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CONSTITUTIONAL JUSTICE - SOME COMPARATIVE REMARKS

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Conference on
"Constitutional Justice and the Rule of Law"

on the occasion of
the 10th anniversary of the
Constitutional Court of Lithuania
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We are celebrating the tenth anniversary of the Lithuanian Constitutional Court. Such birthdays are frequent events nowadays. In the 'nineties many Constitutional Courts have been founded in Europe. This was the third wave of democratization in Europe and these courts form the third generation of Constitutional Courts. But constitutional developments cannot be seen restricted either to Europe or to the present times. The third generation European courts have been contemporaries of the rise of the global constitutional movement and spreading of constitutional justice around the world. We have also to remember the rise of constitutionalism in Western Europe in the decade after the second WW, but doing so we cannot forget the Civil Rights movement in the USA either. This was a period of reconsidering human rights, of the revival of natural law, an epoch of human dignity and non-discrimination. One could say the *substantive part* of the work has been done that time. In contrast, what we had at the end of the century was rather an *institutional* development: a sudden mushrooming of Constitutional Courts everywhere. Such an explosion like expansion of an institution would not have been possible without following models. The crucial question is however not to set up institutions - it is easy -, but how they work. Today, any comparison between Constitutional Courts is at the same time an account the process of receiving and mastering both institutional and substantive standards. What the third generation produced was by no ways a simple imitation. The development of constitutional justice reveals rather a set of new problems both for new and old courts.

2.

Historically, the American and the European constitutional justice had not the same theoretical foundation. But apart from legal philosophy, constitutional review carried out by all courts in America and the "negative legislation" by the special Austrian *Verfassungsgerichtshof* was quite different in fact. 1949 a third type of Constitutional Court emerged. This was the German Constitutional Court, which became then decisive for the further development of constitutional justice and served as model for subsequent Courts. The German Court unified the American individual protection of fundamental rights with Kelsen's abstract norm control. Through the "constitutional complaint" (*Verfassungsbeschwerde*) the German Constitutional Court offered an individual remedy of highest order in constitutional matters for everybody. It was accessible to all citizens and not only for high State organs, to which the right to file an abstract norm control is usually limited. Being the sole organ for constitutional review the German Court cannot select the cases for itself like the US Supreme Court. At the same time the German Court preserved the status of the Austrian Constitutional Court outside of the ordinary judiciary, moreover, it developed into a unique, separate "constitutional organ" placed *above* the ordinary judiciary. Likewise it followed the Austrian tradition of the abstract norm control. This double function – the review of laws and protection of individual rights – continued in the second generation of the European constitutional courts in Spain and Portugal. The question how to satisfy both functions remained valid also for the third generation and no future Constitutional Court will be able to escape it.

The third generation, the Constitutional Courts emerging after the collapse of Communism, seems however return to the Austrian model with the dominance of the abstract norm control.[1] Their main, defining competence is the *a posteriori* abstract norm control.[2]

[1] Only four or five out of about thirty courts can review individual cases, that is, decisions of ordinary courts. Under the name of "constitutional complaint" the new courts typically review a law that was applied in an individual case, and if the law is annihilated the concerned party may have his case reopened before the ordinary court.

According to the competences we have three types of Constitutional Courts: the American and the opposing Austrian model, further the German-type court, which unifies important traits of both of the previous. However European courts have common traits. Such is their abstract character. Abstractness is not confined to the abstract norm control. While the US Supreme Court refused to give advisory opinion to the President from the beginning, many European courts may deliver an abstract interpretation of the constitution, that is, an advisory opinion, which is however binding. Although there is always a concrete – and mostly delicate political – issue in the background the courts keep the opinion in abstract terms. It sounds as a law and has the force of a law. Such opinions usually transgress the border between interpreting and writing the Constitution. Another abstract competence is that - under different names and using various techniques - European courts can oblige the parliament or government to pass a law, the content of which is determined by the constitutional court. In the German original this is the "non-compatibility" of a law with the Constitution. The institution developed fully in the third generation. Many of the new courts can establish the *unconstitutional omission of the legislature to pass an act*. The court sets a deadline for passing the law and usually tells the law-maker how to fill the gap.

The abstract competences have twofold consequences. Abstract norm control – reviewing and possibly killing a law without any concrete case or violation of rights of an individual – makes the conflict with the legislative branch open and provocative. Furthermore the historical origins of the European Constitutional Courts support their self-conscious activism. All the three generations of the European Courts have been created within a democratic change and out of distrust in majoritarian institutions. The Constitutional Courts may justly believe they represent the essence of the democratic change, and enjoy "revolutionary legitimacy."

On the other hand the Courts avoid annihilating a law of the parliament if possible. Instead they establish the constitutional meaning of the law in which it can be maintained. Both the non-conformity with the Constitution and the competence for establishing legislative omission can also be used instead of killing laws. In this way cooperation is offered to the legislator. The parliament feels not being humiliated by annihilation of its acts and is ready to follow the advice of the constitutional court in the subsequent legislation. Mitigating conflicts and cooperation help to avoid clashes with the legislator. But at the same time the constitutional court turns her role from the "negative legislator" to positive legislator. The court tell the legislator how to fill gaps and how to correct unconstitutional laws. Moreover European courts go far beyond abstractly formulated tests of constitutionality, which is practiced also in America. Their statements of principle work as legal rules. Abstractly formulated rules frequently appear on the top of the decision. Many new courts put positive rules into the operative part of the decision. Such rules are generally binding.

On the other side, the Austrian type Constitutional Courts that form the majority of the third generation are unable to give remedy in individual cases. This remains for the ordinary courts. It is an open question whether ordinary judges are ready to deliberate constitutional problems; if ready, whether they are able, and even if so, whether this will not result in double standards of constitutionality. The actual question for all Kelsenian courts is how to maintain the monopoly of the final interpretation of the Constitution. As like as the

[2] The review of the constitutionality of a law – with the power to declare it null and void – makes a court a constitutional court. This follows from Kelsen's conception and this is the requirement for the admission to the Conference of the European Constitutional courts as well.

Constitutional Courts could find a way to compromise with the legislative, they may be able to respect the sensitivity of the judicial branch, but at the same time to enforce the Constitutional Courts' interpretation of the Constitution. A possible means for it is the Italian *diritto vivente*: the Constitutional Court reviews the law not as it has been written and promulgated but in the meaning as it is applied by the judicial practice.

3.

Turning from the competences of Constitutional Courts to the substance of their jurisprudence we have another dimension of comparison. On this occasion it's not possible to go into details and to analyze concrete decisions of the Courts. We must be satisfied with general remarks on the conditions of mutual interdependence of constitutional jurisdictions.

It's generally known that new generations are receiving the standards and techniques developed by former Constitutional Courts in a shorter and shorter time although the material to be mastered had grown intensively. For the third generation ten years may be enough to reach the level and develop the richness of jurisprudence, for which the first generation needed forty years hard work. Traditional influence zones of French or German law can be identified rather in the structure and powers of Constitutional Courts than in their jurisprudence, and appear more in the overall legal culture than in constitutional decisions. A strong, and traditional, German impact is nevertheless obvious in Poland, Hungary, the Czech Republic and Slovenia. America was also racing for influence in the political and institutional reconstruction. The assistance programs were however often ill-considered owing to lack of knowledge of the history and the present stage of development of specific countries and were therefore not welcomed in Central European States, which have got their constitutional traditions and wanted to revive them. So the US Supreme Court or the American doctrine is just one of the normal sources of information. Its impact in some fields – for instance in free speech cases – can equally be demonstrated in old and new courts.

The third generation of Constitutional Courts was born into a favourable international environment. The Courts had a world of flourishing international human rights jurisdiction around themselves. The unifying effect of Strasbourg and Luxemburg cases is natural in member States to the respective treaties. But we have many examples of citing their judgments by Constitutional Courts of States, for which these judgments were or are still not binding. The new courts found already a common European language of constitutionality, which they not only learned to speak but were also able to express new ideas in that language. That is, ideas of new courts could also be received by the old ones. Receiving international standards included far more than adaptation, it was a mutual process. The real interchange of ideas has been supported by the unique publicity, which the international political situation offered to the new courts. Although only the Constitutional Court of South Africa is obliged by the Constitution to consider foreign constitutional cases, the constitutional courts today usually work on a comparative law basis. A good example is the way of new ideas for abolishing capital punishment, which differ from the American argument. This way can be followed from Hungary to South Africa and then to the Baltic States, and then down to the Ukraine and Albania. On the other side the new mechanism for international co-operation should be mentioned: the Conference of the European Constitutional Courts, and the Commission for Democracy through Law, the "Venice Commission". The integrative impact of the Venice Commission has been momentous indeed and it serves the globalization of constitutional justice. Besides the official collection of court decisions a new body of authoritative opinions in constitutional matters is emerging. I think of the opinions of the Venice Commission, which extend beyond justicable problems and may cover all fields of human rights and democracy and are especially open for innovative ideas. One has also to take notice of an interesting personal overlapping. Many persons sit once in an international

court, once in a domestic constitutional court and serve another time in the Venice Commission. This surely contributes to the coherence of constitutional standards.

Now the situation is changing again. A Constitution for the European Union with a chapter of fundamental rights will be adopted soon. Many of the States of the third generation Courts will become member of the European Union. This will be a further step towards the integration and unification of the substance of human rights protection. I wish that the innovative potential inherent in the diversity of competences and character of the generations of European Constitutional Courts will not be lost either.