding of what his or her party achieved or sacrificed by these compromises. If this is true about law in general, this is even truer about constitutions because most constitutions are results of fundamental political compromises. Each constitutional provision, taken separately, may be absolutely unambiguous and clear. But whenever they

have to be interpreted in their entirety and interrelatedness and general ideas must be abstracted from the whole system of constitutional regulation, disagreements are natural. Official constitutional doctrine is a means for solving these disagreements. Although many theories of law are not inclined to grant official constitutional doctrine the same status of law as that of the 'original' constitutional document (as later amended, if at all), it, in fact, has the same status of law. It is the status of constitutional law, i.e. the status of the law consolidated in the constitution. Thus, official constitutional doctrine rises, in its legal force, to the same status as the 'original' constitutional document (as later amended). Constitution is a legal reality consisting not only of the provisions (explicit or implicit) of the document called 'constitution' but also of doctrinal provisions of judicial acts which provide for official interpretation of constitutional provisions.

Thus, constitutional courts turned out to be important participants in the process of legislation in the 'positive' sense, although, as already mentioned, from the outset, they were meant to be mere 'negative legislators'. Constitutional courts create official constitutional doctrine, which is the extension of the constitution per se. But more than that: constitutional courts' (provided that they are truly independent) 'legislative' activities are not limited to creation of official constitutional doctrine but also embrace ordinary, i.e. sub-constitutional, law making. They exert such influence on the legislative process that the notion of 'negative legislation' appears to be too narrow. Constitutional courts acts as 'positive legislators' in their own right, albeit a very specific one. Of course, 'positive legislation' is a metaphor, but so is 'negative legislation', too.

There are several aspects of this participation in legislation in the 'positive' sense. I do not pretend to have enumerated all of them. This problem is too wide to be fully elucidated in one short article wherein its elucidation serves only auxiliary function of providing additional arguments for substantiation of the main theses.⁶ Therefore, below, only some of these aspects are touched upon.

First, as already briefly mentioned, constitutional doctrine, especially repeated and re-interpreted on its own basis, amounts to sending specific signals to the legislator. This concerns both the content of possible future legislation and the procedure of law making. Constitutional courts send signals to the legislator regarding what ordinary law shall be and what it shall not be, as well as in which procedure law may or may not come into existence. They construct the framework for future law making.

Second, constitutional courts, by recognizing legal acts as constitutional, in fact, give a 'positive' sanction to them. This is the constitutional, i.e. highest, 'positive' sanction. What legislators have legislated is not final. Constitutionality of legal acts (or parts

⁶ See especially: Brewer-Carías, A. R. *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge, MA: Cambridge University Press, 2011.

thereof) may be challenged in constitutional courts. Only when this constitutionality is approbated by the latter these acts can be regarded as having passed the test of supreme legality; until then they are questionable and prone to doubts of various sort.

Third, constitutional courts, when checking constitutionality of challenged provisions, face situations where the 'real' (or exact) meaning of a provision is ambiguous, unclear, obscure, or unintelligible. They have two options: either to recognize such provision to be in conflict with the respective constitution (inter alia as contradicting such constitutional principles as legal clarity or legal certainty) or, after having systematically examined a set of interrelated provisions, legislative history, legislative intent and travaux préparatoires, to provide it with the one clear meaning. In the latter case, constitutional courts, again, have the choice between recognition of constitutionality of the provision and recognition of its unconstitutionality.

Here, we come to the fourth aspect of 'positive legislation' by constitutional courts. Whenever a constitutional court is faced with the task to choose between two or more alternative meanings of the ambiguous or unclear provision of the legal act passed by the legislator, it legislates. In such cases, constitutional courts are left with no choice. Quite often, they resort to the so-called presumption of constitutionality of legal acts and choose in favor of such alternative where the challenged provision, inventively interpreted, is given such meaning, which is not in conflict with the constitution. There are many instances of such 'positive legislation' where constitutional courts have to complete what was not completed by the 'real' legislator. Instances where constitutional courts legislate in such 'positive' way are revealed by such formulas, not infrequent at all, as 'being interpreted in this way, provision A is not in conflict with article B of the constitution'. One can find quite a lot of such or similar formulas in the Hungarian or Lithuanian constitutional jurisprudence, but this is not an invention of these constitutional courts because they just followed the pattern laid down by such 'old' constitutional courts as German Bundesverfassungsgericht. In fact, this is even a twofold 'positive legislation' by constitutional courts: (i) the meaning is provided to the provision; and (ii) this provision is approbated. On the other hand, the second of these stages may not take place if the constitutional court decides that the provision is in conflict with the constitution. In such case, 'positive legislation' by the constitutional court is combined with the 'negative' one.

Fifth, some constitutional jurisdictions provide constitutional courts with additional tools for 'positive legislation'. For example, some constitutional courts are entitled to recognize the challenged legal acts (or parts thereof) as being unconstitutional *ex tunc*. In my opinion, recognition of *ex tunc* unconstitutionality is a highly controversial device. Judges must be extremely circumspect and moderate in resorting to it because re-writing

history, even a formal legislative history, is an undertaking, which can bring more harm than benefit, not to mention that often such re-writing is not possible at all. Nevertheless, recognition of *ex tunc* unconstitutionality is a tool designed for ‘positive legislation’ by a constitutional court, an *ex post facto* one. Another such tool is granting constitutional courts with the power to oblige the ‘real’ legislator to legislate. It manifests itself in such powers (to mention a few) as to oblige the legislator to amend a statutory or sub-statutory provision (or to repeal the legal act whatsoever), to oblige him to fill in the *lacunae legis*, or to set the later date of coming into force of such constitutional court decision which would create a gap or even a vacuum in the system of law and thus to give the legislator the possibility to amend the legislation already recognized as unconstitutional before this recognition of unconstitutionality creates the said legal outcomes.

FEATURES OF THE NASCENT PARADIGM

In the previous chapter I attempted to show that constitutional courts, initially meant—both by legal theorists and by constitution-makers—to be mere ‘negative legislators’, have become important players on the law-making scene. Having looked into the role of constitutional courts in law-making, both ‘negative’ and ‘positive’, it is worth examining how their activities contributed to the transformation of the perception of constitutional law in the Central and Eastern European states where, in the relatively recent past, no judicial constitutional review was exercised and—in those in which political control of legal or scholarly thought was more severe—even little known.

Let us briefly recall the features of that paradigm of constitutional which was prevalent at that time when, in the countries under consideration, judicial constitutional review was absent. They were described *supra* (‘The Paradigm Inherited’). Provisions of constitutional law were perceived as not directly applicable (at least, quite many of them) and depending on their ‘development’ in statutes and sub-statutory legislation. Constitutional law was perceived as one of the branches of law, which had its own subject matter, however, at the same time, it ‘regulated the most important social relations’ that, ironically enough, also constituted the subject matter of other branches of law. The system of sources of constitutional law did not differ from that of any other branch, and included all sources that were not politically unacceptable, including normative acts from constitution down to normative acts of the lowest legal force. The system of its sources lacked court acts wherein official interpretation of constitutional provisions was formulated. I have described such constitution as ‘static, stiff and stagnant’ as opposed to the notion of ‘the living constitution’.

Such perception of constitutional law, by inertia, carried on immediately after the regime change in the Central and Eastern European states in late eighties and early nineties of the twentieth century. This is even more characteristic of the so-called ‘for-

mer Soviet republics'. Some critical volume of constitutional jurisprudence had to be accumulated to raise awareness that that paradigm of constitutional law missed some important points and, in essence, devalued constitutions, as well as to facilitate the transformation of this earlier paradigm into something different, which would be adequate to the notion of the constitution as supreme law of the land. This did not happen simultaneously in different countries. As already mentioned, those of them who institutionalized constitutional justice earlier underwent this transformation earlier, too. However, countries that have institutionalized constitutional justice relatively late (as, e.g., Latvia in 1997) do not necessarily lag behind in this undergoing the said transformation. What has proved to be much more important in this respect is whether the new regime allows for the functioning of a full-fledged judicial constitutional review or it is concerned only with preserving the visibility and the form of constitutional justice while, in fact, it demands that the constitutional court of the respective country remains submissive to political will. There is little sense to expect that the paradigm of constitutional law inherited from the epoch of absence of constitutional justice changes not only in some detail but also in essence in such so-called new democracies where the political regime manipulates its constitutional court with or even threatens it with inauspiciousness which it can easily materialize.

Still, wherever this transformation has taken place it has done so along similar lines. The new paradigm of constitutional law is characteristic of certain features that, in their entirety, allow us to speak of the perception of constitutional law, which is in direct opposition to the one prevalent earlier. These features are discussed below. Their separation serves analytical purposes only; however, as qualities of the same phenomenon, i.e. constitutional law, they are interrelated.

First, constitutional law is perceived as a field of law, which is in constant development. It is perceived as a living law. Constitutional law is not static because of its constant interpretation and re-interpretation in the course of constitutional dispute settlement. It grows case by case. It is a self-generating jurisprudential law.

Second, constitutional law is not any longer treated as a branch of law. If one wishes to compare it to a part of a tree he or she should better refer to trunk or roots, not branches. Branches of law are parts of ordinary, i.e. sub-constitutional, law alone. They are distinguished on the basis of what relations the respective branch of law regulates. True, there will always be 'grey zones' that embrace norms and principles that could be attributed not to one but to two or even more branches of law. For instance, a norm that establishes criminal liability for tax evasion may be equally attributed either to criminal law because it is essential part is a criminal sanction or to tax law because the positive obligation the violation of which is the basis for application of the said sanction is a financial obligation

in the field of taxation. Consequently, division of ordinary law into branches is instrumental, or operational, and depends very much on the goal pursued. However, constitutional law does not have a specific subject matter and is not a branch of law. Rather it embraces all subject matters that various branches of ordinary law regulate. Some norms of different branches of law are elevated, upon the decision of the constitution-makers, to the supreme level of constitutional law. Thus, many constitutions consolidate the duration of budget year; such norm, according to its subject matter, belongs to budget law but has also been elevated to the level of constitutional law. Constitutions also contain norms that establish different rights of persons including those that, according to their subject matter, belong to labour law, property law, law of criminal procedure, administrative law, environmental law etc. All constitutions consolidate the powers of parliament, as well as the basic rules of its functioning; these norms are part of parliamentary law. Sure, there are a lot of constitutional provisions, mostly principles (such as equality of persons, or due process of law), that cannot be attributed, on the basis of their subject matter, to one specific branch of ordinary law; they are the common for the whole constitutional law and serve as the cement which helps to integrate various constitutional norms into one non-contradictory unity. Constitutional law is distinguished from other fields of law not horizontally but vertically: it is the supreme law of the land.

Third, the system of sources of constitutional law has admitted such source of law of which, in practice, never was regarded as important or even possible. This source of constitutional law is constitutional court jurisprudence, which contains official constitutional doctrine. Above, I have expanded on the quality of official constitutional doctrine to be an extension of constitution *per se*. Each constitutional court decision wherein constitutional provisions are interpreted and applied is a source of constitutional law. Moreover, their number grows, as well as the content of constitutional court jurisprudence does by new aspects of constitutional regulation being revealed and re-interpreted on a case-by-case basis.

Fourth, the system of sources of constitutional law shrank dramatically. Now, it embraces, *de facto*, only two sources: (i) the 'original' constitutional document (as later amended, if at all); and (ii) constitutional court jurisprudence which contains official constitutional doctrine. This is it. All other 'former' sources of constitutional law, i.e. statutes and sub-statutory legislation, were excluded from the list as being, in their legal force, inferior to constitution. In some Central and Eastern European constitutional jurisdictions it has become a taboo (although a few years ago it was not so) to rely, in interpreting constitutional provisions, on how these provisions are concretized or laid down in detail in statutes or even sub-statutory legislation. There is a sharp vertical delineation between constitutional law and ordinary law. In this context, it has to be mentioned that some Central and Eastern European states have laws that are not of

equal legal force. In Romania, they are called ‘organic laws’ (following French tradition); in Hungary, ‘supermajority laws’ (according to 2011 Constitution); and in Lithuania, ridiculously enough, ‘constitutional laws’. However, they are not of the same legal force as the respective constitution. On the other hand, from the normative point of view, certain hypothetical sources of constitutional law are not excluded from the list, however, in practice, they do not exist. This can be attributed to international treaties. The latter, depending on many circumstances, can be also sources of constitutional law. Another hypothetical source of constitutional law could be constitutional customs (or constitutional conventions, if this term can be used to denote something that is not of English origin). However, for a legal custom to be formed and recognized, one needs much more time than has expanded since the oldest of the currently valid constitutions of the Central and Eastern European states was adopted.

Fifth, constitutional law has no gaps, or lacunae. Being supreme, it ‘covers’ all existing ordinary law. Whatever can be ordinary (statutory or sub-statutory) regulation, it must be possible to check it *vis-à-vis* constitution. Whenever constitution is silent on a specific matter this means that it allows for the discretion of the respective lawmaker. This is a fundamental Kelsenian maxim, which still holds. It can be supplemented by the principle that whenever the constitution does not explicitly regulate certain relations it nevertheless dictates certain general principles, which cannot be overstepped when these ‘constitutionally unregulated’ areas are regulated by ordinary law. In addition, constitutions quite often consolidate that certain fields shall be regulated by statutes; this is the obligation of the legislator to pass certain statutes and, at the same time, the provision that allows legislative discretion within limits drawn by most general constitutional provisions. To maintain that there are (or may be) gaps in constitutional regulation would amount to acknowledgement that there are fields of human activity and social life which can be regulated by ordinary law without possibility to test constitutionality of this regulation. Neither the idea of constitution as the supreme law nor the idea of the rule of law could agree with this. Constitutional law ‘covers’, explicitly or implicitly, all ordinary law. As new branches of ordinary law are distinguished following the emergence of new fields of human activity, such as electronic communication law or biotechnology law, constitutional law is already there because regulation of these new fields of human activity must also not overstep the most general constitutional provisions mentioned above.

CONCLUSION

The transformation of the paradigm of constitutional law which some Central and Eastern European countries have already undergone and some are still undergoing is just one side of a wider transformation. Strict delineation of constitutional law and ordinary law, restructuring of the system of sources of constitutional law, the emphasis on constant de-

velopment of constitutional law by means of constitutional jurisprudence which serves also as a tool for 'positive law-making' by constitutional courts, as well as such perception of constitutional law where it has no gaps and embraces all fields that are or can be regulated by ordinary law mark the transformation of perception not only of constitutional law but of the whole national system of law. The whole system of which constitutional law is an important part is perceived as not only nominally but also really constitution-centered.⁷

One politically important outcome of this transformation relates to the modification of the concept of democracy. This concept is often reduced to only majoritarian democracy, i.e. to making of political decisions by majority. It is the majoritarian aspect of democracy, which dominated the public discourse in the Central, and Eastern European states since the 'velvet' and the 'singing' revolutions sprang up across the whole area in late eighties of the twentieth century. Paradoxically enough, the majoritarian aspect of democracy fit well, in the states under consideration, with the earlier paradigms of constitutional law and the system of law, with that only reservation that, before the revolutions, here, majoritarianism was falsified. However, this majoritarian aspect of democracy, if taken alone, does not fit so well with the new paradigm of constitutional law and the constitution-centered paradigm of the system of law described above. The latter two require that the concept of democracy acquires some additional quality, or element. The will of majority, under certain conditions, may be ruinous for some members of society and even suicidal for the whole society itself. Majoritarian democracy may be self-destructive. Hence, for the sake of democracy itself, the majoritarian side of democracy has to be complemented with the anti-majoritarian, i.e. constitutional, one.⁸ Constitutions of most Central and Eastern European states most of whom are not only nominal but also real democracies (with whatever flaws they may have) provide for a strong judicial constitutional review. Invalidation, in the course of this review, of acts of legislative or executive branches is a manifestation of constitutional democracy, which is anti-majoritarian. E.g., infringements upon rights of individuals or minorities, if made by the will of the majority, could be eliminated only under constitutional democracy and not majoritarianism. In theory, this is not new at all. However, it is rather new in such political systems that have the long experience on being based not on law but on political will alone. The idea of constitutional democracy able to defend itself against the self-destruction by the majority and the new constitution-centered paradigm of the system of law go together and complement each other. The system under rule of law could not be built if any of these two cornerstones is missing.

⁷ The issue how constitution-centered paradigm of the national system of law lives with the law of the European Union deserves special attention. It is not touched upon in this article.

⁸ I have expanded on this subject in: Kūris, E. *Constitutional Law in a Constitutional Democracy – A View from the Constitutional Court of Lithuania*, in Breitenmoser, S. et al. (eds.) *Human Rights, Democracy and the Rule of Law. Liber amicorum Luzius Wildhaber*. Zürich: Dike & Nomos, 2007.

В так называемых новых демократиях (странах Центральной и Восточной Европы) роль конституционного права значительно изменилась. В статье указывается, что это развитие сопровождается коренным изменением самого восприятия конституционного права, т.е. парадигмы конституционного права. Более того, несколько иную форму приобрело представление о структуре всей системы права. Основным механизмом и катализатором упомянутых преобразований является создание и функционирование судебного конституционного контроля.

Раньше конституционное право воспринималось как одна из отраслей права, “регулирующая наиболее важные общественные отношения” и “устанавливающая основы политической, экономической и социальной систем”, “порядок формирования государственных органов и их полномочия”, “основные права, свободы и обязанности граждан” и т.д. Считалось, что как и любая отрасль права, оно также имеет свой предмет регулирования. Однако отрасли права подразделяются по предмету, регулируемому совокупностью соответствующих норм и принципов, а не по неопределенным критериям “важности” общественных отношений или “фундаментального характера” прав, свобод и обязанностей граждан. С точки зрения системы источников права также не было различий между конституционным правом и другими отраслями права; Конституция была лишь одним из источников конституционного права наряду с законами и подзаконными актами. В системе указанных источников отсутствовали акты официального толкования Конституции. Не было процессуальных или институциональных механизмов, допускающих рассмотрение конституционности законодательства. Таким образом, не существовало судебного толкования Конституции. В отсутствие конституционного контроля и толкования Конституции конституционное право было статичным, негибким и неразвивающимся. Хотя сущность конституционного права быстро изменилась с принятием новых конституций и с существенным изменением действующих, потребовалось время для первых изменений в унаследованном от прошлого восприятии конституционного права.

Учреждение и деятельность конституционных судов способствовали преобразованию парадигмы конституционного права, унаследованного от эпохи отсутствия конституционного правосудия. Изначально конституционные суды могли участвовать в правотворческом процессе только в “негативном” смысле посредством рассмотрения соответствия актов обычного законодательства Конституции на основании представленных в суд обращений. В этой кельзенской модели они были “негативными законодателями”, но со временем превратились в нечто большее.

Судебный конституционный контроль предполагает конституционное толкование. В статье представляется и обосновывается отрицательный подход относительно абстрактного толкования Конституции, не связанного с каким-либо правовым спором (в том числе по обращениям общих или специализированных судов). Это, однако, не означает, что Конституционный Суд, дающий толкование положений Конституции только в случае возникновения такой необходимости в ходе рассмотрения конституционности оспариваемого акта обычного законодательства, должен избегать абстрактного, чисто теоретического обоснования. Он не должен делать и не делает этого. Многие конституционные положения нуждаются в абстрактном толковании. Это неизбежно также при толковании Конституции по конкретным делам. Они являются частью официальной конституционной доктрины, которая дополняет, обогащает и расширяет краткие формулировки Конституции. “Официальная” означает властная или господствующая и в этом смысле окончательная. Все конституционные суды формируют официальную конституционную доктрину, то есть дают толкование Конституции без конкретных обстоятельств соответствующих дел (как теоретический комментарий к Конституции).

Принцип, согласно которому аналогичные дела должны разрешаться одинаковым образом (что предполагается принципом равноправия), требует обеспечения единообразной и последовательной судебной практики, что в значительной степени связано с предсказуемостью решений Конституционного Суда; последняя обеспечивает правовую определенность и сама является правовой ценностью. Конституционные суды ограничены своими предыдущими решениями, то есть сформулированной в них официальной конституционной доктриной. Как правило, континентальные правовые системы официально не признают принцип *stare decisis*, но признают значение принципа *jurisprudence constante*. Как отмечается, основное различие между ними состоит в том, что в случае *stare decisis* одно решение суда по конкретному вопросу становится обязательным прецедентом как для нижестоящих судов, так и для создавшего его суда, в то время как в случае *jurisprudence constante* только ряд судебных решений по конкретному вопросу может привести к формированию прецедента. Однако различия между *stare decisis* и *jurisprudence constante* не надо преувеличивать, поскольку как первое, так и второе предполагает, что, в конечном итоге, выраженная в примененном по делу правовом акте воля законодателя, по сути, становится зависимой от судебной практики и от представленного обоснования, в котором было установлено, каким было его применение в конкретном деле. *Jurisprudence constante* можно рассматривать как умеренную форму *stare decisis* и, наоборот, *stare decisis* можно рассматривать как *jurisprudence constante*, сокращенный до одного решения. В случае судебного конституционного контроля такая умеренная фор-

ма *jurisprudence constante* менее предпочтительна, чем более сильная, в рамках которой одно решение Конституционного Суда становится “обещанием” относительно того, что в будущем будет сформирована такая система *jurisprudence constante*, в рамках которой данное первое решение будет использоваться в качестве краеугольного камня. Юридическая сила резолютивной части решения Конституционного Суда обращена в прошлое, в то время как мотивировочная часть направлена также на будущее, так как очевидно, что она будет потенциально воспроизводиться при разрешении последующих дел. Доктринальные прецеденты играют значительную роль, так как конституционные суды основываются на них при рассмотрении последующих дел (несмотря на случаи непоследовательной судебной практики). Именно так образуется система судебной практики Конституционного Суда и сформулированной в ней официальной конституционной доктрины. Процесс формирования этой системы никогда не заканчивается, так как судебный конституционный контроль сам является постоянным и непрерывным процессом. Формирование практики Конституционного Суда подобно кораллу – оно осуществляется “слой за слоем”. Конституционные суды не только дают толкование Конституции, но и переосмысливают свою собственную доктрину (что не означает ее модификацию); данное переосмысление становится элементом конституционной эволюции. Хотя многие теории права не предоставляют официальной конституционной доктрине такой же статус, что и “оригинальному” конституционному документу, она, по сути, имеет тот же статус в системе права. Это статус конституционного права, т.е. статус закрепленного в Конституции права. Таким образом, по своей юридической силе официальная конституционная доктрина приобретает тот же статус, что и “оригинальный” конституционный документ. Конституция - это правовая реальность, состоящая не только из положений (определенных или неопределенных) названного “конституцией” документа, но также из доктринальных положений судебных актов, в которых представляется официальное толкование конституционных положений.

Таким образом, конституционные суды являются важными участниками законодательного процесса в “позитивном” смысле, хотя первоначально должны были быть лишь “негативными законодателями”. Они создают официальную конституционную доктрину, которая, по сути, является расширением Конституции как таковой. Более того, “законодательная деятельность” конституционных судов (при условии, что они являются по-настоящему независимыми) не ограничивается формированием официальной конституционной доктрины, но также охватывает обычное законотворчество. Они выступают в качестве “позитивного законодателя” в рамках их собственного права, хотя и довольно своеобразного. В статье затрагиваются некоторые аспекты этой деятельности: (I) конституционная

доктрина, особенно воспроизводящаяся и переосмысливаемая на своей конкретной основе, становится представлением законодателю определенных требований относительно как содержания возможного будущего законодательства, так и процесса правотворчества, которая, таким образом, создает соответствующие рамки для будущего законотворчества; (II) конституционные суды, признавая правовые акты конституционными, по сути, “в позитивном смысле” одобряют их; (III) когда “настоящее” значение нормы является неоднозначным, неясным или непонятым, конституционные суды придают ей одно четкое значение, (IV) сделав это, они могут одобрить оспариваемое положение; (V) в некоторых системах конституционного правосудия конституционным судам предоставляются дополнительные механизмы “позитивного законотворчества”, такие как признание оспариваемых правовых актов неконституционными с действием *ex tunc*, полномочие обязывать “настоящего” законодателя восполнять законодательные пробелы или возможность установления более позднего срока вступления такого решения Конституционного Суда в силу, которое может создать пробел или даже вакуум в системе права.

Прежнее восприятие конституционного права по инерции продолжило существование после смены режима в странах Центральной и Восточной Европы. Должна была накопиться обширная судебная практика Конституционного Суда, чтобы стало ясно, что в этой парадигме конституционного права отсутствуют некоторые важные моменты, и что она обесценила конституции, а также, чтобы она начала способствовать преобразованию существующей ранее парадигмы. Это не произошло одновременно в различных государствах. Но там, где имело место указанное преобразование, оно осуществлялось аналогичным образом. Новой парадигме конституционного права характерны определенные особенности, которые в совокупности позволяют говорить о восприятии конституционного права, прямо противоположном ранее преобладающему: (I) конституционное право воспринимается как сфера права, находящаяся в постоянном развитии (живое право) в силу постоянного толкования и переосмысления в ходе разрешения конституционно-правовых споров. Оно развивается по каждому конкретному делу и является самогенерирующимся судебным правом; (II) конституционное право больше не рассматривается как отрасль права. Отрасли права являются частью лишь обычного, то есть подконституционного права, и различаются на основании того, какие отношения они регулируют. Конституционное право не имеет специфический предмет регулирования и не является отраслью права, оно скорее охватывает все вопросы, которые регулируются различными отраслями обычного права, а также общие принципы. По решению конституционного законодателя некоторые нормы различных отраслей права подняты на высший уровень конституционного права. Следует

отметить, что различие конституционного права от других отраслей является не горизонтальным, а вертикальным; (III) в системе источников конституционного права признается такой источник, которому практически не придавалось значение и который даже не рассматривался возможным, а именно практика Конституционного Суда, содержащая официальную конституционную доктрину. Каждое решение Конституционного Суда, в котором толкуются и применяются конституционные положения, является источником конституционного права, и содержание практики Конституционного Суда придает новый аспект конституционному регулированию, которое раскрывается и переосмысливается по каждому конкретному делу; (IV) система источников конституционного права резко сократилась, и в настоящее время фактически охватывает только “оригинальный” конституционный документ (с внесенными впоследствии поправками, если они вообще вносились) и практику Конституционного Суда, содержащую официальную конституционную доктрину; (V) конституционное право не имеет пробелов, будучи высшим в системе права, оно “охватывает” все существующее обычное право. Утверждение, что в конституционном регулировании есть (или могут быть) пробелы, означало бы признание того, что существуют сферы человеческой деятельности и общественной жизни, которые могут регулироваться обычным правом в условиях отсутствия возможности рассмотрения конституционности данного регулирования. Несмотря на возникновение новых отраслей обычного права в результате появления новых сфер человеческой деятельности, конституционное право продолжает охватывать указанные вопросы, так как регулирование этих новых сфер также не должно выходить за рамки вышеупомянутых общих конституционных положений.

Преобразование парадигмы конституционного права, включая строгое разграничение конституционного и обычного права, реструктурирование системы источников конституционного права, акцент на постоянное развитие конституционного права посредством конституционного правосудия, что является также механизмом для осуществления конституционными судами “позитивного законотворчества”, а также такое восприятие конституционного права, в соответствии с которым оно не имеет пробелов, указывает также на преобразование восприятия всей внутригосударственной системы права, которая в настоящее время воспринимается как сфокусированная на конституции. Следует отметить также, что важным с политической точки зрения результатом этого преобразования является изменение концепции демократии: помимо принципа большинства (который может стать саморазрушительным, если воспринимается с абсолютистской точки зрения), концепция демократии приобрела дополнительное качество - конституционный элемент. Признание актов законодательной и исполнительной власти недействительными в ходе судебного конституционного контроля является проявлением конституци-

онной демократии, находящейся в противоречии с принципом большинства. Идея конституционной демократии, которая в состоянии защитить себя от саморазрушительной деятельности большинства, и новая сфокусированная на конституции парадигма системы права развиваются совместно и дополняют друг друга.

ZUSAMMENFASSUNG

In den so genannten neuen Demokratien (Ländern Mittel- und Osteuropas) hat sich die Rolle des Verfassungsrechts beträchtlich verändert. Im Beitrag wird darauf hingewiesen, dass mit dieser Entwicklung eine radikale Änderung des Verständnisses des Verfassungsrechts, d. h. des Paradigmas des Verfassungsrechts, einhergeht. Mehr noch, eine etwas andere Form hat die Vorstellung von der Struktur des ganzen Systems des Rechts bekommen. Der Hauptmechanismus und Katalysator der erwähnten Umwandlungen ist die Schaffung und das Funktionieren der gerichtlichen Verfassungskontrolle.

Früher wurde das Verfassungsrecht als ein Zweig des Rechts wahrgenommen, der die wichtigsten gesellschaftlichen Verhältnisse regelt und die Grundlagen des politischen, ökonomischen und sozialen Systems, die Ordnung der Bildung der staatlichen Organe und ihre Befugnisse, die Grundrechte, Freiheiten und Pflichten der Bürger u. a. festsetzt. Man war der Meinung, dass es wie auch jeder andere Zweig des Rechts seinen Regelungsgegenstand hat. Aber die Zweige des Rechts werden nach dem Gegenstand eingeteilt, der durch die Gesamtheit entsprechender Normen und Grundsätze und nicht nach unbestimmten Kriterien der «Wichtigkeit» der gesellschaftlichen Verhältnisse oder des «fundamentalen Charakters» der Rechte, Freiheiten und Pflichten der Bürger geregelt wird. Unter dem Aspekt des Systems der Rechtsquellen wurde ebenfalls nicht zwischen dem Verfassungsrecht und den anderen Zweigen des Rechts unterschieden; die Verfassung war nur eine Quelle des Verfassungsrechts neben Gesetzen und untergesetzlichen Akten. Im System der erwähnten Quellen fehlten Akte der offiziellen Auslegung der Verfassung. Es gab keine prozessualen oder institutionellen Mechanismen, die die Prüfung der Verfassungsmäßigkeit der Gesetzgebung zulassen konnten. Es gab also keine gerichtliche Auslegung der Verfassung. Als es keine Verfassungskontrolle und Auslegung der Verfassung gab, war das Verfassungsrecht statisch, inflexibel und entwickelte sich nicht. Das Wesen des Verfassungsrechts hat sich zwar mit der Verabschiedung neuer Verfassungen und wesentlichen Änderungen der bestehenden Verfassungen schnell verändert, aber es hat gedauert, bis in dem von der Vergangenheit geerbten Verständnis des Verfassungsrechts erste Änderungen eintraten.

Die Einrichtung und Tätigkeit der Verfassungsgerichte förderten die Umwandlung

des Paradigmas des Verfassungsgerichts, das von der Epoche der fehlenden Verfassungsgerichtsbarkeit geerbt war. Die Verfassungsgerichte konnten zuerst an dem Prozess der Rechtschöpfung nur im "negativen" Sinn teilnehmen, indem sie auf Grund der eingereichten Gesuche die Akte der einfachen Gesetzgebung auf ihre Übereinstimmung mit der Verfassung hin prüften. In diesem Kelsen'schen Modell waren die Verfassungsgerichte "negative Gesetzgeber", mit der Zeit wurden sie indes zu etwas mehr.

Die gerichtliche Verfassungskontrolle setzt eine Auslegung der Verfassung voraus. Im Beitrag wird eine negative Einstellung zur abstrakten Auslegung der Verfassung, die mit keinem Rechtsstreit verbunden ist (u. a. auf Grund der Vorlagen der Gerichte allgemeiner Gerichtsbarkeit oder der spezialisierten Gerichte), an den Tag gelegt und begründet. Dies bedeutet aber nicht, dass das Verfassungsgericht, das die Bestimmungen der Verfassung nur während der Prüfung der Verfassungsmäßigkeit des angefochtenen Akts der einfachen Gesetzgebung auslegt, eine abstrakte, rein theoretische Begründung vermeiden soll. Es soll es nicht tun und tut es nicht. Viele Bestimmungen der Verfassung bedürfen einer abstrakten Auslegung. Die Formulierung allgemeiner Verfassungsgrundsätze ist ein Ergebnis der Abstraktion in der Auslegung der Verfassung, die auch bei der Auslegung der Verfassung in konkreten Sachen unvermeidlich ist. Sie sind ein Teil der offiziellen Verfassungsdoktrin, der die kurzen Formulierungen der Verfassung bereichert und erweitert. Mit «offiziell» ist «vorherrschend» und in diesem Sinne «endgültig» gemeint. Alle Verfassungsgerichte formieren die offizielle Verfassungsdoktrin, d. h. sie liefern eine Auslegung der Verfassung ohne konkrete Umstände der betreffenden Sachen (als ein theoretischer Kommentar zur Verfassung).

Der Grundsatz, nach dem über ähnliche Sachen gleiche Entscheidungen zu treffen sind (dies setzt der Grundsatz der Gleichberechtigung voraus), erfordert die Sicherstellung einer einheitlichen und konsequenten Rechtsprechung, was in beträchtlichem Maße mit der Vorhersehbarkeit der Entscheidungen des Verfassungsgerichts zusammenhängt; diese Vorhersehbarkeit sichert die rechtliche Bestimmtheit und sie ist selbst ein rechtlicher Wert. Die Verfassungsgerichte sind an ihre früheren Entscheidungen, d. h. an die in diesen formulierte offizielle Verfassungsdoktrin, gebunden.

In der Regel anerkennen die kontinentalen Rechtssysteme den Grundsatz *stare decisis* offiziell nicht, aber die Bedeutung des Grundsatzes *jurisprudence constante* wird anerkannt. Im Beitrag wird festgestellt, dass der Grundunterschied zwischen diesen darin besteht, dass im Falle von *stare decisis* eine Entscheidung des Gerichts über eine konkrete Frage zu einer verbindlichen Präzedenzentscheidung für sowohl untergeordnete Gerichte als auch das erlassende Gericht wird, während im Falle von *jurisprudence constante* nur eine Reihe gerichtlicher Entscheidungen über eine konkrete Frage zur Entstehung einer Präzedenzentscheidung führen kann. Allerdings sollte man die Unterschiede

zwischen *stare decisis* und *jurisprudence constante* nicht übertreiben, denn die beiden Grundsätze setzen voraus, dass der Wille des Gesetzgebers, der in dem Rechtsakt über die Sache zum Ausdruck gekommen ist, letzten Endes in Abhängigkeit von der Rechtsprechung und der Begründung gerät, in der festgestellt wird, wie dieser Rechtsakt auf die konkrete Sache angewandt worden ist. *Jurisprudence constante* kann man eine moderate Form von *stare decisis* und *stare decisis* lässt sich umgekehrt als auf eine Entscheidung reduzierte *jurisprudence constante* betrachten. Im Falle einer gerichtlichen Verfassungskontrolle ist einer solchen moderaten Form der *jurisprudence constante* eine stärkere vorzuziehen, in deren Rahmen die Entscheidung des Verfassungsgerichts zu einem «Versprechen» wird, in der Zukunft ein solches System der *jurisprudence constante* zu formieren, in deren Rahmen diese erste Entscheidung als Ausgangspunkt benutzt wird. Die juristische Kraft des Tenors der Entscheidung des Verfassungsgerichts ist in die Vergangenheit, die der Begründung aber auch in die Zukunft gerichtet, denn es liegt auf der Hand, dass sie bei der Entscheidung über spätere Fälle potentiell reproduziert wird. Die doktrinellen Präzedenzentscheidungen spielen eine bedeutende Rolle, denn die Verfassungsgerichte gehen von ihnen bei der Verhandlung späterer Fälle aus (trotz der Fälle einer inkonsequenten Rechtsprechung). Gerade so entsteht das System der Rechtsprechung des Verfassungsgerichts und der darin formulierten offiziellen Verfassungsdoktrin. Der Prozess der Herausbildung dieses Systems hat kein Ende, weil die gerichtliche Verfassungskontrolle selbst ein fortwährender und ununterbrochener Prozess ist. Die Herausbildung der Rechtsprechung des Verfassungsgerichts kann mit einer Koralle verglichen werden: Sie erfolgt nämlich »schichtweise«. Die Verfassungsgerichte legen die Verfassung nicht lediglich aus, sie geben ihrer eigenen Doktrin einen neuen Sinn (was indes keine Modifizierung bedeutet); diese neue Sinngebung wird zu einem Element der Verfassungsevolution. Zahlreiche Theorien des Rechts räumen zwar der offiziellen Verfassungsdoktrin nicht den gleichen Status ein wie dem »originären« Verfassungsdokument, aber sie hat im Grunde den gleichen Status im System des Rechts. Es ist der Status des Verfassungsrechts, d. i. der Status eines in der Verfassung verankerten Rechts. Somit erlangt die offizielle Verfassungsdoktrin den gleichen Status wie das »originäre« Verfassungsdokument. Bei der Verfassung handelt es sich um eine rechtliche Realität, die nicht allein aus den (bestimmten oder unbestimmten) Vorschriften des als »Verfassung« bezeichneten Dokuments besteht, sondern auch aus doktrinellen Sätzen der Gerichtsakte, in denen eine offizielle Auslegung der Verfassungsvorschriften zum Ausdruck kommt.

Die Verfassungsgerichte sind also wichtige Teilnehmer am Gesetzgebungsprozess im «positiven» Sinn, obwohl sie ursprünglich als «negative Gesetzgeber» gedacht waren. Sie schaffen die offizielle Verfassungsdoktrin, die im Grunde eine Erweiterung der Verfassung als solcher ist. Vielmehr, die «gesetzgeberische Tätigkeit» der Verfassungsge-

richte (wenn sie wirklich unabhängig sind) beschränkt sich nicht auf die Formierung der offiziellen Verfassungsdoktrin, sie erfasst, auch die einfache Rechtsschöpfung. Sie handeln als «positive Gesetzgeber» im Rahmen ihres eigenen Rechts, aber es ist ein ziemlich eigenartiger Gesetzgeber. Im Beitrag werden einige Aspekte dieser Tätigkeit behandelt: (I) Die Verfassungsdoktrin, die sich reproduziert und auf ihrer konkreten Grundlage einen neuen Sinn erhält, stellt bestimmte Anforderungen hinsichtlich des Inhalts der möglichen zukünftigen Gesetzgebung und des Prozesses der Rechtssetzung an den Gesetzgeber und schafft dadurch den Rahmen für die spätere Rechtssetzung; (II) indem sie die Rechtsakte für verfassungsmäßig erklären, billigen sie die Verfassungsgerichte im »positiven Sinn«; (III) wenn die »echte« Bedeutung einer Norm nicht eindeutig, unklar oder missverständlich ist, geben ihr die Verfassungsgerichte eine genaue Bedeutung; (IV) indem sie es gemacht haben, können sie die angefochtene Vorschrift billigen; (V) in einigen Systemen der Verfassungsgerichtsbarkeit werden den Verfassungsgerichten zusätzliche Mechanismen der »positiven Gesetzgebung« bereitgestellt, dazu gehören die Feststellung, dass die angefochtenen Rechtsakte ex tunc verfassungswidrig sind; die Befugnis, den »echten« Gesetzgeber zur Ausfüllung der Lücken in der Gesetzgebung zu verpflichten; die Möglichkeit, eine spätere Frist des In-Kraft-Tretens einer solchen Entscheidung des Verfassungsgerichts vorzusehen, die eine Lücke oder sogar ein Vakuum im System des Rechts schaffen kann.

Die frühere Auffassung des Verfassungsrechts bestand nach dem Regimewechsel in den mittel- und osteuropäischen Staaten aus Gewohnheit fort. Es musste eine umfangreiche Rechtsprechung des Verfassungsgerichts zustande kommen, damit Klarheit entstehen konnte, dass in diesem Paradigma des Verfassungsrechts bestimmte wichtige Momente fehlten, wodurch die Verfassungen entwertet werden, und damit die Umwandlung des früher bestehenden Paradigmas vorankommen konnte. Das ist in verschiedenen Staaten zu unterschiedlichen Zeiten geschehen. Aber überall, wo diese Umwandlung eintrat, erfolgte sie in der gleichen Weise. Das neue Paradigma des Verfassungsrechts zeichnet sich durch bestimmte Besonderheiten aus, deren Gesamtheit die Behauptung zulässt, dass das jetzige Verständnis des Verfassungsrechts im direkten Gegensatz zu dem früher herrschenden steht: (I) Das Verfassungsrecht wird als ein Bereich des Rechts verstanden, der sich wegen ständiger Auslegung während der Entscheidungsfindung über verfassungsrechtliche Streitigkeiten stets fortentwickelt (lebendes Recht). Es entwickelt sich in Verhandlungen wegen konkreter Sachen und ist ein gerichtliches Recht, das sich selbst generiert. (II) Das Verfassungsrecht wird nicht mehr als ein Rechtszweig betrachtet. Die Rechtszweige sind nur ein Teil des einfachen, d. i. unterkonstitutionellen Rechts und werden nach der Art der geregelten Verhältnisse unterschieden. Das Verfassungsrecht hat keinen spezifischen Regelungsgegenstand und es ist kein Rechtszweig, sondern es erfasst alle Fragen, die durch unterschiedliche Zweige des einfachen Rechts geregelt

werden, und allgemeine Grundsätze. Durch die Entscheidung des Verfassungsgebers in einige Normen verschiedener Rechtszweige auf die oberste Ebene des Verfassungsrechts erhoben worden. Es ist zu erwähnen, dass der Unterschied zwischen dem Verfassungsrecht und den anderen Zweigen des Rechts nicht horizontaler, sondern vertikaler Natur ist. (III) Im System der Quellen des Verfassungsrechts wird eine Quelle anerkannt, der praktisch keine Bedeutung beigemessen wurde, die nicht einmal als eine mögliche Quelle angesehen wurde – gemeint ist die Rechtsprechung des Verfassungsgerichts, die die offizielle Verfassungsdoktrin beinhaltet. Jede Entscheidung des Verfassungsgerichts, in der Verfassungsvorschriften ausgelegt und angewandt werden, ist eine Quelle des Verfassungsrechts, und der Inhalt der Praxis des Verfassungsgerichts verleiht der konstitutionellen Regelung, die in jedem konkreten Fall aufgedeckt und gedeutet wird, einen neuen Aspekt. (IV) Das System der Quellen des Verfassungsrechts hat sich abrupt reduziert und erfasst derzeit faktisch nur das «originäre» Verfassungsdokument (mit den später vorgenommenen Änderungen, wenn es solche gegeben hat) und die Rechtsprechung des Verfassungsgerichts, die die offizielle Verfassungsdoktrin beinhaltet. (V) Das Verfassungsrecht hat keine Lücken, als das oberste Recht im System der Rechte «erfasst» es das ganze geltende einfache Recht. Die Behauptung, die Verfassungsregelung weise Lücken auf (oder könnte sie aufweisen), würde bedeuten, dass anerkannt wird, dass es Bereiche der menschlichen Tätigkeit und des gesellschaftlichen Lebens gibt, die durch das einfache Recht geregelt werden können, da es keine Möglichkeit gibt, die Verfassungsmäßigkeit der betreffenden Regelung zu prüfen. Trotz der Entstehung neuer Zweige des einfachen Rechts im Ergebnis der Existenz neuer Bereiche der menschlichen Tätigkeit werden die erwähnten Fragen vom Verfassungsrecht nach wie vor erfasst, denn die Regelung dieser neuen Bereiche darf ebenfalls nicht aus dem Rahmen der oben erwähnten allgemeinen Verfassungsvorschriften hinausgehen.

Die Umwandlung des Paradigmas des Verfassungsrechts, einschließlich der strengen Unterscheidung zwischen dem Verfassungsrecht und dem einfachen Recht, die Restrukturierung des Systems der Quellen des Verfassungsrechts, setzen den Akzent auf die ständige Fortentwicklung des Verfassungsrechts mittels der Verfassungsgerichtsbarkeit, was ebenfalls ein Mechanismus für die Ausübung einer «positiven Rechtssetzung» durch die Verfassungsgerichte ist; auch ein solches Verständnis des Verfassungsrechts, wonach dieses keine Lücken aufweist, weist auf die Umwandlung des Verständnisses des ganzen innerstaatlichen Systems des Rechts hin, das gegenwärtig als auf Verfassung fokussiert aufgefasst wird. Es ist ebenfalls zu erwähnen, dass ein unter dem politischen Gesichtspunkt wichtiges Ergebnis dieser Umwandlungen der geänderten Konzeption der Demokratie besteht: Neben dem Mehrheitsprinzip (das selbstzerstörerisch werden kann, wenn es absolutistisch verstanden wird) hat die Konzeption der Demokratie heute eine weitere Eigenschaft: eine konstitutionelles Element. Die im Ergebnis der gerichtli-

chen Verfassungskontrolle festgestellte Ungültigkeit der Akte der gesetzgebenden und vollziehenden Gewalt ist eine Erscheinungsform der konstitutionellen Demokratie, die im Widerspruch zum Mehrheitsprinzip steht. Die Idee der konstitutionellen Demokratie, die im Stande ist, sich gegen das selbstzerstörerische Handeln der Mehrheit zu verteidigen, und das neue auf Verfassung fokussierte Paradigma des Systems des Rechts entwickeln sich nebeneinander und sie ergänzen sich.

RÉSUMÉ

Dans les nouvelles démocraties (pays d'Europe centrale et orientale) le rôle du droit constitutionnel a considérablement changé. L'article souligne que cette évolution s'accompagne d'un changement radical de la perception du droit constitutionnel, c'est-à-dire, du paradigme du droit constitutionnel. Par ailleurs, la représentation de la structure de l'ensemble du système de droit a acquis une autre forme. La mise en place et le fonctionnement du contrôle judiciaire constitutionnel est le mécanisme de base et le catalyseur des changements susmentionnés.

Auparavant, le droit constitutionnel était perçu comme l'une des branches du droit, «celle qui régleme les relations publiques les plus importantes» et «qui établit le cadre des systèmes politique, économique et social», «...l'ordre de la formation des organes de l'Etat et de leurs pouvoirs», «les droits, les libertés fondamentaux et les devoirs des citoyens» etc. Il était considéré que, comme toute branche du droit, celle-ci a aussi son objet de réglementation. Cependant, les branches du droit sont subdivisées selon l'objet réglementé par l'ensemble de normes et de principes, et non sur critère vague de «l'importance» des relations sociales ou de la «nature fondamentale» des droits, des libertés et des devoirs des citoyens. Du point de vue du système des sources du droit il n'y avait pas non plus de distinction entre le droit constitutionnel et les autres branches du droit : la Constitution n'a été que l'une des sources du droit constitutionnel, au même titre que les lois et les actes réglementaires. Les actes d'interprétation officielle de la Constitution n'ont pas fait partie du système des sources susmentionnées. Les mécanismes procéduraux ou institutionnels permettant l'examen de la constitutionnalité de la législation n'ont pas été mis en disposition. Ainsi, il n'y avait pas d'interprétation judiciaire de la Constitution. En l'absence du contrôle constitutionnel et de l'interprétation de la Constitution, le droit constitutionnel était statique, rigide et ne se développait pas. Bien que l'essence du droit constitutionnel ait été rapidement modifiée avec l'adoption de nouvelles constitutions et l'amendement considérable des constitutions existantes, il a fallu du temps pour les premières conversions dans la perception du droit constitutionnel hérité du passé.

La mise en place et le fonctionnement des cours constitutionnelles ont contribué à la transformation du paradigme du droit constitutionnel, hérité de l'ère d'absence de la justice constitutionnelle. Initialement, les cours constitutionnelles ne pouvaient participer au processus législatif que dans le sens «négatif» à travers l'examen de la conformité des actes ordinaires de la législation à la Constitution sur base des recours soumis à la Cour. Dans ce modèle Kelsenien les cours se présentaient comme «des législateurs négatifs», mais avec le temps, elles se sont transformées en quelque chose de plus.

Le contrôle constitutionnel judiciaire suppose une interprétation constitutionnelle. L'article présente et justifie l'approche négative concernant l'interprétation abstraite de la Constitution qui ne soit pas associée à un litige juridique (y compris les recours des tribunaux de compétence générale et spécialisée). Toutefois, cela ne signifie pas que la Cour constitutionnelle qui ne donne l'interprétation des dispositions de la Constitution qu'en cas de nécessité lors de l'examen de la constitutionnalité de l'acte contesté de la législation ordinaire, doit éviter d'en donner des fondements abstraits, purement théoriques. Elle n'est pas tenue de le faire et ne le fait pas. Beaucoup de dispositions constitutionnelles ont besoin d'une interprétation abstraite. La formulation des principes constitutionnels généraux est une conséquence inévitable d'abstraction de l'interprétation constitutionnelle, aussi inévitable que l'interprétation de la Constitution lors des cas concrets. Ils font partie de la doctrine constitutionnelle officielle qui complète, enrichit et élargit les formulations laconiques de la Constitution. «Officielle» signifie dominante ou régnante, et en ce sens, définitive. Toutes les cours constitutionnelles forment une doctrine constitutionnelle officielle, c'est-à-dire, donnent une interprétation de la Constitution en dehors des circonstances concrètes des cas (sous forme du commentaire théorique à la Constitution).

Le principe conformément auquel les cas similaires sont résolus de la même manière (ce qu'est supposé par le principe d'égalité), nécessite la mise à disposition d'une pratique judiciaire uniforme et cohérente qui est en grande partie due à la prévisibilité des décisions de la Cour constitutionnelle: ladite pratique assure la détermination juridique et est, en elle-même, une valeur juridique. Les cours constitutionnelles sont limitées par leurs décisions précédentes, c'est-à-dire, par la doctrine constitutionnelle officielle stipulée dans lesdites décisions. En règle générale, les systèmes juridiques continentaux ne reconnaissent pas officiellement le principe de *stare decisis*, mais reconnaissent l'importance du principe de la jurisprudence constante. La différence principale entre les deux consiste en ce que dans le cas de *stare decisis* la décision de la Cour concernant un cas concret devient un précédent obligatoire pour les tribunaux inférieurs et pour la Cour qui l'a adoptée, tandis que dans le cas de jurisprudence constante le précédent n'est formulé que si un certain nombre de décisions est adopté sur un cas concret. La différence entre *stare decisis* et jurisprudence constante ne doit pas être exagérée, puisque dans les

deux cas la volonté du législateur qui est exprimée dans l'acte juridique appliqué au cas, en fait est dépendante de la pratique judiciaire et du fondement de l'examen ou il a été constaté son application dans le cas concret. La jurisprudence constante peut être considérée comme la forme modérée du *stare decisis* et, inversement, *stare decisis* peut être considéré comme jurisprudence constante, réduite à une seule décision. Dans le cas du contrôle constitutionnel judiciaire cette forme modérée de la jurisprudence constante est moins préférable que la forme plus imposante, dans le cadre de laquelle la décision de la Cour constitutionnelle devient une « promesse » qu'en avenir se formera un tel système de jurisprudence constante dans lequel la pierre angulaire sera cette première décision. La validité juridique du dispositif de la décision de la Cour constitutionnelle s'est tournée vers le passé, tandis que son fondement vise également l'avenir, car il est évident qu'il sera potentiellement réutilisé lors des décisions concernant les cas ultérieurs. Les précédents doctrinaux jouent un rôle important, puisque les cours constitutionnelles se basent sur eux dans des affaires subséquentes (malgré les cas de la pratique judiciaire incompatible). C'est ainsi qu'est formé le système de la pratique judiciaire de la Cour constitutionnelle et de la doctrine constitutionnelle officielle formulée dans cette pratique. Le processus de formation du système n'a pas de fin, car le contrôle constitutionnel en lui-même est un processus constant et permanent. La formation de la pratique de la Cour constitutionnelle ressemble à la formation d'un corail - elle se fait « couche après couche ». Les Cours constitutionnelles donnent non seulement une interprétation de la Constitution, mais repensent leur propre doctrine (qui ne veut pas dire une modification) : cette réinterprétation fait partie de l'évolution constitutionnelle. Bien que de nombreuses théories du droit n'accordent pas à la doctrine constitutionnelle officielle le même statut qu'au document constitutionnel « original », elle a en effet le même statut dans le système de droit. C'est le statut du droit constitutionnel, c'est-à-dire, le statut du droit défini dans la Constitution. Ainsi, par sa validité officielle la doctrine constitutionnelle acquiert le même statut que le document constitutionnel « original ». La Constitution est une réalité juridique, composée non seulement des dispositions (définies ou non-définies) du document intitulé « Constitution », mais aussi des dispositions doctrinales des actes judiciaires, donnant l'interprétation officielle des dispositions constitutionnelles.

Ainsi, les cours constitutionnelles sont des acteurs importants dans le processus législatif, dans le sens « positif », bien qu'à l'origine elles ne fussent que des « législateurs négatifs ». Elles créent la doctrine constitutionnelle officielle qui, en fait, est une extension de la Constitution elle-même. En outre, « l'activité législative » des cours constitutionnelles (à condition qu'elles soient réellement indépendantes) ne se limite pas à la formation de la doctrine constitutionnelle officielle, mais couvre également la législation (création de loi) ordinaire. Elles agissent comme « législateur positif » dans le cadre de leur propre droit qui a des particularités considérables. L'article traite de certains aspects de

cette activité: (I) la doctrine constitutionnelle, particulièrement celle qui est répliquée et repensée sur une base concrète, établie des exigences au législateur de certaines concernant le contenu d'une éventuelle législation future et le processus de la création de droit, ce qui crée un cadre pour la législation future, (II) les cours constitutionnelles reconnaissant les actes juridiques comme étant de nature constitutionnelle, en fait, les approuvent «dans un sens positif»; (III) lorsque la valeur «réelle» de la norme est ambiguë, imprécise ou confuse, les cours constitutionnelles lui apportent une seule signification précise, (IV), en faisant cela, elles peuvent approuver la disposition contestée; (V) dans certains systèmes de la justice constitutionnelle les cours constitutionnelles disposent de mécanismes supplémentaires de «la législation positive», telles que la reconnaissance des actes contestés comme inconstitutionnels avec l'effet *ex tunc* (rétroactif), la compétence d'obligation du législateur à combler les lacunes législatives ou la possibilité de retarder l'échéance d'entrée en vigueur d'une telle décision de la Cour constitutionnelle qui puisse créer une lacune ou même un vide dans le système de droit.

L'ancienne perception du droit constitutionnel a continué par inertie son existence après le changement du régime en Europe Centrale et Orientale. Une vaste jurisprudence de la Cour constitutionnelle s'était accumulée pour qu'il soit clair que dans ce paradigme du droit constitutionnel manque quelques points importants et qu'il a érodé les constitutions pour qu'il commence à contribuer à la transformation du paradigme préexistant. Ceci n'a pas eu lieu en même temps dans différents pays. Mais là où il y a eu cette transformation, elle a été réalisée d'une manière analogique. Le nouveau paradigme du droit constitutionnel se caractérise par certaines caractéristiques qui, dans leur combinaison, nous permettent de parler d'une perception du droit constitutionnel, contraire à celle qui existait auparavant: (I) le droit constitutionnel est perçu comme un domaine du droit, qui est en évolution constante (droit vivant) en raison de l'interprétation constante et de la réinterprétation lors des résolutions des litiges constitutionnels et juridiques. Il se développe lors de chaque cas concret et est un droit judiciaire auto-générateur, (II) le droit constitutionnel n'est plus considérée comme une branche du droit. Les branches du droit ne sont qu'une partie du droit sus-constitutionnel, et diffèrent en fonction du genre des relations qu'ils régulent. Le droit constitutionnel n'a pas d'objet spécifique de réglementation et n'est pas une branche du droit, mais il englobe plutôt toutes les questions qui sont réglementées par les diverses branches du droit et les principes généraux. Selon la décision du législateur constitutionnel, certaines dispositions des branches du droit sont soulevées au plus haut niveau du droit constitutionnel. Il convient de noter que la différence entre le droit constitutionnel des autres droits n'est pas horizontale, elle est verticale; (III) dans le système des sources du droit constitutionnel est reconnue une telle source qui n'avait pratiquement aucune valeur auparavant et qui n'a même pas été considérée comme une source potentielle, à savoir la pratique

de la Cour constitutionnelle qui contient la doctrine constitutionnelle officielle. Toute décision de la Cour constitutionnelle, qui interprète et applique les dispositions de la Constitution, est une source du droit constitutionnel et le contenu de la pratique de la Cour constitutionnelle donne une nouvelle dimension à la réglementation constitutionnelle qui se développe au travers de chaque cas concret, (IV) le système des sources du droit constitutionnel a fortement diminué et désormais ne couvre réellement que le document «original» constitutionnel (avec les amendements postérieurs si, le cas échéant, ceux-ci ont été effectués) et la pratique judiciaire de la Cour constitutionnelle, contenant la doctrine constitutionnelle officielle; (V) le droit constitutionnel n'a pas de lacunes, étant le plus élevé dans le système juridique, il «couvre» tout droit ordinaire existant. L'affirmation selon laquelle dans la réglementation constitutionnelle existent (ou peuvent exister) des lacunes serait égale à la reconnaissance du fait qu'il existe des domaines de l'activité humaine et de la vie sociale qui peuvent être réglés par le droit ordinaire en l'absence de la possibilité d'examiner la constitutionnalité d'une telle réglementation. Malgré l'émergence de nouvelles branches du droit ordinaire qui résulte de l'émergence de nouvelles sphères de l'activité humaine, le droit constitutionnel continue de couvrir ces questions puisque la réglementation de ces nouvelles sphères ne doit pas dépasser les dispositions constitutionnelles générales.

La transformation du paradigme du droit constitutionnel, y compris la séparation stricte du droit constitutionnel et du droit ordinaire, la réglementation du système des sources de droit constitutionnel, l'intensité du développement continu du droit constitutionnel au travers de la justice constitutionnelle qui prévoit le mécanisme de la mise en œuvre par les cours constitutionnelles de «la législation positive», ainsi qu'une telle perception du droit constitutionnel, selon laquelle il n'a pas de lacunes, ce que démontre la transformation de la perception de l'ensemble du système de droit interne qui est actuellement perçu comme étant fixé sur la constitution.

Il convient également de noter que du point de vue politique, le résultat le plus important de cette transformation est le changement du concept de la démocratie: outre le principe de la majorité (qui peut être autodestructeur lorsqu'il est perçu du point de vue absolutiste), le concept de démocratie a acquis une qualité supplémentaire - l'élément constitutionnel. L'annulation des actes émis par les pouvoirs législatif et exécutif lors du contrôle constitutionnel judiciaire est la manifestation d'une démocratie constitutionnelle qui est en contradiction avec le principe de la majorité. L'idée d'une démocratie constitutionnelle qui est capable de se protéger contre l'activité autodestructrices de la majorité et le nouveau paradigme axé sur le système de droit constitutionnel se développent ensemble et se complètent mutuellement.

NATIONAL AND SUPRANATIONAL CONSTITUTIONALISM IN EUROPE

Rainer ARNOLD

1. THE PHENOMENON OF CONSTITUTIONALISM

a) Reflections on the term of Constitutionalism

1.1. Formal and functional Constitutional law

While the terms “Constitution” and “Constitutional Law” are (relatively) well determined in legal terminology, the words “Constitutionalism” and “Constitutionalization”, often used in the current debate on the developing legal processes in Europe, are rather vague and not clearly defined. It seems indispensable to find criteria for a better understanding of these terms.

The creation of a written Constitution as the basic legal order of a State is the traditional and also supreme form of Constitutionalism. The problem begins beyond the existence of a written Constitution text.

Formal Constitutional law means that the basic normative regulations are *formalized*, in form of one or more written texts (for example, in Czech Republic a formal Constitution text and a Charter of fundamental rights) which have a particular rank in the hierarchy of norms of the State, regularly at the top of this hierarchy.

A formal Constitution is not the only formalized expression of basic rules; also ordinary legislation which often regulates basic issues is formalized because it appears in written form. What seems important for formal Constitutional Law is the *functional* aspect of being high-level ranked in the hierarchy of norms.

We can say that three elements must be present for qualifying the set of norms as formal Constitutional law: (1) a formalized text in written form (formal aspect), (2) a normative rule on a basic issue either with reference to the institutional system of the State or on values (institutional or individual values, such as fundamental rights) (substantive aspect), and (3) the superior, qualified rank within the hierarchy of norms, which gives the rule a directive power and assures obedience from side of the state authorities as well as from society (hierarchy aspect).

Formal constitutional law has to be distinguished from functional Constitutional Law, which is not formalized but regulates basic issues important for the institu-

tional or the value system of a State.¹

Formal Constitutional law is also functional Constitutional law as it regulates basic issues. However, the hierarchy aspect of formal Constitutional law does not exist in the field of (purely) functional Constitutional law.

Functional Constitutional law can exist within all fields of legal sources: ordinary legislation, customary law, jurisprudence, practice.

Ordinary legislation often regulates basic matters of the State order, which are not regulated by the formal Constitution or which are basic implementations of general provisions of the written Constitution. Also jurisprudence or even State practice can be the expression of basic legal orientations and therefore of Constitutional nature. The role of jurisprudence is of particular importance in common law countries but also in continental legal systems which are regularly based on formal Constitutional law jurisprudence has a significant implementing function for the basics of the State order. It is evident that functional Constitutional law in this sense is the main source of constitutional law in systems without a written Constitution, notably in the United Kingdom.

Functional Constitutional law can appear on the level of Constitutional law itself, in the form of unwritten, customary Constitutional law, or on the level of ordinary law, such as legislation on basic matters or even in form of jurisprudence. Insofar as courts interpret the provisions of a written Constitution, jurisprudence is a tool for defining written Constitutional law. If jurisprudence goes beyond the written text, for example by filling up normative gaps of the Constitution, the courts decisions are, insofar as the basic issues are concerned, functional Constitutional law. This dimension is significant in common law systems where a formal Constitution as such does not exist.

Constitutional practice, specifying written Constitutional norms, makes formal Constitutional law more concrete and has therefore a genuine interpretation effect. In this sense, it belongs to the category of written Constitutional law. If Constitutional practice goes beyond the written text and is generally accepted in the specific legal order as a source of Constitutional law it has to be regarded as a kind of functional Constitutional law. It is obvious that practice has an important role in systems with unwritten Constitutional law. Practice can lead to the evolution of customary Constitutional law if practice and *opinio iuris*, the two constituting elements for customary law, come together. However, practice can remain in the sphere of political behavior without being directly normativized. In the United Kingdom Constitutional conventions, political rules on State practice which are observed by tradition in inter-organ relations, are a source of Constitutional law, though they are not law, not normative but law-like. They can be classified as functional Consti-

¹ See R. Arnold, European Constitutional Law, in: Nadežda Šišková (ed.), The Process of Constitutionalisation of the EU and Related Issues, Groningen/Amsterdam 2008, p. 41 – 49.

tutional law and if we do not mind that they are not law in a strict perspective.

Thus, we can state that the traditional meaning of Constitutional law is that of formal, written Constitutional law (typically as formal Constitutions in one or more specific documents) and of functional Constitutional law. The latter type comprises various phenomena: legislation and legislative acts, customary law, case law, practice. Both categories refer to the regulation of basic issues (what does not exclude that a formal Constitution will also regulate details which could be easily regulated by ordinary legislation or that it does not regulate all the basic issues but leaves this task to the ordinary legislation such as the electoral system in Germany²). The important difference between the formal and functional Constitutional law is that the latter has only the rank of the ordinary law sources. Therefore legislation on basic matters has the same rank as other legislation and can be repealed in the same way while formal Constitutional law normally is assured by qualified repeal conditions such as a two thirds majority in Parliament or a referendum.

Formal Constitutional law is created regularly by the people (exceptionally by Parliament³) while the other types of functional Constitutional law have their origin in the ordinary sources within the established legal order.

A2. The terms of Constitutionalism and Constitutionalization

These both terms are frequently used in the discussion on the developments of Constitutional law in Europe and in the world. It is difficult to find a clear definition for them, a task which is even more difficult for the fact that these terms are not strictly legal ones.

Constitutionalism can indicate the general situation of Constitutional law in a certain State or region.

European Constitutionalism may express the fact that various levels of Constitutional law exist, not only the national level, but also the supranational level within the system of the European Union and the level of the European Convention of Human Rights (ECHR). All three levels are Constitutional law systems even if the EU legal order is based on multinational treaties and the ECHR is, in its form, an international Covenant. In substance and function they are of Constitutional nature⁴.

Constitutionalism in Europe can also mean the inter-action of these three mentioned levels which is particularly characterized by a mutual conceptual influence. The result of this interaction is the appearance of converging Constitutional principles all over Eu-

² See Art. 38 Basic Law on the one side and § 1BWahlG (Federal Electoral Law Act) on the other side.

³ Adoption of the Czech Constitution of 1992 by the Czech National Council (Národní Rada).

⁴ See R. Arnold, The concept of European constitutional law, in: The emergence of European constitutional law, XVII Congress of the International Association of Comparative Law, Utrecht 2006, National reports, Athens 2009, 15 – 23.

rope. It seems that this is the most significant form of Constitutionalism in Europe.

Constitutionalism is also the tendency to promote the impact of Constitutional law on all law branches within the State and beyond. This includes the improvement of the instruments in order to make Constitutional law prevailing in the legal order of the State as well as in the supranational and international sphere.

The transfer of Constitutional concepts as they have developed within the State to the international and supranational communities has raised the appearance of the new term of *constitutionalization* of a legal order which, by its nature, is not constitutional from its origins. Such a development can be notified with great clearness in the supranational order of the European Union law and, to some extent, also in the sphere of the international community.

What does *constitutionalization* mean? The strongest form would be the creation of a formal Constitution in the traditional sense as it exists within the State. This leads to the question whether it is possible to create a Constitution in this traditional sense outside the State, in the multinational sphere? For various reasons which should be explained later this seems to be possible but this is a highly disputed question.

A well-known attempt has been made with the drafting of *Constitution for Europe* which failed. A world Constitution is not in sight and seems to be utopian. The *Kant* ideal⁵ is very far from being realized.

However, constitutionalization also means that concepts developed in the constitutional law of States are transferred to the extra - State sphere, to international law and in particular to the supranational legal order.

Such concepts which have been developed in the interior legal order of the State are mainly value-oriented. In particular the relation between State power and the individual has originated guarantees of the freedom, autonomy and dignity of the human being, specifically expressed by fundamental rights. Elements of rule of law as well as the concept of democracy are important complementary aspects which merged together to constitute a comprehensive protection for the person. It is due to the growing emancipation of the individual that the idea of her/his protection is becoming more and more important.

These substantive aspects define the basic position of the individual in the relation with public power and are of genuine constitutional character.

The more pluri- or multinational systems take over the intervention function of the State destined to impose obligations on the individual, the more the guarantees found by national constitutional law are transferred to the legal orders outside the State. Insofar

⁵ Immanuel Kant, *Vom ewigen Frieden*, Königsberg (Friedrich Nicolovius) 1795.

as international and supranational law is concerned with the individual, guarantees of this kind have to exist also in these orders. In this sense, constitutional concepts enter into the international sphere.

This is the *substantive* aspect of constitutionalization (related in particular to the protection of the individual), but there is also a *functional* one. Multi-national systems normally use *coordination* as a modality of cooperation, what reflects the fact that sovereign states are concerned. *Within* a State, the vertical exercise of power is typical, which is based on the subordination of the individual to State authorities. Horizontal cooperation in form of coordination is the method of persons with an equal status. Therefore, international law as an inter-State law is mainly based on a horizontal co-action resulting from State sovereignty. However, sovereignty undergoes a significant process of relativization. Therefore, coordination shifts, to some extent, to vertical law relations, in particular in the field of *ius cogens*. This phenomenon can also be called, in a functional sense, as a constitutionalizing process.

Thus we can distinguish between *substantive* and *functional* processes of constitutionalization.

Therefore we can state that constitutionalization in the fields outside the State, that means in international and supranational law, has a twofold meaning: either it refers to issues which have been, since ever, typically internal matters of a State such as the protection of fundamental rights or the application of rule of law (this is the *substantive* dimension of constitutionalization) or it refers to the means of action which are assimilated to those typical for internal State action (this is the *functional* dimension of constitutionalization). Examples for this functional dimension are the appearance of objective rules in international law with the character of *ius cogens* (even if it refers to substantively typical international matters as the prohibition of the use of force between subjects of international law) or as the use of State - like instruments within the European Union, such as directly applicable regulations, etc.

Constitutionalization is a phenomenon which exists also *within* the State. If this term is used in this sense, it means strengthening rule of law that is in particular fostering the primacy of the constitution. This term can also point out the inner-State tendency to strengthen the fundamental rights protection of the individual and to improve the situation of the person with respect to public power. Thus, jurisprudence intensifying the safeguards of fundamental rights, in particular the principle of proportionality, can be described as a constitutionalizing process.

Regularly, this term is used for non-constitutional areas, in particular outside the State, areas which receive impulses from State Constitutional law, in order to describe the assimilation with State law in the important issues.

a) *The transfer of Constitutional Law concepts from the State to the international Community*

As already mentioned, the term of Constitution and Constitutional Law has been for a long time only used for the basic legal order of the State. In particular from the middle of the 20th century on Constitutional Law of the State has undergone, to a significant extent, a process of *internationalization*. Concepts which have been internal State matters have been transformed into fields of international concern, in particular individual rights. The Human Rights Covenants are basic for international law, and even regarded as *ius cogens* growing up to an element of a worldwide public order, which is, in this respect, no longer a matter of coordination at the disposal of the States being the main political actors on the international scene, but an objective obligation for the international Community not able to be derogated even by consensus.⁶

In the internal State law, fundamental rights protection is a part, the main part, of the State Constitutional Law. The fact that this dimension has been doubled by a parallel protection system on the international level is due to the growing international consciousness of the importance of the individual rights with regard to the manifold violations all over the world. This is a complementary process to the attempt of the international Community to ban war and to develop the field of humanitarian law.

The transfer of the idea of protecting the individual from the inner State sphere to the international level means to transfer a traditional dimension of Constitutional Law to the international Community.

This substantive transfer has been reinforced by the functional transfer of the quality of the normative impact of the individual rights protection. Within the States the fundamental rights protection is mainly a matter of the supreme law of the land, the Constitution. By qualifying the international protection of fundamental as *ius cogens*, a Constitutional law element has been realized, which can be seen in the privileged normative position of fundamental and human rights in international law. This process of constitutionalization can, as already pointed out, also be discerned in other fields which have not been genuinely internal State fields. The prohibition of the use of military force in inter-state relations is one of the *Grundnorms* of public international law with the character of an objective fundamental value being a part of *ius cogens*. Self-determination of peoples has also become a principle of this nature.

While the process of constitutionalization on the international level is slowly proceeding, this process is much more dynamic in Europe, in particular in the community of

⁶ See Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht. Konstruktion und Elementeeineridealistischen Völkerrechtslehre*, 2012; Erika de Wet, *The international constitutional order*, ICLQ 55 (2006), 51 (both authors with numerous references to the literature on this issue).

the 27 member states of the European Union. Besides the EU such a process is going on specifically within the Council of Europe where the European Convention of Human Rights has grown up into a sort of Constitutional Charter. Consequently, the European Court of Human Rights has characterized the Convention as a Constitutional Charter determining the European public order ⁷. This describes clearly the shift from a coordination structure to a constitutional system.

2) THE SUPRANATIONAL LEGAL ORDER OF THE EUROPEAN UNION AS THE MOST SIGNIFICANT PHENOMENON OF EUROPEAN CONSTITUTIONALISM

a) *Treaty law in form, constitutional law in substance and function*

The European communities, the predecessors of the European Union, have been founded on the basis of international treaties between the member states. However, the finality of these organizations was directed towards the establishment of a transnational system eliminating the economic borders and making Europe-wide politics. Internal State matters have been Europeanized to a great extent. The former State finalities were now fulfilled on a European level. This was linked to a limitation of State sovereignty and, as the German Constitution formulates in article 24.1, the original basis for the co-founding of the European Communities and now in article 23.1, with the *transfer of sovereign powers* to multinational organization. This transfer has *opened* the formerly closed legal order of the State ⁸ and relativized its sovereignty. The substance of the community politics and the functioning of the instrumental system have been clearly constitutional.

This system can be denominated as *supranational*, a term which has become common for the characterization of the EU legal system. As to the word “constitutional”, the European Court of Justice has repeatedly used it instead of *supranational*, the fact that opened the debate on the constitutional character of the European Union. ⁹ It seems that this was one of the reasons for projecting a “Constitution for Europe”, what has finally failed. It shall also be noted that the Federal Constitutional Court of Germany also used the term *constitutional* for characterizing the supranational system of the European

⁷ Loizidou v. Turkey, 310 ECHR (ser. A) (1995). See Jacob Mchangama, The European Court of Human Rights - A European Constitutional Court? <http://www.fed-soc.org/publications/detail/the-european-court-of-human-rights-a-european-constitutional-court>. See further Stone Sweet, Alec, On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court (March, 12 2010). *Revue Trimestrielle des Droits de l'Homme*, Vol. 80, pp. 923-944, 2009. Available at SSRN: <http://ssrn.com/abstract=1569359>.

⁸ The German Federal Constitutional Court explains the sovereign power transfer in this way, vol. 37, 271, 280.

⁹ See Ingolf Pernice, *Europäisches und nationales Verfassungsrecht*, Walter-Hallstein-Institut Paper 13/01, 2004, <http://www.whi-berlin.de/documents/whi-paper1301.pdf>.

Communities¹⁰. The Court did not continue using this word and has now, in the decision on the constitutionality of the Treaty of Lisbon, largely referred to *supranationality*.¹¹

b) The meaning of supranationality

Supranationality can be defined by three elements: (a) autonomy of the EU legal order generated by the transfer of internal State competencies (b) the direct normative effect of the EU law and (c) primacy of EU law over national law.

EU law is neither international law nor State law, but an own legal order of a specific character built up by the transfer of sovereign powers of the member States, that means of internal competences to the European Union (formerly European Communities, since 1993 European Community) institutions. The German Federal Constitutional Court has, as already pointed out, clearly defined what such a transfer is: the member state “opens” its legal order and lets come in non-state law, renouncing the exclusivity of national law to have validity on its territory.¹² Sovereignty no longer corresponds to the exclusive existence of national law within the State.

Direct legal effect of EU law within the member States means that the EU legal source deploys normative force on the territory of the member States, without any further act of admittance from their side. The addressees of the legal acts are immediately reached by EU law adopted by the EU institutions. State sovereignty is no longer a frontier for the internal legal effect of such a law. This functional system clearly shows the difference of the multinational legal instruments with supranational character and the traditional international law method of coordination. Normative obligations stemming from international treaties depend on the will of the sovereign State to ratify or not the treaty. In a clear contrast to this, EU legal acts have effect within the member States, even without or against their will, due to the already mentioned fact that the transfer of internal competences has opened the internal State legal order.

The third element of supranationality, primacy over national law, is the most decisive aspect in this context. Jurisprudence has pointed out the indispensability of the primacy rule for the creation of a common market and for upholding the legal system of the Community. Primacy is not supremacy that means that in case of conflict between national law and EU law the latter has to be applied by the authorities and tribunals instead of national law. Supremacy would mean that the national law conflicting with EU law would be void. This is not the solution presented by the jurisprudence of the Court of Justice which prefers the primacy solution as a concept which is more compatible with the tra-

¹⁰ Vol. 22, p.293.

¹¹ Vol. 123, p. 267.

¹² Vol. 37, p. 271, 280.

ditional sovereignty prospective. Primacy means in the view of the Luxembourg Court that Community law prevails over whatever type of national law, ordinary legislation as well as constitutional law. This absolute primacy concept¹³ is not completely accepted by the member States constitutional courts which consider themselves as defenders of the national constitutional order. Some of these courts deny primacy over constitutional law at all, such as the Polish and Lithuanian Constitutional Courts regarding their Constitutions as the “supreme law of the land” which is not at the disposal of any institutions from outside. Most of the Constitutional Courts however, accept primacy but apply reservations insofar as the fundamental structures of the constitutional orders are concerned.¹⁴ The new term is “constitutional identity”.¹⁵

c) What is supranational constitutionalism?

A1. The transfer of the term “constitutional” to the multinational level

As already pointed out, the traditional meaning of “constitutional” is limited to the basic legal norms within the State. However, there are important reasons to extend the meaning of this term to legal orders outside the State which fulfill certain characteristics.

First of all, the rules in multinational systems which can be called “constitutional” must concern, as the State Constitution does, either the institutional structure of the relevant organization or the relation between this organization and the individual. This corresponds to the two important parts of the State Constitution, the institutional provisions and the fundamental rights.

Furthermore, these rules must constitute a legal entity which exercises public power. The European Union is such a body regulating matters in a Europe-wide sense which have been decided on before by national States. Therefore the basic law of the European Union can easily be denominated as constitutional. While the attempt to create a formal Constitution for Europe has failed, as it has been already mentioned, the EU Treaty containing the basic rules on the institutions and the EU Fundamental Rights Charter can even be characterized as formal constitutional law. It is true that the founders of these treaties intended to avoid this term for getting the consent of all the member States more easily than they would have obtained it by new referenda. However, the legal quality has to be assessed apart from the intention of the founders, in an objective way. This would legitimate even to apply the term of formal Constitutional law in this context. If not, these rules and principles are at least functional Constitutional law in the above described sense.

¹³ See ECJ 11/70, 1970, 1125.

¹⁴ See R. Arnold, *Verfassungsidentität und Europäische Integration. Die Perspektive der mittel- und osteuropäischen Verfassungsgerichte*, in: Herbert Küpper, *Von Kontinuitäten und Brüchen: Ostrecht im Wandel der Zeiten*, Festschrift für Friedrich-Christian Schroeder zum 75. Geburtstag, Frankfurt am Main 2011, 309 – 319.

¹⁵ See in particular FCC (German Federal Constitutional Court) vol. 123, p. 267 (Lisbon-Decision).

Supranational constitutionalism includes all the basic structures of the European Union, its instrumental specificities, in particular the direct normative effect of the secondary law and its primacy over national law, furthermore the values developed on the supranational level, the general principles of EU law with the function of fundamental rights protection and rule of law guarantees. It corresponds to the high importance of fundamental rights in contemporary constitutionalism that the unwritten, judge-made rights have been substituted by a written Charter which is part of the primary law of the EU. The elements of rule of law, called elements of the community of law (we could say today: Union of law), which have been shaped from the member states examples, are only in part written down in the Charter, even transformed into subjective fundamental rights such as the famous article 41 of the Charter, the right to good administration. Written fundamental rights as well as rule of law elements are complemented by unwritten general principles of Union law. Their development is not excluded by the entry into force of the Fundamental Rights Charter; they have a complementary function filling up gaps of the written text.

In a summary we can state that supranational constitutionalism refers to both sides of constitutionalism, to the institutional dimension (State-like functioning of the legislation instruments, relation to the member States) as well as to values: fundamental rights, rule of law, democracy, social orientation of the EU and openness towards international law. It shall be noted that values are individual and institutional. Individual values are fundamental rights with dignity of human being as the basis. Institutional values are those which are expressed by institutions: rule of law by tribunals obliged to apply law, democracy by the parliamentary system, social orientation by social structures (in the European Union with particular connection with the member states social systems) and the principle of “open Union” by a complex activity on the international level, in particular by the existence of manifold international treaties binding the European Union.

Supranational constitutionalism must also be seen in the fact that the conformity of EU legislation with primary law, in particular with fundamental rights as laid down in the Charter, is assured by an efficient court system with large competences.

d) Supranational constitutionalism through the European Convention of Human Rights (ECHR)

The leading fundamental rights document in Europe is the ECHR binding on the 47 member States of the Council of Europe. In its form the Convention is an international treaty drafted in 1950 and complemented by a series of additional protocols. In its substance the Convention can be qualified as Constitutional law for its significant differences from traditional international law. The main reason seems to be the strong impact on the solutions stemming from the national Constitutions. Constitutional courts in Europe

make efforts to be in harmony with the jurisprudence of the Strasbourg Court. In many countries the Convention enjoys primacy over ordinary legislation what enables the judges not to apply national law but the Convention. The manifold impact on national law legitimates its qualification as constitutional and as an integral part of European constitutionalism.

The constitutionalism connected with the ECHR is different from that of the European Union. The Convention has to be observed by the Council of Europe member States and is not a value document for an own legal entity as the European Union is. However, the values expressed by the Convention and expressed by the EU Charter of Fundamental Rights have many similarities in common.

3) NATIONAL AND SUPRANATIONAL CONSTITUTIONALISM IN INTERACTION

a) Institutional interconnections:

In a system of integration as it is in Europe, institutional interconnections between the different levels of constitutional law are indispensable. In this context “institutional” means directly that these interconnections are legally foreseen as mechanisms to assure integration and to resolve conflicts between the different levels.

The strongest institutional interconnection is that of the European Union concerning its member States. The basis for this interconnection is the principle of primacy of EU law over national ordinary and constitutional law, as it has already been pointed out. There are various forms of impacts possible: EU law as a supranational legal order prevails even over national constitutional law, in accordance with the jurisprudence of the European Court of Justice. Supranational law is therefore considerably influencing national constitutionalism. The Tanja Kreil case¹⁶ is a significant example for the primacy mechanism. Equal access to professional activity as specified in EU law was regarded as overriding article 12 a.IV of the German Grundgesetz which prohibited military service for women. The German tribunal applied EU law and not the German Constitution; the German Parliament adapted subsequently, with overwhelming majority, the Constitution to EU law. We can state a tendency that national Constitutional law seeks to adapt to the supranational order, accepting the primacy rule and initiating a formal Constitutional reform process. Of course, Constitutional Courts do not abandon the protection of the essence of the national Constitution, accepting primacy also over constitutional law (except Poland and Lithuania), but keeping intact the basic structures of the constitutional order.¹⁷ It is not clear how to define this nucleus which is called “constitutional identity” by the German, Polish and French Constitutional Courts.¹⁸

¹⁶ ECJ C-285/98, 2000, 69.

¹⁷ See above note 13.

¹⁸ See the synopsis by the Polish Constitutional Court K32/09 (Nov. 2010).

As to the European Union Fundamental Rights Charter, the interconnection with the national constitutions is of importance. Except Poland and UK which have not ratified the Charter, the member states are bound by it insofar as their State authorities (administration, tribunals) apply or execute EU law. This occurs very frequently because most of the EU secondary law is executed by national authorities. The EU Charter itself defines its field of application which includes the activities of national authorities if they are concerned with EU law. In purely national matters the national Constitution is applicable so that between EU - related issues and distinctly national matters the relation of *complementarity* exists.

What the Charter says about its field of application is obligatory for the member States, on the basis of the principle of primacy of EU law.

Besides primacy the EU treaty establishes in its Article 2 the obligation of the member States to adhere to the same values as the European Union does. European and national constitutionalism are interconnected by this homogeneity clause. This is based on the idea that the coexistence in a strongly integrated system requires common values because they give the ideological orientation for EU, the member States and the societies in them. There is no need for a detailed, strict homogeneity but for common concepts. This is so important that severe violations can be sanctioned in the specific procedure of Art. 7 EU treaty.

As a summary we can state that the major constitutional connections between supranational and national constitutionalism are the mechanism of primacy and the homogeneity clause for common values.

Considering the *European Convention of Human Rights* and its impact on the Council of Europe member States, we can state that the relations between this Convention and the member States are in their form traditional. The obligation of the States to conform with the Convention is a treaty obligation which is reinforced, in many member States, by constitutional mechanisms which give the Convention primacy over ordinary legislation, as it is in France (article 55 of the Constitution) or in many of the new democracies in Central, Eastern and South-Eastern Europe. As it has been already mentioned, the judges in these countries have to prefer the application of the Convention in case of legislation which is not conform to it. Also in dualist systems as in Germany, where the Convention as an international treaty enjoys only the rank of ordinary federal legislation, the judges have found interpretation techniques to give due observance to the Convention even on the level of Constitutional Law. Seen from this institutional perspective, the Convention mechanism is a much weaker instrument than the application of the EU law primacy rule.

However, it should be mentioned that the most significant constitutional and therefore supranational element of the ECHR system is the existence of the European Court of

Human Rights which is accessible by the individual after having exhausted the national remedies. Resolving legal conflicts by courts and not by political compromise is a characteristic for systems with a high integration degree and similar to the internal structures of a constitutional order. The constitutional specificity lies within the fact that the individual has direct access, while international jurisdiction normally addresses sovereign states and is rather facultative than obligatory. Of course, this jurisdictional individualization in international law is a broader process which finds its recent expression in the establishment of an International Criminal Court.

As a summary it can be said that the ECHR and its jurisdictional system exercise an extraordinary influence on European constitutionalism. The Convention can be regarded as the leading document in fundamental and human rights in Europe which influences the shaping of new Constitutions as well as the national jurisprudence of Constitutional Courts.

The type of interconnection between the Convention and the national Constitutions is in form international but, to some extent, constitutionalized in the respect of the structure and functioning of the Strasbourg court system. The interconnection of European and national constitutionalism is even more evident in countries where the Constitution itself gives primacy to the Convention or makes it, as in Austria and Switzerland a part of the internal Constitutional law. Institutionalized interconnections can also be seen in the mechanisms which oblige the courts to interpret the national fundamental rights in the light of international treaties, in particular of the Convention. A significant example is article 10.2 of the Spanish Constitution. Even beyond the institutionalized connection mechanisms there is a common tendency in European constitutionalism to adapt as far as possible the national interpretation to the Strasbourg perspective. This shows clearly the existence of a convergence process in the fields in particular of fundamental and human rights and also of rule of law.

This convergence process will be even intensified by the accession of the European Union to the European Convention of Human Rights which will take place in the next future. The Convention will be integrated into the EU legal order as an integral part of it and obtain a rank between primary and secondary EU law (according to the opinion of some authors even the rank of primary law).¹⁹ The individual will be able to invoke directly the guarantees of the Convention against the application of EU law by supranational institutions as well as by the EU member states.

It shall be mentioned in this context that the European Union even before the accession to the ECHR takes the Convention into consideration and has bound itself, unilaterally

¹⁹ See Walter Obwexer, *Der Beitritt der EU zur EMRK: Rechtsgrundlagen, Rechtsfragen und Rechtsfolgen*, *Europarecht* 2012, p. 115.

by EU law (see Article 6.3 EU Treaty), to it.. Since long the Convention has had a significant influence on the development of unwritten fundamental rights in the European Communities when the Court of Justice judges started to develop such rights in their decisions, taking the reference to the common member States constitutional tradition as well as to the ECHR. The latter has later become the predominant document of reference for the European Court of Justice. After the entry into force of the EU Charter of Fundamental Rights, the Convention was important for the interpretation of those parts of the Charter which have been shaped under the example of the Convention, such as in particular chapter 6 of the Charter.

b) Interconnection by interpretation

There are also *indirect* interconnection mechanisms which have been developed by jurisprudence. A significant example for the progressing observance of the Convention and therefore of European constitutionalism is Germany. As already pointed out, Germany adheres to the dualist transformation system which means that international treaties such as the Convention are transformed into German law and applied by the German institutions as internal law. The formal consequence is that international treaties have a rank equivalent to legislation and not superior to it. Despite that fact the Federal Constitutional Court has started to constitutionalize the Convention and, by this, to Europeanize the German Basic Law. The Court interpreted the rule of law as formulated in general terms in article 20 of the Constitution in the light of the Strasbourg jurisdiction introducing as the new element the presumption of innocence, until this moment not directly guaranteed by the constitutional text.²⁰

A further important step was the functional assimilation of the protection standard of the national Constitution and of the Convention. In Görgölü case²¹ the Court pointed out with clearness that the application of a German fundamental right in a lower standard than that of the corresponding Convention right would violate the German right, violation to be pursued by individual complaint to the Constitutional Court. The basic argument was that rule of law of today has an internal and external dimension. The observance of international law is indispensable under the constitutional concept of rule of law. This legitimates the functional assimilation of Constitution and Convention.

CONCLUSION

European constitutionalism is of the supranational character. Three levels of constitutional law are interacting in Europe: national constitutions, the European Convention of Human Rights and the basic rules of EU law. These legal orders are autonomous but interdependent and horizontally and vertically interactive. The transnational relations which

²⁰ vol. 74, p. 378.

²¹ vol. 111, p. 307.

express this interconnection are of a particular nature, not traditionally international but supranational. National constitutionalism is therefore increasingly supranationalized. A process of convergence is going on in European Constitutional Law, in particular in the fields of fundamental and human rights and of rule of law. National constitutional concepts assimilate to supranational concepts. The results are principles of a European dimension which are developing towards a body of European Constitutional Law.

РЕЗЮМЕ

Европейский конституционализм имеет наднациональный характер. В Европе наблюдается взаимодействие трех уровней конституционного права: национальные конституции, Европейская конвенция о защите прав человека и основные правовые акты ЕС. Последние являются автономными, но вместе с этим взаимозависимыми, а также горизонтально и вертикально взаимосвязанными правовыми системами. Выражающие эту взаимосвязь транснациональные отношения носят особый характер и являются наднациональными, а не международными, какими традиционно воспринимались. Таким образом, национальный конституционализм постепенно становится наднациональным. В рамках европейского конституционного права имеет место процесс конвергенции, в частности в области прав человека и верховенства права. Наблюдается также процесс ассимиляции национальных и наднациональных концепций. Результатом происходящего в Европе данного процесса является формирование особой системы европейского конституционного права.

ZUSAMMENFASSUNG

Der europäische Konstitutionalismus hat einen supranationalen Charakter. In Europa lässt sich eine Wechselwirkung zwischen drei Ebenen des Verfassungsrechts beobachten: nationale Verfassungen, die Europäische Konvention zum Schutze der Menschenrechte und grundlegende Rechtsakte der EU. Bei den letzteren handelt es sich um autonome Rechtssysteme, die voneinander gegenseitig abhängen sowie im horizontalen und vertikalen Zusammenhang stehen. Die transnationalen Beziehungen, die diesen Zusammenhang zum Ausdruck bringen, haben einen besonderen Charakter und es sind supranationale und nicht internationale Beziehungen, wie traditionell verstanden. Der nationale Konstitutionalismus wird somit nach und nach zu einem supranationalen. Im Rahmen des europäischen Verfassungsrechts spielt sich ein Prozess der Konvergenz ab, namentlich im Bereich der Menschenrechte und des Vorrangs des Rechts. Es lässt sich ebenfalls ein Prozess der Assimilierung nationaler und supranationaler Konzeptionen beobachten. Im Ergebnis dieses Prozesses in Europa bildet sich ein besonderes System des europäischen Verfassungsrechts heraus.

RÉSUMÉ

Le constitutionnalisme européen a un caractère supranational. En Europe se détecte l'interaction entre les trois niveaux du droit constitutionnel: les constitutions nationales, la Convention européenne de protection des droits de l'homme et les actes juridiques fondamentaux de l'Union européenne. Ceux-ci sont autonomes, mais en même temps interdépendants, comme des systèmes juridiques entrecroisés horizontalement et verticalement. Les relations transnationales qui expriment cette interaction ont un caractère spécifique supranational plutôt qu'international, comme cela a été perçu traditionnellement. Ainsi, le constitutionnalisme national devient progressivement supranational. Dans le cadre du droit constitutionnel européen s'est établi un processus de convergence, en particulier, dans le domaine des droits de l'homme et de la primauté du droit. Aussi se détecte le processus d'assimilation des concepts nationaux et supranationaux. En conséquence en Europe se crée un système particulier du droit constitutionnel européen.

**CONSTITUTION FROM THE ANGLE
OF VALUE-SYSTEM CHALLENGES
OF THE NEW MILLENNIUM**

THE CONSTITUTIONAL STATE AND CONSTITUTIONAL JURISDICTION AGAINST THE CONFLICTING NEEDS OF EUROPEAN INTEGRATION

Gerhart HOLZINGER, Stefan Leo FRANK

I.

Constitution is a term people use differently and with different meanings. In legal parlance, the word “constitution” stands for constitutional law as a part of the legal order. In a socio-political sense, constitution refers to the sum-total of all policy decisions taken in response to given political concerns of a society. Lastly, a constitution adopted as expression of the free will of the people is a legal compound, which lays down the organization and decision-making processes within a polity by consensus of the relevant political forces.¹

Materially, constitutional law can be understood as the fundamental legal order of state that governs the underpinnings of human coexistence within a nation. Typically, these constitutional issues include the set-up, organization and objectives of the state, the principles governing the exercise of the state functions (legislature, executive/ administration, judiciary), the relations between state and society, and the position of the individual within the body politic.

The concrete making of a constitution depends on the historical context in which it came into being. Its structural principles, systematic construction, contents, as well as individual provisions, reflect the prevailing constellation of powers and ideology at the time it was drafted. From this vantage point, constitutional law is the codification of political history. Without knowledge of their political, historical and theoretical background, it is – in general – not possible to properly read constitutional institutions. This is true in particular for the Austrian Federal Constitution.

The Federal Constitutional Act of 1 October 1920, the “master deed” of the Austrian Constitution, was enacted in light of Austria’s history as a constitutional monarchy. The Federal Constitutional Act perpetuated many institutions from the monarchy, such as the separation of powers, an independent judiciary, the principle of government administration being bound by directions, elements of parliamentarism, administrative jurisdiction, the audit of state finances, and the fundamental liberties. In addition to their original functions, some of these institutions also fulfill political functions (e.g.

¹ Pelinka/Welan, *Demokratie und Verfassung in Österreich* (1971) 9.

the fundamental rights and their checking function also vis-à-vis the legislature), while others have become largely devoid of meaning (e.g. ministerial impeachment).

Despite of its age and many anachronisms, the Austrian Constitution has by and large proven its usefulness as the basis of the legal order of the Republic of Austria. It was above all the Constitutional Court and the practice of the (supreme) bodies called upon to apply the constitution, which has been responsible for maintaining its viability. With the Constitution offering much more of a framework than detailed rules and regulations, it allowed for an adequate response to many new social concerns without requiring formal amendment. It is important to emphasize the changed understanding of the fundamental rights, which evolved from merely defensive rights vis-à-vis the state into general principles which compel the legislator to weigh provisions, which interfere with fundamental rights against those fundamental rights and to create the requisite conditions for the very exercise of those rights.

The federal state, and in particular the allocation of competences between the Federation and the *laender*, is in urgent need of reform. While Austria was nominally set up as a federal state in 1920, the federalist principle could not be wholeheartedly implemented due to diverging ideas of the political powers at the time when the federal Constitution came into being. The current structures are excessively complex, confounding, anachronistic and functionally counterproductive in parts. The system has long failed to serve its purpose, which is the efficient delivery of government tasks. The strictest possible division of powers between the Federation and the *laender*, which the drafters originally had in mind when allocating responsibilities, has become obsolete given how closely interwoven the delivery of public-sector tasks is both on a legal and factual level. In some areas, the structural complexity and rigidity conflicts with the requirements of effective implementation of Union law, which does not take federal structures into account.

A modern-day approach to the allocation of competences in a federal state is made all the more difficult by the fact that the Constitutional Court interprets the allocation of competences in accordance with the meaning it had when this system took effect (1 October 1925). Because of this dogmatic reading of the constitution (known as ‘petrification’ doctrine), the allocation of competences is not amenable to reform by state practice, but only by formal amendment of the Constitution.

II.

At the time of its inception, the Austrian Federal Constitution was not designed as a systematic codification of federal constitutional law, but as a provisional body of rules which contained many transitional provisions which were to be replaced by final provisions at a later stage. The Federal Constitutional Act of 1 October 1920, the master

document of the Federal Constitution, was just the prime legislative text among many which, taken together, were to make up the Constitution.

In Austria, unlike in other states, the legal order is characterized by a formal reading of the Constitution. The Constitution is held to consist of the sum total of all laws which are adopted by the National Council by a two-thirds majority and have been designated as “constitutional acts“. Therefore, the qualifying attribute, which gives a legal provision constitutional rank, is just its form. In this understanding, the traditional contents of historic and existing constitutions and the function of the constitution as a fundamental order governing the state go unheeded.

This specific understanding of the Constitution is reflected in how constitutional law is structured: to date, Austria does not have a finite constitutional document. The text of the Constitution is scattered among a host of different laws which – by substantive criteria – partly do not have constitutional relevance.

It was the experience of the constitutional form being misused during the time of the authoritarian corporate state (1933-1938) and the National Socialist regime (1938-1945) which paved the way towards a more differentiated view of the Constitution in the Second Republic, i.e. the second half of the 20th century, not only as a formal concept, but also a substantive fundamental order of constitutional democracy. As of now, the Austrian Federal Constitution is understood as a meaningful overall order that is underpinned by substantive fundamental principles (“*Baugesetze*”) of a higher rank.² In this understanding, the Constitution consists of two hierarchical layers of law: a constitutional fundamental order which is underpinned by fundamental principles, and other constitutional norms which are subordinate to those fundamental principles.

Apart from some rather vague hints one can find in the Federal Constitutional Act of 1 October 1920, these fundamental principles (democracy, republic, federal state and rule of law) are not codified. Their substance is rather the result of the doctrine and the case law emanating from the Constitutional Court. Measured by the standard of a modern constitutional state, it is those very fundamental principles which make up the Austrian Constitution.

III.

A constitution fulfils several functions. First, it defines the procedures and the organization of the political process within a state, in other words, it lays down the “rules of the game” that govern the political contest vying for the majority. Constitutional law also includes norms which determine the direction of policy-making by either imposing constraints, or by spelling out positive factual goals.

Since amending a constitution is a tedious process, these “rules of the game” and val-

² Pernthaler, *Österreichisches Bundesstaatsrecht* (2004) 46.

ues cannot be easily challenged by day-to-day politics.

Typologically, the Austrian Constitution can be categorized as one that is driven by “rules of the game“. Since its very inception, it has also included substantive value norms. Such a system of values is established in particular by the fundamental rights, but also by the fundamental principles it enshrines (democracy, republic, federal state and rule of law).³

IV.

The term constitutional state describes a polity whose fundamental legal order is characterized by defined core contents. In this context, “constitution“ means more than just any legal order governing the fundamental institutions of the state, which every state by necessity espouses once there is a minimum of shared organization. Rather, it refers to the legal organization of a state which hinges on two closely interlinked principles: a separation of powers, in other words a clear differentiation between the supreme state bodies, which ensures checks and balances of sovereign power in the interest of individual freedom; and fundamental rights, in other words legal guarantees of defined areas where individuals are free from state interference.

Both notions – separation of powers and fundamental rights – determine the constitutional concept in modern constitutionalism. In the 19th and 20th centuries, this constitutional model spread across the world to become a present-day standard against which states and their political and legal realities are being measured.

In the 20th and 21st centuries, constitutionalism gained new dimensions as the constitutional notion detached itself from the nation state: The end of World War II spurred a process of constitutionalisation of international law, i.e. the increasing limitation of states by overarching, cogent legal principles (*ius cogens*) which are fuelled by elements of national constitutionalism, the “shared constitutional traditions” of the states. Prime among these principles are what is generally referred to as human rights.

Increasingly, this constitutionalisation is making inroads into supranational communities of states, notably the European Union. Even though the “Constitution for Europe“ project failed in 2005, the existing Treaty on European Union (TEU) contains all elements of a “European Constitution“: on the one hand, this “Constitution“ overrides the national constitutions, on the other, the EU explicitly subscribes to the principles of a constitutional state (fundamental rights, freedoms, democracy, equality, rule of law) which form a standard for the legality of the entire body of derived law (i.e. law created by EU bodies). The Court of Justice of the European Union is called upon to ensure adherence to EU law – and hence to assure the supremacy of EU law over national legal orders. In this respect, it is an instrumental player in the concert of European constitutions.

³ Adamovich/Funk/Holzinger/Frank, Österreichisches Staatsrecht. Volume 1: Grundlagen2 (2011) 14.

V.

Austria has been a member of the European Union since 1 January 1995. With the accession treaty, Austria adopted and recognized the entire body of law governing the European Union (*acquis communautaire*). This *acquis* also includes the case law handed down by the Court of Justice of the European Union, which is paramount for the relation of national law and Union law.

The relation between national law and Union law is governed by the principles of autonomous validity, direct applicability, and the supremacy of Union law over national law⁴.

Autonomous validity means that Union law constitutes an independent legal order which is addressed not only to the Member States, but also to individuals.⁵ Accordingly, Union law is applicable by its own rules for and in Austria without there being a need for any official endorsement by the state. This autonomy of Union law also implies that Union law governs its own effects. Union law therefore is applicable alongside and independent of national law.

A consequence of the autonomous validity of Union law is its direct applicability. Independent of national legal orders, Union law can impose duties and confer rights on individuals; as such, it must be applied by the national authorities without requiring any concretization by national law. This self-executing effect, too, is fully independent of national law. Individuals may invoke Union law before national courts of law not only in explicitly stated cases, but also on the basis of clear obligations which Union law imposes on third parties, on the Member States, or on Union bodies.⁶

The autonomous validity of Union law and its direct applicability require that there be a rule stating what to do when one and the same matter is governed differently by Union law and by national law. In the opinion of the Court of Justice of the European Union, Union law – as a law which emanates from an autonomous source of law – takes precedence over a conflicting national provision.⁷ Every national court being seized within its competence is under an obligation to apply Union law without limitation and to protect the rights which it confers upon individuals, by desisting from applying any conflicting provision of national law, regardless of whether it was enacted earlier or later than the Union law provision.⁸ The validity of any such national provision, however, remains unaffected.

By acceding to the European Union, Austria opened up its legal order to the specificities of European Union law, thereby interlacing it with the latter. This has vastly

4 Öhlinger/Potacs, EU-Recht und staatliches Recht4 (2011) 55 et seq.

5 ECJ Case C-26/62, Van Gend en Loos [1963] 3 (25).

6 ECJ Case C-26/62, Van Gend en Loos [1963] 3 (25).

7 ECJ Case C-6/64, Costa vs. ENEL [1964], 1253 (1270).

8 ECJ Case C-106/77, Simmenthal [1978], 629 (644).

changed Austria's fundamental constitutional order, with the democratic principle and the legality principle being affected first and foremost.

The democratic principle is affected inasmuch as Union acts are not created by the will of the Austrian people (alone). They could even come about without or against Austria's consent, yet are still effective both for and in Austria – taking precedence over Austrian law. Since Austria's accession to the European Union, the law no longer emanates from the Austrian people (alone), but also from the Union bodies, whose democratic legitimation does not meet the standards of a constitutional democracy.

This democratic deficit is only mitigated, but not fully compensated, by the parliamentary accountability of the Member State representatives in the Council of the European Union and in the European Council (made up of the heads of state and government of the Member States), by the involvement of the national Parliaments in European legislation, and finally by the direct election of the European Parliament.

A factor which weighs heavily from the angle of legality is that the acts of the Union bodies – in keeping with the autonomous validity of Union law – can only be reviewed against the standard of Union law. The national constitutions are therefore no yardstick for the legality of Union acts. It is only for the Court of Justice of the European Union to dismiss Union acts as null and void for non-conformity with EU law. If a national court has concerns about the legality of Union acts, it must refer the matter to the Court of Justice of the European Union for a preliminary ruling.

EU membership has also affected the identity of the national constitutions. Owing to the autonomous validity of Union law, its immediate applicability and supremacy over national law, the national constitutions in the European Union (including that of Austria), have lost their function as the highest-ranking norm to which all other legal norms are subordinated and from which all other legal norms can be inferred.

In Austria, this supremacy of Union law over the national constitution reaches its limits in the fundamental principles which underpin the fundamental constitutional order. The national referendum of 12 June 1994 on Austria's accession to the European Union amended these fundamental principles only to the extent which corresponded to the *acquis* of the time. With this modified content, the fundamental principles have still retained their function as a standard for all further amendments of Union law. From an Austrian perspective, every further development of Union law must therefore be reviewed against the fundamental principles of the Federal Constitution as amended by the national referendum of 12 June 1994 and put to another national referendum should these fundamental principles be affected anew.

Irrespective of these provisos of the Austrian Federal Constitution, the European

Union has come to realize that the national constitutions play a key role. This understanding rests in particular on Article 4(2) of the Treaty on European Union (TEU) according to which the Union shall respect the “national identity“ of the Member States which are inherent in their “fundamental structures, political and constitutional, inclusive of regional and local self-government“. This provision also affirms that the individual states will continue fulfilling essential functions, including ensuring territorial integrity, maintaining law and order, and safeguarding national security.

The fundamental legal structure of the states united in the Union is hence characterized by a “double constitution“, in other words a constitutional duality which is fuelled by the national and the European legal orders in concert. While both legal orders are interlinked in manifold ways and relate to one another, they remain separate.

The functional link between Union law and national law becomes apparent when Union law is being applied. The Union’s primary remit is legislating, i.e. creating provisions with general validity. But for a few exceptions, the implementation of these provisions, i.e. their transposition into national law and application in individual cases, is for the Member States to put into practice, in conformity with their respective national orders. Lacking an underlying administrative structure at the national level, the Union would by no means be in a position to implement Union law at the national level by itself. It is therefore limited to steering the implementing measures taken by Member States by means of appropriate provisions and to monitoring their effectiveness.

In this interaction with Union law, however, the autonomous regulatory power of constitutional law and the discretionary leeway it affords are lastingly and extensively curtailed. This limitation manifests itself in a dual loyalty (“*Doppelbindung*”) binding national bodies when implementing Union law at national level in two respects: Inasmuch as European Union law is implemented at national level, the competent national bodies are bound by Union law as well as by national constitutional law. The national constitution is relevant for implementing Union law only as far as it does not inhibit the effective implementation of Union law. By that token, the national constitution is experiencing a modification of its function as a fount of the fundamental legal order of the state and as a measure of the legality of state acts.⁹

VI.

Democracy and the rule of law are the core pillars of any modern constitutional state. The European Union, too, is founded on those very pillars.

The combination of (social) democracy and a (liberal) rule of law is nothing to be taken for granted, since those principles are in themselves contradictory: If the state

⁹ Adamovich/Funk/Holzinger/Frank (FN 3) 20.

takes over responsibility for social services (e.g. education, health-care, pensions), state interventions are required to ensure the delivery of these services. Democracy and the rule of law can still coexist if the limits for state intervention in personal freedoms derived from the fundamental rights, in particular the basic tenets of equality and proportionality, remain unaffected.¹⁰

1. Democracy thrives on the idea of reconciling to the extent possible the divide between the rule of law and personal freedom, between external determination and self-determination. All social systems – states included – develop forms of ruling. Democracy rests on the notion that this rule is created, exercised and controlled by those affected, so that the ruler and the ruled become one.

For democratic structures the principle of equality is quintessential. This principle goes beyond a formal equality of all those involved as holders of voting rights. It relates to material equality, primarily to equal access to individual and collective goods (ownership, education, social security, medical care), and to their fair and equitable distribution.

In many states – Austria included – the right to vote for legislative assemblies is reserved to national citizens. Non-nationals who have chosen Austria as the centre of their lives without obtaining citizenship are hence excluded from participating in the appointment of the supreme state bodies. This limitation can be justified by arguing that only the status of nationality which – unlike a mere residence permit – is of lasting duration, and which as a rule can be acquired only by renouncing a former citizenship, expresses that degree of loyalty to a state that would justify being granted a say in political decisions in matters of fundamental importance.

The growing freedom of movement – within the European Union as well as in relation to third countries – increasingly calls into question that political participation rights should be tied to nationality.

Depending on how decisions are reached, we distinguish between direct (plebiscitary) and indirect (representative) democracy. In direct democratic procedures, decisions are taken by all citizens entitled to vote. In indirect democratic procedures, deputies (members of parliament) become active as delegates (representatives) on behalf of the citizenry.

The principle of representative democracy has gained acceptance in all modern-day democracies, including the European Union. For all practical purposes, no territorial state would be able to rationally discuss the numerous questions to be solved within a society by all its members and then decide on the basis of such debates. It is only the system of representative democracy that transforms the democratic idea of self-rule and

¹⁰ Adamovich/Funk/Holzinger/Frank (FN 3) 147.

self-government into a form that is capable of acting and of taking decisions.¹¹

Most representative democracies, including Austria, have adopted the system of parliamentarism, in which the people are represented by delegates who are elected for a limited period of time and who are free from directions by the electorate when exercising their mandates. This system is conducive to rational decision-making, all while harbouring the risk of ill-directed developments such as the alienation of the electorate from those elected, which may breed populist, potentially anti-parliamentary tendencies.

There are several ways of countering those risks. Strengthening personality elements in the electoral law and expanding the instruments of direct democracy may be conceivable starting points for reforming parliamentary democracy.

2. A polity with an effective legal order, in which sovereign rule is exercised in accordance with the laws, is considered to be a state governed by the rule of law.

In a state governed by the rule of law, everything revolves around the law. In a democracy governed by the rule of law, the law has a double function: it does not only serve to curtail, but actually establishes the executive power. The law is not just a limitation to state action, but the very precondition for its existence. Executive power cannot be exercised without adherence to the law.

This so-called 'legality principle' is at the same time a characteristic feature of the democratic principle. Supposing that in a representative parliamentary democracy the law is the expression of the people's will, the fact that the entire executive is bound by the law offers assurance that the executive power can only be exercised in conformity with the people's will.

Typically, a state governed by the rule of law is endowed with mechanisms which ensure the supremacy of the law and of the constitution, i.e. their function as a standard for the exercise of sovereign power, and which also show a minimum of factual efficiency. Here, the judiciary has an instrumental role to play.

In this point, the national constitutions follow the same tenets as the ones laid down e.g. in the European Convention on Human Rights (Art. 6) and in the Charter of Fundamental Rights of the European Union (Art. 47): Every person whose rights or freedoms are affected by an executive act is entitled to have the legality of this act reviewed by an independent, unbiased court on the basis of the laws.

Membership in the European Union has given added value to the role of the judiciary. The reasons for this development lie in the system of decentralized implementation of Union law (at Member State level):

Under the Treaty on European Union (TEU), the Court of Justice of the European

¹¹ Öhlinger, *Direkte Demokratie: Möglichkeiten und Grenzen*, Österreichische Juristen-Zeitung 2012, 1054 (1061).

Union must guard the law when interpreting and applying Union law. Since it is the competent national authorities which are entrusted with implementing Union law at Member State level, and since their decisions cannot be challenged at the Court of Justice of the European Union, it is for the national courts to ensure the proper use of Union law as they must apply Union law without limitation.

To this end, the national courts are empowered to review national law against the standard of Union law and, if there is a conflict between the provisions of national law and Union law, ensure the full effectiveness of Union law: either by interpreting national law in conformity with Union law, or by desisting from applying the conflicting provisions of national law. In the interest of the uniform effectiveness of Union law in the Member States, every court at which a legal dispute on Union law is pending and which is not clear about its meaning or scope, must refer questions on the interpretation of the applicable provision of Union law to the Court of Justice of the European Union for a preliminary ruling.

This close inter-linkage of national law and Union law, and the resultant complexity of the law, has massively impacted the position of the national courts in the separation-of-powers regime, in particular vis-à-vis the legislature and the law; specifically, the law-creating function inherent in the judiciary has gained significant ground over the mere adjudication of applicable law. The national courts are transforming from executive bodies of government which act in a clearly prescribed legal framework to fora whose prime calling is to determine which legal situation prevails in a given case.¹²

This (creeping) transformation from a law-governed state into a court-governed state sees itself confronted with a remarkable “hyperactivity” of the legislative bodies at national and European level. The resultant “flood of norms” is a serious threat to any state governed by the rule of law once the legal order reaches a degree of complexity that can neither be understood by those affected, nor effectively implemented by the state authorities.

As a result, national authorities tend to be faced with the problem of having to deliver ever more comprehensive and complex tasks without the requisite staffing. An inherently overburdened executive apparatus constitutes one of the most daunting challenges a modern constitutional state has to come to terms with.

VII.

In Austria a special constitutional body, i.e. the Constitutional Court, is charged with ensuring the primacy of the Constitution.

The Constitutional Court dates back to the monarchical constitution of 1867. The so-called

¹² On this “Americanisation” of European law, Öhlinger, *Gesetz und Richter unter dem Einfluss des Gemeinschaftsrechts*, in: *Festschrift für Thomas Fleiner* (2003) 719 (732 et seq.).

December Constitution of 1867, which transformed Austria into a constitutional monarchy, comprehended a number of major constitutional texts, including the “Basic Law on the General Rights of Nationals“ (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), the first and to date only genuine Austrian catalogue of fundamental rights.

In parallel with these fundamental rights, the Imperial Law Court (*Reichsgericht*) came into being as precursor institution of today’s Constitutional Court. Its main task was to pronounce on alleged violations of constitutionally guaranteed “political rights“. It had, however, no power to review the constitutionality of laws.

Today’s Constitutional Court was established by the Republican Federal Constitution of 1 October 1920. It did not only take over the function of the former *Reichsgericht*, but was also furnished with the competence to review laws as to their constitutionality.

With this novel constitutional creature – largely influenced by the eminent Austrian legal scholar *Hans Kelsen* - the newly constituted republic set global standards. From a law policy perspective it was evident that the court’s power to review the constitutionality of laws which Parliament had enacted would be the - by far - most significant power of the Constitutional Court. Judged from a present-day perspective, the Constitutional Court was elevated to a body of overwhelming legal policy status that is unrivalled in contemporary constitutional history.

As a special feature, the competence to decide on the constitutionality of laws and to rescind laws on the grounds of unconstitutionality is concentrated and monopolized with an institutionally independent court specializing on constitutional issues. In the ‘American’ model of constitutional jurisdiction, by contrast, every court may assess the constitutionality of laws in a preliminary ruling and may desist from applying laws it holds unconstitutional.

At its inception, the Austrian Constitutional Court was virtually the only one of its kind world-wide. Merely the Czechoslovakian Republic had set up a constitutional court even some months before the Austrian Constitutional Court came into being. However, this court was never to gain any practical relevance. In 1921, the Principality of Liechtenstein created a constitutional court by the name of *Staatsgerichtshof* (state court).

It was only decades later, in the second half of the 20th century, that the ‘Austrian’ model of institutionalized judicial review should assert itself on a global scale.

Historically, the competence to review the constitutionality of laws which the Austrian Constitutional Court was given in 1920 is rooted in Austria’s set-up as a federal state. The review of laws by the Constitutional Court in fact allowed settling competence conflicts between the federation and the *laender* in a manner which does not compromise the equality in rank of the constituent states, which was all-important to a federal state.

In that way, the Constitutional Court acted as an arbiter between the legislative bodies of the Federation and the *Laender*, which had been conceived as being of equal rank.

Moreover, the introduction of judicial review lent a novel dimension to the fundamental rights protection regime.

The competence of the Constitutional Court to repeal laws on the grounds of unconstitutionality made it clear that all rights and freedoms enshrined in the Constitution – the fundamental rights – are a standard for the constitutionality of laws and have a binding effect on the legislature. Accordingly, the Constitutional Court will have to repeal a law as unconstitutional if it violates the fundamental rights, in particular if that law would allow disproportionate interferences with a fundamental right.

VIII.

Every “constitutionally guaranteed right”, i.e. every subjective right that is based on a provision of objective constitutional law, can be asserted at the Constitutional Court

Austria does not have an exhaustive catalogue of fundamental rights. Those rights which are “constitutionally guaranteed” can be derived from a variety of different legal sources: from the Federal Constitution of 1 October 1920 and from the above mentioned Basic State Act on the General Rights of Nationals adopted from the monarchical constitution, but first and foremost from the European Convention on Human Rights which, together with all additional protocols (except for Protocol 12), has constitutional status in Austria.

The Constitutional Court has recently formed the view that the rights and freedoms ensured by the Charter of Fundamental Rights of the European Union (CFR) can be asserted at the Constitutional Court as constitutionally guaranteed rights and as such form a standard of review in judicial review proceedings.¹³ This applies at any rate to such guarantees of the CFR which, in terms of their phrasing and unambiguity, are similar to rights which are constitutionally guaranteed by the Austrian Federal Constitution.

This position is first underpinned by the idea that the CFR forms a distinct sphere of Union law which is detached from the remainder of primary and secondary Union law. In this respect, the rights and freedoms emanating from the CFR differ from the legal positions which are deduced by the Court of Justice of the European Union from general legal principles or from the common constitutional traditions of the Member States.

The Constitutional Court’s second main line of reasoning ties in with the principle of equivalence under Union law. Accordingly, proceedings which are provided for under national law to enforce rights under Union law must not be less favourable than proceed-

¹³ VfSlg. 19.632/2012.

ings in which similar claims are invoked under national law.¹⁴

Several rights contained in the CFR are modeled in their wording and intention on the rights contained in the ECHR which – as mentioned – has constitutional status in Austria. Moreover, the rights of the CFR have the same function for the scope of application of Union law as the constitutionally guaranteed rights of the Austrian Federal Constitution have for the autonomous area of national law in Austria. Given this similarity, it would run counter the equivalence principle of Union law if those affected could not assert violations of the CFR at the Constitutional Court.

IX.

The tasks given to the Constitutional Court, in particular its competence to review the constitutionality of laws, highlight its political significance. Given its specific mandate, the Constitutional Court finds itself at the borderline between law and politics. On the one hand, it is a genuine court in the constitutional sense, an institutionally autonomous state body which is independent of the legislature and of the executive/administration. It bases its decisions solely on the law, notably on the Constitution as the highest-ranking norm in the national legal order. On the other hand, however, one must not overlook that the decisions handed down by the Constitutional Court tend to have considerable political impact.

This is true in particular when it comes to its competence to review the constitutionality of laws, i.e. acts of the democratically legitimized legislator. In this respect, the Constitutional Court finds itself opposed to Parliament and government and/or the political parties which form the government as well as the parliamentary majority of the day. When reviewing laws for their constitutionality, the Constitutional Court is held to respect the legislator's freedom to design its own policies. It is not for the Constitutional Court to assess the political expediency or meaningfulness of any legal provision. Even an inexpedient law need not *eo ipso* be unconstitutional. However, the Constitutional Court must ensure adherence to the Constitution. If the Constitutional Court finds a legal provision to be in contradiction with the Constitution, it must repeal it as being unconstitutional, even if this may appear to be politically inexpedient.

Especially when it comes to safeguarding fundamental rights, the assessment of the constitutionality of laws often raises issues which are difficult to evaluate. And these issues, too, must be answered by the Constitutional Court. Typically, constitutions – and Austria is no exception – contain a wealth of general notions from which it is rarely possible for the legislator to derive concrete instructions to act. However, one would miss the point if one were to argue that, because of their non-discreetness, these parts of the constitution do not have a binding effect on the legislator. While the discretion that is left to the legisla-

¹⁴ ECJ Case C-33/76, Rewe [1976], 1989 (1998).

tor by these vague provisions is extensive, it can still be delimited. In this respect, it is the task of the Constitutional Court to gauge the leeway which is afforded to the legislator by the constitution and to determine whether the limits of the discretionary scope have been exceeded. To the extent that conformity with the normative contents of the constitution can be assessed, the Constitutional Court must decide on behalf of the legislator. Areas falling under the legislator's discretion are not subject to review by the Constitutional Court.

One would be mistaken to see this review function of the Constitutional Court as being in contradiction with the democratic principle. On the contrary, the judicial review of norms by the Constitutional Court actually serves as a vehicle to implement the democratic principle, inasmuch as the provisions of the constitution which bind the legislator and impact its actions, are carried by a much broader democratic consensus. The binding effect which the constitution has on the legislator is at the same time a binding effect which an act of higher democratic legitimation has on the democratically legitimized legislator. The Constitutional Court therefore exercises a democratic function whenever it reviews the legislator's adherence to the Constitution.¹⁵

Constitutions inherently do not lend themselves to ready amendment. What is "enshrined" in the constitution is protected by a special guarantee of continued existence. Politically, this guarantee implies the protection of a qualified minority vis-à-vis a merely absolute majority. Here, the fundamental rights and freedoms come to mind. This protective function of the constitution would remain ineffectual if the Constitutional Court were to exclude "political" questions from its scope of review out of consideration for the democratically legitimized legislator. It is especially for democratic reasons that the Constitutional Court must not refuse this task.

X.

Austria's membership in the European Union has tangibly affected the judicial review carried out by the Constitutional Court.

The Constitutional Court's power to repeal laws on the grounds of unconstitutionality has not been changed in principle. The subject and standard of judicial review by the Constitutional Court have remained the same:

Neither is the Constitutional Court allowed to assess, beyond Austrian laws, legislative acts of the European Union by the standard of the Austrian constitution, nor does Union law constitute a standard for the constitutionality of laws – leaving aside the Charter of Fundamental Rights (VIII.). This legal situation reflects the separation and autonomy of national law and Union law.

¹⁵ Korinek, Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen, Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 39 (1981) 7 (45 et seq.).

However, laws which transpose European legal acts, in particular directives, into Austrian law can only be assessed by the standard of the Austrian constitution in as far as there are no mandatory requirements of Union law to the contrary.¹⁶ This limitation results from the fact that the national legislator, when implementing Union law, is bound in a double manner: by the requirements of Union law and by the limits set by the national constitution.

In the event that a national law is inconsistent with Union law and with the national constitution, the monopoly of the Constitutional Court to repeal unconstitutional norms competes with the obligation of every national court to desist from applying national provisions which conflict with Union law. This obligation emerges directly from Union law; it conflicts with national provisions compelling national courts to refer the norm to the Constitutional Court for a judicial review of its constitutionality, thereby preventing it from upholding the supremacy of Union law (whether independently or in cooperation with the Court of Justice of the European Union).¹⁷

This however, it not to mean that the judicial review of norms as to their constitutionality has altogether lost its significance in the European Union. For one, there is a host of different areas of law that are not covered by the scope of Union law and where the national constitution has retained its function as the highest-ranking determinant. Moreover, the supremacy of Union law is just a “minimum guarantee“ which, in the opinion of the Court of Justice of the European Union, does not provide adequate assurance for its unlimited application.¹⁸ The primacy of Union law in individual cases does not discharge Member States from their obligation to adjust their legal order also formally to the requirements of Union law, either through parliament or by any other constitutional procedure (including judicial review by the constitutional court).

РЕЗЮМЕ

Федеральная Конституция Австрии, несмотря на некоторые недостатки, доказала свою жизнеспособность в качестве основы правопорядка Австрийской Республики. В то же время следует отметить, что основные элементы современного конституционного государства не закреплены в писаной Конституции и вытекают лишь из прецедентного права Конституционного Суда. Всеобщие принципы Федеральной Конституции - принципы (представительной) демократии,

¹⁶ VfSlg. 15.106/1998, 17.001/2003, 17.022/2003.

¹⁷ ECJ Case C-348/89, Mecanarte [1991], I-3277 (I-3313); cf. most recently ECJ joined cases C-188/10 and C-189/10, Melki and Abdeli [2010], I-5667.

¹⁸ ECJ Case C-102/79, Commission vs. Belgium, [1980], 1473 (1487).

республиканской формы правления, федерализма и верховенства права - являются основой конституционного строя и служат в качестве критериев для рассмотрения остальной части (писаного) конституционного права.

Относительно принципов демократии, федерализма и верховенства права существуют определенные проблемы, в том числе из-за членства Австрии в Европейском союзе:

Со вступлением в Европейский союз правовая система Австрии стала открытой для права ЕС, органы которого не имеют тот же уровень демократической легитимации, как органы демократических национальных государств.

В Австрии принцип федерализма реализован не полностью. Распределение полномочий между федерацией и землями не соответствует требованиям, которым необходимо следовать при имплементации права Европейского союза.

Относительно вопросов верховенства права следует отметить, что под влиянием права Европейского союза управляемое законами государство преобразовывается в государство, управляемое судами, в котором положение независимых судов заметно усиливается по сравнению с положением законодательной и исполнительной власти.

Конституционная юрисдикция является важнейшей характерной особенностью демократического правового государства. Судебный контроль над конституционностью законов служит обеспечению соблюдения правил игры в политическом процессе.

Значение судебного контроля, осуществляемого Конституционным Судом, уменьшается, так как членство Австрии в Европейском союзе релятивизировало функцию Конституции в качестве источника права, имеющего высшую юридическую силу. Изменения в рамках права Европейского союза, которые, по существу, выходят за рамки законодательства ЕС, принятого после вступления Австрии в Европейский союз, ограничены основополагающими принципами Федеральной Конституции. Что касается Австрии, следует отметить, что любое дальнейшее развитие права Европейского союза должно считаться полным пересмотром, требующим общественного согласия путем национального референдума.

Ungeachtet mancher Mängel hat sich die österreichische Bundesverfassung als tragfähige rechtliche Grundordnung der Republik Österreich bewährt. Wichtige Elemente eines modernen Verfassungsstaates sind allerdings nicht im geschriebenen Verfassungstext niedergelegt, sondern ergeben sich nur aus der Rechtsprechung des Verfassungsgerichtshofes. Diese sogenannten Grundprinzipien der Bundesverfassung – (repräsentative) Demokratie, Republik, Bundesstaat und Rechtsstaat – bilden die verfassungsrechtliche Grundordnung, an der sich das sonstige (geschriebene) Verfassungsrecht messen lassen muss.

Demokratie, Bundesstaat und Rechtsstaat stehen vor großen Herausforderungen, die auch mit der Mitgliedschaft Österreichs in der Europäischen Union im Zusammenhang stehen:

Mit dem Beitritt zur Europäischen Union hat Österreich seine Rechtsordnung dem Recht der Europäischen Union gegenüber geöffnet, deren Organe jedoch kein solches Maß an demokratischer Legitimation erreichen, wie es einer staatlich verfassten Demokratie entspricht.

Der österreichische Bundesstaat ist nur halbherzig verwirklicht. Die Kompetenzverteilung zwischen Bund und Ländern wird den Anforderungen, die sich aus der Umsetzung des Unionsrechts ergeben, nicht gerecht.

Der Rechtsstaat droht durch Überregulierung entwertet zu werden. Unter dem Einfluss des Rechts der Europäischen Union wandelt sich der Gesetzesstaat zu einem Justizstaat, in dem die Position der unabhängigen Gerichte gegenüber Gesetzgeber und Regierung deutlich aufgewertet ist.

Ein wesentliches Element des demokratischen Rechtsstaates ist die Verfassungsgerichtsbarkeit. Die richterliche Prüfung der Verfassungsmäßigkeit von Gesetzen dient dem Zweck, die Einhaltung der Spielregeln des politischen Prozesses zu gewährleisten.

Soweit sich durch die Mitgliedschaft Österreichs in der Europäischen Union die Funktion der Verfassung als ranghöchste Rechtsquelle relativiert hat, ist auch die verfassungsgerichtliche Gesetzesprüfung berührt. Änderungen des Unionsrechts, die über den mit dem EU-Beitritt übernommenen *acquis* qualitativ hinausgehen, sind jedoch durch die Grundprinzipien der Bundesverfassung Schranken gesetzt. Eine derartige Weiterentwicklung des Unionsrechts wäre aus österreichischer Sicht als (neuerliche) Gesamtänderung zu qualifizieren, die der Zustimmung des Volkes in einer Volksabstimmung bedürfte.

La Constitution fédérale de l'Autriche, malgré quelques lacunes, a prouvé sa vitalité en tant que base du droit de la République autrichienne. Mais faut-il noter que les éléments fondamentaux d'un État de droit moderne ne sont pas inscrits dans la Constitution écrite et ne découlent que de la jurisprudence de la Cour constitutionnelle. Les principes généraux de la Constitution fédérale : les principes de la démocratie (représentative), de la forme républicaine de la gouvernance, du fédéralisme et de la primauté du droit sont les fondements du système constitutionnel et servent de critères pour le reste du droit constitutionnel (écrit).

Concernant les principes de la démocratie, du fédéralisme et de la suprématie du droit, certains problèmes existent, y compris du fait de l'adhésion de l'Autriche à l'Union européenne:

Avec l'adhésion à l'Union européenne, le système juridique de l'Autriche est devenu ouvert pour le droit de l'UE, le niveau de légitimité démocratique des organes de laquelle n'est pas le même, que celui des organes des États démocratiques nationaux.

En Autriche, le principe du fédéralisme n'est pas complètement mis en œuvre. La répartition des compétences entre la fédération et les provinces (terres) ne correspond pas aux exigences auxquelles il faut se conformer lors de l'implémentation du droit communautaire.

En ce qui concerne la question de la suprématie du droit il est à noter que sous l'influence du droit de l'Union européenne l'État régi par les lois se transforme en État régi par les tribunaux, dans lequel la position des tribunaux indépendants se renforce nettement par rapport à la position des pouvoirs législatif et exécutif.

La juridiction constitutionnelle est une particularité caractéristique essentielle d'un État de droit démocratique. Le contrôle judiciaire de la constitutionnalité des lois sert à l'assurance du respect des règles du jeu dans le processus politique.

La signification du contrôle juridictionnel exercé par la Cour constitutionnelle diminue du fait que l'adhésion de l'Autriche à l'Union européenne a relativisé la fonction de la Constitution comme source du droit ayant une force juridique suprême. Les amendements, apportés dans le cadre de la législation de l'Union européenne, qui, en fait, vont au-delà de la législation européenne et qui sont adoptés après l'adhésion de l'Autriche à l'Union européenne, sont limités par les principes fondamentaux de la Constitution fédérale. Quant à l'Autriche, il est opportun de dire que tout développement postérieur du droit de l'Union européenne doit être considéré comme révision complète, nécessitant le consentement de la société par le biais d'un référendum national.

CONDITIONALITY AND LIVING CONSTITUTION

Sergio BARTOLE

The concept of the living Constitution is frequently used by scholars who are not completely satisfied with a formalistic approach to the study of the constitutional law.¹ They think that the knowledge of the law actually in force requires something more than the reading and the construction of the constitutional and legislative texts and implies the reconstruction of the effective legal practice through the understanding of the acts and the behaviours of the constitutional actors. It is a frequently accepted idea that only the living Constitution can allow the lawyers to catch the effective meaning of the texts and the words and expressions adopted and used by the legislator, or – at least – the meaning which is given to those texts, words and expressions by the prevailing interpretation.

There is a risk in sticking to the concept of the living Constitution as such without critically analyzing the possible gap between it and the text of the Constitution. If this gap derives from our initial inability of realizing all the possible meanings which can be given to the constitutional text in the frame of the constitutional principles there is the risk of substituting a betrayal of the Constitution for its correct compliance. Certainly the historical evolution of the society and of the relations between the power and the persons can concur in modifying the meaning of the Constitution in terms which we were not able to appreciate at the time of the entering in force of the Constitution itself. But in any case the correctness of our choices is controlled by the principles of the Constitution.² When we accept practices, acts and behaviors which are not in conformity with the principles of the Constitution, our choices are clearly a betrayal of the Constitution itself. Therefore we have to be very prudent in handling the concept of the living Constitution avoiding the substitution of any possible occasional practice for the Constitution itself.

The concept of the living Constitution is a useful tool in dealing with the effective practice of the Constitution. It is made up by the acts and behaviors of the constitutional authorities, by the conventions of the Constitution agreed between them, by the case – law of the Constitutional Court. It is at the same time a yardstick of the credibility of

¹ For two different approaches Strauss D.A., *The living Constitution*, Oxford 2010, and Ackerman B., 2006 Oliver Wendell Holmes Lectures, *The living Constitution*, Harvard Law Review 2007, 120, 1738.

² Dworkin R., *A matter of principle*, Cambridge 1985.

our construction of the Constitution and a symptomatic evidence of the compliance (or of the non compliance) of the Constitution itself. The usefulness of the concept is especially evident when we are dealing with the developments of the interpretation of the Constitution which imply various and serious transformations of the meaning given by the interpreters to the provisions of the Constitution. As a matter of fact these developments determine a transformation of the Constitution which is implemented in the effective practice (or a transformation of constitutional practices aimed at implementing the provisions of the Constitution). Through the use of the concept we are in the position of understanding the meaning of the Constitution which the interpreters adopt effectively.

While in the internal life of the constitutional order of a State the interpretations of the provisions of the Constitution which are conflicting with the constitutional principles can always be sanctioned by the authorities entrusted with the task of judging the legitimacy and the constitutionality of the acts and of the behaviors of the governing bodies of the State, the concept of the living Constitution is particularly useful for those international or supranational institutions which are given the power of verifying the conformity of the overall constitutional practice of a State with its Constitution or, better, with the principles which are supposed to be enshrined in its Constitution. Therefore, while – for instance – a constitutional court has to check the constitutionality of individual acts in the light of specific constitutional provisions, the mentioned international institutions have the responsibility of judging the conformity with the principles enshrined in the Constitution of the overall constitutional practice of a State or of a particular branch (judiciary, parliament, executive) of the State.

The purpose of this contribution is to demonstrate the usefulness of the concept of the living Constitution for those international institutions which are called to verifying the compliance with the principle of conditionality by those States which have a special accountability in the matter of the observance of the constitutional principle under the control of those international authorities.

Conditionality is the content and the possible effect of specific provisions (frequently named by the doctrine “HR clauses“)³ of international treaties or agreements whose purpose is the adoption of “a basic strategy through which international institutions promote compliance by national governments “ of the principles of the European constitutionalism or of the main elements of the economic free market.⁴ This strategy is especially interesting when commercial relations and admission criteria of the new members of the European Union are at stake. On one side, the Union looks at establishing preferential trade schemes with States which are not members of the Union itself in

³ Zwagemakers F., The EU’s conditionality policy: a new strategy to achieve compliance, IAI Working Papers 12/3, January 2012, 3.

⁴ Checkel J.T., Compliance and conditionality, ARENA Working Papers WP 00/18, 1.

view of the incentive of the compliance of the principles of the protection of the human rights and of the democracy by those States, even if the matters dealt with in the trade treaties and agreements fall outside the scope of a policy of promotion of the constitutionalism.⁵ When the concerned third States are ready to accept the insertion of the HR clauses in the international schemes which regard them, it happens frequently that at the moment of the necessary compliance with the strategy of the conditionality they suffer the request of the implementation of their engagements as a violation of their own sovereignty which is not connected with the field of the trade relations. On the other side, the adoption of the strategy of the conditionality in the matter of the human rights and democracy is conceived as an essential factor in view of the promotion of the cohesion of the European Union at the moment of the accession to it of new member States. While in the EU documents stability and security in the European interstate relations are seen as essential purposes of the commitment of the Union to the enlargement⁶, the link which is established between accession of the new member States and the compliance with the principles of the protection of the human rights and of democracy is aimed at the implementation of the mission of the European Union for the common guarantee and observance of the European Constitutional Heritage⁷ by all the participants in the creation of the European Union.

As it is frequently remarked, there is a difference between the modalities and the purposes of the strategy of the conditionality concerning the accession of new member States to the European Union and the policies regarding trade agreements with third States. In this last case special attention is paid to the protection of the human rights and of the principles of the democracy because the establishment of a constitutional structure complying with the principles is considered “a facilitating condition for accomplishing development through trade”.⁸ Instead, when the accession of the new member States to the European Union is at stake, the purpose of the strategy is the take-off of a process of transformation which, specially in the post-communist constitutional orders of the Central and Eastern Europe, can make these countries “more receptive to the EU institutional paradigms....because EU models are being presented at the same time as CEE policy-makers are seeking institutional models to replace or to create new structures”.⁹

Therefore the documents concerning the accession (see, for instance, the document

5 Look for all this matter Brandtner B. and Rosas A., Human rights and the external relations of the European Community: an analysis of doctrine and practice, *European Journal of International Law* 9 (1998), 468.

6 Sjursen H., Why expand? The question of legitimacy and justification in the EU's enlargement policy, *JCMS* 2002, 40, 3, 491, 499.

7 Pizzorusso A., *Il patrimonio costituzionale europeo*, Bologna 2002.

8 Zwagemakers F., *The EU's conditionality policy...*, 3.

9 Grabbe H., How does Europeanization affect CEE governance? Conditionality, diffusion and diversity, *Journal of European Public Policy* 8, 6 december 1013, 1014.

adopted at Copenhagen in 1993 by the European Council) go farther than the HR clauses of the trade agreements and state “the «stability of institutions guaranteeing democracy, the rule of law, human rights and respect for an protection of minorities» as the *sine qua non* political condition of the EU accession”.¹⁰ It is evident that this choice is aimed at establishing a common political organization of Europe which requires to all the member States to share the same constitutional principles and values. The extension of the criteria of the accession has a relevant impact as far as it touches the overall structures of the State concerned, its efficacy and functionality. The political actors are confronted by the necessity of balancing the internal costs of the compliance with the Copenhagen criteria and the objective of the accession: they cannot complain of a violation of their sovereignty as far as they consciously accepted to enter in the race of the accession,¹¹ while the third States which are partners of the trade relations with EU are more easily offended by the absence of a direct connection between the economic content of the trade agreements and the HR clauses which are frequently seen by them as the result of external imposition.

As a matter of fact, conditionality implies the establishment of a relation between the country which is required to comply with a stated yardstick and the international organization which proposed this yardstick. The country concerned feels that its sovereignty is at stake and can have the feeling that it is suffering coercion¹². The purpose of this paper is to deal specially with the enlargement conditionality that is with the adoption of that strategy with regard to the accession of new member States to the European Union. Mention of the adoption of the conditionality in the case of the trade negotiations was and has been made only for the completeness of the presentation. In any case it is evident that the scientific literature in the matter is correct when underlines that “compliance with the enlargement conditionality is in the main a matter of voluntary choice, “ at least as far as “ all applicant countries have the option of not entering the European Union and thus of not complying with the enlargement conditionality“¹³. A country which envisages the possibility of the adhesion to the European Union is in some way ready to accept the limitation of its sovereignty which, first of all, the process of joining the Union and, moreover, the European Union membership imply. The acceptance of the binding link of the enlargement conditionality is based on the exigency of the new Union to shape its own internal order according to the constitutional principles commonly accepted by its member States. Therefore it is easily understandable the choice of

10 Schimmelfenning F., Engert S., Knobel H., Costs, commitment and compliance: the impact of EU democratic conditionality on Latvia, Slovakia and Turkey, *JCMS* 2003, 41, 3, 495, 497.

11 Schimmelfenning F. and others, Costs, commitments and compliance, *passim*.

12 Agne' H., European Union conditionality: coercion or voluntary adaptation? *Alternatives: Turkish journal of international relations*, 8, 1, spring 2009, *passim*.

13 Agne' H., European Union conditionality...., 8.

the Union to establish a special machinery of monitoring the compliance with the strategy of the conditionality both in the process of the accession of the new member States and in the following time of acquaintance with the main principles of the organization after the accession. The functioning of the system of monitoring is certainly different from the practice of the political dialogue which is frequently adopted by the European Union in dealing with the third States in the implementation of the HR clauses enclosed in the trade agreements.¹⁴

Dealing with conditionality, the authors frequently use the expression “political conditionality”¹⁵. It is true that the developments of the strategy of the conditionality have left – because of the open texture of the relevant terms of reference – a lot of discretion to the authorities of the international organizations interested in its compliance which often requires political choices. But it also true that the activity of those authorities is bound to stick to two factors which are in some way stable terms of reference of the monitoring process. On one side, the yardstick of the monitoring is certainly flexible and elastic but it implies the reference to the European Constitutional Heritage whose content has acquired a consolidated meaning which cannot be easily forgotten. Its use is necessarily under the control of the legal scientific community which is the guarantor of the continuity and of the respect of its practical and operational meaning. Moreover the attention of the public opinion is earnestly stimulated because the terms of the civic cohabitation is at stake with regard to the citizens of the interested State and those of all the States which are members of the monitoring institutions. On the other side, the attention of the monitoring authorities is focused on the effective developments of the constitutional life of the concerned State. Therefore they are necessarily engaged in an investigation aimed at carry out an inquiry about the coherence of the State’s constitutional practices with the mentioned yardstick. The monitoring process requires an attentive overview of those practices which should be inspired to the criteria of the objectivity and of the nearly scientific precision. Whatever is the purpose of the adoption of the conditionality strategy; these exigencies have to be respected. But they are especially present when the process of accession of new member States to the European Union is at stake because it affects the overall organization of the interested national legal order.

If we want to identify the conceptual tools which are taken into consideration by the authorities entrusted with the task of verifying the compliance with the yardstick of the conditionality in regard to the admission of new member States to the European Union, we have to look at the experience of the process of the enlargement of the Union. The authors have correctly underlined the fact that the Copenhagen criteria as defined in 1993

14 Zwagemakers F., *The EU’s conditionality policy...*, 6.

15 Sadurski W., *Accession’s democracy dividend: the impact of the EU enlargement upon democracy in the new member States of Central and Eastern Europe*, *European Law Journal* 10, 4, July 2004, 371, 374.

have played an essential role in the buttressing of these strict requirements “by the tight monitoring procedures detailing the satisfaction of the political conditions by candidate countries”¹⁶. It was the stability of democratic institutions at stake with special attention to the rule of law, the independence of the judiciaries, the adoption of anti-corruption measures and the enforcement of the human rights and of the minorities’ protection. To these elements the authors add “the strengthening of the state capacity”, which implies the relevance of the administrative reforms in view of the implementation of the obligations of the conditionality as we can see in the period of the post-accession to the European Union of the new member States.¹⁷

Even if “the EU’s political conditionality did not embrace all tasks of democratic consolidation”, and specially “the working of democratic government” and “the competitive role of political parties on the basis of genuine and unrestricted pluralism”¹⁸, the monitoring process requires that attention is paid not to piecemeal details of the organization of the concerned States but to the overall aspects of the relations between the authorities and the citizens and between the citizens themselves in those legal orders. This feature is particularly evident in the conclusion adopted by the European institutions in rejecting the application of Slovakia for EU membership negotiations in December 1997. “Slovakia does not fulfill in a satisfying manner the political conditions set out by the European Council in Copenhagen, because of the instability of Slovakia’s institutions, their lack of rootedness in political life and the shortcomings in the functioning of its democracy”¹⁹. The case of the refusal of considering satisfying the compliance of Latvia with the criteria of Copenhagen also offers an example of the “broadly focused” EU’s conditionality in comparison with the piecemeal approach of other international organizations²⁰. For instance, the attention of the OSCE and of the Council of Europe was specially focused on the requirements of the naturalization in view of the adoption of a new citizenship law, and on the protection of the minorities.²¹ In any case both in Latvia²² and in Slovakia²³ the development of the process of accession can be understood only if we take into consideration the relations between the political parties and the con-

16 Pridham G., Status quo bias or institutionalization for reversibility?: the EU’s political conditionality, post-accession tendencies and democratic consolidation in Slovakia, *Europe-Asia Studies* 60, 3, May 2008, 423, 433, and ID, Securing the only game in town: the EU’s political conditionality and democratic consolidation in post-soviet Latvia, *Europe-Asia Studies* 61, 1, January 2009, 51, 60.

17 Pridham G., Securing the only game..., 70 – 71, and ID., Status quo bias or institutionalization..., 440.

18 Pridham G., Securing the only game..., 81.

19 European Commission, Report July 1997, 77 (which is at the basis of the decision adopted in December 1997).

20 Pridham G., Securing the only game..., 69.

21 Schimmelfenning and others, Costs, commitment and compliance....., 510 – 511.

22 Schimmelfenning and others, Costs, commitment and compliance....., 510, and Pridham G., Securing the only game..., 69.

23 Pridham G., The European Union’s democratic conditionality and domestic politics in Slovakia: the Meciar and Dzurinda governments compared, *Europe-Asia Studies* 54, 2, 2002, 203.

stitutional institutions of the interested States in the internal perspective of the evolution of the democratic life and in the context of the negotiations with the European Union.

The opinion is largely shared that “Latvia’s conditionality before EU entry constituted imperfect implementation”²⁴, and a similar opinion is expressed about the outcome of political conditionality by the actual accession of Slovakia in May 2004 which is defined “one of imperfect implementation”²⁵. As a matter of fact these are only individual examples of a general situation which justifies the feeling that there is “a generalized sense of frustration regarding the state of democracy in the new member States”²⁶. Even before the conclusion of the process of the adhesion of many Central Eastern Europe’s Countries to the European Union the authorities of this organization had the fear that it would be difficult to complete in the new member States the implementation of the Copenhagen criteria. The accession deprived the leverage of the conditionality of an important factor, leaving space to the internal difficulties for the acceptance of the traditional principles of the European constitutionalism. The decision of continuing the monitoring of the internal situation of the new member States specifically interested Romania and Bulgaria,²⁷ while with the Treaty of Amsterdam was adopted the well Known art. 7 TEU according to which the union is given the competence of imposing sanctions against member States who do not respect the fundamental principles of democracy and the rule of law as they are stated in the previous art. 6.

The purpose of this provision is evident. European Union has to establish and actually be a political community whose member States share the common principles of constitutionalism in view of insuring the stability of their reciprocal relations and the general acceptance of the common institutions which have to be shaped according to those common principles. The Union has not yet adopted against one of its member States the sanctions provided for by art. 7. But its Members decided in one occasion measures which resembled those sanctions without following the decision-making process regulated by the TEU²⁸. The measures concerned Austria and were adopted in January 2000 in presence of the formation of a Cabinet which included representatives of the FPÖ which was supposed to be “a right wing populist political party with extremist expressions”²⁹. As a matter of fact party officials were reported to have made “statements that can be interpreted as xenophobic and which indicate praise for Austrian Waffen SS veterans.”³⁰

24 Pridham G., *Securing the only game...*, 69.

25 Pridham G., *Status quo bias...* 438.

26 Sadurski W., *Accession’s democracy dividend...*, 373.

27 Pridham G., *Securing the only game...*, 57.

28 Regan E., *Are EU sanctions against Austria legal*, *Zeitschrift fur offentliches recht*, 55 (2000) 323.

29 Duxbury A., *Austria and the European Union – The report of the “three wise men”*, 2000 *Melbourne Journal of international law* 10, quoting the Report of the three wise men.

30 See Bantekas I., *Austria, the European Union and Article 2(7) of the UN Charter*, *ASIL Insights* February 2000.

After some months in June 2000 the fourteen members of the EU requested a report on the situation in Austria to Martti Ahtisaari, Jochen Frowein and Marcelino Oreja. These three “ wise men “ complied with their task investigating at the same time the extension of the legal obligations of Austria in the field of human rights on the basis of the international legal instruments subscribed and ratified by the Country, on one side, and, on the other side, the status of the constitutional and legislative provisions in the matter. The three figures elaborated a positive judgement of the Austrian attitude in the field and suggested that the measures adopted by the member States of the EU should be lifted, notwithstanding the fact that the FPÖ could still be defined as a right wing populist party with extremist expressions and many of its members disregarded the existing guarantees of the human rights with public declarations and legal initiatives (for instance, the use of the libel procedures to prevent political opponents criticizing the Government)³¹ .

The Austria case suggests that even the mere fact of the participation of a right wing populist political party to the Cabinet of a member State can put in danger the status of this Member in the frame of the European Union and can allow the other member States to adopt specific sanctions against the concerned Country. Apparently the formal conformity with the principles of the European Constitutional Heritage is not at stake but even the mere possibility that formally correct constitutional provisions could be interpreted according to the unacceptable and regrettable ideologies of a political party (at the moment in the Government) can authorize the decision of adopting sanctions affecting the status of the interested member State in the Union.

It is well known that it happened in the past that also a political and personal change in the composition of the Government of a State affected and modified the relations between this State and the European Union. The case of Slovakia is well known: the substitution of the Dzurinda Cabinet for the Meciar Cabinet changed the perspective of the future adhesion of that State to the Union,³² and, notwithstanding the fact that at that moment “the outcome of the political conditionality by the actual accession in May 2004 was one of imperfect implementation“³³ , Slovakia was accepted as a member State of the European Union. Also “ Latvia’s new democracy could not be seen as a consolidated one by the time the Country joined the EU in 2004“³⁴ , but in its case the governing bodies of the Union thought too that it was possible to adopt a positive and favourable decision. Certainly in both States important changes and measures of constitutional innovation had been taken but a relevant role was displayed in Slovakia and in Latvia by the political will of the parties and by the explicit acceptance of the European constitutional principles as leading guidelines of the internal policies.

31 Duxbuty A., Austria and the European Union....

32 Pridham G., The European Union’s democratic conditionality.... 214.

33 Pridham G., Status quo bias..., 438.

34 Pridham G., Securing the only game in the town..., 64.

Rebus sic stantibus, it is evident that in analyzing the effects of the conditionality strategy in the frame of the European Union we have to take into consideration at least two different perspectives. On one side, we cannot restrict the study of the concerned experiences to the formal aspects of the process of constitutional innovation in the new member States (that is, the texts of the constitutional and legislative reforms they adopted), but we have to consider the practical implementation of these reforms, its delays and its possible deviations from a correct compliance with the principles of The European Constitutional Heritage which should be respected. On the other side, it is clearly necessary to approach the experience of the new Members looking at the same time at the working of the conditionality machinery in the pre-accession years and in the post-accession years.³⁵ This last perspective implies that in deciding the accession of the new member States the EU authorities recognized that there was a gap between the will of accepting the Copenhagen criteria and their effective constitutional and legislative observance. The results of the accession process suggested the adoption of “new mechanisms like sanctions and infringement procedures”.³⁶ But these novelties are restricted to Romania and Bulgaria, whose performances are subject to a monitoring process even in the post-accession time.³⁷ In other cases the ordinary machinery governing the relations between the member States and the European Union institutions are at stake, as they are – for instance – regulated by articles 6 and 7 TEU. Moreover we cannot forget that also other European institutions, that is OSCE and Council of Europe, are concerned and their interventions obviously bypass the distinction between pre-accession and post-accession to EU times and are traditionally attentive not only to the formal effects of the conditionality but also to the effective practice of the authorities of the States concerned in the matters affected by the strategy of the conditionality.

Art. 7 explicitly speaks about the evident risk of grave violations of the fundamental principles of the EU by a member State in view of the opening of the procedure aimed at the determination of the sanctions provided for by the same article. The existence of such a risk allows interventions of monitoring whose negative results can authorize the suspension of some rights deriving from the implementation of the treaties in favour of the Member State interested.

Therefore, as it is confirmed by the Austrian case, the implementation of the system of the conditionality depends not only on the effective and concrete existence of violations of the fundamental principles of the European Constitutional Heritage but also on political declarations of intentions and constitutional programs and on interpretation of

35 Sedelmeier U., Pre-accession conditionality and post-accession compliance in the new member States: a research, *Après enlargement: legal and political responses in Central and Eastern Europe*, ed. W. Sadurski, J. Ziller, K. Zurek, Florence, European Institute 2006, 149.

36 Pridham G., *Securing the only game in town...*, 57.

37 Sedelmaier, *Pre-accession conditionality and post-accession compliance...*, 147.

legislative and constitutional texts. In Austria was apparently sufficient to justify the adoption of the sanctions the inclusion in the governing coalition of a political party whose cultural and ideological inspiration could arise the risk of concrete violations of the European values. Even if the approval of questionable legislative and constitutional reforms was not a stake, the possibility of deviating interpretations of the existing legal order was apparently sufficient to give the basis for a restrictive European policy of conditionality against Austria.

The elaboration of these considerations suggests two conclusions about the practical implementation of the conditionality machinery. On one side, it is evident that the necessary monitoring process regards not only specific and individual acts adopted in violation of the fundamental European principles but also, and specially, the overall conception of the State and of its functioning that the cultural and political attitude of the authorities of the concerned State implies. Moreover, on the other side, the process requires both the consideration of the legislative and constitutional texts and their practical and effective application as it is directed by the doctrines and the theories of the constitution which support and underpin the interpretation of the texts.

A good example is offered by the recent developments of the monitoring of Romania. At the moment of the accession of this Country to the European Union in 2007, it was accepted that further work was needed to address still pending shortcomings in some key area of the legal and constitutional system. The Cooperation and Verification Mechanism was established to monitor progress in the concerned areas. In its Report to the European Parliament and the Council 18 July 2012³⁸ the European Commission clearly underlined that the actions of the Romanian authorities “ raised serious doubts about the commitment to the respect of the rule of law or the understanding of the meaning of the rule of law in a pluralist democratic system “, while “ political challenges to judicial decisions, the undermining of the constitutional court, the overturning of established procedures and the removal of key checks and balances have called into question “ the government’s compliance with its engagements. It deserves attention the fact that the Report does not mention only actual and concrete acts and facts, but it speaks also about the meaning or understanding of the meaning of the rule of law, political challenges to judicial decisions and the undermining of the Constitutional court. The European Commission is evidently making reference to the possible different interpretations of the constitutional provisions, to the possible different conceptions of the rule of law, to the political attitudes in relation to the judicial decisions and the jurisprudence of the Constitutional court. It invites our attention to focus on the behavior of the Romanian authorities.

In the meantime, on 6 July 2012, the Secretary general of the Council of Europe asked

³⁸ European Commission On progress in Romania under the Cooperation and Verification Mechanism, Brussels, 18.7.2012 COM (2012) 410 final.

the Venice Commission to provide an opinion on the compatibility with constitutional principles and the rule of law of actions taken by the Government and the Parliament of Romania in respect of the other State institutions. It is interesting underlining that the request did not make reference to individual and specific acts and actions of the Romanian Government and Parliament, but it called the attention of the Venice Commission to the overall behavior of those authorities in respect with the other State institutions.

In its conclusions³⁹ the Venice Commission was of the opinion that the examined events included ordinances, decisions and procedures “whose constitutionality is questionable, especially when are taken together in quick succession “. The Commission found worrying the extensive recourse to Government emergency ordinances which restricted the decision power of the Parliament and were aimed at bypassing the judgement of the Constitutional court when adopted with the same normative content of parliamentary statutes already submitted to the judgement of the Constitutional court. This use of the Government emergency ordinances aimed at immediately bringing in force normative provisions which were being under the examination by the Constitutional court looked particularly regrettable to the Commission because it was not in conformity” with basic principles of correctness derived from the rule of law and the separation of powers “. Same remarks deserved the events and several statements which demonstrated “a worrying lack of respect among representatives of State institutions for the status of other State institutions, including the Constitutional court as the guarantor of the supremacy of the Constitution.

“ The respect for a Constitution “, says the Commission, “ cannot be limited to the literal execution of its operational provisions. The very nature of a Constitution is that, in addition to guaranteeing human rights, it provides a framework for the State institutions, sets out their powers and their obligations. The purpose of these provisions is to enable a sooth functioning of the institutions based on their loyal cooperation...” in view of “ the interest of the State as a whole in mind, including, as a consequence, the interests of the other institutions and those of the parliamentary minority “.

Therefore the picture of the constitutional order which the bodies in charge of the monitoring process have to keep in mind is made up not only by the literal interpretation of the constitutional provisions but also by the doctrines and the theories which underpin the construction of those provisions, whose mere interpretation according to the original expressions and words of the text of the constitution is not possible; by the jurisprudence of the Constitutional court and the case law of the judges: by the conven-

39 EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, Opinion on the compatibility with constitutional principles and the rule of law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the law no.47/1992 regarding the organization and functioning of the Constitutional court and on the Government emergency ordinance on amending and completing the law no. 3/2000 regarding the organization of a referendum, CDL-AD (2012) 026, Opinion no. 685/2012, 17 December 2012.

tions of the Constitutions and, sometimes, by interpretative customs of the Constitution. All these elements are often taken into consideration as constituent part of the concept of the living constitution.⁴⁰ Is this concept useful to the monitoring authorities as far as it helps the interpreters in defining the picture of the practical and effective identity of a constitutional system? For instance, was the excessive use of Government emergency ordinances the result of a practice which appeared justified by political necessities (for instance, the implementation of the European engagements of Romania), and was it accepted by the Parliament which was conscious of its practical inability to provide to the urgent legislative exigencies? Or was that practice an explicit violation of the constitutional principles derived from the authoritarian attitude of the Government?

Probably, this last construction deserves our approval. The attitude of the Government is also at the starting point of the elaboration of the idea that the Government emergency ordinances are at the disposal of the Executive to allow the unilateral settlement of conflicts with other State institutions, the Constitutional Court included. Eventually the choice of pursuing the individual interests of an individual institution (instead of the interests of the State as a whole) hindered the establishment of fair and correct relations of mutual respect and loyal cooperation between the State's bodies. Does the knowledge of all these developments require the use of the concept of the living constitution in describing the compliance of the Romanian constitutional situation with the rule of law and the constitutional fundamental principles?

As a matter of fact, the concept of the living constitution is useful in catching the meaning of the constitution as it develops in time starting from its written text. It usually gives a picture of the results of the evolution of the constitutional system according to its physiological destination and in conformity with its principle. It is specially useful when the development of the constitutional events establishes in the effective practice a meaning of the constitution which cannot be entirely perceived sticking to the written text of the constitution without the intermediation of the doctrines and the theories of the constitution itself elaborated by the interpreters.

Romania is apparently a different case: according to the Venice Commission it shows many deviations from fundamental constitutional principles. Therefore we could conclude our investigation that the concept of the living constitution can be applied at the case at stake only in a negative way. That is that Romania exhibits traits of clear no-compliance with the values and principles which should be supported by the system of the conditionality in the frame of the European Union legal system. But our reasoning needs some qualifications.

If, on one side, Romania has many difficulties in complying with its European engagements, on the other side even the Venice Commission at the same time complains “about statements by public office holders which showed disrespect for the Constitutional

⁴⁰ Bartole S., *La Costituzione è di tutti*, Bologna 2012, 167.

court “, but recognizes that important decisions of that Court were implemented by the other State institutions. As it is frequently said, the compliance of the living constitution with the fundamental principles of the constitution depends, eventually, on the respect of the interpretation of those principles given by the highest authorities which are entrusted with the task of guaranteeing the observance of the constitution, for instance the Constitutional court, the Superior council of the judiciary and, sometimes, even the President of the Republic. Romania was at half way between a correct evolution of the constitutional system and a large disregard of the constitutional principles. The existence of a living constitution coherent with the principles of the Western European constitutionalism was really in danger but there were elements which could support the perspective of more positive developments of its constitutional system as it was confirmed by the Venice Commission warm welcoming of the fact that its interlocutors were of the opinion that constitutional and legislative reforms were required to ensure that “ a situation of danger for the constitution should not arise again “.

This conclusion is substantially supported by the Report of the European Commission 30 January 2013⁴¹ according to which “ the place of the Constitution and the Constitutional court has been restored “, insuring, on one side, continued respect of the Constitutional court as the guarantor of the supremacy of the Constitution and, on the other side, “ as well as the independence and stability of the judicial institutions including the prosecution “.

The reference to the problem of the possible existence of a living constitution conflicting with the fundamental constitutional principles is not – in any case – without justification. The Romanian case confirms what David S. Law underlined when, defining the written constitutions as “ aspirational or expressive “ documents, recognized the possibility that always some gaps exist between text and reality.⁴² Also the methodological suggestion we introduced finds justification in the case at stake. If “ judicialization and constitutionalization form a virtuous circle “⁴³, the existence of a constitutional jurisdiction has a relevant normative impact in promoting the implementation of the constitution and its case law offers indispensable empirical support to the knowledge of the practical and effective observance of the constitution. In absence of this support it is difficult pretending the existence of a true living constitution. In this way we come back again to the necessity of looking beyond the written text of the constitution according to a more realistic approach of the legal interpretation and research of which the concept of the living constitution is a part.

41 EUROPEAN COMMISSION, Report from the Commission to the European Parliament and the Council, On progress in Romania under the Cooperation and Verification Mechanism, Brussels 10.1.2013 COM (2013) 47 final.

42 Law D.S., Constitutions, The Oxford Handbook of empirical legal research, Peter Cane and Herbert M. Kritzer ed., Oxford 2012, 376, 380.

43 Law D.S., Constitutions..., 385.

В статье рассматриваются некоторые вопросы относительно понятий обусловленности и живой Конституции.

Раскрывая понятие живой Конституции, автор отмечает, что историческое развитие общества и отношений между властью и людьми может привести к таким изменениям смысла Конституции, которые невозможно было предусмотреть в момент ее вступления в силу. Одновременно подчеркивается, что, в любом случае, эти изменения должны соответствовать принципам Конституции. Соответствие живой Конституции указанным основополагающим принципам, в общем, обусловлено последовательным применением ее толкования, даваемым высшими органами власти, на которые возложена функция по обеспечению соблюдения последней. Это, в свою очередь, предполагает, что конституционное правосудие имеет определенное нормативное влияние на обеспечение реализации Конституции, и ее прецедентное право вносит существенный эмпирический вклад в аспекте приобретения знаний относительно практического и эффективного соблюдения последней. При отсутствии такого содействия трудно представить наличие настоящей живой Конституции.

Понятие обусловленности раскрывается как содержание и возможное действие определенных положений международных договоров или соглашений, целью которых является формулирование “основной стратегии, посредством которой международные организации обеспечивают соблюдение национальными правительствами” принципов европейского конституционализма или основных составляющих свободного рынка.

Относительно обсуждаемого вопроса автор отмечает, что Европейский союз должен создать и в действительности стать политическим сообществом, государства-участники которого основываются на общих принципах конституционализма, учитывая необходимость обеспечения стабильности их взаимных отношений и всеобщего признания определенных общих институтов, формирующихся в соответствии с указанными принципами.

Обсуждая вопросы, касающиеся функции по контролю за соблюдением критериев обусловленности при вступлении новых государств-участников в Европейский союз, автор отмечает, что в ходе этого процесса необходимо принимать во внимание не отдельные частичные вопросы организации соответствующего государства, а все аспекты отношений между властью и гражданами, а также между самими гражданами в соответствующих правовых системах.

Im Beitrag werden einige Fragen erörtert, die die Begriffe der Determiniertheit und der lebenden Verfassung betreffen.

Der Verfasser erläutert den Begriff der lebenden Verfassung und bemerkt dabei, dass die geschichtliche Entwicklung der Gesellschaft und der Beziehungen zwischen der Macht und den Menschen solche Veränderungen des Sinns der Verfassung herbeiführen können, die unmöglich im Zeitpunkt ihres In-Kraft-Tretens konnten vorausgesehen werden. Zugleich wird hervorgehoben, dass diese Veränderungen jedenfalls den Prinzipien der Verfassung zu entsprechen haben. Die Übereinstimmung der lebenden Verfassung mit den erwähnten grundlegenden Prinzipien ist im Allgemeinen durch eine konsequente Anwendung ihrer Auslegung durch die obersten Organe der Macht bedingt, die für die Einhaltung der Verfassung sorgen müssen. Dies setzt seinerseits voraus, dass die Verfassungsgerichtsbarkeit einen bestimmten normativen Einfluss auf die Sicherstellung der Umsetzung der Verfassung ausübt und ihr Präjudizienrecht einen wesentlichen empirischen Beitrag zum Erwerb von Kenntnissen hinsichtlich einer praktischen und effektiven Einhaltung der Verfassung leistet. Ohne solche Mitwirkung lässt sich die Existenz einer echten lebenden Verfassung kaum vorstellen.

Der Begriff der Determiniertheit wird als Inhalt und mögliche Wirkung der Bestimmungen von internationalen Verträgen oder Abkommen verstanden, die das Ziel der Formulierung der Grundstrategie verfolgen, mit deren Hilfe internationale Organisationen die Einhaltung der Grundsätze des europäischen Konstitutionalismus oder der Grundkomponenten des freien Marktes seitens nationaler Regierungen sicherstellen.

Bezüglich der diskutierten Frage bemerkt der Verfasser, dass die Europäische Union zu einer politischen Gemeinschaft werden soll, deren Mitgliedsstaaten sich von den allgemeinen Grundsätzen des Konstitutionalismus leiten lassen, und zwar unter Berücksichtigung der Notwendigkeit der Sicherstellung der Stabilität ihrer Wechselbeziehungen und der allgemeinen Anerkennung bestimmter allgemeiner Institute, deren Herausbildung in Übereinstimmung mit den erwähnten Grundsätzen erfolgt.

Anlässlich der Erörterung der Fragen, die die Funktion der Kontrolle über Einhaltung der Kriterien der Determiniertheit im Falle des Beitritts neuer Mitgliedsstaaten betreffen, bemerkt der Verfasser, dass in diesem Prozess nicht einzelne Teilfragen der Organisation des betreffenden Staates zu beachten sind, sondern alle Aspekte der Beziehungen zwischen der Macht und den Bürgern sowie zwischen Bürgern in betreffenden Rechtssystemen.

L'article aborde un certain nombre de questions sur les concepts de la conventionnalité (conditionnalité) et de la Constitution vivante.

En explicitant la notion de la Constitution vivante, l'auteur avance l'idée que l'évolution historique de la société et des relations entre le pouvoir et les personnes peuvent conduire à de telles modifications du sens de la Constitution qui ne pourraient pas être prévues au moment de son entrée en vigueur. Il est souligné que, dans tous les cas, ces modifications doivent être conformes aux principes de la Constitution. La conformité de la Constitution vivante auxdits principes fondamentaux est, en général, conditionnée par l'application cohérente de son interprétation donnée par les autorités supérieures qui sont chargées de l'application de celle-ci. Ceci, à son tour, suppose que la justice constitutionnelle a un effet réglementaire spécifique sur la garantie de la réalisation de la Constitution, et sa jurisprudence amène une contribution empirique importante à l'aspect de l'apprentissage de la mise en œuvre pratique et efficace de celle-ci. Il est difficile d'imaginer qu'une vraie Constitution vivante puisse exister sans un tel support.

Le concept de la conditionnalité est révélé comme le sens et l'effet possible de certaines dispositions des traités ou des accords internationaux, dont l'objectif est l'élaboration de la «stratégie de base à travers laquelle les organisations internationales assurent le respect par les gouvernements nationaux» des principes du constitutionnalisme européen ou des principaux composants de l'économie de marché.

Concernant la question abordée, l'auteur estime que l'Union européenne doit créer et devenir effectivement une communauté politique dans laquelle les États-membres se fondent sur les principes généraux du constitutionnalisme, compte tenu de la nécessité d'assurance de la stabilité de leurs relations mutuelles et de la reconnaissance générale de certaines institutions communes, constituées en conformité avec lesdits principes.

Discutant des questions liées à la fonction de contrôle sur le respect des critères de conditionnalité lors de l'adhésion des nouveaux États à l'Union européenne, l'auteur souligne que, dans le cadre de ce processus, il est nécessaire de prendre en considération non pas tellement les aspects partiels de l'organisation de l'État concerné, mais toutes la gamme des aspects des relations entre le pouvoir et les citoyens, ainsi que entre les citoyens eux-mêmes dans leurs systèmes juridiques appropriés.

Kaarlo TUORI

Not all constitutions are alike, nor are all constitution-making processes similar. Neither should all constitutions be alike, nor all constitution-making processes similar. Despite this factually existing and even desirable diversity, some generalizations and classifications are indispensable.

I would like to introduce a classification of constitutions based on the circumstances of their drafting and enacting. First, we have what can be called *revolutionary constitutions*, which signal the beginning of a new political regime and perhaps even a new social order. The classical examples of revolutionary constitutions are the constitutions of the American and French revolutions from the late 18th century. Secondly, we have constitutions which amount to *declarations of independence*. Drafting a constitution is the first thing a newly-independent nation state engages in, and in adopting the constitution, it reinforces its claim to autonomous existence. Let me take two examples from my own political and cultural context: the Norwegian Constitution of 1814, the oldest constitution still in force in Europe, and the Constitution of Finland from 1919, adopted after Finland had seceded from the Russian Empire. It is possible but not necessary that a constitution combines features of both these types and is to be seen as both a revolutionary constitution and a declaration of independence. At least some observers would argue that this was the case with, for instance, the US constitution of 1787.

But not all constitutions herald the beginning of a new political or social era, nor reaffirm a newly-won independence of the polity. There exists a third type of *codificatory constitutions*. These codify at the constitutional level already occurred social, legal and political developments and introduce only minor constitutional novelties. Again, Nordic countries offer two examples: the Swedish Constitution from 1975, which replaced the Constitution dating back to 1809, and the Finnish Constitution from 2000, which replaced the first constitution of independent Finland from 1919. In Sweden, the King had long ago lost his real political power, and the political system had been gradually transformed from the power balance between the Monarch and the estates into a parliamentary regime with mass parties and universal suffrage. The Constitution of 1975 merely added formal benediction to the political system which had emerged from the historical contingencies of the previous 150 years. In Finland, in turn, the President's strong power

position had, after the end of President Kekkonen's long reign, already been dismantled through partial reforms, and a new Bill of Rights, drafted after the model of the European Convention, had already been accepted. The new Constitution from 2000 mainly codified the constitutional development of the last two decades.

So we have three types of constitution: revolutionary constitutions; constitutions as declarations of independence; and codificatory constitutions. However – this is what I would like to argue – all these types of constitution share certain common functions which they are expected to perform in a well-ordered society. As many theorists of the constitution, the German sociologist Niklas Luhmann among them, have noted the constitution is a vital element in two social sub-systems, in both the legal and the political sub-system. In the legal system the constitution is expected to bring about order and coherence, in both formal and substantive sense. In the formal dimension, the constitution establishes the hierarchy of legal norms and indicates the law-making authorities and their respective powers. In the latter, substantive, dimension, the constitution gives expression to the fundamental principles of the legal order; principles which infuse substantive coherence into this order and guide the interpretation and application of lower-order legal norms. Such coherence-creating is one of the functions of fundamental rights. It is not the only task of fundamental rights in the legal system, nor are substantive constitutional principles necessarily exhausted by fundamental-rights norms. Fundamental rights and other substantive constitutional principles also fulfill an important limiting or boundary-drawing task in the legal system: they impose substantive limits to the powers of the constitutional law-making bodies. The supervision and maintenance of these limits falls to specific mechanisms of constitutional review, such as a constitutional court.

In the political system of a “well-ordered society”, the constitution fulfils both an organizational and a legitimizing function. The organizational part of a constitution defines the basic institutional structure of political power: the main state organs, their competence and their mutual relationships. By the same token, the constitution defines the basic rules of the game which ordinary, daily political processes are supposed to respect. The constitution renders the political system the organizational and procedural stability necessary for its effective and frictionless functioning. This is an important accomplishment in itself, regardless of the specific organizational and procedural choices of the constitution.

The constitution's organizing function is closely connected to its other crucial task in the political system, namely, its legitimizing function. The constitution channels the legitimacy of the law into the political system. We may recall Max Weber's claim that the legitimacy of modern institutional state (*Anstaltsstaat*) is based on a belief in legality; on the belief that state organs function in accordance with the constitution and the law in general. Weber's thesis, of course, has its problems, noted by many of his critics. Thus, Weber does

not really proffer an account of how a mere belief in legality could engender legitimacy. In spite of these notorious Weberian problems, we can at least contend that a minimum condition for the legitimacy of the exercise of political power consists of its compliance with the constitution: unconstitutional exercise of power cannot be regarded as legitimate.

However, the ideal of a democratic constitutional state - a democratic *Rechtsstaat* - sets more demanding conditions for the legitimacy of political power than merely its exercise without breaching explicit constitutional norms. According to this ideal, a constitution can confer legitimacy on a political system only if it corresponds to certain basic principles, such as the principles of democracy, separation of powers and the legality of administration. In the normative framework of the principles defining a democratic *Rechtsstaat*, a mere confidence in the legality and constitutionality of the exercise of political power would not account for the legitimacy of modern state. Rather, the legitimacy would be engendered by the confidence that the political organization of society respects the principles of a democratic *Rechtsstaat*.

Let us look a little more closely to the issue of legitimacy. Constitutions can be examined as speech acts raising particular claims which are expected to find resonance in the audience, among the addressees of constitutional speech acts. Central among these claims is that of legitimacy. Modern constitutions address not only social and political elites but also the population at large. Correspondingly, even the claim of legitimacy must be discussed in relation to both the elites and the general public.

The claim of legitimacy concerns both the constitution as normative entity and the political system the constitution regulates. The constitution is expected to transfer its legitimacy to the political system as the object of constitutional regulation. Where, then, does a constitution draw its legitimacy from? Here the particularities of the constitutional history of diverse polities are, of course, highly relevant. It is also obvious that the three types of constitution I have introduced - revolutionary constitutions, constitutions as declarations of independence and codificatory constitutions - differ with regard to their typical conditions of legitimacy. However, in general terms, two principal explanations for constitutional legitimacy can be suggested: origin-based and contents-based. *Origin-based legitimacy* derives from the circumstances in which a constitution has been enacted and/or the procedure which was thereby adhered to: the *constitutional moment* which gave birth to the constitution. Characteristically, the constitutional moment giving rise to a revolutionary constitution is marked by wide political mobilization and intensive discourses within civil society and among the citizenry as the *demos* - the ultimate subject of the constituent power - perhaps culminating in a referendum as the formal expression of this constituent power.

In addition, the constitutional moment may come to symbolize a turning point in the na-

tion's existential history, such as gaining independence or at least an autonomous political status; here we could also speak of a *symbolic* legitimacy. Thus, the Norwegian constitution from 1814 evokes the memory of Norway's detachment from Denmark and entry into a personal union with Sweden as an autonomous entity; hence the very high symbol value of the Norwegian constitution. Similarly, the legitimacy of Finland's 1919 constitution was to a large extent due to its symbolizing the political independence of the nation.

Contents-based legitimacy, in turn, flows from the substance of the constitution, from its accordance with the basic ethical values and moral principles of society. Thus, arguably, constitutional fundamental-rights provisions endow principles which belong to the very core of modern morality with legal form and consequences.

Origin-based and contents-based legitimacy can, of course, be mutually complementary and supportive. The origin-based legitimacy of say, the US Constitution or the Norwegian Constitution from 1814 can only have lasted because complemented by contents-based legitimacy. But origin-based and contents-based legitimacy may also be detached from each other. So it seems that the legitimacy the German Basic Law has, over the years, gained is mainly contents-based: the circumstances in which the Basic Law was adopted were not very conducive to its legitimacy. On the other hand, it may happen that origin-based legitimacy loses its edge because of an increasing discrepancy between constitutional provisions – for example, the Bill of Rights – and social values and moral principles.

Our typology of constitutional legitimacy is still in need of a vital addition. It is also possible that the proponents of constitutionalisation put their faith in the sheer legitimating force of constitutional rhetoric – which, in turn, is only explicable against the background of what can be called constitutional normalcy, i.e. the origin- and/or contents-based legitimacy. Here we can speak of *parasitic legitimacy*. When a military junta has a façade “constitution” adopted by a puppet parliament or in a rigged referendum, it aims at parasitic legitimacy, drawing upon the positive connotations constitutional vocabulary evokes or is at least expected to evoke.

Origin-based legitimacy is typical of revolutionary constitutions and constitutions as declarations of independence; we could even argue for a conceptual connection between types of legitimacy and types of constitution. Recent constitution-making in the Northern African states in the forefront of the Arab spring clearly falls under revolutionary constitutions. Evidently, here the basic problem is not the lack of political mobilization or of interest among either the elites or the general public. Rather, the fundamental issue is – at least in the eyes of an external observer – how to channel the revolutionary enthusiasm into constructive and consensus-seeking discourses, without extinguishing its flame.

Let me introduce one further distinction which in my view is crucial for discussing constitution-making. This is the distinction between *constitutional politics* and *ordinary politics*. Constitutional politics differs or at least should differ from ordinary politics in two vital respects. Firstly, origin-based constitutional legitimacy presupposes a high or at least higher than normal level of political mobilization and the engagement of the general public. It also poses high requirements with regard to the inclusiveness and transparency of the deliberative procedures of constitution- drafting and -making; closed bargaining processes among new and old elites are not able to engender democratic legitimacy. Secondly, in ordinary politics majoritarian decision-making is natural and legitimate, but constitutional politics aims at as large a consensus as possible. Constitutional politics seeks to establish the constitutional rules of the game for ordinary politics. Only if the majority and the minority agree on these rules, can the minority be expected to accept the legitimacy of the decisions the majority adopts in ordinary politics. Consequently, a contingent majority should not abuse its advantage by cementing in constitutional provisions its institutional power positions or substantive views in issues falling in the province of ordinary politics. Furthermore, the generally accepted rules of the game can only structure the procedures of ordinary politics if they display certain stability. The routinization of constitutional politics, the launching of constitutional reform after practically every government change, would turn constitutional into ordinary politics and obliterate the vital distinction between the two. Constitutional moments are and should be exceptional instants in the history of a political nation.

Recent experiences in Europe demonstrate that the distinction between constitutional and ordinary politics is far from self-evident. I take two examples from the new democracies of Eastern and Central Europe. In Ukraine, constitutional reform has lain high on the political agenda almost constantly ever since the present constitution entered into force in 1996. But too often constitutional reform has been downgraded to the level of ordinary politics, without serious attempts either to involve civil society and the general public or to reach a consensus among rival political forces. The procedure followed in the recent constitutional reform in Hungary, in turn, was quite severely criticized in the opinion given by the Venice Commission. The procedure did not meet the demanding criteria of inclusiveness, transparency and consensus-orientation. And the end-result has the flavor of a dictate of a contingent constitutional majority, buttressing its institutional power positions and locking behind a requirement of qualified majority standpoints which should be open to contestation in ordinary majoritarian politics: in, for instance, taxation or family and social policy.

В статье рассматриваются некоторые вопросы относительно создания конституций. Автор представляет следующую классификацию конституций, учитывая отдельные вопросы их разработки и принятия: революционные конституции; конституции, знаменующие провозглашение независимости; кодифицирующие (codificatory) конституции. Всем указанным видам присущи некоторые общие функции, которые должны осуществляться в любом “вполне упорядоченном” (well-ordered) обществе.

Конституция является существенной составляющей двух социальных подсистем - как правовой, так и политической. В правовую систему она вводит порядок и согласованность. В политической системе Конституция осуществляет как организационную, так и легитимирующую функцию.

Относительно вопроса легитимности политической власти автор отмечает, что минимальной предпосылкой для этого является осуществление власти в соответствии с Конституцией; неконституционное осуществление последней не может считаться легитимным. Вместе с этим подчеркивается, что идея демократического правового государства предполагает также, что Конституция может придать легитимность политической системе, только если она соответствует определенным основным принципам, таким как принципы демократии, разделения властей и законности управления.

Автор представляет две основные группы предпосылок, свидетельствующих о наличии конституционной законности: 1) связанная с обстоятельствами создания и 2) связанная с вопросами содержания. Первая относится к обстоятельствам, в условиях которых была принята Конституция и/или к процедуре, которая соблюдалась при этом, иначе говоря, к конституционной обстановке, породившей необходимость принятия Конституции. Вторая, в свою очередь, касается содержания Конституции, ее соответствия основным этическим ценностям и моральным принципам общества.

Автор также представляет еще одну классификацию, имеющую ключевое значение для обсуждения вопросов создания конституций, разграничивая конституционную и обычную политику. Вместе с этим на двух примерах новых демократий Восточной и Центральной Европы - конституционных реформ в Украине и Венгрии - отмечается, что происходящие в Европе недавние события свидетельствуют о том, что различие между конституционной и обычной политикой далеко не очевидно.

Im Beitrag werden einige Fragen hinsichtlich der Schaffung von Verfassungen behandelt. Der Verfasser schlägt folgende Klassifizierung der Verfassungen unter Berücksichtigung einzelner Fragen ihrer Ausarbeitung und Verabschiedung vor: revolutionäre Verfassungen; Verfassungen, die eine Unabhängigkeitserklärung bedeuten; kodifizierende (codificatory) Verfassungen. All diesen Typen sind einige gemeinsame Funktionen eigen, die in jeder wohlorganisierten (well-ordered) Gesellschaft ausgeübt werden.

Bei der Verfassung handelt es sich um eine wesentliche Komponente von zwei sozialen Subsystemen, eines von denen rechtlich und das andere politisch ist. Sie bringt Ordnung und Koordination ins Rechtssystem ein. In einem politischen System übt die Verfassung eine organisierende Funktion aus.

Hinsichtlich der Frage der Legitimität der politischen Macht bemerkt der Verfasser, dass die minimale Voraussetzung dafür die Ausübung der Macht in Übereinstimmung mit der Verfassung ist; eine nicht verfassungsmäßige Ausübung dieser kann nicht als legitim bewertet werden. Zugleich wird hervorgehoben, dass die Idee eines demokratischen Rechtsstaates auch voraussetzt, dass die Verfassung einem politischen System Legitimität verleihen kann, nur wenn sie bestimmten Grundprinzipien entspricht, und zwar solchen Prinzipien der Demokratie wie Gewaltentrennung und Gesetzmäßigkeit des Regierens.

Der Verfasser stellt die beiden Hauptgruppen der Voraussetzungen, die davon zeugen können, ob die verfassungsmäßige Gesetzlichkeit da ist: Die erste ist mit den Umständen der Schaffung der Verfassung und die zweite mit den Fragen ihres Inhalts verbunden. Die erste betrifft somit die Bedingungen, unter denen die Verfassung angenommen wurde, und/oder das diesbezügliche Verfahren; anders gesagt, sie betrifft die konstitutionelle Situation, die die Annahme einer Verfassung notwendig gemacht hat. Die zweite Voraussetzung betrifft – wie gesagt – den Inhalt der Verfassung, ihre Übereinstimmung mit den ethischen Grundwerten und Moralprinzipien der Gesellschaft.

Der Verfasser stellt auch eine andere Klassifizierung vor, die eine Schlüsselbedeutung für die Erörterung der Fragen der Schaffung der Verfassungen hat, indem sie die Verfassungspolitik von der konventionellen Politik abgrenzt. Zugleich wird am Beispiel von Verfassungsreformen in zwei neuen Demokratien Ost- und Zentraleuropas – in der Ukraine und in Ungarn – gezeigt, dass die jüngsten Ereignisse in Europa davon zeugen, dass die Unterscheidung zwischen der Verfassungs- und der konventionellen Politik bei weiten nicht offensichtlich ist.

L'article porte sur plusieurs questions de création et d'élaboration des constitutions. En fonction des circonstances de leurs élaboration et adoption, l'auteur introduit la classification suivante des constitutions: les constitutions révolutionnaires, celles qui marquent les déclarations d'indépendance et les constitutions codificatrices. L'ensemble de ces types de constitutions se caractérisent par un certain nombre de fonctions communes qu'elles doivent effectuer dans une société bien ordonnée (well-ordered).

La Constitution est un élément essentiel dans les deux sous-systèmes sociaux : juridique et politique. Dans le système juridique la Constitution amène de l'ordre et de la cohérence. Dans le système politique, elle remplit la fonction d'organisation et de légitimation.

Concernant la question de la légitimité du pouvoir politique, l'auteur relève la précondition minimale de celle-ci, à savoir la conformité avec la Constitution: l'exercice inconstitutionnel du pouvoir ne peut être considéré comme légitime. En parallèle il souligne l'idée d'un Etat démocratique de droit suppose également que la Constitution ne peut conférer une légitimité à un système politique que si celui-ci correspond à un certain nombre de principes de base, tels que les principes de la démocratie, de la séparation des pouvoirs et de la légalité de gestion.

L'auteur détermine deux groupes de conditions de base qui témoignent de la légitimité constitutionnelle: celui lié aux circonstances de la création et celui lié au contenu de la Constitution. Le premier groupe de conditions concerne les circonstances dans lesquelles une constitution a été adoptée et / ou la procédure qui a été mise en place, c'est-à-dire concerne la situation constitutionnelle qui a exigé l'adoption de la Constitution. Le deuxième groupe concerne le contenu de la Constitution, sa conformité aux valeurs d'éthiques fondamentales et les principes moraux de la société.

L'auteur introduit également une autre classification, cruciale lors de la discussion des questions de la création des constitutions, celle de distinction entre la politique constitutionnelle et la politique ordinaire. A travers deux exemples de nouvelles démocraties de l'Europe centrale et orientale - les réformes constitutionnelles en Ukraine et en Hongrie - l'auteur illustre que la distinction entre la politique constitutionnelle et la politique ordinaire, selon les expériences récentes en Europe, est loin d'être évidente.

RÉFLEXIONS SUR LA MONDIALISATION DU DROIT CONSTITUTIONNEL

Didier MAUS

Il y a vingt-cinq ans, personne n'aurait utilisé le terme de «mondialisation». S'il avait existé, personne n'aurait eu l'idée de l'appliquer au droit constitutionnel. Les linguistes expliquent que «mondialisation» est une mauvaise traduction, en français, de «globalization» en anglo-américain. Prenons le mot «mondialisation» pour ce qu'il signifie : une idée d'ouverture, de dépassement des frontières et du cadre national. L'idée centrale, l'ouverture au monde, la mondialisation des échanges, des techniques et des savoirs repose sur l'unification des espaces et donc le dépassement des frontières.

Pour le droit, les choses sont un peu différentes. Mme Mireille Delmas Marty analyse au Collège de France la mondialisation du droit ¹; elle explique fort savamment qu'elle est en marche et qu'il est inutile d'essayer de faire marche arrière. Nous y sommes. Derrière tout cela, il y a cette réalité, différente d'ailleurs selon les branches du droit, qui est le dépassement des cadres nationaux. Cela est probablement plus facile à constater dans d'autres branches du droit que le droit constitutionnel : le droit des affaires par nature tend à s'internationaliser ; le droit des relations personnelles tend à reposer de plus en plus sur des conventions internationales et l'on cherche à régler, de façon intelligente et efficace, un certain nombre de situations. Mais, dans le droit constitutionnel, il y a l'idée de Constitution, il y a l'idée de Nation, il y a l'idée d'État, il y a l'idée de frontières. Tout ceci peut constituer des obstacles à la perception de la mondialisation.

Depuis une trentaine d'années, le monde académique a très nettement pris conscience de l'explosion des frontières constitutionnelles et de la nécessité de développer le droit comparé, non plus uniquement comme la mise en relation de deux ou plusieurs systèmes constitutionnels, mais également comme la circulation des idées, des faits et des solutions et leurs interactions. «L'argument de droit comparé», pour prendre une dénomination désormais courante, est souvent utilisé pour expliquer et convaincre². Il serait passionnant d'étudier comment les lieux académiques du débat constitutionnel ont progressivement intégré cette évolution. Il suffit, à titre de points de repère, de fixer

¹ Collège de France, chaire «Études juridiques comparatives et internationalisation du droit» (www.college-de-france.fr).

² Marie-Claire Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, Economica, 2010.

quelques balises. En 1981, la création de l'Association internationale de droit constitutionnel marque la volonté de réunir régulièrement les constitutionnalistes du monde entier et de leur permettre, au-delà des barrières politiques et juridiques, de faire avancer la cause du constitutionnalisme.³ Depuis 1985, la publication annuelle de *l'Annuaire international de justice constitutionnelle*, sous l'autorité - jusqu'à son décès en 2004 - de Louis Favoreu, permet de connaître et d'analyser les jurisprudences des cours constitutionnelles.⁴ Le nombre croissant de revues consacrées au droit constitutionnel offre des espaces de plus en plus importants à eux qui souhaitent écrire et réfléchir.⁵ La multiplication des colloques, congrès et conférences, qu'ils soient organisés par des instances universitaires ou par les cours constitutionnelles à l'occasion de leurs anniversaires, n'est pas uniquement l'occasion pour une communauté d'hommes et de femmes de se retrouver. Il s'agit surtout d'apprendre des autres et de s'enrichir par un dialogue de plus en plus organisé. Récemment, la publication, en français, d'un *Traité international de droit constitutionnel*⁶ et, en anglais de *The Oxford Handbook of Comparative Constitutional Law*⁷ traduisent une même réalité, celle du besoin d'une véritable mondialisation des savoirs constitutionnels.

Il est possible de consacrer à l'expression «le droit constitutionnel» un temps considérable.⁸ Le doyen Pierre Pactet définit cet objet dans les premières pages de son manuel.⁹ On peut dire, pour faire simple, que c'est le droit de la constitution, mais cela ne simplifie rien, car il faut savoir ce qu'est une constitution. Dans un certain nombre de cas, cela n'est pas très aisé, y compris pour la Constitution française d'aujourd'hui.¹⁰ Tous ceux qui réfléchissent autour de la notion de droit constitutionnel concluent sur une double affirmation et un double constat : dans la notion de droit constitutionnel il y a, par nature, un aspect institutionnel, c'est-à-dire «comment fonctionne le pouvoir ?». Il y a également cet aspect que nous avons oublié en France mais qui est, depuis l'origine, consubstantiel à la Constitution, la notion de droits fondamentaux, des relations entre le pouvoir et les hommes et les femmes. On peut alors prendre l'expression sous sa forme moderne, que l'on doit beaucoup à Louis Favoreu de «droits fondamentaux»¹¹. On peut la prendre

3 www.iacl-aicd.org.

4 *Economica*. Le XXVIIe volume porte sur 2011.

5 Voir la Revue française de droit constitutionnel (PUF) depuis 1990; la Revue belge de droit constitutionnel (Bruylant) depuis 1994 ; *International Journal of Constitutional Law* (Oxford University Press) depuis 2003; *European Constitutional Law Review* (TMC AsserPress) depuis 2005; le Red de Revistas en Derecho Constitucional mis en place depuis 2010 par Edgar Corzo Sosa (www.revistasconstitucionales.unam.mx).

6 Michel Troper et Dominique Chagnollaud (dir.), Dalloz, 2012.

7 Michel Rosenfeld et Andrés Sajó (ed.), Oxford University Press, 2012.

8 V. ma contribution «Où en est le droit constitutionnel?», *Mélanges Franck Moderne*, Dalloz, 2004.

9 Pierre Pactet, Ferdinand Mélin-Soucramanien, *Droit constitutionnel*, 25e éd., Sirey, 2006, chapitre 4.

10 Au texte de 1958 modifié, il faut ajouter la Déclaration des droits de l'homme de 1789, le préambule de 1946, la Charte de l'environnement de 2004 et «Les principes fondamentaux reconnus par les lois de la République».

11 Louis Favoreu et autres, *Droit constitutionnel*, Dalloz, 1998.

sous la forme «droits de l'homme», peu importe. En tout cas, il y a la conscience que nous avons des droits à l'égard du pouvoir et que le pouvoir doit être organisé de façon à les faire respecter. C'est autour de cette dualité institution/droits fondamentaux qu'il est possible d'appréhender la réalité constitutionnelle du XXI^e siècle.

Ces deux définitions approximatives étant posées, l'une dans la sphère géographique, l'autre dans la sphère intellectuelle, il apparaît un triple constat: d'abord une mondialisation du langage constitutionnel; ensuite une mondialisation des réalités constitutionnelles; enfin une mondialisation des interrogations constitutionnelles.

I - UNE MONDIALISATION DU LANGAGE CONSTITUTIONNEL

A - LES VALEURS CONSTITUTIONNELLES

Le doyen Georges Vedel ne pourrait plus écrire aujourd'hui, comme il l'a fait en 1946: «Existe-t-il deux conceptions de la démocratie?»,¹² où il opposait la démocratie occidentale et la démocratie marxiste. Cet article témoigne d'une époque qui a complètement disparu. Il y a eu, au moins à vue humaine, disparition d'un des deux modèles de la démocratie. L'événement marquant est symbolisé par la chute du mur de Berlin. Cela a peut-être commencé avant, cela a un peu continué après, mais comme il faut toujours trouver des repères; le 9 novembre 1989 en est un. À partir de ce jour là, il y a eu unification du vocabulaire constitutionnel, au moins en Europe. Nous nous sommes mis à parler, à peu près - sinon complètement encore - le même langage. Progressivement, les termes ont eu un contenu qui est devenu le même. Lorsque nous parlons de démocratie, de libertés ou d'élections, il existe de plus en plus un langage commun. Cela signifie que les idées, dont le «modèle occidental» est porteur, se sont répandues et qu'il n'y en a plus beaucoup d'autres qui entrent en concurrence, même dans des contextes culturels très différents.

Pour illustrer de constat, j'évoque simplement deux souvenirs:

1) Travaillant il y a quelques années, sur la Constitution de l'Érythrée avec des partenaires d'une exceptionnelle qualité, la discussion aborde les techniques électorales, thème assez classique : on a besoin d'élections ; à un moment ou à un autre, on ne peut pas s'en passer. Nos interlocuteurs – nous étions un aréopage d'experts internationaux – nous demandent : «Quels sont les avantages et les inconvénients de tel ou tel système électoral?»¹³ Chacun commence à évoquer les caractéristiques de son propre système. Au bout d'un moment, nos partenaires disent: «Tout ceci est très bien, mais nous voudrions organiser des élections qui soient jugées correctes selon vos critères – ceux de l'Union interparlementaire, et de l'ONU – mais on voudrait qu'il n'y ait ni vainqueur

¹² Études, janvier 1946.

¹³ Les controverses sur les mérites respectifs des modes de scrutin à base majoritaire ou proportionnelle durent depuis que les élections sont devenues le moyen normal de désignation des responsables politiques. Il est sans conclusion et durera encore pendant de nombreuses décennies.

ni vaincu». Cela devient alors très, très compliqué! Il faudrait organiser des élections ouvertes sans qu'il y ait une majorité et une minorité.

2) Deuxième exemple, dans un univers totalement différent qui est le Golfe persique. C'était au Qatar où j'ai passé trois jours à essayer de réfléchir à la nouvelle constitution. Nos interlocuteurs qataris disent : «1/ On inscrit dans la Constitution que le Qatar est un "émirat islamique" ; 2/ mais après, on n'en parle plus. Il faut préparer un texte qui soit compatible avec les standards internationaux des droits de l'homme». Deux ans après, la Constitution a été adoptée.¹⁴ On pensait bien à cette idée qu'il y a des valeurs admises et qu'il faut essayer de s'y conformer. Il y a encore beaucoup de pays qui sont loin de cela : le monde arabo-musulman, dans l'ensemble, en est assez loin ; la Chine, évidemment. Mais un retour en arrière permet de regarder ce qui s'est passé depuis vingt ou vingt cinq ans ; tout le continent américain est entré dans ce système de valeurs, une très large part du continent africain également. L'Afrique du Sud incarne aussi le miracle constitutionnel ; elle est le prototype de cette évolution du langage ; ceux qui y ont été le savent. Il y a une mondialisation du discours et, derrière le discours, évidemment, des valeurs.

Les affrontements sur «Qu'est ce que la démocratie ?» ont largement, mais pas totalement, disparu. Cela ne veut pas dire que certains n'ont pas d'autres conceptions ; cela ne veut pas dire que dans tel ou tel régime le parti unique, ou le centralisme démocratique ne sont pas défendus, mais on sait que, dans ce cas là, il s'agit d'une position délicate à soutenir. Dans de nombreux pays post communistes le principe de la démocratie a été inscrit dans la constitution, mais la réalité du pouvoir est demeuré oligarchique, en particulier lorsque les anciens dirigeants ont réussi à devenir les nouveaux. L'idéologie des droits de l'Homme, dans ses différentes composantes, est pour l'instant en tête, mais rien ne garantit qu'il en sera de même pour les cinquante ans à venir. Le langage est devenu un langage commun. C'est important.

Les transformations qui surviennent dans les pays arabo-musulmans depuis le début de 2011 (Tunisie, Égypte, Yémen, Maroc...), connues sous la dénomination de «printemps arabe» illustrent les ambiguïtés du langage commun. La lutte contre les pouvoirs autoritaires en place (Ben Ali, Moubarak...) exprime une demande de démocratie, de liberté et de droits de l'homme. En même temps l'importance politique des partis politiques «islamistes», qui souvent s'alignent sur une interprétation très stricte de la religion et de la sharia, inquiète les premiers acteurs des révolutions et suscite une très profonde hostilité chez les partisans des droits de l'homme. Le cas du Maroc est particulier dans la mesure où le Roi, Commandeur des croyants, a permis l'élaboration rapide d'une nouvelle constitution nettement plus parlementaire et son adoption par le référendum du 1er juillet 2011.¹⁵

¹⁴ Constitution approuvée par référendum le 29 avril 2003. L'article 1er indique : « Le Qatar est un État arabe souverain. Sa religion est l'Islam et la Sharia la source principale de son droit. Son système politique est démocratique... » (traduction de l'auteur).

¹⁵ La Constitution marocaine de 2011. Analyses et commentaires (Michel Rousset, coord.), Centre d'études internationales (Rabat), LGDJ, 2012.

Derrière le langage, il y a évidemment les problèmes des langues. Le fait que l'on travaille, selon le cas, en français, en allemand, en anglais, en russe, en arabe, etc., rend les choses plus difficiles, mais comment peut-on faire autrement ? Certains continuent par exemple à s'interroger sur le point de savoir si «État de droit», «Rule of Law» et «Rechtsstaat», pour ne prendre que trois langues européennes, signifient la même chose. Quand on les traduit, on les traduit l'un par l'autre, et le vieux dicton italien «Traduttore, traditore» («Traduire, c'est trahir») trouve alors à s'appliquer. Première conclusion : le langage s'est incontestablement mondialisé.

B - LA MONDIALISATION DES TEXTES

Une étude sur la mondialisation du langage dans les textes constitutionnels présenterait un très grand intérêt. Il y a eu, à travers ceux que l'on a appelé «les pèlerins constitutionnels», une diffusion intense. En fin de compte, quand on cherche à rédiger une nouvelle constitution – ce qui a été beaucoup le cas : en Europe centrale, en Afrique, en Amérique latine, etc. –, que fait-on ? On regarde ce qui existe et on essaye de faire mieux. La part d'imagination totalement nouvelle – il faut voir les choses comme elles sont – est relativement faible. On a beaucoup utilisé le «copier coller», avant même qu'il ait existé sur ordinateur. Il en découle un certain nombre de transformations et de mutations tout à fait passionnantes.

Arrivant un jour dans un pays d'Asie centrale – et lisant la Constitution de ce pays en français – je me dis : «C'est quand même étonnant, j'ai l'impression de lire la Constitution française de 1958». Sur place, je fais évidemment part de cette observation à l'un de mes interlocuteurs, lequel me dit : «Oui, c'est un de vos bons amis qui est venu nous aider et il a “recopié” l'article 16, l'article 49 alinéa de votre Constitution, des dispositions au demeurant très utiles». Je me sentais en confiance. On pourrait faire l'exercice dans d'autres cas. Il y a des situations où des expressions venues de la Loi fondamentale allemande ou de la pratique britannique se reconnaissent aisément.

Le droit dur, c'est-à-dire le droit écrit, s'uniformise aussi du point de vue de son expression. On trouve, à la fois dans la structure, dans la terminologie et dans les concepts, une proximité que l'on ne rencontrait pas auparavant. Il y a quelques années, j'ai comparé les structures des quinze constitutions des pays qui composaient alors l'Union européenne. Dans les quinze pays, j'avais examiné comment les constitutions étaient structurées et comment étaient présentés les droits fondamentaux. C'était frappant. Il y avait une analogie – aux particularismes nationaux près – très remarquable, notamment pour ce qui concerne l'énoncé des droits fondamentaux.

Les constitutions d'Amérique latine qui, du point de vue culturel et juridique, sont très proches de celles de l'Europe révèlent exactement le même phénomène. Pour les pays de l'Afrique francophone, en particulier pour les constitutions de l'après indépendance

dans les années 1960, cela n'a rien d'étonnant, un certain nombre de similitudes se retrouvent également.

Ces textes ne sont pas uniquement les textes nationaux. Un des grands phénomènes sur lequel il convient d'insister découle de l'apparition de textes internationaux concernant la matière constitutionnelle. Il faut entrer dans des subtilités, en particulier la distinction entre le droit *dur* et le droit *mou*.¹⁶ Ce droit mou, la *soft law* est presque devenu la règle. Il existe de plus en plus de *soft law*. Un jour, cela devient du droit *dur*; on ne sait pas très bien par quel mécanisme, par quelle alchimie, mais il est très difficile pour des juristes de comprendre ce qu'est le droit mou. Nous disons : «C'est du droit ou ce n'est pas du droit?». Quand on vous répond : «Ce n'est pas du droit, mais cela peut le devenir», cela n'entre dans aucune des cases du droit traditionnel.¹⁷

En tout cas, ce droit, qui n'est pas du droit international, ces textes, durs ou mous, contiennent des thèmes communs avec les constitutions. Ils émanent de l'ONU, de l'OSCE (Organisation sur la sécurité et la coopération en Europe) ou du Conseil de l'Europe, mais aussi de la Commission de Venise ainsi que de la Charte africaine des droits de l'homme et des peuples de 1981 et de la Convention américaine des droits de l'homme de 1969. Il y a une multiplication de textes qui contiennent du vocabulaire typiquement constitutionnel : la démocratie, la séparation des pouvoirs, les droits fondamentaux, les élections... tout ce qui fait l'ordinaire du monde constitutionnel. L'exemple de la résolution de l'Assemblée générale de l'ONU du 15 mars 2006 relative à la création du Conseil des droits de l'Homme, destinée à remplacer la Commission des droits de l'Homme,¹⁸ est instructif. Le langage onusien est souvent à double sens, mais en même temps, on y retrouve tout ce qui émane des discours ou des écrits dont le droit constitutionnel a l'habitude : la promotion de l'individu, l'égalité, les droits de l'Homme, etc. Il y a des progrès dans ces textes.

Le site Internet de l'ONU, à la rubrique «droits de l'Homme» ou «libertés» est significatif. Les longs développements sur le Bureau d'assistance électorale entrent dans le champ constitutionnel. Depuis 1990, l'assistance de l'ONU en matière électorale, donc en matière constitutionnelle, s'est largement amplifiée.¹⁹ Il y a de nombreux pays où l'ONU remplit des rôles divers et variés, avec à la fois la création de la loi électorale, les mécanismes de contrôle, la désignation des experts, la vérification, etc. Il y a beaucoup à faire : ceux qui ont travaillé dans le domaine de la coopération le savent. Il y a là un champ nouveau pour l'ONU.

¹⁶ La traduction de «soft law» par «droit mou» n'est pas parfaite. Elle a été adoptée par commodité de langage. Il s'agit d'un ensemble de règles dont la portée juridique n'est pas contraignante, mais qui s'imposent progressivement comme normes de comportement.

¹⁷ Das soft law der europäischen Organisationen. The Soft Law of European Organisations. La soft law des organisations européennes, (Jean-François Flauss, Julia Iliopoulos-Strangas, éditeurs), SIPE, Nomos Verlagsges.Mbh, 2012.

¹⁸ A/RES/60/251.

¹⁹ Site Internet « un.org.french/Depts.dpa.ead/ ».

C'est en 1990 qu'a été adoptée en Europe dans le cadre de l'OSCE une déclaration sur la démocratie.²⁰ Depuis 1990, l'Union interparlementaire a adopté des résolutions sur «Les élections libres et démocratiques».²¹ Avant 1990, c'était impossible.

Les deux codes adoptés par la Commission de Venise, en 2002 en matière électorale, en 2008 pour les partis politiques constituent de bons exemples de ces documents sans valeur normative, mais qui progressivement, en raison de la réputation de leur auteurs, deviennent aisément des normes de référence.²²

Certes, il s'agit en général de droit mou, mais il peut ensuite être pris en considération par telle ou telle instance internationale «bien pensante», y compris la Cour européenne des droits de l'homme, et devenir ainsi du droit dur. Une cour constatera, le cas échéant, qu'il y a un standard international. Ensuite, on condamnera tel ou tel pays au nom du non-respect de ce standard international. Il existe une forte valorisation de ces textes, même si leur valeur normative est inexistante.

Les textes à contenu constitutionnel ne sont plus uniquement nationaux.

II - LA MONDIALISATION DES RÉALITÉS CONSTITUTIONNELLES.

Les systèmes constitutionnels se sont rapprochés. L'organisation constitutionnelle des quarante-sept pays du Conseil de l'Europe, de tous les pays du continent américain, d'un certain nombre de pays d'Asie ou du Proche Orient, ceux qui fonctionnent selon les critères «occidentaux», ainsi que Israël, l'Inde, le Japon, et quelques pays d'Afrique - leur nombre dépend des circonstances - comporte des éléments très proches.

Quels sont ces éléments qui sont devenus le fond commun? Quatre méritent d'être évoqués.

A - LA SOURCE DU POUVOIR ET LE DEVELOPPEMENT DU DROIT INTERNATIONAL DES ELECTIONS

Le pouvoir politique trouve son fondement dans les élections. À la base de la mondialisation des réalités, il y a l'organisation à intervalles réguliers d'élections libres, ouvertes et concurrentielles.²³ Elles ne sont pas faciles à organiser. La perfection est difficile à atteindre, mais il y a quand même cette idée que ce n'est qu'à travers la confrontation électorale que l'on peut attribuer le pouvoir. La confrontation électorale implique en amont la liberté des

20 Le document le plus emblématique est la « Charte de Paris pour une nouvelle Europe » du 21 novembre 1990 (www.oxe.org), le plus précis le « Rapport du séminaire d'experts de la CSCE sur les institutions démocratiques » adopté à Oslo le 15 novembre 1991 (id.).

21 Déclaration sur les critères pour des élections libres et régulières (Paris, 26 mars 1994). V. www.ipu.org. V. aussi la Déclaration universelle sur la démocratie (Le Caire, 16 septembre 1997).

22 Commission de Venise, Code de bonne conduite en matière électorale, (adopté lors de la session des 18-19 octobre 2002); Code de bonne conduite en matière de partis politiques, (adopté lors de la session des 12-13 décembre 2008). Voir site internet «www.venice.coe.int».

23 V. les textes cités plus haut.

partis politiques et la liberté d'expression; sinon, la campagne électorale n'a aucun sens.

Les élections sont devenues une des premières préoccupations constitutionnelles et un des premiers enjeux politiques.²⁴

Il est remarquable de constater que dès que la démocratie est rétablie dans un pays, la première urgence consiste à légitimer une nouvelle équipe politique, soit par l'intermédiaire d'un parlement, soit par l'intermédiaire d'un exécutif, cette légitimation ne pouvant désormais être réalisée que par des élections, c'est-à-dire une participation directe des citoyennes et des citoyens à la désignation de l'équipe gouvernante.

D'un point de vue historique, les mécanismes électoraux remontent très loin. Dès l'Antiquité grecque ou romaine, même s'il ne s'agissait pas du suffrage universel, la désignation de «ceux qui nous gouvernent» procédait de l'élection. Dans l'Église catholique romaine, institution qui a derrière elle plus de vingt siècles d'existence, l'élection, au moins pour les fonctions suprêmes, qu'il s'agisse de celle de pape²⁵ ou de responsable d'une communauté religieuse, fait partie des traditions ecclésiales.

Lorsqu'il s'est agi de trouver en France, en 1789, des règles pour faire délibérer les États généraux, puis les différentes assemblées de la Révolution, les précédents des assemblées d'églises ou du parlement britannique ont servi d'exemple.²⁶ La technique électorale n'est ainsi pas nécessairement liée à la notion de la démocratie du suffrage universel telle qu'elle est entendue aujourd'hui. Il n'en demeure pas moins que le choix des responsables politiques, lorsqu'il est effectué à bulletin secret avec une garantie absolue du secret du vote, s'oppose à d'autres techniques de désignation : l'hérédité ou le tirage au sort. Il est significatif que dans l'ancienne Pologne, la mort du souverain entraînait l'élection d'un nouveau roi, lequel était élu à vie. Il y avait combinaison de l'institution monarchique et du principe électif, ce qui démontre que la monarchie n'est pas obligatoirement héréditaire.

D'une manière générale, les constitutions d'hier et d'aujourd'hui, si elles fixent les bases du droit électoral, ont toujours hésité à entrer dans les détails, tellement il existe de variantes des modes de scrutin et tellement il est souvent indispensable de faire évoluer les techniques électorales en fonction des circonstances politiques.

A côté de la juxtaposition des droits constitutionnels nationaux, s'est développée, depuis l'après Seconde guerre mondiale, et encore plus depuis une vingtaine d'années, un

24 Ces développements s'inspirent très directement de mon article « Élections et constitutionnalisme: vers un droit international des élections? » publié dans *Démocratie et élections dans l'espace francophone*, (Jean-Pierre Vettovaglia, dir.), Brulant, 2010.

25 Il existe une véritable similitude entre les conditions d'élection du pape (nécessité de la majorité des deux tiers) et celles de l'élection du Président de la République française entre 1875 et 1958 (majorité absolue des suffrages exprimés).

26 André Castaddo, *Les méthodes de travail de la Constituante*, PUF, 1989.

ensemble de principes et de règles dont la valeur est souvent floue, mais qui constitue progressivement un véritable corpus international en matière de droit électoral. Le simple recensement de ces différents textes, en indiquant leur portée normative, montre qu'il n'est plus possible d'imaginer le constitutionnalisme du XXI^e siècle sans son complément naturel, des élections libres et ouvertes.

D'un point de vue chronologique, il semble que le premier texte international ayant une portée électorale soit la Déclaration universelle des droits de l'homme, adoptée par l'ONU le 10 décembre 1948. L'article 21 énonce dans son alinéa 1er : «Toute personne a le droit de prendre part à la direction des affaires publiques de son pays, soit directement, soit par l'intermédiaire de représentants librement choisis». Après que l'alinéa 2 soit consacré à l'égalité d'accès à la fonction publique, l'alinéa 3 poursuit : «La volonté du peuple est le fondement de l'autorité des pouvoirs publics, cette volonté doit s'exprimer par des élections honnêtes qui doivent avoir lieu périodiquement au suffrage universel égal et au vote secret ou suivant une procédure équivalente assurant la liberté du vote». Certes, ce texte n'a, au regard du droit international, qu'une valeur déclarative, et au regard du droit national que très rarement une valeur normative, mais il consacre dès les débuts de l'ONU les grands principes qui établissent la liaison entre démocratie et élections. Ceux-ci sont au nombre de trois :

1) la légitimité repose sur le choix direct ou indirect des dirigeants, mais toujours librement choisis ;

2) les élections doivent avoir lieu de manière périodique, selon un rythme qu'il est évidemment impossible de déterminer par avance, mais qui doit assurer un renouvellement régulier des corps élus ;

3) les règles relatives aux élections, qu'elles soient de nature constitutionnelle, législative ou autre, doivent respecter le suffrage universel, l'égalité de suffrage, le secret du vote et sa liberté.

Depuis plus de cinquante ans, ces préceptes n'ont pas varié. On les retrouvera à des titres divers dans tous les textes, internationaux ou nationaux, consacrés aux élections.

Le Pacte international relatif aux droits civils et politiques de 1965, dix-huit ans après la Déclaration universelle, prévoit en son article 25 que :

«Tout citoyen a le droit et la possibilité, sans aucune des discriminations visées à l'article 2 et sans restrictions déraisonnables:

a) de prendre part à la direction des affaires publiques, soit directement, soit par l'intermédiaire de représentants librement choisis ;

b) de voter et d'être élu, au cours d'élections périodiques, honnêtes, au suffrage universel et égal et au scrutin secret, assurant l'expression libre de la volonté des électeurs;

c) d'accéder, dans des conditions générales d'égalité, aux fonctions publiques de son pays».

De manière curieuse, la Convention européenne des droits de l'homme et des libertés fondamentales, signée à Londres le 4 novembre 1950, ne contient rien sur le droit des élections libres. Il faudra attendre la signature du protocole n° 1, le 20 mars 1952, pour que soit ajouté aux droits substantiels garantis par la CEDH, l'article 3 intitulé «Droit à des élections libres» rédigé comme suit : «Les Hautes Parties contractantes s'engagent à organiser, à des intervalles raisonnables, des élections libres au scrutin secret dans les conditions qui assurent la libre expression de l'opinion du peuple sur le choix du corps législatif». Cette rédaction, qui constitue un des très rares textes ayant une portée contraignante en matière électorale, a donné lieu à quelques décisions de la Cour européenne des droits de l'homme, notamment en ce qui concerne l'obligation d'organiser des élections libres ou sur la nécessité, pour la réglementation concrète du droit de vote, de respecter les principes conventionnels, mais la Cour de Strasbourg n'a jamais osé, de manière parfaitement compréhensible, entrer dans le choix du mode de scrutin lui-même, le réservant à la marge nationale d'appréciation.²⁷

De manière significative, la Cour s'est prononcée sur la définition du corps électoral et, dans la célèbre affaire du 18 février 1999 (*Mattews c/Royaume-Uni*), elle a censuré la non inscription d'un ressortissant britannique sur les listes électorales.

Il faudra ensuite attendre le véritable dégel des années 1990 pour que se multiplient des textes de principe relatifs aux élections. Il est difficile d'en faire la liste, mais on peut relever que, dès la Charte de Paris pour une Europe nouvelle du 21 novembre 1990, adoptée dans le cadre de la Conférence sur la sécurité et la coopération en Europe, il est affirmé que : «Le gouvernement démocratique repose sur la volonté du peuple exprimée à intervalles réguliers par des élections libres et loyales»²⁸. Le rapport général du séminaire d'experts réunis à Oslo du 4 au 15 novembre 1991, insiste également sur le rôle essentiel des élections dans le développement de la démocratie et de l'État de droit et passe en revue les différentes composantes d'élections libres et démocratiques.²⁹

Par la suite, on relève que, dès 1994, l'Union interparlementaire, organisation pourtant fondée en 1889, adopte pour la première fois une «Déclaration sur les critères pour les élections libres régulières» dans laquelle elle définit successivement ce que sont les élections libres régulières, les droits relatifs au vote et à l'élection, les droits et responsabilités relatifs à la candidature, aux partis et à la campagne, et les droits et responsabilités de l'État.³⁰

²⁷ Jean-Loup Charrier, *Code de la Convention européenne des droits de l'homme*, Litec, 2005.
Frédéric Sudre et autres, *Les grands arrêts de la Cour européenne des droits de l'homme*, PUF, Thémis, 5e éd., 2009.

²⁸ Sécurité et coopération en Europe, Emmanuel Decaux (dir.), *La Documentation française*, 1992, p. 285 et s.

²⁹ Id., p. 341 et s.

³⁰ Site Internet de l'Union interparlementaire: www.ipu.org.

Quelques années plus tard, le 16 septembre 1997, cette même Union interparlementaire adoptera sans vote une «Déclaration universelle sur la démocratie» dans laquelle le paragraphe 12 dispose : «L'élément clé de l'exercice de la démocratie et la tenue à intervalles périodiques d'élections libres et régulières permettant l'expression populaire...».³¹ Plusieurs ouvrages de l'Union interparlementaire compléteront ce corpus de droit mou, et fourniront des lignes directrices à ceux qui s'intéressent aux élections.³²

Entre-temps, dans l'espace francophone, la déclaration de Bamako sur la démocratie, les droits et les libertés du 3 novembre 2000, après avoir rappelé que francophonie et démocratie sont indissociables précise: «Les engagements pour la tenue d'élections libres, fiables et transparentes, notamment en ce qui concerne les listes électorales, le déroulement des campagnes électorales, la participation effective des citoyens, la liberté des partis politiques et l'équité financière».³³

Ces différents textes ne seraient rien s'il n'était pas fait référence, en plus, à au moins trois organisations internationales qui, depuis une vingtaine d'années, ont développé des actions importantes et un savoir-faire réel en matière d'élections.

L'Assemblée parlementaire du Conseil de l'Europe adopte, en 2003, une résolution relative à un code de bonne conduite en matière électorale dans laquelle le § 1 précise que : «La tenue à intervalles réguliers d'élections libres à scrutin égal, universel, secret et direct reste une condition fondamentale de la reconnaissance du caractère démocratique d'un régime politique».³⁴

La Commission de Venise, dont le rôle a déjà été souligné, développe depuis 1990 une impressionnante activité dans le domaine du développement constitutionnel.³⁵ En son sein, le Conseil des élections démocratiques assure une régulière coopération dans le domaine électoral entre l'Assemblée parlementaire du Conseil de l'Europe, le Congrès des pouvoirs locaux et régionaux, les pays membres et l'OSCE. Ses avis, ses études, ses séminaires, sa base de données constituent une documentation de premier ordre pour ceux qui cherchent à faire la synthèse des mécanismes électoraux en Europe. Son *Code de bonne conduite en matière électorale*, son *Code de bonne conduite en matière référendaire*, son rapport sur *Le droit électoral et l'administration des élections* constituent véritablement des documents qui, certes, n'ont pas de valeur normative, mais sont sus-

31 Id.

32 G.S. Goodwin-Gill, *Élections libres et régulières*, Éditions de l'UIP, 1ère édition 1994, nouvelle édition 2006. G.S. Goodwin-Gill, *Code de bonne conduite pour les élections*, Éditions de l'UIP, 1998. Collectif, *Démocratie, principes et réalisation*, Éditions de l'UIP, 1998. G.S. Goodwin-Gill, *Élections libres et régulières: droit international et pratique*, Éditions de l'UIP, 2006.

33 Site Internet «apf.francophonie.org».

34 Résolution 1320 (2003) du 30 janvier 2003. Voir le site «assembly.coe.int».

35 Voir les très riches et nombreuses références sur le site www.venice.coe.int.

ceptibles d'en acquérir une par imprégnation des législations nationales.³⁶ Plus aucune étude de droit électoral ne peut les ignorer.

L'Organisation sur la sécurité et la coopération en Europe, véritablement née des grands mouvements de la décennie 1990, consacre une part essentielle de ses activités, à travers son bureau des institutions démocratiques et des droits de l'homme, aux mécanismes électoraux. Outre de nombreuses missions d'observation, des avis sur les lois électorales, elle a notamment publié un Manuel d'observation des élections dont le contenu mérite d'être reconnu par tous ceux qui veulent véritablement agir en matière électorale.³⁷

Dans une autre sphère, l'Organisation des nations unies a fortement développé les activités de sa Division de l'assistance électorale, laquelle fait partie du Département des affaires politiques. Intervenant soit comme formateur, soit comme conseiller, soit encore parfois comme organisateur d'élections, cette division est l'une des plus actives du secrétariat général de l'ONU. Elle montre que la seule organisation à vocation universelle s'intéresse autant que d'autres à la promotion de la démocratie, du constitutionnalisme et des élections.³⁸

D'autres textes internationaux, eux aussi plus ou moins normatifs, évoquent les élections. L'article 13, § 1, de la Charte africaine des droits de l'homme et des peuples, énonce que «Tous les citoyens ont le droit de participer librement à la direction des affaires publiques de leur pays, soit directement, soit par l'intermédiaire de représentants librement choisis, ce conformément aux règles édictées par la loi».³⁹ Cette rédaction, moins prescriptive que celle de la Convention européenne des droits de l'homme pose néanmoins le principe des élections libres et de la nécessité que celles-ci soient organisées par la loi.

De son côté, la Convention américaine relative aux droits de l'homme prévoit dans son article 23 que «tous les citoyens doivent jouir des droits et facultés ci-après énumérés : a) de participer à la direction des affaires publiques, directement ou par l'intermédiaire de représentants librement élus ; b) d'élire et d'être élu dans le cadre de consultations périodiques authentiques tenues au suffrage universel et égal et par scrutin secret garantissant la libre expression de la volonté des électeurs...».⁴⁰

Les différents textes et documents recensés ci-dessus mériteraient une analyse approfondie pour déceler les points communs, les différences, leur caractère impératif ou incitatif et tenter de procéder à une évaluation de leur effectivité. Il n'en demeure pas moins que cette simple recension montre que les élections ne dépendent plus unique-

36 Voir le site internet.

37 OSCE, Manuel d'observation des élections, 5e édition, 2005.

38 Voir le site www.un.org/french/events/democracyday/elections.html.

39 Voir le site «democratie.francophonie.org».

40 Voir le site www.aidh.org.

ment du cadre constitutionnel national. Il existe une véritable dimension internationale des élections, phénomène qui, par nature, demeure, lui, national. Il découle de ce constat quelques conséquences simples :

1) Aucun État, même les plus anciennes démocraties, ne peut faire abstraction de la construction progressive de ce corpus international du droit des élections. Certains évoquent, par exemple en France, l'obligation, un jour, que les élections ne soient plus organisées de manière verticale par le ministre de l'Intérieur, les préfets et les maires, mais soient placées sous la responsabilité, comme dans beaucoup d'autres pays, d'une commission électorale indépendante ;

2) La surveillance internationale des élections devient une réalité. L'idée, totalement rejetée par les démocraties traditionnelles, s'impose de plus en plus dans les nouvelles démocraties, quel que soit le continent concerné. Parmi les pratiques récentes figurent celles des observateurs étrangers. Qu'ils soient missionnés par une organisation internationale, spécialisée ou non spécialisée, ou par des pays tiers en ayant reçu mission ou s'étant donné mission de surveiller les élections nationales, ces équipes d'observateurs apportent une caution. En tout cas, elles empêchent dans la plupart des cas que les élections se déroulent à l'opposé des critères de transparence, de liberté, de sincérité et forment les canons de référence de la démocratie contemporaine.

Certes, le rôle même de ces missions d'observation est sujet à caution, mais, le mieux pouvant être l'ennemi du bien, leur existence constitue un progrès, sinon le progrès définitif;

3) Il existe encore trop peu d'études et de réflexions, voire de synthèses sur les approches et le contenu de ce nouveau corpus. Ce droit international constitutionnel consacré aux élections n'étant ni du véritable droit national, ni la plupart du temps du véritable droit international, s'inscrit dans un entre-deux et ne passionne guère ceux qui ne savent pas dépasser l'horizon constitutionnel national, mais fournit un véritable terrain d'études pour ceux qui tentent d'approfondir en français la notion de «soft law» du droit anglo-saxon.

En tout cas, de nombreuses associations non gouvernementales ont investi ce domaine et savent tirer parti de telle ou telle prescription, recommandation ou observation émanant d'un des organismes internationaux compétents ou d'un des textes internationaux de référence.

L'attribution du pouvoir se fait donc à travers des élections que les politistes appellent des «élections ouvertes», à la différence des «élections fermées» qui se sont pratiquées dans un certain nombre de pays autoritaires.⁴¹

B - LA SÉPARATION DES POUVOIRS

Deuxième élément: une organisation du pouvoir et de la justice qui repose sur la sépa-

⁴¹ Guy Hermet, «Élections non concurrentielles», in Pascal Perrineau et Dominique Reynié (dir.), Dictionnaire du vote, PUF, 2001.

ration des pouvoirs et l'État de droit. Le fait qu'il existe un système parlementaire ou un système présidentiel n'a strictement aucune importance. Il s'agit du même type d'architecture, c'est-à-dire une répartition des rôles entre un exécutif, un législatif et un pouvoir judiciaire. En fin de compte, il y a beaucoup plus de ressemblance qu'on ne le croit entre ces différentes formes d'aménagements constitutionnels. La distribution du pouvoir entre des autorités distinctes en est un des éléments clés. On le constate aujourd'hui pour les quarante sept pays du Conseil de l'Europe et pour tout le continent américain. En Afrique, le cas de l'Afrique du Sud est tout à fait clair.

La problématique de la séparation des pouvoirs fait l'objet, depuis de nombreux siècles, d'importantes discussions. Il s'agit de savoir s'il existe véritablement trois pouvoirs parfaitement séparés ou d'un côté les deux pouvoirs politiques constitués par l'exécutif et le législatif et d'un autre le judiciaire. L'observation des réalités constitutionnelles et politiques conduit à privilégier la deuxième approche. Dans les régimes parlementaires (ou considérés comme tels) l'opposition entre l'exécutif et le Parlement est devenue fictive. Les difficultés de la Belgique ou de l'Italie à constituer un gouvernement proviennent de l'absolue nécessité pour ce dernier de disposer d'un véritable soutien au sein des assemblées parlementaires, que le Parlement soit composé d'une chambre ou de deux. Même dans le régime présidentiel type, celui des États-Unis, le Président ne peut mettre en œuvre une politique que s'il dispose du soutien du Congrès. Dans le cas inverse, il doit négocier avec les majorités de la Chambre des représentants et du Sénat pour aboutir à un éventuel – et souvent incertain - accord. En France l'expérience des périodes dites «de cohabitation» (1986-1988, 1993-1995, 1997-2002) a permis de constater que le Président de la République n'est puissant que s'il dispose d'une majorité qui le soutient à l'Assemblée nationale. Dans le cas contraire, ce qui est la situation de «cohabitation», le véritable chef de l'exécutif devient le Premier ministre, même si le Président conserve de réelles prérogatives en matière de politique étrangère et de défense et, surtout, continue à jouer un rôle politique de premier plan.

En définitive, la vraie séparation des pouvoirs est entre les deux pouvoirs politiques et le pouvoir judiciaire. Une des caractéristiques essentielles des démocraties contemporaines se trouve dans la nécessité d'organiser le pouvoir judiciaire de manière indépendante et efficace. Chacun sait que cela dépend autant de considérations juridiques que de la nature humaine. Des institutions comme les conseils supérieurs de la magistrature (ou de la justice) se sont développées et ont pour mission de mettre de la distance entre le pouvoir politique et les magistrats.

C - LES DROITS FONDAMENTAUX

Troisième élément de ces systèmes : l'affirmation des «droits fondamentaux». Toutes les constitutions contemporaines contiennent des «déclarations de droits fondamen-

taux», ou «principes généraux», c'est-à-dire un *catalogue* de grands principes auxquels nous sommes les uns et les autres attachés et auxquels il ne peut être porté atteinte. La comparaison de ces catalogues de droits fondamentaux entre eux, puis avec les catalogues internationaux, qu'ils soient européens, américains, africains ou mondiaux, révèle d'extraordinaires similitudes. Il y a un socle commun des libertés individuelles: la liberté d'aller et venir, pour commencer ; la liberté de pensée, la liberté de s'exprimer, la liberté d'opinion. On retrouve ensuite les libertés collectives à travers le droit d'association ou le droit syndical, les libertés économiques dans beaucoup de cas, les droits sociaux dans d'autres cas.

Il y a entre ces catalogues de droits fondamentaux de vraies analogies. Est-ce qu'on aurait pu faire autrement? Est-ce qu'on pourrait faire autre chose? Peut-être, mais lorsque, après les grands chocs de 1990, tous les pays de l'Europe ex-communiste ont commencé à rédiger leur constitution, ils ont tous voulu faire un catalogue de droits fondamentaux. À la suggestion: «Écoutez, cela serait peut-être plus simple si vous commenciez tous par incorporer la Convention européenne des droits de l'homme ; au moins vous auriez déjà la même chose; tout le monde l'interpréterait de la même façon, etc.», la réponse unanime était: «Mais nous sommes beaucoup plus astucieux que tous les autres!». On peut prendre l'Europe du centre, des pays baltes ou du sud, c'est exactement le même discours. Ceci étant, il est aisé de constater en fin de compte, que tous ces pays, tous ces systèmes constitutionnels, sont fondés sur un même socle de droits fondamentaux. Cela, *in fine*, légitime le «dialogue des juges»⁴² et le recours à «l'argument de droit comparé».⁴³ Ils sont justifiés par les ressemblances entre les différents catalogues.

Dans l'espace européen, l'existence de la Convention européenne des droits de l'homme⁴⁴ (47 signataires) et la Charte des droits fondamentaux de l'Union européenne (27 signataires)⁴⁵ contiennent de très importants catalogues, avec de larges domaines communs. Ni l'un ni l'autre de ces documents n'a de valeur constitutionnelle, sauf si la constitution nationale le prévoit, mais les cours constitutionnelles sont quasiment obligées de les prendre en considération et d'éviter que leurs décisions soient en contradiction avec la jurisprudence de cours supranationales : la Cour européenne des droits de l'homme de Strasbourg et la Cour de justice de l'Union européenne de Luxembourg. Cela contribue fortement à une internationalisation, une étape vers la mondialisation, des droits fondamentaux.

42 Laurence Burgogue-Larsen, «De l'internationalisation du dialogue des juges», in *Le dialogue des juges*, Mélanges Bruno Genevois, Dalloz, 2008.

43 Marie-Claire Ponthoreau, «Le recours à l'argument de droit comparé par le juge constitutionnel», in *L'interprétation constitutionnelle*, Ferdinand Mélin-Soucramanien (dir.), Dalloz, 2005.

44 La dénomination exacte est «Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales».

45 La Croatie deviendra, le 1er juillet 2013, le 28e pays membre de l'Union européenne.

Les progrès de la Cour interaméricaine des droits de l'homme, les espoirs mis dans l'action à venir de la Cour africaine des droits de l'homme et des peuples s'inscrivent également dans cette perspective

D - LES COURS CONSTITUTIONNELLES

Dernier élément de cette réalité: les cours constitutionnelles. Il y en a maintenant presque partout. Il n'y a plus une seule constitution moderne, contemporaine qui n'ait pas sa cour constitutionnelle.⁴⁶ Quel est le rôle d'une cour constitutionnelle ? 1^o Elle s'occupe des droits fondamentaux; elle est la cour suprême en matière de droits de l'homme, quelles que soient les techniques d'intervention; 2^o elle a pour fonction de réguler l'organisation des pouvoirs publics, c'est-à-dire «les conflits entre organes». On peut lui confier d'autres attributions, mais ce sont là les deux noyaux durs.

Dans l'optique de la mondialisation, il s'avère que ces cours constitutionnelles ne travaillent pas en vase clos. Elles dialoguent entre elles, et de plus en plus. Certes, par définition, une cour constitutionnelle nationale est là pour appliquer la constitution nationale; cela va de soi. Mais, en même temps, comme les textes nationaux se ressemblent beaucoup, lorsqu'il y a un problème nouveau, la cour nationale commence parfois par regarder ce qui se fait à l'étranger. Ce «dialogue des juges», qui fait partie du vocabulaire régulier - même s'il est logiquement critiqué -, est très développé dans le dialogue des cours constitutionnelles, pas toujours de façon évidente mais toujours de façon sous-jacente.⁴⁷ Par la force des choses, il y a un esprit commun qui se développe.⁴⁸ Même la plus nationaliste des cours, la Cour suprême américaine⁴⁹, s'intéresse - du moins grâce à certains de ses membres - à ce qui se passe à l'étranger. C'est tout à fait nouveau; ses membres le reconnaissent eux-mêmes. Cela signifie que, dans la préparation d'une décision, lorsque c'est pertinent - lorsqu'il s'agit d'interpréter le fédéralisme américain il y a peu à apprendre d'une cour constitutionnelle étrangère d'un pays non fédéral -, lorsqu'il y a à se prononcer sur des problèmes de libertés et de droits fondamentaux, voir comment se sont prononcées, soit des cours étrangères, soit les grandes cours internationales, a, au minimum, de l'intérêt. Cela est utilisé comme matériau. Dans certains cas, cela ira jusqu'à les citer. Par exemple, la Cour suprême du Canada⁵⁰ cite facilement des jurisprudences d'autres cours constitutionnelles ou cours suprêmes; elle juge selon

46 Parmi les constitutions européennes post-communistes, seule celle de l'Estonie de comporte pas une cour constitutionnelle spécifique, mais la Cour d'État est compétente en matière constitutionnelle.

47 V. Julia Iliopoulos-Strangas (dir.), *Cours suprêmes nationales et cours européennes*, Concurrence ou collaboration, Actes du colloque des 12, 13 et 14 mai 2005 (Athènes), en hommage à Louis Favoreu, Bruxelles, Bruylant, 2007.

48 Voir mon article «Le recours aux précédents étrangers et le dialogue des cours constitutionnelles», *Revue française de droit constitutionnel*, 2009, n° 80. Il s'agit du rapport préparé pour la Ire conférence mondiale des cours constitutionnelles (Le Cap, 22-24 janvier 2009).

49 www.supremecourtus.gov.

50 www.scc-csc.gc.ca.

la technique anglaise d'un raisonnement long, avec beaucoup de développements, donc de références et des précédents.

Par contre, il est très exceptionnel de trouver dans les décisions du Conseil constitutionnel des références à de la jurisprudence extra française; il n'y a qu'un seul cas, c'est la référence à la Cour européenne des droits de l'homme à propos de la laïcité.⁵¹ Les dossiers préparatoires des décisions du Conseil constitutionnel, lorsque le problème est significatif (pas quand il s'agit d'étudier le droit d'amendement selon la Constitution française), quand il s'agit d'étudier un certain nombre de libertés, contient toute la jurisprudence des principales cours étrangères ou des cours internationales sur le sujet à juger.

Il y a là un effet très net de la mondialisation. Elle n'est pas rampante, elle est tout à fait explicite. Lors du congrès mondial de droit constitutionnel à Santiago du Chili, en 2004, la dernière séance plénière consistait en une table ronde, avec des juges constitutionnels, sous la présidence de notre regretté ami Louis Favoreu, sur «Le dialogue des juges».⁵² Chacun d'entre eux, y compris les Américains, ont dit: «Nous utilisons ce qui se fait ailleurs». Cette affirmation, cette reconnaissance, est une contribution essentielle à notre réflexion.

La volonté des cours constitutionnelles de s'inscrire dans un mouvement international a donné naissance, d'une part, à des regroupements régionaux ou linguistiques, d'autre part, à une amorce d'organisation mondiale.

C'est ainsi qu'il existe des associations, des regroupements ou des conférences réunissant les cours constitutionnelles d'Asie (association des cours constitutionnelles ou institutions équivalentes d'Asie), d'Europe (conférence des cours constitutionnelles européennes), du monde ibérico-américain (conférence ibérico-américaine de justice constitutionnelle), d'Afrique australe (Forum des juges en chef⁵³ d'Afrique australe), d'Afrique (Conférence des juridictions constitutionnelles africaines), les cours francophones (Association des cours constitutionnelles ayant en partage l'usage du français), anglophones (Cours du Commonwealth), lusophones (Conférence des cours constitutionnelles de langue portugaise), et du monde arabe (Union des cours et conseils constitutionnels arabes), voire des jeunes démocraties (Conférence des organes de contrôle constitutionnel des pays de jeune démocratie).

La Conférence mondiale sur la justice constitutionnelle, mise en place à l'initiative de la Commission de Venise, a tenu une première réunion au Cap (Afrique du Sud) du 22 au 24 janvier 2009. Elle a consacré ses travaux au thème «L'influence de la justice

51 Décision 2004-505 DC, 19 novembre 2004, Traité établissant une Constitution pour l'Europe (www.conseil-constitutionnel.fr).

52 Comparative constitutionalism in practice :VIe World Congress of the International Association of Constitutional Law, International Journal of Constitutional Law (I.CON), volume 3, number 4, October 2005, p. 543 et s.

53 «Chief justices».

constitutionnelle sur la société et sur la jurisprudence globale des droits de l'homme», intitulé qui met bien en relief la mondialisation des cours et de la portée de leurs décisions. La déclaration finale insiste sur le fait que «la justice constitutionnelle joue un rôle crucial afin de développer et renforcer les valeurs fondamentales consacrées par les constitutions...».⁵⁴ La deuxième réunion s'est tenue à Rio de Janeiro (Brésil) du 16 au 18 janvier 2011. Ses travaux ont porté sur «La séparation des pouvoirs et l'indépendance des cours constitutionnelles et instance équivalentes», problématique très directement reliée à ce qui a été indiqué ci-dessus. Si aucune déclaration finale n'a été adoptée, c'est à Rio de Janeiro qu'a été entériné le projet d'institutionnalisation de la Conférence mondiale sur la justice constitutionnelle.⁵⁵ Les premières lignes du statut de la Conférence mettent bien en valeur les progrès de l'État de droit et des droits de l'homme: «La conférence mondiale sur la justice constitutionnelle agit en faveur de la justice constitutionnelle – comprise au sens de contrôle de la constitutionnalité des lois, y compris la jurisprudence en matière de droits de l'homme – comme élément essentiel de la démocratie, de la protection des droits de l'homme et de l'État de droit» (article 1^{er}, § 1). À fin avril 2013 soixante-neuf cours (ou juridictions équivalentes) ont confirmé leur accord pour participer à ce réseau mondial. Il est à noter que la Cour suprême des États-Unis, dont la renommée est, depuis l'arrêt *Marbury/Madison* de 1803, la cour la plus emblématique n'a pas participé aux réunions du Cap et de Rio et n'a pas l'intention de devenir membre de la nouvelle organisation. Certaines cours peuvent faire partie de plusieurs réseaux, par exemple l'un régional, l'autre linguistique. Le Tribunal constitutionnel d'Andorre participe à trois réseaux, le réseau européen, le réseau ibérico-américain et le réseau francophone.

Il est toujours difficile d'apprécier la portée de la coopération internationale. Les grandes lignes de clivage du monde contemporain se retrouvent dans l'univers des cours constitutionnelles comme dans d'autres enceintes. Les discussions sur le caractère universel ou non des droits de l'homme, sur la possibilité pour des juges de tenir compte de situations politiques conflictuelles, sur leur capacité à condamner de graves atteintes aux droits de l'homme ou à l'ordre constitutionnel démocratique traversent les débats, soit de manière diplomatique, soit parfois de manière provocante. L'observateur actif regrette toujours que les discussions prennent trop la forme de monologues juxtaposés et très rarement de véritables dialogues, par exemple à partir de cas jurisprudentiels fictifs. Une vision optimiste inclinera à penser qu'en fin de compte les échanges d'information, les contacts entre les membres, le développement de nombreuses réunions régionales ou bilatérales et la simple affirmation de la légitimité des cours constitutionnelles constituent un élément de plus de la mondialisation constitutionnelle.

⁵⁴ site internet www.venice.coe.int/WCCJ/.

⁵⁵ Voir les statuts sur le site de la note précédente.

III - LA MONDIALISATION DES INTERROGATIONS

Il s'agit de réfléchir sur deux thèmes : la hiérarchie des normes, le problème de la souveraineté.

A - LA HIERARCHIE DES NORMES

Pour l'Europe, il faut évoquer les parts respectives du national et de l'international. Ceci n'est pas un problème nouveau. Quand on dit : «C'est nouveau à cause de la Convention européenne des droits de l'homme ou de l'Union européenne», c'est totalement faux: la Cour permanente de justice internationale a déjà eu l'occasion, en 1926, de rappeler qu'«aucune disposition nationale, y compris constitutionnelle, ne pouvait faire obstacle à l'application d'un traité».⁵⁶ Il faut donc relativiser les éclats de voix d'aujourd'hui. Ceci d'ailleurs paraît assez évident : quand un pays signe un traité international, ce n'est pas pour le mettre de côté; c'est plutôt pour l'appliquer, si possible de bonne foi, comme le prévoit la Convention de Vienne sur le droit des traités de 1969.

Il existe effectivement une vraie difficulté face à la mondialisation. C'est en Europe que les problèmes se développent le plus. On voit très bien se dessiner de nettes tendances dans l'espace européen, l'espace des quarante sept du Conseil de l'Europe et pas uniquement celui des vingt sept de l'Union européenne.

Première tendance: les cours internationales, la Cour de Strasbourg⁵⁷ pour la Convention européenne, la Cour de Luxembourg pour l'Union européenne,⁵⁸ ont dit clairement, l'une et l'autre, qu'un État ne peut pas mettre en avant ses dispositions constitutionnelles nationales pour faire obstacle à l'application de la Convention européenne, ou du droit de l'Union européenne. Elles utilisent à cet égard le même raisonnement que la Cour suprême américaine à l'égard du droit des États: le droit supérieur l'emporte sur le droit inférieur.

Certes, la Cour européenne des droits de l'homme l'a dit beaucoup plus clairement que la Cour de Luxembourg, simplement parce qu'elle est beaucoup plus compétente pour ce type de questions. Elle a même censuré des pays à la suite de décisions de leur cour constitutionnelle, en considérant que les cours constitutionnelles nationales avaient statué en méconnaissance de la Convention européenne des droits de l'homme, ce qui est quand même aller assez loin. Il n'y a aucun doute là dessus. Le 19 janvier 2007, lors de la rentrée solennelle de la Cour européenne des droits de l'Homme, aussi bien le président sortant, M. Wildhaber que le nouveau président, M. Costa, ont réaffirmé la position de la Cour.⁵⁹

⁵⁶ CPJI, 25 mai 1929, Certains intérêts allemands en Haute-Silésie (www.icj-cji.org). V. Otto Pfersmann, « La Primauté : double, partiellement directe, organiquement indéterminée, provisoirement fermée », Cahiers du Conseil constitutionnel, n° 18, 2005.

⁵⁷ V. le site www.eche-coe-int, notamment l'arrêt Sejdic et Finci c. Bosnie-Herzégovine, Grande chambre, 22 décembre 2009 (n° 297996/06 et 34836/06).

⁵⁸ CJCE, aff. 11-70, 17 décembre 1970, Internationale Handdgesellschaft.

⁵⁹ V. Les discours du 19 janvier 2007.

Certains le contestent, mais la réalité est là: la Cour européenne des droits de l'homme se considère, à tort ou à raison, comme étant la cour «supra-constitutionnelle» des cours constitutionnelles nationales. Il faut voir les choses comme elles sont en droit positif.⁶⁰

Est-ce que la Cour interaméricaine des droits de l'homme⁶¹ ou la Cour africaine des droits de l'homme et des peuples iront dans le même sens? Pour le continent américain, nous sommes en chemin; pour l'Afrique, la Cour africaine, installée en 2006, n'a pas encore eu une activité suffisante pour qu'un bilan puisse être présenté.⁶² Il faut un peu attendre: «*wait and see*». En tout cas, il n'y a pas d'autre solution possible. Si l'on accepte l'idée que la constitution nationale et que le droit constitutionnel national, sont un frein à l'application de la norme internationale, c'est tout le système, extrêmement sophistiqué – et de plus en plus sophistiqué – de l'ordre international qui disparaît progressivement. Il s'agit de systèmes juridictionnels en formation, avec des juridictions telles que la Cour pénale internationale, les tribunaux spécialisés pour l'ex-Yougoslavie ou le Rwanda, l'Organe de règlement des différends de l'Organisation mondiale du commerce, etc. Tout ceci va dans le même sens et soulève la question fondamentale de savoir quel sera l'avenir du droit constitutionnel national.

Face à cette incontestable mondialisation, à cette internationalisation, les cours constitutionnelles nationales ont toutes la même réponse, en tout cas en Europe: «Oui, tant que cela n'est pas en contradiction avec la propre identité constitutionnelle de notre pays». On a vu la Cour allemande, la Cour italienne, la Cour espagnole, la Cour française dire à des occasions diverses: «Nous acceptons cette logique de la supériorité du droit européen, tant que cela ne porte pas atteinte au noyau le plus dur de notre identité constitutionnelle nationale».⁶³

B - LA SOUVERAINETE

Les observations relatives à la hiérarchie des normes induisent une nouvelle interrogation: la question de la souveraineté. On voit très bien se dessiner des systèmes régionaux. En réalité, derrière «mondialisation», il faudrait dire «régionalisation» car il y a une région du monde où le système est maintenant très développé, c'est l'Europe. Il y en a d'autres où il n'est pas du tout développé, et il y en a où il se développe. La Cour africaine des droits de l'homme repose sur la Charte africaine des droits de l'homme et des peuples. La Cour

60 Didier Maus, « La Cour européenne des droits de l'homme est-elle une cour constitutionnelle supranationale? » Liège, Strasbourg, Bruxelles : parcours des droits de l'homme (Liber amicorum Michel Melchior), Bruxelles, Anthemis, 2010.

61 www.costeidh.or.cr V. Laurence Burgorgue-Larsen et A. Ubada de Torres, Les grandes décisions de la Cour interaméricaine des droits de l'homme, Bruylant, 2008.

62 www.african-court.org.

63 Pour l'Allemagne, BVerfG..., 2 BuR, aff. 1481/04, 14 octobre 2004, site www.bverfg.de. Pour la France, Conseil constitutionnel, 30 novembre 2006, Loi relative au secteur de l'énergie. V. Pierre Bon et Didier Maus (dir.), Les grandes décisions des cours constitutionnelles européennes, Dalloz, 2008. V. également Laurence Burgorgue-Larsen (dir.), L'identité constitutionnelle saisie par les juges en Europe, done, 2011.

interaméricaine des droits de l'homme est-t-elle réellement efficace? Elles sont, d'une certaine manière, les enfants de la Cour européenne des droits de l'homme, mais ce sont des enfants qui ont encore besoin de grandir s'ils veulent rejoindre la cour mère.

Est-ce que ces systèmes régionaux sont susceptibles de porter atteinte à la souveraineté? Existe-t-il une limite? La réponse est très délicate. Quels que soient nos sentiments, les États sont entrés dans cette perspective de mondialisation des systèmes juridiques ; ils l'ont fait volontairement. En souscrivant à un certain nombre de traités, ou en ne s'en retirant pas le cas échéant, ils en acceptent automatiquement les conséquences. Toutes les juridictions tirent un effet utile de la règle *pactasuntservanda*. Il faut appliquer les traités. Ce que disent les juges constitutionnels de tel ou tel pays se ressemble beaucoup: d'ailleurs ils s'en inspirent souvent, d'un pays à l'autre.

Alors est-ce que, véritablement, cela débouche sur une remise en cause du traditionnel concept de souveraineté? Probablement. En tout cas, cela oblige à poser des questions, notamment celle de savoir jusqu'où les États et les peuples voudront aller. C'est là que se fait le lien avec le débat qui a eu lieu en Europe en 2005 à propos du «Traité constitutionnel européen». Ce n'était qu'un des aspects du sujet, mais il fut au centre des controverses. Les résultats négatifs des référendums en France et aux Pays-Bas reposent très largement sur une résistance des peuples à accepter une autorité politique supranationale.

Il y a des réalités nationales, il ne faut pas les occulter, notamment dans les nouveaux pays de l'Union européenne ou les pays issus du démembrement de l'URSS. Il y a souvent un très grand attachement à une sorte de nationalisme juridique. En même temps, il y a cette confrontation entre les traditions, ce qu'on appelle dans les traités européens «les traditions constitutionnelles communes», et l'effort d'européanisation, de mondialisation qui est mis en œuvre par les uns et par les autres. Alors que peut-il se passer demain ? Selon la formule d'un humaniste: «La prévision est un art difficile, surtout lorsqu'il s'agit de l'avenir» parce que... comment prévoir ce que sera demain?

Des étapes de la mondialisation ont été accomplies. Peut-il y en avoir d'autres? Est ce que cela peut déboucher sur un droit constitutionnel de la mondialisation ? La réponse est probablement «non», parce que à vue humaine raisonnable cela n'est pas prévisible, mais le véritable système international peut devenir par exemple beaucoup plus efficace ou pertinent.

Il y a des évolutions qui peuvent aller dans ce sens, par exemple celle qui concerne la Cour internationale de justice ; elle est passée un peu inaperçue, mais elle est intéressante. Il y a de plus en plus de conflits de normes internationales : comment concilier un traité sur la libre circulation avec un traité sur la liberté individuelle ou un traité sur la protection de l'environnement? Pendant très longtemps, ce problème n'existait pas parce que les traités n'avaient pas d'effet direct. Mais les juges nationaux et internationaux ont

de plus en plus de difficultés pour concilier ces textes. Certains – dont le Président de la République française, Jacques Chirac – ont émis l'idée que la Cour internationale de justice pourrait être chargée de régler les problèmes de conflit entre les normes internationales elles-mêmes. Il serait envisageable que l'on instaure au profit de cette cour le même système de renvoi préjudiciel – *mutatis mutandis*, cela va de soi – que celui qui existe au profit de la Cour de justice des de l'Union européenne.⁶⁴ A ce moment là, il existerait une cour internationale, véritablement universelle, qui aurait la possibilité de statuer sur des problèmes typiquement constitutionnels ; certains d'entre eux sont épineux. Il s'agit certainement de futurologie, mais l'extrapolation s'appuie sur ce que l'on a vu se développer depuis vingt ou trente ans.⁶⁵

Plus personne ne peut échapper à la réflexion sur la mondialisation. Il faut que la question de la mondialisation des phénomènes constitutionnels soit clairement posée, soit pour l'encourager, soit pour la regretter, voire la combattre. C'est un problème de choix individuel. Il appartient aux observateurs de constater les phénomènes et de leur donner une cohérence. Le droit constitutionnel évolue. Tant mieux.

РЕЗЮМЕ

Данная работа представляет собой размышления о глобализации конституционного права, то есть размышления о преодолении национальных конституционных границ и появлении действительно глобального конституционного сообщества.

Анализ глобализации конституционного языка (I), конституционных реалий (II), поставленных вопросов (III) и их исследование на примере геополитических изменений, произошедших с момента падения Берлинской стены в 1989 году, позволяют объяснить появление подлинного транснационального конституционного права. В нем одновременно существуют почти идентичные для всех демократий нормы и само, истинное международное конституционное право, в частности в Европе с её Европейской конвенцией по правам человека и с договорами о Европейском союзе. Сравнение, проведенное между юриспруденциями национальных конституционных судов и международных судов (Европейский суд по правам

64 Jacques Chirac, Discours devant la Cour internationale de justice, La Haye, 29 février 2000 (www.discours.vie-publique.fr/notices/007000092.html).

65 Voir *Le pari d'un gouvernement mondial* (Marcel Ruby, dir.), A2Cmédiast (Paris), 2011, notamment Didier Maus, « Le Parlement mondial » et les propositions sur une fonction judiciaire universelle.

человека, Суд Европейского союза, Межамериканский суд по правам человека), показывает подлинное двустороннее движение ценностей, касающихся основных прав человека, методов, используемых судьями, и решений, принятых относительно идентичных проблем.

Первая часть исследования является констатацией глобализации конституционного языка как с точки зрения конституционных ценностей, так и с точки зрения глобализации текстов. Мы являемся свидетелями появления текстов конституционного содержания, которые, хоть и не всегда имеют статус обязательной нормы, тем не менее отныне формируют принципы регионального или всемирного значения. Резолюции ООН, декларации ОБСЕ, рекомендации Венецианской комиссии составляют набор принципов мягкого права.

Во второй части проводится анализ конституционных реалий, позволяющий исследовать источник власти и международное право в области выборов, разделение властей, основные права и конституционные суды. Помимо простой констатации фактов, основной упор делается на развитие международной конституционной сети, которая имеет академический, парламентский характер, или той сети, которая относится к конституционным судам. Более глубокое осмысление возможно благодаря большому количеству ссылок.

В последнем разделе рассматриваются два ключевых вопроса: иерархия норм и суверенитет. Столкнувшись лицом к лицу с глобализацией или европеизацией европейских стран, логично задаться вопросом о взаимосвязи национальных конституционных норм с международными нормами, задуматься о современном значении суверенитета и об отражении утопической идеи прогресса всеобщей справедливости.

ZUSAMMENFASSUNG

In diesem Beitrag werden Überlegungen über die Globalisierung des Verfassungsrechts, d. i. über Überwindung der nationalen Verfassungsgrenzen, und die Entstehung einer wirklich globalen konstitutionellen Gemeinschaft angestellt.

Eine Analyse der Globalisierung der Sprache der Verfassung (I), der konstitutionellen Realien (II), der gestellten Fragen (III) und deren Untersuchung am Beispiel der geopolitischen Veränderungen, die sich nach dem Fall der Berliner Mauer im Jahre 1989 vollzogen haben, ermöglichen die Erklärung der Entstehung des echten transnationalen Verfassungsrechts. In diesem Recht bestehen gleichzeitig Normen, die fast in allen Demokratien identisch sind, und das echte internationale Verfassungsrecht als solches wie

in Europa mit seiner Menschenrechtskonvention und den Verträgen über die Europäische Union. Der Vergleich, der zwischen den Zuständigkeiten der nationalen Verfassungsgerichte und der internationalen Gerichtshöfe (Europäischer Gerichtshof für Menschenrechte, Gerichtshof der Europäischen Union, Interamerikanischer Gerichtshof für Menschenrechte) gezogen wurde, zeigt eine echte bilaterale Bewegung der Werte, die die Grundrechte, Methoden, die von Richtern angewandt werden, und die über identische Probleme getroffenen Entscheidungen betreffen.

Im ersten Teil des Beitrags wird die Globalisierung der Sprache der Verfassung unter dem Aspekt der Verfassungswerte und der Texte festgestellt. Wir sind Augenzeugen der Entstehung von Texten konstitutionellen Inhalts, die zwar nicht immer den Status einer verbindlichen Norm haben, aber nichtsdestoweniger von nun an Grundsätze regionaler oder weltweiter Bedeutung aufstellen. Die Resolutionen der Vereinten Nationen, die Erklärungen der OSZE, die Kodizes der Venezianischen Kommission bilden einen Satz von soft-law-Prinzipien.

Im zweiten Teil wird eine Analyse der konstitutionellen Realien vorgenommen, die die Quelle der Macht und das internationale Völkerrecht im Bereich der Wahlen, der Gewaltentrennung, die Grundrechte und die Verfassungsgerichte zu untersuchen ermöglichen. Neben einfacher Feststellung von Fakten bildet die Entwicklung des internationalen konstitutionellen Netzwerks, das einen akademischen, parlamentarischen Charakter besitzt, oder des Netzwerks, das die Verfassungsgerichte betrifft, den Schwerpunkt. Zu einem tieferen Verständnis tragen zahlreiche Verweise bei.

Im letzten Teil werden zwei Schlüsselfragen behandelt: die Hierarchie der Normen und die Souveränität. Angesichts der Globalisierung oder Europäisierung der europäischen Länder liegt die Frage nach dem Zusammenhang zwischen nationalen Verfassungsnormen und internationalen Normen, nach der aktuellen Bedeutung der Souveränität und der Reflexion der utopischen Idee des Progresses der allgemeinen Gerechtigkeit nahe.

This paper is the reflection on globalization of constitutional law, i.e., reflection on overcoming the national constitutional boundaries and emergence of the truly global constitutional community.

Analysis of globalization of the constitutional language (I), the constitutional realities (II), the set of questions (III) and their study on the model of geopolitical changes, which have occurred since the fall of the Berlin Wall in 1989, can explain the emergence of a genuine transnational constitutional law. It includes norms nearly identical for all democracies and genuine international constitutional law itself, in particular in Europe with its European Convention on Human Rights and the Treaty on European Union. The comparison made between the jurisprudence of national constitutional courts and international judicial institutions (the European Court of Human Rights, the Court of the European Union, the Inter-American Court of Human Rights) shows a genuine *inter partes* movement of values, concerning the fundamental human rights, the methods used by the judges, and the decisions adopted on identical problems.

The first part of the study is the statement of the globalization of the constitutional language, both from the perspectives of constitutional values, and of globalization of texts. We are witnessing the emergence of the texts of the constitutional content, which, although do not always have the status of binding rules, however, now form the principles of regional or global importance. UN resolutions, declarations of OSCE, codes of the Venice Commission constitute a set of principles of lenient law.

In the second part, the analysis of constitutional realities allows us to examine the source of power and international law in the domains of elections, separation of powers, fundamental rights, and constitutional courts. In addition to the simple statement of facts, an emphasis is made on the development of the international constitutional network, which is of academic, parliamentary nature, or the network, which refers to the constitutional courts. A deeper understanding is possible due to the large number of links.

The last section discusses two key issues: the hierarchy of norms and sovereignty. Faced with globalization and Europeanization of the European countries, it is logical to wonder about the relationship of the national constitutional norms with international standards, to think about the modern meaning of sovereignty and reflection of the utopian notion of progress of the universal justice.

CAN FEDERALISM HAVE JURISPRUDENTIAL WEIGHT?

Cheryl SAUNDERS

THE ROLE OF COURTS IN FEDERAL SYSTEMS

All definitions of federal systems of government require a division of powers of some kind between at least two spheres of government in a way that gives each a degree of autonomy.¹ Institutional arrangements for federal systems typically include a Constitution, by which the division of power is prescribed and arrangements for judicial review, through which the Constitution can be enforced.² At the same time, however, analyses of the operation in practice of most federations point to inexorable expansion of central power, through judicial decisions as well as other means. In the case of the oldest and most famous of all federations, the United States of America, the courts have largely, although not entirely, abandoned the task of enforcing the federal division of power against the central sphere of government (Barnett 2007).³

My contribution to this volume is prompted by this apparent inconsistency between the theory and practice of federal government. The gap is significant, not only for existing federations, but for the institutional design of developing federations.

In this paper I assume, for the sake of argument, that federations have courts that take seriously the task of resolving disputes about the meaning of the Constitution. This assumption underpins my focus on the reasoning of the courts and the legal principles they develop and apply. I acknowledge that there may be room for argument about the extent to which judicial reasons sufficiently reflect the basis on which particular choices are made. Nevertheless, courts are assigned a key role in most federations and their published reasons are critical to their accountability for the performance of that role. The jurisprudence that emerges is an important dimension of such federations that merits understanding and analysis in its own right.

A tendency of courts to favour central power in disputes about the meaning and application of the constitutional division of power might be explained in at least three ways. One

¹ There is of course more to a federal form of government than a division of power: Aroney, 2006, 2.

² Switzerland is an exception, where “the referendum becomes the adjudicative process for ruling on the validity of federal legislation”: (Watts 2008: 158-9). Ethiopia is another, where the second chamber of the legislature, the House of the Federation, has final authority to interpret the Constitution and resolve constitutional disputes, drawing on recommendations of a Council of Constitutional Inquiry: Articles 82-84.

³ What John Kincaid has described as the Supreme Court’s “federalism sputter” in the last decade of the 20th century proved highly controversial and did not last: (Kincaid 2008: 19).

is that, over time, judicial review can not and perhaps should not impede the expansion of central power, because of the greater perceived legitimacy of the sphere of government representing the people organized nationally, the greater perceived efficiency of the exercise of power centrally,⁴ or a combination of the two.⁵ If this is correct, it undermines one of the central premises on which federal systems of government are based. A second possible explanation is that effective judicial review of a federal division of power depends on other aspects of institutional design. One of the most obvious of these is the form of the division of power itself and in particular the presence or absence of an exclusive list of sub-national powers as a textual brake on the expansion of powers assigned to the centre. Other potentially relevant design features include the constitution of the court with final responsibility for constitutional interpretation and in particular the sufficiency of its independence from both spheres of government⁶ and the willingness of the elected branches of government, for whatever reason, to respect the restrictions of the federal arrangement. The hypothesis that the effectiveness of judicial review depends on factors of this kind has implications for the structure of federal systems of government and suggests that generalizations about a division of powers and judicial review may be insufficiently prescriptive.

A third possibility, which I do not suggest is exclusive, is that a pattern of judicial decisions that consistently favours central authority reflects a failure on the part of the courts to develop approaches to the interpretation and construction of federal constitutions that enables them to give weight to federalism as a constitutional principle without unduly inhibiting the capacity of the federated state to manage the complexity of divided power and to adapt to changing conditions. Such a shortfall in judicial doctrine might be attributable to the relative novelty of the idea that federalism is a constitutional principle that merits protection, by contrast to, for example, questions of rights or separation of powers. Alternatively or in addition, it might reflect the preconceptions of a previous era when, in Ron Watts' words, federations were viewed "as simply an incomplete form of government and a transitional mode of political organization..." (Watts, 2007: 8). In any event, this hypothesis raises the question whether it is possible to identify doctrines that allow a more nuanced approach to the judicial resolution of disputes over a federal division of power.

This chapter is concerned with the last of these possible explanations of the shortfall between federal theory and practice in relation to judicial enforcement of the federal division of power against the central sphere of government. In other words, it asks whether progres-

4 What John Kincaid has described as the Supreme Court's "federalism sputter" in the last decade of the 20th century proved highly controversial and did not last: (Kincaid 2008: 19). This consideration may become more pressing over time, in the face of increasing mobility within the federation, affecting the ability of sub-national governments to deal with spillovers and externalities. I am grateful to Tom Courchene for this point.

5 A related argument, with which this chapter is not directly concerned, but which also has implications for assumptions about federal design, challenges the legitimacy of judicial review of federal constitutions: (A. Stone, 2008).

6 For an argument questioning the effectiveness of judicial review largely on this basis see André Bzdera, 1993.

sive centralization of power in federal states, with the imprimatur or acquiescence of constitutional courts, can be attributed in part to the failure of courts to develop doctrines that take the federal character of the polity adequately into account and, if so, whether alternative doctrines can be envisaged that might enable courts to play a more effective role.

In this chapter, I explore this question in relation to one federal country, Australia, in which the effective reach of Commonwealth constitutional power has expanded over the course of more than 100 years. Australia is chosen in large part because it is the country whose federalism jurisprudence I understand best; a not insignificant criterion, given the depth of knowledge about judicial reasoning that is necessary for a project of this kind. For comparative purposes, it would be useful for similar projects to be undertaken by scholars in other federations who are familiar with the subtleties of the reasoning of their own courts.⁷

Australia is a useful case study for other reasons as well, however. On the one hand, judicial review of the federal division of power continues to be taken seriously: the High Court accepts that the judiciary “has the responsibility of deciding the limits of the respective powers of the State and Commonwealth governments (sic)”: (*Lange*, 1997: 564). Federation remains the principal rationale for the entrenched, but thin, Australian Constitution; the High Court insists on its role as the final arbiter of the constitutional validity of both legislative and executive action; and the Commonwealth occasionally loses a case on federalism grounds (*Incorporation*, 1991; *Austin*, 2003).

On the other hand, Australia lacks all the institutional safeguards for a federal division of powers that, under the second hypothesis outlined earlier, might complement or supplement the role of the courts (cf Gageler 1987). Following the United States federal model, the Constitution of the Commonwealth of Australia enumerates the powers of the Commonwealth Parliament, leaving the unenumerated residue to the States, in a way that was “deliberately asymmetrical” and makes the “role of the States...inherently vulnerable” (Crommelin, 1995: 172). Justices of the High Court of Australia, the final court of appeal in constitutional as in all other matters, are appointed by the Commonwealth executive, subject to an insignificant obligation in section 6 of the *High Court of Australia Act 1979 (Cth)* to consult with the Attorneys-General of the States. The Australian system of parliamentary responsible government favours the concentration of political power and values its speedy exercise and to that extent is antithetical to federalism. The federal chamber, or Senate, famously plays no protective role in relation to Australian federalism, beyond ensuring that members of the smaller States are better represented in the two dominant parliamentary groupings that they would otherwise have been. The Australian High Court thus encounters a greater degree of difficulty in maintaining the federal division of powers, while possessing a greater degree of responsibility for it.

⁷ See, however, Jean Leclair, 2005, 383.

This chapter is confined to the role of courts in interpreting and applying the federal division of powers. Questions that arise under the Constitution about other aspects of the federal system thus are excluded from its scope except, occasionally, by way of contrast. Specifically, I do not deal directly with the extent to which each sphere of government can subject the institutions of other governments to its own legislation (Austin, 2003), or with the constitutional protection for Australian economic union (*Castlemaine Tooheys*, 1990; *Street*, 1989) beyond noting that, in each of these areas, the High Court has accorded weight to a conception of Australian federalism. Similarly, I am not concerned here with the broad field of fiscal federalism, except to the extent to which it can be considered a dimension of the federal division of fiscal power (Saunders 2006), or with the principles that govern inconsistency between Commonwealth and State law (Evans and Saunders, 2005), even though both have contributed significantly to the effective expansion of Commonwealth power.

There is a danger that an inquiry of this kind will be typecast by reference to old antipathies over “states rights” and dismissed out of hand. This would be a pity because the issues are both serious and contemporary, not only in Australia but in federations elsewhere. Governments do not have rights, except as representatives of people. In a federation, people have at least two sets of representatives, each of which has a role to play in the governance of the federated state. If any rights are in issue they are those of the people themselves, to be governed by both sets of their elected representatives in accordance with principles of federal democratic government and the rule of law. The immediate question is what these principles require, especially when the Constitution is relatively rigid and the conditions within which it operates change over time. This chapter does not seek to wind the Australian federation back to a mythological golden age but to ask how, in this first decade of the 21st century, the federal division of power ought to be interpreted and applied. There are some, admittedly small, signs that the question is agitating the Court as well (*Workchoices* 2006: [50],[190]).

The analysis of Australian doctrine that begins in the next part outlines the design of the Australian federal division of power, identifies the interpretative principles that underpin the current Australian approach and examines aspects of their operation in practice that affect not only federalism but also the rule of law. Unavoidably, this part makes reference to a wide range of judicial decisions but it draws on two in particular, in which challenges to the adventurous use of Commonwealth power have recently been rejected. One is *New South Wales v Commonwealth* (2006) otherwise known as the *Workchoices* case, in which the High Court accepted that a Commonwealth law that regulated the workplace relations of the categories of corporations covered by the Commonwealth’s head of power in section 51(xx)⁸ was valid for that reason alone. The other is *Thomas v Mowbray* (2007),

⁸ Section 51(xx) confers power to make laws with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”.

in which the Court upheld the validity of Commonwealth legislation that provided for the imposition of interim control orders to protect the public from terrorism as an exercise of the power with respect to “naval and military defence” (sec 51(vi)).

The final part explores alternative interpretative techniques, each of which, in one way or another, would involve taking the federal character of the Constitution into account to a greater extent than the Court does now. Some of these could be implemented without major upheaval in Australia, even now. Others may effectively be precluded for Australia by the weight of judicial authority to the contrary, but may be more readily applicable elsewhere. In any event, the Australian experience with the interpretation and application of the federal division of powers offers insight into both constitutional design and the potential impact of judicial review that may be useful in emerging federations.

THE AUSTRALIAN APPROACH INFLUENCES

The Australian approach to determining the boundaries between the legislative powers of the Commonwealth and the Australian States is influenced by both the design of the Constitution and the general interpretative methodology of the High Court. The latter has varied between parts of the Constitution and over time and is a product of tension between common law techniques of statutory interpretation, which themselves have evolved considerably over the course of the 20th century, and the additional demands of a written constitution. The prevailing technique has been described as “strict and complete legalism”, following an influential formulation by Sir Owen Dixon, on his swearing-in as Chief Justice of Australia in 1952 (85 CLR xiv). Legalism is a variant of formalism, in the sense that it relies on a small range of positive legal sources to resolve any questions of meaning that are perceived to arise (Stone: 171). Understanding of what legalism requires, however, has also varied between different members of the Court and Dixon himself famously believed in the “apt and felicitous use” of the “high technique and strict logic” of the common law, rather than narrow textualism (Dixon, 1955).

DESIGN

When the Australian Constitution was drafted, in the last decade of 19th century, the United States, Canada, Germany and Switzerland already had a federal form of government. The framers of the Constitution were aware of all four and drew on each of them to a degree (Maddox and Caplan). They relied most extensively on the United States model, however, in part because of its familiarity and in part because it was perceived as more federal than Canada, otherwise a closer fit with the circumstances of Australia but “more nearly a unified community than a federation” in the view of one of the Australian framers, Andrew Inglis Clark (La Nauze, 1972: 27).

Relevantly for present purposes, the Australians broadly followed the United States approach to the federal division of power, by identifying only Commonwealth powers,

most of which were not described as exclusive and were assumed to be concurrent. The unexpressed residue of power was left to the States (section 107),⁹ although by ‘continuing’ the existing powers of the colonies rather than by ‘reserving’ the residue to the States or to the people as in the Tenth Amendment. No significance seems to have been attached to this difference in wording at the time (Quick and Garran, 1901:933, 936).

In other respects, however, the Australians seem to have learnt from US experience and sought to improve on it. Major commercial powers, such as banking, were expressly included, rather than left to be drawn from the commerce clause or from a “necessary and proper” clause as in *McCulloch v Maryland* (1819). Whether or not as a consequence the Australian equivalent of the necessary and proper clause (Article 1 section 8) is significantly more limited, conferring power only over “matters incidental to the execution of any power...” (sec.51 (xxxix)). An express guarantee of freedom of interstate trade (sec. 92) obviated the need to construct a “dormant” commerce clause (*Gibbons*, 1824). The consequences of inconsistency were prescribed, rather than left to be inferred from federal supremacy (cf US Constitution Article VI, clause 2). Drawing on earlier proposals for Australian federation (Quick and Garran, 1901: 648-9) the Commonwealth was given express power to legislate on matters referred to it by Parliaments of the States (sec.51(xxxvii)). These important details aside, however, the similarity of approach is marked.

The US model was influential in other ways as well. Both federations drew together existing polities with constitutions and governing institutions of their own. In the case of each federation, the new Constitution left existing governance arrangements in place and created new structures only for the national sphere, regulating State institutions lightly, to the extent that they were regulated at all. Significantly, however, in the case of the US, the 13 original States had enjoyed a period of sovereignty, however brief. By contrast, the colonial status of the Australian States at the time of federation was used to deny them any share in external sovereignty once Australian independence was achieved and further fuelled the view that the Constitution is not a “compact” of a kind that might encourage a more federal friendly approach to interpretation (*Payroll Tax*, 1971: 371). This history also contributed to the emergence of the external affairs power as one of the heads of power on which the Commonwealth principally relies (*Seas and Submerged Lands*, 1975): a development potentially relevant to the theme of this chapter, but so distinctively Australian as to diminish its usefulness as an example for comparative purposes.¹⁰

⁹ Section 107 continues the previous powers of the colonies “unless...exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State”. Quick and Garran understood the reference to “withdrawn” powers to include the exercise of concurrent powers by the Commonwealth in a form that prevailed over State law under section 109: 933.

¹⁰ This is not to deny the significance of treaty implementation for the division of powers in most federations. The link between this power and the acquisition of independence in Australia is more distinctive, however: Saunders (1995).

The institutions of government also differed in the two federations; and in some cases markedly. Most obviously, the Australians continued to rely on parliamentary responsible government, in preference to a separation of the legislature and executive. They established a Senate with equal representation from the original States but its members were directly elected from the outset and voted along party lines from the time of federation. They designed the judicature chapter with an eye to article III of the Constitution of the United States but departed from it to provide appeals to the High Court in matters of State as well as federal jurisdiction. In due course, this led to the view that, in Australia, there is a single common law (*Lange* 1997: 563). They rejected the US mechanisms for formal constitutional change, adapting instead a referendum procedure from the Constitution of Switzerland, which they expected, wrongly as it turned out, to strike a better balance between rigidity and change (Saunders, 2001: 454).

Two principal questions arise in interpreting and applying a federal division of power of this kind. The first is what the powers themselves mean. What is a “trading corporation” (sec 51(xx))? What is “trade and commerce among the States” (sec 51(i))? What are “external affairs” (sec 51(xxix))? What are “trade marks” (sec 51 (xviii))? Difficult though these questions may be, they involve the familiar problem of extracting the legal meaning of a text from a range of semantic possibilities (Barak, 2005: 6). The second and more difficult question is the reach or scope of each power, often described in Australia as “characterization”. This involves a decision about the nature of the connection that is necessary to establish that a Commonwealth statute is validly supported by a particular head of power. To take an apparently extreme case: would a Commonwealth law requiring schools to be established in lighthouses be a valid exercise of Commonwealth power with respect to lighthouses, in the absence of a Commonwealth power with respect to schools (*Huddart Parker*, 1908: 410)? Or, to take a more recent and still topical example: may the power with respect to trading corporations be used to prevent the building of a dam in a wilderness area, as long as the construction authority is a trading corporation, in the absence of another, direct head of power, on which the legislation could be based (*Tasmanian Dams*, 1983)?

These questions about the meaning and scope of Commonwealth power are the primary focus of this chapter. They should be distinguished from a third, more specific question that has frequently arisen, as to whether Commonwealth power extends to legislation for State institutions and vice versa. Can Commonwealth power with respect to taxation, for example, be used to impose taxation on the States (*Payroll Tax*, 1971)? Does the power with respect to the arbitration of certain industrial disputes extend to disputes between State governments and their employees (*Engineers*, 1920)? It will be seen that this question is responsible for the early repudiation of reliance on federalism as a value in constitutional interpretation and that, paradoxically, it is also one of the few power-related contexts in which the Court now takes the federal character of the Consti-

tution into account. Otherwise, however, the extent of immunity of instrumentalities is a subsidiary issue, which will be considered only for its considerable role in the development of the interpretative method of the High Court.

INTERPRETATIVE METHOD

The problem of interpretative method arose in two main contexts in the High Court in the decades immediately following federation in 1901. First, a series of cases raised the question of the extent to which spheres of government could tax each other, or each other's officials. By 1906, the extent of claimed immunity had broadened to the point where, potentially, it embraced any form of action by one sphere of government that impinged on the "instrumentalities" of another (*Railway Servants*, 1906). Secondly, a group of cases dealt with the meaning and scope of the powers more generally, in circumstances in which there was room for argument about their use. Could the Commonwealth's power over trademarks be used to provide for the registration of workers' marks to protect goods made by Australian labour (*Union Label*, 1908)? Could the Commonwealth rely on its power over trading and financial corporations to prohibit contracts by corporations in restraint of trade (*Huddart Parker*, 1909)? Could the power with respect to taxation be used to encourage fair conditions of labour, by providing for the waiver of the tax on manufacturers who provided conditions of employment that met the standards in the Act (*Barger*, 1906)? In each of these examples, the Commonwealth relied on a power expressly allocated to it to achieve outcomes in relation to which it had no explicit power.

In resolving the arguments over the immunity of instrumentalities the early High Court relied on a conception of federalism in which each Australian jurisdiction was, "within the ambit of its authority, a sovereign State" (*D'Emden*, 1904) and entitled to immunity on that ground. The Court approached the second group of questions, about the meaning and scope of Commonwealth powers, on the basis that each power should be read with reference to the other grants of power and "to powers reserved to the States" through the operation of section 107 (*Barger*, 1906). In each of the examples given earlier, *Union Label*, *Huddart Parker* and *Barger*, the Commonwealth Act was held to be invalid on the basis of reasoning that took into account the effect of the legislation on intra-State trade. Intra-State trade self-evidently was not included in the Commonwealth power over "trade and commerce with other countries, and among the States" (sec 51(i)) and thus was taken to be reserved to the States. The doctrines of both immunity of instrumentalities and reserved State powers drew on United States jurisprudence, in the face of the similarity of the two Constitutions. Canadian experience was rejected, largely on the basis of differences in constitutional design (*Baxter*, 1907).

Over the course of the first two decades of the 20th century, these doctrines ran into

difficulties in Australia as in time they would do also in the United States (Claus, 1995: 894). It proved impracticable either to maintain a complete immunity of governments from the legislation of other jurisdictions or to develop principled and coherent exceptions to the doctrine. Similarly the doctrine of reserved powers proved too extreme a solution to the problem of determining whether Commonwealth laws were within power. The First World War put more pressure on it still, reflected in the observation of Isaacs J. in *Farey v Burvett*: (1916: 454) "...of what avail is the State right to regulate the internal sale of commodities if the State itself disappears?" Reliance on both doctrines for the purposes of constitutional interpretation divided the Court for over a decade. Finally, in 1920 in the *Engineers'* case, the Court adopted a new approach to interpretation that not only repudiated the two contested doctrines but also, at least for a time, eschewed reliance on conceptions of federalism at all.

The issue before the Court in *Engineers* was whether the Commonwealth's industrial relations power extended to disputes between State authorities and their employees. It thus turned on the doctrine of immunity of instrumentalities, raising reserved powers only to the extent that the defendants, faced with the challenge of identifying a textual basis for the immunities doctrine, pointed to section 107 as a possible source. Nevertheless, the Court majority attacked both doctrines as tainted by reliance on conceptions of federalism rather than explicit constitutional provisions. In its reasoning it pointed to the Constitution as a "political compact of the whole of the people of Australia" (*Engineers* 1920: 142). Earlier formulations describing it as a compact of the people of the States were abandoned (*Whybrow*, 1910: 291). Equally, if not more, importantly, the compact had become binding law as a statute of the Imperial Parliament. To interpret such an instrument, the High Court was bound by the "settled rules of construction" laid down by the "highest tribunals of the Empire" (148). This atypical obedience to the views of the Privy Council on interpretation of the Australian Constitution was complemented by a repudiation of the relevance of United States decisions on the grounds of two claimed structural differences: the "common sovereignty" of the Commonwealth and the States, still manifested in an "indivisible" Crown and "the principle of responsible government" (146).

The rules of construction henceforth to be applied corresponded closely to the then prevalent principles of statutory interpretation. They relied heavily on literal interpretation and encouraged recourse to context only to resolve ambiguity. A "vague, individual conception of the spirit of the compact" on which the doctrine of intergovernmental immunities relied, was precluded by such an approach. Equally, however, section 107 was no longer to be read as reserving power from the Commonwealth that "falls *fairly* within the explicit terms of an express grant...as that grant is *reasonably* construed" (154).¹¹ Insofar as questions might arise about what was fair and reasonable for this purpose, the

¹¹ Emphasis supplied.

Constitution should be read “naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *luceat ipsa per se*” (152).

Famously, *Engineers* did not supply the final word on the aspect of interpretative method with which it was principally concerned. Within less than a decade, it began to be suggested that there were limitations on Commonwealth power to legislate for the States (Sawer, 1967: 133). By 1947, this became settled doctrine (*State Banking*, 1947). The new intergovernmental immunities doctrine is much weaker than the old one, focusing on the logic of the existence of State polities, rather than on the incidents of State sovereignty. Nevertheless, it draws on a conception of Australian federalism that is not expressed in the text of the Constitution and it continues to be given effect by the Court (*Austin*, 2003).

The impact of *Engineers* on the meaning and scope of Commonwealth powers more generally, however, has been pervasive. It continues to be accepted that Commonwealth powers should be interpreted literally and that considerations of federalism are irrelevant. In addition, the effect of the case has been extended by a range of other interpretative principles for which *Engineers* itself provides no authority, although it may be a source of inspiration. As a Constitution, intended to last over time, the text should be construed “with all the generality which the words used admit”; at least as far as Commonwealth heads of power are concerned.¹² The Constitution authorizes whatever additional power is necessary to make each head of power effective, either through the express incidental power in section 51 (xxxix) (*Jumbunna*, 1908) or as an inherent characteristic of any grant of power (*Le Mesurier* 1929). Each head of power is to be interpreted in isolation from the others, in the absence of an explicit restriction on power that cannot be circumvented, of which the express exception of “state banking” from the banking power is an example. Thus in *Russell* (1976: 539) Mason J declined to interpret the marriage power in section 51(xxi) by reference to the power over “matrimonial causes” in section 51(xxii) in order to give the former “a full operation according to its terms, unrestricted by dubious implications drawn from the existence of another grant of legislative power touching an associated subject matter”.

With what presently seems to be the sole exception of the defence power, the Commonwealth heads of power are not understood as purposive but are categorized variously instead by reference to activities, persons, classes of public service and standard categories of legislation (*Stenhouse*, 1944). In the absence of the opportunity to resort to purpose, it became necessary to identify other criteria by which to determine whether a law was supported by a power. One such criterion is whether the law operates directly

¹² The quotation is from Public Vehicles Licensing Appeals Tribunal (1964). The source of the idea is commonly attributed to *Jumbunna* (1908), drawing on *McCulloch v Maryland*, although *Jumbunna* itself in fact was concerned rather with the reach of the incidental power.

on the subject matter of a power (*Huddart Parker* 1931:515-6). If it does, it seems now that it is automatically within power even if, for example, the law operates to prohibit the activity, subject to a condition that “gives it the additional character of a law upon some other topic” (*Herald and Weekly Times*, 1966: 434). In any event, however, the Court looks to both the legal and practical operation of the law to determine whether there is a sufficient connection with the power or, conversely, whether the connection is ‘so “insubstantial, tenuous or distant” that it cannot sensibly be described as a law “with respect to” the head of power’ (*State Banking* 1947: 79). Motive, intention, and the purposes of the legislator are irrelevant, for the purposes of establishing, or demolishing, the requisite connection. The fact that a law has two or more “characters” only one of which is within power does not affect its validity (*Fontana Films*, 1982).

Over time, these interpretative principles have become more expansive, as caution expressed in relation to particular conclusions by earlier Courts have been abandoned by their successors in a series of small steps over time. Any attempt to persuade the Court to consider the federal context of the Constitution in determining a question about the scope or application of a Commonwealth power invariably is rejected, often with ritualistic expressions of horror about the “discredited doctrine” of reserved State powers (*Workchoices*: [48]); a story that itself grows in the telling.¹³ In reality, however, arguments of this kind do not seek to return to the reserved powers doctrine, as it was understood at the time of *Engineers*, but challenge the Court’s assumption that the scope of Commonwealth power can adequately be determined in isolation from the rest of the Constitution by focusing on the text of the power alone.

OUTCOMES

The particular approach taken by the High Court to the interpretation and application of Commonwealth powers has inexorably expanded their reach, with a corresponding erosion of discrete areas of State responsibility. This part is less concerned to establish this somewhat obvious end result than with the implications of the Court’s interpretative method for the way in which powers are used and, ultimately, for the coherence of Australian law.

Most Commonwealth powers now have been used to the full for the purposes for which they obviously were conferred. Extensive and effectively comprehensive Commonwealth legislation dealing with banking, insurance, marriage and divorce, intellectual property and immigration is based on heads of power explicitly referable to each of those subjects. In some cases, the meaning of a head of power has been stretched over time, in ways subsequently endorsed by judicial interpretation. Thus “patents of inven-

¹³ In *Workchoices* the majority suggests that the underlying problem with reserved powers is that it treats the Constitution as “preserving to the States some legislative power formerly held by the unfederated colonies” – surely an unastonishing proposition (my italics; the Court’s italicization of “preserving” removed): [192].

tion” has been held to support legislation on plant breeders rights despite some differences between the two conceptions (*Grain Pool*, 2000); broadcasting has been accepted as a service sufficiently “like” post and telegraphs to be covered by the same head of power (*Brislan*, 1935; *Jones*, 1963); and the need for an industrial dispute to extend “beyond the limits of any one State” before attracting the Commonwealth’s conciliation and arbitration power has been rendered largely nugatory by acceptance that the interstate element can be artificially created by the use of “paper” disputes (*Re State Public Services Federation*, 1993:267-268).

Questions of this kind have been resolved by a range of legal techniques, including the Australian distinction between the connotation and denotation of constitutional terms (*Professional Engineers*, 1959: 267). This distinction sometimes is used by the Court to explain the extension of Commonwealth power to embrace new developments that the terms of a power are apt to “denote” while its core “connotation” remains stable over time. This is only one of many techniques that might be adopted to choose the legal meaning of a federal power from a range of “semantic possibilities” (Barak, 7:2005). Choices nevertheless must be made and in each of these and other similar cases the result is, in the scheme of things, unremarkable and warrants no further comment here.

Somewhat more noteworthy for present purposes are cases in which the constitutional prescription is more ambiguous and the case for consideration of constitutional context is correspondingly more compelling. The decision in *Thomas* (2007) illustrates the point. *Thomas* raised for the first time a question about whether the defence power supports Commonwealth legislation to impose control orders on citizens in order to tackle the threat of terrorism within Australia. Potentially relevant to the answer was a constitutional provision that requires the Commonwealth to protect a State from domestic violence “on the application of the Executive Government of the State” (sec 119). It is arguable that this section throws light on the extent of the Commonwealth’s power to deal with internal disturbance (Quick and Garran: 964) as well as imposing a duty on the Commonwealth to respond to a State request. A contextual approach to resolving the question of whether the defence power extends to threats of internal terrorism necessarily would take section 119 into account. In the event, however, the defence power was accepted as the basis for the challenged legislation and sec 119 was considered only by a dissenting judge ([247-249]).

More significant still for present purposes is the use of powers to achieve outcomes that are indirect, in the sense that they are less obviously indicated by the terms of the power conferred. For the most part the capacity of the Commonwealth to extend the scope of its power by these means is attributable to the Court’s approach to characterization, rather than to the meaning of the power itself. Many powers are amenable to indirect use, given the ease with which the connection is established between a law and

a power, coupled with the Court's acceptance that a law might be characterized in multiple ways, only one of which needs to be within power. By way of example, the Commonwealth has successfully relied on the taxation power to increase workplace training by private sector employers by imposing a charge on employers equal to the amount by which costs of approved training fall short of a prescribed minimum (*Northern Suburbs*, 1993). It has drawn on the overseas trade and commerce power to prevent mining of mineral sands, by prohibiting export without ministerial approval, which can be withheld on environmental grounds (*Murphyores*, 1975).

The power to make laws with respect to "foreign corporations, and trading and financial corporations..." (sec. 51(xx)) has proved particularly susceptible to use in this way. For some time, the Court was wary of concluding that a law had a sufficient connection with a "person" power for no better reason than that it imposed obligations on the category of "constitutional" person or provided a benefit to it. Its self-imposed interpretative method, however, made it difficult to draw a sustainable line. Use of the power was incrementally extended, to provide a base for Commonwealth legislation in relation to trade practices (*Rocla*, 1971), environmental protection (*Tasmanian Dams*, 1983) and secondary boycotts (*Fontana Films*, 1982). Necessarily, in each case, the application of the law was confined to trading and financial corporations, providing partial coverage of the area for which regulation was sought. Finally, in *Workchoices*, the Court explicitly accepted what already had become tolerably clear that any law that makes a constitutional corporation an "object of command" is a law with respect to such corporations for constitutional purposes. *Workchoices* thus confirmed the full potential of the corporations power as a base for laws on any activities in which constitutional corporations are engaged, or by which they might be affected. The inability of many such laws to extend equally to all affected persons, or even to all affected corporations, may raise questions from the standpoint of public policy in Australia but not of constitutional law.

It is ironic that the one power that has not so far profited from the High Court's generous approach to characterization is the power in section 51(i) of the Constitution to make laws for "trade and commerce among the States". The now-discredited doctrine of reserved powers was linked most closely with section 51(i), as early Justices of the High Court sought to interpret other powers so as to preserve the authority of the States over intra-state trade, which patently was excluded from its scope. The decision in *Engineers* ensured that other powers were no longer inhibited by consideration of the impact of their use on intra-state trade, but the power over inter-state trade itself has continued to be so restricted. The High Court has rejected argument that inter-state and intra-state trade are commingled (*Airlines of New South Wales (No.2)*, 1965: 78) and has insisted that "the express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction, however artificial it may appear"

(*Burgess*, 1936: 672). In so doing, it has prevented the emergence of an Australian “commerce clause” as an all purpose head of power, capable of obliterating the federal division of powers in the manner of its counterpart in the United States. On the other hand, the corporations and external affairs powers on which the Commonwealth primarily relies are so much less satisfactory as bases for rational legislative regimes that a more effective trade and commerce power appears preferable, notwithstanding the risks to the federal division of power that it obviously presents.

It may be that the inter-state trade and commerce power eventually will develop as a more significant head of Commonwealth power. Until 1988, it was possible to explain its stunted growth as a corollary of the expansive interpretation of the constitutional protection of “absolute” freedom of interstate trade in section 92: the narrower the scope of interstate trade, the narrower the gap in the regulatory authority of the combined Australian governments. Reinterpretation of section 92 in 1988, so as to preclude protectionism but not regulation per se, removed at least this obstacle to a more expansive approach to the power (*Cole v Whitfield*, 1988). So far, however, it has had no effect. The Commonwealth has continued to rely primarily on its corporations and external affairs powers and the Court has been presented with no significant opportunity to examine the meaning and scope of the interstate trade and commerce power. There are, however, some straws in the wind. In determining whether a law has a sufficient connection with a head of power, the Court will consider “the practical, as well as the legal, operation of the law” (*Dingjan*, 1995: 369). And in a recent decision narrowing the sphere of State regulation exempt from the prohibition against protectionism in section 92, the Court majority noted ‘that what is purely “local” commerce today may not be readily distinguished at any practical level from interstate commercial activity’ (*Betfair*, 2008: [97]).

The interpretative approach taken by the Court to the federal division of legislative power creates an expectation that powers will continue to expand and encourages experimentation by Commonwealth governments and Parliaments in order to push the limits of their powers as far as they can. Commonwealth legislation often makes adventurous use of the Commonwealth’s own powers even when the States have referred power to the Commonwealth to provide a more stable base. Techniques to maximize the reach of Commonwealth power take two principal forms.

First, a Commonwealth statute often relies on the terms of the power on which it rests to define the application of the law, in order to ensure that the statute extends as far as the power permits, even when the meaning of the latter is uncertain. A statute that relies on the corporations power, for example, typically is drafted to apply to “constitutional corporations”, defined to mean “foreign, trading or financial” corporations, without further definition of those terms, which under present constitutional doctrine

remain imprecise (Evans et al, 2007: 34). Corporations that are marginal candidates for these categories, of which universities are an example, must determine for themselves whether they fall within the legislation. The decision is significant: a corporation that wrongly concludes that it is a trading corporation is not subject to the Commonwealth law and may well be subject to a State law. A former Chief Justice of Australia noted in 1979 that such an approach to legislative drafting “may well prove highly inconvenient and costly to those affected by the statute” and urged the Commonwealth to ‘assay’ a definition, “making...its own judgement of the ambit of its constitutional power”(WA National Football League, 1979: 199). These strictures had no apparent effect. Use of this technique is now so common that it no longer attracts attention.

Secondly, many Commonwealth statutes experimenting with the reach of Commonwealth powers rely on a smorgasbord of powers. The legislation challenged *Work Choices* legislation is a case in point. The Workplace Relations Amendment (Work Choices) Act 2005 applied not only to employers who were constitutional corporations but also to employment relations involving the Commonwealth or a Commonwealth entity; certain categories of employment in the course of interstate or overseas trade and commerce and employers who are located in a territory. The Water Act 2007 was an even more telling example. In order to take over from the States the authority to manage the water resources of the Murray-Darling Basin, in circumstances in which at least one State was reluctant to refer power, the Act claimed as its “constitutional basis” powers in relation to interstate trade and commerce (sec 51(i)); postal, telegraphic, telephonic and other like services (sec 51(v)); astronomical and meteorological observations (sec 51(viii)); census and statistics (sec 51(xi)); weights and measures (sec 51(xv)); corporations (sec 51(xx)); external affairs (sec 51(xxix)); incidental matters (sec 51(xxxix)); territories (sec 122); and “any implied legislative powers of the Commonwealth”. The complexity of Commonwealth legislation resulting from the combination of these two techniques means that much of it cannot adequately be understood without significant constitutional expertise.

ANALYSIS

The interpretative approach adopted by the High Court of Australia in *Engineers* has been explained, with hindsight, as a response to “a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs” (Payroll Tax, 1971: 397). The explanation is now *de rigueur*: most recently, the *Workchoices* majority attributed *Engineers* to “a sense of national identity emerging during and after the First World War” ([193]). Other doctrinal shifts that took place around the same time, expanding Commonwealth power by broadening the concept of “inconsistency” for the purposes of the paramountcy of Commonwealth law (*Clyde Engineering*, 1926) and releasing the Commonwealth (temporarily, as it turned out) from the constraints

of the guarantee of free interstate trade (*WA McArthur Ltd v Queensland*, 1920), can be seen to be linked to the same phenomenon. To the extent that this analysis is correct, it suggests a deliberate substitution by the High Court of one form of federalism for another, in response to changes in external circumstances of an intangible kind¹⁴. In the aftermath of the Second World War, the judicial conception of Australian federalism was further embellished by the rather improbable observation that: “The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them.” (*State Banking*, 1947: 82)

There is, however, room for some skepticism about this explanation for *Engineers*, at least as the sole explanation for the doctrinal change. Argument over the doctrines of reserved State power and immunity of instrumentalities had divided the High Court since 1906. The immediate catalyst for the outcome in *Engineers* was the final shift in the balance of judicial power as the last of the original justices retired and the number of seats on the Court increased. And the most obvious underlying point of difference between the two groups of judges concerned the proper approach to constitutional interpretation. It would be simplistic to ascribe the division to a choice between the British and American constitutional traditions, represented by decisions of the Privy Council and of the Supreme Court of the United States respectively, if only because the significance of the constitutional character of the instrument was acknowledged by both. Nevertheless, the explanation has a germ of truth, in the sense that the approach that prevailed in *Engineers* emphasized the statutory origins of the Constitution and endorsed techniques of interpretation indistinguishable from those used for statutes, which in turn were affected by a culture of parliamentary sovereignty, developed in the context of a unitary state.

Engineers provided a foundation stone for the interpretative method of the High Court, which remains authoritative in relation to the federal division of legislative power. Over the almost 90 years since *Engineers* was decided, however, the High Court’s approach to the interpretation of both statutes and other parts of the Constitution has evolved considerably, drawing on techniques that, for the moment at least, apparently are precluded in dealing with questions about the respective powers of the Commonwealth and the States.

Interpretation of statutes by reference to purpose is now the norm. While a purposive approach initially was adopted in response to a legislative requirement (Acts Interpretation Act 1901 sec 15AA), the modern notion of purpose, mandated by statute, is sufficiently close to the older concept of mischief, developed by the courts (Spigelman 2008), for the latter to have unilaterally adopted a purposive approach to constitutional interpretation, if they were minded to do so. Indeed, only the courts could take this step.

¹⁴ By contrast, later changes in constitutional doctrine as Australia acquired independence responded to new external circumstances that could readily be substantiated by a court: *Sue v Hill* (1999) 199 CLR 462.

The Commonwealth Parliament cannot prescribe the approach to the interpretation of the Constitution on which its own power depends. The Imperial Interpretation Act 1889, which once governed the interpretation of the Commonwealth Constitution (Quick and Garran, 1901: 792), is, quite properly, frozen in its application to Australia by the evolution of Australian independence (Australia Acts 1986, sec 1). In the event, however, the only head of power that has been treated unequivocally as purposive by the High Court is the power to make laws with respect to defence (*Stenhouse*, 1944).

The approach of the Court to the interpretation and application of legislative powers now also contrasts with its approach to the rest of the Constitution. The former remains in the realm of what contemporary commentators Quick and Garran referred to as “interpretation...in a narrower sense” (791). The latter is open to the methodology that Quick and Garran described as “construction”: “the process of comparing different parts of the document and gathering its intent from a survey of the whole” (791).¹⁵ Quick and Garran themselves assumed that the High Court would use both types of technique and except in relation to legislative powers, it does so. Structure and context are familiar judicial tools for determining the meaning of constitutional as well as statutory provisions. Constitutional provisions dealing with both representative democracy and separation of powers, as two of the three pillars of the Australian constitutional system, have been understood and developed in this way. Federalism is the third pillar and the federal context of the Constitution also has been used to resolve some constitutional questions. Thus the Court has accepted limits on the capacity of the Commonwealth to legislate for the States, modifying the ratio of *Engineers* itself (*Austin*, 2003); acknowledged that both the guarantee of absolute free trade in section 92 (*Castlemaine Tooheys*, 1990; cf *Betfair*, 2008) and the prohibition against discrimination on the grounds of State residence in section 117 (*Street*, 1989) must be understood in the light of the nature of federalism; and begun the process of developing a framework of principle to deal with overlapping laws between the States for which the Constitution does not specifically provide (*Mobil Oil*, 2002; *John Pfeiffer*, 2000). In relation to the interpretation and application of legislative powers, however, it continues to confine itself to “interpretation in the narrow sense”, eschewing all except historical context; denying, for the most part, the relevance of purpose; and rejecting any attempt to rely on the federal character of the Constitution as an aid to an interpretative problem.

It may readily be accepted that the two particular interpretative doctrines that were swept away by *Engineers* were unsatisfactory. It is both impracticable and, by current standards, undesirable, to exempt all the instrumentalities of one sphere of government from the legislation of another. It is unduly restrictive to resolve all questions about the scope of Com-

¹⁵ They also equated “interpretation” with “analysis” and “construction” with “synthetic processes”, presumably drawing on the philosophical understanding of the two terms.

monwealth power by reference to assumptions about the powers retained by the States on federation. Both doctrines, in essence, were too absolute and too extreme. But the response, which requires federalism to be ignored altogether, was equally extreme. In the case of the immunity of instrumentalities, this was recognized over time, as a more limited immunities doctrine returned. As far as characterization is concerned, however, the *Engineers* response has remained in place and has been further embellished over the years.

The explanation for this discrepancy lies in two perceived advantages of the present approach. The first is that the interpretative method of the High Court has enabled the progressive expansion of Commonwealth power under a Constitution that has proved resistant to formal change. The capacity of the Constitution to adapt to emerging needs through judicial interpretation has gone some way towards easing the problems otherwise created by its rigidity. On the other hand, continued expansion of Commonwealth power through judicial acquiescence in its exercise is not necessarily an automatic good. Federalism assumes that power is divided. At some point a concentration of power in either sphere of government jeopardizes whatever values federalism brings to the constitutional system. It also is also possible that formal constitutional change could have been secured more regularly in the latter part of the 20th century had the Court been less ready to accept the validity of a creative use of Commonwealth power.

The second perceived advantage of the current interpretative approach in Australia is that it limits judicial discretion in determining the validity of Commonwealth legislation and offers what appear to be legal formulae to guide the discretion that remains. To this extent, it is consistent with the generally restrained approach to adjudication that prevails in Australia. On the other hand, as the High Court itself has been at pains to emphasize, it is the task of the judiciary to resolve controversies about the meaning and effect of the Constitution that are brought before the courts (*Workchoices*: [134]) and the resolution of controversy by definition involves choice. An interpretative method that masks the element of choice detracts from the purposes of giving reasons for decisions and compromises the value of the judicial process (Dyzenhaus and Taggart, 2007: 148).

The current Australian approach presents difficulties for other aspects of the system of government as well. It has encouraged an opportunistic style of legislative drafting that enhances the Commonwealth's chances of success in litigation at the expense of uncertainty for those potentially affected by the legislation. In that sense, it impinges on the rule of law. It produces bizarre regulatory solutions: on the basis of current doctrine it is conceivable, for example, that the Commonwealth could regulate universities by relying on Commonwealth power over trading corporations. The complexity of the system is such that there is no realistic prospect that the solution lies in the political process, through what the *Engineers* Court optimistically described as "the power of the people themselves to resent and reverse what may be done" (152).

In *Workchoices* the majority Justices criticized arguments that sought limits to Commonwealth power in the name of “federal balance” as lacking content ([196]). The absence of a persuasive alternative to an interpretative approach that has the legitimacy that accompanies long-user is an impediment to change in Australian doctrine. The next part explores some possibilities, ranging from minor interpretative changes to major systemic shifts.

ALTERNATIVES

PARAMETERS

The interpretative change in *Engineers* was a judicial response either to the inadequacy of existing doctrine or to developments in the external context in which the Constitution applied. A case can be made for a further change on either of these grounds now. The current approach is out of step with the somewhat more sophisticated interpretative methodology that Australian courts employ in other contexts and has a distorting effect on the form and coherence of Australian law. The impact of globalization, coupled with the complexity of modern government, has cast federalism in a more favourable light than in the 1920s, when it was widely seen as a transitional, or at least incomplete, form of government. Justice Kirby put the case eloquently in the *Workchoices* decision, when he exhorted the Court:

‘...to rediscover the federal character of the Constitution. It is a feature that tends to protect liberty and to restrain the over-concentration of power which modern governments, global forces, technology and now the modern corporation, tend to encourage. In this sense, the federal balance has the potential to be an important restraint on the deployment of power. In that respect, federalism is a concept of constitutional government especially important in the modern age’. ([612])

There are limits to the extent of the methodological change that is likely to be acceptable and desirable. These follow both from the constraints of Australian legalism and from the need to maintain an effective capacity for national action in changing conditions over time. The former precludes the introduction of interpretative principles that require the Court to give effect to a particular conception of federalism, formed by material outside the text, structure and context of the Constitution. For the same reason, any new approach must identify tests of a sufficiently legal kind, which the Court can apply in determining the validity of Commonwealth law. The latter requires the scope of Commonwealth powers to be sufficiently flexible to embrace new circumstances. An example from existing case law is the interpretation of the patents power to support plant variety rights (*Grain Pool*, 2000). An example for the future, which already has been the subject of some speculation in the Court, is an understanding of the marriage power that includes the union of same-sex couples (*Re Wakim*, 1999; *Grain Pool*, 2000).

The flexibility for which I argue here does not extend to accepting convoluted use of Commonwealth power as bases for national action. In such cases, in any event, as the examples of the Workchoices and Water Acts show, Commonwealth legislation does not in fact deliver consistent national regulation, but deals with the subject matter in a way that necessarily is incomplete. Public demand for national action that cannot adequately be met by existing Commonwealth powers, including the interstate trade and commerce power, calls either for intergovernmental action, drawing on the reference power, or constitutional change.

Within these parameters there is room for movement in interpretative method. On any view, the Australian Constitution provides a framework for a federal form of government, combined with representative and responsible government and the rule of law. On any definition, federalism involves the organized division of power between at least two spheres of government, each of which represents some configuration of the people. To this extent at least, federalism forms part of the constitutional context, to be taken into account in the interpretative process. As the Court recently confirmed in *Thomas v Mowbray*, “judgmental evaluation” is not antithetical to the judicial function (Gleeson CJ: [20]).

MINOR

This part identifies five relatively minor steps that would enable the High Court to take better account of the federal context of the Constitution in determining the meaning and scope of Commonwealth legislative powers.

The first is symbolic, but important nonetheless. The Court should abandon the view, which patently is incorrect, that power does not form “part of the conception of a government” in the Australian federation (*State Banking*, 1947: 82). Power lies at the heart of any conception of government and the division of power is central to federalism. To the extent that the views of the framers of the Constitution on this point matters, Alfred Deakin, one of the leaders of the federation movement, famously urged delegates to “embody in our draft [Constitution] such a distinct limitation of federal power as would put the preservation of state rights beyond the possibility of doubt”, rather than relying on the Senate for the purpose (Official Record of Debates, Sydney 1891: 82).

Secondly, the Court should bring the interpretative method that it uses for Commonwealth powers into line with its approach to the interpretation of other parts of the Constitution. This would involve, for example, drawing on the context of the entire Constitution, including other heads of power, in determining the meaning of a particular head of power and the manner in which it might be used. This does not mean that a power necessarily would be read down by reference to another. It does mean, however, that the Court may have regard to the full range of relevant legal sources to assist it in

its interpretative function. Thus in determining whether the defence power extended to internal terrorist threats, in the case of *Thomas*, the presence elsewhere in the Constitution of a section dealing with the protection of the States from invasion and violence would be a relevant consideration (sec 119). In determining whether the Constitution authorizes the use of the corporations power to enact industrial relations legislation, as in *Workchoices*, the existence of another power dealing with industrial disputes would be a relevant, although not a determinative factor.

The third draws on the familiar common law technique of resolving legal disputes on the least adventurous ground. Where a Commonwealth law is supported by a State reference of power, the Court should attempt to resolve the question on the basis of the referred power, avoiding the need to consider and approve a novel use of Commonwealth power. By contrast, in *Thomas* the majority Justices dealt first with the arguments based on the defence power, making it “unnecessary to deal with the arguments concerning the references of matters by the States” (Gleeson CJ [6]; see also [131]). Greater deference to the significance of a referred matter on the part of both the Commonwealth and the Court might also encourage more widespread use of the reference technique.

Fourthly, the Court should be cautious before endorsing a significant new doctrinal development that has implications for the existing understanding of the meaning or scope of Commonwealth and State powers *inter se*. Caution in this context might involve more critical scrutiny of a novel interpretation or claimed connection between the challenged law and a Commonwealth power. Arguably, *Workchoices* was a case of the latter kind. While on one view the conclusion that any law that applies to a constitutional corporation is a law with respect to a constitutional corporation followed logically from previous authority, on another view, the case broke new ground. It finally determined a question that had bothered successive Justices for 100 years, about whether a head of power can be used merely as a convenient peg on which to hang a sometimes unlikely law, without further attention to the sufficiency of the connection.

There are other features of challenged legislation that also should trigger more careful scrutiny to ensure that the connection between the law and the power is one of substance and not mere form. Most obviously, these include aspects of legislation that appear questionable from the standpoint of the rule of law because of coverage that is uncertain or arbitrary. There is no developed conception of State power in Australia, along the lines of the police power in the United States (*Lopez*, 1995). Nevertheless, the High Court’s attention might be alerted by Commonwealth legislation that intrudes partially or on an unusual basis into an area otherwise covered by State law, thus compromising the integrity of both legal regimes. A Commonwealth law for schools that happened to be incorporated would be an example of a law of this kind.

MAJOR

The difficulty with a technique that merely alerts the Court to legislation requiring more careful scrutiny is that it leaves the Court to a case-by-case resolution of the question whether the challenged law is supported by a head of power, rather than providing it with guidelines for general application. This may be appropriate where the problem concerns the meaning of words. Where the problem concerns the scope or reach of the power, however, more guidance may be required. The difficulties raised by the present approach to this problem suggests that more should be required by way of a connection between a law and a power than use of the constitutional activity or person to which the power relates as the criterion for the operation of the law. It is hard to generalize about how this connection might be established, however, as long as the powers continue to be categorized in terms of activities or persons, which encourages a static process of characterization of the present kind.

A more dramatic methodological shift would treat both the division of powers and the individual powers themselves as purposive and evaluate challenged legislation by reference to whether it falls within constitutional purpose. In order to determine whether a challenged law is based on a claimed head of power, both the purpose of the power and the more general purpose of the constitutional conferral of power on the Commonwealth could be taken into account. In either case, the constitutional purpose should be derived from a combination of subjective and objective sources, including not only the intentions of the framers, to the extent that they can be ascertained, but also constitutional text and context. In his illuminating study of purposive interpretation, Aharon Barak would accept a range of additional sources to determine objective purpose, including legal culture and tradition and basic constitutional values (Barak, 2005: 162-3). Australian jurists may balk at these as reaching too far outside the range of customary Australian legal sources, although in reality such considerations often are implicitly taken into account. Even if a more limited range of sources were admitted, however, it would be possible to identify the purposes of many powers and of the general conferral of power on the Commonwealth from the Constitution as a whole. Self-evidently, for example, one purpose of the latter is to enable the enactment of nationally consistent legislation, in which like cases are treated alike.

Adoption of a purposive approach to constitutional interpretation in Australia would have several advantages. First, it would supply a meaningful touchstone by which to evaluate the sufficiency of a connection between a law and a power. Secondly, it would provide a useful aid to understanding the meaning of particular powers. The long-running dispute over whether the corporations power enables the Commonwealth to provide for the creation and dissolution of corporations, for example, would have been assisted

by a prior determination of the purpose of the corporations power. Thirdly, it would offer a framework within which the division of legislative power could be given an effect that avoids the complexity and patchy quality of much current Commonwealth legislation. Divided power necessarily adds a measure of complexity to governing arrangements. One lesson from Australian experience is that reliance on powers that are unsuited to the purpose compounds the complexity and is not a necessary feature of the system.

A greater emphasis on purpose would inhibit the extent of Commonwealth dependence on particular heads of power for a wide range of regulatory ends. It would not necessarily be decentralizing in effect, however, across the range of fields of governmental activity. On the contrary, articulation of the purpose of, say, the interstate trade and commerce power would be likely to expand its reach. Whatever the implications of a purposive approach for the respective authority of the Commonwealth and the States, however, it would provide a more sophisticated interpretative regime, with outcomes that are more rational and more easily understood.

An interpretative approach to Commonwealth power that identified constitutional purpose might be coupled with proportionality analysis, although this is not necessarily so. Proportionality typically is associated with human rights protection and requires care in its application to federalism. Most obviously, proportionality would be useful for identifying the causal connection between a law and a power by asking whether the law is “appropriate and adapted” to achieving a purpose within power. Proportionality would also be useful for determining whether a law meets other goals connected with the federal distribution of power, including the goal of national consistent regulation. On the other hand, at least in the Australian context, a version of proportionality that triggered concern where “federalism” was burdened or that sought to minimize the impact of a law on “federalism” would not be acceptable. Either would tend to set in stone a particular understanding of the distribution of federal legislative power and would come too close to the shibboleth of reserved State powers.

Critics would fear that a turn to purposive interpretation, whether coupled with proportionality analysis or not, would encourage the evaluation of legislation by reference to constitutional standards other than those connected with the federal division of power and, in particular, with standards derived from values linked with rights. There is a basis for this perception in Australian experience, which in 1996 led the Court to reject both purpose and proportionality as tools for determining whether Commonwealth laws were supported by a head or heads of power, with the defence power as the sole exception (*Leask*, 1996). This is a peculiarly Australian problem, attributable to the lack of constitutional provisions that provide direct rights protection, and is unlikely to present difficulties elsewhere.

CONCLUSIONS

The approach to the interpretation of federal Constitutions deserves more attention in the design and operation of federal arrangements than it has been given so far. A variety of issues is likely to arise in the course of giving meaning to those parts of a constitutional text that provide the legal framework for a federation. A range of interpretative techniques are available for dealing with them. The choices that are made may have profound significance for a federal system in practice.

At one level, the task of interpreting constitutional provisions dealing with federalism is broadly comparable to the task of interpreting other kinds of constitutional provisions that protect rights or distribute power between institutions in accordance with the prevailing principles of separation of powers. At another level, however, it is distinctive. As a constitutional principle, federalism does not have the same cachet as separation of powers or rights protection and its contribution to a constitutional system is less well understood. Historically, federalism has suffered from the perception that it is a transitional form of government. To some extent, this persists. Courts may be more ambivalent about their role in enforcing provisions of the Constitution dealing with the federal division of powers, even where federalism was the moving cause for bringing the Constitution into being as fundamental law. Their reluctance is exacerbated by the tendency for questions about whether a central legislature has acted within federal power to become entangled with debates about democracy and countermajoritarianism, overlooking the reality that in federal systems there are multiple majorities, each with democratic claims of their own, which sometimes give rise to constitutional conflict in which courts have an arbitral role. To complicate the picture further, the apex court is likely to be appointed by the sphere of government that claims the mantle of democratic legitimacy for the polity as a whole.

This paper uses Australia as a case study to illustrate the issues that may arise in the course of interpretation and the effects that interpretative method can have. The Australian courts have adopted a formalist approach to the interpretation and application of legislative power that largely precludes considerations of federalism. This approach has enabled the role of the national sphere of government to grow, with almost no formal constitutional change. Importantly, from the perspective of Australian legal culture, it has also confined, or appeared to confine, the occasion for creativity by courts in the course of judicial review.

This approach to constitutional interpretation has some less satisfactory by-products as well. Most obviously, for present purposes, it has provided a vehicle for continuing, centralization of power to a degree that jeopardizes the value of federalism to Australia at a time when the advantages of multi-level government are acknowledged elsewhere in the world. In addition, it encourages a degree of complexity and arbitrariness in Com-

monwealth legislation that in any other context would be considered a threat to the jurisprudential rule of law. The methodology on which the Court relies is dated, tracking its origins to a single decision more than 80 years ago, before the flowering of interest in the interpretation of texts that took place in common law countries in the later 20th century. It is at odds with the approach of the Court to texts of other kinds, where context and purpose now play a greater role.

This paper has identified a range of measures that would allow a more nuanced approach to disputes about the federal division of power and thus would assist to resolve these problems. All would require the federal character of the Constitution to be acknowledged to a greater degree than presently is the case. Two of the most significant such measures would introduce concepts of purpose and proportionality into the Court's approach to the interpretation of the federal division of powers. Either of these now would be difficult to achieve in Australia, because of the major doctrinal shifts involved.

They may be of greater interest in emerging federations. As with any constitutional comparison, however, conclusions for other federations must be drawn with care. The outcomes of judicial interpretation in Australia are at least in part dependent on the particular Australian model for the federal division of power. The interpretative method adopted by the High Court has been influenced by Australian legal and constitutional culture and by the distinctive course of Australian history.

Nevertheless, despite the challenges of comparison, two broad lessons can be drawn by other federations from Australian experience. The first is the relevance of the method used by judges for interpreting the federal division of powers. Where a federal state is formed, and in particular when a state moves from a unitary to a federal form, it may be useful to sensitize judges in advance to the new issues that are likely to arise and to the options for dealing with them. There is some precedent for this in the judicial training that often is provided before a new rights instrument takes effect.¹⁶ The second lesson concerns the significance of the model for the federal division of powers. Australian experience suggests that conferral of largely concurrent power on the centre, without providing a State list of power, puts a premium on judicial review. In federations where this is not acceptable, in terms of either process or certainty of outcome, consideration should be given to choosing a different model or to providing methodological guidance to the Courts in other ways.

¹⁶ See for example the training offered by the Judicial College of Victoria to Victorian judges before the Charter of Human Rights and Responsibilities came into effect: 2007 Calendar, [http://www.judicialcollege.vic.edu.au/CA256902000FE154/Lookup/JCV_PDFs/\\$file/Calendar%202007.pdf](http://www.judicialcollege.vic.edu.au/CA256902000FE154/Lookup/JCV_PDFs/$file/Calendar%202007.pdf) (viewed 20 July 2008).

В статье рассматривается парадокс, связанный с организацией и управлением федерациями. С одной стороны, почти все федеративные государства предоставляют судебной власти полномочие по разрешению споров о компетенции между органами власти посредством толкования и применения писаной Конституции. С другой стороны, в системах судебного контроля многих федераций со временем становится очевидной тенденция давать преимущество центральной власти. В статье на примере Австралийской Федерации рассматривается вопрос о том, насколько причиной этой тенденции является малочисленность доктрин, разработанных судами федеративных государств в связи с толкованием конституционного принципа разделения властей. Относительно Австралии отмечается, что федеральный характер Конституции не является специальным объектом судебного рассмотрения при толковании и применении принципа разделения властей и объясняется, как указанная и подобные доктрины способствовали эффективному расширению власти Содружества. В статье утверждается, что такой подход к вопросам федерального разделения властей в настоящее время несовместим с другими интерпретационными подходами как относительно статута, так и других частей Конституции. Кроме влияния на федерализм, интерпретационный подход к разделению властей в Австралии оказывает влияние также на согласованность законодательства Содружества, включая и вопросы верховенства права. В заключении представляются предложения относительно способов, посредством которых результатом даже незначительных изменений в судебном подходе может стать более последовательная судебная практика. Хотя большая часть аналитического материала касается особенностей австралийской системы, в статье отмечается, что эффективность судебного контроля по разрешению споров относительно компетенции является вопросом, заслуживающим внимания при создании новых федераций. Для разработки более общей концепции относительно проблем и возможностей судебной практики по поводу федерализма требуются также исследования других подобных государств.

Im Beitrag geht der Verfasser auf das Paradoxon ein, das mit der Organisation und der Regierung der Föderationen verbunden ist. Einerseits räumen so gut wie alle föderativen Staaten der Judikative die Befugnis ein, über die Kompetenzstreitigkeiten zwischen Machtorganen mittels der Auslegung und Anwendung der geschriebenen Verfassung zu entscheiden. Andererseits macht sich in den Systemen der gerichtlichen Kontrolle vieler Föderationen die Tendenz sichtbar, der zentralen Macht den Vorrang zu geben. Im Beitrag wird am Beispiel des Australischen Bundes die Frage untersucht, inwieweit diese Tendenz darauf zurückzuführen ist, dass die Gerichte der föderativen Staaten nur einige wenige Doktrinen der Auslegung des Verfassungsprinzips der Gewaltenteilung entwickelt haben. Über Australien wird gesagt, dass der föderale Charakter der Verfassung kein spezielles Objekt der Betrachtung der Gerichte bei der Auslegung und Anwendung des Prinzips der Gewaltenteilung darstellt, und es wird erläutert, wie die besagte Doktrin und ähnliche Doktrinen zur effektiven Erweiterung der Macht der Commonwealth beigetragen haben. Im Beitrag wird behauptet, dass eine solche Herangehensweise an die Fragen der föderalen Gewaltentrennung mit anderen auf der Auslegung beruhenden Herangehensweisen bezüglich des Statuts und der anderen Teile der Verfassung gegenwärtig unvereinbar ist. Die auf der Auslegung beruhende Herangehensweise an die Gewaltentrennung in Australien beeinflusst nicht nur den Föderalismus, sondern auch die Konsistenz der Gesetzgebung des Commonwealth, einschließlich der Fragen des Vorrangs des Rechts.

Es werden Empfehlungen gegeben darüber, wie man selbst durch geringfügige Änderungen in der Herangehensweise der Gerichte eine konsequentere Rechtsprechung erreichen könnte. Obwohl der Großteil des analytischen Stoffs die Besonderheiten des australischen Systems betrifft, bemerkt der Verfasser, dass es sich bei der Effizienz der gerichtlichen Kontrolle im Falle der Kompetenzstreitigkeiten um eine Frage handelt, die bei der Bildung neuer Föderation beachtet werden sollte. Für die Ausarbeitung eines allgemeineren Konzeptes über Probleme und Möglichkeiten der Gerichtspraxis bezüglich des Föderalismus sollten auch die Erfahrungen anderer ähnlicher Staaten zum Gegenstand der Untersuchung gemacht werden.

L'article examine le paradoxe lié à l'organisation et au fonctionnement des fédérations. D'une part, presque tous les États fédéraux dotent les autorités judiciaires du pouvoir de résolution des conflits sur la compétence entre les organes du pouvoir à travers l'interprétation et l'application de la Constitution écrite. D'autre part, dans les systèmes de contrôle judiciaire de nombreuses fédérations finalement apparaît la tendance à donner l'avantage au pouvoir central. L'auteur apporte l'exemple de la Fédération australienne pour examiner à quel point le nombre minime de doctrines élaborées par les tribunaux des États fédéraux sur l'interprétation du principe constitutionnel de la séparation des pouvoirs est à la cause de cette tendance. En ce qui concerne l'Australie, il note que le caractère fédéral de la Constitution ne fait pas l'objet spécial d'un contrôle judiciaire lors de l'interprétation et l'application du principe de séparation des pouvoirs et explique comment la doctrine susmentionnée et les autres doctrines ont contribué à l'extension efficace du pouvoir de la Communauté (Commonwealth). L'article soutient l'idée que cette approche à la répartition fédérale des pouvoirs est pour l'instant incompatible avec d'autres approches interprétatives concernant le statut, ainsi que les autres parties de la Constitution. Au-delà de l'impact sur le fédéralisme, l'approche interprétative à la séparation des pouvoirs en Australie influence également la cohérence (concordance) de la législation du Commonwealth, y compris les questions de la suprématie du droit.

En conclusion, l'auteur propose des procédés au travers desquels une pratique judiciaire plus cohérente peut découler comme résultat des changements même minimes dans l'approche judiciaire. Bien que la grande partie de la matière analytique concerne les particularités du système australien, l'article souligne que l'efficacité du contrôle judiciaire pour la solution des conflits de compétence est une question qui mérite l'attention lors de la création de nouvelles fédérations. Le développement d'un concept plus général sur les problèmes et les possibilités de la pratique judiciaire concernant le fédéralisme exige une étude approfondie d'autres États fédéraux.

**THE RULE OF LAW AS A UNIVERSAL PRINCIPLE
OF CONSTITUTIONAL DEVELOPMENT
IN A DEMOCRATIC SOCIETY**

GOOD STATE AND GOOD LAW: CONTEMPORARY CHALLENGES TO RULE OF LAW

Péter PACZOLAY

From the very beginning, both political and legal thinkers searched for the conditions of good life in their own realm that is to say how a political community, where life is happy, should look like. They shared views about good law or correct law, which corresponds to the values that facilitate good and happy life. Throughout history, a value has been crystallized as the answer to the question of “good State – good law”: the rule of law that places the State under the rule of law.

Today the proliferation of doubts about the rule of law can be experienced as an element of the crisis striking the world.

This is why we have to face the ideas that deal with the perspectives of the State under the rule of law and the constitutional framework of the future. Indeed, it is well justified to address this issue, as many people take too easily for granted certain achievements that today – but not since a long ago – have determined our lives. At the same time I think that our principles require constant reinforcement, otherwise the things that are natural at present can be lost for the future generations.

1. THE RULE OF LAW AS A POLITICAL PRINCIPLE

1.1. According to Article B) of the Fundamental Law – just as Article 2 para. (1) of the Constitution that was in force until 31 December 2011 – „[Hungary] is an independent state under the rule of law”. This provision is not only a descriptive, declarative one – it has prescriptive, normative force. As pointed out by the Constitutional Court at the beginning of its operation in 1992: the rule of law is more than establishing a fact about the operation of the State, it is a programme as well. According to the Constitutional Court’s decision explaining the constitutional importance of the change of the regime: “That Hungary is a State governed by the rule of law is both a statement of fact and a statement of policy.”¹ It means that the principle of the rule of law contained in the Fundamental Law is the formulation of a political idea. This idea implies requirements that can be either complied with or violated. Indeed, the quoted decision of the Constitutional Court identifies the “programme-setting” character of the rule of law correctly, as being a State under the rule of law is a very complex phenomenon, which is much more than a question of “yes or no” or “there is or isn’t”. The rule of law demands on the one hand constant

¹ Decision 11/1992. (III. 5.) AB, ABH 1992, 77, 80.

efforts to meet the requirements, and on the other hand certain solutions applied in the functioning of the State and its organizations may comply to more or less extent with the criteria of the rule of law.

1.2. What requirements are set by the rule of law for the functioning of the State? The answers to this question provided by science, state theory and constitutional theory are very diverse, and explaining them in details would be far beyond the limits of this work. May it be enough to refer here to the traditional distinction between the formal and substantial approaches to the rule of law. The former focuses on the legal restrictions on the operation of the State, the obligation to comply with the formal rules of the law, the primacy of law as a tool, while the latter expects more from a State under the rule of law: compliance with substantial requirements, primarily in the field of fundamental rights. However, the present paper intends to concentrate not on the differences, but on the common point of the theories about the rule of law: practically all modern works on constitutional theory agree on emphasizing the values of the rule of law and the importance of the moral considerations in the background of it. This is of course trivial in case of the material approach placing fundamental rights within the rule of law, but also Lon Fuller, who grasps the formal character of the rule of law, mentions the “internal moral of the law” when enumerating the requirements that can be raised against law as a tool.² Also according to Joseph Raz, “the rule of law almost always bears a huge moral value” and the aim of it is to “decrease to the least possible extent the damages to freedom and dignity”.³

Thus it is a common feature of the diverse theories that they consider the rule of law as a value-based system of requirements connected – to be emphasized again: both in the more formal and in the more substantial approaches – primarily to the concepts of freedom and equality, and destined to safeguard human dignity and autonomy.

1.3. The rule of law is an important part of the common European constitutional tradition. The preamble of the Treaty on European Union reinforces the Member States’ commitment to pay respect to human dignity, freedom, democracy, human rights, fundamental freedoms and the rule of law. Among the values forming the foundations of the Union, Article 2 of the Treaty enumerates respect to human dignity, freedom, democracy, equality, the rule of law and respecting human rights including the rights of persons belonging to minorities. The rule of law is also mentioned in the preamble of the Charter of Fundamental Rights.

The study prepared by the Venice Commission of the Council of Europe, aimed at defining the concept of the rule of law, provided a list of its substantial elements. According

² Fuller, Lon, *The Morality of Law*, Yale University Press, New Haven, 1969, pp 41-44.

³ See Raz, Joseph, *The Rule of Law and its Virtue*, in *The authority of law: Essays on law and morality*, Clarendon Press, Oxford, 1979.

to the study, these are the following: a) granting legality, including transparent, accountable and democratic legislation, b) the requirement of legal certainty, c) the prohibition of arbitrariness, d) access to justice before independent and impartial courts, e) respect for human rights, f) the prohibition of non-discrimination and equality before the law.⁴

2. THE RULE OF LAW FOR DIFFERENT GENERATIONS

2.1. The exceptional value of the rule of law is a determining life experience of those who lived at the time of the atrocities committed by the dictatorships of the 20th century. These generations have a personal experience about how the rule of law can promote human freedom and dignity. In line with this experience, at the beginning of its operation, after the change of the regime, the Constitutional Court grasped the difference between the regime functioning before 1989 and the democracy built upon the Constitution having a brand new content in the concept of the rule of law: it defined the change of the regime as the “revolution of the rule of law”.

As contained in the relevant decision of the Constitutional Court:

“With the enactment of the constitutional amendment of 23 October 1989, in fact, a new Constitution came into force which, with its declaration that ‘the Republic of Hungary is an independent and democratic state governed by the rule of law,’ conferred on the State, its law and the political system a new quality, fundamentally different from that of the previous regime. In the sense of constitutional law, this is the substance of the political category of the ‘change of regime’. (...) The Constitution provides for the basic institutions of the State governed by the rule of law and defines the human and civil rights together with their basic guarantees.”⁵

After the change of the regime in Hungary the faith in the rule of law had to be developed. It was the historical duty of the Constitutional Court to make it clear: the new Constitution requires absolute enforcement. As László Sólyom refers to this work: “the Constitutional Court has demonstrated that the law is setting limits for the politics, and it is a fundamental difference compared to the previous regime, where the law was the tool of politics.”⁶

2.2. We have to take into account that today there are generations who have not experienced the inhumanity of dictatorships. On one hand, of course, historical experience is to be handed over to new generations who have to take the responsibility of understanding and learning the lessons that history warns us. On the other hand, however, we have to accept that young people face other questions, they do not seek the answers to the questions of

⁴ Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011, CDL-AD (2011)003rev, para 41.

⁵ Decision 11/1992. (III. 5.) AB, ABH 1992, 77, 80.

⁶ Sólyom, László, *Az alkotmánybíráskodás kezdetei Magyarországon* [The beginnings of constitutional justice in Hungary], Osiris, Budapest, 2001, p 693.

previous generations and actually this is not their task. They see new challenges that have to be addressed in new circumstances. Of course, these challenges affect the whole society, but in the case of new generations, there is a particularly high stake, determining the future, of being able to give answers that reinforce our values and principles developed in the past.

Also the requirements of the rule of law have to be enforced in newer and newer circumstances. The questions of modern age set very serious challenges for the concept of the rule of law even without dictatorships. However, the duty is nothing else but to give responses of the rule of law to the questions of a changing world. Let me mention some of the actual challenges faced by the rule of law, without providing an exhaustive list. I intend to demonstrate that the practical implications of the solutions that advocate stepping beyond the requirements of the rule of law in a certain sense can be regarded as self-deceptions – and of course they question the commonly acknowledged values of the principle of the rule of law (human dignity, autonomy, freedom).

3. URGING AN EFFECTIVE STATE

3.1. Today we see an urging need for the more effective functioning of the State. Those who speak in the name of effectiveness often depict the requirements of the rule of law as conditions that unjustifiably slow down the procedures and hinder the enforcement of public interest. As experienced, constitutional judiciary is a particularly remarkable point of conflict in the debate. In the eyes of those who argue for effectiveness, the Constitutional Court uses sublime principles to hinder the concrete and necessary measures and solutions to be applied by the government. According to a similar claim, the Constitutional Court favours individual or minority interests in contrast with the majority or public interests. These arguments are often accompanied with the incomprehension – based on the majoritarian concept of democracy – of why the government, acting on the basis of the will of millions of voters, should back off because of the position taken by a few legal scholars (counter-majoritarian difficulty).⁷

With regard to the above concerns, first of all, it is worth “cleaning up” the argument about the effectiveness of the State. On the one hand, the acceleration of the world’s events and the strengthening of the idea of service-providing public administration lead to raising justifiable expectations in the citizens for effective measures by the State. On the other hand, governments use the argument of effectiveness to require a more barrier-free implementation of their political intentions in the name of public interest.

3.2. Regarding the citizens’ expectations towards the State, they are, beyond doubt, well founded. As regulations by the State penetrate extensively and deeply into the everyday life of individuals, the swift and successful implementation of such measures

⁷ M. Bickel, *Alexander: The Least Dangerous Branch*, Yale University Press, New Haven and London. 1962, p.

becomes more and more important. It is true both for the legislation and the application of the law. This need is also acknowledged by the Fundamental Law, stating in Article XXIV that: “Everyone shall have the right to have their affairs handled impartially, fairly and within a reasonable time by the authorities.”

However, this need of the citizens is not in conflict with the requirements of the rule of law. First, all the criteria developed by the Constitutional Court on the basis of the concept of the rule of law, are the preconditions of the reasonable, predictable and effective operation of the law. The clarity of norms, the time for preparation, predictability, the transparency of the legislation and the application of the law etc. are all necessary for the success of the enforcement of individual rights and the regulation of the society. Secondly, the Constitutional Court handles the issue of the effective enforcement of the legal system as a requirement under the rule of law, to be balanced with other constitutional interests as well. It means that the guarantees protecting the individuals are not of absolute nature. As explained in the Constitutional Court’s decision dealing with this question: “Effectiveness, the interest in the swift completion of the case, and the requirement of enforcing the rights of the persons involved in the procedure may become conflicting each other. An unconstitutional situation may occur if the legal regulation grants an imbalanced priority either for effectiveness or for the enforcement of the rights of the persons addressed. Absolute priority of effectiveness may hinder the enforcement of the rights of the persons under the procedure. However, providing unlimited possibilities for enforcing the rights of the persons under the procedure would make it impossible for those who initiated the procedure to enforce their rights.”⁸

3.3. At the same time, one can conclude that real and long term effectiveness and predictability can only be granted by effectiveness embedded in the rule of law, in contrast with effectiveness driven by the political interests of the moment. Accelerating the legislation and the application of the law beyond a certain point shall become an end in itself, actually making it impossible to resolve the problems effectively in the long run.

Speeding up the legislation to an extent that eliminates the substance of the necessary consultations in the society and even in the Parliamentary debates, may not end in lasting results in a pluralist democracy. The intentions of the government “forced through” without the minimum accord of those who disagree with such decisions – by way of their real participation in the relevant debate – can not be expected to be enforced effectively in the future. Similarly: speeding up the application of the law to an extent jeopardizing or violating the rights of the participants of the procedure would give up any chance for a fair procedure, although it is not only an unquestionable human right but also a sine qua non of the acceptance and the obeying of judicial decisions.

⁸ Decision 46/2003, (X. 16.) AB, ABH 2003, 488, 499.

3.4. In contrast with the expectations of the citizens mentioned above, demanding the barrier-free implementation of momentary political will is in fact unmatchable with the principle of the rule of law. However, the past decades of constitutional judiciary show that the Constitutional Court's decisions very rarely prevent the government from implementing its intentions. Indeed, the decisions made (forced) the legislator to find constitutional solutions rather than giving up the original aims.

4. THE QUESTION OF THE ECONOMIC CRISIS

The problem of handling the economic crisis is a prominent challenge. In addition to the general reasoning about effectiveness, in this case, there are other strong arguments cited to support giving – when needed – a total empowerment for the government to make the necessary measures without delay. Indeed, masses of citizens filled with fear and the sense of defenselessness are understandably ready to accept the attractive reasoning that under such extraordinary circumstances there is no place or time for respecting the usual requirements of the rule of law.

However, one should ask one more time: is it really the suspension – to some degree – of the rule of law that can lead to any long-lasting solution? ⁹ This time again, let me argue for paying respect to the requirements of the rule of law not only because of its underlying values but also for practical reasons. The weakness of the institutional system plays an important role in the development of proneness to crisis. The requirements of the rule of law strengthen the institutional system as they make the functioning of the system predictable. Just as the weakening of the institutional system is not caused by the crisis, the way out of the crisis is not through passing over the criteria of the rule of law. Evidently, getting out of the crisis depends basically on the success of reinforcing the long-term functioning of the society, the economy and – connected to them – of the State. Nevertheless, this can only be achieved by way of restoring trust in the operation of the systems, through compliance with the commonly acknowledged and accepted laws of the game. This is indeed what the rule of law is expecting from those who operate it.

A number of studies try to prove by the close examination of the most recent crisis as

⁹ Let me mention one example: a Study of the World Bank on the relationship between the economic development and the legal institutions draws attention to the followings: Very strong arguments establish a basis that a successful economy requires institutions of appropriate quality. On the other hand, certain institutions can make it difficult for the government to enforce its economic policy. However, this can be beneficial for economic development because it makes government commitments more credible. The Study mentions the Constitutional Court as an example: an independent Constitutional Court may encourage foreign investments by its decisions because it guarantees, for instance, the protection of right to property. But in time of economic crisis it can hinder the introduction of rapid and crisis management measures. According to the Study, within the complex situation, maintaining credibility is economically more profitable than flexibility.
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:23103355~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>.

well as those of the past that the adherence to the rule of law is actually more important during periods of economic crisis, both to restore short-term economic prosperity during the crisis as well as for the long-term systemic impact. Adherence to the rule of law is a necessary condition for long-term economic growth.¹⁰

5. SECURITY CHALLENGES OF A GLOBALIZING WORLD

The third challenge I would like to mention is the measures that can emerge as answers to the security risks of the modern age, as they may pose a threat both on the formal (procedural) and the material ('fundamental rights') requirements of the rule of law. Of course it is the elementary interest of all societies to be able to guarantee the security of its members and communities. It is also beyond doubt that the globalizing world can make the States face security-related challenges never experienced before.

At the same time, again, this may not justify giving up requirements for the rule of law in the name of the "fight" against "terrorism" or "organized crime". "Using the war on terror to circumvent constitution" is really a threat on our democracies, and on the basic values of rule of law.

Terrorism is not a new phenomenon. Even before September 11 a dozen international conventions and protocols had been adopted to prevent and suppress terrorist acts. However, a new phase began in this history with the attack on the Twin Towers, and the global war on global terrorism was set in a different context after 9/11. This was worsened by the terrorist attacks in Madrid in 2004 and in London in 2005.

The United States and most European countries reacted immediately to the tragic events, and adopted legislations that tried to offer effective and immediate response to the terrorist threat. The respective pieces of legislation include the USA PATRIOT Act dated 26 October 2001 and the EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA). The European measures embrace the EU-US Passenger Name Record, the retention of call data by telephone companies, money laundering directive to cover financing of terrorism, and the European Arrest Warrant.

The prompt response generated quite soon serious concerns and critics because of the apparent restriction of fundamental freedoms. Moreover, some commentators and even certain agents of the EU considered the balancing between war on terrorism and the protection of fundamental rights as 'mission impossible'. The respective investigations proved that the war against terrorism has led to human rights violations in many countries. In some cases, governments have enacted new security laws that violate basic rights

¹⁰ Todd Zywicki, Upholding the Rule of Law, in Season and out of Season. Library of Law and Liberty. April 20, 2012. <http://www.libertylawsite.org/2012/04/20/upholding-the-rule-of-law-in-season-and-out-of-season/>.

and freedoms, or have denied terrorist suspects due process and the protection of law.¹¹

The Commission for Democracy through Law of the Council of Europe (Venice Commission) addressed more times in comprehensive studies, mostly on the request of the Parliamentary Assembly and its organs, issues related to the legal consequences of terrorist threat.

In the opinion on *the possible need for further development of the geneva conventions* adopted in 2003¹² the Commission recommended further reflection to consider whether any additional instrument may be needed in the future to meet or anticipate the novel threats to international peace and security. Any attempt in this respect must, however, take care not to inadvertently undermine the existing level of protection under the international humanitarian law as well as the international law of human rights (§ 87).

A very important consideration was formulated in the opinion regarding the rights of the terrorists; it could be suggested that terrorists do not deserve any kind of legal protection. Although this view has some understandable emotional appeal, the issue must be considered in the light of fundamental rules of law and prudence. Every human being, without exception, carries with him/her an inherent dignity. This has been recognized by all states with constitutions under the rule of law, all humanitarian and human rights treaties, and by all major religions. Rules and principles of such weight and force should not be discarded in the shock of a moment.

The opinion *on the protection of human rights in emergency situations* (adopted in 2006)¹³ stated that the democratic institutions are bound to take effective steps to fight terrorism, even at the detriment of full enjoyment of human rights, while the human-rights element of the rule of law requires that the rights of everyone, also of (alleged) terrorists, should be respected within the limits of national and international standards. It follows that the best way to fight those who threaten State security and public safety is not primarily and in all situations to give more powers to the executive authorities and restrict personal rights and freedoms, but to strengthen democracy and the rule of law, which are precisely meant to protect the individual against arbitrary and disproportionate restrictions of his human rights and freedoms by the authorities.

In the era of “global terrorism” it has been put to debate whether fundamental human

11 A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights (March 25, 2003)¹¹ pointed out some important features of the problem.

First, it rightly warned that “the human rights framework is not soft on terrorism. It acknowledges that states must sometimes take exceptional measures to ensure public security.”

Second, some fundamental human rights and freedoms cannot be suspended or derogated even in emergency situations, such as the right to life or the right to freedom of thought, conscience, and religion.

Third, the restrictions must be exceptional and temporary in nature, and non-discriminatory. In the Name of Counter-Terrorism: Human Rights Abuses Worldwide: A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights (March 25, 2003) p. 3.

12 CDL-AD(2003)018

13 CDL-AD(2006)015

rights or the extent of possible derogations from them should be reinterpreted. Recent decisions by several domestic courts in Europe and beyond, however, have confirmed that the existing rights and standards are, in principle, appropriate for the current situation of the fight against global terror. (§§ 28-30).

The opinion on *the international legal obligations of council of europe member states in respect of secret detention facilities and inter-state transport of prisoners* was adopted in 2006¹⁴. The opinion pointed out among others that so-called incommunicado detention, that is detention without the possibility of contacting one's lawyer and of applying to a court, is clearly not "in accordance with a procedure prescribed by law" of any of the member States of the Council of Europe, if alone because the detention is not subject to judicial review.

The opinion drew as main conclusion that Council of Europe member States are under an obligation to fight terrorism, but in doing so they must safeguard human rights (§§ 154-157).

It is worth thinking over both in the case of managing crises and of providing security what is in fact at the stake and what is in peril when the society is ready to accept solutions outside the rule of law in the name of "public interest", "urging societal-economic needs" or in many cases with reference to "justice" itself. Let me make a sharp distinction for a moment: outside the rule of law there is nothing else but manifestations of dictatorship and the arbitrary exercising of power. If we refuse them in the name of our human rights, our freedom and our dignity, then we can only achieve a predictable, sound and effective State on the basis of sticking to the requirements of the rule of law.¹⁵ These requirements (and only these requirements) set the sample that gives a form to the steps of the society respecting the creativity of individuals and of the community, and therefore, in the long run, leading to a more effective operation. It would be a self-deception to think that it's worth stepping on a slippery slope.

6. THE CAUSE OF THE CRITICISM OF THE RULE OF LAW AND THE TASK

I presented here three of the challenges and in all the three cases I argued for maintaining the requirements of the rule of law, as indeed they can be the source of real long-term solutions. Now it can be justified to ask me why certain standards of the rule of law are blamed by so many people with regard to the emergence and the solution of the problems of the society. The answer is surely connected to the elemental truth that the rule of law cannot defend itself if its institutions operate poorly. In other words: the rule

¹⁴ CDL-AD(2006)009.

¹⁵ Built on a cross-sectional, time-series data analysis of 131 countries during the period from 1984 to 2004, a study found that maintaining a sound rule of law notably reduces the likelihood of any type of terrorist events. In short, the rule of law instantiated in democratic institutions provides a formidable bulwark against terrorism. Seung-Wan Choi, Fighting Terrorism through the Rule of Law? *The Journal of Conflict Resolution*. December 2010 54: 940-966.

of law is not destined to success - its success depends on the ones who operate it. Only the stable operation of the institutions of the rule of law – meeting the expectations – can justify the whole of the system. Weakening the trust in the institutions and skepticism regarding their operation would undermine the rule of law and it can become a soil feeding attempts to create a totalitarian system.

Undoubtedly, the establishment of institutions in the course of the “revolution of the rule of law” at the time of changing the regime was not always followed by a stable operation of such institutions. Many times life provided bitter evidences supporting the Constitutional Court’s quoted “warning”: the rule of law is a programme, the implementing of which requires constant efforts. The success of such efforts depends on many cultural conditions. The most important of these conditions is whether there are enough people who are really committed to the idea of the rule of law. This is the big question and the duty of our future.

РЕЗЮМЕ

В статье рассматриваются современные вызовы обеспечения верховенства права. Автор отмечает, что согласно венгерскому Основному Закону Венгрия является независимым правовым государством. Это положение является не просто описательным, декларативным, но обладает также и обязывающей (предписывающей) нормативной силой. Согласно позиции Конституционного Суда верховенство права - это больше, чем установление фактического состояния деятельности государства; оно имеет также и программный характер.

В статье обсуждаются вопросы относительно значения верховенства права для разных поколений, указывая на взаимосвязь между обсуждаемым понятием и сменой режима, которая была определена Конституционным Судом Венгрии как “революция верховенства права”.

Автор также отмечает, что реальной и долгосрочной эффективности и предсказуемости можно достичь только посредством эффективности в сфере верховенства права, а не эффективности, обусловленной существующими в определенный период политическими интересами.

В статье также обсуждается вопрос взаимосвязи экономического кризиса и верховенства права и делается заключение, что соблюдение верховенства права является необходимой предпосылкой для долгосрочного экономического роста.

Говоря о вызовах обеспечения безопасности в глобализирующемся мире, автор отмечает, что отказ от предъявляемых принципом верховенства права требова-

ний под предлогом “борьбы” против “терроризма” или “организованной преступности” не может быть оправданным. “Использование предлога борьбы против терроризма для оправдания несоблюдения Конституции” является действительной угрозой нашим демократиям и основным ценностям верховенства права.

Обобщая вышесказанное, автор отмечает, что успех верховенства права не предопределен, а зависит от тех, кто претворяет его в жизнь. Только стабильное функционирование институтов верховенства права может свидетельствовать о нормальной деятельности системы. Уменьшение доверия к этим институтам и скептицизм в отношении их реализации может подорвать верховенство права и стать почвой для попыток создания тоталитарной системы. Идея верховенства права имеет программный характер, и ее осуществление требует постоянных усилий, успех которых зависит от множества культурных обстоятельств. Наиболее важным из них является то, есть ли достаточное число людей, действительно приверженных идее верховенства права. Именно это является важнейшей проблемой и обязанностью, которая будет стоять перед нами в будущем.

ZUSAMMENFASSUNG

Im Beitrag werden die modernen Herausforderungen der Sicherstellung des Vorrangs des Rechts erörtert. Der Verfasser bemerkt, dass Ungarn nach seinem Grundgesetz ein unabhängiger Rechtsstaat ist. Dies ist nicht lediglich ein beschreibender, deklarativer Satz, sondern er besitzt ebenfalls eine verbindliche normative Kraft. Nach der Auffassung des Verfassungsgerichts ist der Vorrang des Rechts mehr als nur die Feststellung des faktischen Zustands der Tätigkeit des Staates; der Vorrang des Rechts hat auch einen programmatischen Charakter.

Im Aufsatz werden Fragen der Bedeutung des Vorrangs des Rechts für verschiedene Generationen erörtert, wobei auf den Zusammenhang zwischen dem erörterten Begriff und dem Regimewechsel, den Ungarns Verfassungsgericht als eine “Revolution des Vorrangs des Rechts” bezeichnet hat.

Der Verfasser hebt hervor, dass eine reale und langfristige Effizienz und Vorhersehbarkeit nur durch eine Effizienz im Bereich des Vorrangs des Rechts und nicht durch die Effizienz zu erreichen ist, welche durch die im betreffenden Zeitraum bestehenden politischen Interessen bedingt ist.

Im Beitrag wird ebenfalls die Frage des Zusammenhangs zwischen der Wirtschaftskrise und dem Vorrang des Rechts behandelt und der Schluss gezogen, dass die Sicher-

stellung des Vorrangs des Rechts eine unumgängliche Voraussetzung für ein langfristiges Wirtschaftswachstum ist.

Hinsichtlich der Herausforderungen der Gewährleistung der Sicherheit in der globalisierten Welt führt der Verfasser aus, dass die Aufgabe der Anforderungen, die das Prinzip des Vorrangs des Rechts erhebt, unter dem Vorwand der "Bekämpfung des Terrorismus oder der organisierten Kriminalität" nicht gerechtfertigt werden kann. Die Ausnutzung des Vorwands der Bekämpfung des Terrorismus für Rechtfertigung der Nichteinhaltung der Verfassung stellt eine reale Gefahr für unsere Demokratien und Grundwerte des Vorrangs des Rechts dar.

Das oben Dargelegte zusammenfassend hebt der Verfasser hervor, dass die Durchsetzung des Vorrangs des Rechts nicht vorbestimmt ist, sondern von denen abhängt, die ihn in die Wirklichkeit umsetzen. Nur ein stabiles Funktionieren der Institute des Vorrangs des Rechts kann davon zeugen, dass das System normal funktioniert. Vermindertes Vertrauen in diese Institute und Skepsis bezüglich ihrer Realisierung kann den Vorrang des Rechts untergraben und den Boden für Versuche ebnen, ein totalitäres System zu errichten. Die Idee des Vorrangs des Rechts hat einen Programmcharakter und ihre Verwirklichung erfordert ständige Anstrengungen, deren Erfolg von einer Vielzahl kultureller Faktoren abhängt. Der wichtigste von diesen betrifft die Frage, ob es genug Menschen gibt, die sich in der Tat zur Idee des Vorrangs des Rechts bekennen. Gerade das ist unsere wichtigste Aufgabe und Pflicht, die vor uns in der Zukunft stehen wird.

RÉSUMÉ

L'article porte sur les défis contemporains de la garantie de primauté du droit. Conformément à sa Loi fondamentale, la Hongrie est un État indépendant de droit. Cette disposition n'est pas seulement descriptive et déclarative, elle a une force prescriptive et normative. Selon la Cour constitutionnelle, la primauté du droit, au-delà de la constatation de l'état du fonctionnement étatique, a un caractère de programme.

L'article aborde les questions relatives à la primauté du droit pour les différentes générations, en indiquant la relation entre la notion discutée et le changement du régime défini par la Cour constitutionnelle de la Hongrie comme la «révolution de la primauté du droit».

L'auteur remarque que la réelle et durable efficacité, ainsi que la prévisibilité peuvent être atteintes par l'efficacité dans le domaine de la primauté du droit, et pas par l'efficacité conduite par les intérêts politiques d'une période définie.

Examinant le lien entre la crise économique et la primauté du droit, l'auteur tire la

conclusion que le respect de la primauté du droit est une condition nécessaire à la croissance économique durable.

Faisant face aux défis de la mondialisation, l'auteur rappelle que l'abandon des exigences de la primauté du droit au nom de la «lutte» contre le «terrorisme» ou le «crime organisé» ne peut être justifié. «L'utilisation du prétexte de la lutte contre le terrorisme dans le but de couvrir le non respect de la constitution» c'est la vraie menace pour nos démocraties et pour les valeurs fondamentales de la primauté du droit.

Résumant le susmentionné, l'auteur remarque que le succès n'est pas préétabli en ce qui concerne la primauté du droit, ce succès dépend de ceux qui mettent en œuvre ladite primauté de droit. Seul le fonctionnement stable des institutions de la primauté du droit peut prouver le bon fonctionnement de l'ensemble du système. L'affaiblissement de la confiance pour ces institutions et le scepticisme envers leur action peuvent porter atteinte à la primauté du droit et préparer le terrain pour les tentatives de création de système totalitaire. La primauté du droit est un programme et sa mise en œuvre exige des efforts constants dont le succès dépend de nombreuses circonstances culturelles dont la plus importante est le nombre d'adeptes de l'idée de la primauté du droit. La grande question et le devoir de notre avenir consiste en cela.

RULE OF LAW AND STATE GOVERNED BY LAW

Evgeni TANCHEV

Introductory Remarks

Genesis and Evolution of the Rule of Law—From Antiquity to the US Constitution

Law Governed State—Evolution and Substance

Early Law Governed State

Types of Law Governed State

Dimensions and Implications of Contemporary Law Governed State

Efficiency of Judiciary as a safeguard to the Efficient Rule of Law Enforcement

Concluding Remarks

Introductory Remarks

GENESIS AND EVOLUTION OF THE RULE OF LAW—FROM ANTIQUITY TO THE US CONSTITUTION

Contemporary democratic, law governed nation state, conforming to the concepts of the liberal and of the welfare state, is an outcome of centuries lasting evolution.

Modern constitutionalism uses a vast array of terms¹ when expressing the idea that in a constitutional democracy all legal persons, including state authorities and officials, when performing governance should be bound by the law.² The rule of law is a sine qua non prerequisite to democratic and responsible government limited by the constitution within the modern nation state, on one side, and to the supranational governance within the integrated states and multilevel constitutional pluralism in Europe.

Within the comparative law context, legal terminological notions reflect conceptually two basic variations of the principle—the law governed state and the rule of law. Those two might be identical to the layman, but scholars, committed to researching this area, usually consider the differences in their meaning.

¹ The term law governed state is the closest equivalent of the German notion of *Rechtsstaat*, respectively of the French concept of *etat de droit* and the English expressions *state bound by the law*, *state under law*, *legal state*, which are used in the translations of European constitutions, but remain unknown to British and American lawyers. Just the opposite, the rule of law has a relatively precise meaning in the common law systems, but in the continental civil law families it is translated sometimes as governance of law, and also, although incorrectly, governance of the laws or through the law. Leaving aside the various trends in the doctrine, attributing different meanings to the notions, it is worth noting that terminology should be clarified and unified for the sake of clarity.

² Referred to the constitution as an institutionalized political power constraint one of the best liberal definitions emphasizing the constitutions role as frame of government was offered in the second half of the 19 century in the US by John Potter Stockton “The constitutions are chains with which men bind themselves in heir sane moments that they may not die by a suicidal hand in the day of their frenzy.”, J.E.Finn, *Constitutions in Crisis*, Oxford University Press, 1991, 5.

The common connotation of the principle, regardless of its modifications, is the universal and equal binding force of the law for all physical and legal persons when exercising state governance or implementing fundamental human rights. But the terminological difference might be misleading. In the law governed state, the state is bound by the law, which it creates and implements itself through the state authorities. The rule of law requires equal compliance with legal norms by all legal entities, natural persons and the state itself, within its boundaries. If we, however, assume that, by virtue of state sovereignty, the law has primacy in the system of social control, we will see that in the law governed state the requirement for all legal subjects are universally and equally bound by the law is a result of the implementation of the constitutional principle. That is why, regarding practical implications, it is not easy to draw the precise line demarcating differences between the law governed state and the rule of law.³

Within the context of the main legal families, there is no doubt that, in terms of time and space, the genesis and evolution of the law governed state cannot be identified with the rule of law and vice versa.

The principle of the rule of law emerged and is predominant in the Anglo-Saxon common law legal family, while the nation state constitutions, belonging to the continental or civil law family, primarily use the notion of the law governed state. Within the context of the contemporary constitutional pluralism rule of law is the sole possibility for the supranational level of constitutionalism for the EU is not and probably will never become a supranational state entity but union of states, while both options of the law governed state or rule of law can be used for within the nation state.

While the rule of law emerged much earlier in human civilization, while the law governed state as a principle was established after the revolutions, which led to the advent of the first written constitutions in Europe. Going back to the antiquity, long before the forming of the contemporary legal families, roots of the rule of law concept can be traced while law governed state, as a legal construct is unknown to the ancient Greek and Roman law systems.

At different stages of the civilization process thinkers have coined and political practice though in a mosaic, sporadic and discontinuous manner has introduced elements of the principle of the rule of law. The idea, having different interpretations by different authors, about the primary rule of nature, God given law or the common sense, binding the bearers of state power in the process of government, runs like a thin red line throughout the concept of the rule of law.

³ There are also other differences in literature. Theoretically, it is sustained that the rule of law is based upon the correlation between the independence and the dependence of the law upon the state, while the law governed state is a symbiosis between the state and the law. In the understanding of C. de Malberg the French version of the law governed state is expressed by the recognition of fundamental rights, which limit the state power, or the constitutional state as a guarantor of fundamental rights, see M. Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, in *Sothorn California Law Review*, v.74, 2001, 1307–1351, 1319, 1332.

The reference in the ancient and medieval legal systems to a law of a supreme order was used as basis of the law, created by those in power, and, at the same time, as a moral authority, requiring from citizens of Greece and Rome or the subjects of the king obedience to the democratic republican rule or the monarchy. Even in pre-modern societies or under despotic forms of government the successful law enforcement and effective governance did not depend on the use or the threat to use coercion, being a legitimate prerogative of the state only, but on the morals and the justification of the state action. Therefore, we can see the prototype of the modern notion of the rule of law in ancient and medieval times, where it was related to a supreme and irrevocable law, God's will, moral or reason, which justify the established legal system and mark the top of its hierarchy of the legal rules.⁴ The compliance of the legal order and the political system with the natural law began to be seen as the main source of the principle of the rule of law during the age of the Enlightenment.

The roots of legality can be traced back to the development of the law itself in ancient and medieval times, when under the sovereignty of monarchy the theory and practice held that the law developed when each king added on to the legislation of his predecessors.⁵ In the Anglo-Saxon family, the laws acquired supremacy also by conforming to the requirement for compliance with the Magna Carta.⁶ This was centuries before Sir E. Coke proclaimed in 1610 in the Bonham case the principle that common law was superior and should be complied with as a prerequisite for validity of all legal acts.⁷

The first ideas about the rule of law could be traced back to the antiquity and polis democracy in the ancient Greece. Aristotle relates the rule of law to justice, equality, and governance, based on order. According to the author of *Politics* it is not fair for someone to rule more than he submits, but it is fair to govern, based on order. That is already law—the order is actually a law. Therefore, it is more preferable to have a rule of law than to have a rule by one of the citizens, whoever he/she might be, and, for the same reason, even if it is better to be ruled by several people, they should be appointed keepers and servants of the laws—certain governing positions should be in place, but it is

⁴See "The Higher Law" background of American Constitutional Law, Corwin on the Constitution, ed. R. Loss, 1981, Cornell Univ. Press, 79–140 as basis of the American constitutional law; the study of the primary forms of legitimacy during pre-modern times and absolutism is related to the doctrine of state interests, see F. Meinecke, Machiavelism, The Doctrine of Raison d'Etat and its Place in Modern History, London, 1998]; C. C. J. Friedrich, Constitutional Reason of State, Providence, 1957, 4–5.

⁵ H.J. Berman, Law and Revolution, The Formation of Western Legal Tradition, Harvard, 1983, 536–537.

⁶ In 1368 the 42th law of Edward III stipulated that the Magna Carta "is applied and observed in all cases; and when there are other acts, which contradict it, the latter are deemed non-existent." A.E. Dick Howard, The Road from Runnymede, Magna Carta and Constitutionalism in America, Charlottesville, 1968, 9; During the reign of the Tudors the Magna Carta was not applied and the king did not strive towards compliance of his acts with it, see Idem, Magna Carta, Text and Commentary, Univ. Press of Virginia, 1999, 25.

⁷ See Bonham case of 1610, M. Cappelletti and W. Cohen, Comparative Constitutional Law, Charlottesville, 1979, 9–10.

deemed unfair for one person to rule, if all people are equal.⁸ The ancient scholars found the primary source of legality and the rule of law in the idea of *isonomia*, which in the Ancient Greece denoted the legal equality. Moreover, equality not only chronologically proceeded, but was also an instrumental and pre-requisite to the functioning of ancient democracy. In the republican period of Ancient Rome Cicero held that the observance of the laws was a pre-requisite to freedom, and that the laws should be drafted, using general rules and judges should apply the laws in deciding the cases and not create them.

In the beginning of the 9th century the municipal body of local governance in Paris has formulated the relationship between the king's and God's power from one side and the laws, on the other, by the principle that "any order, reaching outside the scope of power of the ruler, is null and void for his subjects and cannot bind them to obey."⁹

In his legal doctrine, St. Thomas Aquinas proposed a set of requirements, which the legal norms, created by the state, should meet in order to be in compliance with natural law. They should reflect the common interest, justice, seen primarily as proportionate equality. Legal acts when issued by the legislature within the limits of its competence and should be promulgated should be valid, so that all legal subjects know all of them.¹⁰

The landmark legal act of the Anglo-Saxon legal family—the Magna Carta Libertatum of 1215, proclaimed in several provisions the command to observe the law, by limiting King's prerogative concerning certain privileges of the gentry and later during the English revolution in the 16 c. to the laymen.

The renowned legal authority Bracton noted in the 13th century that the king cannot obey any man, but was bound by God's rule and the laws, because the law created and upheld the rule of the monarch.¹¹

Within the context of reining absolutism, even before the English revolution lawyers and philosophers upheld the ideas of the rule of law as skeleton, holding the justice factor in the administration of justice, and the parliament was seen as the main and supreme court, able to curb the unlimited power of the monarch.¹²

Sir Edward Coke contributed to the evolving views about the rule of law, adding to that the supremacy of common law, the independence of magistrates when ad-

8 Аристотел, Политика, София, 1995, Chapter 16, 1287a, 95.

9 O.Girke, Political Theories of Middle Age, Cambridge, 1958, 35.

10 F.Neumann, The Rule of Law, Heidelberg, 1986, 54; I cannot help to bring here a real story which sounds like a joke. Before couple of decades a Polish colleague—compativist visited North Korea. On the border he was told by the border police officer that the national legal system consists of 3 categories of legal provisions. The first layer being all that are universally known, the second group which is familiar only to public and party officials higher than certain rank and the third group of rules stem from the will of the ruler. When my colleague asked how the second and last group of rules is enforced when their content is unknown the officer explained that each time when the real situation concerns regulation by these categories of rules he has to give a telephone call to the superior in command who delivers the rule related to the concrete case.

11 Bracton, On the Laws and Customs of England, ed. by S.Thorne, Cambridge, Massachusetts, vol.II, 33.

12 G. de Q.Walker, The Rule of Law, Melbourne Univ. Press, 1988, 96–103.

ministering justice and the equality before the law.¹³

In the age of revolutions, the rule of law and the equality before the law led to the creation of institutional and procedural guarantees against absolute power and arbitrariness in the first written constitutions. Liberalism saw in the rule of law a universal tool for “taming” the state power to defend freedom.

During the English revolution, J. Harrington enriched the idea of the rule of law in his work *Oceania*.¹⁴

Going back to the time, when the state constitutions in North America were drafted just before the Declaration of Independence was adopted by the Continental Congress in 1776, J. Adams saw the rule of law as a criterion to determine the form of government. The republic, he wrote, is a state, where government is carried according to the law, in contrast to the arbitrariness of monarchy, which is not an empire of law, but a personal regime.¹⁵

LAW GOVERNED STATE—EVOLUTION AND SUBSTANCE EARLY LAW GOVERNED STATE

In Germany, the principle of the law-governed state emerged as an antipode of the police state. According to I. Kant understanding, civil liberty balanced state power and derived from the laws. In his concept for a law, governed state I. Kant included “the supreme measure of coordination between state structure and legal principles, to which reason binds us to strive through a categorical imperative.”¹⁶

The German doctrine of the *Rechtsstaat* was created by R. von Mohl in the first half of the 19th century¹⁷. Initially, the idea was based upon Kantian liberalism alone, but later it was developed as a principle, having its own substantive and procedural aspects. Thus, several basic forms emerge in the development of the law-governed state in the last two

13 Ibid., 104 – 119.

14 The Political Works of James Harrington, Cambridge, 1977, 161.

15 J. Adams reproduced the phrasing of J. Harrington, who took this expression from Aristotle: “Government of laws and not of men.”, see J. Adams, Thoughts on Government, April 1776, Papers v., 4, 87, [http://press-pubs.uchicago.edu/founders/documents/, v.1 ch4s5.html](http://press-pubs.uchicago.edu/founders/documents/v1_ch4s5.html).

16 И. Кант, Метафизика нравов, Учение о праве, Соч. т. 4, часть 2, Москва, 1965, 240.

Not only this founding idea, but the whole system of concepts of I. Kant is based on the government being bound by the law to guarantee civil freedom. Thus the state is an association of people, based on laws and justice. Each law governed state is based on three principles—the freedom of each member of society as a human being, the equality of each person to the others as a legal subject and the independence of each member of the state as a citizen. Citizens take part in the creation of the laws directly or through representatives in order to submit voluntarily to the law, which they have created themselves, see R. Grote, Rule of Law, Rechtsstaat and “Etat de Droit” in Constitutionalism, Universalism and Democracy—a Comparative Analysis, ed. C. Starck, Nomos, Baden–Baden 1999, 269–365.

17 The expression was first used by C. Th. Welker in 1813 and R. von Mohl developed the idea in 1829; Regarding the history and development of the notion, see E.–W. Bockenforde, State, Society and Liberty, Studies in Political Theory and Constitutional Law, Berg, Oxford, 1991, 47–70; O. Kirchheimer, The Rechtsstaat as Magic Wall, in Politics, Law and Social Change, Selected Essays of O. Kirchheimer, Columbia Univ. Press, New York, 1969, 429–452; R. Grote, Rule of Law, Rechtsstaat, and “Etat de droit”, in Constitutionalism, Universalism and Democracy – a comparative analysis, ed. C. Starck, Nomos, 1999, 269–306; J.–Y. Morin, The Rule of Law and Rechtsstaat Concept: A Comparison, in Federalism – in – the – Making, ed. by E. Mc Winney, J. Zaslove, W. Wolf, Kluwer, 1992, 60–85.

centuries. The substantive (material) law governed state, which was transformed from a liberal state in the 19th century to a welfare state in 20th and 21th century. The formal law governed state and the rule of law in its formal meaning may be positive or negative.

At the time of their emergence, the main postulates of the doctrine were related to the liberal tradition. The principle of the law–governed state was distinguished from the form of government. The state was based on reason, collective will and the government functions were limited to the protection of freedom, security and property and even the determination of political goals and the use of coercion were directed towards lifting the barriers before the accomplishment and independence of the individual. In its substantive and procedural aspects, the *Rechtsstaat* covered the standards for legitimacy and legality. The notion of *Rechtsstaat* was affirmed as an antipode of dictatorship and despotic rule by including values such as equality before the law and human rights, which were protected against government encroachments upon freedom, as well as governance and self–governance in compliance with the law in the sense, used in liberal theories.¹⁸

In the second half of the 19th century, the concept of the formal law governed state evolved within the framework of the conservative theory of the *Rechtsstaat*. The principle of the law–governed state was limited to a formal concept and the value neutral approach towards the state and the legal system only led to the supremacy of the acts of Parliament, which were to be observed by the bodies of the executive. The severance of the ties between legitimacy and legality reached its completion in the classic definition of F.J. Stahl, according to which the *Rechtsstaat* did not realize moral ideals and did not express the nature of state functions and governance, but only the means, method and nature of their implementation.¹⁹ However, value neutral rule of law might be used by an arbitrary government to shield despotism with the law.

The conservative interpretation of the principle has two inevitable consequences:

- guaranteeing the legality of the executive action, bound by common and rational law, makes the interference of the state in the sphere of personal freedom and property predictable and measurable;
- independence from the aims, values, and forms of the state.²⁰

When assessing the formal notion of the law governed state, we should not overlook the

18 For the contributions of L.von Stein, O. Mayer and other liberals, supporting the principle, see Bockenforde, op. cit., 52–58.

19 According to the definition of F.J.Stahl “the state should be governed by law. It should outline the limits of state action, as well as the sphere of freedom of citizens and should, forcefully, apply the moral ideals, but not more widely than what is established in the law. This is the concept of the law governed state, but not in the sense that the state governs the legal order without administrative goals and only protects the rights of the individual. This does not mean at all an aim or substance of the state, it only determines its type and character.” F.J. Stahl, *Rechts und Staatslehre*, Bd. 11, 2 Hafte, 1856, 137.

20 See F. Neumann, *The Rule of Law, Political Theory and the Legal System in Modern Society*, Berg, 1986, 182–183.

fact that the principle remains an antipode of the police state, but also of radical democracy, supported by the followers of J. J. Rousseau–M. Robespierre, J.P. Marat, and Saint–Just in the practice of the Jacobean Convent during the Great French Revolution. It is worth acknowledging that a century before the revolution in France and 3 years after J. Bodin sovereignty doctrine popular sovereignty principle was eloquently restated by G. Buchanan in a much more tempered manner for it was balanced with the rule of law principle.²¹

The principle of the formal law governed state was further developed and enriched by R. von Gneist. The law governed state means governance in accordance with the laws, adopted pursuant to the prescribed legal procedure and putting limits to the executive and the judiciary, as well as unity of governance and self–governance in implementing state tasks. The main contribution of R. von Gneist has been the justification of administrative justice, which exercises control over state authorities, bound by the law. In the sphere of civil liberties everybody should be fully aware of their obligations, no citizen should bear more burden than his/her fellow citizens and private law should continuously and energetically protect the individual and the property in all spheres. Governance realizes the negative formal law governed state by preserving public order, guaranteeing personal freedom and ensuring equal access to public services to citizens, complying with the conditions, set by law.²² In the second half of the 19th century within the framework of the formal law, governed state there emerged the understanding about the liability of the state and state authorities for any guilty infringement of the law against the fundamental rights of citizens.

The practical implications of the conservative notion of the formal law governed state are related to upholding legality, but the disregard towards the substantive conditions, which the law should meet, limits the content of the principle to the procedure for adoption, observance and application of the laws, regardless of their content. In addition, what is even more important, the separation of legality from legitimacy justifies different forms of infringement upon legality itself and sometimes encroachments upon human rights.²³

The formal concept of the rule of law is nowadays supported by most representatives of legal positivism. According to J. Raz, the main task of the principle is to guarantee legal security in the actions of the state and other legal subjects, which can plan their activities, as long as the observance of laws increases the predictability of the results expected. Thus, the principle of the rule of law has a negative function, since it pro-

21 G. Buchanan, *The Powers of the Crown in Scotland*, Austin, 1949.

22 R. Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland*, Berlin, 1879, 24–25.

23 Theoretically, the primacy of legitimacy over legality is possible, based on the legal normativism of H. Kelsen and the political decisionism of C. Schmitt, although during Nazi rule he sustained that the appointment of a Nazi or a Communist Chancellor was illegitimate and contradicted Weimar constitution, C. Schmitt, *Legalität und Legitimität*, Berlin, 1968, 61; H. Kelsen, *General Theory of Law and State*, Harvard, 1945, 117.

protects citizens from the arbitrariness of despotic power.²⁴ According to J. Raz, the formal content of the principle pre-supposes characteristics of the law, through which it can effectively determine the conduct of legal subjects. Legal acts should not be retroactive, they should be clear, relatively stable and created in furtherance to sustainable, open and common procedural rules. At the same time, the enforcement of legal norms should not deprive the law of its ability to determine the conduct of legal subjects through deformations in the application of the law. Above all things, these features of the law relate to the independence and the impartiality of the judiciary, accessibility of legal protection to curb the violation of the law through the discretion of the institutions, administering justice.²⁵ In this way, the formal law governed state and the formal rule of law concentrate upon procedural requirements, prescribed in the laws and the means for enforcement, thus isolating legal acts from social values and principles. The formal meaning of the principle has been limited to guaranteeing of legality, legal security and the reasonable expectations of legal subjects, but has ignored the problem of legitimacy in the context of the law-governed state.²⁶

TYPES OF LAW GOVERNED STATE

The debate in Weimar Germany added new dimensions to the nature of the law-governed state.

From the standpoint of legal normativism, H. Kelsen challenged the meaning of the notion of the law-governed state since every state represented a legal order and was based on the law. Every state, according to him and his followers, was governed by law, thus the use of the notion law governed state was a redundancy. The formalization of the notion and the approach of H. Kelsen, shared by H. Lasky in Great Britain, leads to the compatibility of the principle with all forms and types of state, including totalitarianism. That is how a conclusion is reached once again that the formal law governed state may justify despotism, when tyrannical power turns arbitrariness into law using value free approach to the rule of law. The formal law governed state gives a legal form to the implementation of the sovereign power, given that the government itself has submitted to the requirement to observe the law it has created. Sovereign power limits itself by the law, but the law is an expression of the power, not limited by democratic values and principles. Thus, the law-governed state legitimizes itself only through sovereignty, while despotic power, creating law, is not able to create

24 M.L.F. Esteban, *The Rule of Law in the European Constitution*, Kluwer, 1999, 92.

25 J. Raz, *The Rule of Law and its Virtue*, *Law Quarterly Review*, N 93, 1977, 196; for the differentiation between the formal and substantive material law governed state, see also P. Craig, *Formal and Substantive Conceptions of the Rule of Law*, in *Public Law* 1997, 467; R.S. Summers, *A Formal Theory of the Rule of Law*, in *Ratio Juris*, 1993, N.6, 127.

26 J. Raz turns the rule of law into an instrument and compares it to a good knife, whose basic benefit is to cut well. The good implementation of the principle of the rule of law requires qualities, which would guarantee the effective application of legal acts. The rule of law is the substantive value of the law and not its moral value, J. Raz, *Op.cit.*, 225.

legitimacy and is supported only by the fear and coercion towards citizens. Legality under the formal law governed state might lead to legitimation of despotic power. The observance of the laws by the state itself standardizes and rationalizes state governance, which does not become more democratic under the requirement for the formal rule of law.²⁷ Ultimately, the rule of law might be transformed into a rule through law.

C. Schmitt decisionism is more refined, because it sees legal norms as a product of a political decision. The analysis of the hierarchy of the legal system goes outside legal positivism, which leads to perfection the formal law governed state and legal exegetics and finds its place under political science. C. Schmitt defines the law governed state as a mixed form of state, since it unites, in its constitutional system, the values of liberalism and democracy.²⁸ The perfect critique of the liberal law governed state, which C. Schmitt creates, does not guarantee, however, the preservation of the basic democratic values.

Totalitarianism marked the end of the *Rechtsstaat*, but long before that the reducing of this principle to legality shakes to some extent the foundations of the *Rechtsstaat*, by limiting democracies' capacity for self-defense against despotism and facilitating the establishment of dictatorial regimes in the period between the wars in Europe.

The substantive law governed state binds together the observance of the law with moral and constitutional values and principles, transcending procedural rules, valid for the creation of the parliamentary laws and other legal acts. It is compatible with both the liberal and the welfare state.

The liberal law governed state is, chronologically, the first prototype of the substantive law governed state. The essence of the rule of law reflects the liberal constitutional principles and supports the basic features of the limited, democratic, and responsible government. The liberal rule of law in the USA is founded in the premise that the government decisions are to be adopted with the consent of the people. They are to be implemented, observing fundamental human rights, as well as procedures, which would prevent the establishment of a despotic rule in violation of civil freedom. The legal safeguards of human rights include judicial protection against legal acts, which are to be controlled by independent and impartial courts. Thus, in contrast to the formal law governed state, the government cannot take political decisions in a legal form, for pursuing the interests and benefit of the rulers, which are based on command of sovereign authority.²⁹

27 According to M. Neumann's metaphor, the formal law governed state, which he calls the state of laws, puts people into the situation of domesticated animals or laboratory mice and the law turns into an instrument for laboratory tests, see M. Neumann, *The Rule of Law and Order: Between Rechtsstaat and Gezechtsstaat* www.trentu.ca/~mneumann.rulepap.html, 4.

28 C. Schmitt, *The Liberal Rule of Law*, in *Weimar Jurisprudence in Crisis*, ed. A. Jacobson and B. Schlink, Univ. of California Press, 2001, 162.

29 See for more details Дж.Н.Мур, *Верховенство права: обзор*, в *Верховенство права*, Москва, 1992, 10–53, 13–15.

The constitutional principles of the liberal rule of law include people's sovereignty, the separation of powers, representative governance, limited and responsible governance, the control for constitutionality of parliamentary legislation and the judicial control over administrative action and legal regulations drafted by the executive bodies. The protection of fundamental rights and the constitutionally limited governance involve ensuring opportunities for broad public discussion, fair criminal proceedings, guarantees for personal freedoms, the freedom of religion, freedom of expression, assembly and association, holding free, competitive, pluralist and fair elections at regular time periods, liability of officials for infringements of laws, protection of social rights and the right to a healthy environment, civic control over the army and the security services.³⁰

Back in Weimar Germany H. Heller supported the view about the welfare law governed state.³¹ His system of ideas, including the analysis of the Weimar Constitution, presupposes interaction among the legal values, principles and norms and the objective laws of society, the ethical bases, the moral and other social norms. It is this approach, which allows us to outline the links between the social, political and legal substance of the constitutional principles, including the principle of the law governed state.³² The welfare law governed state is a result of the effective interaction between social reality and the normative substance of law, where the state sovereignty and the separation of powers ensure the rule of law, democracy and freedom, based upon the fundament of the social ethical values, legitimizing public power. The stability of constitutional democracy is to a large extent determined by the functioning of the welfare law governed state, based on the strive for social justice and social equality. Thus, new features have been integrated to substantive law governed state content. The welfare state strengthens constitutional rule through including citizens in a community, which shares values and principles, legitimizing the aspiration towards exercising state power according with the social justice and individual social dignity. Those in power should justify their claim to govern by creating laws and taking normative obligations towards those under their rule. The legal order encompasses fully-fledged system of second generation-economic and social rights as well as social safeguards and social benefits including medical care and pension funds.

The welfare law governed state organizes the life of the population, respecting the autonomy of individual citizens and their associations, as well as fundamental human rights. The growing social differentiation increases the responsibility of the state in the field of social coordination.³³ The pluralism of modern societies puts the democratic state before the requirement not to limit diversity, but to create opportunities for cooperation among individuals and their associations. At the same time, the welfare state

30 *Ibid.*, 28–47.

31 D. Dyzenhaus, *Legality and Legitimacy*, C. Schmitt, H. Kelsen and H. Heller in Weimar, Oxford, 1997 169–216.

32 H. Heller, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: The Nature and Structure of the State*, in *Cardozo Law Review*, N 18, 1997, 1139 – 1216.

33 D. Dyzenhaus, *Op.cit.*, 183.

pre-supposes active citizens, trying to take part in the establishment of a democratic and fair social and political order. This participation involves the recognition of the equal right of individuals and their associations, being aware of their short-term and long-term interests in the formation of the substance of legal acts, which are product of the common, will of the members of society. Enhancing legitimate expectations by including social security is probably the most important value added effect of the social (welfare) state to the substantive rule of law.

The brief overview of the evolution of the notions of the law governed state and the rule of law allows us to mark the main avenues and trends in the debate, concerning forms of the rule of law, types, and patterns of the law-governed state historically regarding the substance of the characteristics they include:

- A pre-modern phase, preceding the emergence of the nation state, where, as from ancient times, the different elements of the notion of the rule of law are justified;
- The early law governed state and the rule of law, introduced in the first written constitutions;
- The formal law governed state and the formal rule of law during the second half of the 19th century;
- The liberal law governed state and the liberal rule of law during the 20th century;
- The welfare law governed state in the 4th generation of written constitutions, created after the end of World War II in Europe.
- Rule of law in the nation state and beyond within the emerging supranational constitutional legal orders like the EU.

The main trend in the development of the substantive principle of the law governed state and the rule of law is the expansion of their meaning—each subsequent step in the evolution of the principle leads to extending the scope of characteristics. Besides, increasing of criteria or the standards in the international hard and soft law to be met by the national constitutions in order to prove the introduction of the principle of the welfare law governed state narrows the group of countries, which meet those conditions.

DIMENSIONS AND IMPLICATIONS OF CONTEMPORARY LAW GOVERNED STATE

All democratic constitutions of the 4th generation, adopted after the end of World War II, and especially the German *Grundgesetz* of 1949 proclaim and confirm the substantive, as well as the procedural meaning of the principle of the *Rechtsstaat*, ensuring the unity of legitimacy and legality of political and legal systems. A brief outline of the scope of characteristics, inherent to the contemporary welfare law governed state should, however, distinguish the procedural and substantive characteristics of the law governed state from the norms of common sense and natural law, which in modern constitutionalism constitute an ingredient of the ethical and context of the law governed state.

The capacity of the political and economic system to ensure integration, inclusion and tolerance for citizens and the observance of their fundamental rights by the political institutions is necessary pre-requisites to the constitutional principle of the modern law governed state.

Principles and values of the legal system, such as people's sovereignty, the separation of powers, political pluralism, equality, fairness in exercising power and fundamental rights, are the context, under which the principle of the law governed state is applied. The substance of legal regulation should always comply with democratic values and principles. Their violation leads to deformation of the law governed state, which, although proclaimed as a constitutional principle, remains an ideal of what is due in the sphere of legal reality.

All forms of the law-governed state involve the minimum substance of the principle, inherent to the formal law governed state and the formal notion of the rule of law. Their content is expressed in the requirements towards the law and the legal acts, concerning the nature and characteristics of the creation and enforcement of the normative acts, as well as their interaction in the legal system.³⁴

The content and enforcement of the laws and should exclude the use of violence on the part or between physical persons as means for achieving their aims and should also frame coercion on the part of the state under legal limits, judicial restraint, representative institutions and civil society control.³⁵

The institutional safeguards for the Constitutional and parliamentary law supremacy in the hierarchy of the legal system are of considerable importance for the realization of the law-governed state. Constitutional judicial review preserves and polices supremacy of the Constitution, maintaining the compliance of parliamentary legislation with the constitutional provisions (and the international treaties in most of contemporary democratic nation states where the constitution has stipulated international law primacy), prevents exacerbating political conflicts into political violence by transforming political conflict between political actors into legal dispute to be peacefully resolved, serves as a counter-majoritarian check when turbulent majorities are tempted to overstep constitutional boundaries and restrict minorities or individual freedom and guarantees human rights protection. Within most of the civil law family countries administrative justice is a necessary guarantee for civil freedom and the main mechanism for ensuring the supremacy of parliamentary laws, complying with the Constitution, which determines their content, and the executive law making, individual administrative acts and the executive action. The administration of criminal and civil justice ensures the legitimate monopoly over violence, which in constitutional democracies

³⁴ In broad outlines the requirements for drafting laws, set by J. Raz, were expressed in Bulgaria in the Law on Normative Acts of 1974 and the decree on its implementation.

³⁵ G. de Q. Walker, *Op .cit.*, 24–28.

belongs to the state alone. Weberian definition of the state as the sole monopoly of legitimate coercion, excludes pluralism or dispersion of violence between paramilitary association and guarantees that citizens will resolve their conflicts through peaceful legal means, observing fundamental rights, the Constitution, international human rights instruments and the parliamentary laws. To introduce pluralism in the area of law enforcement by coercion and permit violence to be exercised between para military formations striving to achieve domination or balance in law enforcement instead of legitimate state monopoly coercion is per se the end of constitutional democracy, rule of law and modern democratic nation state. The principle of the law-governed state requires accessible and effective judicial protection against the violation of rights by all the legal subjects including institutions of government and ensuring the enforcement of the obligations of legal subjects.

The politically responsible government and the legal liability of the state and state officials for violations of rights are substantive features of the law governed state. Of course, the pre-requisites for achieving the fair justice in the context of the rule of law are the principles of independence, impartiality, and fairness of the judiciary. The independence of judiciary should ensure the fair law enforcement; any pressure upon magistrates' work and acts on the part of state authorities, political parties, officials, or physical persons has been prevented. No doubt, telephone justice and absolute adherence to the "gramophone" or phonograph justice formula³⁶ within the civil law family judiciary does not comply with the essence of the rule of law. Using the distortion of the structural and functional principles of the system of administration of justice is also an obstacle for the application of the principle of the law-governed state.

The law-governed state requires fair and effective procedural guarantees for the protection of human rights and interests of citizens and to exclude arbitrary governmental action by control and containment of political institutions powers within the constitutional limitations. Among them, the constitutionalized presumptions for fair criminal proceedings occupy an important spot.

The principles of the law governed state and the rule of law after World War II are based on the primacy of international law, on the binding force and direct application of international treaties into domestic law and on the compliance of domestic legal order with the generally acknowledged norms and principles of international law. Constitutions and constitutional legislation are designed in consonance with the international and European standards established in the international hard and soft law based on the common democratic European constitutional heritage.

³⁶ The metaphor of phonograph justice was coined by F. Neumann. The picturesque expression connotes the prohibition of the judge made law and limitation imposed on judges within civil law family countries to enforce the laws adopted by the parliaments without interpretation. Laconically stated in each case the judge is supposed to play the tune that has been printed in the disc by the legislator., See F. Neumann, *The Democratic and the Authoritarian State*, Free Press, New York, 38.

The real status and effective implementation of the principle of the law-governed state depends to a great extent on the level of legal culture, seen as a combination of legal tradition and legal knowledge on the part of citizens and officials. The quality of legal education is also a pre-requisite to the abilities of lawyers and the capacity of the judiciary to implement the requirements, which constitute the basis of the law governed state.³⁷

As a rule, not all characteristics of the law-governed state are constitutionalized.³⁸ Many of them are provided in laws enacted by the parliament and are sometimes developed by the constitutional courts jurisprudence.³⁹

The discourse about “the rule of law” and the principles of the *Rechtsstaat* and *Etat de droit* depends also on the legitimacy and legality relationship. Besides all other implications, all forms and modifications of the principle are also bound to produce and ensure the legality and legitimacy of the legal system. The common feature among all national models of the classic and modern notion of the rule of law is the compatibility of legitimacy and legality within a constitutional rule, based on the consent of citizens. The constitutional guarantees ensure compliance of government action with legitimacy and legality. The establishment of a range of liberal, democratic, and social values, to serve as basis for the structure and functioning of the institutions, is a pre-requisite for the legitimacy of government, where state bodies exercise their powers, observing the principle of legality.

Without more theoretical speculation, I will jump into practical implications of the rule of law and rechtsstaat. Venice Commission and ABA CEELI have identified slightly different set of indicators.

American Bar Association (AbA) Rule of Law Index 2010
 Limited government
 Absence of corruption
 Clear, stable, and publicized laws
 Order and security
 Fundamental rights

37 The most extensive catalogue of characteristics of the law governed state was created by the International Commission of Jurists, see *The Rule of Law and Human Rights, Principles and Definitions*, Geneva, 1966.

38 First of all, these are the provisions, devoted to proclaiming the principle in Art. 4 and Art. 5, the principles of equality (Art. 6), the separation of powers, the liability of the state, the right of defense and other constitutional provisions, see Е.Друмевa, *Конституционно право*, София, 1998, 127–128; At the same time, the institutional and procedural characteristics of the law governed state are regulated in the chapters, devoted to the fundamental rights and state bodies.

39 In Germany the Constitutional Court upholds the principles of proportionality, of the opposing democracy, the cooperation among the Länder, etc., see D. Currie, *The Constitution of the Federal Republic of Germany*, Univ. of Chicago, 1994, 23, 215, 101; see also A.E.Dick Howard, *The Indeterminacy of the Constitutions*, in 31 *Wake Forest Law Review*, Summer 1996, 383–410, 389.

Open government
 Regulatory enforcement
 Access to civil justice
 Effective criminal justice
 Informal justice
 Venice Commission (vc) *CDL(2010)141* [p. 9 ff]
 Separation of powers
 Legality
 Legal certainty
 Respect for (judicial) human rights
 Non-discrimination and equality before the law
 Hierarchy of norms
 Prohibition of arbitrariness
 Independence and impartiality of the judiciary ⁴⁰

Restating various indicators the most evident conclusion is that added values of the rule of law and rechtsstaat are high legal certainty and legitimate expectations for all physical and legal persons – nation state including. For their legal and constitutional conform behavior and compliance they would be rewarded by achievement of the best results they perceive through their efforts.

EFFICIENCY OF JUDICIARY AS A SAFEGUARD TO THE EFFICIENT RULE OF LAW ENFORCEMENT

Efficient Judiciary is a key element to the rule of law for it plays many and indispensable functions including a prerequisite, a consequence and ultimate legitimate safeguard to constitutionalism, human rights and survival of constitutional democracy.

No doubt, independence is the true foundation of Judiciary's legitimacy but efficiency⁴¹ is of primary importance among other values legitimating the pivotal role of judiciary to the rule of law. The balance between them should be part of constitutional design and it is among the top priorities cares of legislators and law enforcement to be maintained. Both independence and efficiency should be well balanced for the most independent judiciary is one that nothing depends on or most inefficient judiciary. The most efficient judiciary at first glance is the one that is not independent but de facto by losing its independence it becomes a toy in the hands of other branches or sources of power and undermines its own legitimacy and efficiency. No doubt, telephone justice and absolute adherence to the "gramophone" or phonograph

⁴⁰ See M.G. Oropeza, The Rule of Law, 86 plenary session of the Venice Commission March, 24–26, 2011, 8.

⁴¹ Efficiency [from Latin "effectus" – action] is an ability to bring effect, to have result; productivity.

justice formula⁴² within the civil law family judiciary does not comply with the essence of the rule of law for it increases dependence of judiciary on the executive, the legislative branch or on the ruling political party.

The least dangerous branch can easily be transformed by others through dependence or by inefficiency itself into a branch that is most dangerous to human rights and constitutional democracy.

Leaving theoretical speculation aside and indulging into practical needs of legal system life it is crucial to outline (analysis requires quite an extensive study and enormous effort, which cannot be contained in present brief intervention):

- Factors on which efficiency of Judiciary depends;
- Goals and Tasks of efficiency;
- Criteria and Indicators of efficiency;
- Who is entitled to evaluate efficiency;
- How the efficiency is measured—what is evaluated or how efficiency is measured;
- Factors on which efficiency of Judiciary depends
- Factors on which efficiency of Judiciary depends are multiple and of various nature

Without any attempt to exhaust all the factors instrumental to the best performance of judicial functions of efficient judiciary the list should include:

Well designed constitutional and legal framework of the judicial branch corresponding to the international including European standards and best practices in the comparative constitutional law;

Within the legal framework some of the tools instrumental to the increasing of efficiency aimed at reducing the workload of the courts like mediation, arbitration, increasing the areas of torts and decriminalization at the expense imposition of administrative courts punishments for petite criminal offences instead, should be actively involved;

Well designed budget adequate to the real needs and sufficient to the judicial functions performance;

High professional qualification of judges with the legal education supplemented and upgraded by special educations of magistrates and special exams on doctrine and practice of the candidates applying to enter judiciary;

Bodies for objective supervision and management of the courts and career promotions or sanctioning of judges;

⁴² The metaphor of phonograph justice was coined by F. Neumann. The picturesque expression connotes the prohibition of the judge made law and limitation imposed on judges within civil law family countries to enforce the laws adopted by the parliaments without interpretation. Laconically stated in each case the judge is supposed to play the tune that has been printed in the disc by the legislator., See F. Neumann, *The Democratic and the Authoritarian State*, Free Press, New York, 38.

Clear, transparent and procedures of dispute resolution and logical and understandable language of judicial decisions in compliance to the ECHR and jurisprudence of the European court of Human rights;

Proper working conditions in terms of court premises, judges offices and technical equipment – hardware and software.⁴³

There should be a sufficient number of judges recruited to secure a reasonable workload for magistrates.

Judges need adequate support staff including referenders, technical assistants and information services and resources.

Judges need to be safe. States need to ensure the safety of judges by including the presence of security guards on Court premises or providing police protection where necessary.

Goals and Tasks of efficiency

Among the goals and tasks of judiciary's efficiency a short list should include:

Protection of the person's rights, freedoms and legitimate interests, interests of legal entities and individual businessmen, societies and the state – resolving civil and economic disputes, consideration of criminal and administrative cases;

Correct legislation enforcement – absence of mistakes, stability of judicial decisions and absence of revocations or changes;

Prompt consideration of cases – respecting schedule of taking certain procedural actions established by the legislation for legal proceeding.

Judicial performance in a just and timely manner—justice delayed is justice denied. The Strasbourg Court has been overburdened with applications concerning lengthy judicial proceedings. The problem of lengthy judicial proceedings should be resolved first at the level of domestic remedies before addressing supranational court.

Criteria and Indicators of efficiency

1. Number of cases:

1.1 received

1.2 subject to consideration (proceeding by the court)

1.3 considered;

For system of common courts: total number of cases, including

a) Civil;

⁴³ It is difficult to exhaust all the necessary variations of the premises for performing judicial functions including Number of buildings of courts erected; Number of buildings of courts that underwent capital repairs; Number of buildings of courts that underwent refurbishment; Availability of office equipment (computers, printers, copiers) in courts; Number of acquired vehicles; Presence and functioning of communication facilities;

b) Criminal;

c) Administrative;

For system of economic courts: total number of cases, including

a) On economic insolvency (bankruptcy);

b) Administrative;

c) Others.

1.4 number of cases considered per judge.

2. Quality of consideration of cases (legal proceeding):

Total number of decisions taken by court on certain category of cases (criminal, civil, administrative, economic);

Number of the appealed against (protested) decisions;

Number of the cancelled (changed) decisions.

3. Timeliness of consideration of cases (legal proceeding):

Number of cases considered within the period established by the legislation;

Number of cases considered with infringement of procedural schedule.

4. Number of cases with legal proceeding was postponed:

Because participants of the process (offender, victim, parties, witnesses, other persons) failed to turn in; Because lawyers, public prosecutors and experts failed to turn in; For other reasons (illness of the judge, the inadequate notification of participants of process, etc.);

5. Number of particular decisions taken by courts (messages, suggestions) to eliminate violations of legality, reasons, and conditions promoted committing offences:

Total number of cases considered by courts by certain category (criminal, civil, administrative, economic);

Number of particular decisions taken;

6. Fulfillment judicial decisions and other acts, which are subject to execution:

The sums to be collected under judicial decisions and other acts;

The sums really collected in the course of implementation of the above-stated documents.

Quality indicators that are more difficult to measure should supplement Quantative factors.

Evaluation of overall performance of courts and directly judges it was envisaged to develop parameters of the intra-system nature, concerning activity of each part of corresponding judicial system and each judge, taking into account such criteria as complexity and extensionality of cases, multi-event cases, specificity of regions, extent of loading of judges and other issues.

The number of the considered cases and materials, periods of consideration of cases, quality of their consideration, monthly average number of cases considered by a judge, actual labor expenditures for legal proceeding, prevention work. At the same time, it was supposed to consider complexity of cases, quantity of materials of cases, which shall be studied and researched (extensionality), and correctness of application of regulatory legal acts, organization, and culture of proceeding.

Who is entitled to evaluate efficiency?

Evaluation of the effectiveness of the judiciary should not be used to exert pressure on judges or to influence particular decisions of the courts.

Three levels of evaluation of judicial decisions might be identified:

By courts – in order to improve activity – intra–system control within the judicial branch;

By management bodies of the Judiciary –Supreme Judicial Councils (Magistratura), Ministry of Justice or their special inspectorates–nationwide control performed by the national institutions;

Supranational evaluation through monitoring by supranational political or expert bodies within the context of Council of Europe, monitoring by the parliamentary assembly, activities, reports, observations opinions and best practices prepared or carried by the European Commission for the Efficiency of Justice (CEPEJ), Consultative Council of European Judges (CCEJ), Venice Commission and other expert entities like ODIHR of OSCE etc.

How the efficiency is measured–what is evaluated or how efficiency is measured;

In measuring efficiency, indicators are developed by making relationships of inter-related criteria of judiciary’s workload. is a measure that helps ‘answer the question of how much, or whether, progress is being made toward a certain objective.’⁴⁴ Indicators can be used at the highest policy levels to measure progress towards an overarching pur-

⁴⁴ On meaning of the term effectiveness and debate on the connotation of the term indicator see Report and Recommendations of the National Expert, T. Melnik “Parameters of Efficiency of Bodies of the System of Administration of Justice” in (This definition comes from the Handbook of Democracy and Governance Program Indicators (Washington, DC: U.S. Agency for International Development, 1998). Other organizations working in the development field define indicators in nearly the same way. The large and well– known Organization for Economic Co–operation and Development (OECD) defines an indicator as, a ‘direct and valid statistical measure which monitors levels and changes over time in a fundamental social concern.’ (Measuring Social Well–Being: A Progress Report on the Development of Social Indicators, Paris: OECD, 1976.) The smaller Performance Assessment Resource Center (PARC), based in Birmingham, England, offers this definition: “An indicator is something that can be seen, experienced, or recorded. It is a sign that something exists, or has happened, or has changed.’ (Good Monitoring and Evaluation Practice: Guidance Notes (Birmingham: PARC, October 2001.) The World Bank defines an indicator as ‘information [that] can be used...to assess performance and assist in planning for the future.’ (Judicial Sector Indicators (JSI), a World Bank Information System available on the web at http://www4.worldbank.org/legal/legop_judicial/whatisjsi.html , See Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector, Vera Institute of Justice, www.vera.org/indicators., 00051784 Promotion of a Wider Application of International Human Rights Standards in the Administration of Justice in Belarus.

pose, such as reducing the level of violence in society, or assuring equal access to justice across lines of gender, ethnicity, or economic class. Indicators are also commonly used to measure progress toward institutional objectives (intermediate outputs)—such as increasing the number of criminal convictions of those committing violent crimes or expanding the provision of legal services to people in poverty—that are expected to contribute to broader policy goals. At a third level, indicators can be used to measure the daily activities through which an institution can attain its objectives.

In all regions of the world, justice officials want to know whether the work of the courts serves the public and cultivates trust in the judiciary, but they have few, if any, indicators for these outcomes. Most judiciaries today keep track of at least one of three aspects of court performance:

- The amount of decision-making—the volume of cases passing through the system
- The speed of decision-making—the time frame in which courts make decisions
- The character of decision-making—the kinds of decisions courts make⁴⁵

Many countries closely monitor the first two aspects of court performance, which deal primarily with productivity. In the United States and Europe, for example, the volume of cases passing through courts is tracked constantly (usually as the relationship between the number of cases filed and the number of cases disposed) and so is the time it takes for courts to process these cases. (In most European states, this is sometimes referred to as the “Cappelletti–Clark” index.) Court systems also analyze this kind of information according to the type of offence, court, and individual judge presiding, tracking ratios over time to distinguish between seasonal disturbances and more meaningful trends.

These kinds of indicators can warn of possible imbalances in the relationship between the public’s demand for judicial services and the courts’ capacity to supply it, but they do not reveal much about the experience or quality of justice and provide little guidance for justice officials who want to serve the public well.⁴⁶

The list of parameters would include evaluation of:

Level of organization of the bodies that administer justice (sufficiency of quantity of courts, judges; service load);

⁴⁵ *Ibid.*, 45–46.

⁴⁶ In Russia, for example, every six months, and again at the end of the year, the Department of Judicial Statistics of the Supreme Court receives and compiles statistical reports from each of the Federation’s 89 regions about the “quality of justice” (*kachestvo pravosudiiia*) administered in the courts. But “Quality of justice” is measured narrowly, by two indicators: (1) the percent of decisions taken in excess of the time frame established by law; and (2) the ratio of the number of decisions overturned, or modified by a higher court upon appeal, to the number of original decisions taken by the court in a given period. The use of rates of reversal as the main indicator of good performance encourages consistency in the application of law. But consistency is often a poor proxy for both quality and equality. Excessive attention to rates of reversal also can generate perverse incentives, for it amplifies the pressure for judges to align their decisions with the opinions of higher courts. Many judges feel this pressure jeopardizes judicial independence, whose achievement and protection is in some countries an important policy goal.

Sufficiency of financing, material and technical support of courts (presence of appropriate buildings, offices for judges and their assistants, secretaries of judicial sessions, premises for receiving citizens, halls for judicial sessions; ensuring security; appropriate quantity of necessary office equipment, literature; wages and social guarantees);

Competence, qualification of the judiciary, staff of courts;

Results of administering justice (completeness, quality, motivation, validity of judicial decisions; correctness of application of the legislation; conformity of procedure of legal proceeding to the standards established by the law; providing of access to justice; adequacy of court costs);

Level of trust to courts;

Within the framework of each of the noted parameters, a lot of criteria may be contained, to some extent allowing evaluation of an aspect under consideration.

So, for example, the following criteria can be used for evaluation of decisions taken by courts, based on results of cases considered in essence:

Legality and validity of the decision (sentence, verdict);

Substantiation with arguments, persuasiveness and clarity of its motivation (in drawing up of motivation part);

Precise structure, linguistic and grammar correctness;

In each concrete case the choice (definition) of parameters subject to evaluation (“that is subject to evaluation”) and set of qualitative criteria for each parameter (“concerning in relation to what the evaluation will be carried out”) will depend both on the subject of evaluation and the objectives that are pursued during its implementation.

One of the best liberal definitions of constitutionalism emphasizing the constitutions role as frame of government was offered in the second half of the 19 century in the US by John Potter Stockton “The constitutions are chains with which men bind themselves in heir sane moments that they may not die by a suicidal hand in the day of their frenzy.”, J.E. Finn, *Constitutions in Crisis*, Oxford University Press, 1991, 5.

The quest for efficient judiciary is a constant goal and a safeguard l but with moving. It is also a priority on the legislators list all over the world where constitutional democracy has been established.

The formulation and measurement indicators of the efficient judiciary are constantly developed by self government of judiciary , administration of the judicial power within the nation state context and or on a supranational level by the standards setting and standards monitoring by the international organizations.

CONCLUDING REMARKS

With constitutional democracy triumph during the last decades of the 20th century, rule of law has become a common denominator among the principles entrenched in the new constitutions. De facto, this means in most of the constitutions since scholars of comparative law have counted that the constitutions adopted after 1970 outnumber the constitutions created for two centuries since the 18 century revolutions in North America and in France. Adopted as reactive documents to the ancient regimes constitutions as a scripture reflect the common European constitutional heritage while the rule of law in the living constitutions acquires the unique pattern depending on the context of the nation state tradition, history, and politics.

Besides the traditional obstacles, practical enforcement of the principle of the rule of law or *rechtsstaat* has to cope with new challenges. Three of them deserve special attention.

In the emerging democracies, constitutional design of the *rechtsstaat* confronts underdeveloped legal culture on the part of the rulers and ruled. Due to the lack of active civil society and perceptions like legal nihilism and fetishism the living rule of law is abound with unenforceable provisions and ineffective law enforcement. These defects of the rule of law might be cured gradually and the treatment might take generations that have lived their life in a constitutional democracy.

One of the most fascinating events in contemporary global age is the emergence of multi level constitutionalism. Constitutional monism of the nation states is supplemented with supranational constitutional dimension by gradual constitutionalization through establishing international and European standards of constitutional democracy. Within European context two variously shaped and encompassing different sets of nation member states supranational constitutional streams evolve – Council of Europe, ECHR, and jurisprudence of the Strasbourg court of Human Rights on one side and the EU constitutional order for its member states on the other side.

In contrast to federations, multilevel constitutionalism is not hierarchically structured like supremacy of the nation state constitutions within the national legal system. For the time being and in the foreseeable future integration through law and economic integration have not scheduled emergence of European super state neither EU would be transformed in omnipotent statal entity identical to that of the nation states. Primacy of the EU law and validity of EU standards will be guaranteed not by supremacy of a written formal supranational constitution but by contra-punctual constitutionalism where conflicts between the constitutional orders and harmony is achieved by the same democratic constitutional values and principles shaped by the common European constitutional heritage established after the Westphalian peace treaty.

Like in contra-punctual music harmony is achieved only if different melodies are composed in one key so contra-punctual constitutionalism resolves and avoids conflicts by foundation of the national and supranational levels on the same set of democratic constitutional values and principles with the each one contents being modified and adapted to its respective constitutional orders.

In a constitutional pluralism rule of law transcends the *rechtsstaat* and the rule of law within the national legal system, which is supplemented, by the rule of law beyond the nation state on a supranational and international law level. The conflicts between different legal orders are unavoidable but the mechanisms for their resolution are built, negotiated, and agreed upon in order to peacefully overcome them.

Terrorism and transnational crime pose the most formidable threat to the rule of law in contemporary constitutional democracies. The constitutional democracies confront actual dilemma that they have to preserve and protect the principle of the rule of law and constitutional democracy with the established procedures and instruments of the rule of law from individuals or groups that do not recognize the very fabric of the principle but aim to destroy democratic societies built on the rule of law. Indeed there has not been agreement between scholars and politicians on the content of terrorism neither there has been a legal definition of this term in any international law instrument. However, considered by some of the obvious implications terrorism and the rule of law are diametrically opposites. While on the one side of the antinomy lie values like predictability, security and legitimate expectations of people on the other side the goals are to be achieved by intimidation, insecurity and unexpected harms to physical persons in order to exert pressure on government. While the constitutions and the rule of law aim to limit coercion and resolve conflicts peacefully terrorism and transnational crime is apply by definition unlimited coercion in order to achieve their goals. Rule of law is a universal principle and once there is an attempt to suspend it or to impose unrestricted violence to the criminals without observing fair trial, presumption of innocence etc. where is the guarantee that the government and law enforcement does not become a criminal himself. Leaving the area of the rule of law though for its protection though legitimated with the reason of state or constitutional dictatorship or limited emergency formulae might transform the law enforcement into criminal activity.

Constitutional democracies and the principle of rule of law seem to be ill equipped to defend themselves against terrorist and international crime threats with the legal means of peaceful conflict resolution.

С триумфом конституционной демократии в последние десятилетия 20-го века верховенство права стало общим знаменателем среди принципов, закрепленных в новых конституциях. Следует отметить, что хотя конституции отражают общее европейское конституционное наследие, верховенство права в условиях живой Конституции приобретает своеобразное выражение в зависимости от традиций, истории и политики конкретного государства.

В статье рассматриваются основные элементы реализации идеи правового государства, такие как эффективность судебной системы, институциональные гарантии верховенства конституционного и парламентского права в правовой системе, политическая ответственность государственной власти и юридическая ответственность государства и его должностных лиц за нарушения прав, справедливые и эффективные процессуальные гарантии защиты прав и интересов граждан, а также для исключения произвольных действий органов государственной власти посредством контроля и сдерживания деятельности политических институтов в рамках конституционных ограничений и т.д. Вместе с этим отмечается, что эффективная реализация обсуждаемого принципа в значительной степени зависит от уровня правовой культуры, рассматриваемой как совокупность правовых традиций и правовых знаний граждан и должностных лиц.

Автор отмечает, что помимо существующих традиционных препятствий практическая реализация принципа верховенства права сталкивается с новыми вызовами, три из которых заслуживают особого внимания.

В странах развивающейся демократии конституционная структура правового государства находится в противоречии с невысокой правовой культурой управляющих и управляемых. В условиях правового нигилизма и фетишизма, а также отсутствия активного гражданского общества правовая система становится заполненной множеством нереализуемых положений и неэффективным правоприменением. Следует отметить, что указанные недостатки в сфере верховенства права могут быть устранены постепенно.

Одним из интереснейших явлений современной глобальной эпохи является формирование многоуровневого конституционализма. В дополнение к конституционному монизму национальных государств формируется наднациональное конституционное пространство, имеет место ее постепенная конституционализация и установление международных и европейских стандартов конституционной демократии. В европейском правовом пространстве развиваются два наднациональных конституционных направления, различные по структуре и включающие разные государства-члены – Совет Европы, ЕСПЧ и практика Страсбургского суда по правам человека, с одной стороны, и конституционная система ЕС для его государств-членов – с другой.

В отличие от федераций многоуровневый конституционализм не имеет иерархическую структуру, проявлением чего является, например, верховенство конституций национальных государств в соответствующей внутригосударственной правовой системе. В настоящее время и в обозримом будущем правовая и экономическая интеграции не приведут к возникновению европейской сверхдержавы, а ЕС не будет преобразован в государствоподобную всемогущую организацию, идентичную национальным государствам. Верховенство права Европейского союза и действие стандартов ЕС будут гарантированы не посредством верховенства формальной писаной наднациональной Конституции, а посредством такой формы конституционализма, в рамках которой разрешаются конфликты между конституционными системами, а гармония достигается с помощью одинаковых демократических конституционных принципов и ценностей, сформированных под влиянием возникшего в результате Вестфальского мирного договора общего европейского конституционного наследия.

В условиях конституционного плюрализма верховенство права выходит за рамки правового государства и национальной правовой системы и дополняется верховенством права не только на уровне национального государства, но также и на уровне наднационального и международного права. Конфликты между различными правовыми системами неизбежны, и с целью их мирного преодоления и разрешения устанавливаются, обсуждаются и согласовываются соответствующие механизмы.

Автор также отмечает, что терроризм и транснациональная преступность представляют наиболее серьезную угрозу верховенству права в современной конституционной демократии, и что терроризм и верховенство права являются диаметрально противоположными явлениями.

ZUSAMMENFASSUNG

Мит dem Triumph der konstitutionellen Demokratie in den letzten Dekaden des 20. Jahrhunderts wurde der Vorrang des Rechts zu einem gemeinsamen Nenner unter den Grundsätzen, die in neuen Verfassungen verankert sind. Es ist zu erwähnen, dass, obwohl die Verfassungen ein gemeinsames europäisches konstitutionelles Erbe darstellen, der Vorrang des Rechts unter Bedingungen einer lebenden Verfassung in Abhängigkeit von Traditionen, Geschichte und Politik des konkreten Staates einen eigenen Ausdruck findet.

Im Beitrag werden die Grundelemente der Umsetzung der Idee des Rechtsstaates behandelt, zu denen die Effizienz der Justiz, die institutionellen Garantien des Vorrangs des Verfassungs- und parlamentarischen Rechts im Rechtssystem, die politische Verantwortlichkeit der Staatsgewalt und die juristische Verantwortlichkeit des Staates und seiner Amtsträger für Verstöße gegen Rechte, die gerechten und effektiven prozessua-

len Garantien des Schutzes der Rechte und Interessen der Bürger sowie der Ausschluss willkürlicher Handlungen der Organe der Staatsgewalt mittels der Kontrolle über die Tätigkeit der politischen Institute und der Zügelung dieser Tätigkeit im Rahmen der konstitutionellen Beschränkungen u. a. Zugleich wird hervorgehoben, dass eine effektive Umsetzung des erörterten Grundsatzes in beträchtlichem Maße von dem Niveau der Rechtskultur abhängt, die als Gesamtheit von Rechtstraditionen und Rechtskenntnissen der Bürger und Amtsträger zu verstehen ist.

Der Verfasser bemerkt, dass die praktische Verwirklichung des Grundsatzes des Vorrangs des Rechts neben den bestehenden traditionellen Hindernissen auf neue Herausforderungen stößt; drei von diesen verdienen besondere Aufmerksamkeit.

In den Ländern, wo die Demokratie in der Entwicklung begriffen ist, steht die konstitutionelle Struktur des Rechtsstaates im Widerspruch zu niedrigerer Rechtskultur der Regierenden und Regierten. Unter den Bedingungen des rechtlichen Nihilismus und Fetischismus und der fehlenden aktiven Zivilgesellschaft wird das Rechtssystem zu einer Menge nicht umgesetzter Vorschriften, wo eine effiziente Anwendung fehlt. Zu bemerken ist, dass die erwähnten Mängel im Bereich des Vorrangs des Rechts erst nach und nach beseitigt werden können.

Zu den interessantesten Phänomenen der modernen globalen Epoche gehört die Entstehung eines Konstitutionalismus mit vielen Ebenen. In Ergänzung zum Verfassungsmonismus der Nationalstaaten entsteht ein supranationaler Verfassungsraum, etablieren sich internationale und europäische Standards der konstitutionellen Demokratie. Im europäischen Rechtsraum entwickeln sich zwei supranationale konstitutionelle Richtungen, die sich ihrer Struktur nach unterscheiden und verschiedene Mitgliedsstaaten einschließen: Der Europarat, der Europäische Gerichtshof für Menschenrechte und die Rechtsprechung des Straßburger Gerichtshofs einerseits und das Verfassungssystem der Europäischen Union für ihre Mitgliedsstaaten andererseits.

Im Unterschied von Föderationen hat der Konstitutionalismus mit vielen Ebenen keine hierarchische Struktur, die beispielsweise im Vorrang der Verfassungen der Nationalstaaten im betreffenden innerstaatlichen Rechtssystem zum Ausdruck kommt. Gegenwärtig und in absehbarer Zukunft wird die rechtliche und ökonomische Integration nicht zur Entstehung einer europäischen Supermacht bringen und die EU wird sich nicht in eine allmächtige quasistaatliche, den Nationalstaaten gleichzusetzende Organisation verwandeln. Der Vorrang des Rechts der Europäischen Union und die Wirksamkeit der Standards der EU werden nicht durch den Vorrang der formellen geschriebenen supranationalen Verfassung garantiert werden, sondern durch eine Form des Konstitutionalismus, in dessen Rahmen die Lösung der Konflikte zwischen Verfassungssystemen und die Harmonisierung mittels der gleichen Verfassungsgrundsätze und –werte erfolgt, die sich unter dem Einfluss des im Ergebnis des Westfälischen Friedens entstandenen gemeinsamen europäischen konstitutionellen Erbes herausgebildet haben.

Unter den Bedingungen des konstitutionellen Pluralismus geht der Vorrang des Rechts

über den Rahmen des Rechtsstaates und des nationalen Rechtssystems hinaus und wird durch den Vorrang des Rechts nicht nur auf der Ebene des Nationalstaates, sondern auch auf der des supranationalen und internationalen Rechts ergänzt. Konflikte zwischen verschiedenen Rechtssystemen sind unvermeidlichen, und zwecks ihrer friedlichen Bewältigung und Lösung werden entsprechende Mechanismen etabliert, erörtert und abgestimmt.

Der Verfasser hebt ebenfalls hervor, dass der Terrorismus und die transnationale Kriminalität die größte Bedrohung für den Vorrang des Rechts in der modernen konstitutionellen Demokratie darstellen und dass der Terrorismus und der Vorrang des Rechts einen diametralen Gegensatz bilden.

RÉSUMÉ

Lors de ces dernières décennies du 20^{ème} siècle, quand nous avons enregistré le triomphe de la démocratie constitutionnelle, la primauté du droit est reconnue comme dénominateur commun des principes inscrits dans les nouvelles constitutions. Et bien que les Constitutions reflètent le patrimoine constitutionnel européen commun, la primauté du droit dans la Constitution vivante a, en quelque sorte, sa propre expression qui dérive des traditions, de l'histoire et de la politique de chaque pays.

L'article examine les éléments principaux de la mise en œuvre de l'idée de l'État de droit, tels que l'efficacité du système judiciaire, les garanties institutionnelles de la primauté du droit constitutionnel et parlementaire dans le système juridique, la responsabilité juridique du pouvoir politique et la responsabilité juridique de l'État et de ses fonctionnaires en cas de violation des droits de l'homme, des garanties procédurales équitables et efficaces de la défense des droits et des intérêts des citoyens et de l'exclusion de toute action arbitraire de la part des autorités au travers du contrôle et de l'encadrement des institutions politiques dans le cadre des restrictions constitutionnelles, etc. En même temps, il est souligné que la mise en œuvre efficace du principe susmentionné dépend du niveau de la culture juridique, considérée comme un ensemble de traditions et de connaissances juridiques des citoyens et des fonctionnaires.

L'auteur signale que, outre les barrières traditionnelles, la mise en œuvre pratique du principe de la primauté du droit fait face à de nouveaux défis, dont trois méritent d'être mentionnés.

Dans les démocraties émergentes la structure constitutionnelle de l'État de droit est en contradiction avec la culture juridique faible des gouvernants et gouvernés. Dans les conditions de nihilisme et de fétichisme juridique et de l'absence d'une société civile active, le système juridique se remplit de nombreuses dispositions irréalisables et d'applications de lois inefficaces. Il convient de noter que lesdits manquements dans le domaine de la primauté du droit peuvent être éliminés progressivement.

Un des phénomènes les plus intéressants de l'ère de la mondialisation moderne est la formation du constitutionnalisme à plusieurs niveaux. Au-delà du monisme constitutionnel des États nationaux, se forme un espace constitutionnel supranational, s'établit une constitutionnalisation progressive et la mise en place de standards internationaux et européens de la démocratie constitutionnelle.

Dans l'espace juridique européen se développent deux directions constitutionnelles supranationales, différentes dans leur structure et intégrant différents États membres, tels le Conseil de l'Europe, la CEDH et la jurisprudence de la Cour des droits de l'homme de Strasbourg, d'une part, et le système constitutionnel de l'Union européenne pour ses États membres, – de l'autre.

Contrairement aux fédérations, le constitutionnalisme à plusieurs niveaux n'a pas de structure hiérarchique dont l'expression est, par exemple, la suprématie des constitutions des États nationaux dans le système juridique national. À l'heure actuelle et dans un avenir prévisible l'intégration juridique et économique ne va pas conduire à l'émergence d'un super État européen, et l'UE ne se transformera pas en une structure puissante qui est identique à celle des États nationaux. La primauté du droit de l'Union européenne et l'effet des standards de l'UE ne seront pas garantis à travers la suprématie de la Constitution supranationale formelle écrite, mais par le biais d'une telle forme de constitutionnalisme, dans le cadre duquel les conflits sont résolus entre les systèmes constitutionnels et l'harmonie est assurée par l'application des mêmes principes constitutionnels et des valeurs démocratiques qui se sont mis en place sous l'influence du patrimoine constitutionnel européen commun résultant de l'accord de paix de Westphalie.

Dans les conditions du pluralisme constitutionnel, la primauté du droit est au-delà de l'État de droit et du système juridique national et est complétée par la primauté du droit, non seulement au niveau de l'État national, mais au niveau du droit supranational et international. Les conflits entre les différents systèmes juridiques sont inévitables, et aux fins de leur résolution paisible sont définies, discutées et convenues des dispositions appropriées.

L'auteur note également que le terrorisme et la criminalité transnationale constituent la menace la plus sérieuse pour l'État de droit dans une démocratie constitutionnelle moderne, et que le terrorisme et la primauté du droit sont des phénomènes diamétralement opposés.

MENSCHENRECHTE UND GEWALTENTEILUNG: UNIVERSELLE FAKTOREN DER KONSTITUTIONALISIERUNG VON STAATSGEWALT UND DER BESCHRÄNKUNG NATIONALER SOUVERÄNITÄT

von Otto LUCHTERHANDT

I. EINLEITUNG: PROBLEMSTELLUNG

Eines der Kernprobleme, wenn nicht das Schlüsselproblem, das sich durch die Weltgeschichte der letzten Jahrhunderte zieht, ist die Frage nach der Bindung politischer Macht und staatlicher Gewalt an das Recht. Man kann die gesamte neuzeitliche Geschichte der Menschheit, des Staates und der Staaten insgesamt unter diesem Gesichtspunkt betrachten. Bindung bedeutet die rechtliche Begründung, Formgebung und Begrenzung der staatlichen Herrschaft, der Staatsgewalt durch das Recht, und alle drei Aspekte zusammen führen zu einer vom Recht bestimmten Beschränkung politischer Macht und staatlicher Gewalt.

Der tiefere Sinn und Zweck der Bindung der Macht an das Recht ist die praktische, tatsächliche Ermöglichung sowohl individueller als auch gemeinschaftlich ausgeübter Freiheit, d. h. der Schaffung eines autonomen Raumes sittlicher Selbstbestimmung und „Selbstgesetzgebung“ (Immanuel Kant) für das Leben des einzelnen Menschen und der Gesellschaft insgesamt. Integriert in dieses Freiheitskonzept ist auch das private Eigentum.

Das Problem der rechtlichen Bindung und Gebundenheit staatlicher Gewalt und Herrschaft stellt sich sowohl theoretisch als auch praktisch in zweierlei Hinsicht: erstens geht es um die Herrschaft, die innerhalb eines Staates über die Bürger ausgeübt wird, also um die innere Staatsgewalt, und zweitens geht es um die Dimension staatlicher Macht im Verhältnis der Staaten zueinander und untereinander in den internationalen Beziehungen der Staatenwelt, also um die äußere Staatsgewalt. Antwort auf die Frage nach der Rechtsbindung der inneren Staatsgewalt gibt in erster Linie das (nationale) Staatsrecht. Die rechtliche Bindung der Staatsgewalt in den internationalen Beziehungen ist hingegen primär eine Frage des Völkerrechts.

Aber das Völkerrecht beschränkt sich schon lange nicht mehr auf die rechtliche Regelung der Verhältnisse und Beziehungen der Staaten untereinander, sondern sein Geltungsanspruch und sein Geltungsbereich erstrecken sich, und das mit steigender Intensität, auch auf die vom nationalen (Staats-) Recht bestimmten Beziehungen zwischen den Staaten und den einzelnen Menschen, seien es Bürger, Ausländer oder Staatenlose. Das ist das Thema der im Völkerrecht verankerten Menschenrechte.

Die geschichtliche Evolution des Rechts, sowohl der nationalen Rechtsordnungen als auch des Völkerrechts, hat in den letzten Jahrhunderten sukzessive und insgesamt stetig dazu geführt, dass sowohl die Staatsgewalt als auch die Souveränität der Staaten in Bezug auf den Status des Individuums, sei es schlechthin als Mensch oder als Staatsangehöriger und Bürger, nicht mehr absolut gelten.¹ Es sind im Geschichtsprozess zwei Bewegungen, eine politische und eine rechtliche Bewegung zu erkennen, die zwar in Wechselbeziehung miteinander stehen, aber jede für sich eigenständig sind, und die seit der zweiten Hälfte des 20. Jahrhunderts immer mehr konvergieren: der Ziel- und Fluchtpunkt der *beiden* Bewegungen ist dabei kein Geheimnis, sondern schon seit langem klar erkennbar: die Beschränkung der staatlichen Gewalt und staatlicher Souveränität zum Zwecke der Institutionalisierung und Konstitutionalisierung von individueller Freiheit und persönlicher Sicherheit. Es ist eine politische Bewegung im globalen Maßstab, ein globaler Trend zur Konstitutionalisierung. Er hat sich vorsichtig und zaghaft in der ersten Hälfte des 20. Jahrhunderts vorbereitet. In seiner zweiten Hälfte aber hat die Bewegung trotz oder vielleicht auch gerade wegen des ideologischen und politischen Systemgegensatzes zwischen Ost und West während des Kalten Krieges in einem schwierigen und widersprüchlichen Prozess stark an Kraft gewonnen, um dann zum Ende des Jahrhunderts in der Osteuropäischen Revolution einen weltgeschichtlich kaum zu überschätzenden Durchbruch zu erleben. Möglich wurde er durch den Zusammenbruch des kommunistischen Staatensystems in Europa und das Abtreten seiner kollektivistischen, menschenrechtsfeindlichen Ideologie des Marxismus-Leninismus, durch den Untergang der Sowjetunion und das definitive Ende des Kalten Krieges.

II. KONSTITUTIONALISIERUNG DES STAAT-BÜRGER-VERHÄLTNISSES IM NATIONALEN RECHT: DIE HISTORISCHE PERSPEKTIVE

Die Bindung der politischen Herrschaft an das Recht hat sich in Europa und Nordamerika in einem Jahrhunderte hindurch dauernden sowohl revolutionären, als auch evolutionären Prozess entwickelt. Man kann vier Fälle oder auch Modelle in dieser Entwicklung unterscheiden: England, USA, Frankreich und Deutschland.

a. England

In England hat die Vorstellung, dass die vom Fürsten oder König ausgeübte Herrschaftsmacht an das gute, alte Recht gebunden ist, dass er seine Macht besitzt, um das Recht im Herrschaftsgebiet zu wahren, dass seine Macht durch das Recht beschränkt ist und dass der Fürst vom Volk abgesetzt werden könne, wenn er das Recht bricht und tyrannisch wird, mit Ausnahme der kurzen Zeitspanne der Diktatur Oliver Cromwells im 17. Jahrhundert, bis heute kontinuierlich seine Geltung gehabt und bewahrt. Die Vorstellung, dass die fürstliche Macht durch das Recht beschränkt ist, war eine im Mittelalter in ganz Europa verbreitete und herrschende Idee. Sie hat zwar in der Magna Charta

¹ Grimm, Dieter: Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs, Berlin 2009; Quaritsch, Helmut: Souveränität. Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland vom 13. Jahrhundert bis 1806, Berlin 1986.

Libertatum (1215) ihren berühmtesten Niederschlag gefunden, aber es gibt in Spanien, Ungarn, Polen und Deutschland vergleichbare Rechtsakte aus jener Zeit. Durch die Glorious Revolution (1688), 100 Jahre vor der Französischen Revolution, wehrten die englischen Stände die Versuche ihrer aus dem Hause Stuart stammenden Könige endgültig mit Erfolg ab, eine „absolutistische“, also eine vom Recht losgelöste (*legibus absoluta*) Herrschaft zu errichten. England gab sich zwar keine geschriebene Verfassung, sondern hatte (und hat bis heute) nur einzelne, grundlegende Rechtsakte und Gesetze, aber es besaß eine politische Ordnung, in der die Staatsgewalt auf verschiedene, zunächst noch nach ständischen Prinzipien gebildete Organe (König, Parlament, Gerichte) aufgeteilt war. Die ständische Struktur wich im 19. und 20. Jahrhundert, vor allem durch die Demokratisierung des Wahlrechts, dem Prinzip der Volkssouveränität, und die konstitutionelle Monarchie Großbritanniens verwandelte sich in ein parlamentarisches Regierungssystem mit der Besonderheit eines nicht demokratisch gewählten, sondern im Wege familiärer Erbfolge bestimmten, in kompetenzieller Hinsicht nunmehr machtlosen Staatsoberhauptes. Die Gewaltenteilung blieb erhalten, und aus den seit der Magna Charta verbrieften Rechten und Privilegien der englischen „Untertanen“ wurden in einem kontinuierlichen, von den Gerichten und vom Parlament gesteuerten Wandlungsprozess moderne Grundrechte der Menschen und Bürger.

b. Vereinigte Staaten von Amerika

Die in den britischen Kolonien Nordamerikas lebenden Untertanen haben sich gegenüber dem Londoner Parlament, welches über sie zwar herrschte, von dessen Wahl und Mandaten sie aber ausgeschlossen waren, in der berühmten Unabhängigkeitserklärung (4. 7. 1776) auf das Selbstbestimmungsrecht der Völker berufen und ihre staatliche Unabhängigkeit vom Mutterland erklärt. Die Kolonien empfanden die von Großbritannien über sie ausgeübte Herrschaft als „Despotie“ und „Tyrannis“ und erklärten es für ihr unveräußerliches, von der Natur gegebenes Recht, diesen Zustand durch Errichtung einer eigenen, auf den Willen des Volkes gegründeten Herrschaft zu beenden.

Drei Wochen vorher hatte die Virginia Bill of Rights (12.6.1776) unmittelbar in Anschluss an die Berufung auf die elementaren, unveräußerlichen (*unalienable*) Menschenrechte (Leben, Freiheit, Eigentum, Streben nach Glück und Sicherheit) das Prinzip verkündet, das staatliche Herrschaft demokratisch legitimiert sein müsse (Art. 2). Aber die amerikanischen Revolutionäre wussten sehr wohl um die Gefahr, dass selbst die von ihnen neu begründete staatliche Herrschaft zur Despotie entarten könnte. Um dem einen Riegel vorzuschieben, verbanden sie in Art. 5 das Prinzip der Demokratie mit dem Prinzip der Gewaltenteilung und periodischen Wahlen: „That the legislative and executive powers of the state should be separate and distinct from the judicative; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former

members, to be again eligible, or ineligible, as the laws shall direct.“

Demokratie und Gewaltenteilung erhalten in diesen klassischen Deklarationen der politischen Freiheit den Rang von Rechten (rights) des Einzelnen wie auch der Bürger insgesamt. Zugleich bilden die beiden Prinzipien aber auch entscheidende staatliche Strukturelemente, um die unveräußerlichen Menschen- und Bürgerrechte in den künftig zu erwartenden wechselnden politischen Zuständen institutionell zu sichern.

Von diesen Ideen und Grundsätzen ist die bis heute geltende Verfassung der USA (1787) bestimmt, denn ihr innerer Aufbau wird völlig von der Gewaltenteilung beherrscht. Das der Gewaltentrennung angenäherte Prinzip gibt der Verfassung einen an Klarheit und Stringenz nicht zu übertreffenden Aufbau: die Legislative bildet der Kongress (Art. 1), die Exekutive der Präsident (Art. 2) und die Judikative das Oberste Gericht der Vereinigten Staaten (Art. 3). Integriert in diese Organisationsstruktur ist das Demokratieprinzip durch die Bestimmung über die Wahlen sowohl der beiden Häuser des Kongresses (Senat und Repräsentantenhaus), als auch des Präsidenten. In Art. 4 der Verfassung folgen Bestimmungen über die der Union angehörenden Gliedstaaten (states).

Bekanntlich enthielt der Verfassungstext zunächst keinen Grundrechtskatalog. Erst durch einzelne, zu verschiedenen Zeiten beschlossene „Anhänge“ (amendments) wurden der Verfassung ab 1791 Grundrechte hinzugefügt, beginnend mit der Religionsfreiheit, der Redefreiheit, der Pressefreiheit, der Versammlungsfreiheit sowie dem Petitions- und Beschwerderecht.

Der Text der US-Verfassung ist in den bald 240 Jahren ihres Bestehens in ihrem Kern nicht geändert, sondern nur ergänzt worden. Man wird dies als einen starken empirischen Beleg dafür nehmen können, dass die von den Vätern der Verfassung auf „checks and balances“ und „balance of power“ gesetzten Akzente zusammen mit dem Demokratieprinzip den Menschenrechten und der Bürgerfreiheit breite Entfaltungsmöglichkeiten gesichert und die Entstehung einer starken Zivil- und Wirtschaftsgesellschaft als Grundlage dieser Freiheit ermöglicht haben.

c. Frankreich

Im Unterschied zu England und den Vereinigten Staaten hatte sich im 17. Jahrhundert in Frankreich in der Regierungszeit Ludwig XIV die klassische Form des kontinental-europäischen Absolutismus, d. h. eine vom Recht in keiner Weise eingeschränkte monarchische Herrschaft, herausgebildet und die einstige politische Macht des Adels, der Stände insgesamt, marginalisiert. Gleichwohl war auch in Frankreich die Erinnerung an die Funktion und Rechtsstellung der Stände nicht völlig erloschen, denn als 1788 die finanziellen Nöte des Hofes sich dramatisch verschärft hatten, ergriff König Ludwig XVI auf ein ständestaatliches Rechtsinstitut zurück, um sich Geld zu verschaffen. Er berief die Generalstände (les États généraux) Frankreichs zum 1. Mai 1789 ein, um mit ihnen über einen Ausweg aus der Finanzkrise zu beraten. Die Generalstände hatten von alters das Recht der Steuerbewilligung, sie waren aber seit 1614 nicht mehr vom

König einberufen worden. Unter den am Ende des 18. Jahrhunderts völlig veränderten gesellschaftlichen Verhältnissen führte der Schritt des Königs sukzessive zur Revolution. Der Dritte Stand, das Bürgertum, erklärte sich zur Nation, d. h. zum politischen Repräsentanten des ganzen französischen Volkes, zum Träger der Volkssouveränität und der verfassungsgebenden Gewalt (le pouvoir constituant).

Die Erklärung der Menschen- und Bürgerrechte (26.8.1789) verkündete nicht nur die Prinzipien der Freiheit, Gleichheit, Eigentum und Sicherheit, sondern nahm in ihren Katalog auch die Volkssouveränität (Art. 3) und die Gewaltenteilung (Art. 16) auf. Sie ging darin sogar so weit zu verkünden, dass eine Gesellschaft, in welcher jene Rechte nicht verbürgt und die Gewaltenteilung nicht festgelegt sei, „keine Verfassung habe“.

d. Deutschland

Die Idee, dass staatliche Herrschaft durch das Recht begrenzt und beschränkt sei und sein müsse, war in Deutschland bis zum Ende des ersten Reiches (1806) schon durch die Fortexistenz der Institutionen und Organe eben dieses Reiches präsent, denn der Kaiser war zu keiner Zeit ein absoluter Herrscher an der Spitze einer staatlichen Zentralgewalt. Das Reich war vielmehr ein im Lehnssystem wurzelndes, auf das Recht gegründetes, in einer langen Geschichte gewachsenes und daher überaus kompliziertes Herrschaftsgebilde, in welchem die Fürsten - Träger weltlicher und geistlicher Territorialherrschaften - durch wechselseitige Rechte (Privilegien) und Pflichten spannungs- und konfliktreich miteinander verbunden waren. Ohne die Zustimmung der auf dem Reichstag versammelten Reichsstände war der Kaiser kaum handlungsfähig.

Allerdings hatte der Westfälische Frieden von Münster und Osnabrück (1648) aber den Reichsständen in ihren Territorien (teilweise) eine rechtlich unbeschränkte Hoheitsgewalt nach innen über ihre Untertanen und nach außen die volle staatliche Souveränität zu erkannt. Sie hatten insbesondere das Recht, frei über die Führung von Krieg und über den Abschluss von Friedensverträgen zu entscheiden.

Nach dem Untergang des Reiches und dem Wiener Kongress (1815) fand in den deutschen Staaten ein über hundert Jahre währender Kampf um die Beschränkung der monarchischen Staatsgewalt durch Verfassungen und um die Durchsetzung des Prinzips der Volkssouveränität statt. In dieser Zeit setzte sich im Zeichen der von Immanuel Kant begründeten Idee des Rechtsstaates das Prinzip der Unabhängigkeit der Justiz überall in Deutschland durch und damit jene rechtliche Institution, in welcher sich die Bindung der Staatsgewalt an Gesetz und Recht, aber auch die Gewaltenteilung am sichtbarsten nach außen manifestiert.

Das Bürgertum erwies sich in sozio-politischer Hinsicht jedoch als nicht mächtig genug, das Prinzip der Volkssouveränität gegenüber der herrschenden monarchischen Exekutive durchzusetzen. Die bürgerliche Revolution von 1848/1849 scheiterte. Erst mit der Verabschiedung der Weimarer Reichsverfassung (1919) und der Annahme von republikanischen Verfassungen in den Gliedstaaten der föderal organisierten Weimarer

Republik fand die konstitutionelle Monarchie in Deutschland ihr Ende. Menschenrechte, Demokratie und Gewaltenteilung hatten sich durchgesetzt, jedoch nur für kurze Zeit, denn die Machtergreifung Adolf Hitlers und seiner NSDAP (März 1933) etablierte ein „rechtes“ totalitäres Herrschaftssystem, einen rassistischen Einparteistaat, der in der absoluten Macht des „Führers“ kulminierte und nicht nur in praktischer, sondern auch in theoretischer Hinsicht Menschenrechte, Demokratie und Gewaltenteilung verwarf.

Die am Ende des Zweiten Weltkrieges von den alliierten Siegermächten bewirkte Teilung des Deutschen Reiches führte in Gestalt der Bundesrepublik Deutschland im Westen und der Deutschen Demokratischen Republik im Osten zu zwei in idealtypischer Hinsicht absolut gegensätzlichen, antagonistischen Staatsordnungen: während die Bundesrepublik mit ihrem Grundgesetz Anschluss an die westeuropäisch-nordamerikanische Verfassungstradition fand und einen pluralistischen, demokratischen Rechtsstaat mit Menschenrechten, Gewaltenteilung, Demokratie, Verfassungsgerichtsbarkeit und Zivilgesellschaft etablierte, errichtete die sowjetische Besatzungsmacht in der DDR ein „linkes“ totalitäres Herrschaftssystem, einen kommunistischen Einparteistaat, der Menschenrechte als „bourgeoise Ideologie“ negierte und stattdessen „Klassenrechte“ propagierte, der Gewaltkonzentration an die Stelle von Gewaltenteilung setzte, der die Macht der Partei- und Staatsführung, der Opportunität wechselnder politischer Zweckmäßigkeit folgend, über Gesetz und Recht stellte und im Zeichen der „Parteilichkeit“ die politische Abhängigkeit der Justiz zum Grundsatz erhob. Die Volkssouveränität wurde zwar behauptet, war aber tatsächlich durch die Souveränität der Kommunistischen Partei, ihre Allgewalt, ersetzt worden. Diese beruhte nicht auf der demokratischen Zustimmung der Bürger in freien Wahlen, sondern wurde mit einem politischen Wahrheits- und Richtigkeitsanspruch begründet und gerechtfertigt, der apriori aus der verbindlichen, von der Partei verwalteten marxistisch-leninistischen Ideologie hergeleitet wurde.

Mit dem Ende dieses Systems in der DDR (1989) und ihrem Beitritt zur Bundesrepublik und zum demokratischen Rechtsstaat des Grundgesetzes (3.10.1990) ist die Bindung der politischen Macht an das Recht endgültig in ganz Deutschland zur Geltung gelangt.

Unter dem Gesichtspunkt der Bindung der Staatsgewalt an das Recht stellt das Grundgesetz Deutschlands von 1949 den Abschluss einer langen geschichtlichen Entwicklung und zugleich deren Krönung dar. Denn hinausgehend über die Weimarer Reichsverfassung hat das Grundgesetz auch die Legislative, also den Bundestag, an die Grund- und Menschenrechte als unmittelbar geltendes Recht gebunden (Art. 1 Abs. 3; Art. 20 Abs. 3 GG), die fundamentalen, prägenden Strukturbestimmungen des Grundgesetzes (Art. 1 „und“ [d. h. „bis“] 20) von Verfassungsänderungen definitiv ausgeschlossen (Art. 79 Abs. 3 GG) und durch die Einführung des Bundesverfassungsgerichts eine Institution geschaffen, welche die Bindung der drei Zweige der Staatsgewalt an das Recht (Verfassung) überwacht und durchsetzt. Durch das Rechtsinstitut der Verfassungsbeschwerde (Individualbeschwerde) hat das Grundgesetz auch jedem Einzelnen die Möglichkeit eröffnet, mit Hilfe des Verfassungsgerichts seine verfassungsmäßigen Rechte und Freihei-

ten gegenüber Maßnahmen der Staatsgewalt zu verteidigen (Art. 93 Abs. 1 Nr. 4a).

III. ERWEITERUNG UND VERTIEFUNG DES KONSTITUTIONALISMUS DURCH REGIONALES VÖLKERRECHT UND SUPRANATIONALES RECHT: EUROPA

a. Stärkung der konstitutionellen Rechtsbindungen durch den Europarat (ER)

Alle europäischen Staaten, die nicht der Europäischen Union, aber – mit der Ausnahme von Belarus und Kosovo - dem Europarat angehören, haben sich durch die Übernahme seiner Satzung (Statut) und zusätzlich durch die Ratifizierung der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK) dazu verpflichtet, „den Grundsatz der Vorherrschaft des Rechts“ sowie die Menschenrechte und Grundfreiheiten zu achten und zu fördern (Art. 3). Durch die Beteiligung an der Konstituierung des Europäischen Gerichtshofes für Menschenrechte (EGMR) und durch die Unterwerfung unter seine Jurisdiktion haben die Mitgliedsstaaten des Europarates institutionell am sichtbarsten zum Ausdruck gebracht, dass sie den Vorrang des Rechts vor der Macht anerkennen.

Seit seiner Gründung (1949) hat der Europarat den Prozess der Konstitutionalisierung der Staatsordnungen in ganz Europa in einem Maße wie keine andere Organisation gefördert.

b. Stärkung der konstitutionellen Rechtsbindungen durch die Europäische Union (EU)

Die Bindung der Staatsgewalt derjenigen Staaten, die Mitglieder der Europäischen Union sind, an Rechtsstaatlichkeit und Demokratie, Menschenrechte und Gewaltenteilung wird auch durch das supranationale Recht der Union abgesichert. Art. 2 des EU-Vertrages (EUV) von Lissabon (2007/2009) über die fundamentalen, von der EU für verbindlich erklärten Werte bestimmt:

„Die Werte, auf die sich die Union gründet, sind die Achtung der Menschenwürde, Freiheit, Demokratie, Gleichheit, Rechtsstaatlichkeit und die Wahrung der Menschenrechte einschließlich der Rechte der Personen, die Minderheiten angehören. Diese Werte sind allen Mitgliedstaaten in einer Gesellschaft gemeinsam, die sich durch Pluralismus, Nichtdiskriminierung, Toleranz, Gerechtigkeit, Solidarität und die Gleichheit von Frauen und Männern auszeichnet.“

Zeichnet sich „die eindeutige Gefahr einer schwerwiegenden Verletzung der in Art. 2 genannten Werte durch einen Mitgliedstaat“ ab, besteht die Möglichkeit, gegen den betreffenden Mitgliedstaat mit Sanktionen vorzugehen (Art. 7 EUV), insbesondere seine Mitgliedschaftsrechte für eine gewisse Zeit zu suspendieren. Äußerstenfalls ist der Ausschluss aus der EU möglich.

Zwar ist der „Verfassungsvertrag“ der EU an der Ablehnung der Völker Frankreichs und Hollands gescheitert (2003), aber die an seiner Stelle 2007 angenommenen und

2009 in Kraft getretenen beiden EU-Reformverträge von Lissabon und die mit ihnen zusammen verabschiedete Charta der Grundrechte der Europäischen Union haben das konstitutionelle Profil auch der EU selbst geschärft. Art. 2 EUV legt die EU auf grundlegende Werte fest, zu denen auch Rechtsstaatlichkeit, Demokratie und Menschenrechte gehören. Zwar ist die Europäische Union kein Staat, sie ist aber einem föderalen Staatsgebilde angenähert und folgt im Ansatz auch entsprechenden Organisationsprinzipien. Ausdrücklich bekennt sich die EU zur "repräsentativen Demokratie" (Art. 10 Abs. 1 EUV) sowie mittelbar, durch das Bekenntnis zur Rechtsstaatlichkeit (rule of law) in Art. 2 EUV, auch zu dem Prinzip der Gewaltenteilung. Art. 13 Abs. 2 EUV enthält außerdem eine Bestimmung über die Funktions- und Kompetenzabgrenzung zwischen den Organen der Union, welche dem Gedanken der Gewaltenteilung nahe steht:

"Jedes Organ handelt nach Maßgabe der ihm in den Verträgen zugewiesenen Befugnisse nach den Verfahren, Bedingungen und Zielen, die in den Verträgen festgelegt sind. Die Organe arbeiten loyal zusammen."

Die Europäische Union ist durch und durch ein Rechtsgebilde: sie ist durch völkerrechtliche Verträge begründet worden und kann gemäß dem die Union beherrschenden „Grundsatz der begrenzten Einzelermächtigung“ (Art. 5 EUV) nur dann und nur insoweit tätig werden, wie ihre Organe dazu ausdrücklich durch die Verträge unmittelbar und mittelbar ermächtigt sind. Über die Einhaltung dieser Grundsätze wachen der Gerichtshof der Europäischen Union (EuGH) und unter gewissen Voraussetzungen auch die Verfassungsgerichte der EU-Mitgliedstaaten.

Die Europäische Union ist ferner an die Grund- und Menschenrechte gebunden (Art. 6 EUV). Die im Jahre 2000 beschlossene Charta der Grundrechte der Europäischen Union ist 2007 für rechtsverbindlich erklärt und damit integraler Teil des Unionsrechts geworden. Die EU hat außerdem beschlossen, der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK) beizutreten und sich damit der Jurisdiktion des Europäischen Gerichtshofes für Menschenrechte in Straßburg zu unterwerfen (Art. 6 Abs. 3 EUV).

Alle diese Bestimmungen des Rechts der Union haben eine sehr starke Ausstrahlungswirkung in Europa, vor allem auf jene europäischen Staaten, die Mitglieder der EU werden wollen. Sie sind gezwungen, die betreffenden Fundamentalnormen des Unionsrechts in ihre nationalen Verfassungen zu übernehmen und sie einzuhalten.

Zusammen mit dem Europarat und der EMRK als dessen Instrument stellt die Europäische Union seit Jahrzehnten ein mächtiges Bollwerk für die Bindung der Macht an das Recht in Europa dar.

Insgesamt gesehen zeigt sich Europa als derjenige Teil der internationalen Staatengemeinschaft, in welchem die rechtliche Bindung der Staatsgewalt an das Recht am breiteten und weitesten vorangeschritten ist. Allerdings zeigen neuere Entwicklungen vereinzelt in der EU (Rumänien; Ungarn), bedenklicher noch im Europarat (Russland;

Ukraine; Aserbaidshan), dass erreichte Standards bedroht und Rückfälle in rechtsstaatswidrige und menschenrechtsfeindliche Zustände möglich sind.

IV. GLOBALE STÄRKUNG UND FÖRDERUNG DES KONSTITUTIONALISMUS DURCH ENTWICKLUNGEN IM UNIVERSELLEN VÖLKERRECHT DER VEREINTEN NATIONEN

a. Die verborgene konstitutionelle Dimension der UN-Menschenrechtspakte von 1966

Die Vorstellung von einer Staatsgewalt, deren Machtorgane erklärtermaßen und definitiv nicht an das Recht gebunden sind, sondern über dem Recht stehen, ist mit dem heute geltenden Völkerrecht nicht mehr vereinbar. Der Grund dafür ist der Rang, den die Menschenrechte im universellen Völkerrecht haben. Ihre Geltung gründet sich auf den menschenrechtlichen Mindeststandard des Völkergewohnheitsrechts sowie ferner auf die Charta der Vereinten Nationen, die Allgemeine Erklärung der Menschenrechte und auf zahlreiche internationale, rechtsverbindliche Abkommen über Menschenrechte, aus welchen die beiden Internationalen Pakte der Vereinten Nationen über zivile und politische Rechte („Bürgerrechtspakt“) bzw. über wirtschaftliche, soziale und kulturelle Rechte („Sozialrechtspakt“), die beide am 16.12.1966 verabschiedet wurden und 1976 in Kraft getreten sind, sowie das Internationale Abkommen zur Beseitigung jeder Form von Rassendiskriminierung vom 7.3.1966 und die Konvention vom 10.12.1984 gegen Folter und andere grausame, unmenschliche und erniedrigende Art der Behandlung oder Strafe weit herausragen. Dazu tritt die UN-Konvention zur Verhütung und Bestrafung von Völkermord vom 9. 12. 1948. Zwar ist sie kraft ihrer Rechtsnatur und Zielsetzung in erster Linie ein Akt zum Schutze nationaler und ethnischer Minderheiten, aber sie besitzt auch eine individualrechtliche Dimension und wird daher in der Rechtsliteratur gewöhnlich als Teil des internationalen Menschenrechtsschutzes verortet und behandelt.²

Die größte Bedeutung haben die beiden seit langem unter der Bezeichnung „International Bill of Rights“ zusammengefassten UN-Pakte, an vorderer Stelle der Bürgerrechtspakt, weil in diesem erstens die klassischen, liberalen Menschenrechte und Grundfreiheiten verankert sind, und weil er zweitens von 174 der 193 UN-Mitgliedstaaten unterzeichnet worden ist.³ 167 von ihnen haben ihn darüber hinaus auch ratifiziert, d. h. seine Bestimmungen in ihr innerstaatliches Recht transformiert.⁴ Daraus folgt: Die klassischen, liberalen Menschenrechte haben auf der Ebene des Völkervertragsrechts in einer Breite rechtliche Anerkennung gefunden, die hinter dem menschenrechtlichen

² Ausführlich zum rechtssystematischen Ort der Völkermordkonvention Luchterhandt, Otto: Völkerrecht versus Völkermord: bedeutende Fortschritte – ungelöste Probleme, in: Zeitschrift für Genozidforschung 9. Jg. (2008), Heft 2, S. 10 – 67 (15 f.).

³ Die Breite der Zustimmung wird nur noch von dem Internationalen Abkommen zur Beseitigung jeder Form von Rassendiskriminierung übertroffen, das nahezu von allen UN-Staaten unterzeichnet und von 176 Staaten auch ratifiziert worden ist.

⁴ Unter ihnen fehlen, aus unterschiedlichen Gründen, die USA und die Volksrepublik China. Sie haben den Bürgerrechtspakt nur unterzeichnet. Im Unterschied zu den USA hat die Volksrepublik China den Sozialrechtspakt ratifiziert.

Mindeststandard des Völkergewohnheitsrechts nur noch geringfügig zurückbleibt.

Diese Tatsache ist von weitreichender juristischer Bedeutung, denn sie erlaubt die Feststellung, dass die Menschenrechte heute in der internationalen Staatengemeinschaft praktisch von einem universellen Konsens getragen sind, und zwar bemerkenswerterweise auch jene Menschenrechte, die seit den Menschenrechtserklärungen des 18. Jahrhunderts ein Symbol für die rechtliche Bindung und Beschränkung der Staatsgewalt bilden und untrennbar mit der Idee des demokratischen Rechts- und Verfassungsstaates verbunden sind.

Diese Feststellung beschränkt sich zunächst auf die materiell-rechtliche Ebene der Menschenrechte, gilt also nicht für die Ebene des institutionellen Menschenrechtsschutzes. Denn die Zahl der Staaten, die noch zusätzlich das (1.) Fakultativprotokoll (optional protocol) zum Bürgerrechtspakt ratifiziert und sich damit dem quasi-gerichtlichen Verfahren der Individualrechtsbeschwerde vor dem UN-Human-Rights-Committee (HRC) unterworfen haben, ist zwar schon sehr beachtlich (114), bleibt aber noch deutlich hinter der Zahl der Signatarstaaten des Bürgerrechtspakts zurück. Immerhin aber sind auch die Signatarstaaten, die nur den Pakt ratifiziert haben, einem gewissen Kontrollmechanismus unterworfen, nämlich der Verpflichtung, dem HRC auf Anforderung über den Stand und ihre Maßnahmen zur Erfüllung des Bürgerrechtspaktes förmlich zu berichten und sich dem Verfahren einer kritischen Überprüfung und Diskussion ihrer Berichte zu unterwerfen (Art. 40 Bürgerrechtspakt).

Mit Blick auf das Problem eines internationalen Prozesses der Konstitutionalisierung stellt sich folgende Frage: Schließt die völkerrechtlich verbindliche Anerkennung der materiellen Menschenrechte auch die Anerkennung bestimmter Ordnungsprinzipien und –strukturen für die institutionelle Ausgestaltung der Staatsordnung ein, anders gefragt: verpflichten sie auch zu einer menschenrechtskonformen Staatsorganisation?

Die Antwort lautet, dass dies von den Texten der besagten Menschenrechtsverträge und ihrer Analyse abhängt. Diese zeigt, dass vor allem in dem UN-Bürgerrechtspakt ziemlich klare Vorstellungen von einer staatlichen Ordnung enthalten sowie rechtliche Bedingungen und Voraussetzungen formuliert sind, unter denen die materiellen Menschenrechte eine Chance haben, geachtet und realisiert zu werden und von deren Institutionalisierung die Wirkung und Wirklichkeit der Menschenrechte abhängen.

Im Falle der euro-atlantischen Staatenwelt, gemeinhin als „der Westen“ bezeichnet, besteht also die feste Überzeugung, daß die Menschenrechte, sollen sie tatsächlich Geltung und Wirkung haben, einer ihnen entsprechenden Staats- und Verfassungsordnung bedürfen. Aber wie steht es mit den Staaten, die an diesem historischen „Erbe“ keinen Anteil hatten und über keine vergleichbare Verfassungstradition verfügen? Die Frage spitzt sich zu, wenn man bedenkt, daß zwar nicht wenige dieser Staaten Teilnehmer zahlreicher UN- Menschenrechtskonventionen allgemeineren und spezielleren Inhalts sind und sich durch den Beitritt zu ihnen völkerrechtlich verpflichtet haben, die Menschenrechte zu achten, sie einzuhalten und zu fördern, daß sie aber eine Staatsordnung besitzen, deren

Strukturprinzipien denen eines demokratischen Rechts- und Verfassungsstaates unter Umständen diametral entgegenstehen. Als Beispiel sei die Volksrepublik China herausgegriffen, deren politisches System trotz ihrer eindrucksvollen wirtschaftlichen und gesellschaftlichen Liberalisierung der letzten Jahrzehnte noch immer ein kommunistischer Einparteiestaat ist und als solcher nach Prinzipien funktioniert, die – wie ehemals die Sowjetunion – in *prinzipiellem* Gegensatz zu Menschenrechten, Rechtsstaat und Demokratie stehen. Gleichwohl ist China wie seiner Zeit die UdSSR und die Staaten ihres Hegemonialbereichs den bedeutendsten Menschenrechtsverträgen der Vereinten Nationen beigetreten, dem Internationalen Pakt vom 19.12.1966 über bürgerliche und politische Rechte (IPBPR, Bürgerrechtspakt), den sie 1998 unterzeichnet, allerdings nicht ratifiziert hat,⁵ und dem Internationalen Pakt vom selben Tage über wirtschaftliche, soziale und kulturelle Rechte (IPWSKR, Sozialrechtspakt), den sie nicht nur unterzeichnet (1997), sondern auch ratifiziert hat (2001).⁶ Die unterschiedliche Behandlung der beiden Pakte spiegelt den Umstand wider, daß sich die Volksrepublik China aus ideologischen Gründen mit dem Sozialrechtspakt leichter identifizieren kann und daß dessen Ratifizierung wegen seiner im Vergleich zum Bürgerrechtspakt erheblich schwächeren Normativität den Staaten von vornherein wesentlich leichter fallen muß.

Hält man sich vor Augen, daß dem Bürgerrechtspakt weitaus die meisten UN-Mitgliedstaaten, beigetreten sind, darunter hinsichtlich ihrer Staatsverfassungen so unterschiedliche Länder wie die Schweiz, Norwegen, Mexiko, Canada, USA, Indien, Turkmenistan, Bolivien, Peru, Libyen, China, Australien, Japan, Iran, Irak, Rwanda, Zimbabwe, Ägypten oder der Sudan, dann liegt die Vermutung, wenn nicht gar die unabweisbare Schlußfolgerung nahe, daß sich zumindest die völkervertragsrechtlich verankerten Menschenrechte neutral zu Staats- und Verfassungsordnungen verhalten (müssen) und namentlich die in den beiden UN-Menschenrechtspakten normierten Menschenrechte mit jeder beliebigen Staatsverfassung, mit demokratischen Rechtsstaaten ebenso wie mit Theokratien, totalitären Systemen, Diktaturen und autoritären Regimen vereinbar sind.

Die Heterogenität der Teilnehmerstaaten des Bürgerrechts- und des Sozialrechtspakts läßt jedenfalls den Schluß nicht zu, sie hätten mit ihrem Beitritt zu den Pakten eine völkerrechtliche Verpflichtung zur Einführung und Errichtung einer und sei es auch nur in ihren Grundzügen bestimmten Verfassungsordnung übernehmen wollen. Einen dahingehenden Konsens wird man schon a priori nicht unterstellen dürfen.

Damit ist aber noch nicht die Frage beantwortet, geschweige denn erledigt, ob nicht die beiden Menschenrechtspakte und insbesondere der Bürgerrechtspakt Anhaltspunkte für Institutionen, Organe und Verfahren liefern, die gewisse Schutzfunktionen be-

⁵ Dem Fakultativprotokoll zum IPBPR über die Individualbeschwerde ist China nicht beigetreten.

⁶ Weitere wichtige Konventionen, denen China beigetreten ist, sind das Internationale Abkommen zur Beseitigung jeder Form von Rassendiskriminierung vom 7.3.1966 (ratifiziert 1981) und die UN-Konvention vom 10.12.1984 gegen Folter und andere grausame, unmenschliche und erniedrigende Art der Behandlung oder Strafe (unterzeichnet 1986, ratifiziert 1988).

züglich der Menschenrechte erfüllen. Die Frage ist zu bejahen. Solche institutionelle Mechanismen sind festzustellen. Das zeigt der folgende Katalog:

1. Die Menschenrechtsverpflichtungen der Teilnehmerstaaten schließen notwendige „gesetzgeberische und sonstige Vorkehrungen“ zur Gewährleistung der Rechte ein (Art. 2 Abs. 2 IPBPR). Sie zielen damit jedenfalls auf menschenrechtsfreundliche oder wenigstens mit ihnen vereinbarende staatliche Organisationsstrukturen und Verfahren.

2. Die Teilnehmerstaaten sind verpflichtet, die Effektivität der Menschenrechte durch ein wirksames Beschwerdeverfahren sicherzustellen, wobei „der gerichtliche“ Rechtsschutz favorisiert wird (Art. 2 Abs. 3 lit. a – c).⁷

3. Der Pakt unterscheidet „zuständige Gerichts-, Verwaltungs- und Gesetzgebungsorgane“ (Art. 2 Abs. 3 lit. b), verpflichtet die Teilnehmerstaaten, „unabhängige, unparteiische und auf Gesetz beruhende Gerichte“ mitsamt einem Instanzenzug einzurichten (Art. 14 Abs. 1 Satz 1, Abs. 5 IPBPR)⁸ und setzt die Institution eines von den Gerichten getrennten und gegenüber der Exekutive selbständigen Gesetzgebers voraus (vgl. Art. 9 Abs. 1; Art. 12 Abs. 3; Art. 14 Abs. 1; Art. 15 Abs. 1; Art. 18 Abs. 3; Art. 19 Abs. 3; Art. 20 Abs. 2; Art. 21; Art. 22 Abs. 2; Art. 26).

4. Die Volksvertretung (Gesetzgeber) ist nach einem Wahlrecht zu bilden, das „echte“, bzw. „periodische, allgemeine, gleiche und geheime Wahlen“ und insbesondere „die freie Ausübung des Wählerwillens“ gewährleistet und ferner frei von jedweder Diskriminierung ist (Art. 25).⁹

5. Die verbürgten Menschenrechte sind als im Regelfall geltende Freiheiten konzipiert, mithin keine Gewähungen in Ausnahmefällen. Sie dürfen nur im verfassungsmäßig verhängten Notstandsfall, begrenzt auf die Rechte und Freiheiten der Art. 9, 10, 12-14, 19 – 25 IPBPR aufgehoben werden (Art. 4). In der Normallage dürfen sie nicht abgeschafft werden (Art. 5 Abs. 1 IPBPR). Der Teilnehmerstaat darf sie vielmehr nur „einschränken“ und dies auch nur unter bestimmten Voraussetzungen und nur bis zu einer bestimmten Grenze: die Voraussetzungen sind, daß Einschränkungen erstens nur durch ein „Gesetz“, also durch das Parlament selbst oder mit dessen Ermächtigung erfolgen dürfen, daß sie zweitens nicht zu beliebigen Zwecken, sondern nur zum Schutz der nationalen Sicherheit, der öffentlichen Ordnung und Sittlichkeit, der Gesundheit sowie der Rechte und Freiheiten anderer Menschen eingeschränkt werden dürfen und dass die vorgesehene Einschränkung drittens für die nämlichen Zwecke „erforderlich“ bzw.

⁷ M. Nowak, UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll. CCPR-Kommentar, 1. Auflage, 1989, S. 63 (Art. 2 Rn. 58); derselbe: UN-Covenant on Civil and Political Rights, 2-nd revised Edition, 2005, S. 63 (Art. 2 Rn. 63).

⁸ Zu Recht bemerkt Nowak, „daß hier eine auf den liberal-rechtsstaatlichen Grundsätzen der Gewaltenteilung und der Unabhängigkeit der Gerichte gegenüber der exekutiven Gewalt bestehende Bestimmung Eingang in einen universellen Menschenrechtsvertrag gefunden hat.“ A.a.O. 1989, S. 249 (Art. 14 Rn. 2); engl. Ausgabe 2005, S. 306 (Art. 14 Nr. 2).

⁹ Nowak, a.a.O. 1989, S. 475 (Art. 25 Rn. 17); engl. Ausgabe 2005, S. 575 (Rn. 20). Der Vorschlag einer ausdrücklichen Verankerung des Mehrparteiensystems ist wegen des Widerspruchs der Sowjetunion fallengelassen worden.

notwendig sein muss (Art. 12 Abs. 2; Art. 18 Abs. 3; Art. 19 Abs. 3, Art. 21 Abs. 2; Art. 22 Abs. 2 IPBPR). Übermäßige Einschränkungen und folglich erst recht Aushöhlungen der betreffenden Menschenrechte und Grundfreiheiten sind ausdrücklich untersagt (Art. 5 Abs. 1 IPBPR). Schließlich kann sich die Erforderlichkeit von Einschränkungen zum Schutze etwa der nationalen Sicherheit – viertens – nicht nach einer beliebigen Zweckmäßigkeit richten, sondern sie sich nur danach bemessen, was „in einer demokratischen Gesellschaft“ für angemessen gehalten wird.

Diese Bestimmungen, die auch dem Sozialrechtspakt immanent sind, normieren in verschiedenen Varianten den Grundsatz, dass staatliche Eingriffe in bzw. Einschränkungen von Menschenrechten legitim, begrenzt, messbar und verhältnismäßig sein müssen. Der Grundsatz der Verhältnismäßigkeit aber ist ein Kerngedanke des Rechtsstaates.¹⁰

6. Indem Einschränkungen der Menschenrechte nur durch oder auf Grund eines Gesetzes erfolgen dürfen, folgen die Pakte dem klassischen rechtsstaatlichen Gedanken, dass die „Behörden“, also die Exekutive, nicht kraft originärer eigener Kompetenz nach ihrem freien Belieben in Menschenrechte eingreifen dürfen, sondern dazu einer Ermächtigung des Gesetzgebers bedürfen. Damit ist in die Pakte ein weiterer fundamentaler Grundsatz der Rechtsstaatlichkeit (rule of law) eingefügt, nämlich der Grundsatz der Gesetzmäßigkeit der Verwaltung.

7. Die Pakte normieren schließlich ein vielfältig differenziertes Verbot, Menschen zu diskriminieren, namentlich auch wegen ihrer „Religion, der politischen oder sonstigen Anschauungen, der nationalen oder sozialen Herkunft“ (Art. 2 Abs. 1; Art. 26 IPBPR; Art. 2 Abs. 2 IPWSKR). Ein so weitreichendes Diskriminierungsverbot setzt auf Seiten der Vertragsstaaten denknötwendig eine Verfassungsordnung voraus, welche die Menschenrechte unter Beachtung weltanschaulicher und politischer Neutralität gewährleistet. Ein säkularer Weltanschauungsstaat oder eine Theokratie, seien sie totalitär oder autoritär-diktatorisch, sind damit schlechterdings nicht vereinbar.

8. Stellt man die institutionellen Implikationen der Pakte in einen systematischen Zusammenhang, dann drängt sich die Feststellung förmlich auf, daß ihre Normen und vor allem ihr „Geist“ einer Staats- und Verfassungsordnung am nächsten stehen, welche Rechtsstaatlichkeit und Demokratie im Interesse von individueller Freiheit und Gleichheit zu einer festen, institutionellen Einheit verbindet: Unabhängigkeit der Gerichte, ein durch demokratische Wahlen konstituierter Gesetzgeber (Parlament), Gesetzmäßigkeit der Verwaltung sind, zusammen genommen, ein „Plädoyer“ für den Grundsatz der Gewaltenteilung; dazu treten der Grundsatz der Verhältnismäßigkeit, gerechtes Gericht (fair trial), Diskriminierungsverbot und Individualfreiheit. Die Grundsätze fügen sich nahtlos zu jenem Menschenbild, das die Präambeln der Pakte übereinstimmend formulieren und zur Vorgabe des Verständnisses und zur Leitlinie bei der Auslegung ihrer Einzelbestimmungen machen. Es wird von der Idee der jedem Menschen innewohnenden Würde und

¹⁰ Nowak, a.a.O. 1989, S. 373 (Art. 19 Rn. 37); engl. Ausgabe 2005, S. 460 Rn. 47.

von dem „Ideal vom freien Menschen“ als Grundlage der Menschenrechte bestimmt.

b. Re-Interpretation des nationalstaatlichen Souveränitätsprinzips: Das globale Konzept der „Responsibility to Protect“

Die materielle Rechtsbindung der heutigen Staaten durch die Menschenrechte des universellen Völkerrechts steht in einem starken Spannungsverhältnis zu dem völkerrechtlichen Prinzip der Souveränität (Art. 2 Nr. 1 UNO-Charta). Unter dem Eindruck der Tatsache, dass es in den 1990er Jahren bei innerstaatlichen Konflikten vor den Augen der Weltöffentlichkeit und der Vereinten Nationen mehrfach zu schweren Verbrechen gegen die Menschlichkeit und Völkermord gekommen war (Somalia, 1992/1993; Rwanda, 1994; Bosnien-Herzegowina, 1992-1995; Tschetschenien, 1994-1996; Kosovo, 1998/1999; Osttimor, 1999), ist in der internationalen Gemeinschaft eine lebhafte Diskussion darüber entstanden, wie eine Wiederholung solcher Vorgänge in Zukunft ausgeschlossen werden könne. Sie wird unter dem Schlagwort „responsibility to protect“, d. h. der postulierten Verpflichtung der Staaten zum Schutz ihrer Bürger kraft Völkerrecht, geführt.¹¹

Den Anstoß zu der Diskussion hat UN-Generalsekretär Kofi Annan mit seinem Auftritt am 20.9.1999 in der 54. Session der UN-Generalversammlung gegeben, bei welchem er mit Blick auf den Millenniumsgipfel der Vereinten Nationen die katastrophale humanitäre Negativbilanz der 1990er Jahre zum Anlass nahm, sich kritisch mit dem herkömmlichen Verständnis von nationaler Souveränität und mit dem Problem der „humanitären Intervention“ – mit oder ohne Mandatierung durch die UNO – auseinanderzusetzen.¹² Annan entfaltete seine Kritik in vier Thesen:

1. Die Staaten müssten sich auf **Prävention** von Gewalt konzentrieren, um zu verhindern, dass es zu massenhaften, schweren Menschenrechtsverletzungen und zu Völkermord komme. Mit militärischen Mitteln vorgehende humanitäre Interventionen kämen zu spät.

2. Das Konzept der „nationalen Interessen“ müsse unter den neuen Verhältnissen und Bedingungen der Globalisierung breiter als bisher verstanden werden, nämlich die „fundamentalen Werte der UNO-Charta – Demokratie, Pluralismus, Menschenrechte und rule of law“ in sich einschließen. Diese kollektiven Interessen der Weltgemeinschaft seien zugleich nationale Interessen der UN-Mitgliedstaaten!

3. Der Weltsicherheitsrat müsse sich seiner Verantwortung stellen und Entschlossen-

¹¹ Die Literatur dazu ist binnen weniger Jahre breit angeschwollen. Siehe etwa Stoll, Tobias: Responsibility, Sovereignty and Cooperation – Reflections on the „Responsibility to Protect“, in: König, Doris etc. (eds): International Law Today: New Challenges and the Need for Reform? Berlin usw. 2008, S. 1-16; Wolter, Detlev: A United Nations for the 21st Century: From Reaction to Prevention. Towards an Effective and Efficient International Regime for Conflict Prevention and Peacebuilding, Baden-Baden 2007; Evans, Gareth/ Sahnoun, Mohamed: The Responsibility to Protect, in: Foreign Affairs Vol. 91 (2002), Nov./Dec., S. 99 – 110.

¹² Text: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/858/23/PDF/N9985823.pdf?OpenElement>.

heit zeigen, gegen schwere Menschenrechtsverletzungen und Völkermord ohne Rücksicht auf Regionen und Nationen vorzugehen.¹³

4. Es bedürfe eines neuen, modifizierten Verständnisses von nationaler Souveränität, das den tiefgreifenden Veränderungen in der globalen Staatengemeinschaft gerecht werde, die seit der Gründung der Vereinten Nationen 1945 eingetreten seien.

Unmittelbar nach der Millenniums-Vollversammlung (September 2000) kam es auf Initiative der kanadischen Regierung zur Bildung einer „International Commission on Intervention and State Sovereignty“ (ICISS).¹⁴ Deren erklärtes Ziel war es, die umstrittene Lehre von der „humanitären Intervention“ auf eine konsensfähige juristische Grundlage zu stellen. Dafür setzte die Kommission bei der völkerrechtlichen Verantwortung und Verpflichtung der Staaten an, ihre Bürger gegen Rechtsverletzungen zu schützen. Sie entfaltet das Konzept einer *responsibility to protect*¹⁵ in drei Dimensionen: 1. „responsibility to prevent“ (Verantwortung für Vorbeugung); 2. „responsibility to react“ (Verantwortung, zu reagieren) und 3. „responsibility to rebuild“ (Verantwortung für Wiederaufbau). Primäre Träger der Verantwortung sind die UN-Mitgliedstaaten selbst, aber die internationale Staatengemeinschaft bzw. die Vereinten Nationen tragen daneben, zumindest subsidiär, eine gewisse Mitverantwortung.

Die *Verantwortung für Vorbeugungszielt* auf die Schaffung von Verhältnissen ab, die für einen demokratischen Rechtsstaat mit starker, unabhängiger Justiz, effektiver ziviler Kontrolle über Militär und Geheimdienste, mit einer prosperierenden Wirtschaft, gut funktionierenden sozialen Sicherungssystemen und einer starken selbstbewussten Zivilgesellschaft typisch sind. Die zur Erreichung oder Bewahrung und Sicherung eines solchen zivilisierten, friedlichen Staatswesens von der Kommission beschriebenen Strategien, Ansätze, Wege und Verfahren erfassen alle Politiken zur Erreichung von good governance - von der Armut- und Korruptionsbekämpfung über eine effektive Verwaltung bis hin zur Errichtung stabiler Institutionen. Sie repräsentieren eine Langzeitstrategie zur Zurückdrängung, Neutralisierung und Ausschaltung von Gefahren für

13 Wörtlich sagte Annan. „As I said during the Kosovo conflict, the choice must not be between, on the one hand, Council unity and inaction in the face of genocide, as in the case of Rwanda and, on the other, Council division and regional action, as in the case of Kosovo. In both cases, the States Members of the United Nations should have been able to find common ground in upholding the principles of the Charter and in acting in defence of our common humanity. As important as the Council's enforcement power is its deterrent power. Unless it is able to assert itself collectively when the cause is just and when the means are available, its credibility in the eyes of the world may well suffer. If States bent on criminal behaviour know that frontiers are not the absolute defence and if they know that the Security Council will take action to halt crimes against humanity, they will not embark on such a course of action in expectation of sovereign impunity. The Charter requires the Council to be the defender of the common interest, and unless it is seen to be so in an era of human rights, interdependence and globalization, there is a danger that others could seek to take its place“.

14 ICISS: The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, Text: <http://www.iciss-ciise.gc.ca/report2-en.asp>. Die Kommission bestand aus 12 Personen aus allen Erdteilen (China war nicht einbezogen) und stand unter dem Vorsitz des Australiers Gareth Evans, ehemals Außenminister seines Landes und Vorsitzender der International Crisis Group, sowie des Algeriers Mohamed Sahnoun, Botschafter seines Landes und Sonderberater des UN-Generalsekretärs Kofi Annan für Konflikte in Afrika.

15 Im Deutschen entspricht „responsibility“ der Begriff der „Verantwortung“, doch schwingt in ihm auch der Begriff der „Zuständigkeit“ mit und ferner das Element der „Pflicht“.

die innere Sicherheit und soziale Stabilität von Gesellschaften „an den Wurzeln“.

Unter der Verantwortung für eine Reaktion, versteht die Kommission die Verhängung von Sanktionen einigen Gewichts. Sie kommt zu dem Ergebnis, dass im Konfliktfälle unter bestimmten Voraussetzungen das Prinzip der nationalen Souveränität hinter der vorrangigen Verantwortung der Staatengemeinschaft für den Schutz von Menschenleben zurückzutreten habe und militärische Gewalt gerechtfertigt sei: „In the Commission’s view, military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert: 1. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation, or 2. large scale ‘ethnic cleansing’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.“¹⁶

Mit großem Nachdruck betonte die Kommission die Notwendigkeit, in jeder Phase den Grundsatz der Verhältnismäßigkeit zu berücksichtigen. Zwar wies sie dem Weltsicherheitsrat den Vorrang bei der Entscheidung über eine Militärintervention zu, aber sie plädierte dafür, militärische Interventionen zur Erfüllung der Responsibility to Protect notfalls auch ohne Mandat des Weltsicherheitsrates durchzuführen und die zur humanitären Intervention entschlossenen Mächte durch andere repräsentative internationale Institutionen oder Organe zum Einsatz militärischer Gewalt zu ermächtigen, und zwar die UN-Generalversammlung, eine Regionalorganisation wie die EU oder ein Militärbündnis wie die NATO.

Die UN-Generalversammlung machte sich auf ihrer „Gipfelveranstaltung“ vom September 2005 das Konzept unter dem Titel „Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity“ zwar im Ansatz zu eigen, lehnte aber militärische Interventionen ohne ein Mandat des Weltsicherheitsrates ab.¹⁷ Angesichts des ungelösten Strukturproblems der UNO-Charta, nämlich der möglichen Selbstblockierung und Handlungsunfähigkeit des Weltsicherheitsrates infolge des Vetos eines seiner fünf ständigen Mitglieder, könnte diese Position Enttäuschung auslösen. Dem muss man jedoch entgegen halten, dass die Generalversammlung durch die Unterstützung des völkerrechtlichen Konzepts der responsibility to protect im Prinzip das von Kofi Annan geforderte neue Verständnis Souveränität übernommen hat. Nationale Souveränität gibt den Staaten keine Carte blanche, mit ihren Bürgern beliebig zu verfahren, sondern, ausgehend von den Menschenrechten und den humanen Zwecken von Staatlichkeit, ist der juristische Kern der Souveränität die Verantwortung und Verpflichtung der Staaten, zum Wohle und Schutze ihrer Bürger zu handeln. Das bedeutet, dass die Rechtsbindung staatlicher Gewalt ein integraler Bestandteil des Begriffs der Souveränität ist.

¹⁶ ICISS: The Responsibility to Protect: Report (Anm. 16), para. 4.19.

¹⁷ 2005 World Summit Outcome Document vom 16.9.2005 (para. 138 /139), Text: A/Res.60/1 (www.un.org): „138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.“

V. SCHLUSSBEMERKUNG

Wir können heute noch nicht wissen, ob dem Durchbruch im Kampf des Rechts um die Beschränkung der politischen Macht und staatlichen Gewalt, der am Ende des 20. Jahrhunderts in Europa stattgefunden hat, weitere Durchbrüche in Asien und Afrika folgen werden und wir wissen erst recht nicht, ob die globale Bewegung und der Prozess der Bindung staatlicher Macht an das Menschenrecht schon unumkehrbar geworden sind. Wir können es schon deswegen nicht wissen, weil es sich hier um einen ständigen und harten Kampf zwischen zwei großen politischen Philosophien und Lagern sehr verschiedener Couleur handelt, nämlich zwischen denjenigen Kräften, welche der Vorstellung anhängen, dass das Individuum der Staatsgewalt und denjenigen, welche sie ausüben, absolut untergeordnet sein müsse und zu ihrer Disposition stehe, und denjenigen politischen Kräften, die für das Individuum einen unantastbaren rechtlichen Status der persönlichen Freiheit im Staat anerkennen, deswegen die Staatsgewalt an jenes elementare Menschenrecht binden und insgesamt den Zweck der Staatsgewalt darin sehen, die daraus resultierende menschenrechtskonforme Staats- und Verfassungsordnung zu verwalten und zu bewahren.

РЕЗЮМЕ

В Европе и Северной Америке ограниченность государственной власти правом сложилась в длившемся столетия революционном и эволюционном процессе. Подданные и граждане в этих странах со времен средневековья осознавали, что личная свобода, безопасность и собственность гарантированы только в том случае, если власть связана и ограничивается правом. Это восприятие продолжало существовать даже в тех странах, в которых (как во Франции) удалось установить абсолютную монархию. Французская революция провозгласила принципы суверенитета народа, разделения властей, права человека и положила начало конституционному процессу, приведшему к созданию демократического конституционного государства. В Англии королевская власть со времен своего формирования была непрерывной, за исключением короткого периода в XVII веке - в условиях верховенства права, характерными особенностями которого являются разделение властей и защита прав граждан. Именно на этой основе в XIX и XX столетиях Англия постепенно превращалась в демократическое правовое государство. Соединенные Штаты Америки с самого начала основывались на конституции, которая хоть и исходила из суверенитета народа, но с целью обеспечения прав человека организовала государственную власть строго по принципу разделения властей. Она создала конституционный режим, основы которого, несмотря на все социально-политические изменения и кризисы, оказались достаточно гибкими и стабильными. В Германии также представление о том, что политическая

власть должна быть ограничена правом, укоренилось еще в средние века, однако вместе с этим абсолютные монархии появились только на некоторых ее территориях. С XIX века под влиянием доктрины верховенства права в этих монархиях шел процесс постепенной конституционализации и демократизации. Он был внезапно прерван тоталитарным режимом национал-социализма, отрицающим права человека, а после Второй мировой войны – в Восточной Германии (ГДР) тоталитарным коммунистическим режимом коммунистической партии Восточной Германии. И лишь на основании Основного Закона ФРГ в Германии сформировалось демократическое конституционное государство, в котором права человека и принцип разделения властей имеют прочную институциональную основу.

После окончания Второй мировой войны конституционализация государственной власти посредством прав человека и разделения властей постепенно укоренилась во всей Европе. О том, что “триумф” этих принципов не был случайным, свидетельствуют соответствующие исторические предпосылки. Этот процесс происходил в рамках организации Совета Европы, а также Европейской конвенции по правам человека (ЕКПЧ) и Европейского суда по правам человека (ЕСПЧ), т. е. в условиях регионального международного права. После революций в странах Восточной Европы (1989-1991 гг.) все европейские государства провозглашают себя сторонниками принципов демократического правового государства. Однако в некоторых странах Восточной Европы они на практике отчасти не применяются (Азербайджан, Беларусь), в некоторых государствах их практическое применение сильно ограничено (Россия, Украина), а в других - находится под серьезной угрозой (Румыния). Процесс конституционализации государственной власти в Европе углубился в результате создания Европейского союза (ЕС) и формирования наднационального права ЕС и значительно укрепился после расширения Европейского союза на восток и юг.

После 1945 г. конституционализация государственной власти не ограничилась странами Европы, а переросла в глобальный процесс под эгидой Организации Объединенных Наций и Устава ООН. Импульсом этого развития являются права человека, укоренившиеся в универсальном международном праве. Существенную роль при этом играют договоры ООН по защите прав человека, в первую очередь – Международный пакт о гражданских и политических правах и Международный пакт об экономических, социальных и культурных правах от 19.12.1966. Последние не только обязывают соблюдать индивидуальные права, но также содержат институциональные нормы, свойственные государственной структуре с разделением властей: независимость судов, образованный в результате справедливых выборов парламент и законность в сфере управления. Указанное конституционное значение пактов ООН о правах человека до сих пор надлежащим образом не учитывалось.

После Саммита тысячелетия Генеральной ассамблеи ООН в 2000 г. националь-

ный суверенитет находится в процессе правовой реконструкции. В качестве нормативной основы этого принципа в настоящее время рассматривается обязанность государства защищать жизнь, свободу и собственность своих граждан. Нарушение указанной “обязанности защищать” (“responsibility to protect”), укоренившейся в международном праве, предоставляет международному сообществу право применять санкции против соответствующего государства. Внутренние границы суверенитета - в обязательности прав человека.

SUMMARY

In Europe and North America, the binding of state power by the law has developed in a centuries lasting revolutionary and evolutionary process. Since Middle Ages, the subjects and citizens here have always realized, that personal freedom, security and property are only secured, if the power is bound and limited by the law. This knowledge remained active even there, where like in France the kingdom succeeded in establishment of an absolute monarchy. The French Revolution proclaimed the sovereignty of the people, human rights and separation of powers and initiated a constitutional process which led to the establishment of a democratic constitutional state. Since its formation, the royal power in England has been continuously, except for a brief period in 17th century, subjected to the rule of law, characteristics of which include the separation of powers and the protection of civil rights. On this basis in the 19th and 20th century, the real constitution of England developed gradually into a democratic state with rule of law. The United States of America were based on a constitution from the very beginning, although emanating from the sovereignty of the people, but having organized the state power strictly according to the principle of separation of powers in order to ensure the human rights. That constitution has created a constitutional regime that has proved to have sufficiently flexible and stable fundament despite socio-political changes and crises until now. Also in Germany, the idea that political power should be bound by the law, has its roots in the Middle Ages, but nevertheless absolute monarchies were established in some parts of German territories. Influenced by the doctrine of the rule of law, those monarchies had been exposed to a slow process of constitutionalization and democratization since 19th century. The process was suddenly interrupted by the totalitarian Nazi regime negating human rights and after the World War II in East Germany (GDR) by the totalitarian communist regime of the East German Communist Party. Only under the Basic Law of the Federal Republic of Germany a democratic constitutional state has been established in Germany where human rights and the principle of separation of powers have a solid institutional basis.

After the end of the World War II, the constitutionalization of state power through human rights and separation of powers was enforced gradually in all parts of Europe.

The historical background explains why the “triumph” of these principles was not an accident. It took place in the organizational framework of the Council of Europe (ER) and the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECHR), i.e. under the regime of a regional international law. As a result of the revolution in Eastern Europe of 1989/1991, all European states declare themselves today as proponents of the principles of democratic legal state. However, their practical applicability is partly repealed in some Eastern European countries (Azerbaijan, Belarus), partly strongly limited (Russia, Ukraine), partly seriously endangered (Romania). The process of constitutionalization of state power in Europe has been intensified by the establishment of the European Union (EU) and by the EU created supranational EU law and greatly enhanced by the EU expansion in East and South.

After 1945, the constitutionalization of state power was not confined to Europe, but turned into a global process under the aegis of the United Nations and the UN Charter. Human rights anchored in the universal international law are the driving force of that development. The UN human rights treaties play here an essential role with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights dated December 19, 1966 at the forefront. The pacts oblige not only to comply with individual rights, but they also include institutional norms typical for a system of government with separation of powers: independence of courts, a parliament formed by fair elections and legality of administration. This constitutional dimension of the UN human rights covenants has been ignored until now.

Since the Millennium Summit of the UN General Assembly in 2000, the national sovereignty is in a process of legal reconstruction. The normative core of the principle is now the responsibility of the state to protect life, freedom and property of its citizens. The violation of this “responsibility to protect” anchored in the international law provides the international community with right to proceed with sanctions against the relevant State. The sovereignty finds its inner boundary in the binding nature of human rights.

RÉSUMÉ

En Europe et en Amérique du Nord, la restriction du pouvoir étatique par le droit s’est développée dans un processus révolutionnaire et évolutive qui a duré des siècles. Depuis le Moyen Age, les sujets et les citoyens de ces pays ont été toujours conscients que la liberté personnelle, la sécurité et la propriété privée ne sont garanties que si le pouvoir est restreint et est limité par le droit. Cette conscience a existé même là où, comme en France, une monarchie absolue a été établie. La Révolution française a proclamé les principes de la souveraineté du peuple, des droits de l’homme et de la sé-

paration des pouvoirs et a lancé un processus constitutionnel qui a conduit à l'établissement d'un Etat de droit démocratique. Depuis sa création, le pouvoir royal en Angleterre a été permanent, sauf une brève période au 17ème siècle, et a existé dans les conditions de la primauté du droit, qui s'est caractérisée par la séparation des pouvoirs et la protection des droits des citoyens. Sur cette base, aux 19ème et 20ème siècles, l'Angleterre s'est transformée progressivement en un Etat démocratique de droit. Dès le début, les Etats-Unis d'Amérique se sont fondés sur la Constitution qui, bien que provenant de la souveraineté du peuple, mais aux fins d'assurer les droits de l'homme, a organisé le pouvoir de l'Etat dans le strict respect du principe de la séparation des pouvoirs. Cette constitution a créé un régime constitutionnel qui s'est avéré être suffisamment souple et stable malgré les changements sociopolitiques et les crises. En Allemagne, les racines de l'idée que le pouvoir politique doit être restreint par le droit étant établies au Moyen Age, les monarchies absolues, néanmoins, ont été mises en place dans certaines parties du territoire allemand. Influencées par la doctrine de la primauté du droit, les monarchies ont vécu le processus de la constitutionnalisation et de la démocratisation depuis le 19e siècle. Ce processus a été brusquement interrompu par le régime totalitaire national-socialiste, niant les droits de l'homme et, après la Seconde Guerre mondiale, en Allemagne de l'Est, par le régime communiste totalitaire du Parti communiste de l'Allemagne d'Est. Ce n'est que sur base de la Loi fondamentale de la République fédérale d'Allemagne qu'un Etat de droit démocratique a été mis en place en Allemagne où les droits de l'homme et le principe de séparation des pouvoirs ont un fondement institutionnel solide.

Après la fin de la Seconde Guerre mondiale, la constitutionnalisation du pouvoir d'Etat au travers des droits de l'homme et de la séparation des pouvoirs a été progressivement enracinée dans toute l'Europe. Le contexte historique explique pourquoi le «triomphe» de ces principes n'était pas imprévu. Ce processus a eu lieu dans le cadre de l'organisation du Conseil de l'Europe, de la Convention européenne des droits de l'homme et de la Cour européenne des droits de l'homme soit, dans les conditions du droit régional international. À la suite des révolutions en Europe de l'Est des 1989/1991, tous les Etats européens se déclarent adeptes des principes de l'Etat de droit démocratique. Toutefois, leur application pratique est partiellement abrogée dans certains pays de l'Europe de l'Est comme en Azerbaïdjan, Bélarus, en d'autres elle est fortement limitée (Russie, Ukraine), en quelques autres - gravement menacée (Roumanie). Le processus de constitutionnalisation du pouvoir d'Etat en Europe a été renforcé par la mise en place de l'Union européenne (UE), par la création de la législation supranationale de l'Union européenne et a été grandement consolidé par l'élargissement de l'UE vers l'Est et vers le Sud.

Après 1945, la constitutionnalisation du pouvoir d'Etat ne s'est pas limitée par l'Europe, mais s'est transformée en un processus global sous l'égide de l'Organisation des Nations Unies et sa Charte. Les droits de l'homme ancrés dans le droit international sont la force motrice de ce développement. Les traités relatifs aux droits de l'homme

des Nations Unies jouent ici un rôle essentiel, premièrement les dispositions du Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels du 19 décembre 1966. Les pactes obligent non seulement à respecter les droits individuels, mais ils comprennent également des normes institutionnelles typiques pour une structure étatique qui a adopté la séparation des pouvoirs: l'indépendance des tribunaux, le parlement formé au travers d'élections équitables et la légalité de l'administration. Cette dimension constitutionnelle des pactes relatifs aux droits de l'homme de l'ONU n'a pas été prise en considération.

Depuis le Sommet du Millénaire de l'Assemblée générale des Nations Unies en 2000, la souveraineté nationale se retrouve dans un processus de reconstruction juridique. Le noyau normatif de ce principe relève de la responsabilité de l'Etat de protéger la vie, la liberté et les biens de ses citoyens. La violation de cette «responsabilité de protéger» ancrée dans le droit international accorde à la communauté internationale le droit de sanctionner l'Etat concerné. La limite intérieure de la souveraineté est désormais dans le caractère indispensable des droits de l'homme.

**CHARACTER OF JUDICIAL CONSTITUTIONALISM:
THE NATIONAL AND SUPRANATIONAL ASPECTS**

**JUDICIAL SUPREMACY?
ON THE RELEVANCE OF A US-CENTRED PERSPECTIVE
ON CONSTITUTIONAL JUSTICE IN EUROPE**

Eivind SMITH

INTRODUCTION

According to a leading trend of political philosophy, authoritative decision-making on behalf of the nation-state should emanate from decision-making bodies that may either claim a reasonable degree of political representativity (like parliaments) or act – more or less directly – on behalf of such bodies (governments accountable to Parliament, indirectly elected presidents, and so on).

At the same time, commonly agreed requirements currently accepted as inherent in the “rule of law” or “Rechtsstaat” ideology make access to independent courts a fundamental element of constitutional democracies with high democratic pretensions. For many reasons, however, judges are unlikely to satisfy such basic requirement of representativity.¹ Among those reasons, the claim for wide-reaching personal independence for members of the judicial branches of government ought in particular to be highlighted.

In the field of judicial decision-making, this may bring ideal claims for both “representativity” and “judicial independence” in conflict. In the next turn, this contributes to explaining why concern about “judicial supremacy” has occurred. The concern comes on its edge in the field of constitutional justice, where precisely enactments by the highest representative bodies of the state may actually be overruled.

Polities that seek recognition according to standards of “democracy” as well as of “the rule of law” might either have to live with this contradiction or look for ways to accommodate both within over-arching standards of democratic government. For those who find the idea of “judicial supremacy” hard to accept: Could the combination of representativity and the rule of law be conceived upon otherwise?

As a matter of fact, it seems as if current debates are quite often biased due to the selection of the comparative and/or intellectual information called upon to serve as the basis of the argument. That’s why the issues at stake are better understood if we take into

¹ Neither quite isolated systems of directly elected judges (like those found in a number of the United States of America) nor such elements of indirect representativity that command the composition of many constitutional courts, will be further developed at this point.

account that more often than not, concerns about “judicial supremacy” seem inspired by decennium-long discussions on the counter-majoritarian problem as conducted by American scholars and widely spread around the World with the powerful help of their language (i.e. English the American way).

However, (ideas about) the American “model” should only be admitted as an important source of inspiration for concern about the dangers of judicial supremacy insofar as its adequacy in a European comparative perspective has not been properly questioned: To what extent, if any, may experiences from that particular system of government inform the debate on the construction of constitutional democracies in Europe?

ON THE IMPORTANCE OF (TRUMP) WORDS

Current discussions on the interaction of courts, politics and society tend to make use of a number of expressions that enjoy a high value-load. Examples include “constitutionalism”, “democracy”, “judicial activism” and “the judicialization of politics”; even the expression to which the title of the present paper (“judicial supremacy”) has recourse may be counted among them.

Ambiguity is normally inherent in such words. But this has not stood in the way for them being used by people in favor of (or against) the phenomena to which they supposedly refer.

Among expressions of particular interest in our field of interest, the word “democracy” clearly hints at values high in esteem; that is clearly one of the reasons why it is even highly ambiguous. The same goes for words or expressions like

- “constitutionalism”: Does it refer to the constitution actually operating in a given polity or rather to adherence to “constitutional principle, not necessarily to a particular constitution” or – in other words – to “constitutional norms” that are “accepted” according to certain ideological and/or social standards (Maddex 1996:321)? In the latter version however, the question to know who defines the relevant standard becomes acute.

- “judicial activism”: Does it simply refer to judicial conduct that I (or a group of people to which I belong or with whom I sympathize) find unacceptable, or rather – in a more sophisticated manner – to reasoning and/or outcomes by courts hard to justify on behalf of pre-established constitutional norms?

- “legitimate judicial conduct”: How do we draw the borderline between more or less “legitimate” judicial decision-making? Should solely “activism” in the sense of adding (rights, etc.) to what would follow from a closer, more text-addicted reading of the written constitution be included? Should we even take into account the kind of “negative” activism that consists of “construing” the constitution in less demanding ways thus relieving the ordinary lawmaker from the burden of either respecting what would other-

wise follow from the constitutional norm, or – in other words – relieving him from the need to convince the constitution-amending power to take the lead?

- “the judicialisation of politics“: Does it imply that legally binding provisions enshrined in the constitution or in statutory law, etc. do not, in the last instance, result from political decision-making, namely in Parliament? Does it imply that not only legal text of a general kind (rules), but even individual decisions authorized by such rules, ought to be adopted by political bodies (in the last resort: by parliaments)?

- “law” and “politics“: Could the relationship be properly understood as a zero-sum game or might decision-making built upon legal norms rather help strengthen the effects of genuinely political decision-making?

When successfully used, value-loaded but ambiguous expressions may function as trump words. In other words, they may – by intention or not – function as tentatives to trump the debate in the sense of closing it with the “right” conclusion rather than as contributions to open-minded discussions.

Together with expressions like “popular sovereignty” and “the rule of law”, words and expressions like those just mentioned tend to underpin current discussions on the role of courts in a democracy. That’s why it may be useful to take them seriously as points of departure for some further remarks on the idea of “judicial supremacy”.

“LAW” OR “PRINCIPLES OF MORAL REASONING”?

Before embarking on the question to know to what extent the American “model” is relevant for discussions on “judicial supremacy” in Europe, we need to know more precisely what is envisaged: Are we mostly interested in the way the US Supreme Court is actually interacting with the other constituted powers within that particular statehood, or rather in the way that system is frequently perceived through influential glasses of legal or philosophical doctrine? For instance, should we make use of glasses constructed by people like Ronald Dworkin (1977 and later), who tend to regard the system with a positive eye, or rather trust those provided by Jeremy Waldron (1999), who tends to regard the idea of judges as some kind of philosopher-kings with high suspicion?

My impression is that a lot of the participants in the debate among philosophers and political scientists, and to some extent even among legally trained people, are basing their criticism of or support to constitutional judges more on ideas about what *ought to be* the substance of “constitutional rights” than on what may reasonably be read out of close reading of any given constitutional text.

According to Richard Bellamy, for example, what he refers to as “pure legal constitutionalism [...] sees itself as superior to and independent of democracy” even if fre-

quently resting on “questionable normative and empirical assumptions” (2007: 2-3). He further suggests that major contributions by people like Rawls and Dworkin rest much on “an idealization of US constitutional arrangements and the role of the Supreme Court” (2007: 10, footnote 18).

If he is right, the norms of reference that we ask the constitutional judge to apply (or at least accept that he applies) are based less on a close reading of the constitutional text than on wide-reaching “principles” claimed to be abstracted from the constitution, or even on considerations of an openly “moral” character with little or no link to the actual text of the constitution. A similar approach clearly ends up within the realm of politics in any possible conception of that word.

The style adopted in the often overwhelmingly lengthy opinions by justices of the US Supreme Court admittedly lend some credibility to a similar image of what is going on within that particular jurisdiction. The same goes for a number of the most famous rulings of that court, in particular selected cases from the famous civil rights’ epochs frequently albeit somewhat misleadingly referred to as the “the Warren Court” (Smith 2007).

One of the cases that most prominently contribute to putting the choice between liking the individual outcome or rather the reasoning on which that outcome is based, up on the sharp edge, is of course the (in)famous *Roe v Wade* (1973) on abortion: Departing from a particular reading of a “right to privacy” not spelled out in the US Constitution but nevertheless found somewhere inside it by former generations of Supreme Court justices, it illuminates the argument about constitutional judges deliberately moving inside the “circumstances of politics” at a point where “theorists, politicians, lawyers and ordinary citizens frequently disagree” (Bellamy 2007: 16).

As a matter of fact, the US Supreme Court took over a matter of legitimate political concern from the legislature in each of the 50 states of the Union. The rather unreasonable degree of “politicizing” of the procedure for selecting new members of that court provides but one indication that the entire system of judicial review in the United States continues to pay the price.

If “moral reasoning” is the “US model” that should underpin the European debate, there may be convincing arguments in favor of disagreement (or of warning). As suggested by political scientists and others, there are compelling arguments for not trusting judges – or, in other words, “committees of lawyers” – as “moral reasoners” (Waldron 1999) more than people elected on the basis of preferably open political debates.

However, “moral reasoning” is not the only possible conception of the US system. As a matter of fact, a number of alternative perspectives are at hand; is it really for a “committee of nine lawyers” to change the constitution (Scalia 1997)? In the field of

constitutional adjudication, the problem lies less in the point of departure than in the pure “originalist” idea that every possible question on the genuine meaning of the Constitution may be found in its text and history (mind you: not in some kind of “original intent”). As Richard Bellamy rightly puts it, “no theorist of the rule of law believes that rule by persons can be avoided in all respects” (2009: 57). At the very least, historical guidance must be called upon under the reader’s vibrant eyes.

In any case, the heated debate over “originalism” in different forms is pretty much a US creation of its own. As a matter of fact, it is strongly influenced by elements like the US federal constitution’s high age in combination with its high degree of formal rigidity.

There are reasons to argue that the US system is best understood in the light of a number of peculiarities that make it inadequate for serving as a “model” for Europeans discussing how to regard and possibly develop their proper systems of judicial review of legislation. After a short interlude, we will return to that question.

THE MARGINAL ROLE OF THE CONSTITUTIONAL JUDGE

A few words about the role of constitutional judges in a comparative perspective may be useful in order to more closely apprehend that idea of “judicial supremacy”.

As a matter of fact, it may well be that the role of constitutional judges within constitutional democracies tends to be exaggerated. Such exaggerations would sometimes be expressed with acclaim (as more or less eloquently illustrated by those advocating constitutional and/or human rights). Sometimes, they are rather meant to serve as warnings (as illustrated by a number of political scientists insisting on the virtues of political democracy regarding the definition and delimitation of “rights”).

At present, however, no need to position ourselves within a “good” or “bad” spectrum. Instead, the focus will be on the practical role actually played by constitutional judges: There are good reasons to believe that both tendencies are misleading when it comes to their implicit basic assumption of the practical importance of systems of judicial review of legislation: There may be considerably less to be expected from courts than many lawyers and human rights activists tend to believe. For skeptics, consolation may be found in the assumption that constitutional judges are less dangerous than they seem to think.

Taking a step back, the practical role of constitutional judges as an element of the entire political set-up seems rather remote. To put the point on its rhetoric edge: While the US Supreme Court was busy with cases on sodomy or abortion, the US executive initiated wars in Iraq and elsewhere whereas Congress adopted (presumably destructive) tax reforms! Parts of Europe are different of course; but for the time being, let’s leave it like that.

One line of argument in this sense may be drawn from statistical data about the relative

importance of judicial review of domestic legislation in different polities. At present, we may limit ourselves to a few numeric observations of the operation of the relevant system from its birth till around 1980 in three of the main Western democracies (Favoreu 1986):

- In the United States of America, the number of cases where pieces of federal legislation was “set aside” due to unconstitutionality by the Supreme Court was 90, equalizing 0.13 % of the total number of (federal) statutes.
- In the Federal Republic of Germany, the similar numbers were 160/4.57 %.
- In France, the similar numbers were 34/1.4 %.

Of course quantitative data of this kind are far from saying it all. First, this is due to evident problems of calculation: What does it mean to “set aside” a piece of legislation? What should be counted as one, two or more specimens? What was the political or societal importance of the relevant provisions? To what extent should even jurisprudence from lower courts be taken into account?

Moreover, the limitation to review of federal acts clearly limits the importance of the numbers regarding the United States. On the other hand, however, the total amount of legislation by the growing number of States of the Union is likely to be extensive enough to outweigh the considerably higher number of settings aside of such legislation by the federal Supreme Court as well.

How about the age of the reported data? It certainly counts: In France, for instance, the development following constitutional reforms in the 1970s (giving standing to parliamentary minorities) and in 2009 (opening up for elements of the kind of *ex post* review labeled *Question Prioritaire de Constitutionnalité/QPC*) have clearly increased the instances of settings-aside in absolute as well as in relative terms. But the increase must be measured against the very low level observed until around 1980.

It should even be mentioned that the numerical presence of cases where pieces of legislation are “set aside” through mechanisms of judicial review is likely to be higher in some of the “new” democracies than in more settled ones. But whether a high number of such decisions by the constitutional judge would be a good sign for the state of democracy in the relevant polities may be open to doubt ...

It is nevertheless hard to see why such reservations should undermine the main assumption at this point: that both friends and proponents of judicial review tend to exaggerate the practical importance of such systems within the entire system of government.

This clearly seems to be the case at least when it comes to the US, notwithstanding the wide-spread fascination for the “marble temple” in Washington D.C., the sometimes colorful justices and/or opinions, the extensive academic as well as press commentaries written in a langue accessible to most of us, etc. But attention should be paid to the

risk of exaggeration when it comes to other polities as well: Quite simply, it seems everywhere to be true that the overwhelming bulk of legislation is never brought before a constitutional judge or, when submitted, passes the test in good shape. In Germany, for instance, that was the case with more than 95 % of the legislation.

It goes without saying that these observations by no means reduce the importance in principle of access to a constitutional judge. It may even be worthwhile noting that awareness of the possibility of being governed by judges entail a risk that the political machinery, in order to avoid censorship (in the form of “settings-aside”) and for other more sophisticated reasons, deteriorates into governing like judges. But the importance of such a risk is likely to depend on other factors already hinted at, not the least the choice between review based on “principles” or “moral reasoning”, at one hand, or on a “positivist” reading, at the other.

ON THE INADEQUACY OF THE US SYSTEM

While strikingly different, the constitutional system of the United States may seem familiar to many of us. To a large extent, I believe that this familiarity is due to a mixture of linguistic, historical and strategic factors paving the way for the influence of American legal and political thought: While often assumed as being of general interest well beyond the US borders (and sometimes is, of course), a closer look would frequently show that the relevant literature depart from their authors’ own, more or less implicit American *présupposés* in ways likely to make their reasoning less adequate for the analysis of European institutions, cases and social patterns than it may seem at first glance.

A number of differences of interest for the appreciation of the relevant systems of judicial review may be observed between the constitutional systems in the United States, at one hand, and in a “typical” European polity, at the other. Some at least are likely to influence our evaluation of the adequacy of the US system for discussions based on comparative elements in Europe. We’ll focus on just a few (for a more extensive version, see Smith 2007).

The first and probably most important particularity is the US constitution’s high degree of formal rigidity: In combination with a number of substantial factors, including tradition and the bi-partisan character of politics, the constitution’s requirements regarding how to amend its own text implies that in practical terms, this mechanism cannot be trusted as a tool for correcting judicial choices (see further below). This means that when the US Supreme Court has stated what the constitution means at any point brought before it, the other state powers have no other choice than obey.

This goes even if such decisions frequently result from a 5-4 vote and even if the Court itself is not bound to follow its own previous statements about the meaning of the constitution. But of course history knows about a number of examples where consecutive courts have themselves im-

licity showed some willingness to abide by leading political or moral tendencies of their time...

A second element worth attention in the present context is the fact that the ordinary lawmaker is frequently deadlocked by a rigid “separation of powers” system established by the US constitution operating under a conflict-ridden bi-partisan party system. Alongside the federal character of the state, this may admittedly be said to carry some of the same effect; as a matter of fact, political reform can not be expected from ordinary law-making in the way we are used to in most constitutional systems of Europe.

In the next run, people may be tempted to expect more from the judiciary than under constitutions of the kind we frequently find in Europe. “Pro-life” or “pro-Roe” street demonstrations in front of the Supreme Court building in Washington D.C. just provide one set of examples; in Europe, similar demonstrations would generally head for the Assembly (or the seat of the government) instead.

In their turn, academic writers submit to the temptation to construct idealized versions of the system – namely regarding rights – and to figure out how the judiciary could, or perhaps even should, use its power of review to contribute to the construction of the good society more or less independently of what is stated in the written constitution. Too seldom, it seems to be stressed that an important part of such discussions could best be understood in light of – precisely – US social and constitutional peculiarities.

A further difference to which some attention should be paid is closely linked to the former: Low trust in the ordinary lawmaker may have some connection with a relatively low trust in the state: who has not remarked the quite typical US argument on “the taxpayer’s money” (that should not be used at random, of course, by federal or other public authorities ...)? Quite simply, the point is again to highlight what appears as a kind of overkill when it comes to what may be expected from the judiciary – if needed, by limiting the freedom of action of the ordinary lawmaker.

ELEMENTS OF A PROPER EUROPEAN PERSPECTIVE

If we now turn to a kind of ideal-type European constitution, how would it appear in contrast to what has just been said about relevant parts of the US constitutional system?

A first point might be that Europeans generally seem to insist much more on the importance of the ordinary lawmaker than their fellow Americans. Of course this appreciation varies from one part of the Continent to another, as from one country to the next. For instance, we know about important differences between “old” and “new” democracies or between “northern” and “southern” polities; unfortunately, such differences have gained actuality in the present times of social and financial crises. But in almost every case, the legislative machinery tends to function in the sense of actually producing legal texts (whether good or bad is quite another matter).

This tends in itself to ease the burden of the judiciary when it comes to American-inspired (expectations of) constitutional engineering or reform in the form of adjudication on behalf of “principle” or “moral judgment”. Within limits we all know, dissatisfaction may generally be channeled through ordinary political forums highlighting elections and debate, not adjudication.

Another characteristic of most constitutional review systems in Europe is the presence of specialized judges selected according to more or less open political criteria, but without the collective biases often produced by the hap-hazards of presidential elections and the absence of limitations in time for the function as a supreme court judge known from the United States.

Among the typical patterns of European systems of judicial review are systems of selection on political grounds that at the same time tend to ensure some balance between such fractions within the court that might emerge along party political lines, and a system of rotation ensuring a minimum of accommodation between the changing political landscape as expressed through elections. When such elements are combined with the quite evident efforts of such courts to justify their decisions on strictly legal grounds, it is understandable that the legitimacy of many of these courts in terms of popular support (“sociological legitimacy”) has become quite solid indeed.

It is true that even the US Supreme Court ranks high on opinion polls when it comes to popularity or trust. But it may well be that this status is due inasmuch to weaknesses in other parts of the US constitutional system (see above) than to the way the Court is composed or actually operates.

Of course exceptions to the prevailing “European” model with specialized constitutional courts exist, like in Ireland and the Scandinavian countries (in particular Norway), where the ordinary supreme instances may adjudicate even matter on constitutionality. But none of them comes close to the US example regarding the way they are staffed, nor do they enjoy the same latitude for picking cases from an overwhelming number of petitions. A number of other differences may be mentioned as well, namely when it comes to procedure and to the prevailing modes of reasoning and justification.

It is true that most constitutional courts in Europe enjoy formal powers not bestowed upon the US Supreme Court: They decide with formal effect not only between the parties to the case, but with effects *ergo omnes*, including the ordinary lawmaker and other organs of the state. This fact tends to make them more like “positive legislators” than ordinary courts with formal jurisdiction *inter partes* only (Brewer-Carias, 2011).

For evident reasons, this power tends even more to reduce the difference between political and judicial law-making in a way that may give rise to concern. These concerns are not

really eased by the fact that the practical importance of the distinction between formal and real effects is smaller than the point of departure invites us to believe: In well established constitutional democracies, clear conclusions by the highest judicial instance will normally be accepted as determining the meaning of the constitution with *de facto* effects more or less equal to those produced in systems that formally are of an *erga omnes* character.

CORRECTING JUDICIAL CHOICES?

The most important difference may nevertheless be the one to which we will now turn: Formally, most European constitutions are relatively flexible according to formal criteria for amendment like stake-holder institutions, time and majority requirements. Moreover, the constitution of most (if not all) European countries, the constitution is rather flexible even in practical terms: As a matter of fact, amendments to the constitution are not at all rare. From time to time amendments are adopted even in order precisely to “correct judicial choices” for the future; examples include constitutional amendment following decisions by the *Conseil constitutionnel* on the non-compatibility between upcoming treaties on European integration and the French constitution.

The US record is radically different: What has just been said about European constitutions opens up the possibility for amendments in situations where the judge has provided answers that a (sufficient) majority within the political spectrum finds unacceptable as commands for the future. No such tool is available to the political branches of the US government.

Of course amendments with the effect of changing the outcome of judgments detrimental to individual parties directly concerned would not be acceptable even if formally “validated” by constitutional amendment; needless to say that the opposite would flagrantly contradict one of the most fundamental components of the rule of law or *Rechtsstaat* ideology.

Insofar as only *erga omnes* effects are concerned, however, the diagnosis becomes different: In the end, judicial review is about defining the substance of the constitutional norms at stake. When deciding the individual case, the judge cannot avoid building on a “prejudicial” definition of the relevant norms: Before applying the constitution, you need to know what it says. The substance of such norms as identified by the judge is precisely what may be changed for the future while following the proper procedure for constitutional amendment.

The eminent French scholar and sometimes member of the *Conseil constitutionnel*, Georges Vedel, once said that the legitimacy of the constitutional judge lies in the fact that he does not have the last word about the future meaning of the constitution (Vedel 1992, translated into English in Smith 1995). Interestingly enough, the postscript to the 1994 edition of Hart’s influential *The Concept of Law* expresses a similar view (Hart 1994: 275-276).

A part of Vedel's statement may be quoted for the occasion (my translation):

"If judges do not govern, it is because at any given moment the sovereign, on condition that he appears in majesty as the Constituent, may [...] quash their judgments".

The point is of course that the applicable constitutional norm itself – be it presupposed or the outcome of adjudication – may be changed with effect for the future. The idea generally holds within Europe (as in many other parts of the World). It is of little or no relevance for the appreciation of the American "model" of judicial review.

APPLYING THE CONSTITUTION OR RATHER MORAL PRINCIPLES?

A part of this line of reasoning that is not frequently spelled out is the expectation that the constitutional judge will accept the amended constitution as the point of departure when deciding future cases. In the next run, this presupposes a kind of a "positivist" approach to constitutional interpretation.

If by contrast the judge adopts a more far-reaching attitude in favor of "principles" or "moral reasoning" in the sense of taking upon him parts at least of the task of adapting the constitution to changing needs or circumstances, the argument about the possibility of correcting judicial choices is weakened: Why should we believe that the basic attitude would be more "positivist" or loyal towards the new constitutional text than it used to be before the amendment was adopted?

One answer to this question might be that a lot of the literature on constitutionalism and constitutional interpretation inspired by the US experience is preconditioned, at least to some extent (but generally without saying), by the high age of most of the right's provisions of the constitution. This pretext for moving towards "moral reasoning" would clearly change if applied on "new" provisions about rights (or any other constitutional matter) in a way likely to put the "activist" judge (or professor) in a much more delicate position.

It seems reasonable to assume the situation is generally different in Europe at this point as well. Not only is the average age of the relevant constitutions considerably lower. It even seems that the prevailing ideas about constitutional interpretation has little or nothing to do with such far-reaching versions of the "moral reasoning" approach so often found in US (or US inspired) literature (see above). Notwithstanding the high age (1814) of that constitution and of a certain amount of its provisions, this is true even for Norway.

Approaches to constitutional interpretation are likely to depend on a totality of factors. A few have already been mentioned. A more extensive list would have to include elements like the history and pre-established traditions of the relevant polity, which concept of democracy prevails and the symbolic strength or weaknesses of the given

constitution. Altogether, the style of interpretation depends on the entire constitutional culture (Smith 2003b). Within the spectrum of regime continuity: Is that culture likely to change profoundly with the age of given constitutional provisions?

ON THE POSSIBILITY OF A “POSITIVIST” LEGAL APPROACH

According to a thought-provoking British political scientist interested in constitutional matters, “judges play a necessary role in upholding legality” (Bellamy 2007: 7). It seems reasonable to think that the word “legality” in the quotation means “conformity with ordinary law” (like acts of Parliament).

The legitimacy or binding nature of such acts builds upon their origin in political decision-making by parliament, which in the next turn is designed by the electorate, and so on. The same goes for norms enshrined in written constitutions – and ideologically even more so because they have frequently been adopted by referendum or some other more demanding procedure not applicable to ordinary law.

Why then should judges not “play a necessary role in upholding” even constitutional norms? Paraphrasing some of the key points of what I have written elsewhere (including, but not exclusively, Smith 1995 and Smith 1999), a sketch of an answer to this question may look like this:

In the wake of the era of modern constitutions, the idea that constitutions should serve as positive law in the sense of being within the cognizance of judges was atypical (to put it mildly). That’s the reason why what happened by the famous *Marbury v Madison* (1803) decision of the US Supreme Court, as by similar decisions by the Norwegian Supreme Court a few years later, was not first and foremost to establish a system of judicial review. Much more fundamentally, what occurred was the elevation of the constitution to the rank of positive law in the sense of being applicable by judges acting independently of the other branches of government.

In principle at least, this move depends upon a choice of a genuinely political nature. Only when the constitution is admitted within the positive law of the relevant polity, it becomes meaningful to question the existence or extent of judicial review. By the same token, Bellamy’s statement about the necessity of judges to uphold “legality” becomes pertinent even in the field of formal constitutions.

If “constitutions” are regarded as sets of ideal norms or principles, this gives rise to a number of further problems to which we have already had the opportunity to hint. The same goes if the “constitution” is regarded as a set of century-old provisions the substance of which can be changed in practice by more or less fanciful re-interpretation without waiting for formal amendment.

The legitimacy of or even need for similar activities is a typical, albeit often implicit element of wide-spread assumptions about the US Constitution. In Europe (including Norway, with its constitution dating back to 1814 but frequently amended), this would seem rather odd: It is not only in former communist countries that constitutions are more properly understood as “instruments of change” (Smith 2003a) than as stone tablets more or less impossible to amend. The burden placed upon the instances charged with interpreting the actual text of the constitution may be similarly eased.

Constitutions emerge from political decision-making. They are frequently best understood as political instruments with a rather limited life expectancy (Elkins 2009). In this respect, they are pretty much like ordinary acts of parliament. If they may nevertheless be more powerful than the latter, it is because bestowed with a superior rank within the hierarchical system of legal norms belonging to the same polity. The main source of such a rank is more demanding amendment procedures.

If they are supposed to have binding effect, some opportunity to approach constitutional judges is more or less unavoidable. But this is certainly not because adjudication would (or should) normally be the sole or most important guarantees of constitutional “legality”. The point is rather that individual cases are more credibly dealt with in other forums than those dealing with day to day politics.

On the other hand, Bellamy (2007: 7) even affirms that judges “cannot ensure the laws themselves are not arbitrary”. This may be read as a positivist legal statement in the sense that judges should apply the law according to what may be qualified as a “loyal” reading. Implicitly, the statement insists on the idea that judges themselves should not create the “substance” of the law (and even less: that of the constitution).

A legal norm is not necessarily good just because adopted as “constitutional” in the sense of resulting from political decision-making according to given procedural norms. In reasonably decent systems of government, however, judgment about “the good” or “the bad” should normally belong to politics, moral philosophy or the like, not to the business of law *stricto sensu*. It may be argued that this becomes more important the more demanding procedures for constitution-amending apply.

On the other hand, rule of law (including constitutional law) without elements of rule of man is hardly conceivable. This goes even if we deny the legitimacy of (open) moral reasoning as the basis for judicial decision-making. How do we then cope with the personal factor necessarily involved in judicial review as well?

A first step might be to distinguish between norms and their application on particular facts. Because the judge cannot decide individual cases without defining the precise meaning of the norm to apply, no sharp limits between the two is available. But this is

different from admitting that a degree of vagueness gives *carte blanche* for more or less unfettered judicial activism. Perhaps we could further distinguish between the roles of the constitutional judge as positive legislator *en gros* (in constitution-amending and/or ordinary law-making) and *en detail* (inevitable for the courts).

Other elements of a discussion on the *democratic legitimacy* of judicial review of legislation (Smith 1995) would include arguments on procedure (unlike parliaments, the judge is bound to listen to the individual parties) and the need for justification by reference to the kinds of political decisions called “constitution” or “statute” (in quite another manner than, say, parliamentary majorities).

For many reasons, including unequal access to justice, no such argument may be regarded as sufficient in itself, neither would no single argument be able to demonstrate that the judge (paraphrasing *Montesquieu*) is but *la bouche qui prononce les paroles de la constitution* (the mouth that pronounces the words of the constitution). Most of us would agree that the judges’ personality, personal values, etc. may inevitably influence the outcome of certain cases; such influences are probably even to be welcomed in order to avoid a judiciary being blind and deaf.

Should the constitutional judge nevertheless come up with constitutional interpretations that the political branches find difficult to accept, the final argument should be recalled: As already pointed out, the possibility of correcting judicial choices (on the level of the norms underpinning individual decisions) through constitutional amendment is generally open in constitutional systems in Europe, formally as well as in practice. This fact ought to make (legitimate) distrust in the capacity of judges as philosopher-kings or the like considerably more easy to bear. Again, the US constitution is different.

HOW ABOUT TREATY OBLIGATIONS AS SPELLED OUT BY (INTERNATIONAL) JUDGES?

At present, international treaties extensively add to domestic constitutions as instruments for constraining day-to-day politics in Europe. In the United Kingdom, such instruments may be seen as means for filling in gaps left open by the absence of a written constitution with a *lex superior* status towards parliamentary enactments. In the rest of Europe, they may be regarded as supplements to the formal constitution.

Both situations give rise to some of the same concerns as those likely to be created by judicial review in constitutional democracies. This is namely so when treaty obligations may be adjudicated by judges in a system where an international or even supra-national court is bestowed with the last word. The supra-national elements of the European Union and the European Convention of Human Rights are the most important examples. We will stick to the largely to the last, most pan-European of the two.

In cases where the protection of rights, etc. rests on the relevant constitution or other domestic instruments, a possibility for the political branches to correct judicial choices for the future would generally be open, in the last instance through constitutional amendment.

When the norm of reference for the review is found in the European Convention, no similar possibility of correcting judicial choices exists: Unlike a constitution, an international treaty can only be amended with the agreement of all the parties to the treaty. In real life, no such possibility seems available within the European political space. By consequence, the relevant government might have either to submit to the outcome provided by the European court of human rights or leaving (parts of) the system ... and presumably paying the political price.²

The dilemma increases when we take into account that submitting to the Convention means leaving the last word to the appreciation of a court that cultivates the idea of the treaty as a “living instrument” in the sense that its meaning is bound to develop or even change over time.

To some extent, a similar approach comes close to the way the US Supreme Court has actually been operating during some periods of time on behalf of a constitutional text that is equally rigid, albeit for different reasons. Largely inspired by a “moral reasoning” approach, ideas insisting on the judge’s right or even responsibility to finding the “right” choices even when they are hard to justify by reference to the text on which the review is supposedly based have spread widely over the Western World.

In both cases, the absence of a possibility for the political branches of government to correct judicial choices by amending the norms of reference gives rise to similar concern. The concern loses considerable parts at least of its pertinence when it comes to judicial review of the constitutionality of ordinary legislation in most constitutional democracies in Europe.

CONCLUSION: “JUDICIAL SUPREMACY”?

Does judicial review of legislation imply “judicial supremacy” (in the field of constitutional law), as so often suggested? The answer depends not only on what is meant by the key expression and on the constitutional systems within which the constitutional judge is operating. The distinction between the outcome of individual cases and the constitutional norm to apply may be even more important.

It should go without saying that the judiciary is “supreme” in settling the final outcome of individual cases. If not, the rule of law itself fades away.

When it comes to the most important question about the substance of constitutional norms

² Quite another matter is it that the European Court of Human Rights certainly is aware of criticism from the World in which it operates. For the occasion, we even leave aside the governments’ possibility of submitting reservations to the applicability of the relevant part of the Convention.

for the future, by contrast, the answer largely follows from what has already been said:

In genuine constitutional democracies in Europe, the judiciary is not “supreme”.³

In the United States, the answer might easily be the opposite one: Due to the rigidity of the US constitution, it is not at all far-fetched to regard the US Supreme Court as “supreme” – in the sense of final – when defining the meaning of the federal constitution. The same reason forcefully contributes to stressing the inadequacy of the US system of judicial review as a “model” for understanding the bulk of constitutional democracies within Europe.

By the fact that the European Convention of Human Rights cannot be amended unless on behalf of a pan-European consensus, the European Court finds itself in a more or less similar position. In this way, the most important part of the European system for the protection of human rights may seem paradoxical as an element within the constitutional systems in Europe, generally fine-tuned as they are when it comes to bestowing the last word about the future meaning of the constitution upon instances accountable to the electorate⁴.

3 Extensive use of so-called supra-constitutional clauses by the judiciary would entail the opposite answer insofar as such clauses are concerned. Quite simply, judicial decision-making at this point would eliminate the constituent power’s possibility to correct judicial choices with future effect.

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Согласно ведущей тенденции политической философии, решения от имени национального государства должны принимать субъекты, обладающие достаточной степенью политической репрезентативности (например, парламенты). В то же время идеология верховенства права / Rechtsstaat превратила доступность независимых судов в ключевой элемент демократической государственности. Однако в идеальном смысле вряд ли можно совмещать понятия “репрезентативности” и “независимости судебной системы”. Это одна из причин возникновения вопроса относительно “верховенства судебной власти”, в частности, в области конституционного правосудия.

Истоки идеи “верховенства судебной власти” находятся в американской правовой мысли. Следует отметить, что вопрос о возможности применимости опыта США в европейском правовом пространстве не является однозначным.

В дискуссиях часто используются являющиеся козырными ценностные понятия, одним из которых является “верховенство судебной власти”. Оно, вероятно, больше относится к представляющим “моральные обоснования” судьям, чем к судам, придающим важнейшее значение тексту Конституции. Подход “моральных обоснований” распространен в находящейся под влиянием США литературе относительно конституционного правосудия. Более того, осуществляющие конституционное правосудие судьи на практике играют менее доминирующую роль, чем это часто предполагается.

В ряду многочисленных различий между американским и европейским подходами в статье затрагивается также вопрос об относительном отсутствии обычного законодателя в американской системе и способах формирования и функционирования конституционного или верховных судов. Особое внимание уделяется чрезмерной жесткости Конституции США, что делает изменение позиции судов относительно будущего регулирования правоотношений почти невозможным путем внесения поправок в текст Конституции. Для того, чтобы измененный текст был эффективным, осуществляющий конституционное правосудие судья должен осуществлять свою деятельность надлежащим образом, не ставя основной акцент на “моральное восприятие” Конституции.

В отличие от большинства европейских конституций в Европейскую конвенцию по правам человека не могут вноситься поправки с целью изменения спорных позиций Европейского суда.

Таким образом, осуществляющие конституционное правосудие судьи в Европе вряд ли могут рассматриваться как “верховные”, когда речь идет об определении смысла конституционных положений. С точки зрения указанных стандартов статус Верховного Суда США или Европейского суда по правам человека является гораздо более уязвимым.

In Übereinstimmung mit der führenden Tendenz der politischen Philosophie müssen die Subjekte, die über einen ausreichenden Grad der politischen Repräsentanz verfügen (z. B. die Parlamente) Entscheidungen im Namen des Nationalstaates treffen. Gleichzeitig hat die Ideologie des Rechtsstaates die Zugänglichkeit unabhängiger Gerichte zum Schlüsselement eines demokratischen Staatswesens gemacht. Jedoch lassen sich die Begriffe «Repräsentanz» und «Unabhängigkeit der Gerichte» im idealen Sinne nicht vereinbaren. Dies ist eine der Ursachen der Entstehung der Frage nach dem «Vorrang der richterlichen Gewalt», insbesondere im Bereich der Verfassungsgerichtsbarkeit.

Den Ursprung der Idee des «Vorrangs der richterlichen Gewalt» findet man im amerikanischen juristischen Gedankengut. Es ist zu erwähnen, dass die Frage nach der Möglichkeit der Anwendung der Erfahrungen der USA im europäischen Rechtsraum keine eindeutige Antwort hat.

In Diskussionen werden axiologische Begriffe häufig als Trumpf verwendet, dazu gehört der «Vorrang der richterlichen Gewalt». Er bezieht sich wahrscheinlich eher auf die Richter, die «moralische Begründungen» machen, als auf die Gerichte, die die wichtigste Bedeutung dem Text der Verfassung zumessen. Der Ansatz der «moralischen Begründungen» hat sich in der Literatur über die Verfassungsgerichtsbarkeit verbreitet, die unter dem Einfluss der USA steht. Mehr noch, die Richter, die die Verfassungsgerichtsbarkeit vertreten, spielen in der Praxis eine weniger dominante Rolle als angenommen.

Im Beitrag wird anlässlich zahlreicher Unterschiede zwischen dem amerikanischen und dem europäischen Ansatz auch die Frage der relativen Abwesenheit eines gewöhnlichen Gesetzgebers im amerikanischen System und der Mittel der Bildung und des Funktionierens des Verfassungsgerichts oder der obersten Gerichte behandelt. Eine besondere Beachtung wird der übermäßigen Härte der Verfassung der USA zuteil, die die Änderung der Position der Gerichte hinsichtlich der künftigen Regelung der Rechtsverhältnisse mittels Änderungen im Verfassungstext so gut wie unmöglich macht. Für die Effektivität des abgeänderten Textes muss der Richter in der Verfassungsgerichtsbarkeit seine Tätigkeit angemessen ausüben, ohne den Schwerpunkt auf die «moralische Wahrnehmung» der Verfassung zu legen.

Im Unterschied von den meisten europäischen Verfassungen können in der Europäischen Menschenrechtskonvention keine Änderungen zwecks Änderung der streitigen Positionen des Europäischen Gerichtshofs für Menschenrechte vorgenommen werden.

Die Richter der Verfassungsgerichtsbarkeit in Europa können somit kaum als «oberste» Richter betrachtet werden, wenn es um die Bestimmung des Sinns der Verfassungsvorschriften geht. Vom Standpunkt der genannten Standards aus ist der Status des Supreme Courts der USA oder des Europäischen Gerichtshofs für Menschenrechte viel angreifbarer.

Selon la tendance directrice de la philosophie politique, les décisions au nom de l'État national doivent être adoptées par les sujets dont le degré de représentation politique est suffisant (les parlements, par exemple). En même temps, l'idéologie de la primauté du droit (*Rechtsstaat*) a transformé l'accessibilité des tribunaux indépendants en un élément clé de l'Etat démocratique. Cependant, dans le sens idéal, il n'est guère possible de combiner les notions de la «représentativité» et de «l'indépendance du pouvoir judiciaire». C'est l'une des causes de l'apparition de la question de «la primauté du pouvoir judiciaire», particulièrement dans le domaine de la justice constitutionnelle.

C'est dans la pensée juridique américaine que nous trouvons les origines de l'idée de la «primauté du pouvoir judiciaire». Il convient de noter que la question de l'applicabilité de l'expérience américaine dans l'espace juridique européen n'est pas incontestable.

Lors des discussions sont souvent utilisés les concepts de valeur dont l'un est la «primauté du droit». Ceci convient probablement plus aux juges présentant les «fondements moraux» qu'aux tribunaux qui accordent beaucoup d'importance au texte de la Constitution. L'approche des «fondements moraux» est propagée dans la littérature sur la justice constitutionnelle influencée par les Etats-Unis. En outre, dans la pratique, les juges qui accomplissent la justice constitutionnelle jouent un rôle moins important que ce qui est souvent supposé.

Parmi les nombreuses différences entre les approches américaines et européennes, l'article soulève la question de l'absence relative du législateur ordinaire dans le système américain et des modalités de formation et de fonctionnement des cours constitutionnelles ou des cours suprêmes. Une attention particulière est accordée à la rigidité excessive de la Constitution américaine, ce qui rend presque impossible tout changement de position des cours visant la réglementation des relations juridiques à travers la modification du texte de la Constitution. Pour que le texte amendé soit efficace, le juge qui accomplit la justice constitutionnelle doit mener ses activités correctement, sans mettre l'accent sur la «perception morale» de la Constitution.

Contrairement à la plupart des constitutions européennes, la Convention européenne des droits de l'homme ne peut pas être amendée aux fins de modification des positions controversées de la Cour européenne.

Ainsi, les juges accomplissant la justice constitutionnelle en Europe peuvent difficilement être considérés comme des «juges suprêmes» quand il s'agit de la définition du sens des dispositions constitutionnelles. Du point de vue des standards susmentionnés, le statut de la Cour suprême américaine ou celui de la Cour européenne des droits de l'homme est beaucoup plus vulnérable.

VOLKOV VS. UKRAINE AND THE VENICE COMMISSION'S APPROACH TO STRUCTURAL INDEPENDENCE OF THE JUDICIARY ¹

Gianni BUQUICCHIO, Schmutz Rudolf DÜRR

- 1 *Structural judicial independence as an individual human right*
- 2 *Development of the Venice Commission's doctrine on judicial independence*
- 2.1 *A doctrine first developed in country-related opinions*
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STRUCTURAL JUDICIAL INDEPENDENCE AS AN INDIVIDUAL HUMAN RIGHT

The organization of the judiciary – the appointment of judges, their promotion, their remuneration, judicial discipline – is usually seen as an implementation of the principle of the rule of law, which is one of the three pillars of the Statute of the Council of Europe together with democracy and human rights protection.

Democracy, the protection of human rights and the rule of law are of course closely intertwined: real democracy is unthinkable without the protection of human rights and the rule of law. Substantial rule of law includes elements of the democratic creation of the law and at least the right to a fair trial. Human rights, as set out in the European Convention on Human Rights include of course the right to a fair trial and the democratic right to vote under Article 3 the First Protocol to the Convention.

¹ This article reflects the views of the authors only and does in no way engage the Council of Europe or the Venice Commission.

While there are also monitoring mechanisms for the other two pillars, the mechanism for the protection of human rights is developed most thoroughly by the European Convention on Human Rights and the case-law of the Strasbourg Court.

The Court's recent judgment *Volkov vs. Ukraine*² has highlighted that structural judicial independence is a key element of the right to a fair trial under Article 6 of the European Convention on Human Rights. Due to the nature of the Convention system, Article 6 is usually interpreted on a case by case basis, when the Court looks into the issue of the independence of the individual judge who decided a case that was brought before the Strasbourg Court.

In the *Volkov* case, the Court identified "structural deficiencies"³ in the proceedings before the High Judicial Council of Ukraine in a case relating to disciplinary proceedings against a judge of the Supreme Court:

"112. ... Given the importance of reducing the influence of the political organs of the government on the composition of the HJC and the necessity to ensure the requisite level of judicial independence, the manner in which judges are appointed to the disciplinary body is also relevant in terms of judicial self-governance..."

The *Volkov* case thus underlines that the whole judicial system surrounding individual judges is of direct relevance to the determination of the case at hand. In fact, *Volkov vs. Ukraine* is not a novelty, but *Volkov* gave the Court the opportunity to set out the principles to be applied in a clear manner. Even if the chamber case will be appealed to the Grand Chamber, the issue of structural independence will certainly remain an important topic for the Article 6 examination by the European Court of Human Rights.

What is structural independence of the judiciary and how can it – or rather how can its absence – influence the outcome of an individual case before a judge in any of the Council of Europe member states and what has the Venice Commission to say on that issue?⁴

This article examines the position of the Venice Commission in respect of the necessary 'ingredients' for structural judicial independence. In doing so, the authors rely both on elements drawn from opinions relating to the judiciary of individual countries and on general reports on judicial independence. When appropriate, the authors also make reference to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities⁵, which provides important guidelines on the structural independence of the judiciary.

² Application no. 21722/11.

³ Para. 117.

⁴ The present article further develops ideas presented in an earlier text of the authors: Buquicchio, Gianni / Dürr, Schnutz Rudolf, *European Standards for an Independent Judiciary in a Democratic State – Contribution of the Venice Commission*, in Csehi, Zoltán / Schanda, Balázs / Sonnevend, Pál, *Viva VoxIurisCivilis, Tanulmányok-SólyomLászlóTiszteletére 70. SzületésnapjaAlkalmából (Mélanges LászlóSólyom)*, Xenia-LibriAmicorum, UniversitasCatholicae de Petro PazmanyNominatae, Budapest (2012), pp. 105-118.

⁵ Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Minister's Deputies.

DEVELOPMENT OF THE VENICE COMMISSION'S DOCTRINE ON JUDICIAL INDEPENDENCE

Since its establishment in 1990, the Venice Commission⁶ has always insisted in its opinions and recommendations on the elements of structural independence of the judiciary. In its work, the judiciary – constitutional justice, but also the ordinary judiciary – always played a key role. No democratic system is conceivable without an independent judiciary and the judiciary is the starting point for any attempt to define the rule of law.⁷

A DOCTRINE FIRST DEVELOPED IN COUNTRY-RELATED OPINIONS

The Venice Commission built the key elements of its doctrine on structural independence of the judiciary through opinions on draft constitutions⁸ and in opinions on laws on the judiciary.⁹

To name but a few of the major topics which the Commission covered in opinions on individual countries, the authors refer to the status of prosecutors and especially their relations with courts¹⁰, judicial councils¹¹, the status of judges¹², their disciplin-

6 The Venice Commission, its real name being the European Commission for Democracy through Law, is an advisory body of the Council of Europe, composed of “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science” (Resolution(2002)3, Revised Statute of the European Commission for Democracy through Law, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers’ Deputies).

As a result of an Italian initiative within the Council of Europe, the Commission has its seat in Venice, Italy, which explains why it is referred to as the Venice Commission. It advises its 59 member States in Europe and beyond in matters of constitutional and international law (non-European full members are: Algeria, Brazil, Chile, Israel, the Republic of Korea, Mexico, Morocco, Peru, Tunisia and the United States. Belarus is associate member, while Argentina, Canada, the Holy See, Japan, Kazakhstan and Uruguay are observers. South Africa and the Palestinian National Authority have a special co-operation status similar to that of the observers). Upon request by its member states, the organs of the Council of Europe and other international organizations, the Venice Commission provides opinions on (draft) constitutions and legislation in the field of constitutional law in the wide sense, including legislation on the judiciary. Its opinions relate to specific countries, whereas reports are of a general nature. In the field of the judiciary, the Venice Commission also acts as a “service provider” to the constitutional courts and equivalent bodies (constitutional councils, supreme courts with constitutional jurisdiction). The Commission’s Joint Council on Constitutional Justice provides the means for a mutual exchange of information between courts through the on-line Venice Forum and information on case-law in its publications - the Bulletin on Constitutional Case-Law and the CODICES database (www.CODICES.coe.int). The purpose of these services is to promote “cross-fertilization” between the courts, which is conducive to the basic principles of the Council of Europe, democracy the protection of human rights and the rule of law.

7 CDL-AD(2011)003rev, Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011).

8 E.g. CDL(1995)044, Opinion on the provisions concerning the organization of the judiciary contained in the Transitional Constitution of the Republic of Albania and on related provisions (G. Malinverni).

9 E.g. Opinion on the reform of the judiciary in Bulgaria, adopted by the Commission at its 38th Plenary Meeting (Venice, 22-23 March 1999, CDL-INF(1999)005).

10 CDL-AD(2008)019, Opinion on the draft Law on the Public Prosecutors’ service of Moldova adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008); CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

11 CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

12 CDL-AD(2008)007, Opinion on the Draft laws on Judges and the Organization of Courts of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

ary liability¹³ and even aspects criminal procedure¹⁴.

In preparation for its general report on the independence of the judiciary, the Commission systematized its opinions in the draft *Vademecum* on the Judiciary.¹⁵ This *Vademecum*¹⁶ provided a first overview of the opinions adopted in the field of ordinary justice (as opposed to constitutional justice) by presenting citations from the opinions in a systematic manner. On the basis of the *Vademecum*, the Commission examined various topics linked to judicial independence.

GENERAL REPORTS – JUDICIAL APPOINTMENTS

While the Venice Commission always saw the independence of the judges as the central element of the rule of law in a democratic state, the opinions on individual countries did not provide the Commission with an opportunity to express its views in an abstract and comprehensive manner. The Commission was given an opportunity to do so when in 2007, the Committee of Ministers of the Council of Europe gave a mandate to the Consultative Council of European Judges (CCJE)¹⁷ to prepare an opinion on judicial appointments and to consult the Venice Commission on this issue.¹⁸

As an input to the preparation of the CCJE's "Opinion No. 10 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society"¹⁹, the Venice Commission prepared its own Report on Judicial Appointments²⁰, which took up ideas and principles already expressed in previous country opinions. The more abstract approach allowed the Commission to prepare a coherent text on a key element of judicial independence - judicial appointments.

The next opportunity to develop the Venice Commission's position came soon thereafter, in 2008. It was the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, which requested an opinion on "European standards as regards the independence of the judicial system". The most challenging aspect of this request was to present not only the existing *acquis*, but also proposals for future development.

13 CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

14 CDL(2000)013, Revised comments on the amendments to the Bulgarian Penal Procedure Code (J. Hamilton).

15 CDL-JD(2008)001.

16 Since 2011, the Venice Commission calls its overviews of opinions and reports "Compilations" (e.g. on Constitutional Justice – CDL(2011)048 or on Minorities - CDL(2011)018).

17 As opposed to expert committees composed of government representatives from the respective ministries, which usually prepare draft recommendations and conventions for the Committee of (foreign) Ministers of the Council of Europe, the Consultative Council of European Judges is an advisory body to the Council of Europe, composed exclusively of judges.

18 Terms of reference of the Consultative Council of European Judges (CCJE) for 2010 and 2011, Decisions adopted at the 1075th meeting of the Ministers' Deputies, 20 January 2010, Appendix 3, (Item 10.1).

19 Adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007).

20 CDL-AD(2008)028, adopted by the Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

Within the framework of its Sub-Commission on the Judiciary, the Commission prepared two partial reports, the first on the independence of judges²¹ and the second on the prosecution service²². In the present article, the authors cannot deal with the second report on the prosecution service, even if it contains many aspects, which – in the light of the close relationship between judges and prosecutors - are of relevance for judicial independence as a whole (the variety of models of organization of the prosecution service, the incidence of mandatory or discretionary prosecution, appointments, discipline, external and internal independence, including the possibility for an effective appeal against illegal instructions, public accountability and finally a warning against excessive powers of the prosecutor outside the criminal law field).²³

The Report was prepared taking into account Recommendation (94)12 of the Committee of Ministers, then still in force. In addition to providing an overview of European Standards to the Parliamentary Assembly, the Venice Commission's Report was also designed to provide input to the work of the Committee of Ministers of the Council of Europe in revising this recommendation, which resulted in the adoption of Recommendation CM/Rec(2010)12²⁴. When appropriate, we will therefore also refer to that Recommendation, without trying to be exhaustive.

ELEMENTS OF STRUCTURAL JUDICIAL INDEPENDENCE

Judges do not operate in a vacuum, but are part of a complex system of courts on various levels, from first instance courts and appeal courts to supreme courts²⁵. In addition to civil and criminal courts, in many countries there are specialized courts dealing for example with commercial, labour or administrative issues and some of them have their own hierarchic system of judicial instances. While there is no decision making hierarchy and no judge can give another judge instructions on how to decide cases²⁶, judges are dependent on others in a number of ways – as concerns their appointment, training, promotion, discipline and salaries, to name but a few. The procedures

21 CDL-AD(2010)004, adopted by the Venice Commission at its 82nd plenary session (Venice, 12-13 March 2010).

22 CDL-AD(2010)040, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

23 We also cannot refer here to the OSCE/ODIHR's Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, which were a point of reference for the Venice Commission in its Joint Opinion with ODIHR on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011, CDL-AD(2011)012).

24 Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Minister's Deputies.

25 The present article does not refer to Constitutional Courts, which are specialized in dealing constitutional aspects only. Often, constitutional courts remain outside of the judicial power, as set out in the various Constitutions. This does not mean, however, that many aspects of judicial independence would not relate to Constitutional Courts as well (see for example Recommendation CM/Rec(2010)12, para. 1). Often, constitutional courts differ however in the system of appointment and status of judges (see Venice Commission, The composition of constitutional court- Science and Technique of Democracy, no. 20 (1997), CDL-STD(1997)020).

26 On this topic see Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001), para. 69.

regulating these issues are highly relevant for determining, in a case at hand, whether a judge is really free to make a judgment in an independent and unbiased manner.

LEVEL OF REGULATION

The Venice Commission's Report, like Recommendation CM/Rec(2010)12²⁷, insists that the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts. This logic was applied in the Hungarian case:

“While some principles, as well as the general structure, composition and main powers of the National Council of Judges and National Judicial Office, should have been developed in the Constitution itself, most of the details could have been left to ordinary laws that do not require a qualified majority in Parliament.”²⁸

Regulations on a lower level lack appropriate guarantees, whereas regulations on a too high level are difficult to amend and can obstruct the necessary development of the judicial system.

APPOINTMENT SYSTEM

In its Report on Judicial Appointments, the Commission distinguished two major types of appointments – elective systems and direct appointment systems and warned against the dangers of the former. In particular, the Venice Commission was of the opinion that ordinary judges should not be elected by Parliament, because there was a great danger that “political consideration prevail over objective merits of a candidate”²⁹.

In its series of opinions on the judiciary of Bulgaria,³⁰ the Venice Commission regretted the complete replacement of the “parliamentary component” of the Supreme Judicial Council (11 out of the 25 members) after each change of parliamentary majority by simple majority vote. The Commission consequently called for an election of the parliamentary component of the judicial council by a qualified majority. The composition of judicial councils thus became one of the Commission's recurrent topics in the field of judicial independence (see further below).

The Commission preferred that the appointment of judges be made by an indepen-

27 Recommendation CM/Rec(2010)12, paragraph 7.

28 CDL-AD(2010)004, paragraph 22.

29 CDL-AD(2007)028, paragraphs 9-12.

30 CDL-INF(1999)005, Opinion on the Reform of the Judiciary in Bulgaria; CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, adopted by the Commission at its 51st Plenary Session (Venice, 5-6 July 2002); CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria adopted by the Venice Commission at its 56th Plenary Session (Venice, 17-18 October 2003); CDL-AD(2008)009 Opinion on the Constitution of Bulgaria adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009); CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, adopted by the Venice Commission at its 85th Plenary Session, Venice (17-18 December 2010).

dent judicial council.³¹ Appointments by the Head of State were however found to be acceptable, as long as he or she was bound by the decisions of an independent judicial council.³² Such a Council should have a “decisive influence on the appointment and promotion of a judge and [...] on disciplinary measures brought against them”³³.

JUDICIAL COUNCILS

A central point of the Report on Judicial Appointment dealt with the composition of judicial councils. While accepting that there is no standard model for such councils, the Commission recommended that they should have a mixed composition, with a “substantial element or a majority” of judges and other “members elected by Parliament among persons with appropriate legal qualification taking into account conflicts of interest.”³⁴ With this formula, the Commission tried to combine two conflicting principles. Judicial independence might be best served by a judicial council composed only of judges, but experience has shown that such councils tended to be lenient, especially in the field of judicial discipline, and when only judges appointed judges there was a danger of corporatism within a judicial caste, unaccountable to the public.

Referring only to the ordinary judiciary, the Venice Commission is of the opinion that an independent judicial council should have a “decisive influence on decisions on the appointment and the career of judges”³⁵. Recommendation Rec(2010)12 accepts that decisions are made by the head of state, the government or the legislative power, but calls for input from an independent and competent authority.

The Commission goes further than that by recommending that “states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.”³⁶ The Commission wants these judicial councils to take the final decision in judicial appointments, not limit them to making recommendations.

MIXED COMPOSITION, INVOLVING A NON-JUDICIAL COMPONENT

The other principle pursued was that of the uninterrupted chain of democratic legitimacy, developed in the German constitutional doctrine. According to this doctrine, all state bodies should have a direct or indirect link to the will of the sovereign people. By recommending to have part of the judicial council elected by Parliament, the Venice

31 However, the Commission was of the opinion that such a council should not be burdened with administrative organization of the judiciary.

32 CDL-AD(2007)028, paragraph 14.

33 CDL-AD(2007)028, paragraph 25.

34 CDL-AD(2007)028, paragraph 29.

35 CDL-AD(2010)004, paragraph 32.

36 *Idem*.

Commission sought to achieve a compromise between full judicial independence and democratic legitimacy of judicial appointments. The Commission limited the scope of Parliament's influence right away by insisting that active members of Parliament are not eligible. Moreover, a qualified majority vote should oblige the parliamentary majority to seek a compromise with the opposition. Ideally, they could settle on neutral candidates, but they would have to accept, at least, a balanced composition of the parliamentary component of the judicial council, which would include members close to the majority and others close to the opposition. On this point, ideas that were developed over the years in country opinions found their way into the general report on judicial appointments.

In the Venice Commission's Comments on the Draft Opinion of the Consultative Council of European Judges on Judicial Councils,³⁷ the Venice Commission had opted for the formula of "a substantial element or a majority" of judges as members a judicial council. The substantial element clause was intended to accept even slightly less than half of the members as judges. The CCJE however envisaged 75 per cent of judges as a minimum and admitted even judicial councils composed only of judges. In her comments pointing out this difference, Ms Suchocka explicitly referred to democratic legitimacy as the argument supporting a lower number of judges.

MEMBERSHIP OF THE MINISTER OF JUSTICE

Another issue that had come up in the Commission's opinions was the participation of the minister of justice in the judicial council and whether he or she should preside it *ex officio*. Not least because of the responsibility of the minister for the judiciary towards parliament, the Commission did not exclude the minister's participation in the council. Often, as a member he or she might be an instigator of reform, which would have to be implemented by the judicial council. However, because of his or her political mandate, the minister of justice should not participate in certain decisions, especially on judicial discipline.

The CCJE also had ruled out the participation of the Minister of Justice in the Council, admitted by the Venice Commission. For the CCJE, the president of the judicial council should be elected by its members from among the judicial members, whereas the Commission had preferred a non-judicial member as the council's president.³⁸ In expressing this view, the Venice Commission explicitly referred to the need to avoid "corporatist tendencies within the council".³⁹

MEMBERSHIP OF THE PROSECUTOR GENERAL

When the European Court of Human Rights held, in the *Volkov* case, that the role of the Prosecutor General in the disciplinary body was problematic, it specifically referred to the Venice Commission:

³⁷ CDL-AD(2007)032.

³⁸ CDL-AD(2007)032, paragraphs 11 and 13.

³⁹ CDL-AD(2007)028, paragraph 35.

“114. The Court refers to the opinion of the Venice Commission that the inclusion of the Prosecutor General as an ex officio member of the HCJ raises further concerns, as it may have a deterrent effect on judges and be perceived as a potential threat. In particular, the Prosecutor General is placed at the top of the hierarchy of the prosecutorial system and supervises all prosecutors. In view of their functional role, prosecutors participate in many cases which judges have to decide. The presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges of whose decisions he disapproves (see paragraph 30 of the Venice Commission’s Opinion cited in paragraph 79 above). The same is true with respect to the other members of the HCJ appointed by quota of the All-Ukrainian Conference of Prosecutors.”

In general, the Venice Commission is of the opinion that a separation of judges and prosecutors in judicial councils is required. When there is a single judicial council for both corps, chambers need to be introduced within the council to allow for such a separation.⁴⁰

INDEPENDENCE OF THE MEMBERS OF THE JUDICIAL COUNCIL – FULL TIME OCCUPATION

In its Volkov judgment, the European Court of Human Rights also criticized another aspect of the composition of the High Judicial Council (HJC), in particular that its members are dependent on their other occupation – including as judges:

“113. The Court further notes that in accordance with section 19 of the HCJ Act 1998, only four members of the HCJ work there on a full-time basis. The other members continue to work and receive a salary outside the HCJ, which inevitably involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality.”

This means that the members of a judicial council should work on a full-time basis in order to avoid possible pressures stemming from their other employment.

PROBATIONARY PERIODS

The report on judicial appointments takes a clear stance against probationary periods for judges, because the Commission found that probation can “undermine the independence of judges”. In its country related opinions, the Commission was often confronted with constitutional provisions setting out such probationary periods. The last such opinion relates to Ukraine and was adopted in October 2011, just at the moment when the former Prime Minister of Ukraine, Ms Tymoshenko, was condemned to a seven year

⁴⁰ CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), para. 21; CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), para. 66.

prison sentence by a judge during his probationary period. The Commission was of the opinion that “it should be ensured that judges in these temporary positions cannot be appointed to deal with major cases with strong political implications”⁴¹.

Some countries, unfortunately, go as far as to regulate probationary periods for judges on the level of the constitution. In order to overcome the problem that the laws, which the Commission assessed, could not contradict the constitution, the report recommended in such cases to quasi assimilate the non-confirmation of a judge in a probationary period to dismissal and called for the same guarantees as those against dismissal: citing its opinion on “the Former Yugoslav Republic of Macedonia”, the Report on Judicial Appointments states that a “refusal to confirm a judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is removed from office”⁴².

The Committee of Ministers’ Recommendation demands that decisions on probationary periods for judges “be based on objective criteria pre-established by law or by the competent authorities”⁴³. The Venice Commission has a stronger view on this point and recommends that judges be appointed permanently because probationary periods are “problematic from the view of independence”⁴⁴.

DISCIPLINE

In its Opinion no. 10, the CCJE had opted for disciplinary measures to be adopted by a judicial council reduced in its membership to judges only.⁴⁵ Here, the Venice Commission had a different approach. Because of the perceived leniency of ‘judges-only’ disciplinary boards, the Commission was of the opinion that disciplinary measures should be adopted in a mixed composition. The idea was that non-judicial members were more likely to hold a judge accountable than his or her peers. However, the judge sanctioned should have the possibility to appeal these measures to a court of law.⁴⁶

As concerns disciplinary proceedings, the Commission’s Report on Judicial Independence confirms the position of the Venice Commission that decisions should be made

41 CDL-AD(2011)033, Joint Opinion on the Draft Law amending the Law on the Judiciary and the Status of Judges and other Legislative Acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), paragraph 49. See also ECtHR, case of Miroslaw Garlicki v. Poland (application no. 36921/07).

42 CDL-AD(2007)028, paragraph 41, referring to CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the reform of the Judicial System in ‘the Former Yugoslav Republic of Macedonia’, paragraph 23.

43 CM/Rec(2010)12, paragraphs 51 and 44.

44 CDL-AD(2010)004, paragraph 38.

45CCJE, Opinion no. 10 on the Council for the Judiciary at the Service of Society, para. 20.

46 CDL-AD(2008)028, paragraph 14.

by an appeal to a court against decisions of disciplinary bodies.⁴⁷ Without explicitly referring to a court, the Committee of Ministers also recommends to “provide the judge with the right to challenge the decision and sanction”⁴⁸. The Committee of Ministers also insists that such proceedings be conducted with all the guarantees of a fair trial and that sanctions be proportionate.

In the Volkov case, the European Court of Human Rights held that the judicial review of disciplinary cases is problematic if the review judges themselves are subject to the disciplinary body, the decisions of which they review:

*“The Court observes that the judicial review was performed by judges of the HAC [High Administrative Court] who were also under the disciplinary jurisdiction of the HCJ [High Judicial Council]. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ’s independence and impartiality (as examined above), the Court is not persuaded that the judges of the HAC considering the applicant’s case, where the HCJ was a party, were able to demonstrate ‘the independence and impartiality’ required by Article 6 of the Convention”.*⁴⁹

This is an issue, which the Venice Commission has not yet examined. While this argument in the Volkov case is convincing, it is likely to be difficult to find a way to implement this requirement. Judges reviewing disciplinary cases would thus need a separate disciplinary system, which does not involve the disciplinary body, which is in charge of all other judges. This could finally result in a type of specialized group of “disciplinary judges”, with their own disciplinary system. It seems however too early to come to any conclusion on this complex issue.

BUDGET AND REMUNERATION

In its Recommendation Rec(2010)12, the Committee of Ministers calls upon member states to allocate adequate resources, facilities and equipment to the courts.⁵⁰ The Commission goes a step further by recommending that “the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council”.⁵¹

A major point of the Venice Commission’s Report on the Independence of the Judiciary deals with bonuses for judges. Based on the experience in some Eastern European coun-

47 CDL-AD(2010)004, paragraph 43.

48 CM/Rec(2010)12, paragraph 69.

49 Paragraph 130.

50 CM/Rec(2010)12, paragraph. 33.

51 CDL-AD(2010)004, paragraph 55.

tries, the Venice Commission feared that bonuses and the allocation of housing could be abused in order to influence a judge. Therefore, the Commission recommends that bonuses and non-financial benefits, which involve a discretionary element, be phased out.⁵² The Committee of Ministers recommends that “[s]ystems making judges’ core remuneration dependent on performance should be avoided as they could create difficulties for the independence of the judges”.⁵³ The reference to “core remuneration” seems to allow some performance based bonuses as long as they do not constitute a major part of the revenue.

Stable salaries for judges is an essential guarantee for their independence, not least to avoid the danger of corruption of judges. Recommendation Rec(2010)12 states that “Judges’ remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions.” The Recommendation is silent however on whether in exceptional cases of economic crisis, the salaries of judges could be reduced. The Venice Commission had to reply to this question in an amicus curiae opinion for the Constitutional Court of “the Former Yugoslav Republic of Macedonia”:

“... in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges’ salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge’s profession and his or her burden of responsibility. If the reduction does not comply with the requirement of the adequacy of remuneration, the essence of the guarantee of the stability of conditions of judge’s remuneration is infringed to a degree that the basic aim, pursued by that guarantee, i.e. a proper, qualified and impartial administration of justice is threatened, even leading to a danger of corruption.”⁵⁴

JUDICIAL IMMUNITY

Another issue, which the Commission had to address in its series of Bulgarian opinions, was judicial immunity. The Bulgarian Judiciary was rattled by allegations of corruption in the three branches of its magistracy: judges, prosecutors and investigators. Their immunity, similar to that of the members of Parliament, was deemed to be too wide. The Commission affirmed its position that judges should benefit only from functional immunity for acts performed in their judicial activity. Immunity should not shield them against intentional crimes such as taking bribes for handing down a favourable

⁵² CDL-AD(2010)004, paragraph 51.

⁵³ CM/Rec(2010)12, paragraph 55.

⁵⁴ CDL-AD(2010)038, Amicus Curiae Brief for the Constitutional Court of “The former Yugoslav Republic of Macedonia” on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), para. 20.

judgment. While pointing to the dangers of pressure on the judges, including from the prosecution, this position was further developed in the *amicus curiae* Brief for the Constitutional Court of Moldova on Judicial Immunity⁵⁵.

Following its line of development in country opinions, the Commission held that judges “should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)”⁵⁶. Without referring to immunity as such, the Committee of Ministers came to a similar result when it stated that the “interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice”⁵⁷, read together with paragraph 71 of the Recommendation, which says: “[w]hen not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen”.

CASE ALLOCATION

On the basis of Article 6 of the European Convention on Human Rights and the right to a lawful judge found in many constitutions, the Commission came to the conclusion that the possible abuse of the allocation of sensitive cases to compliant judges by court presidents, which had been observed in some countries, should be avoided by introducing automatic case-allocation systems. The Commission discussed in detail whether such systems should be recommended to all states, how such systems could be established and under which conditions exceptions were permissible. As a result of these discussions, the Commission “strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations”⁵⁸. While the term “to the maximum extent possible” admittedly weakens the recommendation, the Commission strengthened it by adding that: “Exceptions should be motivated”. In a similar vein, the Recommendation sets out that the “allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge”⁵⁹.

Case allocation was a central issue in the Opinion on the Judiciary in Hungary⁶⁰. The Commission stated:

55 CDL-AD(2013)008, *Amicus curiae* Brief on the Immunity of Judges for the Constitutional Court of Moldova Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).

56 CDL-AD(2010)004, paragraph 61.

57 CM/Rec(2010)12, paragraph 68.

58 CDL-AD(2010)004, paragraph 81.

59 CM/Rec(2010)12, paragraph 24.

60 Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001).

“The allocation of cases is one of the elements of crucial importance for the impartiality of the courts. With respect to the allocation of cases, the Venice Commission - in line with Council of Europe standards⁶¹ - holds that “the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law.”⁶² According to the ECtHR’s case-law, the object of the term “established by law” in Article 6 ECHR is to ensure “that the judicial organization in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament”.⁶³ Nor, in countries where the law is codified, can the organization of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.⁶⁴ Together with the express words of Article 6 ECHR, according to which „the medium” through which access to justice under fair hearing should be ensured must not only be a tribunal established by law, but also one which is both “independent” and “impartial” in general and specific terms [...], this implies that the judges or judicial panels entrusted with specific cases should not be selected ad hoc and/or ad personam, but according to objective and transparent criteria.”⁶⁵

„The order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed. In national legislation, it is sometimes provided that the court presidents should have the power to assign cases among the individual judges. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process.”⁶⁶

This means that an essential part of structural independence is a system which guarantees to the maximum extent possible that there is either no discretion at all in the allocation of cases or that court presidents or judges’ bodies allocating cases must follow stringent criteria. These criteria, in turn, could be subject to judicial review as part of an appeal against the decision made by the judge(s) to whom the case was assigned.

61 Recommendation CM(2012)12, paragraph 24. [footnote numbering within this citation follows the order in this article].

62 CDL-AD(2010)004, paragraph 81, 82.16.

63 See Zand v. Austria, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.

64 See Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paragraph 98, ECHR 2000-VII.

65 CDL-AD (2010)004, paragraph 77.

66 CDL-AD(2010)004, paragraph 79.

CONCLUSION

The judgment of *Volkov vs. Ukraine* by the European Court of Human Rights confirms that the right to a fair trial under Article 6 of the Convention not only depends on the circumstances of the individual case, but also on whether there are sufficient guarantees for structural independence of the judiciary. Only when such guarantees are in place, a fair trial can take place in an individual case.

This article highlighted a few aspects of structural judicial independence and presented the Venice Commission's views on these standards, in particular those related to judicial appointments including the composition and work of judicial councils, permanent tenure and judicial discipline.

The doctrine of the Venice Commission in the field of judicial independence evolved from country-related opinions on specific topics, to a general approach, first on judicial appointments only and then covering a wider range of issues. This evolution was both gradual and coherent as from the outset it was based on the common constitutional heritage and applicable European standards.

The Venice Commission found that in the new democracies which it assists, the establishment of an independent judiciary often proved to be even more difficult than setting up other democratic institutions such as a pluralistic parliament or a functioning electoral system. The reasons for these persistent problems are complex, starting with a low esteem of the profession of judges in some countries, an overwhelmingly strong position of prosecutors, underfunding of the judicial system and problems of corruption as a consequence, to name but a few.

While the Venice Commission did not cover all aspects of the life of the judiciary, its opinions and reports were always geared towards assisting its member states, both in old and new democracies, in establishing and further developing a judiciary that is independent and provides an impartial service to all. Democracy is unthinkable without an independent judiciary. An independent judiciary is the core of the rule of law. *Volkov vs. Ukraine* has reminded us that an independent judicial system is also a directly applicable human right.

Постановление Европейского суда по правам человека по делу “Волков против Украины” свидетельствует о том, что право на справедливое судебное разбирательство, предусмотренное статьей 6 Конвенции, зависит не только от обстоятельств конкретного дела, но и от того, имеются ли достаточные гарантии структурной независимости судебной власти. Только при наличии таких гарантий можно говорить об осуществлении справедливого судебного разбирательства по каждому конкретному делу.

В статье рассматриваются некоторые аспекты структурной независимости судебной системы и представляются позиции Венецианской комиссии относительно этих стандартов, в частности по поводу назначения судей, включая состав и деятельность судебных советов, осуществление полномочий на постоянной основе и судебной дисциплины.

Доктрина Венецианской комиссии относительно независимости судебной власти развивалась посредством представления касающихся конкретных государств мнений по поводу определенных вопросов, в результате чего сначала был сформулирован общий подход о назначении судей, а затем – охватывающий более широкий круг вопросов. Это развитие позиций было постепенным и последовательным, так как с самого начала в его основу было положено общее конституционное наследие и действующие европейские стандарты.

Венецианская комиссия пришла к заключению, что в новых демократиях, которым она оказывает содействие, создание независимой судебной системы часто оказывается труднее, чем учреждение других демократических институтов, таких как плюралистический парламент или функционирующая избирательная система. Причины этих существующих проблем комплексные: ненадлежащее отношение к профессии судьи в некоторых государствах, очень сильный статус прокуроров, недофинансирование судебной системы и вследствие этого – проблемы коррупции (и это лишь некоторые из них).

Несмотря на то, что исследования Венецианской комиссии не охватывают все вопросы относительно судебной власти, ее мнения и доклады были всегда направлены на оказание содействия государствам-участникам как старой, так и новой демократий в создании и дальнейшем развитии независимой и беспристрастной судебной власти. Демократия немыслима без независимой судебной системы, которая является основой верховенства права. Дело “Волков против Украины” еще раз указало на то, что независимая судебная власть также является непосредственно действующим правом человека.

Die Entscheidung des Europäischen Gerichtshofs für Menschenrechte im Fall *Volkov v. Ukraine* zeugt davon, dass das in Artikel 6 der Konvention vorgesehene Recht auf ein faires Verfahren nicht nur von dem konkreten Sachverhalt abhängt, sondern auch davon, ob ausreichende Garantien für eine strukturelle Unabhängigkeit der richterlichen Gewalt da sind. Erst wenn solche Garantien vorhanden sind, kann man von einem fairen Verfahren wegen konkreter Einzelfälle sprechen.

Im Beitrag werden einige Aspekte der strukturellen Unabhängigkeit des Gerichtssystems behandelt und die Auffassungen der Venezianischen Kommission über die entsprechenden Standards vorgestellt, die insbesondere die Ernennung der Richter, die Zusammensetzung und Tätigkeit der Justizräte, die Ausübung von Befugnissen auf einer konstanten Grundlage und die Gerichtsdisziplin betreffen.

Die Doktrin der Venezianischen Kommission hinsichtlich der Unabhängigkeit der Judikative hat sich auf dem Wege der Meinungsbildung über bestimmte Fragen in konkreten Staaten entwickelt; so ist zunächst eine gemeinsame Position zur Ernennung der Richter und danach auch zu einem immer weiteren Kreis von Fragen entstanden. Es war eine schrittweise und konsequente Entwicklung, die vom Anfang an auf dem gemeinsamen konstitutionellen Erbe und den geltenden europäischen Standards beruhte.

Die Venezianische Kommission kam zum Schluss, dass in den neuen Demokratien, die sie unterstützt, es oft schwieriger ist, eine unabhängige Justiz als andere demokratische Institute wie etwa ein pluralistisches Parlament oder ein funktionierendes Wahlsystem, zu schaffen. Diese Probleme haben komplexe Ursachen: unangemessene Einstellung zum Richterberuf in einigen Staaten, sehr starker Status der Staatsanwälte, nicht ausreichende Finanzierung der Gerichte und als Folge davon Probleme der Korruption (dies ist keine abschließende Aufzählung).

Obwohl sich die Venezianische Kommission nicht mit allen Angelegenheiten auseinandersetzt, die die Judikative betreffen, waren ihre Meinungen und Berichte immer auf die Unterstützung der Mitgliedsstaaten – der alten und neuen Demokratien – bei der Schaffung und Fortentwicklung einer unabhängigen und unparteiischen richterlichen Gewalt gerichtet. Die Demokratie ist ohne eine unabhängige Justiz undenkbar, auf die sich der Vorrang des Rechts gründet. Der Fall *Volkov v. Ukraine* hat wieder einmal gezeigt, dass eine unabhängige Judikative auch ein unmittelbar geltendes Menschenrecht ist.

La Cour européenne des Droits de l'Homme en adoptant l'arrêt «Volkov c. Ukraine» témoigne de ce que le droit à un procès équitable garanti par l'article 6 de la Convention dépend non seulement des circonstances de l'affaire, mais du fait que les garanties suffisantes d'indépendance structurelle des tribunaux sont mises en place. Parler d'un procès équitable pour chaque cas particulier n'est possible qu'en cas d'existence de telles garanties.

L'article traite de certains aspects de l'indépendance structurelle du système judiciaire et présente la position de la Commission de Venise sur ces standards, en particulier, en ce qui concerne la nomination des juges, y compris la composition et le fonctionnement des conseils judiciaires, l'exercice permanent du pouvoir et de la discipline judiciaire.

La doctrine de la Commission de Venise sur l'indépendance du pouvoir judiciaire a évolué à travers les avis de la Commission sur des questions particulières qui ont concerné des États concrets, ce qui a conduit à la mise en place d'une première approche générale sur la nomination des juges, et en second lieu, a couvert une large gamme de questions. Ce développement des positions de la Commission a été progressif et continu, dès le début étant basé sur le patrimoine constitutionnel commun et les normes européennes en vigueur.

La Commission de Venise a conclu que dans les nouvelles démocraties, qu'elle promeut, la mise en place d'un système judiciaire indépendant est souvent plus difficile que la création d'autres institutions démocratiques, telles qu'un parlement pluraliste ou un système fonctionnel électoral. Les causes de ces problèmes sont complexes: une attitude inadéquate à l'égard de la profession du juge dans certains pays, le statut très fort des procureurs (ministres publics), le sous-financement du système judiciaire et de ce fait, les problèmes liés à la corruption (et ce ne sont que quelques-uns d'entre eux).

Bien que les études de la Commission de Venise ne couvrent pas toutes les questions relatives à la justice, ses avis et ses rapports ont toujours visés à aider les États-membres comme des anciennes, aussi des nouvelles démocraties dans l'établissement et le développement d'un système judiciaire indépendant et impartial. La démocratie est inconcevable en dehors du pouvoir judiciaire indépendant, qui est au fond de la suprématie du droit. L'affaire «Volkov c. Ukraine» a démontré de nouveau que l'indépendance du pouvoir judiciaire est aussi l'un des droits directs de l'homme.

INTERACTION OF NATIONAL AND SUPRA-NATIONAL JUSTICE

Valery D. ZOR'KIN

The activity of the supra-national judicial bodies requires permanent comprehension of their place in the globalizing world, analysis of forms of their interaction with national judicial bodies, their influence on the national legal systems, mechanisms of settling unavoidable conflicts between national and supra-national levels of justice. Such comprehension is closely connected with interpretation of basic notions, lying in the basis of modern world system: supremacy of law, human rights, sovereignty and its delegating etc.

JUDICIAL ACTIVISM (“LAW OF THE JUDGES”)

The problem of interaction of the intra-State (national) and the inter-State (supra-national) judicial bodies is particularly actual in the context of constant actual extension of the field of competence of the judicial power. This phenomenon, having received the name of judicial activism (“law of the judges”), is typical not only for courts of international and regional scale, but for national courts too. This phenomenon reflects the growth of public significance of justice in the rapidly changing modern world and appearance of new public demands, to which the legislative power is not always able to react opportunely and adequately. This determines changes in the approach to the place and role of a court (and a judge) in the legal system, to the interrelation of functions of the legislative and judicial authorities. Such changes we observe, first of all, on the intra-State level – in all legal systems, irrespective of historically formed interrelation of legislative acts and the judicial power. The role of higher judicial bodies as instances directing the development of the legislation is changing proceeding from problematic legal relations in various fields, revealed in the judicial practice.

In the context of the problem considered above particular role in the process of development of law, determining of its main direction belongs unconditionally to the constitutional courts, whose activity, going beyond the limits of the classical theory of separation of powers, is aimed at constructing of a system of legal co-ordinates, corresponding to constitutional notions about the due in all fields of normative regulation of social life.

Herewith it is necessary to fully take into account the fact that on the level of supra-national judicial bodies significant improvements are also being observed with regard to self-determination of the supra-national judicial bodies in the questions of their role and

their place in the global legal order and as a consequence – changes in the interrelations of the national and the supra-national levels of justice.

The following may be singled out among the reasons of these phenomena:

- globalization of the concept of human rights, its adoption in all legal systems, in all types of political regimes;
- extension of the subjective composition of international law taking place in the last few decades, in particular, inclusion in their list, equally with collective subjects (States, nations), the individual in the proper sense as well, and broadening the very list of States joining the unified supra-national model of legal regulation in various fields.

Dissemination of the universal humanitarian system of values is a positive effect of this process. But, on the other hand, this process is linked to changes of the primordially built up concepts of the protected “universal rights”, sometimes leading to their inflation. Concrete content of modern human rights begins to be more often determined proceeding from subjective outlooks, reflecting the views of some or other political and social groups, the groups of States according to geographic sign or even groups of individual personages.

Besides, a rather technical, but very important problem of overloading of the supra-national judicial bodies, incarnating the control mechanism of the human rights protection system, can be ascribed to the negative effects of the abovementioned extension.

All the tendencies adduced above particularly clearly manifest themselves in the activity of the European Court of Human Rights as the brightest representative of a supra-national body of the “new generation”.

Today the future of the European system of human rights protection and the role of the European Court as a control mechanism of this system are actively discussed on the whole European space. In particular, these issues were actively discussed at the high level conferences devoted to the ECHR's future – in Interlaken in 2010, in Izmir in 2011 and in Brighton in 2012.

In the question of “the future of the Strasbourg Court” two extremities revealed themselves. Some view through rose-colored spectacles and see gracious picture. They accept no discussion and the slightest critical analysis interpret as “infringement of sanctities”. But I am afraid that others can provoke the discontented to excessive activity in criticizing the ECHR. It would hardly be correct. For Russia, in any case, there are no grounds to be more active in this question than the countries of the West. I consider it as my duty to expound my understanding of the situation.

TECHNICAL ASPECT OF THE ECHR'S ACTIVITY

If one judges according to declarations adopted on the outcome of the abovementioned conferences, at present the technical aspect of the Court's activity comes to the forefront: the ability to cope with the huge flow of petitions becomes the question of survival of the whole European system of human rights. In fact, the largest part of the Court's time – of its judges and staff – is absorbed by the process of selecting complaints, answering the criteria of admissibility, out of a huge amount of the incoming petitions. Significant time is spent on consideration of admissible, but “repeating” complaints, actual circumstances of which are similar to those examined earlier. Therefore, the most important problem standing before the whole European legal community is to look for a new model of activity of the European Court of Human Rights, which would guarantee effective and timely consideration of the incoming complaints and ensuring of the primordial subsidiarity of its activity, built in the Convention.

Today it is already evident that all “technical” reforms of the last years, connected, among others, with long-awaited entering into force of the Protocol No. 14 to the Convention, did not bring expected effect able to ensure the admission capacity of the Court, equal to the number of newly incoming complaints. In this connection various proposals are expressed: in particular, at the recently held conference in Brighton (called on the initiative of the Great Britain), the British authorities suggested to hand over part of the complaints, coming to the ECHR's consideration, to the intra-State level for their consideration by the national courts. Among less preposterous suggestions reflected in the Brighton declaration are possible increase of the number of judges, encouragement of voluntary donations for the Court's needs, translation of the ECHR's decisions into national languages and their active dissemination among the law-applying bodies, shortening time for addressing the Strasbourg Court.

ECHR IN THE ROLE OF ALL-EUROPEAN “CONSTITUTIONAL COURT”

The need to cope with the indicated problems changes the European Court's perception of its principal mission, which at the present stage is understood as revelation of structural shortcomings of the national systems and, in a number of cases, offering ways of their elimination.

And here, however, the problem arises of the inter-relation with the primordial mission of the Court according to the Convention, which did not contemplate suggestion of universal decisions, and what is more, extended to all States and not only to the State in respect of which the Court has found violation. At present the Court more and more uses the method of “universal decisions”, which often means intrusion in the competence of the national legislator and therefore deviation from the key principle of the Court's activity – the principle of subsidiarity.

Conceptual assessments given to the ECHR's activity in the modern legal doctrine are different, but the majority of them agree that the ECHR plays today the role of the All-European "constitutional court" of human rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms – the role of All-European constitution.

Of course, this parallel is not literal. Fully recognizing the most important role of the ECHR in the development of values, including anthropocentric, common to all mankind, one cannot but notice that with the development of its practice more and more poly-semantic questions arise, related to the form and substance of the Court's activity. One of them is connected with determination of the limits of Court's interference in the powers of national legislator in cases when the Court formulates recommendations on elimination of some or other shortcomings of legal regulation leading to violation of rights enshrined in the Convention. The Court in its practice insists that it does not assess the norms of national law in themselves, but only the result of their application in the concrete case considered by it. But it is clear that, notwithstanding the form which the Court's conclusions are wrapped in, the substance of these conclusions often directly points at obligation of the respondent State to make amendments to legal regulation in order to avoid repetition of the established violations.

The possibility of such practice in itself as a whole follows from Article 40 of the Convention, obliging the States to execute final judgments of the Court in cases in which they are parties (*comment*: referring to this Article, they speak of a need to adopt general measures, but in the Article itself nothing is said about adoption of general measures). On the other hand, until now the interrelation of this power of the Court with operation of the principle of subsidiarity and the powers of national legislator, following from national sovereignty, is not fully understood.

It should also be taken into account here that, unlike national courts carrying out control of norms, inter alia with regard to legislative acts, the European Court of Human Rights is not built into any system of checks and balances; in other words, it has no correspondent in the person of legislator equal to it in level. This is, apropos, a substantial difference of the European Court of Human Rights from another supra-national European body – the Court of Justice of the European Communities.

In other words, the European concept of protection of human rights and freedoms does not contemplate primordially supra-national law-making body, authorized to adopt norms of general nature, which would be a subject of the ECHR's control. And the norms which are issued by the national legislators, within the Convention's meaning, do not form the subject-matter of direct ECHR's control either – they are subordinate to other criteria of review and in other, national procedures.

Disregard of the indicated circumstances creates risk of springing up of situations when, guided by sufficiently abstract, uncertain norms of the Convention, several particular persons, though highly respected international law specialists, could “upset” the will of the national legislator (and sometimes more than one) in the international-law construction which does not contemplate transmission of such element of State sovereignty.

Earlier I had an occasion to speak about certain tendency observed on the European legal space, when States voluntarily take into consideration the ECHR’s judgments, passed upon complaints against other States, with respective change of their legal regulation or law-applying practices. Such measures of preventive nature are aimed at prevention or elimination of similar violations from the national legal system. This position of States is an act of their good will, because respective obligation does not follow from the Convention. This is an undoubtedly positive tendency, because it makes for harmonizing of the European legal field, establishment of the system of similar values. However, the practice shows that the States are ready to accept such voluntary reception, as a rule, until the European Court in its judgment has raised some questions sensitive for them. In other words, the States themselves choose the spheres in which they consider the ECHR’s legal positions, including those formulated in decisions upon complaints against other countries. Obviously, such an approach by no means contemplates unreserved reception of all legal positions of the Court: in a number of cases we observe completely different reaction, including that of collective counteraction, as it took place in case of adoption of the first judgment in the case “Lautsi v. Italy” or, to put it mildly, of legal bewilderment caused by the judgment of the Grand Chamber in the case “Kononov v. Latvia”.

CONVENTION AS A LIVING INSTRUMENT

What is the reason of such unacceptance of some ECHR’s decisions? I think that these reasons have deep-rooted character and reflect, in the end, the problem of content of rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, in today’s historic, cultural and political context. To a large extent it is connected with the methodology of the European Court’s interpretation of the Convention’s content, evolution of this interpretation. This methodology is not indisputable, to say the least.

As is well known, recently the extension of the subject-matter and content of the rights themselves, enshrined in the Convention, takes place in the European Court’s practice, as a result of which these rights sometimes acquire completely different content compared with the primordially built in.

It goes without saying that the requirements of the changing legal, social and political context force us to look differently at the content of the provisions of this document,

aged now over 60. Could its authors presuppose, in what context the questions of the content of fundamental rights fixed by the Convention would be posed? For example, does the right to life, fixed by Article 2, include ban of euthanasia and abortion? This question may be put even in a more sharp way: does the right to life include prohibition to apply death penalty? Does the inadmissibility of brutal treatment, following from Article 3, imply inadmissibility of poverty? May Article 8, fixing the right to private life, include the right of unisexual couples to adopt a child or the right to calm sleep in the absence of noise from planes?

The Court more and more often runs into such questions, absolutely new questions from the point of view of the classical concept of rights and freedoms.

To determine the content of the conventional rights in contemporary conditions, the Court uses various instruments; first of all, it follows from the understanding of the Convention as a “living instrument”, interpreting which the judges are not bound by the primordial idea of its authors. According to this approach, the text of the Convention is constantly developing, it depends on the changing conditions of life, and evolutionary interpretation of the Convention becomes the means of adapting of its provisions to these changing conditions. One of the main challenges to the integrity of the conventional system consists in the methodology and practice of use of these concepts.

Today three main problems connected with the approach to the interpretation of the conventional provisions may be singled out:

-first, vagueness (uncertainty) of the rights fixed in the Convention, leading to practically unlimited discretion of the ECHR’s judges (judicial activism), when the provisions of the Convention are extended in the context, manifestly not conforming to the original content. This gives rise to the problem of legitimacy of such broad interpretation;

-secondly, the very methods of interpretation used by the Court, including the so-called evolutionary interpretation and the criterion of consensus, which are often used inconsistently or contradictorily;

-thirdly, increasing contradictions in the definition of the nature and scope of application of the rights fixed by the Convention; “prolongation” of the traditional sphere of action at armed conflicts, humanitarian intervention, social and labor rights, which, in the opinion of some researchers, demonstrates “inflation” of conventional rights (or breach of proportionality and balance); extension of the geographical base of the Convention’s operation – to the territory of countries which are not parties to it can also be ascribed here.

Regarding the Convention as “living instrument”, i.e. assessing the content of the rights fixed in it not in the light of the intentions of its authors of 1950, but in the light of today, the ECHR’s judges have recognized as falling under the scope of the Convention the rights

which are not only not mentioned in the Convention, but which its founding fathers absolutely definitely, if we believe the preparatory documents, decided not to include in it (I mean the judgment in the case of *Young, James and Webster v. the United Kingdom*, in which it was said about the right not to join compulsory associations; the authors specially decided not to include this right in Article 11, but the Court recognized its violation in this case).

In this connection, a number of questions arises. What the Convention today is turning into, if interpretation of its norms disregards its initial content? To what extent placement on the States Parties of obligations, significantly differing from those which they once agreed about, is founded? Is such change justified solely by reference to Article 32 of the Convention, vesting the ECHR with exceptional powers to interpret its provisions? Is it possible to say definitely, what document exactly does the European Court apply today?

Moreover, the ECHR's approach to consideration of the initial meaning of the norms of the Convention as a whole distinguishes itself with inconsistency: if in some cases the need of such consideration was directly rejected (in particular, in the judgment in the case "*Golder v. the United Kingdom*", "*Young, James and Webster*" judgment, mentioned above), in others, on the contrary, the Court's conclusion was substantiated by such necessity (case of "*Bankovič v. Belgium and others*" – concerning NATO bombings in former Yugoslavia).

As a result, the Court has worked out a certain compromise position, which is far from always easy to explain in practice: it came to the conclusion that it is necessary to take into account "abstract" intentions of the Convention's authors, simultaneously ignoring concrete ones – i.e. concrete textual expression of the conventional rights which may change in the course of time, not losing its fundamental base. However, the fundamental base is also determined by the judges in the conditions of concrete historical context.

It should be noted that recently both national politicians (who can be suspected of certain partiality and populism) and independent researchers of academic sense (there are much less grounds to accuse them of such "sins") consider it a good form to criticize in different ways manifestations of this kind of activism of the European Court.

I shall make a reservation straight away: we on no account come out against evolutionary interpretation and adaptation of conventional rights to new realities; such a position for the Constitutional Court of the largest country, a Member State of the Council of Europe, would be like inhabitants of a glass house start throwing stones. The activity of all constitutional courts today is based on the evolutionary interpretation of constitutional norms, and what is more – without such "lively" interpretation adequate answer to actual challenges of the time, ensuring proper balance of interests of various social groups, as well as balance of public and private interests are impossible.

“CORRIDOR” OF OPPORTUNITIES FOR NATIONAL SYSTEMS IN THE REALIZATION OF CONVENTIONAL RIGHTS AND FREEDOMS

Arbitrary and inconsistent interpretation of legal norms – be it on the national or supra-national level – not only breaks legal certainty, but also creates threat to the balance of different interests sought for. It is necessary to recall here that over-emphasizing of a private interest – to the detriment of a public one – can create threat to the security and existence of the whole society. Nonetheless, in the ECHR’s activity sometimes a “trend” may be seen towards sticking out the interest of the one to the detriment of all and everybody.

In the conditions of changing realities the European Court tries to fumble for the “nucleus” of one or another right which must be unified for all States and which may not be limited by virtue of the discretion of national legislator. However, such nucleus itself is not invariable – we see as the substance, quintessence of the content of one or another right appears in a different way in the ECHR’s interpretation depending on concrete historical, cultural and other context. And what is more, sometimes understanding of this nucleus differs in the decisions of the Court itself passed in its different sections. May be, in the present conditions it would be more correct to speak about a “corridor” of opportunities for the national systems in the interpretation and application of some or other conventional rights and freedoms.

The concept of “evolutionary interpretation” of the Convention, more and more often used in the Court’s practice for adapting of the content of rights and freedoms fixed in the Convention, was first applied by the Court in the judgment in the case “Tyren v. the United Kingdom” (on application of corporal punishment with the birch on the Isle of Man). This concept contemplates development of the Convention’s content in order to make it conforming to the “present day” conditions. Accordingly, this content may change if the necessary conditions in the majority of States change. However, first, far from always the Court substantiates such changes with the necessary degree of minuteness and, secondly, even in case of their substantiation, actually its conclusion means compulsion of countries left in the minority to respective change of their normative regulation, which means again interference with the powers of national legislator. For example, exactly such situation took place in the judgment in the case “Hirst v. the United Kingdom”, which caused extremely negative reaction in the Great Britain (up to recurrent calls to go out of the Convention). Similar situation we saw in the recent judgment of the Grand Chamber in the case “Markin v. Russia”.

In fact, this means renewal of the conventional standards in accordance with what is regarded as respective standard in the majority of the Contracting States. But this idea contradicts the principle according to which each country is entitled to refer to the need to protect morals for restriction of a number of rights envisaged by the Convention (Ar-

ticles 8, 9, 10 and 11). Thus, moralistic preferences of the majority replace the notion of morals within the meaning of the Convention, the text of which puts in this notion more individual sense. That is exactly why on a number of questions, most closely connected with such moral and cultural code, the presence of a consensus can not justify imposing some or other standards on the States left in the minority on this issue. Otherwise the Convention risks to turn into its own antipode, the instrument of suppression of the minority by the majority, diktat of the only possible and admissible way of action, thought, life, and the European Court – into the Oracle of Absolute Truth. But the intentions of the authors of the Convention hardly went this far.

And this is hardly achievable in the visible future in the practical realization of regulative legal norms. Of course, references to the requirements of morals of some or other communities or individuals must not restrict the scope of the law. But at the same time one can not but consider that in case of origin of legal norms contradicting moral aims of social majority, mass feeling of injustice of such norms can not but lead not only to sabotage of these norms, but also to mistrust to legal and as a whole State institutions, catastrophic for the law and social peace.

The problem under consideration in today's world acquires particular actuality in connection with the initiated wave of "Islamic revolutions", deep transformation of the political relief and legal field in very many countries of the world. In the majority of such cases we watch deep gap between the desired legal democratic ideality and very heterogeneous and crisis-ridden socio-economic, political, religious-normative reality. This is a very complicated problem, requiring thorough, and not only legal, comprehension.

In this connection, I would like to remind of the fact that in Weimar Germany deep divergence between the adopted democratic State juridical form and real concrete-historical socio-State content gave rise to Nazism. Chaos which came into the gap between the ideal form and systematic crisis-ridden German post-war reality (and steadily extending this gap) literally drove mad wide German social masses. And allowed one of the most cultural peoples of Europe to see a Messiah, savior of the country in the raging Führer.

That is why I am convinced that we, proceeding from particular historical responsibility of international jurisprudence, can not, have no right to insist on uncompromised propagation of ideal universal legal formalism without consideration of the specifics of a concrete national, cultural, social, economic, psychological situation. We must remember that the road to national and in the prospect to international political, terroristic, war-conflict hell may be covered by good intentions exactly of this sort.

Obviously, the complexity of social (including legal) relations in the modern world is such that in many, if not in the overwhelming majority of situations it is impossible to give them mono-semantic assessment which would suit the representatives of ethnic,

religious, political and other social strata. But to what extent can the opinion of the ECHR's judges on these most important and sensitive questions, presented as the only right one, be the final verdict for the European world, having historically distinguished itself by the strive to pluralism of approaches and cultures? And to what extent can be "the only right one" the opinion of the judges of the Grand Chamber, whose votes divided in correlation 10 to 7? To what extent can the decision of a chamber be accepted as unreserved, where all 7 judges express, in one form or other, a dissent or partly concurring opinion? And finally, to what extent the very concept of "the only right solution", sometimes offered by the Court on very complicated and sensitive questions, is compatible with the idea of liberal values lying in the basis of the Convention?

Let us turn to the latter problem in detail. As is well known, one of the criteria, actively used by the ECHR for the interpretation of the provisions of the Convention and development of its own practice, is the presence of "current consensus" of the majority of the States Parties on the issue under consideration. Meanwhile, the idea of such "current consensus" is contradictory. First, it is unclear, from what number of States the consensus begins? Secondly, what range of the States' activity on one or another question it encloses? Must it be certainly legislative regulation, law-applying practices, formed custom or simply a requirement of social morals? In particular, the latter criterion, let us recall, was applied by the European Court in the case "Marx v. Belgium", concerning the rights of illegitimate children to recognition of the fact of their birth from biological mother.

Further, the Court's approach as to how the presupposed presence or absence of such consensus influences the limits of freedom of discretion of States does not distinguish itself with consistency. If in some decisions the ECHR points out that the presence of this consensus influences such freedom of discretion, in others it gives directly opposite conclusion.

Finally, the ECHR's position on the nature of the consensus aimed at substantiation of the ECHR's decision causes doubt from the point of view of the liberal-democratic principles, lying in the basis of the Convention. Does the States' following "current consensus" on the indicated, very painful questions mean thrusting the will of the majority on the minority, against which the Convention is called upon to protect?

THE CONSTITUTIONAL COURT – CONDUCTOR OF THE CONVENTION AND ECHR'S DECISIONS IN THE RUSSIAN LEGAL SYSTEM

As we see, the future of the European system of rights and freedoms poses many questions already today, and answers do not exist to all of them. Their search is a common task of all actors on the European legal field, contemplating constant dialogue, both in the judicial and non-judicial planes. Particular role in this dialogue belongs, of course, to the national judicial bodies, including higher courts.

I had to say repeatedly about the significance of the Convention for the Protection of Human Rights and Fundamental Freedoms and the ECHR's practice for the Russian legal system, the interaction of the European Court and Russian judicial bodies, including the Constitutional Court of Russia.

The results of the Constitutional Court's activity in the implementation of the provisions of the Convention are today expressed in many dozens of its decisions, in which the Constitutional Court consistently formulated positions on the most important problems of the Russian legal system, revealed by the ECHR. Actively using in its arguments references to the norms of the Convention and their interpretation by the European Court, the Constitutional Court thus inculcates them directly into the tissue of the Russian legal space. It is not a secret that it is easier and habitual for majority of the Russian law-appliers to refer in their activity to the decisions of the Constitutional Court than to the ECHR practice; besides, there are more clear-cut legal grounds for it. In particular, voluminous legal positions have been formulated by the Constitutional Court on the issues of procedural guarantees, applicable in cases of deprivation or limitation of freedom of a person in various forms; of the State's responsibility for damage caused by State bodies, officials and other public subjects; of procedural guarantees both in criminal and civil, as well as in administrative judicial proceedings; of appeal of court acts and activity of higher judicial instances, and many others.

Assessing both qualitative and quantitative contribution of the Constitutional Court to the implementation of the provisions of the Convention and of its interpretation in the Russian legal space, it is possible to say that the accumulated experience allows to put a question of necessity of institutionalization of the existing forms of interaction between the Constitutional Court of the Russian Federation and the ECHR and search of new forms of such interaction. In other words, the time has come for juridical mounting of actually formed international law element of the Constitutional Court's activity in the part concerning interaction with the European Court. Besides, there is a need to extend the directions of such interaction in the future.

In connection with holding of a high-level conference in Brighton, international juridical community actively discussed the future of the European system of human rights protection, its key problems, means to overcome them, outlines of possible new model of the ECHR's activity. As at two preceding conferences devoted to the ECHR (in Interlaken in 2010 and in Izmir in 2011), the main emphasis in the final conclusions of the Brighton conference was made on transfer of the principal burden of human rights protection to the national level, on perfecting and introduction of new intra-State means of legal protection, on adoption of measures of general character following the results of the ECHR's decisions, including those preventive by their nature. Realization of the

abovementioned tasks requires more active interaction of supra-national and national judicial systems, including the search of its new forms and methods.

Russia does not stay aside of this process. Today, before the national legal system there is a task of broadening of forms and instruments of co-operation with the ECHR, first of all at the expense of more active use of the potential and resources of Russian judicial system. Reformation of the system of courts of general jurisdiction, when all judicial instances will be recognized as effective intra-State means of legal protection, so that to address to Strasbourg could be possible after passing through all levels of the judicial system inside Russia becomes an immediate task. The situation when an application to the European Court may be sent after proceedings at the second instance – and this is the level of a regional or even district court – is ineffective and does not suit neither the Russian, nor the European parties. However, to achieve this goal it is necessary to complete reformation of the judicial instances and the procedures of review of court acts in accordance with the criteria formulated both by the European Court in jurisprudence in Russian cases and by the Constitutional Court of the Russian Federation.

This work has already been done in the system of courts of arbitration, where all four instances are recognized as effective remedies which must be exhausted before appeal to Strasbourg. The system of courts of general jurisdiction is in the course of improvement and, let us hope, that soon these positive efforts will lead to the desired result.

It should be noted in this connection that the Russian constitutional judicial proceedings have never been assessed by the European Court of Human Rights from the point of view of the need to pass through it before addressing to Strasbourg. Evidently, the Russian Constitutional Court has its special subject-matter of activity connected with the review of constitutionality of norms; its competence is not that wide as of bodies of constitutional justice in some other European countries, which consider complaints on review of constitutionality not only of normative acts, but also of the individual acts of application of law. But the ECHR often comes across the problem of violation of human rights by a norm as such and not by its application by courts. If with respect to this norm the Constitutional Court has formulated some position, the ECHR always adduces it in its decisions. However, if the norm has not yet been the subject-matter of the Constitutional Court's examination, it would be logical to first verify its accordance with the fundamental rights and freedoms, which in essence coincide in the Russian Constitution and in the Convention. In many cases this could eliminate the need of further appeal to Strasbourg.

Constitutional judicial proceedings in a number of countries are recognized by the ECHR as an effective intra-State remedy. In all these countries the institute of individual constitutional complaint obligatorily exists. At the same time, taking into account the existing procedure of lodging a constitutional complaint with the Constitutional Court

of the Russian Federation, today the constitutional judicial proceedings can hardly be considered from the point of view of Article 35 of the Convention as an instance, passing through which is a necessary stage preceding appeal to the ECHR. The main problem here, from the point of view of the Convention, is absence of time-limit for lodging a complaint with the Constitutional Court.

Today on the European space the Constitutional Court of the Russian Federation remains probably one of the few constitutional courts, complaint to which may be filed on the expiry of any period after assumed violation. At the time of adoption of the Law on the Constitutional Court this approach was justified from the point of view of maximum broadening of the amount of guarantees granted to citizens for the protection of their rights in complicated conditions of drawing up the system of constitutional judicial proceedings practically anew. Today, when the outlines of the legal field are precisely depicted and its content has been formed and is sufficiently stable, formulation of a question of introduction of a time-limit for lodging a complaint before the Constitutional Court is justified. This is necessary from the point of view of legal certainty as well: in case of lodging a complaint of a citizen on the expiry of a significant time after resolution of his/her particular case (such cases take place), what should be done with law-applying decisions adopted on this case, if after their adoption a long time passed, they entered into legal force, were executed and legal condition established by them got further development? To what extent the balance of different protected interests, sought for, is secured in this case?

There is one more argument in favor of the introduction of time-limits for a complaint before the Constitutional Court: in the majority of cases, which end with a “positive” result for the petitioner (i.e. recognition of a law as unconstitutional, revelation of its constitutional law meaning or recognition of the contested norm analogous to the one having earlier been the subject-matter of consideration by the Constitutional Court, with following consequences), the petitioners turn to the Constitutional Court practically immediately after (on the expiry of a short time) completion of consideration of their case in court. At the same time complaints, lodged on the expiry of a significant period of time, as a rule, do not meet the criteria of admissibility established by the Law. Of course, the assessment of one or another intra-State procedure from the point of view of Article 35 of the Convention may be made only by the European Court. But I am reassured by the fact that the ECHR as nobody else is interested in extension of the range of procedures accessible to citizens for the protection of their rights on the national level. That is why approximation of the national procedures to the criteria fixed by the Convention increases the chances for recognition of such procedures as an effective intra-State remedy.

One more most important problem of the interaction of the ECHR and Russian bodies of justice concerns execution of the ECHR's decisions. It was also actively discussed in the course of the Brighton conference, where the need to adopt particular measures on structural problems revealed by the European Court in its decisions, including "pilot" judgments, was underlined anew, as well as strengthening of co-operation between higher national judicial bodies and the ECHR on the issues of execution of the decisions of the latter.

Earlier I had opportunities to speak repeatedly about the legal status of the ECHR's decisions in the Russian legal system, binding character of their execution and the role of the Constitutional Court in this process. I also repeatedly had to refute various inaccurate or partial interpretations, tolerated in the press or certain circles with regard to the position of the President of the Constitutional Court on the issue of execution of the ECHR's decisions. I emphasize particularly: binding force of the ECHR's decisions, passed in Russian cases, for Russia was not and is not subject to any doubt, and the Constitutional Court is the very body which consistently, in its decisions, underlines their obligatory status and integration into Russian legal system. Of course, they must be executed, *inter alia* in the part of elimination of the problems of structural character. We see how the ECHR's decisions are executed in Russia on various issues, including most problematic for the domestic legal system: non-execution of court decisions, amelioration of the conditions of keeping in custody, humanization of implementation of measures of suppression, connected with restriction of freedom of a person, reinforcement of procedural guarantees in criminal and civil procedures. One should remember here that any measures directed at resolution of these most painful – from the point of view of personal protection – problems can not bring instantaneous result; they contemplate long and systematic work, interaction of numerous institutions and structures and a whole complex of measures.

Another important aspect which requires attention: the choice of concrete measures, by means of which the European Court's decisions are executed, pertains to the sphere of discretion of a national legal system. The European Court itself repeatedly emphasized it in its practice. Adoption of such measures is a competence of the national legislator, of judicial bodies, of the executive, if necessary – in coordination with the Committee of Ministers of the Council of Europe, which is vested with the function of supervision over execution of the ECHR's decisions. This fully conforms to the principle of subsidiarity in the activity of the Strasbourg body of justice. That is why formulation of concrete requirements, for instance, to the national legislator, indication of laws needed to be adopted, would be an intrusion in sovereign powers of the latter, the possibility of which is not envisaged by the Convention. And, for the sake of justice, one must say that the European Court, on the whole, tries to avoid such kind of "direct instructions" to national authorities, though there are exceptions. Particular approach is used by the ECHR in its pilot

judgments, where recommendation format is expressed more precisely. However, here the final say in the choice of appropriate means also remains with national authorities: for the European Court the final result is important, and not the means to achieve it.

At the same time, such an approach, absolutely justified from the point of view of the Convention, its philosophy and the nature of activity of the Strasbourg Court, sometimes creates difficulties in realization of its decisions, because the Court itself does not indicate what measures exactly (apart from paying just compensation to the applicant, if such has been awarded) it is necessary to take for such realization. That is why with adoption of measures of both individual nature, necessary for restoration of applicant's rights (*restitutio in integrum*) and of general nature, necessary for elimination of similar violations on the intra-State level, problems often arise on the national level.

In the Russian legal field it is connected, first of all, with uncertainty of what subject and in what procedure is to initiate the process of adoption of these general measures or to determine what exactly measures of individual nature are to be implemented. Formally, initiation of the issue on adoption of measures of general nature does not relate to the competence of any organ. Ideally, it must be realized in the procedure of ordinary legislative initiative, but absence of a concrete subject, authorized for such an initiative, makes this process ineffective.

Moreover, as is well known, the practice of passing "pilot judgments", in which recommendations to a State on adoption of measures of general nature are formulated, has been formed in the European Court in relatively recent time, and the first "Russian" judgment was passed only in 2009 (in the case "Burdov v. Russia", No. 2). Since this mechanism, as was already mentioned, is recent and still undergoing certain "running in" in the Court's practice, the practice of "feed-back" between the ECHR and national justice, i.e. practice of reaction of States on decisions of this sort, has not yet been formed.

At the same time, the need for a State to adopt measures of general nature sometimes follows not from a pilot judgment, but from a great number of judgments of individual nature, establishing violations of the same type. When the number of such decisions gathers critical mass, this is, at the least, a cause for serious inspection of the inner state of various legal relations and of the approach of a State to their regulation. However, in this case either, in the context of the Russian legal system, there is no answer to the following principally important questions: Who, what subject may initiate such an inspection? In what cases amending legislation is necessary, and in what cases – improvement of the law-applying practices?

In Russia for the time being only one occasion of adoption of measures of general nature in response to the "classical" pilot judgment of the ECHR has taken place – it is the question of passing the law on compensation for violation of the right to judicial proceedings

within a reasonable time and of the right to execution of a court act within a reasonable time following the ECHR's pilot judgment on the complaint "Burdov v. Russia" (No. 2).

However, this does not mean that similar measures of general nature following the ECHR's decisions were not taken in the Russian legal system before. It is sufficient to recall large-scale reforms of the criminal procedure (directed at securing of fundamental procedural guarantees of rights of the parties, realization of the principle of equality of arms); reform of judicial instances in the civil judicial proceedings which is being conducted up to now; alteration of the legislation on the rights of persons recognized incapable in court procedure; broadening of the grounds of State's responsibility for errors in the administration of justice and other most important issues.

In many cases adoption of these measures was initiated by means of constitutional judicial proceedings. Stimulus for the Constitutional Court of the Russian Federation to consider various problematic issues was created by the traditional means of initiation of the constitutional judicial proceedings: court request, individual constitutional complaint, requests in the procedure of abstract review of norms. But sometimes initiation of the proceedings in the Constitutional Court took years. Moreover, the Constitutional Court, as is well known, considers cases within the limits of the contested norms, which does not always provide an opportunity to realize an over-all approach to a problem emphasized by the European Court in its judgment or a number of judgments.

Today's situation requires more efficient and complex approach. At present, it is necessary to create a mechanism of adoption of measures of general nature as a result of a ECHR's decision and, accordingly, energetic assessment as to what measures are needed to eliminate one or another problem and determination of their concrete format.

Therefore, vesting the Constitutional Court with powers to determine measures of general nature as a result of the ECHR's judgments could become one more factor of strengthening of interaction of the Constitutional Court and the ECHR. In the proposed construction, the Constitutional Court accepts the function of the main interlocutor of the ECHR in Russia in the context of execution of its decisions. And, unlike other bodies carrying out interaction with the Strasbourg Court (first of all, the staff of the Representative at the ECHR), the Constitutional Court has real powers to correct the legal field and is a judicial body, in whose activity the "international element" is expressed the most manifestly.

De facto the elements of such a mechanism are used in the Constitutional Court's practice, because the Court has already repeatedly recognized as unconstitutional norms, application of which had led to a result incompatible with the Convention. In these cases the Constitutional Court acts within the framework of legal instruments which are at its disposal, i.e. by means of consideration of petitions on review of constitutionality of such norms. But formally such a review is not connected with the adoption of the ECHR's

judgment. In order to reinforce the Constitutional Court's powers, it would have been expedient to vest it with the power to determine, on requests of the subjects fixed by the Law (Parliament, higher courts), the need to adopt measures of general nature as a result of passing the ECHR's judgment and to formulate concrete content of such measures.

The decisions of the Constitutional Court, passed in such a procedure, shall be subject to execution in the same order as its other decisions, obliging the legislator in an appropriate way or introducing changes into the formed law-applying practices.

I suppose that suggested measures will make for rise of the quality of the Russian judicial system and its more effective participation in the processes of harmonization of the European legal space.

INTERACTION OF THE CONSTITUTIONAL COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS IS A "BRIDGE" WITH TWO-WAY TRAFFIC

The Constitutional Court pays particular attention to the decisions of the European Court of Human Rights. It is connected, first of all, with the fact that Russia, having ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, thus accepted obligations to coordinate national legislation and law-application with conventional provisions. Regard paid to the ECHR's decisions when administering constitutional justice is also aimed at fulfillment of these international obligations.

At the same time, one must not forget that our State has joined the Convention in order to provide the realization of a fundamental provision about human rights and freedoms as a supreme value for the State, contained in the Constitution of the Russian Federation, with additional guarantees. Thus, the participation of Russia in the Convention, to secure the observance of which the ECHR is called upon, has been determined exactly by the task of proper realization of constitutional prescriptions. Accordingly, harmonization of the national law and its application with the provisions of the European Convention (including its interpretation in the decisions of the ECHR) is admissible to the extent where it does not contradict the Constitution of the Russian Federation (including constitutional-law meaning of various legislative provisions revealed by the Constitutional Court). Let me note that in the overwhelming majority of cases there are no collisions of this sort.

INCREASING EFFECTIVENESS OF THE MECHANISM OF JUDICIAL PROTECTION: INTER-STATE ASPECT

Today the ECHR passes through a new stage of its history, which may be called actual reform of its activity: preserving the significance and role of individual complaint in the system of conventional rights' protection and the role of the Court as the body of individual law-application, the Court begins to pay more and more attention to revelation of structural problems of the national legal systems.

The new tasks of the ECHR's activity – revelation of structural problems of this kind and providing assistance to national legal systems in overcoming them. Alteration of the methodology of the Court's activity – elaboration of mechanisms of resolution of repeated problems, but not individual compensation of their consequences.

As far as change of the number of judges and the criteria of their selection is concerned, the Brighton Conference suggested, among others, to increase the number of judges carrying out selection of admissible complaints (the stage of filtering). But the main means of increasing the effectiveness of the Court's activity in the new conditions lies out of the sphere of its activity: these are efforts of the national legal systems to overcome structural problems revealed by the ECHR.

Accordingly, the new tasks of national systems, including Russia, in these conditions – increase of effectiveness of interaction with the control mechanism of the Convention, first of all at the expense of coordination of efforts to overcome structural problems, which will allow to diminish sharpness of the situation with overloading of the Court; more effective execution of the ECHR's judgments on the national level (through measures of general nature) and inculcation of the Convention's standards into the routine law-applying practices.

Immediate task of the Russian legal system is inventory making of structural problems, revelation of their causes, elaborating ways of overcoming. The main goal for Russian legal system is increase of the inner level of legal protection (it is self-valuable irrespective of international obligations; the ECHR's practice, problems revealed by it appear as a catalyst, this is a possibility to look at some problems "from the outside", if the inner "compass" refuses to identify them).

What is it for? Apart from the goal of fulfillment of international obligation, still remaining actual, it is reanimation and reinforcement of basic values, lying in the base of the Russian Constitution, and first of all human dignity, on which the constitutional status of a person is based. The same values are in the basis of the conventional system of rights and freedoms, protecting also constitutional traditions of States Parties.

On the majority of questions connected with the existence of structural problems there is a consensus between the Russian legal system and the ECHR (including non-execution of court decisions, conditions of keeping in custody, excessively long terms of keeping in custody, procedural guarantees, including accusatory bias). In some cases, when there is no full consensus, further study of values lying in the basis of the ECHR's practice is needed, as well as their comparison with values built in the Russian Constitution is necessary. The process of rapprochement may require time, which is a usual process for conventional system, where, as a rule, the strongest actors turn to be "discordant" (Great Britain, France, Germany).

At present there are a number of methodological, theoretical and organizational problems. First of all, elaboration of theoretical and practical instruments is necessary in order to increase effectiveness of both types of measures. Measures of individual character require determination of cases, where review of court decisions is necessary (possible) and where the use of other means of restoration of the violated conventional rights is needed. For measures of general nature it is necessary to reveal a State's obligation following from the judgment, contemplating adoption of general measures (the Constitutional Court ideally fits the role of a body, initiating the process of their revelation and adoption), working out the procedure of such adoption and its consequences.

RUSSIA'S ROLE IN ELABORATION OF GENERAL STANDARDS AND IMPLEMENTATION OF THE CONVENTION ON THE NATIONAL LEVEL

To strengthen the influence outside, visible results of the Convention's implementation on the national level are needed. An example of such results is the adoption of the Federal Law "On Compensation for Violation of the Right to Judicial Proceedings within a Reasonable Time and to Execution of a Court Act within a Reasonable Time", in execution of the ECHR's judgment in the case "Burdov No. 2". The adoption of the Law became possible as a result of effective interaction of different segments of juridical public.

In the image of such interaction, but on a broader basis, it would be expedient to start up a project connected with large-scale discussion of the problems raised above (implementation of the conventional standards; ways to overcome structural problems; execution of the ECHR's decisions; settlement of possible conflicts of the "higher" norms, those of the Constitution and the Convention; search of balance in realization of various competing rights). The Constitutional Court could become a moderator of such a project and partly its venue. The project can include the representatives of the European control mechanism of the Convention (ECHR, Committee of Ministers) and their Russian partners (Ministry of Justice, Ministry of Foreign Affairs), legal science, judicial and lawyer's community. Forms of realization – scientific publications, public discussions, consultations. The results of this activity may include also proposals on law-drafting, including those related to working out measures of general nature for implementation of the ECHR's decisions.

The project may include international element with the aim to discuss the problems of the Convention's implementation on the national level, common for many European countries, and working out common positions on these issues. It is necessary to remember that many ways of reforming the Convention reflected in the declarations of the Interlaken, Izmir and Brighton conferences, were originally raised at the Yaroslavl' Conference of 2006, devoted to the influence of the European Convention on the national legal system of States Parties; in this sense Yaroslavl' was Interlaken's harbinger.

As far as Russia's participation in the European judicial proceedings in the narrow sense of the word is concerned, change of the algorithm of interaction with ECHR is necessary, including more active participation as a third party in cases considered in Strasbourg, especially on the issues having strategic significance for the Russian legal system and where potential ECHR's judgment may cause disagreement from the Russian side. Coordination of efforts with other States Partners is needed in order to influence the elaboration of "conventional standards", which far from always meet the requirements of the "consensus" proper; such work now is not under way.

National judge is the key figure in the implementation of the Convention on the intra-State level. There is a significant progress in the process of integration of the conventional standards into Russian law-applying practices. Nonetheless, if on the highest level of judicial practice, as well as on the general theoretical level the necessity of the Convention's implementation is confirmed, on the "lowest" level this process has not been fully started up. Harmonization of legal standards requires more professional freedom from the judge; changing his/her role in the national legal system; vesting with more professional independence, extension of professional instruments.

In this connection, legislative fastening of powers of the Constitutional Court of the Russian Federation in respect of implementation of the ECHR's decisions could be realized on the basis of the following concept.

1. At present, juridical mounting of actually formed international-law element of the Constitutional Court's activity is needed, including the one concerning interaction with the European Court and consideration of its practice in the Russian law both in the positive (non-conflict) and negative (conflict) aspects. Herewith it is expedient to make accent on fixing powers for realization of mainly positive (non-conflict) aspect. This is justified also from the point of view of quantitative correlation of the ECHR's decisions which are executed in the Russian Federation without problems with those which cause negative reaction. For determination of legal consequences of decisions of this second ("conflict") group, it is desirable to avoid fixing special norms in the legislation, which can be regarded as aimed at limiting the operation of the ECHR's decisions. As the practical discussion of the abovementioned draft law has shown, any attempts to introduce provisions in the legislation, from which the possibility of limitation of execution of the ECHR's decisions by the Constitutional Court directly follows, will cause undesirable political echo from public and abroad. Besides that, one can hardly expect many "conflict" ECHR's decisions, causing negative reaction (from the constitutional law point of view) in the Russian Federation. Accordingly, in order to determine their further fate it is not necessary to introduce special norms in the legislation; more justified would be fixing of the provisions of neutral character which would allow, if need be, to determine

the whole spectrum of possible consequences of adoption of some or other ECHR's decisions on the individual basis, considering all circumstances.

2. The principal measure is to include into the Constitutional Court's competence the power to determine the measures of general nature, which are needed to be adopted following the ECHR's judgment upon a complaint against Russia. This would, to a significant extent, eliminate uncertainty existing today as to what subject and in what procedure is to initiate the process of adoption of these general measures. *De facto*, the elements of such mechanisms are used in the Constitutional Court's practice by way of recognition as unconstitutional the laws conformity of which to the European Convention caused European Court's doubt; the Constitutional Court acts within the framework of the instruments at its disposal, i.e. considering petitions on review of constitutionality of norms, earlier criticized by the ECHR because of their non-conformity to the Convention. But formally such review is not linked to the adoption of the ECHR's judgment. At present it is suggested to introduce a provision into the Law on the Constitutional Court, which would allow appealing to the Court with a request to adopt measures of general nature resulting from the ECHR's judgment.

3. The ECHR's judgment, finding a violation of the Convention, may suggest adoption of measures of both individual and general nature. Concrete measures of individual nature are determined either in the ECHR's judgment itself (just compensation, reimbursement of damages) or are subject to determination by national authorities (review of court decisions, if necessary). Usually this is done by a competent court (of general jurisdiction or of arbitration) to which the petitioner addresses for review of decisions passed earlier. The existence of grounds for review, with regard to all circumstances of the case, is determined by a national court.

Vesting the Constitutional Court with powers to determine measures of general natures in consequence of the ECHR's judgment, as proposed above, will, among other things, make for strengthening of the Constitutional Court's authority both inside the country and in the external relations, and mainly will allow to control the process of implementation of the ECHR's decisions and to observe reasonable balance of international obligations and national interests, because adoption of the ECHR's judgment in itself does not pre-determine the Constitutional Court's conclusion on the need to take general measures. The Constitutional Court, considering such petition, analyses the ECHR's arguments in a concrete case and comes to the conclusion either about existence of the grounds to amend normative regulation (on the basis of analysis both of constitutionality of contested norms and the international obligations of the Russian Federation) or about absence of the grounds to amend normative regulation in its entirety.

In case of vesting the Constitutional Court with such powers the mechanism of execu-

tion of the general measures determined by the Constitutional Court on the basis of the ECHR's judgment could become analogous to the mechanism used for execution of the decisions of the Constitutional Court itself.

4. Usual subjects of appeal in the procedure of abstract control of norms, petitioners having participated in consideration of a case by the ECHR, whose conventional rights were violated, as well as courts considering applications on review of a court decision on newly discovered facts as a result of the ECHR's judgment can act as subjects, vested with the right to address the Constitutional Court in respect of such measures of general nature on the outcome of the ECHR's judgment.

In the latter case, the Constitutional Court may actually also decide the issue of the necessary individual measures, subject to application in the petitioner's case. Considering a request of a court the Constitutional Court comes to the conclusion about the need to adopt measures or absence of such need. However, resolving this issue, the Constitutional Court actually pre-determines the fate of review of the case. If the conclusion is negative, then, if it follows from the ECHR's judgment that the petitioner's rights were violated by the legal regulation itself and not by the act of law-application, individual interpretation of the norm as applied in the given case is possible in order, not changing normative context as a whole, to ensure execution of the ECHR's decision exactly in the given concrete case, having precisely substantiated it by the circumstances of the individual case and impossibility to change the norm as such. If in the concrete case it is impossible to give such interpretation of the norm *ad hoc*, the Constitutional Court may substantiate, with regard to circumstances of the case, some other means of restoration of the violated conventional rights of the petitioner. From the point of view of contemporary practice of the Committee of Ministers of the Council of Europe, such approach will mean full realization by a State of the obligations concerning execution of the ECHR's decision.

5. It is extremely important to expound the arguments on the need (or particularly on the absence of the need) to change legal regulation in the decision of the Constitutional Court of the Russian Federation on the basis of analysis of the ECHR's arguments, their compatibility with the basic constitutional principles, the fundamentals of the public order of the Russian Federation, as well as proceeding from the character of the problem itself, touched on by the ECHR in its judgment. Adoption of such measures may be required only by a problem of systematic character, revealed on the basis of settled ECHR's case-law (i.e. one judgment is not enough to change legal regulation) and in case if legal element (and not any other) dominates in the ECHR's argument.

This measure will also be an effective means of dialogue between the Constitutional Court and the ECHR in case of conflict of approaches to an issue. If constitutionality of a norm, which caused criticism from the ECHR, was earlier reviewed by the Constitutional

Court, the recurring address of the Court to the same issue in the proposed construction seems to be the most effective means of interaction of supra-national and national legal systems in case of collision between constitutional and conventional interpretations. In this case the Constitutional Court may either agree with the ECHR's arguments and adopt measures of appropriate correction of the legislation and/or law-applying practices, or give reasons for its disagreement with arguments put forward in Strasbourg, thus confirming its position expressed earlier. In this case formally there is no issue of review of the Constitutional Court's decisions – they remain final and are not subject to review in any case, their legal status is not called in question. And recurring address of the Constitutional Court to the same issue in similar situations is dictated by changing circumstances and another legal substantiation of the norm's defect. Cases of such recurring address of the Constitutional Court to the same norms do exist in its practice.

6. Realization of the proposed conception will require respective amendments of the legislation:

-providing in the Federal Constitutional Law on the Constitutional Court for powers to determine measures of general nature in connection with execution of the ECHR's decision, upon request of bodies and persons authorized to apply with requests to review constitutionality in the procedure of abstract control of norms; upon requests of courts, considering cases upon applications on review of court decisions on newly discovered facts in connection with adoption of the ECHR's judgment; upon petitions of citizens and their associations, having been applicants to the ECHR in connection with adoption of a judgment by the latter, from which follows a need to adopt measures of general nature (including in the part of putting legal regulation in accordance with the Convention);

-supplementing of procedural codes (their corresponding chapters about review of court acts on newly discovered facts) with the provision on the right of a court, considering application on review of court judgment in connection with passing of the ECHR's judgment, to address the Constitutional Court of the Russian Federation with a request concerning the need to adopt measures of general nature.

* * *

To conclude, I want to emphasize once again that formation of international law both in the global system and in Europe in a certain sense repeats general historical logic: from aristocratic in its essence "rule of the judges" to the democratic parliamentary procedure of law-making. At present, the process of formation both of global and European law stays mainly at the stage of "law of the judges" (judicial activism), because for the time being there are no other mechanisms on the global level, and in Europe they only

start to appear in the institutions of the European Union. By efforts of the European Court of Human Rights germs of All-European law are being created. This must be valued. It is inadmissible to undermine this process.

One of the main problems of formation of democratic mechanisms of global law-making on the basis of the concept of joint sovereignties is unevenness of socio-economic, political (and then, legal too) development of States.

In these conditions, the West constantly calls in question the role of other countries (including so called “new democracies”) as equal partners in the international juridical rule-making (although formally “politically correctly” fails to mention it). But reverse side of the problem is also on hand. Fairly insisting on equality and pointing at inadmissibility of manifesting by the developed Western countries of “double standards” in the field of the international law-making, relatively young democracies must undertake more active efforts for rapprochement of their systems of legislation and law-application with already sufficiently approbated norms included in the basic international documents.

And on the whole, in my opinion, one should speak of the necessity to form democratic mechanisms of law-making in the framework of the Council of Europe, and in the prospect – global politico-legal space on the basis of the principle of supremacy of law. Here, at the least, there will be no mistake.

РЕЗЮМЕ

Формирование международного права как в глобальной системе, так и в Европе в каком-то смысле повторяет общую историческую логику: от аристократического в своей основе «правления судей» к демократической парламентской процедуре правотворчества. Сейчас процесс формирования и глобального, и европейского права в основном находится на стадии «права судей» (судейский активизм), потому что других механизмов на глобальном уровне пока нет, а в Европе они только начинают создаваться в институтах ЕС. Усилиями Европейского суда по правам человека создаются зачатки общеевропейского права. Этим надо дорожить. Недопустимо подрывать этот процесс.

Одна из основных проблем формирования демократических механизмов глобального правотворчества на базе концепции объединенных суверенитетов – неравномерность социально-экономического, политического (а значит и правового) развития государств.

В этих условиях Запад постоянно ставит под сомнение роль других стран (в

том числе так называемых «новых демократий») как равноправных партнеров в международном юридическом нормотворчестве (хотя формально об этом «политкорректно» умалчивает). Но налицо и обратная сторона данной проблемы. Справедливо настаивая на равенстве и указывая на недопустимость проявления развитыми странами Запада «двойных стандартов» в сфере международного правотворчества, сравнительно молодые демократии должны предпринимать более активные усилия для сближения своих систем законодательства и правоприменения с уже достаточно апробированными нормами, включенными в основополагающие международные документы.

В целом, по-моему, надо говорить о необходимости формирования демократических механизмов правотворчества в рамках Совета Европы и в перспективе – глобального политико-правового пространства на основе принципа верховенства права. Здесь, как минимум, не будет ошибки.

ZUSAMMENFASSUNG

Die Herausbildung des internationalen Völkerrechts sowohl im globalen System als auch in Europa wiederholt in bestimmtem Sinn die allgemeine historische Logik: von der im Grunde aristokratischen «Regierung der Gerichte» zur demokratischen parlamentarischen Prozedur der Rechtsschöpfung. Der Prozess der Herausbildung des globalen und europäischen Rechts befindet sich weitgehend im Stadium des «Richterrechts» (richterlicher Aktivismus), denn auf der globalen Ebene gibt es bislang keine anderen Mechanismen und in Europa sind sie in den Instituten der EU erst im Entstehen begriffen. Den Bemühungen des Europäischen Gerichtshofs für Menschenrechte sind die ersten Ansätze des gesamteuropäischen Rechts zu verdanken. Dies ist viel wert. Dieser Prozess darf nicht untergraben werden.

Ein Grundproblem der Bildung demokratischer Mechanismen globaler Rechtssetzung auf der Grundlage des Konzepts vereinter Souveränitäten besteht in der ungleichmäßigen sozialwirtschaftlichen, politischen (folglich auch rechtlichen) Entwicklung der Staaten.

Unter diesen Bedingungen zweifelt der Westen ständig die Rolle anderer Länder (darunter der so genannten «neuen Demokratien») als gleichberechtigter Partner in der internationalen juristischen Normenschöpfung an (allerdings stillschweigend, weil formell an der political correctness festgehalten wird). Aber auf der Hand liegt auch die Rückseite dieses Problems. Die verhältnismäßig jungen Demokratien fordern zu Recht eine Gleichberechtigung und sie weisen auf die Unzulässigkeit der Anwendung von «Doppelstandards» seitens der führenden Länder des Westens im Bereich der in-

ternationalen Rechtsschöpfung hin. Aber sie müssen sich aktiver um die Annäherung ihrer Systeme der Gesetzgebung und der Rechtsanwendung an die Normen bemühen, die sich bereits bewährt haben und in den grundlegenden internationalen Dokumenten verankert sind.

Im Großen und Ganzen sollte man m. E. über die Notwendigkeit der Herausbildung demokratischer Mechanismen der Rechtsschöpfung im Rahmen des Europarats und in der absehbaren Zukunft im globalen politisch-rechtlichen Raum auf der Grundlage des Grundsatzes des Vorrangs des Rechts sprechen. Hier kann wenigstens nichts falsch gemacht werden.

RÉSUMÉ

Dans le système mondial comme en Europe, la constitution du droit international, dans un certain sens, répète la logique historique commune: de la «gestion par les juges» (une gestion aristocratique dans son fond) à la procédure parlementaire démocratique de la «création du droit». Pour l'instant, le processus de la constitution du droit européen et mondial se trouve à l'étape du «droit des juges» (activisme judiciaire), puisque les autres mécanismes ne sont pas encore mis en place au niveau mondial, et en Europe ils ne commencent qu'à se créer dans les institutions de l'UE. Les débuts du droit commun européen sont établis grâce aux efforts de la Cour européenne des Droits de l'Homme. Il convient de chérir ce processus. Il est inacceptable de le compromettre.

L'un des problèmes majeurs d'établissement des mécanismes démocratiques de la création du droit global sur la base du concept des souverainetés unies, consiste en développement socio-économique, politique (et donc en développement du droit) disproportionné des États.

Dans ces circonstances, l'Occident remet constamment en question le rôle des autres pays (y compris des soi-disant «nouvelles démocraties») en tant que partenaires égaux dans la création des normes juridiques internationales (bien que d'une manière «politiquement correcte» ceci ne soit pas mis en évidence). Mais existe le revers de ce problème. Insistant à juste titre sur l'égalité et indiquant la non acceptabilité de «doubles standards» maniés par les pays développés de l'Occident dans le domaine de création du droit international, les démocraties relativement jeunes doivent consacrer beaucoup plus d'efforts au rapprochement de leurs systèmes de législation et d'application de la loi aux normes déjà suffisamment approuvées, incluses dans les documents fondamentaux internationaux.

Et en général, il convient de parler de la nécessité de constituer des mécanismes démocratiques de création du droit dans le cadre du Conseil de l'Europe et dans la perspective de l'espace politique et juridique global fondé sur le principe de la suprématie du droit. Là, au moins, il n'y aura pas d'erreurs.

PROLEGOMENA TO COMPARATIVE LAW¹

Boštjan M. ZUPANČIČ

This essay is a selection from a longer manuscript dealing with the contrast between Continental legal formalism in juxtaposition to the Common Law method and the legal process in action. The author endeavors to identify and to describe, selectively— and as an illustration only—, a few yardsticks for the comparison between the two major legal systems. Obviously, the foremost question is, which of the two is functionally superior. While there is no one-dimensional answer to this query, it is a fact that the European Court of Human Rights is a straight outgrowth of the common-law legal method. The standpoint, therefore, of the judge of that Court might be interesting— at least as an example of one conceivable comparative perspective.

OSTENSIVE DEFINITION

In order to explain, even to lawyers and judges, what ‘in their essence’ human rights are, one might resort to what is sometimes called an ostensive definition. One of the legendary legal theorists, Professor Hamson of Cambridge University², in one of his splendid lectures in the summer of 1968, compared in the following story the Continental system and Common Law. Imagine, he said, that you’re trying to explain to a Martian, who has just arrived on Earth, realize what a dog is. You might say to him: “*A dog is an animal on four legs, hairy and it has a tail!*” He will nod; he will say that he understands; he will then walk down the street, see a cat and he will contentedly exclaim: “*Oh, what an amusing dog...!*”

This approach is the one that describes, in the words of Prof. Hamson, the functioning of the Continental system of laws. From the Common law point of view— the Continental system of laws is fraught with definitions³ of which one level is more abstract than the other. Incidentally, it is ascending through different levels of abstractions that the Continental system arrives at the well-known legal pyramid of Hans Kelsen. H.L.A. Hart’s distinction between prescriptive and instrumental norms, for example, would seem to be of the same Cartesian order of separating what is abstract from what is merely

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² Professor Charles John »Jack« Hamson (1905-1987), Professor of Comparative Law, Trinity College, see at <http://www.trinitycollegechapel.com/about/memorials/brasses/hamson/>, 22/05/2013.

³ But compare Iavolenus: *Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset.* D 50. 17. 202. : “*Every definition in civil law is dangerous, for rare are those [scit: definitions] that cannot be subverted.*” The Continental system’s principal disease has always been legal formalism and thus, as we hope to demonstrate, the verb ‘subvert’ has a prescient and ominous connotation.

concrete, but Hart is perhaps the only true legal theorist of the Common Law, first, and second the above distinction, too, is primarily functionalistic rather than Cartesian.

Suffice it to say that, especially in the Continental constitutional law, the differentiation between the abstract and the concrete is nowadays still the misleading basis for the distribution of jurisdictions of different ‘state organs’, while Common Law long ago did away with Cartesian theories through Henry More’s famous formula: “*quick acceptance, serious examination with accumulating ambivalence, final rejection.*”⁴ Later, we shall demonstrate that legal formalism, the perceptual syndrome of the Continental legal system, is instituted in the rather crude application of the Cartesian separation of the abstract and the concrete. Still, this is its second order consequence. In the first order we find the lack of democratic tradition and the consequent lack of the autonomous legal reasoning—especially so in the formalist Continental judicial, because this is what they are, bureaucracies.

It is not an exaggeration to say that all Continental legal systems—apart from Common Law—are based on this specific pseudo-Cartesian approach, i.e., Continental lawyers are trying to arrive nomotechnically at the ‘essence’ of a particular legal phenomenon such as a contract, a definition *per genus proximum et per differentiam specificam* of a particular offense, etc.

The objective underlying this approach is rather obvious. In order to do this, i.e., to be able to define any phenomenon that law is dealing with, one must start with the effort to abstract from everything the nonessential and focus on the elements of the definition that are crucial. In Roman law, for example, this was called ‘*essentialia negotii*’, as opposed to ‘*naturalia negotii*’ and ‘*accidentalialia negotii*’. Actually, this is a ‘scientific approach’ common both to philosophy as well as to empirical sciences.⁵ Moreover, codification, which is something more than mere restatement, is without this Cartesian separation of abstract from the concrete, simply not possible.⁶

If we peel away one more layer of this onion, we soon detect the hidden premise underlying this technique. The motivation seems to be truly ‘scientific’, in the sense that solving legal complications would seem to require the understanding of ‘the essence’

4 Lennon, Thomas M.; John M. Nicholas, John Whitney Davis (1982), PROBLEMS OF CARTESIANISM. McGill-Queen’s Press, p. 4.

5 The Latin verb ‘*abstraho*, is, ere’ literally means ‘to draw away from’; it thus connotes abstracting from what is presumably inessential and retaining what is essential. Clearly, the criteria of what is (is not) essential are determinative of the outcome, i.e., of the abstraction or of the abstract definition. In turn, the criteria of what is essential, are—often unbeknownst to the thinker himself—predetermined with his purpose.

6 Codification, as it were, requires above all a breakdown of the constituent elements of a particular legal field, say criminal law. The constituent elements are separated into the general part of the code, as if they were put in front of the brackets mathematically. These elements then apply to all the constituent parts of the ‘special part’ of the code, which implies that every major premise used in practice is a combination of these constituent elements from the general and from the special part of the code. The code is thus not a mere restatement of the law, it is a sophisticated combinatorial structure used to construct major premises in legal syllogisms. The first truly sophisticated code of this kind was *le Code Napoléon*.

of a contract, a criminal act, etc. Now, to extract the elements necessary to define a contract or a criminal act, etc., requires a relatively rigorous process of abstraction. Yet law is not an empirical science in the sense we usually conceive of it, with Francis Bacon's 'imperfect induction'. The mental process is closer to philosophy except that the subject matter of such abstraction in law is rather commonplace.⁷

If you were to define the Continental legal process as a language game of abstractions and, further, if we were to maintain that this game is comparable to Wittgenstein's 'language game', we would undoubtedly come to the conclusion that the game is circular, i.e., self-referential. Wittgenstein as an analytical philosopher concentrated on the self-referential and in that sense self-confirming fallacies that we entertain in any particular 'language game'. But we need not go so far because legal abstractions are circular very simply in relation to power, i.e., were it not for the underlying power of the state, legal abstractions would amount to nothing. Everything from the notion of a contract to the notion of a crime depends on the policing power of the state, which means that legal-conceptual frameworks make very little philosophical or scientific sense. Moreover, the abstractions in the Continental legal system—because lawyers forget that they depend on power—tend to get reified in the sense that lawyers, indoctrinated by their legal education, begin to believe that such empty abstractions that have no explanatory power whatsoever do exist independently of the power of the state. The same mental superficiality, as we shall see at the end of this essay, applies to 'human rights', which many also tend to perceive as something real, i.e., as something in possession of a genuine and idiosyncratic 'essence'.

As we shall see, this discernment of 'the essence' of human rights, of a contract, a criminal act, etc. might not even be necessary. It is indispensable for a philosopher, it may be necessary for scientists—, but the question is whether law really needs to find itself somewhere between philosophy and science in the first place. In other words, the focus of law—mere resolution of relational conflicts—is far too run-of-the-mill and ordinary to command the deep probing for 'essences' of its objects of inquiry. One can, of course, look for an essence of e.g. a chair, one can define it, etc.—, but to what purpose except to pretend that 'a chair' is a very important topic? The Continental legal mind-set is surreally pretentious, which is in itself disagreeable, but it becomes truly objectionable when it befuddles, as it often does—here I speak out of personal familiarity with the problem—both the common sense and the sense of justice.

⁷ Incidentally, Lon L. Fuller used this understanding in conceiving of his distinction between the 'morality of duty' and the 'morality of aspiration', i.e., law deals with mundane and ordinary matters it is capable of defining, whereas it is incapable of defining 'morality of aspiration' precisely because it is out of the ordinary. In the third remove from this, we obtain the distinction between a right and a privilege that I had introduced in my dissenting opinion in *E.B. v. France* and which was unanimously confirmed in *Lambois v. Luxembourg*. See more extensively, Owl of Minerva, the last Chapter.***

The outlook, conversely, depends on how one describes the social function of the legal process in general, which may be unpretentious, as it effectively is at Common Law—, or it may be more presuming. ‘Less pretentious’ is the word to use here because the unassuming Common Law system does not exhibit the need to consider the essences of things and this for a very simple reason: the Anglo-Saxon law, I hesitate to even call it a ‘system’, considers its primary task unassumingly to resolve all kinds of conflicts. It is less burdened with all kinds of theories; it does not need them.

In order to corroborate this, we should understand that in both systems, if they were to be endowed with judges who would be wholly, whatever this would mean, intelligent and utterly honest—, the laws defining all kinds of things would in principle not even be necessary. As we shall see, this is easy to prove because at its inception the European Court of Human Rights in the 1950’s was indeed in precisely this *tabula rasa* position.

A judge, considering his realistic task simply to be the resolution of the conflict before him, will use his intelligence, his common sense, and his imagination— and he will resolve the disagreement. If he can arrive at this result without ever understanding what the conflict was all about, this will not prevent him from being proficient at conflict resolution—, which is his single assignment. If this were for example not accurate, the judge in private law matters would not be able to accept settlement between the parties (*compromissum* in Roman law) as a legitimate end to an adversary scenario.

Common Law, therefore, does not even pretend to be a system of thought; it muddles through and is utterly matter-of-fact and pragmatic. This is the ‘system’ in which the judge will preside over a trial without worrying too much about technicalities; he will simply strive to arrive at and to adjust the balance of considerations and in the end he will, by his *fiat*, put an end to the adversary scenario.⁸

One might say that this is the model— the ‘ideal type’ as Max Weber would have called it— of the judicial role. Relying on his intelligence and his sense of justice it authorizes the judge’s common sense and his imagination and it is above all proficient, i.e., if we indeed consider the speedy and authoritative and final resolution of the conflicts to be the main goal of the legal system. In this kind of a system it is then completely irrelevant, whether the object observed is a dog or a cat. In our story, the punch line is as follows: the Martian will walk down the street; he will see a cat and he will say: “*Oh, what a nice dog!*”

The point of the story, however, is elsewhere. Given that epistemological pragmatism of Common Law and the absence of Cartesian presumptuousness, since there is no

⁸ It is in the very nature of a decision that it should be final; the finality of decisions is, because we are dealing with mere conflicts, in law much more important than their content. Thus the formula in the Continental law according to which the finality prevails, in private law, even over truth: *Res judicata pro veritate habetur*. (‘The final decision is irrefutably presumed to figure as truth’).

need to strive for the understanding of the ‘essence’ of things and while there exists only a realistic and modest, i.e., non-transcendental need to resolve the conflict—the metaphor of excessive definitions is the point of the parable. The above realistic and modest requirement to resolve the conflict, however, does not mean that the system is less intelligent or intellectually rigorous. In effect, such a system as we shall see later requires more intelligent input, just as the Chinese system of characters requires it—when compared to the simple system of 25 letters that we have in the West.

In the Common Law system, therefore, one does not define things as dogs and cats, one simply shows a dog, and one says: “*You see, this is a dog!*”

So, when the Martian walks down the street and he sees the cat, he might say: “What a strange dog!”—but he would at least see that this is not the kind of animal he was instructed to recognize. The zoological taxonomy would strive to describe exhaustively the differences between cats and dogs, which in effect is also the difference between natural history and science. This is why natural history always precedes science, i.e., think of Darwin describing different species of plants and animals in order to arrive later at a ‘scientific’ view of natural selection. But of course law does not exist to explain things, as Continental lawyers are unconsciously trained to accept; its purpose, more modestly and practically, is to maintain social stability⁹ by promptly, authoritatively, definitely, etc., resolve disturbing disagreements. The question, therefore, is why does the Continental system display this ‘scientific’ ambitiousness, whereas the Common Law system can easily do without it? ¹⁰

TWO DIFFERENT MODES OF THINKING

It was Max Weber who spoke of the Common Law as a system in which the lawyer identifies the similarities between different cases as if he were to draw “parataxical index cards”. This just means that in Common Law, which is analogous to the Chinese system

⁹ For example, see references to ‘social stability’ in Luban’s seminal article, *The Publicity Principle*, in *The Theory of Institutional Design*, Robert E. Goodin, Ed., Cambridge University Press, 1998, pp. 154-198, freely available at <https://www.law.upenn.edu/institutes/cerl/conferences/ethicsofsecrecy/papers/reading/Luban.pdf> (last visited 11/16/2012).

¹⁰ In comparative terms we observe a typical aversion, in Common Law, to abstract theoretical excursus. It is an exaggeration, of course, to say that the Anglo-American legal system does not have any ‘theory,’ but if it has one, its purview is completely different from the one in Continental legal theory. On the other hand, this ‘theory—I am referring to most of the articles published even in the leading American law reviews—may easily get reduced to pure ‘analogy mongering’ as R.M. Unger of Harvard Law School has called it, without any explanatory value. This is not without untoward consequences, because the ‘theoretical’ level remains horizontal in the sense that it does not elevate itself above the case law, hence the critical reference to ‘analogy mongering’. The case law thus remains ‘open textured’, which for example makes it possible for the American Supreme Court to go forward and then again backwards—for example in the case of exclusionary rule and the privilege against self-incrimination—simply because the connection between the two has in theory never been made ‘close textured’, i.e., explained and thus fixed as a *fait accompli*.

From the Continental point of view, it is patent that the Common Law legal theory, with honorable exceptions, is practically non-existent simply because it remains on the same level of abstraction as the case law, which could be its extremely rich empirical subject matter. For a Continental legal theorist this is a goldmine!

of characters, one does not ambitiously resort to abstract definitions ('of chairs'); one simply remembers the story of a case. The lawyer then says: "*Oh yes, this is reminiscent of the case of so-and-so in which the courts took such-and-such position...*"

In Common Law, one starts from this associative recollection, reminiscent of De Bono's lateral thinking¹¹, without necessarily trying to 'appreciate' what the case is on a higher level of Cartesian abstraction, i.e., to what higher level of abstraction (of more abstract conception) the fact pattern would seem to logically correspond.

A very good example of this is the so-called *wanton and willful disregard of unreasonable human risk*, a category that derives from a case-story from the American West where a young boy was standing on top of a bridge throwing stones at the trains passing by under the bridge. A passenger was killed and the boy was accused of homicide. Clearly this was not a murder; the intent was lacking. The direct intent was replaced by what they then descriptively called 'wanton and willful disregard of unreasonable human risk'.

This becomes more interesting if we know that in the Continental system this is called *dolus eventualis*, and that many theories have been advanced in order to explain the difference between the direct intent (*dolus directus*) on the one at hand and the negligence (*culpa*) on the other hand, where the 'wanton and willful disregard of unreasonable human risk' is consigned in between these two categories. Parenthetically, negligence might very easily be described not only as an absence of due care, but as some kind of a mental omission. These theories are very interesting, they border on the philosophy of intentionality (the intentionality school of Graz University with Meinung as its main proponent), but the real question is whether they add anything substantial to the just resolution of the conflicts.¹²In the end there are simple formulas for the application of the *dolus eventualis* theory, but these practical solutions could have been arrived at through an intelligent shortcut, i.e., without excessive philosophizing on the matter that is mundane and commonplace.

Moreover, the Common Law can do without any theories because eventually after the trial the jury is at any rate sequestered in a closed room and may very well disregard all of the judge's instructions. Likewise, because jury verdicts are not explained or reasoned out, appeals on material grounds referring to substantive criminal law are practically impossible in Common Law. Could we say that Common Law is therefore less just?

The system of precedents would, therefore, seem to be agnostic and in a sense undecided; it never strives to 'understand' in the Continental sense of the word, i.e., in the sense of the word *understanding* that is so characteristic of the Continental lawyers.

¹¹ De Bono, *Lateral thinking: creativity step by step*, Harper & Row, 1970.

¹² They say it is wise to avoid physicians with scientific propensity. Such a medical doctor may place the 'scientific' discovery above the well being of the patient. The latter, of course, only expects an efficacious answer to his medical problem. Incidentally, psychological tests taken in the United States demonstrate, which is truly surprising, that the most creative of all the professions—is the legal profession. The reverse results would be obtained on the Continent.

Conversely, the Continental lawyer would not say anything about the case, of which the one before him reminds him; he would immediately resort to a remembered *definition* that he got from a code or some other, the case law excepted, source of law. The mental association here is not between two similar fact patterns. No, it is vertical when compared to the horizontal mode of association between two different Common Law cases. In the Continental system one jumps from the concrete to the abstract and back—, but one cannot cite a precedent case of which the immediate situation would remind him.¹³

It is therefore clear that we have here two completely different modes of reasoning. As an aside to this comparison, one might mention the formula popular among Common Law lawyers to the effect that in Common Law the law is difficult to find but once found is easy to apply. The reverse would be true of the Continental system, of course from the perspective of the Anglo-Saxon lawyers, to the effect that on the Continent the law is easy to find, but once it has been found, is difficult to apply.¹⁴

How does one explain this formula? The issue is not whether the law is easier to apply or not; the issue is the level of abstraction, i.e., if the norm is very abstract then the gap between the abstract and the concrete is difficult to bridge, whereas the horizontal reference to another case is on a very specific concrete level. Here, one does not need to descend from the lofty high level of abstraction down to the specific and concrete case. The horizontal reference, in other words, is clearly more determinative in the case's outcome, which in turn means that such a system while often textural is nevertheless more predictable, i.e., that it offers a high level of legal reassurance. This catchphrase of Anglo-Saxon lawyers illustrates the radical difference between the horizontal and vertical modes of reasoning.

The Continental system requires, one might say 'presupposes', the mental exercise of constantly leaping from the concreteness of a specific case over to the abstract definition found in some legislative act, and back again. One might easily suggest that Continental lawyers are masters of abstraction because their job is nothing but bouncing between what is abstract and what is concrete. To put it differently, a good Continental lawyer is one well versed in deploying abstractions and making them fit the given fact pattern.

On the other hand, this aptitude almost presupposes a cognitive impediment where the veritable reification of these abstractions takes hold of them; they become so deeply immersed in these abstract mental constructs that they begin to believe that generalizations,

¹³ Until very recently, because the cases were not recorded and disseminated (except as *la jurisprudence* in the French system)—the Continental legal system functioned as a system without memory and consequently unable to learn from its own experience. The recent arrival of the national constitutional courts on the one hand and the case law of the European Court of Human Rights on the other hand are the only exceptions to the idea that the courts are there only to apply the law and not to generate it.

¹⁴ It is 'difficult to apply' because of the considerable gap between the abstract norm and the concrete fact pattern, which seems to the Common law jurist, due to the fact that he is not sensitized to abstract thinking, more indeterminate than it actually is.

e.g., contract or murder, are real. They should be reminded of the illusoriness of theories and of their dependence on the power of the state through the use of Thomas Hobbes's formula: "*Civil laws ceasing, crimes [and other constructs] also cease*", i.e., to exist.¹⁵

LEGAL FORMALISM

Continental legal formalism is a form of fascination with the abstractions where the jurist has invested so much in the deciphering of the legislative definitions, that he is now unwilling to depart from the mental practice in which hopping from the concrete to the abstraction and back is the name of the game.

Legal formalism is the weakness of Continental law. Moreover, it is an institutionalized form of folly where Wittgenstein's language game is reduced to the constricted jumping between the concrete of the abstract, where the space of the jump is *close textured* as opposed to *open textured*. To put it differently, the Continental system is 'close textured' and utterly and reflexively conservative in the sense that it hinders the mere opening of any new questions. It prevents the protagonists in the judicial and legal process in general to be commonsensical and creative, i.e., to find new solutions that would be logical, natural, and just. If this was the intent of the 'separation of powers' where the judge, according to Montesquieu, was just the mouthpiece of the law, it worked very well indeed.¹⁶

The narrowness of the space is meant to kill the originality of solving the problems, which precisely had been the intent of absolutist rulers ranging from Justinian in the 6th century on the one hand and Friedrich II of Germany on the other hand. It has been historically shown that Justinian wanted to reduce the power of the praetors and that Friedrich II with his *Landesgericht* was intent on abolishing at least the lawyers if not also the judges. The idea behind that casuistic legislative project had been to make autonomous legal reasoning superfluous because all of the answers to concrete questions would have been supplied in advance—in the abstract.

If today, as Professor Kuhn has shown, legal formalism is also the 'transitional' legal disease of Central and Eastern Europe¹⁷, this is closely and causally related to the former

15 "[T]he civil law ceasing, crimes cease: for there being no other law remaining but that of nature, there is no place for accusation; every man being his own judge, and accused only by his own conscience, and cleared by the uprightness of his own intention. When therefore his intention is right, his fact is no sin; if otherwise, his fact is sin, but not crime. Thirdly, that when the sovereign power ceaseth, crime also ceaseth: for where there is no such power, there is no protection to be had from the law; and therefore every one may protect himself by his own power: for no man in the institution of sovereign power can be supposed to give away the right of preserving his own body, for the safety whereof all sovereignty was ordained. But this is to be understood only of those that have not themselves contributed to the taking away of the power that protected them: for that was a crime from the beginning." Thomas Hobbes, *LEVIATHAN*, Chapter XXVII entitled "*On Crimes, Excuses and Extenuations*".

16 The symptomatic idiom in French legal language is '*appliquer le droit*' where '*appliquer*' implies an almost automatic renunciation of judge's own cognitive input: he is there only to apply the law. In recent decades this verb 'to apply' began to have creative connotations—but very timidly. The big fear in the French constitutional theory is still of '*le gouvernement des juges*'.

17 Zdenek Kuhn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation*, Martinus Nijhoff, Leiden, 2011.

‘dictatorship of the proletariat’ in which the law at any rate was, according to Marx and Pashukanis, supposed to ‘wither away’.¹⁸

The legal incongruities coming from Central and Eastern Europe are now the everyday bread of the judges of the European Court of Human Rights. One could say that undoing the extreme effects of legal formalism-primitivism is now the mainstay of their job. One of the leading Anglo-Saxon lawyers of the Court once indicated, not without reason that the actual role of the Court right now is to deal with cases coming from Central and Eastern Europe. Nevertheless, one must keep in mind that the East European legal formalism is only an amplified form of its older brother, the Continental legal positivism-formalism. Their anti-democratic origins are the same.

The intent has always been to reduce the power of the magistrates and to constrain them in the close-textured frame of reference, whereby they would ‘apply the law’ but would have no leeway for inventing new solutions to new problems. People forget that Roman law came about, in its very origin, as an accumulation of judicial and specific instances of inventiveness of specific original solutions and other escape routes in solving the particular problem the judge was being confronted with, if he wanted to resolve the conflict. The case I usually cite is the example of *Lex Rhodia de Iactu* in Roman law.

LEX RHODIA DE IACTU¹⁹

In Roman times the ships were sailing in the Mediterranean Sea carrying the cargo of wheat, the amphorae containing olive oil, wine, cedar wood etc. If a ship was caught in the storm, perhaps caused by a Meltemi (μελτέμι) wind, the skipper was obliged to throw overboard the bulkiest and the least valuable cargo.

During the storm the commander would therefore have to decide to abandon the extra cargo, to make the ship lighter and more likely to endure the tempest. The Meltemi storms do not last long. When the sea was calm again, the vessel navigated quietly into the port of, say, Rhodes. Now things were tranquil again, but the loss for those whose cargo was jettisoned, was obvious. Their cargo was wasted in order that other cargoes would be saved. Obviously, those sustaining the damage found this to be unjust as their cargo was sacrificed in order to save the cargo of others.

Praetor, once the legal action was taken to compensate for this damage, was confronted with the question as to whether those who lost their cargo were entitled to seek damages

¹⁸ Evgeny Bronislavovich Pashukanis (1891– 1937), *LAW AND MARXISM: A GENERAL THEORY*, Ink Links, 1978. Pashukanis proposes the so-called ‘commodity exchange theory of law’ amounting basically to the thesis that Western capitalist societies are based on the *quid pro quo* commodity exchange, whereas Marxism and Marxist societies are based on a generalized solidarity such as proposed by Karl Marx in his *Critique of the Gotha Programme: From each according to his ability, to each according to his needs!* See at <http://www.marxists.org/archive/marx/works/1875/gotha/ch01.htm>.

¹⁹ Literally, The Law concerning Jetisoning, see for example at http://openlibrary.org/books/OL19331299M/Lex_Rhodia_de_iactu.

from those who had their cargo saved so as to evenly distribute, although *ex post facto*, the damages caused by the *vis major*, the act of God. The magistrate found it just, i.e., logical—to re-allocate the damages, which was only fair. This *ex post facto* sharing of the risk, akin to modern insurance, was an unprecedented solution to a very specific problem.

Thus *Lex Rhodia de Iactu* thus becomes a typical example of a very specific difficulty finding a very specific answer. However, this solution, once discovered, became a rule and it became a rule through generalizing the situation and the answer to it. The elucidation by the judge was a precedent in the sense that at some point in the future similar but not identical situations might arise where the real risks had to be re-distributed among those who had suffered damages as a consequence of a hailstorm, drought or some other kind of *vis major*, etc. The jurists in such other cases would naturally think of *Lex Rhodia de Iactu* as a model for resolving similar conditions.

Looking at it from today's point of view, one might say that Roman law functioned very much like the Common Law. Lawyers remembered the cases, i.e., in a certain sense they were cited and they suggested the solution to the magistrate by reference to the initial case. Easily, we could call this a legal tradition; it was handed down also by word of mouth from one generation of lawyers to the next.

Then came Justinian. It can be demonstrated, that the intent of his Codification in the 6th century was not simply to gather all the empirical data that had been accumulated thus far but on the contrary, to take away the power of the magistrates and to make them follow the rules such as were distilled from the previous empirical materials. In fact, Justinian caused damage because in his restatement of the law he discarded much of the empirical material, so that he could distil the subject matter of his restatement.

The declared purpose of restatement was to codify and organize the empirical findings of the judges so that they might be easier to find and to refer to, which is laudable. On the other hand, in order to streamline the system one had to throw overboard much that didn't fit into the preconceived model of what the Justinian's *Digestae* in fact had to be—because in the last analysis the intent was to disenfranchise the magistrates, i.e., to bind them to an *abstract* legal norm. Imagine that the Chinese system of characters were to be, through this same strategic simplification, reduced to the 25 letters of the Western alphabet. Would this still be the same system, i.e., from the semiotic point of view, would it carry the same open textured richness of meanings, the richness that you derive from the ambiguity of their symbolic language in the first place?

Indeed, the difference between the Continental system of distilled legal norms on the one hand and the rich, semiotic, associative-open-textured nature of the Anglo-Saxon legal frame of reference essentially explains the profound, the very deep difference between the two modes of thinking inherent in the functioning of the two juxtaposed legal systems.

THE WEAKNESSES OF THE COMMON LAW

Naturally, there are a few drawbacks, on the side of the Anglo-Saxon system when compared to the Continental system and its processes

That Common Law when it comes to functioning, is clearly a superior, can readily be observed in the performance of all of the United Kingdom, Ireland, and other Common Law jurists also in the European Court of Human Rights on the one hand— as well as providing a swift and sophisticated nature of justice such as rendered in the Common Law countries— ranging from the United Kingdom and Ireland on the one hand to Malta and Cyprus on the other.

When explaining the handicap of the Anglo-Saxon legal system, I used the following metaphor.

Imagine that you have a system of local roads and that the arrangement is very intricate, where many points in the system connect to many other points, and where the roads are not always that suitable, i.e., there are no roads or highways—, then in order to function (in the system of precedents), you must be a pretty good driver. The arrangement requires a high level of intelligence, great input in terms of labour, as well as an abundant portion of imagination.

It is also interesting to observe that such a bad road system not only requires but in fact produces better drivers and that, on the other hand, the European-Continental system of abstract highways does not seem to exert the same kind of ‘natural selection’ on its motorists. Here I speak as a law professor who has taught in both systems, in addition to having been a judge, for 18 years, in the courts of last resort. I could easily observe the dissimilarity between the end-results of the legal system based on several appeals under the Continental Constitutional Court— and the appeals coming from unlike jurisdictions and ending in the European Court of Human Rights.

An interesting case in this respect is *Burden & Burden v. the United Kingdom*. In the case the judgment of the House of Lords was appealed to the Court in Strasburg because, after the exhaustion of domestic remedies, it became clear that the House of Lords could not have made its judgment binding on the United Kingdom legislature. For many years the two Burden sisters had lived in a common household and while they were getting older they started to be concerned about the inheritance tax that would have been obligatory for the surviving sister in case the other sister were to die. The sisters felt discriminated against because those registered in civil partnerships, although not married in the usual sense of the word because homosexual, would benefit from the inheritance tax exemption in case one of the civil partners were to die, whereas one of the sisters otherwise in a completely analogous situation would not have profited from the same exemption.

On the Continent this would have been a classic case dealt with by the country's constitutional courts. In the United States, because it is a unified jurisdiction, the question of the equal protection of the laws would have been addressed by the United States Supreme Court probably under the less stringent equal protection test such as applies to socio-economic matters. At any rate, the real reasons for which the two sisters living in the same household had not been afforded the same tax exemption were probably the consequence of British tax authorities' convenience because a registered partnership is easy to demonstrate whereas the actual living together in the same household is a question of fact the tax authorities cannot *a priori* discern from the papers filed as a tax return. The outcome, however, was not only discriminatory; it was clearly irrational and a mere convenience for the tax authorities.²⁰

The case, however, is interesting for yet another reason. David Panic, the barrister who brought the case to Strasbourg, had in fact succeeded in persuading the House of Lords to assent to the sisters' claim. The House of Lords agreed but its position had not been binding on the British legislature. The lawyer thus turned to the European Court of Human Rights in order to have a binding judgment, which the United Kingdom Parliament would have been obliged to follow. Irrespective of the fact—I wrote a dissenting opinion in the case—that Mr. Panic in Strasbourg had not succeeded with his claim, it was extremely interesting to observe how a well-defined issue was handled in the United Kingdom domestic legal system and how well prepared the issue arrived in the European Court of Human Rights. It was well argued and the issue itself is, of course, on the cutting edge of contemporary legal questions. The question may then well be asked, as to why similar cutting edge contemporary legal questions do not arrive from countries like Germany, France, Sweden, Italy, Spain, and other nations.

A similarly interesting question, a few years before *Burden and Burden*, appear in the case concerning the Heathrow Airport next to London.²¹ In general, the European Court of Human Rights has so far not dealt with many environmental protection cases; there are two cases from Romania, but *Hutton v. the United Kingdom* was interesting because it concerned noise pollution. The neighborhoods close to Heathrow Airport were of course constantly disturbed by the uproar of departing and landing aircraft and the question was whether these people may claim damages for the obvious lowering of their quality of life due to the airport noise. In terms of article 8 of the European Convention on Human Rights the issue could not have been defined directly as a matter

²⁰ In other cases, too, the Court has ceded to bureaucratic convenience. In a Dutch case, for example, the obvious cohabitation between the defendant and his common-law wife was not sufficient to afford the wife the usual status of the privileged witness—not obliged to testify against her husband. Although such privileged status of a 'significant other' is an outgrowth of the privilege against self-incrimination, the Court refused to extend this privilege to a partnership that had not been officially registered. Obviously, this, too, is a manifestation of legal formalism.

²¹ *Hutton v. the United Kingdom*, no. 28014/02, 17 December 2002.

of environmental protection because the Convention does not have a provision to that effect. Again, it is interesting to observe that the issue arrived from the Common Law country although the identical problem of noise pollution near many European airports is exactly the same.

If such interesting questions do ascend from the United Kingdom, the system, as it were, must be doing something right. For example, it is well known how frequently suicides take place in French prisons and yet the cases dealing with this question in the European Court of Human Rights are very rare. This seems to indicate that the French system for some reason does not generate the relevant issues so that they might appear in the European Court of Human Rights.

Nonetheless, to look at the end result, i.e., to observe the issues which are brought from different domestic jurisdictions and to consider in what state they do arrive in Strasbourg, does not *per se* explain much about the functioning of the domestic system or its proficiency, or lack thereof, to produce them. To the inside judicial observer it is nevertheless obvious that the Common Law, for whatever reason, does produce the cutting edge legal issues, which other systems on the Continent are apparently less capable of generating.

In legal theory it is taken for granted that the legal process in any culture will lag behind the actual happenings in society, i.e., it will deal with a particular problem, a controversy that might well be decided by law, with a considerable delay. This delay, and especially so before the case arrives in Strasbourg, is normal; it takes many years for the domestic legal remedies to be exhausted before the case is admissible at the international level. Still, social stability, which is the main purpose of legal conflict resolution, suffers if these delays proliferate.

The issue, therefore, is not the interesting, *vel non*, nature of the cases arising from particular jurisdictions; the issue is whether their resolution actually contributes to social stability. In the above *Burden and Burden* case, for example, the solution of the tax issue would have eliminated a discrimination in the domestic system, contributing in some small way to social stability, i.e., to justice. Likewise, the elimination of the noise problem around Heathrow airport would have represented a satisfaction for the numerous neighbors who have been suffering from the problem for many years. That, too, would have contributed to social stability— had it been resolved properly. In the end, one must again be reminded of the question as to whether the system, in this case Common Law, is or is not capable of generating the right questions.

I would also say that most judges in the European Court of Human Rights share the opinion to the effect that, *one*, the English cases, as it were, are the most interesting

ones and, *two*, that English barristers and English lawyers in general are by far the most competent. The judges of yesterday, too, were of this opinion.

It is, therefore, puzzling to say the least to observe the ostensibly irrational attitude of the British politicians of late; who seem to attack the European Court of Human Rights and its jurisdiction because of the *Hirsch* judgment bestowing the voting rights upon the British prisoners. While this judgment, with which I don't agree, has clearly gone overboard, i.e., it ought to have afforded 'the margins of appreciation' to the United Kingdom, it, despite everything, is not as such a sufficient reason to have misgivings about the European Court of Human Rights. The political harassment of the Court, while specifically irrational, is nevertheless well founded for other reasons.

These reasons have nothing to do with inheritance tax or with voting rights of the prisoners. These reasons have to do with what we have so far been describing as 'legal formalism' that is, to put it mildly, in direct syllogistic collision with a sophisticated system of law based on reasoning by analogy. This cultural conflict is multilayered, i.e., this is not the place to explore the many facets of it. I remember a judge from the Common Law jurisdiction saying to me, concerning the French, many years ago: "*For 600 years we have tried to understand them, but we have not succeeded in doing so...*"

In other words but especially so in the area we are discussing here, it is practically impossible to decipher the points of collision between the two aspects of Western legal cultures, but if the British member of the European Parliament angrily refers to the decisions of the European Court of Human Rights as "those idiotic judgments"—, it becomes obvious that the incompatibility is real and must be understood in order to be taken into account.

It must be taken into account, the sooner the better, because otherwise the very future of the European Court of Human Rights is endangered. The reasons for this may seem capricious and arbitrary if we only observe the surface. If we understand the underlying difference in the mentality we then begin to understand that these differences in these disagreements are not capricious, neither are they arbitrary. This is not only the collision of the two legal systems; it is a head-on collision of the two aspects of culture and civilization.²²

²² As an aside to this let us remark that the power of a particular culture or civilization is not measured by its military might or even by its effort to indoctrinate (cultural imperialism) the members of other cultures.

The power of a particular culture is measured, precisely enough, by *the amount of positive identification this culture receives from the members of other cultures*. Thus for example the French President Chirac was obliged to leave the site of the football game because the members of the Arab community began to whistle when the band played la Marseillaise; likewise, the German chancellor Angela Merkel may complain that the Turks of the third-generation in Germany refuse to adapt to the German culture. The Chancellor here betrays a basic problem of German culture. By contrast, those who arrive to the United States all wave the American flag; they want to be in every sense and as soon as possible—Americans. It is difficult for us to assess whether newcomers to the British Isles react similarly as those arriving in America; we would surmise that the intensity of positive identification is unlikely to be as strong. Nevertheless, the general preference for the English-language, as opposed to French or German, does indicate something about the power of the English-speaking civilization as opposed to the old Continental civilizations.

Any, legal system, needless to say, is an integral part of a particular society, indeed of its civilization as a whole. The normative structure, the law, cannot be seen independently of the moral and ethical structure in a particular society, in a particular culture, and in a particular civilization. If we say, for example, that a particular country's criminal code is its minimal moral code, we have said something about the relationship between substantive law on the one hand and the ethics and morals on the other hand. Interestingly, in light of the problem we are discussing here, the comparisons between different substantive laws in the Common Law as opposed to Continental law do not seem to be too striking. To put it differently, what is incriminated in the Common Law mostly overlaps with what is incriminated in any of the Continental countries. Indeed, the relevant differences do not come from "substantive" law.

The subject matter here is "*legal process*" but not in terms of a particular procedure, e.g., civil or criminal. The reference to *legal process in general* is characteristic of the Common Law; it is entirely alien to the Continental legal mentality. In the Common law countries the idioms such as "law in action" or "legal process" have a specific meaning because they generally refer, as it were, to the dynamic aspects of the happenings in the legal sphere. These happenings contribute, as we have explained before, to the organic growth of the system on an everyday and case-by-case basis. In this sense, the system predominantly benefits from the contributions of the judges and other lawyers that are a part of it, i.e., it is not ordained, except in certain areas, by the legislature. One must understand this "organic" characteristic of the Common Law in which law is taught out of casebooks and in this sense empirically and horizontally, rather than doctrinally and vertically.

If we now return to our metaphor of roads and highways needed to find one's way today, even with GPS such as Lexis or Westlaw involving interconnections and many loose associations of semiotic ambiguity, it is still not easy. Ambiguity is the price to be paid for the open textured nature of the law. Again, such ambiguity is the convincing sign of epistemological unpretentiousness; the system does not harbor the ambition to define the concepts unambiguously.

On the other hand, the Continental system seems to have in some simplified sense inherited the philosophy of *monads* of the famous German philosopher, the inventor of infinitesimal calculus—Gottfried Leibniz (1646-1716). For Leibniz, a monad is a unit (here: of thinking) precisely corresponding to the ambition of each Continental code, where each particular article is to figure as a monad to be recombined with other monads—, just as the letters of the alphabet are recombined into words, into whatever major premise the system might need in order to adequately describe the fact pattern in question. In the *travaux préparatoires* of Napoleon's *Code Civil* there are explicit passages referring to such recombination. The framers of the *Code Civil* must have been aware of Leibniz's theory, because the structure of the Code composed of articles

as monads yields billions of combinations (of ‘monads’) thus supplying the material for the composition of syllogistic major premises such as would presumably be adequate to every possible fact pattern to which one of the combinations might correspond.²³

The system is supposed to work through the code. The code would offer the alphabet of so many monads and it is for the lawyers to use them. They use them by combining the monads into major premises, to which the fact pattern must fit.

Except that in this process, which is supposed to be bound by the principle of legality as in criminal law, one does not know which is the hen and which is the egg. A lawyer is confronted with the special fact pattern; he recognizes it as a violation of a norm—because he has more or less unconsciously recombined several aspects of a particular article and of different articles into the actual major premise. The given major premise in turn provides for a selective perception of the facts, i.e., the lawyers see certain facts as legally relevant. But on the other hand other facts, which might have been relevant under a different major premise, become irrelevant. Because they are irrelevant under the chosen major premise, they are simply disregarded, vis-à-vis the lawyers turn a blind eye.

The French existentialist writer Albert Camus in his novel entitled “Stranger” provides the best mockery of this; the defendant is ultimately convicted because he had failed to cry at his mother’s funeral! This ‘legal qualification’ (*qualification juridique*) is a crucial step in the functioning of any legal system. Again, what does this really mean? After an event happens in the real world that comes to the attention of the law, lawyers must perceive it as either relevant or irrelevant. In case it is perceived as irrelevant it vanishes from the legal horizon. In case it is perceived as relevant, the lawyers in charge must ‘legally qualify’ it.

* * *

Take an event such as described by Dostoyevsky in his novel *Crime and Punishment*. The story is long and complex but in law it is instantly reduced to the legal qualification of “homicide”. Thus a “monad” from the special part of the criminal code is chosen as the initial legal qualification. The qualification of homicide became obvious the moment

23 I have dealt with this in *Criminal Law: The Conflict and the Rules*, S.J.D. dissertation, Harvard Law School, 1980. The idea is not difficult to explain since, for example, each major premise derived from the e.g. a criminal code must contain at least one hypothesis from the special part of the code referring to a particular crime on the one hand and at least one reference to the level of guilt in the general part of the code.

If the code contains 100 articles in the general part and 200 in the special part, these already, if you only take combinations of two, give us a great number of combinations. Of course, it is rarely the case that only these two “monads” would be required. Therefore, if we take combinations of two, three, four, and five in cases in which aside from liability we have to do with questions such as insanity, duress, self-defense, etc. --, we come to about 50 billion combinations. Moreover, one has to be aware that the articles of the code are not single units because they contain subsections referring perhaps to different doctrines etc. In the end we, indeed, arrive at an enormous number of combinations that supply the material to the lawyer trying to establish the adequate major premise such as would be adequate to describe and to correspond to the fact pattern that he is dealing with.

the dead body of the female pawnbroker was found, the next question being whether Raskolnikov was or was not at the time of the homicide legally insane or sane. At this point we already have two monads recombined into one major premise that will determine further perception and apperception of what are now, and only now, 'legally relevant' facts. Given the definition of insanity, the next question is did Raskolnikov suffer from schizophrenia. This is a question of fact that would be testified to by a psychiatrist. But once the diagnosis is established, the next question is the causal link²⁴ between the mental illness on the one hand and the act of Raskolnikov on the other hand.

Which monads do we have in play at this stage? The definition of homicide will vary according to the establishment of the defendant's sanity or insanity. Legal establishment of insanity, however, will vary according to the definition of mental illness, and the establishment of a causal link between the mental illness and its influence on the murder of the pawnbroker. The least we can say is that in this process there is a Ping-Pong effect between the realities as in minute detail described by Dostoyevsky and the reductive construction of the major premise as ridiculed by Camus, i.e., from the point of view of criminal law. Here we must keep in mind that 'homicide' is a very general definition that undergoes very complex changes and can ultimately result in murder or in innocent homicide. In other words, homicide is not a monad, because underneath this designation we have many others, which must be recombined into an adequate major premise that will, at least approximately and reductively, correspond to what has really happened in the killing of the pawnbroker woman.

²⁴ The question of causal nexus is in itself an extremely complicated issue. In law, causality is the subject matter of much controversy. In science, we speak of necessary conditions and legal experts testifying to 'causal link' between two events, would usually be inclined to speak only of the fact that one event is 'not incompatible' with the other event. Moreover, the theories relating to 'legal causation' are themselves misleading to the point where the American Model Penal Code has effectively reduced causality, because it is misleading, to the question of the *sine qua non* necessary condition. In this perspective, any necessary condition may be considered to be the legally relevant cause, if the actor would be, by reference to other provisions of the Code, considered blameworthy.

Данная статья рассматривает существенный культурный конфликт между в большей части формальным подходом континентального права и так называемым органическим подходом общего права к правотворческой и интерпретационной деятельности.

Одним из общих неустановленных правил в континентальной правовой системе является то, что право исходит исключительно от законодательной власти; «судейское право», особенно во французской системе, является анафемой.

Однако, когда речь идет о «судебном правотворчестве» современных конституционных судов и Европейского суда по правам человека, становится совершенно ясно, что судебный прецедент является высшим источником права.

Иначе говоря, миф континентальной правовой системы, вытекающий из теории разделения властей, в соответствии с которой существует декартовское разделение труда между судебной и законодательной властями— вместе с различием абстрактного и конкретного, по сути, теряет свою актуальность. Удивительно, что постепенное «распространение общего права» на континентальную правовую систему осуществляется так, как будто ничего необычного не происходит.

В то же время существуют конкретные разногласия между двумя правовыми менталитетами на уровне Европейского суда по правам человека, то есть в самом эпицентре формирования европейского прецедентного права.

ZUSAMMENFASSUNG

Im Beitrag wird der wesentliche Kulturkonflikt zwischen der zumeist formellen Herangehensweise des kontinentalen Rechts und der so genannten organischen Herangehensweise des allgemeinen Rechts an die Rechtssetzungs- und Auslegungstätigkeit behandelt.

Eine der allgemeinen nicht formell etablierten Regeln in dem kontinentalen Rechtssystem lautet, das Recht gehe ausschließlich von der gesetzgebenden Gewalt aus, das «Richterrecht» sei verfehmt, besonders in dem französischen System.

Wennes aber um die «richterliche Rechtsschöpfung» der modernen Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte geht, wird absolut klar, dass Präzedenzentscheidungen der Gerichte die höchstrangige Rechtsquelle ist.

Anders gesprochen, der Mythos des kontinentalen Rechtssystems, der seinen Ursprung in der Theorie der Gewaltentrennung hat, wonach die Descartesche Arbeitsteilung zwischen der Legislative und der Judikative existiert, wobei zwischen dem Abstrakten und dem Konkreten unterschieden wird, eigentlich an seiner Aktualität verliert. Es ist schon erstaunlich, dass sich die schrittweise «Erstreckung des allgemeinen Rechts» auf das kontinentale Rechtssystem derart vollzieht, als würde nichts Ungewöhnliches geschehen.

Gleichzeitig bestehen konkrete Differenzen zwischen den beiden Rechtsmentalitäten auf der Ebene des Europäischen Gerichtshofs für Menschenrechte, d. i. im eigentlichen Epizentrum der Herausbildung des europäischen Präjudizienrechts.

RÉSUMÉ

L'article examine le conflit culturel important entre l'approche essentiellement formelle du droit continental et celle dite organique du droit général à l'activité législative et interprétative.

L'une des règles tacites communes dans le système juridique continental consiste en ce que le droit découle uniquement du pouvoir législatif; «le droit des magistrats», en particulier dans le système français, est un anathème.

Cependant, quand il s'agit de «la législation judiciaire» des cours constitutionnelles modernes et de la Cour européenne des droits de l'homme, il est clair et net que le précédent judiciaire est la source suprême du droit.

En d'autres termes, le mythe du système juridique continental qui découle de la théorie de la séparation des pouvoirs, en vertu de laquelle il existe la division cartésienne du travail entre les pouvoirs judiciaire et législatif, avec la distinction de l'abstrait et du concret, en fait, perd de sa pertinence. Il est surprenant que l'extension progressive «de la common law» dans le système juridique continental se réalise comme si de rien n'était.

Dans le même temps, il y a des contradictions très concrètes entre les deux mentalités juridiques au niveau de la Cour européenne des droits de l'homme, c'est-à-dire au cœur même de la constitution de la jurisprudence européenne.

JUDICIAL LAW-MAKING (THE STRASBOURG COURT ON APPLICABILITY OF THE EUROPEAN CONVENTION)

Lech GARLICKI

I. INTRODUCTORY REMARKS

1.

Modern constitutional law is, to a growing extent, a judge-made law. In more and more countries the vague provisions of the written constitutional text are constantly being translated into more specific norms and rules. This mission, I am not going to discuss its legitimacy, is fulfilled by constitutional (supreme) courts all over the world.

Those activities of national constitutional (supreme) courts are accompanied by a developing net of supranational jurisdictions, particularly in the area of individual (human) rights. The case-law of bodies like the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights and recently also of the African Court of Human and Peoples' Rights, add a lot of juridical content to different international instruments on human rights.

The experience of the European Court of Human Rights (ECtHR) offers here a very pertinent illustration. Although the ECtHR is not a "constitutional court" in the proper sense of that term¹, its activities place it very close to "classic" constitutional jurisdictions².

First of all, as it is well known, the 1950 European Convention on Human Rights (ECHR) was adopted in a form of an international treaty; therefore, the process of its interpretation and application should follow general rules adopted in the Law of Treaties, in particular in the 1969 Vienna Convention. Among those rules is the principle of the primacy of the text that coexists with the principle of teleological interpretation³. While the essence of these two principles does not necessarily differ from their understanding in constitutional law, it is the very nature of the constitution and of the international law which makes a real difference. International treaties constitute voluntary limitations of the national sovereignty and must not be constructed in the manner imposing more

¹ L. Favoreu, *Les Cours de Strasbourg et de Luxembourg ne sont pas des cours constitutionnelles*, in *AU CARREFOUR DES DROITS: MÉLANGES EN L'HONNEUR DE LOUIS DUBOUIS* (2002); J.-P. Costa, *La Cour Européenne des droits de l'homme est-elle une cour constitutionnelle?*, in *CONSTITUTIONS ET POUVOIRS: MÉLANGES EN L'HONNEUR DE JEAN GICQUEL* (2008).

² See recently: S. Greer and L. Wildhaber: *Revisiting the Debate about 'constitutionalising' the ECtHR*, *Human Rights Law Review* 2012, p. 655 et seq.

³ Consequently, "treaty provisions must be given a meaningful interpretation rather than one which would render them meaningless (principle of *effet utile*)" – L. Caffisch: *The Protection of Human Rights in Europe and the General Rules of International Law*[in:] *Liber amicorum Cançado Trindade*, Porto Alegre : Fabris, 2005, vol. 4.

obligations on a State than this State intended to accept. Thus, the historical method (related to the analysis of the travaux préparatoires) may be quite relevant in international law since it allows discovering the “original intent” as to the scope and substance of the State’s obligations. It is true that the interpretation of international treaties must not ignore the actual context in which they are applied. A question, however, may be raised to what extent the sovereignty principle allows interpretations that clearly go beyond the original intent, rewriting the substance of obligations originally undertaken by the contracting parties. While similar questions may be raised also in respect to national Constitutions and to the process of their interpretation, it seems that the methodological perspective of the constitutional law differs from that of the international law. In consequence, it may be easier to regard national Constitutions as “living instruments” and to afford them less protection against a subsequent judicial “re-interpretation”.

However, the ECHR differs in many respects from “typical” international treaties, in the substantive, as well as in the procedural and historical dimension. In brief, the only chance for the Convention not to be placed among purely historical documents is to accept that its interpretation must have a dynamic nature.

There are many examples of that dynamism and it is clear that the Convention of today differs significantly not only from its original text but also from the Convention as existed in 1998 when the 11th Protocol entered into life.

The case law on applicability of the Convention may be regarded as an interesting illustration of that process.

2. Article 1 of the Convention provides that the Member States undertake to “secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention and the Protocols thereto. Thus, the competence of the Court extends only to matters (situations) which fall within the jurisdiction of at least one the Member States. In other words, the jurisdiction of the Court is determined by the, more general, scope of the jurisdiction of the Member-States.

Living aside other aspects of the problem (like, in particular, jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*), it is jurisdiction *ratione loci* which deserves more elaborate presentation.

Like all other international and constitutional instruments, the Convention is applicable according to the territoriality principle: a State’s jurisdictional competence is primarily territorial. There is an obvious logic in that principle as, in principle, the sovereignty of a state is limited to its national territory. Nevertheless, both constitutional law and international law accept situations when jurisdiction of a state may exceed beyond its territorial limits. In the perspective of constitutional law, the concept that “jurisdiction goes together with the flag” allows to apply, at least some, constitutional provisions, to situations in which a foreign territory enters, even temporarily, under de facto or/and de jure control of another state. In the perspective of international law, it has been always

assumed that states are responsible for acts of its diplomatic and consular agents as well as for acts of other agents of official persons effectuated outside their territory. This takes even more complete form whenever a state, by a military action, exerts effective control of an area outside its national territory. Also traditionally, the notions of jurisdiction and responsibility were applied to ships, vessels and aircrafts registered in or flying the flag of a particular state.

The question which the ECtHR is constantly confronted with is how to apply those generally recognized principles to the adjudication on human rights. The Court has never had problems in referring to general instruments of international law, especially to the 1969 Vienna Convention on the law of treaties. All its particularities notwithstanding, the European Convention is an international treaty and it must be applied in the light of the general rules of interpretation set out in the Vienna Convention⁴. Thus, it seems obvious for the Court that “the State’s territorial jurisdiction under Article 1 is primarily territorial and only exceptional circumstances give rise to exercise of jurisdiction by the State outside its territorial boundaries”⁵. General international law allows, in principle, for a precise determination of those boundaries, historically however some problems emerged in respect of other (colonial) territories for which a Member State was responsible (part II).

3. The concept of “rule and exception” assumes that exceptions should not be constructed in a broad manner and, therefore, that the Court should not be too generous in accepting extraterritorial applicability of the Convention. But, and here the specificity of human rights instruments comes into light, interpretation of those instruments should not restrict the scope of protection unless such restriction is clearly provided in the text. And, what seems to be of particular importance in the axiological perspective, the interpretation of the Convention must not lead to a creation of “black holes” where no one is held responsible for certain types of violations of human rights. Thus, there must be some limit to a mechanical application of the principle that exceptions are narrowly constructed. While this principle is uncontroversial in respect of exceptions concerning the exercise of human rights, it should not be applied with the same rigidity when dealing with exceptions concerning the scope of protection of those rights.

Over the last twenty years those problems have been emerging in respect of two different areas which, with some oversimplification, could be labeled as “extraterritoriality” and “attributability”.

The former evokes the question, how the “extraterritoriality exception” should be applied in situations where human rights violations take place outside the national territory, but with some contribution or participation of one of the Convention States; the importance of the question become particularly relevant for situations of (lawful or unlawful) military action undertaken either on a territory of another Member State or outside the territorial boundaries of the Convention (part III).

⁴ LG Universalism, par. 16.

⁵ See recently: *Chagos Islanders v. the United Kingdom*, decision of December 11, 2012, par. 70.

The latter raises the question how to coordinate the consequences of territoriality and attributability; the importance of the question become nowadays more and more relevant as some actions of Member States are undertaken merely in implementation of decisions taken elsewhere, in particular by the United Nations or by the European Union (part IV).

II. THE “COLONIAL CLAUSE” AND ITS CONTINUING VALIDITY

4. Art. 56 sec. 1 of the Convention (until 1998 – Article 63 sec. 1) provides that “any State may [...] declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall [...] extend to all or any of the territories for whose international relations it is responsible”. This was a reflection of the colonial system still maintained after the Second World War and, at the same time, this was an exception from the general principle (later expressed in Article 29 of the Vienna Convention) that international treaties are binding in respect of the whole territory of a State. The drafters of the Convention were not ready to extend the concept of human rights outside Europe and, as the ECtHR later observed: “the system established by Article 63 (art. 63) was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilization did not, it was thought, permit the full application of the Convention”⁶.

The language of the Convention was rather unequivocal: it was left to the Member States’ discretion whether to extend the applicability of the Convention and whether to apply such extension to all or only some of the dependent territories. There was no uniform policy in the use of Article 56 (then 63) – some Member States, like France, declared that Convention would apply to all the dependent territories, other, like the U.K., limited the extension only to some of such territories⁷.

The “colonial clause” did play some role in the early period of the Convention⁸. Also in the 1990s, the European Commission of Human Rights confirmed that the lack of an appropriate declaration excludes jurisdiction of the Convention bodies in respect of situations which had taken place within a dependant territory. In *Bui Van Thanh and Others v. the U. K.*, the Commission rejected the argument that it had jurisdiction *ratione loci* as decisions of the local authorities should be regarded as a mere implementation of the policies adopted by the United Kingdom⁹. This interpretation of Article 56 was later confirmed by the Court¹⁰.

6 *Tyrer v. the United Kingdom*, judgment of April 25, 1978, par. 38. Hypocrisy of that approach seems especially obvious as the “colonial clause” was applicable also to certain European territories, like – in the *Tyrer* case – to the Isle of Man.

7 See M. Wood: Article 63 in:] *La Convention européenne des droits de l’homme, sous la dir. de L.-E. Pettiti, E. Decaux, P.-H. Imbert*, Paris 1999, p. 918-919.

8 See J.-P. Costa: *L’Etat, le territoire et la CEDH [w:] Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Luzius Caflisch*, Leiden 2007, p. 181.

9 Decision of March 12, 1990. The application was lodged by a group of Vietnamese refugees who were detained in Hong Kong and faced forcible repatriation to Viet-Nam. See also November 25, 1999 *Yonghong v. Portugal*.

10 *Yonghong v. Portugal* (decision of November 25, 1999 – Macau); *Quark Fishing Ltd. V. the United Kingdom* (decision of September 19, 2006 – Falkland Islands).

5. The “colonial clause” was adopted more than half a century ago in a completely different geographical and political context. Inevitably, in the second decade of the 21st Century, the Court had to be confronted with the question whether, in the light of present-day conditions, Article 56 should still be regarded as a valid bar against applications arriving from the dependent territories.

The problem was, at first, addressed by the Grand Chamber in *Al-Skeini*¹¹, albeit in a very particular context of the war in Iraq: the U. K. Government argued that finding that the Court’s jurisdiction covered the actions of the U.K. armed forces in Iraq would have the strange results that a State was free to choose whether or not to extend the Convention to a territory outside the Convention “espace juridique” over which it might in fact have exercised control for decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised temporary control as a result of military action. The Court, while adopting a broad notion of the “effective control”, took an effort to distinguish situations taking place on a foreign territory in the context of military intervention (see, *infra* part III) from situations taking place on a dependant (colonial) territory for which a Member State has always been in full control. The Court noted that: “the “effective control” principle of jurisdiction does not replace the system of declarations under Article 56 of the Convention which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, “with due regard ... to local requirements,” to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term “jurisdiction” in Article 1. The situations covered by the “effective control” principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible”¹². Thus the Court, while accepting its jurisdiction over situations in Iraq, indicated that the “living instrument approach” cannot nullify a clear disposition of Article 56 sec. 1.

This position was later confirmed and elaborated in *Chagos Islanders v. the United Kingdom*¹³. The Court disagreed with the suggestion that, in the present day conditions, Article 56 should be set aside as an objectionable colonial relic. As the Court observed: “Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article

11 *Al-Skeini and Others v. the United Kingdom*, judgment of July 7, 2011 (applicability of the Convention to actions of the U.K. forces during the war in Iraq).

12 *Al-Skeini and Others*, par. 140.

13 Decision of December 12, 2012 – the case concerned claims of inhabitants of the archipelago who, in the beginning of the 1970s, had been expelled from the islands without being adequately compensated. This was the consequence of a military agreement between the U. K. and the U. S. in that the latter was given use of the islands for defence purposes. Later a U.S. air base was built on Diego de Garcia island.

56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result¹⁴. Thus, Article 56 should be today regarded as an exception from the general (judge-made) principle that the very existence of “effective control” became a sufficient base of jurisdiction under Article 1 of the Convention.

The Chagos Islanders decision was adopted only by a majority of votes and it is not impossible that it might have been the question of Article 56 which provoked disagreement within the Chamber. Although it would be difficult to deny that the Court has no competence to annul or to ignore what is clearly present in the text of the Convention, it might have been, nevertheless, possible to depart from the old interpretation of Article 56. All “classic” decisions (Bui Van Thanh, Yonghong, Quark) were based on the assumption that alleged violations of human rights were mainly due to the acts of local authorities, even if those authorities acted in implementation of the policies formulated on a central level of government. It may be time to rethink that approach and to put more weight on the question where relevant decisions have been actually made. In the circumstances of the Chagos archipelago, it could easily lead to a conclusion that, as most of decisions had been formed by the central authorities, the whole case escapes the guillotine of Article 56. The language of this Article leaves a considerable room for interpretation and, as already mentioned before, exceptions concerning the scope of protection of human rights should be constructed in a narrow manner. In other words, although the living-instrument-approach cannot justify a simple nullification of any written disposition of the Convention, it can and should be used in the process of re-interpretation of dispositions which are no longer compatible with the present understanding of human rights.

Even in the time of drafting, the “colonial clause” could hardly be regarded as a human-rights-friendly arrangement. Sixty years later, its continuing presence in the text of the Convention appears as absolutely unacceptable and it is regrettable that the Court did not take measures to minimize the damage.

III. MILITARY ACTION AND THE CONCEPT OF “EFFECTIVE CONTROL”

6. Peace constitutes one of the most important values in the modern world and the Convention was designed in the belief that fundamental freedoms “are the foundation of justice and peace”. Nevertheless, wars, civil wars and other forms of civil unrest have not entirely disappeared from the modern European history. Thus, the judicial interpretation of the Convention could not simply ignore that there has been situations in which a military action was undertaken either on the territory of another Member State or elsewhere in the world. As violations of human rights are inevitably involved in such situations, the Court had to clarify whether and to what extent such violations enter into the jurisdiction of one or more Member States.

¹⁴ Ibidem, par. 73.

The Court dealt, at first, with situations in which one Member State conducted a military action on the territory of another Member State, i.e. with situations in which violations of human rights took place within the “European legal space”. It was the 1974 Turkish military action in Northern Cyprus which gave rise to the most important precedents in the Strasbourg case-law¹⁵.

The Court, in reliance on its earlier Drozd and Janousek judgment, noted that although a State’s jurisdictional competence is primarily territorial, the State’s responsibility may also be involved because of the acts of their authorities producing effects outside its own territory. Although extraterritorial jurisdiction should be regarded as exception, the relevant principles of international law governing State responsibility confirm that such exceptions may include military actions abroad. In consequence, “the responsibility of a Contracting Party could also arise when as a consequence of military action – whether law or unlawful – it exercises effective control of an area outside their own territory. [...] The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration”¹⁶.

Four important conclusions were inserted into the Strasbourg case-law in consequence of Loizidou judgments. First of all, the Court confirmed that, in some circumstances, jurisdiction may be exercised outside the State’s territorial boundaries. Secondly, the Court developed the concept of “effective control” as a necessary requirement to accept that military action may enter into the scope of jurisdiction of an acting State. Thirdly, the Court adopted the concept of “derived responsibility”: once, in the effect of a military action, an effective control has been established, the responsibility (jurisdiction) extends also to acts taken by a subordinate local administration. Finally, the Court, albeit indirectly, indicated that, at least within the legal space of the Convention, no “black holes” in the protection of human rights can be tolerated. Thus, if one State loses its control over parts of its own territory, someone else must undertake responsibility for securing, in such an area, all rights and freedoms guaranteed by the Convention.

7. In the future cases, the Court had no hesitations applying Loizidou principles to other situations involving, on both sides, States members to the Convention¹⁷. At the same time, however, the Court developed a concept of “divided responsibility” which always reserves some responsibility (and, therefore, jurisdiction) for the State who lost effective control of some of its territory.

As the Court noted in Ilascu, “even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the

¹⁵ See, in the first place, Loizidou v. Turkey (preliminary objections), judgment of March 23, 1995 and Cyprus v. Turkey, judgment of May 10, 2001.

¹⁶ Loizidou v. Turkey, par. 62.

¹⁷ See, in particular: Assanidze v. Georgia (judgment of April 8, 2004, par. 138) and Ilascu and Others v. Moldova and Russia (judgment of July 8, 2004, par. 314-316).

Convention to take the diplomatic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention”¹⁸. In other words, the loss of “effective control” does not absolve the State from taking measures in respect to the territory in question. Although it is obvious that primary responsibility rests with the State which exercises the effective control, there is always a “residual” responsibility of the State which conserves a legitimate title to the territory in question.

The concept of “divided responsibility” was confirmed by the Court in later cases concerning the Transnistrian region¹⁹.

8. Another situation arises where a Member State, through military action, assumes control over a territory situated outside the legal space of the Convention. Although it is obvious that the local population has no independent claim to the Convention protection, there may be some “secondary” protection in respect of human rights violations which may be attributed to actions and decisions of any of the Member States.

The problem was at first addressed in the 2001 *Bankovic* decision which still may be regarded as one of leading precedents in the case-law of the Strasbourg Court. The case resulted from one of most tragic episodes in Balkans when, in the mid-1990s, the NATO forces launched air strikes on Belgrade and other cities in the former Yugoslavia²⁰. While NATO easily acquired an absolute control of the air space, no further action was taken and, in particular, no ground forces entered the territory of Yugoslavia.

The applicants submitted that the application is compatible *ratione loci* with the provisions of the Convention because the impugned acts of the respondent States, which were either in Yugoslavia or on their own territories but producing effects in Yugoslavia, brought them and their deceased relatives within the jurisdiction of those States. They claimed that, as the NATO forces gained an absolute control over the Yugoslav air space, the requirement of “effective control” as elaborated in *Loizidou* has been fulfilled in respect of the situation in Yugoslavia.

The Court disagreed and, in explaining its position, it:

- recalled that “Article 1 of the Convention must be considered to reflect the ordinary and essentially territorial notion of jurisdiction, other basis of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case” (par. 61);

¹⁸ *Ilascu...*, par. 331 – in this case the Court found that both defendant States, Russia and Moldova had violated the Convention.

¹⁹ *Ivantoc and Others v. Moldova and Russia* (judgment of November 15, 2011, par. 106-111) and *Catan and Others v. Republic of Moldova and Russia* (judgment of October 19, 2012, par. 109-110). In both judgments, however, the Court found that Moldova had satisfied its positive obligations.

²⁰ *Bankovic and Others v. Belgium and Other States* (decision of December 12, 2001) – during one of the air strikes, a State Television building in Belgrade was hit by a missile launched from a NATO aircraft. Two of the four floors of the building collapsed, the master control room was destroyed and several persons (including the daughter of the applicants) were killed or injured.

- confirmed that extra-territorial jurisdiction may arise “when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation [...] exercises all or some of the public powers [on that territory]” (par. 71);

- observed that the applicants proposed a very broad interpretation of what constitutes “effective control”. In the Court’s opinion, “the applicants’ submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention [...] The text of Article 1 does not accommodate such an approach to “jurisdiction” [...]. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as [adopted in] the four Geneva conventions of 1949” (par. 75);

- rejected the argument that the decline of jurisdiction would create a vacuum in the protection of human rights and, therefore, contradict with the nature of the Convention. Although the Court confirmed that the Convention may be regarded as “constitutional instrument of the European public order”, the Convention “was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention [as it was in the case of Northern Cyprus]” (par. 80);

- noted that the State Convention responsibility, if applied to such extra-territorial circumstances, could not extend to all guarantees provided by the Convention “The Court is of the view that the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question” (par. 75).

- In brief, the Court adopted rather careful approach to its jurisdiction. Once extra-territorial effects of actions and decisions of a Member State give rise to human rights violations outside the “European legal space”, there is no room for automatic applicability of the approach adopted in *Loizidou* and other similar cases.

9. It was hardly a surprise that the *Bankovic* decision received with only limited support in the doctrine. More significant, however, was that, very soon a process of gradual erosion of the *Bankovic* holding has begun also in the case-law of the Strasbourg Court.

In *Issa v. Turkey*²¹ the Court, while dealing with a situation which clearly had taken place outside the “European legal space”, accepted that the notion of “effective control”

²¹ Judgment of November 16, 2004. The case was lodged by families of several Kurdish shepherds who claimed that, during a raid of the Turkish army into north of Iraq, their relatives had been abducted and later found dead. The Court, while not dismissing the case for want of jurisdiction, arrived to the conclusion that it has not been established to the required standard of proof that the Turkish armed forces had conducted the operation in the relevant area.

need not always be interpreted in a narrow manner. The Court observed that it cannot be excluded that “as a consequence of [a] military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, [it cannot be excluded] that, at the relevant time, the victims were within the jurisdiction of Turkey and not that of Iraq which is not a Contracting State and clearly does not fall within the legal space of the Contracting States” (par. 75).

Thus, the Court’s position in *Issa* suggested that, first of all, the concept of “effective (overall) control” may also be applicable to situations which took place outside the territory of the Convention or, in other words, outside the “legal space of the Contracting States”. Furthermore, the situation of “effective control” may be limited in both time and space; in other words, it may be extended to situations different from a full-scale military occupation as it was the case in Northern Cyprus. Although the essence of *Bankovic* has not been touched (*Issa* dealt with an operation conducted by the ground forces and, therefore, the intensity of “control” clearly surpassed the situation in Yugoslavia), the Court suggested that the definition of that “control” may be constructed in a flexible and may also enhance situations of a more incidental nature.

The same approach was later adopted in the admissibility decision in the *Al-Saadoon and Mufhdi* case²². In examining the question of jurisdiction, the Court held that, “given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction” (par. 88). The Court position could hardly be different as the same interpretation of “jurisdiction” had been adopted, in this case, by the House of Lords and had not been questioned by the Government. Nevertheless, *Al-Saadoon* could be regarded as a clear confirmation that the concept of “effective control” is applicable outside the European legal space and may address situations where the “control” is limited to a particular space and a particular time²³.

The next step was taken by the Grand Chamber in *Al-Skeini and others*²⁴ also related to the U. K. occupation of southern Iraq. The Court reiterated that jurisdiction is presumed to be exercised normally throughout the State’s territory, that extraterritorial jurisdiction can be accepted only in exceptional cases and that situations of “effective control” may constitute such exception. In accepting its jurisdiction over all six applicants, the Court:

22 *Al-Saadoon and Mufhdi v. the United Kingdom*, decision of June 30, 2009. The application was lodged by two Iraqi soldiers who, in the aftermath of the 2003 war, were at first detained in a U.K. military prison located in the vicinity of Basrah and later transferred to the Iraqi authorities. Later, in the judgment of March 2, 2010, the Court found that the U.K. has violated several Convention rights of the applicants.

23 Similarly, in *Al-Jedda v. the United Kingdom* (judgment of July 7, 2011), the Court regarded as obvious that a person interned in a detention facility in Iraq, controlled exclusively by the British forces, remains within the authority and control of the U.K. (par. 85).

24 *Al-Skeini and Others v. the United Kingdom*, judgment of July 7, 2011. The applicants were families of six Iraqis killed, in different circumstances, by the U. K. military during the first period of the occupation of southern Iraq. Three of the victims were killed by the U.K. soldiers in shooting incidents, one was hit by a stray bullet and two deaths were due to ill-treatment of persons already in custody of soldiers.

- observed that “whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual” (par. 137). Thus, it was accepted that individual situations may be sufficient to trigger an “effective control”, independently whether any such “control” has been already established, even temporarily, over a particular area. It should be reminded that, as some of the deaths occurred in combat-like situations, the “effective control” resulted only from the general “strength of the U.K.’s military presence in the area” (par. 139);

- noted that the obligation to secure rights and freedoms may be restricted to those “that are relevant to the situation of the individual [in question]” and that, in respect of the procedural duties under Article 2, they “must be applied realistically, to take account of specific problems faced by the investigators” (par. 168). In other words, Convention guarantees may be applicable only in part, and “in this sense, the Convention rights can be divided and tailored” (par. 137);

- recalled that while in earlier cases, it used the argument of a “vacuum” of protection only in respect of the Convention legal space, it “does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States” (par. 148).

In *Al-Skeini*, the Court took a lot of effort to demonstrate that *Bankovic* may still be regarded as a valid precedent. In any case, *Al-Skeini* could be decided upon its own factual situation: as the U. K. military presence in Iraq was not confined to the air space, it was very easy to distinguish it from *Bankovic*. At the same time, however, the Court, albeit in very elegant language, put in question two premises of the *Bankovic* decision. On the one hand, it rejected, *expressis verbis*, the *Bankovic* statement that the Convention rights cannot be divided and tailored²⁵. In *Al-Skeini* the Court adopted quite realistic approach that, in the context of military intervention outside the European legal space, only some guarantees of the Convention may be enforceable. But, by focusing on what could and should be guaranteed, the Court opened the door that was deliberately left closed in *Bankovic*. On the other hand, it seems that the Court did not exclude that the “vacuum-in-protection” argument may be applicable also outside the European legal space. While the matter should be addressed in a clearer manner in the future, the *Al-Skeini* case confirms that the mere geography of the Convention cannot longer be used as a procedural pretence against recognition that human beings have certain inalienable rights also in other regions of the world.

IV. IMPLEMENTATION OF DECISIONS OF INTERNATIONAL (SUPRANATIONAL) BODIES

10. Globalization involves integration and, in consequence, more and more decisions are taken on different supranational levels and national authorities are expected to implement them in good faith. As those decisions, quite often, affect individual rights, a

²⁵ The new position of the Court was later reconfirmed in *Hirsi Jamaa and Others v. Italy* (judgment of February 23, 2012, par. 74).

question arises whether national implementation may give rise to State's responsibility under the European Convention. This is not (or – not primarily) the question of territoriality (jurisdiction *ratione loci*), but rather of attributability (jurisdiction *ratione personae*), namely whether a State may be held responsible for decisions taken outside its direct sphere of sovereignty.

The Court was, at first, confronted with the States' implementation of acts and decisions taken by the European Union (and, earlier, the European Community). After initial hesitations, finally, in the 2005 Bosphorus case²⁶, the Court established three basic principles:

- the Convention “does not prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organization [...]; that organization, even as a holder of such transferred sovereign power, is not itself held responsible under the Convention [...] as long as it is not a Contracting Party” (par. 152). “On the other hand, [...] a Contracting Party is responsible for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligation. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's jurisdiction from scrutiny under the Convention” (par. 153);

- State action taken in compliance with international legal obligations “is justified as long as the relevant organization is considered to protect fundamental rights [...] in a manner which can be considered at least equivalent to that what the Convention provides” (par. 155). As such equivalent protection is, in principle, ensured within the EU system, “the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization” (par. 156);

- However, “any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order” (par. 156).

In Bosphorus, the Court confirmed the universal nature of its jurisdiction: Contracting States are responsible for all acts and omissions of their authorities, independently whether they have been taken in implementation of international (supranational) legal obligations or within the remaining sphere of their sovereignty. In other words, obligation to comply with other international law commitments cannot claim precedence before the obligation to respect rights and freedoms guaranteed by the European Convention. Thus, jurisdiction (responsibility) of a Member State is not affected by the fact that a decision which gave rise to implementing acts of omission was taken on the supranational level and, therefore, could not directly attributed to any of the Member States.

At the same time, the Court granted a particularly privileged position to the national implementation of the EU obligations. By adopting the “manifest deficiency test”, the

²⁶ Bosphorus HavaYollari Turizm v. Ireland, judgment of June 30, 2005.

Court, in clear analogy to the “Solange” jurisprudence of the German Constitutional Court, declared that it would intervene into the area but in exceptional cases. And this declaration has been duly followed in the case-law: since Bosphorus not a single case resulting from the implementation of the EU obligation has been heard on the merits by the Strasbourg Court.

1. Bosphorus clarified the Court’s position in respect to the European Union and – as it seems – all other regional organizations of international integration. Another approach was, however, adopted in respect to the United Nations, at least as regards actions taken by the UN Security Council within its powers provided in Chapter VII of the UN Charter. As those actions may also involve military interventions, the Member States may be obliged to render necessary assistance. And, as those actions and interventions may easily infringe upon human rights, the Court had to clarify whether such infringements are capable to trigger responsibility under the European Convention on Human Rights.

The first answer was negative. In two 2007 decisions, the Court, assessing actions of the KFOR forces in Kosovo, arrived to the conclusion that “as those actions were directly attributable to the UN [...], the complaints must be declared incompatible *ratione personae* with the provisions of the Convention”²⁷.

The Court observed that “the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part” (par. 122). In this process, a particular attention must be given to the unique position of the United Nations and, in the first place, to its responsibility for the maintenance of international peace and security.

In this process, it is the UN Security Council “has primary responsibility, as well as extensive means under Chapter VII, to fulfill this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force” (par. 148). In consequence, as “the effectiveness [of operations established by UNSC resolutions under Chapter VII of the UN Charter depends] on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the ECtHR. To do so would be to interfere with the fulfillment of the UN’s key mission in this field [and] would be tantamount to imposing conditions on the implementation

27 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (decision of May 2, 2007, par. 151-152) – the first two applicants were family of two boys from Kosovo region who, when playing with an undetonated bomb, were fatally harmed. The third applicant was detained and held by the KFOR forces operating in Kosovo. Applications (alleging, respectively, violation of “positive obligations” to protect human life and violation of the right to personal liberty) were directed against those European countries who were conducting military operations in the relevant parts of Kosovo.

of a UNSC Resolution which were not provided for in the text of the Resolution itself” (par. 149). The Court noted that the acts of the KFOR forces could not be attributed to the respondent States and, “moreover, did not take place of the territory of those States or by virtue of a decision of their authorities” (par. 151). In contrast to the Bosphorus situation (which dealt with a particular form of the cooperation of the EU states), in Kosovo the “KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organization of universal jurisdiction fulfilling its imperative collective security objective” (par. 151).

The position on the Court relied on two assumptions. First, the position of the UN is so unique that decisions of the Security Council should be given a particular respect. Therefore, as long as there is a sufficient coverage in the UNSC Resolutions, actions of the Member States (and, in particular, of their agents and military forces) cannot be attributed to the responsibility (and, therefore, jurisdiction) of those States. Secondly, the UNSC Resolutions should not be “reconstructed” by the Court: it is not possible to impose additional conditions on the implementation of UNSC Resolutions which were not provided in the text of those Resolutions, even if protection of human rights is at stake. In other words, the international superiority of the UN excludes any “creative intervention” of the Court into the meaning of obligations (and powers) which are given to the States by virtue of UNSC Resolutions.

12. Behrami and Saramati could evoke some analogies with Bankovic: in both cases, the Court rejected responsibility of the Member States for internationally organized military action, albeit under different jurisdictional arguments. Like in the case of Bankovic, also the 2007 decision gave rise to vivid discussions, in the legal doctrine as well as within the Court itself. And it was only four years later when the Court, in *Al-Jedda v. the UK*²⁸, partly revisited its original position.

The Court reiterated that decisions taken by the Security Council should be followed by all UN member states and may even have precedence before obligations established in regional human rights instruments. In this respect, the UNSC Resolution No. 1546 authorized the Multi-National Force “to take measures to contribute to the maintenance of security and stability in Iraq”. If this provision could be read as vested the Multi-National Force with a power of administrative detention of indefinite duration, actions of the UK forces would have to be attributed to the UN and, therefore, would remain outside the UK jurisdiction.

The solution of the case was, therefore, dependant on the interpretation of the Resolution No. 1546. The Court considered that “in interpreting the resolutions [of the UNSC], there must be a presumption that the Security Council does not intend to

²⁸ Judgment of July 7, 2011 – the applicant was detained by the UK forces in Iraq and spend long time in administrative detention. The UK authorities, invoking Behrami and Saramati, maintained that, as its forces had acted under the auspices of the UN, the internment could not be attributed the United Kingdom. The Court disagreed, confirmed jurisdiction of the UK and found a violation of Article 5 of the Convention.

impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a SC Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the UN's important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law" (par. 102). This method of interpretation led the Court to the conclusion that it cannot be considered "that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention" (par. 105). "Neither Resolution 1546 nor any other UNSC Resolution explicitly or implicitly required the UK to place an individual whom its authorities considered to constitute a risk to the security in Iraq into indefinite detention without charge" (par. 109). In consequence, as "the provisions of Article 5 par 1 of the Convention were not displaced and none of the grounds for detention set out in sub-paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 par. 1" (par. 110).

The gist of the Court's position was that all States members to the Convention must apply a "Convention-friendly" (human rights friendly) interpretation of the UNSC instruments. The Court seemed to accept that, had a UNSC resolution imposed, in a clear and explicit language, an obligation which would be incompatible with the Convention, the Convention States would have been bound by it and would have to give precedence to such Resolution. But, and this was a point the Court missed in *Behrami and Saramati*, as long as such clear and explicit language cannot be found in any of the UNSC instruments, the Member States must not construct those instruments in breach of their undertakings under the Convention. It means that, once the language of a resolution leaves some room for interpretation, it is within the jurisdiction of the ECtHR to determine whether a particular interpretation is compatible with the Convention. In other words, although implementation of clear and explicit UN obligations cannot be attributed to the responsibility of the Convention countries, this exemption does not apply whenever states are left with some interpretational choices.

13. *Al-Jedda* dealt with a situation which had occurred outside the "legal space of the Convention". It was, therefore, not astonishing that when the Court was confronted with a situation within that space, it not only confirmed *Al-Jedda*, but also intensified its control over national implementation of UNSC instruments.

In *Nada*²⁹, the Court addressed consequences of putting the applicant's name on

²⁹ *Nada v. Switzerland*, judgment of September 12, 2012.

the so-called “black list” established by the Sanctions Committee of the UN Security Council³⁰. First of all, the Court distinguished the present case from *Behrami and Saramati*, by pointing out that, in that decision, “the impugned acts and omissions of KFOR, whose powers had been validly delegated to it by the UNSC [...] were directly attributable to the United Nations [...] In the present case, by contrast, the relevant UNSCV resolutions required States to act in their own names and to implement them at national level... The acts in question therefore relate to the national implementation of UNSC resolutions [and] are thus attributable to Switzerland” (par. 120-121).

The Court rejected the respondent Government’s argument that, as the binding nature of the resolutions adopted by the UNSC place them in a position of primacy over any other international agreement, the application was incompatible *ratione materiae* with the Convention. The Court reiterated its *Al-Jedda* statement that “when creating new international obligations, States are assumed not to derogate from their previous obligations [and] that two diverging commitments must be harmonized as far as possible so that they produce effects that are fully in accordance with existing law” (par. 170). Thus, the assessment of the Court depended on whether the Swiss authorities met the “obligation to harmonize” in respect of the applicant.

The Court accepted that, “contrary to the situation in *Al-Jedda*, where the wording of the resolution in issue did not specifically mention internment without trial, Resolution 1390 expressly required States to prevent the individuals on the UN list from entering or transiting through their territory” (par. 172). It may suggest that the “clear and explicit language” requirement was satisfied in the case. However, the Court observed that “the UN Charter does not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII” (par. 177), that

³⁰ The practice of “blacklisting” originated in 1999 when, in response to the 1998 Nairobi and Dar-es-Salaam bombings, the UNSC adopted, under Chapter VII of the UN Charter, Resolution 1267 providing for sanctions against the Taliban and created a committee consisting of all the members of the Security Council to monitor the enforcement of that resolution. Later UNSC Resolutions (1333 and 1390) required a list of individuals and organizations to be maintained for the implementation of the UN sanctions. All Member States were requested to enforce a ban of entry and transit, as well as other sanctions, on individuals who were placed on the list by the Sanctions Committee. The problematic point of the system was, however, the lack of procedural guarantees: only in 2006, Resolution 1730 created a “focal point” to receive delisting requests in respect of persons and entities on the lists. In the same year, Resolution 1735 established a procedure for notifying the individuals or entities whose names were on the list and clarified the criteria for delisting. The procedure was subsequently reinforced with the adoption of Resolutions 1822 (2008) and 1904 (2009). In the latter, the UNSC decided to create an office of the Ombudsperson whose task is to receive requests from individuals concerned and, after an impartial and independent examination, to submit a report to the Sanctions Committee explaining the reasons for or against delisting.

Mr. Nada, an Egyptian national residing in Italy, was added to the list in 2001. As he lived in Campione d’Italia, which is an Italian enclave of about 1.6 sq. km, surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano, he had to cross the Swiss border in order to travel to Italy. The Swiss authorities, however, prohibited entry into and transit through Switzerland to all “blacklisted” individuals.

Before the ECtHR, Mr. Nada, focusing on the very particular geographical setting of his place of residence, complained that the measure by which he was prohibited from entering or passing through Switzerland had breached his right to respect for his private life, including his professional life, and his family life. He contended that this ban had prevented him from seeing his doctors in Italy or in Switzerland and from visiting his friends and family. He further claimed that the addition of his name to the list annexed to the Taliban Ordinance had impugned his honor and reputation.

“Switzerland enjoyed some latitude, which was admittedly limited, but nevertheless real, in implementing the relevant binding resolutions of the UNSC” (par. 180) and that the Swiss authorities should, in each and every case, take into account the realities of particular situations (par. 195).

Therefore, “in the light of the Convention’s special character [...] the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should persuade the Court that it had taken, or at least – had attempted to take, all possible measures to adapt the sanctions regime to the applicant’s individual situation” (par. 196). In conclusion, the Court found “that the restrictions imposed on the applicant’s freedom of movement [...] did not strike a fair balance [and], consequently was not proportionate and not necessary in a democratic society” (par. 198) and constituted a violation of Article 8 of the Convention.

The *Nada* judgment may be seen as a considerable extension of the scope of control over national implementation of UNSC instruments. First of all, the Court decided that its jurisdiction applies also to the implementation of measures covered by a “clear and explicit language” of UNSC resolutions, providing some latitude was left for the implementing State. At the same time, the Court, by stating that the UN Charter does not impose on States any particular model of implementation, suggested that – on the one hand, there may be a limit to the specificity of the UNSC regulatory powers, and, on the other hand, that – almost invariably – some “margin of discretion” would be left for the States in the implementation process. Furthermore, the Court imposed on the States an obligation to differentiate the implementation depending on the particular circumstances of each affected individual. Here the onus lies with the State who must convince the Court that “it had taken or, at least had attempted to take, all possible measures” to take into account those individual situations. Finally, it seems that the Court not only adopted its own reading of the UNSC resolutions (constructing those resolutions in a “Convention-friendly” manner), but also imposed that reading on all Contracting Parties.

It would be premature to assess how this line of reasoning will be addressed in the future case law. It should not be forgotten that the *Nada* case was particular not only due to the especially heavy interference with individual rights, but also due to the mounting criticism of procedural shortcomings of the blacklisting regime. In this perspective, the Strasbourg Court was the last one to join the club³¹.

V. CONCLUDING OBSERVATIONS

The position of the Strasbourg Court on applicability of the European Convention has developed in quite dynamic manner. Although the Court has reiterated, on several occasions, that the jurisdictional competence under Article 1 is primarily territorial, its recent case-law accepts more and more exceptions from that principle. This trend is

³¹ As well known, the problem was at first addressed by the Luxembourg Court in the 2008 *Kadi* case and, also in 2008, by the UN Human Rights Committee in *Sayadi and Vinck* case. In a perfect example of a judicial dialogue, the Strasbourg Court followed its fellow human rights jurisdictions.

visible in respect of “classic” situations of extraterritoriality (horizontal extension of the Convention beyond its legal space) as well as in respect of so-called attributability (vertical applicability of the Convention to decisions taken on “higher”, international or supranational, level). As most of the cases were lodged in the context of military interventions or other anti-terrorist measures, the human rights aspect of the Court’s decisions becomes particularly visible.

There is a clear element of continuity: the concept of “effective control” (Loizidou) and the principle of universal responsibility of Member States for all acts and omissions of its organs (Bosphorus) constitute a well-established foundation of the Strasbourg case-law. But, at the same time, it seems that the Court is no longer convinced that it should give full effect to interpretations adopted earlier in *Bankovic* (2001) and in *Behrami and Saramati* (2007). Although, it has never been said in a clear manner, the newest case-law suggests that the approach adopted in those cases was too narrow and, therefore, not appropriate for an effective protection of human rights. It should be kept in mind that the Court, generally, does not like to overrule its own decisions and, therefore, it prefers to pretend that a new case could be distinguished from the old precedent. But, more careful confrontation of *Bankovic* with *Al-Skeini* or of *Behrami and Saramati* with *Al-Jedda and Nada*, demonstrates that, in several aspects, the Court adopted broader approach to the interpretation of Article 1 of the Convention.

It is still too early to predict whether and to what extent the present, more active, line of jurisprudence would be confirmed in the coming years. Dramatic necessities of the war on terror may have impact also on the Strasbourg case-law. But, the Court is also conscious of the human rights context of the problem. Military actions always result in a considerable loss of life, anti-terrorist measures may involve administrative detentions, secret “blacklisting” or freeze of personal assets. As the Convention States are often invited or required to participate in such undertakings, there is an ever-growing risk of human rights violations, particularly outside the European legal space. National jurisdictions may not be able (or – willing) to remedy those violations. Thus, individuals should not be denied access to supranational protection and there is no alternative but to construct jurisdictional premises of that protection in the light of the present-day conditions. The Convention is a living instrument and so is the recent case-law on applicability of the Convention.

Позиция Страсбургского суда относительно применимости Европейской Конвенции развивалась достаточно динамично. Хотя в ряде случаев Суд отмечал, что юрисдикция согласно статье 1 является, прежде всего, территориальной, в его недавней практике заметно все больше исключений из этого принципа. Эта тенденция проявляется относительно «классических» ситуаций экстратерриториального применения (горизонтальное распространение действия Конвенции за ее правовое пространство), а также в отношении так называемой атрибутивности (вертикальная применимость Конвенции к решениям, принятым на «высшем» - международном или наднациональном, уровне). Так как большинство представленных дел относится к военному вмешательству или другим антитеррористическим мерам, аспект прав человека в решениях Суда становится особенно очевидным.

Очевиден элемент преемственности: концепция «эффективного контроля» (Лозиду) и принцип всеобщей ответственности государств-членов за все действия и бездействие их органов являются устоявшейся основой Страсбургского прецедентного права. Но в то же время складывается впечатление, что практика Суда по полному применению толкований, данных ранее по делам Банкович (2001) и Бехрами и Сарамати (2007), постепенно меняется. Несмотря на это, в новом прецедентном праве нет четкого установления относительно того, что принятый по этим делам подход является слишком ограниченным и, следовательно, неадекватным для эффективной защиты прав человека. Следует иметь в виду, что Суд, как правило, не склонен отменять свои собственные решения и, следовательно, он предпочитает указывать на то, что новое дело отличается от старых прецедентов. Но более тщательное сопоставление дела Банкович с делом Аль-Скейни или дел Бехрами и Сарамати с делами Аль-Джедда и Нада показывает, что относительно некоторых аспектов Суд принял более широкий подход к толкованию статьи 1 Конвенции.

Пока еще рано предсказывать, будет ли в ближайшие годы поддерживаться современная более активная практика Суда и если да, то в какой степени. Очевидная необходимость борьбы с терроризмом может повлиять и на Страсбургское прецедентное право. Однако Суд также учитывает аспект прав человека в данном вопросе. Военные действия всегда приводят к человеческим потерям; антитеррористические меры могут включать административные задержания, секретный «черный список» или замораживание личных активов. Поскольку Государств-участников Конвенции часто призывают к участию в подобных мероприятиях или требуют от них участия, существует постоянно возрастающий риск нарушений прав человека, особенно за пределами европейского правового простран-

ства. Национальное правосудие может быть не в состоянии (или не готово) рассматривать дела относительно этих нарушений. Таким образом, людям не может быть отказано в доступе к наднациональной защите, и нет другой альтернативы, кроме регулирования юрисдикционных вопросов этой защиты в свете современных условий. Конвенция является живым документом; таким является также недавняя прецедентная практика относительно применимости Конвенции.

ZUSAMMENFASSUNG

Die Position des Straßburger Gerichtshofs hinsichtlich der Anwendbarkeit der Europäischen Menschenrechtskonvention entwickelte sich ziemlich dynamisch. Obwohl der Gerichtshof in mehreren Fällen hervorhob, dass die Jurisdiktion laut Artikel 1 vor allem territorialen Charakter hat, machen sich in seiner jüngsten Rechtsprechung immer häufiger Ausnahmen aus diesem Prinzip bemerkbar. Diese Tendenz kommt in den «klassischen» Situationen extraterritorialer Anwendung (horizontale Erstreckung der Geltung der Konvention über ihren Rechtsraum hinaus) sowie in der so genannten Attributivität (vertikale Anwendbarkeit der Konvention auf Entscheidungen, die auf der – internationalen oder nationalen – «höchsten» Ebene getroffen werden) zum Ausdruck. Da die meisten vorgelegten Sachen die militärische Intervention oder sonstige antiterroristische Maßnahmen betreffen, wird der Aspekt der Menschenrechte in den Entscheidungen des Gerichtshofs besonders offensichtlich.

Das Element der Kontinuität liegt auf der Hand: die Konzeption eines «effektiven Kontrolle» (Loizidou) und der Grundsatz der gemeinsamen Verantwortlichkeit der Mitgliedsstaaten für alle Handlungen und die Untätigkeit ihrer Organe bilden die bewährte Grundlage des Straßburger Präzedenzrechts. Jedoch zugleich entsteht der Eindruck, die Praxis des Gerichtshofs, die früher in Fällen Bankovic (2001) und Behrami und Saramati (2007) gegebene Auslegungen vollständig anzuwenden, ändert sich nach und nach. Trotzdem lässt das neue Präzedenzrecht eine klare Feststellung vermissen, dass in diesen Fällen eine sehr beschränkte Herangehensweise an den Tag gelegt wurde, die deshalb für einen effektiven Schutz der Menschenrechte nicht angemessen ist. Wir sollten daran denken, dass der Gerichtshof in der Regel nicht geneigt ist, seine eigenen Entscheidungen aufzuheben, und daher lieber darauf hinweist, dass sich der neue Fall von den alten Präzedenzfällen unterscheidet. Aber wenn man den Fall Bankovic mit dem Fall Al-Skeini oder die Fälle Behrami und Sarmati mit den Fällen All-Djeddah und Nada aufmerksam vergleicht, so fällt auf, dass der Gerichtshof hinsichtlich einiger Aspekte Artikel 1 der Konvention weiter interpretiert.

Momentan ist es noch zu früh, vorauszusagen, ob und in welchem Maße die heutige aktivere Praxis des Gerichtshofs in kommenden Jahren fortgesetzt wird. Die offenkundige Notwendigkeit der Bekämpfung des Terrorismus könnte das Straßburger Präzedenzrecht beeinflussen. Aber der Gerichtshof beachtet dabei auch den Aspekt der Menschenrechte. Kriegshandlungen führen immer zu Menschenverlusten; zu antiterroristischen Maßnahmen können vorläufige Festnahme, geheime «schwarze Listen» oder Einfrieren persönlicher Aktiva. Da die Mitgliedsstaaten der Konvention häufig zur Teilnahme an solchen Maßnahmen aufgefordert werden, besteht ein ständig wachsendes Risiko der Verletzungen der Menschenrechte, besonders außerhalb des europäischen Rechtsraums. Die nationale Justiz ist nicht immer in der Lage (oder bereit), Fälle wegen solcher Verletzungen zu verhandeln. Den Menschen darf aber der Zugang zu dem supranationalen Schutz nicht versperrt werden und es gibt keine andere Alternative als die Regelung der Jurisdiktionsfragen bei diesem Schutz im Lichte gegenwärtiger Bedingungen. Die Konvention ist ein lebendes Dokument und ähnlich verhält es sich auch mit der jüngsten Präzedenzpraxis hinsichtlich der Anwendbarkeit der Konvention.

RÉSUMÉ

La position de la Cour de Strasbourg concernant l'applicabilité de la Convention européenne a évolué de manière assez dynamique. Bien que pour un certain nombre d'affaires, la Cour ait remarqué que la juridiction, en vertu de l'article 1, est en premier lieu territoriale, de plus en plus, dans sa pratique récente se détectent des exceptions à ce principe. Cette tendance se manifeste en cas des situations «classiques» de l'application extraterritoriale (extension horizontale de la Convention au-delà de son espace juridique), ainsi que de l'attribution (applicabilité verticale de la Convention aux décisions prises au niveau supérieur, international ou supranational). Puisque la majorité des affaires concernent les interventions militaires ou autres mesures anti-terroristes, l'aspect des droits de l'homme dans les arrêts de la Cour devient particulièrement évident.

L'élément de la continuité est évident: la notion de «contrôle effectif» (*Loizidou c. Turquie*) et le principe de la responsabilité de tous les États-membres pour toutes les actions et les omissions (inactions) de leurs organes (*Bosphore*) sont incontestablement à la base de la jurisprudence de Strasbourg. Mais en même temps, la pratique de la Cour sur l'application complète des interprétations précédemment données aux affaires *Banković* (2001) et *Behrami et Saramati* (2007), semble se modifier progressivement. Néanmoins, la nouvelle jurisprudence n'établit pas clairement que l'approche adoptée à l'égard des affaires susmentionnées étant restreinte, est insuffisante (inadéquate) pour

la protection efficace des droits de l'homme. Il convient de garder à l'esprit que la Cour, en règle générale, n'annule pas ses propres décisions et, par conséquent, préfère indiquer que la nouvelle affaire est différente des précédentes. Mais une analyse comparative plus détaillée de l'affaire Banković avec celle de Al Skeini ou de l'affaire Behrami et Saramati avec les affaires Al-Jedda et Nada montre que, concernant certains aspects, la Cour a adopté une approche plus large d'interprétation de l'article 1 de la Convention.

Il est encore trop tôt pour prédire, si les prochaines années la pratique récente plus dynamique de la Cour sera soutenue et, si oui, dans quelle mesure. Le besoin évident de la lutte contre le terrorisme peut avoir son impact aussi sur la jurisprudence de Strasbourg. Cependant, dans cette question, la Cour tient également compte de l'aspect des droits de l'homme. Toujours, les actions militaires entraînent des pertes humaines, les mesures antiterroristes peuvent inclure des détentions administratives, la mise en place d'une «liste noire» secrète ou entraîner le gel des actifs personnels. Comme les États-membres de la Convention sont souvent appelés à participer à ce genre d'actions, ou sont confrontés à l'obligation d'y prendre part, le risque de violations des droits de l'homme, en particulier en dehors de l'espace juridique européen s'augmente. La justice nationale peut ne pas être en mesure (ou ne pas être prête) d'examiner les affaires relatives aux dites violations. Ainsi, l'accès à une défense supranationale ne peut pas être refusé à des personnes, et il n'existe pas d'autre alternative à la régulation de la protection des questions juridictionnelles à la lumière des conditions actuelles. La Convention est un document vivant, telle est aussi la jurisprudence récente concernant l'applicabilité de la Convention.

THE CONSTITUTIONAL COURT AS A POSITIVE LEGISLATOR

Marek SAFJAN

1. PRELIMINARY REMARKS

It is more than evident that the constitutional court – in the European system – has a considerable impact on the legislative process. The classical separation of powers, based upon Montesquieu's model, does not sufficiently describe reality, i.e. the infrastructure of the modern state under the rule of law. Owing to the channeled system of constitutional review, the constitutional court cannot be classified as a legislative or judicial organ, regardless of how broadly these terms are understood. Nonetheless, the Kelsenian concept of constitutional justice differentiates between legislative power and prerogatives of the constitutional court¹. From this perspective the constitutional court does affect legislative system, but only as a negative legislator. It is not the competence of the constitutional court to make laws or to introduce normative elements into the legal order, which have not been properly legislated. Therefore, the constitutional court may not replace the legislator. Since constitutional review is based on the coherent structure of a hierarchical legal system, the constitutional court has to operate within this order, drawing its own authority from the constitutional legislator. Judgments of the constitutional court cannot contain anything that has not already been proclaimed by the supreme norm laid down in the Constitution. In addition, the function of constitutional review will always be limited to a mere application of the law – admittedly at the highest level of normative hierarchy – and it cannot involve the creation of norms.

This apparently clear and simple model of constitutional review, strictly determining the position of the constitutional court, seems to be difficult to defend, as shows the established, nearly one hundred years old tradition of constitutional justice in Europe. There are two areas in which the model loses its coherence. First, in the area of the court's competence to affect the normative sphere which creates the model of constitutional

¹ See H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego* (The Essence and the Development of Constitutional Justice), Warszawa 2009, Biuro Trybunału Konstytucyjnego (translation by K. Banaszkiewicz). In Kelsen's opinion: 'Not only does constitutional jurisprudence not contradict the principle of separation of powers, but – on the contrary – it confirms it' (p. 40) and further '[***] a negative legislator, i.e. the constitutional court, is in its operation essentially determined by the constitution, and it is in this very moment that its function is the same as the function of the courts in general: it involves mostly application of law and – in this sense – effective exercise of the judicial power [***]. The structure of this organ is not determined by any rules other than those which apply to the organization of courts or, generally, to the organs exercising executive power'.

review, i.e. the very constitutional norm. Second, in the area of the constitutional court's prerogatives with regard to norms subject to review, i.e. the statutes. Both dimensions contain elements that require revision of our ideas concerning the position of the constitutional court, which is formally regarded – as postulated by Kelsen – as a 'negative legislator' only².

My analysis will attempt to identify which factors play a role in revising our idea of constitutional justice. I will also try to establish whether modern tendencies are an involuntary and dangerous deformation of constitutional justice or – on the contrary – may be treated as inevitable consequence of the adopted model of constitutionality of law, and stimulating mechanisms that are in the very nature of this organ³.

2. WHAT IS THE FUNCTION OF THE COURT AS A POSITIVE LEGISLATOR?

The opinion that the modern constitutional court performs legislative functions increasingly more often, replacing the legislator in its lawmaking role, is quite frequent in the doctrine of constitutional justice. This opinion also entails a more general conclusion: that of a gradual transformation of parliamentary democracy into 'judicial' democracy or even into 'judicial government'⁴. Without going into detail, it is worth reflecting how – theoretically – the constitutional court takes over the prerogatives of the legislator. Generally, we should assume that the role of a positive legislator implies the creation of new normative content: either with respect to the very model (i.e. the constitutional norm) or to the legal acts (lower rank legislation) which undergo constitutional review. Although the methods and mechanisms of positive impact may vary substantially, they usually remain somewhat 'concealed', never being openly proclaimed or clearly expressed in a legal solution, as doing so would transgress the boundaries of ethos and ideology of constitutional justice.

² Such an approach is still considered obligatory in all official documents of the Polish Constitutional Tribunal. See e.g. the position presented in 'Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego' (Information on important problems arising from the activity and jurisprudence of the Constitutional Tribunal) in 2008, Warszawa 2009, p. 15: 'The constitutional principle of separation of powers excludes, in consequence, participation of the Constitutional Tribunal in the exercise of legislative power and imposes a self-restraining approach when evaluating petitions and complaints questioning the normative solutions adopted by the legislator'. See also judgment of 19 July 2007, K11/06.

³ In Polish literature this issue has been long discussed. See e.g. R. Hauser, J. Trzeciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* (Lawmaking effect of judgments of the Constitutional Tribunal in the jurisprudence of Supreme Administrative Court), Lexis Nexis 2008; K. Gonera, E. Łętowska, *Wieloaspektowość następstw stwierdzenia niekonstytucyjności* (The multiple consequences of declaring law unconstitutional), *Państwo i Prawo* 2008, no. 5, p. 20 and following. See also L. Garlicki, *Ewolucja ustrojowej roli i kompetencji polskiego Trybunału Konstytucyjnego* (Evolution of the structural role and competence of the Polish Constitutional Tribunal) in: M. Zubik (Ed.), *Księga XX-lecia Trybunału Konstytucyjnego* (The book on the 20th anniversary of the Constitutional Tribunal) Warszawa 2006; M. Safjan, *Skutki prawne orzeczeń Trybunału Konstytucyjnego* (Legal consequences of judgments by the Constitutional Tribunal), *Państwo i Prawo* 2003, no. 3.

⁴ See A.S. Sweet, *Governing with judges. Constitutional politics in Europe*, Oxford University Press 2000; M. Davies, *Government of Judges. An Historical Review*, *American Journal of Comparative Law* 1987, no. 35, p. 559 and following, O. Wiklund (Ed.), *Judicial Discretion in European Perspective*, Kluwer Law International 2004.

In the first part of this article I will discuss indirect positive impact connected with the concept of the constitutional court as a negative legislator, while in the second part I will look at the positive influence, having a different form, much more profound than just a ‘positive reflex’ of a negative ruling. I will conclude by attempting to evaluate these tendencies.

3. INDIRECT POSITIVE IMPACT – EFFECTS OF ‘NEGATIVE LEGISLATION’

The opinion that the constitutional court when declaring a normative act unconstitutional, exerts a direct impact on the existing legal order is certainly banal. *A posteriori* review may be exercised in many ways and the procedures adopted in this respect in various systems may differ substantially. The Polish model – like some others in Europe – provides for two types of procedure. First, an abstract review which does not arise out of an actual case, but is initiated by a constitutionally defined group of legitimized bodies⁵. Second, a review that is initiated through an individual application to the Constitutional Tribunal⁶ or through a question of law submitted by a court in a pending case⁷. In the latter, the question of unconstitutionality arises out of an actual case either closed by a final judgment (individual petition) or one that is pending. The type of procedure does not affect the character of the judgment passed by the constitutional court. In both categories it is always an *abstracto* evaluation of constitutionality of a legal norm. In the Polish model, the Constitutional Tribunal is a court of law, i.e. it decides on the law and not about the facts.

If a normative act is declared unconstitutional, its challenged provisions become void. Consequently, they are eliminated from the legal system. However, the ‘negative’ effects of such a decision cannot be reduced to this simple statement because the impact of such judgment is far more complicated. Not only does it eliminate a legal norm from the

⁵ See Art. 191 of the Constitution:

1. The following may apply to the Constitutional Tribunal regarding matters specified in Article 188:1) the President of the Republic, the Speaker of the Sejm, the Speaker of the Senate, the Prime Minister, 50 Members of Sejm, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Attorney General, the President of the Supreme Chamber of Control and the Commissioner for Citizens’ Rights, 2) the National Council of the Judiciary, to the extent specified in Article 186 sec. 2; 3) the lawmaking bodies of local government; 4) national bodies of trade unions as well as national bodies of employers’ organizations and occupational organizations; 5) churches and religious organizations; 6) those referred to in Article 79 to the extent specified therein.

2. Those referred to in sec. 1 item 3-5 above may apply if the normative act relates to matters within the scope of their activity.

⁶ See Art. 79 of the Constitution:

1. In accordance with principles specified by statute, every person whose constitutional freedoms or rights have been infringed, shall have the right to file a complaint with the Constitutional Tribunal regarding conformity with the Constitution of a statute or another normative act upon which a court or organ of public administration has relied in making a final decision affecting her freedoms or rights or obligations specified in the Constitution. 2. The provision of sec. 1 above does not apply to rights specified in Article 56.

⁷ See Art. 193 of the Constitution: Any court may submit a question of law to the Constitutional Tribunal as to the conformity of a normative act with the Constitution, ratified international treaty or statute, if the answer to such determines an issue before such court.

system (negative effect), but it also – and indeed frequently – affects other provisions by modifying their present meaning (positive effect).

First, no provisions operate in vacuum. Therefore, elimination of an unconstitutional provision does not necessarily create a loophole, because the scope of other provision may be extended. It is, therefore, nothing but a (positive) amendment to the content of a legal norm. Moreover, the amendment affects a different norm than the one which was reviewed and eliminated. Thus, for example, elimination of special law (*lex specialis*) by its very nature increases (positive effect) the scope of application of a general law (*lex generalis*), which is expressed in a well-known formula *lex specialis derogat lege generali*⁸.

Second, given the scope of retroactive consequences of such a judgment, not only will the ‘negative legislation’ simply eliminate a provision ‘*pro futuro*’ - that is, ban application of the unconstitutional norm in the future, but also modify the legal status (legal relations) in the past, which is essentially a legislative function. In the Polish system the scope of influence of retroactive effects is controversial. Also, Polish law does not differentiate between a simple incompliance with the Constitution and invalidity of norms, as it is the case, for example, in the German system. However, the Constitution states very clearly that retroactive application may be used to challenge decisions made by public authorities pursuant to unconstitutional provisions⁹. This rule applies to decisions issued by courts and administrative bodies prior to the judgment. This mechanism uses a legal fiction that when a given decision was issued, the provision of law (ultimately declared unconstitutional) was not in force. As a result, a case can be evaluated according to different criteria (without applying the unconstitutional provision) and a new decision may be issued (positive effect)¹⁰.

Third, it is possible – at least theoretically – to consider effects of a ‘negative decision’ by the constitutional court whereby earlier provisions, which had been replaced with new ones, ‘come back’ into force because the latter have been declared unconstitutional¹¹. This would imply filling a loophole not with other currently binding provisions of law

8 Numerous examples can be shown, e.g. elimination of statute of limitations for specific claims may lead to an application of general norms (see judgment of 1st September 2006 related to Art. 442 of the Civil Code, SK 14/05, OTK ZU 2006/8A/97); elimination of a provision reducing compensation may lead to an application of a general law concerning compensation (see judgment of 23 September 2003 related to Art. 160 Code of Administrative Procedure K 20/02, OTK ZU 2003/7A/76).

9 See Art. 190 sec. 4 of the Constitution: A judgment of the Constitutional Tribunal on the non-conformity with the Constitution of an international treaty, statute or a normative act on which a final court judgment, administrative decision or resolution of other matter was based, shall constitute grounds for re-opening of the proceedings, or for quashing the decision or other resolution pursuant to provisions applicable to given proceedings.

10 In the Polish system the scope of application of Art. 190 sec. 4 is broad. It applies to convictions, civil judgments and administrative decisions.

11 See *inter alia* R. Hauser, J. Trzeciński, *op. cit.*, p. 102 and following; P. Radziejewicz, Przywrócenie mocy obowiązującej przepisu prawnego jako skutek orzeczenia Trybunału Konstytucyjnego (Restoration of a legal provision as result of a judgment by the Constitutional Tribunal) *Przegląd Sejmowy* 2005, no. 3, p. 121 and following.

(e.g. general norms, cf. section 1), but with the norms earlier derogated by the legislator. Assuming this hypothesis is correct would mean that consequences of a constitutional judgment are *par excellence* positive. They enter the area of legislative prerogative because they ‘bring back to life’ norms, which the positive legislator wished to eliminate. Although this variant is rejected by most of the Polish doctrine, it cannot be totally abandoned since it was applied by the Constitutional Tribunal at least once¹².

Fourth, the Polish system has a special legal instrument connected with declaration of unconstitutionality of a normative act. Namely, the Tribunal may adjourn the date upon which such judgment enters into force¹³. This means that such an act will be eliminated from the system only after lapse of time specified in the judgment (18 months at most), and not – which is the rule – on the date of its publication in the Official Gazette¹⁴. These provisions may be seen as investing the Constitutional Tribunal with the function of a positive legislator. Unlike with a typical judgment, the Tribunal achieves application of certain provisions (positive effect), which were declared unconstitutional, by setting a date by which they temporarily remain in force. No other organ, except for the constitutional court, may achieve this result. This is, in fact, paradoxical considering the fundamental role of any constitutional court is to eliminate unconstitutional legal acts and not to let them remain in force. This authority raises doubts when applied in practice and is considered controversial. However, it is also difficult to deny the solid reasons which justify this approach. The main argument is the protection of the legal system against negative consequences, which might occur if the judgment’s effects were immediate. Imagine, for example, that the ‘loophole’ created after derogation of unconstitutional provisions was filled with other provisions, which would in turn generate a greater non-conformity with the Constitution than further prolonged application of the challenged provisions¹⁵. Irrespective of how we assess this solution, the consequences

12 See judgment of 20 December 1999, K 4/99 concerning pension regulations. In this judgment the Constitutional Tribunal expressly ordered reintroduction of an earlier provision which did not contain unconstitutional elements. In the opinion of the Constitutional Tribunal ‘[***] declaration of substantive (related to the content of the provision) incompliance with the Constitution makes the provision void. In consequence, the provisions reenter into force in the wording prior to the amendments that have been ultimately declared unconstitutional [***]’.

13 See Art. 190 sec. 3 of the Constitution: A judgment of the Constitutional Tribunal is effective as of the day of its publication; however, the Constitutional Tribunal may set another date after which a normative act will be no longer in force. Period thus set may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the budget, the Constitutional Tribunal shall set the date after which a normative act will be no longer in force having sought the opinion of the Council of Ministers.

14 See Art. 190 sec. 1 of the Constitution: Judgments of the Constitutional Tribunal are universally binding and final. See Art. 190 sec. 2 of the Constitution: Judgments of the Constitutional Tribunal regarding matters specified in Article 188 shall be immediately published in the same official publication as the original normative act. If the normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*.

15 See e.g. judgment regarding municipal parking fees of 10 December 2002, P6/02, OTK ZU2002/7A/91. The provisions establishing parking fees were found unconstitutional, but their immediate expulsion from the legal system would have caused total chaos in the capital city (due to drivers who would not have to pay any parking fees). The Constitutional Tribunal deferred the effective date of the judgment, thus giving the legislator time to pass new law.

of the postponement of the judgment's effect undoubtedly represent the function of a positive, rather than a negative legislator.

To summarize the preceding analysis, it is not always easy to draw the boundaries between the constitutional court acting as a positive or a negative legislator. This phenomenon is not at all new. It essentially corresponds to the pure Kelsenian model or may be seen as a natural consequence of its introduction – provided we do not forget the banal truth that the law does not operate in isolation. Therefore, a legal norm decoded from the system is always a result of the application of inferential rules, including a consideration of the interrelation of different legal provisions, often originating from different normative acts. What follows is that elimination of one element from a complex legal structure changes this structure and may influence the content of the legal norm, which is ultimately decoded from the system.

In the next part I am looking at those mechanisms in constitutional jurisprudence which may affect legislation in an even more profound way, and, in some cases, may even allow for change to the normative content.

5. DIRECT FORMS OF IMPACT EXERTED BY THE CONSTITUTIONAL COURTS VS. NORMATIVE ACTS

5.1. INTERPRETATION OF THE CONSTITUTION

As I mentioned earlier, in constitutional jurisprudence, we may observe the positive impact on normative acts either in relation to the constitutional model (constitutional norm which is the basis of review), or in relation to a particular norm which is subject to review.

The former situation (impact on the content of the constitutional norm) is strongly associated with a phenomenon defined in the European literature as judicial activism. This phenomenon involves open and creative interpretation of constitutional norms, especially the so called 'fundamental principles and general constitutional clauses'. It is characteristic for constitutions to employ a large number of 'open' norms having flexible normative scope, expressing fundamental legal values, and creating 'axiology of the Constitution'. The search for normative content hidden in general, undefined expressions, as well as decoding other – more precise and concrete – norms out of them, deciding the scope of their application and establishing a special 'hierarchy' between the colliding rules and values lies at the heart of constitutional interpretation and is closely connected with the essential role of constitutional courts¹⁶. This process

¹⁶ See Ch. F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge University Press 2007, p. 264 ('If however, any organ with the power of constitutional review is introduced into the system and if the protection – elaboration dynamics is unavoidable, then the authorized constitutional review organ will be ineluctably involved with the generation of general and prospective constitutional norms, and thereby undermine the classical conception of the separation of powers').

is widely described in contemporary legal literature and the reader can only be referred to some well-known titles¹⁷.

The thesis of a ‘living constitution’ has been put forth in response to the phenomenon of judicial activism (or creativism). According to this thesis, a constitution is subject to a dynamic interpretation by the constitutional court. This interpretation evolutionally changes its content. As a result, the constitutional rules and values adapt to the changing social context, in an attempt to meet the new challenges and expectations, as well as to face the threats posed to humanity by contemporary world. This process of adaptation also involves absorbing new phenomena and needs generated by the developing society, including science and technology. Ultimately, the constitution exists through creative constitutional jurisprudence, which gradually and evolutionally both shapes its content and ensures stability of its principles¹⁸. One important – although often neglected – argument supporting judicial activism is the pursuit of, what is sometimes called, ‘normativisation’ of the constitution. It is the drawing of concrete normative content from open, generally formulated provisions. Without this, the constitution would be merely an act of purely ideological proclamation, non translatable into concrete rights, freedoms or duties. Radiating of the constitution and constitutionalization of the legal system, which occurs through the process of decoding specific content from the axiology expressed by general provisions inevitably infuses judges with prerogatives, which render their activity similar to the creational functions of law¹⁹. In this short study I am not able to answer the question of what are the character and the nature of this process. The answer could vary depending on the research perspective. In a purely formal analysis we are always confined to explaining the boundaries of judicial ‘interpretation’. And it is limited exclusively to the application of norms, and does not involve their creation. On the other hand, in the theoretical, philosophical and sociological analysis, the constitutional court creates norms by decoding them from the principles and values included in the general constitutional expressions, and, unless we include this process in the analysis, we may lose it out of sight.

17 See R. Dworkin, *Biorąc prawa poważnie* (Taking rights seriously), Warszawa 1998; R. Alexy, *The Argument for Injustice. A reply to legal positivism*, Oxford University Press 2004; J. Rawls, *Teoria sprawiedliwości* (A theory of justice), Warszawa 1994.

18 It would be difficult to assume that this thesis is commonly accepted. For example, Justice Antonin Scalia of the US Supreme Court formulated fundamental opposition against this interpretative assumption: ‘A change occurred in the last half of the 20th century, and I am sorry to say that my Court was responsible for it. It was my Court that invented the notion of a «living Constitution»’. Beginning with the Cruel and Unusual Punishment Clause of our Eighth Amendment, we developed the doctrine that the meaning of the Constitution could change over time, to comport with ‘the evolving standards of decency that mark the progress of a maturing society’ (see Mullahs of the West: Judges as moral arbiters, Warszawa, Biuro Rzecznika Praw Obywatelskich, 2009).

19 This is concisely described in an essay by M. Cappelletti: ‘And judges do not make those choices through any powers of mystical divination: the law is not revealed to them, but decided by them. If judges are the mouths of the law, they are also – to some inevitable extent – the writers of the script’ (see *Some Thoughts on Judicial law-Making* (in): *Mélanges en l’honneur d’Imre Zajtay*, Tübingen 1982, p. 100). See also E. McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review*, Dordrecht 1986, p. 89 and on.

The Polish Constitutional Tribunal manifests considerable judicial activism. Initially, especially after 1989, the scope of activism in Tribunal's jurisprudence was determined by a particular historical context. It was created by the fall of a totalitarian system and a necessity to re-build the structures of a democratic state of law²⁰. The fundamental transformation of the state, in the period when adequate constitutional norms were still missing²¹, required substantial creativity from the constitutional court. It had to decode the standards for rights and freedoms – which were not directly expressed in the constitutional norms – from the axiology of the new democratic system. By laying down such standards the jurisprudence in fact supplemented the existing Constitution. Many principles expressed in the judgments of the Tribunal were later expressly written into the new Constitution. Among many, the 'principle of the democratic state of law', introduced shortly after the fall of the communist system played a key role. The constitutional jurisprudence derived from this very principle, among others, such fundamental rights as: the right to the protection of human life before birth²², the right to court²³, the right to protection of privacy²⁴, as well as the ban on retroaction²⁵, the protection of duly acquired rights²⁶, so called rules of decent legislation²⁷, protection of ongoing business and legal certainty²⁸, or the principle of proportionality²⁹.

Most of these rules belong to the universal canon of values, adopted expressly in the constitutions of most democratic states. However, it is fair to ask whether the Constitutional Tribunal was empowered to create these rights and rules, and to introduce them to the system on the basis of a general and template-like constitutional norm (the principle of the democratic state of law). Looking at the state's transformation from the historical perspective, the creativity of constitutional court and its pro-democratic determination

20 See especially W. Sadurski, *Rights before Courts. A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, Springer 2005.

21 Between 1989 and 1997 (after the new Constitution came into force) to a large extent, the provisions of the old, communist Constitution were still binding, only partly amended by the new Constitution, which introduced, among others, the rule of democratic state of law.

22 See judgment of 28 May 1997, K 26/96, OTK ZU 1997/2/19.

23 See e.g. judgment of 7 January 1992 K8/91, OTK ZU 1992, part I, p. 76-84; of 27 June 1995 K4/94, OTK 1993, part II, p. 297-310.

24 See judgment of 24 June 1997, K21797, OTK ZU 1997/12/23.

25 See e.g. judgment of 22 August 1990 K7/90, OTK 1990, p. 42-58 (concerning pension benefits to employees).

26 See judgment of 25 February 1992 K3/9, OTK 1992, part I, item 1 (concerning acquisition of the property of the communist party).

27 This rule, also in the light of the present Constitution is not literally expressed and is based solely on constitutional jurisprudence. The constitutional court has derived from this rule – among others – the requirement that legal provisions be clear and understandable. See e.g. judgment of 15 December 2008 P57/07, OTK ZU 2008/10A/178.

28 See judgment of 15 July 1996, K5/96, OTK ZU 1996, part II, p. 16-28 (concerning customs duties). Jurisprudence based on this rule requires passing new tax law no later than one month prior to commencement of fiscal year, since citizens should not be surprised during the fiscal year with new tax laws.

29 See e.g. judgment of 26 April 1995 K11/94, OTK 1995, part I, item 12 (formula of proportionality adopted in the jurisprudence was then de facto incorporated in the text of new Constitution of 1997).

was a factor substantially affecting the pace and direction of the changes. Given the above, I have no doubt that the social and political revolution justified the approach of the Tribunal. Nonetheless, the answer may be different if we look at this phenomenon unemotionally and analyze acceptable limits of judicial interpretation, which clearly transforms into creation of constitutional norms. Can relativisation of these limits be justified, considering the historical aspect, political context and societal aspirations? We may as well pose this question here, but will have to leave it without a definite answer.

Following the proclamation of the new Constitution, the significance of the 'principle of the democratic state of law' decreased. The Constitution expressly stipulates many rules previously decoded from it. Although the scale and direction of judicial activism changed, the nature of the phenomenon of 'creation' of constitutional norms did not. Under the current Constitution, the key principle – which serves as the basis for judicial creativity in pursuit of justice, much like in the jurisprudence of other constitutional courts, especially the Federal Constitutional Court of Germany – is the principle of protection of inviolable human dignity³⁰. This principle was recently applied to render use of certain preventive measures in fight against terrorism unacceptable³¹. Earlier, it was the basis for the prohibition against eviction of an illegal tenant³². Yet another example is a judgment, in which the Constitutional Tribunal found significant normative content in the principle of protection of the common interest. This principle was one of the grounds on which the Tribunal found certain solutions of the national health system unconstitutional due to a lack of transparency with regard to availability of medical services offered by public health care³³. In the process of decoding rules (and – *de facto* – their creation) and finding a new normative content, the quality of the argumentative process applied by the constitutional court becomes increasingly important. Not only are growing expectations about the quality of arguments used by the courts a test for the soundness of judgments, but they also function as actual limits to judicial arbitrariness.

In the process of decoding the rules the Constitutional Tribunal avoids, in principle, an interpretation imposing a certain social or economic policy, which would push the parliament and the government towards specific legal solutions. It is pretty evident, however, that a modern European state, member of the European Union, has strongly determined directions for social and economic policies, in which the fundamental rules of

30 See inter alia F. Rymarz, *Zasada ochrony przyrodzonej i niezbywalnej godności człowieka w orzecznictwie Trybunału Konstytucyjnego* (The Principle of the Human Dignity in the Jurisprudence of the Constitutional Tribunal), *Przegląd Sadowy* 2003, no. 6, p. 3-22; K. Complak (Ed.), *Godność człowieka jako kategoria prawna* (Human Dignity as Legal Category), Warszawa 2001.

31 See judgment regarding prohibition of preventive shooting of a civil aircraft with innocent passengers aboard dated 30 September 2008 K44/07, OTK ZU 2008/7A/126.

32 See judgment on eviction of 14 December 2007 K 26/05, OTK ZU2007/ 11A/ 153.

33 See judgment of 7 January 2004 K14/03, OTK ZU 2004/1A/1.

the system and the protection of fundamental rights clearly overlap with specific solutions in the social, economic or fiscal sphere³⁴. Given the above, all systemic solutions of social or economic nature may acquire a constitutional dimension and push the constitutional courts (much like the European Court of Justice³⁵) to look for concrete, increasingly more detailed answers in the principles such as prohibition of all discrimination, protection of social rights or the rule of economic freedom³⁶. These tendencies may be enhanced by the introduction to the Constitution of a broad catalogue of general principles relating to social and economic rights, which also define the economic system as respecting the principle of ‘social market economy’ (see Art. 20 of the Constitution). Against the background of such constitutional constellation it is difficult to avoid confusion of the creative and interpretative functions and inevitable tendency of the Tribunal to enter – creatively – the conceptual sphere of policy which, until very recently, was an exclusive domain of the positive legislator. Unless these principles are to be purely ideological manifestations and constitutional decorum, expressing the ‘wishful thinking’ attitude of the authors of the Constitution, the constitutional court, by turning them into norms, and seeking at least some normative content in the so called programme norms³⁷, will at the same time have increasingly greater influence on the directions of state policy.

To conclude, we can say that the modern constitutional court transforms into a ‘positive legislator’ mostly by interpreting general and undefined constitutional norms. Regardless of how banal this thought is, interpretation of law – which always precedes its application, since not only ‘*clara*’ but ‘*omnia sunt interpretanda*’, and seeks concrete normative content – is moving towards lawmaking. In case of constitutional norms,

34 See such provisions as Art. 20 of the Constitution:

The basis of the economic system of the Republic of Poland is a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners.

Also, see Art. 67 and 76 of the Constitution:

Art. 67: A citizen shall have the right to social security whenever unable to work by reason of illness or disability, as well as after having attained retirement age. The scope and forms of social security shall be specified by statute.

Art. 76: Public authorities protect consumers, users and tenants against activities threatening their health, privacy and safety, as well as against unfair market practices. The scope of this protection is regulated by statute.

35 In the jurisprudence of the European Court of Justice this tendency is very clear, especially with regard to a broad prohibition of discrimination. Its application in judicial practice leads to a considerable interference with the sphere of social policy in Member States (e.g. with regard to employment contract). See e.g. C. Mc Hugo, Positive Action and Race Discrimination: Challenges for the European Court of Justice, Firenze 2005; D. Martin, Egalité et non-discrimination dans la jurisprudence communautaire. Étude critique à la lumière d’une approche comparatiste, Bruxelles 2006, p. 588 and on.

36 Application of these general rules in the European law is associated with usually creative, lawmaking role of the European Court of Justice. See e.g. J.P. Puissechot, Des Traités et des Juges: la Fonction de la Jurisprudence dans l’élaboration du droit communautaire (en): Problèmes d’interprétation à la mémoire de Constaninos N. Kakouris, Bruxelles – Bruylan 2003, p. 303 et suiv. Cf. S. Weatherill, The Constitutional Competence of the EU to deliver Social Justice, ERCE 2006, No 2, p. 135.

37 Such attempts to decode positive normative content from the so called programme norms are made by jurisprudence. See e.g. judgment concerning the law on National Health Fund (7 January 2004 K147/03, OTK ZU 2004/1A/1); protection of consumer (bio-fuels) (21 April 2004 K33/03, OTK ZU 2004/4A/31), protection of tenants (12 January 2001 P11/98, OTK ZU2000/1/3, and of 19 April 2005, K 4/05, OTK ZU 2005/4A/37); social market economy (29 January 2007 P5/05, 2007/1A/1).

the interpretative margin left to the discretion of the judge is far greater. This occurs especially when the interpretation of rules is inherently related to ‘*moral choices*’, whereby certain values, although not directly expressed in the system, or moral preferences of the judges themselves, become reference points. In Poland, as in many other countries, the judgment on the admissibility of abortion on social grounds is a good example³⁸. There, the field of choice is placed at the top of the system, touching on the fundamental notions related to the definition of a person on the one hand, and those of human autonomy and privacy on the other.

Now I will discuss another form by which the Constitutional Tribunal influences the content of law. Namely, it does so by constitutional review.

4.2. INTERPRETATION OF STATUTES. INTERPRETATIVE RULINGS

Apart from the ‘classic’ judgment declaring a normative act unconstitutional, many European constitutional courts, in their practice, utilize also other forms of judgments. They are inconsistently referred to as interpretative, conditional or partial judgments (the latter review a norm only up to a certain extent)³⁹. It is difficult to talk about precise classifications since these terms are not defined and, additionally, they are not stipulated by constitutional norms, while different authors understand them differently. Their common denominator is that the act under review remains in force, but with a modified normative content. Thus, we restore the constitutional character of the norm under review, without strongly interfering with the legal order, which is inherently the case with direct declaration of lack of conformity with an act at a higher hierarchical level.

Polish constitutional practice has also developed another kind of judgment, which is not expressly provided for by the Constitution or by The Constitutional Tribunal Act. In its most typical form, such judgment is worded with one of the following formulas: ‘provision X is consistent with the Constitution under the condition that it is understood as follows...’, or ‘provision X, understood as follows ..., is consistent with the Constitution’ or ‘provision X, understood as follows ..., is inconsistent with the Constitution’. Partial judgments usually go further because they expressly determine the normative elements included in the provision, which are inconsistent with a hierarchically higher act (e.g. ‘provision X, as far as it stipulates that, is inconsistent with the Constitution’).

In all these cases, the reviewed norm remains in the system, which means that the

³⁸ See judgment on the constitutionality of the law on abortion.

³⁹ Polish literature in this field is relatively broad. See e.g. A. Mączyński, O tak zwanych wyrokach interpretacyjnych Trybunału Konstytucyjnego/Konstytucyjnego (w): P. Wieczorek (red.), *Teoria i praktyka wykładni prawa* (The so called Interpretative Judgments of the Constitutional Court (in): Theory and the Practice of the Interpretation of the Law), Warszawa 2006; J. Trzciński, *Orzeczenia interpretacyjne Trybunału Konstytucyjnego* (Interpretative Judgments of the Constitutional Tribunal), *Państwo i Prawo* 2002, no. 1; A. Józefowicz, *Orzeczenia interpretacyjne Trybunału Konstytucyjnego* (Interpretative Judgments of the Constitutional Tribunal), *Państwo i Prawo* 1999, no. 11.

content of the provision is changed (positive effect) without legislative interference. In this way the Constitutional Tribunal – metaphorically speaking – takes a shortcut by skipping the legislative stage which, typically, involves replacement by the legislator of the defective norm with a correctly structured norm. Consequently, there is no doubt that the constitutional court acts as a positive legislator.

However, the matter is not free from fundamental controversies. They have been expressed in the literature and even become a source of conflict between the Supreme Court and the Constitutional Tribunal⁴⁰. The Supreme Court, opposing this practice of the Constitutional Tribunal, argues that interpretation is strictly confined to the application of a given norm. Interpretation of a norm is not about the evaluation of its conformity with a hierarchically higher act. Interpretation of law is within the domain of common courts. Claiming that a binding norm cannot be interpreted in a given way violates, therefore, that domain and can even arguably limit the courts' independence since they are subject only to the Constitution and statutes⁴¹. This position is not flawless, of course. Counterarguments stress the essence of the Tribunal's prerogative. That is, when analyzing the constitutionality of a norm, it cannot be restrained in its right to interfere with the legal order in a narrower manner (interpretative judgment), if it can do so in a much broader manner (*argumentum a maiore ad minus*). The elimination of a given normative meaning of a provision may be illustrated by comparison of a laparoscopic surgery to a general surgery. The latter always leaves a scar after an open wound. The wound is a loophole in the legal system with usually complicated consequences as regards the retroactive effects of the eliminated norm. These consequences can be avoided through the use of interpretative judgments⁴². This problem is clearly illustrated by a fundamental conflict between the two highest court instances. It arose in connection with an interpretative judgment regarding an important provision of the Civil Code regulating the liability of the state for harm done to an individual by public officers (a category larger than civil servants)⁴³. By issuing an interpretative judgment, and therefore avoiding derogation of a Civil Code provision, the Tribunal established a totally new regime of *ex delicto* liability of the state. This new regime has been based on the objective condition of illegality, while and the intent of the officer as a prerequisite to the finding of liability has been eliminated. This interpretation, although in compliance

40 Even a speech delivered by the President of the Constitutional Tribunal at the General Assembly of the Constitutional Tribunal in 2003 addressed that issue.

41 See Art. 178 of the Constitution: Judges, within the exercise of their office, are independent and subject only to the Constitution and statutes.

42 Generally, the effects of an interpretative judgment may be more complicated. It seems, for example, that also in this case it is possible to undermine judgments and decisions passed earlier on the basis of an erroneous, unconstitutional interpretation of a given provision (Art. 190 sec. 4 of the Constitution, quoted above applies). It is also different in the case of partial judgments which consist in elimination of a fragment of a reviewed normative act.

43 See judgment of the Constitutional Tribunal of 4 December 2001 in the case SK18/00, OTK ZU 2001/8/256.

with a norm of the new Constitution (Art.77 (1))⁴⁴, was in fundamental opposition to the interpretation accepted for nearly forty years by common courts, as well as the Supreme Court. The previous interpretation required the existence of intent of the direct culprit (public officer) as a condition of liability. This system could not have been maintained any longer. Still, this does not mean that the line adopted by the Tribunal was correct. Perhaps, the Tribunal should have left the provision of the Civil Code intact. Perhaps the Tribunal should have left it to the legislator to create a new norm of great importance to individuals and realization of the constitutional rights and guarantees. This matter is still debated today. The leading view seems to be that interpretative judgments should not be used to change an established and coherent line of jurisprudence in the common courts. It is a particular provision, as understood in existing court practice that should be the subject of review and evaluation of constitutionality. The constitutional court would invade a sovereign domain of the common courts by trying to reverse – by means of interpretative judgments – established tendencies in jurisprudence, even if the result of such tendencies is an interpretation that cannot be reconciled with the Constitution. In such a scenario, there is no other way out than to apply a more powerful instrument of review, namely a judgment declaring a norm entirely unconstitutional. In addition, we have to accept that an unambiguous court interpretation excludes the search for any other meanings of the norm. The judgment of the Tribunal discussed above, dealt with an unusual situation because the original, established interpretation lost its validity due to the introduction of the new Constitution. It is fair to talk about ‘secondary constitutionality of a norm’. That is, a provision which had initially been consistent with the Constitution, but became unconstitutional after the Constitution has been changed. Such was the case with the former Constitution with regard to the requirement of intent in order to find the state liable for damages caused by public officers. Since 1997 the directive to interpret the law in compliance with the Constitution has led to a fundamental reform of this regime. This has been achieved by the Constitutional Tribunal, which de facto created a new norm in the Civil Code regarding state liability.

4.3. SIGNALIZATION

The constitutional court affects the legislation in yet another special way, namely by the so called signalization. It contains concrete proposals with regard to a domain in which it is clear from existing judicial practice that urgent legislative intervention is needed. Signalization is neither a normative project, nor a binding opinion of the Constitutional Tribunal. Moreover, it is not directly connected with a given, pending case. It purports to direct the legislator’s attention to problems of general nature, which

⁴⁴ See Art. 77 sec. 1 of the Constitution: Everyone has the right to be compensated for loss incurred as a result of unlawful act by public authority.

cannot be presented in a written opinion dealing with a particular case⁴⁵. Views about the purpose and usefulness of signalization vary. Can the constitutional court express – by means of signalization – a wider content than the one presented in the jurisprudence so far? An answer to this question is ambiguous. On the one hand, there is little point in claiming that it merely repeats the content already expressed. On the other hand, if we adopt a different opinion, it is easy to cross the line, beyond which there are only automatic, positive proposals of legislative character. And these may provoke accusations that the court is politically involved. Correctly structured signalization should always use only certain parameters of future solutions, which result from constitutional provisions, and not ready-made normative proposals. This should be the case if we want to respect the principle that the constitutional court must not replace the legislator as far as the choice of economic or social policies is concerned. As already mentioned, it is difficult to apply this principle in practice because certain constitutional criteria open up a broad area of freedom of evaluation. In my opinion, signalization should be treated as an instrument of an extraordinary character. I am not entirely certain about its usefulness, either. I see it only with regard to cases, in which the unconstitutionality of legal solutions results from legislative loopholes ('legislative omission'). The Constitutional Tribunal in Poland, like most constitutional courts, cannot declare in its judgment the existence of legislative omission. Therefore, it has no power to force the legislator to fill a normative loophole⁴⁶.

5. CONCLUSIONS:

A modern constitutional court, with complex legal tools at its disposal affects the legal system and becomes an increasingly active actor in the lawmaking field. Parallel to the process of constitutionalisation of legal system there is a process of serious narrowing of legislative freedom legislative bodies once enjoined. The capacity of the Kelsenian '*Grundnorm*' being a point of reference for the hierarchic review of law is enlarging considerably because the new constitutional norm has entered areas unknown to constitutions of the 19th century and even early 20th century. In this regard, human rights play a special role. They are now strongly supported both in the system of constitutional

45 See e.g. signalization concerning protection of tenants of 29 June 2005, OTK ZU 2005/6A/77 and constitutional status of assessor judges (court officers before formal appointment to the post of judge) of 30 October 2006 OTK ZU 2006/9A/146.

46 Only the Hungarian constitutional court has such a prerogative. The constitutional court may find a provision showing e.g. legislative omissions unconstitutional. The unconstitutionality results from a lack of some specific element e.g. arbitrary omission by the legislator of a certain category of entities, which might benefit from given legislative preferences. See also, among others, judgment of 3 December 1996, K 25/95, of 9 X 2001 Sk8/00, of 16 XI 2004, P 19/03. There exists, however, a specific solution in Polish law which allows to treat legislative omission by the common court as a premise for universal liability for compensation by public authority. Legislative omission may be treated as a manifestation of the so called normative unlawfulness, and thus constitute grounds for compensatory liability of the State pursuant to express provisions of the Civil Code, See Art. 417 of the Civil Code. See also L. Bosek, *Odpowiedzialność państwa za bezprawność legislacyjną* (State Liability for Unlawful Legislation), Warszawa 2007.

norms and on the level of international acts, the latter enjoying most of the time direct application in the national legal order and a hierarchically higher place than national law. From this point of view, the principle of equal treatment has become very popular. Broadly understood, this principle may justify extensive interference with the legal system by the constitutional court and may sometimes take the form of express instructions to the legislator to shape legal relations in a particular way⁴⁷. In our contemporary, increasingly integrated Europe, which is building a uniform system of legal standards in many domains, the courts grow stronger, especially supranational courts (i.e. the European Court of Human Rights and the European Court of Justice) with their power to positively define what are necessary components of the law. *Vis-a-vis* the EU member states, the European Court of Justice plays a role of a unique constitutional court of the European Union. Its judgments, especially those rendered in the preliminary ruling procedure and concerning the interpretation of European law, become an independent and separate source of obligation for national legislators (as far as they decode necessary elements from the European norm), which they must consider while implementing EU rules⁴⁸. Naturally, this function of the Court of Justice may be effectively exercised only in co-operation with national courts (supreme courts as well as common courts), which play the role of European Union courts. We must not, therefore, neglect the fact that currently it is both the constitutionalization and the Europeanization of law, which define the boundaries to the positive legislator and increasingly determine the direction of adopted legal solutions. Apart from the interpretative rule that law should be interpreted in compliance with constitutional norm, there is now a directive to interpret the law also in accordance with European law. The latter is a concept of interpretation friendly to the European law and a consequence of the universally recognized rule of supremacy of community (EU) law over national law⁴⁹. The consequences drawn there from are sometimes far-reaching. The national court, by denying application of a national norm which is contrary to European law or by creatively interpreting a national norm with due regard for the spirit of a European norm *de facto* applies a new, previously unknown

47 See M. Safjan, *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania* (Horizontal Effects of the Fundamental Rights: Autonomy of the Will and the Principle of the Equal Treatment), *Kwartalnik Prawa Prywatnego* 2009, no. 2, p. 297 and on.

48 See broad literature on quasi-legislative activity of the ECJ, among other, L. Burgorgue-Larsen, *Les juges face à la charte. De la prudence à l'audace* (en): *Face à la charte des droits fondamentaux de l'Union Européenne* (sous la direction L. Burgorgue-Larsen), Bruxelles, p. 4 and following; M. Vranken, *Role of the Advocate General in the Law – making process of the European Community*, *Anglo-American Law Review* 1996, No 1, p. 39 and following; M. Cappelletti, *op. cit.*, p. 97; O. Due, *The Law-making Role of the European Court of Justice Considered in Particular from the Perspective of Individual and Undertakings*, *Nordic Journal of International Law* 1994, vol. 63, p. 123 and following. See also the characteristic text of K. J. Alter and L. R. Helfer, 'International Courts have in their DNA the capacity to be expansionist lawmakers' (Nature or Nurture? Judicial Law Making in the European Court of Justice and the Andean Tribunal of Justice), *Northwestern Law, Public Law and Legal Theory Series*, No. 09-16, 2009, p. 24).

49 See especially judgment of 11 May 2005, K18/04, OTK ZU 2005, 4A/37 and judgment of 17 July 2007 P16/06, OTK ZU 2007/7A/79.

norm. In a way, it thus becomes a positive legislator for that specific case. In comparison to the Kelsenian model, the process of hierarchical review of law, together with all its consequences, is now systematically dispersing and decentralizing. As a result, one may note that never before have the courts in continental Europe affected the positive law as much as at the present level of European integration.

Returning to my original question: Are we faced with real *'judicial government'*, which having abandoned the traditional function of the arbiter and administrator of justice, actually aspires to governing? I think we may give this question a partially positive answer, provided that we understand the exercise of state power predominantly as lawmaking, as it probably is in the case of the state of law. Yet, at the same time we cannot neglect, however speculative they may be, threats to the model of the democratic state in which the will of the nation should be decisive. The judges, invested with greater power, have to accept responsibility for the future of our democratic systems. This grant of significant power must be accompanied by a sense of self-restraint and humbleness towards the grantor, namely the society. This, however, is a topic for another essay.

РЕЗЮМЕ

Современные конституционные суды посредством находящихся в их распоряжении комплексных правовых механизмов влияют на правовую систему и становятся все более активными участниками законотворческого процесса. Параллельно с процессом конституционализации правовой системы идет процесс серьезного сужения законодательной свободы, когда-то присущей законодательным органам. Возможности кельзенской "основной нормы" ("Grundnorm"), являющейся критерием при рассмотрении законов, значительно расширяются, поскольку новые конституционные нормы охватывают вопросы, неизвестные конституциям 19-го и даже начала 20-го веков. В этом смысле права человека играют особую роль. В настоящее время они серьезно защищаются как посредством системы конституционных норм, так и на уровне международных актов; при этом последние, как правило, имеют прямое действие в национальной правовой системе и иерархически более высокую юридическую силу, чем национальное законодательство. С этой точки зрения довольно популярным стал принцип одинакового подхода. В широком смысле посредством этого принципа можно обосновать значительное вмешательство Конституционного Суда в правовую систему; в некоторых случаях оно может выражаться в форме конкретных указаний, даваемых законодателю с целью регулирования правоотношений определенным образом. В современной, все более интегрированной Европе, которая создает единую систему правовых стандартов во многих областях, суды, особенно наднациональные (например, Европейский суд по правам человека и Европейский суд правосудия), становятся сильнее, обладая полномочием давать позитивное определение того,

какими должны быть основные характерные особенности права. Для государств-участников Европейского союза Европейский суд правосудия играет роль исключительного Конституционного Суда ЕС. Его постановления, особенно те, которые принимаются в результате рассмотрения дел по предварительным запросам и касающиеся толкования европейского права, становятся самостоятельным и особым источником права для национальных законодателей (поскольку раскрывают основные характерные особенности соответствующей нормы европейского права), которые должны учитываться при имплементации права ЕС. Безусловно, эта функция Суда может эффективно осуществляться только в условиях сотрудничества с национальными судами, выступающими в качестве судов Европейского союза. Следовательно, мы не должны игнорировать тот факт, что в настоящее время как конституционализация, так и европеизация права устанавливают ограничения для позитивного законодателя и все в большей степени определяют направления принимаемых правовых решений. Помимо правила толкования закона в соответствии с конституционной нормой, в настоящее время существует также обязанность толковать закон в соответствии с европейским правом, что является результатом общепризнанного правила верховенства права Европейских сообществ (ЕС) над национальным правом. Следует отметить, что последствия вышесказанного иногда являются далеко идущими. Национальный суд, отказывая применять противоречащую европейскому праву национальную норму или активно толкуя последнюю с учетом духа европейского права, фактически применяет новую, ранее неизвестную норму. Таким образом, суд в некотором смысле становится позитивным законодателем для данного конкретного случая. По сравнению с кельзенской моделью, процесс рассмотрения законов, вместе со всеми его последствиями, в настоящее время становится децентрализованным. Отметим, что в континентальной Европе суды никогда прежде не имели такого влияния на позитивное право, как на современном этапе европейской интеграции.

Возвращаясь к моему первоначальному вопросу – “Имеем ли мы дело с настоящим «судебным правлением», которое, отказавшись от традиционных функций арбитра и осуществления правосудия, фактически стремится к осуществлению функции управления?” - отмечу, что, по-моему, на этот вопрос можно дать частично положительный ответ, при условии, что осуществление государственной власти воспринимается преимущественно с точки зрения законотворчества. Вместе с этим мы не можем не учитывать угрозы (какими бы теоретическими они ни были), существующие для модели демократического государства, в которой воля народа должна быть решающей. Судьи, наделенные большими полномочиями, должны принять на себя ответственность за будущее наших демократических систем. Предоставление этой значительной власти должно сопровождаться чувством самоограничения и подчинения субъекту, предоставляющему данную власть, а именно обществу. Это, однако, тема для другой статьи.

Die modernen Verfassungsgerichte beeinflussen mittels der komplexen Rechtsmechanismen, über die sie verfügen, das Rechtssystem und nehmen am Rechtssetzungsprozess immer aktiver teil. Parallel zum Prozess der Konstitutionalisierung des Rechtssystems vollzieht sich ein Prozess beträchtlicher Verengung der gesetzgeberischen Freiheit, die seinerzeit den Gesetzgebungsorganen eigen war. Die Möglichkeiten der Kelsenschen Grundnorm, die ein Kriterium bei der Überprüfung der Gesetze ist, erweitern sich, denn die neuen Verfassungsnormen erfassen Fragen, die die Verfassungen des 19. und sogar des Anfangs des 20. Jahrhunderts nicht kannten. In diesem Sinn spielen die Menschenrechte eine besondere Rolle. Sie sind gegenwärtig sowohl durch das System der Verfassungsnormen als auch auf der Ebene der internationalen Akte in hohem Maße geschützt; dabei haben die Letzteren eine unmittelbare Geltung in den nationalen Rechtssystemen und besitzen in ihren Hierarchien eine höhere juristische Kraft als die nationale Gesetzgebung. Aus dieser Perspektive hat der Grundsatz der Gleichbehandlung eine recht große Beliebtheit erlangt. Die beträchtliche Einmischung des Verfassungsgerichts ins Rechtssystem lässt sich weitgehend durch diesen Grundsatz begründen; in einigen Fällen kann diese Einmischung in Form konkreter Anweisungen zum Ausdruck kommen, die dem Gesetzgeber zwecks Regelung der Rechtsverhältnisse in einer bestimmten Art und Weise erteilt werden. Im modernen Europa mit einem höheren Grad der Integration, das ein einheitliches System von rechtlichen Standards in vielen Bereichen schafft, werden die Gerichte, insbesondere die supranationalen (beispielsweise der Europäische Gerichtshof für Menschenrechte und der Europäische Gerichtshof) stärker, da sie zu bestimmen befugt sind, welche charakteristischen Besonderheiten das Recht haben soll. Für die Mitgliedsstaaten der Europäischen Union spielt der Europäische Gerichtshof die Rolle eines exklusiven Verfassungsgerichts der EU. Seine Entscheidungen, insbesondere diejenigen, welche in Vorabentscheidungsverfahren getroffen werden und die Auslegung des Europarechts betreffen, werden zu einer selbstständigen und besonderen Rechtsquelle für die nationalen Gesetzgeber (sie erläutern nämlich die wichtigsten spezifischen Besonderheiten der betreffenden Norm des Europarechts), die bei der Implementierung des Rechts der Europäischen Union zu berücksichtigen ist. Diese Funktion des Europäischen Gerichtshofs kann zweifelsohne nur in einer Kooperation mit nationalen Gerichten, die als Gerichte der Europäischen Union handeln, ausgeübt werden. Daher sollten wir nicht die Tatsache missachten, dass sowohl die Konstitutionalisierung als auch die Europäisierung des Rechts derzeit Beschränkungen dem positiven Gesetzgeber auferlegen und die Ausrichtungen der rechtlichen Entscheidungen immer stärker bestimmen. Neben der Regel der Auslegung des Gesetzes gemäß der Verfassungsnorm besteht z. Z. auch die Pflicht, die Gesetze in Übereinstimmung mit dem Europarecht auszulegen, was aus der allgemein anerkannten Regel des Vorrangs des Rechts der Europäischen Gemeinschaft vor dem nationalen Recht resultiert. Es sollte erwähnt werden, dass das oben Dargelegte weitgehende Folgen zeitigt.

Wenn ein nationales Gericht die Anwendung einer dem Europarecht widersprechenden nationalen Norm ablehnt oder die Letztere im Sinne des Europarechts aktiv auslegt, so wendet es faktisch eine neue, früher nicht bekannte Norm an. Damit wird das Gericht in gewissem Sinne zu einem positiven Gesetzgeber für den konkreten Einzelfall. Im Vergleich zum Kelsenschen Modell erfolgt im gegenwärtigen Prozess der Überprüfung der Gesetze mit all ihren Folgen eine Dezentralisierung. Es sei hervorgehoben, dass die Gerichte im kontinentalen Europa früher nie einen so starken Einfluss auf das positive Recht gehabt haben wie im derzeitigen Stadium der europäischen Integration.

Ich komme nun auf meine eingangs gestellte Frage zurück, ob wir es mit einer echten "Gerichtsregierung" zu tun haben, wo die Gerichte ihre traditionellen Funktionen eines Arbiters und der Rechtsprechung ablegen und faktisch darauf erpicht sind, zu regieren. Ich meine, dass diese Frage zum Teil positiv zu beantworten ist, wenn die Ausübung der Staatsgewalt überwiegend unter dem Aspekt der Rechtssetzung verstanden wird. Zugleich dürfen wir nicht die Gefahren übersehen (selbst wenn sie einen nur sehr theoretischen Charakter haben), die das bestehende Modell des demokratischen Staates bedrohen, in dem der Wille des Volkes ausschlaggebend sein soll. Die Richter, die mit weiten Vollmachten ausgestattet sind, müssen die Verantwortung für die Zukunft unserer demokratischen Systeme übernehmen. Die Einräumung einer so bedeutenden Macht muss vom Gefühl der Selbstbeschränkung und der Unterordnung unter das Subjekt, das diese Macht einräumt, begleitet werden. Dieses Subjekt ist die Gesellschaft. Dies wäre aber ein Thema für einen anderen Aufsatz.

RÉSUMÉ

Les Cours constitutionnelles modernes, avec les outils juridiques complexes qu'elles disposent, affectent le système juridique et deviennent des acteurs de plus en plus actifs du processus légiférant. Parallèlement au processus de constitutionnalisation du système juridique, on assiste au processus de rétrécissement grave de la liberté législative propre aux organes législatifs des époques précédentes. Les dispositions de la «norme principale» (Grundnorm) qui a servi de référence pour l'examen des lois, sont considérablement élargies car actuellement les nouvelles normes constitutionnelles couvrent des zones inconnues aux constitutions du 19ème et même du début du 20ème siècles. Dans ce sens, les droits de l'homme jouent un rôle particulier. Actuellement, ces droits sont sérieusement protégés à la fois par le système des normes constitutionnelles et au niveau des actes internationaux, ces derniers étant d'application directe dans l'ordre juridique national, occupent une place hiérarchiquement supérieure à la loi nationale. De ce point de vue, le principe de l'égalité d'approche est devenu très populaire. Au sens large, ce principe peut justifier une ingérence étendue de la Cour constitutionnelle dans le système juridique; parfois cette intervention peut prendre la forme d'instructions au législateur dans le but de réglementer les relations juridiques d'une façon particulière.

Dans notre Europe contemporaine de plus en plus intégrée, qui se construit comme un système unique de normes juridiques dans de nombreux domaines, les cours et en particulier les cours supranationales (par exemple, la Cour européenne des droits de l'homme et la Cour européenne de Justice) se renforcent, ayant l'habileté de définition positive des particularités caractérielles du droit. Vis-à-vis des États membres de l'UE, la Cour européenne de Justice joue le rôle d'une Cour constitutionnelle extraordinaire de l'Union européenne. Ses arrêts, notamment ceux adoptés à la suite d'une procédure d'examen des affaires sur recours préalables et portant sur l'interprétation du droit européen, deviennent une source indépendante et distincte du droit pour les législateurs nationaux (puisqu'ils décodent les particularités essentielles de la norme européenne), dont ils doivent tenir compte lors de la mise en œuvre du droit de l'UE. Naturellement, cette fonction de la Cour de Justice ne peut être effectivement exercée qu'en cas de collaboration avec les juridictions nationales qui se présentent en tant que des Cours de l'Union européenne. Nous ne devons donc pas négliger le fait que, actuellement, la constitutionnalisation aussi bien que l'eupéanisation du droit définissent les limites au législateur positif et de plus en plus déterminent la direction des décisions juridiques adoptées. En dehors de la règle d'interprétation de la loi en conformité avec la norme constitutionnelle, actuellement, s'est mise en place l'obligation d'interpréter la loi en conformité avec le droit européen: une conséquence de la règle universellement reconnue de la suprématie du droit communautaire (UE) sur le droit national. Les conséquences du susmentionné sont de grande envergure. Le tribunal national, en refusant l'application d'une norme nationale contraire au droit européen ou en interprétant activement une norme nationale selon l'esprit de la norme européenne applique de facto une nouvelle norme, jusque-là inconnue. D'une certaine manière, le tribunal devient un législateur positif pour ce cas précis. En comparaison avec le modèle de la «norme principale», le processus d'examen des lois, avec toutes ses conséquences, est désormais décentralisé. Jamais auparavant les tribunaux de l'Europe continentale n'ont affecté le droit positif autant qu'à l'étape actuelle de l'intégration européenne.

Revenant à ma question initiale: «Sommes-nous confrontés au vrai «gouvernement judiciaire», qui, ayant abandonné la fonction traditionnelle de l'arbitre et de l'opérateur de la justice, aspire réellement à gouverner? », - je pense que nous pouvons donner à cette question une réponse partiellement positive, à condition que nous comprenions l'exercice du pouvoir étatique principalement sous forme de légiférer. Pourtant, nous ne pouvons pas négliger les menaces (aussi spéculatives qu'elles puissent être), contre le modèle de l'Etat démocratique dans lequel la volonté du peuple devrait être déterminante. Les juges, investis d'un plus grand pouvoir, doivent accepter la responsabilité pour l'avenir de nos systèmes démocratiques. Cette habileté significative doit être accompagnée d'un sentiment d'auto-restriction et de soumission à l'autorité du mandant, à savoir à l'autorité de la société. Ceci, cependant, est le sujet d'un autre article.

**NATIONAL FACE
OF THE TRANSFORMATIONAL CONSTITUTIONALISM**

CONSTITUTIONALISM IN LATVIA: REALITY AND DEVELOPMENTS

Anita RODIŅA, Jānis PLEPS

I. INTRODUCTION

The modern state belonging to the Western legal system is based on the principle where the state power is effectively limited through the mediation of particular principles of law, traditions and institutional mechanisms.¹ The model of governance in such a state is based upon the principles of state governed by law (rule of law), democracy and human rights.² On the one hand, democracy requires realization of the sovereignty of people and respecting the will of the majority and the legislator as the body expressing the will of people. On the other hand, democracy requires respecting the principle of the separation of powers, state governed by law, independence of judiciary, human rights and other public values.³

Traditionally the principles of state governed by law and human rights are included in the concept of constitutionalism. Constitutionalism is a sufficiently complex model of state governance, demanding not only declaration of the respective values and principles in the texts of the constitution, but also their practical implementation.

Throughout centuries, constitutionalism, evolving in some countries, has become inalienable and significant heritage of Western legal traditions. The European Court of Human Rights has unswervingly noted that democracy is a fundamental feature of the European public order.⁴ Even though the ideas of constitutionalism have become internationalized, covering the countries belonging to the Western legal system and tending to become the dominant political ideology in the world, the constitutionalism of each particular state is a deeply national concept, summarizing the shared values of the respective society. The European Court of Human Rights, likewise, has recognized that the national peculiarities of individual states should be respected, as the European Convention on

1 Sajó A. *Limiting Government. An Introduction to Constitutionalism*. Budapest: Central European University Press, 1999, p. xiv.

2 European Commission for Democracy through Law (Venice Commission). Report on the Rule of Law. [http://www.venice.coe.int/webforms/documents/CDL-AD\(2011\)003rev-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)003rev-e.aspx) [02-03-2013], para.1.

3 Barak A. *The Judge in a Democracy*. Princeton and Oxford: Princeton University Press, 2006, pp. 23 - 26.

4 Ahmed and others v. the United Kingdom: judgement of European Court of Human Rights, 2 September 1998, 65/1997/849/1056, para. 52.

Human Rights⁵ did not aim to ensure total homogeneity among the member states.⁶ The size of the state or its importance in international politics is not decisive in developing and strengthening the ideas of constitutionalism. Referendums and electorate's direct legal initiative rights is a traditional mechanism in the constitutional order of the Swiss Confederation, which has been adopted by other states.⁷ The currently dominant European institution of constitutional control with a separate constitutional court, in its turn, initially was accepted only in Austrian and Czechoslovakian constitutional orders.⁸

The collapse of the socialist system established by the USSR and its satellite states in the 1980s and 1990s allowed the states of this region to regain sovereignty and state independence, as well as to impart practical political and legal meaning to constitutional ideas. More than twenty years after the collapse of the socialist system the ideas of constitutionalism in countries of Eastern Europe have consolidated and reunited the states belonging to the Western legal system, without differentiating according to the "old Europe" or "new Europe" dimensions. Simultaneously, the unique experience of these states in transforming the socialist system of law into democratic states governed by law has provided new insights into constitutionalism.

The foundation of Latvia's constitutional system is formed by the constitution - Satversme of the Republic of Latvia of 15 February 1922 (hereinafter – Satversme).⁹ Currently the Satversme can be considered to be one of the oldest constitutions that are in force in Europe. The fact that the Republic of Latvia after restoration of independence at the beginning of the 1990s did not draft a new constitution, but renewed the Satversme, can be seen as unique.¹⁰ This decision meant that a constitution, the operation and application of which had been stayed more than fifty years ago, was returned into legal reality. No other state has conducted a constitutional experiment of this kind.

The peculiar codification style of the Satversme, which could be characterized as extreme brevity or textual laconism, is principally different from the expanded political declarations or detailed technical regulation typical of contemporary constitutions.¹¹

5 European Convention on Human Rights. http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf [02-03-2013].

6 *The Sunday Times v. the United Kingdom*: judgement of European Court of Human Rights, 26 April 1979, 6538/74, para. 61.

7 Dzelzītis K. Šveices Savienības satversme (Satversmes teksta tulkojums ar ievadu). Rīga: A. Gulbis, 1921, 8. - 14.lpp.

8 Kelsen H. *General Theory of Law and State*. New Brunswick: Transaction Publishers, 2006, p.157.

9 Latvijas Republikas Satversme. *Valdības Vēstnesis*, 30.06.1922., Nr.141. The text of the Constitution of the Republic of Latvia in English available: <http://saeima.lv/en/legislation/constitution> [02-03-2013].

10 Taube C. *Constitutionalism in Estonia, Latvia and Lithuania. A study in comparative constitutional law*. Upsala: Iustus Förlag, 2001, p. 46 – 55.

11 Endziņš A. The principle of separation of powers and the experience of the Constitutional Court of the Republic of Latvia. Report in seminar "Cases of conflicts of competence between state powers before the Constitutional Court". Yerevan, 4 – 5 October, 1999. [www.venice.coe.int/docs/2000/CDL-JU\(2000\)030-e.pdf](http://www.venice.coe.int/docs/2000/CDL-JU(2000)030-e.pdf) [02-03-2013].

Essentially, the Satversme recognizes elements of constitutionalism as self-evident and mandatory in the constitutional order of Latvia, often dispensing with references to them in the text of the Satversme. Because of this, the Constitutional Court has emphasized that “the Satversme is a short, laconic but at the same time a complicated document”.¹²

In the article authors will address the general characteristic of the constitutional order of the Republic of Latvia, particularly emphasizing those elements, which could be important also on supranational level and which have been discussed and developed in recent years thus forming new trends of Latvian constitutionalism. The article will analyze the concept of the constitution (*Chapter II*) and characterize the principles of constitutional order (*Chapter III*). The authors will also examine the core of the constitution and the idea of its inviolability (*Chapter IV*), the mechanism of constitutional control (*Chapter V*), as well as the procedures of people’s legislative initiative very typical of Latvia’s constitutionalism (*Chapter VI*).

II. THE CONCEPT OF THE CONSTITUTION

In Latvian legal terminology the constitution is denoted with a specially made word “Satversme”. It was proposed for denoting constitution in 1869 by Kronvaldu Atis, one of the leaders of Latvian national awakening. The word “Satversme” has been derived from the verb “*tvert*” (to contain, to cover), because “people have adopted laws because of that, so that in time of need they would have a place of containment.”¹³ Even the Latvian term used to denote constitution contains ideas of constitutionalism, i.e., that the constitution protects people and ensures the existence of the state. Kronvaldu Atis wrote, “each state provides to its members, to its citizens refuge against one another and against strangers.”¹⁴

During evolution of Latvian constitutional law science, it was specially emphasized, that constitution was not only a law determining the procedure for realizing the state power and an individual’s relationship with the state. The role of the constitution in restricting the state power was always mentioned. For example, a comment to the first provisional constitution of Latvia notes: “In a narrower sense of the word, “constitution” means an act of the state, through which the sovereign limits its power and under certain conditions shares it with its citizens.”¹⁵

¹² On the Compliance of the Cabinet of Ministers November 11, 2005 Regulations No. 17 “Amendments to the Law “On Coercive Expropriation of Real Estate for State or Public Needs”” and June 9, 2005 Law “Amendments to the Law “On Coercive Expropriation of Real Estate for State or Public Needs”” with Articles 1 and 105 of the Republic of Latvia Satversme: decision of the Constitutional Court, case No.2005-12-0103, 16 December 2005. <http://www.satv.tiesa.gov.lv/upload/2005-12-0103E.rtf>[02-03-2013], para.17 [Hereinafter – Case No.2005-12-0103].

¹³ Karulis K. *Latviešu etimoloģijas vārdnīca*. 2. sējums. Rīga: Avots, 1992, 159.lpp.

¹⁴ Kronvalds A. *Kopotie raksti*. I. Rīga: Valters un Rapa, 1937, 427.lpp.

¹⁵ Bite E. Latvijas pagaidu konstitūcija. *Jaunā Latvija*, 03.03.1920.

Latvia's science of constitutional law was significantly influenced by F. Lassalle's lecture of 1862 on the real constitution. I.e., the true constitution of state is formed by the real, actual relations of power existing within the state. The written constitution is stable and authoritative only, if it complies with this balance of power existing in the society.¹⁶ Thus, it is necessary to distinguish between the formal constitution and material constitution, explaining the latter in the context of F. Lassalle's theory. As K. Dišlers, the most authoritative Latvian scholar of constitutional law, wrote, formal constitution is "a legislative act, in written or printed form, in which at any time the defined basic principles of state order can be found, rules on the organization and jurisdiction of main institutions of power, on citizens' rights and freedoms, etc."¹⁷ The material constitution, in its turn, should be understood as the existing state order in its main constituent parts and the relationships between these parts, irrespectively of whether these parts have been named and their relationships defined in any written act or not. Each state has its constitution, i.e., the actually existing state order, which is founded upon the real balance of powers existing in society.¹⁸

It has been frequently noted as regards the formal constitution of Latvia that the Satversme has been written and codified (i.e., the regulation of constitutional order is included in one act) and that the constitution of Latvia is made up by one law.¹⁹ However, the philosophy of law has examined the question, with good reason, whether at present a written constitution can exist and whether all principles of constitutional order can be included in one law.²⁰

The Constitutional Court has defined a wider scope of the formal constitution. The Constitutional Court has noted: "[t]he constitutional regulation of the State of Latvia is broadly summarized in the Satversme, however the Declaration on the State of Latvia of May 27, 1920, the Declaration of Independence [of May 4, 1990,] and the norms of the Constitutional Law [of August 21, 1991,] have preserved their legal force alongside it.

16 Лассаль Ф. *Суцность конституции*. Грām.: Дюги Л. *Общество, личность и государство*. Лассаль Ф. *Суцность конституции*. Санкт - Петербург: Издательство „Вестника Знания”, [b. g.], с.77.

17 Dišlers K. *Demokrātiskas valsts iekārtas pamati (Ievads konstitucionālajās tiesībās)*. Rīga: A. Gulbis, 1931, 12.lpp.

18 Ibid.

19 Eglītis V. *Ievads konstitūcijas teorijā*. Rīga: Latvijas Vēstnesis, 2006, 91.lpp.; On Compliance of the Law "On Authorization to the Cabinet of Ministers to Sign the Draft Agreement between the Republic of Latvia and the Russian Federation on the State Border between Latvia and Russia Initialed on August 7, 1997" and the Words "Observing the Principle of Inviolability of Borders Adopted by the Organization of Security and Cooperation in Europe" of Article 1 of the Law "On the Republic of Latvia and the Russian Federation Treaty on the State Border of Latvia and Russia" with the Preamble and Article 9 of the Declaration of May 4, 1990 of The Supreme Council of the Republic of Latvia "On Restoration of Independence of the Republic of Latvia" and Compliance of the Treaty of March 27, 2007 of the Republic of Latvia and the Russian Federation of the State Border of Latvia and Russia with Article 3 of the Satversme (Constitution) of the Republic of Latvia: decision of the Constitutional Court, Case No.2007-10-0102, 29 November 2007. http://www.satv.tiesa.gov.lv/upload/judg_2007_10_0102.htm [02-03-2013], para 57 [Hereinafter – Case No.2007-10-0102].

20 Gardner J. Can There Be a Written Constitution? http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401244 [02-03-2013].

Legal writings suggest that the valid acts of a constitutional rank alongside the Satversme are the Proclamation Act of the Republic of Latvia of November 18, 1918, Declaration on the State of Latvia of May 27, 1920, the Declaration of Independence and the Constitutional Law²¹ In addition to that the Constitutional Court has concluded that those laws, which have been adopted in accordance with the procedure established by Article 68(2) of the Satversme should be considered as acts of constitutional rank, i.e., these are laws by which the Saeima delegates part of state power to international organizations²²

Thus, the formal constitution of Latvia consists of several acts. In accordance with the approach taken by the Constitutional Court, the Satversme of 15 February 1922 is the central act of formal constitution. However, documents that establish and restore Latvian state have maintained their constitutional rank alongside it. Undoubtedly, the Act of Proclamation of 18 November 1918, by which the People's Council as the founder of the state of Latvia proclaimed the establishment of a new state, belongs to Latvia's formal constitution. The People's Council of Latvia declared that "Latvia – united within ethnographic borders (Kurzeme, Vidzeme and Latgale) – is independent, sovereign, democratically-republican state. The Satversme and relationships with foreign states in the nearest future will be defined by the Constitutional Assembly, convened on the basis of general voting rights for both genders, direct, equal, secret ballot and proportional".²³

The first representatives' institution, elected by the people of Latvia – the Constitutional Assembly, on 27 May 1920 adopted Declaration on the State of Latvia, confirming repeatedly that "Latvia is a sovereign and independent republic with a democratic state order" and "The sovereign state power in Latvia is vested in Latvian people".²⁴ It was necessary to adopt this act, since the People's Council of Latvia was not an elected institution, and its opponents questioned the right of the People's Council to proclaim an independent state.²⁵ According to the plan for the Latvian Constitutional Assembly both previous mentioned acts were not considered provisional documents, but the basis for the laws adopted for eternity.²⁶

The Declaration of 4 May 1990 by the Supreme Council "On Restoring the Independence of the Republic of Latvia"²⁷ and the constitutional law of 21 August 1991 "On the

21 Case No.2007-10-0102, para 62.

22 Ibid, para. 56.3.

23 Latvijas pilsoņiem! *Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums*, 1919, 1.burtnīca, 1.lpp.

24 Deklarācija par Latvijas valsti. *Likumu un valdības rīkojumu krājums*, 1920, 4.burtnīca, 1.lpp.

25 Latvijas Satversmes sapulces I sesijas 5.sēdes 1920.gada 27.maijā stenogramma. Grām.: *Latvijas Satversmes sapulces stenogrammas*. 1920.gads. 1.burtnīca. Rīga: Satversmes sapulces izdevums, 1920, 27.lpp.

26 Latvijas Satversmes sapulces IV sesijas 1.sēdes 1921.gada 20.septembrī stenogramma. Grām.: *Latvijas Satversmes sapulces stenogrammas*. 1921. gads. 14. burtnīca. Rīga: Satversmes sapulces izdevums, 1921, 1311.lpp.

27 Par Latvijas Republikas Neatkarības atjaunošanu. *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, 17.05.1990., Nr.20.

Status of the State of the Republic of Latvia”²⁸ formed the constitutional basis for restoring the independence of the Republic of Latvia. First of all, it must be noted that the restoration of the independence of the Republic of Latvia is based upon the doctrine of the continuity of the state. In 1990 a new state was not established, but the state established on 18 November 1918, which, irrespectively of the occupation and annexation occurring in 1940, had continued existing without interruption, was restored *de facto*.²⁹ As A. Endziņš, former President of the Constitutional Court, has noted, “the continuity of the state of Latvia [...] is the backbone for the whole body of Latvian constitutional law.”³⁰ The Constitutional Court, in its turn, has explained that „[t]his is the official opinion of the Republic of Latvia on the issue that the Republic of Latvia that was founded on November 18, 1918, despite the aggression and occupation by the USSR that took place in 1940, has continued its uninterrupted existence [...]. In all juridically important circumstances the State organs of the Republic of Latvia have to base their action in the doctrine of continuity formulated in the Preamble. Similarly, the description of the historical facts included in the Preamble and its legal assessment that justifies the continuity doctrine is binding on the organs of the Republic of Latvia.”³¹ After the Satversme was renewed in full on 6 July 1993³² the declaration “On Restoring the Independence of the Republic of Latvia” and the constitutional law “On the Status of the State of the Republic of Latvia” have retained their constitutional rank and regulate issues, which are not *expressis verbis* dealt with by the Satversme, in particular, the continuity of the Republic of Latvia, the priority of international law over the norms of national law, as well as the basic principles in the relations with other countries.³³

In addition it must be noted, that understanding of formal constitution in Latvia is influenced by the school of natural law, which dominates in the country right now. Latvian legal theory recognizes that unwritten general principles of law have higher legal force and these define the limits of constitution.³⁴ In the framework of the natural law doctrine, not only the legislator, but also the constitutional legislator is bound by the general principles of law. Thus, also the formal constitution consists of two types of norms – the norms adopted by the constitutional legislator and the general principles of

28 Par Latvijas Republikas valstisko statusu. *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, 24.10.1991., Nr.42.

29 Levits E. 4. maija Deklarācija Latvijas tiesību sistēmā. Grām.: *4.maijs*. Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju. Dr. habil. Tālava Jundža redakcijā. Rīga: Fonds Latvijas Vēsture, 2000, 56.lpp.

30 Endziņš A. Latvijas konstitūcijas apskats, kas rada šaubas un jautājumus. *Jurista Vārds*, 01.03.2005., Nr.8(363).

31 Case No.2007-10-0102, para. 64.2.

32 Latvijas Republikas 5.Saeimas pirmās sēdes 1993.gada 6.jūlijā stenogramma. http://saeima.lv/steno/st_93/060793.html [02-03-2013].

33 Pleps J. 1990. gada 4. maija deklarācijas piemērošana. Grām.: *1990. gada 4. maija Latvijas Neatkarības deklarācija: starptautiskie un iekšpolitiskie aspekti*. Starptautiskas zinātniskas konferences rakstu krājums. Feldmanis I., Taurēns J. (zin.red.) Rīga: LU Akadēmiskais apgāds, 2011, 49. – 70.lpp.

34 Iļjanova D. *Vispārējo tiesību principu nozīme un piemērošana*. Rīga: Ratio iuris, 2005, 58. – 61.lpp.

law. The constitutional legislator is no more required to define the formal constitution in full. The content of the formal constitution is made up by the general principles of law, but the constitutional legislator retains discretion in those fields, in which the general principles of law envisage various possibilities for regulating the respective issue. Or at present the formal constitution is no longer only a set of positive norms defined by the constitutional legislator, but a complex system of written legal norms and general principles of law, which must be construed and applied as a united whole.³⁵ The Constitutional Court has also recognized that the general principles of law are an element of the constitution, which adjusts and harmonized the norms adopted by the constitutional legislator, so that the application of individual norms of the Satversme would comply with the requirements of a state governed by the law.³⁶

The general principles of law follow from the act of proclamation of 18 November 1918, which envisages founding of the Republic of Latvia, based upon the principles of national sovereignty, democracy, republic and state governed by law.³⁷ The Prime Minister K. Ulmanis emphasized on 18 November 1918 that “everybody, without differentiating as to ethnicity, are invited to help, since in Latvia the rights of all people will be ensured. It will be a democratic state of justice, neither oppression nor injustice will have place in it.”³⁸ The general principles of law, which define the organization of state and a person’s relationship with the state, is an unwritten part of the constitution, which is binding to and restricts the constitutional legislator. The validity and applicability of the general principles of law cannot be revoked or adjusted by amending the Satversme.

In the constitutional law of contemporary Latvia, alongside the written (positive) norms of the Satversme and the principles the concept of the values of the Satversme has also been evolved. The Constitutional Court has noted that there are “fundamental values of statehood”, - those that can be amended only in a national referendum.³⁹ The Constitutional Court holds that the fundamental values of statehood are shaped by those legal norms, which are included in Article 77 of the Satversme. Another decision of the Constitutional Court specifies that „[t]he Constitutional Court recognizes that the State of Latvia is based on fundamental values such as human rights and fundamental freedoms, democracy, the sovereignty of the

35 Pleps J. *Satversmes iztulkošana*. Rīga: Latvijas Vēstnesis, 2012, 24. - 28.lpp.

36 Case No.2005-12-0103, para. 24.

37 Rezevska D. Legal Methods in Latvia’s Legal Arrangement and European Integration. Grām.: *European Integration and Baltic Sea Region: Diversity and Perspectives*. Muravska T., Petrov R., Sloka B., Vaivads J. (ed.) Rīga: University of Latvia, 2011, p.224 – 225.

38 Ministru prezidenta runa. Grām.: *Latvijas valsts pasludināšana 18.novembrī 1918.g.* Rakstu vainags Haralda Jēgera sakopots. Rīga: Astra, 1918, 19.lpp.

39 Case No.2007-10-0102, para. 40.2.

State and its people, the division of powers and the rule of law.³⁴⁰

The constitutional tradition has been customarily allocated an important role in Latvia's constitutional order.⁴¹ Already K. Dišlers in his time proposed that the constitutional law should take into consideration “not only the letter of the Satversme and other laws, but also other precedents of the constitutional law and the application of political institutions in the real life of the state.”⁴²

The significance of the constitutional customs in applying the norms of the Satversme in practice is growing, bringing closer Latvian constitutional law to the British constitutional law, which has widely recognized and applied the doctrine of conventional norms.⁴³ The Constitutional Court has accepted the significance of constitutional customs, noting that “[t]he Rules of Procedure do not forbid reviewing cases in compliance with the parliamentary traditions, if they are not at variance with the Rules of Procedure.”⁴⁴ However, simultaneously it must be noted that the constitutional tradition is a broader concept than conventional norms or constitutional customs, as the latter are to be recognized as unwritten legal norms, which have developed in the practical application of the Satversme. The constitutional tradition is formed, alongside the conventional norms or constitutional customs, by the dominant opinion of the scholars of constitutional law and some activities of the ceremonial constitutional institutions.⁴⁵ It must be noted, that the President's Constitutional Law Commission, involving recognized scholars and practitioners of constitutional law, has significantly contributed to the development of the Latvian constitutional law. In their extensive opinions they have carried out both extensive analysis of the problematic constitutional law issues and proposed new theoretical insights, which might strengthen the constitutional order of Latvia.⁴⁶

The Latvian constitutional tradition, since its establishment, has accepted the right of the legislator to provide more detailed regulation of many constitutional

40 On Compliance of the Law “On the Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community” with Article 101 of the Satversme of the Republic of Latvia: decision of the Constitutional Court, case No 2008-35-01, April 7 2009, http://www.satv.tiesa.gov.lv/upload/judg_2008_35.htm [02-03-2013], para.17 [Hereinafter - Case No 2008-35-01].

41 Par iespējamo ministra noteikumu satversmību. Grām.: *Valsts prezidenta Konstitucionālo tiesību komisija. Viedokļi: 2008 – 2011*. Rīga: Latvijas Vēstnesis, 2011, 182. – 183.lpp. Viedokļa 16. - 20.punkts.

42 Dišlers K. Latvijas Satversme. Grām.: *Latvieši II*. Balodis K., Šmits P., Tentelis A. (zin.red.) Rīga: Valters & Rapa, 1932, 148.lpp.

43 Dicey A.W. *Introduction to the study of the Law of the Constitution*. London: Macmillan and Co, 1889, p. 341 – 361.

44 On Conformity of the Saeima 30 April, 1998 Resolution on the Vote of Confidence for the Cabinet of Ministers with the Law “The Structure of the Cabinet of Ministers” and Rules of Procedure of the Saeima: decision of the Constitutional Court, case No.03-04(98), 13 July 1998. [http://www.satv.tiesa.gov.lv/upload/03-04\(98\)E.rtf](http://www.satv.tiesa.gov.lv/upload/03-04(98)E.rtf) [02-03-2013], para.3.

45 Pastars E. Par grāmatu “Satversmes iztulkošana”. Grām.: Pleps J. *Satversmes iztulkošana*. Rīga: Latvijas Vēstnesis, 2012, 5.lpp.

46 Commission on Constitutional Law. http://www.president.lv/pk/content/?cat_id=2896 [02-03-2013].

law issues.⁴⁷ In several cases the Satversme even directly envisages authorizing the legislator to define by law details of a constitutional law issue. The legislator, by drafting and adopting such laws, specifies the regulation of the Satversme or provides normative interpretation of the wording of the Satversme. The normative interpretation of the Satversme in laws is to be considered as “natural supplementing and evolving of our Satversme.”⁴⁸ However, it must be noted that this kind of regulation does not acquire constitutional rank, i.e., the laws, which regulate issues of constitutional law, are not to be considered constitutional laws and in applying them the constitutionality of the applicable legal norms must be verified, i.e., whether the legislator has acted within the framework of the Satversme and has not exceeded its jurisdiction.

The Constitutional Court has been established in Latvia to verify the constitutionality of laws and other regulatory enactments. In accordance with Section 32(2) of the Constitutional Court Law, the interpretation of the Satversme, provided in a judgement by the Constitutional Court, is mandatory to all state and local government institutions (including courts) and officials, as well as natural and legal persons.⁴⁹ Hence, the Satversme can be applied only in compliance with the interpretation provided by the Constitutional Court. In every democratic state governed by law, rulings of a constitutional court plays a principal role in construing the constitution. Latvia is not an exception in this regard. Since its establishment the Constitutional Court of Latvia has pronounced over two hundred rulings, in which it has provided fundamental interpretation of the norms of the Satversme, as well as dealt with relevant cases of constitutional law.

III. THE PRINCIPLES OF THE CONSTITUTIONAL ORDER

In accordance with the will expressed in the Act of Proclamation of 18 November 1918, Latvia was evolving as a democratic, socially oriented state, in which justice would rule and which would be founded upon the principles of Western democracy.⁵⁰ In the course of discussing the Satversme J. Purgals, a member of the Constitutional Commission, provided the opinion of its authors on the basic principles of the Satversme: “The first article recognizes Latvia as an independent state, i.e., the principle of state sovereignty. The second principle provides that Latvia as an independent state should be a republic, namely, a state, in which to a lesser or greater extent vast masses of people rule through bodies established by the people. As such this form of state, i.e., the republic is a strict opposite to the monarchy. Since there can be different republican orders, the

47 Lazersons M. „Konstitucionāla” likumdošana un Saeimas publisko tiesību komisija. *Jurists*, 1928, Nr.6, 166. sl.; Dišlers K. *Ievads Latvijas valststiesību zinātnē*. Rīga: A.Gulbis, 1930, 90. - 91.lpp.

48 Akmens A. Mūsu militārā likumdošana. *Tieslietu Ministrijas Vēstnesis*, 1927, Nr.6/7, 224.lpp.

49 Satversmes tiesas likums. *Latvijas Vēstnesis*, 14.06.1996., Nr.103. The Text of the Constitutional Court Law in English available: <http://www.satv.tiesa.gov.lv/?lang=2&mid=9> [02-03-2013].

50 Stradiņš J. 18.novembra Ulmanis (Latvijas Republikas pirmais Ministru prezidents). Grām.: *Kārlim Ulmanim 125*. Caune A., Millers T., Stradiņš J. (red.) Rīga: Latvijas vēstures institūta apgāds, 2003, 24. - 25.lpp.

third principle requires that Latvia be a democratic republic, i.e., that the power of the state should, indeed, be in the hands of people. [...] Article 2 provides that the sovereign state power is vested in the people of Latvia. It expresses the principle of the sovereignty of people.”⁵¹

However, by construing Article 1 of the Satversme, the range of basic principles of the Satversme has been expanded and supplemented. The Constitutional Court has concluded that it follows from the Satversme that Latvia is a state governed by law.⁵² Likewise, the Constitutional Court has recognized that “the State of Latvia is based on fundamental values such as human rights and fundamental freedoms, democracy, the sovereignty of the State and its people, the division of powers and the rule of law.”⁵³ Latvian constitutional law has recognized the following principles: respecting an individual’s fundamental rights, separation of powers, the supremacy of law, reasonable application of the rules of law, existence of a mechanism for legal protection, responsibility of the State, criminal procedural guarantees, legal certainty, including legal clarity, proportionality, constitutional priority, consistence of legal order or non-contradictoriness, the obligation to substantiate a state’s decision and the right of a person to be heard.⁵⁴

The Constitutional Court has, likewise, recognized that Latvia is a socially responsible state: “Latvia’s constitutional legislature has enshrined a series of social rights in the Constitution [...] Thus the legislature determined that Latvia is a socially responsible state – a country that, in terms of its legislation, governance and court rulings, tries to implement social justice as broadly as possible. The goal of a socially responsible state is to even out fundamental social differences in society and ensure that each group of residents has appropriate standards of living”.⁵⁵

The practice of the Constitutional Court indicates that the principle of a socially responsible state means:

1) That the state is obliged to ensure a standard of living which is worthy of human beings; this includes ensuring social assistance, fundamental services, as well as the ac-

51 Latvijas Satversmes sapulces IV sesijas 1.sēdes 1921.gada 20.septembrī stenogramma. Grām.: *Latvijas Satversmes sapulces stenogrammas*. 1921.gads 14.burtnīca. Rīga: Satversmes sapulces izdevums, 1921, 1311.lpp.

52 On Conformity of Items 1 and 4 of the Saeima April 29, 1999 Resolution on Telecommunications Tariff Council with Articles 1 and 57 of the Satversme (Constitution) of the Republic of Latvia and Other Laws: decision of the Constitutional Court, case No.03-05(99), 1 October 1999. <http://www.satv.tiesa.gov.lv/upload/03-05-99E.rtf> [02-03-2013], para. 1.

53 Case No 2008-35-01, para 17.

54 Dravnieks A. Vai Latvija jau ir tiesiska valsts. Grām.: *Administratīvā procesa likums. Administratīvā procesa likuma spēkā stāšanās likums*. 3.izdevums. Rīga: Tiesu Namu Aģentūra, 2006, XIII lpp.

55 On the Compliance of that Paragraph of Section 1 of the Law “Amendments to the Law on State Social Allowances” by which a New Item has been Incorporated into the State Social Allowances Law as well as the Compliance of its Section 2 with Article 110 of the Republic of Latvia Satversme (Constitution): decision of the Constitutional Court, case No.2006-07-01, 2 November 2006. http://www.satv.tiesa.gov.lv/upload/judg_%202006-07-01.htm [02-03-2013], para. 18.

cessibility of educational, health care, social care and cultural institutions.

2) That the state is obliged to protect people against social risks.

3) That the state is obliged to be concerned about social justice, including concern about evening out social differences, protecting the weak, and ensuring equal opportunities.

4) That the country's residents must be linked to society, which means that people have obligations vis-a-vis other people.⁵⁶

In accordance with the principle of the sovereignty of people, the people of Latvia are the sole subject of the sovereign power of the state. "Under the principle of national sovereignty, the Latvian people are the only subject of sovereign power. Not the public constitutional institutions, but the Latvian people are the source of public power and carrier of the sovereign power of the State. National sovereignty is the right of people to decide their own fate, also by forming an independent state."⁵⁷ The Constitutional Court has included in Article 2 of the Satversme also the doctrine of the state continuity of Latvia, which is defined in the Declaration "On Restoring the Independence of the Republic of Latvia".⁵⁸

Article 3 of the Satversmes defines the principle of unity of all historic ethnographic regions populated by Latvians.⁵⁹ Article 4 of the Satversme defines Latvian as the official language and describes the Latvian flag. Even though the principle of nation state is reflected in the text of the Satversme only in a fragmented way, it follows from the identity of the state of Latvia as a nation state.⁶⁰ The principle of nation state requires promoting Latvian identity, Latvian language, culture, art, traditions, promoting democratic patriotism, social integration on the basis of the Latvian language, deepening the understanding of national values, the history of the state and people of Latvia. Latvian identity means also affinity with the Western and European political and cultural space⁶¹

The second and third part of Article 68 of the Satversme has introduced the principle of European integration.⁶² This principle means the openness of the Satversme to membership in the European Union. It is a constitutional norm, which allows the applica-

56 Kovaļevska A. Sociāli atbildīgas valsts princips. *Jurista Vārds*, 26.08.2008., Nr.32, 10. - 13.lpp.

57 Case No.2007-10-0102, para. 31.1.

58 Ibid, para. 31 – 34.

59 Ibid, para. 40.1.

60 Valsts prezidenta Konstitucionālo tiesību komisijas 2012.gada 17.septembra viedoklis „Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu”. http://president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf [02-03-2013], para. 379.

61 Par sabiedrisko elektronisko plašsaziņas līdzekļu tiesisko regulējumu demokrātiskas valsts iekārtā. Grām.: *Valsts prezidenta Konstitucionālo tiesību komisija. Viedokļi: 2008 – 2011.* Rīga: Latvijas Vēstnesis, 2011, 84.lpp. Viedokļa 12.3.punkts.

62 Balodis R. *The Constitution of Latvia*. Trier: Institut für Rechtspolitik an der Universität Trier, 2004, p.16 – 17.

tion of the European Union law in Latvian legal space. As the Constitutional Court has noted, “the European Union law has become integral part of the Latvian legal system.”

⁶³ Article 68 of the Satversme constitutionally legitimizes Latvia’s membership in the European Union and sets out the conditions for delegating the competence of Latvian state institutions to international institutions. The norm providing that Latvia’s membership in the European Union is to be decided in a national referendum is significant in this context. This emphasizes that the issue of Latvia joining the European Union or seceding from it can be decided by the totality of Latvia’s citizens. Likewise, the Article 68 (2) of the Satversme allows delegating the competencies of Latvian state institutions under the condition that it strengthens democracy. The Satversme prohibits Latvia’s closer integration into unions created by authoritarian or semi-totalitarian states or not founded upon the values of a constitutional state.

IV. THE ETERNITY CLAUSE OF THE CONSTITUTIONAL ORDER

Written constitution usually is construed in belief that it will determine the constitutional order for an indefinite period of time. Even though formally the constitutions contain norms, envisaging amendments to the constitution, most often these are included with the aim to achieve protection of the existing text of the constitution, not to urge the future legislator to implement a fundamental constitutional reform.

After the First World War the Weimar Constitution⁶⁴ had an extensive impact upon constitutional creation, since many countries used the German constitutional ideas in drafting their constitutions. The Weimar constitutional ideas had also strong impact upon the creating of the Satversme. Article 76 of the Weimar Constitution formally allowed any amendments to the constitution, without restricting the possibilities to review the constitution. It was considered that by way of amending constitution any fundamental decision could be reviewed, allowing even abolishing the democratic order of the state or giving up the independence of the state.⁶⁵ Therefore it was held that the will of indisputable majority of people, expressed in accordance with the procedure set out in Article 76 of the Weimar Constitution, cannot be legally recognized as a *coup-d’état* or an uprising, even if it were to review all fundamental principles of the Weimar Constitution.⁶⁶

⁶³ On Compliance of the Part of Riga Spatial Plan 2006 – 2018 Related to the Territory of the Freeport of Riga with Article 115 of the Satversme (Constitution) of the Republic of Latvia: decision of the Constitutional Court, case No.2007-11-03, 17 January 2008. http://www.satv.tiesa.gov.lv/upload/judg_2007_11_03.htm [02-03-2013], para. 24.2.

⁶⁴ Die Verfassung des Deutschen Reichs vom 11. August 1919 <http://www.dhm.de/lemo/html/dokumente/verfassung/index.html> [02-03-2013].

⁶⁵ Anschütz T. *Die Verfassung des deutschen Reiches vom 11.mai 1919*. Homburg: Hermann Gentner Verlag, 1960, s.400 - 409.

⁶⁶ Thoma R. *The Reich as a Democracy*. Grām.: *Weimar. Jurisprudence of crisis*. Edited by Arthur J. Jacobson and Bernhard Schlink. Berkley, Los Angeles, London: University of California Press, 2000, p.163.

Similarly, Articles 76 – 79 of the Satversme envisage a procedure for amending the Satversme. Article 77 of the Satversme allows amending also those articles, which enshrine the fundamental principles of the constitutional order. The science of law has traditionally held that this procedure allows also amending the basic constitutional principles.⁶⁷

However, comparatively recently the Constitutional Law Commission of the President of the State has concluded that an unwritten core of the Satversme exists, which defines the constitutional identity of the State of Latvia, i.e., the identity of the state in state law and the identity of the state order. Essentially the core of the Satversme is inviolable, i.e., the constitutional legislator has the right to amend the Satversme in accordance with the procedure set out in Article 76 – 79 only in a way that does not make the amendments incompatible with the core of the Satversme. The elements of the state identity in state law, included in the core of the Satversme, are the nature of the state of Latvia as the nation state of Latvian people, the territory of the State defined in Article 3 of the Satversme and the principle of its unity, Latvian people as the content of sovereign, as well as the prohibition to divest the people of Latvia of the sovereign power. Likewise, the principles of democratic state, state governed by law, socially responsible state and nation state as the elements in the identity of the state order belong to the core of the Satversme.⁶⁸

The President's Constitutional Law Commission has proposed to introduce thus into the Satversme the so-called eternity clause, which would restrict the possibility to abolish state independence, constitutional order or its most significant basic principles.

Already during the period of the Weimar Republic C. Schmitt noted that amending the constitution is not an authorization to adopt a new constitution or to review significantly the basic principles of constitutions, since the identity of the constitution should be retained also during amending the constitution.⁶⁹ These ideas by C. Schmitt significantly influenced the authors of the basic law of the Federal Republic of Germany⁷⁰, providing theoretical grounds for the necessity of the eternity clause in the third part of Article 79 of the Basic law.⁷¹ The eternity clause is a constitutional norm, which proclaims particular parts of the constitution as unchangeable in the framework of the constitution. Thus, none of the constitutional institutions is

67 Disterlo B. Juridiskas piezīmes pie Latvijas Republikas Satversmes. *Tieslietu Ministrijas Vēstnesis*, 1923, Nr.7, 10. lpp.; Dišlers K. Ievads Latvijas valststiesību zinātnē. Rīga: A.Gulbis, 1930, 110.lpp.

68 Valsts prezidenta Konstitucionālo tiesību komisijas 2012.gada 17.septembra viedoklis „Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu”. http://www.president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf [02-03-2013].

69 Schmitt C. *Constitutional Theory*. Durham and London: Duke University Press, 2008, p.150 – 154.

70 Das Grundgesetz für die Bundesrepublik Deutschland. <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf> [02-03-2013].

71 Barak A. Unconstitutional Constitutional Amendments. *Israel Law Review*, Vol.44, p.328 <http://law.huji.ac.il/upload/44Barak.pdf> [02-03-2013].

authorized to amend or to review those constitutional principles, which the granter of the constitution has proclaimed as unchangeable.⁷²

The introduction of the eternity clause in Latvia's constitutional practice first and foremost depends upon the attitude taken by the Constitutional Court. At least in its case law until now the Constitutional Court hasn't expressed its opinion on the possibility that amendments to the Satversme pertain also to elements in the core of the Satversme.⁷³

The core of constitutional order of Latvia can be founded in the Act of Proclamation on 18 November 1918. The Satversme is bound by the principles of statehood defined in the Act of Proclamation. "The Act of Proclamation of 18 November 1918 must be accepted by all institutions, including courts, as an act of constitutional law, the legitimacy of which, contrary to the plaintiff's opinion, there is no need to substantiate, and this even should not be done."⁷⁴ Therefore, by recognizing the Act of Proclamation of 18 November 1918 as the foundation for the statehood of Latvia, it can be concluded that the constitutional legislator may act within the framework of Latvia's constitutional legal basis, supplementing or reviewing the constitutional regulation, however, it is not authorized to define a new constitution, i.e., to amend the constitutional law foundations of Latvia.⁷⁵

V. CONSTITUTIONAL COURT AS THE GUARDIAN OF THE CONSTITUTIONAL ORDER

The Constitutional Court of the Republic of Latvia is an institution of judicial power, endowed with an exclusive function – to safeguard the constitution, by ensuring the rule (priority) of the constitution – the Satversme – and constitutional justice.⁷⁶

The Constitutional Court is the youngest constitutional institution, because for the first time in Latvia it was established just on 1996. In Latvia, starting with the foundation of the state on 18 November 1918 till the very 17 June 1940, similarly to the majority of European states, the idea of constitutional control was not recognized, thus a special institution of constitutional control was not established during this period. At the Constitutional Assembly, when the text of the Satversme was debated, the idea (concept) that in general an institution could "stand above" the parliament was not acceptable to the

72 Preuss U.K. The Implications of "Eternity Clauses": The German Perspective. *Israel Law Review*, Vol.44, pp.440 – 442 <http://law.huji.ac.il/upload/44Preuss.pdf> [02-03-2013]. See also: Möller H. *Die verfassungsgebende Gewalt des Volkes und die Schranken der Verfassungsrevision*. Hamburg: Universität Hamburg, 2004. <http://www.hauke-moeller.org/art79.pdf> [02-03-2013].

73 Case No.2007-10-0102, para 40.4.; 43.5.

74 Latvijas Senāta Kriminālā kasācijas departamenta 1924. gada 9. maija spriedums Nr. 201. Grām.: *Latvijas Senāta Kriminālā kasācijas departamenta spriedumu tēžu pilnīgs kopojums ar likumu un priekšmetu alfabētiskiem rādītājiem*. Kamradziuss F. (sast), Rīga: autora izdevums, 1928, 68. lpp.

75 Pleps J., Pastars E., Plakane I. *Konstitucionālās tiesības*. Rīga: Latvijas Vēstnesis, 2004, 70.lpp.

76 On Compliance of the second sentence of Paragraph 7 and Paragraph 17 of the Transitional Provisions of the Law "On Judicial Power" (in the wording of 14 November, 2008 of the Law) to Articles 1, 83 and 107 of the Satversme of the Republic of Latvia: decision of the Constitutional Court, case No.2009-11-01, January 18 2010, http://www.satv.tiesa.gov.lv/upload/judg_2009_11.htm [02-03-2013], para 5.

majority. In accordance with the dogma of parliamentary supremacy, dominant at the time, the parliament was granted the role of the dominant institution of state power, the issue of establishing a special institution for constitutional control was not proposed at the Constitutional Assembly. The view prevailed that the law, which was in force, “shall be enforced without hesitation and doubt by all public institutions and officials, also all citizens to whom it applies; neither private persons, nor public institutions shall have any legal right to doubt or contest the power of law [...]”⁷⁷ But the legal community of the time did not fully forget the idea of constitutional control. For example, Member of the Saeima P. Šīmanis in the 1930s spoke of the need to establish a special institution for safeguarding the Satversme.⁷⁸ Another attempt to establish a special institution of constitutional control followed in 1934, when on 27 February the Saeima Public Law Committee discussed the proposal submitted by Member of the parliament H. Štegmans on adding Article 86¹ to the Satversme, envisaging that “a state court shall exist, which, functioning on the basis of a separate law, shall decide on the compliance of laws with the Constitution, as well as the compliance of the regulations and orders of the Cabinet of Ministers with the Satversme.” This proposal did not gain support.⁷⁹

The political and legal processes at the end of the 1980s and the beginning of the 1990s opened the possibility to initiate discussions in Latvia about the establishing an institution of constitutional control. The first legal act of constitutional level, envisaging the establishment of a constitutional court is the declaration on 4 May 1990 “On the Restoration of the Independence of the Republic of Latvia”. The second sentence in its Section 6 provided that in cases of “[d]isputes over the issues regarding the application of a legal act shall be resolved by the Constitutional Court of the Republic of Latvia.” Later, though, the law of 15 December 1992 “On Judicial Power” envisaged entrusting the Supreme Court with the function of constitutional supervision.⁸⁰ Quite soon the political and legal thought gave up the idea of entrusting the right of constitutional supervision to the Supreme Court, starting to develop a concept of a special – Constitutional Court.

Prior to adopting a special law on the Constitutional Court, amendments had to be introduced to Satversme and the special status of the Constitutional Court had to be enshrined in the constitution of the state, which was called by A. Endziņš, the first President of the Constitutional Court, a “peculiar experiment” and a “risky step”, because the Constitutional Court had to fit or squeeze into the system of in-

77 Dišlers K. *Ievads administratīvo tiesību zinātnē*. Rīga: Latvijas Universitāte, 1938, 201.lpp.

78 Schiemann P. Acht Jahre lettländische Verfassung. *Jahrbuch des öffentlichen Rechts*, 1930, Bd. XVIII, S.261 – 273.

79 Akmentiņš R. Latvijas Satversmes reforma. *Jurists*, 1934, Nr.5 (57)135.sleja.

80 Par tiesu varu. *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, 14.01.1993., Nr. 1. The text of the Law „On Judicial Power” in English available: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Judicial_Power.doc [02-03-2013].

stitutions already executing the state power.⁸¹

Upon starting discussing the wording of Article 85 of the Satversme at the Saeima, A. Endziņš, Member of the Commission of Legal Affairs and rapporteur, drew the attention of those present to the necessity of including this provision in the Satversme, explaining in detail the need to introduce such amendments and why such a judicial institution could not exist without including the corresponding legal provisions in the Satversme, “[...] in order for the Constitutional Court to work and for its rulings to be legitimate also from the constitutional perspective, it must be clearly said in the Satversme of the Republic of Latvia, that Constitutional Court exists in Latvia, and that it, within the competence set in the law, examines the compatibility of law with the Satversme, as well as other cases placed in its jurisdiction with the Law on the Constitutional Court, - and, namely, that the Constitutional Court has the right to declare a law, other enactments or their parts invalid, being incompatible with the Satversme, and also that the Saeima appoints the Justices of the Constitutional Court for a definite term.”⁸² Following the debates in the Saeima on 5 June 1996 the law “Amendments to the Satversme of the Republic of Latvia” was adopted, which amended Article 85 of the Satversme, and the Constitutional Court Law.

The Constitutional Court is a constitutional institution, which exercises state power. The Constitutional Court exists alongside other constitutional institutions – the totality of Latvia’s citizens, the Saeima, the President of the State, the Cabinet of Ministers, the State Audit, courts –, fulfilling its functions set out in the Constitution. As the exercising of state power in Latvia is based upon incontestable constitutional principle, which has to be respected as such – the principle of the division of power, the Constitutional Court exercises judicial power.⁸³ In difference to courts of general court system, the essence of administering justice at the Constitutional Court is to solve special or specific disputes regarding the compatibility of legal provisions with the provisions of higher legal force.⁸⁴

The Constitutional Court of Latvia has the features typical of the European model of

81 Endziņš A. Latvijas Republikas Satversmes tiesas loma Latvijas Republikas Satversmē noteikto vērtību aizsardzībai. Grām.: *Konstitucionālās tiesas loma valsts konstitūcijā nostiprināto vērtību aizsardzībā*. Rīga: Tiesu namu aģentūra, 2007, 7.lpp.

82 Latvijas Republikas 6.Saeimas ziemas sesijas sestā sēde 1996.gada 8.februārī. http://www.saeima.lv/steno/st_96/st0802.html [02-03-2013].

83 On Compliance of Items 4, 5, 6, 7, 8 and the First Sentence of Item 9 of the Saeima Presidium February 28, 2000 Regulations „On the Procedure of Compensating Expenses Occurred to the Deputies while Exercising their Authority” with Article 91 of the Republic of Latvia Satversme: decision of the Constitutional Court, case No 2001-06-03, March 22 2002. <http://www.satv.tiesa.gov.lv/upload/2001-06-03E.rtf> [02-03-2013], para 1.2.

84 On the Compliance of Section 1, Paragraph 1; Section 4, Paragraph 1; Section 6, Paragraph 3; Section 22 and Section 50 of the Office of the Prosecutor Law with Sections 1, 58, 82, 86 and 90 of the Republic of Latvia Satversme: decision of the Constitutional Court, case No. 2006-12-01, December 20 2006. http://www.satv.tiesa.gov.lv/upload/judg_2006-12-01.htm [02-03-2013], para 9.2.

constitutional control: centralization, implementation of abstract constitutional control, as well as the possibility of preventive (*a priori*) control alongside the repressive (*a posteriori*) control, *erga omnes* power of its decisions.

The Constitutional Court in its case law has repeatedly emphasized that the aim of the legislator, in establishing the Constitutional Court, was to create an effective mechanism for safeguarding the priority of constitutional provisions.⁸⁵ Or Constitutional Court within the jurisdiction specified in the Satversme (Article 85) and in the Constitutional Court Law, adjudicates matters regarding the compliance of laws and other regulatory enactments with the Constitution. As it is set out in the Constitutional Court Law (Article 16) the Constitutional Court adjudicates matters regarding 1) compliance of laws with the Constitution; 2) compliance of international agreements signed or entered into by Latvia (also until the confirmation of the relevant agreements in the *Saeima*) with the Constitution; 3) compliance of other regulatory enactments or parts thereof with the norms (acts) of a higher legal force; 4) compliance of other acts of the *Saeima*, the Cabinet of Ministers, the President of the Republic of Latvia, the Speaker of the *Saeima* and the Prime Minister, except for administrative acts, with law; 5) compliance with law of such an order with which a Minister authorized by the Cabinet has suspended a decision taken by a local government council; and 6) compliance of Latvian national legal norms with those international agreements entered into by Latvia that are not in conflict with the Constitution.

Since the Constitutional Court has been created according to the European models of constitutional control, it follows from Article 85 of the Satversme, that the Constitutional Court can exercise abstract constitutional control, which in principle is excluded from the American model. The subjects of abstract constitutional control (in the meaning of the Constitutional Court Law these are the President of the Saeima, the Saeima as a collegiate institution, at least 20 members of the Saeima, the Cabinet of Ministers, the Prosecutor General, the Council of the State Audit Office, as well as two subjects, who have to abide by specific procedural restrictions, – the Judicial Council and the Ombudsman) submit an application to the Constitutional Court to safeguard general or public interests.⁸⁶

The subjects of concrete control, which in the countries with the European model of constitutional control, are courts (in Latvia – also the judges of the Land Registry Offices), have the right to contest the compliance of a law with the Satversme, if during adjudication of a concrete case doubts arise about the compatibility of the applied provision (in administrative procedure) or the provision that should be applied with the

⁸⁵ Case No 2008-35-01, para 10.4.

⁸⁶ On Compliance of Article 10 (5) (6) of the Law on the Rights of Patients, insofar as It Fails to Establish the Right of the State Audit Office to Request Necessary Information regarding a Patient for the Performance of the Functions Specified by the Law with Article 1, Article 8, and Article 88 of the Satversme of the Republic of Latvia: decision of the Constitutional Court, case No 2010-51-01, 14 March 2011. http://www.satv.ties.gov.lv/upload/Judgment_2010-51-01_ENG.htm [02-03-2013], para 10.2.

Satversme. Thus, the application submitted by a court can be only concrete – related to the adjudication of a concrete case and if the constitutionality of a legal provision is a precondition for adjudicating a concrete case. At the same time application regarding concrete control may not be “a preliminary question on the interpretation of the legal provision to be applied”.⁸⁷

In Latvia Constitutional Court is also open to the individuals (persons) who can submit to the Constitutional Court a special type of application – the constitutional complaint. The rights of the persons to submit constitutional complaint should be considered as a corner point in the development of the constitutionalism in Latvia. It is because constitutional complaint as a remedy against the public power stresses the importance of the person in the state and also allows developing rights based constitutionalism.⁸⁸ Within that state recognizes basic rights as natural rights against the state power and also stresses importance of such rights. Besides this direction of constitutionalism is based on the main value (or reason) of the state – to the person, accenting the necessity to protect his/her rights. Up to author’s point of view, if it is allowed for a person to stand before the Constitutional court, then people can feel that constitution is not a “far or untouchable” instrument, but a real one who can be used to benefit something. Or it is very important to stress the importance of the constitution as a living or real document not just for constitutional institutions but also for everybody in the state.

In difference to other subjects, a person may not contest at the Constitutional Court the compliance of a law to any provisions of the Satversme, but only with the fundamental human rights enshrined in the Satversme if those rights are violated by the legal norm.⁸⁹ As the *actio popularis* is not allowed in Latvia, the applicant (of the constitutional complaint) has to abide by various restrictions. First, there should be a violation of the constitutionally guaranteed basic rights which can be either existing, possible in the future or even in exceptional cases potential. The second, before submitting the constitutional complaint to the Constitutional Court, person has to exhaust other legal means or person has to observe and respect principle of subsidiarity. The third, constitutional complaint can be submitted within 6 months term which should be calculated from the moment the last ruling of the court enters into the force or from the moment violation was caused.

It’s been considered that just constitutional court is an effective basic rights protection

87 Par likuma „Par nodokļiem un nodevām” (1997. gada 4. decembra redakcijā) 30. panta otrās daļas vārdu,, ja šie darījumi nav deklarēti šā panta pirmajā daļā noteiktajā kārtībā, – 15 procentu apmērā no šo darījumu kopsummas, ja šajā pantā nav noteikts citādi” atbilstību Latvijas Republikas Satversmes 1. pantam: Satversmes tiesas 2010.gada 13.oktobra lēmums par tiesvedības izbeigšanu lietā Nr.2010-09-01. http://www.satv.tiesa.gov.lv/upload/lem_izb_2010-09-01.htm[02-03-2013], 12.punkts.

88 Poole T. Legitimacy, Rights and Judicial review. Oxford Journal of Legal Studies, 2005, Vol.25, No.4, p.700.

89 See also: Rodiņa A. Konstitucionālās sūdzības teorija un prakse Latvijā. Rīga: LatvijasVēstnesis, 2009, 20. – 25.lpp.

remedy because it functions without any political influence.⁹⁰ Although this argument is disputable, one can agree that especially in so called new democracies constitutional courts play an important role in protection of basic rights. It is because in the time of transformation and development of various legal institutes, violations of basic rights can appear. Experience of Latvia shows, that individuals are the most active subjects. During 15 years of the activities of the Constitutional Court, the largest number of cases has been initiated and reviewed upon an application by natural and legal persons (in total - 329).⁹¹ To compare, the President of the State during this (*i.e.* 15 years') period has applied to the Constitutional Court once, but the Cabinet of Ministers - twice. The activity of the persons proves the fact that they trust the Constitutional Court. This is also proven by surveys, for example, a survey conducted on 28 February 2010 revealed that the largest number of Latvian citizens, 70%, trust the Constitutional Court.⁹² And the reason of such a high trust to the court should be founded in decisions of the Constitutional Court which was passed after evaluation of the constitutional complaints as well. People's trust to the Constitutional Court is a very important measure, because it is always linked with the respect of the decisions of the court.⁹³

People's trust to the Constitutional Court in Latvia increased after Constitutional Court decided cases in so called economic crises times. To regulate financial issues in the economical crises, legislator passed several decisions which influenced or decreased payments from the state budget funds. Cuts like these are always "painful", especially if they affect the so-called socially vulnerable groups, for example, pensioners or families with children. Relying upon the advantages of constitutional complaint, innumerable complaints were submitted to the Constitutional Court, contesting the imposed restrictions. As it was characterized by the Constitutional Court justice V. Skudra that during a difficult time for the country „[...] the Constitutional Court became something of a lightning rod.”⁹⁴ And this is the truth, because Constitutional Court was and still is the only one and last national remedy for reviewing normative regulation of the legislative.

In total Constitutional Court received several hundreds of constitutional complaints in so called crises years (from 2009 till 2010). For example, in 2008 Constitutional Court received 300 constitutional complaints, but in 2009 – 4030 complaints!⁹⁵ Analyze of all

90 Конституционный контроль и демократические процессы в новых независимых государствах. Ереван: [b.i.], 1996, с. 255.

91 Pededze Dz. Satversmes tiesai - 15. Jurista Vārds, 02.01.2012., Nr.51(698).

92 Society have the greatest trust in the Constitutional Court, whereas the least trusted institution is the Saeima: <http://zinas.nra.lv/latvija/17436-cilveki-visvairak-uzticas-satversmes-tiesai-vismazak-saeimai.htm> [02-03-2013].

93 Limbach J. The Role of the Federal Constitutional Court. S.M.U. Law Review, 2000, Vol.53, p.429.

Skudra V. Pārskats par Satversmes tiesas darbu starpkonferenču laikā – 2009. un 2010. gadā”. www.satv.tiesas.gov.lv/upload/Skudra_parskats_10_09_2010.pdf [02-03-2013].

95 Statistics. Information provided by the Constitutional Court.

crises cases shows that Constitutional Court decided and passed over twenty decisions concerning issues related to the economic crisis that is cuts of various payments from the budget.⁹⁶ Not in all cases challenged legal norms was decided as unconstitutional. By deciding so called crisis cases, Constitutional Court had to balance between necessity to overcome the consequences of the economic crisis and necessity not to reduce standard of protection of basic rights. In the case-law of the Constitutional Court it is possible to find the principle which was observed by deciding those cases - that even during an economic crisis, basic human rights and the principles of a democratic state must be accepted by the legislature. As it was later explained by the President of the Constitutional Court G. Kūtris, economic crisis is no excuse for constitutional violations.⁹⁷ At the same time, Constitutional Court demonstrated a pragmatic approach by respecting public interests in limitation of person's basic rights. Or Constitutional Court approved attempts of the legislator to realize reforms in those areas where it was necessary.

For example, tens of parents submitted an application to the Constitutional Court, contesting the conformity of a legal provision with the Constitution, envisaging decrease of parental benefits paid to working parents by 50%. The Constitutional Court in this case concluded that the contested legal provision served for the benefit of the society, because the contested norm was adopted with the purpose to balance revenues and expenses of the State special budget of social insurance. The Court explained that the economic recession denied the possibility for the State to guarantee the social security in the amount, which was established during the period of the State's economic growth. With such a restriction „[a] fair balance between restriction of legal security of a person and the right of the society to a sustainable State social insurance system and balanced State budget was ensured.”⁹⁸

One of the most significant categories of those recession cases, adjudicated by the Constitutional Court, were the cases in which the Court had to assess the decrease of the State pensions defined in various ways. In 2009, the case on which the Constitutional Court had to decide on whether stopping the indexation of pensions complies with Articles 1 and 109 of the Constitution was the first to be adjudicated. In this case, the Constitutional Court did not identify infringement of the Constitution. Similarly as in the case concerning decreased parental benefits, the Court noted that the

96 Ķinis U., Amoliņa D. Konstitucionālā kontrole valsts finanšu jautājumos Satversmes tiesas praksē. *Jurista Vārds*, 26.02.2013., Nr. 8(759).

97 Delfi intervija ar Gunāru Kūtri: Arī ST sprieduma ignorēšana ir krimināla darbība. <http://www.delfi.lv/news/conference/interviews/delfi-intervija-ar-gunaru-kutri-ari-st-sprieduma-ignoresana-ir-kriminala-darbiba.d?id=37308831> [02-03-2013].

98 On Compliance of the First Part of Section 5 of the Law “On State Pension and Allowance Disbursement from 2009 to 2012” with Article 1, Article 91 and Article 110 of the Satversme of the Republic of Latvia: decision of the Constitutional Court, case No.2009-44-01, 15 March 2010. http://www.satv.tiesa.gov.lv/upload/judg_2009-44.htm [02-03-2013], para 24.

contested norm was adopted with the purpose to balance incomes and expenses of the State special budget of social insurance and that the State could no longer guarantee the same amount of social security as was provided during the period of economic growth. “Otherwise the ability of the State to implement the right to social security and to guarantee sustainability of social security system would be threatened. This would contradict the principle of a socially responsible State.”⁹⁹ The so-called “second pension case” was important in the case law of the Constitutional Court because the application to the Court was submitted by more than a hundred persons - pensioners. In general, even several thousand persons expressed the wish to apply to the Constitutional Court, wishing to contest the provisions envisaging that for a certain period of time the State pensions would be paid in the amount of 90%, deducting mathematically with regard to all pensioners 10% from all State established pensions, but with regard to working pensioners to decrease the amount of State pension by 70%. Assessment of the proportionality of this restriction and the compliance of these provisions with the principle of legal certainty allowed concluding that in this case the legislator had committed a violation of the Constitution. Moreover, the Constitutional Court, declaring the contested legal provisions as invalid from the moment of their adoption, decided that “the part of pensions withheld on the basis of the infringed provisions must be, in accordance with the procedure established by the *Saeima*, reimbursed in full not later than by 1 July 2015.”¹⁰⁰ Immediately after the decision of the Constitutional Court came into force, the legislator started disbursement of the unlawfully deducted pensions, demonstrating respect towards the judgments of the Court and their enforcement. Undeniably, the unconditional enforcement of the Constitutional Court decisions created even greater trust in the Constitutional Court and the judicial power in general. Moreover, all these decisions served as a signal to the legislator that constitution and the fundamental human rights guaranteed in it should be respected always.

VI. LEGISLATIVE INITIATIVE RIGHTS OF THE PEOPLE AS INALIENABLE PART OF LATVIAN CONSTITUTIONALISM

As it is characteristic for Latvian constitutionalism, parallel to various instruments of direct democracy, like national referendum, forms of political human rights (meetings, pickets etc.), the special significance should be dedicated to the legislation initiative

99 On Compliance of the Words “State funded pensions shall not be revised in 2009” of Section 2 of the Law “On Amendments to the Law “On State Funded Pensions”” of 12 March 2009 with Article 1 and Article 109 of the Satversme (Constitution) of the Republic of Latvia: decision of the Constitutional Court, case No 2009-08-01, 26 November 2009, para 25. http://www.satv.tiesa.gov.lv/upload/judg_2009-08-01.htm [02-03-2013].

100 On Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009 – 2012) insofar as it Applies to State Old-Age Pension with Article 1, Article 91, Article 105 and Article 109 of the Satversme of the Republic of Latvia: decision of the Constitutional Court, case No 2009-43-01, 21 December 2009. <http://www.satv.tiesa.gov.lv/upload/Judgment%202009-43.htm> [02-03-2013], para 35.3.

rights of the people (voters). The rights of the people – initiate a draft law conceptually in the constitutional level has been maintained the same as it was provided in the Satversme. At the same time, especially in the recent years, not changing the essence of the same institute, contend of the legislative initiative rights of the people has been developed to protect constitutional order and constitutional values.

In Latvia people's legislative initiative right belongs to the institutional part of the constitutional law and differs from fundamental human rights. The participation in the legislative procedure aims to ensure the direct participation of people (as a whole) in the legislative process, but the aim of fundamental human rights is to protect "individual freedoms from intervention by the State, as well as to guarantee certain material or non-material benefits."¹⁰¹ The aforementioned right - legislative initiative of people - should be differentiated from another – a more recent institute of direct democracy – the collective submission, the legal regulation of which, i.e., the law "Amendments to the Saeima Rules of Procedure" entered into force on 2 February 2012.¹⁰² The collective submission is an issue to be dealt with by the *Saeima*; however, the people's right to legislative initiative is closely linked with another instrument of direct democracy – the national referendum. It must be noted that in Latvia the people's right to legislative initiate must be differentiated from the national referendum, thus, these two should be seen as two separate types of direct democracy.¹⁰³

1. People's legislative initiative rights as a reality of Latvian constitutional order

The Article 78 of Satversme provides that the right to legislative initiative can be realized by one-tenth of the electorate submitting either fully elaborated draft amendments to the Satversme or a draft law to the President of the State, who forwards it to the Saeima. By fulfilling this obligation, the President of the State cannot influence elaborated draft law or he/she cannot introduce any amendments in that.¹⁰⁴The specific feature for

101 On Compliance of the Second Sentence of Section 22 of the Law "On National Referendums and Initiation of Legislation" with Article 1 of the Satversme (Constitution) of the Republic of Latvia: decision of the Constitutional Court, case No 2008-40-01, 19 May 2009. http://www.satv.tiesa.gov.lv/upload/2008-40-01_ENG.htm [02-03-2013], para 12.

102 Article 1313 of the Saeima Rules of Procedure envisage that at least 10,000 citizens of Latvia who have reached the age of 16 on the day of filing a submission shall have a right to file a collective submission with the Saeima. The collective submission shall contain a request to the Saeima and a brief justification of the request, as well as specify the natural person authorized to represent the signatories of the collective submission. A collective submission shall not contain a request, which is clearly unacceptable in a democratic society or is plainly offensive; a collective submission shall not undermine values of human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of minorities. Not later than three months after the collective submission has been filed, the Mandate, Ethics and Submissions Committee shall draft a report on the evaluation of the collective submission by the Committee and prepare a draft resolution of the Saeima on further processing of the collective submission. See: Grozījumi Saeimas kārtības rullī. Latvijas Vēstnesis, 01.02.2012., Nr.18.

103 Compare with: Suksi M. *Bringing in the people. A comparison of Constitutional Forms and Practices of the Referendum*. Dordrecht: Martinus Nijhoff Publishers, 1993, p.6.

104 Par Valsts prezidenta funkcijām Latvijas parlamentārās demokrātijas sistēmas ietvaros. Grām.: *Valsts prezidenta Konstitucionālo tiesību komisija. Viedokļi 2008-1011*. Rīga: Latvijas Vēstnesis, 2011, 156.lpp.

Latvia in implementing the people's right to legislative initiative is that also the Saeima cannot introduce amendments to the draft law submitted by one-tenth of the electorate without further involvement of the electorate. If the Saeima rejects handing the draft law to the committees, rejects it as a whole or adopts it with amendments to its content, then the so-called automatic national referendum follows.¹⁰⁵ In such cases the decision of the national referendum will depend upon the hierarchical level of the legal act put to national referendum. If the national referendum is on amendments to the Satversme, then an amendment to the Satversme shall be deemed adopted if at least half of the electorate has voted in favour. However, if the national referendum decides on another draft law, then above mentioned decision shall be deemed adopted if the number of voters is at least half of the number of electors who participated in the previous Saeima election and if the majority has voted in favour of the draft law.

Since the independence of the state was restored and the Satversme came into full force on 6 July 1993 several campaigns for collecting signatures in accordance with the Article 78 of the Satversme have been conducted.¹⁰⁶ For example, important role in the development of the Latvian constitutionalism was played by the collection of the signatures in 2008 when the Free Trade Union Confederation of Latvia supported adopting the draft law "Amendments to the Constitution of the Republic of Latvia". This draft law envisaged the rights of the people, i.e., of at least one-tenth of the electorate to initiate and to dissolve the Saeima.¹⁰⁷ As the Saeima on 5 June 2008 rejected the adoption of the draft law in first reading¹⁰⁸, the national referendum on the draft law elaborated by people was held on 2 August 2008. Even though considerable part of people (i.e. 608 847 voters) supported the elaborated draft law, it was not enough to consider the draft law "Amendments to the Constitution of the Republic of Latvia" adopted.¹⁰⁹ While conception of the recalling of the Saeima was not included in the Satversme with the direct voice or vote of the Latvian people, this initiative or collection of the signatures was like a motive or inspiration for politicians who later changed the Satversme. Right now in Latvian constitutional law there are two possibilities of pre-term termination of the Saeima: Saeima can be dissolved (Article 48) and Saeima also can be recalled (Article 14) by the people.¹¹⁰

105 Dišlers K. Referenduma veidi Latvijas Republikas Satversmē. *Jurists*, 1930, Nr 3 (19), 68.-70.sl.

106 The right to legislative initiative was implemented for the first time in the history of the State of Latvia already in 1923. See: Dišlers K. Referenduma pielietošana un kvoruma jautājums. *Jurists*, 1930, Nr.5(21), 130. – 133.sl.

107 Parakstu vākšana likuma "Grozījumi Latvijas Republikas Satversmē" ierosināšanai <http://web.cvk.lv/pub/public/29005.html> [02-03-2013].

108 Latvijas Republikas 9.Saeimas pavasara sesijas divpadsmitā sēde 2008.gada 5.jūnijā. <http://www.saeima.lv/steno/Saeima9/080605/st080605.htm>[02-03-2013].

109 Tautas nobalsošana par likumprojektu "Grozījumi Latvijas Republikas Satversmē". <http://web.cvk.lv/pub/public/29108.html> [02-03-2013].

110 Rodiņa A. Republic of Latvia (Chronicles). *European Review of Public Law*. Vol.23, 4/2011, Winter, p.1295-1332.

The year 2011 marked a new stage in the implementation of the people's right to legislative initiative – the stage of confrontation. The people's legislative initiative realized in the beginning of 2011 envisaged amendments to the Article 112 of the Satversme¹¹¹, providing that the state ensures the possibility to acquire the basic and secondary education free of charge only in the state (i.e., Latvian) language.¹¹² The activists - society "Safeguard the Language and Latvia" and the national association "All for Latvia" – "For Fatherland and Freedom"/ LNNK" held that amendments to Article 112 of the Satversme were necessary for safeguarding the Latvian language and keeping Latvia Latvian.¹¹³ Although the number of collected signatures was insufficient for submitting the draft law "Amendments to the Satversme of the Republic of Latvia" to the Saeima¹¹⁴, the aforementioned campaign triggered a counter-reaction in the Russian speaking community. Therefore on 9 September 2011 the Central Election Commission received another draft law "Amendments to the Satversme of the Republic of Latvia", envisaging amending Articles 4, 18, 21, 101 and 104 of the Satversme, including in them provisions on Russian as the second official language.¹¹⁵ Society and political elite doubted, whether the necessary number of signatures would be collected, however, the conclusion was that 187 378 voters or 12.14 % of citizens with the right to vote signed in favour of initiating amendments to the Satversme.¹¹⁶ In accordance with Article 78 of the Satversme the draft law "Amendments to the Satversme of the Republic of Latvia" was submitted to the President of the State.

At this time a wave of shock swept over Latvia's political elite: no one could believe that, indeed, the required number of signatures had been collected and that the Saeima would have to return to the very significant and very sensitive issue – that of the official language. To stress the relevance of retaining Latvian as the only official language, it must be explained that the Soviet occupation had caused a complicated ethno-demographic situation in Latvia. After the World War II mass migration of the U.S.S.R. citizens to Latvia occurred, thus the share of Latvians decreased, but the share of other ethnicities significantly increased. For example, in accordance with the data of the State Statistics Committee, in 1935 Latvians – the title nation – made up only 77% of the

111 Parakstu vākšana par grozījumiem Latvijas Republikas Satversmē. 2011.gada 11.maijs - 9.jūnijs. <http://web.cvk.lv/pub/public/29863.html> [02-03-2013].

112 Likumprojekts „Grozījumi Latvijas Republikas Satversmē”. <http://web.cvk.lv/pub/public/29883.html> [02-03-2013].

113 Kavējas savākto parakstu iesniegšana par izglītību tikai latviešu valodā. <http://www.delfi.lv/news/national/politics/kavejas-savakto-parakstu-iesniegsana-par-izglitibu-tikai-latviesu-valoda.d?id=37484961> [02-03-2013].

114 In total 120 433 signatures of the electorate was collected instead of necessary 153 232 signatures.

115 The Draft Law "Amendments to the Constitution of the Republic of Latvia" <http://web.cvk.lv/pub/public/30190.html> [02-03-2013].

116 Par parakstu vākšanas likuma „Grozījumi Latvijas Republikas Satversmē” ierosināšanai rezultātu: Centrālās vēlēšanu komisijas 2011.gada 19.decembra lēmums Nr.94. <http://web.cvk.lv/pub/public/30264.html> [02-03-2013].

whole population, but in 1989 – prior to the restoration of Latvia’s independence – the share of Latvians was only 52 %.¹¹⁷ However, Latvia is the only place on earth, where the existence and development of the Latvian language and, thus, the title nation, can be guaranteed.¹¹⁸ The Constitutional Court has even emphasized that “[...] narrowing the use of the Latvian language as the state language within the territory of the state should be perceived as threat to the democratic order of the state.”¹¹⁹

On 22 December 2011 the Saeima rejected the amendments to the Satversme.¹²⁰ Thus, the law “Amendments to the Satversme of the Republic of Latvia” had to be put to national referendum. The national referendum on adopting this draft law was held on 18 February 2012 and the referendum results showed that 273 347 voters cast their votes for adopting of the amendments to the Constitution, while 821 722 voters were against the amendments to the Constitution.¹²¹ Therefore the amendments to the Constitutions were not supported, since the number of votes “for” received in the referendum was less than 772 502 or one-half of voters who have the right to vote.

Even though the amendments to the Satversme initiated by the people were not adopted, this national referendum must be seen as crucial because of several reasons.

First of all, the people of Latvia clearly expressed its opinion that there can be only one official language – the Latvian language – in Latvia. In other words, the people have emphasized their unequivocal will – to maintain its nation state, which can have only one official language.¹²² At the same time it must be emphasized that Latvia has not given up respecting the human rights standards, inter alia, its duty to guarantee the minority rights enshrined in the Satversme. The Official Language Law underlines that this law has the purpose, inter alia, to ensure the integration of minority representatives in Latvian soci-

117 On the Compliance of Section 9, Paragraph 3 of the Education Law Transitional Provisions with Articles 1, 91 and 114 of the Republic of Latvia Satversme, Article 2 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as its Article 14 (linked with Article 2 of the First Protocol), Articles 26 and 27 of the International Covenant on Civil and Political Rights, Article 5 of the International Convention on Elimination of any Form of Race Discrimination, Articles 2 and 30 of the Convention on the Rights of a Child as well as Article 18 of the Vienna Convention on the International Agreement Rights: decision of the Constitutional Court of the Republic of Latvia, case No. 2004-18-0106, 13 May 2005. <http://www.satv.tiesa.gov.lv/upload/2004-18-0106E.rtf> [02-03-2013], para 1.

118 On Compliance of Article 19 of the Language Law and the Cabinet of Ministers August 22, 2000 Regulations No.295 “Regulations on Spelling and Identification of Names and Surnames” with Articles 96 and 116 of the Satversme (Constitution): decision of the Constitutional Court, case No.2001-04-0103, 21 December 2001. <http://www.satv.tiesa.gov.lv/upload/2001-04-0103E.rtf> [02-03-2013], para 3.2.

119 Ibid.

120 Latvijas Republikas 11.Saeimas rudens sesijas sešpadsmitā (ārkārtas) sēde 2011.gada 22.decembrī. <http://saeima.lv/lv/transcripts/view/99> [02-03-2013].

121 Referendum on the Draft Law “Amendments to the Constitution of the Republic of Latvia”. <http://web.cvk.lv/pub/public/30287.html> [02-03-2013].

122 Gailīte D. Konstitucionālā identitāte atšķir valsti no valsts. Intervija ar Egilu Levitu. Jurista Vārds, 2.10.2012., Nr.40(739).

ety, respecting their right to use their native language or other languages.¹²³

Secondly, for the first time in the history of Latvia the majority of vote required by Article 79 (part 1) of the Satversme was reached (even though in negative sense). Contrary to some discussion about seemingly unsurpassable quorum, the people of Latvia proved the opposite, its ability to mobilize, when important issues are to be decided.¹²⁴

Thirdly, the national referendum, including the negative decision of the people, has legal consequences. In explaining the term “law” the Constitutional Court has noted that “[...] it comprises not only the promulgated text of the law adopted by the Saeima, but also those proposals regarding maintaining the previous wording of some norms, currently in force, that the Saeima reviewed and adopted in the third reading of the law, even though these are not formally reflected in the promulgated text of the law.”¹²⁵ I.e., the concept “law” covers also such norms, which the legislator (including the people – as it was on this occasion) has reviewed, discussed and rejected. It follows that also in this national referendum the people with the negative decision have rejected the possibility of granting the status of official language to the Russian language.

Fourthly, all laws, with which the Saeima or the totality of Latvian citizens amend the Satversme, are of constitutional order, if these have been adopted in compliance with the procedural requirements set out in the Satversme.¹²⁶ Taking into consideration the aforementioned regarding the binding force of the negative decision, one might uphold the opinion that the act of national referendum of 18 February 2012 or the will of the people was defined in an act of constitutional order, as it was adopted on the basis of the first part of Article 79 of the Satversme, which sets out the rules for amending the Satversme.¹²⁷

2. People’s legislative initiative rights: some material and procedural aspects

The people as the sovereign should respect limitations of such right. Accordingly Article 65 of the Satversme defines that one tenth of electorate can realize legislative initiative rights “[...] in accordance with the procedures and in the cases provided for in this Constitution [...]”. Thus the people – or the lawful totality of Latvian citizens is

123 Valsts valodas likums. Latvijas Vēstnesis, 21.12.1999., Nr.428/433. The Text of the Official Language Law in English available: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Official_Language_Law.doc [02-03-2013].

124 Nikuļceva I. Vēlētāju likumdošanas iniciatīva Latvijā. *Jurista Vārds*, 8.12.2009., Nr.49(592).

125 On Conformity of Regulations of the Cabinet of Ministers No.23 of January 10, 1997 “Amendments to the Law on Regulating Business Activity in the Energy Sector” (passed in compliance with the procedure set by Article 81 of the Satversme (Constitution)) to Article 81 of the Satversme of the Republic of Latvia and conformity of Regulations No.54 of the Cabinet of Ministers of 14 March, 1995 “On Purchase Prices of Electrical Energy Generated in the Republic of Latvia” with the Satversme of the Republic of Latvia and to the Law “On Regulating Business Activity in the Energy Sector”, as well as with other Laws: decision of the Constitutional Court, case No 04 – 01(97), 7 May 1997. [http://www.satv.tiesa.gov.lv/upload/04-01\(97\)E.rtf](http://www.satv.tiesa.gov.lv/upload/04-01(97)E.rtf) [02-03-2013], para 1.

126 Case No.2007-10-0102, para 56.3.

127 Pleps J. Krievu valoda pēc tautas nobalsošanas. *Jurista Vārds*, 28.08.2012., Nr.35(734).

linked with the norms, principle and values of the Satversme.¹²⁸

Article 78 of Satversme specifies that people can initiate fully elaborated draft amendments to the Satversme or a draft law. The term “fully elaborated” means that the people cannot initiate just any concept or an idea of a law. Only a draft law, which complies with the formal requirements set for regulatory enactments, can be initiated. Or the „draft law submitted by electorate must be “drawn up in the form of a draft”. Thus, draft amendments to the Satversme or legislative initiative, which has not been drawn up in the form of a draft, should be recognized as not being fully elaborated as to its form.”¹²⁹The submitted draft law must be accurately worded, must be clear and comprehensible, logical, without internal contradictions. The draft law must be fully elaborated to the extent that it is clear, which of the laws or sections of the law currently in force are revoked or amended, or what kind of new legal provisions are envisaged.¹³⁰ These requirements must be abided by especially because automatic consequences will set in, if the Saeima introduces any amendments to the submitted draft law. Likewise, it must be taken into consideration that people, in exercising the right to legal initiative, operate in the field (sector) of legislation. This means, that people cannot decide upon those issues, the regulation of which falls within the competence of other institutions implementing the functions of state power (for example, within the competence of the judicial power). People cannot initiate also draft law which provides to decide issues which is not regulated by the law at all. It is also worth noting that the people can initiate a draft law, which does not collide with legal norms of higher legal force. This requirement as such is comprehensible and complies with the principle of state governed by the law, since also the people must act within the scope of the constitution (in broad understanding of it). The Constitutional Court has explained that “the people are obliged to comply with the norms of higher legal force and respect the constitutional values enshrined in them. Thus, a party submitting a draft law can predict that a draft law, which, in case it were adopted, would collide with the norms, principles and values contained by the Satversme, cannot be recognized as being fully elaborated. None of the constitutional institutions, also people, in exercising the rights granted to it, has the right to violate the Satversme.”¹³¹ Likewise, it has been explained that a draft law, which would contradict Latvia’s international commitments, could not be regarded as being fully elaborated.¹³²

128 On Compliance of Section 11 (1) and Section 25 (1) of the Law “On National Referendum and Legislative Initiatives” with Article 1, Article 77 and Article 78 of the Satversme of the Republic of Latvia: decision on terminating judicial proceedings of the Constitutional Court, case No.2012-0301, 19 December 2012. http://www.satv.tiesa.gov.lv/upload/2012-03-01_tiesv_izb_lem_ENG.pdf [02-03-2013], para 18.3. [Hereinafter - Case No.2012-0301].

129 Ibid.

130 Dišlers K. Vai Centrālajai vēlēšanu komisijai ir tiesība pārbaudīt iesniegtos likumprojektus? Jurists, 1928, Nr.5, 135.sl.

131 Case No.2012-0301, para 18.3.

132 Ibid.

If the submitted draft law or even in a part of it does not comply with the concept “fully elaborated”, then it is impossible to rectify this deficiency and it must be recognized that the draft law as a whole is incompatible with the requirements of Article 78 of the Satversme.¹³³ Thus it can be concluded that person who wish to solve an issue using the path of electorate’s legislative initiative, should be able to draw up a draft law of adequate quality and it cannot be presumed that such a draft law is fully elaborated; it has to be fully elaborated.¹³⁴

In realization of the people legislative initiative rights several persons and institutions are involved which realizes duties in this process as it is provided by the normative acts. Control functions are dedicated to the court institution as well.

Substantial changes were made in the procedure of the peoples legislative initiative rights by the end of the year 2012. The amendments to “Law on National Referendums, Legislative Initiatives and European Citizens’ Initiative”, overcoming various legal obstacles, i.e., twice the suspensive veto imposed by the President of the State, was finally adopted by the Saeima on 8 November 2012 and came into force on 11 December of the same year.¹³⁵ The legal regulation envisages changes in the commencement of the collection of the signatures of the voters, gradual transition to one stage collection of the signatures and also précises the rights of the institutions involved in this initiative.

The Central Election Commission should be an institution which should ensure that the national referendum and initiation of legislation are uniformly and properly applied and strictly enforced.¹³⁶ That is in the competence of the Central Election Commission to decide if draft law is fully elaborated and necessary amount of signatures collected.¹³⁷ Right now normative regulation - “Law on National Referendums, Legislative Initiatives and European Citizens Initiative” clearly provides competence of the Central Election Commission to assess, whether the draft law or draft amendments to the Satversme is fully elaborated as to its form and content. If the Central Election Commission concludes that the draft law is not fully elaborated, it can refuse to register it.

In accordance with Article 78 of the Satversme, the President of the State is the person, who in the implementation of the people’s right to legislative initiative, submits the

133 Par parakstu vākšanu likuma „Grozījumi Pilsonības likumā” ierosināšanai: Centrālās vēlēšanu komisijas 2012. gada 1. novembra lēmums Nr 6, 18. punkts. <http://web.cvk.lv/pub/public/30441.html> [02-03-2013].

134 Ibid, 19.1. punkts.

135 Grozījumi likumā “Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu”. Latvijas Vēstnesis, 27.11.2012., Nr.186. The Text of the Law on National Referendums, Legislative Initiatives and European Citizens Initiative in English available: <http://web.cvk.lv/pub/public/28862.html> [02-03-2013].

136 Par Centrālo vēlēšanu komisiju. Latvijas Vēstnesis, 20.01.1994., Nr.8. The Text of the Law on the Central Election Commission in English available: <http://web.cvk.lv/pub/public/28127.html> [02-03-2013].

137 Dišlers K. Vai Centrālajai vēlēšanu komisijai ir tiesība pārbaudīt iesniegtos likumprojektus? *Jurists*, 1928, Nr.5, 136.sl.

draft law, elaborated by electorate, to the Saeima. The President of the State A. Bērziņš, upon submitting to the Saeima the draft amendments to the Satversme elaborated by the electorate, noted that “Article 78 of the Constitution of the Republic does not grant a choice to the President of the State to submit or not to submit to the Saeima a draft law initiated by electorate.”¹³⁸

One can support the opinion that the Central Election Commission should be the primary institution of control, which verifies, whether the people in implementing their right to legislative initiative have complied with Article 78 of the Satversme. However, if for any reason the Central Election Commission has made errors, then one cannot uphold the view that the President of the State should be the technical submitter of the draft law to the Saeima.¹³⁹ The Constitutional Court, explaining the scope of the President’s functions on this issue noted that “the President of the State has the right and obligation to present to the Saeima only a draft law, which 1) has been submitted by at least one tenth of the electorate; 2) is fully elaborated.”¹⁴⁰ It means that the President of the State may present to the Saeima only a draft law, which has been recognized by Central Electing Commission as being fully elaborated. Since the Constitutional Court has recognized as being ungrounded the opinion that it is the duty of the President of the State to forward to the Saeima for examination a draft law, the compliance of which has not been assessed, one might conclude that the Constitutional Court holds that the President of the State has the duty to participate in fulfilling the function of protecting the Satversme and preclude, inter alia, submitting to the Saeima a draft law, which is not fully elaborated.

The controlling functions of the submitted draft law can be realized by the Saeima as well. The Saeima can support people’s legislative initiative or it can also refuse it. Those controlling functions of the Saeima can be realized in so called parliamentary order by deciding issues in the session. Also court institutions can realize controlling functions. The initiative group can appeal the decision of the Central Election Commission to refuse registering a draft law at the Department of Administrative Cases of the Senate of the Supreme Court, which hears the case as the first instance court in a panel of three judges within a month from the day when the application was received. Constitutional Court can be involved in this process as well. In accordance with the Article 85 of the Satversme Article 16, point 1, Constitutional Court Law, Constitutional Court can review conformity of the and law passed by the people in the national referendum with the Satversme. Constitutional Court is entitled to review conformity of the act (decision)

138 Ibid.

139 Lībeka M. Satversmes pirmā nodaļa – negrozāma. Saruna ar Inetu Ziemeļi. *Latvijas Avīze*, 29.12.2011.; Pastars E. Ievadītāžu diskusijai par atsevišķu prezidenta pilnvaru īstenošanas kārtību. *Jurista Vārds*, 25.12.2012., Nr.52(751).

140 Case No.2012-0301, para 21.

passed by the President of the State with the law as well. Such an act (decision) can be the decision of the President of the State to submit or not to submit the draft law elaborated by the people to the Saeima.

VII. CONCLUSIONS

Constitutional order of the Republic of Latvia is based upon the doctrine of the continuity of the state. This is the official opinion of the Republic of Latvia that the Republic of Latvia that was founded on November 18, 1918, despite the aggression and occupation by the USSR that took place in 1940, has continued its uninterrupted existence. In 1990 a new state was not established, but the state established on 18 November 1918, which, irrespectively of the occupation and annexation occurring in 1940, had continued existing without interruption, was restored *de facto*.

The main principles of the constitutional order of the Republic of Latvia are: the principle of state sovereignty, the principle of democratic republic, the principle of state governed by law (rule of law), the principle of socially responsible state, the principle of national state and the principle of people sovereignty.

The formal constitution of Latvia consists of several acts. In accordance with the approach taken by the Constitutional Court, the Satversme of 15 February 1922 is the central act of formal constitution. However, documents that establish and restore Latvian state have maintained their constitutional rank alongside Satversme. Such constitutional acts are: the Proclamation Act of the Republic of Latvia of November 18, 1918; the Declaration on the State of Latvia of May 27, 1920; the Declaration “On Restoring the Independence of the Republic of Latvia” of May 4, 1990, and the Constitutional Law “On the Status of the State of the Republic of Latvia” of August 21, 1991.

Also laws, which have been adopted in accordance with the procedure established by Article 68(2) of the Satversme should be considered as acts of constitutional rank, i.e., these are laws by which the Saeima delegates part of state power to international organizations.

Understanding of formal constitution in Latvia is influenced by the school of natural law. Latvian legal theory recognizes that unwritten general principles of law have higher legal force and these define the limits of constitution. Thus, also the formal constitution consists of two types of norms – the norms adopted by the constitutional legislator and the general principles of law. The formal constitution is a complex system of written legal norms and general principles of law, which must be construed and applied as a united whole.

The President’s Constitutional Law Commission has concluded that the Satversme has so-called eternity clause, which would restrict the possibility to abolish state independence, constitutional order or its most significant basic principles. This unwritten

core of the Satversme defines the constitutional identity of the State of Latvia, i.e., the identity of the state in state law and the identity of the state order.

Constitutional Court of the Republic of Latvia - the youngest constitutional institution plays very important role in protection of the constitutional order. As it has features of European model of constitutional control, applications to the Constitutional Court can be submitted by public persons, constitutional institutions, courts, as well as persons who can submit constitutional complaint (not *actio popularis*) to defend basic human rights which is violated by the legal norm. Experience of Latvia shows, that persons are the most active subjects. Activity of the persons proves that they trust to the Constitutional Court. People's trust to the Constitutional Court increased after Constitutional Court decided cases in so called economic crises times.

As it is characteristic for Latvian constitutionalism, the special significance should be dedicated to the legislation initiative rights of the people (voters). In Latvia people's legislative initiative right belongs to the institutional part of the constitutional law and differs from fundamental human rights and also from a more recent institute of direct democracy – the collective submission.

Special significance should be dedicated to the national referendum on 18 February 2012 when people had to decide on adopting amendments to the Constitutions providing state language status for Russian language. Even though the amendments to the Satversme initiated by the people were not adopted, this national referendum must be seen as crucial because people of Latvia clearly expressed its opinion to maintain its nation state, which can have only one official language – Latvian language. For the first time in the history of Latvia the majority of vote required by Article 79 (part 1) of the Satversme was reached (even though in negative sense). As the Constitutional Court has noted that also negative decisions of the legislator has to be observed, the act of national referendum of 18 February 2012 or the will of the people was defined in an act of constitutional order.

In realization of legislative rights, people are also bounded by the norms, principles and values of the constitution. Thus, it can be concluded that those submitting a draft law have freedom; however, they must abide with the requirement included in the Satversme on a fully elaborated draft law. If the submitted draft law or even in a part of it does not comply with the concept “fully elaborated”, then it is impossible to rectify this deficiency and it must be recognized that the draft law as a whole is incompatible with the requirements of Article 78 of the Satversme. Persons who wish to solve an issue using the path of electorate's legislative initiative, should be able to draw up a draft law of adequate quality and it cannot be presumed that such a draft law is fully elaborated; it has to be fully elaborated.

В латвийской юридической терминологии конституция обозначается термином „*Satversme*”. Этот латвийский термин используется для обозначения содержащихся в конституции идей конституционализма, то есть того, что конституция защищает народ и является основой существования государства. Согласно *Satversme* элементы конституционализма являются самими собой разумными и обязательными в конституционном строе Латвии, поэтому ссылки на них в тексте *Satversme* часто опускаются.

Конституционный строй Латвийской Республики основывается на доктрине государственной непрерывности. Это официальная позиция Латвийской Республики о том, что Латвийская Республика, которая была основана 18 ноября 1918 года, продолжала существовать непрерывно, несмотря на агрессию и оккупацию со стороны СССР в 1940 году. В 1990 году не было основано новое государство, но было *де-факто* восстановлено государство, основанное 18 ноября 1918 года и, вопреки оккупации и присоединению в 1940 году, продолжавшее свое непрерывное существование.

Основными принципами конституционного строя Латвийской Республики являются: принцип государственного суверенитета; принцип демократической республики; принцип правового государства (верховенство права); принцип социально ответственного государства; принцип национального государства; принцип суверенитета народа.

Формальная конституция Латвии состоит из нескольких актов. В соответствии с постановлением Конституционного Суда *Satversme* от 15 февраля 1922 года является основным актом формальной конституции. Однако документы, которые регулируют становление и восстановление Латвийского государства, сохранили свой конституционный ранг наряду с ней. Такими конституционными актами являются: Акт о провозглашении Латвийской Республики от 18 ноября 1918 года; Декларация о Латвийском государстве от 27 мая 1920 года; Декларация «О Восстановлении независимости Латвийской Республики» от 4 мая 1990 года; Конституционный закон «О государственном статусе Латвийской Республики» от 21 августа 1991 года. Кроме того, законы, которые были приняты в соответствии со статьей 68 (2) *Satversme*, следует рассматривать как конституционные акты, т. е. это законы, на основании которых Сейм делегирует часть компетенций государства международным организациям.

Интерпретация формальной конституции в Латвии определяется влиянием школы естественного права. Латвийская правовая теория признает, что неписанные общие принципы права обладают большей юридической силой, и они определяют границы конституции. Таким образом, формальная конституция состоит из двух типов норм – норм, принятых конституционным законодателем, и общих принципов права. Формальная конституция представляет собой сложную систему письменных правовых норм и общих принципов права, которые должны толковаться и применяться как единое целое.

Комиссия Президента по конституционному праву пришла к выводу, что *Satversme* имеет так называемое положение о вечности (*Die Ewigkeitsklausel*), которое ограничивает вероятность отмены государственной независимости, конституционного строя или его наиболее значительных основных принципов. Это неписаное ядро *Satversme* определяет конституционную идентичность Латвийского государства, т.е. идентичность государства в государственном праве и идентичность государственного строя.

Элементами государственной идентичности в области государственного права, включенными в ядро *Satversme*, являются: Латвийское государство как национальное государство латвийского народа, территория государства, определенная в статье 3 *Satversme*, принцип ее единства, народ Латвии, обладающий суверенной властью, а также запрет на лишение народа Латвии суверенной власти. Кроме того, к ядру *Satversme* относятся также принципы демократического государства, правового государства, социально ответственного государства и национального государства как элементов идентичности государственного строя.

Конституционный Суд Латвийской Республики – самый молодой конституционный орган – играет очень важную роль в защите конституционного строя. Поскольку он схож с европейской моделью конституционного контроля, в Конституционный Суд могут обращаться конституционные учреждения, суды, а также лица, которые могут подать конституционную жалобу (не *actio popularis*) о нарушении прав человека правовыми нормами. Опыт Латвии показывает, что индивидуальные лица являются наиболее активными субъектами. Деятельность этих лиц доказывает, что они доверяют Конституционному Суду. Народное доверие к Конституционному Суду выросло вследствие принятия решений Конституционным Судом во время экономического кризиса. Рассматривая так называемые кризисные дела, Конституционному Суду приходилось балансировать между необходимостью преодоления последствий экономического кризиса и необходимостью обеспечения должного уровня защиты основных прав. В постановлениях

Конституционного Суда можно обнаружить принцип, который соблюдался при разрешении тех дел – даже во время экономического кризиса законодательными органами должны соблюдаться основные права человека и принципы демократической страны. В то же время Конституционный Суд продемонстрировал прагматичный подход, соблюдая общественные интересы в ограничении основных прав человека. Также Конституционный Суд одобрил стремление законодательных органов реализовать реформы в тех областях, где это было необходимо.

Характерным для латвийской конституционной системы правления образом особое значение должно придаваться праву народа (избирателей) на законодательную инициативу. Права человека инициировать законопроект концептуально, на конституционном уровне не претерпели изменений по сравнению с положениями *Satversme*. В то же время, особенно в последние годы, без изменения сути, для защиты конституционного строя и конституционных ценностей было разработано основное содержание и ограничение права народа на законодательную инициативу.

В Латвии право народа на законодательную инициативу определяется институциональной частью конституционного права. Особенность реализации права граждан на законодательную инициативу в Латвии состоит в том, что и Сейм не может внести изменения в законопроект, представленный одной десятой частью избирателей, без дальнейшего участия электората. Если Сейм отказывается передать законопроект в комитеты, отклоняет его в целом или принимает его с поправками, то за этим следует так называемый автоматический национальный референдум.

Законодательные права народа — это не просто «пустой звук» Конституции. С момента восстановления независимости государства и вступления *Satversme* в силу было проведено несколько кампаний по сбору подписей в соответствии со статьей 78 *Satversme*. Важную роль в развитии латвийского конституционализма сыграл сбор подписей в 2008 году о принятии законопроекта «Поправки к Конституции Латвийской Республики», который предусматривают право народа инициировать и распустить Сейм по волеизъявлению хотя бы одной десятой части избирателей. И хотя концепция отзыва Сейма путем прямого волеизъявления или голосования народа не была включена в Конституцию, эта инициатива или сбор подписей послужили мотивом и вдохновением для политиков, которые позже изменили *Satversme*.

Особо должен быть отмечен всенародный референдум 18 февраля 2012 года, когда народ должен был принять решение о принятии поправок к Конституции о

статусе русского языка как государственного. Даже, несмотря на то, что поправки к *Satversme* не были приняты, этот национальный референдум стал чрезвычайно важным, ввиду того, что народ Латвии четко выразил свое желание сохранить свое национальное государство, в котором может быть только один государственный язык — латышский. Впервые в истории Латвии решение было принято большинством голосов в соответствии со статьей 79 (часть 1) *Satversme* (хотя решение и являлось отрицательным).

В реализации законодательных прав народ также ограничен нормами, принципами и ценностями конституции. Можно сделать вывод, что лица, представляющие законопроект, должны соблюдать требования *Satversme* в отношении полностью разработанного законопроекта. Лица, которые хотят решить вопрос, прибегая к законодательной инициативе избирателей, должны быть в состоянии разработать законопроект надлежащего качества, причем нельзя презюмировать, что такой законопроект является полностью разработанным; он должен быть полностью разработан.

Центральная избирательная комиссия является учреждением, которое следит за тем, чтобы строго соблюдался порядок инициирования законодательства и приведения его в исполнение. Она имеет право оценивать, является ли законопроект или поправки к *Satversme* полностью разработанными по форме и содержанию. В соответствии со статьей 78 *Satversme* Президент государства является лицом, которое, реализуя права граждан на законодательную инициативу, представляет разработанный электоратом законопроект в Сейм. Если по какой-либо причине Центральная избирательная комиссия допустила ошибку, то Президент государства не считается техническим подателем законопроекта в Сейм. Президент государства обязан обеспечивать защиту *Satversme* и препятствовать, в частности, представлению в Сейм законопроектов, которые не были полностью разработаны. Контроль над представленными законопроектами может реализовываться Сеймом и судебными учреждениями, в том числе Конституционным Судом.

In der lettischen juristischen Terminologie wird für die Verfassung der Begriff „*Satversme*“ benutzt. Dieser lettische Terminus wird für die Bezeichnung der in einer Verfassung enthaltenen Ideen des Konstitutionalismus verwendet; gemeint ist, dass die Verfassung das Volk schützt und die Existenzgrundlage des Staates bildet. Gemäß *Satversme* sind die Elemente des Konstitutionalismus etwas Selbstverständliches und Obligatorisches in der Verfassungsordnung Lettlands, deshalb bleiben die Verweise darauf im Text der *Satversme* oft aus.

Die Verfassungsordnung der Lettischen Republik beruht auf der Doktrin der staatlichen Kontinuität. Dies ist die offizielle Position der Lettischen Republik, die darauf hinweist, dass die am 18. November 1918 gegründete Lettische Republik trotz der Aggression und Okkupation durch die UdSSR im Jahre 1940 weiterhin bestanden hat. Im Jahre 1990 wurde kein neuer Staat gegründet, sondern der am 18. November 1918 gegründete Staat de facto wiederhergestellt, der – wie gesagt- nicht aufgehört hatte zu existieren.

Die Verfassungsordnung der Lettischen Republik weist folgende Grundprinzipien auf: das Prinzip der staatlichen Souveränität, das Prinzip der demokratischen Republik, das Rechtsstaatsprinzip (Vorrang des Rechts), das Prinzip eines in sozialer Hinsicht verantwortlichen Staates, das Prinzip des Nationalstaates und das Prinzip der Souveränität des Volkes.

Die formelle Verfassung Lettlands besteht aus mehreren Akten. Gemäß der Entscheidung des Verfassungsgerichts ist die *Satversme* vom 15. Februar 1922 der Grundakt der formellen Verfassung. Aber die Dokumente, die die Errichtung und Wiederherstellung des lettischen Staates regeln, besitzen wie die *Satversme* einen verfassungsmäßigen Rang. Solche Verfassungsakte sind: Akt über Proklamation der Lettischen Republik vom 18. November 1918; Deklaration über den Lettischen Staat vom 27. Mai 1920; Deklaration „Über Wiederherstellung der Unabhängigkeit der Lettischen Republik“ vom 4. Mai 1990; Verfassungsgesetz „Über den staatlichen Status der Lettischen Republik“ vom 21. August 1991. Ferner sind die laut Artikel 67 (2) der *Satversme* verabschiedeten Gesetze als Verfassungsakte anzusehen, d. h. dabei handelt es sich um Gesetze, auf deren Grundlage der Sejm einen Teil der Kompetenzen des Staates an internationale Organisationen delegiert.

Die Auslegung der formellen Verfassung Lettlands ist durch die Schule des Naturrechts beeinflusst. Die lettische Rechtstheorie anerkennt, dass ungeschriebene allgemeine Grundsätze des Rechts eine große juristische Kraft besitzen und die Grenzen der Verfassung festlegen. Die formelle Verfassung besteht somit aus zwei Typen von

Normen: vom Verfassungsgeber angenommene Normen und allgemeine Grundsätze des Rechts. Bei der formellen Verfassung handelt es sich um ein komplexes System schriftlicher Rechtsnormen und allgemeiner Grundsätze des Rechts, die als eine Ganzheit auszulegen und anzuwenden sind.

Die Kommission für Verfassungsrecht des Präsidenten ist zum Schluss gekommen, dass die *Satversme* eine so genannte *Ewigkeitsklausel* enthält, die die Wahrscheinlichkeit der Abschaffung der staatlichen Unabhängigkeit, der Verfassungsordnung oder der besonders bedeutenden Grundprinzipien dieser Ordnung beschränkt. Dieser ungeschriebene Kern des *Satversme* bestimmt die konstitutionelle Identität des lettischen Staates, d. i. die Identität des Staates im Staatsrecht und die Identität der Staatsordnung.

Elemente der staatlichen Identität im Bereich des Staatsrechts, die zum Kern der *Satversme* gehören, sind: der lettische Staat als der Nationalstaat des lettischen Volkes; das in Artikel 3 der *Satversme* festgelegte Gebiet des Staates; das Prinzip der Einheitlichkeit des Staates; das Volk Lettlands, das souveräne Macht besitzt; sowie das Verbot, dem Volk Lettlands die souveräne Macht zu entziehen. Ferner gehören auch die Prinzipien des demokratischen Staates, des Rechtsstaates, des in sozialer Hinsicht verantwortlichen Staates und des Nationalstaates als Elemente der Identität der Staatsordnung zum Kern der *Satversme*.

Das Verfassungsorgan der Lettischen Republik – das jüngste Verfassungsorgan des Landes – spielt eine sehr wichtige Rolle beim Schutz der Verfassungsordnung. Das Modell der Verfassungskontrolle ähnelt dem europäischen, so dass Verfassungseinrichtungen, Gerichte sowie Bürger eine Verfassungsbeschwerde (keine Popularklage) beim Verfassungsgericht einlegen dürfen, wenn Menschenrechte durch Rechtsnormen verletzt werden. Die Erfahrungen Lettlands zeigen, dass Einzelpersonen besonders aktive Subjekte dieses Rechts sind. Ihre Tätigkeit beweist, dass sie dem Verfassungsgericht vertrauen. Das Vertrauen des Volkes in das Verfassungsgericht hat sich dank Entscheidungen des Verfassungsgerichts während der Wirtschaftskrise erhöht. Das Verfassungsgericht musste in den so genannten Krisenverfahren einen Ausgleich zwischen der Notwendigkeit der Überwindung der Folgen der Wirtschaftskrise und der Notwendigkeit der Sicherstellung des gehörigen Niveaus des Schutzes der Grundrechte finden. In den Entscheidungen des Verfassungsgerichts lässt sich ein Grundsatz feststellen, der dabei beachtet wurde: Selbst in der Wirtschaftskrise müssen die Grundrechte des Menschen und die Prinzipien des demokratischen Staates gewahrt werden. Das Verfassungsgericht hat zugleich eine pragmatische Herangehensweise an den Tag gelegt, indem es das öffentliche Interesse bei der Beschränkung der Grundrechte berücksichtigt hat. Das Verfassungsgericht billigte ebenfalls die Bestrebungen der Gesetzgebungsorgane, Reformen in bestimmten Bereichen durchzuführen.

Das lettische Verfassungssystem des Regierens zeichnet sich dadurch aus, dass dem Recht des Volkes (der Wähler) auf Gesetzesinitiative eine besondere Bedeutung zukommt. Das Recht auf konzeptionelle Gesetzesinitiative auf der Verfassungsebene ist im Vergleich zu den Bestimmungen der *Satversme* unverändert geblieben. Zugleich aber wurden – besonders in den letzten Jahren – der Hauptgehalt des Rechts des Volkes auf Gesetzesinitiative und die Beschränkungen dieses Rechts für den Schutz der Verfassungsordnung und der Verfassungswerte entwickelt.

Das Recht des Volkes auf Gesetzesinitiative wird in Lettland durch den institutionellen Teil des Verfassungsrechts bestimmt. Die Besonderheit der Realisierung des Rechts der Bürger auf Gesetzesinitiative in Lettland besteht darin, dass nicht einmal der Sejm Änderungen in einem Gesetzesentwurf, den ein Zehntel der Wähler eingereicht hat, ohne Beteiligung der Wählerschaft vornehmen darf. Weigert sich der Sejm, den Entwurf den Ausschüssen vorzulegen, lehnt er ihn ganz oder nimmt ihn mit Änderungen an, so folgt darauf das so genannte automatische nationale Referendum.

Gesetzgebungsrechte des Volkes – das ist kein “leerer Klang” der Verfassung. Seit der Wiederherstellung der Unabhängigkeit des Staates und dem In-Kraft-Treten der *Satversme* wurden mehrere Unterschriftensammlungen gemäß Artikel 78 der *Satversme* veranstaltet. Eine wichtige Rolle bei der Entwicklung des lettischen Konstitutionalismus spielte die Unterschriftensammlung über die Annahme des Gesetzentwurfs “Änderungen in der Verfassung der Lettischen Republik” im Jahre 2008. Diese Änderungen sahen das Recht des Volkes, die Auflösung des Sejms zu initiieren und durchzuführen, wenn mindestens ein Zehntel der Wähler dies verlangt. Obwohl das Konzept der Auflösung des Sejms auf Grund der direkten Willensäußerung oder Abstimmung des Volkes in die Verfassung nicht eingeführt wurde, waren diese Initiative und Unterschriftensammlung eine Anregung für die Politiker, die später die *Satversme* änderten.

Besonders hervorzuheben ist das nationale Referendum am 18. Februar 2012, als das Volk über Änderungen in der Verfassung abstimmen sollte, bei denen es sich um den Status der russischen Sprache als zweiter Amtssprache handelte. Dieses Referendum war überaus wichtig, denn das Volk von Lettland brachte dabei seinen Wunsch klar zum Ausdruck, seinen Nationalstaat zu erhalten, in dem es nur eine Amtssprache geben kann: Lettisch. Zum ersten Mal in der Geschichte Lettlands wurde eine Entscheidung mit der Stimmenmehrheit gemäß Artikel 79 (Teil 1) der *Satversme* getroffen (die Mehrheit hat gegen das Russische als zweite Amtssprache gestimmt).

Bei der Realisierung seiner Rechte im Bereich der Gesetzgebung ist das Volk durch Normen, Prinzipien und Werte der Verfassung beschränkt. Man kann zum Schluss kommen, dass wer einen Gesetzesentwurf einreicht, die Anforderungen der *Satversme* an den Entwurf erfüllen muss. Wer durch die Gesetzesinitiative der Wähler eine

Entscheidung über eine Angelegenheit herbeiführen möchte, muss in der Lage sein, die erforderliche Qualität des Gesetzesentwurfs sicherzustellen, wobei der Entwurf tatsächlich vollständig ausgearbeitet sein muss.

Die Zentrale Wahlkommission ist eine Einrichtung, die darauf achtet, dass das Verfahren der Initiierung eines Gesetzes gehörig durchgeführt wird. Die Kommission darf ihre Einschätzung darüber abgeben, ob die Form und der Inhalt des Gesetzesentwurfs oder der Änderungen in der *Satversme* den vorgeschriebenen Anforderungen entsprechen. Laut Artikel 78 der *Satversme* ist es der Staatspräsident, der das Recht der Bürger auf Gesetzesinitiative realisiert, indem er den Gesetzesentwurf in den Sejm einbringt. Wenn die Zentrale Wahlkommission aus irgendeinem Grund einen Fehler begangen hat, gilt der Staatspräsident technisch nicht als derjenige, wer den Gesetzesentwurf in den Sejm eingebracht hat. Der Staatspräsident muss den Schutz der *Satversme* sicherstellen und insbesondere die Einbringung nicht vollständig ausgearbeiteter Gesetzesentwürfe in den Sejm verhindern. Eine Kontrolle über die eingebrachten Gesetzesentwürfe können der Sejm und Gerichtsinstanzen, darunter das Verfassungsgericht, ausüben.

RÉSUMÉ

Dans la terminologie juridique lettonne la constitution est désignée par le terme *Satversme* qui est utilisé pour la dénomination des idées de constitutionnalisme qui se trouvent dans la constitution, à savoir que celle-ci protège le peuple et est à la base de l'existence de l'Etat. Selon *Satversme*, les éléments du constitutionnalisme sont considérés comme allant de soi et obligatoires dans l'ordre constitutionnel de la Lettonie, c'est pourquoi le renvoi à ceux-ci est souvent omis dans le texte.

L'ordre constitutionnel de la République de Lettonie se fonde sur la doctrine de continuité de l'Etat. C'est la position officielle de la République de Lettonie selon laquelle la République de Lettonie fondée le 18 novembre 1918 a continué d'exister d'une manière ininterrompue en dépit de l'agression et de l'occupation par l'URSS en 1940. En 1990, n'a pas été fondé un nouvel Etat, mais a été *de facto* rétabli celui créé le 18 novembre 1918, qui a continué son existence sans interruption malgré l'occupation et l'annexion survenues en 1940.

Les principes fondamentaux de l'ordre constitutionnel de la République de Lettonie sont: le principe de la souveraineté de l'Etat; le principe de la république démocratique; le principe de l'Etat de droit (de la prééminence du droit); le principe de l'Etat socialement responsable; le principe de l'Etat national; le principe de la souveraineté du peuple.

La Constitution formelle de la Lettonie se compose de quelques actes. Conformément à l'arrêt de la Cour constitutionnelle, le *Satversme* du 15 février 1922 est l'acte fondamental de la Constitution formelle. Toutefois, les textes qui régissent l'établissement et la restauration de l'Etat letton ont conservé leur rang constitutionnel à côté de *Satversme*. Ces actes constitutionnels sont les suivants: l'Acte de la proclamation de la République de Lettonie du 18 novembre 1918, la Déclaration sur l'État de Lettonie du 27 mai 1920, la Déclaration sur « Le rétablissement de l'indépendance de la République de Lettonie » du 4 mai 1990, la loi constitutionnelle sur « Le statut de l'Etat de la République de Lettonie » du 21 août 1991. En outre, les lois qui ont été adoptées conformément à l'article 68 (2) de *Satversme* sont considérées comme des actes constitutionnels, c'est-à-dire, ce sont des lois selon lesquelles la *Saeima* délègue une partie du pouvoir d'Etat à des organisations internationales.

L'interprétation de la Constitution formelle en Lettonie porte l'influence de l'école du droit naturel. La théorie juridique lettonne reconnaît que les principes généraux non écrits du droit ont une force juridique supérieure et qu'ils définissent les limites de la constitution. Ainsi, la Constitution formelle est constituée de deux types de normes: les normes adoptées par le législateur constitutionnel et les principes généraux du droit. La Constitution formelle est un système complexe de normes juridiques écrites et de principes généraux du droit qui doivent être interprétés et appliqués comme un tout.

La commission auprès du Président de la République du droit constitutionnel a conclu que *Satversme* a, ce qu'on appelle, la clause d'éternité (*Die Ewigkeitsklausel*), ce qui limite l'éventualité d'abolition de l'indépendance de l'Etat, de l'ordre constitutionnel ou de ses principes de base les plus importants. Ce noyau non écrit de *Satversme* définit l'identité constitutionnelle de l'Etat letton, à savoir l'identité de l'Etat dans le droit étatique et l'identité de l'ordre étatique.

Les éléments identitaires de l'Etat dans le domaine du droit étatique inclus dans le noyau de *Satversme* sont: l'État letton comme Etat national du peuple letton, le territoire de l'État tel qu'il est défini à l'article 3 de *Satversme*, le principe de son unité, le peuple letton doté de pouvoir souverain, ainsi que l'interdiction de priver le peuple de la Lettonie de son pouvoir souverain. De même, le noyau de *Satversme* comporte, en tant qu'éléments de l'identité de l'ordre étatique, les principes de l'Etat démocratique, de l'Etat de droit, de l'Etat socialement responsable et de l'État national.

La Cour constitutionnelle de la République de Lettonie,- la plus jeune institution constitutionnelle,- joue un rôle très important dans la défense de l'ordre constitutionnel. Etant proche du modèle européen de contrôle constitutionnel, la Cour constitutionnelle peut être saisie par les institutions constitutionnelles, les tribunaux, ainsi que les personnes ayant droit au recours constitutionnel (non *actio popularis*) pour dénoncer les

violations des droits de l'homme par des normes juridiques. L'expérience lettone démontre que les individus sont les sujets les plus actifs. L'activité de ces individus prouve qu'ils font confiance à la Cour constitutionnelle. La confiance pour la Cour a augmenté suite à ces arrêts pris lors de la crise économique. Lors de l'examen d'affaires dites de crise, la Cour constitutionnelle a été amenée à respecter l'équilibre entre la nécessité de surmonter les conséquences de la crise économique et la nécessité d'assurer un niveau adéquat de défense des droits fondamentaux. Dans les arrêts de la Cour constitutionnelle, on peut relever le principe qui sous-tend l'examen des affaires évoquées, à savoir que *même en période de crise économique, le législateur est tenu de respecter les droits fondamentaux de l'homme et les principes d'un pays démocratique*. En même temps, la Cour constitutionnelle a fait preuve d'une approche pragmatique en respectant les intérêts publics par la limitation des droits fondamentaux de l'homme. D'autre part, la Cour constitutionnelle a encouragé le législateur à mettre en place des réformes là où cela a été indispensable.

Comme cela est caractéristique au système constitutionnel letton, une importance particulière est accordée au droit du peuple (des électeurs) à l'initiative des lois. Le droit de la personne d'initier un projet de loi conceptuellement a été maintenu au niveau constitutionnel comme il a été prévu par *Satversme*. En même temps, surtout les dernières années, sans changer l'essence de cette institution, aux fins de la protection de l'ordre et des valeurs constitutionnels, ont été élaborés le contenu du droit du peuple à l'initiative législative et les restrictions en la matière.

En Lettonie le droit du peuple à l'initiative des lois est défini par la partie institutionnelle du droit constitutionnel. La particularité de la mise en œuvre du droit des citoyens à l'initiative des lois en Lettonie consiste en ce que la *Saeima* non plus ne peut amender le projet de loi présenté par 1/10 des électeurs sans la participation ultérieure de l'électorat. Si la *Saeima* refuse l'examen du projet de loi par les commissions, le rejette dans son intégralité ou l'adopte avec des amendements, c'est un référendum national automatique qui s'en suit.

Le droit législatif du peuple n'est pas un simple son creux de la Constitution. Depuis le rétablissement de l'indépendance et l'entrée en vigueur de *Satversme*, plusieurs campagnes de collecte de signatures conformément à l'article 78 de *Satversme* ont été organisées. Un rôle important dans le développement du constitutionnalisme letton a joué la collecte de signatures en 2008 pour l'adoption du projet de loi sur «Les amendements à la Constitution de la République de Lettonie» qui prévoit le droit du peuple d'initier et de dissoudre la *Saeima*, si au moins 1/10 de l'électorat y est favorable. Bien que le concept du rappel de la *Saeima* par la voie de l'expression directe de la volonté ou du vote du peuple n'ait pas été inscrit à la Constitution, cette initiative ou la collecte

de signatures a servi de motif et d'inspiration aux hommes politiques qui ont amendé plus tard *Satversme*.

Une importance particulière revêt le référendum national du 18 février 2012, lorsque le peuple a dû se prononcer sur l'adoption des amendements à la Constitution concernant le statut de la langue russe comme langue d'Etat. Même si les amendements apportés à *Satversme* n'ont pas été adoptés, ce référendum national garde toute son importance par le fait que la population lettonne a exprimé clairement son désir de maintenir son Etat national avec une seule langue officielle - la langue lettonne. Pour la première fois dans l'histoire de la Lettonie, la décision fut prise à la majorité des voix, comme le veut l'article 79 (1partie) de *Satversme* (même si celle-ci fut négative).

Dans la réalisation des droits législatifs, le peuple est aussi limité par des normes, des principes et des valeurs de la Constitution. On pourrait dire que les personnes qui présentent un projet de loi doivent se conformer aux exigences de *Satversme* concernant le projet de loi complètement élaboré. Les personnes qui souhaitent résoudre un problème par la voie d'initiative législative de l'électorat, doivent être en mesure d'élaborer un projet de loi de qualité exigée et sans présomption de l'entière élaboration de celui-ci, puisqu'il doit être entièrement élaboré.

La Commission électorale centrale est l'institution qui veille à ce que l'ordre d'initiation de la législation soit respecté et strictement appliqué. Elle a le droit d'évaluer si le projet de loi ou le projet d'amendement à *Satversme* est entièrement élaboré dans sa forme et son contenu. Conformément à l'article 78 de *Satversme*, le Président de la République est la personne qui, lors de la mise en œuvre du droit du peuple à l'initiative législative, soumet le projet de loi élaboré par l'électorat à la *Saeima*. Le Président de la République ne peut pas être considéré comme un porteur technique du projet de loi à la *Saeima*, si pour une raison quelconque, la Commission électorale centrale a commis une erreur. Le Président de la République est tenu de protéger *Satversme* et d'interdire, entre autres, de présenter à la *Saeima* un projet de loi qui n'est pas entièrement élaboré. Le contrôle du projet de loi peut être réalisé par la *Saeima* et les organes judiciaires, y compris la Cour constitutionnelle.

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Professor Sergio Bartole carried out post-graduated researches at Law Faculty of the University of Trieste until he became chair professor in 1972. After five years he moved to the University of Pavia as a professor of Regional and Constitutional law until 1982 when he returned to the Law Faculty of that University. Previously the Scientific Director of the Institute of Regional Legal Studies of Friuli Venezia Giulia, he chaired the Scientific Board of the Institute for the Regions of the National Council of researches.

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A consultant of several constitutional and regional bodies, he took part on behalf of the Italian Minister of Foreign Affairs in the preparation of the Framework Convention for the Protection of National Minorities and from 1998 to 2002 was a member of the relevant Advisory Committee. In this capacity, he took part in several missions. For the last twenty years he has been substitute and effective member of the Venice Commission in respect of Italy.



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Kaarlo Tuori is professor of jurisprudence at the University of Helsinki. At present, he is Academy Professor and Director of the CoE Foundations of European Law and Polity. His main research fields are legal and constitutional theory. His publications include *Critical Legal Positivism* (Ashgate 2002), *Ratio and Voluntas: the Tension between Reason and Will in Law* (Ashgate 2011) and *The Many Constitutions of Europe* (ed. with Suvi Sankari; Ashgate 2010). He is the Finnish member of the Venice Commission since 1998 and at present the Vice-President of the Commission.



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Didier Maus did his graduate studies in Paris. He is a graduate of the Institut d'Etudes Politiques of Paris, with the studies in public law and economics. He also attended the National School of Administration (1970-1973). In the 1970s, while conducting important activities in the field of constitutional law, Didier Maus became civil servant at the Ministry of Economy and Finance. After holding various positions, on 1984 he was appointed by the President of the French Republic to publish the preparatory study on the French Constitution of 1958. On March 1986, he became Director of the Cabinet of André Rossinot, the Minister for Relations with Parliament. On 1992, Didier Maus was appointed as the Member of the Advisory Committee for the Revision of the Constitution. From November 1993 to September 2001, he was Director of the International Institute of Public Administration. On September 2001, Didier Maus was appointed at the position of the State Councilor. While retaining his responsibilities at the Council of State, on 2002 he was appointed as the General Rapporteur of the new Committee on Constitutional archives of the Fifth French Republic. The activities of this body concluded on December 31, 2011. From July 2002 - December 2003 he held a position of a Judge at the Constitutional Court of Bosnia and Herzegovina. He was also appointed as the Member of the Constitutional Court of the Principality of Andorra (December 10, 2003 until December 2011, where he presided from June 2006 to June 2008). He retired on March 5, 2012. From 1999 to 2006, he chaired the French Association of constitutional law. From 1993 to 2007 he was the Vice-President of the International Association of Constitutional Law and was elected as the president on June 2007. Didier Maus was a member of the Board of Directors of the Association of French Political Scientists from 1988 to 2000 and the Head of the working group.



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Peter Paczolay was elected Judge of the Constitutional Court by Parliament in February 2006. He was Vice-President of the Constitutional Court from March 2007 to July 2008. The plenary session of the Constitutional Court elected him President on 4 July 2008 for three years. On 4 July 2011 the Hungarian Parliament – for the period of his mandate as Constitutional Judge – elected him as President of the Court. He graduated from the Faculty of Law and Political Sciences of Eötvös Loránd University, Budapest in 1980. From 1980 to 1983 he worked as legal advisor. From 1983 to 1990 he lectured at the Department of the Philosophy of Law, from 1990 to 2005 at the Department of Political Sciences at the Faculty of Law and Political Sciences of Eötvös Loránd University, Budapest. Since 1992 he has been Head of Department of Political Sciences at the Faculty of Law and Political Sciences of József Attila University of Szeged (at present University of Szeged). Between 1994 and 1998 he was Vice-Dean of the Faculty. From August 2000 he was Deputy Head, from August 2005 Head of the Office of the President of the Republic of Hungary. In 2002 he was elected member of the European Academy of Sciences and Arts (Salzburg). From 2001 to 2005 he represented Hungary as substitute member, since 2005 as member of the Venice Commission of the Council of Europe. Since December 2009 until 2011 he was Vice President of the Venice Commission. By virtue of law – as he is President of the Constitutional Court – he is member of the Hungarian Holy Crown Committee. He obtained his candidate's degree in 1989. He qualified as a university lecturer in 1999. He was been granted full professorship in 2000. In 1991-92 he was research fellow at Woodrow Wilson International Centre for Scholars in Washington, D. C.



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Gianni Buquicchio has studied at the Law Faculty of the University of Bari (1963-1967) and has been awarded a Doctor of Law Degree for a thesis in Public International Law on the United Nations. In 1968-1971 he was a Lecturer at the Institute of International Law and Political Science of the University of Bari. In 1971-1974 Gianni Buquicchio held the office of the Administrator at the Division of Public Law of the Directorate of Legal Affairs of the Council of Europe. In 1978-1983 he was a Senior Administrator at the same Division. From 1981 to 1994 he was Responsible for the Conferences of European Ministers of Justice. In 1990-1996 Gianni Buquicchio was the Head of the Division of the Legal Advisor and Treaty Office at the Directorate of Legal Affairs of the Council of Europe. Since 1990 he held the office of Secretary of the European Commission for Democracy through Law (Venice Commission) making a significant contribution to its creation. 1996-2009 he was Director, Secretary of the European Commission for Democracy through Law As Secretary of the Commission, contributed to its successful establishment and development (created by 18 member States of the Council of Europe, today this body has 56 European and non-European member States), by ensuring the conception, preparation and follow-up of projects concerning constitutional reforms and the setting up of democratic institutions within Europe and beyond. Has established and maintained relations at the highest level and has represented the Commission vis-à-vis persons at the highest political and judicial levels in member States and vis-à-vis international authorities. In 2009 Gianni Buquicchio elected President of the Venice Commission (re-elected in 2011). He is a member of the Scientific Council of the Foundation “Venice for Research on Peace” and of the Executive Committee of the International Association of Constitutional Law (IACL). He is the Grand Officer of the Order of Merit of the Italian Republic (2002), Knight of the Legion of Honour (France, 2004), Commander of the Order “Star of Romania” (2006).

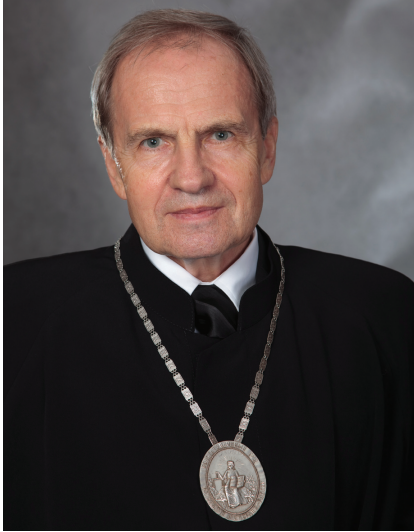


Rudolf 'Schnutz' DÜRR

*Head of the
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Rudolf 'Schnutz' Dürr studied at the Law Faculty of the University of Graz (Magister of Law) and the Diplomatic Academy in Vienna, Austria. In 2002, he obtained the degree of Doctor of Law from the University of Vienna. After working as a diplomat for three years at the Ministry of Foreign Affairs of Austria, he joined the European Commission for Democracy through Law (Venice Commission) of the Council of Europe in 1994. Within the Venice Commission's Secretariat he is the Head of the Constitutional Justice

Division, in charge of providing support to Constitutional Courts and equivalent bodies (Supreme Courts, Constitutional Councils). He prepares opinions of the Commission on constitutional amendments and laws relating to the constitutional and ordinary judiciary. He publishes the Constitutional Courts' case-law in the Venice Commission's Bulletin on Constitutional Case-Law and the database CODICES. In June 2012, he was appointed as Secretary of the World Conference on Constitutional Justice.



Valery ZOR'KIN

*President of the Constitutional Court
of the Russian Federation*

Valery Zor'kin has graduated from the Law Faculty of the Moscow State University in 1964. Associate professor (1964-1979) at the Law Faculty of the Moscow State University. Professor at the Academy of the USSR Ministry of the Interior (1979-1986); Professor at the Law School of the Ministry of the Interior (1986-1991). Head of the Constitutional Expert Commission of the Congress of People's Deputies of Russia (1990-1991).

In October 1991 elected to the Constitutional Court and then the first President of the Constitutional Court at its first meeting. In 2003 elected President of the Constitutional Court. Re-elected President in 2006 and 2009, appointed President in 2012 for a 6-year term. Candidate of Law (1967); thesis entitled B.N. Chicherin's Views on the Law and the State. Doctor of Law (1978); thesis entitled The Positivist Theory of Law in Russia: a Historical and Critical Investigation.

Author of several books (Russia and the Constitution in the 21st Century; The Constitution and Human Rights in the 21st Century; Contemporary World, Law and the Constitution; Constitutional Development of Russia; etc).



Boštjan ZUPANČIČ

*Judge of the European Court
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Boštan Zupančič is a Judge of the European Court of Human Rights since 1 November 1998. He was the President of Section from 1 November 2004 to 31 January 2008. Dipl. Jur. Degree, Faculty of Law, University of Ljubljana, 1970 University of Montreal, School of Criminology, 1971-72.

Master of Law (LL.M.), Harvard Law School, Cambridge, Massachusetts, 1974 Scientiae Juris Doctor (S.J.D.), Harvard Law School, 1981 Assistant Professor of Law, University of Ljubljana (1970-76) and New York Law School (1977-79) Associate Professor, University of Iowa, Law School, 1980 and Fordham University, Law School, 1981 Distinguished Visiting Professor, 1981 and full Professor of Law, Seton Hall University, Law School, 1986 Full Professor of Law, Faculty of Law, University of Ljubljana, since 1988 First Vice-President (for academic affairs), University of Ljubljana, 1989-92 Boštjan Zupančič was Judge at the Constitutional Court of Slovenia in 1993-98 and Member and Vice-Chair of the United Nations Committee against Torture (Geneva) in 1995-98.



Lech GARLICKI

*Former Judge of the European Court
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Lech Garlicki is Professor of constitutional law at the University of Warsaw (Poland). Judge of the European Court of Human Rights 2002-2012. Former judge of the Constitutional Tribunal of the Republic of Poland (1993 -2001). Member of the Polish Association of the Constitutional Law (headed it in 2001 – 2003). Member of editorial boards of several Polish, American and French journals. The author of more than 250 articles on Polish and comparative constitutional law, which were published in different languages. Among his numerous publications should be mentioned such as “The Supreme Court of the United States of America” (1982 in Polish), “Constitutional Courts in the Western Europe” (1987 in Polish), “Commentary on the Constitution of the Republic of Poland” (five editions from 1999 to 2007 in Polish), “Polish Constitutional Law” (2003, 2007 in Polish).



Marek SAFJAN

*Judge of the European Court
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Marek Safjan is a Judge at the European Court of Justice since 7 October 2009. He is Doctor of Law (University of Warsaw, 1980); habilitated Doctor in Legal Science (University of Warsaw, 1990); Professor of Law (1998). Marek Safjan was the Director of the Civil Law Institute of the University of Warsaw (1992-96); Vice-Rector of the University of Warsaw (1994-97); Secretary-General of the Polish Section of the Henri Capitant Association of Friends of French Legal Culture (1994-98); representative of Poland on the Bioethics Committee of the Council of Europe (1991-97); Judge (1997-98), then President (1998-2006), of the Constitutional Court. He is a member (since 1994) and Vice-President (since 2010) of the International Academy of Comparative Law, member of the International Association of Law, Ethics and Science (since 1995), member of the Helsinki Committee in Poland; member of the Polish Academy of Arts and Sciences.

Marek Safjan is author of a very large number of publications in the fields of civil law, medical law and European law, including: *The Right to Protection of Personal Privacy and Autonomy in the Case Law of the Polish Constitutional Tribunal* /in/; *Human Rights, Democracy and Rule of Law, Liber Amicorum Louis Wildhaber, Dike Nomos 2007*; *Politics and Constitutional Court. Judge's personal perspective*, European University Institute 2008. Pro Merito Medal conferred to Marek Safjan by the Secretary-General of the Council of Europe (2007); Marek Safjan is a Doctor honoris causa of the European University Institute (2012).



Anita RODIŅA

*Associated professor
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In 2006 defended doctoral thesis at the University of Latvia, obtaining doctors' degree in law.

Since 2001 lector (later – associated professor) in Constitutional Law and Constitutional Court Procedure in the University of Latvia, Faculty of Law. In 2008 elected as vice dean of the Faculty of Law. Since 2010 member of the Senate of the University of Latvia. Board member of the European Public Law Organization. Member of editorial board of the publication Central and Eastern European Legal Studies.

Author of several articles and publications on Constitutional Law and constitutional court, participant of several international and local conferences. Author of the commentary of Article 85 of the Constitution of the Republic of Latvia. Author of the book „Konstitucionālās sūdzības teorija un prakse Latvijā” (Theory and practice of the Constitutional complaint in Latvia).



Jānis PLEPS

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Author of several articles and publications on Constitutional Law and Legal Theory, participant of several international and local conferences. Author of the commentary of Articles 103 and 116 of the Constitution of the Republic of Latvia. Author of the book „Satversmes iztulkošana” (Interpretation of the Constitution of the Republic of Latvia).

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