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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**Seminar on**

# "CONSTITUTIONAL COURTS, STATE OF LAW AND THE PROCESS OF ECONOMIC REFORMS"

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**SPEECH BY**

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The quest for the rule of law has long been an endeavour of humankind. Today, the review of the constitutionality of laws has become a very important ingredient of the rule of law. Yet, the history of the constitutional review is quite recent. For a long time, the United States of America remaining the only example of constitutional review, starting from the famous Marbury v. Madison decision of the American Supreme Court, and remained in the eyes of most Europeans a peculiarity of the American political system, like presidentialism and federalism. In the nineteenth and an important part of the twentieth centuries, the dominant conception of democracy prevailing on our side of the Atlantic was based on the Rousseauist notion of general will. In other words, the will of the majority as expressed by the elected parliaments was equated with the general or national will which was considered supreme, indivisible and infallible. Therefore, to subject laws which are the products of sovereign parliaments to some sort of judicial review was alien to European political thought. Between the two World Wars, Austria was the leading example of the review of constitutionality in Europe inspired by the ideas of the distinguished jurist Hans Kelsen. But the Austrian example remained a lonely one. Until after the end of the Second World War, the idea of the judicial review of the constitutionality of laws did not take root in Europe.

But the painful experiences of the mankind especially in the first half of the twentieth century clearly exposed the dangers associated with the majoritarian notions of democracy and the equation of public good with the unrestricted will of the majority. Today, most democratic theorists would agree that the true meaning of democracy is liberal democracy, i.e. constitutional and limited government. And it was increasingly realised that judicial review of the constitutionality of laws was one of the most effective ways of limiting the power of the rulers and one of the most effective ways to protect the freedoms of the governed.

Following the end of the Second World War, two important European countries, the Federal Republic of Germany and Italy established Constitutional Courts in their post-war constitutions. Turkey, inspired by these two examples, followed suit in her Constitution of 1961. Yet, the real breakthrough in the development of constitutional review came with what Huntington called the ‘‘third wave of democracy’’, namely the period starting with the Portuguese revolution of 1974 to the present time. All European countries which made a transition to democracy during this period accepted the principle of the review of constitutionality and established constitutional courts. So much so that today constitutional review is considered an indispensable ingredient of liberal democracy and a necessary step in democratisation.

Acceptance, in principle, of review of constitutionality leaves a number of important questions open and gives the country concerned the possibility of choosing among different institutional options. For there is no single model of constitutional jurisdiction, but several models and still a larger number of combinations between them. First of all, a country may choose between what is called the decentralised model of constitutional review (i.e. the American system) which entrusts the regular courts with powers of constitutional review, and a centralised system which concentrates such powers in a specially created constitutional court. Interestingly,

almost all-new European democracies have opted for a centralised system. Then countries may choose between a preventive type of control and repressive control as regards the timing of judicial review. Various systems exist with regard to the method of election of constitutional judges and their tenure. The important point to be emphasized here is that whatever method of selection is chosen, it must ensure the complete independence of the judges vis-à-vis the legislative and executive authorities. With regard to the nature of the review process a choice can be made between what is called abstract norm control and concrete norm control. Most new European constitutions have combined the two in some way. With regard to the abstract norm control an important point is who has the right to initiate review proceedings. As far as the legal effects of the constitutional court rulings are concerned, distinctions can be made between erga omnes and inter partes effects, and between ex tunc and ex nunc effects. Of course, various combinations among these alternatives are possible and indeed most new European constitutions have adopted some form of a mixed system. In view of these alternatives, it is difficult to speak about one single ideal model of constitutional jurisdiction. The adoption of one form or another of judicial review is a decision to be made by individual countries based on their legal traditions and legal culture. It is clear, however, that whatever model is adopted, Constitutional Courts have become an indispensable element in the functioning of constitutional democracy.

Finally, it would be appropriate to mention the role of the Venice Commission, which I have the privilege of representing here, in the establishment and development of constitutional courts in new European democracies. The Venice Commission (its full name is the European Commission for Democracy through Law) is an organ of the Council of Europe created in May 1990 under a partial agreement concluded within the Council of Europe. The driving idea behind the establishment of such a commission was to provide constitutional know-how to the newly emerging democracies in Central and Eastern Europe. Indeed, the Venice Commission has actively collaborated with most of these countries in the preparation of their constitutions, electoral laws, laws on the constitutional courts, on minority rights and other pieces of important legislation with a bearing on their constitutional systems. The Commission provides these services only at the request of the state concerned. It does not impose a solution but its opinions are often heeded in the preparation of a final text. The Commission favours exchanges of views, dialogue and persuasion. In addition to the member states of the Council of Europe, a number of non-member states have associate member or observer status in the Commission. Of these states, the Venice Commission has actively participated in the constitution-making activities of Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Kyrgyztan, and South Africa. In addition to providing such services to member and other states, the Commission from time to time carries out studies and publishes reports at the request of other organs of the Council of Europe, such as the Parliamentary Assembly or the Committee of Ministers.

As early as September 1991, the Commission decided to establish a documentation centre to collect and disseminate constitutional case law. The centre's function was to make such case-law as widely available as possible. The documentation would consist of court decisions and summaries of them, a systematic thesaurus and explanatory notes on the constitutional system of each Member State,

associate member or observer. A liaison officer has been appointed by each court, which contributes to the Bulletin. In January 1993 the Commission began publishing the Bulletin on Constitutional Case-Law, with its summaries of decisions of constitutional courts in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities. The Bulletin is published in English and French three times a year, each issue reporting the main case law during a four-month period. The Bulletin has already become a document widely used by the judges of national constitutional courts, as well as by constitutional scholars.

Thus the Venice Commission, since its inception in 1990, has not only provided useful constitutional services to the new democracies of Europe, but also fostered the exchanges among the constitutional courts of the member states and helped to disseminate knowledge about constitutional institutions and rule of law.