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REPORT

**“CONSTITUTIONAL REVIEW DESIGN AND FUNCTIONS
IMPLICATIONS FOR THE SEPARATION OF POWERS”**

**by
Mr Evgeni TANCHEV
(Member, Bulgaria)**

Introductory Remarks

Since the subject Control of Constitutionality Models and Structures and their interaction with other institutions has been overwritten I would not volunteer to join the rehearsal of all that have spoken on the subject or I will not follow the famous saying originating from the mother of modern legislatures – the British Parliament that everything has been said already but not by everybody.

This was the main reason to address the rich topic of this conference by speculating how Constitutional Review Design and Functions influenced the Separation of Powers.

I will reduce the impact only on legislative power for the lack of time and effort saving. However, it would be more than enough to observe that there are many paths through which the separation of powers principle is affected. They go beyond the traditional dilemmas which place constitutional review institutionalization within or outside the judicial branch or in a sui generis position between constitutional review by judiciary or political control by (non-judicial body) checking legislation to be in conformity with the constitution.

In my contribution I will concentrate on the historical, institutional and functional context instrumental to the generation of negative versus positive legislator dilemma.

1. Control of Constitutionality Models and Structures

Control of constitutionality of laws exists in various forms in contemporary world. As a general rule control of constitutionality should be located outside the Legislative and the Executive branches of power.¹ There have not been any serious attempts to entrust control of constitutionality to the Executive, although even at Philadelphia some of the framers considered a Council of Revision to the Chief Executive and in Bulgaria in 1879 Tirnovo Constitution and during 1980ies there were proposals to create analogous organ to the President.²

Efforts to include control of constitutionality among the powers of Legislature were equally meaningless for the only result would have been an omnipotent despotic parliament or a convention like that of 1793 during the Jacobin regime in France. Instead of controlling the Legislature control of constitutionality would have been transformed into a formidable weapon of legislative control. Constitutional supremacy would have lost any meaning for it would have been dissolved into Legislative supremacy.

The most frequent solution in common the models of constitutional review of laws is vesting this function in the courts, or creating a special institution outside the traditional judicial power, but never attributing the function to the Legislative or the Executive branches. One can remember the justification by Al. Hamilton³ in the Federalist Papers and Alexander Bickel's book "The Least Dangerous Branch".

¹ **G. Haratyunyan, A. Mavcic**, The Constitutional Review and Its Development in the Modern World, Yerevan-Lybyana, 1999, 12-35.

² Luckily these efforts did not prevail for attributing the control of constitutionality function to the head of state would no doubt lead to a one man rule. For it is a well-known fact that this power was inherent prerogative of absolutist kings or dictators although resting on a very specific prerequisite. The king alone could control constitutionality for he was the only person to know what the constitution is for it was time when *raison d'état*, monarchical sovereignty and the rule of man and not of laws were principles of state.

³ "Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honours, but holds the sword of the community.

The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no

Since J.J. Rousseau and J. Bentham's proponents of the popular sovereignty and legislative supremacy doctrines still argue on the admissibility and rationality of entrusting constitutional review to the courts. In the words of J. Bentham "Give to the Judges a power of annulling the acts(laws);and you transfer a portion of the supreme power from assembly, which the people have had some share, at least, in choosing, to a set of men in the choice of whom, they have not the least imaginable share." 4

To this argument has been added a very small portion by the followers which especially enjoy to label and accuse judges of legislative and even constituent power encroachment or usurpation when they declare a law, repugnant to the constitution to be void. By interpreting the constitution the courts develop the meaning of the constitutional provisions and in fact adapt the constitution to the new realities. (In the T. Jefferson's words the constitution belongs to the living and not to the dead).

Sometimes the Courts are qualified as an independent policy makers, leaders of a public opinion, arbiter in the conflicts between the powers, catalyst of social change and the basic institutions which lead America to a "government by judiciary" 5. The European equivalent founded on American experience appeared after the end of the First World War when on the ashes of the Austro Hungarian Empire in the constitutions of the new democratic nation states the constitutional courts were established.6

The critics of judicial review of constitutionality of laws label the Supreme Court as a supreme legislator7, super legislature8, last resort that discovers the framers intent9 and a third chamber or permanent constitutional convention10.

According to the structures for its implementation control of constitutionality might be diffused (de-concentrated) or concentrated one. In a diffused system judicial review is carried by plural institutions, usually the courts and in the concentrated system constitutional control is vested in a single institution being a court or a special council for constitutional supervision.

Prior Control of Constitutionality used to be the only available form in the Vth French Republic until the latest reforms of constitutional review, while in other countries like Austria, Hungary and others it was combined with posterior control of constitutionality.

direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary" **Al. Hamilton, J. Madison, J. Jay**, Federalist Paper #78 – The Judiciary will always be least dangerous to the political rights of the Constitution

⁴ **J. Bentham**, A Comment on the Fragment of Government, London, 1974, 488

⁵ The New American Political System, 1980, 17, **A. Bickel**, The Least Dangerous Branch, 229, H.J. Abraham, Freedom and the Court, N.Y., 1978, 6, **R. Neely**, How Courts Govern America, New York, 1981, 12-19

⁶ See **E. Lambert**, *Le Gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis*, Marcel Giard & cie eds, 1921

⁷ **A. Berle**, The Three Faces of Power, 1967, 49

⁸ **К.Шмитт**. Государство; Право и политика. Гарант конституции, Москва, 2013, 42-86; **П. Киров**, Президентът в българския конституционен модел, София, 2004, 226-248; **A. S. Miller**, Judicial Activism and American Constitutionalism, in Constitutionalism, ed. J. R. Pennock, N.Y., 1979, 357

⁹ **E. Corwin**, The Constitution and What it Means Today, Washington, 1957, 252

¹⁰ **L. Hand**, The Bill of Rights, Harvard, 1957, 73

Prior control of constitutionality can be only an abstract one while posterior control of constitutionality can be either abstract or a concrete one.

Various systems of control of constitutionality are exercised by four models in the cotemporary world.

The American model of JR has been implemented in Japan, Norway, Denmark, Brazil, Argentine, Chile, Honduras, Guatemala and other countries in Latin America during the periods when they have democratic constitutions. Judicial review is carried by all the courts in the judicial system.

Judicial review might be vested in the Supreme Court. This model of is developed in the constitutional system of India, Australia, Swiss Confederation, Ireland, Canada, South Africa and others. No other courts can decide on constitutionality except the supreme court of the country. The common argument is that the control of constitutionality of laws is sophisticated activity and it should be available only to the justices that are trained best and have a long experience.

Control of constitutionality is concentrated in a special court - Constitutional Court This system prevails in Europe and the best examples are Austria, Germany, Italy, Spain, Portugal, Turkey, most of the constitutional democracies in Central and Eastern Europe, independent republics of the former Soviet Union and others. There is an interesting peculiarity, however in Germany. The concentrated control of constitutionality, performed by the Federal Constitutional court has not been devised to eliminate totally the diffused system of judicial review. While the Constitutional court has the exclusive jurisdiction to revise the Federal statutes, all the German courts can exercise judicial review revising other acts which might be contradictory to the constitution.

All of the constitutions of the emerging democracies have already introduced Constitutional courts. And even the constitutions in the breakaway former Soviet Union republics have implemented this model to replace the committees for constitutional revision established during the Gorby's Perestroika but proven to be an unsuccessful experiment.

The Constitutional court pattern was established first in the Austrian 1920 constitution. This was the original idea of a concentrated and firmly institutionalized judicial review initiated by the famous European scholar H. Kelsen. Almost simultaneously the idea was developed in the 1920 Constitution of Czechoslovakia. However, before the end of the World War II the control of constitutionality did not meet the expectations of the constitution makers. The Constitutional courts were most active in settling disputes between the federal and the member states governments. Since authoritarianism and totalitarianism were opposed to the rule of law Constitutional courts flourished in the post-World War II constitutions in Europe.

In contrast to the U S Supreme court the constitutional courts have to resolve controversies arising in political life for example concerning the results of the general elections, checking the validity of parliamentary mandates, deciding on the constitutionality of a political party, the refusal of some elected representatives to take an oath to the Constitution on the grounds that they oppose some provisions of the constitution.

In contrast to the American judicial review the Constitutional courts annul the law or a part of it that is considered to be unconstitutional and their decision has an erga omnes effect.

Some of the constitutional courts have the power to provide interpretation of the provisions of the constitution.

Some of the constitutional courts are devised to compensate the lack of a second chamber of the parliament during a Presidential impeachment, since some of the European countries provide for unicameral representative assemblies.

Some of the constitutional courts combine prior control of constitutionality with posterior judicial review which is performed after the act has been enforced (Hungary)

Control of constitutionality is vested in a specially created political institution which is not a court. This institution is situated out of the traditional branches of power. This unique system of control of constitutionality was devised in the constitution of the Vth French Republic and with some amendments is successfully functioning in France since 1958. However, analogous model has been a complete failure in the former Soviet Union.

Conseil Constitutionnel was the first and reluctant institutionalisation of the control of constitutionality in France although the idea was launched during the French revolution by abbey Sieyes. Dictatorial regimes, notions of parliamentary supremacy and popular sovereignty leading to plebiscitary democracy were opposed to control of constitutionality for century and a half after the revolution.

Initially Conseil Constitutionnel was conceived as an autocratic instrument of the Executive power, for the president or the Prime minister alone had the standing to ask for revision of the parliamentary draft bills.

During 1970s a very important constitutional amendment granted standing to a certain number of the members of each one of the both houses of Parliament.

Another important step was made by Conseil Constitutionnel itself. In one of its decisions Conseil broadened the scope of constitutional content, invoking the Preamble of the constitution, in which the two great declarations of rights are included. Since then Conseil Constitutionnel has assumed the status of a guardian of the fundamental rights and liberties.

Council of the Guardians of the Constitution (Iran,1979)

This institution has been established for the purpose of safeguarding the principles of Islam and the constitution and to avoid any conflict between these principles and the laws of parliament. (Art. 91).The Council of guardians consists of six members of the clergy "who are just, are knowledgeable in Islamic jurisprudence, and are aware of the needs of the times". They are selected by the Leader of the Country. (It is worth noting that the leader, according to the Article 110 is to appoint the highest judicial authorities of the country). Another six lawyers from various branches of law, "from among the Moslem lawyers" are nominated by the Supreme council of the Judiciary and confirmed by the Assembly.

2. Constitutional Review Functions

Constitutional provisions and legislative norms attribute constitutional courts long lists of powers that are most often identified or regarded as functions. When constitutional court functions are identified with powers although, they vary considerably from country to country in addition to the constitutional review of laws, their jurisdiction might include controlling electoral processes and cancellation of the elections, guaranteeing the autonomy of municipalities, policing the constitutionality of political parties or resolving criminal proceedings against high government officials.

Deciding on conformity of the international treaties before ratification by the parliament to the nation state constitution or judging the compliance of laws to the international treaties

already signed ratified and enforced and the international customary law principles consists another particular set of issues in the list of constitutional courts powers.

It should be noted that while the list of powers entrusted to the constitutional courts are mistakenly treated for functions they are only means or weapons instrumental to carry the functions of judicial review of constitutionality of laws.

Although the genesis and evolution of constitutional review followed different pattern depending on the constitutional design and the legal family to which the particular institution that was assigned to review the parliamentary legislations compliance to the constitution belonged they have shared the same set of liberal democratic principles and values. Protection of the rule of law starting with the constitutional supremacy and fundamental human rights has been the common denominator while the difference concerned paths of development, growth, logistics of enforcement and quantity of the courts enforcing constitutional review.

Often the genesis and development of the institutionalized patterns of constitutional review has been interpreted to be a pure intellectual exercise of judges and professors rather than as being an outcome of the essential features of Anglo American (Anglo Saxon) and civil law systems. With no intention to diminish Chief justice John Marshall or Hans Kelsen's contributions in the area of founding constitutional review it seems that the legal family context is somewhat more influential and is crucial to the content and form of principles and agents of constitutional review introduced. Both legal families attributed different roles to the judges and legislators. Within the common law tradition the law was developed mostly by the judges' finding the legal rule to reach judicial decision complying to justice in every concrete case. By the system of precedent the validity of the rule acquired normative meaning by applying it to the identical cases and situations.

While in the US since colonial times judges were trusted and held in high esteem, in Europe courts were looked with a great suspicion by the parliamentarians and officials in the Executive bodies.

Two premises were indispensable for the emerging of diffuse decentralised incidental judicial review of constitutionality of legislation – the system of precedent and courts of general jurisdiction. Lack of these premises doomed to failure all efforts to transplant the American system on the European soil¹¹ Within the civil law family especially after the French revolution the system of positive legislation and general validity rulemaking was affirmed on one side and different limitations on judge made law were devised and imposed, on the other.¹² Within the separation of powers Judges were assigned to be only the mouth of the law.¹³ The ultimate forms of these were the prohibition for the judges to enforce the laws but not to interpret them, known as “gramophone justice” meaning that the judge is

¹¹ See **Louis Favoreu**, *Le Cours constitutionnelles* 1996 (Луи Фаворьо, Конституционните съдилища, София 2002, 10-15).

¹² Some attribute genesis of centralized of centralized concentrated constitutional review having jurisdictional monopoly over constitutional issues to legal education in Europe, the role of career judges in deciding policy issues, the merger of the executive and legislative power in the prime minister through his position as leader of the party that has won the general elections, recognition and protection of fundamental human rights, **G.F.de Andrade**, *Comparative Constitutional Law: Judicial Review*, *Journal of Constitutional Law*, vol.3, 977

¹³ „Of the three powers above mentioned, the judiciary is in some measure next to nothing: there remain, therefore, only two; and as these have need of a regulating power to moderate them, the part of the legislative body composed of the nobility is extremely proper for this purpose.

It is possible that the law, which is clear sighted in one sense, and blind in another, might, in some cases, be too severe. But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor”. **Montesquieu**, *Spirit of Laws*, bk. 6, CH. 2; BK. 11, CHS. 1--7, 206., www.press-pubs.uchicago.edu/founders/.../v1ch17s9.ht.

under the obligation to play the record that has been produced by the legislator in concrete cases and “telephone justice” when the executive put a pressure on the court to achieve a beneficial decision by the court.¹⁴

Several types of functions might be distinguished among the institutions for judicial or constitutional review. Functions might be divided into universal exemplified by all bodies entrusted or recognized by the constituent power to control compliance to the constitution or specific - consisting of those particular institutions that have been assigned in some nation states to be the guardians of the law of the land. According to their nature constitutional courts functions might be constitutional (legal) or socio political. They might be strictly national when entrusted by nation state constitution to the national courts or supranational if performed by supranational courts. Finally they might be treated as manifest (indispensable), implicit or surrogate when the bodies of constitutional review act to compensate an institution that has not been created by the national constituent authority but exists in other nation state constitutions.

An attempt to review most important functions of the constitutional courts would include the enumeration without any claim produce an exhaustive list of them. It would be also contra productive to declare a priori which of them are more important than the others or to propose a hierarchical structure of various functions of the constitutional courts. However between the functions two groups could be distinguished. The first one would include functions common to all of the constitutional courts and bodies entrusted with the review of constitutionality of laws.

1. Constitutional Courts have been recognized by the constitution drafters to be the Guardians of Constitutional Supremacy. Constitutional courts perform the function of supreme policeman of the Constitution. It seems that all of the Constitutional court powers are oriented in this direction. However, this is obviously the case with the most typical of the powers – abstract control of the constitutionality of laws having erga omnes effect. Where the Constitutional courts were established abstract posterior control has been monopoly of the Constitutional court though constitutionality and constitutional conformity might be recognized and more than this accepted by all other legal subjects until its unconstitutionality would not be declared by the court.

2. Constitutional review has been the voice and Guardian of the constitution’s content as established by the constituent power. According to the classical democratic theory the nation state constituent power being an expression of popular sovereignty creates the constitution and has no place in legislation, practical executive government and adjudication of justice and deciding cases by the courts. The constituent power does not disappear but assumes a latent status or it “falls into sleep”. It springs to life and becomes active when the terms of the constitutional contract need an amendment or the nation and its political elites have arrived to political decision to adopt new constitution.¹⁵ While being in a latent position it is the constitutional court that voices the exact meaning of constitutional provisions, might interpret them but staying within the limits of the founding fathers will. Even the boldest judicial activist should accept that the constitutional court interpretation might update the constitutional provisions but it cannot amend or develop the constitutional content beyond the will of the founders. The process of growth of the constitution is not tantamount to constitutional amendment which is a legitimate monopoly of constituent power as emanation of popular sovereignty.

¹⁴ F. Neumann coined the term phonograph or gramophone justice , see **F. Neumann** the Democratic and Authoritarian state, The Free Press, New York, 1957, 38.

¹⁵ On drafting a constitution as an act of supreme political decision over the type and form of political unity see **Carl Schmitt**, Constitutional Theory, Duke Univ.Press, 2008, 75-94.

Within this function the constitutional courts primary role would be in voicing and keeping the content of the constitution as established through popular sovereignty by constituent power. Though it is generally accepted that division between constituent and constituted powers is a monopoly belonging to the civil law family firmly established since E.Sieyes it should be emphasized that in the American system it was stipulated as a premise to the birth and enforcement of judicial constitutional review by the court itself.¹⁶

In the area of constituent power will formation the constitutional review is not supposed to play the function of positive or negative legislator but rather plays a function of executive of the constituted power staying within constitutional limitations but enforcing the true will of the constituent power.

3. Constitutional Courts act as ultimate judicial safeguard of fundamental human rights. No doubt this position of the courts is cornerstone in the legitimation of judicial review of constitutionality of laws. It was the status of the courts as guardians of fundamental constitutional rights and liberties that defeated the radical democratic opposition to review of constitutionality of laws by judiciary. Parliaments are product of direct ascending procedural democratic legitimation through election and are entrusted with the democratic will of the nation or majority of the electorate. To this source of legitimation courts consisting of judges that are never directly elected by the people bring their constitutional legitimacy defending fundamental human right as a last and supreme national institution to protect human rights and ultimate resort to defend constitutional freedom against an encroachment on human rights by parliamentary legislation.

4. Constitutional courts act as border guards containing the state institutions within the constitutional limits of their powers. This function of Constitutional courts has been performed though in different ways and forms with all of their constitutional powers.

5. Constitutional courts act as legal arbiters (legal *pouvoir neutre* contrasted to political *pouvoir neutre* performed by the head of state) or agents of constitutional and legal arbitrage resolving the conflicts. In this respect status of the constitutional courts might be compared to the neutral power or *pouvoir neutre* described by B. Constant¹⁷ and attributed to the head of state conceived to be performing neutral arbitrage to resolve, diminish, accelerate, prevent, mediate institutional conflict or compromise an outcome beneficial to the participants and that whole nation. In contrast to this position of the head of state performing political arbitrage, the constitutional courts exercise constitutional arbitrage – i.e. the conflicts between the powers are resolved on the basis and within the constitution.

6. Constitutional courts act as counter majoritarian check preventing despotic aspirations of majorities in government. In the context of liberal democracy courts perform function of preventing the majority to quash the opposition by protecting minority rights. Probably the most symptomatic of this function has been the action of filing petitions demanding unconstitutionality decision by the parliamentary minorities – parties or MP groups.

With the introduction of direct constitutional complaint individuals when their fundamental rights are abrogated by parliamentary legislation adopted by majority have an important source to impose veto on the tyranny of the majority that has overstepped the constitution by a constitutional court's decision.

¹⁶ UK legal system with the principle of parliamentary sovereignty respected should be considered to be an exception, for the idea that there should be power above the parliament and beyond the reach of parliamentary amendment undermines the parliamentary sovereignty principle. In the famous *Marbury v. Madison* decision judicial review has been affirmed as a safeguard ruling out the option that "the legislature may alter the constitution by an ordinary act" *Marbury v. Madison*, 5.U.S.(1 Cranch) at 177.

¹⁷ **B. Constant**, *Principle of Politics Applicable to All Representative Governments*, in *Political Writings*, Cambridge Univ.Press, 1989,183-194.

7. Constitutional Courts acting as a safety valve to decrease the level of the social pressure, unrest and prevent the constitution and governmental system from self-destruction or destruction by the violent extra constitutional, extra parliamentary or illegal action. One of the first explanations of the function of procedures, devices and institutions acting as a safety valve belongs to N. Machiavelli long before constitutional review of legislation emerged.¹⁸ Another approach by converting a political or extra parliamentary violence into legal conflict one has been emphasized by A. De Tocqueville.¹⁹ Instead of being resolved by violence on the streets the conflicting issue is given in the hands of the court to decide within the constitution and with legal means. By this procedure the degree of social discontent is reduced from the melting pot of boiling emotions and hostilities to impartial and universally accepted procedures by people and institutions where the decision is worked out based on reason with rational arguments.

Without any claim of all inclusive enumeration a list of specific constitutional courts functions would include:

Constitutional courts act as harmonizers of national constitutional and supranational values, principles and norms and resolving conflicts between national and supranational legal orders and institutions. In the context of multilevel constitutionalism constitutional courts harmonize relationship between national and supranational values and resolve conflicts between different constitutional orders.

Constitutional judicial review on parliamentary legislation has been considered as a structural check on governmental power proceeding out or contrary to the constitutional limitations enumerated powers of the institutions. Though situated outside any of the classic branches of constituted powers of legislative, executive and judiciary powers Constitutional courts can be tackled as an important checks on arbitrary powers and on despotic government as a whole.

Constitutional review on parliamentary legislation performs the function of appeal and resort to the constitutional review to protect the constitutional rights and has been entrenched in

¹⁸“To those set forward in a commonwealth as guardians of public freedom, no more useful or necessary authority can be given than the power to accuse, either before the people, or before some council or tribunal, those citizens who in any way have offended against the liberty of their country. A law of this kind has two effects most beneficial to a State: *first*, that the citizens from fear of being accused, do not engage in attempts hurtful to the State, or doing so, are put down at once and without respect of persons: and *next*, that a vent is given for the escape of all those evil humours which, from whatever cause, gather in cities against particular citizens; for unless an outlet be duly provided for these by the laws, they flow into irregular channels and overwhelm the State. There is nothing, therefore, which contributes so much to the stability and permanence of a State, as to take care that the fermentation of these disturbing humours be supplied by operation of law with a recognized outlet” In respect of this incident I repeat what I have just now said, how useful and necessary it is for republics to provide by their laws a channel by which the displeasure of the multitude against a single citizen may find a vent. For when none such is regularly provided, recourse will be had to irregular channels, and these will assuredly lead to much worse results. For when a citizen is borne down by the operation of the ordinary laws, even though he be wronged, little or no disturbance is occasioned to the state: the injury he suffers not being wrought by private violence, nor by foreign force, which are the causes of the overthrow of free institutions, but by public authority and in accordance with public ordinances, which, having definite limits set them, are not likely to pass beyond these so as to endanger the commonwealth”. 40

DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS BY **NICCOLO MACHIAVELLI** CITIZEN AND SECRETARY OF FLORENCE TRANSLATED FROM THE ITALIAN BY NINIAN HILL THOMSON, M.A. A PENN STATE ELECTRONIC CLASSICS CHAPTER VII www2.hn.psu.edu/.../machiavelli/Machiavelli-Discourses-Titus-Livius.pdf

¹⁹ “The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question”, Alexis de Tocqueville, Democracy in America Vintage books, New York, 1945, Volume I, Chapter XVI CAUSES WHICH MITIGATE THE TYRANNY OF THE MAJORITY IN THE UNITED STATES, 290

some constitutions itself is a fundamental human right especially where individual complaint has been provided or through the indirect access to the constitutional courts.²⁰

Constitutional courts exercise transforming function when updating the constitution and providing the growth of the constitution or in T. Jefferson's words the constitution should belong to the living and not to the dead.²¹ Providing new interpretation of the constitutional provisions in the context of new generations and might be instrumental to avoiding the textual constitutional amendment by the constituent power. This function of constitutional review might be indispensable to the avoiding of gridlocks especially in countries with rigid constitutions. It might be instrumental to reduce the cost of the formal constitutional amendment through the cumbersome procedure of election and activity of constituent assembly.

Constitutional courts might play as a substitute (surrogate) or compensating role for the lack of a second chamber of parliament especially in impeachment trials particularly in those countries where the constitution provides impeachment trial while establishing unicameral assembly.

Constitutional courts are ultimate arbiter on legality of the elections and constitutionality of political parties when they are assigned by the constitution and entrusted with powers in that area.

Constitutional courts perform function of a criminal jurisdiction concerning crimes of high government officials with effective sentencing power in the case of finding them guilty if the respective nation state constitution has explicitly provided for this.

3. Attempt of a short Restatement of the Separation of Powers Principle

The complicated contemporary dimensions of the separation of powers do not mean unity of power or simple division of functions and competence between the institutions in the constitutional framework of limited and responsible government. Differentiation of the constituent from constituted powers is a prerequisite to the modern constitutional government, determining constitutional supremacy and the nature of the constitution as a creation of constituent power and popular sovereignty expression.²² The preliminary differentiation of powers is meant to exclude hasty, undemocratic and ill thought constitutional amendment by the constituted organs, which under the legitimate constitutional government are supposed to act within the constitutional limitations. Constituent power performance, however, is limited within the amending of the constitution and ceases to exist after the amendments have been ratified. Governmental functions are to be performed by the constituted powers, after the constituent power has established rules of the game assigned to the political institutions.

The separation of powers, established in the first constitutional generations, is the classical triad of legislative, executive and judicial power attributed to Parliament, Presidency, Cabinet, and the Courts in different patterns, depending on the form of

²⁰ See the Venice Commission special report on the individual complaint CDL-AD(2010)039rev Study on individual access to constitutional justice - Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010) on the basis of comments by Gagik HARUTYUNYAN (Member, Armenia), Angelika NUSSBERGER (Substitute Member, Germany) Peter PACZOLAY (Member, Hungary)

²¹ The basic meaning of famous quotation has been stated in its absolutist form the earth belongs to the living not to the dead T. Jefferson's letter to J. Madison of September 6, 1789, in *The Portable Thomas Jefferson*, ed.. M. Peterson, Viking press, New York, 1975, 444-451, 450

²² Constituent power repositories and the procedure of constitutional amendment are provided in the Chapter IX of the Bulgarian 1991 Constitution. The people acting through the Great National Assembly or Parliament with procedures and super majorities, aiming to achieve high degree of consensus are the sole repositories of constitutional amendment or empowered to adopt a new constitution.

government and political tradition.²³ In defining the horizontal division between the three branches of power, the written constitutions emphasized autonomy, independence, checking, interposition and conflict between the institutions as a safeguard of balance, excluding concentration, abuse and usurpation of power and despotic government.

To this classic triple division a vertical dimension of the principle should be added, due federalism and to a less extent by the devolution, decentralization and deconcentration in the unitary states. In the federal states the horizontal separation between the legislative, executive and judicial branches within Central and State governments is shaped by a priori constitutional vertical division of powers between the institutions of the Federal and member state governments. Exclusive and cooperative competence are the basic method of constitutional limitation in the vertical division of power.²⁴

Legal and political theory contributed to the establishing of specific patterns of implementation of the principle of separation of powers by subdividing or constituting new agents or by emphasizing the impact of extra institutional factors. Foreign affairs was reserved as an independent federal branch while the judiciary was blended with the executive in the Lockean scheme of government. Any attempt to look at the separation of powers principle, especially under the parliamentary government would be incomplete, if the contribution of B.Constant is ignored. *Pouvoir neutre*, attributed to the head of the State - an institution within the constitutional monarchy, according to Constant, was added to the three classic branches of power. Although conceived to frame the balance between monarchic and popular sovereignty, the concept of four branches has been revived and substantially modified within the framework of parliamentary or semi presidential government in modern Europe after the World War II. Presidentialism, however, has been founded on the rigid separation of powers and its Madisonian meaning of checks and balances between the institutions including the psychological dimension where ambition of the politicians in different branches is to counteract and stop the absolutist and despotic trends.

In contemporary constitutional democracies the horizontal separation between the legislative, executive and judicial branches is developed further in the internal differentiation of the institutions, designed as repositories of the three powers. Bicameral legislatures, dualism in the executive, shaped by subdivision between Presidents and Cabinets and differentiation of jurisdictional models with separate, specialized court systems completes structural balance within the separation of powers principle in the modern nation state at the turn of the 20 century. Further the European model of concentrated, abstract, posterior, specialized control, performed by Constitutional Court, devised to protect constitutional supremacy, human rights, being a counter majoritarian check and policing the constituted powers trespass of constitutional limitations.²⁵

The horizontal separation of powers has institutional, functional and political dimensions.

However, there is no constitutional system of government based on absolute separation, non-interaction and conflict, for the balance between the branches is achieved by mutual control through exercising competence checking on each other in order that the institutions be kept within constitutional limitations. After the horizontal division of spheres of

²³ Different constructs of horizontal separation of constituted powers have been created by J.Locke, Montesque, J. Madison, B. Constant, Abbey Mably, W. Badgehot and others

²⁴ In all of the federal states of intergovernmental elements are present and subsidiarity principle has emerged in the federal framework too.

²⁵ The Constitutional Courts, designed after H.Kelsen's scheme in 1920, have been recognized as being primary features in the common European constitutional heritage., **D. Rousseau**, The Concept of European Constitutional Heritage, in the Constitutional Heritage of Europe, European Commission for Democracy through Law, Council of Europe Publishing, Science and Technique of Democracy N 18, Strasbourg, 1997, 16-35

government and their attribution to different institutions has taken place, each of the branches receives within its competence residuary powers belonging to the main spheres of power of the other branches in order mutually to control them against concentration of absolute power. For example the presidential veto is within the domain of the legislative power, but has been attributed to the executive, while by the power of pardon, being of a judicial nature, the president corrects injustice, caused by the judiciary.

While totalitarianism, despotic government, rule by convention and confederacies negate the separation of powers, authoritarian government, plebiscitarian regimes and constitutional dictatorship, legitimated by reason d'état doctrine deform the principle.

Political parties and openness in the public sphere within political pluralism modify the model of the separation of powers principle in the modern constitutionalism and contribute to the interaction, cooperation between the branches of power. Political party systems in the context of the parliamentary government reduces the functional separation between the parliament and executive for the Cabinets control parliamentary majorities and due to the discipline of the mp's can transform the executive political decisions in legislation. Although party mechanism brings to cooperation between the legislative assembly and the executive, which is feature of parliamentary government, the separation of powers does not disappear under the limited constitutional government. Simultaneously due to the political party systems, the European parliamentary governments form the basis of the "soft" or flexible separation of powers, which differs from the rigid model - common to the presidentialism and especially to the US system of government.

The type of the separation of powers - influences the structure of government, institution building, mutual relationship and control, systems of responsibility of the executive to the legislative branch of government and the role of the judiciary in the responsibility of the President, Cabinet and ministers.

Instead of functional division or competence differentiation the separation of powers principle has an impact on the formation, functioning and mutual control and responsibility between the institutions within the constitutional government, based on the rule of law.

Applied to the formation of the institutions of the constituted powers, the separation of powers principle implies independent sources of authority, achieved by the constitution makers by the different ways of constituting the branches. While in the presidential system this effort has lead to totally different sources of formation of the three branches of government in the parliamentary systems differentiation of the sources is not a clear cut one. However, even in a parliamentary government the legislature is directly elected by the people and though it is generally recognized that the executive or cabinet originates from the majority in the representative assembly, the participation of the head of State in the ministerial investiture is a prerequisite to the parliamentary government.

Due to the varying nature of the three constituted powers the three branches of government perform different governmental functions. In exercising their competence they enter in relationships of support and autonomous action, control and interposition, sharing and cooperation. In this phase over exaggeration of Montesque brings to the confusion that there is but a simple division of labor in government. The separation of power principle plays an important role in designing the liberal system of constitutional democratic government with enumerated powers by the mechanisms of responsibility between the branches.

While in the radical democratic theory popular sovereignty and dependence on the will of the electorate has traditionally been conceived as an ultimate check on government, liberal constitutionalism emphasized procedures of control and responsibility checking

despotism and abuse of power.²⁶ To a great extent the control and responsibility in the democratic governance is shaped by blending the ideas from the two political currents - radical democracy and political liberalism.

The legislatures are subject to political control by the electorate, to the executives by the power of dissolution and legally to the Constitutional courts performing judicial review on constitutionality of parliamentary statutes.

The presidential responsibility through impeachment is an exclusive complicated procedure for removing the head of State on limited ground. The political responsibility of ministers to the parliament is engaged by countersignature of the presidential ordinances, who are subrogated and liable to the legislature instead of the President.

The Cabinet is collectively responsible to the Parliament and under no confidence vote is supposed to resign. The individual ministerial responsibility might be political, criminal and civil and depending on its nature might be exercised through the legislature or judicial branch. The cabinet and the ministerial legal acts are subject to control for compliance to the parliamentary legislation by administrative courts.

The Judicial branch, which is more independent from the other branches of power, is under obligation to act within the constitution and laws, drafted by the parliament, but judges having immunity can be removed on very limited grounds by impeachment or by special procedures exercised by the Council of Magistrates.

The short overview of the scheme of formation, performance of functions and responsibility is indicative of multi-dimensional division and counteracting of different agencies of power which cannot be reduced to the division of the functions in government.

In democratic constitutional systems different degrees of separation between the legislative and executive power depend on the form of government and on the particular legal family the country belongs to.

However, the degree of structural and functional autonomy of the judiciary is always greater than of the legislative and executive branches of power, designed to be a forum of political struggle and the most important stake of the party aspirations. Constitutional arrangements on the judicial branch are structurally designed in order to prevent the Judiciary becoming a subject of the political game.

The classic separation of powers principle is further complicated in the context of functional division of political decision making - policy determination, policy execution and control over the political decisions.²⁷ Legislative assemblies, executive organs and judicial bodies might perform separately or blend the functions in the political process within one of the powers. The division of political functions does not coincide with the tripartite separation of between the legislative, executive and judicial branches of government as a sole repository of one of the powers.

It is to this separation of powers scheme that implications of design and functions of the constitutional review are added to complicate the picture further.

²⁶ The first written constitutions mark the beginning of this trend. The necessity of devices for checks and responsibility was justified best by **J. Madison**, see *The Federalist Papers*, New York, 1961, N 51, 322

²⁷ **K. Loewenstein**, *Political Power and the Governmental Process*, Chicago Univ. Press, 1966

4. Negative v. Positive Legislator in the context of Separation of Powers

The European model of concentrated, abstract, posterior, specialized control, performed by a Constitutional Court, devised to protect constitutional supremacy, human rights, supranational law supremacy being a counter majoritarian check and policing the constituted powers trespass of constitutional limitations was considered to be a part of the European Constitutional Heritage.²⁸

In democratic constitutional systems the type of separation between the legislative and executive branches determine on the form of government but degree of structural and functional autonomy of the judiciary is always greater than that of the legislative and executive powers, designed to be a forum of political struggle and the most important stake of the party aspirations. Constitutional arrangements on the judicial branch are structurally designed in order to prevent the Judiciary becoming a subject of political game. The two main columns of the Constitutionality review legitimacy are judicial independence and the Constitutional courts mission as supreme guardians of Human Rights.

The classic separation of powers principle might be further treated in the context of functional division of political decision making - policy determination, policy execution and control over the political decisions.²⁹ Legislative assemblies, executive organs and judicial bodies might perform separately or blend the functions in the political process within one of the powers. The division of political functions does not coincide with the tripartite separation of between the legislative, executive and judicial branches of government as a sole repository of one of the powers. The negative positive legislator dilemma will be further obscured if seen in the context of functional division of political decision making.

Being an institution for posterior, abstract, concentrated and specialized judicial review of the compliance of parliamentary statutes to the Constitution, the Constitutional Court is not assigned any of primary separation of powers of the three constituted branches of government, neither it is situated within the structure of the Judiciary. The Constitutional Court is the main institutional safeguard to the supremacy of the Constitution and to the separation of powers principle. No doubt, the Constitutional Court is a constituted institution with limited powers, but has been attributed a role to keep the other branches of constituted power within the limits of the Constitution, or within the framework of the will of the constituent power. The Constitutional Court acts as intermediary between the constituent power and the legislative, executive and judicial branches of government by policing their functions within the constitutional limitations. The Constitutional jurisdiction occupies the status of juridical arbiter by deciding on the conflicts of competence between the institutions.

To contain the positive legislator within the limits of the constitution a negative one was needed and ordinary courts could not be entrusted with this function since the judges of general jurisdiction were themselves constrained by the parliamentary statutes. Decentralized, diffuse review in the civil law system would be inoperative for the lack of doctrine and practice of stare decisis unifying the system by the rule of the precedent. Thus a specialized constitutional court had to be created and assigned abstract posterior review of parliamentary statute to ensure their compliance to the constitution as the supreme law of the land. ³⁰ Today the constitutional courts or other forms of constitutional review are

²⁸ The Constitutional Courts, designed after Kelsenian scheme in 1920, have been recognized as being primary features in the common European constitutional heritage., **D.Rousseau**, The Concept of European Constitutional Heritage, in the Constitutional Heritage of Europe, European Commission for Democracy through Law, Council of Europe Publishing, Science and Technique of Democracy N 18, Srasbourg, 1997, 16-35

²⁹ **K. Loewenstein**, Political Power and the Governmental Process, Chicago Univ. Press, 1966

³⁰ For extensive treatment see **V.F. Comella**, Constitutional Courts and Democratic Values, Yale Univ. Press, London, 2006, 3-29

universally accepted as a part of the European constitutional heritage³¹. Scholars still argue whether it was due to the popular sovereignty and democratic cravings rising from the grassroots or rather it was introduced by the political elites. ³² The latter has been titled insurance model. By introducing judicial review it is a kind of a security investment protecting a former governing party when stepping out of government to become a party in opposition.³³

By the time when the 1920 Austrian constitution entrenched for the first time constitutional review vested in a specialised constitutional court its very existence was imperilled by three strong critical currents.

The first of them based on popular sovereignty doctrine elevated legislative power as being true one and only expression, a mirror and dependent on peoples will alone. Theoretically it was mutatis mutandis the Jacobin credo based on Rousseau contract social ideas and practically developed by the British parliament sovereignty whose supreme power did not know any limit posed by a written constitution. Despite the constitutional supremacy in the countries with a written constitution it was the parliament and its legislation considered to be embodiment of popular sovereignty delegated in free, pluralist and competitive elections with legislative power unlimited and beyond the reach of any review for conformity with the constitution by any other institution.

The second was the US successful experience affirming decentralised, concrete incidental judicial review exercised by the courts of general jurisdiction affirmed for nearly 12 decades since 1803 Marbury versus Madison case.

The third came from the notion of government by judiciary which was the restraining of the ideas of Rousseau camp but in reverse - a construction making court tantamount to legislative bodies or a body consisting of unelected politically and partial irresponsible conservative judges. A specialised constitutional court enforcing constitutional and later human rights supremacy over legislative and executive branches was regarded as illegitimate conservative reactionary despotism to democratically elected representatives in free, pluralist and competitive elections.

Looking over the vast literature one might get lost among the adjectives that are used when judiciary is humbly labelled as legislator.

Within the context of separation of powers any notion on judiciary possessing or exercising legislative function or even interfering with legislation has been more often humbly whispered in the doctrine or carried in practice with extreme care or in such a hesitation shielded against accusations to the break away from democratic constitutionalism. Judicial role in legislation or legislative function was seen as a heresy to the constitutional orthodoxy endangering separation of powers and undermining judicial independence. Indeed constitutional review of parliamentary statutes, whether institutionalised by a special constitutional court or a body of equivalent jurisdiction, has been a special case for the necessity to pronounce on conformity of laws to the constitution and if found to be in contradiction to declare the statute void ab initio or to annul it ex nunc. Even in that situation, however the coexistence of possible forms and combinations of coexistence between the nouns judiciary and legislation or adjectives of judicial and legislative has been uneasy and

³¹ More than 80% of the written constitutions around the world have special provisions on constitutional review see **T. Ginzburg**, the Global Spread of the Constitutional Review, in the Oxford Handbook on Law and Politics, eds. K. Whittington et al., Oxford University Press, 2008, 81

³² **M. Schor**, Mapping Comparative Judicial Review, Washington University Global Studies Review, vol 7, 2007, 257 -287 www.law.wustl.edu/WUGSLR/Issues/Volume7_2/Schor.pdf

³³ **T. Ginzburg**, Judicial Review in the New Democracies, Constitutional Courts in Asian cases, Cambridge University Press, 2003, 24-25

to qualify a logical controversy was much easier in theory and practice. The concept of constitutionalism as a safeguard of fundamental human rights and limited governance with enumerated powers under the rule of law the constitutional review was meant to protect the constitutional supremacy and not to supply the governmental system with another extra parliamentary channel of legislation.

Situating the constitutional jurisdictions outside of traditional triad of judiciary, legislative and executive branch was no automatic solution to enable systemic explanations. Neither the idea of juridical constitutional arbitrage in contrast to the presidential political arbitrage to the conflicts and interaction between the three branches alone might be productive. Another solution which was developed by H. Kelsen to nourish and defend his constitutional review invention to be performed by the constitutional courts or a hybrid body which closer to legislation but in jurisprudential form or judicial like organ to perform legislative like function of constitutional control. What a danger to democracy this might seem for besides and in addition to this boiling legislative judiciary or judicial legislation mixture contemporary constitutional courts acting as guardians of constitutional supremacy, prevalence of human rights and primacy of international and some of them of EU law are in a position of agents enforcing the constituent power will while at the same time being limited by the constituent power themselves.

But how to eliminate and soften such a radical challenges to the classic separation of powers and constitutional democracy basic principles of popular sovereignty and the rule of law to prevent it from the dangerous transformation into but another absolutism metamorphosis – famous government by judges or imposing judicial legislation. Although due to the position of the judiciary in the continental legal family no danger of this kind has been a real threat, H. Kelsen tempered the radical consequences and repercussions of the constitutional courts on constitutional theory by coining the term of negative legislator.

This might have been the start of the long journey in search of the authentic identity of constitutional jurisprudence. Since then may qualifications have been brought in the political debate. A short but not exhaustive list of positions between the full-fledged positive legislators functions and the limited role of constitutional courts in the area of legislation would certainly include: reluctant legislator, substitute or surrogate legislator, indirect legislator, quasi legislator, demi semi, co-legislator³⁴, legislator in hiding, prompting to the parliament content of the legislation, facilitating future legislation by parliament, expedient legislator (not to be mixed with legislator in during the emergencies) finding temporary solution until the parliament steps in and adopts the necessary statute or provisions etc. Negative legislator status marks the other end of possible interference of constitutional courts with the legislation seems to conclude the whole issue of the constitutional review quasi legislative powers. But are negative and positive legislator's roles antonyms or real diametrical opposites where courts and parliaments are the opposite ends of the creation of legislation within the constitution and complying with the constitution i.e. of a constitutional friendly legislation. Certainly no and not because of the so many intermediary positions already mentioned.

Indeed in 1928 H. Kelsen first contrasted the parliamentary to the judicial activity in the area of legislation. While parliament as a positive legislator is creative and acts on his own initiative deciding when, how and to what extent to regulate, the constitutional court cannot act ex officio but has to be seized in order to control the statutory content compliance to the constitution. So if the parliamentarians can have the autonomy to enact general norms influenced by political and partisan factors striking out legislation should be made only on the grounds of non-compliance he constitution and the courts judgement should reflect from

³⁴ **M. Safta**, Developments in Constitutional Review: Constitutional Court: Between the Status of Negative and status of Positive co-legislator. www.businesslawconference.ro/M.Safta

judicial independence in applying the constitution. However he went on to say that these two statuses were not antipodes and de facto can be seen to convert in the process of enacting legislation complying to the constitution. "To annul a law is to assert a general (legislative) norm, because the annulment of a law has the same character as its elaboration – only with a negative sign attached ... A tribunal which has the power to annul a law is, as a result, an organ of legislative power." 35 In a sentence simultaneously with the introduction of the negative legislator shield against critiques he provided the "currency conversion rate" between the negative and positive legislator statuses.

Constitutional courts negative positive legislator status has been approached from different avenues in legal and political theory since H. Kelsen.

It would be unserious to attempt to all inclusive analysis of the all of the doctrines in the present report. It might be stipulated that by picking 3 examples one cannot aspire for the in-depth thorough analysis this topic truly deserves.

In a very original and rational manner L. Favoreu tackled the issue from the context of constitutional jurisdictions. L. Favoreu developed ideas of direct and indirect effect of constitutional review on parliamentary legislative power. He distinguished between downstream impact when statutory provisions are found to be in contradiction to the constitution and upstream impact leading to self-restraint (auto limitation) chilling the legislators ambition in the direct effect of constitutional review on the parliamentary legislation.³⁶

A.S.Sweet analysis brilliantly summarises L.Favoreu concept that the constitutional jurisdictions perform several types of regulation.³⁷ "First, constitutional courts act as either "a counterweight" against a parliamentary majority that is "too powerful" (in France and Spain, for example), or as a "substitute" legislator, where a parliamentary majority "does not exist" (as in Italy).

Second, constitutional review tends to "pacify" politics; "quarrels," which before would have been fought out in partisan terms unrelentingly, are "appeased" and settled more reasonably — with reference to constitutional legality.

Third, L. Favoreu denied that constitutional courts ever "block," "veto," "censor," or "prevent" decisions taken by parliament; instead, they "guide," "direct," "authenticate," and "correct" the legislator, "putting reforms on the right normative track the constitutional one." Thus, far from obstructing the general will, constitutional judges actually legitimise it. Last in the absence of constitutional review...human rights would enjoy no protection."³⁸

A.S. Sweet analysed the legislative role of the constitutional courts from the perspective of consequences for the parliament of decisions when statutory provisions have been declared by the court repugnant to the constitution and in consequence being null and void.

³⁵ **H.Kelsen**, La garantie juridictionnelle de la constitution (La Justice Constitutionnelle) Revue de Droit Public et Science Politique en France et étranger, 1928,197- 257 www.worldcat.org/.../garantie-juridictionnelle-de-la-constitution...; see **A.S.Sweet**, Why Europe Rejected American Judicial Review and Why it May not Matter (2003), Faculty Scholarship Series, Paper 1297, www.digitalcommons.law.yale.edu/fss_papers/1297

³⁶ **L. Favoreu**, The Constitutional Council and Parliament in France in Constitutional Review and Legislation, ed.C.Landfreid, Nomos, Baden-Baden, 1988, 81-109, 104-107

³⁷ A.S.Sweet, The Politics of Constitutional Review in France and in Europe, I.Con, vol 5, N 1, 2007, 69-92 , 85-87 , <http://www.deepdyve.com/lp/oxford-university-press/the-politics-of-constitutional-review-in-france-and-europe-0qLFMMsfMn>

³⁸ Ibid, 86

Brewer Carrias contributed substantially to this discourse. He conducted a comparative study dedicated to the constitutional courts as positive legislators for the 2010 World Congress on Comparative law.

When the constitutional review has proclaimed a parliamentary statute unconstitutional without a doubt the Constitutional jurisdiction has acted as negative legislator.³⁹ This was the direct effect of the constitutional court decision in the area of legislation. Simultaneously the constitutional courts have exercised indirect effect on the parliamentary legislation – not by exerting political pressure which is a part of the interrelationship game between the executive and the legislative branches of power but through anticipatory reaction of the legislature.

Annuling a statute found to contradict the constitution triggers anticipatory reaction in the form of corrective revision. The parliament starts a procedure of adoption of legislative provisions in conformity in order to fill the statute with conforming provisions to the constitution. Although here the parliament and not the court is the positive legislator the parliamentary new legislation has been influenced by the courts decision. So there is no doubt that according to the substance of the new regulation was influenced by the courts decision so the court indirectly takes part in the positive legislation. The ratio decidendi of the constitutional court judgement striking the law as unconstitutional usually prompts or explicitly mentions which path the legislation would have followed in order to be within the constitutional frame instead of the regulation that was found in contradiction to the constitution. A.S.Sweet drove four possible scenarios of legislator's reaction. The prevailing one is when the parliamentary legislation might follow the court's reasoning when adopting the new provisions in line with the constitution. Rarely the legislature might decide to forego the regulation entirely i.e. to return to the position before the passage of the law found not to comply to the constitution. Another option the obstinate parliamentary majority might perceive is to attempt to reformulate the provisions stricken by the court and to replace them with slightly changed wording that repeats the previous attempt found to be unconstitutional.

The new unconstitutionality ruling would follow if the court would be seized.

The final resort of the multiple governing majorities is to amend the constitution as a trump to overcome the function of the negative legislator enforced by the courts judgement nullifying the previous provisions by the legislator.

The European model was transplanted to constitutionalism of the emerging democracies and now EU member states after the fall of the Berlin wall in 1989 including the implication of negative positive legislator's dilemma.⁴⁰ On their part they have made some contributions to the theory and practice of constitutional review some of which are related to the position of the constitutional courts as negative and positive legislator's issue. At least several of them should not be ignored.

A problem which has received scholarly attention belongs to the nature of the interpretative decisions of the constitutional court. The court's binding interpretative decisions have

³⁹ **A.S. Sweet**, The Politics of Constitutional Review in France and in Europe, *I.Con*, vol 5, N 1, 2007, 69-92 ,87 , <http://www.deepdyve.com/lp/oxford-university-press/the-politics-of-constitutional-review-in-france-and-europe-0qLFMMsfMn>

⁴⁰ See **М.Карагьозова-Финкова**, Конституционните юрисдикции в новите демокрации от Европейския съюз, София, 2009; **H.Schwartz**, The Struggle for Constitutional Justice in Post-Communist Europe, University of Chicago Press, 2000; **W. Sadurski**, Twenty Years After the Transition: Constitutional Review in Central and Eastern Europe, *The University of Sidney Law Review*, July 2009, <http://ssrn.com/abstract=1437843>, See **H. Dimitrov**, The Bulgarian Constitutional Court and Its Interpretative Jurisdiction, 37 *Colum. J Transnational Law* 459-505

provided prospective non-adversarial constitutional interpretation which was successful to prevent unconstitutional legislation by resolving the constitutional ambiguity ex ante.

Though interpretative decisions share some of the legal features of the prior control of constitutionality, advisory opinions and preliminary rulings of the European Court of Justice they are unique. Advisory opinions are rendered by the International court of Justice or some of the states' courts in the US on request of government or private parties and indicate how the court would rule if adversary litigation should arise on the same matter. Contrary to the some of the East and Central European as well as some of the Constitutional courts in the now independent republics and former soviet union states the constitutional court interpretative decisions the advisory opinions do not have binding effect. Interpretative decisions are rendered like the preliminary rulings when different opinions on the content of a provision exist and its content is not clear. Both legal phenomena have binding effect – preliminary rulings concerning EU law on the national courts and interpretative decisions of the east and central European constitutional courts on national parliament, president and government to which have to comply their legal acts or actions with the constitutional court holding.

Within the context of the constitutional governance the interpretative decisions affirm the constitutional court's position as the constitution expositor and mediator between the dormant constituent power (which resides in the people or special representative bodies the springs to active position triggered by necessity of constitutional amendment) and the acting institutions of constituted powers i.e. the legislature the executive and the judiciary.

On number of occasions by interpretative decisions the constitutional court ex ante defined certain principles and scope of parliamentary legislation to meet the requirements of the constitution in the area of human rights, freedom of expression and electronic media.

Another of the most controversial issues concerns the consequences after a provision which has been amendment to a parliamentary statute has been declared unconstitutional.⁴¹ The court by interpretation has arrived at conclusion that in this case after its decision has entered in force an automatic revival (resurrection, restoration) of the acting before the amendment takes place. This interpretation was met with many counterarguments the most important of which is that there is no such explicit provision of the constitution and that the automatic revival in fact is a special case of retroactivity of the constitutional court decision. Moreover in Bulgaria, the restoration should be considered contrary to the text of the Art. 22, par. 4 of the Law on the Constitutional Court which states that all of the consequences of the law proclaimed to be unconstitutional have to be arranged by the institution which has adopted it. Another argument against the automatic revival of the acting provisions amended with norms proclaimed to be unconstitutional is that the old provisions contradict to the logic of the new provisions which were considered constitutional. The final result is the paralysis of the whole statute. To perform the revival or reincarnation function courts decisions have to have ex tunc retroactive effect in order to nullify the statutory provision ab initio but instead in the new democracies the court rulings most often enjoy ex nunc binding effect.

When the new democratic constitutions were drafted at the turn of the 20ieth century Retroactivity (ex tunc effect) was thought to undermine the rule of law principle which was considered cornerstone in the founding of the new democracy after the fall of the totalitarian

⁴¹In Austria and in the Constitution of Portugal there are explicit provisions on the revival (reincarnation) of the legal norms which have been amended by provisions proclaimed to be unconstitutional. In 1940 H. Kelsen has explained this solution of the constitution with one of the basic arguments being that it helps to avoid the situation where proclamation of unconstitutionality would lead to lacunae or vacuum in the legislation, **H. Kelsen**, Judicial Review of the Legislation, Journal of Politics, N 4, 1942, 183 ;

system. In general liberal constitutionalism has condemned retroactivity as instrument which undermines social contract, justice, certainty of law and legitimacy of the legal order.⁴²

In principle *ex nunc* effect of the constitutional court's decisions proclaiming unconstitutionality of certain parliamentary statute as a whole or some of its provisions is consonant to the certainty of the legal system and rule of law since it establishes the presumption that until a law is declared contrary to the constitution it is constitutional and should be enforced. However, there are cases when a law that has been declared repugnant to the constitution has seriously affected basic human rights and other democratic values of the constitution. In these circumstances the presumption of constitutionality and impossibility of declaring the law unconstitutional *ab initio* with *ex tunc* constitutional court's decision undermines the rule of law. Things can get even worse if the parliamentary statute which was declared unconstitutional has had retroactive effect itself.

Concluding Remarks

The conclusion that the Constitutional courts as positive/negative or v.v. legislators should be treated as a second hand or the younger child in the family of legislators within the nation state is wrong.⁴³

In other fields of the separation of powers they might play much more decisive role than the parliament or the executive. This is so because only a part of the constitutional court powers are related to the parliamentary legislation while others are pure special, last instance court jurisdictional matters pronouncing final and irreversible judgements that cannot be appealed. Besides all of the powers of the court including legislative one cannot be performed *ex officio* but only if initiated in the form of legal complaint on a juridical conflict by someone of the authorised subjects to seize the court.

Constitutional courts decisions adjudicating constitutionality of political parties, legality of election results, cancellation of elections or mandates, resolving conflict of competences and ruling on impeachment or criminal trial for highest state officials have nothing to do with the legislative function. In these jurisdictional matters the court enjoys full monopoly status for adjudication power is not shared with any other agents of legislative or executive power.

II. Negative – positive legislator position of the constitutional court is present in the following powers of the constitutional jurisdiction.

During the XVIII International Congress in Comparative Law at George Washington University Law School on July 27, 2010, Professor Alan R. Brewer – Carias presented the general report on a big comparative study "Constitutional Courts as Positive Legislators in Comparative Law".⁴⁴ It is so far the most extensive and thorough comparative work where

⁴² One of the most eloquent statements on retroactivity of law belongs to **B. Constant**. In his words "Retroaction is the most evil assault which the law can commit. It means tearing up of the social contract, and the destruction of the conditions on the basis of which society enjoys the rights to demand the individual's obedience, because it deprives him of the guarantees of which society assured him and which were the compensation for the sacrifice which his obedience entailed. Retroaction deprives the law of its real character. A retroactive law is not law at all." **B. Constant**, *Moniteur*. June 1, 1828, 755; Within the natural law theories retroaction was considered a just cause for civil disobedience or murdering of tyrants. "Retroactive laws, that are *ex post facto* law legislation depriving man of life and liberty, violate the principle of the law's neutrality. They are thus illegitimate, and resistance to them is legitimate" **F. Neumann**, *The Democratic and Authoritarian State*, New York, 1957, 158

⁴³ Positive – negative legislators dichotomy in constitutional justice does not transform the fact that the modern nation state belonging to the civil law family in Europe remains a legislative state where the parliament has almost monopoly of statutes drafting or establishing the sources of domestic norms coming second to the Constitution alone despite primacy of supranational law., see **C. Schmitt**, *Legality .Legitimacy*, Duke University Press, 2004, 17-36

⁴⁴ **Alan R. Brewer – Carias**, "Constitutional Courts as Positive Legislators in Comparative Law", XVIII International Congress in Comparative Law in at George Washington University Law School on July 27, 2010,

title boldly addresses straightforward the issue of the judicial role in the area of legislation and the courts as positive legislators. In the very beginning of the study the author poses the limits within which the constitutional review might be considered as positive legislator without reaching a status of irresponsible judicial totalitarianism. "The Constitutional court can assist the legislators in the accomplishment of their functions, but they cannot substitute Legislators and enact legislation, nor have they any discretionary political basis in order to create legal norms or provisions that could not be deducted from the Constitution itself." Analysing the constitutional courts and institutions of equivalent jurisdiction powers to perform constitutional review of legislation Brewer – Carias distinguished four areas where constitutional jurisdictions resemble positive legislators:

The role of Constitutional Courts interfering with the Constituent power, enacting constitutional rules and mutating the Constitution;
The role of Constitutional Courts interfering with parliamentary legislation and playing the role of assistants to the Legislator, complementing statutes, adding to them new provisions and determining the temporal effects of legislation;
The role of Constitutional Courts interfering with absence of legislation due to legislative omissions acting sometimes as provisional legislators;
The Constitutional courts role as Legislators on Matters of Judicial Review;
The Constitutional courts role in providing interpretative decisions on the Constitutional text in case if different understanding of constitutional provisions exist contradictions and obscurities exist in the text ;
The Constitutional courts role in resurrecting producing reincarnation of the older regulation which preceded the provisions annulled by the court as unconstitutional;
The Constitutional courts role in determining temporal action and consequences of statutory provisions declared to be unconstitutional.

III. There are important differences in the legislative roles of Parliaments and Constitutional Courts which should be emphasised.

It is apparent that the constitutional courts negative legislator's performance is clearly different from the parliamentary legislative role. Nevertheless, when the Constitutional Court plays the role of positive legislator it is also different from the positive legislation which is the main competence of parliaments. While parliamentary positive law making is always on the parliament initiative, the court positive legislative function might be triggered only on request of a legal actor empowered to seize the court and the court decision has been based on legislators non-compliance to the constitution

The parliamentarians are free autonomously in picking the subject matter of statutory provisions stipulated that they observe the constitutional limitations. The Constitutional courts cannot exercise their positive /negative legislator's role ex officio. While the parliamentary legislation might be influenced by politics and partisan purposes electoral campaign issues while the constitutional court intervention when deciding cases should result only in the interest of affirming supremacy of constitution, protection of fundamental human rights and primacy of the international and EU law for the EU member states..

IV. When the Constitutional court is not seized it also exerts certain impact on the legislator by disciplining him potentially with the constitutional restraint. The very existence of constitutional review acts as potential threat or prevention to the legislator to observe the constitutional limitations in order to avoid nullification of statutory provisions. In this way the

www.allanbrewercarias.com/, Later the general report and the national reports were printed in a separate volume of more than thousand pages, Allan R. Brewer-Carías, **Constitutional Courts as Positive Legislators** A Comparative Law Study, <http://www.cambridge.org/us/academic/subjects/law/comparative-law/constitutional-courts-positive-legislators-comparative-law-study>

possibility of seizing constitutional court has preventive indirect effect on the legislators will formation or the legislation substance and content. It contains the legislators ambition within constitutional limitations.

V. Negative versus or and Positive legislator in Constitutional court decision is a false dilemma. In fact many combinations and degrees of this interrelationship might be present in every single judgment of the constitutional court. The constitutional courts negative positive dualism in legislation treated according to H.Kelsen "legislation currencies conversion" formula might be further developed and taken to its logical consequences. Most often the hypothesis of direct negative legislator goes hand in hand simultaneous and not as an alternative to the indirect positive legislator in the courts decisions declaring unconstitutionality.

However, this leads to direct positive legislation function of parliament which has the implicit indirect negative law making of legislature.

If the two pairs of legislative roles of courts and parliaments are compared we can conclude that it would be fair to speak about reverse relationship of parliaments and constitutional courts positive versus negative legislation and not ponder on the false dilemma of contraposition of negative to positive legislator or v.v.

VI. In fine. The relationship between constitutional court passivism and judicial activism should be treated within the context of classical and modern constitutionalism built for democratic government with constitutionally enumerated powers.

Within this context the constitutional court is a restraint of arbitrary power breaking the constitution. To restrain the restraint tantamounts to facilitation of governmental despotism despite it might be hidden behind the original intent or supremacy of peoples will arguments. However, the courts have to temper their activism as well in order to prevent becoming an agent of despotism themselves.