This book is dedicated to Prof. Boguslaw Banaszak who has passed away some months before publication. This book represents a tribute which the authors of this book and the Constitutional Court of the Republic of Moldova wish to pay to the professionalism, natural wisdom and warm personality of Prof. Banaszak.

Rainer Arnold, Alexandru Tănase (Eds.)

CONSTITUTIONAL JUSTICE AND EVOLUTION OF INDIVIDUAL RIGHTS

International Conference

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FOREWORD

Constitutions are living instruments. Contemporary constitutionalism lives from transnational dialogue.

During 18 years, international congresses on European and comparative constitutional law brought together academics and constitutional judges from many European and overseas countries in Regensburg, city on the Danube, rich in history and cultural heritage. Common debate, exchange of perspectives and mutual intellectual enrichment through national diversity have always been their intention. In the course of years an international "constitutional law family" has emerged on this basis.

In 2017, for the first time, the Congress took place outside Regensburg, in Chisinau, in cooperation with the Constitutional Court of Moldova. The choice of this congress venue was essentially due to my long years close cooperation and personal friendship with Alexandru Tănase, the former President of the Constitutional Court, the professional excellence of him and of his judges as well as the highly esteemed efficiency of his collaborators. Deep gratitude is owed for the excellent congress organization and for the financial support!

The Congress in Moldova has confirmed the international *Constitutional Law Family* and has inspired it to pursue the way on the road of peaceful understanding and mutual incitation for the ideals of democracy, rule of law and human rights.

Rainer Arnold

FOREWORD

The insertion of individual rights particularly in constitutional acts arises as a guarantee of the existence of the human personality. The originality of civil and personal rights in relation to other categories of fundamental rights consists in the fact that reflect first of all they a moral ideal, and only later a political one, being enshrined in constitutional documents and being categorized as rights of the individual and not of the citizen.

Undoubtedly, today's concern is not the recognition of the existence of individual rights, the holder of which is the person as an essence of everything that is human; it is rather the recognition of their content and scope, which is the task of constitutional justice.

That is why, stemming from the Constitutional Court's mission to ensure the viability of the Constitution for every situation of everyday life, each act of the Constitutional Court is a new piece of the Constitution's mosaic, in which not only elements of the rule of law and democracy must coexist in a unison, but also fundamental human rights. The axiom from which one must start when individual rights are to be observed is that they cannot be sacrificed in the process of ensuring political opportunism.

The blistering increase of the role of technologies in our society may threaten the limits of extension of individual rights, including through legislative or constitutional initiatives to amend the Constitution. Therefore, it is imperative to provide legal, appropriate and effective means, compatible with the ongoing process of modernization and technological development, without diminishing the hard core of fundamental rights.

At the same time, individual rights cannot be exercised *in absurdum*, but may be subject to restrictions which are justified by the goal pursued. Limiting the exercise of individual rights is the challenge of the present day society. Thus,

when considering collective rights and public interests, which envisage national security, public order or criminal prevention, a process that is always a sensitive in terms of regulation, it is necessary to maintain a fair balance between individual interests and rights, on one hand, and those of the society, on the other.

We are witnessing today how international jurisdictions, like national constitutional jurisdictions, apply the test of proportionality while recognizing fundamental rights and the configuration of their sphere in ensuring social balance, the Constitution itself being a regulator in this respect.

The message that I would like to convey is that in the development of the paradigm between the State and the holder of individual rights, constitutional jurisdiction has an overwhelming role in the context of constitutionalization of the legal system, and which through its case-law forms the backbone of the implementation of constitutional law, being a *raison d'être* of the State itself.

I would like to note that constitutional courts have the necessary tools to enrich the whole range of guarantees and ways of protecting fundamental human rights and freedoms through settled disputes of constitutionality and delivered judgments, being an "efficient and dynamic agent" of procedures assimilating and implementing fundamental rights.

The present compilation of reports is a valuable document for professionals and represents an unprecedented theoretical examination of comparative constitutional case-law and the subject of fundamental rights.

At the same time, this publication serves as an occasion to remember the XIX International Congress on European and Comparative Constitutional Law that took place for the first time ever in Chișinău. This collection is valuable through its articles and thanks to the professor Rainer Arnold who is the promoter of the International Congress on European and Comparative Constitutional Law and a faithful supporter of the development of constitutional law in Central and Eastern Europe, including the Republic of Moldova.

Democracy through law should be regarded through the angle of practitioners, but especially of the doctrinaires who, devoid of political temptations, keep the verticality of the fair interpretation of the law regardless of territorial jurisdictions. We, the lawyers, have the feeling of belonging to the community of free and creative thinking, each contributing to the strengthening of fundamental rights by ensuring legality.

Alexandru Tănase

CONTENTS

THE PROTECTION OF THE INDIVIDUAL IN THE NEW CONSTITUTIONALISM - SOME ASPECTS

Pr. Dr. RAINER ARNOLD*

1. THE ANTHROPOCENTRIC APPROACH OF THE NEW CONSTITUTIONALISM

New constitutionalism in liberal democratic states is characterized by its focus on values, that means on the principle of freedom of the individual which is closely connected with human dignity and which appears in form of specific fundamental rights. It is recognized generally that the principle of freedom requires a comprehensive, complete protection against all dangers for the individual's freedom, dangers which are existent in the presence and which will develop in the future. It does not matter whether fundamental rights are written in the constitutional text or are unwritten. The judges have the competence and even the obligation to derive from the general principle of freedom specific rights even if they are unwritten. The principle of substantive and functional efficiency of the freedom protection is one of the pillars, perhaps the most important pillar of the new constitutionalism.[1]

This can be said in particular for Europe but the same ideas do exist also in other parts of the world, of course only in those states which can be considered as functioning liberal democracies, true democracies and not sham democracies which exist in a considerable number in the world.

What is the new constitutionalism? In a historic perspective it can be roughly said that the period after the end of the Second World War can be qualified in this way, the period in which constitutionalism tries to find ways to avoid the catastrophic developments which happened in the first half of the 20th century. These ways are new political, but also legal, constitutional orientations: the strengthening of human rights on the national and international level, the trust in constitutional justice as a means of efficient guardianship of the new orientation and the opening towards the international community.

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[1] See Rainer Arnold, Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus, in: Max-Emanuel Geis, Markus Winkler, Christian Bickenbach (eds.). Von der Kultur der Verfassung, Festschrift für Friedhelm Hufen zum 70. Geburtstag, C.H. Beck, 2015, 3 – 10.

It is true that long before the middle of the 20th century constitutionalism has been developing in Europe and in some other parts of the world, however not as a regular, functionally advanced phenomenon. Fundamental rights, as far as they have been listed up in constitutional documents, have not been understood as rights directly binding the legislator and defendable before the courts. Their nature was rather programmatic. Their primacy over the legislator was not yet recognized. However, Marbury v. Madison, a landmark decision of the US Supreme Court in 1803[2], had repercussions on legal thinking, promoting in some countries the constitutionality review of legislation by the ordinary courts (in Brazil[3], Portugal[4], to some extent also in Germany[5]). The establishment of a specific Constitutional Court in Austria in 1920[6] with the power to declare legislation void for unconstitutionality has given the significant impulse to the progress of constitutionalism which has started to be realized after the end of the Second World War.

It can be said, in my view, that the new constitutionalism is characterized by the primacy of the individual, while the previous phase of constitutionalism is focused on the primacy of the State. The today's perspective is well reflected by the preamble of the most recent constitutional document in Europe, the EU Fundamental Rights Charter which clearly expresses that national and supranational power have to serve the individual and not vice versa. This basic approach reminds the *dictum of Hermogenianus* that all law is made for the sake of human being (*omne ius hominum causa*).[7]

2. HOW TO CHARACTERIZE THE PROTECTION OF THE INDIVIDUAL IN THE NEW CONSTITUTIONALISM?

a) Constitutionalism is mainly reflected by constitutional jurisprudence. The sheer text of the Constitution does not indicate the developments in constitutional thinking, the text is static, not dynamic and therefore not completely able to explain the will of the Constitution

[2] 5 U.S. (1 Cranch)137 (1803).

[3] See http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda_pt_br/anexo/palestra_berlim1.pdf

[4] G. Haase/K. Struger, Verfassungsgerichtsbarkeit in Europa, 2009,114

[5] „K. Schlaich/St. Korioth, Das Bundesverfassungsgericht, 8th ed., 2010,p.76-79

[6] See H. Schambeck, Hans Kelsen und die Verfassungsgerichtsbarkeit, in: R. Arnold/H. Roth (eds.), Constitutional Courts and Ordinary Courts: Cooperation or Conflict? XVIIth International Congress on European and Comparative Law, Universitätsverlag Regensburg, 2017, 10-21.

[7] D.1,5,2 libro primo Epitomarum

which is a living instrument[8]. *Constitutional law is what you judges say it is*; this often quoted saying of the Governor of New York (which he made in 1907) and later US Supreme Court Judge Charles Evans Hughes characterizes what is the reality of constitutional law.[9] Constitutional reforms are complicated political processes with lengthy debates and inevitable compromises; they are needed for developing the institutional parts of the Constitution which are designed in a necessarily more stricter and clearer way as the Constitution parts regarding values are. The structures of institutions are of a rather pertaining character, less really living parts of the Constitution. Constitutional reforms rather than jurisprudential dynamism come into effect for them. However, also in the field of institutions judicial interpretation can clarify and modernize the functions and ways of cooperation. Examples for both situations from German constitutional law can be on the one hand the everlasting dispute on the adaptation of the financial compensation in a federal system, which has been and is now again in reform, the reform which is carried out through the reform of the federal Constitution as well of the implementing federal legislation[10]. On the other hand, adaptation of institutions to changing circumstances and needs is reflected by the jurisprudence of the Federal Constitutional Court with regard to the army operating outside the NATO context and by use of military force.[11] Although not written in the constitutional text, the consent of the federal parliament as a requirement for use of military force was a result of jurisdiction of the Federal Constitutional Court, of course with reference to correlating written constitutional provisions.

As a conclusion it can be said that the dynamism of constitutional law development is much more up to the constitutional jurisprudence and in particular relevant in the field of values than to the written constitutional text and to the formal constitutional reforms.

This means also that the interpretation and development of the fundamental rights protection reflects mainly from constitutional jurisprudence.

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[8] Loizidou v. Turkey(Preliminary Objections).Application no. 15318/89. Judgment 23 March 1995, para. 70 – 72.

[9] *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), https://archive.org/stream/addressespaperso00hugh#page/138/mode/2up, p. 139

[10] See http://www.bundesfinanzministerium.de/Monatsberichte/2017/08/Inhalte/Kapitel-3-Analysen/3-1-Neuordnung-Bund-Laender-Finanzbeziehungen.html

[11] FCC vol.68,p.1; vol. 77,p. 170; vol. 89, p. 38; vol. 90, p. 286

b) The fundamental rights development in the new constitutionalism is characterized mainly by the following factors:

Fundamental rights are not only written in the Constitution text but do exist also in form of unwritten rights. Of relevance is *the principle of freedom* which derives from human dignity and requires a comprehensive, complete protection of the individual against all dangers for freedom. It does not matter whether they are written or not. This approach explains the tendency of the constitutional judges to formulate new fundamental rights or at least new aspects of fundamental rights which cannot be directly derived from the written text. The principle of freedom does not allow any gap in the protection of the individual. This is the necessary completeness of the freedom protection, what I would call the "substantive efficiency of protection"[12].

The new constitutionalism gives many examples of this tendency realized by constitutional judges on the national, supranational and conventional level.

Substantive efficiency of freedom protection is complemented by *functional* efficiency: fundamental rights are interpreted in the "effet utile" oriented sense[13], giving full protection and adapting to changing conditions in society. It corresponds to the fact that the constitution is a living instrument that fundamental rights are interpreted in an evolutionary way. Furthermore, the restrictions of fundamental rights must be legitimized because freedom is the principle and restrictions for the common interests are exceptions from freedom, which are evidently necessary but must serve a legitimate finality, ultimately in favor of the individual, and have to comply with the requirements of the principle of proportionality. Restrictions can only be established by legislation, under the condition that the constitution permits these restrictions. Legislation gives the consent of the representatives of the people, that is of the community of individuals, is therefore the expression of the individuals' self-determination. Rule of law requires in addition that restrictions are well determined and clearly expressed so that the limitation of freedom can be easily recognized by the concerned persons. The restriction never must infringe the very essence, the nucleus of the fundamental right.

These principles are well-established nowadays in constitutionalism, most of them having been developed by constitutional jurisprudence.

c) This phenomenon is accompanied by increasing importance of the *rule of law* which supports essentially the protection function of fundamental rights. The today's concept is clearly Constitution-oriented, the constitutionality of legislation is in the main focus. At the

[12] See note 1

[13] M. Potacs, Effet utile als Auslegungsgrundsatz, EuR 2009, 465

same time the concept is freedom-oriented and is therefore the basic norm of the constitutional protection of the individual. Fundamental rights, with human dignity as their ideological and legal basis, and rule of law form a "functional unit"[14]. Rule of law is rule of the Constitution and unites the basic principles of the constitutional order of a liberal democratic State. Democracy is also included in so far as it is expression of the political self-determination of the individual, very close therefore to human dignity as it is also pointed out by the German Federal Constitutional Court.[15]

d) Rule of law is no longer a purely national concept, it comprises the respect of international law as well. This is connected with the modern situation of the State which is an "open State"[16] amidst globalization. The national fundamental rights are therefore embedded in the human rights developments of the international community and receive interpretation impulses from there. In integration areas such as in Europe specific protection systems have evolved, in part with the finality of control such as the European Convention of Human Rights, in part as constituting charters such as the European Union Fundamental Rights Charter.

The existing parallelism of national, supranational and conventional rights may arouse, to some extent, interpretation difficulties but is marked by an increasing convergence of the basic constitutional concepts. This is reinforced by institutional interconnection as well as by judicial dialogue. Also in this field constitutional jurisprudence is a pacemaker for the new constitutionalism which is essentially a constitutionalism of various legal orders and their interaction.

3. WHAT ARE THE REASONS FOR THE INDIVIDUAL-RELATED NEW CONSTITUTIONALISM?

This question is difficult to answer and too complex for treating in detail. Only a few reflections can be put forward in this context.

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[14] R. Arnold, L'État de droit comme fondement du constitutionnalisme européen, Revue française de droit constitutionnel, numéro spécial, 25 ans de droit constitutionnel, no 100 (Décembre 2014), 769 – 776.

[15] FCC BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421), http://www.bverfg.de/e/es20090630_2bve000208en.html / 211

[16] See Sommermann,Offene Staatlichkeit: Deutschland, in: Armin von Bogdandy/ Pedro Cruz Villalón/Peter M. Huber (Eds.) Handbuch Ius Publicum Europaeum, vol. 2: Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht, 2008, 3- 35.

a) First of all, there has evolved a new orientation in legal thinking and also in political practice. It must of course be mentioned just at this place that fundamental rights are largely disrespected in many parts of the world. The manifold violations, however, do not hinder to confirm the existence of an individual-related new constitutionalism in true liberal democracies. This encourages me not to abandon the attempt to reflect on this subject at all but to go on trying to make a short analysis of what could have initiated and promoted this new orientation.

This attempt has at first to state that there is not one reason alone but a plurality of reasons which have co-acted and finally led to the mentioned result.

b) It seems evident that the history in the first half of the 20th century marked by wars, unimaginable crimes against humanity, nationalism and closed statehood has strengthened the desire for legally and politically ensuring dignity and freedom of the individual, at the State as well as at the multistate and international level. In that time the States concentrated their intention on banning war and establishing a peace ensuring system, unfortunately without success. The foundation of the United Nations in 1945 has been the start of a new epoch in international law. This was also the starting point for the internationalization of fundamental and human rights.

c) At the State level, guarantees of freedom were increasingly transformed from programmatic norms to subjective rights binding on all public power and efficiently claimable before the courts. This was also the most important or at least one of the most important incentives for the establishment of specific constitutional courts, by expanding the Austrian constitutional court model to many other countries and converting it by this in a European model. In countries with a rather common law tradition the ordinary courts were encouraged to initiate and to intensify a "diffuse" review of legislation[17] (however, a weaker instrument in comparison to the first mentioned type of constitutional justice because unconstitutional legislation could not be nullified but only declared inapplicable in the concrete case within the common law model).

Furthermore: The introduction of the instrument of individual complaint to the constitutional court in a series of countries opened the institutional possibility for the individual to address the courts and ultimately the constitutional courts in defense of their fundamental rights. This had as a consequence

[17] See G. Haase/K. Struger, op.cit., 37-42.

that legal issues of the daily life were examined for their constitutionality and concepts with a specific individual reference have been developed such as the principle of proportionality[18] and elements of the rule of law which protected the position of the individual.

Individual constitutional complaints have been foreseen either as means of review of the whole spectrum of public actions or the review only of legislation which has been applied or is to be applied with impact on individuals. Especially in the first named case the individual complaint is conceived as a subsidiary means to defend fundamental rights, what requires to exhaust the ordinary remedies before being admitted to the review by the constitutional court. The protection of the individual is here and in other cases embedded in the judicial system of the European Convention of Human Rights which reinforces the importance of fundamental and Convention rights. As individual complaints and applications to the national as well as to the European Court of Human Rights are very numerous, filter systems had to be established. Nevertheless, the evolution of the fundamental rights protection has been functionally strengthened to a great extent both by the institutionalization of an individual complaint (against public law actions including last instance court decisions[19] or only against legislation[20]) and by the individual application to address the Court of Strasbourg (even in those countries where no individual complaint to the constitutional court exists).[21]

It shall be underlined that the promotion of fundamental rights can also be effectuated by constitutional justice instruments other than the individual complaint. As fundamental rights being a part of the Constitution have higher rank than legislation and actions of the executive or the decisions of the judiciary they influence on all branches of law and are therefore included in all review instruments of the constitutional courts. We can see that the constitutional courts are the most important promoters of fundamental rights through all their judicial instruments they have at their disposal.

d) Separation of powers is an important element of rule of law, however, is a limit for jurisdictional expansion. In the 19th century it was even the main argument against judicial review of public power acts, however, today it is a principle which is well-respected but not con-

[18] See M. Andreescu, Principul proprtionalitatii in dreptul constitutional, C.H.Beck Bucuresti, 2007.

[19] See e.g. the German system; art. 93.1 no. 4a Basic Law

[20] See e.g. the Polish system Art. 79 Constitution and https://prawo.uni.wroc.pl/sites/default/files/students-resources/skarga%20konstytucyjna.pdf

[21] See e.g. France or Italy, G. Haase/K. Struger, op. Cit., 69-76 and 88-97.

sidered as being contrary to constitutional justice. The rule of law is deemed to find its perfection in constitutional review by judges. This approach has also led to extending constitutional review to all public law actions while political discretion is not under judicial control. Within the field of fundamental rights jurisprudence has significantly specified the personality rights, has defined and fortified human dignity and elaborated different spheres for State intervention: the closer the individual is concerned, the more public intervention is reduced. In the core area of personal life conduct restriction is excluded because it is recognized by jurisprudence that this is an area protected by human dignity which is not able to be restricted at all. Private life which is not part of this core area is exposed to restrictions but under strict control in accordance with the principle of proportionality. The social sphere is open to more intensive interventions but the principle of proportionality is also applicable, though in a less strict form. This three spheres model has been developed by the German constitutional jurisprudence but is in substance also existent in other countries. 22It indicates the relationship between freedom and restriction in a differentiated perspective focusing on the ECHR.

e) The opening of the State to international and supranational orders has also contributed essentially to the promotion of the individuals' rights protection. This has already been pointed out for the ECHR. In countries where the Convention is considered as superior to ordinary legislation, the judges can solve the conflict between national law and the Convention by applying the Convention and not the contradicting legislation. This is a similar process as the constitutionality review of legislation. The same idea is valid for the EU Fundamental Rights Charter.

4. CONCLUSION

The individual and its protection has become the most important subject of constitutionalism. Constitutional law protects the individual in a dynamic and evolutionary way. The concepts developed on the national, supranational and conventional level are converging more and more. The political, technical and economic emancipation of the individual reflects. In the development of law.

[22] See F. Hufen, Staatsrecht II. Grundrechte, 3rd ed. 2011, p. 185-186.

THE CONSTITUTIONAL PRINCIPLE OF MILITARY NEUTRALITY OF THE STATE

ALEXANDRU TĂNASE*

Article 11 of the Moldovan Constitution stipulates that the "Republic of Moldova proclaims its permanent neutrality". The second paragraph of the article specifies that the "Republic of Moldova does not admit the stationing of any foreign military troops on its territory".

The Constitution of the Republic of Moldova was adopted in 1994, when a part of our territory was already under Russian military occupation, as a result of the Russian military aggression from 1992. It is in this context that the issue of the applicability of the Article 11 of the Constitution was brought before the Constitutional Court.

In order to understand exactly the issue, it is necessary to take into consideration the historical background of the formation of the Republic of Moldova.

1. HISTORICAL BACKGROUND

– Creation of the Republic of Moldova

The Moldavian Soviet Socialist Republic (MSSR) was set up by a decision of the Supreme Soviet of the USSR on 2 August 1940. It was formed from a part of Bessarabia taken from Romania on 28 June 1940 following the Molotov-Ribbentrop Pact between the USSR and Nazi Germany and a strip of land on the left bank of the Nistru river in Ukraine (USSR), named Transnistria.

Russian became the official language of the newly Soviet republic. Immediately, the Soviet authorities ordered the change of the Latin alphabet with the Cyrillic alphabet.

On 27 August 1991 the Parliament of the Republic of Moldova adopted the Declaration of Independence, which also refers to the territory of Transnistria.

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* Judge and President of the Constitutional Court of the Republic of Moldova (2011-2017), Member of the Venice Commission

– Separatist movements

From 1989 the soviet authorities have induced movements of resistance to the independence of the Republic of Moldova, that started to act in the southern (Gagauzia) and the eastern (Transnistria) parts of Moldova.

The separatists' military operations were directed by the soviet 14th Army, which coordinated all its actions with the Ministry of Defense of the Russian Federation. The 14th Army had intervened actively, both directly and indirectly, in the Transnistrian conflict, against the armed forces of Moldova.

Taking into account the support offered by the troops of the 14th Army to the separatist forces and the massive transfer of arms and ammunition from the 14th Army's stores to the separatists, it is certain that the Moldovan army was in a position of inferiority that prevented it from regaining control of Transnistria.

On 21 July 1992 the President of the Republic of Moldova, Mr Snegur, and the President of the Russian Federation, Mr Yeltsin, signed *the* Agreement on the principles for the friendly settlement of the armed conflict in the Transnistrian region of the Republic of Moldova. According to Article 1 of this Agreement:

> "The Republic of Moldova and the Russian Federation, striving for the complete and expeditious ceasefire and for the settlement of the armed conflict in the Transnistrian districts by peaceful means, have agreed as follows: As of the signing of the Agreement, the parties to the conflict undertake to take all necessary measures for the complete cease-fire, as well as any armed actions against each other."

I want to explain why I cited this particular paragraph from the Agreement**: unlike the case of Russia's military aggression against Georgia and Ukraine, in the Transnistrian war the Russian Federation appears officially for the first and only time as a belligerent party**.

On 29 July 1994 the Republic of Moldova adopted a new Constitution. It provides, *inter alia*, that Moldova is neutral state and the stationing in its territory of troops belonging to other States is prohibited.

On 21 October 1994 the Republic of Moldova and the Russian Federation signed an agreement concerning the legal status of the military formations of the Russian Federation temporarily present in the territory of the Republic of Moldova.

The second agreement was approved by the Government of the Republic of Moldova alone, on 9 November 1994.

These agreements have never been ratified by the authorities of the Russian Federation and so they never came into force.

In their declaration at the Istanbul summit of 19 November 1999, the heads of State and government of the OSCE States indicated that they were expecting "an early, orderly and complete withdrawal of Russian troops from the Republic of Moldova" and welcomed the commitment by the Russian Federation to complete withdrawal of its forces from the territory of the Republic of Moldova by the end of 2002. However, from 2004, there has been no controlled withdrawal of Russian arms and equipment from Transnistria. Russia used to provide and continues to provide economic and political assistance to the Transnistrian region.

For example, the **14th Army militaries** participated in the elections in Transnistria, in common military maneuvers with the Transnistrian forces, etc. Permanent consular posts, acting as voting bureaus, were opened by the authorities of the Russian Federation on the Transnistrian territory, in the absence of any consent from the authorities of the Republic of Moldova. In 1997, Trasnistrian leader Mr Smirnov was granted Russian nationality

In the Resolution no. 1334 IGD of 17 November 1995, the Duma of the Russian Federation declared Transnistria a "zone of special strategic interest for Russia". Eminent politicians and representatives of the Russian Federation have confirmed on various occasions the support it has lent to Transnistria. Representatives of the Duma and other prominent figures of the Russian Federation have travelled to Transnistria and taken part in official events there. The leader of so called MTR

– "Jurisdiction" over the occupied territories

By a series of judgments, the European Court recognized the *de facto* "jurisdiction" of the Russian Federation over the separatist territory. The Court **considered that the separatist regime could not have survived without the continued military, economic and political support of the Russian Federation** (*Ilascu and others v. Moldova and the Russian Federation*, ECtHR Grand Chamber Judgment of 8 July 2004, *Ivanțoc and others v. Moldova and the Russian Federation*, judgment of 15 November 2011, *Catan and Others v. Moldova and the Russian Federation*, ECtHR Grand Chamber Judgment of 19 October 2012).

The case before the Constitutional Court originated in the complaint lodged on 26 May 2014 by a parliamentary group. The MPs asked the Constitutional Court to explain the effects of the declared neutrality of the Republic of Moldova in the circumstances when a part of the national territory is occupied by the foreign military troops.

In order to answer to this question, the Court analyzed the following aspects related to the military neutrality issue:

1) The law of neutrality

2) Neutrality as an instrument adapted to defend national interests

3) Neutrality and security

4) Interdiction on the stationing of military troops of other states

5) Participation in collective security systems

2. RULING OF THE COURT

Neutrality is a complex concept in international law and in politics, which basically means that such a state does not participate in wars between other states.

Neutrality is not an institution that determines the overall conduct of foreign policy, neither does it define the peacetime position of a permanently neutral state. In particular, traditional practice and doctrine have not prevented neutral states from collaborating with foreign military authorities to prepare joint defense measures. Similarly, a state that has proclaimed itself permanently neutral is under no obligation to extend its neutrality to the political, ideological or economic realms. The only unchanging principle inherent in neutrality is non-participation of the state in armed conflicts between other states.

The law of neutrality grants great freedom of action, and limits the political decision-making of the state only to a very small extent.

Historically, neutrality has never been a rigid, fixed and unchanging institution, neither in its content, nor in its duration. On the contrary, the states have adapted neutrality to international requirements and their own interests.

Neutrality describes the position of a state in a war involving other states. Neutrality is thus defined in relation to tensions and military conflicts, *i.e.* in relation to basic forms of insecurity. It is essentially in this context that it has a function as a foreign and security policy instrument. Such a status is appropriate when antagonistic states or blocs oppose each other and the country in question fears the outbreak of military conflicts in which it may become involved and have to defend itself on its own.

Neutrality should continue as a foreign and security policy instrument, as long as it remains more appropriate than other instruments to safeguard national interests.

In view of the number of interdependent challenges of the final decade of the 20th century and beginning of the 21st century, neutrality cannot be understood as a position of passivity and isolation. Solidarity has always been a de-

termining approach in the current collective security system, because in many fields, the individual interests of the states can be achieved only through the availability to share international responsibilities and to participate in solving international issues and to take part in international decision-making. The interests of the states can be satisfied only through global solidarity, cooperation and participation at regional and global level.

If neutrality meant prohibition of cooperation with other states in the field of security policy, it would have represented a dangerous obstacle for international measures that refer to the elimination of these threats.

The law of neutrality, developed from the beginning of the past century, refers to the behavior of neutral states **in case of war** and does not mention preventive defense measures **during peace.** Insofar as the arms have evolved at the end of last century, and we cannot ensure our defense except through **cooperation with other countries** in certain fields, this cooperation (provided it does not exceed certain limits) shall be considered **compatible with the spirit of neutrality.** This applies even more, given the fact that **a neutral state is not only entitled, but also obliged to take military precaution measures that can be requested reasonably to be able to defend efficiently against possible attacks.**

According to Article 11 of the Moldovan Constitution, there are two distinctive characteristics of the permanent neutrality instrument of the Republic of Moldova.

First, permanent neutrality means that the Republic of Moldova commits itself to stay neutral in any present or future conflict, irrespective of the identity of the belligerents, location and its onset.

Second, the neutrality of the Republic of Moldova means that the Republic of Moldova does not admit the **stationing of foreign military troops on its territory.**

The Court ruled that this, however, does not impede the Republic of Moldova to make use of all its means to defend itself militarily against any aggressor and to prevent any act that is incompatible with its neutrality, which may be committed by the belligerents on its territory.

Article 11 of the Constitution stipulates that the "Republic of Moldova proclaims its permanent neutrality". Although the second paragraph of the article specifies that the "Republic of Moldova does not admit the stationing of any foreign military troops on its territory", since the Soviet occupation of the present territory of the Republic of Moldova (1944-1991) until now, in the Eastern part of the country there are still stationed occupation troops of the Russian Federation.

Practically, the Soviet/Russian occupation has never stopped in the Eastern part of the country, although the independence of the Republic of Moldova has been proclaimed. The Russian Federation has recognized it, but withdrew its army only from the western part of the Moldovan territory (11% of the territory of the Republic of Moldova is still under occupation).

Hence, the fact that the Russian Federation did not withdraw its occupation troops from the Eastern region of the country, but on the contrary, has consolidated its military presence in the Transnistrian region of the Republic of Moldova, this constitutes a **violation of constitutional provisions regarding the independence, sovereignty, territorial integrity and permanent neutrality of the Republic of Moldova, as well as of international law.**

The Court noted that inasmuch the Republic of Moldova remains under military occupation, the more relative are rendered its independence and autonomy, which are required by the status of neutrality.

The Court noted that the **Constitution is not a suicide pact**. Hence, if there is **any threat against fundamental constitutional values, such as national independence, the territorial integrity or the security of the state, the authorities of the Republic of Moldova are under the obligation to take all the necessary measures, including military to defend itself efficiently**.

It is **obvious that neutrality does not constitute an obstacle in the defense policy of the Republic of Moldova**. A too narrow interpretation, limiting very much the defense possibilities, would be a handicap for our country and its citizens. The purpose of neutrality is to enhance the security of the country and not to limit its defense capacity.

Moreover, neutrality cannot be applied to the aggressor, as **the state cannot abstain when it is aggressed.** The neutral state **enjoys the right to legitimate defense** (individual and collective) against an armed attack targeting the sovereignty and territorial integrity of the state.

Modern neutrality does not exclude cooperation with military alliance members to consolidate the defense capacity of the Republic of Moldova. In this partnership context, the peacekeeping operations are perfectly consistent with neutrality. Neutral states, such as Austria, participate actively in the EU crisis management tasks, in accordance with the Lisbon Treaty. Also, Austria cooperates closely with NATO in important and necessary fields, such as crisis management, humanitarian or peacekeeping operations.

The Court ruled that the provisions of Article 11 of the Constitution, according to which no foreign military bases can be stationed on the territory of the Republic of Moldova, *inter alia*, means that no military bases managed and controlled by foreign states can be located on the territory of the Republic of Moldova.

Article 11 of the Constitution should be seen as an instrument of protection, not as an obstacle in protecting the independence, democracy and other constitutional values of the Republic of Moldova.

Participation to a collective security system, which like the UN security system would impose collective sanctions against aggressors and international law offenders, is not in contradiction with neutrality status. The extent to which one security system or another or an alliance are contrary to neutrality status should be estimated on a case-by-case basis, and there is no generally applicable interdiction. The decision shall be based mainly on the answer to the question as to whether participation to a regional defense system is to protect the country and its population more efficiently than non-participation.

Based on these reasons, the Constitutional Court ruled the following:

– the military occupation of a part of the territory of the Republic of Moldova at the moment of declaring neutrality, as well as the lack of international recognition and guarantees of this status, **do not affect the validity of constitutional provisions on neutrality**;
– in the event of **any threats to constitutional fundamental values, such as national independence, territorial integrity or state security, the authorities of the Republic of Moldova are obliged to take all necessary measures, including military that would allow it to efficiently defend against these threats**;
– stationing of any military troops or bases on the territory of the Republic of Moldova *managed and controlled by foreign states,* is unconstitutional;
– the participation of the Republic of Moldova in collective security systems, similar to the United Nations security system, peacekeeping operations, humanitarian operations, etc., which would impose collective sanctions against aggressors and international law offenders, is not in contradiction with the neutrality status.

3. CONCLUSIONS

At the end of my speech, I want to draw your attention to the following conclusions:

The Republic of Moldova was the first case of open military aggression from the Russian Federation in the post-Soviet space. The cowardice and the hesitation of the international community has made my country an easy victim in front of the military, political and economic machinery of the Russian Federation.

Then the aggression against Georgia followed, where again the great Western chancelleries limited themselves to the **expression of concerns**.

Today the Russian Federation has occupied a part of the Ukrainian territory (the Crimean Peninsula) and triggered a war in the Eastern regions of Ukraine.

In September, Russia deployed demonstration of force at the gates of the Europe: I refer to the Zapad-2017 military maneuvers. Nobody can guess what's going to happen next.

If two decades ago the international community would have been firm and would have responded adequately to Russia's military aggression against the Republic of Moldova, it is possible that the aggression against Georgia and Ukraine wouldn't have happened.

Francisco de Goya has published in 1799 the 80 famous engravings, one of which is known today by the phrase "The sleep of reason produces monsters". Paraphrasing Goya, when the reason of the governments falls asleep and their ability to respond adequately to threats is paralyzed by the illusion that these violations do not concern them, monsters take courage. It is enough to recall how Stalin and Hitler triggered World War II in order to understand how close we are today to that red line that can cost mankind millions of human lives.

Our countries are at the crossroad between two civilizations: the European one, which is based on the religion of human rights and the Asian one, for which the person itself has never been a value and which does not recognize anything else than the **force as an argument**. The survival of the small nations at the crossroad between these two civilizations will depend not so much on the ability to adapt to these challenges, but on the ability to react promptly and without hesitation.

THE ROLE OF THE CONSTITUTIONAL AND SUPREME COURTS IN THE EXTENSION OF THE CONSTITUTIONAL CATALOG OF INDIVIDUAL RIGHTS AND FREEDOMS

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1. INTRODUCTION

In the process of modification and adaptation of the constitutional individual rights and freedoms to the current social, economic and political premises, a problem of the unwritten constitutional rights of the individual arises. These are norms that can be deduced from constitutional provisions, although they are not explicitly expressed in the text of the Constitution. They have power equal to the norms of the constitution and are included in the whole complex of constitutional norms. Z. Giacometti[1] formulated the thesis that the enumeration of fundamental rights in a constitution can only be exemplary, since the legislature cannot foresee all possible ways of the state's interference into the various spheres of individual life. Therefore, in addition to the rights enshrined in the constitution, there may, in his opinion, exist "unwritten" rights of equal rank, which should be guaranteed at the time of their implementation. The Swiss Federal Court partially accepted this concept and allowed the existence of "unwritten" constitutional rights of the individual, motivating it in the following respects:

- they are essential for the existence of a democratic system and a federal legal system,
- they create the necessary premises for the existence of individual rights contained in the constitution[2],
- they derive from „the principles that make up the Swiss state system"[3];
- they are contained in the constitutions of the cantons and should therefore be regarded as universally accepted[4].

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[1] Compare: F. Fleiner, Z. Giacometti, *Schweizerischen Bundesstaatsrecht*, Zürich 1976, p. 241-242.

[2] Compare eg. BGE 100 Ia 400-401; 104 Ia 96.

[3] BGE 90 I 29.

[4] Compare eg. BGE 100 Ia 401; 104 Ia 96.

This position has not been approved in most democratic countries. However, one can see its acceptance in some of them - for example, the practice of the French Constitutional Council, which, while relying on the introductory constitutional provisions 1946 still in force, formulates new rights and freedoms that are not in the present in constitutional norms, and treats them as basic principles recognized by the laws of the Republic. It does not usually provide, however, to which of the laws they relate specifically[5]. Thus, in France, similarily as in Switzerland, the catalog of constitutional rights of the individual is expanded. „We are dealing here with a clinical example of the constitutional norms established by the constitutional court"[6].

In some states where the constitutions do not provide for social rights at all or contain little of them, a very interesting evolution of the attitude of the constitutional courts to the social elements of other fundamental rights can be observed. In Germany, the FCT initially recognized that fundamental rights cannot be the basis for claiming state benefits - even in connection with the constitutional principle of the social state. The FCT stated that the way to implement this principle belongs to the legislator, who is "constitutionally obliged to be active in social affairs" and "only when the legislator arbitrarily, ie without substantive justification, fails to meet this obligation, it would give rise to claims that individuals could make through a constitutional complaint"[7]. At the turn of the 1970s, the FCT modified its position and recognized the social function of fundamental rights that ensured individuals 'use', 'participation' (German term *Teilhabe* allowes both translations) in state benefits and, at the same time, treated them as a source of the state's and the legislator's obligation to take care of "equalization of social opposites" and "fair social order"[8]. In the justification of one of his judgments (on recruitment for higher education), the FCT stated, for example: „The more the modern state draws attention to the provision of social security and cultural development to the citizen, the more there comes into the relationship between the citizen and the state apart from the original postulate to guarantee through the fundamental rights a certain sphere that is free from the state, also a complementary claim to guarantee, through the fundamental rights, benefits from the state"[9]. The FCT pointed out that this claim is of par-

[5] Compare: L. Garlicki, *Rada Konstytucyjna a ochrona praw jednostki we Francji*, Warszawa 1993, p. 73.

[6] *Ibidem*, p. 63.

[7] BVerfGE 1, 97 (104).

[8] BVerfGE 22, p. 180 ff.

9 BVerfGE 33, p. 330-331.

ticular importance in cases where the state actually holds a monopoly in directing or managing certain areas of social life (eg education). It should, however, be limited to „what the individual can reasonably demand from the public"[10].

Another example of the extension of the constitutional catalog of individual rights and freedoms can be found in the case law of the Polish Constitutional Tribunal. Although the Constitution does not include the right to life and the principle of the protection of human life in every phase of development, the Constitutional Tribunal brought it out of the provisions of the Constitution not contained in the chapter on the status of individuals. The Constitutional Tribunal came up with the following statement: „The basic rule from which the constitutional protection of human life must be derived is (...) the principle of democratic rule of law. Such a state is realized only as a community of people, and only humans can be the proper subjects of the rights and obligations established in such a state. The basic qualification of man is his life. (...) The value of the constitutionally protected good of human life, including life developing in the prenatal stage, can not be differentiated. There are no criteria for making such a distinction according to the development phase of human life. Since the inception, human life has become a constitutionally protected value „ (judgment of the CT of 28.5.1997, K 26/96, OTK 1997, No. 2, pos. 19).

The Polish Constitutional Tribunal is also the author of the concept of fetal dignity (judgment of 28.5.1997, K 26/96, OTK 1997 No. 2, pos. 19). It rejects thus the academic, not only in legal scinces, ongoing disputes about when life begins, that means when we are dealing with a human being and not a collection of dividing cells, and does not recognize that the word "inherent" may imply that dignity is a characteristics owned to someone who was born, ie left the mother's body. It clearly stands in the position that "inherent" means immanently belonging to every human being, regardless of the stage of development of their life.

2. SUBJECTIVE SCOPE OF CONSTITUTIONAL NORMS CONCERNING INDIVIDUAL RIGHTS AND FREEDOMS

a/ Non-citizens (foreigners, stateless persons)

The constitutional provisions of democratic states can imply the general principle that all the rights guaranteed by individuals are vested in citizens and only certain in foreigners and stateless persons. In the case of non-citizens, constitutional regulation is neither comprehensive nor precise. Indeed, in defining

[10] ibidem p. 333.

the scope of the rights granted to them, it is not enough to confine to the norms of constitutional status but it is also necessary to take into account ordinary laws and international agreements. This principle is laid down by only a few constitutions (eg the Spanish Constitution of 1978 in Article 13, paragraph 1 states that foreigners enjoy the rights guaranteed by the Constitution "within the limits set by the Treaties and the Law"). Consideration should also be given to the case law of the courts. Thanks to it - even in spite of a clear constitutional provision - in the systemic practice there is an extension of the subjective scope of a given citizen's right. An example of this is the judicature of the Swiss Federal Court on Art. 56 of the non-binding Swiss constitution of 1874. From its dogmatic interpretation it can be inferred that it guarantees only the citizens freedom of assembly and the right of association. In the jurisprudence of the Federal Court and of the common courts, however, there has been a tendency to expand the scope of freedom of assembly and the right to associate on non-citizens, while acknowledging that greater restrictions on the exercise of these rights can be imposed on non-citizens than on citizens[11]. Such a view was based in Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that was ratified by Switzerland, conferring freedom of assembly and the right to association to "everyone", and therefore independent of the citizenship of the individual.

As the Polish Constitutional Tribunal stated, it cannot be said that the rights of citizens "are characterized by a special exclusivity ... understood in such a way that if a given right is granted to a Polish citizen, it cannot be granted to citizens of other states, including the citizens of the European Union. (...). The "exclusivity" of the constitutional rights of citizens is not justified in the provisions of the Constitution itself. In particular, not every extension of a particular civil right leads to a breach of the constitutional guarantee granted to this right" (judgment of 11.5.2005 r., K 18/04, OTK-A 2005, No. 5, pos. 49).

In all democratic states there is a contemporary tendency in the case law of constitutional courts and the supreme courts to limit the catalog of rights granted only to citizens to the minimum necessary (political rights, especially electoral right).

b) Legal persons of civil law

The subject of the constitutional rights of an individual includes in many countries also legal persons in civil law. In Germany, Art. 19 paragraph 3 of the

[11] More on this topic: H.R. Arta, *Die Vereins, Versammlungs und Meinungsäuserungsfreiheit der Ausländer*, St. Gallen 1983, p. 66-70.

Basic Law points out that it is only domestic people. In other countries this is governed by ordinary laws (eg Switzerland, Spain)[12], or the extension of the subjective scope of the individual rights has in practice been governed by the activities of state authorities (eg France, Hungary). In some states (eg in Switzerland) it does not matter whether we are dealing with a national or a foreign person, while in others (eg in Spain and France) a rule similar to that in Germany is adopted. It must be emphasized that legal persons of civil law can only benefit from such rights which, by their nature, are applicable to them[13]. In this context, it is worth noting that the Constitutional Tribunal has recognized the scope of constitutional rights not only of natural persons, stating: "(...) the Constitution establishes certain rights and freedoms relating to collective entities (eg political parties, religious associations). It also seems obvious that certain rights, such as property rights or freedoms, such as right on business activity, must include not only natural persons, but also business entities that are not natural persons" (judgment of 8.6.1999, SK 12/98, OTK 1999, No. 5, pos. 96). In a similar position stands the Supreme Court stating: "Although there is no explicit provision in the Constitution of the Republic of Poland that (as far as it is possible) would require proper application of constitutional guarantees of fundamental freedoms and human and civil rights" also to those who are not natural persons, one should take the view that only such interpretation of the provisions of the Constitution (...) is in line with the principle of the democratic rule of law as enshrined in Article 2 of the Constitution" (Court order of 5.4.2002 r., III RN 133/01, OSNP 2002, No. 12, pos. 281). In the courts' case-law practice, however, the recognition of the scope of rights that legal persons may be subject to makes difficulties. (eg. Supreme Court order of 1.10.2007 r., III SW 7/07, OSNP 2008, No. 13–14, pos. 209, where the Supreme Court held that the principle of proportionality established in Art. 31 sec. 3 of the Constitution refers exclusively to natural persons and does not apply to political parties) and it is not possible to provide a directory of these rights for individual types of non-natural persons.

In the 70s of the twentieth century, the Austrian Constitutional Tribunal, through the interpretation of constitutional and statutory norms, established the scope of entities entitled to apply these constitutional protection measures to individual rights and freedoms, extending it to legal persons. No piece of legislation has resolved this issue, and the Constitutional Tribunal, considering spe-

[12] In Spain the civil code, in Switzerland, the federal law of 1943 on the organization of federal justice.

[13] Compare: B. Braud, *La notion de liberie publique en droit français*, LDGJ 1968, p. 209-213.

cific cases, granted legal persons of civil law the right to make a so-called individual application or a complaint against an administrative authority's decision as long as the nature of the law that is thus protected is thereby permitted. Such an exemplification may be a ruling on the subjective scope of the principle of equality, in which the Constitutional Tribunal stated that this principle "is also guaranteed to national legal persons, provided that there is protection against infringement of the principle of equality which may be taken into account in the case of legal persons"[14]. The first ruling going in this direction was already in the interwar period[15], but its jurisprudence in this area developed only after 1950[16] and covered both domestic and foreign legal entities. This extension of the scope of the individual complaint has been positively accepted in Austrian doctrine of law[17].

The Austrian Constitutional Tribunal has also recognized the legitimacy of legal persons of public law on a number of occasions to complain about administrative decisions if they operate within civil law relationships[18].

3. HORIZONTAL VALIDITY OF CONSTITUTIONAL NORMS CONCERNING INDIVIDUAL RIGHTS AND FREEDOMS

The constitutions of most democracies do not speak directly about the horizontal impact of individual rights guaranteed by them (eg the Constitution of Poland 1997, France 1958, Hungary 1949, Italy 1947). In some of these states, for example in France, common courts, although the constitution does not contain any guidance in this matter, allow for horizontal indirect, and, exceptionally, direct action[19]. There is evidence in the case law of the Hungarian Constitutional Court that the indirect horizontal rights of individuals are regarded to be valid[20].

It should be noted here that the Polish Constitutional Tribunal, in the justification of one of the judgments, only referring to Art. 51 recognized the possibility of indirect horizontal rights of the individual (for the term see the com-

[14] VfSlg 6191/1970.

[15] Compare eg. VfSlg 1430/1932.

[16] Compare eg. VfSlg 2088/1951; 3703/1960; 7380/1974

[17] Compare eg. L.K. Adamovich, B.Ch. Funk, *Österreichisches Verfassungsrecht*, Wien-New York 1985, p. 397.

[18] Compare eg. VfSlg 1383/1933; 8578/1070.

[19] Compare :E. Savoie, *Frankreich,* s. 233.

[20] Compare judgment 21/1990.

ment on the title of Chapter II), stating: "The constitutional legislator in Art. 51 of the Basic Law emphasizes primarily the protection of individuals against public authorities. In paragraph 2, as the entity obliged to implement the law referred to in this provision, public authorities are indicated. Article 51 paragraph 1 of the Constitution of the Republic of Poland does not explicitly define the entity obliged to implement the law guaranteed in this provision. This means that this constitutional provision applies to all cases in which an entity is obliged to disclose information about itself to other entities, and therefore also to private parties" (judgment of 29.1.2002, K 19/01, OTK-A 2002, No. 1, pos. 1).

The Austrian Constitutional Tribunal in certain judgments seems to allow indirect horizontal obligations - such as the right of association[21] or the principle of equality ("it seems (..) impossible that the provisions of civil law (...) which regulate legal relations do not take into account the principle of equality"[22]). However, the ACT is not consistent in its views and many rulings reject the possibility of even the indirect horizontal application of fundamental rights[23].

4. HIERARCHY OF CONSTITUTIONAL INDIVIDUAL RIGHTS AND FREEDOMS

Constitutions of democratic states generally do not introduce a hierarchy of their norms and recognize the same legal power to all of them (all fundamental rights in the constitution are of equal rank and constitute "a historically-formed guarantee catalog"[24].

With regard to the norms regarding individual rights and freedoms some constitutional and supreme courts introduce such a hierarchy. The first one that did it was in the 1930s the US Supreme Court formulating the doctrine of the so-called prefered freedoms[25]. It assumes that the freedoms expressed in the First Amendment to the Constitution have a privileged position in a free society: „ freedom of the press, freedom of speech, freedom of religion are in a preferred position"[26].

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[21] Compare: VfSlg 6095/1969, 6304/1970.

[22] VfSlg 5854/1968. Compare also: VfSlg 6390/1971, 8254/1978.

[23] Compare eg.VfSlg 7400/1974.

[24] H. Scholer, *Person und Öffentlichkeit*, München 1967, p. 30.

[25] More on this topic see: K.L. Hall (ed.), *The Oxford Companion to the Supreme Court of the United States*, Oxford 2005, p. 115.

[26] Case Murdock v. Pennsylvania (1943).

Also the German CT introduces the hierarchy of individual rights and freedoms. It recognizes the role of the individual's fundamental rights in creating a system of values for modern society. Recognition of this function also entails the need to establish a certain hierarchy of values. Examples of such preferences may be the FCT rulings emphasizing the importance of personal freedom as „the premise of all free human activity"[27], the principle of the inviolability of human dignity, the rights and freedoms of a political nature, and the recognition by the Court of their role in the process of formulating political will and articulation of social interests. They should further stimulate the integration of society and have constitutive meaning in defining the democratic framework for shaping the will of the sovereign. This is especially true of freedom of speech, freedom of the press, the right of association, freedom of assembly and the right to petition. These rights - such as freedom of speech - are defined as "of fundamental importance to a democratic state" and constitute "the basis of all freedom"[28]. In one of the rulings FCT stated, "It is only with their help that the citizen is able to create the necessary conditions for himself to perform his personal and political tasks so that he can act responsibly in the democratic sense of the word"[29].

This tendency is also expressed by judgments recognizing the primacy of the freedom of art and the freedom of expressing views before the protection of worship[30]. Given that all of these three rights enjoy the same constitutional protection, critics of FCT's position even talk about its activity contra legem[31]. The result of such preferences may be the judicial decision or the decision-making of another entity that interprets the fundamental rights of the individual and makes subjective judgments based on reality on his or her free discretion (free interpretation) under the pretext of adhering to a particular system of values[32]. This may lead to the FCT exceeding its competence and determining the content of the amendments to the laws and the jurisprudence of other courts. "In recent years the FCT seems to strive to reform the civil contract law, as it repeals the

[27] BVerfGE 10, p. 322.

[28] BverfGE 7, p. 208.

[29] BverfGE 27, p. 80-81.

[30] Compare eg. BVerfGE 86, p. 1 ff; 93, p. 266 ff.

[31] Review of views on this subject see: H.H. Klein, *Gedanken zur Verfassungsgerichtsbarkeit*, in: J. Burmeister (ed.), *Verfassungsstaatlichkeit. Festschrift für Klaus Stern zum 65. Geburtstag*, München 1997, p. 1141.

[32] Compare: K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg 1984, p. 120-121.

civil courts' rulings recognizing their unconstitutionality due to <<the unequal position of contracting parties>>."[33]

Proponents of the FCT position, accepting the need for a certain hierarchy of constitutional values, point out that the case law of the Court can not be seen as disregard for the socially accepted hierarchy of values. It counteracts Judge Decisionism. Furthermore, one of the tasks of FCT is to transpose constitutional norms of fundamental rights into social reality and to update them in the framework of existing social relations. Recognition of the fundamental rights function of an individual in the creation of a value system facilitates FCT's realization of this task, and further stimulates the development of social awareness in the direction set by the Court.

5. FINAL REMARKS

The Constitution is not a static document, but it changes with the progressive social changes and it is precisely in the contemporary society that adjusts the constitution to its own needs. This is particularly important in the case of individual rights and freedoms, which determine the status of the individual in the state. Thanks to the jurisprudence of the constitutional courts, the highest possible dynamic approach is to determine their content and adapt it to the conditions of the present day. This corresponds to the idea expressed by one of the leading theorists of contemporary democratic constitutionalism W.H. Hamilton, who wrote that „there is the light arrogance of one generation to impose its will through the Constitution on the posterity of the generation. The posterity has its own problems, and their adequate solution requires the freedom of action unfettered by the dead hand of the past"[34].

[33] W. Brohm, *Die Funktion …*, p. 8.

[34] See: R. A. Rossum, G. A. Tarr, American Constitutional Law. The Structure of Government, tom I, Westview Press 2010, p. 13 with reference to W. H. Hamilton, The Constitution – Apropos of Crosskey, Univeristy of Chicago Law Review 21, No. 1 (1953), p. 82.

THE IMPACT OF PROPORTIONALITY TEST IN PROTECTING INDIVIDUAL RIGHTS SOME REFLECTION ON THE CASE LAW OF ALBANIAN CONSTITUTIONAL COURT

DR. ARTA VORPSI*

I. INTRODUCTION

When we talk about the constitutional justice and its impact on political will we face one important question: Why do political actors, such as presidents and legislatures, comply with acts of judicial review that limit their power? This is a difficult question because courts lack any obvious means of enforcing their decisions against other government actors. Insofar as they lack enforcement power, however, constitutional courts engaged in the exercise of judicial review are hardly unique. Throughout history, courts have thrived under circumstances in which state enforcement of judicial decisions has been nonexistent or impossible. Today's constitutional courts, from the German Bundesverfassungsgericht to the Supreme Court of the United States, are not in precisely the same position as the courts of medieval times. Their situation is more precarious. The problem is that they place themselves in direct opposition to powerful actors who do wield the purse and the sword.

Constitutional courts that engage in judicial review make it their business to rule against the very institutions of government with the power to enforce judicial rulings. From the late nineteenth century, constitutional courts often characterized judicial review not as an obstacle to the popular will, but rather as a means of protecting the people from abuses of power by their own government.

Constitutional courts with the power of judicial review perform monitoring, signaling, and coordination functions that facilitate the exercise of popular control over the government. A constitution ordinarily sets forth mechanisms by which the people may exercise such control peacefully, such as competitive

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elections and a process for amendment of the constitution itself, but these are not immune to sabotage or failure. In extreme cases of constitutional failure, the people may band together to overthrow a government that has blocked the ordinary mechanisms of popular control: no government can withstand a concerted uprising by the whole citizenry. There are, however, significant potential obstacles to any effective exercise of popular power over the government. One is an information problem: the people cannot respond to bad behavior by the government if they remain unaware of that behavior. Another is a problem of collective action, or coordination: even if the people acting together are capable of toppling the government, such action may require widespread coordination that can be difficult to achieve.[1]

Constitutional courts offer a solution to both problems. First, they provide reliable, low-cost information about the constitutionality of government conduct. A court engaged in judicial review performs the function of a whistleblower or fire alarm: it warns the people if their government has overstepped the bounds of its delegated power. Second, courts can coordinate popular action against usurping governments by generating common beliefs and common knowledge about both the constitutionality of government conduct and the ways in which other citizens will react. People are unlikely to act openly against a government unless they believe that others will act as well: it is folly to engage in solitary rebellion against a despotic regime. What they need is a signal that it is time to act. A court can provide such a signal by ruling publicly against the government. The substantive content of the ruling operates on our beliefs about whether there is reason to act against the government. The fact that the ruling is public, however, operates on our beliefs about how others are likely to think and act. Courts make possible coordinated action against the government by shaping both types of beliefs at once.

By acting as a fire-alarm mechanism that litigants can activate in cases of unconstitutional conduct, judicial review provides an economical source of reliable information about government behavior that facilitates popular control over the government. The threat that the judiciary will sound the alarm, in turn, gives the government an incentive both to obey constitutional limits in the first place, and to comply with adverse judicial rulings after the fact.[2]

There is certainly a triumph of constitutional review which is now generally accepted as an essential or desirable feature of a liberal constitutional demo-

[1] *David S. Law,* A Theory of Judicial Power and Judicial Review. The Georgetown Law Journal, Vol.97, 723.

[2] *David S. Law*, Ibid, 734.

cracy and has become a global phenomenon.[3] This widespread device can be shortly defined as the power of a court to determine the constitutionality of legislation enacted by Parliament as a mean to check and limit the exercise of power by those in charge. Two arguments typically justify the right for judges to declare laws unconstitutional: one is that it guarantees the supremacy of the constitution and the other is that it provides a check on the lawmaker for the protection of minorities.

II. THE PROPORTIONALITY PRINCIPLE IN THE CASE LAW OF ALBANIAN CONSTITUTIONAL COURT

The establishment of constitutional review is by definition, disruptive. It alters the traditional balance of powers between the constitutional court and Parliament and has also an impact on the relations within the ordinary judicial branch. The role of constitutional courts has been further transformed by the growing significance and enforceability if fundamental rights. Originally concerned with primarily issues of government structure the focus of constitutional review has indeed shifted to concerns about violations of fundamental individual rights since in almost all systems, constitutional texts referring to fundamental rights give the judiciary the vast opportunity to take moral considerations into account in deciding cases with significant political implications.[4]

The transformation stemmed from changes of a substantive normative nature and politico-institutional nature. On a substantive level, the proliferation of constitutional adjudication is very much linked to an increasing variety of rights being enforced at constitutional level. The influence of international human rights instruments, supranational and transnational courts, notably well-developed in the European context under the authoritative jurisprudential activity if the Court of Justice of the European Union and European Court of Human Rights has instilled a new dynamic to the practice of constitutional review leading to the recognition of pluralistic forms thereof.[5]

The role of constitutional courts has been further transformed by the growing significance and enforceability of fundamental rights, which was stron-

[3] *Neal Tate*, Why the expansion of judicial power in Neal Tate and others (eds) The Global Expansion of Judicial Power, New York UP 1995, 27.

[4] *Mark Tushnet*, Advanced Introduction to Comparative Constitutional Law. Edward Elgar Publishing 2014, 16.

[5] *John Bell, Marie-Luce Paris*, Rights-Based Constitutional Review, Edward Elgar Publishing (2016), 14.

gly affected by the most important element of judicial review: the principle of proportionality. Although the proportionality has different meaning I will focus only on proportionality of a limitation applied within a democratic system, on a constitutional right by a law. A limitation on a constitutional right by law will be constitutionally permissible if and only if it is proportional. The constitutionality of the limitation in other words is determined by its proportionality. Proportionality therefore can be defined as the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible. According to the sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose; (iii) the measures undertaken are necessary, so there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation and finally (iv) there needs to be a proper relation between the importance of achieving the proper and the social importance of preventing the limitation on the constitutional right. This is also what Article 17 of Albanian Constitution clearly provides for the principle of proportionality.[6]

The Article 17 of Albanian Constitution clearly provides for the principle of proportionality. According to it the limitations of constitutional rights and freedoms may be imposed if certain conditions are met. More concretely, Article 17 requires that there should be a clear necessity which dictate the legislator's intervention in the fundamental right. Also the public interest which aim to be protected, the circumstances that dictate an intervention and the possibility to cause as less as possible harm for individuals should be considered prior the intervention by the legislator.[7] In order to assess the proportionality of the legislator's intervention there should be a clear balance between the damage caused to the individual, the degree of protection against arbitrariness during the legal process and the possibility of legislator to find other less invasive means to achieve the goal. The legislator should limit its intervention to a minimum, seeking alternative solutions and striving to achieve its goals through less harmful means.[8] The principle of proportionality implies that the legislator's intervention to limit a certain right or liberty should be achieved with appropriate means that respond accordingly to the goal.[9]

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[6] *Arta Vorpsi,* Procesi i rregullt ligjor në praktikën e Gjykatës Kushtetuese të Shqipërisë (2011) 205.

[7] Decisions no.39/2007; no.41/2007; no.17/2010; no.10/2008.

[8] Decision no.17/2010.

[9] Decision no.10/2008.

In compliance with these criteria, the Albanian Constitutional Court has analyzed in many cases the interventions of the legislator and/or the executive in the fundamental rights and freedoms of citizens, concluding that there was a violation of a fundamental right because of no compliance with the principle of proportionality.[10] Thus, in an earlier decision, the Court analyzed the legislator's intervention in the private sphere of persons holding a public function, who are obliged to declare and publish personal data (such as income, real estate and other removable properties they or their family members possess. The Court stated that the limitation of the right to have a private is done by a formal law ... according to it the intended purpose fully justifies the adoption of such law. On the other hand, it is assessed that the means used to achieve this legitimate purpose, i.e. the obligation to declare and to make them accessible for the public all assets, their sources are effective and respect the proportionality to the intended aim. The legislator has been careful in balancing the fundamental right to information and the right to a private life. The obligation to declare income and any other assets as well as the possibility of their publication do not aim to damage or denigrate the subjects of the law, but to a more rigorous transparency and control over their enrichment or financial relations with third persons. From this point of view, the Constitutional Court recognizes that the public has a legitimate interest to be informed not only about the success of their job as public officials but also about their income, assets and their resources.[11]

The Constitutional Court has considered as a legitimate intervention the increasing criteria for running a gambling business. The applicant considered that the criteria were excessive and not in conformity with business rights in general. The court in this case has a different opinion stating that the legislator has taken into consideration the elements of proportionality in establishing a fair relationship between the public interest and the individual's right to run a business, by strengthening the licensing criteria in order to protect the consumers, especially the vulnerable persons or groups. The Constitutional Court stated that there is a still unstable legal and factual situation in relation with gambling business, because this activity is relatively young in Albania. Having said that, the state is obliged to take the necessary measures to control and prevent the gambling addiction by vulnerable individuals, especially the young generation. Setting stronger criteria for licensing gambling entities has shown that

[10] *Sokol Sadushi,* Drejtësia kushtetuese në zhvillim *(2012) 565.*

[11] Decision no.16/2004.

is more likely to stop or prevent the uncontrolled and undisciplined spread of this activity, which would protect the consumers.[12]

There are cases in which the Court argued that the test of proportionality has failed and there was no balance between the intervention of legislator and the purpose sought to be achieved. Thus, in one of its most popular decisions it has concluded that the purpose of lustration law was to ensure the loyalty of public officials to the principles of rule of law in a democratic state, thus this is a legitimate interest. The proportionality of this limitation is related to the question in what extend the public official has been a collaborator with the communist regime's structure and what function he held during that time. The broader or meaningful his co-operative activity was, the more important his function was and as result the more likely this limitation should be considered as proportional to the aim of the law. The court assessed that the legislator has failed to justify the need for this limitation for each individual responsible for any concrete act, not avoiding the collective responsibility which is not in conformity with the rule of law principle.[13] According to the Court the balance between limited right and the public interest or the protection of the rights of others obligates the legislator to find the balance between the interest of making justice and the necessity to bring an end of the disputes on former collaboration with communist regime. An indispensable precondition is that the balance is achieved by giving clarity of all possible effects raising by the law and not causing new conflicts between different groups of population.

In another case referring to the law on former expropriated land owners, the Court found that the legislator has regulated the issue of financial compensation of former owners expropriated by the communist regime in Albania and this regulation should be looked at on the light of criteria imposed by article 17 of the Constitution, which is the test that should be applied to every intervention into the fundamental rights and freedoms of the individual, according to the consolidated case law of the Court. The reason for this should be found in the fact that the law provides a new way of evaluation for the compensation of properties which raise the question of proportionality. More concretely, the Court dealt in its analysis with the question whether or not the legislator's intervention has respected the principle of legal certainty and foreseeability of the legislation according to the standards established by it and also by the European Court of Human Rights.

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[12] Decision no.10/2008.

[13] Decision No.9/2010.

Referring to article 17 of the Constitution and the case law of the Court, the first criteria of intervention by a formal law, turned out to have been respected, because the intervention was made through a law approved by the Assembly, according to the procedures provided for this purpose. The second criteria in order to be assessed was the existence of the public interest. The constitutional concept of the public interest is quite broad and should be looked carefully on the light of the concrete act and its effects. The Court has emphasized in its jurisprudence that the principle of legal certainty is not absolute and can be limited if there is a legitimate reason for this or a major public interest, the failure to respect which would bring serious consequences to the legal or social order in the country. It is difficult to list in an exhaustive manner the issues that constitute a public interest that might justify an intervention in a fundamental right. To decide whether or not a restrictive measure taken by the legislator is in accordance with the existence of a major public interest and therefor there is an eminent need to act through a legal act should be verified case by case by the Court.[14]

The Court emphasized again that article 41 of the Constitution of the Republic of Albania and article 1 of Protocol no. 1 to the European Convention on Human Rights provides the possibility of fair compensation in setting the amount and the manner of indemnification, according to the margin of appreciation of the national legislator, because of the familiarity with the economic and social relations of the specific country. The legitimate objectives of the *public interest* such as those pursued in the framework of economic reform measures or measures drafted to achieve greater social justice might require a small reimbursement than the full market value.[15]

The Court has stated in its previous case law that the legislator within its margin of appreciation regulates the method and amount of compensation of properties confiscated during the communist regime. In this framework, the Court has recognized the competence of the legislator to limit the right of private property because of the public interest which would be really harmed if the law would have foreseen the possibility of full financial compensation for them. Having said that, the legislator should apply a fair balance between the intervention to limit a fundamental right and the aim to be achieved. It is essential also to analyze if the use of these legal means are less harmful towards the subjects whose rights and freedoms are infringed.[16]

[14] Decisions No.10/2008; no. 4/2011.

[15] Decision No. 30/2015.

[16] Decisions No.25/2014; no.4/2011.

In the concrete case, the Court stated that identifiable public interest is the end resolution of the issue of former expropriated owners with the most reasonable financial costs and length of time, as well as establishing social peace between different social categories affected by this issue, which has remained unsolved for more than 25 years. According to the Court, the public interest that should be evaluated as important up to the extent that it justifies the legislator's intervention. Referring also to the *amicus curiae* opinion of the Venice Commission,[17] national legislator enjoys a wide margin of appreciation in defining the public interest, especially concerning article 1 of Protocol no. 1 of ECHR in the framework of implementation of social and economic policies.[18]

III. EPILOG

Proportionality is not perfect, there is always room for improvement. When considering improvements to proportionality it is important to make use of the legal and judicial experience provided by comparative law. Proportionality requires that the limiting law be enacted for a proper purpose. This requirement is an expression of the understanding that a limitation on a constitutional right many not be taken for granted. The constitutional right is meant to protect the individual from the tyranny of the majority. Not every consideration of the public interest may serve as a legitimate justification for limiting a human right. Rather, the public interest consideration must be sufficiently unique to justify such a limitation. Those considerations apply, naturally, when the legislative purpose was meant to serve the public interest (such as national security). But what if the legislative purpose is designed to advance not the public interest but rather another constitutional right? What should be the essence of the requirement for a "proper purpose" where on both sides of the scales we have constitutional rights? It seems to me that the proper answer is that whenever the purpose of a limiting legislation on one constitutional right (such as the right to privacy) is to advance another constitutional right (such as the right to information), this alone should provide sufficient justification for the limitation of the (first) right. In other words, the very purpose of advancing another constitutional right is a proper purpose in a constitutional democracy. This conclusion is valid in those cases where the right the legislator wishes to promote has a constitutional status. The reason for that is that protection of the constitutional right has more

[17] See Opinion of the Venice Commission approved in the 108th Plenary Session, Venice, 14-15 October 2016.

[18] Decision No.1/2017.

significant social importance than the protection of the sub-constitutional right. However, there is room to take into account, within balancing, the scope of the limitation of one right and the scope of the protection of the other right. Therefore, it will at times be possible to justify a small limitation of a constitutional right to provide the sub-constitutional right with comprehensive protection.

Proportionality's tests are all derived from the notion of a constitutional duty not to limit a constitutionally protected right (such as freedom of expression). This duty is however not absolute. In some instances, a constitutional right may be limited. The most used reason is public interest, which we find as a very common justification also in Albanian case law. However, the question raise: is the public interest a constitutional duty? National security considerations are for the executive branch to consider. An individual has no constitutional right to enjoy a higher (or lower) level of national security. The level of probability that should be required to satisfy the proportionality test should reflect the relative social importance of the marginal benefits gained by achieving the law's purpose in comparison with the social importance of the marginal benefits gained by preventing the harm caused to the constitutional right in question.[19] To see the further evolution of that we have to look forward in the Court's case law.

Chisinau, on 8-9 June 2017

[19] *Ahron Barak*, Proportionality – Constitutional rights and their limitations. Cambridge University Press (2012), 540.

PROTECTING THE RIGHT TO PROPERTY IN ALBANIA: THE ROLE OF THE STRASBOURG COURT AND ALBANIAN CONSTITUTIONAL JUSTICE

RENIS ZAGANJORI*

The protection of property has been in focus in several cases brought to the European Court of Human Rights against Albania and cases brought to the Albanian Constitutional Court. With regard to cases brought before the Strasbourg Court, this is a particularly worrying fact since the protection of property is, firstly a fundamental human right, and secondly, since the Albanian state, and the Albanian taxpayers therefore, are being burdened with considerable sums to be paid in compensation to individuals for breaches against this right. Most of these cases relate to former owners, or heirs of former owners, of land confiscated by the former communist regime in Albania. The 2004 Property Act in Albania aimed at the restitution of urban, immovable property, which had been expropriated, nationalised or confiscated prior to 29 November 1944 by the communist regime. In the impossibility of restoring the original property, as it was used for other means in the meantime, it provided an alternative for the grant of compensation. In this paper I will look into the issues raised by the Strasbourg Court in the landmark case of Manushaqe Puto and what was subsequently done in Albania to remedy these problems. The status quo regarding this aspect of the right to property was also under scrutiny by the Albanian Constitutional Court in a recent decision which I will then look into in the second part of my presentation.

ECtHR IN MANUSHAQE PUTO V ALBANIA

In the landmark case of Manushaqe Puto and others vs Albania, a breach of Article 13 (right to an effective remedy) and breach of Article 6 (right to a fair trial) and Article 1 of Protocol 1 (protection of property) was alleged by the applicants. The applicants in this case inherited property titles to plots of land measuring between approximately 600 and 5,000 square metres were recognised between 1994 and 1996 by commissions in charge of restitution and compensation of properties under the 1993 Property Act. The applicants were

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awarded compensation in one of the ways provided for by law in place of the restitution of their respective properties. However, those decisions had still not been enforced to that day. The applicants complained that, despite their inherited title to plots of land having been recognised by the authorities, the final administrative decisions awarding them compensation in place of restitution had never been enforced.

The Strasbourg Court's assessment focused, among others, on the alleged violation of article 6 of the Convention and article 1 of protocol no. 1.

As regards Article 6 of the Convention, the Court stated that the right to a court protected by Article 6 would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by a judicial body must therefore be regarded as an integral part of the "trial" for the purposes of this Article. An unreasonably long delay in enforcement of a binding judicial judgment may therefore breach the Convention. Some delay may be justified in particular circumstances but it may not, in any event, be such as to impair the essence of the right protected under Article 6.

As regards Article 1 of Protocol No. 1 to the Convention the Court stated that an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right.

The Court further observed that Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention. Just as Article 1 of Protocol No. 1 does not guarantee the right to acquire property, it does not impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners. On the other hand, and crucially in this context, once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement.

Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the

exercise of the right of property, including deprivation and restitution of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

The decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has declared that it will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation.

Both an interference with the peaceful enjoyment of possessions and an abstention from action must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State.

APPLICATION OF THOSE PRINCIPLES TO THE PRESENT CASE

As in previous cases concerning delays in enforcing final administrative property decisions, such as Ramadhi vs Albania and Driza vs Albania, the Strasbourg Court found violations of Article 6 (1) and Article 1 Protocol 1 No 1 of the Convention. In these cases, the Court based its judgements in the extended delay by the state authorities which in essence deprived the applicant's the peaceful enjoyment of their property, as well as the lack of and efficient legal framework which regulates the cases of restitution and compensation of former owners in Albania. In addition, the Court found that the lack of funds or other resources as a reason for not honouring a judgment debt cannot relieve the State of its obligation under the Convention to ensure compliance with a final decision within a reasonable time.

In such circumstances, the Court found that final and enforceable Commission decisions in favour of the applicants remained unenforced for periods varying between 15 and 17 years and accordingly decided there had been a violation of Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention in this case as well.

Furthermore, the Court recalled, as it had stated in previous similar cases, that the violations it had found originated in a widespread problem affecting a large number of people in Albania. It noted that it had found those violations despite having indicated in its previous judgments in 2007, 2009 and 2011 that

Albania had to take general measures to remedy the problem. Having regard to the fact that there were currently 80 similar cases pending before it and to the risk that the number of well-founded complaints could further increase, the Court considered it necessary to apply the pilot-judgment procedure in this case. The Court stated that it was seriously concerned that the number of well-founded applications registered could increase and, therefore, represent a critical threat to the future effectiveness of the Convention machinery.

It was held that Albania had to take general measures, as a matter of urgency, in order to secure in an effective manner the right to compensation. Subject to monitoring by the Council of Europe's Committee of Ministers, Albania remained free to choose the means to achieve this aim. However, the Court noted that, observing that the Albanian property legislation had been changed a number of times between 2004 and 2010, those frequent changes contributed to a lack of legal certainty. Albania should therefore carefully examine all legal and financial implications before introducing further modifications.

In addition, the Albanian authorities were held to lack accurate and reliable information as regards the overall number of administrative decisions recognising property rights and awarding compensation adopted since 1993. Therefore, the compilation of precise data would enable the authorities to calculate the overall financial implications of compensation.

Moreover, the compensation scheme and the modalities thereof should be revisited in light of the Court's findings and its case-law. The revision and update of valuation maps should be subject to transparent and explanatory criteria, taking into account the land development. The Court urged the authorities, as a matter of priority, to start making use of other alternative forms of compensation as provided for by Albanian legislation in 2004, instead of relying heavily on financial compensation.

Finally, it was held equally important to set realistic, statutory and binding time-limits in respect of every step of the compensation process. Finally, sufficient human and material resources had to be placed at the competent authorities' disposal and coordination amongst different State institutions had to be ensured.

THE ALBANIAN REACTION AFTER THE ECtHR DECISION IN PUTO

As a result of the decision in Manushaqe Puto, Albania was left with homework to do to comply with the judgement and the measures as indicated above. In March 2014, the Government presented to the Committee of Ministers of

the Council of Europe, an action plan to remedy the problems evidenced in the Puto decision. According to this action plan, a complete overhaul of prior legislation was envisaged, creating a compensation mechanism which would create a fair balance between ex-owners of property and public interest, as evidenced in the Puto decision, as well as ending the problem of non-enforcement of binding judicial decisions in respect of property and compensation.

As a result of these, the Albanian Parliament approved a law titled "The treatment of property and ending the property compensation process" in 2015, which came into force in February 2016. Predominantly based on the Strasbourg Court's judgement in *Puto*, the law's main aim was twofold: 1) ending the process of the treatment of property through acknowledging and compensating former owners of property nationalised by the state from 1944, and 2) executing all final judicial and quasi-judicial decisions awarding compensation within the time limits set by the law.

In addition to the law, the structure of the Agency responsible for the Treatment of Property was also approved by the Government, providing a structure of roughly 170 employees, taking into consideration the tasks and deadlines provided in the law to complete the process of compensation of ex-owners of property. In the meantime, the compensation process for all final decisions has started in a chronological order, simultanous to the proces of accepting new requests for the compensation of property.

THE ALBANIAN CONSTITUTIONAL COURT

The reaction to the ECtHR decision in Puto was considered an advancement and the law seemed to remedy the problems raised. However, after its entry into force, the law was brought before the Albanian Constitutional Court by some interest groups among which also the Albanian President, challenging some aspects of the law as unconstitutional. Specifically it was asserted that the provisions of the law which provided for a financial re-evaluation of the compensation sum, for which compensation was already awarded by a final decision of a judicial or quasi-judicial body, was unconstitutional. The provisions of the law provided that the property had to be re-evaluated in accordance to the pricing of the market at the time the property was confiscated, not that of the current market, which rendered the financial compensation sum significantly lower than what was initially awarded by a judicial decision. Such a re-evaluation would, in effect, nullify these final judicial decisions, which would seriously undermine the legitimate expectation of the parties' involved and legal certainty.

The Albanian Constitutional Court had previously interpreted that the decisions of the commissions in charge of restitution and compensation of property equalled final and enforceable court decision which recognises an individual's property rights. "Commission decisions were capable of conferring on individuals' legal expectations equal to that created by virtue of a court decision which recognises an individual's property rights".

In the present case, the Constitutional Court recalled that, in accordance with the Albanian Constitution and Article 1 of Protocol 1 of the European Convention on Human Rights, the state may award just compensation to individuals whose property rights had been interfered. The state enjoys a wide margin of appreciation in such instances, since the state is better positioned to balance the right of the individual to that of the wider public interest. As such, the Court holds that the lawmaker has a wide margin of appreciation when it comes to awarding compensation for property nationalised or confiscated during the communist regime. At the same time, the lawmaker may limit the property rights of individuals in the existence of a more important wider public interest. Of course, this would have to be done in a proportional manner.

But, as for the present case, the Court holds that the legitimate objectives of the wider public interest may at times require awarding a lower compensation than the prices of the current market. The Constitutional Court recognised the existence of a greater public interest in settling the issue of former owners of property with a reasonable financial burden and timeframe, which would also contribute in social peace between different social categories which had been touched by this problem for more than 25 years.

The Court was also right to explain that there cannot be a complete compensation for property confiscated or nationalised under regimes which had no respect even for minimal standards of human rights and that the full reinstatement of previous property rights would also be contrary to the principle of equality. As such, the court held that the purported lower compensation to former owners is proportional under the European Convention for the protection of human rights and the Albanian Constitution.

CONCLUSION

To conclude, despite its difficulties, the path towards effectively ensuring and protecting individual rights, such as the right to property, has made significant progress in Albania. In particular, the this path has been shaped by important judgements of the Strasbourg Court, as evidenced in the case of Puto, but also the Albanian Constitutional Court, as described above.

According to these judgements and the Strasbourg case law, there is no obligation upon states to compensate ex-owners of property confiscated or nationalised, but if such procedures are to be undertaken, the state has to comply with the standards of the European Convention of Human Rights. Accordingly, states enjoy a wide margin of appreciation in balancing private interests' vis-à-vis the public interest. In the case of Albania, there is still a lot of work ahead in respect of the full and just compensation of former owners of property in Albania, but the legal amendments and the judgement of the Albanian Constitutional Court seem to put these procedures on the right track again.

DEVELOPMENTS IN THE FIELD OF GUARANTEEING OF INDIVIDUAL'S RIGHT TO CONSTITUTIONAL JUSTICE: ARMENIA'S EXPERIENCE

DR. AREVIK PETROSYAN*

Distinguished participants of the International Congress,
Ladies and Gentlemen,

First, please allow me to extend the words of thankfulness to the hosts and organizers of the 19th International Congress of the European and Comparative Constitutional Law for the provided invitation and opportunity to address you today with the speech.

It is a well-known fact, that the main path for increasing the efficiency of the judiciary system is the guaranteeing of the rule of law and entrenchment of functioning systems for guaranteeing, ensuring and protecting the human rights. And that is impossible without full ensuring of an individual's right to constitutional justice.

At the Constitutional Court of Armenia, we share the approach, that the states, where the full Institute of constitutional complaint is a place, have a specific advantage in the matters of guaranteeing the rule of law, as far as the examination of such complaints allows to review practically all aspects of the system of guaranteeing, ensuring and protection of human rights. By the mentioned path we can ensure and guarantee the direct effect of the constitutional rights.

In our opinion, the contemporary prerequisites for the entrenchment of the full system of the constitutional complaint relate to constitutional, as well as to legislative solutions. In particular, I would like to identify the following:

1. Guaranteeing of individual's right to constitutional justice via the Institute of individual complaint,
2. Guaranteeing the constitutional review of the entire legal system via the mentioned institute,
3. Increasing the efficiency of the constitutional judicial proceedings via the individual applications,

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4. Guaranteeing full implementation of the decisions of the constitutional court based on the individual applications.

The first prerequisite states, that in case of total non-existence of the Institute of constitutional complaint or in conditions of its non-completeness a contradiction between the functions and powers of the constitutional court may arise. The constitutional rights and freedoms of individuals are recognized as the rights that have direct effect. Without the guaranteeing of the direct effect of these rights, it is impossible to ensure the supremacy of the Constitution, and this mission is mostly carried out by the Constitutional Court.

The Institute of the individual constitutional complaint was introduced in the Republic of Armenia because of the Constitutional Amendments of 2005 and it has been in force since 2006. According to the Constitution of the Republic of Armenia (Article 101 Part 1 Point 6), the applications to the Constitutional Court may be filed by everyone, regarding a specific case, where a final court act is available, all the judicial remedies are exhausted, and who challenges the constitutionality of a legal provision applied with respect to him or her upon such act. The mentioned constitutional regulation has been prescribed also in the Law of the Republic of Armenia on "the Constitutional Court" (Article 69), which in line with the constitutional provision and in accordance with the logic of the concrete constitutional review based on the given constitutional provision, stipulates the admissibility conditions of applications filled by the natural and legal persons. The appeals on the cases described in this Article can be brought by those natural and legal persons:

- who were participants at the courts of general jurisdiction and in specialized court;
- in relation of who the law was implemented by a judicial act;
- who exhausted all the remedies of judicial protection.

Before 2006 when the Institute of the individual constitutional complaint was introduced, the Constitutional Court of the Republic of Armenia had taken for examination and consideration only 8 cases regarding the constitutionality of the law. After 2006, our Constitutional Court considers almost the same amount of cases within a month. According to the statistics as of 1 June 2017, the Constitutional Court of the Republic of Armenia within the frames of its 262 decisions has taken for consideration the constitutionality of 609 provisions of 93 different normative acts. Furthermore, the main grounds for consideration of the mentioned matters were the applications presented by natural and legal entities. It is obvious, that the qualitatively new situation has occurred.

The second point relates to the fact, that the legal act, action or inaction violating human's rights adopted by any of the constitutional institutes shall be an object of the constitutional review based on the individual complaint.

First of all, there is a need to have a consolidated approach in regard to the legal acts, which constitutionality can be disputed by the citizens at the constitutional court. The constitutional justice cannot be fully functioning unless the individual complaints are constrained only within the frames of the constitutionality of the law. In the Republic of Armenia, according to the existing constitutional solutions, the only object of the constitutional review based on individual complaints can be the matter of the constitutionality of the legal provision.

We shall attach specific attention to the third group prerequisites. From the viewpoint of the increasing the efficiency of the proceedings of the constitutional justice the main challenge is to understand to what extent the decision of the constitutional court is aimed at the future (relates to the objective law) and to what extent the restoration of the constitutional right is guaranteed (solves matters of subjective law).

The experience of the Constitutional Court of the Republic of Armenia states, that both the postponing of the decisions of the Constitutional Court and the legislative regulations in regard of the reversibility of decisions have substantive importance and are a matter of attention. If in accordance with Paragraph 3 of Article 102 of the Constitution the Constitutional Court finds that declaring invalid the challenged general act or any provision of it from the time of the announcement of the Court decision are unconstitutional and will inevitably cause such hard consequences for the public and for the state that it would harm the legal security expected from the annulment of the given general act, then the Constitutional Court has the right to declare the act as unconstitutional and at the same time to postpone the period of invalidation of the act. In this case, the act is considered constitutional before being invalidated. In addition to that, in case of the decision recognizing the examined norm as anti-constitutional and void the Constitutional Court is authorized to the provisions of the given decision also on the previously existing legal regulations if in case of not the adoption of such decision can create harmful consequences for the public and for the state.

We also deeply believe, that when the issue of the constitutionality of the normative act is a matter of examination in a concrete review framework and the norm is recognized as anti-constitutional, then only the revealing of new circumstances cannot guarantee the full protection of the right.

Let me also drop your attention to one more interesting circumstance There are cases when the Constitutional Court recognizes the disputed norm

as corresponding to the constitution with a specific interpretation, thus helping to keep the validity of the given normative act, and this is an effective model, when the courts of general jurisdiction and the administrative courts do not follow that provided interpretation. As a result of further legislative amendments, according to Article 69 Part 12 of the Law of the Republic of Armenia on "the Constitutional Court", in the cases defined by this Article on recognizing the provisions of the Law applied against the Applicant as null and contradicting the Constitution, or when The Constitutional Court, in the conclusive part of the decision revealing the constitutional legal contents of the provision of the law, recognized it in conformity with the Constitution and found simultaneously that the provision was applied to him in a different interpretation, the final judicial act made against the applicant on the grounds of new circumstances is subject to review in accordance with the procedure prescribed by law. Part 12 of this Article also affects the persons, who on the day of publication of the decision in question by the Constitutional Court, still preserve the right to apply to the Constitutional Court on the same issue, but have not applied to the Constitutional Court.

The above stated does not mean, that the existing situation is ideally complete for guaranteeing the individual's right to constitutional justice. In this regard, we still have problems in Armenia, and the process of constitutional reforms and the Constitutional Referendum of 6 December 2015 were also targeting the respective problems. The chapter of the given constitutional amendments and legal regulations regarding the Constitutional Court of the Republic of Armenia will get into force from 9 April 2018, when the newly elected President of the Republic of Armenia will take on his/her office. Until that moment, the provisions of the Constitution of the Republic of Armenia of 2005 will be in force and at the place.

When it comes to the individual complaints, the constitutional amendments abolished the non-natural situation, when the Constitutional Court is limited only by the functioning of checking and considering the constitutionality of the law. According to the new constitutional regulation, the constitutional court in accordance with the prescribed procedure is authorized to check the constitutionality of any normative act, which has violated the fundamental human rights and freedoms. In addition to this, according to the new regulation, while considering the constitutionality of the mentioned normative acts the constitutional court shall take into account also the existing interpretation of the legal practice in regard to the given provision. These changes, of course, significantly increase the frameworks of the Institute of the individual constitutional complaint.

In our opinion, we shall take as the basis that the system of the individual complaint can be effective only in the case when the latter provides grounds to ensure fully the protection of the human rights. Accordingly, the common position of the states in regard to the above-mentioned matter shall be directed to the establishment of the effective system of review of judicial acts arisen as the result of the respective decisions of the constitutional court.

Thank you for the attention!

CONSTITUTIONAL COURT OF BELARUS AND FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

ALEXANDER VASHKEVICH

INTRODUCTION

Constitutional courts in Europe play an important role in protection of the rights and freedoms of a person, including freedom of thought, conscience and religion.[1] The aim of the article is to show the attempts of the Constitutional Court of Belarus to protect this freedom while functioning in unfavorable legal and political environment.

ORGANIZATION AND LEGAL STATUS OF THE COURT

The Constitutional Court of the Republic of Belarus is a judicial body to review the constitutionality of normative legal acts in the State, to ensure the supremacy of the Constitution and its direct effect.

The legal status, competence, organization and activities of the Constitutional Court are regulated by the Article 116 of the Constitution,[2] by several articles of the Code on Judicial System and Status of Judges,[3] the Law of the Republic of Belarus on the Constitutional Proceedings adopted in 2014 and amended in 2017[4] and the Rules of Procedure of the Constitutional Court, its latest version adopted in 2017.[5]

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[1] See for example: Renáta Uitz.Freedom of religion in European, constitutional and international case law. Council of Europe Publishing, 2007; Sadurski Wojciech.Rights Before Courts.A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe. Springer, 2nd ed. 2014.

[2] Constitution of the Republic of Belarus of 1994 (with alterations and amendments adopted at the national referendums of November 24, 1996 and of October 17, 2004). Available at http://www.kc.gov.by/en/main.aspx?guid=1411. All URLs were last accessed on 03 March 2018.

[3] Code of the Republic of Belarus on Judicial System and Status of Judges // http://pravo.by/document/?guid=3871&p0=hk0600139

[4] http://www.kc.gov.by/en/main.aspx?guid=13225

[5] Rules of Procedure of the Constitutional Court of Belarus // http://www.kc.gov.by/main.aspx?guid=21745

The Constitutional Court consists of 12 judges. The candidates to this position should have Belarusian citizenship, higher legal education, have to know two state languages, Belarusian and Russian, be of high moral standards and, as a rule, should hold doctoral or habilitation degree. Six judges are appointed by the President of the Republic of Belarus, while six more are elected by the Council of the Republic of the National Assembly – an upper house of the Parliament – on the proposal of the Chairman of the Court who, with the consent of the Council of the Republic of the National Assembly, is appointed by the President from amongst the judges of the Constitutional Court for a five-year term.

The judges of the Constitutional Court are appointed or elected for a term of 11 years and may be re-appointed or re-elected without limitations. One judge at the current CC was reelected for the third time in a row and three other judges are serving their second term. The obligatory retirement age of the members of the Constitutional Court is 70 years.

The main task of the Constitutional Court is to deliver judgments on conformity of normative legal acts, obligations under treaties and other international commitments of the Republic of Belarus, acts of interstate formations to which the Republic of Belarus is a party to the Constitution in the exercise of subsequent review. However, CC is competent to start the procedure of *a posteriori* control only on the initiative of five subjects: 1) the President; 2) the House of Representatives and the Council of the Republic (two chambers of the Parliament); 3) the Supreme Court; 4) the Government.

As a result of a constitutional referendum in November 1996, the superpresidential form of government was established in Belarus. Head of the State is a central figure in the political and legislation process. The opposition is not represented in the parliament, and the National Assembly has no real control power over the executive (for example, though MP's have formal right for the interpellations, during the last 10 years there were no cases of using this right). In practice, all drafts of the laws are prepared by the National Centre of Legislation and Legal Research of the Republic of Belarus. The general management of the Centre is carried out by the Administration of the President of the Republic of Belarus. The Director of the Centre is appointed and dismissed by the President of the Republic of Belarus.

CONSTITUTIONAL REGULATION OF THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

According to the Article 16 of Belarusian Constitution, "Religions and faiths shall be equal before the law. Relations between the State and religious organiza-

tions shall be regulated by the law with regard to their influence on the formation of the spiritual, cultural and state traditions of the Belarusian people. The activities of confessional organizations, their bodies and representatives, that are directed against the sovereignty of the Republic of Belarus, its constitutional system and civic harmony, or involve a violation of civil rights and liberties of its citizens as well as impede the execution of state, public and family duties by its citizens or are detrimental to their health and morality shall be prohibited".[6] Moreover, Article 31 proclaims the right of every person to determine their attitude towards religion, to profess any religion individually or jointly with others, or to profess none at all, to express and spread beliefs connected with one's attitude towards religion, and to participate in the performance of acts of worship and religious rituals and rites that are not prohibited by the law. The Law of the Republic of Belarus on Freedom of Religion and Religious Organizations contains detailed regulation of legal relations regarding the rights of individuals and citizens to freedom of conscience and freedom of religion and legal requirements for creating and conducting the activities of religious organizations.[7]

ALTERNATIVE SERVICE CASE

In 2000, Belarusian Helsinki Committee applied to the Constitutional Court and raised a question of the legislative gap in the field of the alternative service. According to the Article 57, part two, of the Constitution of Belarus, "the procedure governing military service, the grounds and conditions for exemption from military service **and the substitution thereof by alternative service** shall be determined by the law".[8] The same provision was included in the Law on universal military duty and military service.[9] In Belarus, military service is compulsory for all males between the ages of 18 and 27. They are obliged to serve for 18 months, or 12 months if they are university graduates. Since 1994, a draft law on alternative service has been under discussion in Belarusian parliament for several times, but was never adopted. At the same time, because of the absence of a detailed regulation of the alternative service, young men who stated their conscientious objection to military service were prosecuted by the military authorities and faced conviction on criminal charges for evading the service. The prosecution was based on the Article 435, Part 1, of the Criminal

[6] http://www.kc.gov.by/en/main.aspx?guid=1411
[7] http://forb.by/node/78
[8] http://www.kc.gov.by/en/main.aspx?guid=1411
[9] http://pravo.newsby.org/belarus/zakon2/z041.htm

Code, which proclaims that a person who avoids the conscription may be fined or imprisoned for up to two years.[10]

In its decision, the Constitutional Court of Belarus quoted the relevant provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Document of Copenhagen Conference on Human Dimension of CSCE. It stressed that because of the legislative gap citizens have no possibility to implement their constitutional right for the substitution of military service to alternative one. That circumstance has been pointed out by the Constitutional Court in its Message on constitutional legality in 1999.[11] The Court ruled that according to the Constitution and Articles 1 and 14 of the Law on Military Duty and Military Service, the citizens of Belarus have the right to alternative service on religious grounds, which must be ensured through adequate administrative mechanisms. In this respect the Court considered it necessary to immediately adopt a law on alternative service or make necessary amendments to the Law on Military Duty and Military Service in order to establish mechanisms that ensure the right to alternative service. In the current situation, until the grounds and conditions for substituting military service with alternative service are determined by the legislature, CC agreed with the practice of relevant state bodies establishing conditions for the citizens of Belarus to perform their duty of defending their country in forms corresponding with their religious beliefs. According to the Court, "in approaching the issue of prosecution for refusal to serve in the army, the authorities should define to what degree the actions of the citizen are connected with the realization of the constitutional right to alternative service on religious grounds or refusal to serve under conditions that do not ensure respect of religious beliefs. In each particular case the authorities must take all measures to provide for thorough and due investigation of all the circumstances in order to provide the rights and freedoms of citizens who are willing to perform their duty to defend the Republic of Belarus in some other legally allowed way, and also to avoid misuse of these norms by citizens who are attempting to avoid military service".[12]

Thus, the Constitutional Court of Belarus used its competence to make decisions on elimination of legal gaps, collisions and legal uncertainty in normative legal acts in order to protect freedom of conscience and religion of a person.

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[10] http://www.pravo.by/document/?guid=3871&p0=hk9900275

[11] http://www.kc.gov.by/main.aspx?guid=19965

[12] Alexander Vashkevich,The Relationship of Church and State in Belarus: Legal Regulation and Practice, 2003 BYU L. Rev. 681 (2003). Available at: http://digitalcommons.law.byu.edu/lawreview/vol2003/iss2/11

The Constitutional Court has since May 2000 repeatedly called for the adoption of an alternative service law. However, this law was adopted only in 2015, fifteen years after the CC decision. It came into force on July 1, 2016.

What is interesting, after its adoption but before the signing by the President, the Constitutional Court had to exercise the obligatory preliminary review of the abovementioned Law. In its decision Constitutional Court noted that "the decision to substitute alternative service for military service (Article 16.5 of the Law) depends on how deep are the individual's religious objections so as to prevent him from performing military service. The legislator does not bind the right to substitute alternative service for military service merely by membership in any religious group or by other convictions, in particular pacifistic beliefs".[13] Approving this attitude, Constitutional Court quoted the legal position of the European Court of Human Rights in its Judgment of the case "Bayatyan v. Armenia" of July 7, 2011. It is noted that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 "Freedom of thought, conscience and religion" of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Law sets periods of alternative service for individuals not having higher education – 36 months; having higher education – 24 months, which is two times more than the term of military service. Alternative service would thus be punitive in length. Those doing alternative service have a 48-hour working week, 10 days' holiday per year and a small financial allowance.[14] Though formally alternative service is supposed to be socially beneficial labour, it is not regulated by the Labour Code which provides for a 40-hour working week, 24 days' holidays annually and a salary according to qualifications and position.

Constitutional Court ruled to recognize the Law of the Republic of Belarus on Alternative Service to be conforming to the Constitution of the Republic of Belarus.[15] However, the length of the service might be problematic in the light of the UN Human Rights Committee jurisprudence.[16]

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[13] http://www.kc.gov.by/en/main.aspx?guid=44313

[14] http://www.pravo.by/document/?guid=3871&p0=H11500276

[15] http://www.kc.gov.by/en/main.aspx?guid=44313

[16] See for example: Foin v.France.Communication№666/1985;Maille v.France. Communication № 689/1996; Venier & Nicolas v. France Communication Nos. 690/1996 and 691/1996 // http://www.un.org/documents/ga/docs/55/a5540vol2.pdf

CASE OF WRITTEN WARNING

In 2007, the CC got a request from the Secretary of the Consistory of the Religious Union Evangelical-Lutheran Church in Belarus. This organization was issued a written warning by the Plenipotentiary on the issues of religion and nationalities under the Council of Ministers of Belarus about violation of the Law on the Freedom of Conscience and Religious Organizations. According to the Article 37 of the abovementioned Law, if a religious organization violates the legislation of the Republic of Belarus or conducts activities conflicting with its statute, the registration office shall issue a written warning to be sent within three days to the administrative body of the religious organization. If a religious organization does not correct these violations within 6 months, or if it repeats the same violations within 1 year, the registration office may file a declaration in court for the liquidation of the religious organization. At the same time, the registration office may decide to suspend the activities of the religious organization until a court decision has been passed.[17]

In December 2006, the author acting on behalf of the Religious Union, appealed the written warning to the Supreme Court. On December 22, 2006, the Supreme Court rejected the author's appeal on the following grounds:

(a) according to article 358 of the Civil Procedure Code, legal persons who consider that unlawful actions (or the omission to act) of public authorities [...] infringe upon their rights, have a right to submit a complaint to court only in cases directly provided for by the law. The Law on the Freedom of Conscience and Religious Organizations, however, does not envisage such procedure and (b) according to Article 245, clause 1, of the Civil Procedure Code, the court shall refuse to initiate proceedings if the applicant does not have the right to file such suit in court due to lack of jurisdiction. The Supreme Court therefore refused to initiate proceedings for lack of jurisdiction to examine the author's complaint.

On February 15, 2007, the author applied to the Constitutional Court for an interpretation of Article 60 of the Belarus Constitution which stipulates that "everyone shall be guaranteed protection of one's rights and liberties by a competent, independent and impartial court of law within time periods specified in law."[18] In its reasoning, the Court compared the legal status of religious organizations to that of political parties and public associations. It took into account the Article 30 of the Law on Political Parties. It stipulates that the written notice made for the political party by the registering body may be subject to appeal to

[17] https://www.religlaw.org/common/document.view.php?docId=1367

[18] http://www.kc.gov.by/en/main.aspx?guid=1411

the Supreme Court of the Republic of Belarus within a month period of time after its receiving (part three of Article 30).[19] Similar norm is specified in the Article 27 of the Law of the Republic of Belarus on Public Associations.[20] Besides, the Constitutional Court emphasized that even though the Law on Freedom of Religion and Religious Organizations shall not stipulate directly the right of judicial appealing against written notice made with respect to a religious organization in case of violation by the religious organization of the legislation of the Republic of Belarus, the Code of Civil Procedure contains Chapter 29 that provides the procedure of appealing against actions of officials that violates rights of legal entities.[21] Taking into account all this information, the Constitutional Court ruled to confirm its legal position on the direct effect of the norm of Article 60 of the Constitution of the Republic of Belarus that guarantees the right to judicial protection expressed in Judgments of June 24, 1998, of May 13, 1999, and in its annual Messages.[22]

However, when the author appealed to the Supreme Court on the basis of the Constitutional Court's decision once again, the complaint was still rejected, that time on the following grounds: (a) on December 22, 2006, the Supreme Court refused, under Article 245, paragraph 1, of the Civil Procedure Code, to initiate proceedings on the basis of the complaint submitted by the Secretary of the Religious Union and this decision became executory; and (b) according to the ruling of the Plenum of the Belarus Supreme Court No.7 of June 28, 2001, and Article 247, paragraph 2, of the Civil Procedure Code, if the court's refusal, under Article 245, paragraph 1, of the same Code, to initiate proceedings has already become executory, a repeat recourse to court on the same grounds is not allowed.

Thus, even the Decision of the Court doesn't help to solve the petitioner's problem. Moreover, for the date there is no legal provision that would challenge abovementioned written warnings. This case demonstrates the weakness of the legal status of the Constitutional Court of Belarus. According to Article 24 of the Code of the Republic of Belarus on Judicial System and Status of Judges, all judgements and decisions of the Constitutional Court of the Republic of Belarus shall be final and not subject to appeal or protest; have the direct effect and do not require confirmation by other state bodies, other organizations, officials.[23]

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[19] http://pravo.by/document/?guid=3871&p0=v19403266

[20] http://pravo.by/document/?guid=3871&p0=v19403254

[21] http://pravo.by/document/?guid=3871&p0=hk9900238

[22] http://www.kc.gov.by/ru/main.aspx?guid=9853

[23] http://pravo.by/document/?guid=3871&p0=hk0600139

However, there is no mechanism of the implementation of its decisions and, as practice shows, some of them are not implemented for decades.

PENSION AND PASSPORT CASE

In 1996, Belarus introduced a new type of passport – national identity document– which assigned a personal identity number to every citizen. Some radical members of the Orthodox Christian religious communities refused to apply for the new identity document, since they considered that the assignment of a personal number contradicted their religious beliefs. They felt that replacing their names with a number for the purposes of interaction with the State authorities and society is demeaning, equating an individual created in the image of God with a soulless object. They considered that replacing their name with a number carried anti-Christian symbolism. Their members from the different regions of Belarus asked several times to be issued a passport without a personal identity number, but all their requests were rejected by the authorities. One of their arguments was that the interpretation of the Bible to which the applicants adhere appears to be at variance with the position expressed in 2000 by the Holy Synod of the Russian Orthodox Church.

The main problem for the persons that refused to obtain new passports was that when they became eligible for retirement benefits they were refused those. The reasoning was that the Regulation of the Ministry of Labour and Social Protection required pension applicants to submit a passport that confirmed their identity and place of residence. No other documents were taken into account, even old passports that were declared invalid. This situation lasted for almost two decades. However, in 2014 a case on Legal Uncertainty in the Legal Regulation of Personal Identification when Granting a Pension by Labour, Employment and Social Protection Bodies was initiated by the Constitutional Court, in accordance with Article 158 of the Law of the Republic of Belarus on the Constitutional Proceedings. According to this norm, "applications of state bodies, other organizations and individuals containing information on existence of legal gaps, collisions and legal uncertainty in normative legal acts submitted to the Constitutional Court shall be the ground for initiation of the proceedings on elimination of legal gaps, collisions and legal uncertainty in normative legal acts".[24] It was noted in the Decision of the Constitutional Court of July 9, 2014 that the existing procedure of granting pensions and submitting appropriate documents for the process was specified at the level of a normative legal act of the

[24] http://www.kc.gov.by/en/main.aspx?guid=13225

Ministry that provides for the mandatory presentation of a passport when applying for a pension. This procedure limits the realization of the constitutional right to a pension guaranteed by the State for individuals who cannot submit their passport because of the refusal of its receipt due to their religious beliefs, despite the fact that they had acquired this right by their labour activity and fulfillment of other conditions specified in the Law of the Republic of Belarus on Pension Provision.

In order to ensure the proper realization of the constitutional right to social security as well as the principle of social justice, the Constitutional Court recognized it necessary to eliminate legal uncertainty. The Council of Ministers of the Republic of Belarus was proposed to prepare an appropriate resolution in order to ensure, through legal regulation of the procedure for the submission and processing of documents for granting a pension by labour, employment and social protection bodies, the possibility of personal identification in exceptional cases not only by the passport of the citizen of the Republic of Belarus but also by other documents.[25]

This decision was implemented in February 2015 by the Council of Ministers.[26]

CONCLUSION

The Constitutional Court of Belarus has very limited power to protect constitutional rights and freedoms of individuals. The institute of the constitutional complaint does not exist in Belarus. Ombudsman office, though proposed by the Constitutional Court many times, was never created in the country. There are no applications to the Court from the state bodies that are entitled to do so. The only option available for it is to initiate procedure on elimination of legal gaps, collisions and legal uncertainty in normative legal acts and to propose amendment of the Belarusian legislation. However, the implementation of such decisions of the Constitutional Court depends exclusively on the good will of the executive branch of power. Even humble attempts of the Court to protect rights and freedoms of a person could be easily blocked by the judicial system of Belarus, as well as by executive power.

[25] http://www.kc.gov.by/ru/main.aspx?guid=37433

[26] http://pravo.by/upload/docs/op/C21500134_1424984400.pdf

RELATIONSHIP BETWEEN THE CONSTITUTION OF BOSNIA AND HERZEGOVINA AND KEY EUROPEAN AND PLANETARY DOCUMENTS GUARANTEEING/ PROTECTING FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

ZLATKO M. KNEŽEVIĆ*

GENERAL REMARKS

I In terms of history and issue of transition from a socialist system, Bosnia and Herzegovina provides a rare example of a country in transition from a socialist system which nevertheless has a history of having a constitutional court, since the former Yugoslavia was the only country which had a system of the constitutional courts even in the socialist regime. The first constitutional court in former Yugoslavia was created as early as 1963 and this date coincided with the starting point of the history of a Constitutional Court in Bosnia and Herzegovina.

The Constitution of Bosnia and Herzegovina (as Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina)[1], which was signed in Paris and entered into force on 14 December 1995, is a basic legal framework for the organization and functioning of the Constitutional Court of Bosnia and Herzegovina. In addition to the Constitution, it is also provided that the European Convention for the Protection of Human Rights and Fundamental (hereinafter: "the European Convention") shall be directly applicable in Bosnia and Herzegovina and shall have priority over all other laws.

The Constitutional Court of Bosnia and Herzegovina (hereinafter: "the Constitutional Court") started functioning upon the completion of election and appointment procedures in May 1997 when the first session of the Constitutional Court was held, which marked the continuity of the constitutional judiciary in Bosnia and Herzegovina following the former Constitutional Court of the Republic of Bosnia and Herzegovina. The Constitutional Court is based on Article

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[1] In order to stop the war in Bosnia and Herzegovina, a peace conference was held in Dayton, Ohio, which resulted in the end of the war and acceptance of peace agreement.

VI of the Constitution of Bosnia and Herzegovina which defines not only its jurisdiction, but also provides for its organizational structure and its procedure, as well as for the final and binding character of its decisions. The issues of the position, jurisdiction, procedure and decisions of the Constitutional Court, which are regulated by the Constitution of Bosnia and Herzegovina, are additionally regulated by the Rules of the Constitutional

Court adopted by the Constitutional Court itself. The Constitution of Bosnia and Herzegovina provides for a special position of the Constitutional Court in terms of being independent of three branches of power: legislative, executive and judicial powers, which makes it the highest legal authority whose basic function is to defend the Constitution of Bosnia and Herzegovina and the integrity of the entire constitutional-legal system, as well as for a consistent compliance with human and constitutional rights in accordance with international conventions and other international documents.

The jurisdiction of the Constitutional Court is primarily defined under Article VI(3) of the Constitution of Bosnia and Herzegovina.

II Bearing in mind Article VI(3) of the Constitution of Bosnia and Herzegovina, we may say that the relations between the Constitutional Court and other judicial instances are established in accordance with two basis:

a) The first basis is the appellate jurisdiction[2] which is established for the issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI(3)(b) of the BiH Constitution). This provision implies that the Constitutional Court is the highest judicial body in the country. This confirms its role as being a special institutional safe-guard for the protection of human rights and fundamental freedoms enshrined in the Constitution and European Convention. The appellate jurisdiction of the Constitutional Court under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina gives no jurisdiction or possibility to the Constitutional Court, as a court of last judicial instance, to consider the same appellate allegations which have been entirely considered at previous ordinary judicial instance. To the contrary, the Constitutional Court, within its appellate jurisdiction, deals exclusively with possible violations of constitutional rights or rights from the European Convention in the proceedings before ordinary courts and with the issue whether the decisions of ordinary courts have violated some constitutional rights. The Constitutional Court is not called upon to review the establishment of facts or the interpretation of laws by ordinary courts, unless the decisions of the ordinary courts violated consti-

[2] *Appellate jurisdiction is actually identical to the constitutional complaint in other countries having the same or similar legal systems.*

tutional rights. This is the case when decisions of ordinary courts are based on the wrong perceptions concerning the significance and scope of constitutional rights, when constitutional rights are not taken into consideration at all, when application of law is manifestly arbitrary, when relevant law is in itself unconstitutional or when fundamental human rights are violated. In the event that the Constitutional Court establishes that an appeal is well-founded, pursuant to Article 64, paragraphs 1 and 5 of the Constitutional Court's Rules, the Constitutional Court may refer the case back to the court that adopted the challenged judgment for renewed proceedings. The court whose decision has been quashed is obligated to take another decision under an expedited procedure and, while doing so, it shall be bound by the legal opinion of the Constitutional Court concerning the violation of the appellant's rights and fundamental freedoms guaranteed under the Constitution. The European Convention which has a special place in the Constitution of Bosnia and Herzegovina (Article II(2) of the BiH Constitution), shall apply directly and shall have priority over all other laws.

When it comes to this discussion, it is indisputable that the constitutions and constitutional courts exist and that, as a rule, those courts have the capacity of the highest national courts and that their decisions are final in the field regulated by the constitutions and that, in the field of *constitutionality* and *constitutional justice* and adjudication, their authority as supreme interpreter of the constitution is not challenged.

If we accept these basic premises given that all of us come from such kind of countries and the courts in the countries we come from are of that kind, we will have a task to find out whether there are the challenges in our job and in our area and what our prospects are; do we work in the best possible manner and are we going to repeat the best possible and the highest result in the years to come as better result cannot be achieved or there is something new happening in societies we represent and defend by *adjudication* or there is something new that is revealing either new or old modified horizons. If our intention is to discuss current and new trends, let us start with the basics.

In the history of the law and in the beginnings of philosophy and religion, a human freedom, or better to say the freedom of an individual, was the key point of discussions and theoretical and practical efforts dating back from the very beginning of formation of a state or state organizations. A law, as a defined collection of norms protected by collective coercion, has guaranteed and/or protected a freedom of individual person - a man in various periods in a different manner, in different scopes and for different groups.

With all the uniqueness of its creation, the Constitution of Bosnia and Herzegovina has several particularities in terms of constitutional constraints as to

separation of powers. At the level of state of Bosnia and Herzegovina, it foresees two types of powers, legislative and executive and as a specific form of control mechanism of the *rule of law*- which was designated already in the Preamble at the level of constitutional principle – it foresees the Constitutional Court of Bosnia and Herzegovina.

In addition, the Constitution has awarded the Constitutional Court – and we will not list here all the jurisdictions provided for by the Constitution - in addition to classical jurisdiction of any other constitutional court (review of constitutionality of laws, conflict of jurisdictions between various constitutional categories (in terms of German legal theory one could say between different constitutional entities), general law of the Constitutional Court to regulate its procedures, types of decisions, time-limits, organisations, immunity – which is regulated by the constitutional law in different systems) – jurisdiction to decide *against decisions of any other court in the country* by special legal remedy - *appeal*, if it finds a violation of the rights and freedoms as guaranteed by the Constitution. At the same time, the Constitution, in terms of fundamental human rights and freedoms, highlights: a) enumeration of constitutional rights; b) European Convention as an integral part of the Constitution; c) immediate application of the European Convention in the internal legal order; d) priority of the European Convention above all other law in the legal order; e) obligation of interpretation in accordance with the highest standards and f) additional rights of individuals and citizens and an obligation of public authority arising under the international agreements listed in Annex I to the Constitution.

If we add a provided prohibition of amendments to the Constitution in the part relating to *reduction* of achieved or better yet, guaranteed rights, one can easily say that the Constitution is one of the rare ones in the contemporary constitutional practice at the highest level of interaction with international documents concerning human rights. Perhaps it is an exception, when the application of international documents and especially European Convention is raised to the level of *constitutional adoption* where it becomes an integral part of the Constitution. As a rule, national constitutional systems confer upon the European Convention a position of international ratified contract or internal (national) law.

Such a collection of constitutional directives grants the Constitutional Court a completely different position in relation to other constitutional national courts. Thus, the Constitutional Court has a role of the *highest national court;* in addition, it has a role of a classical constitutional court with a task of classical protection of constitutionality and, especially important for this paper, it has a role of the court that has an obligation to apply the international document (European Convention): a) as an integral part of the Constitution; b) with direct ap-

plication and c) with priority above all other laws. Here we have another uniqueness of the constitutional order in BiH and particularly a specific position of the Constitutional Court, when we consider the duality of the European Convention – relation of the European Convention and standards in the interpretation does not only have an international significance in terms of supranationality or *constitutionalisation* of the international law concerning the protection of fundamental human rights and freedoms but one can also reflect on the relation of the Constitutional Court and European Court, viewing it through perspective of even ! subordination of the courts. This logic could lead to the conclusion that if the European Convention was an integral part of the Constitution and the European Court was a part of the Convention, the decisions of the European Court could then be the decisions of *practically, a national court*. Naturally, such logic in its simplification is incorrect as it fails to consider many other constitutional categories but also categories of the international public laws which are almost forgotten, like national sovereignty.

One of the uniquenesses of the Constitution of Bosnia and Herzegovina, which will be addressed in this paper, is that the European Convention is an *integral part of the Constitution*. This is provided for by the explicit constitutional provision. In its case-law, the Constitutional Court undisputedly applies not only rights guaranteed by the Constitution of Bosnia and Herzegovina but also equally establishes a violation of the European Convention, if there is one. In the specific situations, additional international agreements are applied as well, as listed in Annex I to the Constitution. In addition, Bosnia and Herzegovina is linked to, up until now, the only case of the European Court, which relates to violations of the European Convention as to the collective rights of the minorities concerning the election law. In this case, the European Court established that the provisions of the Constitution are ! in violation of the political rights of the minorities in the country that was constituted as consisting of three people (three equal, constituent peoples).

Thus, constitutional complaint, which is called an *appeal*, represents a part of the Constitution in the constitutional system of Bosnia and Herzegovina which again proclaims European Convention as an integral part of the Constitution. In addition to the European Convention, there is an obligation to apply other listed international agreements concerning the human rights protection. In such context, the issue of position and mutual relations of the European Court and Constitutional Court is not only an issue of parallelism but also even potential *subordination and hierarchical position*.

General issues of mutual impact and challenges of the constitutional justice in the example of Bosnia and Herzegovina are diffused on several levels.

First level is the relation of decisions of the European Court and Constitutional Court and their mutual correlation. Principles of interpretation of the European Convention, principles and legal tools used for discovering the contents of the norm, indicate that classical form of constitutionalism is not applicable. The simplest answer which would refer to form of subordinated position is in fact incorrect. Supranational court is not a *classical higher instance court* just like national court is not a *classical lower instance court*. There is no such relation nor can one exist as evident from the very essence of action – supranational court acts upon the *state* as the other party and national court acts upon the *individual*. Although such hypothesis is subjected to a different influence when it comes to the relation of the Court of Justice of the European Union and national courts, member countries of the European Union, in our case this hypothesis is indeed correct.

Principle of harmonized interpretation is not unambiguous, it implies mutual action and as such, implies that that this *harmonization of colours* is not mixing of oil and water but rather it implies *creation of common intellectual product*. If such approach is violated, a series of problems occurs. Neglecting an uniqueness of a certain state, not a mechanical transfer of standards of fundamental rights but interpretation of those standards without considering *national context*, leads to reactions ranging from open resistance to interpretation through legal initiative that relate to changes of *effects* of decisions of supranational court (in the sense that they are of *declarative and not constitutional character*) all the way through amendments to the Constitution as the highest act and awarding the highest national court (Constitutional Court) obligation of *a posteriori* verification of *applicability* of decision of supranational court in the national constitutional order.

Declarative and, up until recently, undisputedly guaranteed by constitutions and through general acceptance of public opinion, constitutional courts had a role of final authority and guardian of not only Constitution but supranational rights as well. However, *conflict of priorities* between political sphere of power (legislative and above all executive) has reduced or seriously attempts to reduce the role of the constitutional courts. Through a series of changes in Hungary or recently in Poland, a political sphere indicates that inherited rights to independence and separation are interpreted in a manner as it is best suited to the political sphere which consumes its undisputedly democratic term acquired in the democratic elections also on *keeping the constitutional judiciary under control.*

There is only a small step from such behaviour to *keeping under control* the fundamental norms of supranational documents. This has been demonstrated by the reaction to the current migration crisis - *freedom of movement of people*

has been reduced to freedom of protection or separation of national space regardless of affiliation to the community or even against the positions of authorities of the community without offering an excuse but merely justifying itself by the protection from the other and different.

European Convention on Human Rights and Fundamental Freedoms is by its essence, the most significant legal instrument in the recent history of law in general. Its appearance is tied to the organisational form of new European architecture after the end of the Second World War through organization of the Council of Europe as the form of international communication and cohabitation of countries in Europe divided by the ideological fence or curtain. The European Convention originates in its Article 3 of the Statute of Council of Europe that provides for the obligation of member countries to accept the principles of the *rule of law* and obligation of protection of all, regardless of citizenship, to enjoyment of human rights and fundamental freedoms on the European soil.

Naturally, the rule of law, as universal principle, and the principle of establishment, guaranteeing and implementation of human rights and fundamental freedoms, are not completely identical in contemporary world but it is undisputable that the European Convention is foundation of operationalisation of these principles. If those three principles - human rights compliance, pluralistic democracy and rule of law – are prerequisites of democracy in a contemporary society then the European Court is a mechanism or tool by which these principles and, especially, rule of law and human rights compliance are harmonized within the area of the Council of Europe.

CONSTITUTIONAL JUSTICE AND THE DEVELOPMENT OF INDIVIDUAL RIGHTS

MARCELO FIGUEIREDO*

I) Introduction. Constitutions in Latin America and their major concerns.

II) The Judiciary in the Brazilian constitutional regime.

III) The Federal Supreme Court in Brazil: membership, criticism and competences.

IV) The exercise of constitutional jurisdiction by the Federal Supreme Court.

V) The protection of fundamental rights by the Federal Supreme Court.

1) The case of constitutionality of anticipating childbirth in cases involving anencephalic fetus.[1] Non-applicability of the crime of abortion (ADPF 54-DF, Reporting Justice J. Marco Aurélio). 2) The research of embryonic stem-cells case (ADI* 3510/DF, Reporting Justice J. Carlos Britto, 5.3.2008). 3) The same-sex unions case – the legal recognition of same-sex cohabitation (steady unions) (ADIn* 4277, 142 and ADPF 132). 4) Nepotism. Inadmissibility to appoint relatives for positions of trust (ADC 12/2006). 5) The marijuana march – constitutionality (ADPF*** no.187, Reporting Justice J. Celso de Mello). 6) The Right to Health (fundamental social rights) and the Federal Supreme Court. 7) The constitutionality of the quotas system in public universities and of the Brazilian "University for**

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[1] Anencephaly is defined by medical literature as a congenital fetal malformation due to a defective closure of the neural tube during pregnancy, so that the fetus lacks the cerebral hemispheres and the cortex. Popularly known as "absence of brain", this anomaly consists in the inexistence of all superior functions of the central neural system, responsible for conscience, cognition, relational life, communication, affectivity and emotiveness. Only a few inferior functions remain, which partly control breathing, vasomotor functions and the spinal cord. Anencephaly is incompatible with extra-uterine life, and causes death in 100% of cases. Scientific literature or medical experience has settled this understanding, and there is no controversy on that. The legal procedure required for obtaining abortion authorization in these cases involve numerous complexities.

Everyone Program", or PROUNI (ADPF no. 186/DF, Reporting Justice J. Ricardo Lewandowski) and (ADI no. 3.300-DF, Reporting Justice J. Carlos Ayres Britto). 8) Requirement of university diploma to practice journalism. Unconstitutionality. (Extraordinary Appeal no. 511961-SP, Reporting Justice J. Carlos Ayres Britto). 9) Judicial activism by the Federal Supreme Court, the lack of clear criteria for the exercise of constitutional jurisdiction. Conclusive Summary.

*** "ADI" or "ADIn" stands for "Direct Action for the Declaration of Unconstitutionality" [TN]**

**** "ADC" stands for "Direct Action for the Declaration of Constitutionality" [TN]**

**** "ADPF" stands for "Action against violation of a constitutional fundamental precept" [TN]**

I) INTRODUCTION. CONSTITUTIONS IN LATIN AMERICA AND THEIR MAJOR CONCERNS

Initially, I would like to say that it is a great honor to be invited by Professors **Alexandru Tănase** and **Rainer Arnold** to take part in such a prestigious and important international gathering, where we are going to discuss *constitutional justice* and the *development of individual rights* from a comparative perspective.

I intend to share with our colleagues how this subject is viewed in my country, Brazil. Since our time is limited, my talk will be brief.

I'm going to talk about the exercise of the *Constitutional jurisdiction in Brazil*, its characteristics, its model and how human rights (individual, collective, social and diffuse) are specifically protected.

As an introduction, I must provide you with an overview of how the Judiciary is structured in Brazil, particularly the Constitutional Justice.

As everyone knows, Brazil is a Federal Republic formed by the inseparable union of member-States, Municipalities and the Federal District.

Brazilian federation is made up of three political persons: the Federal Government, the member-States and the Municipalities[2]. The Legislative, the Executive and the Judiciary are independent and harmonic powers (Art. 2 of Brazilian Constitution).

[2] Article 1 of Brazilian Federal Constitution states: "The Federal Republic of Brazil, formed by the inseparable union of States, Municipalities and the Federal District, constitutes a Democratic State based on the Rule of Law whose principles are: I- sovereignty; II- citizenship rights; III- human dignity; IV- the social values of work and free enterprise; V- political pluralism".

The most recent Brazilian Constitution of **1988,** that already counts ninety-five (95) Amendments, which results from hard, democratic work by the constitutional convention power of 1987, has produced an analytical, broad and ambitious Constitution with two-hundred fifty (250) articles in its permanent part.

Perhaps because at that time (1988) we were leaving a long-standing dictatorship, as other Latin American countries, or because the people were eager to actively participate in its new Constitution, the result was, *for the good or for the bad*, a Constitution that provides for various subjects, even for some that would not fit the classical conception of constitutional subject matters.

The Brazilian Constitution addresses a vast array of matters. Besides structuring the branches of government, outlining fundamental rights, providing rules for the tax and budget system, it defines the economic order, the urban, land and agricultural policies, brings an extensive chapter on social order, with matters relative to social security, health, social assistance, education, culture, sports, science, technology and innovation, social communication, the environment, family, children, adolescent, youth, the elderly and natives.

It is very hard to find a matter *not provided for* somehow in the constitutional norms and principles in Brazil. Of course, such an ambitious text, that brings so many aspirations of Brazilian people (an *aspirational*[3] character), also carries a series of difficulties as regards its effectiveness and applicability to the reality it intends to govern.

Brazilian Constitution somehow has influenced the Constitutions of the region, not only because it introduced a *new model* for the Democratic and Social State based on the Rule of Law, but has also established one, or several philosophical ramifications that characterize Latin-American constitutionalism.

With due regard for the differences between Latin-American States, it is possible to say that the Constitutions in that region acknowledge the cultural differences between the peoples, promote pluralism, respect diversity, protect groups traditionally discriminated against (such as natives and blacks), are multicultural and promote participative citizenship.

In the same way, the successive reforms in the region over the recent years caused Latin-American Constitutions to be very *generous* as they recognize their inhabitants' constitutional rights, because not only they have incorporated civil and political rights inherited from the liberal tradition (privacy, due process, freedom of speech, right to vote), but they have also broadly established

[3] "Aspirational" character: Revealing the aspirations (desires) of people at that time in history.

economic, social and cultural rights, such as education, housing, health, the environment, in addition to other special rights to autonomy and citizenship, such as the right to water, nature rights, and the recognition of the natives' rights, as the Constitution of Bolivia, Peru and Ecuador specifically state, and which the Constitution of Venezuela state to a certain extent.

A considerable broadening of constitutional rights has been seen in comparison with the previous texts, especially a great openness to the *international human rights law,* which usually includes human rights international treaties in their constitutional language.

Still as regards our study, one has created and strengthened the *Constitutional Justice* in several ways, either by creating Constitutional Tribunals or Courts, or by improving the jurisdiction (competences) of Supreme Tribunals or Supreme Courts, thus enhancing the constitutionality control of laws and rules, through the introduction of either an "ombudsman" or "defenders of people", who are in charge of promoting and protecting human rights.

It is also important to mention the *strengthening of democracy mechanisms,* which bolstered controlling state institutions such as Prosecution Offices, People Defenders' Office or the Comptroller General Offices and Accounting Offices. The intention was not only to enhance human rights as a whole, but also to provide citizens with the capacity to protect their constitutional rights through several protection[4] actions. We must also remember the creation, in some countries, of semi-direct democracy mechanisms (plebiscite, referendum, ballot initiative and public consultations).

Also, bodies or Superior Councils of Magistrates have been created in an attempt to reduce the influences from political appointments by the Executive which is usually very strong in the region. Brazil, Colombia, Argentina, Peru and Paraguay are examples of how the judicial power has strengthened.

Likewise, some countries prohibit or limit reelection of the Head of the Executive Branch and increase the powers of the Legislative, although in this respect, there are always some attempts to amend the Constitution to the opposite direction. Allowing reelections and increasing the powers of the Executive.

Clearly, despite all these reforms, classic problems *remain* in the region, such as the deep inequality in the distribution of resources (unequal distribu-

[4] In Brazil, through several actions such as the citizen suit, the public-interest civil action, the *habeas-data,* the writ to remedy legislative omission ("*mandado de injunção*"), the individual or collective writ of mandamus, the *habeas-corpus*, among other instruments.

tion of income), strong presidential systems, the need to overcome misery and poverty, economic inequality, corruption of public and private officials, impunity and quality of democracy.[5]

II) THE JUDICIARY IN THE BRAZILIAN CONSTITUTIONAL REGIME

The Judiciary Branch in Brazil is organized in the Federal Constitution (CONSTITUTION) in Articles 92 to 126. Its main function is to solve, or settle, conflicts of interests in each specific case. As we all know, this is referred to as *jurisdiction,* and is developed through *judicial proceedings.*

Jurisdiction is controlled by the Judiciary Branch and the State (Art. 5, XXV of the CONSTITUTION). There is only state jurisdiction, entrusted to judges or magistrates, who in Higher Courts are called Justices.

In Brazil, justice is, because of the federal model, divided into *federal and state.* No municipal justice (at the city level) is exercised in Brazil. The following are the bodies that exercise the Judiciary's judicial function, also referred to as jurisdictional function, in Brazil:

I- The Federal Supreme Court
II- The National Council of Justice
III- The Superior Court of Justice
IV- The Regional Federal Courts (Circuit Courts of Appeals) and federal judges
V- The Labor Courts and Judges
VI- The Electoral Courts and Judges
VII- The Military Courts and Judges
VIII- The Federal, State and Federal District[6] Courts and Judges

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[5] Consult, among others: Rodrigo Uprimny, "Las Transformaciones Constitucionales Recientes en America Latina", a paper presented in the last World Congress of Constitutional Law in Mexico, published in Buenos Aires, Siglo XXI Editores, coordinated by C. Rodriguez, 2011; Jorge Carpizo, "Tendencias Actuales del Constitucionalismo Latino-Americano", published in Revista Derecho del Estado, no. 23, December 2009, UNAM, Mexico, 2009; Marcelo Figueiredo, "Perspectives of the Latin-American Constitutionalism – Towards Renewing Liberal and Social Constitutionalism" in "Constitutional Law – Interdisciplinary studies on federalism, democracy and Public Administration", Fórum Ed., Belo Horizonte, 2012.

[6] In Brazil there is also the (Federal and State) Justice of the Peace made up of individuals elected by the people through direct, universal, secret and periodic vote, for a four-year term and with competence to, under the law, celebrate marriages and hear challenges. Their decisions are not considered judicial.

All *trial court* judges in Brazil (both federal and state) take office in this initial position of the career through *competitive civil-service examination (tests and academic achievements)*, with the participation of the Brazilian Bar Association (OAB) along all the stages.

All the judges enjoy the following *guarantees*: a) entrance through a competitive civil-service examination including tests and academic achievements; b) promotion in order of seniority and based on merit; c) access to second-level courts of appeal also in order of seniority and merit; d) compensation known as *subsidies* with maximum limits, based on the compensation paid to judges (Justices) of the Federal Supreme Court (STF); e) inactivity upon retirement that may be compulsory, out of disability or time of service limit (75 years of age); f) publicity and justification of their decisions.

In all Brazilian judicial Courts there is a second-(higher-)level body made up of all of judges for the exercise of their administrative and judicial functions as the so-called full bench or special body (*full bench*)[7], where half of the positions are filled in order of seniority and the other half upon internal election.

Judges enjoy the following institutional guarantees for the regular exercise of their functions: a) administrative and financial autonomy of Courts; b) functional guarantees, in order to ensure their Independence and impartiality.

The guarantees are: I) *tenure for life,* as to the position for which they have been appointed upon competitive civil-service examination after two years. They cannot be removed only by their own will or voluntary or compulsory retirement, in this latter case with the right to defend; II) permanent function ("*inamovibilidade*"), as to their permanence in the position for which they have been appointed, in that the court cannot transfer them to another place to exercise their functions. They can only be removed by public interest following decision by absolute majority vote of the members of the court of upon determination of the National Council of Justice on a same quorum. In the case of exchange, then it will be permitted, provided that with another judge of the same judicial district and same Court; III) *no compensation (subsidies – remuneration) reduction.* Their remuneration may not be reduced, and they are subject to pay income tax, just like any other taxpayer.

Judges *cannot exercise several activities*: a) hold another position or function, except for teaching; b) receive payment of costs or any share of any case; c) dedicate to political-party activities; d) receive allowances or contributions from

[7] Art. 97 of the Brazilian Constitution states: "Only upon absolute majority vote of the members or of the members of the respective special body can courts declare the unconstitutionality of a law or rule issued by the Government".

individuals or public or private entities; c) practice law in the court or court of appeals where they have exercised their functions, before three years have passed since they left the position based on retirement or dismissal.

The Judgeship Statute (the Judges' Organic Law[8]) provides for official preparation training, improvement, and judges must attend these until the end of their tenure for life, or voluntarily at any time.

It should be noted that at the second level of the (federal or state) Judiciary one-fifth of the vacancies is made up of members of the Prosecution Office with more than ten (10) years in office and reputable lawyers known for their expertise appointed from a 6-name list by the bodies representing the sector. Upon receipt of such list, the Court prepares a 3-name list that is sent for analysis by the Executive for this latter to, within twenty (20) subsequent days, choose a name on the list for appointment.[9]

In Brazil the access to justice (the so-called *judicial relief)* is a *fundamental right* guaranteed by Art. 5, XXXV, of the Federal Constitution, and materializes as it is the *duty* of the Judiciary to hear any *injury* or *threat* to individual, collective or diffuse right.

In Brazil, no judge of any court level can deny access to judicial relief, nor can a judge fail to decide. The so-called *non liquet*[10] prohibition is provided both in Article 4 of the Law of Introduction to the Brazilian Civil Code and in the Civil Procedure Code.

Article 4 of the Law of to the Brazilian Civil Code sets out:

> "If the law has an omission, the judge shall decide the case in accordance with analogy, customs and the general principles of law".

On the other hand, Article 126 of the Brazilian Civil Procedure Code, provides that:

> "a judge is not exempt from rendering a decision or from issuing an order on the grounds of a gap or obscurity in the law. Upon adjudication of a conflict, the judge shall apply the legal rules; and if no rule provide for the case, the court shall make use of analogy, customs and the general principles of law".

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[8] Federal Law no. 35/1979.

[9] See José Afonso da Silva, "Course on Positive Constitutional Law", 38th Ed., Malheiros Ed., São Paulo, 2015, page 563 et seq.

[10] One should not confuse the *non liquet* prohibition with the necessary observance of certain procedural conditions inherent to the right to action and its feasibility.

In fact, if a person seeking judicial relief claims something, they have the right to a response from the Judiciary. Without such a perception, one runs the risk of completely emptying the content of rights, especially the fundamental rights, in view of the instrumental importance of the access to justice.

Articles 3 and 5 of the Brazilian Civil Procedure Code[11] provide for similar effects:

> Art. 3. No threat or injury to any right may be deprived from judicial relief.
>
> §1 Arbitration is permitted, under the law.
>
> §2 The State shall promote, whenever possible, a consensual solution for conflicts.
>
> §3 Conciliation, mediation and other consensual methods for resolving conflicts shall be fostered by courts, lawyers, public defenders, and members of the Prosecution Office, even in the course of proceedings.
>
> Art.4 The parties are entitled to obtain, within reasonable time, full solution of the merits, including the granting of final relief".

III) THE FEDERAL SUPREME COURT IN BRAZIL: MEMBERSHIP, CRITICISM AND JURISDICTION (COMPETENCES)

The term "Federal Supreme Court[12]" was adopted by the Provisional Constitution published upon the issuance of Order no. 510, of June 22, 1890, and was repeated in Order no. 848, of October 11 of the same year, organized by the Federal Justice.

The Constitution promulgated on February 24, 1891 instituted the constitutionality control (or judicial review) of laws and dedicated Articles 55 to 59 to the Federal Supreme Court.

At that time, the Brazilian Supreme Court was made up of fifteen justices appointed by the President of the Republic, upon subsequent approval by the

[11] Law no.13105, of March 16, 2015.

[12] The most ancient predecessor of the Federal Supreme Court was the so-called "Brazil's House of Pleadings", created by a Permit issued by the Regent Prince D. João, on May 10, 1808. So far, proceedings were taken to Lisbon, since Brazil was a colony of Portugal. When the Portuguese Royal Family landed in Brazil, as they fled the Reign targeted by Napoleon troops, remitting all the proceedings to Lisbon was unfeasible. Hence, the Regent Prince decided to create the embryo that, centuries ahead, would turn into the Federal Supreme Court.

Senate. After the 1930 Revolution, the Provisional Government has decided to reduce the number of justices to eleven, through Order no. 19656, of February 3, 1931.

On April 21, 1960, with the new federal capital, the Federal Supreme Court was transferred to Brasília, after having operated for sixty-nine (69) years in the city of Rio de Janeiro.

The Federal Supreme Court, according to the current Brazilian Constitution, promulgated in 1988, is made up of eleven (11) judges called Justices, appointed by the President of the Republic, following their acceptance by the Federal Senate, from among Brazilian citizens (born in Brazil), over thirty-five years of age and less than sixty-five, renowned for their legal expertise and high reputation.

We shall not go into a deep analysis of the *liability of judges* in Brazil because this would take much time. Therefore, I recommend the study of a paper already published on that subject.[13]

Lately, much is discussed about the *convenience* of maintaining a model of entrance and appointment for Federal Supreme Court Justices in Brazil.

Critics allege that there are very few requirements to enter the Court, besides the minimum and maximum age and the hazy concepts of "*renowned legal expertise*" and "*high reputation*".

Just like the *appointment method* applied to Justices of the U.S. Supreme Court[14], critics argue that at the very beginning the model is excessively politicized, either from the "candidate" standpoint, or considering the broad powers of the President of the Republic to choose them, or even considering the very nomination, that may be addressed to persons holding top positions in the Federal Administration, not to mention appointments made to direct assistants of the President of the Republic, for them to act in the capacity of legal advisors or counsels for the Federal Government, Minister of State and politicians in general.

In the same way, one criticizes the role of the Federal Senate which, with a few exceptions, fails to conduct a deeper analysis, as one might expect – as occurs in the North-American model – of the appointee, and limits to holding a quite *pro forma* confirmation hearing.

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[13] Marcelo Figueiredo, "La Magistratura Y El Federal Supreme Court En El Sistema Constitucional Brasileño", in "Estatuto Jurídico del Juez Constitucional en América Latina y Europa", Libro Homenaje al Doctor Jorge Carpizo, Coordenadores: Héctor Fix-Zamudio e César Astudillo, página 293 e seguintes. UNAM, México, 2013.

[14] Unlike in the USA, in Brazil, judges – including the Justices of the Federal Supreme Court – retire *compulsorily* at the age of 75.

Adauto Suannes[15] comments on the membership of the U.S. Supreme Court and points out that out of the sixty (60) judges appointed by the President of the Republic in the 20th century, five have been rejected by the North-American Senate, unlike our experience in Brazil.

He states: "[In Brazil], we have never had a candidate to the Brazilian Supreme Court turned down by the Senate, which limits to probing the candidate without any concern about his past professional life and legal expertise. As everyone knows, we had an unbelievable case of a justice who, after resigning his position in the Supreme Court, accepted a position in the Executive, and then came back to the Supreme Court and retired.[16] Moreover, in the past we had one physician and two generals in the Supreme Court".

Criticism to this method has strengthened, because today, under our constitutional system, the Supreme Court is in charge of crucial and comprehensive functions, as we will see further on.[17]

We are not discussing, one should stress, the undeniable technical qualification and reputation of the great majority of Justices currently making up the Supreme Courts; we only report and question the method of selection that unquestionably deserves *improvement*. We claim a greater *democratization and social participation* in this process.[18]

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[15] Adauto Suannes, "The Ethical Fundaments of Due Criminal Process", São Paulo, RT, 1999, page 117.

[16] Fertunately, in this case, he was a great jurist.

[17] Academic works present several claims for changes in the STF, either through a model similar to the Constitutional Court, such as in Germany, with judges counting 10 or 12 years in office, as is the case in many Countries, or through its "democratization", with members from other branches of the judiciary family, such as lawyers, prosecutors, university professor and political agents from the Parliament minorities. Of course, this and other proposals have hitherto found no resonance either in the Legislature or in the very Federal Supreme Court, that prefers to keep its *status quo*.

[18] For that matter, one should remember not the appointing process, but the process in the constitutionality concentrated control, that improvement has been made when it comes to its availability to civil society through Law 9869/99, which among other aspects, introduced important advances, such as: the possibility that an *amicus curiae* participates in the case, and the holding of *public hearings* under constitutional proceedings. These two important instruments allow for *experts*' manifestation in the constitutionality control on technical issues involving different areas of knowledge. There is no doubt that both institutes had the purpose of granting greater democratic legitimacy and technique to the decisions rendered by the Federal Supreme Court upon the abstract constitutionality control, as we will see. The *amicus curiae* was taken from the North-American experience and allows for civil society entities, connected with the matter under constitu-

Let us move to the analysis of their competences, or jurisdiction. As per Article 102 of the Constitution, we can divide the Supreme Court's jurisdiction into *three groups,* as teaches José Afonso da Silva:[19]

> (1) Those to be originally processed and adjudicated, i.e., as a single and final court, under item I;
>
> (2) Those to be processed and adjudicated as ordinary appeal, under item II;
>
> (3) And finally, those to be processed and adjudicated as extraordinary appeal, and which are the cases to be decided as single jurisdiction or as a court of last resort, when the appealed judgment involves one of the constitutional matters under III.

Article 102, I, II, and III of the Brazilian Constitution Federal establishes:

Art. 102. The Federal Supreme Court shall primarily protect the Constitution, and shall:

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tional discussion, to bring new arguments to the debate to be brought to the Court. Even if in principle such participation in the debate assumes no position for or against the thesis raised by the plaintiff or claimant, one cannot deny that both institutes may play a major role of assistants to the Court, either by avoiding a mistaken decision, or by improving and enhance the arguments of the parties. A public hearing, on the other hand, consists of a group of experienced persons in the matter, who are called to participate. They may clarify technical, administrative, political, economic and legal matters, and cause the constitutional jurisdiction to be more democratic. Public hearings have been first provided for in Laws 9868/99 and 9882/99, governing the processing and adjudication of the direct actions for the declaration of unconstitutionality, actions for the declaration of constitutionality and actions against violation of constitutional fundamental precepts. Afterwards, the public hearings started being governed by Regimental Amendment no. 29/2009, that granted jurisdiction to the Chief-Justice of the STF or to the Reporting Justice in charge of drafting the judgment, under Articles 13, XVII, and 21, XVII of the Internal Rules of the Court, to "Call a public hearing for purposes of taking the testimony of persons with experience and authority in a given matter, whenever one deems necessary to clarify factual issues or circumstances with general repercussion and of relevant public interest" debated by the Court. The procedure to be observed is set forth by article 154, sole paragraph, of the Internal Rules of the Federal Supreme Court. The first public hearing held by the Court was called by Justice Ayres Britto, Reporting Justice of ADI 3510, that challenged provisions of the Biosecurity Act (Law no. 11.05/2005), and took place on April 20, 2007.

[19] Op. Cit. Page 565.

I – conduct the processing and adjudicate the case, as a court of original jurisdiction, in the following situations:

a) a direct action for the declaration of unconstitutionality of a law or another federal or state rule and the action for the declaration of constitutionality federal law or rule;
b) common criminal violations, the President of the Republic, the Vice-President, the members of the National Congress, their Ministers and the Federal Attorney General;
c) common criminal violations and impeachable offenses, the Ministers of State and the Commander of Navy, Army and Air Force, except for Art. 52, I, the members of Higher Courts, of the General Accounting Office and the heads of permanent diplomatic missions;
d) the *habeas corpus*, where the petitioner is any of the persons above; writ of mandamus and *habeas data* against the President of the Republic, the Boards of the House of Representatives (Chamber of Deputies) and the Federal Senate, the General Accounting Office, the Federal Attorney General and the Federal Supreme Court itself;
e) a controversy involving a foreign State or international body and the Federal Government, a State, the Federal District or a Territory;
f) cases and conflicts between the Federal Government and the States, the Federal Government and the Federal District, or between one another, including the respective entities of indirect administration;
g) an extradition requested by a foreign State;
h) (Revoked).
i) the *habeas corpus*, when the defendant is a Higher Court or when the defendant or the petitioner is an authority or an employee whose actions are directly subject to the jurisdiction of the Federal Supreme Court, or when the crime is subject to the same jurisdiction in a court of last resort;
j) criminal reviews and reliefs from judgment;
l) complaints to preserve its jurisdiction and to guarantee the authority of its judgments;
m) enforcements of judgment in cases under its original jurisdiction, with the right to delegate duties for the exercise of procedural acts;
n) actions wherein all the members of the judgeship are directly or indirectly interested, and that wherein more than a half or the members of the lower court of appeals are impeded or are directly or indirectly interested;

o) conflicts of jurisdiction between the Superior Court of Justice and any other courts of appeals, between Higher Courts, or between these and another court of appeals;
p) claims for a provisional remedy under direct actions for the declaration of unconstitutionality;
q) o Brazilian writ to remedy legislative omission (or "*mandado de injunção*"), when the preparation of the missing law is a duty incumbent on the President of the Republic, the National Congress, the House of Representatives (Chamber of Deputies), the Federal Senate, the Board of one of these Legislative Houses, the General Accounting Office, of one of the Higher Courts or of the Federal Supreme Court itself;
r) actions against the National Council of Justice and against the National Council of the Prosecution Office;

II – adjudicate, as ordinary appeal:

a) the *habeas corpus*, writ of mandamus, and writ to remedy legislative omission decided as a single jurisdiction by the Higher Courts, if the judgment denies relief;
b) political crimes;

III – adjudicate, as extraordinary appeal, the cases decided under single jurisdiction or as a court of last resort, when the decision appealed:

a) violates a provision of this Constitution;
b) declares the unconstitutionality of a treaty or federal law;
c) holds valid a law or rule issued by the local government that is challenged as a violation of this Constitution.
d) adjudicate a valid local law that is challenged as a violation of a federal law.

Most of the adjudicating jurisdictions under the items of Article 102 have a content of constitutional controversy. Therefore, the function of the STF, in these cases, consists in resolving the constitutional controversy, through the exercise of *constitutional jurisdiction.*

José Afonso da Silva[20] goes on to state that the *constitutional jurisdiction* encompasses several contents and objectives, in three types that may be observed in that Court's jurisdiction, to wit:

[20] Op. Cit. Page 566 to 568.

a) Constitutional jurisdiction with constitutionality control;

b) Constitutional jurisdiction of freedom;

c) Constitutional jurisdiction without constitutionality control

Basically, item "a" refers to the actions for the declaration of unconstitutionality by action or by omission, and the extraordinary appeal.

Basically, item "b", refers to the constitutional remedies intended for the defense of fundamental rights and their own mechanisms (writ of mandamus, *habeas-corpus*, writ to remedy legislative omission, *habeas-data*);

Basically, item "c", refers to the jurisdiction to adjudicate crimes committed by members of the other branches, controversies between States, conflicts of jurisdiction, and other actions.

Then, as to the Federal Supreme Court jurisdiction, we also find: a) the action against violation of a constitutional fundamental precept (ADPF[21]), binding precedents and e precedents preventing appeals and the binding effect:

§1 The action against violation of a constitutional fundamental precept, provided by this Constitution, shall be heard by the Federal Supreme Court, under the law.

§2 Final judgments on the merits, issued by the Federal Supreme Court, under direct actions for the declaration of unconstitutionality and under actions for the declaration of constitutionality shall be effective against everyone and produce binding effects on the other bodies of the Judiciary and the direct and indirect public administration, in the federal, state and municipal spheres.

§3 In extraordinary appeals the appellants must demonstrate the general repercussion of the constitutional matters discussed in the case, under the law, in order for the Court to be able to examine the acceptance of the appeal, in that a refusal may only occur upon manifestation of two-thirds of its members.

Then there is Article 103 of the Federal Constitution that, as we mentioned at the beginning of this paper, has largely broadened the set of persons with standing to file actions for the declaration of unconstitutionality, to wit:

Art.103. The **direct action for the declaration of unconstitutionality** and the action for the declaration of constitutionality can be filed by:

I – the President of the Republic;

II – the Board of the Federal Senate;

[21] Governed by Law 9882/99

III – the Board of the House of Representatives (Chamber of Deputies);

IV – the Board of the State Legislature or of the Legislative Chamber of the Federal District;

V – the State Governor or the Governor of the Federal District;

VI – the Federal Attorney General;

VII – the Federal Council of the Brazilian Bar Association;

VIII – political parties with representation in the National Congress;

IX – union confederation or trade association of national scope.

§1 The Federal Attorney General shall be heard first in actions for the declaration of unconstitutionality and in all proceedings under the jurisdiction of the Federal Supreme Court.

§2 Upon declaration of unconstitutionality by omission relative to a measure that brings a constitutional rule to effect, the relevant Branch shall be notified to take the necessary actions and, in the case of administrative bodies, to so do within thirty days.

§3 When the Federal Supreme Court adjudicates the unconstitutionality, in principle, of a legal act or rule, the General Counsel for the Federal Government shall be previously summoned, to defend the challenged act or text.

Art. 103-A. The Federal Supreme Court may, *sua sponte* or upon request, on decision made by two-thirds of its members, following repeated decisions on a constitutional matter, approve a precedent that, from the date of publication thereof in the official press, shall be binding on the other bodies of the Judiciary and on the direct and indirect administration, in the federal, state and municipal spheres, and shall either review it or cancel it, pursuant to the terms stated by law.

§1 The purpose of the precedent shall be the validity, the interpretation and the effectiveness of certain rules, about which there is a current controversy between judiciary bodies, or between these and the public administration that leads to a serious legal insecurity and to a relevant multiplication of proceedings on identical subject-matter.

§2 Without prejudice to anything that may be provided by law, the approval, review or cancellation of a precedent may be claimed by those authorized to file the direct action for the declaration of unconstitutionality.

§3 Any administrative act or judicial decision contrary to the applicable precedent, or which unduly applies it, shall be subject to a complaint

to the Federal Supreme Court which, upon granting thereof, shall annull the administrative act or revoke the judicial decision subject to the complaint, and determine that another one be issued, with or without application of the precedent, as the case may be

IV) THE EXERCISE OF THE CONSTITUTIONAL JURISDICTION BY THE FEDERAL SUPREME COURT

Initially, one must stress that Brazil adopts two basic types of constitutionality control. The *diffuse* system, originated from the North-American system, and the *concentrated* or abstract system of constitutionality control, originated from Europe.

Despite the historical origins, we have developed specific peculiarities, as is natural in several States of the region.

The diffuse, repressive or *posterior* of constitutionality control is well known throughout the world. It may be exercised by *any judge or court of the Judiciary*.

The diffuse control allows for verification, in a concrete case, of a given unconstitutionality; the declaration of unconstitutionality occurs incidentally (*incidenter tantum*), with prejudice to the analysis of the merits.

Something is claimed in court, within the ambit of a controversy, with grounds on the unconstitutionality of a law or legal rule, whose procedural cause of action is the unconstitutionality.

If the judge or court recognizes it, the challenged rule is not applied *to the case under scrutiny o*n the grounds of being unconstitutional, because its unconstitutionality is judicially declared. The effects are *inter partes*.

The same occurs in Courts of Appeals. Article 97 of the Federal Constitution applies, in that more recently its enforcement has been dismissed if a decision exists and derives from the very Court of Appeals (*ad quem*) or Federal Supreme Court.

We shall not focus on the diffuse control. Let us move on directly to the abstract or concentrated constitutionality control, where we find more and more comprehensive problems concerning constitutional jurisdiction.

We observe that numerous persons have standing under article 103 of the Federal Constitution, as stated above. The abstract or concentrated constitutionality control in Brazil has strengthened over the constitutional reforms.

Through such abstract control, in the several actions therein provided (direct actions for the declaration of unconstitutionality, action against violation of

a constitutional fundamental precept and constitutional complaints), the remedy sought is the constitutionality control *of the act in theory, abstract, marked by its generic nature, impersonality and abstraction.*

As a rule, through the concentrated control one intends to purge (either materially or formally) defective laws or rules and seek their invalidity.

The concentrated or abstract constitutionality control exercised by the Federal Supreme Court in Brazil is very comprehensive.[22] Constitutional Amendments, provisional presidential decrees issued by the Executive, autonomous orders, international treaties and conventions (except for those concerning human rights, which enjoy constitutional status), can all be the object of constitutionality control.

Even some types of state acts that produce concrete effects, and state acts producing concrete effects issued under the law (exclusively formal) can be controlled under the abstract or concentrated control.

At least three important judgments, the Federal Supreme Court in Brazil, in exercising abstract constitutionality control, have acknowledged the concentrated constitutionality control of the budget law.

The first, ADI 2925, Reporting Justice J. Ellen Gracie, Justice in charge of drafting the Judgment, J. Marco Aurélio, adjudicated on 19/12/2003, held *unconstitutional the interpretation of the Budget Act no.10.640/2003,* that led to the granting of supplementary credit differently from the destination of what was collected from the terms of §4, of Article 177 of the Federal Constitution, in view of the restrictive nature of letters "a", "b" and "c" of item II of said paragraph.

A Provisional Remedy under a Direct Action for the Declaration of Unconstitutionality (ADI) challenging Provisional Presidential Decree no. 405 of 2007, which addressed the granting of extraordinary credit, held that there are limits to the exceptional legislative activity by the Executive when issuing such decrees. Since the credits granted were designed for current and unpredictable expenses, it declared unconstitutional the Provisional Presidential Decree, and suspended the effectiveness of Law no.11.658/2008. (ADI 4048, MC, Reporting Justice J. Gilmar Mendes, en Full Bench, adjudicated on 14/05/2008).

Finally, in ADI 4049, Reporting Justice J. Carlos Britto, Full Bench, adjudicated on Nov/05/2008, also held that the granting of extraordinary credit for payment of current and trivial expenses do not fall within the category of unpredictability and urgency, under Article 167, §3 of the Constitution. Provisional Remedy granted.

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[22] Governed by Law 9868/1999, as amended by Law 12063/2009. See, also, Law 9882/99.

V) THE PROTECTION OF FUNDAMENTAL RIGHTS BY THE FEDERAL SUPREME COURT

As already mentioned, the Brazilian Constitution offers a large array of actions to protect fundamental rights.

Thus, any person or interested party may go to the Judiciary through numerous actions[23] to present the discussion over the enforcement of fundamental rights.

It is natural that, because they refer to constitutional matters, even if originating from the diffuse route, they end up reaching the Supreme Court, the ultimate interpreter of the constitutional jurisdiction.

One must also add all the jurisdictions (or competences) of actions of concentrated control (Art.103), which also refer, many times, to injury, threat or discussions on fundamental rights of numerous types.

Several reasons contribute to this phenomenon. However, I will mention only the main ones. One should note that the Brazilian Constitution is generous in recognizing several individual, social, economic and cultural rights. Therefore, subjects such as the right to health, housing, education, life, Science and technology and the rights of minorities are often sent to the Federal Supreme Court.

I have hand-picked some of the most paradigmatic cases to convey this outlook.

1) The case of constitutionality of anticipation of childbirth in cases of anencephalic fetuses.[24] Non-applicability of the crime of abortion (ADPF 54-DF, Reporting Justice J. Marco Aurélio);

Paragraph1 of Article 103 of the Constitution is quite laconic:

[23] See, among others: The Habeas-Corpus, the Habeas-Data, the Writ of Mandamus, the Writ to Remedy Legislative Omission (*Mandado de Injunção*), the Citizen Suit, the Public-Interest Civil Action, the Action against a Public Official or Third Party for Misconduct in Office, Electoral Actions, among others.

[24] Anencephaly is defined by medical literature as a congenital fetal malformation due to a defective closure of the neural tube during pregnancy, so that the fetus lacks the cerebral hemispheres and the cortex. Popularly known as "absence of brain", this anomaly consists in the inexistence of all superior functions of the central neural system, responsible for conscience, cognition, relational life, communication, affectivity and emotiveness. Only a few inferior functions remain, which partly control breathing, vasomotor functions and the spinal cord. Anencephaly is incompatible with extra-uterine life, and causes death in 100% of cases. Scientific literature or medical experience has settled this understanding, and there is no controversy on that. The legal procedure required for obtaining abortion authorization in these cases involve numerous complexities.

"The action against violation of a constitutional fundamental precept, provided for by this Constitution, shall be heard by the Federal Supreme Court, under the law".

There is no constitutional or legal definition for the meaning and the extent of the concept of a "fundamental precept". Doctrine experts and case law from the STF have sought to enhance its content through cases heard.

In brief, although academic writing does not consider "fundamental precepts" and "fundamental rights" to be equivalent, some points of contact are so considered for purposes of protection through.

ADPF was created to fill a gap in the abstract constitutionality control of laws in Brazil. This remedy enables to overcome the impossibility to conduct abstract supervision of pre-constitutional right and if infra-legal norms, and to perform the direct control of the municipal right that formerly had no direct access to the Federal Supreme Court.

The ADPF can be used to object legal acts, administrative acts and even jurisdictional acts. The phrase "government acts", contained in the governing law, is understood in the more broad sense and includes acts by private persons that act in the capacity of public authority.

Furthermore, the ADPF also allows anticipation of STF judgments on relevant constitutional controversies that not long ago could only reach the STF after a long procedural route from the trial court up to the STF. Thus, one avoids that in the meantime legal uncertainty prevails, clogging national Courts of Appeals and leading to possible discrepant judgments, and allowing that subjective situations become consolidated in time, and that might be in breach of the understanding that the STF would adopt in the future on certain constitutional issues.[25]

The ADPF presents *some similarities* with the Spanish "*recurso de amparo*" and with the German constitutional appeal, because of its subjective dimension, considering that it is claimed based on a concrete case, and an objective dimension, because it is intended to protect the integrity of the legal-constitutional order. Nevertheless, in the ADPF, the objective aspect prevails, especially because the action cannot be filed by the parties to the legal proceeding, but only by those with standing to file direct actions for the declaration of unconstitutionality (ADI), in view of a presidential veto against item II of Article 2 of Law no. 9882/99, that granted standing to any person injured by an act of the Government.

[25] On this subject, see Daniel Sarmento, "Commentaries on the ADPF", RDA, volume 224, Ed. Renovar, Rio de Janeiro, Fundação Getúlio Vargas.

Only those with standing under Article 103 of the Federal Constitution (abovementioned) can file the action. In addition, the ADPF is not limited to the protection of fundamental rights. The institute was created with an eye driven much more towards the protection of governability and the fight against the so-called "industry of injunctions".

The purpose of Law no. 9882/99 is to "avoid or remedy an injury to a fundamental precept, resulting from an act of *Government"*. The action shall also be applicable "when there are relevant grounds for the constitutional controversy on federal state and municipal law or rule including those preceding the Constitution".

The decision of the STF under an ADPF is immediately self-applicable as the Chief-Justice of the STF will determine prompt compliance with the decision, with the judgment being drafted afterwards.

As in any action under constitutionality concentrated control, the decision may be *shaped* considering the "*reasons of legal security or exceptional social interest*". The STF can, by a supermajority representing two-thirds of the members, limit the effects of any of its judgments to the moment it deems appropriate to make it effective, which may or may not produce retroactive effects.

Let us examine the case mentioned:

The *National Confederation of Health Workers* filed the Action against Violation of a Constitutional Fundamental Precept no. 54 before the Federal Supreme Court.

The *Confederation* requested acceptance of its claim by the Court: 1) interruption of pregnancy of women carrying anencephalic fetuses; 2) extraordinary circumstance of the fact (disregard of regular applicability); 3) evolutionary interpretation of the Brazilian Penal Code (of 1940); 4) prevalence of the constitutional principle of dignity of human being and the fundamental right to health.

In a very complex proceeding, with public hearing held in September 2008, where several medical, religious entities, entities from civil society and public authorities, and several testimonies given by women, the Court, by majority vote, *granted the action* for purposes of declaring the **unconstitutionality of the interpretation** under which the anticipation of childbirth in cases involving anencephalic fetuses is a conduct that falls within the definition of Articles 124,126,128, I and II, of the Penal code, against the opinions of Justices Gilmar Mendes and Celso de Mello who, although having granted the action, added conditions of anencephaly diagnosis specified in the opinion issued by Justice Celso de Mello; and against the opinions of Justices Ricardo Lewandowski and Cezar Peluso (Chief-Justice), who considered the action to be devoid of legal grounds. Full bench held on 12/04.2012.

Justice Marco Aurélio's prevailing opinion stated:

"What is at stake here is the women's right to self-determine, to choose, to act under their own will in a case of absolute impossibility of extra-uterine life. Ultimately, the subject-matter concerns these women's privacy, autonomy and dignity. They must be respected in either case, i.e., not only those opting for proceeding with the pregnancy – because they might feel happier in this manner or for any other reason that we are not to investigate – but also those intending to interrupt their pregnancy, in order to put an end or at least minimize their suffering. (...)

I emphasize that these days call for empathy, humanity and solidarity toward these women. From the testimonies we heard in public hearings, only those who live so anguishing a situation is able to measure the suffering they are subject to. Acting with knowledge and justice, based on the Constitution of the Republic and devoid of any moral and religious dogma or paradigm, we must ensure women's right to express themselves freely without fearing to be prosecuted in any action for the crime of abortion.

For all that has been put forth, I grant the claim presented in the complaint, for purposes of declaring the unconstitutionality of the interpretation according to which the anticipation of childbirth in cases of anencephalic fetuses is an offense under Articles 124, 126, 128, items I and II, of the Brazilian Penal Code".

2) The research of embryonic stem-cells case (ADI 3510/DF, Reporting Justice J. Carlos Britto, March.5.2008;

The core of the controversy was Article 5 of Law no. 11105, of Mar/24/2005. Known as the *Biosafety Act,* this law provides for several subject-matters; the challenged part provides, specifically about the use, for purposes of research and therapy, stem-cells obtained from human embryos, produced upon *in vitro* fertilization, and not transferred to the uterus.

The challenged legal provisions read as follows:

Art. 5 Using embryonic stem-cells obtained from human embryos produced by ***in vitro*** fertilization and not used in the respective procedure is allowed for research purposes and upon observance of the following conditions:

I – the embryos are non-viable; or

II – the embryos have been frozen for three (3) years or more on the date of publication of this Law, or if already frozen on the of publication hereof, after completion of three (3) years from the date of freezing thereof.

§1 In any case, consent of the genitors is needed.

§2 Research and health service institutions conducting the research or therapy with human embryonic stem-cells shall submit their projects to examination and approval by the respective research ethics committees.

§3 The biological material herein provided cannot be marketed, and if so the practice shall fall within the definition of the offense of Art.15 of Law no .9.434, of February 4, 1997.

The main thesis of the action filed by the Federal Attorney General was that "human life starts at and from insemination." Based on that premise, he alleged that the challenged legal provisions were in breach of two precepts (or provisions) of Brazilian Constitution: Article 5, main clause, that provides for the *right to life;* and Article 1, III, that introduces the *principles of human dignity* as one of the foundations of Brazilian State. The arguments put forward in the complaint can be summed up in a sentence: the embryo is a human being whose life and dignity would be violated by the research authorized by the challenged provisions.

As is known, *in vitro* insemination is an assisted reproduction method, usually intended to overcome infertility, and successfully applied since 1978. It allows sperms to fertilize eggs in laboratory, out of women's uterus if this process is not possible to occur naturally, in the fallopian tube. In consolidated medical experience several eggs are taken for simultaneous insemination, thus avoiding submitting the woman to successive ovulation induction and follicular aspiration at each attempt to fertilize and develop the embryo.

Many eggs are usually non-viable. However, in a successful fertilization phase and initial development, the embryo is transferred to the uterus, where it continues its formation cycle, until it is able to be implanted in the endometrium, which is the internal layer of women's womb (nesting). The odds of pregnancy increase due to the number of transferred embryos. However, in order to limit multiple-pregnancy it is recommended to transfer two embryos, sometimes three. The remaining embryos are freezed.[26]

Since adult stem-cells are only *oligopotent* or *unipotent*, their potential for research is significantly smaller, although they are also considered important. Among the pathologies whose cure may result from embryonic stem-cells one may cite, for instance, progressive spinal atrophy, muscular dystrophy, *ataxy*,

[26] "Considerations on freezing embryos", by Raquel de Lima Leite Soares Alvarenga, in the work "Biotechnology and its ethical-legal implications" coordinated by Carlos Maria Romeo Casabona and Juliane Fernandes Queiróz, Ed. Del Rey, Belo Horizonte, 2005, p. 232.

amyotrophic lateral sclerosis, neuropathies and motor-neural neuropathies, diabetes, Parkinson's disease, several syndromes (such as *mucus-polysaccharides* and other innate metabolic errors, etc.). They are all serious diseases, causing great suffering to people carrying them.

Tragically enough, these pathologies reach a considerable portion of world population. In Brazil, between 10 and 15 million people carry diabetes, 3 to 5% of the population have genetic diseases that can be either congenital or manifest in childhood or in adult life; between 8,000 and 10,000 new cases of marrow lesion each year (paraplegia or tetraplegia, also known as quadriplegia).

To be adjudicated the case was separated into two parts. The result was 6 votes against 5, with at least three of vote lines concurred by the Justices.

The majority line of thought was led by reporting Justice, J. Carlos Ayres Britto, followed by Justices Cármen Lúcia, Joaquim Barbosa, Ellen Gracie, Marco Aurélio and Celso de Mello, and fully dismissed the claim.

The reporting Justice stressed a few points, to wit: (I) embryonic stem-cells offer greater contribution than the other because they are pluripotent cells; (II) life, as a legal asset, constitutionally refers to live births; (III) there is no obligation to use all the embryos obtained through artificial fertilization, upon observance of family planning and of principles of dignity of human being and responsible parenthood; (IV) the rights to free expression of scientific activity and health (which is also a duty of the State), as well as §4 of Article 199 of the Constitution of 1988, contribute to affirm the constitutionality of the law; and (V) one has already admitted that ordinary law considers that life ends upon brain death (Law no. 9437/97), and that the embryos under the challenged rules is unable to have brain life.

And finally, as stated by Justice Carlos Ayres Britto:

"Thus, this post-positivist standpoint on Brazilian Law, and a conciliatory approach of our legal system with the imperatives of humanist ethics and material justice lead me to my final conclusion as I present by opinion. In so doing, to the three syntheses above I add these two other constitutional grounds, the right to health and the right to a free expression of scientific activity, to conclude by holding entirely devoid of grounds this present direct action for the declaration of unconstitutionality. Nevertheless, I request that everyone thinking otherwise, either out of legal, ethical or philosophical conviction, or even by virtue of faith, to respect my view. This is my opinion".

The second line of thought was introduced by Justice Carlos Alberto Menezes de Direito and followed by Justices Enrique Ricardo Lewandowski and Eros Roberto Grau. The core idea lying behind it is that, in the case of frozen

embryos, one cannot accept their destruction for purposes of conducting research. Since in our current state of the art one cannot perform research with embryonic stem-cells without destroying the embryo, this standpoint ultimately meant that research should not be pursued.

Finally, the third view was defended by Justices Cezar Peluso and Gilmar Ferreira Mendes. Both lined up with an interpretation based on the challenged Article to demand, as additional decision, the prior submission of researches with embryonic stem-cells to centralized controlling agency – a "Central Ethical Committee" – subordinated to the Ministry of Health (or Health Department).

Accordingly, strictly speaking, the vote result was six in favor of research, without any limitation to the terms of the law; two votes in favor of research, but upon prior approval thereof by a central ethical committee; and three votes denying research that implied the destruction of the embryo, which currently corresponds to a ban thereto.

3) Same-sex unions case – the legal recognition of same-sex cohabitation (steady unions) (ADIn 4277, 142 and ADPF 132);

Initially, ADPF 132 was proposed. Then, the Office of the Federal Attorney General proposed another action, with the same claim. The justification was that the action filed by the governor (ADPF), the thesis of equating cohabitation (or steady union) and same-sex union would only be valid within the State of Rio de Janeiro. In the end, both actions started being adjudicated on May 4, 2011.

As is known, in the past decades several persons started living fully their sexual orientation, as a result of the end of prejudice and discrimination.

In Brazil and in the world, millions of people of the same sex now live in continual and long-lasting partnerships characterized by affection and by a common project of life. Social acceptance and the legal recognition of this fact are relatively recent and, consequently, there is uncertainty about how the Law should tackle the matter.

In this environment, it is natural that the legal regime of same-sex unions be urgentily put to discussion. In fact, such partnerships exist and will continue to exist, regardless of the State's positive legal recognition thereof. If the Law remains indifferent, this will lead to an undesirable situation of insecurity. However, more than that, State indifference is only apparent and actually reveals a devaluating judgment. Once a state decision has effectively made to legally recognize informal relationships (that is, not under a marriage), failing

to extend such regime to same-sex unions only represents scant regard for these individuals. Such lack of equation is unconstitutional for several reasons[27].

The action was based on two *philosophical* grounds. The first one is that homosexuality is a fact of life. No matter if it is an innate or acquired condition, of if it results from genetic or social cause, sexual orientation is a free choice, an option from different possibilities. It does not affect third parties' lives.

The second philosophical ground if the action is the recognition that the role played by the State and the Law, in a democratic society, is to ensure the development of everyone's personality, thus allowing that they all be able to fulfill their lawful personal projects. Government may not and should exercise or recognize prejudice and discrimination, but rather face them firmly, by providing support and safety to vulnerable groups. Political and legal institutions must welcome – and not reject – persons who are victims to prejudice and intolerance.

The *legal* grounds have developed through main theses. The first one is that a set of constitutional principles demand inclusion of same-sex unions into the partnership (or steady union) legal regime, because it is a subtype of a genre.

The second thesis is that, even if it were not an immediate consequence of the constitutional text, equating legal regimes would derive from a hermeneutical rule: in the absence of a provision under the law, the legal order must make use of analogy. Since the essential features of steady unions, or partnerships under the Brazilian Civil Code are present between persons of a same sex, the legal treatment must be the same, under pain of giving rise to an unconstitutional discrimination.

The principles at issue are that of equality, freedom, dignity of human being and legal security. The analogy, in turn, imposes that the most similar situation be extended to a situation not provided for by the legal order. The situation that best equates steady unions (or partnerships) certainly is not the *de facto organization*, where *two or more persons* combine forces to achieve a common end, which generally has economic nature. The proper analogy, as one simply observes from the situation, is the partnership, or steady union: a situation where two persons share a common project of life, based on affection. This brings us to the key concept in structuring the matter: it is above all the *affection* and not the sexuality or the economic interest that typifies same-sex relationships and which warrants protection by the Law.[28]

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[27] By Luís Roberto Barroso, in "The New Brazilian Constitutional Law. Contributions to theoretical and practical construction of constitutional jurisdiction in Brazil", Ed. Fórum, Belo Horizonte, 2012, p. 425 et seq.

[28] Barroso, Op. Cit.

In the first action filed on this matter with the STF, that of the State of Rio de Janeiro, the governor argued by stating the existence of numerous civil-servants who are parties to same-sex steady unions, or partnerships. Therefore, relevant issues are addressed to the State and to the Public Administration on leave rules based on a *family member* with a disease, or to be present when *partners* need assistance, as well as for purposes of social security and assistance. The legal lack of definition regarding the applicability of such rules to partners of a same-sex union obliged the governor, in his capacity of Head of Public Administration, legal consequences before the State Accounting Office, the Prosecution Office and the state justice, regardless of the interpretation he intended to adopt.

There were also individual claims with different interpretations by the Judiciary in the State of Rio de Janeiro about the reach of such rights. Accordingly, we needed a position stated by the highest court in the Country, the Federal Supreme Court to settle the matter.

We shall not go into detail about procedural issues of the action. Let us move directly to the claim stated.

The main claim requested the Court to declare that the legal regime applicable to steady unions (partnerships) must also apply to same-sex relationships, as a result of either the fundamental precept expressly stated – equality, freedom, dignity, and legal security – or of the analogical application of Article 1723 of the Civil Code, interpreted according to the Constitution.

Consequently, the claim asked the Court to:

a) Interpret in accordance with the Constitution the aforementioned state legislation – Article 19, II and V, and Article 33, of Executive Order no. 220/75, relative to the rights to social security and assistance in that State (leave, family assistance, etc.), by extending the guaranteeing the benefits therein provided to partners under same-sex steady unions;
b) Declare that court decisions denying said legal equation do violate fundamental precepts protected by the ADPF;
c) Finally, should the Court understand that the ADPF does not apply for procedural reasons, then it should be processed as an ADI (direct action for the declaration of unconstitutionality) under the principle of contingency.

On May 4 and 5, 2011, ADPF no. 132 and ADI no. 142 were jointly adjudicated before a full bench packed with militants defending the cause. An unexpected unanimous judgment took place. The summary (headnote) of Justice Carlos Ayres Britto's decision read as follows:

"No discrimination against people on the basis of sex, either from the perspective of man/woman dichotomy (gender), or their sexual orientation. The

prohibition against prejudice as a chapter of fraternal constitutionalism. Deference to pluralism as a social-political-cultural value. Freedom to express their own sexuality, within the category of individuals, considering that it is the manifestation of free of will. Right to privacy and to private life. Entrenched clause.

People's sex, except otherwise expressly or impliedly provided by the constitution, is not to be taken as a means to exercise unequal legal treatment. Prohibition against prejudice in light of item IV of Article 3 of the Federal Constitution, because it collides with the constitutional purpose of "promoting everyone's well-being" (...) Recognition of the right to sexual preference as a direct consequence of the principle of "human dignity": right to self-esteem at the highest level of awareness of individuals. Right to pursue joy. Normative leap from the prohibition against prejudice to the proclamation of the right to sexual freedom. The concrete use of sexuality is part of natural persons' autonomy of will. Empirical use of sexuality from the perspective of privacy, widely protected by the Constitution. Freedom of will. Autonomy of will. Entrenched clause".

In the conclusion, the Reporting Justice asserted:

"In the merits, I grant the claims in the two actions. Therefore, I interpret Article 1723 of the Civil Code in accordance with the Constitution for purposes of removing from it any meaning that prevents it from recognizing a continual, public and long-lasting relationship between persons of the same sex as a "family entity", so understood as a synonym for "family". This recognition must be under the same rules and consequences the opposite-sex steady union".

5) Nepotism. Nepotism. Inadmissibility to appoint relatives for positions of trust. (ADC 12/2006)

When the National Council of Justice (CNJ) published a resolution prohibiting appointment of relatives until the third degree, of judges and civil servants for positions of trust and salaried positions, several State Courts of Appeals in the Country objected. There was a long relative-appointment tradition for those positions. The Courts asserted that the prohibition could not be governed by a resolution, but by law. Thus, the Brazilian Judges Association (AMB) filed suit with the STF to confirm the validity of said resolution.

The filing took place on February 2, 2006. The core argument was: constitutional principles must be directly and immediately applied, at least in their minimum ambit of meaning, regardless of lawmakers' activity, and occasionally, even against it. Thus, the prohibition against nepotism would derive directly from the Constitution, based on principles such as morality and impersonality (Art.37, main clause, of the Constitution).

The suit was distributed to Justice Carlos Ayres Britto, and then started to be identified as Action for the Declaration of Constitutionality number 12.

We briefly present the main arguments of the plaintiff, AMB:

a) The CNJ has constitutional jurisdiction to care for observance of Article 37 of the Constitution and examine the validity of administrative acts exercised by the bodies of the Judiciary (Art. 103, B, 4, II da Constitution);
b) The ban on nepotism is a constitutional rule that results from the central principles of administrative impersonality and morality;
c) The government is bound not only to formal legality, but to *juricity,* a more comprehensive concept that includes the Constitution;
d) Resolution no. 7/05, of the CNJ does not affect the balance between the Branches because it does not cause them to be subject to one another, nor does it affect the federative principle, for the same reason;
e) Resolution no. 7 of the CNJ finds no obstacle in any rights of third parties hired by the Government and no violation whatsoever of civil servants rights.

One should note that before the action was filed, the Federal Supreme Court, in ADI no. 3367/DF, has already defined the *constitutionality* of the National Council of Justice (CNJ), as well as its jurisdiction, especially considering the principle of separations of powers (branches) and the federative for of the State. In reality, some of the arguments against Resolution no. 7/05 were a mere reproduction of those already examined and rejected by the Court in that case.

The claim for provisional remedy under Action for the Declaration of Constitutionality n.12 was adjudicated on February 16, 2006. A preliminary relief was granted by vast majority, with only one dissenting opinion.

The aforementioned Resolution remained valid, in sum, as expression of the respect of the republic, impersonality, efficiency, equality and morality principles.

On August 20, 2008, the case was finally adjudicated, and affirmed the preliminary relief. The headnote of the judgment containing the final decision stated:[29]

1. The conditions imposed by Resolution no. 07/05 of the CNJ constitute no violation of the freedom to appoint for or remove from positions of trust in the government. The restrictions therein provided are, strictly speaking, the same that have already been imposed by the Constitution of 1988, which derive from the republican principles of impersonality, efficiency, equality and morality.

[29] Still according to Barroso, Op. Cit. Page 392.

2. Dismissal of the allegations of disrespect for the principle of separation of Branches and the federative principle. The CNJ is not separated from the Judiciary (Art. 92, of the Constitution) and does not subject the Judiciary to the authority of any of the other two. The Judiciary has a peculiar position within the national ambit, perfectly compatible with the *state framework* to which it is conditioned. In addition, Article 125 of the Constitution confers to the States the jurisdiction to organize their own Justice system, although in the main clause said Article 125 binds such body to the principles "stipulated" by the Constitution, among which are those provided for by Article 37, main clause".

The next day, on August 21, in the wake of said judgment, the Federal Supreme Court approved **Binding precedent n.13**, expressly stating that the ban on nepotism extends to the three Branches. The approved Precedent reads as follows:

Binding Precedent no. 13:

"The appointment of a spouse, partner or direct or collateral relative or in-laws, until the third degree, including these latter, of the appointing official or a civil servant of the same entity, for a decision-making, assistance or managerial position, for the exercise of a position of trust or, still, for a function paid by the direct or indirect Public Administration (the Government), in either Branch of the Federal, State, Federal District or Municipal government, including reciprocal appointments, constitutes a violation of the Federal Constitution".

Brazilian binding precedents, unlike the North-American precedents, are valid considering their generic provision, and not the grounds providing the basis for a given judgment issued by a Court.

Binding precedents are issued by two-thirds of the Federal Supreme Court (STF) members on constitutional matter that meet the requirements of Article 103-A et seq., as mentioned above.

Unlike the North-American legal system, the Brazilian binding precedent will always be represented by a literal provision, even if it is vague and inaccurate, whereas under the *stare decisis* system, often enough controversies arise on what portion of the judgment is to be considered as a precedent and is thus binding.

In North-American law a precedent is initially followed only if it results from a duly grounded and careful judicial analysis based on the parties' exercise of their full right to defend.

The binding precedents' strength, in turn, derives from the authority from which they are rendered. The legislative command of the STF becomes effective following its publication with powers of general and abstract law for the future,

regardless of the cases underpinning it and of the rationale underlying the judgments from which the precedent originated, which are not binding.

In the Brazilian system, only the Federal Supreme Court can issue binding precedents.

Georges Abboud[30] mentions an important aspect and affirms:

"Therefore, it is evident that the rule concerning the binding nature of precedents under the *stare decisis* principle is not a strict one, unlike the binding nature conceived by Constitutional Amendment no. 45/2004, that allows for cancellation of any and all judicial decision upon complaint to the STF, as per §3 of Article 103-A of the Constitution; the binding nature is so strong that the manner in which it was approved does not allow for any rational reflection or case-law adjustment by the judges, it is not an overstatement to say that binding precedents in Brazil have the intent to seize reason. (...)

Thus, since binding precedents are normative texts aimed at prescribing new legal criteria to be applied in the future by judges and courts, such as laws, rules, orders, one cannot admit that because they come from a jurisprudential (case-law) practice exercised by the STF they are more important than the other legal rules issued within the legal system".

The author says that binding precedents in Brazil are similar to a Portuguese legal institute, the so-called *assent (assento)*, as they detach from the judgments from which they derive to become autonomous, without a concrete connection with their original cases.

6) Marijuana march's constitutionality (ADPF no. 187, Reporting Justice J. Celso de Mello)

By unanimous vote (8 opinions), the Federal Supreme Court (STF) authorized the so-called "marijuana march" events, gathering demonstrators in favor of decriminalizing the drug.

For the justices, the constitutional rights to meet and to the freedom of speech guarantee the holding of such marches. Many have said that the freedom of speech can only be banned when intended to incite or provoke illegal and imminent actions.

According to the decision rendered in an action (ADPF 187) filed by the Office of the Federal Attorney General (PGR), Article 287 of the Penal Code must be interpreted in accordance with the Constitution in order not to ban

[30] Georges Abboud, "Brazilian Constitutional Proceedings", Ed. Thomson Reuters-Revista dos Tribunais, 2016 page 595 and 603.

public demonstrations in defense of legalization of drugs. The provision defines as crime the exercise of the apology of "an offense" or of "a criminal".

The opinion issued by Justice Celso de Mello was fully adopted by his colleagues. According to him, the "marijuana march" is a spontaneous social movement claiming, through the free expression of thought, "the possibility to conduct a democratic discuss of the *prohibitionist* model (for drug consumption) and of its effects on the increase of violence".

In addition, he considered that the event has a clearly cultural tone, because it counts on music, plays and performances, making room for debating the subject in lectures, seminars and presenting documentaries relative to the public policies connected with drugs, either lawful or unlawful.

Celso de Mello explained that the mere proposal for decriminalization of a given offense is not to be confused with incitement to crime nor with apology for an offense. "The debate on the abolishment of certain conducts from the criminal context may be made rationally, with respect between the interlocutors, even if the idea, for the majority, may be considered strange, extravagant, unacceptable or dangerous", he said.

Even with an opinion concurring with the view presented by the reporting Justice, J. Luiz Fux considered necessary to establish parameters for holding the demonstrations. J. Fux pointed out that these must be pacific acts, without the use of guns and incitement to violence. They must also be previously notified to public authorities, including information such as date, time, place and purpose of the act.

He added that "it is absolutely necessary that there is no incitement, incentive or encouragement to the consumption of narcotics" during the march and made it clear that no drugs can be consumed during the march.

Finally, he stressed that children and adolescents cannot be engaged in these marches. "If the Constitution intends to protect minors who are drug-addicted, we infer that preventing children and adolescents from having contact with drugs to avoid dependence is also a constitutional purpose", he stated.

In such respect, Justice Celso de Mello noted that the legal provision defining such duty of parents towards their minor children is enforceable in itself, considering its authority. He added that other restrictions imposed to acts such as the "marijuana march" are determined by the Constitution.

Justice Cármen Lúcia Antunes Rocha issued a concurring opinion (to the same effect as that of the reporting Justice) and quoted the following statement of an American jurist: "If in behalf of security we give up freedom, tomorrow we will have neither freedom nor security". She declared to be in favor of street demonstrations and remembered that 30 years ago her generation was not allowed

to express the desire to change the government at Praça Afonso Arinos square, next to the School of Law, in Belo Horizonte (State of Minas Gerais), where she graduated.

According to Cármen Lúcia, there is a need to guarantee the right to manifest on the criminalization or decriminalization of the use of marijuana because demonstrations may lead to changes in laws.

Freedom to meet

Justice Ricardo Lewandowski insisted in stressing Justice Celso de Mello's opinion, where he tackled the legal regime of the freedom to meet. To Lewandowski, this extract from the opinion is a valuable contribution to the doctrine of public liberties. After analyzing how drugs are defined, not only today but in the future, he said he believes it is not lawful to prohibit any discussion on drugs, provided that constitutional principles are duly observed.

Justice Ayres Britto, in turn, stated that "the freedom of speech is the greatest manifestation of freedom, which is strengthened when exercised in group, because the dignity of human beings is not completed upon the exercise and fruition of strictly individual rights, but of rights that are collectively experienced".

Justice Ellen Gracie, in turn, remembered her colleagues that she is a member of an international committee that studies the decriminalization of drugs. "I feel relieved to know that my freedom of thought and of expression of thought is guaranteed", she affirmed.

Justice Marco Aurélio stated that decisions of the Judiciary prohibiting public acts in favor of legalization of drugs based on the mere fact that the use of marijuana is illegal are incompatible with the constitutional guarantee of freedom of speech. "Even where collective adhesion proves unlikely, the mere possibility to publicly express certain ideas corresponds to the ideal of personal fulfillment and of recognition of individual rights", he said.

The last opinion was rendered by the then Chief-Justice of the Federal Supreme Court, Justice Cezar Peluso, now retired, who stressed that freedom of speech is a direct consequence of the supreme value of dignity of human beings and an element of formation and improvement of democracy.

"From this standpoint, (the freedom of speech) is a relevant element for construction and protection of democracy, whose fundamental requirement is ideological pluralism", he said. And then he added that the freedom of speech "can only be prohibited when driven towards inciting or provoking imminent illegal actions".

Finally, he warned that "in compliance with the Federal Constitution and to sub-constitutional law, the State has to take, as in all gatherings, the neces-

sary precautions to prevent any abuse". But he stressed: "This does not mean that freedom in itself does not warrant constitutional protection and recognition by this Court".[31]

7) THE RIGHT TO HEALTH (SOCIAL FUNDAMENTAL RIGHTS) AND THE FEDERAL SUPREME COURT

It is worth mentioning, from the outset, that social rights, as well as all the other fundamental rights enshrined in the Brazilian Constitution, provide for numerous legal positions to their holders.

That is to say, those entitled to basic education may be put themselves in the position of creditors of the state's duty to provide vacancies in schools (a typically positive relief), and are also entitled to demand from the State that their right be freely exercised and that the State refrains to ban access to education (negative relief).

Both among doctrine experts and in case law, rights are usually endowed with a subjective nature in their negative dimensions, whereas are less so, or not at all, in their positive dimension.

The same is true for survival rights. The Brazilian Constitution of 1988 was fairly generous in assuring such rights. Since the Republic's objectives include eradicating misery and fighting social inequalities, as per Article 3 of the Constitution, one may say that fundamental social rights are a good start or the route towards reducing social differences and asserting the development of human beings in all of their potentialities.

A good example in constitutional jurisdiction is precisely ADPF 45, whose Reporting Justice was dean (elder) Justice Celso de Mello. Despite being prejudiced by procedural reasons, he made it clear the position of the STF when social rights are under discussion.

ADPF – public policies – judicial intervention – "reserve of the possible" ADPF 45 MC/DF. Reporting Justice J. Celso de Mello

HEADNOTE: ACTION AGAINST VIOLATION OF CONSTITUTIONAL FUNDAMENTAL PRECEPT. THE MATTER CONCERNING CONSTITUTIONAL LEGITIMACY OF CONTROL AND OF INTERVENTION BY THE JUDICIARY IN ISSUES

[31] http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=187&classe=ADPF&origem=AP&recurso=0&tipoJulgamento=M. See also by Felipe Derbli, "The Constitutionality of Marijuana March", in "Constitutional jurisdiction", Organized by Luiz Fux, Fórum Ed., Belo Horizonte, 2012, page 229 et seq.

INVOLVING IMPLEMENTATION OF PUBLIC POLICIES, WHEN GOVERNMENTAL ABUSE IS PERCEIVED. POLITICAL DIMENSION OF THE CONSTITUTIONAL JURISDICTION GRANTED TO THE FEDERAL SUPREME COURT. IMPOSSIBILITY TO OBJECT STATE DISCRETION UPON ENFORCEMENT OF SOCIAL, ECONOMIC AND CULTURAL RIGHTS. RELATIVE CHARACTER OF LAW-MAKERS' FREEDOM TO CONFORM. COMMENTARIES ON THE "RESERVE OF THE POSSIBLE" CLAUSE. NEED TO PRESERVE INDIVIDUALS' INTEGRITY AND INVIOLABILITY OF THE NUCLEAR CONCEPT OF "THE EXISTENTIAL MINIMUM". INSTRUMENTAL VIABILITY OF THE ACTION FOR BREACH OF CONSTITUTIONAL FUNDAMENTAL PRECEPT DURING THE PROCESS OF IMPLEMENTATION OF POSITIVE LIBERTIES (SECOND-GENERATION CONSTITUTIONAL RIGHTS).

The matter concerns an action against violation of a constitutional fundamental precept of a veto issued by the President of the Republic and falling within the ambit of §2 of Art. 55 (afterwards renumbered Art. 59), against a legislative proposition that was converted into Law no. 10707/2003 (LDO, or Budget Guidelines Law), intended to set the guidelines for preparation of the annual budgetary law of 2004. The provision vetoed presents the following material content:

"§2 For purposes of item II of the main clause herein, public actions and services for health are so considered the whole budget appropriations of the Ministry of Health, upon deduction of social security charges of the Federal Government, the service of the debt and the Ministry expenses that are funded with financial resources from the Fund for the Combat and Eradication of Poverty." The claimant of this constitutional action alleges that the presidential veto amounted to a **disrespect for a fundamental precept** under Constitutional Amendment (EC) no. 29/2000, which was **enacted to guarantee minimum financial resources to be applied to public actions and services for health**.

I requested information from the President of the Republic, who so provided on pages 93/144.

In is worth mentioning that the President of the Republic, right after the partial veto herein challenged, sent to the National Congress a bill that, converted into Law no. 10777/2003, fully restored §2 of Art. 59 of Law no. 10707/2003 (LDO), and therein stated the same rule on which the executive veto applied.

Due to said initiative by the President, which caused the inception of the relevant legislative process, the abovementioned Law no. 10777, of Nov/24/2003, was enacted, where Article 1 – by modifying the very Budget Guidelines Law (Law no. 10707/2003) – filled the gap that motivated the filing of this constitutional action.

Upon enactment of Law no. 10777/2003, or the Budget Guidelines Law, intended to govern the preparation of the 2004 budget law, Art. 1 presented

the following language, as to the matter concerning the challenged legislative omission:

"Art. 1º Article 59 of law 10707, of July 30, 2003, now reads with the following added paragraphs:

'Art. 59.....

§3 For purposes of item II of the main clause of this Article, public actions and services for health are so considered the total appropriation of the Ministry of Health, upon deduction of the Federal Government social security charges, debt services and the expenses of the Ministry funded with financial resources from the Fund for the Combat and Eradication of Poverty.

§4 Demonstration of observance of the minimum limit set out in §3 herein shall be made at the end of the 2004 fiscal year.' (NR)."

It is worth mentioning that the content of the legal rule resulting from Law no. 10777/2003, now in full force, reproduces the precept (or provision) included in §2 of Art. 59 da Law no. 10777/2003 (LDO) that was vetoed by the President of the Republic (page 23v.).

One should also stress that the legal rule under scrutiny – that ended up filling the gap left by the legislative omission that allegedly violated fundamental precept (or provision) – entered into force in 2003, to provide guidance, still in time, for the preparation of the annual budget law relative to the fiscal year of 2004.

Accordingly, one concludes that the objective of this present action was fully accomplished upon enactment of Law no. 10777, of Nov/24/2003, and produced for the specific purpose of providing effectiveness to Constitutional Amendment (EC) no. 29/2000, conceived to guarantee, on suitable bases, – and always for the benefit of the people of this Country – minimum financial resources to be necessarily invested in public actions and services for health.

Notwithstanding this supervening legally relevant fact, that may lead to a prejudice to this action against violation of a constitutional fundamental precept, I cannot but recognize that the constitutional action at issue, considering its context, qualifies as a **legitimate and proper instrument for enabling implementation of public policies** when, once they are provided for by the Constitution, as is the case under examination (EC no. 29/2000), they are violated, in whole or in part, by the governmental bodies in charge of the command set out in the Constitution.

Such a distinguished duty conferred upon the Federal Supreme Court proves, in a specifically clear means, **the political dimension of the constitutional jurisdiction** granted to this Court, that cannot avoid the most important duty to provide effectiveness to economic, social and cultural rights – that identify, as

second-generation rights, with positive, real or concrete liberties (RTJ 164/158-161, Reporting Justice J. Celso de Mello) – under pain of causing the Government to adversely affect, through a positive or negative violation of the Constitution, the integrity of the very constitutional order, which is not acceptable:

VIOLATION OF THE CONSTITUTION – TYPES OF UNCONSTITUTIONAL BEHAVIOR BY THE GOVERNMENT

Violations of the Constitution can result from either actions or omissions by the government. A situation of unconstitutionality may derive from an active behavior by the Government, upon the exercise or the passing of laws in conflict with the terms of the Constitution, thus infringing the precepts and principles therein enshrined. Such a conduct, that implies a *facere* (positive action), gives rise to unconstitutionality by action.

If the State fails to take the necessary actions for effective performance of the precepts (provisions) set out in the Constitution, in order to cause them to be effective and enforceable, and refraining from complying with the duty to "perform" imposed by the Constitution, it shall incur in a negative violation of the constitutional language. Such *non facere* or *non praestare* gives rise to unconstitutionality by omission, which may in whole, when no action is taken, or in part, when the action of the Government is insufficient.

– Omission by the State – by failing to comply, to a greater or smaller extent, with the impositions of constitutional language – is a very serious behavior by the Government from the political-legal standpoint, because it is out of inertia that the violation of the Constitution occurs, as it also breaches rights based therein and also prevents the very enforceability of the provisions and principles set out by the Constitution." (RTJ 185/794-796, Reporting Justice J. Celso de Mello, full bench).

Typically, the duty to create and implement public policies is not, ordinarily, among the institutional functions of the Judiciary – or this Supreme Court, more specifically (JOSÉ CARLOS VIEIRA DE ANDRADE, "Fundamental Rights of Portugal's Constitution of 1976", p. 207, item n. 05, 1987, Almedina, Coimbra), because this function ir primarily exercised by the Legislative and Executive Branches.

However, such duty may be exercised by the Judiciary in exceptional circumstances if and when the competent state bodies are in breach of their political-legal duties and thus putting at risk the effectiveness and integrity of individual and/or collective constitutional rights, even if deriving from programmatic clauses.

In this context, it is worth mentioning – as already proclaimed by this Supreme Court – that the programmatic nature of the rules of the Constitution "cannot be converted into reckless constitutional promise, under penalty of causing the Government, by defrauding the expectations deposited on it by society, to end up substituting, illegitimately, the performance of its inescapable duty, through an irresponsible violation of the Constitution". (RTJ 175/1212-1213, Reporting Justice J. Celso de Mello).

Having stated the premises above, I must give significant importance to the matter concerning the **reserve of the possible** (STEPHEN HOLMES/CASS R. SUNSTEIN, *The Cost of Rights*, 1999, Norton, New York), notably in cases relative to the implementation (always for a price) of the second-generation rights (economic, social and cultural rights), the performance of which, by the Government, imposes and requires from this latter positive measures that enable the effectiveness of such individual and/or collective rights.

In fact, the performance of economic, social and cultural rights – besides featured by the **gradual process** of effectiveness – largely depends on an inescapable financial link that is subordinated to the State's budgetary possibilities, in such a manner that, if the economic-financial incapacity of the State is objectively proved, this latter cannot be obliged, in view of said material limitation, to immediately put into practice the rule based on the terms of the Constitution.

However, the Government will not be acting lawfully in this case if – **upon undue manipulation of its financial and/or political-administrative activity – it imposes an artificial obstacle that reveals the unlawful, arbitrary and reproachful intent to defraud to frustrate and to prevent the creation and preservation, for the people and the citizens, of minimum material conditions of existence.**

Accordingly, one should note that the "reserve of the possible" clause – except upon due cause objectively ascertainable – cannot be invoked by the State for purposes of escaping performance of its constitutional obligations, especially when such negative conduct by the Government may give rise to nullifying or even annihilating fundamental constitutional rights.

Hence, the correct reflection by Ana Paula de Barcellos ("The Legal Effectiveness of Constitutional Principles", p. 245-246, 2002, Renovar):

"In sum: limitation of funds is a reality and a situation that cannot be ignored. The interpreter must take it into consideration when stating that some asset may be judicially required, and so must do the judge in determining providing thereof by the State. On the other hand, one cannot forget that the purpose of the State when obtaining funds to be spent in works, services or any other public policy, is precisely to accomplish the fundamental ends of the Constitution.

The core aim of modern constitutions, and of Brazilian Constitution of 1988 specifically, may be summarized, as already mentioned, as **promoting human well-being,** whose starting point is to ensure conditions for everyone's dignity, which includes, besides the protection of individual rights, minimum material conditions of life. In determining the fundamental elements of such dignity (the minimum for existence), one is establishing **precisely the priority spending** by the government. Only after achieving them one may be able to discuss, as to the remaining funds, what other projects should be the object of investment. **Thus, the minimum for existence, connected with the setting of budgetary priorities, can productively live with the reserve of the possible."**

Therefore, the conditions imposed by the "reserve of the possible" clause, on the process of implementation of second-generation rights, – always onerous implementation –, are twofold: (1) reasonableness of the individual/social claim presented to the Government and, (2) financial availability by the State to implement the positive actions claimed.

There is no need to point out, considering the governmental duty to provide effectiveness to the application of economic, social and cultural rights, that the twofold condition (reasonableness of the claim + financial availability by the State) must be met in an affirmative manner and simultaneous, because if either element is absent, the State cannot put these rights into practice.

Notwithstanding the creation and execution of public policies depend on political options in charge of those who, by people's delegation, hold elective office, one must recognize that lawmakers' freedom to conform is not absolute, nor is the operation of the Executive for that matter.

The reason for that is, if said Branches of the State act unreasonably or act with a clear intent to neutralize, thus adversely affecting the effectiveness of social, economic and cultural rights, and influencing as a causal consequence of an unjustifiable inertia or abusive behavior by the State, then that intangible nucleus underpinning a set of minimum conditions for a dignified existence, and essential to individuals' survival, shall be justified, as already emphasized – and even for ethical-legal reasons – the possibility of intervention by the Judiciary, in order to enable access, by everyone, to goods and assets whose fruition had been unjustly denied by the State.

To such effect, the statements by Andreas Joachim Krell ("Social Rights and Judicial Control in Brazil and in Germany", p. 22-23, 2002, Fabris) are extremely relevant:

"The constitution affords to lawmakers a significant margin of autonomy in defining how and to what extent social rights are to be guaranteed, the so-

called 'free conformity space' (...). In a politically pluralist system, constitutional norms on social rights must be receptive to several implementations in conformity with alternatives elected by voters from time to time. Evaluating economic factors to make a decision as to the possibilities and as how to perform such rights is incumbent mainly to governments and parliaments.

As a rule, the Judiciary should not interfere with a sphere designed for another Branch upon examination of convenience and opportunity, thus intending to control the legislative options relative to organization and action, unless under exceptional circumstances, when a clear and arbitrary violation is committed by lawmakers, in performing their constitutional duty.

However, it seems to be increasingly necessary to review the ancient Separation of Branches rule in respect of the control of government spending and the providing of basic services in Social State, considering that the Legislative and Executive Branches in Brazil have proved unable to ensure a rational observance of the respective constitutional precepts.

The efficacy of fundamental social rights as to material actions naturally depends on available public funds; normally, there is a constitutional delegation to lawmakers to implement the content of such rights. Many scholars understand that conformity of such concept by the Judiciary would be illegitimate, because it conflicts with the principle of Separation of Branches (...).

Many legal scholars and judges still do not accept an obligation of the State to directly provide an action to each person in need of some activity consisting of medical service, education, housing or food. Neither academic writing (the doctrine) nor case law realized the reach of programmatic constitutional norms on social rights, nor have they given them suitable application as principles-conditions to social justice.

Denying any type of obligation to be performed on the basis of fundamental social rights leads to a waiver of recognition thereof as true rights. (...) Overall, there is an increasing number of persons that consider constitutional principles and the rules on social rights to be sources of rights and obligations and thus admit judicial intervention in the event of unconstitutional omissions." (emphasis added)

All the has been put forth is fully justified, in terms of relevance, by the very constitutional nature of the legal controversy raised in this procedural remedy, consisting in challenging an act issued by the President of the Republic, that could give rise to serious damage to the areas of public health, of enforcement governmental policy resulting from a binding decision by the National Congress, on the grounds of Constitutional Amendment no. 29/2000.

However, as already duly emphasized at the beginning of this decision, what truly occurred, in fact, was a situation amounting to a preliminary ruling on this action against violation of a constitutional fundamental precept.

The unfeasible character of this action for breach of constitutional fundamental principle, as explained here, calls for a final observation: in exercising his procedural powers, the reporting justice has jurisdiction to individually control the actions, claims or appeals addressed to the Federal Supreme Court; consequently, any decisions made by him within the scope of such jurisdiction are legitimate.

It is worth pointing out that this jurisprudential (or case-law) understanding also applies to proceedings relative to abstract constitutionality control, whatever the type (ADI 563/DF, Reporting Justice J. Paulo Brossard – ADI 593/GO, Reporting Justice J. Marco Aurélio – ADI 2.060/RJ, Reporting Justice J. Celso de Mello – ADI 2.207/AL, Reporting Justice J. Celso de Mello – ADI 2.215/PE, Reporting Justice J. Celso de Mello, v.g.), because, as already stated by the Federal Supreme Court, full bench, the Brazilian positive legal system "does not removes from the Reporting Justice of the case the power to conduct – within his function of justice in charge of organizing and directing the case (RISTF, Art. 21, I) – a prior control of the formal requirements for abstract normative inspection (...) (RTJ 139/67, Reporting Justice J. Celso de Mello).

Therefore, for the reasons put forth, I enter a preliminary ruling on this action against violation of a constitutional fundamental precept, by virtue of the supervening loss of its subject-matter. Files to be shelved.

Brasília, April 29 2004".

8) Constitutionality of the determination of quotas in public universities and the PROUNI (ADPF no. 186/DF, Reporting Justice J. Ricardo Lewandowski) and (ADI n.3.300-DF, Reporting Justice J. Carlos Ayres Britto)

In two of the most important judgments in 2012, the Federal Supreme Court confirmed the constitutionality of the determination of quotas for entering public universities and also the PROUNI – University for All Program. In the first case, the Court rendered a unanimous vote and held that, in principle, both social-economic quotas and purely racial quotas are admissible, as well as any combination thereof. It was also determined that the measure can be introduced by legislators or by universities, in the exercise of the autonomy granted under Article 207 of the Constitution. As to PROUNI, the main discussion refer to possible defects in the original provisional presidential decree, which was afterwards converted into law, as well as in the alleged violation of requirement for federal law for concession of tax exemptions.

According to the teaching of Luís Roberto Barroso,[32] the so-called Brazilian racial democracy is a myth that cannot survive a glance on any relevant statistics. By confirming the validity of the quota system, the STF allowed political entities and universities to introduce a special legal regime in order to promote a more democratic environment and minimize a rooted inequality, sometimes reflected in the self-perception of those who are discriminated against. It is natural that criteria and percentages must be reviewed on a case by case basis; however, a tendency to favor political options that may be implemented, as long as minimally reasonable, appears to have been made clear. In the case of the National University of Brasília (UNB), which was the subject-matter of the judgment, there was a quota of 20% of places set aside for black students, and a minimum portion for natives. It also provided for a ten-year term for maintaining the program, an aspect that was not considered determinant.

The judgment finding for the constitutionality of PROUNI was partly benefitted by some of the premises stated in the previous precedent as concerns the quotas, especially as regards the validity of introduction of legal *dis-equalizations* by virtue of the inequalities that exist in practice. The opinion issued by Justice Joaquim Barbosa also warrants mentioning, which declared the non-applicability of offense to university autonomy – considering that adhesion to the Program is optional – and also the principle of free enterprise, considering that offering education may be subject to State regulation, even more so when there is a voluntary-adhesion mechanism, intended to fill the places that used to be idle.

9) Requirement of a diploma to practice journalism. Unconstitutionality. (Extraordinary Appeal no. 511961-SP, Reporting Justice J. Carlos Ayres Britto)

By 8 votes to 1, the full bench of the Federal Supreme Court (STF) decided to override the requirement of a diploma for the exercise of journalism. The decision was made upon examination of the Extraordinary Appeal (RE) 511961, lodged by the Federal Prosecution Office (MPF) and by the Radio and Television Businesses Union of the State of São Paulo (Sertesp) against a judgment issued by the Federal Regional Court of Appeals (Circuit Court of Appeals) for the 3rd Region (TRF-3), which stated the need for a diploma, thus violating a trial-court decision under a public-interest civil action.

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[32] Luís Roberto Barroso, "On Stage, in the Room and on the Streets: The STF in 2012", in "Constitutional jurisdiction in 2020" Organizers: Gilmar Ferreira Mendes, Jorge Octávio Lavocat Galvão and Rodrigo de Bittencourt Mudrovitsch, Ed. Saraiva, São Paulo, 2016, page 345 et seq.

Therefore, by majority vote, the Plenary of the Federal Supreme Court decided that requiring journalism diploma and professional enrollment with the Labor Department in order to be able exercise the journalist profession is unconstitutional.

The decision stated that Article 4º, item V, of Executive Order no. 972/1969, issued during the military government, was not accepted by the Federal Constitution of 1988 and that the requirements therein contained violate the freedom of the press and conflict with the right to free manifestation of thought, as per Article 13 da American Convention of Human Rights, also known as "Pacto de San Jose da Costa Rica".

The decision was made upon adjudication of Extraordinary Appeal (RE) 511961 that discussed the constitutionality of the requirement for journalism diploma and the obligatory professional enrollment as a permission to exercise journalism. The majority opinion, where a dissenting opinion was issued by Justice Marco Aurélio, concurred with the opinion rendered by Chief-Justice and Reporting Justice of the RE, J. Gilmar Mendes, who voted for the unconstitutionality of said provision.

According to Gilmar Mendes, "journalism and the freedom of speech are correlated activities, and cannot be taken separately", he said. "Journalism is the very manifestation and dissemination of thought and information in a continuous, professional and salaried manner".

The Extraordinary Appeal (RE) was lodged by the Federal Prosecution Office (MPF) and by the Radio and Television Businesses Union of the State of São Paulo (Sertesp) against a judgment issued by the Federal Regional Court of Appeals (Circuit Court of Appeals) for the 3rd Region (TRF-3), which stated the need for a diploma, thus violating a trial-court decision under a public-interest civil action.

Both the Federal Prosecution Office and Sertesp allege (in said appeal) that Executive Order No. 972/69, which provides for the rules for exercising the profession – including the diploma –, was not incorporated into the Federal Constitution of 1988.

Moreover, Article 4, which demands registration of professionals of the press with the Ministry of Labor, is said to have been revoked by Article 13 da American Convention of Human Rights of 1969, mostly known as "Pacto de San Jose da Costa Rica", to which Brazil adhered in 1992. Said Article guarantees the freedom of thought and speech as a fundamental right.

This view was strengthened by the counsel for Sertesp, Taís Borja Gasparian, and by the Federal Attorney General, Antonio Fernando Souza. The counsel argued that Executive Order no. 972/69 was issued during the military govern-

ment and had the intent to limit the free spreading of information and manifestation of thought. She states that journalists only exercise a technique consisting in assimilating and spreading information, and that depends on cultural formation, honesty, ethics and respect for the public.

In the same line, the Federal Attorney General stated that current legislation conflicts with Article 5, items IX and XIII, and with Article 220 of the Constitution, which provide for the free manifestation of thought and information, as well as the freedom to exercise a profession.

Counsel João Roberto Piza Fontes, who went to the rostrum in behalf of the National Federation of Journalists (Fenaj), warned that "a diploma cannot prevent anyone from writing in newspapers". He stated that legislation opens opportunities for collaborators holding specific knowledge in a given subject and also for selected individuals, authorized to practice journalism where no professional journalist with university degree or a degree in Communication is found.

He goes on to say that the RE is only a defense by large corporations and a threat to information, if journalism is to be exercise by non-qualified professionals, as well as a devaluation of the profession because it amounts to a threat to fair remuneration of higher educated professionals.

Counsel Grace Maria Mendonça, from the Office of the General Counsel for the Federal Government (AGU), also argued for the diploma. She questioned whether anyone would be willing to put themselves in the hands of a doctor or dentist, or even a pilot without a diploma. She said that there is nothing in the Executive Order (DL no. 972) that conflicts with the Federal Constitution. Much to the contrary, it perfectly suits its terms.

The opinion issued by Justice Cármen Lúcia concurred with that of the Reporting Justice, and declared that Executive Order no. 972 has not been incorporated into the Constitution of 1988. "There is no material or formal incorporation", she stated. In addition, she considered that item V of Article 4 of said Executive Order is in conflict with Article 13 of the aforementioned "Pacto de San Jose da Costa Rica.

Justice Ricardo Lewandowski's opinion was in the same line. He stated that "journalism requires no diploma". The exercise of journalism requires that professionals "have a solid culture, master language, act ethically, and be true to facts". He states that both Executive Order no. 972 and the former – also following a judgment by the STF – Press Act represented "remains of the dictatorship, rubble from authoritarianism", whose purpose was to limit information published by opposing professionals.

Justice Carlos Ayres Britto also defended the end of the requirement for a diploma for the exercise of journalism, and distinguished between "subjects

strictly connected with the press, such as the right to information, creation, freedom of thought", enshrined in Constitutions, and rights indirectly concerning the press, which may be the object of a statute. He states that the requirement for a diploma falls within the second category. "The demand for a diploma does not protect society when it comes to justifying disproportionate restrictions to the exercise of the freedom of the press", he said.

However, he also considered that journalism will continue to be practiced by those who have an aptitude for such profession, without these restrictions. By voting against them, he cited the names of Carlos Drummond de Andrade, Otto Lara Resende, Manuel Bandeira, Armando Nogueira and others who have been prominent journalists without a diploma.

Justice Cezar Peluso, in turn, by concurring with the Reporting Justice, observed that if to practice journalism one needed qualifications such as guarantees against damage and risk to society, or an assessment of sufficient knowledge about scientific truths demanded for this kind of job, work or profession, then a diploma would be justified.

Nevertheless, he says, "journalism does not encompass such indispensable truths", because a diploma in Social Communication is no guarantee against undue practice.

"Are there risks in journalism?", he questioned. "Yes, but none concerns lack of knowledge of a scientific truth that would be governing the profession", he answered.

Then, he concluded: "for centuries, journalism has been correctly practiced, regardless of diploma".

Justices Eros Grau and Ellen Gracie fully concurred with the Reporting Justice, J. Gilmar Mendes.

Justice Celso de Mello, the senior Justice and last one to issue his opinion, concurred with the Reporting Justice. He analyzed Brazilian Constitutions throughout history, from the Empire to this day, where one has always promoted free practice of the profession and access to work.

Still within the historic context, Justice Celso de Mello pointed out that he would not raise the question of what he referred to as "spurious origin" of the executive order that brought the requirement for a diploma or professional registration to exercise journalism, because the norm was published during the military dictatorship.

He affirms that the general rule is the free exercise of the job. He cited bills underway in Congress on rules governing several professions, such as fashion models, interior designers, detectives, nannies and writers. "All professions are

dignifying and noble"; however, we have a Constitution that must be observed" he says.

With a dissenting opinion that supported the requirement for a diploma in journalism, Justice Marco Aurélio stressed that the rule has been in force for 40 years and that, over this period of time, society has organized to comply with the rule, by creating several higher education schools of journalism in the country. "And now we reach the conclusion that we will have journalists from several levels of education. We might have journalists with a college degree and journalists having completed high school and even journalists with only elementary education", he pondered.

Justice Marco Aurélio questioned whether the demand for a diploma is a rule that can be "labeled as disproportionate, even incompatible" with constitutional rules providing that no law may constitute a hindrance to the freedom of speech, and that any profession may be freely practiced.

"To me the answer is no. I believe that journalists must have a basic education, that enables professional activity, that affects the lives of citizens in general. Journalists must count on techniques to interview, to report, to edit, to do research whatever is to be displayed in the means of communication", he argued.

"I cannot endorse that such a requirement, which now will be optional, and thus frustrates numerous people who believed the legal system and enrolled in higher education courses, ends up in a loss to Brazilian society. To the contrary, I must presume what typically occurs, and not what is exceptional: that if a professional has higher education he is better qualified to provide profitable services to Brazilian society", Justice Marco Aurélio concluded.

10) Judicial activism by the Federal Supreme Court, the lack of clear criteria for the exercise of constitutional jurisdiction. Conclusive Summary.

For all that has been put forth, the Federal Supreme Court in Brazil has made great effort towards responding an immense list of themes and issues governed by the Constitution of 1988, and respective amendments.

Many accuse the STF of activism, others complain about its failure to demonstrate what constitutional interpretation methods and criteria it actually uses. And others – unjustly and mistakenly – compare the self-contention of the North-American Supreme Court, which should be an example for Constitutional Courts and Supreme Courts in Latin America.[33]

[33] This would be a very hard task, considering the analytical nature of the Constitutions in our region.

There are also those who affirm that the majority of the STF makes undue use of the so-called *neo-constitutionalism*[34] in facing constitutional interpretation, which would be negative in view of the very lack of definition of what it stands for, thus enabling greater indetermination in stipulating legal concepts, their scope, and an accurate methodology to establish constitutional interpretive principles.

There are also those who blame the Constitution of 1988 for such *defects,* on the grounds that with the ambitious intent to govern everything, it opened the doors that allowed any subject to be constitutional, thus enabling a profusion of causes in the Judiciary and therefore, in the Federal Supreme Court.[35]

Such an overwhelming number of constitutional cases is in place even when we consider the existence of the so-called "defensive precedents[36]" of superior courts, which is so criticized and at the same time necessary to enable the activities of such courts. And all of that is aggravated by the *time,* this enemy of Justice.

The phrase "late justice is clear injustice" is correct. Many Extraordinary Appeals sometimes take decades to reach the Federal Supreme Court.

Evidently, there are no simple solutions for so complex matters, with so different causes and aspects. In a serene reflection, and by weighing all of these multi-factor problems, we must be aware that the *constitutional jurisdiction* must be open to citizens without suffocating lawmakers' ambit of compliance.

No doubt any Supreme Court or Constitutional Court cannot and should not have the ambition to adjudicate all social conflicts. Not only the modern alternative dispute resolution methods must be encouraged by the State, but also it is incumbent upon the political and social systems to solve a significant portion of social problems. Therefore, democracy can always improve.

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[34] For example, Carlos Horbach "The new face of constitutional law: neo-constitutionalism, post-positivism and other fads" Ed. RT, volume 96 São Paulo, 2007.

[35] It must be said that this is not just a Brazilian feature. Most Latin-American Constitutions have this comprehensive ambition, by providing for several issues besides the classical constitutionalism of the 19th century.

[36] These are the cases, for example, of the relevance of subject-matter to file for direct actions for the declaration of unconstitutionality with the STF, the need to prove a direct violation of the Constitution to enable acceptance of the Extraordinary Appeal, the impossibility to cure defects upon formation of the interlocutory appeal following its lodging, the need to prove the so-called "general repercussion", the constitutional matters so that the STF hears the acceptance of the appeal (Article 102, §3 of the Constitution), among many other obstacles to reach the STF.

There are also proposals towards the rationalization of the work of the Federal Supreme Court that are appropriate if debated by society. For example, it is said that the STF should annually determine the matters that will be adjudicated, and prioritize issues of greater constitutional relevance.[37]

On the other hand, one must recognize the noteworthy development that public hearings and the *amicus curiae* have brought to Brazilian constitutional jurisdiction, by democratizing it and enabling it to be plural to social and legal demands.[38]

It seems to us that notwithstanding any interpretive efforts toward finding new constitutional interpretation methods, we are not very optimistic as to the solution to the problems herein reported.

We believe that adopting a generic interpretive method cannot replace a substantive constitutional view and, in some cases, it may even bring difficulties thereto.

Despite the numerous defects of the Brazilian Constitution, which include precisely the ambition to govern everything, perhaps as a response to the post-dictatorship *day after*, the fact is that it guaranteed that the Country be governed during nearly thirty years, which is no small feat for a continent facing so many social problems as in Latin America.

It is true that over ninety constitutional reforms have been made to its original text of 1988. However, it is also true that these consistent majorities have also promoted significant advances to the text, and have completely reshaped our economic system, by re reforming public administration and, to a certain extent, social security as well, in an environment of democratic stability and under constant scrutiny by the Federal Supreme Court. Of course, we have a future ahead with enormous challenges, with the necessary deep political-party reform, the tax and financial reform, the reform to improve democracy and fight corruption.

Nevertheless, one must recognize that with all its defects, we owe such democratic ambivalence that has been in place for nearly thirty years largely to the Brazilian Constitution, despite its defects.

It's no small feat.

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[37] To such effect, see Felipe de Melo Fonte, "Deciding not to decide: restrictive preferences and procedural self-regulation in the STF", *in* Constitutional jurisdiction in 2020, Organized by Gilmar Ferreira Mendes et al., Ed. Saraiva, 2016, page 252 et seq.

[38] In such respect, in a judgmental position, see Rodrigo de Oliveira Kaufmann, "Pragmatic tools for constitutional jurisdiction and its distortion: the *amicus curiae* and public hearing cases", in the aforementioned work, "Constitutional jurisdiction in 2020", page 440.

CONSTITUTIONAL LAW AND FUNDAMENTAL RIGHTS

ALAN BRONFMAN*

The widespread violation of human rights that befell the 20th century in all corners of the globe must not be repeated. It is a duty that all legal scholars must fight to prevent.

We constitutionalists do not have traditional weapons, only a piece of paper that says beautiful and important things. My thesis is that we have to take special care for this singular document, so that it may become the most formidable weapon in defense of the people and in promotion of peaceful coexistence. This is an activity that demands our maximum intellectual efforts; paper is, naturally, very fragile in the face of physical force. This is the premise of my speech.

INTRODUCTION

1. Can, or should, constitutional law pursue the same ends as politics?

In a certain sense, no; rather, it should hold political powers accountable to those limits fixed by the Constitution.

In another sense, yes; it shares some of the basic purposes of politics, such as sustaining stable, peaceful coexistence in the long term.

2. *Three affirmations:*

2.1. Understood as a criterion of action, politics must be a part of constitutional justice, and cannot be excluded from this. Postures that emphasize the rules of interpretation and the objective content of constitutional values inevitably contain options that are political, or that have political effects. Constitutional law is not equivalent to penal or civil law; a more realistic discussion of constitutional law will instead focus on what is the most appropiate proportion of politics within it. I believe it is not convenient to attempt to completely isolate or separate constitutional justice from party politics, but rather better to introduce politics in a controlled manner through more specific appointment procedures, or by means of some requisites to be appointed constitutional judge.

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2.2. The internal procedures of constitutional justice must favor consensus, and must favor arguments and sentences that are simple and clear;

2.3. Constitutional justice must advance surefootedly in the creation of jurisprudence, building on solid and unquestionable foundations, and consolidating the understanding of the Constitution in such a way that it remains harmonious with the progress of culture and society. This progress may be slower than that of its coeval political proposals and projects, but it is good that it is so; as such, it ensures that advances are towards a form of social life in accordance with human dignity. As much as possible, such advances should be able to persist, even in adverse or restrictive budgetary conditions; it is not desirable that the applicability of a supreme norm be subordinate to allocations.

3. *First affirmation:* Politics should form part of constitutional justice, but only in the appropiate amount or proportion. I will attempt to explain what I understand as the proper amount or proportion.

3.1. When I speak of *politics*, I am referring to the activity that is incumbent upon representative authorities and political parties, and not to the broad concept of the same as a synonym for general interest and public affairs. In democracies, the politics I refer to is dominated by electoral interests, in which a certain set of ideas about society and the future are sought to be installed as power in government by means of the triumph of the political party that holds them (Friedrich). Political parties, in their natural efforts to rise to power, promote a set of changes for their society that are more or less profound, and that may collide with the limits of power as imposed by the Constitution;

3.2. Belonging to, or being close to, a political party is considered incompatible with being able to impart any type of justice founded on norms; this latter is inherently an act that must uphold the strictest impartiality. Proof of this is that a judge generally cannot be part of a political party (or hold an elective office), even though they are a citizen that may have their own political ideas.

The requirement of impartiality and independence is usually predominant, even when an issue of constitutionality is refered to the court by the Constitution to resolve conflicts between powers (Legislative and Executive, or National and Provincial). If a constitutional judge is a member (or has been a member) of a political party, it is a reasonable fear that their affinity for the party´s cause could be greater than their affinity for the Constitution and its mandates. In such a case, we lose the protection that the Constitution offer;

3.3. In spite of the above, having political experience (representative and democratic) in constitutional justice can reinforce it. It is not about appointing a constitutional judge that obeys the orders of a certain political party, nor less so a constitutional court that adopts decisions aligned on the basis of majorities or minorities of left or right political discourse. Nor is it about promoting the figure of an "undercover agent" that defends the interests of their political party in matters of special political significance.

The "proper proportion" that I am proposing is best found within constitutional judges that hail from a political background, either having served in representative institutions (such as Parliament), or having served in the Executive branch. In part, this is the case of the French Constitutional Council, which usually has among its members former secretaries of state or MP. They are able to provide political, institutional, and social sensibilities that are invaluable for solving difficult cases as brought before constitutional justice. That this perspective forms part of the decision-making process within constitutional justice is an enrichment of the applicability of the Constitution.

With all this, political experience should not be the main criterion through which a court is appointed and is desirable that the appointement involves retirement from active political life, since the danger there would be weakened juridical heft in decisions handed down. The contributions from politics should not be confused with a predominance of party politics in decisions made by the constitutional court;

3.4. I am reminded of a case from the Constitutional Court of my country, in which a constitutional matter brought before it required a pronouncement of competency of an electoral court of justice over a concrete case. The electoral court had already allowed a matter of litigation to proceed when one of the parties alleged an unconstitutional problem in the matter, which would have obliged the court to recognize its lack of competency. A judge of the Constitutional Court, an ex-senator, argued the following: the electoral court must uphold the greater part of political legitimacy, and no organ of the state may question its decisions. This judge argued that this was a type of pact in national politics from the beginning of the 20th century. Afterwards, although the matter did have a plausible legal basis, the Constitutional Court had to desist with the constitutional

lawsuit "in order not to damage the legitimacy of the organism." The argument was discussed and, definitively, rejected by a majority of three judges against two. Nevertheless, I believe that these types of perspectives should be part of the political and social sensibility of the constitutional courts. A career judge, an academic, or a practicing lawyer that joins the ranks of constitutional magistrates will not always have the representative and democratic experience that good constitutional justice requires.

4. *Second affirmation*: Procedures should favor constitutional consensus and the construction of solid and simple constitutional arguments.
   4.1. Disagreement in the interpretation of Law is both healthy and convenient. It generates questions that allow for debate over the meaning and extent of norms in their application to concrete cases. However, one of the political functions of the Constitution is the promotion of social cohesion. The values defended by the Constitution must serve to increase the union of the political community in peaceful coexistence. In this sense, the political organization that the Constitution provides, as well as the limits to power that it recognizes, are not neutral; rather, these provisions seek to further unite the political community. This duty is central to the organism whose function is to observe the applicability of the Constitution; it does not pursue *particular* political goals (which corresponds to other organisms of democratic representation), but rather those that are *general and permanent*, although still political.
   4.2. In this context, the procedures belonging to the organism of constitutional control must encourage and highlight consensus and, at the same time, discourage and restrict disagreement.
   4.3. *Ad intra*, procedures within and of the constitutional court must encourage consensus in the decision making process incumbent to it in the resolution of a conflict of constitutionality. This objective may be pursued through establishing and promoting collegiate work practices that restrict unnecessary disagreements. For example: it is convenient to generate a stage for discussing a concrete case before it is put to a voting procedure and the legal opinions of the court members. If, preceding the collective decision making process, this discussion were not to exist, each judge would simply provide their vote and their opinion, without allowing for their respective points of view to be contrasted and harmonized with those of the other members of the court. Inversely, if a discussion preceding the de-

cisive debate is included, the members of the collegiate court may present their unresolved legal doubts, their uncertainties in the process, their interpretation difficulties, and even arguments on the matter of elaboration, etc., to receive answers or contributions from other members of the court in order to construct their own opinions. Outside of the ideological or political postures that the members of the constitutional court may have, it is important to generate procedural instances in which *bona fide* intellectual collaboration both allows for the development of links among the judges and reduces disagreements to solely those matters in which it is impossible to harmonize the discrepant points of view.

4.4. *Ad extra*, additional procedural effort should be directed at highlighting constitutional consensus. In resolving a case, in solving a concrete problem, it is important to transmit a clear message of the Constitutional contribution to society. The sentence should be directly related to the Constitutional content that resolves the conflict. Thus, for example, Constitutional inadmissibility should be clearly manifest to society writ large, why access to a job cannot be determined by the skin color of the applicant.

To achieve this end, it is not irrelevant that the elaboration procedure of the sentence provides simple and understandable sentencing. Here, important to the arguments are their brevity (or the ability to summarize), their conceptual clarity (not recurring to complex or convoluted arguments), and, ideally, a writing style that is timeless. This lattermost objective may be met with the appointment of a single writer, or professional sentencing-editing team, such as that of the French Constitutional Council.

4.5. *Ad intra*, the court should consider means to diminish disagreement. In addition to the methods already presented above, the tradition of first looking to construct agreement on the basis of recent precedent is very favorable in limiting discrepancies. It is not always possible, however, and on numerous occasions, the consensus will be more likely to replace the precedent. The tradition I refer to does not prohibit the option of changing existing jurisprudence, but rather simply begins the elaboration of the sentencing by considering the possibility of supporting itself on past, majority-accepted decisions from constitutional judges. If the possibility of utilizing precedents, either partially or wholly, is available, it is recommendable that the constitutional judges at least seriously evaluate them. This will also

help those who interpret law; through these means, they will have a known path to aid them in following the argumentation;

4.6. *Ad extra*, disagreements should also be restricted in the final sentencing. The desire of each judge to register their opinion on a relevant legal point in the sentence is understandable. But if that opinion is contrary to the agreement of the majority, and appears in the sentence as a minority or individual vote, its dissemination diminishes the value of the Constitution as a supreme mandate. A discrepant vote converts the defense of the Constitution into a political cause, which, although not always inappropriate (since it is, after all, the values of the *polis*), does create a negative accumulative effect against the supremacy of the Constitution. This is important, since the renowned decisions of a constitutional court can interpret supreme mandates in different manners; thus the sentencing should show the triumphant interpretation, less the discrepant individual votes.

The inclusion of minority opinions not only damages the coherence of the constitutional discourse, but also makes the sentence more difficult to read and understand. By its nature, such sentencing should be accessible to all citizens.

What we have argued here does not mean that *all* discrepancies in the interpretation and application of constitutional norms should be eliminated. Indeed, discrepancies usually do exist among constitutional judges, and it is good that it is so, since it incentivizes further refinement in legal arguments over better interpretation of the Constitution. I simply sustain that, in the text that *definitively expresses the court´s decision*, only that which contributes to the goal of constitutional supremacy should appear. To this end, there are options, such as not immediately publishing minority votes, but rather keeping them reserved for a number of years; this is a less demanding alternative than prohibiting minority or individual dissent outright. One could also limit dissenting votes in the sentences and encourage alternative forums for such reflection (publications, congresses, etc.) in which the constitutional judges express their minds on constitutional topics under debate (once, of course, the corresponding processes have been concluded). Or have a secret ballot without a record of minutes.

I understand that it is complicated, since there is a political cause behind a minority vote that hopes, in the future, to become the opinion of the majority. But there is also a strong political inter-

est in being able to rely on a firm and prevailing interpretation of the Constitution in its application to a concrete case. The ideal is, I believe, sentences without minority or individual votes of any kind, as well as fully concordant arguments;

5. The contribution of constitutional law to peaceful coexistence must come from a solid interpretation of the text of the Constitution. Constitutional judges should extend the constitutional values that sustain the democratic regime, without having that same extension become understood by society as a simple political option that is born from the will of a court majority. To avoid or diminish solely political values from their sentences, judges should construct an unquestionable relationship between the text of the Constitution and its concrete application. For such a task, it is not convenient to recur to complex interpretative tools; rather, it is better to employ simple, clear arguments and instruments that can be understood and explained by lay citizenry.
   5.1. Constitutional texts usually say very important things in a compressed or synthetic manner. The Constitution, for example, protects the "private life of people", or "equality before the law", and we know that these words may be applied as rules to a large and heterogeneous list of situations. What is most relevant of this fact is that the effective applicability of the Constitution requires precisely and meticulously determining what content is being protected; this is a technical undertaking that judges and academics attempt, with greater or lesser success, in all democracies.
   5.2. This task has great breadth, and of course may generate legitimate disagreement (often in the form of extensive and complex arguments). The interpretative question may be resolved through different bases, however, while still leading to the legitimate foundation that unites the norm to the case, e.g., the Constitution and the historic argument or the originalist interpretation, the progressive interpretation, among others. These interpretation criteria locate legitimacy in the past, present, or future, almost always mediated by the subjetive will of the interpreter for what exactly constitutes the past, present, or future. The use of any of these interpretation criteria is insufficient for discovering an adequate response. It is important, I believe, that the text of the Constitution occupy a central place in the construction of an argument on which the sentencing is based, and that this basis utilize the interpretation criteria that are accepted by the larger part of jurists or lawyers in the nation. As a

counterexample, it is not odd to find sentences that prefer principle and theory as their basis, even over constitutional norms that explicitly provide a response to the case in question. If the purpose is to secure the value of the Constitution as the basis of democratic coexistence, it is preferable then to renounce more attractive arguments about theory and substitute them with those that serve the greater interest of constitutional supremacy.

There is also, by the way, the temptation of advancing more quickly through the incorporation of constitutional law from distinct constitutional courts from advanced nations. This advance is almost always possible (at least formally), since Constitutions are alike one another and the interpreted object is the similar. However, if this incorporation does not generate a broad consensus and has no precedents that serve as its basis, it seems then recommendable to advance more slowly under the tutelage the Constitution of your own country offers. Of little use are sentences before their time in hostile political contexts.

6. *Final consideration*

The Constitution is a formidable instrument for peaceful coexistence. Its content, laid bare by constitutional jurisprudence, may provide significant aid in the functioning of a democratic political system. All in all, I believe, one should not hope to substitute the representative powers as exist in democracies, nor to impose a political agenda separate from what these powers are promoting. The Constitution is fragile in the face of political powers, which we have seen proven once and again in different parts of the world. Constitutional judges may convert that fragility into strength when they take on the task of converting the values that both unite society and are recognized by the Constitution; and they may do so in a practical instrument that resolves a concrete case and projects that case towards the future coexistence of the political community. Justice based on values that unite society ensures a long life for the Constitution and those who defend it.

Viña del Mar, May 25th, 2017.

LA CONSTITUTIONNALISATION DU MODÈLE PÉRIODIQUE D'INTERRUPTION DE GROSSESSE EN CROATIE – LE JUGEMENT DE LA COUR CONSTITUTIONNELLE DE LA RÉPUBLIQUE DE CROATIE NUMÉRO U-I-60/1991 E.A. DU 21 FÉVRIER 2017

BILJANA KOSTADINOV

La Cour constitutionnelle de la République de Croatie n'a pas fait droit à la demande d'ouverture d'une procédure de contrôle de la constitutionnalité de la Loi portant sur les mesures médicales d'exercice du droit de décider librement de la naissance de l'enfant (« Journal officiel » numéro 18/78., 31/86., 47/89. i 88/09). La loi objet du recours n'est pas contraire aux articles 2, 3, 14, 16, 21, 22, 35 et 38 de la Constitution et à la Constitution dans son ensemble. L'adoption d'une interdiction légale de l'interruption de grossesse (Malte, Andorre) ou du modèle légal d'interruption de grossesse interdisant l'avortement sur le fondement des indications sauf en cas d'indications constatées par un tiers (Irlande) ou du modèle légal subordonnant la licité de l'avortement à l'existence d'un dispositif ouvert de conseils de nature dissuasive à l'égard du recours à l'avortement, dans le cadre duquel la femme serait autorisée à prendre une décision définitive après avoir participé à une consultation visant à protéger le fœtus (République Fédérale d'Allemagne) serait dès lors, après l'adoption du jugement U-I-60/1991 e.a., contraire à la Constitution. En outre, l'organisation d'un référendum d'initiative populaire visant au remplacement du modèle périodique par les modèles légaux susvisés serait également contraire à la Constitution croate.

1. LA CONSTITUTIONNALISATION DU MODÈLE PÉRIODIQUE EN RÉPUBLIQUE DE CROATIE

La Cour constitutionnelle de la République de Croatie n'a pas fait droit à la demande d'ouverture d'une procédure de contrôle de la constitutionnalité de la Loi portant sur les mesures médicales d'exercice du droit de décider librement de la naissance de l'enfant (« Journal officiel » numéro 18/78., 31/86., 47/89. i 88/09). La loi objet du recours n'est pas contraire aux articles 2, 3, 14, 16, 21, 22, 35 et 38 de la Constitution et à la Constitution dans son ensemble. La Cour constitutionnelle a considéré qu'une disposition légale permettant l'interruption volontaire de grossesse jusqu'à la 10^{e} semaine de grossesse est conforme à la Constitution,

étant entendu qu'après ce délai la grossesse ne pourra être interrompue que sur l'autorisation de l'organe compétent sur le fondement d'indications médicales et pénales spécifiques.

Le jugement numéro U-I-60/1991 e.a. rendu le 21 février 2017 par la Cour constitutionnelle de la République de Croatie constitutionnalise le modèle juridique périodique de l'interruption de grossesse établissant un juste équilibre entre les valeurs constitutionnelles et les droits garantis par la Constitution afin d'assurer la protection du droit à la vie privée, à la liberté et à la personnalité de la femme, d'une part, et la sauvegarde de l'intérêt public à protéger le fœtus qui constitue une valeur protégée par la Constitution, d'autre part. Se fondant sur la Constitution, la Cour constitutionnelle a estimé qu'il appartient au législateur de définir la procédure et la période dans laquelle la grossesse peut être interrompue à la demande de la femme sans restriction, considérant au passage que le modèle périodique appliqué dans les démocratiques européennes développées suppose des mesures publiques de nature positive visant à protéger la vie du fœtus et traitant l'interruption de grossesse comme une exception tout en garantissant que la décision de la femme quant à sa grossesse et sa maternité sera vraiment libre. La Cour a enjoint au Sabor croate (le Parlement de la République de Croatie) d'adopter dans un délai indicatif de deux ans, une loi qui promeut, au moyen de programmes pédagogiques et préventifs ciblés, incluant par exemple des enseignements en matière de reproduction et d'éducation sexuelle, des comportements responsables sur le plan sexuel et la responsabilité de l'homme et de la femme dans la prévention des grossesses non désirées. Le législateur peut également définir une période de réflexion appropriée précédant la prise de décision quant à l'interruption ou la poursuite de la grossesse et au cours de laquelle des informations sur la grossesse seront adressées et des services proposées à la femme ; il peut aussi aménager la question des coûts de l'interruption de grossesse et la question de l'objection de conscience des médecins qui ne désirent pas réaliser d'avortement. La Loi attaquée contient des institutions ou des notions juridiques qui n'existent plus dans l'ordre constitutionnel de la République de Croatie si bien qu'il est essentiel de les « moderniser ».

L'adoption d'une interdiction légale de l'interruption de grossesse (Malte, Andorre) ou du modèle légal d'interruption de grossesse interdisant l'avortement sauf en cas d'indications constatées par un tiers (Irlande) ou du modèle légal subordonnant la légalité de l'avortement à l'existence d'un dispositif ouvert de conseils de nature dissuasive à l'égard du recours à l'avortement, dans le cadre duquel la femme serait autorisée à prendre une décision définitive après avoir participé à une consultation visant à protéger le fœtus (République Fédérale d'Allemagne) serait dès lors, après l'adoption du jugement U-I-60/1991 e.a.,

contraire à la Constitution. En outre, l'organisation d'un référendum d'initiative populaire visant au remplacement du modèle périodique par les modèles légaux susvisés serait également contraire à la Constitution croate.

2. LA CONSTITUTIONNALISATION DU MODÈLE PÉRIODIQUE EN EUROPE AU XXIE SIÈCLE – LES CARACTÉRISTIQUES DU MODÈLE

La constitutionnalisation de l'interruption de grossesse au XXI^e^ siècle modifie la doctrine exprimée dans les arrêts des cours constitutionnelles relative à la législation des démocraties européennes développées (par exemple, le Portugal en 2007 et 2016 ; l'Espagne en 2010 ; la France en 2001, 2014 et 2016). Le droit à l'interruption volontaire de grossesse est ainsi consacrée et l'obligation de consultation incombant à la femme enceinte conditionnant la légalité de l'avortement abolie, étant entendu que la consultation est dans certains cas permise mais non exigée. Les nouvelles lois adoptées en France, au Portugal et en Espagne s'articulent autour du modèle périodique qui autorise l'interruption volontaire de grossesse à l'intérieur d'une période déterminée de la grossesse, comme la Loi croate sur les mesures médicales. Les États majoritairement catholiques dont la législation en matière d'avortement était inspirée du modèle allemand appliqué au siècle dernier (Portugal, Espagne), ont au début du siècle rejeté le modèle articulé autour d'une consultation de nature dissuasive à l'égard du recours à l'avortement à laquelle la femme était soumise avant de prendre sa décision sur l'avortement, les discours des cours constitutionnelles sur la sauvegarde du fœtus laissant alors la place à des discours promouvant le respect du fœtus et des droits de la femme. Il convient ici de souligner que la République fédérale d'Allemagne a en 2012 et 2014 modifié son mécanisme de consultation. Bien que la femme soit priée d'informer le conseiller des raisons motivant le recours à l'avortement, la consultation ne saurait induire la femme à discuter de sa situation ou à collaborer avec le conseiller. Il sera également fait droit à la demande de la femme souhaitant conserver l'anonymat à l'égard de la personne animant la consultation[1].

En 2007, le Portugal a adopté une loi qui permet aux femmes de demander l'interruption volontaire de grossesse durant les dix premières semaines, après s'être soumises à une consultation obligatoire qui néanmoins n'est pas de nature dissuasive. La conformité de la loi à la Constitution a été confirmée par

[1] Act on Assistance to Avoid and Cope with Conflicts in Pregnancy, Partie II, sections 5, 6.

la Cour constitutionnelle dans une décision rendue en 2010[2]. En confirmant la conformité du modèle périodique à la Constitution, la Cour constitutionnelle du Portugal a admis que la mise en œuvre d'un dispositif de consultation résolument dissuasif, afin de convaincre les femmes d'assumer leur maternité, ne peut être considéré comme un élément essentiel du modèle périodique. La Cour est allé volontairement à l'encontre de la décision sur l'avortement rendue en 1993 considérant que les femmes sont des êtres responsables et conscients des arguments formulés contre l'avortement et qu'elles ont le droit, en qualité de citoyennes à part entière et égales devant la loi, de décider librement des questions qui les concernent, ce que le système consultatif allemand, infantilisant et paternaliste, réfute.

En février 2016, la loi portugaise sur l'avortement a été modifiée afin de supprimer la disposition sur la consultation obligatoire précédant l'avortement et d'abolir l'obligation de payer la mise en œuvre de cette procédure au sein des établissements publics médicaux (parallèlement, la loi est venu reconnaitre aux couples homosexuels le droit d'adopter des enfants).[3]

L'Espagne reconnaît aux femmes le droit de recourir librement à l'avortement sur une demande écrite adressée par la femme durant les 14 premières semaines de grossesse, après une consultation qui, bien qu'obligatoire, n'est pas expressément dissuasive (article 14, Organic law 2-2010 of March 3 on Sexual and Reproductive Health and Voluntary Termination of Pregnancy). Il s'agit d'un modèle périodique assorti de mesures publiques de nature positive en matière médicale et pédagogique promouvant une approche responsable comme moyen le plus efficace de réduire le nombre d'avortements. Aux termes d'une telle approche, également définie par la décision CTD53/1985 comme une « autodétermination consciente », l'ingérence délibérée d'un tiers dans l'expression de la volonté de la femme enceinte, ne procure aucune garantie significative au fœtus tout en restreignant sans motif valable le droit à la croissance et au développement personnels garanti par l'article 10.1 de la Constitution espagnol. L'Espagne motive le droit des femmes à l'interruption volontaire de grossesse en faisant valoir le respect des droits de l'homme et des libertés fondamentales garantissant le droit des femmes à la croissance et au développement personnel, à la vie, à l'intégrité corporelle et psychique, à la vie privée, à la liberté de pensée et l'interdiction des discriminations. Se gardant de s'engager dans un débat sur le fœtus comme titulaire de droits constitutionnels, les juges constitutionnels

[2] Acórdão No. 75/2010., https://dre.tretas.org/dre/271839/acordao-75-2010-de-26-de-marco, accès 1,11, 2018.

[3] Lei n.º 3/2016, 29.02.2016. https://dre.pt/application/file/73737988, accès 1.10.2016.

protègent de manière accessoire ses intérêts, l'État intervenant en qualité de protecteur indirect du fœtus.

En vertu de la loi espagnol, les établissements médicaux publics sont tenus de remettre à toute femme mettant un terme à sa grossesse une enveloppe scellée contenant des informations sur l'assistance médicale publique et les centres de conseils ouverts aux femmes enceintes et sur la protection médicale proposée pendant la grossesse et l'accouchement ; sur les droits sociaux des femmes enceintes et des jeunes mères ; sur les garderies existantes, l'aide publique, les centres qui fournissent des moyens de contraception appropriés et des informations sur les activités sexuelles protégées et les centres organisant des consultations avant et après la grossesse. En sus de l'enveloppe scellée, une attestation comportant la date de remise de l'enveloppe doit être remise à la femme. La grossesse pourra être interrompue à l'expiration d'un délai de trois jours après la réception de l'enveloppe (Organic law 2-2010, article 17).

Le modèle a été présenté comme un juste équilibre entre l'autonomie reproductive de la femme et la vie à l'état de fœtus et constitue un appel adressé à l'État en vue de l'adoption de mesures positives en matière de protection.

En 2014, la France a expressément opté pour le modèle périodique. L'interruption volontaire de grossesse durant les 12 premières semaines ne nécessite plus que « *l'état* » de la femme la place « *dans un état de détresse* » (la femme évaluant elle-même si elle se trouve dans un tel état), la femme « *qui ne veut pas poursuivre une grossesse* » pouvant demander l'interruption volontaire de grossesse (L. 2212-1 *Code de la santé publique*). Le Conseil constitutionnel français a, dans une décision sur la loi numéro *2014-873 du 4 août 2014 sur l'égalité réelle entre les femmes et les hommes,* proclamé cette disposition conforme à la Constitution[4]. En 2001, la France a modifié l'article *L.2212-4 du Code de la santé publique* et décidé que des informations en matière d'assistance fournie à la mère et l'enfant seront données dans le cadre d'une consultation sociale systématiquement proposée à la femme enceinte mais obligatoire uniquement à l'égard des mineures. Le Conseil constitutionnel a constaté que la suppression des dispositions prévoyant l'information de la femme qui demande une IVG sur les alternatives à l'avortement ne porte pas atteinte à la liberté personnelle de la femme et ne l'empêche pas de se déterminer en connaissance de cause[5]. L'As-

[4] Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes,, Décision n° 2014-700 DC du 31 juillet 2014, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029331391, accès 1.11.2016.

[5] Commentaire de la décision no 2001-446 DC du 27 juin 2001. http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2001446DCccc_446dc.pdf, accès 1.10.20016.

semblée nationale a le 26 octobre 2014 adopté la résolution numéro 433 (Résolution réaffirmant le droit fondamental à l'interruption volontaire de grossesse en France et en Europe) qui vient réaffirmer l'importance du droit fondamental à l'interruption volontaire de grossesse pour toutes les femmes en France, en Europe et dans le monde. À l'occasion, elle a rappelé que le droit universel des femmes à disposer librement de leur corps constitue une condition indispensable pour la construction de l'égalité réelle entre les femmes et les hommes et d'une société de progrès et souligne le rôle majeur de la prévention et de l'éducation à la sexualité, en direction des jeunes.[6]

En 2016, le délai de sept jours courant à compter de la demande d'avortement formulée par la femme jusqu'à sa confirmation à l'écrit a été supprimé en France[7]. Le Conseil constitutionnel a estimé qu'en supprimant le délai, la législateur n'a pas rompu l'équilibre que le respect de la Constitution impose entre, d'une part, la sauvegarde de la dignité de la personne humaine contre toute forme de dégradation et, d'autre part, la liberté de la femme (article 2 de la Déclaration des droits de l'homme et du citoyen).[8]

3. APPRÉCIATION PAR LA COUR CONSTITUTIONNELLE DU RECOURS EN CONTRÔLE DE CONSTITUTIONNALITÉ DE LA LOI ATTAQUÉE POUR INEXISTENCE DE LA BASE CONSTITUTIONNELLE SUR LE FONDEMENT DE LAQUELLE LA LOI A ÉTÉ ADOPTÉE

La Cour constitutionnelle a considéré que le recours constitutionnel introduit contre la loi dans son ensemble, invoquant l'expiration de la base constitutionnelle sur laquelle elle a été adoptée, est non fondée. La Cour constitutionnelle considère qu'elle est compétente pour évaluer la conformité de toutes les lois à la Constitution, y compris celles adoptées dans le cadre d'un régime juridico-constitutionnel distinct (c'est-a-dire sur le fondement de Constitutions antérieures) et, même si les délais de mise en conformité avec la nouvelle « Constitution » ont expiré eu égard à leur nature indicative (…), le fait qu'elles aient été adoptées à

[6] **RÉSOLUTION** réaffirmant le droit fondamental à l'**interruption volontaire de grossesse** en France et en Europe. http://www.assemblee-nationale.fr/14/ta/ta0433.asp, accès 1.11.2016.

[7] LOI n° 2016-41 du 26 janvier 2016 de modernisation de notre système de santé, čl.82., https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031912641&categorieLien=id, pristup 1.11.2016.

[8] Décision n°2015-727 DC du 21 janvier 2016, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015727DC2015727dc_ccc.pdf, accès 1.11.2016.

l'époque d'un cadre juridique et constitutionnel différent (et même si la « nouvelle Constitution » ne contient aucune disposition identique ou similaire à celle de la Constitution abolie) n'est en lui-même pas suffisant pour proclamer une telle loi contraire à la Constitution (point 37 du jugement)[9]. L'appréciation de la Cour constitutionnelle est fondée sur le plan constitutionnel dans la mesure où toute nouvelle Constitution s'appuie régulièrement sur le système constitutionnel antérieur. Il est très rare que la Constitution contienne une clause abrogeant expressément la législation antérieure non conforme.[10] Dans un système centralisé de contrôle de la constitutionnalité des lois, (Italie, Espagne, Allemagne) l'inconstitutionnalité d'une loi « erga omnes » peut être établie uniquement par une Cour constitutionnelle.

Afin d'apprécier l'apport de toute nouvelle Constitution, il convient de la lire à partir de la fin. Les dispositions transitoires et finales définissent la valeur juridique des dispositions législatives antérieures. La règle de l'art de la persuasion du droit romain – Un cauda venenum – s'applique en la matière. Le venin est dans la queue (scorpion). L'auteur de la Constitution a le choix de soumettre le « droit ordinaire » antérieur à la Constitution (einfaches Recht, droit infraconstitutionnel) à l'appréciation des juges constitutionnels qui, en contrôlant la constitutionnalité du droit « ordinaire » antérieur à l'adoption de la Constitution, supprimeront de l'ordre juridique les lois qui ne lui sont pas conformes. Un tel système est appliqué dans tous les États qui ont connu des dictatures, dans lesquels le fossé existant entre la nouvelle Constitution et la législation héritée du régime totalitaire (Allemagne, Espagne, Portugal, Grèce, Europe centrale) constitue un problème sérieux. Il suffit d'inscrire dans la Constitution que celle-ci s'applique et prime sur toutes les lois (postérieures et antérieures), la Cour constitutionnelle étant dès lors chargée de faire appliquer cette primauté et de garantir la conformité de la loi aux principes et valeurs constitutionnels.

Cependant, l'auteur de la Constitution ne saurait dans certains cas se contenter de supprimer les normes antérieures et contraires à la Constitution du cadre constitutionnel, il doit aussi combler les espaces ainsi laissés vides. Le pouvoir politique souhaitant s'attribuer cette fonction essentielle en se gardant de la confier aux juges, pourra préserver les dispositions législatives antérieures à la Constitution de son choix pendant une période limitée (nécessaire à la réforme législative). Ainsi, la Loi fondamentale de la République fédérale d'Allemagne prévoit dans ses dispositions transitoires (article 117) que chaque norme contraire à l'article 3 (égalité devant la loi) demeurera en vigueur jusqu'à son

[9] Le juge Miroslav Šumanović a dans cet affaire rédigé et motivé un avis dissident

[10] Par exemple, la Constitution espagnole (1978); REPEALS.

harmonisation et au plus tard jusqu'au 31 mars 1953. La loi civile est de cette façon restée en vigueur pendant quatre ans. Dans le cas présent, si le parlement s'abstenait d'harmoniser la loi dans le délai de forclusion, les juges s'en chargeront en l'abolissant[11]. Dans le cas où la Constitution mettrait en place de nouvelles institutions constitutionnelles, elle pourrait aussi prévoir l'adoption de lois régissant ces institutions ou via les dispositions transitoires définir les périodes transitoires entre l'institution existante et celles futures ou prévoir l'harmonisation des lois essentielles en la matière. Dans ce domaine, les délais constitutionnels sont souvent de nature indicative.et non forclusive afin d'éviter que le pays soit privé de ces institutions ou d'une loi essentielle (par ex., la Constitution italienne (1948), dans son article transitoire IX, dispose que les lois sur l'autonomie locale et les pouvoirs législatifs des régions seront harmonisées dans un délai de trois jours à compter de l'entrée en vigueur de la Constitution).

Invoquer l'expiration des délais indicatifs d'harmonisation des lois antérieures à la Constitution définis par les lois constitutionnelles d'application de la Constitution de la République de Croatie pour exiger leur suppression n'est pas fondé sur le plan constitutionnel. Aucune loi constitutionnelle d'application de la Constitution n'a force constitutionnelle, leurs effets ne pouvant empêcher l'application directe des dispositions correspondantes de la Constitution, même lorsque ceci est expressément prescrit (Cour constitutionnelle de la République de Croatie U-X-832/2012). La Constitution de la République de Croatie de 1990 (IX, DISPOSITIONS TRANSITOIRES ET FINALES) ne contient aucune disposition sur les lois « ordinaires » antérieures à la Constitution. C'est la Cour constitutionnelle de la République de Croatie qui statue sur leur conformité à la Constitution dans le cadre de la procédure en contrôle de constitutionnalité d'une loi. L'action introduite afin que la Loi sur les mesures médicales soit proclamée « automatiquement inconstitutionnelle » par la Cour constitutionnelle en l'absence de la base juridique sur le fondement de laquelle elle a été adoptée est contraire au principal constitutionnel de respect de État de droit.

4. LA COUR CONSTITUTIONNELLE N'EST PAS COMPÉTENTE POUR RÉPONDRE À LA QUESTION SUR LE « DÉBUT DE LA VIE »

La Cour constitutionnelle de la République de Croatie a constaté à juste titre que la question du « début de la vie » ne relève pas de la compétence de la Cour constitutionnelle et que les autres Cours constitutionnelles des États-membres, par exemple l'Espagne (point 31.1.1.), le Portugal (point 31.2.1.) et la

[11] Bundesverfassungsgericht 18. 12.1953., *BVerfGE, 3,225, Gleichberechtigung.*

France (t.31.4.1) estiment de manière cohérente qu'il appartient au législateur de répondre à la question du commencement de la vie. Seul le Parlement croate (Hrvatski sabor) a le droit de dire à partir de quand s'applique le droit à la vie.

Selon la décision récente rendue par la Cour constitutionnelle du Portugal (ACÓRDÃO Nº 75/2010)[12] le fœtus ne détient pas de droits, il personnifie seulement une valeur constitutionnelle, ce qui constitue une différence fondamentale influant sur le type de protection qui lui est accordée par la Constitution. La vie humaine, même si elle mérite une certaine forme de protection depuis la conception, est perçue comme un processus de développement traversé par des points de rupture d'intensité différente justifiant des niveaux de protection différents accompagnant le processus. La décision reconnait que les droits reproductifs et les intérêts des femmes – protégés par les dispositions constitutionnelles sur le libre développement de leur personnalité et leur autodétermination – sont importants, c'est pourquoi le devoir de l'État en matière de protection de la vie ne saurait être automatiquement apparenté à un obligation de maternité incombant aux femmes enceintes. La Cour a entériné la jurisprudence existante en considérant que la protection constitutionnelle du droit à la vie concerne aussi la vie intra-utérine mais seulement comme valeur constitutionnelle cible/objective. Selon la Cour, si cela implique l'existence d'un devoir de protection, , la Constitution du Portugal ne définit aucune forme spécifique de protection. Il appartient donc au législateur de définir une forme de protection en prenant en compte l'interdiction de mesures réputées insuffisantes (garantie de protection minimale) mais aussi l'interdiction de mesures exagérées (ayant une incidence sur les autres valeurs protégées par la Constitution).

Le Conseil constitutionnel français a dans sa décision numéro 2001-446 DC du 27 juin 2001 rejeté l'exception d'inconstitutionnalité de la loi dont les auteurs ont fait valoir que la prolongation des délais applicables à l'interruption volontaire de grossesse de 10 à 12 semaines constitue une atteinte au « respect de la vue humaine depuis le commencement de la vie ». Les requérants ont avancé qu'à cette période, l'embryon se développe en fœtus qui constitue le stade auquel l'être en gestation devient un être humain[13]. Bien qu'il existe incontestablement un droit constitutionnel à la vie de l'être humain, découlant des droits naturels et inaliénables de l'homme de l'article 2 de la Déclaration des droits de l'homme

[12] http://w3.tribunalconstitucional.pt/acordaos/acordaos/20100075s.htmlímpressao=1, 1.10.2016.

[13] *Loi relative à l'interruption volontaire de grossesse et à la contraception.* Commentaire de la décision no 2001-446 DC du 27 juin 2001. http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2001446DCccc_446dc.pdf, accès 1.10.20016.

et du citoyen de 1789 et constituant le premier des droits de l'homme, car il conditionne l'existence de tous les autres droits, les juges constitutionnels n'ont pas, en raison de toute une série de questions restées ouvertes, répondu à la question de savoir si le fœtus est avant la naissance un être humaine titulaire du droit à la vie et le cas échéant à quelle étape de son développement : « Ce droit débute-t-il avant la naissance ? ou encore : à quel stade de la gestation une personne humaine titulaire du droit à la vie existe-t-elle ? Le Conseil constitutionnel n'a pas répondu à cette question car, face au silence de la constitution, elle a trait à la métaphysique et la médecine et ne concerne pas ceux chargés d'appliquer les lois…Il appartient donc au législateur et à lui seul de dire à quel stade de la gestation une « *personne humaine* » existe, étant entendu que :

« Il n'appartient pas au Conseil constitutionnel, qui ne dispose pas d'un pouvoir général d'appréciation et de décision de même nature que celui du Parlement, de remettre en cause, au regard de l'état des connaissances et des techniques, les dispositions ainsi prises par le législateur. Il est à tout moment loisible à celui-ci, dans le domaine de sa compétence, de modifier des textes antérieurs ou d'abroger ceux-ci en leur substituant, le cas échéant, d'autres dispositions ; l'exercice de ce pouvoir ne doit cependant pas aboutir à priver de garanties légales des exigences de valeur constitutionnelle. »[14] Le Conseil constitutionnel a conclu qu'en portant de dix à douze semaines le délai pendant lequel peut être pratiquée une interruption volontaire de grossesse à la demande de la femme, la loi n'a pas, en l'état des connaissances et des techniques, rompu l'équilibre que le respect de la Constitution imposé entre, d'une part, la sauvegarde de la dignité de la personne humaine contre toute forme de dégradation et, d'autre part, la liberté de la femme qui découle de l'article 2 de la Déclaration des droits de l'homme et du citoyen. Le législateur n'a pas dénaturé le principe de respect de l'être humain depuis le commencement de sa vie (L2211-1 de la Loi sur la santé publique).

Selon l'interprétation de la Cour constitutionnelle espagnole, le système juridique ne considère pas le fœtus comme un citoyen auquel le droit fondamental à la vie défini à l'article 15 de la Constitution est garanti, cependant cela ne saurait le priver de l'intégralité de la protection constitutionnelle (CTD 116/1999). La vie prénatale constitue un intérêt juridique qui se doit d'être protégé. Le rôle du législateur est d'élargir cette protection ; en outre il ne faut pas oublier que

[14] *Loi relative à l'interruption volontaire de grossesse et à la contraception*, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2001/2001-446-dc/decision-n-2001-446-dc-du-27-juin-2001.505.html, accès 1.11. 2016.

la forme et le mode d'exercice de la protection dépend toujours de la protection des droits fondamentaux de la femme enceinte.

5. L'APPRÉCIATION PAR LA COUR CONSTITUTIONNELLE DU RECOURS EN CONTRÔLE DE LA CONSTITUTIONNALITÉ DE LA LOI ATTAQUÉE

Selon l'approche de la Constitution comme un ensemble de valeurs, les droits constitutionnels constituent la base de toute législation : des principes régissant tous les domaines législatifs (droit public, pénal, privé) et auxquels même les lois adoptées avant la constitution doivent s'adapter.[15]

Les droits de l'homme et les libertés fondamentales sont interprétés par les Cours constitutionnelles des démocraties développées sur le fondement d'un triangle de valeurs constitutionnelles – la dignité, la liberté et l'égalité – le droit à l'égalité n'étant pas isolé et ne pouvant être interprété indépendamment des autres, la liberté étant parfois explicite, souvent tacite et promouvant incontestablement le droit à l'autodétermination de l'individu face à la menace de paternalisme, alors que la dignité est fondamentale.

La Cour constitutionnelle valide l'approche traitant la Constitution comme un ensemble de valeurs conformément au constitutionnalisme moderne et insiste : « …Lorsqu'elle est interprétée comme un tout, la Constitution reflète certains principes globaux et certaines décisions fondamentales sur le fondement desquelles il convient d'interpréter chacune de ses dispositions. C'est pourquoi aucune disposition constitutionnelle ne saurait être placée hors de son contexte et interprétée de manière isolée. En d'autres termes, chaque disposition constitutionnelle sera systématiquement interprétée en vertu des valeurs suprêmes de l'ordre constitutionnel qui régissent l'interprétation de la Constitution elle-même. Il s'agit de : la liberté, l'égalité, l'égalité des sexes, la paix, la justice sociale, le respect des droits de l'homme, l'inviolabilité du droit de propriété, le respect de la nature et de l'environnement humain, l'État de droit et le système démocratique pluripartite (article 3 de la Constitution). » Pour ces motifs, aucune disposition constitutionnelle ne saurait être interprétée de manière à produire des effets contraires à la Constitution (point 41.1.).

Conformément à l'approche moderne de la Constitution comme un ensemble de valeurs, la Cour constitutionnelle estime que la Loi a mis en place un juste équilibre entre le droit de la femme à décider seule de l'interruption de la grossesse et l'intérêt de la société à protéger la vie du fœtus. Elle souligne que la dignité humaine est protégée de manière absolue, infaillible et incomparable,

[15] V.G.Tarello, *L'interpretazione della legge, Milano, 1980. pages.335-338.*

alors que le droit à la vie conditionne l'existence de tous les autres droits dans la mesure où tous les droits et toutes les libertés humaines en découlent. Elle procède à l'interprétation suivante : « La Constitution garantit le droit à la vie « de chaque être humain », mais ne définit pas (ne précise pas) la notion d'être humain en s'abstenant d'indiquer si elle inclut, outre les personnes qui sont nées (les hommes), qui sont incontestablement titulaires de la personnalité juridique, les personnes qui ne sont pas encore nées. » (point 42). Elle affirme que le droit à la liberté et la personnalité constituent des droits fondamentaux, précisant au passage que la Constitution consacre le principe d'inviolabilité de la liberté et de la personnalité de l'homme (article 22 de la Constitution), qui peuvent être restreintes uniquement dans les conditions prescrites par la Constitution. En outre, celle-ci garantit à chacun le respect et la protection juridique de sa vie privée et familiale et de sa dignité (article 35 de la Constitution).

La Loi sur les mesures médicales consacre le droit de tout individu de décider librement s'il veut avoir des enfants (article 1). Ce droit n'est pas absolu, il peut être limité par la loi afin de protéger la vie et la santé de la femme enceinte. L'Espagne a adopté une disposition légale identique en 2010 : « Le droit des femmes de décider librement si et quand elles veulent avoir des enfants est formellement reconnu » (article 3, paragraphe 2, Organic law 2 – 2010). Le législateur espagnol s'est livré à l'interprétation suivante : « Cette loi reconnait aux femmes le droit de décider librement si et quand elles veulent avoir des enfants. Ceci suppose, inter alia, que la femme puisse décider en connaissance de cause et de manière responsable de mener ou non sa grossesse jusqu'à son terme et que ces décisions soient respectées. S'appuyant sur l'avis d'experts et une analyse de droit comparé, le législateur estime qu'il est raisonnable d'instaurer une période de quatorze semaines pendant laquelle la femme a le droit de prendre une décision informée sur l'interruption de grossesse, sans aucune ingérence. » Et de poursuivre : « Le droit d'une femme de décider librement si et quand elle veut avoir des enfants constitue la décision privée la plus personnelle que tout individu puisse prendre et relève de la sphère de l'autodétermination. »[16]

Selon l'interprétation de la Cour constitutionnelle de la République de Croatie, le droit à la vie privée consacré à l'article 35 de la Constitution suppose le droit de chacun à la liberté de décision et l'autodétermination : « (…) C'est pourquoi le droit à la vie privée est un droit exclusif de la femme à sa propre intégrité spirituelle et corporelle, qui suppose qu'elle puisse décider librement

[16] Organic law 2-2010 of March 3 on Sexual and Reproductive Heealth and Voluntary Termination of Pregnancy, justification introductive. Nous rappelons que ce droit est également consacré par la loi sur l'interruption de grossesse en République de Slovénie.

de concevoir un enfant et du cours de sa grossesse. En tombant enceinte (de manière planifiée ou non, volontairement ou par la contrainte), la femme ne renonce pas à son droit à l'autodétermination. Chaque restriction au droit de la femme à l'autodétermination et ainsi à son droit de décider si elle souhaite mener sa grossesse jusqu'à son terme, représente une atteinte à son droit constitutionnel au respect de la vie privée. » (point 44.1). Et de poursuivre : « Pour ces motifs, la Cour constitutionnelle constate que le fœtus, en qualité de valeur protégée par la Constitution, bénéficie de la protection constitutionnelle au sens de l'article 21 de la Constitution seulement dans la mesure où cela ne porte pas atteinte au droit de la femme au respect de sa vie privée. En ce sens, le droit à la vie du fœtus n'est pas protégé si bien qu'il prime et demeure mieux protégé que le droit de la femme au respect de sa vie privée. Il est donc loisible au législateur de parvenir à un juste équilibre entre le droit de la femme à décider librement et le droit au respect de sa vie privée, d'une part, et l'intérêt publique à garantir la protection du fœtus, d'autre part. (point 45.) ».

La Cour constitutionnelle considère que le législateur a instauré un juste équilibre entre les droits de la femme et l'intérêt à protéger le fœtus. Elle constate que le dispositif légal autorisant l'interruption volontaire de grossesse jusqu'à la 10^{e} semaine de grossesse est conforme à la Constitution (après ce délai, l'interruption sera réalisée avec l'autorisation de l'organe compétent, seulement si, eu égard aux indications médicales, il est constaté qu'il n'est pas possible de sauver la vie de la femme ou de préserver sa santé d'une autre façon pendant la grossesse, l'accouchement ou après l'accouchement, s'il est probable que l'enfant naitra avec de graves déficiences corporelles ou mentales, lorsque la conception découle de la commission d'infractions légales [article 22 de la Loi], ou lorsque la vie ou la santé de la femme sont gravement menacés ou lorsque l'interruption de grossesse a déjà commencé [article 25 de la Loi]).

Pour ces motifs, la Cour constitutionnelle considère que la disposition légale attaquée n'a pas rompu le juste équilibre entre le droit constitutionnel de la femme au respect de sa vie privée (article 35 de la Constitution), à la liberté et la personnalité (article 22 de la Constitution), d'une part, et l'intérêt public à protéger la vie du fœtus consacré par la Constitution comme une valeur protégée sur le plan constitutionnel (article 21 de la Constitution), d'autre part (point 46).

La Cour constitutionnelle de la République de Croatie a dans le cadre d'une décision juste et fondée sur la Constitution, rempli avec succès son rôle de médiateur dans le conflit social relatif au rôle de la femme et de la famille et à *la question de la femme*, à la revendication d'égalité substantielle de la femme - citoyenne et d'égalité des sexes et ainsi permis de sauvegarder la cohésion sociale en Croatie.

HUMAN RIGHTS AND FREEDOMS: AN IMPORTANT ELEMENT IN THE CONSTITUTIONAL CONSTITUTIONA LISATION OF THE REPUBLIC OF CROATIA

MATO ARLOVIĆ*

I. ABSTRACT

The precepts of modern and democratic (new) constitutionalism assign the highest law status to constitutions and identify human rights and freedoms, among other defining factors, as its important element.

Having broken away from the old socialist-communist system, the Republic of Croatia opted for a society of developed democracy, the rule of law, human rights and freedoms. A society in which the Constitution is the highest law that governs social relations, so that the authorities impose responsible rule, in accordance with law, over social transactions, and not over people. In order to achieve its goal, the Republic of Croatia chose to adopt its Constitution and establish its constitutional law order in conformity with that Constitution as the highest law. This is why it selected the precepts of modern and democratic constitutionalism as its model for drawing up the Constitution, believing that it would achieve its legitimate and justified goals on the basis of its characteristics in which human rights and freedoms, as one of the important elements of the constitutionalisation of a modern democratic society, the rule of law, and the Constitution, play an important role. Such a society is one where the individual and his or her wellbeing are at the centre of social relations, and where human rights and freedoms serve to achieve human dignity for each and every human being, without exception and without discrimination on any grounds.

Keywords: Constitution, constitutionalism, human rights and freedoms, constitutional court, democratic society, rule of law.

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II. INTRODUCTION

During the late 20th century (especially its final decade), major (revolutionary[1]) changes resulted in conditions for a so-called "new world order" and enabled the dissolution and elimination of autocratic (totalitarian) socialist-communist regimes from the stage of history. This happened, in particular, in European countries.

Further, the dissolution of the said systems served to create space for "new" political ideas and for the proponents to choose a model to constitutionalise the modern democratic order in their social and state communities after multiparty elections and the democratic takeover of power in their countries. Empirical experiences enable us to conclude today, without any doubt, that all such countries selected and accepted the theoretical and constitutional law model of constitutionalism as a foundation for the transition of their countries and of their orders from autocratic, socialist-communist systems to democratic systems of modern civic and market societies.[2] This led to the opening of discussions in academic, professional, and political circles and in elected representative bodies at state level concerning constitutionalism but also concerning the type and form of constitutionalism to select and apply. The significance of the discussions and of the selection of the form of the constitutionalism model[3] is particularly important for the constitutional model for constitutional regulation — constitutio-

[1] By revolutionary changes, I mean changes in society as a whole, its foundations and upgrading, "in which law is changed from its bases and replaced by a new law... However, revolutionary changes of law can be carried out in two ways: with or without the termination of legal continuity. If a revolution was violent, then a new, revolutionary law is based on the revolutionary act in question and does not represent an extension of old law. If a revolution is peaceful and lawful, then the new law is created by changing the old law in a lawful way... However, regardless of the type of change, revolutions always change law deeply". See "*Pravna enciklopedija*", Savremena administracija, Belgrade, 1979, p. 1221. The expression "revolutionary changes" is used to show the depth of changes in society, and not the way to change it. Namely, as it was changed democratically, by the will of the people shown at multi party and lawfully organised and conducted elections, the common term now (and in my opinion, more correct one) is transition from one to another social order. This ensures, despite the depth of the changes, the basis for legal continuity in the transformation of one to another constitutional order.

[2] See further: A. Bačić; "*Hrvatska i izazovi konstitucionalizma*", Split, 2001, pp. 65-72.

[3] Constitutionalism is an understanding "according to which the Constitution is the basis of state and statehood... The central component of constitutionalism includes human rights, the separation of powers in the state, and restrictions arising from international law and obligations that it imposes on member states of the international law order". See: "*Pravni leksikon*", Zagreb, 2007, p. 610.

nalisation of the social and state community.[4] This is why it is understandable and acceptable that all discussions for the selection of acceptable constitutionalism have as their starting point the experiences, constitutional texts, and theoretical explanations existing in the developed democratic systems of western countries. Based on these, most (almost all European) transitional countries will choose a model of their constitution as the key and highest legal act for the constitutionalisation of their constitutional orders to legally regulate their social and state communities. The selection of the three main types of constitutional constitutionalism, as stated and classified by Alec S. Sweet,[5] was neither easy nor simple. One of the reasons was that the new constitutional organisation of the social and state community was supposed to ensure in the political and legal sense: 1) all important elements of democracy in a state governed by the rule of law;[6] 2) a formal and functional constitution[7] and a constitutional law order based on the constitution, acceptable to all, but not only as a book of good wishes but as a system of real and achievable rights for all and anyone; 3) "de-personalisation" and constitutional restriction of power;[8] 4) freedoms and rights for modern man by prescribing and pro-

[4] In his book, "*Konstitucionalizam i sudski aktivizam*", Split, 2010, P. Bačić deals with the question of constitutionalism and mentions, inter alia, classical, contemporary or modern constitutionalism, then transitional constitutionalism, stating that the term means "a group of legal and political ideas that developed in the western world from the times of Enlightenment to this day. These concepts lay the foundation of constitutional and democratic political and legal power and separations and restrictions of state power, the recognition and protection of certain personal rights... and the representational rule of law. We can observe such phenomena as indicators of the constitutional development of any modern state and society". See ibid., p. 78,. concerning constitutionalism and its types. See further A. Bačić, "*Hrvatska i izazovi konstitucionalizma*", Split, 2001.

[5] In his book, "*Ustavi i sudska vlast*" in "*Komparativna politika*", Zagreb, 2013, p. 165, A.S. Sweet mentions three types starting from empirical differentiation, viz.: the absolutist constitution, the legislative supremacy constitution, and the "higher law" constitution.

[6] Wolfgang Merkel writes in "*Transformacija političkih sustava - Uvod u teoriju i empirijsko istraživanje transformacije*" ("Transformation of Political Systems: An Introduction to Theory and Empirical Research of Transformation"), Faculty of Political Science, Zagreb, 2011: "Democracy in a state of law consists of five partial regimes: (A) electoral regime, (B) political rights, (C) civil rights, (D) horizontal accountability, and (E) effective power to govern, which is ensured *de jure* and *de facto*", p. 18.

[7] Concerning a formal and functional constitution, see N. MacCormik, "*Institucije prava - Ogled iz teorije prava*", Naklada Breza, Zagreb, 2014, pp. 73.-78.

[8] A. Bačić; "*Hrvatska i izazovi konstitucionalizma*", Split, 2001, p. 42.

tecting human and minority rights and freedoms;[9] 5) the rule of law and the guarantee of legal certainty;[10] 6) independent and impartial regular judicial authority; and 7) a constitutional judiciary as a guardian of the Constitution ensuring the protection of constitutionality and lawfulness and the protection of human rights and freedoms prescribed and guaranteed in the Constitution and international acts.

Further, a constitution model had to be selected that would enable the establishment of a constitutional order to regulate a democratic society that is compatible with developed and advanced modern democracies. Further, the model ought to create a constitutional order regulating relations in all social segments, from the economy to culture, which creates space for equal opportunities for individuals, but also for overall social development and prosperity. Further, it had to rely on a system of values generally accepted as freedoms, ideals, and values because they are our common cultural and overall historical heritage, especially in the European historical and cultural area. Naturally, all this had to be done with the intention of contributing to permanent peace, security and stability not only for itself, but also with others in Europe and the world, as a general and irreplaceable condition for the realisation of any order, including a democratic and constitutional social order.

III. DECISION OF THE FRAMER OF THE CONSTITUTION TO ENACT THE CONSTITUTION OF THE REPUBLIC OF CROATIA ON THE PRECEPTS OF CONSTITUTIONALISM

The Republic of Croatia, just like all other transitional European countries, opted for a constitution as "higher law", ie, the third type of constitution.[11] Be-

[9] Ibid, p. 42, where A. Bačić writes: "Freedom of modern man ensures the term of (constitutional) legality constituting the border and restriction of pure and simple democratic principles."

[10] Concerning the rule of law, see B. Smerdel and S. Sokol; "*Ustavno pravo*", Zagreb, 1992, p. 59.

[11] A.S. Sweet, in *"Ustavi i sudska vlast* ("Constitutions and Judicial Power") in *"Komparativna politika"* ("Comparative Politics"), Zagreb, 2013, when he writes about the type 3 constitution, states on p. 165: "Type 2 and 3 constitutions share a common attribute: the constitution establishes (or recognises the status of) state institutions and links these institutions to society, via elections. The type 3 form, however, adds substantive constraints on the exercise of public authority - in the form of constitutional rights - and establishes an independent, judicial means of enforcing rights, even against the legislature. Legislative sovereignty is expressly rejected. Type 3 constitutions are entrenched: they

lieving that by the constitutionalisation of the social and state community on the basis of the constitution it would ensure the fastest and best transition from an autocratic one-party socialist-communist constitutional system to a system of constitutional democracy,[12] and thus carry out transition in the country and ensure its affiliation with the "new world order" on the basis of new constitutional law.[13]

The Republic of Croatia clearly announced its affiliation in the procedure of enactment of the 1990 Constitution in the proposal (foundations) for its enact-

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specify amendment procedures. ... One of the most remarkable developments in global politics over the past fifty years has been the consolidation of the type 3 constitution as a standard without rival. The point is not that all type 3 constitutions are the same; it is a fact that no two constitutions are exactly alike. What is important is the broad global convergence around beliefs that only type 3 constitutions are considered to be "good" constitutions. This convergence has been called the new constitutionalism (Shapiro and Stone Sweet, 1994).

The precepts of this new constitutionalism include the following:

- Institutions of the state are established by, and derive their authority exclusively from, a written constitution.
- This constitution assigns ultimate power to the people by way of elections or referendums.
- The use of public authority, including legislative authority, is lawful only in so far as it conforms to the constitutional law.
- The constitution provides for a catalogue of rights, and a system of constitutional justice to defend those rights.
- The constitution itself specifies how it may be revised."

[12] A. Bačić writes today about constitutional democracy: "To put it in the simplest of terms, the main type of non-autocratic state. The minimum definition of constitutional democracy is that by its Constitution the state ensures a regular system of periodical elections with the free election of candidates, the possibility of organising competition by and between political parties, the right to vote for those of legal voting age, majority decision-making with the protection of minority rights, an independent judiciary, the constitutional guarantees of fundamental civil rights, and the possibility of changing each aspect of the state system through agreed procedures." See A. Bačić, "*Hrvatska i izazovi konstitucionalizma*", Split, 2001, p. 79.

[13] Costas Douzinas writes in "*Ljudska prava i imperija – Politička filozofija kozmopolitizma*" ("Human Rights and Empire: The Political Philosophy of Cosmopolitanism"), ed. *Službeni glasnik*, Belgrade, 2009, translated by Slobodan Divjak, "In March 1991, President George H.W. Bush triumphantly announced that 'a new world is coming into view... in which the principles of justice and fair play will protect the weak against the strong and freedom [and] humanity will find a home among nations... Enduring peace must be our mission'." p. 23.

ment, presented by the then president of the Republic of Croatia, Franjo Tuđman, at the 3rd joint session of all three councils of the Croatian Parliament.[14]

President Tuđman indicated in the foundations that the following political and legal principles must be considered in the drawing up of the Constitution of the Republic of Croatia:

"1. The fundamental origin and goal of the Constitution are man's – human (civil, political, social, and cultural) and people's rights;
2. Supreme power (sovereignty) in Croatia arises from the people and belongs to the people;
3. Legislative power belongs to Parliament;
4. The Constitution guarantees parliamentary democracy and the rule of law (a state of law);
5. The right to free political, entrepreneurial and social associations is the right of all citizens;
6. The right to ownership, a market economy and free entrepreneurship;
7. The right to the free organisation of citizens in trade unions (workers and employers);
8. A welfare state – the guarantee of social rights;
9. The guarantee of people's rights and freedoms;
10. Ensuring the sovereignty of the Republic of Croatia in the regulation of relations with other peoples and states."[15]

During work on the final proposal of the Constitution of the Republic of Croatia and, eventually, its enactment on 22 December 1990,[16] improvements were made to its content, which certainly confirmed acceptance of the "third type" of constitution based on Sweet's model of constitutionalism in democratic and legal states. There are several examples that confirm this beyond any doubt, naturally, along with the remaining, basic content, which characterises "the precepts of new"[17] "modern constitutionalism".[18] First of all, confirmation is found

[14] F. Tuđman, "*Politička i metodologijska polazišta te političko-pravna načela za izradu Ustava Republike Hrvatske, Zapisnik 3. Zajedničke sjednice svih vijeća Hrvatskog sabora, održane 25.7.1990.*", published in the "Report of the Croatian Parliament", Year I, 1990, Number 3, cited by D. Šarin, "*Nastanak Hrvatskog Ustava*", Official Gazette, Zagreb, 1997, p. 12.

[15] Ibid, F. Tuđman, pp. 4-5, cited by D. Šarin, "*Nastanak Hrvatskog Ustava*", Official Gazette, Zagreb, 1997, pp. 12-13.

[16] The Croatian Parliament voted and promulgated the Constitution of the Republic of Croatia on 22 December 1990. It was published in Official Gazette No. 56/1990.

[17] A. S. Sweet; "*Ustavi i sudska vlast*" ("Constitutions and judicial power") in "*Komparativna politika*" ("Comparative Politics"), Zagreb, 2013, p. 165.

[18] P. Bačić; "*Konstitucionalizam i sudski aktivizam*", Split, 2010, p. 78.

in Article 3, which includes the highest values of the constitutional order of the Republic of Croatia as an important element of the constitutionalisation of the Republic of Croatia. Respect of the rights of man and the rule of law, instead of a state of law as included in the "Political and Methodological Foundations for Drawing Up the Constitution", are stated as a value among them. With this approach to human rights and fundamental freedoms, which arises from the fact that they are the most significant content of the right of man as the highest value of the constitutional order, the framer of the Croatian constitution changed its approach to human rights and fundamental freedoms. This approach confirms its decision that the Constitution of the Republic of Croatia should be drawn up on the basis of the precepts of new (modern) constitutionalism, according to which it is the legal instrument which in Sweet's sense includes and accounts for "higher law" as the basis and crown of the constitutional legal order. What is the essence of this new approach if it is examined from the aspect of human rights and fundamental freedoms? I hold that J. Crnić is right when he writes that the essence of the approach is "based on the idea that fundamental rights and freedoms are not derived from the political and legal order, but precede it".[19] This is precisely the approach that provides the status of material content of constitutional constitutionalism to human rights and freedoms in the Constitution of the Republic of Croatia. According to that status, adequate space for human rights and freedoms in the content structure of the Constitution is also ensured.

IV. HUMAN RIGHTS AND FREEDOMS IN THE CONTENT STRUCTURE OF THE CONSTITUTION OF THE REPUBLIC OF CROATIA

Human rights and freedoms are directly regulated in the provisions of Title III of the Constitution entitled "Protection of Human Rights and Fundamental Freedoms", and are classified in three main groups by the chapters: "Common provisions; 2. Personal and political liberties and rights; 3. Economic, social and cultural rights. However, it needs to be mentioned that a) Chapter 3 includes provisions relating to ensuring a healthy environment for the protection of human health, nature, and the human environment, i.e., the question of regulating ecology and environmental protection, and that b) in a number of other provisions (outside Title III), human rights and freedoms, primarily of members of ethnic and national communities, are also protected."[20]

[19] J. Crnić, "Ustav *Republike Hrvatske: komentari, objašnjenja, napomene i ustavnosudska praksa*", *Narodne novine*, Zagreb, 1993, p. 15.

[20] Ibid.

Human rights and freedoms and the rights of ethnic communities and national minorities (individual and collective) that are regulated by the Constitution of the Republic of Croatia are compatible with the relevant provisions of international legal acts. The 1990 Constitution of the Republic of Croatia took care to regulate all human rights and freedoms that were, at the time, regulated by international legal acts in force, viz.: the Universal Declaration of Human Rights and Freedoms, the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights, the Convention of the Council of Europe for the Protection of Human Rights and Fundamental Freedoms and its protocols, etc.[21]

Concerning the significance of human (and minority) rights and freedoms in the constitutional constitutionalisation of the Republic of Croatia, statistics on the content-related scope dedicated to them by the framer of the Constitution in relation to the totality of the Constitution speaks for itself. They cover 40% of the total content of the Constitution of the Republic of Croatia if we take only Title III "Protection of Human Rights and Fundamental Freedoms", but if we include other constitutional provisions relating to human rights and freedoms of ethnic communities and national minorities, then this naturally comes to more than the said percentage. The data, at least in the formal legal sense, enable us to propound the thesis that the Constitution of the Republic of Croatia sets human rights and freedoms as one of its cornerstones. We could say that it confirms precisely the position of the renowned constitutionalist, P. Häberle, who says: "For me, the origin of any deliberation about the constitution and any development of the libertarian constitution is human dignity. I like to refer to human dignity as an anthropological-cultural premise of the Constitutional State."[22]

In addition to the arguments presented above, I find it necessary to point out two more. In my opinion, they confirm beyond any doubt the commitment of the framer of the Croatian Constitution (even at the time of the enactment of the 1990 Constitution) that human rights and freedoms should be treated as an important element of the constitutional constitutionalisation of the Republic of Croatia. First is its decision to elevate the regulation and protection of human rights and freedoms to the highest possible level in accordance with the standards of international law they regulate. This commitment is clearly confirmed in the standard included in Article 134 of the 1990 Constitution of the Republic of Croatia, which reads: "International treaties which have been concluded and

[21] See cited international acts in: J. Hrženjak, "*Međunarodni i Europski dokumenti o ljudskim pravima -Čovjek i njegove slobode u pravnoj državi*", *Informator*, Zagreb, 1992.

[22] Interview with Peter Häberle by Zvonko Posavac, in P. Häberle, *"Ustavna država", Politička kultura*, Zagreb, 2002, p. 265.

ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law."[23] International treaties include, naturally, those relating to the legal regulation of human (and minority) rights and freedoms. J. Crnić reiterates: "Thus, the Republic of Croatia as a sovereign state accepts that the realisation of human rights, and especially national rights and the protection of minorities (Article 15), is no longer an internal matter of the Republic of Croatia (*domaine reserve*), but also a common matter of the international community... In other words, this is the acceptance of those rules that apply today in the democratic world, which includes the Republic of Croatia".[24]

Secondly, protection of human rights and freedoms in the Republic of Croatia is under the jurisdiction of the Constitutional Court of the Republic of Croatia, which, acting further to constitutional complaints of applicants, protects their human rights and freedoms if it is established that they were violated by an individual act of state authorities, bodies of local and regional self-government, or legal persons vested with public powers. Naturally, this happens if the protection could not be realised before competent authorities via regular legal channels.

By placing the protection of human rights and freedoms within the scope of work of the Constitutional Court of the Republic of Croatia, the framer of the Croatian Constitution, back in 1990, also showed the significance it assigns to them in the constitutionalisation of Croatia as a modern democratic constitutional state of the rule of law and protected human (and minority) rights and freedoms,. In terms of content, it seems to me that the thesis is confirmed by P. Häberle when he says in the mentioned interview: "I examined the Croatian constitution a little in comparison with East European constitutions and I was very surprised that it had developed so far in the field of state goals, the protection of minorities, the establishment of a constitutional judiciary (even with a daring possibility of disenting opinions) ... I am very impressed with the standards created so very early by the framer of the Constitution in Croatia; these texts can be shown off anywhere in Europe."[25]

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[23] Constitution of the Republic of Croatia, Official Gazette 56/1990.

[24] J. Crnić, "*Ustav Republike Hrvatske: komentari, objašnjenja, napomene i ustavnosudska praksa*", Official Gazette, Zagreb, 1993, p. 84.

[25] The mentioned interview in P. Häberle, *"Ustavna država", Politička kultura*, Zagreb, 2002, p. 277.

V. STRENGTHENING HUMAN RIGHTS AND FREEDOMS AS AN IMPORTANT ELEMENT OF THE CONSTITUTIONALISATION OF CROATIA IN REVISING THE CONSTITUTION

Let us start from the fact that "we see the Constitution as the fundamental legal order and it is valid at the highest level of the state", on the one hand, and on the other that the Constitution "as an open structure increasingly enters international law relations: many new constitutions recognise, indubitably, the general principles of international law as a suprastate high constitutional law. This is especially true of human rights."[26] I approach the Constitution as a living organism that needs to be amended as a result of new social relations in the social and state community. Further, the need to amend the Constitution also occurs in situations in the state where it stipulates and governs social relations that no longer exist or where they have become an obstacle to the further democratisation of society, in general, and in particular through the higher quality regulation of the protection of human and minority rights to ensure human dignity for everyone, without discrimination on any grounds. In view of the fast tempo of the development of social relations and transitional needs to organise society in a "formal and functional" constitutional way, so that it is compatible with the societies of developed western democracies, the needs to revise the Constitution were much more evident in transitional countries. The Republic of Croatia was no exception in that sense. It could serve as an example that confirms the theses presented because, as of the adoption of its Constitution in 1990 to this day, it has been amended five times.[27] In the substantial sense, the most significant changes occurred in the second amendment in 2000 when the semi-presidential system was abandoned and replaced by a parliamentary system. Namely, "it became obvious that the adopted semi-presidential system enabled the president of the state to have a great concentration of authority and power, to an extent much higher than appropriate to a democratic society".[28] Actually, the "balance between parliamentarism and presidentialism was disturbed, which exists in Croatia in view of the existence of the constitutional legislative powers

[26] Interview with Peter Häberle by Zvonko Posavac on 14 July 2005 in Bayreuth, Politička Misao, vol. XLIII (2006), No. 2, p. 43.

[27] The Croatian Parliament amended the Constitution of the Republic of Croatia in accordance with the Constitution four times: 1997, 2000, 2001 and 2010. The fifth amendment to the Constitution of the Repubilc of Croatia was made in 2013 by a referendum in accordance with a so-called people's initiative.

[28] M. Arlović, Foreword to the Constitution of the Republic of Croatia, as published in the Official Gazette, Zagreb, 2001, p. 9.

of the president in extraordinary circumstances and the possibility of more permanent extraordinary and pseudo-extraordinary circumstances in the state, as expressed by a politologist not in favour of presidentialism, which can lead not only to a deep crisis, but also to a breakdown of the parliament of the state in Croatia".[29] The politologist not in favour of presidentialism, referred to here by A. Bačić, is M. Kasapović.[30] We should point out, however, that many jurists, both domestic and foreign, opposed presidentialism, especially in transitional countries.[31] P. Häberle was one of the first to note its dangers in Croatia as a transitional country in an almost visionary fashion.[32]

The constitutional reform that ensured the "transformation of the semi-presidential into a parliamentary system" led directly to amending the Croatian Constitution. As significant as it is, in this paper I shall not deal with it given the purpose of this paper. I mention it because, besides the basic amendment to the Constitution, a significant step was taken (without changing the basic approach) in improving the constitutionally standardised human (and minority) rights and freedoms as elements of the constitutional constitutionalisation of Croatian society and the state. This substantially still exists in the corpus of the Constitution of the Republic of Croatia. Therefore, for a better understanding of the constitutional regulation of human and minority rights and freedoms it is important to point out the most significant content of the constitutional amendments.

First of all, Article 3 of the Constitution, which prescribes the highest values of the constitutional order, was amended to include the value of "gender equality" and the obligation, set out in the Constitution, that they are (all) "the basis for interpreting the Constitution".[33] This approach of the framer of the Constitution to the values of Croatia clearly shows that precisely those values should be the basis of the constitutional constitutionalisation of Croatian society, and that in interpreting the Constitution they are its foundation. In other words, they are the system of values that the framer of the Constitution wishes and prefers through

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[29] A. Bačić, "*Hrvatska i izazovi konstitucionalizma*", Split, 2001, p. 97.

[30] In terms of Croatian jurists, we could mention theoretical researchers of constitutional law: A. Bačić; P. Bačić; Z. Lauca; B. Smerdel, etc., and in terms of foreign ones, Peter Häberle, whom we mentioned earlier.

[31] Ibid, p. 97.

[32] The cited interview published with P. Häberle, "*Ustavna država*" (Constitutional State), *Politička kultura*, Zagreb, 2002, p. 278.

[33] The provision of Article 3 of the Constitution of the Republic of Croatia was supplemented in the said manner in 2000, but it is still valid today in its unamended form. See the Constitution of the Republic of Croatia, Official Gazette 85/2010 – revised text.

the Constitution as a constitutional system of values on which the Constitution rests and which must be respected and implemented by everyone in their development from the constitutional aspect, especially state authorities, administrative authorities, units and bodies of local and regional self-government, legal persons with public powers, but also all other physical and natural persons.

A new quality in relation to human (and minority) rights and freedoms was brought in by the newly accepted and prescribed value of gender equality. As a value (with others) it has become the basis for interpreting all human (and minority) rights and freedoms and requires that in the legal regulation of their exercise, implementation and protection, gender equality is protected consistently as the highest value of the Croatian constitutional order. This value should be interpreted as the foundation of the equality of any person, regardless of gender and/or sexual (gender) orientation in the positive sense, i.e., as a prohibition of any discrimination on the grounds of gender and/or sexual orientation.[34] It is self-evident that gender equality means equality for everyone, regardless of their gender differences or gender affiliation in terms of the rights and freedoms that belong to everyone solely based on the fact that they are human. Accordingly, this value puts the person at the centre of social focus – people must be equal in each segment of social relations in which they live and work.

The foundation for interpreting this and other values prescribed in Article 3 of the Constitution further confirms the approach included in the provisions of articles under Title III "Protection of Human Rights and Fundamental Freedoms". Namely, the term "all persons" is used for the first time in the text of the Constitution of the Republic of Croatia when prescribing the subjects of human rights and freedoms. The term should be interpreted to include any human being as subjects who "enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics".[35] Secondly, it should be interpreted that all subjects who are included in the term "all persons" are equal in their rights and freedoms, which is confirmed in the Constitution as "All persons shall be equal before the law."[36] Thirdly, the term "all persons" includes all subjects as holders of individual and/or collective human and minority rights and freedoms in accordance with the Constitution and

[34] Starting with the principle that any natural person is entitled to all human rights and freedoms without discrimination on the grounds of gender and/or sexual orientation, including: lesbian, homosexual, bisexual, transgender, transsexual, intersex, queer, and others, if any.

[35] Article 14.1 of the Constitution of the Republic of Croatia, Official Gazette 85/2010.

[36] Ibid, Article 14.1.

law, therefore both citizens of Croatia and foreigners. It follows from such an interpretation, as the fourth, that the holders of human (and minority) rights and freedoms are all natural persons, while legal persons could be, and are also holders of freedoms.[37]

Further, the rights and freedoms relating to national minorities and their members, evident from Article 15 of the Constitution, are regulated more precisely and, in terms of scope, more comprehensively.[38]

Special attention should be paid to Article 82 (now Article 83)[39] of the Constitution, although, in terms of its content, it is not part of Title III, but Title IV.

It is a provision of the Constitution of the Republic of Croatia that prescribes the majority in the Croatian Parliament required to enact laws and decisions. The provision reads:

"Article 83

The Croatian Parliament shall adopt laws (organic laws) regulating the rights of national minorities by a two-thirds majority vote of all Members.

The Croatian Parliament shall adopt laws (organic laws) elaborating constitutionally established human rights and fundamental freedoms, the electoral system, the organisation, remit and operation of state bodies and the civil service, and the organisation and remit of local and regional self-government by a majority vote of all Members.

The Croatian Parliament shall adopt the decision specified in Article 8 of the Constitution[40] by a two-thirds majority vote of all Members."[41]

Starting with the constitutionally prescribed required majority of votes for enacting laws regulating the rights of national minorities, it is evident that the

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[37] Cf. J. Crnić, "*Komentar Ustavnog zakona o Ustavnom sudu Republike Hrvatske*", Official Gazette, Zagreb, 2002, p. 169.

[38] The rights and freedoms of national minorities, other than in Article 15, are also regulated in Article 12 of the Constitution of the Republic of Croatia. Its preamble (historical provisions) enumerates all national minorities registered and residing in the Republic of Croatia. The list is not closed but ends with the following words: "and others who are its citizens", thus making it possible for other national minorities, if formed and registered in the Republic of Croatia, to be included on the list.

[39] In the text of the Constitution of the Republic of Croatia, published in the Official Gazette 113/2000, this was Article 82. Following its amendment in 2010, it became Article 83. See the Constitution of the Republic of Croatia, Official Gazette 85/2010 – revised text.

[40] This relates to a decision of the Croatian Parliament on changing the borders of the Republic of Croatia.

[41] Constitution of the Republic of Croatia, Official Gazette 85/2010 – consolidated version.

framer of the Constitution of Croatia wanted to show in this manner the significance it attributes to human rights and freedoms (including the rights and freedoms of national minorities and their members) as elements of the constitutional constitutionalisation of the Republic of Croatia.

Further confirmation that human rights and freedoms are an important element of the constitutional approach in the Constitution of the Republic of Croatia arises not only from the place, role, and the competence of the Constitutional Court of the Republic of Croatia in the organisation of its state bodies, but especially in its competence regarding the constitutionally protected human (including minority) rights and freedoms.

In line with the precepts of modern constitutionalism, the Constitution of the Republic of Croatia gives a special place for the Constitutional Court in the structure of its content. It is not part of the chapter that regulates the branches of government and separation of powers. The Constitutional Court is dealt with in an independent chapter, and its competence, role, organisation and tasks are regulated exclusively by norms having constitutional power, which means that it is a constitutional body with a special constitutional status that does not impinge on laws. Understandably, this is so because it deals with them, among other things, by protecting their constitutionality and legality. From the said position of competences and tasks of the Constitutional Court of the Republic of Croatia, as prescribed in the Constitution and the Constitutional Act on the Constitutional Court of the Republic of Croatia, theorists and practitioners express their approaches to the interpretation of its position in constitutional law.[42] To illustrate, I shall include a quotation of one such approach advocated by J. Crnić, former president of the Constitutional Court of the Republic of Croatia. He points out that "in a certain sense, we can talk either about the separation of powers into four branches or, rather, about a different layer of power that supervises all three branches (legislative, executive and judicial) within the competences esta-

[42] Article 2.1 and 2.2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia regulate expressly for the first time the constitutional position of the Constitutional Court. When explaining the Proposal of the Constitutional Act on Amendments to the Constitutional Act on the Constitutional Court of the Republic of Croatia, its proponent, the Committee for the Constitution, Standing Orders and the Political System, confirms it as follows: "This provision suitably emphasises the constitutional position of the Constitutional Court of the Republic of Croatia in the system of state power." See Proposal of the Constitutional Act on Amendments to the Constitutional Act on the Constitutional Court of the Republic of Croatia addressed to the Croatian Parliament in the letter of the Committee on the Constitution, Standing Orders and Political System of 9 October 2001, class. 711-01/01-01/03, no. 612/2-01.

blished by the Constitution. Hierarchically, it is not above them and it is not part of them in terms of the organisation of state power or in any other way."[43]

Indeed, Crnić's statement is correct, although it could be regarded as a relatively narrower interpretation of the position, tasks, and roles prescribed by the Constitution and the Constitutional Act on the Constitutional Court of the Republic of Croatia. Namely, Article 2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia regulates the position and tasks of the Constitutional Court of the Republic of Croatia more closely,[44] in addition to the competence, i.e., scope of work, set out in the Constitution.[45] The Constitutional Court of the Republic of Croatia actually has the role of guardian and interpreter of the Constitution and guarantees that it is "respected and implemented". Its operation is based on provisions that have constitutional power and within its scope of work it is "independent of all state bodies".[46]

Without further elaboration of the position, role, and scope of work of the Constitutional Court of the Republic of Croatia as set out in the Constitution of the Republic of Croatia, starting with its role according to modern constitutionalism and its role in the constitutionalisation of the social and state community, I shall only briefly reflect on the interdependence of the Constitutional Court and human rights and freedoms from the aspect of constitutionalism. First of all, according to the precepts of modern constitutionalism, as I have already pointed out, human rights and freedoms[47] are an important element of the con-

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[43] J. Crnić; "*Komentar Ustavnog zakona o Ustavnom sudu Republike Hrvatske*", Official Gazette, Zagreb, 2002, p. 25.

[44] Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette 49/2002 – consolidated text.

[45] Article 129 of the Constitution of the Republic of Croatia, Official Gazette 85/2010 – consolidated text.

[46] Article 2.1 and 2.2 Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette 49/2002 – consolidated text.

[47] Douzinas Costas writes in "Ljudska prava i imperija – Politička filozofija kozmopolitizma" ("Human Rights and Empire: The Political Philosophy of Cosmopolitanism"), *Službeni glasnik*, Belgrade, 2009, p. 46, concerning human rights and freedoms: "Human rights diversified from 'first generation' civil and political or 'negative' rights, associated with liberalism, into second generation, economic, social, and cultural or 'positive' rights, associated with the socialist tradition and, finally, into 'third generation' or group and national sovereignty rights, associated with the decolonisation process. The first generation or 'blue' rights are symbolised by individual freedom, the second, or 'red' rights by claims to equality and guarantees of a decent living standard, while the third or 'green' rights by people's right to self- determination and, belatedly, the protection of the environment."

stitutionalisation of a modern democratic social and state community. They are, thus, an important element of constitutionalism in the content of the Constitution both from the formal and from the functional aspect. From the aspect of the precepts of constitutionalism, the Constitutional Court also has such a role as a constitutional and state body independent of all other state bodies. This is why it was assigned, in addition to other competences, the competence to protect human rights and fundamental freedoms. It should ensure such protection, both formally and in effect, any time it establishes further to constitutional complaints "against individual decisions taken by state bodies, bodies of local and regional self-government and legal persons vested with public authority" that such decisions violated human rights and freedoms.[48] The said provision of Article 129, indent 4 of the Constitution is further elaborated in the provision of Article 62 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.[49] It follows from the interpretation of the mentioned articles that the basic conditions under which constitutional complaints for a violation of human rights and freedoms [and the right to local and regional self-government] can be filed are the following:

a) that a violation, in the opinion of the person filing the constitutional complaint, was caused by an individual act of "state bodies, bodies of local and regional self-government and legal persons vested with public authority", deciding on the rights and obligations of the applicant or on suspicions or accusations for a punishable act;
b) that a human right or fundamental freedom guaranteed by the Constitution was violated...;

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[48] Article 129, indent 4 of the Constitution of the Republic of Croatia, Official Gazette 85/2010 – consolidated version.

[49] Article 62 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette 49/2002 – consolidated version, reads:

"(1) Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right).

(2) If some other legal remedy is provided against a violation of constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted.

(3) In matters in which an administrative dispute is provided for, or a review in civil or non-contentious proceedings, remedies are exhausted after the decision has been rendered in these legal remedies."

c) that a legal recourse was exhausted (Article 62.2 and 62.3, except in the case of conditions referred to in Article 63.1 of the Constitutional Act...;
d) timeliness...".[50]

Without any further discussion about the constitutional complaint and action further to such a complaint before the Constitutional Court of the Republic of Croatia, I shall state only that this is a constitutional means available to anyone to initiate proceedings before the Constitutional Court to protect his or her human right and freedom that was violated, and which is guaranteed by the Constitution. This illustrates one side of the constitutional mutual relationship between the Constitutional Court and human rights and freedoms. The other side is confirmed when the Constitutional Court fulfils its role and competence prescribed in the Constitution further to the precepts of modern constitutionalism if: a) it establishes that a human right and freedom guaranteed by the Constitution is involved; b) that it was violated; and c) it renders a decision accepting the constitutional complaint and ensuring protection of the human right and freedom. From the aspect of modern constitutionalism in this segment, the circle is closed. Protection of human rights and fundamental freedoms fulfils one of the basic requirements of modern constitutionalism, which is that citizens become active participants through the activity of the Constitutional Court in the exercise of the rule of law in a democratic constitutional state.[51]

IN PLACE OF A CONCLUSION

In the disintegration of ties with their socialist-communist past, an exceptional role in all transitional countries was given to "third type" constitutions based on the precepts of modern democratic constitutionalism. In addition to all the important elements of modern democratic constitutional constitutionalism, such as separation and limitation of power, multiparty, democratic, and legally regulated fair elections, fundamental values guaranteeing the freedom of the individual and all people and their human dignity, equality of opportunity, a market economy, the rule of law, etc., human rights and fundamental freedoms, including the rights and freedoms of national minorities and their members and all other minority and underrepresented groups in a society, hold a significant position.

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[50] J. Crnić, "*Komentar Ustavnog zakona o Ustavnom sudu Republike Hrvatske*", Official Gazette, Zagreb, 2002, p. 163.

[51] Cf. P. Häberle, "Ustavna država", *Politička kultura*, Zagreb, 2002, p. 52.

However, the precepts of modern democratic constitutionalism mean that the constitution as a higher law should prescribe and protect all generations of human rights and freedoms. In that sense, the constitutions of modern constitutionalism treat and regulate a "higher status" of human rights and freedoms: "The higher status of human rights is seen as the result of their legal globalisation. The law addresses all states and all human beings qua human and declares their entitlements to be part of humanity's patrimony, which has replaced human nature as the rhetorical ground of rights. Every state and power comes under the mantle of the international law of human rights, every government becomes civilised as the 'law of the princes' has finally become the 'universal' law of human dignity."[52]

Starting with the requirements of modern democratic constitutionalism that require the adoption of a Constitution on the basis of the previously presented elements that will be the constitutional basis for the organisation of the social and state community, the Republic of Croatia adopted its Constitution. In its foundation, it selected the constitutive goals of setting up a constitutional order on the basis of a Constitution that will ensure society and the state the following: the rule of law, and not of men, all human rights and freedoms for all, without discrimination, at the highest level, mutual co-operation and checks and balances between legislative, executive and judicial power, and its restriction and framing by prescribing competence based on the principle that public power may act only within the framework of what the law permits. Further, the constitutional structure is protected and controlled, in accordance with the principle of constitutionality and legality, independently, and autonomously from all bodies of state power, by a separate state judicial body – the Constitutional Court.

In terms of the scope it assumes in the structure of the content of the Constitution and in terms of the constitutionalisation of a wide scale of rights and freedoms, with the guarantee of fundamental human rights and freedoms, the framer of the Constitution of Croatia gave a significant role to these rights and freedoms as an element of modern democratic constitutional constitutionalism. I believe this was done justifiably and wholly acceptably, because: "Human rights and freedoms are one of the most significant issues used to test and monitor the realisation of the democratic organisation of a social community, state or any form of social organisation. Today's civilisational reach of human develo-

[52] Costas Douzinas, *"Ljudska prava i imperija – Politička filozofija kozmopolitizma"* ("Human Rights and Empire: The Political Philosophy of Cosmopolitanism"), Službeni glasnik, Belgrade, 2009, p. 47.

pment means that fundamental human rights and freedoms must be accepted, but also regulated at the highest level. Therefore, they must be covered by the Constitution, elaborated in special, implementing laws, although there is almost no law that does not prescribe the realisation of one or most human rights and freedoms in one way or another or, to put it more precisely, the degree of their protection, i.e., the degree of their realisation can be one of the basic criteria for an evaluation of the level of democracy in a social community, since the level of respect of the civilisational right of man to live a life worthy of man in modern civilised society, with all its rights, obligations, and duties, is an indicator of the degree of development of democracy in that country."[53]

The protection of human rights and freedoms guaranteed and prescribed in the Constitution was assigned in the final instance to the Constitutional Court of the Republic of Croatia. This is so simply because the thesis holds that the "review of constitutionality regarding the protection of the rights and freedoms of man and citizen (especially in the case of a conflict between the state and citizen) must be legitimised by wide philosophical, moral, and political foundations".[54]

Achieving modern democratic constitutional constitutionalism in the Republic of Croatia was not easy or simple. It proceeded with smaller and/or larger difficulties that were caused by both objective and subjective reasons arising from social relations, but also inconsistencies, weaknesses, and even the fact that certain accepted solutions in the Constitution were simply not acceptable for the citizens of Croatia. The greatest problems in achieving modern democratic constitutional constitutionalism, especially in the period from 1991 to 1995, arose from the aggressive war to which Croatia was exposed. Along with this problem, there were also economic reasons arising from war destruction, but also irregularities and serious mistakes in the transformation and privatisation of capital in the economic system. Further, there were reasons connected with the deficit of the labour force, which was, unfortunately, outside the economic and public sector in view of the war and military activities in defending the freedom, territorial integrity and sovereignty of the Republic of Croatia. All of the foregoing help explain that constitutional constitutionalism in Croatia was being achieved at that time under extraordinary circumstances. Extraordinary circumstances were on one hand the real reason to strengthen the presidential system and the dominance of the executive branch over the legislative branch, and on the other to justify the further strengthening of the executive (presidential) branch at the

[53] M. Arlović, *"Zbirka zakona"* - Foreword, Narodne novine, Zagreb, 2003, p. v.

[54] A. Bačić, "Hrvatska i izazovi konstitucionalizma", Split, 2001, p. 137.

expense of the legislative branch beyond what was really necessary and, naturally, at the expense of human rights and freedoms. The foregoing was justified, first and foremost, by the thesis that human rights and freedoms would see better times after victory and when the Republic of Croatia entered a period of freedom, peace, security, and stability throughout its territory.

In the beginning, this thesis was accepted without question by citizens. However, very soon it became evident that in real situations the president of the Republic and the executive branch were in reality taking authority and using it as a power more than was permitted by the so-called semi-presidential model embraced by the Constitution of the Republic of Croatia. Such a system of real power increasingly affected the possibility of exercising human rights and freedoms, both in reality and by excessive legal restrictions, especially by so-called presidential decrees with legal effect, whose constitutionality was questionable in a significant number of cases, both in view of the possible violation of the constitutionally prescribed procedure for their adoption and in relation to the violation of substantive constitutionality itself.

The said situation in the achievement of modern democratic constitutionalism resulted quite soon in demands for its protection, especially through the repeal of the semi-presidential system and its replacement with a parliamentary system and the further defining of human rights and fundamental freedoms and their protection, ultimately before the Constitutional Court of the Republic of Croatia. Actually, this was the request of Croatian citizens as equal citizens who are holders of power in the Republic of Croatia,[55] i.e., to further strengthen modern democratic constitutional constitutionalism at a formal level through amendments to the Constitution of the Republic of Croatia. At the same time, it included, at a real level, requests to achieve the Constitution of the Republic of Croatia in a functional sense. In other words, that the substantial content of the Constitution should be realised in social reality and not remain a dead letter. Such requests in Häberle's sense actually ask (and this request continues to exist) that human beings should be placed centre stage in society as they, by exercising their human rights and freedoms, gain for themselves and everyone a better life by developing and regulating social relations via the protection and strengthening of human dignity and building democratic relations of reciprocity, solidarity, tolerance, and dialogue, strengthening the rule of law in a constitutional state organised around the precepts of modern democratic constitutionalism. At the same time, on such bases, they create conditions in their

[55] Cf. P. Häberle, "*Intervju ...*", in "*Ustavna država*", *Politička kultura*, *Zagreb*, 2002, p. 265.

own country for nurturing and realising their, and a shared European, cultural heritage of freedoms, ideals, and values in order to achieve peace, security, and stability.

In this paper we have show that each constitutional reform was a step towards strengthening the development and achievement of all important elements of modern democratic constitutionalism in the Republic of Croatia, encompassing human (including minority) rights and freedoms, which are an important element in the constitutionalisation of Croatian society and the Croatian state.

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THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS EU BY CONSTITUTIONAL JUDICIARY

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Abstract: The paper is focusing, first, on the aim of codifying case law of the Court of Justice and on the field of application of the Charter of Fundamental Rights in Article 51 (1), reflecting instinctive warries of some Member States about its extensive use beyond the Union´s powers. Then, some observations about a narrower application of the Charter by the Court of Justice favouring effectiveness of the co-operation instruments of Union law and a its broader use in other cases follow. The perception of this dichotomy by national authorities of constitutional judiciary is reminded, too. Also the necessity of mutual trust between the Member States in equivalent fundamental rights protection shall be highlighted. Consequently, the approach of the Court of Justice to the relevance of the Charter for the Member States – whether adequate or arbitrary restrained, weakening the protection and frustrating the expectations of Union citizens – will be sketched. Finally, the reasons for a reserved approach of the Constitutional Court of the Czech Republic to the direct application of the Charter, referring rather to national Charter of Fundamental Rights and Freedoms "irradiated" by the EU standard of protection or to the European Convention on Human Rights, will be explained.

NARRATIVES

The Charter of Fundamental Rights of the European Union („the Charter") was drafted and adopted with the aim of codifying the Court of Justice („the ECJ") jurisprudence and making the EU fundamental rights obligations more visible. With the entry into force of the Treaty of Lisbon the Charter has obtained since 1 December 2009 binding effect. This fact raised a number of questions vitally important for the development of the constitutionalism in Europe: What is the impact of the Charter on the Union´s and Member States´ commitment to fundamental rights? To what extent it affects the balance between competing social and economic rights and principles at both levels? How the interpretative choices the Charter is offering to the ECJ influence the perception of European fundamental rights by the national constitutional judiciaries? Etc.

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The field of application of fundamental rights, that result as general principles of law, in particular, from constitutional traditions and international obligations common to the Member States, was progressively established and developed by the ECJ through its evolving case law.

This case law was courageous in expanding the protection granted to the citizens towards acts of Union institutions as well as national measures implementing provisions of Union law,[1] including the situations, where Member States are authorized under Union law to limit the rights granted to individuals, like free movement rights of the internal market.[2]

However, some Member States, urging the principle of subsidiarity, did not want the Charter to have effects that could potentially – in a not very noticeable way - restrict their competences by extanding in substance the field of application of Union law beyond the scope of powers and tasks confered on the Union. For this reason, restrictions of the applicability of the Charter were introduced in the Charter itself. So far as Article 51 para 1 is stating that the Charter applies to Member States „only when they are implementing Union law" and cannot broaden the field of Union law beyond the Union´s powers or establish new or modify the existing ones (para 2), the notion of „implementing of Union law" is crucial. Although the ECJ suggested, its overal approach would be receptive leading to a narrow interpretation of the applicability of the Charter to national measures, the Protocol no. 30 on the application of the Charter to Poland and United Kingdom, considered as a protection of the both countries against judicial enforcement of rights unknown in their legal orders, was adopted at the Lisbon conference, too.[3]

CLAIMS OF APPLICABILITY OF THE CHARTER TOWARDS MEMBER STATES IN THE ECJ´S CASE LAW

The application of the Charter depends on the area considered. When a stronger Union interest is at stake (e.g. internal market, competition), the Charter is more likely to be applied to national measures. When the application of

[1] Case 5/88 *Wachauf*.

[2] Cases C-260/89 *ERT*, C-292/97 *Karlsson*.

[3] There is no information available about the application of the Protocol no. 30, neither in Poland, nor in United Kingdom, which could justify challenging of values referred to in Article 2 TEU, which is currently taking place in Poland, or circumstances leading to the Brexit. The restrained approach of the former Czech President *Václav Klaus* to the Charter and the European Union in general had never amounted to an exception from the application of the Charter, even though suggested.

the Charter could undermine the effectiveness of Union law (e.g. asylum, European arrest warrant or judicial cooperation in criminal matters in general), the presumption of uniform compliance with a minimum standard of protection by all Member States is paramount and takes precedence over the potential breach of fundamental rights in a given case.

The Spanish Constitutional Court, citing Article 53 of the Charter,[4] refered the question to the ECJ for preliminary ruling, whether it could afford rights guaranteed under the Charter „a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundemantal right recognized by the (Spanish) constitution", i. e. the right of review of a conviction *in absentia*, even if this would run counter to the act of Union law (Framework Decision on the European arrest warrant). The ECJ ruled that Article 53 did not give a Member State a right to dissaply a provision of Union law, which is in compliance with the Charter. The ECJ concluded that by virtue of the principle of primacy, „which is an essential feature of the EU legal order", the rules of national law, „even of a constitutional order", cannot be allowed to undermine the effectiveness of EU law on the territory of that state". Member States may employ theit national constitutional standards only when „the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised".[5]

These conclusions take into account the broader context of the status and role of the national constitutions, under which Union law does not admit the direct applicability of a given national constitution. The case law of the ECJ as well as Article 6(3) TEU referring to the „constitutional traditions common to the Member States" instead of to their constitutions as such, Article 52(4) of the Charter seeking to avoid discrepancies between interpretation of the Charter and common traditions[6] and Article 4(2) TEU laying down an obligation for the Union to respect constitutional identities of Member States „stop short of requiring the direct application of national constitutions in EU law or allowing for national constitutional provisions to trump the application of conflicting provisions of EU law… The status of the post-Lisbon Charter …

[4] Article 53 provides that nothing in the Charter „shall be interpreted as restricting or adversely affecting juma rights and fundamental freedoms as recognized, in their respektive fields of application … by the Member States´ constitutions".

[5] Case C-399/11 *Melloni.*

[6] "In so far as this Charter recognizes fundamental rights as they result from constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

can only serve to further underline the existence of an EU constitutiona and ´federative´ order".[7]

When, on the other hand, the objectives of European integration can be endeavoured only by co-ordinating the exercise of Member States competencies (e.g. family law, social policy), the obligation of national authorities to refer to the Charter by taking it into consideration is limited solely for the specific purposes of interpreting a piece of Union law without an assessment of national law as such[8]. In all other cases the Charter will be most likely not applied. Substantive (higher level of protection) as well as procedural (supremacy) advantages for individuals could have been always favouring the Union rather than national fundamental rights.

The relevance of the Charter in areas reserved to Member States, where the Union has not been empowered to complete harmonisation, is constitutionally questionable as it might result in a competence creep, even when the ECJ created – through a broad understanding of the field of application of Union law – a remote link with it, sufficient enough to refer to the Charter[9]. However, the ECJ rather attempts to ensure that the Charter should not become a means of broadening the impact of Union law on national law through further limitation of the extent, to which national courts have to apply the Charter directly. When deciding whether to exercise discretion to process asylum claim, the Member State was implementing Union law; nevertheless, to ensure the full effectiveness of the Dublin II Regulation, the Charter would be relevant as in „exceptional" situation.[10]

The ECJ is somehow limiting the impact of the Charter even when national authorities are giving effect to Union law. The ECJ retreated from a generous application of fundamental rights also facing fears about undue interference with the sovereignty of the Member States, in particular in the field of migration of third country nationals.

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[7] *Rosas, A.* Five Years of Charter Case Law: Some Observations. In: The EU Charter of Fundamental Rights as a Binding Instrument. Five Year Old and Growing. Ed. by S. de Vries, U. Bernitz and S. Weatherill. Hart Publishing. Oxford and Portland: 2015, pp. 1-20 (20).

[8] Case C-400/10 PPU *McB*, the first preliminary reference on the interpretation of Article 51 para 2 Charter.102

[9] Case C-617/10 *Akerberg Fransson*.

[10] Joint cases C-411/10 and C-483/10 *N.S. and others*.

MODERATING THE APPROACH OF THE ECJ

The integration in sensitive matters is imaginable only when mutual trust between the Member States in adequate fundamental rights protection accross the Union is underlying the legal instruments of co-operation. National authorities should not have to be exposed to the need to scrutinise the „adequacy" of fundamental rights compliance in co-operating states, otherwise the effectiveness of the pieces of Union law in question would be impaired. However, national constitutional courts could be unwilling to rely only on Union guarantees of equality of protection, as the German Federal Constitutional Court recently (in December 2015) demonstrated in a ruling, which claimed its jurisdiction on the review, whether the principle of mutual trust does not violate the constitutional guarantees of fair trial guaranteed under *Grundgesetz* as a part of national identity.[11]

The speedy reaction from Luxembourg (in April 2016) was suprising: in contrast to its earlier case law,[12] the ECJ said, that the „top" imperative is not the uniform and effective application of Union law (Framework Decision on European arrest warrant), but the exclusion of any unhuman treatment of the charged person in the country of destination. The obligation of mutual recognition of standards of protection of an individual in criminal proceedings must be underlined by an objective information about non-existence of degrading treatment and such information should be obtained in a direct communication between the respective national criminal courts. Otherwise the process of surrender can be brought to an end.[13] This indicates that the Union fundamental rights could become a medium of a real, i. e. two direction dialog between European and national judicial authorities.[14]

A CITIZENS-FRIENDLY APPROACH?

It is open to debate whether the approach of the ECJ to the application of the Charter in the Member States is not arbitrary restrained, weakening the protection and frustrating the expectations of Union citizens. Lacking an effective Union procedural mechanism for the enforcement of fundamental rights obligations in the Member States (regardless of the infringement procedure un-

[11] Case 2 BvR 2535, 14 concerniíng European Arrest Warrant (sometimes called *Solange III*).

[12] Case C 399/11 *Melloni*.

[13] Case C-404/15 and C-659/15 *Aranyosi and Caldararu*.

[14] If the Union fundamental rights are to be taken seriously, the proces of surrending should „have to be" rather than only „can be" stopped.

der Article 258 TFEU and „nuclear bomb" of Article 7 TEU), the space for a presumption of minimum compliance within the Union would be narrowed. We can consider, whether or in which way the next draft Treaty on the accession of the Union to the European Convention of Human Rights („the ECHR"), once rejected by the ECJ,[15] could be supportive in this respect.

Both the ECJ case law on co-ordinating legislation and the case law on Article 51 Charter seem to suggest an inferiority of Union fundamental rights to the interest of European integration, a.o., through the rejection to reflect the constitutional reservations of Spanish courts against the execution of European Arrest Warrant in *Melloni* case,[16] calling into doubt Article 53 Charter. National guarantees used to be the main source of protection for Union citizens against acts of the Member States when exercising discretion in a field occupied by Union law, whilst the Charter serves as a safety net to ensure that national authorities will keep their obligations in the field of fundamental rights. From this point of view, a broad application of the Charter might limit national autonomy and entail the loss of constitutional diversity, forming part of national identity which the Union must respect (Article 4 para 2 TEU), in a way that could be difficult to justify with regard to the principle of conferral of powers.

To meet the legitimate aspirations of the Union citizens means to leave the strict application of the Charter by the ECJ, that should have to be more open to a discourse with national courts, which might be as well positioned to assess conflict of constitutional values even beyond the standard instrumentalities of preliminary ruling. A more courageous use of the Charter means for judicial authorities at both levels to take their commitments in this area more seriously. The impediments of a more responsive ECJ are to be examined.[17]

THE POSITION OF THE CHARTER IN THE CZECH AND SLOVAK CONSTITUTIONAL JUDICIARIES

Since 2001[18] until mid of March 2017 the Czech Constitutional Court („CCC") refered in 392 decisions to the Charter. In 12 cases of the whole such references have been made in proceedings on the proposed annulment of a sta-

[15] Opinion 2/13.

[16] Footnote 9.

[17] The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures. Study for the PETI Committee. European Parliament, 2016, p. 35.

[18] I. e. already before the accession of the country to the European Union.

tute, including an element of review of compatibility of the Union law-based legislation or international treaties with the Constitution, the rest occured withing proceedings on a constitutional complaint submitted by individuals against decisions of public - judicial or administrative - authorities. But, these figures do neither explain the quality of coping with the Charter, nor its real impact on the CCC´s reasoning and constitutional order at all.

The alleged violations of the Charter by the contested legislation or encroachments of public authorities on private sphere of persons are, as a rule, insufficiently justified. It deprives the CCC of the opportunity to establish its basic position towards the Charter. Untill now, the doctrine of „irradiation" of Union fundamental rights into the Czech constitutional Charter of Fundamental Rights and Freedoms („Czech Charter"), founded on the first „European", post-accession, i. e. pre-Lisbon cases,[19] prevails in the practice of day-by-day decision-making of the CCC in force. This may be percepted as an obstacle to the direct application of the Charter. The CCC is aware of its „self-restraining approach" based on the assumption, that if the incompatibility of the contested legislation or decisions of public authorities with the Czech Charter or the ECHR has been determined, there is no need to examine their compatibility with the Charter any more in order to attain the objective pursued by the protection of constitutionality.

The CCC does not participate at the „rights revolution" in Europe following the adoption of the Charter as a binding part of the Union constitution after the entry into force of the Treaty of Lisbon. Whereas the CCC has not refered any question to the ECJ for preliminary ruling yet, its judments used to be justified by comparative arguments – references to decisions of constitutional judiciaries in another Member States based on fundamental rights of the Charter based. The CCC is also urging the general courts to do so by emphasizing the constitutional principle of the prohibition of *denegatio iustitiae*.

The position of the Charter before the Constitutional Court of the Slovak Republic („the SCC") is very similar to the Czech one. In the period from December 2009 to July 2016 in 6 cases on constitutional review of legislation applicants objected the incompatibility of the contested legislation with the Charter, whereas such objection occured in 4912 constitutional complaints.[20] However, the application of the Charter poses a challenge to lawyers to which they are

[19] Cases Pl. ÚS 50/04 *Sugar quotas III*, Pl. ÚS 66/04 *European Arrest Warrant*.

[20] Mazák, J., Jánošíková, M. and others: The Charter of Fundamental Rights of the European Union in Proceedings before Courts of the Slovak Republic. Pavol Jozef Šafárik University in Košice, 2016, p. 178.

still not able to respond accordingly. In only two cases of compatibility review of legislation the SCC applied a methodology for the applicability of the Charter in the preliminary hearing.[21] The self-restraining approach to the Charter, in particular, where the a right is guaranteed only by the Charter, is said to be unreasonably dismissive in comparison with other international treaties on human rights, used as a referential Framework for review of compatibility on a routine basis.[22] The insistance of the ECJ on the absolute primacy of Union law could even to institute proceedings about limitating the effects of its case law and emphasizing the primacy of application of the Slovak Constitution to the extent necessary for the protection of the national constitutional identity.[23]

The way to a fuller comprehension of the role of the Charter as forming part of the referential framework for the review of constitutional compliance of contested legislation or decisions of public authorities remains an ongoing challenge for the both constitutional courts.

[21] Cases Pl. ÚS 10/2014 and Pl. ÚS 8/16).

[22] Footnote 20, p. 180.

[23] Ibid, pp. 183-184.

LA PRÉVISIBILITÉ DU DROIT COMME EXIGENCE CONSTITUTIONNELLE ANALYSE À PARTIR DU DROIT CONSTITUTIONNEL FRANÇAIS

BERTRAND MATHIEU*

C'est une banalité, mais une réalité, que de constater que le système normatif devient de plus en plus complexe du fait, notamment, de la multiplication d'ordres juridiques non hiérarchisés et de la concurrence exercée par des normes a-juridiques (soft-law, avis, recommandations…) mais non dépourvues d'effets juridiques[1]. Dans le même temps la multiplication des voies de recours juridictionnelles et des ordres de juridiction fragilise incontestablement la norme juridique. Enfin le développement du droit des droits et libertés fondamentaux constitue un système de référence complexe dans lequel le pouvoir du juge se renforce considérablement du fait qu'il doit, non seulement, interpréter, des textes ou des principes très généraux, mais encore concilier entre elles des exigences souvent contradictoires (droit de propriété et droit au logement, sécurité et liberté, dignité et liberté, droit à l'information et vie privée, droits individuels et exigences relevant de l'intérêt général… les exemples pourraient être multipliés à l'infini).

C'est dans ce contexte, que l'exigence de sécurité juridique se fait plus impérieuse et accéde au rang de norme constitutionnelle De fait, la jurisprudence, tant européenne, que nationale, constitutionnelle, judiciaire et administrative, manifeste le renforcement du contrôle exercé par le juge sur la qualité, l'accessibilité et la prévisibilité de la norme.

Dans les quelques pages qui suivent nous analyserons la prise en compte par le Conseil constitutionnel français de l'exigence de prévisibilité du droit.

Alors que la sécurité juridique constitue plus une exigence constitutionnelle qu'un droit, une contrainte pesant sur les pouvoirs publics, un objectif de valeur constitutionnel, elle tend peu à peu à devenir également un droit subjectif dont la portée est appréciée au regard de la situation du justiciable qui l'invoque.

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[1] Cf Rapport 20134 du Conseil d'Etat français, Le droit souple, La documentation française, 2013, cf Eglt B. Mathieu, La loi, Dalloz, 3° ed. 2010

I-LA SÉCURITÉ JURIDIQUE RENVOIE À UNE EXIGENCE OBJECTIVE DE PRÉVISIBILITÉ DU DROIT

La « juridicisation » de cette exigence de sécurité juridique répond à l'idée selon laquelle le droit ne parvient plus à remplir la mission qui est initialement la sienne et qui est, justement, d'introduire de la sécurité dans les rapports collectifs et inter-individuels. Ainsi la sécurité ne s'opère plus seulement par le droit, elle peut être menacée par le droit[2]. Cependant c'est encore et nécessairement vers le droit que l'on se tourne pour résoudre ce problème. Il ne peut alors être résolu qu'au prix d'un changement de perspective de ce droit. La sécurité juridique s'obtient alors à la fois par et contre le droit. La reconnaissance de droits fondamentaux, essentiellement au niveau constitutionnel et conventionnel, s'accompagne nécessairement, comme le proclame l'article 16 de la Déclaration de 1789, auquel le Conseil constitutionnel tend aujourd'hui à rattacher l'ensemble des exigences qui relèvent de la sécurité juridique, de la garantie de ces droits. Or la sécurité juridique est l'un des éléments essentiels de cette garantie.

A-Origine et signification du principe de sécurité juridique

Le principe de sécurité juridique est en fait un « produit d'importation », issu pour l'essentiel du droit allemand et qui a été introduit progressivement dans l'ordre juridique français, d'abord par le truchement du droit européen. En droit français, la sécurité juridique ne peut être conçue comme un principe autonome au regard d'autres principes comme la non-rétroactivité, la protection des droits acquis, la confiance légitime, la légalité ou la qualité de la loi. C'est plutôt un concept qui englobe tout ou partie des exigences qui viennent d'être citées. L'ensemble de ces principes reliés à la sécurité juridique, peut être divisé en deux groupes, selon qu'ils ont vocation à combattre l'insécurité qui peut affecter la qualité des normes juridiques, notamment la loi, au fond ou dans la forme, ou à vaincre les incertitudes liées à l'application des lois dans le temps. Par ailleurs, la sécurité juridique implique une certaine prévisibilité de la législation. Elle est la « possibilité reconnue à l'opérateur économique, fiscal, à tout administré, d'évoluer dans un environnement juridique sûr, parce qu'à l'abri des aléas et des revirements impromptus affectant les normes de droit » (M. Heers, « La sécurité juridique en droit administratif français », *RFDA* 1995, p. 963 et s.). L'exigence de sécurité juridique, sans s'opposer à la nécessaire mutabilité du droit, implique donc la sanction d'une rétroactivité trop brutale de la législa-

[2] cf ; Dossier sur la sécurité juridique, Les Cahiers du Conseil constitutionnel, , 2001, n°11, p. 66 et s.

tion, ou l'accompagnement, grâce à des mesures transitoires, de l'évolution de la législation. En ce sens, la sécurité juridique ne peut être conçue comme conduisant à l'intangibilité de la norme et des droits ou situations acquis.

B-La soumission du législateur aux exigences relevant de la prévisibilité du droit

C'est par la prise en compte du principe de non rétroactivité que l'exigence de prévisibilité du droit a d'abord été constitutionnalisée par le Conseil constitutionnel[3].

En droit français, si la non rétroactivité des lois est un principe constitutionnel en matière de dispositions pénales plus sévères, en vertu de l'article 8 de la Déclaration de 1789, d'autres hypothèses ont été retenues par le Conseil dans lesquelles la rétroactivité des lois est inconstitutionnelle. Ainsi la portée rétroactive d'une loi est limitée par le principe de séparation des pouvoirs qui exige le respect des décisions de justice passées en force de chose jugée (décis. 86-223 DC).

Plus généralement, le Conseil constitutionnel a affirmé que le caractère rétroactif d'une loi ne devait pas avoir pour effet de priver de garanties légales des exigences constitutionnelles (décis.95-369 DC et décis. 98-403 DC)[4]. Ainsi, le principe de non rétroactivité des lois, tel qu'il est affirmé dans l'article 2 du code civil, est un principe législatif garant d'un principe constitutionnel[5] et auquel il ne peut être porté qu'une atteinte justifiée et insusceptible d'attenter à la substance du principe constitutionnel dont il constitue la « sentinelle », à savoir la sécurité juridique.

La formule employée dans la décision 2010-4/17 QPC synthétise ces exigences: « Si le législateur peut modifier rétroactivement une règle de droit ou valider[6] un acte administratif ou de droit privé, c'est à la condition de poursuivre un but d'intérêt général suffisant et de respecter tant les décisions de justice ayant force de chose jugée que le principe de non-rétroactivité des peines et des

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[3] sur la constitutionnalisation du principe de sécurité juridique, cf. A. L. Valembois, la constitutionnalisation du principe de sécurité juridique en droit français, LGDJ,

[4] B.Mathieu., "Rétroactivité des lois fiscales et sécurité juridique : application concrète d'un principe implicite", *RFDA* 1999, p. 89

[5] sur cette catégorie, cf. B. Mathieu, Pour la reconnaissance de principes matriciels en matière de protection des droits de l'homme, *D.* 1995, C,211

[6] Les lois de validation sont des lois par lesquels le législateur décalre valide ab initio un acte réglementaire ou de droit privé affecté d'une irrégularité et susceptible d'être, pour cette raion annulé. La validation a nécessairement un effet rétroactif (cf. B. Mathieu, les validations législatives, Economica, 1987

sanctions. En outre, l'acte modifié ou validé ne doit méconnaître aucune règle ni aucun principe de valeur constitutionnelle, sauf à ce que le but d'intérêt général visé soit lui-même de valeur constitutionnelle. Enfin, la portée de la modification ou de la validation doit être strictement définie ».

2-LA SUBJECTIVISATION DU PRINCIPE DE PRÉVISIBILITÉ DU DROIT

Cette subjectivisation s'est progressivement affirmée par la protection des situations légalement acquises. Plus récemment, elle s'est incarnée dans le principe de confiance légitime.

A-Sécurité juridique et protection des situations acquises

Le principe de sécurité juridique, en ce qu'il vise la prévisibilité de la norme, a été également appliqué, en ce qui concerne la protection de certaines situations acquises. Il n'existe pas, en droit constitutionnel français, de droit général à la protection des droits acquis. Une telle protection peut cependant représenter une exigence constitutionnelle dans trois hypothèses: s'agissant de situations liées à l'exercice de libertés fondamentales, s'agissant de la protection des droits nés de contrats, mais aussi, plus généralement, s'agissant de situations légalement acquises .

• La protection des situations légalement acquises

Ainsi, dans la décision 2007-550 DC, le Conseil constitutionnel, tout en affirmant que « Il est à tout moment loisible au législateur, statuant dans le domaine de sa compétence, de modifier des textes antérieurs ou d'abroger ceux-ci en leur substituant, le cas échéant, d'autres dispositions », ajoute que « il ne saurait toutefois priver les exigences constitutionnelles de garanties légales. En particulier, il méconnaîtrait la garantie des droits proclamée par l'article 16 de la Déclaration de 1789 s'il portait aux situations légalement acquises une atteinte qui ne soit justifiée par un motif d'intérêt général suffisant ».

• La protection des libertés fondamentales

Le Conseil constitutionnel, dans sa décision n° 84-181 DC a affirmé que le législateur ne peut remettre en cause des situations intéressant une liberté publique que dans certaines limites. En effet, le législateur ne peut réglementer l'exercice d'une liberté publique que pour le rendre plus effectif ou le concilier avec d'autres règles ou principes de valeur constitutionnelle. L'interdiction de mettre en cause des situations légalement acquises liées à l'exercice d'une liberté publique, semble viser l'ensemble de ces libertés et non seulement la liberté de communication (décis. 84-181 DC). Dans cette hypothèse, il ne s'agit pas essen-

tiellement d'éviter un système plus restrictif d'exercice de ces libertés (technique du cliquet anti-retour), mais de protéger des situations individuelles.

• **le respect des obligations contractuelles**

Dans un premier temps, le juge constitutionnel affirme clairement que la liberté contractuelle, entendue comme le respect par le législateur des dispositions contractuelles en vigueur ne relève d'aucune exigence constitutionnelle. Dans la décision n° 94-348 DC, le Conseil constitutionnel déclare formellement "qu'aucune norme de valeur constitutionnelle ne garantit le principe de la liberté contractuelle".

Dans un second temps le Conseil infléchit sa position et sa jurisprudence prend en compte certaines des exigences liées au respect des contrats en cours.

Mais dans la décision n° 98-401 DC du 10 juin 1998, le Conseil constitutionnel affirme, alors que les députés requérants n'invoquaient pas directement ce principe, que "le législateur ne saurait porter à l'économie des conventions et contrats légalement conclus une atteinte d'une gravité telle qu'elle méconnaisse manifestement la liberté découlant de l'article 4 de la Déclaration des droits de l'homme et du citoyen".

C'est ainsi une référence magistrale au principe de la liberté contractuelle qui figure dans cette décision. Ce n'est pas exactement le principe de liberté contractuelle au sens des articles 6 et 1123 du code civil, c'est à dire la liberté de contracter, qui est ici reconnu mais le principe du respect par les tiers au contrat, tant publics que privés, des stipulations prévues par le contrat.

Cette jurisprudence est reprise dans des décisions postérieures (par exemple 2008-568 DC et 2009-578 DC). Dans la décision 2000-436 DC, le Conseil apporte une précision importante à la prise en compte de l'intérêt général comme justificatif à la restriction de la liberté contractuelle. Il considère en effet que l'invocation d'un objectif constitutionnel, en l'espèce le droit à un logement décent, ne suffit pas, par lui même, à justifier une atteinte grave à l'économie des contrats légalement conclus.

B-Sécurité juridique et principe de confiance légitime

Dans la décision 2013-682 DC, le Conseil ajoute une nouvelle exigence celle selon laquelle le législateur « ne saurait sans motif d'intérêt général suffisant… remettre en cause les effets qui peuvent légitimement être attendus de telles situations ». C'est ainsi le principe de « confiance légitime » qui est ainsi implicitement constitutionnalisé. C'est un revirement de jurisprudence dont il s'agit, le Conseil ayant jusqu'alors expressément dénié la valeur constitutionnelle de ce principe (décision 97-391 DC).

La réticence du Conseil à parfaire la pleine reconnaissance du principe de sécurité juridique, au travers du principe de confiance légitime s'explique probablement par le fait que la protection des contrats légalement conclus et des situations légalement acquises présente un caractère objectif, alors que la confiance légitime renvoie à des considérations plus subjectives, celles relatives à l'appréhension du droit par les acteurs juridiques.

Cette réticence est aujourd'hui surmontée. L 'exigence de sécurité juridique qui présente d'abord des enjeux économiques essentiels, les opérateurs économiques devant pouvoir agir et décider dans un cadre prédéfini et juridiquement sûr, est un instrument du respect des droits des citoyens.

C-L'invocabilité de l'exigence de prévisibilité du droit dans le cadre d'une Question prioritaire de constitutionnalité

La question prioritaire de constitutionnalité peut être soulevée par tout justiciable devant toutes juridictions (ou presque) à l'occasion d'un litige à l'encontre d'une disposition législative dont il est argué qu'elle viole un droit ou une liberté que la Constitution reconnaît. Apres un double filtrage (par le juge ad'hoc et par le Conseil d'Etat ou la Cour de cassation) elle est le cas echéant transmise au Conseil constitutionnel. Il s'agit donc d'invoquer la violation d'un droit subjectif à l'occasion d'un litige, le contrôle n'en restant pas moins un contrôle abstrait (contrôle de la constitutionnalité de la norme et non de son application).

La faculté d'invoquer une violation des exigences relatives à la prévisibilité du droit dans le cadre de cette procédure traduit donc sa mutation en droit subjectif.

Il convient in fine de relever que le principe de prévisibilité est invocable à l'appui d'une Question prioritaire de constitutionnalité (décision 2013-354 QPC). L'utilisation de ce principe, non dénué de subjectivité, dans le cadre d'un contrôle abstrait de la loi ouvre des perspectives dont il appartiendra aux justiciables et à leurs conseils de se saisir. Ne doutons pas cependant que cet instrument heureusement forgé, le Conseil se montrera assez prudent dans l'utilisation qui en sera faite.

En conclusion

L 'exigence de sécurité juridique répond à de nombreux enjeux. D'abord la sécurité juridique présente des enjeux économiques essentiels, les opérateurs économiques doivent pouvoir agir et décider dans un cadre prédéfini et juridiquement sûr. De ce point de vue, dans le cadre du développement économique, la qualité du droit étatique et sa prévisibilité constituent des atouts de premi-

er ordre. Mais elle est aussi un instrument de respect des droits des citoyens. L'affirmation de droits fondamentaux serait de peu de portée, si leur mise en œuvre ne respectait pas un principe de prévisibilité.

Cette évolution s'inscrit dans un mouvement général de subjectivisation du droit dont le juge est le vecteur principal[7]. Mais il convient également que le juge garant de cette prévisibilité se l'impose à lui même. Le droit jurisprudentiel doit également être prévisible.

Ainsi la sécurité juridique, entendue comme impliquant la prévisibilité du droit, mais aussi sa qualité, doit être considérée comme une exigence fondamentale susceptible d'assurer à la fois la protection de l'individu et la prise en considération d'exigences d'intérêt général.

[7] cf. B. Mathieu, *Constitution: Rien ne bouge et tout change*, Lextenso 2013 et *Justice et politique: la déchirure?*, Lextenso, 2015

L'ACCÈS DES PARTICULIERS AUX JURIDICTIONS DE L'UNION EUROPÉENNE

JOËL RIDEAU*

Le contrôle juridictionnel est une composante déterminante de l'existence d'un État de droit et donc de la Communauté de droit devenue Union de droit.

Le système juridictionnel de l'Union européenne s'est progressivement complexifié en fonction de l'évolution de la construction européenne. Il comprend deux volets.

Le premier est européen. La Cour de justice de l'Union européenne est composée actuellement de la Cour de justice et du Tribunal, après la dissolution en 2016 du Tribunal de la fonction publique de l'Union européenne dont les affaires ont été transférées à la compétence du Tribunal. Selon une formule traditionnelle adaptée pour tenir compte du traité de Lisbonne (art. 19 TUE) : « *1) La Cour de justice de l'Union européenne comprend la Cour de justice, le Tribunal et des tribunaux spécialisés. Elle assure le respect du droit dans l'interprétation et l'application des traités (…)*

3) La Cour de justice de l'Union européenne statue conformément aux traités :

a) sur les recours formés par un État membre, une institution ou des personnes physiques ou morales ;

b) à titre préjudiciel, à la demande des juridictions nationales, sur l'interprétation du droit de l'Union ou sur la validité d'actes adoptés par les institutions ;

c) dans les autres cas prévus par les traités. ».

Le second est formé par les juridictions nationales, considérées, selon une formule devenue d'usage courant, comme les juridictions de droit commun. Elles sont, depuis le traité de Lisbonne, évoquées par l'article 19, paragraphe 1, alinéa 2, TUE, selon lequel « *Les États membres établissent les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union* ») Elles collaborent avec la Cour par le biais du renvoi préjudiciel *(art. 267 TFUE).*

Le traité de Nice de 2000, entré en vigueur en 2003, a tendu à faire du Tribunal alors appelé de première instance *(*qui avait jusque là une compétence

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d'attribution*)* une juridiction ayant vocation à connaître de l'ensemble des recours directs, sous réserve des compétences réservées à la Cour et aux chambres juridictionnelles, et à laquelle pouvait être éventuellement attribuée une compétence pour répondre aux questions préjudicielles posées par les juridictions nationales dans des domaines à déterminer *(art. 225, § 3, al. 1, TCE)*. La Cour devait continuer à contrôler le Tribunal par la voie des pourvois sur des points de droit mais également se prononcer sur des demandes de réexamens en cas de risque sérieux d'atteinte à l'unité ou à la cohérence du droit communautaire lorsque le Tribunal statuerait sur pourvois ou répondrait à des questions préjudicielles *(art. 225, §2, al. 2, § 3, al. 3, TCE)*.

Cette tendance, intégrée dans le traité établissant une Constitution pour l'Europe *(*de 2004*)*, a été confirmée lors du traité de Lisbonne de 2007, entré en vigueur en 2009, après l'échec du traité établissant une Constitution pour l'Europe en 2005, par l'article 256 TFUE[1].

[1] Selon lequel « *1. Le Tribunal est compétent pour connaître en première instance des recours visés aux articles 263, 265, 268, 270 et 272, à l'exception de ceux qui sont attribués à un tribunal spécialisé créé en application de l'article 257 et de ceux que le statut réserve à la Cour de justice. Le statut peut prévoir que le Tribunal est compétent pour d'autres catégories de recours.*

Les décisions rendues par le Tribunal en vertu du présent paragraphe peuvent faire l'objet d'un pourvoi devant la Cour de justice, limité aux questions de droit, dans les conditions et limites prévues par le statut.

2. Le Tribunal est compétent pour connaître des recours qui sont formés contre les décisions des tribunaux spécialisés.

Les décisions rendues par le Tribunal en vertu du présent paragraphe peuvent exceptionnellement faire l'objet d'un réexamen par la Cour de justice, dans les conditions et limites prévues par le statut, en cas de risque sérieux d'atteinte à l'unité ou à la cohérence du droit de l'Union.

3 *Le Tribunal est compétent pour connaître des questions préjudicielles, soumises en vertu de l'article 267, dans des matières spécifiques déterminées par le statut.*

Lorsque le Tribunal estime que l'affaire appelle une décision de principe susceptible d'affecter l'unité ou la cohérence du droit de l'Union, il peut renvoyer l'affaire devant la Cour de justice afin qu'elle statue.

Les décisions rendues par le Tribunal sur des questions préjudicielles peuvent exceptionnellement faire l'objet d'un réexamen par la Cour de justice, dans les conditions et limites prévues par le statut, en cas de risque sérieux d'atteinte à l'unité ou à la cohérence du droit de l'Union.»

Le Tribunal, selon sa nouvelle appellation depuis le traité de Lisbonne, n'a cependant obtenu qu'une partie des recours directs auxquels il pouvait prétendre[2].

Le Tribunal n'a pas reçu de compétence pour répondre à des questions préjudicielles qui restent pour l'instant le monopole de la Cour de justice.

Le traité de Nice avait également introduit la possibilité de créer des chambres juridictionnelles spécialisées dans un domaine déterminé *(art. 225 A TCE)*, relevant du contrôle du Tribunal sur recours *(*la modalité prévue par l'ancienne annexe I du statut de la Cour abrogée en 2016 lors de la dissolution du Tribunal de la fonction publique était le pourvoi*)* avec une intervention éventuelle de la Cour de justice statuant sur des demandes de réexamen en cas de risque sérieux d'atteinte à l'unité ou à la cohérence du droit communautaire *(art. 225, § 2, al. 2, TCE).* Bien que cette possibilité ait été reprise par le traité de Lisbonne *(art. 257 TFUE)*, la seule chambre juridictionnelle créée a été le Tribunal de la fonction publique créé en 2004 et dissous en 2016.

Le Tribunal est soumis au contrôle de la Cour de justice sous la forme de pourvois sur des questions de droit introduits par les parties devant le Tribunal ou par les États ou par les institutions *(art. 256, §1, al. 2 TFUE).*

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[2] L'article 51 du Statut dispose que « *Par dérogation à la règle énoncée à l'article 256, paragraphe 1, du traité sur le fonctionnement de l'Union européenne, sont réservés à la Cour de justice les recours visés aux articles 263 et 265 du traité sur le fonctionnement de l'Union européenne, qui sont formés par un État membre et dirigés:*

a) contre un acte ou une abstention de statuer du Parlement européen ou du Conseil, ou de ces deux institutions statuant conjointement, à l'exclusion:

– des décisions prises par le Conseil au titre de l'article 108, paragraphe 2, troisième alinéa, du traité sur le fonctionnement de l'Union européenne;

– des actes du Conseil adoptés en vertu d'un règlement du Conseil relatif aux mesures de défense commerciale au sens de l'article 207 du traité sur le fonctionnement de l'Union européenne;

– des actes du Conseil par lesquels ce dernier exerce des compétences d'exécution conformément à l'article 291, paragraphe 2 du traité sur le fonctionnement de l'Union européenne.

b) contre un acte ou une abstention de statuer de la Commission au titre de l'article 331, paragraphe 1 du traité sur le fonctionnement de l'Union européenne.

Sont également réservés à la Cour les recours, visés aux mêmes articles, qui sont formés par une institution de l'Union contre un acte ou une abstention de statuer du Parlement européen, du Conseil, de ces deux institutions statuant conjointement ou de la Commission, ainsi que par une institution de l'Union contre un acte ou une abstention de statuer de la Banque centrale européenne.».

En l'absence de compétence préjudicielle effective du Tribunal et de chambre juridictionnelle il n'existe actuellement pas d'hypothèses dans lesquelles des procédures de réexamen engagées par le premier avocat général en cas de risque sérieux d'atteinte à l'unité ou à la cohérence du droit l'Union seraient envisageables *(art. 256, §2, al. 2 et §3, al. 3 TFUE).*

LA JURIDICTIONNALISATION PROGRESSIVE DE L'ORDRE JURIDIQUE DE L'UNION EUROPÉENNE ET SES LIMITES

Après la période purement communautaire de juridictionnalisation développée qui prévalait dans les traités instituant les Communautés européennes, la juridictionnalisation de l'Union européenne a été différenciée en fonction des piliers établis par le traité sur l'Union européenne à partir de 1993.

Le pilier communautaire était entièrement juridictionnalisé dans la continuité avec la situation précédente, sous réserve d'un régime dérogatoire s'appliquant au titre IV « *Asile, visas, immigration et autres politiques relatives à la libre circulation des personnes* », prévu par le traité d'Amsterdam dans le cadre d'une communautarisation d'une partie du troisième pilier originel *(art. 68 TCE).*

Toute intervention du juge était exclue dans la PESC deuxième pilier, sous réserve de possibilités marginales, créées par la jurisprudence, d'un contrôle du respect des frontières entre les piliers[3].

La juridictionnalisation du troisième pilier Coopération dans les matières de justice et d'affaires intérieures *(CJAI)* était limitée.

Dans la Coopération policière et judiciaire en matière pénale constituant le troisième pilier après le traité d'Amsterdam, le régime juridictionnel était dérogatoire par rapport au régime général communautaire, tant pour le renvoi préjudiciel que pour le recours en annulation contre les décisions et les décisions-cadres *(art. 35 TUE).* L'exclusion de l'effet direct des décisions et des décisions-cadres avait nécessairement une répercussion négative sur l'intervention des juges nationaux. La Cour avait cependant souligné la nécessité d'une interprétation du droit national conforme aux décisions-cadres[4]

Le Traité établissant une Constitution pour l'Europe avait prévu la suppression des piliers liée à une disparition des procédures dérogatoires dans les domaines de l'ancien titre IV TCE *Visas, asile immigration et autres politiques relatives à la libre circulation des pe*rsonnes *(art. 68 TCE)* et dans ceux de l'ex-

[3] *CJCE, 12 mai 1998, aff. C-170/96, Comm. c/ Cons., pts 12 et s. : Rec. CJCE 1998, I, p. 2763.*

[4] *CJCE, 16 juin 2005, aff. C-105/03, Maria Pupino : Rec. CJCE 2005, I, p. 5285.*

troisième pilier visés par les modifications consécutives au traité d'Amsterdam *(art. 35 TUE)*. La PESC demeurait largement non juridictionnalisée. Le traité soulignait par ailleurs l'importance du rôle des juges nationaux appelés à appliquer le droit de l'Union européenne dans les ordres juridiques nationaux, en mettant en œuvre les principes de primauté et d'effet direct qui régissent les relations entre ce droit et les droits nationaux, en invitant les États à prévoir les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union *(art. I-29, § 1, al. 2)*.

Le traité de Lisbonne s'est situé dans la même perspective. La disparition des piliers a été accompagnée par un renforcement de la juridictionnalisation qui n'a touché la PESC que de manière marginale. L'extension de la juridictionnalisation a joué essentiellement pour les matières de l'ancien troisième pilier *(*coopération policière et judiciaire en matière pénale*)* désormais intégrées dans l'espace européen de liberté, de sécurité et de justice. Ces matières faisaient l'objet depuis le traité d'Amsterdam de procédures spécifiques prévues par l'article 35 TUE, distinctes des procédures communautaires. Ces procédures ont été supprimées sous réserve d'un régime dérogatoire provisoire qui a duré jusqu'au 1er décembre 2014[5].

La restriction appliquée à certains contrôles a toutefois subsisté[6].

La juridictionnalisation de la PESC est exclue par l'article 24, paragraphe 1, alinéa 3 TUE[7]. Cette exclusion et les dérogations sont confirmées par l'article 275 TFUE[8].

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[5] V. *prot. n° 36, art. 10* sur les dispositions transitoires relatives aux actes adoptés dans le domaine de la coopération policière et judiciaire en matière pénale avant le traité de Lisbonne.

[6] *« Dans l'exercice de ses attributions concernant les dispositions des chapitres 4 et 5 du titre V, de la troisième partie, relatives à l'espace de liberté, de sécurité et de justice, la Cour de justice de l'Union européenne n'est pas compétente pour vérifier la validité ou la proportionnalité d'opérations menées par la police ou d'autres services répressifs dans un État membre, ni pour statuer sur l'exercice des responsabilités qui incombent aux États membres pour le maintien de l'ordre public et la sauvegarde de la sécurité intérieure » (art. 276 TFUE).*

[7] *« La Cour de justice de l'Union européenne n'est pas compétente en ce qui concerne ces dispositions, à l'exception de sa compétence pour contrôler le respect de l'article 40 du présent traité et pour contrôler la légalité de certaines décisions visées à l'article 275, second alinéa, du traité sur le fonctionnement de l'Union européenne. ».*

[8] *« La Cour de justice de l'Union européenne n'est pas compétente en ce qui concerne les dispositions relatives à la politique étrangère et de sécurité commune, ni en ce qui concerne les actes adoptés sur leur base.*

Selon une première dérogation à la non – juridictionnalisation de la PESC, la Cour est compétente, en vertu des articles 24, paragraphe 1, al. 3 TUE et 275, al. 2 TFUE, pour contrôler la séparation établie par l'article 40 TUE en examinant les actes PESC empiétant sur les autres politiques et, en sens inverse, les actes non PESC empiétant sur la PESC. La Cour s'était d'ailleurs reconnu cette compétence sans texte avant même le traité de Lisbonne. Cette compétence est exercée par le Tribunal sous le contrôle de la Cour de justice.

Elle peut aussi se prononcer, selon une deuxième dérogation résultant des articles 24, paragraphe 1, al. 3 TUE et 275, al. 2 TFUE, sur les recours, formés dans les conditions prévues à l'article 263, quatrième alinéa (recours en annulation), du traité concernant le contrôle de la légalité des décisions prévoyant des mesures restrictives à l'encontre de personnes physiques ou morales adoptées par le Conseil sur la base du titre V, chapitre 2, du traité sur l'Union européenne. Cette dérogation consolide la faculté donnée aux personnes ou entités objet de sanctions ciblées d'invoquer leurs droits fondamentaux devant le juge européen, qui ressort de la jurisprudence du Tribunal et de la Cour sur les sanctions ciblées[9]. Cette compétence est aussi exercée par le Tribunal sous le contrôle de la Cour de justice

Une troisième dérogation à la non-juridictionnalisation de la PESC ressort de l'article 218, paragraphe 11, TFUE sur la vérification de la compatibilité avec les traités de l'Union européenne des accords internationaux envisagés par l'Union européenne, qui étend la procédure donnant lieu à des avis de la Cour de justice de l'Union européenne aux accords PESC ainsi qu'aux accords de l'ancien troisième pilier. C'est la Cour de justice elle-même qui statue dans cette procédure. Un avis négatif exclut la conclusion de l'accord, ce qui ne peut être surmonté que par une modification de l'accord ou par une modification des traités.

Toutefois, la Cour est compétente pour contrôler le respect de l'article 40 du traité sur l'Union européenne et se prononcer sur les recours, formés dans les conditions prévues à l'article 263, quatrième alinéa, du présent traité concernant le contrôle de la légalité des décisions prévoyant des mesures restrictives à l'encontre de personnes physiques ou morales adoptées par le Conseil sur la base du titre V, chapitre 2, du traité sur l'Union européenne. ».

[9] V., par ex. : *CJCE, 3 sept. 2008, aff. jtes C-402/05 P et C-415/05 P, Kadi et Al Barakaat International Foundation c/ Conseil et Comm. : Rec. CJCE 2008 p. I-6351.- Trib. UE, 17 déc. 2014, aff. T-400/10, Hamas c/ Cons. ECLI:EU:T:2014:1095.*

On peut, en outre, noter que la Cour a annulé la décision de conclusion d'un accord PESC en écartant les objections tirées par le Conseil des limitations de la juridictionnalisation de la PESC[10]

La Cour a eu l'occasion de rappeler les limites de sa compétence dans le cadre de la PESC dans son avis négatif sur la compatibilité du projet d'accord d'adhésion de l'UE à la CEDH[11].

LES FINALITÉS DES VOIES DE DROIT EUROPÉENNES

Les voies de droit devant la Cour de justice (et le Tribunal) s'organisent autour de finalités essentielles[12]. Les procédures permettent le contrôle des institutions et le contrôle des États membres. Il s'agit aussi, par le jeu des renvois préjudiciels non contentieux, d'établir la collaboration entre le juge de l'Union européenne et les juges nationaux. La finalité globale est de permettre un accès satisfaisant au juge. La situation antérieure au traité de Lisbonne montre la rareté des modifications opérées lors des révisions, le traité de Lisbonne n'ayant d'ailleurs procédé qu'à des changements limités.

Le **contrôle des institutions** englobe plusieurs types de voies de droit.

Le contrôle de la légalité comprend le **recours en annulation dirigé contre les actes des institutions et le recours en carence qui vise les inactions illégales** *(art. 263 et 265, TF).* S'y ajoute **l'exception d'illégalité**, qui n'est pas un recours autonome, mais se greffe sur un autre recours et a pour objet d'examiner la légalité d'un acte qui n'est pas attaqué directement *(art. 277 TFUE).*

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[10] « *71 En l'occurrence, il convient de relever que, bien que la décision attaquée ait été adoptée sur le fondement d'une seule base juridique matérielle relevant de la PESC, à savoir l'article 37 TUE, il résulte du préambule de cette décision que sa base juridique procédurale est l'article 218, paragraphes 5 et 6, TFUE, réglant la procédure de signature et de conclusion des accords internationaux…*

73 Dans ces conditions, il ne saurait être soutenu que la portée de la limitation dérogatoire à la compétence de la Cour prévue aux articles 24, paragraphe 1, second alinéa, dernière phrase, TUE et 275 TFUE s'étend jusqu'à exclure que la Cour soit compétente pour interpréter et appliquer une disposition telle que l'article 218 TFUE, qui ne relève pas de la PESC, alors même qu'elle prévoit la procédure sur la base de laquelle un acte relevant de la PESC a été adopté» (CJUE, gde ch., 24 juin 2014, aff. C-658/11, PE c/ Cons. : ECLI:EU:C:2014:2025).

[11] *CJUE, ass. plén., avis du 18 déc. 2014, C-2/13, pts 249 à 257 : ECLI:EU:C:2014:2454.* V également la prise de position contraire de Mme Kokott, pts 82 à 103.

[12] J. Rideau et F. Picod, *Code des procédures juridictionnelles de l'Union européenne : Litec, 2e éd. 2002.*

Le recours **contre les sanctions** adoptées par la Commission est un recours de pleine juridiction dans lequel l'examen du juge englobe mais dépasse l'examen de la légalité de la décision et dans lequel il dispose de pouvoirs supérieurs au juge de l'annulation *(art. 261 TFUE)*.

Le **recours en indemnité** permet la mise en cause de la responsabilité extracontractuelle de l'Union européenne. Il pourra conduire à condamner l'Union à réparer un dommage causé par une faute qui sera le plus souvent une illégalité commise par l'institution, sans que la jurisprudence ait retenu l'hypothèse d'une responsabilité sans faute *(art. 268 et 340, al. 2, TFUE)*.

Les **recours des fonctionnaires** relèvent à la fois du contentieux de l'annulation et du contentieux de la pleine juridiction *(art. 270 TFUE)*.

Les **pourvois** sont introduits devant la Cour de justice par les parties à une procédure devant le Tribunal ou par les États ou par les institutions. Ils sont limités aux questions de droit

La procédure du **renvoi préjudiciel par les juridictions nationales** – qui n'est pas contentieuse – tend principalement à obtenir de la Cour une interprétation du droit de l'Union européenne que le juge national auteur de la question appliquera dans le litige dont il est saisi. Cette procédure assure l'unité d'interprétation et d'application du droit de l'Union européenne, essentielle dans une Union de droit[13]. Elle peut s'inscrire dans le contrôle des institutions, la Cour pouvant aussi être appelée à statuer sur la validité des actes de droit dérivé sur laquelle elle est interrogée *(art. 267 TFUE)*. La Cour peut reformuler les questions posées, voire en soulever de nouvelles.

La **procédure consultative** qui permet à un État membre, au Conseil, à la Commission européenne et, depuis le traité de Nice, au Parlement européen de faire contrôler la conformité d'un accord international non conclu aux traités *(*et également la compétence de l'Union pour le conclure*)* participe aussi du contrôle des institutions *(art. 218, § 11, TFUE)*. Un avis négatif empêchera la conclusion de l'accord.

Le **contrôle des États** est opéré par le **recours en manquement** ouvert à la Commission – et le plus souvent exercé par elle – et aux États *(art. 258 à 260 TFUE)*. La Cour de justice de l'Union européenne, après une procédure précontentieuse s'achevant par un avis motivé de la Commission, examine la requête et se prononce sur la réalité du manquement. La Cour peut, depuis le traité de Maastricht, en cas de persistance du manquement après constatation, condamner l'État à payer une somme forfaitaire ou une astreinte *(*en fait les deux sont

[13] F. Picod et J. Rideau, *Renvois préjudiciels : Rép. communautaire Dalloz, 2006. - C. Naômé, Le renvoi préjudiciel en droit européen. Guide pratique : Larcier, 2e éd. 2010.*

possibles en vertu d'une interprétation jurisprudentielle*)* tendant à la cessation du manquement établie. Il existe aussi des procédures dérogatoires.

Le contrôle des États peut aussi prendre la forme non contentieuse des **renvois préjudiciels** *(art. 267 TFUE)*, dans la mesure où les arrêts de la Cour à titre préjudiciel éclairent les juges nationaux en guidant leurs appréciations sur les violations commises par les États sur lesquelles ils statuent dans les procédures nationales.

LE DROIT À L'ACCÈS AU JUGE

L'accès au juge est un élément clé de l'État de droit et donc de la Communauté et de l'Union de droit, comme en témoigne la jurisprudence de la Cour qui s'est, à diverses reprises, appuyée sur la notion de Communauté de droit ou l'Union de droit pour évaluer les possibilités effectives de recours devant les juridictions de l'Union européenne dans une perspective de complétude du système juridictionnel de l'Union européenne[14]. Le droit à un recours effectif

[14] Ont été notamment invoqués : le recours en indemnité *(TPICE, 15 janv. 2003, aff. jtes T-377/00, T-379/00, T-380/00, T-260/01 et T-272/01, Philip Morris International c/ Comm. : Rec. CJCE 2003, II, p. 1)* et l'exception d'illégalité *(CJCE, 25 juill. 2002, aff. C-50/00 P, UPA c/ Cons., Rec. CJCE, 2002 p. I-6677, point 40*, voire même l'intervention *(CJCE, ord. 28 mars 2003, aff. C-75/02 P, Diputación Foral de Alava et a., points 32 s. : Rec. CJCE 2003, I, p. 2903)*. Le juge s'est référé aussi au jeu des recours nationaux avec le recours au renvoi préjudiciel *(CJCE, 2 avr. 1998, aff. C-321/95 P, Greenpeace c/ Comm., points 32 à 34, Rec. CJCE 1998, I, p. 1651. - CJCE, 25 juill. 2002, aff. C-50/00 P, UPA c/ Cons., point 40, cité supra)*. Toutefois, ces voies de droit peuvent ne pas apporter entièrement la protection recherchée. Il en est notamment ainsi lorsque les actes ne comportent pas de mesures d'application européennes ou nationales pouvant être l'objet de procédures. Avant même l'arrêt dans l'affaire «*UPA*» *(citée supra)*, la Cour avait indiqué qu' un recours direct en annulation devant le juge communautaire ne saurait être ouvert même s'il pouvait être démontré, après un examen concret par ce dernier des règles procédurales nationales, que celles-ci n'autorisent pas le particulier à introduire un recours lui permettant de mettre en cause la validité de l'acte communautaire contesté, dans la mesure où « *un tel régime exigerait dans chaque cas concret que le juge communautaire examine et interprète le droit procédural national, ce qui excéderait sa compétence dans le cadre du contrôle de la légalité des actes communautaires* » *(CJCE, ord., 1er févr. 2001, aff. jtes C-300/99 P et C-388/99 P, Area Cova et a. c/ Cons. et a., points 54 et 55 : Rec. CJCE 2001, I, p. 983)*. Le caractère prétendument complet du système a été affirmé par le Tribunal à propos du Traité de Lisbonne alors pourtant que les modifications introduites dans l'article 263, alinéa 4 du Traité FUE ne modifient pas fondamentalement la situation des personnes

conduit à approfondir les droits reconnus au justiciable, en ne se bornant pas à proclamer son droit au recours. On comprend que le juge ait ainsi notamment affirmé : le droit à un procès équitable[15] ; le droit à une durée raisonnable de la procédure[16]*)* ; le droit à être entendu par un juge[17].

Le juge dispose d'éléments écrits sur lesquels il peut s'appuyer pour statuer. Ils renforcent le caractère fondamental du droit au juge dans le cadre de l'ordre juridique de l'Union européenne.

Le droit au juge est un principe essentiel de l'Union européenne inspiré par les systèmes juridiques des États membres qu'il imprègne avec plus ou moins d'intensité et sous des formes diverses selon les États *(*reconnaissance par la Constitution, par le législateur, par le juge etc.*).*

Il est en outre inscrit dans la **Convention européenne des droits de l'homme** dont tous les États membres sont les parties contractantes. L'Union est supposée adhérer à la Convention comme le prévoit l'article 6, §2 TUE. Dans l'attente de cette adhésion, rendue problématique par l'avis 2/13 de la CJUE[18], la Convention est utilisée comme source d'inspiration par le juge de l'Union. Le juge de l'Union s'y réfère de façon courante de même qu'à la jurisprudence

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physiques ou morales et laissent donc planer un doute sur la complétude du système : *« il convient de rappeler que le traité a établi un système complet de voies de recours et de procédures destiné à assurer le contrôle de légalité des actes des institutions, en le confiant au juge de l'Union (voir, en ce sens, arrêt Unión de Pequeños Agricultores/Conseil, point 41 supra, point 40). Les dispositions des conventions internationales invoquées ne peuvent pas s'écarter de ces règles de droit primaire de l'Union (voir, en ce sens, arrêt de la Cour du 3 septembre 2008, Kadi et Al Barakaat International Foundation/Conseil et Commission, C-402/05 P et C-415/05 P, Rec. p. I-6351, points 306 à 308, et arrêt du Tribunal du 17 septembre 2007, Microsoft/Commission, T-201/04, Rec. p. II-3601, point 798) » Trib., ord., 6 sept. 2011, aff. T-18/10, Inuit Tapiriit Kanatami et a. c/ PE et Cons., point 55 : Rec. 2011 p. II-5599).*

[15] *CJCE, 11 janv. 2000, aff. jtes C-174/98 P et C-189/98 P, Pays-Bas et van der Wal c/ Comm., pts 17 et s. : Rec. CJCE 2000, I, p. 1.*

[16] *CJCE, 17 déc. 1998, aff. C-185/95 P, Baustahlgewebe GmbH c/ Comm., pts 28 et s. : Rec. CJCE 1998, I, p. 8417.- Trib. UE, 16 sept. 2013, aff. T-264/11 P, De Nicola c/ BEI, pts 29, 49 : ECLI:EU:T:2013:461.- Trib. UE, 27 mars 2014, aff. jtes, Saint-Gobain Glass France e.a. c/ Comm., pts 495 et 496 : ECLI:EU:T:2014:160.*

[17] *CJCE, ord., 4 sept. 2000, aff. C-192/00 P, Gluiber c/ Comm., pts 16 et s., non publiée.*

[18] *CJUE, ass. plén., avis 2/13 du 18 décembre 2014, Avis rendu en vertu de l'article 218, paragraphe 11, TFUE – Projet d'accord international – Adhésion de l'Union européenne à la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales – Compatibilité dudit projet avec les traités UE et FUE* : ECLI:EU:C:2014:2454.

de la Cour EDH. Il utilise également les principes généraux du droit s'inspirant des traditions constitutionnelles des États membres. La CJCE a toutefois écarté un moyen tiré d'une prétendue contrariété de l'article 230, alinéa 4 TCE avec la Convention européenne des droits de l'homme, en jugeant que « *dans les circonstances de la présente affaire, il n'est démontré aucune contradiction entre la CEDH et l'article 230, quatrième alinéa, CE* »[19].

À cela s'ajoute la **Charte des droits fondamentaux** devenue du droit primaire de l'Union européenne depuis le traité de Lisbonne *(art. 6, §1, TUE)*. L'article 47 « *Droit à un recours effectif et à accéder à un tribunal impartial* » stipule que « *Toute personne dont les droits et libertés garantis par le droit de l'Union ont été violés a droit à un recours effectif devant un tribunal dans le respect des conditions prévues au présent article.*

Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable par un tribunal indépendant et impartial, établi préalablement par la loi. Toute personne a la possibilité de se faire conseiller, défendre et représenter.

Une aide juridictionnelle est accordée à ceux qui ne disposent pas de ressources suffisantes, dans la mesure où cette aide serait nécessaire pour assurer l'effectivité de l'accès à la justice. ».

Le survol des différentes voies de droit ouvertes par les traités européens révèle une **différenciation entre les catégories de requérants**. Les conditions d'accès varient donc selon que l'on considère les particuliers, les États et les institutions.

Certaines voies ouvertes à l'ensemble des requérants comportent des exigences visant les particuliers qui restreignent leurs possibilités de recours. On est ainsi amené à distinguer entre des requérants dits privilégiés (entre lesquels ont peut d'ailleurs établir certaines différences) et les personnes physiques ou morales.

D'autres voies de droit sont fermées aux particuliers. C'est ainsi que les recours en manquement contre les États ne sont ouverts qu'à la Commission et aux autres États membres.

La procédure préjudicielle est spécifique dans la mesure où elle n'est pas contentieuse et où elle repose sur une relation entre les juges nationaux et les juges nationaux. Cependant les requérants nationaux sont appelés à y participer de même que les institutions de l'Union européenne et les États membres qui peuvent apparaitre devant la Cour.

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[19] *CJCE, 18 janv. 2007, aff. C-229/05 P, PKK et KNK c/ Cons. : Rec. CJCE 2007 p. I-439.*

I.- LES LIMITES DE L'ACCÈS DES PARTICULIERS AU CONTRÔLE JURIDICTIONNEL DES INSTITUTIONS

On examinera essentiellement sous cette rubrique les recours directs qui permettent ce contrôle et, en particulier, le recours en annulation qui en est l'instrument emblématique sur lequel porteront les commentaires suivants ultérieurement complétés par une mention du recours en carence.

Recours en annulation

Les dispositions régissant le recours font très nettement ressortir la différenciation entre les catégories de requérants résultant de l'article 263 TFUE[20]. Les juridictions compétentes varient selon la nature des requérants. Les recours des institutions sont introduits devant la Cour de justice alors que ceux des États membres sont, selon les cas, introduits devant la Cour de justice ou devant le Tribunal. Les recours des particuliers sont nécessairement introduits devant le Tribunal. Les cas d'ouverture des recours sont, par contre, communs à

[20] « *La Cour de justice de l'Union européenne contrôle la légalité des actes législatifs, des actes du Conseil, de la Commission et de la Banque centrale européenne, autres que les recommandations et les avis, et des actes du Parlement européen et du Conseil européen destinés à produire des effets juridiques à l'égard des tiers. Elle contrôle aussi la légalité des actes des organes ou organismes de l'Union destinés à produire des effets juridiques à l'égard des tiers.*

À cet effet, la Cour est compétente pour se prononcer sur les recours pour incompétence, violation des formes substantielles, violation des traités ou de toute règle de droit relative à leur application, ou détournement de pouvoir, formés par un État membre, le Parlement européen, le Conseil ou la Commission.

La Cour est compétente, dans les mêmes conditions, pour se prononcer sur les recours formés par la Cour des comptes, par la Banque centrale européenne et par le Comité des régions qui tendent à la sauvegarde des prérogatives de ceux-ci.

Toute personne physique ou morale peut former, dans les conditions prévues aux premier et deuxième alinéas, un recours contre les actes dont elle est le destinataire ou qui la concernent directement et individuellement, ainsi que contre les actes réglementaires qui la concernent directement et qui ne comportent pas de mesures d'exécution.

Les actes créant les organes et organismes de l'Union peuvent prévoir des conditions et modalités particulières concernant les recours formés par des personnes physiques ou morales contre des actes de ces organes ou organismes destinés à produire des effets juridiques à leur égard.

Les recours prévus au présent article doivent être formés dans un délai de deux mois à compter, suivant le cas, de la publication de l'acte, de sa notification au requérant ou, à défaut, du jour où celui-ci en a eu connaissance. ».

l'ensemble des requérants : incompétence ; violation des formes substantielles ; détournement de pouvoir.

Si certaines conditions de recevabilité valent pour tous les requérants (actes attaquables, auteurs des actes, délais), les particuliers sont soumis à un régime propre dont les caractéristiques font ressortir les limitations de leur accès au juge, notamment en ce qui concerne leurs recours contre les actes généraux. Ces particularités se situent au niveau de l'exigence d'un intérêt à agir et à celui de la qualité pour agir.

Dans le régime antérieur au Traité de Lisbonne, les personnes physiques ou morales pouvaient attaquer **les décisions dont elles étaient destinataires** *(CE, art. 230, al. 4)*. Elles pouvaient également attaquer **les décisions les concernant directement et individuellement**, qu'elles soient prises sous l'apparence d'un règlement ou d'une décision adressée à une autre personne. Le traité de Lisbonne a supprimé dans l'article 263 TFUE la référence à la notion de décision (décisions dont les requérants étaient destinataires et décisions prises sous l'apparence d'un règlement ou décisions adressées à une autre personne), qui était une source de complexité créant un hiatus toujours plus grand entre le texte et ses aménagements jurisprudentiels. Il l'a remplacée par une distinction entre les actes dont les requérants sont destinataires et les autres qui doivent les concerner directement et individuellement.

Dans ce système partiellement clarifié les restrictions visant les particuliers jouent toujours au niveau de la recevabilité et concernent, d'une part, l'exigence d'un intérêt à agir et, d'autre part, la qualité pour agir.

Intérêt à agir

Les **États membres, le Conseil, la Commission** - et, depuis le Traité de Nice, **le Parlement** - peuvent attaquer sans avoir à démontrer leur intérêt à agir tous les actes susceptibles de recours, c'est-à-dire ceux qui ont des effets juridiques. Ils sont, selon une expression consacrée, des *opérateurs institutionnels*, leur intérêt à agir est donc présumé à ce titre.

La notion d'intérêt à agir ne doit pas être confondue avec le concept d'acte attaquable, en vertu duquel un acte doit être destiné à produire des effets juridiques susceptibles de faire grief pour qu'il puisse faire l'objet d'un recours en annulation, ce qu'il convient de déterminer en s'attachant à sa substance[21].

[21] *Trib. UE, 21 mai 2010, aff. jtes T-425/04, T-444/04, T-450/04 et T-456/04, France et a. c. /Comm., : ECLI:EU:T:2010:216.*

L'exigence d'un **intérêt à agir personnel distinct de la qualité pour agir** s'impose en toute hypothèse aux particuliers.

Selon une jurisprudence constante, il appartient au juge de vérifier d'office si une partie requérante a un intérêt à obtenir l'annulation de la décision qu'elle attaque[22].

L'intérêt à agir suppose que l'annulation de l'acte soit susceptible, par elle-même, d'avoir des conséquences juridiques ou, selon une formulation différente, que le recours soit susceptible, par son résultat, de procurer un bénéfice à la partie qui l'a intenté[23]

L'intérêt doit être né et actuel. Un requérant se prévalant d'un intérêt concernant une situation juridique future, mais ne pouvant établir que l'atteinte à cette situation est d'ores et déjà certaine, ou se référant à un éventuel changement de circonstances, qui, s'il se produisait, lui permettrait de faire valoir ses droits, n'a pas d'intérêt à agir[24].

L'intérêt peut disparaître en cours d'instance dans ce cas, le requérant n'a plus d'intérêt à poursuivre son action ; la poursuite de l'action est alors abusive et le recours doit être rejeté[25].

L'intérêt à agir doit perdurer jusqu'au prononcé de la décision juridictionnelle, sous peine de non-lieu[26].

En cas de disparition de l'objet du recours au cours de la procédure découlant notamment du retrait ou du remplacement de l'acte attaqué en cours d'instance, le Tribunal ne peut pas se prononcer sur le fond, dès lors qu'une telle décision de sa part ne saurait procurer aucun bénéfice au requérant. L'effet juridique d'un acte abrogé expire, sauf disposition contraire, à la date de son abrogation, alors qu'un acte retiré et remplacé disparaît complètement de l'ordre juridique de l'Union produisant avec un effet ex turc. Cependant, un recours en annulation peut, à titre exceptionnel, ne pas devenir sans objet, malgré le retra-

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[22] *TPICE, 10 mars 2005, aff. T-228/00, T-229/00, T-242/00, aff. T-243/00, T-245/00 à T-248/00, T-250/00, T-252/00, T-256/00 à T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 à T-276/00, T-281/00, T-287/00 et T-296/00, Gruppo ormeggiatori del porto di Venezia c/ Comm. : Rec. CJCE 2005, II, p. 787, point 22.*

[23] *TPICE, 22 oct. 2008, aff. T-309/04, T-317/04, T-329/04 et T-336/04, TV 2/Danmark c/ Comm. : Rec. CJCE 2008, II, p. 2935, points 67-68, 72-74, 79.*

[24] *TPICE, 17 sept. 1992, aff. T-138/89, NBV et NVB c/ Comm. : Rec. CJCE 1992, II, p. 2181, points 33, 34.*

[25] *CJCE, 5 mars 1980, aff. 243/78, Simmenthal c/ Comm. : Rec. CJCE 1980, p. 593.*

[26] *Trib. UE, 19 janv. 2010, aff. jtes T-355/04 et T-446/04, Co-Frutta c/ Comm. : Rec. CJCE 2010, p. II-1, points 34,43-46.*

it de l'acte dont l'annulation est recherchée, lorsque le requérant conserve un intérêt suffisant à obtenir un arrêt annulant cet acte de manière formelle[27].

La jurisprudence se montre globalement plutôt libérale et l'exigence d'un intérêt à agir n'est donc pas dans l'ensemble un obstacle à l'accès au juge des particuliers. Il arrive cependant à la Cour et au Tribunal de rejeter des recours pour défaut d'intérêt.

Qualité pour agir

L'accès au juge de l'Union européenne comporte depuis l'origine des restrictions pour les particuliers *(art. 263, al. 4, TFUE)*. Ceux-ci, en effet, ne pouvaient attaquer dans le cadre de l'article 230, alinéa 4, CE *(*remplacé par l'*article 263, al. 4, TFUE)*, outre les décisions dont ils étaient destinataires que les actes pris sous l'apparence d'un règlement ou les décisions adressées à une autre personne, en démontrant qu'ils les concernaient directement et individuellement. Malgré les assouplissements jurisprudentiels destinés à remédier aux défauts les plus criants de ces exigences, la situation était restée préoccupante et la Cour avait refusé d'opérer une interprétation trop constructive pour y remédier, en se défaussant sur le constituant et en se référant aux différentes possibilités procédurales ouvertes aux particuliers tant devant la Cour que devant les juridictions nationales selon une argumentation fondée sur la complétude supposée du système. L'évolution jurisprudentielle n'avait pas entièrement pris en compte les critiques, émanant d'ailleurs souvent de l'intérieur même de l'institution, en particulier de certains avocats généraux comme l'avocat général Jacobs[28]. La Cour n'avait pas suivi son avocat général et avait bloqué les efforts du Tribunal pour faire évoluer les conditions de recevabilité[29]

Le refus du constituant (les États membres) de modifier le système n'a pendant longtemps pas permis d'apporter les améliorations qui paraissaient s'imposer. Les améliorations apportées par le traité de Lisbonne demeurent d'une portée limitée quant à l'accès au juge car elles ne permettent pas aux requérants dans la plupart des cas d'éviter l'exigence d'avoir à démontrer qu'ils sont concernés directement et surtout individuellement par les actes dont ils ne

[27] *Trib. UE, ord. du 12 janv. 2011, aff. T-411/09, Terezakis c/ Comm., Rec. CJUE 2011 p. II-1, points 14-18, 20.*

[28] *concl., pts 71 et s. sous CJCE, 25 juill. 2002, aff. C-50/00 P, Unión de Pequeños Agricultores c/ Cons., cité supra.*

[29] *TPICE, 3 mai 2002, aff. T-177/01, Jégo-Quéré c/ Comm.: Rec. CJCE 2002, II, p. 2365. 1er avril 2004, aff. C-263/02 P, Comm. c/Jégo-Quéré, Rec. CJCE 2004, p. I-3425.*

sont pas les destinataires alors que cette exigence limite l'accès des particuliers au juge en le compliquant, voire en l'excluant.

L'article 263 TFUE relatif au recours en annulation comporte plusieurs nouveautés reprises du traité établissant une Constitution pour l'Europe dont certaines peuvent être considérées comme une amélioration de l'accès des particuliers aux juges de l'Union.

L'alinéa 1 de l'article 263 étend le champ du contrôle de la légalité aux actes des organes ou organismes de l'Union destinés à produire des effets juridiques à l'égard des tiers qui codifie en fait une évolution amorcée par la jurisprudence.

Le traité supprime dans l'alinéa 4 la référence aux recours aux décisions adressées à une autre personne ou prises sous l'apparence d'un règlement devant les concerner directement et individuellement qui est remplacée par une différence entre les actes dont il est destinataire et les actes dont il n'est pas destinataire devant le concerner directement et individuellement. Le nouveau texte a le mérite de clarifier la situation des particuliers sans la modifier fondamentalement.

Une autre modification de l'alinéa 4 élargit les possibilités de recours des particuliers en permettant la recevabilité des recours des personnes privées contre les actes réglementaires qui les concernent directement et qui ne comportent pas de mesures d'exécution, ce qui exclut l'exigence d'être concerné individuellement souvent difficile à remplir. C'est sans doute la plus intéressante dans la perspective de l'élargissement du droit de recours effectif et de la protection des droits fondamentaux puisqu'elle permet d'attaquer des actes généraux qui ne n'auraient pu l'être dans l'état antérieur des textes. On notera cependant que cette possibilité est restreinte aux recours dirigés contre les actes réglementaires, que la Cour a définis comme des actes normatifs non législatifs[30]. Elle dépend aussi de l'interprétation donnée par la Cour à la notion de mesures d'exécution[31], qui se réfère notamment à la position de la personne invoquant le droit de recours *(pt 30)* et à l'objet du recours *(pt 31)*[32].

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[30] *CJUE, gde ch., 5 oct. 2013, aff. C-583/11 P, Inuit Tapiriit Kanatami e.a. c/ PE et Cons., concl. Kokott : ECLI:EU:C:2013:625.*

[31] *CJUE, gde ch., 19 déc. 2013, aff. C-274/12 P, Telefónica c/ Comm., pts 27-39 : ECLI:EU:C:2013:852.*

[32] Voir en particulier sur ces questions : *Échos de la doctrine, Droit d'action des particuliers dans le cadre du recours en annulation suite à l'entrée en vigueur du Traité de Lisbonne - Commentaires sur l'arrêt de la Cour du 3 octobre 2013 dans l'affaire C-583/11 P - Inuit Tapiriit Kanatami e.a. c/ Parlement et Conseil et sur l'ordonnance du Tribunal du 6 septembre 2011 dans l'affaire T-18/10, Inuit Tapiriit Kanatami e.a. c/ PE et Cons. : Reflets 2/2014, p. 55.*

On notera en outre la référence aux recours contre les actes des organes ou organismes de l'Union figurant dans l'alinéa 5[33], qui sont également visés par l'alinéa 1[34].

Le traité de Lisbonne n'apporte naturellement pas de réponse à la question non spécifique aux particuliers des pouvoirs du juge de l'annulation apparaissant parfois quelque peu limités du fait qu'il se refuse à entraver l'action des institutions contrôlées. Face aux appréciations économiques et aux situations complexes sur lesquelles les institutions – essentiellement la Commission – sont appelées à se prononcer, le juge opère souvent un contrôle minimum du fond en laissant une liberté qui peut, dans certains cas, sembler excessive aux institutions investies du pouvoir de décision. La création du Tribunal de première instance devenu Tribunal a cependant généré un certain affermissement du contrôle, dont témoigne de manière éclatante le contentieux de la concurrence[35]

En définitive, sans que l'on puisse négliger les changements intervenus, on ne peut s'empêcher de regretter qu'ils n'aient pas été plus importants en transformant un système qui porte incontestablement atteinte à l'accès des particuliers aux juges de l'Union européenne en particulier s'agissant des recours contre les actes généraux[36] mais aussi pour les recours contre les actes dont les requérants ne sont pas destinataires.

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[33] *« Les actes créant les organes et organismes de l'Union peuvent prévoir des conditions et modalités particulières concernant les recours formés par des personnes physiques ou morales contre des actes de ces organes ou organismes destinés à produire des effets juridiques à leur égard ».*

[34] *« Les actes créant les organes et organismes de l'Union peuvent prévoir des conditions et modalités particulières concernant les recours formés par des personnes physiques ou morales contre des actes de ces organes ou organismes destinés à produire des effets juridiques à leur égard ».*

[35] V. par exemple, *TPICE, 13 juill. 2006, aff. T-464/04, Independant Music Publishers and Labels Association Impala, association internationale c/ Comm. : Rec. CJCE 2006, II, 2289*, annulant une décision de la Commission déclarant une opération de concentration compatible avec le marché commun et le fonctionnement de l'Accord EEE.

[36] Toutefois, pour ceux-ci l'article 277 peut permettre leur mise en cause par la voie de l'exception d'illégalité qui se greffe sur un autre recours : *« Nonobstant l'expiration du délai prévu à l'article 263, sixième alinéa, toute partie peut, à l'occasion d'un litige mettant en cause un acte de portée générale adopté par une institution, un organe ou un organisme de l'Union, se prévaloir des moyens prévus à l'article 263, deuxième alinéa, pour invoquer devant la Cour de justice de l'Union européenne l'inapplicabilité de cet acte. ».*

Recours en carence

Il existe aussi des restrictions spécifiques aux recours en carence des particuliers dans le cadre de l'article 265[37]qui doivent avoir un intérêt à agir à la différence des requérants privilégiés. La formule utilisée *(art. 265, al. 3 TFUE)* écarte les recours des particuliers mettant en cause la carence d'une institution ou d'un organe à adopter un acte non obligatoire en limitant (à la différence des recours des requérants privilégiés) les hypothèses de carence aux actes autres que les recommandations et les avis. La situation est simple lorsque le requérant aurait été destinataire de l'acte qui n'a pas été adopté. Sinon, le requérant devra démontrer qu'il aurait été directement et individuellement concerné par l'acte, quel qu'il soit, que l'institution mise en cause aurait dû adopter en établissant ainsi qu'un recours en annulation contre cet acte aurait été recevable.

II.- L'ABSENCE D'ACCÈS DES PARTICULIERS À LA MISE EN ŒUVRE DES RECOURS EN MANQUEMENT

Le recours en manquement entre dans le cadre de l'article 19, § 3, lettre a TUE. Les articles 258 à 260 TFUE lui sont consacrés. Il existe aussi des procédures dérogatoires.

Seule la Commission et les États membres peuvent introduire des recours en manquement. En pratique, dans la presque totalité des cas, les recours sont introduits par la Commission.

Les particuliers n'ont aucun accès au juge de l'Union européenne pour le contrôle des États membres. Le recours en manquement leur est fermé. Leur seule possibilité est de déposer des plaintes auprès de la Commission en espérant que celle-ci y donnera suite en engageant une procédure.

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[37] *« Dans le cas où, en violation des traités, le Parlement européen, le Conseil européen, le Conseil, la Commission ou la Banque centrale européenne s'abstiennent de statuer, les États membres et les autres institutions de l'Union peuvent saisir la Cour de justice de l'Union européenne en vue de faire constater cette violation. Le présent article s'applique, dans les mêmes conditions, aux organes et organismes de l'Union qui s'abstiennent de statuer.*

Ce recours n'est recevable que si l'institution, l'organe ou l'organisme en cause a été préalablement invité à agir. Si, à l'expiration d'un délai de deux mois à compter de cette invitation, l'institution, l'organe ou l'organisme n'a pas pris position, le recours peut être formé dans un nouveau délai de deux mois.

Toute personne physique ou morale peut saisir la Cour dans les conditions fixées aux alinéas précédents pour faire grief à l'une des institutions, ou à l'un des organes ou organismes de l'Union d'avoir manqué de lui adresser un acte autre qu'une recommandation ou un avis. ».

Les plaintes doivent être déposées par le biais d'un formulaire disponible auprès de l'Union européenne. Le plaignant dénonce une violation du droit de l'Union qu'il estime avoir été commise par les autorités nationales.

On ne peut évidemment négliger l'intérêt pour la Commission chargée de veiller à l'application du droit de l'Union[38] d'être ainsi informée mais la Commission a un pouvoir discrétionnaire pour donner suite aux plaintes qu'elle instruit en informant les plaignants des suites qu'elle leur donne. Elle est, en toute hypothèse, libre d'engager ou non une procédure contentieuse même si l'instruction de la plainte confirme l'existence d'un manquement.

Les juridictions nationales participent également au contrôle des États membres et peuvent donc jouer un rôle important pour la mise en lumière et l'élimination de leurs violations de leurs obligations au titre de l'Union européenne, notamment avec la collaboration de la Cour de justice par la voie préjudicielle ou en tirant les conséquences des constatations de manquement opérées par la Cour. D'une manière générale, d'ailleurs, les procédures nationales offrent aux particuliers certains accès que leur ferme le système contentieux de l'Union européenne.

Le traité de Lisbonne a modifié le cadre antérieur du traité CE concernant le recours en manquement sans pour autant bouleverser les aspects fondamentaux de la procédure.

Le paragraphe 2 de l'article 260 supprime la nécessité d'un avis motivé en cas de manquement constaté et non supprimé, ce qui simplifie la procédure et devrait donc la raccourcir.

Le paragraphe 3 prévoit une procédure spéciale en cas de manquement d'un État à son obligation de communiquer des mesures de transposition d'une directive adoptée conformément à une procédure législative. La mise en jeu de cette procédure n'est pas alors subordonnée à l'existence d'un manquement persistant après constatation. La Commission pourra, après la procédure précontentieuse, saisir la Cour d'un recours lui demandant de constater le manquement et éventuellement de le condamner au paiement d'une somme forfaitaire ou d'une astreinte. La finalité est aussi de simplifier la procédure et de la raccourcir en prenant en considération le caractère très fréquent de ce type de manquements.

Le recours demeure toujours inaccessible aux particuliers.

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[38] Art. 17, §1 TUE « *Elle veille à l'application des traités ainsi que des mesures adoptées par les institutions en vertu de ceux-ci. Elle surveille l'aapplication du droit de l'Union sous le contrôle de la Cour de justice de l'Union européenne.* »

III.- L'ACCÈS RÉDUIT DES PARTICULIERS À LA COUR DANS LE RENVOI PRÉJUDICIEL

Les renvois préjudiciels prévus par l'article 267 TFUE[39] ont pour objet l'interprétation du droit de l'Union européenne ou l'appréciation de validité du droit dérivé. Les questions des juridictions nationales peuvent porter sur l'un ou l'autre point, éventuellement mêlés dans la même affaire ([40]).

Seules les juridictions nationales peuvent décider de procéder à des renvois préjudiciels à l'occasion de procédures engagées devant elles. Le renvoi est une faculté pour les juridictions des États membres dont les décisions sont susceptibles d'un recours juridictionnel de droit interne. Seules celles dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne sont tenues de renvoyer. À cette obligation découlant de l'article 267 TFUE s'est ajoutée une obligation générale de renvoi d'origine jurisprudentielle, relative à la déclaration d'invalidité d'un acte de l'Union européenne[41].

En toute hypothèse, la décision de renvoi relève d'une compétence exclusive du juge national qui, la décision prise, transmettra sa question préjudicielle à la Cour en prenant sa décision soit d'office, soit sur demande des parties, soit à celle du ministère public.

Les voies de droit nationales peuvent éventuellement être utilisées pour contester la décision de renvoi d'un juge national dont les décisions sont suscep-

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[39] « *La Cour de justice de l'Union européenne est compétente pour statuer, à titre préjudiciel:*

a) sur l'interprétation des traités,

b) sur la validité et l'interprétation des actes pris par les institutions, organes ou organismes de l'Union.

Lorsqu'une telle question est soulevée devant une juridiction d'un des États membres, cette juridiction peut, si elle estime qu'une décision sur ce point est nécessaire pour rendre son jugement, demander à la Cour de statuer sur cette question.

Lorsqu'une telle question est soulevée dans une affaire pendante devant une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, cette juridiction est tenue de saisir la Cour.

Si une telle question est soulevée dans une affaire pendante devant une juridiction nationale concernant une personne détenue, la Cour statue dans les plus brefs délais. ».

[40] V., par exemple, *CJCE, 11 décembre 2003, aff. C-127/00, Hässle, Rec. CJCE, p. I-14781*

[41] *CJCE, 22 octobre 1987, aff. 314/85, Foto-Frost, Rec. CJCE, p. 4199.* Voir un rappel particulièrement net de cette obligation dans *CJCE, 15 avril 1997, Bakers of Nailsea, aff. C-27/95, Rec. CJCE, p. I-1847* et également *CJCE, 18 juillet 2007, Lucchini, aff. C-119/05, Rec. CJCE, p. I-6199, point 53.*

tibles de recours sans que celles-ci permettent cependant de remettre en cause le droit au renvoi que les traités européens reconnaissent aux juges nationaux. En revanche, pourront être mises en cause : la pertinence de la question posée pour la solution du litige soumis au juge ou le non-respect des conditions énoncées par l'article 267 TFUE.

Le refus du juge national de poser une question ne peut être à lui seul de nature à motiver une réformation ou une cassation puisque la saisine du juge dont les décisions sont susceptibles de recours correspond à l'exercice d'une faculté. Ce refus est toutefois contestable s'il se fonde sur une méconnaissance du droit de l'Union européenne.

La Cour constitutionnelle allemande a pris position dans un arrêt du 8 avril 1987 sur l'effet direct des directives[42]. Elle était saisie d'un recours dirigé contre un arrêt du 25 avril 1985 (faisant d'ailleurs suite à une ordonnance dans le même sens du 16 juillet 1981) du Tribunal fiscal fédéral refusant tout effet aux directives. Elle s'est fondée sur l'article 101 LF qui garantit que « *Nul ne peut être soustrait à son juge légal* ». La Cour constitutionnelle a admis la possibilité au regard de l'article 24, paragraphe 1, LF d'un développement jurisprudentiel du droit communautaire qui avait été contestée par la juridiction fiscale fédérale. Elle a déclaré inconstitutionnel l'arrêt du Bundesfinanzhof qui, n'ayant pas suivi la Cour de justice des Communautés européennes, avait omis de la saisir d'un renvoi préjudiciel pour développer ses doutes, en privant le requérant de son droit à son juge légal, en l'occurrence la Cour de justice[43]. Cet arrêt souligne évidemment l'importance de la vigilance des juridictions nationales et, en particulier, des juridictions constitutionnelles et suprêmes.

On pourrait également penser que le refus de poser une question préjudicielle en cas d'obligation de poser une telle question puisse faire l'objet d'un recours en manquement contre l'Etat devant la CJUE et engager sa responsabilité.

Il faut également tenir compte de la jurisprudence de la Cour européenne des droits de l'homme, d'autant plus intéressante qu'elle est intervenue alors que l'Union n'a pas adhéré à la CEDH[44].. La Cour de Strasbourg a rappelé que « *la Convention ne garantit pas, comme tel, un droit à ce qu'une affaire soit renvoyée à titre préjudiciel par le juge interne devant une autre juridiction, qu'elle soit nationale ou supranationale*» et qu'elle laissait aux seules juridictions internes le soin d'apprécier si, dans chaque espèce, les conditions fixées par le droit de l'Union

[42] *Cour const., 8 avril 1987, Kloppenburg*, BVerfGE 75, p. 223.

[43] Voir également *Bundesverfassungsgericht, ord. du 9 janvier 2001, 1 BvR 1036/99.*

[44] *Cour EDH, 2e Sect. 20 septembre 2011, Ullens De Schooten et Rezabek c. Belgique, Req. nos 3989/07 et 38353/07*

en matière de renvoi préjudiciel se trouvaient bien réunies. Toutefois, elle a jugé que «*l'article 6 §1* [de la CEDH] *met dans ce contexte à la charge des juridictions internes une obligation de motiver au regard du droit applicable les décisions par lesquelles elles refusent de poser une question préjudicielle, d'autant plus lorsque le droit applicable n'admet un tel refus qu'à titre d'exception*» (§ 60). La Cour a donc vérifié que cette obligation de motivation était remplie en l'espèce.

Les parties aux procédures nationales ont le droit de transmettre des observations écrites et/ou orales à la Cour de justice.

Les réponses de la Cour aux questions posées, qui peuvent d'ailleurs être modifiées et complétées par la Cour, seront transmises aux juridictions qui en sont les auteurs et devront les prendre en considération pour statuer sur le fond de l'affaire. Cette phase soulève naturellement la question du respect par les juridictions nationales des réponses de la Cour et de l'éventuelle mise en œuvre de procédures nationales tendant à porter remède à un non-respect.

IV.- PERSPECTIVES DE RENFORCEMENT DES VOIES DE DROIT NATIONALES

L'article 19 du traité sur l'Union européenne a repris dans son paragraphe 1, alinéa 2 la formule que prévoyait le traité établissant une Constitution pour l'Europe : « *Les États membres établissent les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union* ». On peut se demander si cette disposition oblige les États à compenser les limites des recours des particuliers en prévoyant des recours nationaux lorsque les voies de droit européennes s'avèrent insuffisantes ou s'il s'agit d'une simple incitation.

La Cour a sur ce point adopté une interprétation moins constructive que celle de son avocat général[45] : « *99 Quant au rôle des juridictions nationales, mentionné au point 90 du présent arrêt, il y a lieu de rappeler que les juridictions nationales remplissent, en collaboration avec la Cour, une fonction qui leur est attribuée en commun, en vue d'assurer le respect du droit dans l'interprétation et l'application des traités (avis 1/09, précité, point 69).*

100. Il incombe donc aux États membres de prévoir un système de voies de recours et de procédures permettant d'assurer le respect du droit fondamental à une protection juridictionnelle effective (…).

[45] V. à ce sujet *CJUE, gde ch., 5 oct. 2013, aff. C-583/11 P, Inuit Tapiriit Kanatami e.a. c/ PE et Cons., cité supra*, en particulier, les conclusions J. Kokott.

101. Cette obligation des États membres a été réaffirmée par l'article 19, paragraphe 1, second alinéa, TUE selon lequel ceux-ci «établissent les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union».

102. À cet égard, il appartient, en l'absence de réglementation de l'Union en la matière, à l'ordre juridique interne de chaque État membre de désigner, dans le respect des exigences découlant des points 100 et 101 du présent arrêt ainsi que des principes d'effectivité et d'équivalence, les juridictions compétentes et de régler les modalités procédurales des recours destinés à assurer la sauvegarde des droits que les justiciables tirent du droit de l'Union (…).

103. Quant aux voies de recours que doivent prévoir les États membres, si le traité FUE a institué un certain nombre d'actions directes qui peuvent être exercées, le cas échéant, par des personnes physiques et morales devant le juge de l'Union, ni le traité FUE ni l'article 19 TUE n'ont entendu créer devant les juridictions nationales, en vue du maintien du droit de l'Union, des voies de droit autres que celles établies par le droit national (…).

104. Il n'en irait autrement que s'il ressortait de l'économie de l'ordre juridique national en cause qu'il n'existe aucune voie de recours permettant, ne fût-ce que de manière incidente, d'assurer le respect des droits que les justiciables tirent du droit de l'Union, ou encore si la seule voie d'accès à un juge était pour les justiciables de se voir contraints d'enfreindre le droit (…)

106. Enfin, ni ce droit fondamental ni l'article 19, paragraphe 1, second alinéa, TUE n'exigent qu'un justiciable puisse former des recours contre de tels actes, à titre principal, devant les juridictions nationales. »

Mme Kokott dans ses conclusions avait estimé que « *121. D'une manière générale, il appartient aux États membres de créer les voies de recours nécessaires à une protection juridictionnelle effective dans les domaines relevant du droit de l'Union. Depuis l'entrée en vigueur du traité de Lisbonne, cette obligation est énoncée en toutes lettres à l'article 19, paragraphe 1, deuxième alinéa, TUE. Elle a notamment pour conséquence que les juridictions nationales ne peuvent pas appliquer d'une manière excessivement restrictive les conditions de recevabilité des recours dont elles sont saisies, même lorsqu'il s'agit de recours en constatation ou en cessation formés à titre conservatoire.*

122. Si le contrôle du respect d'une obligation ou d'une interdiction directement applicables résultant du droit de l'Union devait exceptionnelle-

ment relever du domaine de compétence d'une institution, d'un organe ou d'un organisme de l'Union, il serait alors loisible au particulier de s'adresser à celle-ci ou à celui-ci et de lui demander de confirmer que l'obligation ou l'interdiction en question ne s'applique pas à lui. Le principe de bonne administration imposerait alors à l'autorité concernée de statuer sur cette demande. Il résulte des exigences de la protection juridictionnelle effective qu'une décision de rejet opposée par cette autorité devrait être considérée comme une décision au sens de l'article 288, quatrième alinéa, TFUE contre laquelle son destinataire pourrait introduire un recours en annulation en se prévalant du premier cas de figure visé à l'article 263, quatrième alinéa, TFUE. Dans le cadre de ce recours, il lui serait loisible d'invoquer, à titre incident, l'illégalité de l'acte législatif de l'Union litigieux.

123. En cas d'urgence, aussi bien les juridictions de l'Union (articles 278 TFUE et 279 TFUE) que les juridictions nationales peuvent être saisies de demandes de mesures conservatoires, comme le Conseil l'a indiqué à bon escient au cours de l'audience devant la Cour.».

On ajoutera que dans sa prise de position contraire sous l'avis 2/13[46] Madame Kokott a valorisé le rôle des juridictions nationales appelées à intervenir dans le contrôle de la PESC : « *96. Comme l'indique l'article 19, paragraphe 1, TUE notamment, le système de protection juridictionnelle mis en place par les traités repose sur deux piliers, dont l'un s'appuie sur les juridictions de l'Union et l'autre sur les juridictions nationales. Lorsque, comme c'est régulièrement le cas dans le domaine de la PESC, il n'existe aucune possibilité de recours devant les juridictions de l'Union, les juridictions nationales sont et demeurent compétentes. Enfin, il s'agit là d'une conséquence du principe d'attribution, conformément auquel toutes les compétences que les traités n'ont pas conférées à l'Union demeurent dans le giron des États membres (article 4, paragraphe 1, TUE lu en combinaison avec l'article 5, paragraphe 1, première phrase, et paragraphe 2, TUE).*

97. En outre, l'article 19, paragraphe 1, deuxième alinéa, TUE oblige expressément les États membres à établir les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans le domaine de la PESC, qui est un domaine couvert par le droit de l'Union.

98. De nombreux aspects de la PESC exigent une mise en œuvre par des instances des États membres (article 26, paragraphe 3, TUE, 42, para-

[46] *Cité supra.*

graphe 3, TUE et 44, paragraphe 1, TUE). De toute façon, la voie vers les juridictions nationales est alors toute tracée pour le particulier lorsqu'il souhaite soumettre au contrôle juridictionnel des actes, mesures ou omissions relevant de la PESC qui l'affectent d'une manière ou d'une autre.

99. Même lorsque la PESC est mise en œuvre par des institutions, organes ou autres organismes de l'Union d'une manière qui concerne directement et individuellement les particuliers, l'accès aux juridictions nationales ne leur est pas interdit, à moins qu'exceptionnellement, ils puissent s'adresser directement aux juridictions de l'Union en application de la deuxième possibilité offerte par l'article 275, deuxième alinéa, TFUE. En effet, dans la mesure où la Cour de justice de l'Union européenne ne puise aucune compétence dans les traités, même les litiges auxquels l'Union est elle-même partie n'échappent pas, conformément à l'article 274 TFUE, à la compétence des juridictions nationales. Eu égard à la règle énoncée à l'article 24, paragraphe 1, deuxième alinéa, sixième phrase, TUE et à l'article 275, premier alinéa, TFUE, tel pourrait être la situation normale dans le cadre de la PESC.

100. Lorsque des juridictions nationales sont saisies de pareils litiges dans le cadre de la PESC, elles ont l'obligation d'appliquer le droit de l'Union. À cette occasion, elles auront, le cas échéant, à contrôler la compatibilité d'actes des institutions de l'Union intervenus dans le cadre de la PESC avec du droit de l'Union de rang supérieur et, lorsqu'elles constateront une incompatibilité, elles devront les laisser inappliqués dans ce litige concret. Comme nous l'avons déjà dit, en effet, et contrairement à ce qui se passe dans le domaine des politiques communautarisées, les traités ne prévoient précisément aucune compétence préjudicielle de la Cour dans le domaine de la PESC, comme l'indiquent l'article 24, paragraphe 1, deuxième alinéa, sixième phrase, TUE et l'article 275, premier alinéa, TFUE. Par conséquent, la Cour ne peut pas, dans le cadre de la PESC, revendiquer le monopole qui lui est par ailleurs reconnu sur le contrôle de la validité des actes des institutions, organes ou autres organismes de l'Union. Selon nous, sa jurisprudence constante, qui remonte à l'arrêt Foto-Frost (65), ne peut donc pas être transposée à la PESC. Contrairement à ce qui se passe dans les domaines du droit de l'Union qui sont structurés de manière supranationale, la PESC ne comporte aucun principe général suivant lequel la validité des actes des institutions de l'Union ne pourrait être contrôlée que par les juridictions de l'Union.

101. Il est sans doute regrettable du point de vue de l'intégration politique que, pour les questions relevant de la PESC, la Cour n'ait aucune com-

pétence préjudicielle et ne dispose pas de son monopole de juridiction sur la validité des actes juridiques des institutions au sens de l'arrêt Foto-Frost (EU:C:1987:452) parce que cette privation de compétence ne permet pas de garantir une interprétation et une application uniformes du droit de l'Union dans le cadre de la PESC. Tel est cependant la conséquence logique du choix opéré par le législateur de continuer à aménager la PESC essentiellement au niveau intergouvernemental et de limiter l'élément supranational inhérent à toute compétence de la Cour aux cas exceptionnels strictement délimités qui sont exhaustivement énumérés à l'article 275, deuxième alinéa, TFUE.

102. La protection juridictionnelle effective des particuliers requise par les articles 6 et 13 de la CEDH peut également être assurée sans que la Cour dispose d'une compétence préjudicielle ou d'un monopole de juridiction sur les actes juridiques des institutions.

103. En résumé, l'on retiendra, en ce qui concerne la PESC, que l'Union peut adhérer à la CEDH, comme elle envisage de le faire, sans qu'il soit nécessaire de créer de nouvelles compétences pour la Cour de justice de l'Union européenne parce que, dans les questions relevant de la PESC, la protection juridictionnelle effective des particuliers est assurée en partie par les juridictions de l'Union (article 275, deuxième alinéa, TFUE) et en partie par les juridictions nationales (article 19, paragraphe 1, deuxième alinéa, TUE et article 274 TFUE). ».

V.- INTÉRÊT DE L'ADHÉSION À LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme devrait apporter une garantie nouvelle aux personnes privées en leur permettant de saisir la Cour européenne des droits de l'homme pour mettre en cause les violations par les institutions de l'Union, y compris la Cour de justice, des droits et libertés garantis par la Convention européenne, pour la mise en cause de la Cour dans les limites toutefois des recours ouverts aux particuliers devant la Cour de justice de l'Union européenne et les juridictions qui lui sont rattachées, ce qui exclut *(*au moins directement*)* les recours en manquement et les renvois préjudiciels, sous condition de l'épuisement des voies de recours internes et des autres conditions fixées par la Convention dans les articles 34 et 35[47]. Leur accès

[47] V. J. Callewaert, *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme* , Editions du Conseil de l'Europe, 2013, p. 91.

au juge se trouverait ainsi élargi et l'adhésion permettrait également de remettre éventuellement en cause devant la Cour européenne des droits de l'homme les limites de l'accès au juge constatées dans l'Union européenne et qui demeurent après le traité de Lisbonne, notamment en ce qui concerne les conditions de recevabilité et le contrôle des actes PESC.

L'avis 2/13 de la Cour de justice[48] a retenu parmi les points d'incompatibilité de l'adhésion avec l'article 6, paragraphe 2, TUE et avec le protocole n° 8 UE. l'attribution d'une compétence à la Cour EDH pour contrôler les actes PESC alors que la CJUE ne dispose dans ce domaine que d'une compétence limitée ce qui : « *méconnaît les caractéristiques spécifiques du droit de l'Union concernant le contrôle juridictionnel des actes, actions ou omissions de l'Union en matière de PESC, dans la mesure où il confie le contrôle juridictionnel de certains de ces actes, actions ou omissions exclusivement à un organe externe à l'Union.* ».

On ne peut donc que regretter la motivation en question qui se fonde sur l'absence de compétence de la CJUE pour écarter un contrôle exercé par une autre Cour pouvant favoriser l'accès au juge des particuliers dans un domaine où il est restreint.

[48] Cité supra.

LES MUTATIONS DU CONTENTIEUX CONSTITUTIONNEL EN MATIÈRE DE LIBERTÉS ÉCONOMIQUES. ANALYSE À PARTIR DU CAS FRANÇAIS

Pr. Dr. MATHIEU DISANT*

Le présent rapport porte sur le contentieux constitutionnel en matière de libertés économiques, en cherchant à rendre compte de « l'évolution » - pour reprendre le terme retenu pour notre Congrès – de la jurisprudence constitutionnelle française en la matière.

Le sujet retenu porte sur la dimension constitutionnelle du contentieux économique, à travers la liberté d'entreprendre tout particulièrement. Il est envisagé comme une contribution à la question de savoir si et comment l'économie peut être saisie par le juge constitutionnel.

C'est un sujet qui ne peut être épuisé en quelques lignes. Il mobilise des questions fondamentales que je ne peux aborder frontalement, comme celle des rapports généraux entre Constitution et économie. A tout le moins, la science économique – au moins avec la théorie de la régulation et celle de l'institutionnalisme – intègre directement la fonction économique du droit, entendu à travers ses acteurs, dont le juge qui tient toute sa place de « régulateur » des pouvoirs publics.

Dans de précédents travaux, j'ai pu esquisser la façon dont les constitutionnalistes prennent fort prudemment l'économie pour objet. Il ne s'agit pas pour eux d'un objet spécifique, au-delà tantôt des libertés à caractère économique, tantôt des droits économiques (ces derniers étant abordés comme des droits de deuxième génération). On constate tout autant que les spécialistes du droit économique demeurent, en France, peu familiers du droit constitutionnel. Toutes choses égales par ailleurs, la consultation des ouvrages et manuels de droit commun des affaires le confirme nettement, les développements sur le sujet sont inexistants ou infimes.

Cette relative indifférence ne peut qu'être mise à l'épreuve de la constitutionnalisation du droit, notamment économique – à moins que ce ne soit l'inverse. L'hypothèse d'une élévation au rang constitutionnel des questions économiques

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nourrit légitimement la thèse du développement d'un droit constitutionnel économique.

Je ne reviendrai pas sur les implications de ce processus, tant pour le champ du droit constitutionnel (débat classique mais non consensuel), que pour le « droit économique ». Le caractère assez évolutif de ce dernier a nourri de longues réflexions quant à sa délimitation : tantôt ou à la fois, droit de la collectivisation des biens de production, et droit de l'organisation de l'économie, mais aussi droit de la concurrence, droit de la régulation…etc. J'entends ici le « droit économique » comme porteur d'une vocation générale du droit à saisir l'économie. De ce point de vue, le « droit économique » n'est que la construction d'un objet de recherche. Sa vocation est principalement scientifique.

A cet égard, plusieurs interrogations se posent en droit positif : La constitutionnalisation modifie-t-elle les fondements du droit économique ? Quel rôle devrait être joué par la Constitution ? Les rapports entre Constitution et économie ne sont-ils pas renouvelés, relancés, accélérés… par le développement significatif du contentieux constitutionnel ? Je pense bien sûr à l'instauration de la QPC depuis 2010. Celle-ci a ouvert le champ matériel du contentieux constitutionnel et lui a instillé, dans une certaine mesure, un caractère sinon plus concret, plus subjectif. Le Conseil constitutionnel ne deviendrait-il pas, par la force des choses, lui-aussi un juge économique ? En somme, la constitutionnalisation du droit économique est-elle une réalité ou une « bulle doctrinale » ? Et cette réalité se traduit-elle par l'avènement d'un « contentieux constitutionnel économique » ?

Je ne pourrais répondre ici à toutes ces questions. D'autant plus que je laisse de côté l'idée de Constitution économique européenne… liée à la constitutionnalisation de l'Europe. Je voudrais ici livrer, de façon assez libre, et en essayant de m'attacher à l'évolution contentieuse, quelques brèves observations et quelques tendances qui permettent d'alimenter cette hypothèse de travail, dans le cadre du système juridique français. Avec en ligne de mire une interrogation : celle de l'effectivité et de la portée de ces droits ou libertés constitutionnels économiques.

Parmi les multiples façons d'aborder le sujet, deux questions me paraissent importantes : Existe-t-il une « constitution économique » ? Quels sont les apports et, le cas échéant, les potentialités offertes par le développement du contentieux constitutionnel ?

Je ne reviendrai pas ici sur la première question. Le constat le plus souvent établi est celui de l'absence de « constitution économique » dans la mesure où les rapports entre Constitution et économie sont marqués par une certaine neutralité réciproque, pour reprendre cette thèse telle que développée par Jean-

Yves Chérot. Neutralité sur l'organisation économique de la Constitution, d'un côté ; neutralité sur l'organisation constitutionnelle de l'Etat des politiques économiques, de l'autre. La problématique me semble à vrai dire plus complexe, mais je ne pourrai l'aborder de front.

Elle doit intégrer la façon dont l'économie se serait ou non saisie de l'offre nouvelle du contentieux de constitutionnalité, et inversement, comment s'imposerait une dimension constitutionnelle au contentieux économique, même dans un système constitutionnel supposé neutre en cette matière.

Pour prendre une métaphore économique : le contentieux constitutionnel est devenu un segment du marché du droit – un secteur en « croissance structurelle » pourrait-on dire ! La voie constitutionnelle contentieuse s'offre ainsi au monde économique. Cela est de nature à accélérer le développement du contentieux constitutionnel économique. Le contentieux constitutionnel n'est plus une chasse gardée. Il attise l'attention des acteurs économiques.

La question pourrait se poser ainsi : Comment la construction d'un droit constitutionnel de l'économie jusqu'alors accomplie dans le cadre *a priori* et abstrait de la loi se transforme à la faveur de la QPC permettant le contrôle de la loi appliquée ?

Pour donner des éléments de réponse, il faut tenter de mesurer le degré de protection accordée aux libertés économiques, avant de s'interroger sur la façon dont les acteurs économiques peuvent percevoir le recours constitutionnel, au sein des instruments juridiques et judiciaires, pour développer leurs stratégies.

1. LE RENFORCEMENT DE LA JURISPRUDENCE CONSTITUTIONNELLE SUR LES LIBERTÉS ÉCONOMIQUES

Le Conseil constitutionnel a construit une jurisprudence substantielle sur les libertés économiques. Le contrôle de constitutionnalité *a priori* avait déjà conduit à l'élaboration « d'un droit fondamental économique [inspiré de présupposés incontestables et intangibles] » selon la formule de Guy Canivet.

1.1. Sommairement, il repose en l'état sur quatre piliers :

Primo, le **droit de propriété**, fondé sur le diptyque des articles 2 et 17 de la Déclaration de 1789. Ces articles protègent respectivement contre les atteintes aux conditions d'exercice de la propriété et la privation de propriété. Ils sont régulièrement invoqués en QPC.

Deusio, la **liberté contractuelle**, consacrée sur le fondement de l'article 4 de la Déclaration de 1789, mais trouvant encrage également dans la garantie des

droits (article 16 de la Déclaration) en vue de protéger les conventions légalement conclues.

Un autre pilier, celui de la **sécurité juridique**, s'est affirmé plus récemment. Il est tout aussi important dans ses applications économiques (protection des attentes légitimes et des situations légalement acquises, jurisprudence sur la rétroactivité fiscale développée au titre de la garantie des droits). On y décèle des avancées mais aussi une réticence du Conseil à y déployer une lecture économique. Celui-ci refuse, par exemple, d'examiner les liens entre les opérations ou les possibilités économiques des acteurs[1].

De même, il faut être attentif à la résonnance économique de certains principes. Je pense tout particulièrement au **principe d'égalité**, notamment l'égalité devant les charges publiques. Pour le dire de façon synthétique, le principe d'égalité en matière économique est assez peu contraignant en matière de police administrative, il n'empêche pas non plus l'octroi d'avantages fiscaux (si ceux-ci sont fondés sur des critères objectifs et rationnels en fonction des buts qu'ils poursuivent). Mais on peut noter que le respect du principe d'égalité peut, dans certaines circonstances, impliquer la libre concurrence. Cette dernière n'a jamais reçu de consécration officielle et autonome en droit constitutionnel français, mais le Conseil constitutionnel a jugé que des différences peuvent avoir des effets sur l'égale concurrence. C'est le sens profond de sa jurisprudence de 2001 consacrant le principe d'égal accès à la commande publique.

1.2. Ceci précisé, j'insiste sur le pilier qui est le plus présent, le plus en lumière et peut-être le plus évolutif, la **liberté d'entreprendre**.

Le Conseil constitutionnel a donné valeur constitutionnelle au principe de liberté du commerce et de l'industrie dans sa décision du 30 octobre 1981 (*monopole de la radiodiffusion*). Il a ensuite pleinement consacré la valeur constitutionnelle de la liberté d'entreprendre dans sa décision n° 81-132 DC du 16 janvier 1982 (*loi de nationalisation*). Le Conseil fait découler le principe de la liberté d'entreprendre de l'article 4 de la Déclaration. En dépit de son champ d'application particulier (l'activité économique des personnes privées), elle découle de la liberté personnelle.

La liberté d'entreprendre n'est toutefois « *ni générale ni absolue* » selon la jurisprudence classique du Conseil constitutionnel[2]. Le Conseil retient qu'« *il est*

[1] Par ex. Décision n° 2015-475 QPC du 17 juillet 2015 *(Règles de déduction des moins-values de cession de titres de participation – Modalités d'application)*

[2] Décision n° 82-141 DC du 27 juillet 1982, *Loi sur la communication audiovisuelle*

loisible au législateur d'apporter à la liberté d'entreprendre (…) des limitations liées à des exigences constitutionnelles ou justifiées par l'intérêt général, à la condition qu'il n'en résulte pas d'atteintes disproportionnées au regard de l'objectif poursuivi »[3]. Par conséquent, toute limitation de cette liberté doit être justifiée par une exigence constitutionnelle ou par un motif d'intérêt général.

Le Conseil a consacré clairement la double portée de la liberté d'entreprendre qui comprend non seulement la liberté d'accéder à une profession ou une activité économique[4] mais également la liberté dans l'exercice de cette profession ou de cette activité[5]. Il convient ainsi de souligner que la liberté d'entreprendre n'est pas qu'une liberté d'établissement, c'est aussi une interdiction d'« empêcher ». Sous son aspect « liberté d'exercice », elle implique que son titulaire puisse librement exploiter son entreprise et la gérer à sa guise. C'est une interdiction de « gêner ». Le contrôle des dispositions relatives au licenciement en est une manifestation évidente[6].

Dans sa mise en oeuvre, cela conduit fréquemment le Conseil à procéder à un contrôle combiné, mettant la liberté d'entreprendre en lien avec d'autres droits ou libertés dont elle est proche, en particulier le droit de propriété[7] ou la

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[3] Solution acquise depuis la décision n° 2000-439 DC du 16 janvier 2001, Loi relative à l'archéologie préventive ; reprise dans le contrôle a posteriori, not. décision n° 2010-605 DC du 12 mai 2010, *Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne* ; 2010-55 QPC du 18 octobre 2010, M. Rachid M. et autres (Prohibition des machines à sous), cons. 4 ; 2011-126 QPC du 13 mai 2011, Société Système U Centrale Nationale et autre (Action du ministre contre des pratiques restrictives de concurrence), cons. 4 ; 2012-258 QPC du 22 juin 2012, Établissements Bargibant S.A. (Nouvelle-Calédonie - Validation - Monopole d'importation des viandes), cons. 6 ; 2012-280 QPC du 12 octobre 2012, Société Groupe Canal Plus et autre (Autorité de la concurrence : organisation et pouvoir de sanction), cons. 8.

[4] Par ex. n° 2011-139 QPC du 24 juin 2011, Association pour le droit à l'initiative économique (Conditions d'exercice de certaines activités artisanales)

[5] Déjà, sous cet aspect n° 84-172 DC du 26 juillet 1984 et n° 88-244 DC du 20 juillet 1988. Plus récemment, par ex. n° 2012-285 QPC du 30 novembre 2012, M. Christian S. (Obligation d'affiliation à une corporation d'artisans en Alsace-Moselle)

[6] Par ex. récent n° 2016-582 QPC du 13 octobre 2016 (Indemnité à la charge de l'employeur en cas de licenciement sans cause réelle et sérieuse)

[7] Par ex. n° 2000-436 DC du 7 décembre 2000, Loi relative à la solidarité et au renouvellement urbains ; égal. n° 2015-715 DC du 5 août 2015, Loi pour la croissance, l'activité et l'égalité des chances économiques. Voir également 2017-748 DC du 16 mars 2017, Loi relative à la lutte contre l'accaparement des terres agricoles et au développement du biocontrôle (concernant le droit de préemption des SAFER).

liberté contractuelle[8], mais aussi le principe d'égalité[9], notamment le principe d'égalité devant les charges publiques[10], ou encore le respect des droits de la défense[11], voire le principe de légalité des délits et des peines[12]. Une telle méthode de combinaison est retenue lorsque les griefs se confondent, c'est-à-dire lorsque ce sont les mêmes conséquences effectives qui sont contestées[13]. Il arrive aussi que la liberté d'entreprendre soit le miroir d'une autre liberté : par exemple, une restriction concernant un exploitant peut s'analyser, tantôt au regard du droit de grève pour les gérants salariés, tantôt au regard de la liberté d'entreprendre pour les gérants indépendants[14].

De tout cela, il ressort un corpus de plus en plus solide.

1.3. Pour autant, le Conseil a été amené à poser une série de limites à l'invocabilité de la liberté d'entreprendre. On peut en évoquer deux :

– D'une part, le Conseil est réticent à l'égard d'une invocation à front renversé. Il écarte le grief tendant à dénoncer comme contraire à la liberté d'entreprendre le caractère excessivement libéral d'une règlementation. Ce qui conduit, par exemple, à rejeter la possibilité d'une atteinte à la liberté d'entreprendre des taxis en ce que ceux-ci ne profitent pas des mêmes libertés que les voitures de tourisme[15].

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[8] Par ex. n° 2012-242 QPC du 14 mai 2012, Association Temps de Vie (Licenciement des salariés protégés au titre d'un mandat extérieur à l'entreprise) ; n° 2015-470 QPC du 29 mai 2015, Société SAUR SAS (Interdiction d'interrompre la distribution d'eau dans les résidences principales). Egal. 2017-649 QPC du 4 août 2018.

[9] Par ex. n° 2013-344 QPC du 27 septembre 2013 *(Garantie de l'État à la caisse centrale de réassurance, pour les risques résultant de catastrophes naturelles)*

[10] Par ex. n° 2015-496 QPC du 21 octobre 2015 (*Établissements d'enseignement éligibles à la perception des versements libératoires effectués au titre de la fraction dite du « hors quota » de la taxe d'apprentissage*)

[11] n° 2016-551 QPC du 6 juillet 2016 (Conditions tenant à l'exercice de certaines fonctions ou activités en France pour l'accès à la profession d'avocat)

[12] n° 2017-750 DC du 23 mars 2017, Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (s'agissant de l'obligation d'élaborer, rendre public et mettre en œuvre un « plan de vigilance », en vue d'identifier les risques qui pourraient résulter des activités des sociétés mères).

[13] Par exemple, des mesures limitant l'accès aux ressources pour les établissements privés d'enseignement emportent une restriction à la liberté d'enseignement comme à la liberté d'entreprendre.

[14] n° 2015-507 QPC du 11 décembre 2015*(Plan de prévention des ruptures d'approvisionnement de produits pétroliers outre-mer)*

[15] n° 2014-422 QPC 17 octobre 2014 *(Voitures de tourisme avec chauffeur)*

– D'autre part, le Conseil juge inopérant un grief tiré de la méconnaissance de la liberté d'entreprendre à l'encontre d'une incrimination qui aurait pour effet de reconnaître une forme de liberté d'entreprendre (même limitée) à l'égard d'activités illicites[16]. On ne peut encourager la liberté d'entreprendre de ceux qui favorisent le développement d'activités illégales !

Ces restrictions sont, somme toute, bien compréhensible. Elles n'altèrent pas le sentiment que cette liberté est devenue plus générale… mais, bien entendu, toujours pas absolue. La liberté d'entreprendre demeure une liberté de 2nd rang, pour laquelle le degré d'appréciation est globalement moins approfondi. Le contrôle opéré par le juge constitutionnel français se limite le plus souvent à un contrôle de la disproportion manifeste[17]. Il reconnaît ainsi une large marge d'appréciation au législateur. Il a jugé, à cet égard, que la liberté d'entreprendre pouvait être limitée au nom d'un objectif de valeur constitutionnelle[18], pour des raisons d'ordre public[19], de protection de la santé[20] et de qualité des soins[21], ou par les droits sociaux résultant du Préambule de 1946[22]. On note aussi le souci du Conseil constitutionnel de bien apprécier le champ de la restriction ou de l'obligation mise à la charge de l'entrepreneur, quitte à s'assurer – au besoin par une réserve d'interprétation – que celle-ci est étroitement et précisément délimitée[23].

De même, le Conseil contrôle régulièrement des atteintes à la liberté d'entreprendre justifiées par l'exigence de protection de l'environnement. Ainsi, il a jugé que le législateur pouvait, au nom de la protection du cadre de vie, soumettre les dispositifs de publicité extérieure à un régime d'autorisation administrative, et qu'il n'en résultait pas une atteinte disproportionnée à la liberté

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[16] n° 2015-484 QPC du 22 septembre 2015 *(Incrimination de la mise en relation de clients avec des conducteurs non professionnels)*

[17] Par ex. n° 2013-318 QPC du 7 juin 2013

[18] Par ex. le droit, pour toute personne, de disposer d'un logement décent : n° 2015-470 QPC du 29 mai 2015

[19] Par ex. n° 2011-132 QPC du 20 mai 2011, M. Ion C. (Incapacité et interdiction d'exploiter un débit de boissons)

[20] Par ex. n° 2011-139 QPC précitée

[21] n° 2016- 593 QPC du 21 octobre 2016 (Règles d'implantation des sites d'un laboratoire de biologie médicale)

[22] Par ex. n° 2011-157 QPC du 5 août 2011, Société SOMODIA (Interdiction du travail le dimanche en AlsaceMoselle)

[23] Par ex. récent, n° 2016-605 QPC du 17 janvier 2017 (Obligation de reprise des déchets issus de matériaux, produits et équipements de construction)

d'entreprendre[24]. De la même manière, il a permis que soit interdit l'usage de produits phytopharmaceutique contenant certaines substances actives de la famille des néocotinoïdes, au nom de l'objectif d'intérêt général de protection de l'environnement[25]. On ajoutera que le grief a été écarté récemment à l'encontre d'une obligation de reprise des déchets issus de matériaux de construction, en considération de ce que ladite obligation était suffisamment circonscrite l'activité principale du distributeur[26].

1.4. Pour autant, on peut se demander si **le contrôle exercé rapproche la liberté d'entreprendre d'une liberté de droit commun** (et non plus de 2nd rang). En observant de près la jurisprudence, l'intensité du contrôle est variable, donnant à la jurisprudence (ici comme dans d'autres cas) une « allure ondulatoire » pour reprendre la formule de Valérie le Bihan.

Deux points méritent analyse.

En premier lieu, quant aux éléments de contrôle exercé, le Conseil n'a jamais recherché, dans le cadre du contrôle qu'il opère, s'il existait une mesure alternative moins contraignante. Aucun contrôle de la nécessité n'est, en ce sens, exercé. Seul le champ d'application de la mesure prise et l'existence de garanties suffisantes entourant sa mise en œuvre sont contrôlés – cela relève du contrôle de proportionnalité (au sens strict). Un tel contrôle peut aboutir à une censure, comme dans la décision n° 2015-715 DC du 5 août 2015, Loi pour la croissance, l'activité et l'égalité des chances économiques, dite « Loi Macron ».

Les mesures de lutte contre le chômage sont illustratives. Ces mesures expriment directement les choix politiques et économiques du Parlement. Le Conseil ne vérifie pas si celles soumises à son contrôle sont, à résultat égal, les moins contraignantes pour les droits et libertés. En matière économique, il faut dire qu'une telle recherche serait vaine : les résultats des politiques publiques ne peuvent être mesurés, en tout cas a priori. Le Conseil admet donc que le législateur puisse réduire la durée du temps de travail – et donc emporter une atteinte à la liberté d'entreprendre – dès lors que la mesure permet a priori d'atteindre l'objectif poursuivi et qu'elle est proportionnée à celui-ci.

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[24] Par ex. n° 2012-282 QPC du 23 novembre 2012, Association France Nature Environnement et autre (Autorisation d'installation de bâches publicitaires et autres dispositifs de publicité)

[25] n° 2016-737 DC du 4 août 2016, Loi pour la reconquête de la biodiversité, de la nature et des paysages

[26] n° 2016-605 QPC du 17 janvier 2017 (Obligation de reprise des déchets issus de matériaux, produits et équipements de construction)

En second lieu, l'intensité du contrôle exercé peut varier. On l'a dit, il est le plus souvent restreint, au sens où seules les atteintes manifestement excessives au regard de l'objectif poursuivi sont sanctionnées. La marge de manœuvre laissée au législateur est donc plus grande – d'autant plus qu'il peut restreindre pour tout motif d'intérêt général. Tout ceci a été confirmé dans les toutes premières décisions QPC. Or, l'évolution de la jurisprudence signe une complication : le contrôle peut s'avérer renforcé. En effet, depuis quelques années, la jurisprudence semble faire une place au contrôle entier lorsqu'un simple objectif d'intérêt général – et non une exigence constitutionnelle – justifie l'atteinte portée à la liberté d'entreprendre (n° QPC 21 janvier 2011). Lorsque la conciliation met en cause un « simple » intérêt général, le contrôle tend à se renforcer. Ce précepte n'est toutefois pas toujours respecté, le contrôle restant parfois restreint en présence d'un motif d'intérêt général, comme dans la décision n° 2015-715 DC du 5 août 2015 précitée. Si bien que le contrôle exercé est partiellement entier ! Certes, ce jeu témoigne d'une prise en compte de la valeur de l'objectif poursuivi dans la détermination par le Conseil de l'intensité du contrôle qu'il exerce. Mais il demeure difficile de l'anticiper. D'autant plus que les types d'intérêt (impérieux, suffisant ou simple) ne sont pas vraiment dissociés dans les décisions, ce qui ne permet pas de situer clairement le contrôle par rapport à la compétence politique. Cela peut nourrir des illusions et des déceptions auprès des requérants. Même si les percées du contrôle entier, quoique peu lisible, suscitent l'intérêt des justiciables les mieux informés.

1.5. Il reste que le contrôle de la disproportion manifeste – certes restreint et parfois davantage – présente tout de même une certaine efficacité, à en juger par les **cas de censure** prononcée par le Conseil constitutionnel.

Je ne peux reprendre ici tous les cas[27]. On peut mentionner la sanction :

– des dispositions restreignant les licenciements pour motif économique qui étaient insérées dans le projet de loi de modernisation sociale (n° 2001-455 DC du 12 janvier 2002). Ces dispositions interdisaient les licenciements pour motif économique en dehors de trois hypothèses qu'elles mentionnaient. Le Conseil avait alors clairement motivé cette solution par la circonstance qu'une telle disposition aurait conduit le juge à exercer son contrôle sur les choix de gestion de l'entreprise.

[27] Not. Cons. const., n° 2000-436 DC du 7 décembre 2000, cons. 20 ; n° 2001-455 DC du 12 janvier 2002, cons. 47 à 50 ; n° 2010-45 QPC du 6 octobre 2010, cons. 6 ; rappr. n° 2012-242 QPC du 14 mai 2012, cons. 10.

– des dispositions de l'article L. 224-1 du code de l'environnement fixant une quantité minimale de matériaux en bois dans certaines constructions (n° 2013-317 QPC du 24 mai 2013). Cette QPC avait été initiée par l'industrie cimentière, le Conseil ayant sanctionné l'inadéquation de l'atteinte pour atteindre l'objectif mis en avant[28].
– de dispositions de droit local applicable en Alsace-Moselle (n° 2012-285 QPC du 30 novembre 2012). La QPC portait sur un article qui instituait un régime de corporations obligatoires, auxquelles les artisans sont obligés de s'affilier et de cotiser. Le Conseil a jugé que l'existence d'un tel régime constitue une atteinte injustifiée à la liberté d'entreprendre. Il a particulièrement pris en compte la superposition, en plus de la réglementation professionnelle, du régime d'organisation et de représentation des intérêts de l'artisanat qui résulte de l'immatriculation dans les chambres de métiers.

Quant à la portée de cette décision, précisons toutefois que la protection constitutionnelle de la liberté d'entreprendre n'implique pas que l'existence de corporations soit en elle-même contraire à cette liberté, de sorte qu'il n'y a pas, du point de vue constitutionnel, de prohibition générale et absolue de toutes les corporations.

– Ont été aussi abrogées, au terme d'une lecture très réaliste, des dispositions prévoyant la suspension de fabrication et l'exportation de conditionnement à vocation alimentaire contenant du bisphénol A. En effet, la suspension de la fabrication et de l'exportation décidée par le législateur ne saurait empêcher les sociétés fabricant des produits contenant du BPA dans les pays autres que la France de commercialiser ces produits dans ces pays. Sur ce point, la mesure de suspension ne pouvait être regardée comme ayant une incidence sur la protection de la santé invoquée par le législateur. Dès lors, le Conseil constitutionnel en a déduit qu'en adoptant ces mesures, « *le législateur a apporté à la liberté d'entreprendre des restrictions qui ne sont pas en lien avec l'objectif poursuivi* »[29] ;
– ou encore, plus récemment, les interdictions faites aux conducteurs de taxi de cumuler leur activité avec celle de conducteur de véhicule de

[28] Rappr. n° 2009-599 DC du 29 décembre 2009 ; n° 2013-666 DC du 11 avril 2013, Loi visant à préparer la transition vers un système énergétique sobre et portant diverses dispositions sur la tarification de l'eau et sur les éoliennes

[29] n° 2015-480 QPC du 17 septembre 2015 (Suspension de la fabrication, de l'importation, de l'exportation et de la mise sur le marché de tout conditionnement à vocation alimentaire contenant du bisphénol A)

tourisme, incompatibilités qui n'étaient justifiées ni par les objectifs que le législateur s'est assignés ni par aucun autre motif d'intérêt général[30].

– De même, concernant l'instauration d'un « reporting scal » pays par pays, le Conseil a estimé que l'obligation faite à certaines sociétés de rendre publics des indicateurs économiques et scaux pays par pays est de nature à permettre à l'ensemble des opérateurs qui interviennent sur les marchés où s'exercent ces activités, et en particulier à leurs concurrents, d'identifier des éléments essentiels de leur stratégie industrielle et commerciale. Le Conseil a donc jugé que ces dispositions portaient une atteinte disproportionnée à la liberté d'entreprendre et étaient ainsi contraires à la Constitution[31].

Pour le reste, la protection de la liberté d'entreprendre est souvent liée à une **incompétence négative** du législateur, grief que le Conseil n'hésite pas à soulever d'office. Ainsi, en est-il s'agissant de dispositions qui ne définissaient pas la notion d'entreprise publique au point d'affecter la liberté d'entreprendre[32], ou de dispositions qui confient à une convention collective le soin de fixer des règles qui relèvent en principe de la loi[33].

1.6. Je mentionne simplement la décision très médiatique n° 2014-692 DC du 27 mars 2014, décision relative à la loi visant à reconquérir l'économie réelle dite « Florange ». Cette loi visait à contraindre les entreprises qui ferment des sites industriels rentables à rechercher un repreneur. Une nouvelle procédure avait été mise en place, sous le contrôle du comité d'entreprise et du tribunal de commerce.

Ce dispositif a été partiellement censuré par le Conseil constitutionnel au nom d'une atteinte disproportionnée à la liberté d'entreprendre, eu égard aux contraintes qu'elles feraient peser sur les choix économiques de l'entreprise (notamment relatifs à l'aliénation de certains biens) et sur sa gestion.

A été également condamné le mécanisme de contrôle permettant au tribunal de commerce de juger du caractère sérieux ou non d'une offre de reprise. Pourquoi ? Car il est contraire à la liberté d'entreprendre d'autoriser « *le juge à substituer son appréciation à celle du chef d'entreprise, qui n'est pas en difficulté,*

[30] n° 2015-516 QPC du 15 janvier 2016 (Incompatibilité de l'exercice de l'activité de conducteur de taxi avec celle de conducteur de VTC)

[31] n° 2016-741 DC du 8 décembre 2016, Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite loi « Sapin 2 »

[32] n° 2013-336 QPC du 1er août 2013 *(Participation des salariés aux résultats de l'entreprise dans les entreprises publiques)*

[33] n° 2014-388 QPC du 11 avril 2014 *(Portage salarial)*

pour des choix économiques relatifs à la conduite et au développement de cette entreprise».

Cette décision – dont la teneur me semble pourtant assez classique – a généré de vives réactions, y compris au sein de la communauté juridique. Des critiques assez violentes ont pu être adressées à l'encontre d'une décision jugée comme « l'expression d'une idéologie individualiste et libérale ». Au point de raviver un vieux débat : celui de l'exercice d'un pouvoir politique derrière l'utilisation de principes juridiques… Le contexte de crise attise sans doute cette perception très politique des décisions de justice.

On se contentera de souligner que la liberté de gestion de l'entreprise se trouve ici confirmée, en tant que noyau dur de la liberté constitutionnelle d'entreprendre. Elle implique le pouvoir de licencier, ainsi que celui de pouvoir choisir le repreneur de l'entreprise ou d'une branche de celle-ci.

Cette décision conforte aussi le rôle central de liberté d'entreprendre dans la jurisprudence « sociale » du Conseil constitutionnel. C'est assez logique dans la mesure où, rappelons-le, l'objet même du droit du travail est d'obliger l'employeur à intégrer d'autres logiques et d'autres intérêts que les siens.

1.7. A partir de la portée donnée par le Conseil constitutionnel à cette liberté fondatrice de l'économie de marché, on pourrait considérer que l'orientation de l'économie adoptée par le législateur se trouve potentiellement encadrée ou corrigée par la Constitution telle qu'interprétée par le Conseil.

De façon générale, lorsqu'on lit les décisions constitutionnelles, on constate qu'elles sont fortement inspirées par la doctrine du droit public : rapports de pouvoirs, compétence du législateur et de l'exécutif, ordre public, intérêt général… En revanche, on ne peut manquer d'observer, sans doute avec beaucoup de nuances, qu'elles reflètent moins la doctrine du marché et les valeurs de l'entreprise privée. Mais la décision « Florange » infirme cette tendance de long terme : faudrait-il y voir un infléchissement durable et décidé ? Je n'en suis pas certain.

En toute décision constitutionnelle, comme en toute décision de justice, il y a une part de choix politique (au sens noble du terme), mais je crois qu'on peut tirer la conclusion qu'il n'y a pas de jurisprudence connotée économiquement.

Est-ce que ce diagnostic a vocation à durer ?

On peut le penser car le *self-restraint* du juge constitutionnel est notable en matière de liberté d'entreprendre. Le Conseil constitutionnel s'interdit de substituer son appréciation à celle du législateur quant à la fixation de l'intérêt général[34],

[34] Par ex. n° 2013-318 QPC du 7 juin 2013, Activité de transport public de personnes à motocyclette ou tricycle à moteur

quand bien même il lui arrive de souligner, dans ses commentaires officiels, que « la pertinence économique du motif d'intérêt général poursuivi peut certainement être discutée »[35].

Le Conseil constitutionnel ne s'est jamais reconnu le pouvoir de contrôler les choix économiques ou industriels qui conduisent le législateur à soutenir certains secteurs d'activités. C'est tout à fait significatif lorsqu'il s'agit d'accorder un avantage fiscal, ou une forme d'aide sectorielle. Face à de tels choix de politique économique, le contrôle du Conseil se limite à vérifier trois éléments :

- que le but que s'assigne le législateur présente un caractère d'intérêt général,
- que le champ d'application de la mesure est défini de manière cohérente avec la finalité recherchée,
- et que l'avantage octroyé n'est pas disproportionné au regard du principe d'égalité devant les charges publiques.

La base du contrôle est bien établie : si le principe d'égalité ne fait pas obstacle à ce que le législateur édicte pour des motifs d'intérêt général des mesures d'incitation par l'octroi des avantages fiscaux, c'est à la condition qu'il fixe son appréciation sur des critères objectifs et rationnels en fonction des buts qu'il se propose, et que l'avantage fiscal consenti ne soit pas hors de proportion avec l'effet incitatif attendu[36].

Une récente affaire témoigne de la permanence de cette position, de son enracinement dans l'exercice du contrôle de constitutionnalité. Elle concerne le « crédit impôt collection », réservé aux seules entreprises industrielles (au détriment des entreprises commerciales)[37]. Il ressort implicitement de cette affaire que le choix du législateur de soutenir l'industrie textile plutôt que son commerce ne relève pas du contrôle du juge constitutionnel. Pas davantage que, dans de précédentes décisions, le choix de soutenir la filière du lait plutôt que ses produits de substitution, ou celui d'inciter les particuliers à orienter leur épargne vers les marchés d'instrument financier ou de susciter le développement du marché financier national. Sous la seule réserve, assez mince, de la vérification du caractère d'intérêt général de la finalité recherchée.

Or, la plupart des affaires se règlent ainsi, puisque sous couvert d'une critique de l'avantage fiscal, c'est en réalité sa finalité même qui est souvent remise

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[35] Commentaire sous n° 2011-157 QPC du 5 août 2011, Société SOMODIA (Interdiction du travail le dimanche en AlsaceMoselle)

[36] Décision n° 2007-555 DC du 16 août 2007, Loi en faveur du travail, de l'emploi et du pouvoir d'achat

[37] n° 2016-609 QPC du 27 janvier 2017.

en cause. Autrement dit, c'est le choix fait par le Parlement qui se trouve contesté, dans l'exercice de son libre pouvoir d'appréciation de soutenir une activité économique en particulier plutôt qu'une autre. **Le choix économique fondamental n'appartient pas au Conseil constitutionnel.** Cela fait de lui, si l'on peut dire, un juge économique partiel. Il ne souhaite pas – et il n'est probablement pas souhaitable – qu'il en soit autrement.

Pour autant, il me semble que la QPC introduit une méthode plus dialectique qui, sans forcément bousculer ces présupposés, tend à déplacer le débat vers des réalités économiques.

2. LE DÉPLACEMENT DU CONTENTIEUX CONSTITUTIONNEL VERS LES RÉALITÉS ÉCONOMIQUES

Plusieurs éléments montrent que les acteurs économiques ont désormais prise sur la loi, non plus selon des processus d'influence au moment de son élaboration ou de sa modification, mais par une voie de droit et un processus juridictionnels, dans un espace de discussion organisé, public et médiatisé, dans un rapport de droit et non plus dans un jeu d'influence.

Le cadre procédural dans lequel s'exerce ce contrôle favorise l'émergence d'un contentieux constitutionnel économique, au sens d'un contentieux éveillé à l'économie.

Je n'évoquerai que trois éléments pour justifier cette proposition :

2.1. *Primo*, le Conseil constitutionnel ne peut ignorer cette **densité économique et sociale**. La loi est contrôlée telle qu'appliquée, chargée de sa portée pratique et de son impact économique et social auquel le Conseil ne peut être sourd. Le débat de constitutionnalité se trouve mieux situé de ce point de vue : les valeurs du marché, le poids des réalités économiques, l'impact des politiques économiques sur les individus et les entreprises peuvent alors surgir et peser dans la discussion… cela ouvre tout un champ de réflexion sur la portée économique de certaines décisions, évaluation incontournable désormais dans le cadre de la modulation des effets dans le temps des décisions constitutionnelles. J'ajoute que rien n'exclut que le Conseil recourt à des auditions d'expert du secteur économique pour approfondir l'analyse du contexte d'application. Toute cette dimension de l'instruction est encore à construire dans la pratique du Conseil constitutionnel français.

2.2. *Deusio*, la **position des acteurs économiques** dans le débat de constitutionnalité est considérablement modifiée. Exclus du mécanisme de contrôle préalable, ils jouent un rôle considérable dans le contrôle a posteriori : ils choisissent la question, ils la préparent, ils la formulent, ils déterminent le moment

de la soulever et ils sélectionnent l'affaire à partir de laquelle elle est posée. Ils élaborent aussi une stratégie de plus en plus rôdée en cherchant des censures ciblées ou même parfois des réserves d'interprétation. En somme, la QPC peut ainsi être l'arme d'une contre-politique économique ! Je n'ose pas dire un contre-pouvoir économique…

2.3. *Tertio*, **l'intervention** des personnes ou groupements intéressés par la question est organisée par le règlement de procédure applicable en QPC. Les agents économiques peuvent adresser des mémoires en intervention devant le Conseil constitutionnel, ce qu'ils pouvaient faire de façon plus officieuse dans le contrôle a priori (pratique dites des « portes étroites »). Cette innovation a une portée considérable : une question sur une loi économique intéresse non seulement les parties privées qui la posent, mais aussi des groupes d'opérateurs qui peuvent avoir intérêt à son maintien ou à son abrogation. En pratique, les observations en intervention des tiers à l'occasion d'une QPC transmise au Conseil constitutionnel sont de plus en plus courantes, ce qui témoigne du caractère abstrait et d'intérêt collectif de l'examen que le Conseil opère.

On y relève nombre d'opérateurs économiques, de toutes sortes : sociétés commerciales, organismes de formation, syndicats, chambres des métiers, confédération d'organisations professionnelles, groupement d'entreprises, mutuelles et assurances, fédération d'entreprises du commerce et de transport, entreprises de grande distribution, grandes enseignes, association de professions, etc.

Il convient d'observer que ces acteurs économiques produisent des interventions de plus en plus utiles et mieux dirigées, notamment lorsqu'elles soulèvent des griefs nouveaux au regard de ceux développés par la partie requérante ou le gouvernement.

2.4. Tous ces outils sont autant de modalités d'**insertion des préoccupations économiques dans le procès** constitutionnel et la prise en compte de ces enjeux dans les effets des décisions. Dans ce contexte, qui témoigne d'ailleurs des capacités du contrôle abstrait incident en cette matière, les grandes questions du domaine économique sont mieux débattues au regard des droits constitutionnels, là où les droits fondamentaux européens étaient jusqu'alors les principales références.

Si on peut admettre qu'il n'y a pas de véritable « Constitution économique » en France, l'affirmation et la protection des principes économiques ou à portée économique témoignent que la justice constitutionnelle moderne, nourrie par le rapprochement entre l'Etat et la Société, n'est plus étrangère à l'économie.

La neutralité du juge constitutionnel est-elle tenable ? L'heure est-il venu d'un véritable contentieux constitutionnel économique, pas seulement pour protéger l'ordre public économique, en empruntant peut-être la voie de « l'effecti-

visation » observée dans d'autres systèmes ? Dans l'affirmative, comment le Conseil constitutionnel peut-il se faire juge de principes économiques tout en déclinant, au profit de la décision politique, la responsabilité du choix économique fondamental ?

Cela suppose d'abord que le juge constitutionnel en ait les moyens, notamment en termes d'expertise. Une telle évolution passe aussi sans doute par des techniques d'interprétation plus analytique des dispositions à caractère économique de la Constitution… ce qui donnerait peut-être matière à une « law and economics » à la française. On voit ainsi combien l'étude des libertés économiques est illustrative des points de tension et des défis de l'évolution de l'office du Conseil constitutionnel français.

LE RECOURS INDIVIDUEL ALLEMAND (VERFASSUNGSBESCHWERDE) ET LES RECOURS DIRECTS DANS LES PAYS DE L'EX-YOUGOSLAVIE

CONSTANCE GREWE

1 - Le recours constitutionnel, introduit directement par un individu devant la Cour constitutionnelle, est considéré comme l'un des moyens les plus efficaces pour protéger les droits et libertés des personnes. Cependant, dans le modèle kelsénien de justice constitutionnelle, ce ne sont pas les droits subjectifs individuels qui sont au premier plan mais la protection du droit objectif. Le contrôle de la loi s'effectue de manière abstraite, c'est-à-dire sans référence à une espèce concrète, afin d'assurer le respect de la hiérarchie formelle des normes. Par ce biais, une loi liberticide peut certes être expulsée de l'ordre juridique. Encore faut-il que le juge constitutionnel soit saisi, car traditionnellement le contrôle abstrait des normes ne peut être déclenché que par les plus hautes autorités politiques, représentantes « naturelles » de l'intérêt général.

La consécration d'un recours constitutionnel individuel apparaît alors comme une double dérogation : d'abord parce que la saisine est ouverte aux simples individus, ensuite parce qu'au-delà du droit objectif, il s'agit de protéger des droits subjectifs. C'est la raison pour laquelle, dans la conception juridique traditionnelle, peu de constitutions admettaient ce type de recours et, lorsqu'elles le faisaient, elles l'organisaient comme une voie de droit exceptionnelle et subsidiaire. Le recours constitutionnel allemand, comme d'ailleurs *l'amparo* espagnol, le recours de droit public suisse ou encore le recours individuel devant la Cour européenne des droits de l'homme, correspondaient à cette idée d'une protection spéciale mais exceptionnelle des droits des personnes.

2 – Toutefois, ce paysage juridique classique a subi de profondes évolutions. D'une part, le droit et la pratique du contrôle de constitutionnalité se sont considérablement éloignés du modèle kelsénien. Formulé de manière synthétique, on peut dire qu'on est passé du contrôle de la loi à la protection des droits ou de la protection **du** droit à celle **des** droits. D'autre part, les bouleversements résultant de la dislocation de l'empire soviétique et de la chute du mur de Berlin ont entraîné une diversification et un enrichissement du droit constitutionnel classique. À ce titre, les États de l'ex-Yougoslavie, c'est-à-dire la Bosnie-Herzégovine, la Croatie, la Macédoine, le Monténégro, le Kosovo, la Serbie et la Slovénie, paraissent particulièrement intéressants dans la mesure où, dès avant le démembrement de la Yougoslavie et le changement de leur régime politique, ils avaient

connu un système de justice constitutionnelle assez développé dont le recours constitutionnel direct n'était pas absent.

Au terme de ces évolutions, plusieurs questions se posent : Dans quelle mesure le recours individuel constitue-t-il encore une notion homogène et spécifique, caractérisant à la fois le recours allemand ou plus généralement ouest-européen et celui reconnu dans les constitutions de l'ex-Yougoslavie ? C'est l'examen des aménagements particuliers de ces recours (I) qui permettra de donner un début de réponse à cette question. Il montrera à la fois des convergences et des différences difficiles à évaluer de manière certaine. D'où la nécessité de se demander ensuite si ce recours constitue toujours la protection la plus efficace des droits individuels. Quelle est donc sa fonction principale ? Ce sont donc le rôle et les fonctions de ce recours (II) qu'il s'agit d'envisager dans un second temps afin d'affiner l'appréciation et d'en tirer une conclusion plus éclairée sur la spécificité et l'utilité de cette notion.

I – LES AMÉNAGEMENTS VARIÉS DU RECOURS CONSTITUTIONNEL

Le recours constitutionnel implique d'abord l'accès direct des individus à la Cour constitutionnelle (A). Par ce moyen, la Cour dispose cependant de pouvoirs plus ou moins étendus pour empêcher ou faire cesser les atteintes aux droits fondamentaux individuels (B).

A/ L'accès à la Cour

Traditionnellement, cet accès est conditionné par l'existence d'une violation d'un droit constitutionnel par un acte d'une autorité publique alors que tous les recours disponibles ont été épuisés.

1 – La violation d'un droit constitutionnel …

Conformément à son inspiration originelle, le droit allemand se montre exigeant quant aux conditions d'accès à la Cour. La violation alléguée doit être démontrée de manière précise et concrète afin de convaincre la Cour que le requérant a subi une atteinte actuelle, personnelle et directe dans l'un de ses droits fondamentaux. De plus, le requérant doit avoir épuisé toutes les voies de droit. En dépit de ces conditions, le nombre de recours constitutionnels a littéralement submergé la Cour constitutionnelle. C'est pourquoi une procédure de filtrage, nommée admission, a été instituée. Une section de trois juges peut, si elle est unanime, refuser cette admission sans motivation. La loi sur la Cour constitutionnelle[1] dispose cependant que l'admission est de droit, d'une part, lorsque le re-

[1] Loi sur la Cour constitutionnelle allemande (BVerfGG), § 93, al. 2

cours revêt une importance particulière pour le droit constitutionnel et, d'autre part, lorsque le requérant risque de subir un préjudice grave. Cette disposition témoigne de la double face, subjective et objective, que le recours individuel a acquise au fil du temps et que l'on retrouve également dans les conditions de recevabilité telles que réformées dans le protocole 14 de la Convention européenne des droits de l'homme.

En revanche, le droit constitutionnel yougoslave s'était montré peu formaliste et assez largement ouvert aux recours individuels. Les États successeurs ont tous repris plus ou moins rapidement l'idée d'un recours spécial pour la protection des droits fondamentaux. L'accès à la Cour demeure le plus souvent assez facile sauf en Slovénie où la requête est réputée irrecevable si le préjudice est négligeable ou si elle ne soulève pas une question constitutionnelle sérieuse[2]. Ce filtrage[3] « à l'allemande » est opéré par un panel de trois juges. S'ajoute enfin la subsidiarité du recours, principe qui est cependant assorti de quelques exceptions[4].

2 – …par un acte de la puissance publique

– Sur ce point, le droit allemand s'avère particulièrement généreux : le recours constitutionnel peut être dirigé contre tout acte de la puissance publique. Ainsi il est possible d'introduire un recours contre la loi si celle-ci porte elle-même une atteinte directe et personnelle à un droit fondamental ou à un droit assimilé du requérant, par ex. la loi relative à la collecte et la conservation des données de communication[5]. Toutefois, le plus souvent, le recours est dirigé contre un jugement devenu définitif. Dans ce cas, il doit être introduit dans le délai d'un mois, celui dirigé contre une loi dans le délai d'un an.
– Le droit de l'ancienne Yougoslavie, en revanche, comportait une distinction importante entre actes généraux et actes individuels. Seuls les pre-

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[2] Loi sur Cour constitutionnelle slovène, art. 55a, 55b, publiée en anglais : Constitutional Court Act, Official Gazette 64/07.

[3] *Ibid*., Art. 54 de la loi sur la Cour constitutionnelle slovène.

[4] Concernant le délai raisonnable, cette compétence a été récemment transférée aux juridictions ordinaires en Croatie et en Serbie. Voir S. Baric, The Transformative Role of the Constitutional Court of the Republic of Croatia : From the ex-Yu to the EU, in : W. Sadurski, E. Hodžić (Hrsg.) Working Paper 6/2016, Analitika – Center for Social Research, Sarajevo et T. Papic, V. Deric, The Role of the Constitutional Court of Serbia in the Times of Transition, in: W. Sadurski, E. Hodžić (Hrsg.) Working Paper 2/2016, Analitika – Center for Social Research, Sarajevo.

[5] Plus de 30000 recours ont été formés contre la loi allemande de 2006 que la Cour constitutionnelle a déclarée inconstitutionnelle par un jugement BVerfGE 125, 260 du 2 mars 2010, 1BvR 256/08.

miers pouvaient faire l'objet d'un contrôle de constitutionnalité et seuls les seconds ouvraient l'accès à un recours direct pour violation d'un droit fondamental. Cette tradition survit très clairement en Croatie, en Macédoine[6] et en Slovénie. En Bosnie-Herzégovine, en Serbie et au Monténégro le recours constitutionnel est organisé sous la forme d'un appel devant la Cour constitutionnelle à l'encontre des jugements définitifs (comme en Espagne). Seul le Kosovo a osé ignorer le clivage entre actes généraux et actes individuels en ouvrant le recours constitutionnel à tout acte de la puissance publique, comme en Allemagne.

Le délai d'introduction du recours est court, de 30 à 60 jours, sauf au Kosovo où il est porté à quatre mois. Si la Cour accepte d'examiner la requête, quels sont alors les pouvoirs du juge ?

B/ Les pouvoirs de contrôle des juges constitutionnels

Lorsque le juge constitutionnel allemand statue sur un recours direct, il dispose d'une plénitude de pouvoirs. Il peut donc annuler un acte, casser un jugement et, si nécessaire, évoquer l'inconstitutionnalité de l'acte constituant la base juridique de l'acte attaqué.

La plupart des Cours constitutionnelles ex-yougoslaves, en revanche, voient leur compétence réduite à l'examen de l'acte individuel. De la limitation aux actes individuels il résulte souvent que la Cour ne peut pas examiner la constitutionnalité de la base juridique de l'acte en cause. Concrètement, cela signifie qu'il n'est possible que de se prononcer sur les conditions d'application d'une loi mais pas sur la loi elle-même.

Toutefois, cette limitation de compétence, existant d'ailleurs également en Espagne, peut se voir atténuée ou même compensée de diverses manières. En premier lieu, le contrôle de la base juridique est parfois expressément autorisé par le législateur comme en Slovénie[7] ou pratiqué par la Cour constitutionnelle comme en Croatie et en Serbie. En deuxième lieu, certaines Cours ex-yougoslaves disposent d'une compétence d'auto-saisine[8] leur permettant de se pronon-

[6] Toutefois seuls trois sur 24 droits ouvrent l'accès au recours constitutionnel. Selon l'art. 110 de la Constitution de la Macédoine, ces droits sont la liberté d'expression et de conscience, la liberté de réunion ainsi que l'interdiction des discriminations. Un élargissement de ce recours est prévu mais n'est pas encore adopté ; cf. Le projet de loi et les commentaires de la Commission de Venise, Opinion 779/2014, CDL-AD (2014)026.

[7] Art. 59 Loi sur la Cour constitutionnelle.

[8] En Serbie (art. 42a-3) Loi sur la Cour constitutionnelle), Macédoine (art. 14 Règlement de Procédure de la Cour constitutionnelle) et Croatie (art. 38 Loi sur la Cour constitutionnelle) mais ce droit est rarement utilisé.

cer sur l'acte général, base juridique de l'acte individuel à l'origine de la violation. En troisième lieu, le recours constitutionnel se voit de plus en plus souvent « concurrencé » par une ouverture grandissante du contrôle abstrait voire par une actio popularis. Ainsi le contrôle abstrait est directement accessible aux individus en Slovénie, au Monténégro et en Macédoine, indirectement par le truchement de la « proposition » de contrôle qui subsiste en Serbie et en Croatie[9] et d'une saisine par l'Ombudsman prévue au Kosovo et en Croatie. En conséquence, seule la Cour bosnienne ne dispose d'aucune de ces compétences ; elle peut certes constater l'inconstitutionnalité mais est souvent empêchée de sanctionner celle-ci par une annulation. Il s'agit donc là d'une limite sérieuse à la protection des droits.

Enfin, si la Cour admet le recours, elle annule l'acte irrégulier, le plus souvent un jugement, et, dans ce cas, renvoie ce dernier à la juridiction auteur du jugement pour statuer à nouveau.

En conclusion, on constate donc certaines convergences entre les pays ex-yougoslaves mais une différence assez marquée avec le droit allemand. Dans ces conditions, le recours constitutionnel ne semble pas former une notion homogène et encore moins une catégorie juridique. La variété des actes attaquables et surtout celle des pouvoirs de contrôle du juge lui attribuent des rôles et des fonctions différents dans les systèmes constitutionnels respectifs.

II – RÔLE ET FONCTIONS DU RECOURS DIRECT

Le rôle du recours constitutionnel est certainement important partout où il a été introduit : les données statistiques témoignent de cette convergence (A). Toutefois, il reste à s'interroger sur ses fonctions dans les systèmes constitutionnels et de connaître la part de sa contribution à la protection des droits fondamentaux (B).

A/ Éléments statistiques

Partout, le recours constitutionnel remporte des succès impressionnants justifiant souvent des mesures de filtrage, de multiplication des formations de jugement ou encore de modification des compétences de la Cour. Ainsi en Allemagne, ce recours représente environ 95% des requêtes déposées à la Cour mais dont seulement 1,5 à 2% sont jugées bien fondées.

[9] La distinction entre la requête (request), introduite par les personnes autorisées, et la proposition (proposal), ouverte à tous mais soumise à un examen préalable de la Cour constitutionnelle, remonte au droit constitutionnel yougoslave.

Les chiffres sont semblables dans les pays ex-yougoslaves. En Serbie, où le recours constitutionnel n'a été institué qu'en 2006, il a connu une croissance rapide entre 2008 et 2013 atteignant jusqu'à 11654[10] requêtes par an. Il représente de loin la majorité des affaires soumises à la Cour comme d'ailleurs au Monténégro[11] et en Croatie, où il représente 95,9% des saisines.

Le contentieux constitutionnel slovène dans lequel le recours constitutionnel représente 81,9% est beaucoup plus réduit[12] et, en Macédoine, ce recours ne semble constituer qu'une part modeste du contentieux constitutionnel [13] en raison du faible nombre de droits dont la violation donne accès à la Cour.

En Bosnie-Herzégovine, le recours constitutionnel n'étant pas réservé à la protection des droits fondamentaux peut concerner toute question d'ordre constitutionnel ou conventionnel. La Cour est saisie d'environ 5000 affaires chaque année dont en moyenne 99,81% sont introduites par des particuliers. Enfin, la Cour kosovare, qui ne fonctionne que depuis 2009, s'est prononcée jusqu'en 2016 sur 773 affaires dont 96% sur recours individuel dirigé le plus souvent contre des jugements définitifs[14].

On peut donc constater que le recours constitutionnel remporte des succès impressionnants au point qu'il risque de devenir victime de son succès. Car comment une Cour, totalement surchargée d'affaires, peut-elle protéger les droits fondamentaux de manière efficace ?

B/ Les fonctions du recours constitutionnel et la protection des droits fondamentaux

1 – Pour l'Allemagne, on retiendra qu'en tant que sanction spécifique du respect des droits fondamentaux, le recours constitutionnel s'est révélé d'abord

[10] Une décroissance intervient ensuite en 2014 en raison du transfert de compétence de la Cour constitutionnelle aux juridictions ordinaires pour les litiges relatifs au délai raisonnable des procédures. Par ailleurs, une diversification des formations de jugement a permis à la Cour d'augmenter substantiellement le nombre d'affaires réglées ; voir T. Papic, V. Deric, The Role of the Constitutional Court of Serbia in the Times of Transition, préc.

[11] Le site web, assez pauvre en langue anglaise, ne donne pas d'indication statistique.

[12] De 2007 à 2015, le nombre d'affaires reçues diminue de 4354 à 1224 ; les recours constitutionnels s'élèvent en 2015 à 1003 ; voir les rapports annuels de la Cour.

[13] Le site web est vide en anglais et la bibliographie est ou bien ancienne ou bien imprécise sur ce point.

[14] D. Doli, F. Korenica, A. Rexha, Promising Early Years: The Transformative Role of the Constitutional Court of Kosovo, in: W. Sadurski, E. Hodžić (éd.), Working Paper 4/2016, Analitika – Center for Social Research, Sarajevo, p. 17.

comme témoin de la prééminence de ces derniers. Dirigé plus particulièrement contre des jugements, il s'est ensuite avéré très efficace pour assurer l'uniformité de la jurisprudence et ainsi le rayonnement du droit constitutionnel dans les autres branches du droit. Il remplit donc des fonctions primordiales pour le système entier malgré le faible nombre d'admissions. Ces fonctions, tout en contribuant à la protection des droits fondamentaux, dépassent cette dernière.

Le recours constitutionnel apparaît également comme une voie de droit particulièrement flexible, illustrant l'évolution générale de la justice constitutionnelle de la protection du droit vers la protection des droits. En effet, de nombreuses affaires qui auraient pu ou même dû être décidées par la voie du contrôle abstrait ou du contrôle concret sont parvenues à la Cour constitutionnelle par la voie du recours constitutionnel. C'est particulièrement visible dans la jurisprudence rendue sur les traités de Maastricht[15] et de Lisbonne[16]. Alors qu'au fond, il s'agissait ici de faire juger la conformité de ces traités au droit constitutionnel allemand, objectif relevant plutôt du contrôle de la loi, c'est par des recours individuels que la Cour est saisie. La question est de savoir si cette double face du recours constitutionnel rejoint l'ouverture croissante du contrôle abstrait formant ainsi un pont vers l'Europe de l'Est, en particulier les pays de l'ex-Yougoslavie.

2 – C'est pourtant loin d'être certain. D'une part, en effet, il ne paraît pas évident de gérer simultanément ou de coordonner le recours constitutionnel et un contrôle abstrait ouvert aux individus. Une certaine incohérence risque d'être le prix à payer pour cette juxtaposition. En outre, l'abondance des voies de recours risque de créer des engorgements inextricables et d'exiger des politiques draconiennes de filtrage que les Cours des États concernés ne sont souvent pas en mesure de mettre en place. Par conséquent, il n'est pas évident non plus que cette coexistence de deux voies d'accès des individus à la Cour renforce la protection des droits fondamentaux.

D'autre part, des différences assez sensibles séparent désormais les pays de l'ex-Yougoslavie. On y trouve d'un côté cette juxtaposition du recours constitutionnel et du contrôle abstrait ouvert aux individus et, de l'autre, les situations où seul le recours constitutionnel est ouvert aux individus. Dans cette dernière hypothèse, la fonction de protection des droits semble pouvoir être mieux assurée lorsque le recours constitutionnel peut être dirigé contre tous les actes de la puissance publique (Kosovo) que lorsqu'il est limité à la contestation des jugements (Bosnie-Herzégovine).

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[15] BVerfGE 89, 155 du 12 octobre 1993, 2 BvR 2134, 2159/92.

[16] BVerfGE 123, 267 du 30 juin 2009, 2BvE 2/08.

CONCLUSION

Si l'impact du recours constitutionnel sur chacun des systèmes constitutionnels ici comparés paraît considérable, ne serait-ce que par son importance quantitative, sa contribution à la protection des droits fondamentaux semble beaucoup plus aléatoire, dépendant à la fois de l'indépendance de chaque Cour, de ses compétences et de sa volonté d'en faire son objectif primordial. Ce n'est donc pas l'institution de ce recours qui, par elle-même, pourrait assurer cet objectif. Dès lors, la notion ne possède plus guère de spécificité mais elle reste utile dans l'analyse et la classification des systèmes.

SAME SEX MARRIAGE AND SURROGACY. JUDICIAL ACTIVISM IN ITALY

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1. INTRODUCTION

The Western world, and certainly Europe, is passing through a period of far-reaching change[1] in a large number of areas. There is no doubt that the family and marriage as traditionally understood have been subject to a genuine *cultural revolution*.[2]

There has been heated debate and controversy within institutions, governments, parliaments and civil society at large regarding the issue of "new families" and equal treatment for same-sex unions and marriages.

In an increasingly complex world, contradictions are almost inevitable. Likewise, in a fragmented legal and political landscape, which reflects a fragmented society, the nature and function of law is rapidly changing. Legal rules are becoming progressively greater in number and arise from multiple sources and layers of regulation.

Often the task of dealing with this complexity is left to the judiciary.

In Italy, as already in many other European countries, the assertion of the right to marry and to family life for same-sex couples has arisen in increasingly stark terms before both ordinary and constitutional courts.[3] The ordinary

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[1] See Nicholas Eberstadt, "The Global Flight from the Family," Wall Street Journal, February 21, 2015… 1, Symposium on Religion and Politics. The Future of Marriage and the Family" A Comparative Look at Having and Raising Children", currently available at https://www.bc.edu/content/dam/files/centers/boisi/pdf/S15/Boisi%20Center%20Symposium%20Reading%20Packet%205.pdf

[2] See the Interview with the Archbishop of Dublin, Diarmuid Martin, on the victory of the "yes" campaigners in the Irish same-sex marriage referendum, (may 2015) currently available at http://www.lastampa.it/2015/05/23/vaticaninsider/eng/inquiries-and-interviews/samesex-marriage-the-outcome-of-the-referendum-is-the-result-of-a-cultural-revolution-ZyxngczZ1EVq8m8WPKqCcP/pagina.htm

[3] See the decision of the Portuguese Constitutional Court of 9 July 2009, ruling that the Constitution does not require (nor prevents) recognition of same-sex relationships (Portuguese Constitutional Court, Acórdão no. 359/2009 of 9 July 2009, with a dissent

courts in particular play an active role in providing a legal definition for the developments that have become consolidated within the community, both in terms of the establishment of a couple as well as the manner in which the family dimension is experienced.

By Law no. 76 of 20 May 2016, the Italian Parliament enacted legislation to regulate **civil unions** between persons of the same sex,[4] thereby reforming family law in a manner that is destined to have far-reaching consequences on Italian law and more generally on society as a whole.

The Cirinnà Law – which takes the name of the Senator who sponsored the bill, and has been welcomed by many as an act of civility – resulted from a compromise and thus leaves many unanswered questions. As will be pointed out below, the very term "civil unions", as opposed to "marriage", was born out of compromise. The law sparked off a broad debate concerning a core issue within Italian policymaking and doctrine:[5] the issuing of the growing importance of the judiciary compared to the representative political power of Parliament.

The relationship between judges and the law, which is construed in such a manner as to give less importance to the text of the legislation as compared with the specific facts of the case to be resolved, is particularly delicate in relation to laws for which the intention of the legislature is subjected to the ability of the courts to "adapt" it to the needs of society – especially if that intention is fuzzy as in this case.

It will not be possible within the short space available in this paper to provide an account, even in summary form, of the various legal problems surrounding such a broad and fluid issue.

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of two judges, who favored the idea of a constitutional right to marriage for same-sex couples). On 28 January 2011, instead the French Conseil Constitutionnel held that the ban on same-sex marriage in France was not unconstitutional (Décision n° 2010-92 QPC du 28 janvier 2011, *M.me Corinne et autres*) since, *inter alia*, it did not encroach upon the fundamental right to enjoy family life granted to everyone, regardless of the right to marry.

[4] The law entered into force on 5 June 2016. See law on civil unions and formal co-habitation (Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze) currently available at http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg

[5] The literature in this area is vast. We limit ourselves to noting two recent works by illustrious authors in support of opposing views. See S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale,* Rome, 2009 and G. Valditara, *Giudici e legge*, Rome, 2015. For an overview (in English) of the problems relating the role of the Judiciary in Italy and in other western countries, see L. Pineschi (eds), *General Principles of Law – The role of the Judiciary,* Ius Gentium, Comparative Perspectives on Law and Justice, Vol, 46, Springer, 2015.

This study will therefore be limited to a brief illustration of the position in Italy which has emerged over the last few years along with the role of the courts in the area of civil unions between persons of the sex and the issue of surrogacy; these are two areas that are closely related to each other and which are both directly or indirectly addressed in the Cirinnà law. They will also provide a springboard for several concluding considerations.

2. THE LAW ON SAME SEX CIVIL UNIONS (CIRINNÀ LAW)

It is important to clarify at the outset regarding *civil unions* between persons of the same sex why Italy does not refer to *marriage* between persons of the same sex. This is due to the strong opposition encountered by the draft legislation both in Parliament and on the streets, along with a landmark decision of the Constitutional Court from 2010. In judgment 138 of that year the Court in fact held that, within the Italian system of constitutional law, there is no inseparable link between the concept of marriage and the concept of a family comprised of two people of the opposite sex.[6]

The Constitutional Court held that "all legislation governing the institution of marriage contained in the Civil Code and in special legislation postulates the difference in sex of the married couple against the backdrop of a consolidated concept of marriage dating back thousands of years",[7] which is implemented by Article 29 of the Constitution.[8]

As regards Article 29 of the Constitution, in providing that "The Republic recognises the rights of the family as a natural association founded on marriage", this provision delineates a "two-way relationship" between the concepts referred to in it, whilst also "requiring the legislature to keep family law distinct from other legislation that may be dedicated to any other type of social association, even if it has similar features".[9]

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[6] Also in the judgment no. 170 of 2001 the Constitutional Court has held that the difference in sex of the married couple is an indispensable prerequisites for the existence of a marriage.

A similar point is made by the Court of Cassation, judgments no. 7877 of 2000, no. 1304 of 1990 and no. 1808 of 1976.

[7] See judgment no. 138 of 2010 of the Constitutional Court, Conclusions on points of law, no. 6.

[8] The Court points out that the academic literature reaches the same conclusion, and the majority of it is minded to concluded that any same-sex marriage will be void, even though some commentators speak of invalidity.

[9] See judgment no. 138 of 2010 of the Constitutional Court, The facts of the case, no. 3.

It is the responsibility of the legislative branch to identify the appropriate form of recognition and protection for same-sex unions[10].

In the operative part of the judgment, the Court stressed – after expressly warning the legislature of the need to take action in order to regulate the issue of same-sex unions – in relation to the principle of equality laid down in Article 3(1) of the Constitution that "homosexual unions cannot be regarded as homogeneous with marriage".

The Court consequently classed same-sex unions as one of the social formations protected under Article 2,[11] whilst on the other hand precluding the possibility of applying Article 29 of the Constitution, and that "the necessary and fair protection guaranteed to biological children according to Article 30 of the Italian Constitution does not undermine the constitutional significance attributed to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions".[12]

It need hardly be stressed that this judgment, which has been one of the most widely discussed in recent years, has received highly disparate assessments within the literature concerning both its individual parts and specific assertions contained within it[13] as well as the operative part and the conclusions reached by the Court. This reflects the different ways in which Article 29 of the Constitution is construed. In fact, according to some commentators the constitutional framework incorporates a presumption in favour of marriage and the family.[14]

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[10] It has been expressly acknowledged also by the Court of Cassation that the choice as to whether or not to allow same-sex couples to marry is a matter for legislative discretion expressed through ordinary legislation (see order no. 14329 of 2013).

[11] See judgment no. 138 of 2010 of the Constitutional Court, Conclusions on points of law, no. 8.

[12] See judgment no. 138 of 2010 of the Constitutional Court, Conclusions on points of law, no. 9.

[13] See B.Pezzini A.Lorenzetti (eds), *Unioni e matrimoni same sex dopo la sentenza 138 del 2010: quali prospettive?*,Jovene, Naples, 2011, which also includes papers by a number of authoritative jurists.

For an overview of the problems relating the recognition of same-sex marriage and parental rights for same-sex couples. including a wide-range of decisions by constitutional and international courts, see the recent contribution (in English) by A.Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, Bloomsbury, Oxford and Portland, Oregon, 2017.

[14] M. Bessone, Art. 29, in *Commentario della Costituzione. Rapporti etico-sociali*, G. Branca, Bologna-Roma, 1976, 1.

V. Tondi della Mura, *Famiglia e sussidiarietà, ovvero: dei diritti (sociali) della famiglia,* in M. Gorgoni,(eds), *I modelli familiari tra diritti e servizi,* Jovene, Naples, 2005, 313;

According to others, Article 29 of the Constitution along with the concept of family as described in the Constitution represent "an impossible proposition" which no longer reflects social reality.[15]

Several years later in 2014, the Court once again invited the legislature to take action,[16] which as mentioned above finally enacted the Cirinnà Law in 2016. The intervening period of time was marked by an evident level of judicial activism.

Many years after the 2010 judgment, the ordinary courts once again addressed the Constitutional Court, pointing to the need to open up marriage to persons of the same sex as the exclusion of this right constituted a violation of Articles 2, 3 and 29 of the Constitution. The questions of constitutionality – which were however ruled manifestly unfounded – concerned certain articles of the Civil Code that did not permit persons of the same marriage to marry[17] "insofar as, interpreted systematically, they do not permit persons of homosexual orientation to contract marriage with persons of the same sex".

However, the most striking example of judicial activism is provided by the landmark judgment of the Court of Cassation issued in 2012 in relation to a homosexual couple that had married in the Netherlands. The two men, both of whom were Italian, had married in The Hague in 2012 and had subsequently requested the registration of their marriage certificate at the Municipality of Latina where they were resident. The civil registrar of the Municipality of Latina had refused to register the marriage, after which the couple applied to the courts. Both

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F.Vari, *Profili d'illegittimità costituzionale della legge sulle unioni civili,* Familia, Il diritto della famiglia e delle successioni in Europa, 3/4, May- August, 2016.

[15] See R. Bin, *La famiglia: alla radice di un ossimoro*, in Studium iuris, 2000, 1066.

[16] See judgment no. 170/2014 concerning "forced divorce" following gender reassignment of one of the spouses. The Constitutional Court found that it was for the legislator to ensure that an alternative to marriage was provided, allowing such a couple to avoid the transformation in their situation, from one of maximum legal protection to an absolutely uncertain one. The Constitutional Court went on to state that the legislator had to act promptly to resolve the legal vacuum causing a lack of protection for the couple.

[17] Following (1) order no. 138 of 15 April 2010 and (2) order no. 276 of 22 July 2010, by order no. 4 of 5 January 2011 the Constitutional Court ruled a question of constitutionality manifestly inadmissible and unfounded, which had on this occasion been raised by the Court of Ferrara. In particular, the Court of Ferrara had raised a question of constitutionality which once again impressed upon the Court the need to open up marriage to persons of the same sex on the grounds that the denial of this right constituted a violation not only of Articles 2, 3 and 29 of the Constitution but also of Articles 12 and 16 of the Universal Declaration of Human Rights, Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 7 and 9 of the Charter of Fundamental Rights of the European Union.

the court of first instance and the court of appeal rejected the claim. On the other hand, referring expressly both to the decision of the Constitutional Court as well as a comment made by the Strasbourg Court in the *Schalk and Kopf* judgment,[18] the Court of Cassation held that: as has been held by the Italian Constitutional Court and the ECtHR in Schalk and Kopf decisions, there is no inderogable right to marry for same-sex couples; such a right could only be introduced by the legislature. "Regardless of the intervention by the Parliament in this area"… "the courts, both ordinary and constitutional, can nonetheless intervene to recognise to same-sex partners some of the rights granted to married heterosexual couples, according to the principle of equality". As the ECtHR has held, the sexual heterogeneity of the partners can no longer be considered an essential.

Thus, even though under Italian law same-sex couples could not yet exercise the right to marry, and thus could also not exercise the right to register a marriage contracted abroad, nevertheless in "specific circumstances" the couple has the right to treatment equal to that guaranteed by the law to married heterosexual couples.

The interesting aspect for the purposes of this study is that the Court of Cassation judgment contains a genuine invitation to the ordinary courts to fill the gap in the legislation through subsequent developments of case law.

The Supreme Court expressly invited national judges to intervene to protect specific legal situations of same-sex couples

In this way, the Supreme Court confirmed the role of the judiciary in implementing the prerequisites for the integrated protection of fundamental rights.

In other words, it is clear that, whilst the judgment of the Constitutional Court affords unquestionable and broad recognition to legislative discretion, the Court of Cassation judgment first reiterates the need to guarantee fundamental rights in relation to homosexual unions, and secondly addresses the courts directly in a manner that necessarily establishes a dialogue that is open to subsequent developments within the case law.

After this creative [19] decision of the Court of Cassation, judges have started to display considerable courage, or we can say brazenness, in developing the

[18] See European Court of Human Rights (First Section), Schalk and Kopf v. Austria, no. 30141/04, currently available at https://www.juridice.ro/wp-content/uploads/2017/06/001-99605.pdf

[19] It should be pointed out that this is not the first time that the Court of Cassation has issued creative judgments. In judgment no. 10741 of the 3rd Civil Division of 11 May 2009 on the legal personality of the foetus, the Court clearly asserted "the interpretative role of the courts in relation to the formation of so-called normative case law as an autonomous source of law".

"potential" of the judgement of the Court of Cassation and have established a line of case law on the validity of same sex marriages celebrated abroad.

The first case regarding this matter was that resolved by the order of 3 April 2014 by which the Court of Grosseto ordered the competent public authority to register the marriage the applicants – a male couple – celebrated in New York.

In its order the Court of Grosseto expressly referred to the decision of the Court of Cassation and asserted that the refusal to register a foreign marriage was unlawful.

This order has been followed by many others in which various Italian courts have held that the refusal to register a foreign marriage was unlawful and have ordered the competent state official to enter into the civil registry same-sex marriages celebrated abroad.

In some cases the Italian courts have drawn on Community law where it impinges directly on family law, as occurred in a historic judgment issued by the Court of Reggio Emilia.

In a case which came before the Court of Reggio Emilia, the claimants (a same-sex couple) had not requested the tribunal to recognise their marriage entered into in Spain, but to recognise *their right to family life* in Italy on the grounds that they were related. By an order of 13 February 2012, issued in the light of the EU directives[20] and their transposition into Italian law as well as the EU Charter of Fundamental Rights, the Court of Reggio Emilia ruled that such a marriage was valid for the purposes of obtaining a residence permit in Italy.

Italian judges thus can safely refer to the *obiter dicta* of the Supreme Court, and consider whether certain specific same-sex couples' rights have an EU-law dimension. If so, that link can be used to apply the EU Charter directly in the attempt to instigate an evolutionary trend.

In other words, whether they like it or not, the Italian courts have been expressly called upon to fill a legislative gap.

Returning to the Cirinnà Law it should be pointed out that it was enacted against an extremely turbulent legislative backdrop, following a procedure that was forcibly expedited and inappropriate. The Law contains various ambiguous formulations, which appear to throw into relief the legislature's choice to grant formal recognition to situations of cohabitation, whilst however leaving to the courts the definition of the most problematic aspects of the legislation for the governing majority.

The decision made by Parliament to refrain from clarifying some of the most important aspects of the legislation, thereby "abdicating" its rule-making function and leaving the definition of those aspects to the courts, may be explained by

[20] See directive 2004/38/EC.

the evident attempt to protect the governing majority from excessive tensions in relation to such a complicated issue. This also explains the procedure used to approve the new law. According to authoritative statements within the literature,[21] the procedure violated the procedures enshrined in the Constitution in order to guarantee the powers vested in Parliament, including in particular the role and prerogatives of the opposition. In fact, the draft bill was approved by one of the Houses without having been examined by the competent parliamentary committee, as required under Article 72 of the Constitution.[22] It should also be pointed out that the Law, which was enacted on the initiative of the Government, is comprised of one single article covering the entire area of law, which is made up of 69 paragraphs (sic!) and was only approved after it had been associated with a vote of confidence in both Houses. All of this prevented a serious democratic debate regarding an issue of major social importance and great interest to public opinion. It is also important to note the wide-scale mobilisation and the thousands of people who demonstrated on various occasions on the streets throughout Italy, both in favour of the traditional family and also in favour of the new law.

An evident demonstration of the delicate compromise struck by the Cirinnà law between contrasting political forces is provided by the issue of so-called "step-child adoption", i.e. the adoption of the biological child of a cohabitee. Having been originally provided for in the draft legislation, it was removed following numerous public demonstrations on the basis of an agreement reached with great difficulty between the governing majority and the centre-right opposition, on the grounds that the stepchild adoption provision is a "Trojan horse" that could undermine the prohibition of surrogacy in Italy.

Accordingly, the law on civil unions does *not* formally provide for stepchild adoption. Nevertheless, the ambiguous[23] wording of paragraph 20 appears

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[21] See the interview of Cesare Mirabelli, *former President of the Constitutional Court,* currently available at https://www.avvenire.it/famiglia-e-vita/pagine/il-ddl-cirinn-a-rischio-incostituzionalit-

The procedure followed in order to approve the Cirinnà Law has been critically analysed by F.Vari, *Profili d'illegittimità costituzionale della legge sulle unioni civili,* cit.

[22] According to Article 72 (1) of the Italian Constitution, "Every bill introduced in one of the Houses is, in accordance with its rules, examined by a committee and then by the House itself, which approves it *Article by Article* and with a final vote".

[23] Article 1(20) of the Cirinnà Law excludes the possibility of applying to civil unions the "provisions laid down in the law on adoptions (namely Law no. 184 of 4 May 1983), whilst at the same time asserting that a civil union between persons of the same sex must occur in such a manner that safeguards "the matters provided for and permitted under the applicable law on adoption".

to have been used by the legislature in order to avoid preventing the law on adoption from being interpreted after its entry into force in a manner that allows a cohabitee to adopt his/her partner's child. And in fact, only a few days after the Cirinnà law came into force this possibility was accepted within the creative case law of the Court of Cassation.[24]

3. SURROGACY

The erosion of the role of the law and the autonomy of the courts in the face of the (ambiguous) will of the legislature is even more evident in relation to adoptions by homosexual couples and surrogacy.

In contrast to several European countries, surrogate motherhood in Italy is still strictly prohibited.[25]

This is apparent not only from paragraph 20 of the Cirinnà law but also – extremely clearly – from Law[26] 40/2004, which sets out the rules for assisted reproductive technology (ART).

The law begins with the statement that recourse to ART is allowed only in order to assist in the resolution of reproductive problems arising as *a result of human sterility or infertility*, so as to guarantee the rights of all the persons involved, including the "embryo" (Article 1). After this initial statement, the law lists a long series of prohibitions. In particular, recourse to the assistance of a third party is expressly forbidden. Breaches of the ban are punished by heavy

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[24] The child in question was born abroad to two mothers. See Court of Cassation, 1st Civil Division, judgment no. 12962 of 22 June 2016. The decision is currently available at http://www.foroitaliano.it/in-tema-di-stepchild-adoption-cass-22-giugno-2016-n-12962/

[25] According to leading figures in the LGBT movement and many other politicians, it would enable Italy, as a backward country with deep-seated discrimination, to cast aside a mediaeval mindset, enabling the concept of parental responsibility to be expanded to the couple irrespective of sexual orientation. See "Unioni civili, Cirinnà: "Quasi pronto ddl sulle adozioni gay", currently available at http://www.repubblica.it/politica/2016/02/26/news/unioni_civii_cirinna_-134271079/

According to many, this practice "seriously violates the rights of women and children. It commodifies the female body, maternity and human life, and should be combated in all of its manifestations, and indeed outlawed on international level" See the interview of Elena Centemero, President of the Equality and Non Discrimination Commission Council of Europe currently available at http://www.ilgiornale.it/news/politica/adozioni-gay-centemero-fi-pratica-legata-maternit-surrogata-1356008.html

[26] See the Law 10 February 2004, the Italian Parliament, which was enacted by Parliament after a very long period of consideration.

fines (between 600,000 and 1 million euros) or even imprisonment (3 months to two years).[27]

Despite the ban on surrogacy in the 2004 Law, taking advantage of the loopholes in the Cirinnà law, the Italian courts have begun to allow surrogacy.

In February 2017 an Italian court ruled for the first time that two gay partners should be legally recognised as the fathers of two surrogate children. In a landmark ruling,[28] the Trento Court of Appeal[29] decided that both applicants – a male couple, both Italian - could be officially named as the father – and not just the parent who was biologically related.

The children were born to a surrogate mother in Canada through artificial insemination.

In its decision, the court held that parental relationships in Italy should not be determined only by the biological link. "On the contrary, one must consider the importance of parental responsibility, which manifests itself in the conscious decision to raise and care for the child."

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[27] See Paragraph 6 of Article 12.

According to a decision of the Court of Cassation issued in 2014 in a complex case, a child was removed from parents who had paid a surrogate mother in Ukraine. The couple were charged with fraud and the child was put up for adoption. The Court of Cassation confirmed the overall findings of the Brescia Court of Appeal.

Neither of the two parents was actually a parent of the minor. Thus, even according to Ukrainian law, which provides that at least 50% of the genetic heritage must originate from the commissioning couple, the surrogacy contract was to be considered void. The couple was investigated for interference with civil status and the removal of the child from the applicant couple was "justified" also by the unlawful conduct of the declarants in wilfully seeking to circumvent the Italian legislation.

[28] The ruling was immediately hailed as an important precedent by gay activists and support groups: see the interview of Marilena Grassadonia, President of a gay parents' group, who asserted that litigation "is the only way that we can safeguard our children." See: Marilena Grassadonia, president of gay parents' group, at: http://www.rainews.it/dl/rainews/articoli/storica-decisione-a-Trento-si-asi-genitorialita-coppia-papa-f9f248cc-d177-4a65-afc3-4ae369449230.html

Conversely, spokespeople from various opposition political parties asserted that proposal to allow partners to adopt stepchildren would subvert family values. Surrogate maternity, which has been accepted in this case, highlights the selfishness of adults at the expense of children", who are born orphans. There cannot be two fathers in nature without a mother." according to Lega Nord Secretary Matteo Salvini. See http://www.rainews.it/dl/rainews/articoli/storica-decisione-a-Trento-si-asi-genitorialita-coppia-papa-f9f248cc-d177-4a65-afc3-4ae369449230.html

[29] Order of the Court of Appeal of Trento of 27 February 2017, currently available at http://www.articolo29.it/wp-content/uploads/2017/02/Ordinanza.pdf

The decision by the Trento Court of Appeal gave full validity and effect in Italy to the decision of the Supreme Court of Canada, a country in which children acquire citizenship according to the *jus soli*, ruling "unlawful the refusal by the civil registrar of a municipality in the Trentino region to add the second father to the birth certificate" and recognising the need to safeguard the needs of the child.

A few months after the ruling of the Trento Court of Appeal, a court in Florence[30] recognised the overseas adoptions of children by two same-sex couples in rulings which were hailed by the gay rights community as a new step for Italy.

The Juvenile Court has recognised British and U.S. adoptions as legal in Italy, allowing the Italian citizenship of the parents to be passed on to the children.

Thus, Italian same-sex couples are now petitioning the courts on a case-by-case basis to recognise adoptions granted overseas[31].

Also the judgment of the Milan Court of Appeal[32] is situated within this line of case law, albeit with its own particular circumstances.

As for the other cases, it concerned a homosexual couple which sought to recognise two twins born in California following recourse to in vitro fertilisation and surrogate motherhood. The civil registrar in Milan refused to register the babies' birth certificates, barring the men from registering the boys as their legal children. At first the Court of Milan found against them, although the couple subsequently appealed and the Court of Appeal of Milan *partially* granted their request. As the men had used separate semen samples to inseminate the eggs, the court held that each of them could now register his biological child as his own. However, the babies could not be recognised as the children of the couple, and cannot be considered brothers, even though they share the same genetic mother, who donated both eggs.

Despite these special circumstances – reflecting a situation that arises only in very rare cases as twins are normally conceived at the same time[33]– the judgment is worthy of note: it represents the first occasion that an Italian court has

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[30] See order 7 March 2017, Florence Juvenile Court.

[31] "In the absence of clear laws we hope now that all Italian courts follow the same path". See the interview of Marilena Grassadonia, President of a gay parents' group (above note 28).

[32] Order of the Court of Appeal of Milan of 28 October 2016, currently available at http://www.articolo29.it/wp-content/uploads/2017/01/Corte-app-Milano-trascrizione-nascita-gemelli.pdf

[33] In the world of human embryology, the birth of twins to two different fathers (bi-paternal twins) is not unheard but is very rare. The so called "heteropaternal superfecundation" is rather common in the animal world.

established that a child's best interest comes before [the legality of] how he or she was born. Finally it is also important to note a recent judgment of the Court of Cassation,[34] which allowed the registration in the civil registry of a foreign birth certificate in which two mothers were indicated.

4. CONCLUDING REMARKS

As has been noted on various occasions, it is evident that the Cirinnà law highlights the difficulties and impoverishment of political representation, which has been incapable of mediating between the various demands originating from society and of arriving at a suitable and mutually acceptable solution. The Italian Parliament appears to have abdicated its own responsibilities, in the wake of which the courts have stepped in, leading to decisions that in some cases contrast[35] with one another.

The role assumed by the judiciary, having been called upon to resolve the ambiguity and plug the gaps in the law, is equally evident, and has made possible the birth of "new families" using surrogate mothers, even though this contrasts with the limits laid down under national law.

It has been noted in this regard[36] that, leaving aside the ambiguities contained within it, as far as children born from civil unions are concerned the Cirinnà Law did not in any sense alter the provisions of the Civil Code, including in particular Article 231 according to which the husband is the father of any child conceived or born during the marriage. Thus, it would not appear to be possible to infer any arguments from the need to protect homosexual couples in order to assert that a child may lawfully have two mothers or two fathers. It has also been argued that the case law of the Court of Cassation allowing for surrogate motherhood is unacceptable because the function of the Court of Cassation is to ensure "precise compliance with and the uniform interpretation of

[34] Court of Cassation, Civil Division, judgment of 26 October 2016. Also in other countries the Courts have *de facto* permitted surrogate motherhood even though it is prohibited by law. See for example German Federal Court of Justice (Bundesgerichtshof), judgment of 10 December 2014. See also Spanish Supreme Court (Tribunal Supremo), judgment of 20 October 2016.

[35] See above note 27.

[36] M. Finocchiaro, *Quel "vizio" ricorrente di anticipare le scelte devolute al legislatore*, in Guida al Diritto, Sole24Ore, no. 28, 1 July 2017, p. 59. See also C. Cardia, *L'inumano strappo . Utero in affitto e diritti fondamentali* in Avvenire, 3 June 2017, currently available at https://www.avvenire.it/opinioni/pagine/l-inumano-strappo

the law"[37] and not to intervene in favour of one of the factions that are agitating Parliament and the entire country with the clear intention or pre-empting the future conclusions of the legislature in a certain direction. Drawing momentum from these considerations, some commentators[38] consider that the judgments allowing for two fathers or two mothers, which have been recognised in spite of the fact that a prerequisite for this is the use of a surrogate mother (i.e. a practice not in any way permitted under Italian law), are indicative of *inappropriate lawmaking activity* on the part of the courts.

According to an even more radical thesis, a "de facto subversive operation" is in progress which is "justified by a highly precise political goal: altering the legal order of the state in a 'progressive' manner through interpretation of the law in the light of constitutional principles, thereby achieving change that free elections and parliamentary majorities have been unable to secure".[39]

On the other hand, other commentators[40] consider that, within a democracy, the legislature must presume that the courts will show the optimum adherence to and sensibility towards the requirements of and development within society, with the result that it is only through judgments that depart from the will of the legislature that true equity can be achieved, above all in the area of the protection of individual rights. As regards the problem of the popular or democratic legitimation of the courts, this is claimed to be a "false problem" as the equilibrium and balance between the powers of state is achieved precisely thanks to the parallel presence of two components, which may also enter into conflict".

As has been noted above, the issue concerning the role of the courts within the modern constitutional state and their relationship with the law is an extremely broad one which cannot be discussed within the brief space available in this study. It must be framed within the broader debate concerning the separation of powers[41] and touches upon aspects that are highly complex and detailed, as it must engage with different levels of problem on legislative and constitutional level along with the resulting interpretative entanglement.

There is no doubt that the challenges thrown up by the contemporary age and by the technological progress that characterises it call for further reflection

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[37] See art. 65 of Basic Law on the Judiciary (Legge fondamentale sull'ordinamento giudiziario) of 30 January 1941 no. 12.

[38] M. Finocchiaro, *Quel "vizio" ricorrente di anticipare le scelte devolute al legislatore*, cit.; C. Cardia, *L'inumano strappo*, cit.

[39] G. Valditara, *Gudici e legge,* cit. p.143.

[40] **S**. Cassese, *I tribunali di Babele,* cit. p. 105.

[41] See G. Bognetti, Dividing powers.A theory of the separation of powers, A.Baraggia, P.L.Vanoni (eds), Wolters Kluwers Cedam, 2017, p. 57.

concerning the manner of operation of democracy and the role of the judiciary. It would appear to be relevant in this regard to refer to the writings of an eminent lawyer,[42] who points to an underlying misunderstanding, namely the confusion between principles and values (or rather their mistaken consideration as identical). Whilst principles are objective legal rules, which may also be interpreted broadly, they nonetheless manifest themselves within a text and are constrained within the literal limits of that text, whereas values by contrast are by their very nature subjective and lack any objective normative reference within a legal text. This confusion – along with the resulting overestimating of values and the downplaying of the interpretation of the text – result in extremely significant consequences concerning the role and function of the courts. Indeed, this mistaken interpretation ultimately negates the "classical (and also tragic) figure of the judge confronted with the maxim *dura lex sed lex*, namely the judge who may not personally accept the choice made by the legislature but who is nonetheless required to apply it".

[42] N.Zanon, Pluralismo dei valori e unità del diritto: una rilfessione, in "Quaderni costituzionali", 2015, p. 922.

ANALYSING THE SOLIDARITY PRINCIPLE IN THE EUROPEAN UNION SOCIAL MODEL

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Abstract: This presentation provides a description of the solidarity principle, which had a crucial impact on a variety of the institutional and juridical settings of the European States in the post-WWII constitutions. Also, in the EU legal system, the constitutional value of the solidarity principle seems to influence the different approaches regulating inequality and redistribution, especially with respect to the effect on access to health services, social services, taxation and civil contract as instruments of distributive justice. As a matter of fact, there is an intricate "European Union social model". It is grounded on European constitutional tradition, EU treaties, and EU second level legislation, and it is also founded on the meaning of EU citizenship recognised by the EU Court of Justice, which includes the right of free circulation and the principle of non-discrimination. The solidarity principle is related to many of the historical traditions of the European legal systems (starting with the Summa Theologica, in which Catholic ideas of solidarity are expressed which crossed through the Age of Enlightenment and continued in the formation of the welfare states). It is only possible to talk about the solidarity principle and social rights after the entry into force of the international treaties and the "second generation" of constitutions; particular attention is given to the Lithuanian, Polish, Romanian and Bulgarian Constitutions as case studies.

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1. INTRODUCTION

This paper provides a description of the European social model as grounded on the solidarity principle, which is expressed in European constitutional tradition, EU treaties, and EU second level legislation; the solidarity principle is also founded on the meaning of EU citizenship recognised by the EU Court of Justice, which includes the right of free circulation and the principle of non-discrimination.

The institutionalisation of the legal concept of solidarity in Europe has been a long journey (Stjernø, 2005), starting with the Summa Theologica, in which Catholic ideas of solidarity are expressed which crossed through the Age of Enlightenment (the public duty to realise government interventions in individual social crises for labour or nutritional requirements, or more generally, for personal needs, has Rousseau and Condorcet as its moral fathers) and continued in the welfare state. Based on this historical route, solidarity was viewed as charity or as government interventions made only to assure public control

over private beneficence, as realised during the 19th century by several European countries such as Great Britain in its "Poor Law".

As a matter of fact, only after the international treaties on fundamental rights and the "second generation" of European constitutions has it been possible to properly discuss the solidarity principle and social rights, and only after the post-WWII constitutions has the solidarity principle had a crucial impact on the institutional and juridical settings of the European States.

Today, the constitutions of every EU Member State are inspired by the solidarity principle. Some of their articles are directly or indirectly related to equity, redistribution and solidarity among the citizens. They establish the access to health services and social services, and their taxation systems as instruments for distributive justice.

Social rights have been emblazoned "expressis verbis" mainly in the constitutions of the post-communist Member States.

Also, there is an intricate [1]"European Union social model". It is grounded on European constitutional tradition, EU treaties, and EU second level legislation, and it is also founded on the meaning of EU citizenship recognised by the EU Court of Justice, which includes the right of free circulation and the principle of non-discrimination.

The chapter employs a famous approach called the Legal Origin Theory (La Porta et al., 1998) which traditionally has been used to explain how legal traditions (formerly planned economies) have an impact on the different ways that countries deal with redistributive aims and means.

We will demonstrate that the above-mentioned approach is no longer applicable in light of EU adhesion, not only because of the spill-over effect of the European legal tradition, but also because of the references to the European Court of Human Rights (hereinafter referred to as the ECHR) for the new EU Member States. Today, European constitutions must be in line with the fundamental approach of constitutionalism existing in Europe. (§4)

Starting in 1991 and in a prevision of EU adhesion (as well as the settings of the subset used for our case studies: Poland, Bulgaria, Romania and Lithuania), it can be demonstrated that all the constitutions of the EU Member States are inspired by the solidarity principle: Their constitutional provisions are directly or indirectly related to equity, redistribution and solidarity. They are grounded in access to health services and social services, and in taxation and civil contracts, all of which are used as instruments of distributive justice.

I will attempt to demonstrate that the constitutional norms in the different EU Member States and in the case studies (§5) are now very similar (§3). But in each of the countries, we find different effects on redistribution and solidarity. This is because although it is based on constitutional rules, redistribution is grounded in the second level law in light of EU law and on the governments' choices, e.g. in tax law (§5). In light of the EU legal system and its Charter of Fundamental Rights, one must take in account two dimensions:

a) the relevance of the second level of rights. This not so strange if we pay attention to the traditional approach of the EU Court of Justice to private law. We can say that EU legislation follows a vertical partition, in terms of economic sectors, which abandons the traditional divisions between public and private law (Cafaggi & Watt, 2009) (§7).

b) an intricate "European social model", in which EU citizenship is an "individual fundamental status" grounded on non-discrimination (§7). Thus, the citizen's social dimension, which was formed in the national State and relates directly to the host State's social system, circulates with EU citizenship and the freedom of movement that accompanies it.

After a period of three months[1] and after five years of residence in a host member State, a conflict can arise based on a number of claims: a) the States' right to maintain the integrity of their welfare system; b) to shelter it from claims of 'outsider insiders', c) claims to equal treatment based on EU citizenship law; d) the policy has generated problems that have exceeded the liberalising trend of free market ideology. Internal rights are guaranteed in the EU host country

[1] Residence of Member State citizens is unqualified during first three months.

through EU citizenship; however, this is not adequate to ensure the complete progress of the social dimension of EU citizenship.

Inevitably, a key question has emerged from the Euro zone crisis: What will the impact be on the future of the EU social model?

In any case, with the growing implementation of EU citizenship as a fundamental *status* and of the citizens' freedom of movement, the same harmful effect may occur regarding the level of sustainability of the internal welfare states.

2. CONSTITUTIONAL SOCIAL RIGHTS IN LIGHT OF THE EUROPEAN UNION LEGAL SYSTEM.

Most social rights have already been realised in practice, particularly those relating to workers, which have been concretised in ordinary rules (Salwa, 1990) and have taken EU rules into account; both the horizontal and vertical relationships are aimed at consolidating the EU legal system. The implementation of social rights is based on the level of the constitutional norms, and they not only have a legal meaning, but also a socio-political expression, i.e., that of the State towards the place and the role of work in the new legal structure, and its lack of interest in protecting those who make a living from wage-earning labour. Thus, the omission of social rights from many of the constitutions of Western countries cannot be an argument for marginalising them.

Considering the relevance of the second level of rights, this is not strange if we examine the traditional approach of the EU Court of Justice to private law. These relationships now largely overshadow the *ex*-post remedial, market-based arrangements that are typical of private law to which the EU Court of Justice has assigned the function of guaranteeing the economic order sought by the EU (Colcelli, 2013) regarding e.g. non-contractual liability, anti-competitive business practices, contractual liability, and the recovery of sums paid but not due.

In this context, the EU individual rights are also contributing toward creating and redrawing the traditional instruments of private law, such as the concept of individual legal status. The ECJ stated that citizenship is a fundamental EU individual legal status (CJE, 20.09.2011, C-184/99, Grzelczk, I-6193, 31; CJE, 17.09.2002, C-413/99, Baumbast and R, I-7091, 82). Based on the freedom of circulation, the identification of individuals' legal *status* is regarded as being of direct interest to EU law, and it has a direct effect on the European social model.

3. EU CITIZENSHIP AS A FUNDAMENTAL STATUS AND THE EUROPEAN SOCIAL MODEL

The fundamental individual *status* of EU citizenship is related to individuals' social dimension.

Under EU law, individuals are defined by virtue of their activities, and they are regarded as being of direct interest to EU law: 1. their activities might be involved as a requirement of a certain activity or *status*; 2. they may benefit in some measure from EU law because of a relationship that they enjoy with another person, e.g. a family member (Barrett, 2003).

It has been proven that enlargement has had an impact on the European social model (Collins, 2008), and this impact has always been caused by the imposition of a new social paradigm, which is likened to the European economic constitution.

The European social model is an intricate concept that lacks normative references and has indistinct political formulations. It is situated between two poles: a) its connection with the tradition of social constitutionalism, and b) the claims for modernisation and transformation imposed by the Union itself (Buelga, 2006): The citizens who exercise their right to free circulation in the EU and the connected access to health services and social services in the host EU Member State could be correlated with distributive justice by accepting essential services, thereby compensating for the insufficient resources of original Member State.

In the EU Charter of Fundamental Rights, public services became, more properly, public services of general interest, and thus, they are specifically ranked as "social services", social security and welfare services (Article 14 of the Treaty on the Functioning of the EU). Article 34 (social security and social assistance) recognises the "right of access to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in cases of job loss, according to rules laid down by Community law and national laws and practices."

The rules on services of general interest aim to protect users, persons, consumers or businesses that access the services. Ultimately, in particular, in order to combat social exclusion and poverty, the EU recognises the "right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources" (Article 34, par. 3).

It also prescribes the "right of access to preventive health care and to obtain medical treatment" (Article 35).

Access to social services is not just for the citizens of a particular Member State under the principle of EU solidarity: "Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices" (Article 34, par. 2).

Social rights deeply are engraved on the social position of persons, which has had an impact on the citizens of the Member States post enlargement. Within the domain of EU law, all EU citizens possess the same elements for a joint and fundamental EU *status*. This is also true in the social dimension (*Baumbast v. R*, Racc., I-7091, p. 82).

Indeed, EU citizenship does not rest on the set of laws applicable to the Member States' citizenship. The EU Court of Justice has consistently held that EU citizenship is of no relevance in situations that are solely internal[2], but it has stated that nondiscrimination is the main aim of the EU and is an instrumental right for building the "European Union welfare state" *ex* arts. 2 and 3 TFEU.

If national citizenship is mistakenly used as a grounds for discrimination, this would be divergent from the aims of the Union and the Treaties in any case[3].

In *Lucy Stewart v. Secretary of State for Work and Pensions*[4], the Court clearly explicated:

> "(83) Citizen of Union must be granted, in all Member States, the same treatment in law as accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to the freedom of movement if citizens were to receive, in their own Member State, treatment less favorable than which they would enjoy if they had not availed themselves of opportunities offered by the Treaty in relation to freedom of movement".

4. THE EUROPEAN UNION SECOND LEVEL LAW

The freedom of movement and individual *status* cannot be separated from the social nature that accompanies one's pre-border crossing *status* and his/her settlement in another Member State[5].

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[2] C-184/99, Grzelczk, *Racc*., I-6193, p. 3; C-413/99.

[3] Case C-544/07 Rüffler [2009] ECR I-3389, § 62.

[4] Case C-503/09 Lucy Stewart v. Secretary of State for Work and Pensions, 21 July 2011.

[5] Case C-286/03 Hosse [2006] ECR I-1771, § 37; Joined Cases C-396/05, C-419/05 and C-450/05 Habelt and Others [2007] ECR I-11895, § 63; and Case C-228/07 Petersen [2008] ECR I-6989, § 19).

> "(32) According to settled case-law, a benefit may be regarded as a social security benefit in so far as it's granted to recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and that relates to one of the risks listed in Article 4(1) of Regulation n. 1408/71. (35) EU law must be applied uniformly (.....) In accordance with the principle, concepts of sickness and invalidity benefits in Article 4(1) (a) and (b) of Regulation No 1408/71 are to be determined, for the purpose of applying [the] regulation, not according to the type of national legislation containing provisions which grant those benefits, but in accordance with EU rules which define what those benefits shall consist of[6]".

"In [this] regard, in order to distinguish between different categories of social security benefits, the risk covered by each benefit must also be taken into consideration[7]".

Taking into account the second level legislation, the Preamble to Council Regulation 1612/68 (now Directive 2004/38) stated the fundamental right of workers to improve their standard of living which must be exercised in freedom and dignity (Kostakopoulou, 2014).

This area of analysis has a strong relationship to the workers' right to free movement, which is a typical EU individual right.

The "[f]ree movement of workers – achieving full benefits and potential" (COM(2002)694) (now EU Citizens) has a direct and indirect effect not only on the EU legal *status* of a person and on fundamental and social rights, but also on national family law, contracts law and discrimination in contracts other than employment contracts (i.e. sales and rental contracts, etc.). 'Social' regulation by private law (Joerges & Petersmann, 2006) is correlated with distributive justice and with insufficient resources on the part of people excluded from accepting essential services, the greater bargaining power of the service provider, or the inadequate financial and educational endowment of consumers to be the best measures of their preferences.

The regulation rights usually connected with the *status* of a person — based on the principle of non-discrimination — are a way of establishing or redrawing a new road for the EU social position which is comparable to its economic dimension[8].

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[6] Case 69/79 Jordens-Vosters [1980] ECR 75, § 6.

[7] Case C-406/04 De Cuyper [2006] ECR I-6947, § 27.

[8] Free Movement of Workers in Countries of European Economic Community, Bull. EC 6/61, pp. 5-10, p. 6; European Council (1968) Regulation 1612/68 on Free Movement of Workers OJ Special Edition 475, OJ L257/2.

> The "Court sought to shelter various aspects of workers lives from discrimination on grounds of nationality and to promote their integration into the host society by upholding family reunification rights, granting them the same tax and social advantages of the nationals of the host Member State and to protecting them from differential conditions of employment and from dismissal. It also ensured that their children and their spouses had access to educational opportunities, housing and trade union participation. In other words, both secondary legislation and case law sought to shelter their whole life, that is, both its economic and social dimensions, from disadvantages accompanied, and continuing to accompany, 'alienage'. True, one might argue here that this protective layer of legislation has only one objective, namely, to eliminate restrictions for the exercise of the freedom of movement right in order to promote an ideal single market and guarantee economic productivity. Yet, this argument fails to capture the complexity of free movement in the European Union since it essentially disentangles it from its context and its socio-political aspects" (Kostakopoulou, 2014).

Citizenship *status*, free movement, and individual well-being in regional migration flows in relation to income distribution and the sustainability of the national welfare states.

In a scenario involving the full implementation of EU citizenship *status*, what are the consequences of the freedom of movement on the well-being of individuals and on the sustainability of the national welfare states? To what extent would regional migration flows be driven by fiscal competition, with more generous welfare state contexts attracting low-income immigrants in search of stronger protection? How will this reverberate on inequality and the growth of the origin and destination regions?

I am not addressing the economic arrangement, and thus, I am not able to provide a response. However, the fact is not neutral and indifferent for the EU Court of Justice and EU secondary legislation if they work only from an economic point of view, without taking into account what it means to have "EU citizenship as a fundamental status".

5. THE NATIONAL LEVEL: THE CONSTITUTIONS.

A quite large number of the constitutional articles mentioned above demonstrate that social benefits and social advantages are guaranteed not only by community law, but also by national laws and practice.

At this level of law, i.e. the national level, we must take into consideration that although the constitutional norms in different EU member states are very

similar in the field of the solidarity principle (see e.g. the Italian Constitution, Article 2, which explains that the "Italian Republic recognizes as inviolable the fundamental rights of people, as individual as well as members of groups, and it requires the carrying out of the binding duty of political, economic and social solidarity" or the Polish Constitution, Article 2, which states: "The Republic of Poland is a democratic state governed by law implementing principles of social justice."), in each country, these rules for redistribution and solidarity among citizens have different effects. This is because even though they are based on constitutional rules, the rules on redistribution and inequality are grounded on second level laws and governmental choices, e.g. their taxation systems.

Each constitution assigns a "programme" for economic and social integration, especially of less-privileged groups, in the European states and their internal legal systems.

The legal traditions of some of the new EU Member States (many of the post-communist countries) have influenced their approach to regulating inequality and redistribution with regard to the constitutional solidarity principle, especially concerning the access to health services.

> "Membership [in the] EU involves a complexity of forms of adaptation of national democratic and constitutional systems, but has also witnessed forms of political and legal reaction. The impact of EU accession on national constitutional orders includes a certain thrust towards a liberal or legal-constitutionalist order as well as an endorsement of a distinctive liberal, representative [] democratic model and related to [its] institutional constellation" (Blokker, 2014).

This is connected with the tradition of social constitutionalism, as well as the transformation imposed by the Union.

The spill-over effect differs among various EU Member States and ECHR countries.

In any case, its expression is an osmotic process which characterises the contemporary age of change. The national and supra-national judicial models in Europe are like the old and indifferent "*ius comune*". It cannot have an influence on the "construction" of new constitutions in the post-communist countries, above all those which will become part of the EU as new Members States.

The EU guarantees its European social model and its claims for modernisation in a constitutional manner; on the other hand, it views the enlargement into the post-communist countries in a way that only gives attention to the European economic constitution.

6. LITHUANIA, POLAND, ROMANIA AND BULGARIA: CASE STUDIES.

Some have attempted to categorise the constitutions of states from Central and Eastern Europe. Based on the social and economic rights ingrained in the Constitution,

> "four groups are considered to exist. The Constitutions of Belarus, Czech Republic, Moldova, Poland, Romania, Russia, Slovakia and the Ukraine are to be attributed to the first group. Social rights are broadly regulated (social security, education, health care, rights regarding the protection of work, etc.); The constitutions of Bulgaria, Hungary (still effective in 2012), Macedonia, Montenegro, Serbia and Slovenia in which a catalogue of social rights is limited (right to education, health care, guarantees of protection of work, etc.) are to be attributed to the second group; the constitutions of Estonia, Latvia and Lithuania consolidate the right to social security, education, health care, though a catalogue of social rights is very limited (in the opinion of the author, the Lithuanian Constitution stands in between the first and third groups) and are to be attributed to the third group; the constitutions of Bosnia-Herzegovina and Georgia which include only a few social and economic rights are to be attributed to fourth group" (Sadurski, 2008).

A) In the Italian Constitution, tax law is based on Art. 23: "No obligations of a personal or a financial nature may be imposed on any person except by law." Article 53 fixes the criteria of progression: "Every person shall contribute to public expenditure in accordance with his/her tax-payer capacity. The taxation system shall be based on the criteria of progression."

B) The UK Constitution is described as unwritten. This does not mean the Constitutional rules are not written down, but that they are not all contained in one single document. There is no single source of UK tax law. The basic rules are laid down in Acts of Parliament. It is left to the courts to interpret the Acts, and they provide much of the detail of the tax system. The constitutional documents include documents such as the *Magna Carta* (1297) and the Bill of Rights (1688), which are documents establishing the notion of democracy or equality between persons. The Bill of Rights includes the amusing idea that all persons should enjoy equal rights in taxation.

The courts of the United Kingdom also have the power to declare incompatibility between statutes and rights guaranteed by the ECHR under the 1998 Human Rights Act.

Given the weight of the UK constitutional principle, in the UK, there is "no equity in tax", which is founded on the judgement of Lord Cairns (*Partington v. Attorney-General.*). This is not really a surprise. It is not a principle of equality in taxation:

> "in terms of revenue law, the principle of no taxation without representation means there is no such thing as a common law tax. A subject's obligation to pay tax is derived from [the] words of statute alone. In this regard, therefore, the taxing of statutes is viewed as a special class of statutes and rules of statutory interpretation that have a special importance in relation to them" (Thurony, 2003).

In any case, the above provisions of UK tax legislation have been struck down on the grounds that they breach the obligation of non-discrimination based on Article 14 of ECHR, which require no discrimination. The rights guaranteed by the Convention should be enjoyed (case *McGregor v. UK*).

We will now move on to the cases studies and their constitutional tax norms: Poland's Constitution Art. 84 states: "Everyone shall comply with his responsibilities and public duties, including payment of taxes, as specified by statute". Article 127 of Lithuania's Constitution mandates that "(2) State budget revenue shall be raised from taxes, compulsory payments, levies, income from State property and or income. (3) Taxes, other payments to budgets, and levies shall be established by the laws of the Republic of Lithuania".

Article 56 of Romania's Constitution states: "(1) Citizens are under obligation to contribute to public expenditure, by taxes and duties. (2) The legal taxation system must ensure a fair distribution of tax burden. (3) Any other dues shall be prohibited, except those determined by law, under exceptional circumstances." Article 60 of Bulgaria's Constitution further provides: "(1) Citizens shall pay taxes and duties established by law proportionately to their income and property. (2) Any tax concession or surtax shall be established by law". The two provisions are very similar.

With all this in mind, it is not difficult to understand why the Copenhagen European Council (1993) confirmed the legitimacy of Central and Eastern European applications for membership. This marked the start of one of the most ambitious projects in the EU's history. In 1997, in Amsterdam, the European Council called for accession negotiations:

> "As far as taxation is concerned, EU acquis mainly covers indirect taxation, in particular Value Added Tax (VAT) and excise duties regimes.

> In case of direct taxation, acquis is limited to legislation on corporate taxation and capital duty. For the most part, candidate countries have an indirect taxation regime close to EU's (...). In their negotiating positions, most candidate countries have declared they accept and will apply principles of the Code of Conduct for business taxation".

Fiscal competition, which is governed by second level rules, could drive regional migration flows to more generous welfare states, attracting low-income immigrants in search of stronger protection, with a presumable reverberation on inequality and growth in the origin and destination regions.

I) In the Lithuanian Constitution, the interference of the ECHR was more evident than in the legal systems of the other new Member States. As a matter of fact, during 1992, the Constitution of the Republic of Lithuania afforded a fixed catalogue of social rights, which, to a certain extent, was monitored by the Constitutional Court.

The Constitutional Court was formed and began its activities in 1993. The doctrine and jurisprudence of the Lithuanian Constitutional Court on social rights are interpreted not just as the positive duties of the State, but also of society, such as self-obligations. In any case, the Constitutional Court protects a person's individual rights, for which judicial protection and claims are to be guaranteed. This means the solidarity approach and "*deriving*" of social rights are *inter alia* established through the social functions of the state. This kind of interpretive approach is basically influenced by international law, more particularly the jurisprudence of the ECHR, due to the fact that the procedures and their implementation must be interpreted through ordinary law and supported by constitutional jurisprudence.

The Constitutional Court promoted the position (Žilys, 1998) that the "social orientation of [the] state is reflected in various provisions of the Constitution"[9], while analysing the development of the doctrine of social rights. In any case, since 2002, the Constitutional Court's jurisprudence has continued to develop doctrine on the limitation of social rights during an economic crisis (called the Russian crisis (1999-2002)).

The Constitutional Court noted that a socially oriented state is under a constitutional obligation, and it must undertake the burden of fulfilling certain assurances. According to Article 18: (1) Human rights and freedoms shall be innate (...); Article 21 (1) a human being shall be inviolable. (2) the dignity of

[9] Lithuania Constitutional Court rulings of 5 March 2004 and 6 February 2012.

human beings shall be protected by law. (...); Article 39 (1) The State shall take care of families that raise and bring up children at home, and shall render them support according to the procedures established by law. (2) the law shall provide to working mothers a paid leave before and after childbirth as well as favourable working conditions and or concessions. (...); Article 41(...) (2) Education at State and municipal schools of general education, vocational schools and schools of further education shall be free of charge. (3) Higher education shall be accessible to everyone according to his individual abilities. Citizens who are good at their studies shall be guaranteed education at State schools of higher education free of charge. Article 46 (1) Lithuania's economy shall be based on the right of private ownership, freedom of individual economic activity and initiatives. (2) The State shall support economic efforts and initiative that are useful to society. (3) The State shall regulate economic activity so it serves the general welfare of the Nation. (4) Law shall prohibit monopolisation of production and the market and shall protect freedom of fair competition. (5) The State shall defend the interests of the consumer; Article 48 (1) Each human being may freely choose a job or business, and shall have the right to have proper, safe and healthy conditions at work, to receive fair pay for work and social security in the event of unemployment.(...). Article 49 states: (1) each working human being shall have the right to rest and leisure as well as to an annual paid leave. (2) The length of working time shall be established by law; Article 50 (1) Trade unions shall be freely established and shall function independently. They shall defend professional, economic and social rights and interests of employees. Article 51 (1). While defending their economic and social interests, employees shall have the right to strike.(...); Article 52 (1) The State shall guarantee its citizens the right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and or in cases provided for by law(...); Article 53 (1) The State shall take care of people's health and shall guarantee medical aid and services for people in the event of sickness.

The solidarity principles that are expressed in the Constitution of the Republic of Lithuania also include the right to receive an old-age pension: According to the ruling of February 6, 2012, state pensions which are not directly named in the Constitution differ in their nature and character from state social insurance pensions: They are awarded to persons for their service or merits to the State of Lithuania, and they are paid from the State budget; the recipients of these pensions are not linked with social insurance pension contributions of an established size, but with a corresponding status of the person (the service, merits or circumstances upon which the awarding of the state pension depends).

On June 11, 2010, the Seimas (Lithuania's parliament) approved a series of amendments to the Labour Code aimed at encouraging job creation via more flexible industrial relations (Clauwaert & Schömann, 2011)[10].

II) The new Polish Constitution was adopted on April 2, 1997, by the Polish National Assembly, and it was approved by the Polish people in a referendum on May 25, 1997. It extended the protection of human rights.

The new Polish Constitution was one of the last constitutions to be adopted in Central and Eastern Europe since the start of the political and socio-economic transformations of the post-communist era, despite its protection of human rights and in light of the rights and freedoms in its Constitution.

Of specific importance in the Polish context was a dispute closely related to the constitutionalisation of non-economic and social rights that approach "third-generation rights" (i.e. the right to a clean and healthy environment, and limitations on rights and freedoms).

The new Polish Constitution is unusually long when compared to other post-communist constitutions, but all the political parties agreed upon the need to protect human rights (Spiewak, 1997).

The protection of economic, social, and cultural rights is effectively enshrined in Article 2 of the Polish Constitution, as discussed earlier, which ordains the Republic of Poland as "a democratic state governed by law implementing principles of social justice", and according to its Preamble (point n.16) "paying respect to... [*inter alia*] the obligation of solidarity with others (....)". The Preamble also through, points 12, 13, and 16, recalls the past failures, and affirms a "new commitment to the principles solidarity." Mindful of bitter experiences of times when fundamental freedoms and human rights were violated in our Fatherland, Desiring to guarantee rights of citizens for all time and to ensure diligence and efficiency in work of public institutions, ...We call upon all those who will apply this Constitution for good of the Third Republic, and do so paying respect to the inherent dignity of the person, his (other) right to freedom, obligation of solidarity , and respect for these principles as the unshakable foundation of the Republic of Poland". In any case, Article 2 states: "The Republic of Poland is a democratic state governed by law implementing principles of social justice."

[10] Clauwaert, S., & Schömann, I. (2011). *The crisis and national labour law reforms: a mapping exercise.* Country report: Lithuania, p.3: "Commission recommended "to enhance labour market flexibility by amending labour legislation to make it more flexible and to allow better use of fixed-term contracts."

> "This simple but none the less powerful statement compasses in essence the reason for including human rights in the constitution of a democratic state, namely to protect individuals against excesses of government by ensuring actions of the latter are in accordance with law and in pursuit of social justice, which can be identified with the whole panoply of human right guarantees, but particularly economic and social rights" (Cholewinski, 1998).

The concept of social justice was defined by the Rapporteur during the Constitutional Commission of the National Assembly, Sejm Deputy Marek Mazurkiewicz (SLD), Third Session of the National Assembly as an obligation for the authorities of the State of Poland to adopt a limited form of social interventionism, with the aim of creating equal chances for citizens with reference to their lives and social aspirations.

In chapter II of the Polish Constitution, Article 30 concerns the source of rights and freedoms, declaring that "[t]he natural and inalienable dignity of human beings constitutes the source of freedoms and rights of man and citizen. It's inviolable and its respect and protection is an obligation of public authorities".

The principle of equality is addressed in Articles 32 and 33 of the Constitution, especially Article 33(1): "men and women in the Republic of Poland have equal rights in family, political, social and economic life."

This is established in its first provision, which asserts: "[P]ersons are equal before law. All persons have the right to equal treatment by public authorities". Although it is quite perplexing, the right to social security may be restricted to Polish citizens. In addition, the complete enjoyment of the rights to health, education, and housing may be limited to Polish citizens. In any case, they may also benefit the most from the economic and social rights of the International Covenant on Economic, Social and Cultural Rights.

This may be an approach that is at odds with the universality of these rights, according to which they are granted to everyone (Cholewinski, 1998).

"The right to work," as addressed in Article 65(5), is subsumed in the state as a progressive obligation aimed at "full, productive employment by implementing programs to combat unemployment...as well as public works and economic intervention." Only the "freedom to choose and to pursue an occupation and to choose a place of work" in Article 65(1) is recognised explicitly in this manner.

Articles 68 and 70 of Poland's Constitution grant a right to "everyone" to the protection of health and education, "equal access to health care services, financed from public funds", and in Article 68(2), "universal and equal access to education" must be guaranteed by the public authorities to the citizens.

There is a problem regarding the compatibility of this provision with the EU's individual legal status of EU citizens. In any case, the same Article 68(2) reads: "Equal access to health care services, financed from public funds, shall be assured by public authorities to citizens, irrespective of their material situation. The conditions for, and the scope of the provision of services shall be established by law."

In Article 75(1), public authorities are under an obligation to "pursue policies conducive to satisfying the housing needs of citizens." Originally, this article simply assured equal access to "basic rights, as well as economic, social, and cultural rights".

We will reflect on some of the references (but we are talking about the Constitution of 1997, not about the Constitution of 1980) and supports that safeguard the so-called "third-generation rights".

These rights are named and present in the new Constitution, despite the absence of the general approval of academic scholars regarding their political meaning[11]. In my opinion, a Constitution that was born in 1997 in a country that sought to become a candidate for the EU could not have contained a direct reference to a human right to a clean and healthy environment. Article 75 and Article 74 begin with a broader declaration: "Public authorities shall pursue policies ensuring the ecological safety of current and future generations". Article 74(2) underlines the "protection of the environment shall be the duty of public authorities". Article 74(3) ensures that it is the right of everyone "to be informed of the quality of the environment and its protection". The public authorities must support the activities of citizens that protect and improve the quality of the environment (Article 74(4)). This kind of approach, which is in accordance with the ERCH, is now common: e.g. Art. 34 Cost. Italy; art. 24 of Const. Spain; art. 23 Cost. Netherlands.

These factors include the traditions of state interventions in the economy (Salwa, 1990); the presence of such rights in new constitutions such as Poland's is inevitable. The new Polish Constitution, and many of the new Western constitutions, such as the Spanish Constitution of December 27, 1978, have a substantial concentration on this issue (Salwa, 1990). In any case, Poland's ratification of the international instruments brings with it an acceptance of the ideas concerning these new universal rights.

[11] Exchange of views between Prof. Herman Schwartz, supporting the inclusion of such rights, and Prof. Cass Sunstein, an advocate of the contrary position. Schwartz, H. (1995). Do economic and social rights belong in a constitution. *American University Journal of International Law & Policy, 10*, 1233.

III) The phenomenon of reciprocal influence among the legal systems mentioned above also means that the Constitution of Romania[12] contains primary and relevant references that are amenable to the historical and philosophical concept of solidarity. In the Romanian case, some important populist ideas emerge. They may strengthen the former traditions of 'constitutional nationalism' which were important during and after the 1990s. In any case, the "democratic promise of 1989 largely lost out to a technocratic and top-down view of judicial control of politics – a state of affairs reinforced by EU accession" (Blokker, 2013).

Article 1, 3 co. of the Constitution of Romania declares that it is a State based on the principle of active welfare ("Romania is a democratic and social state"), similar to Article 1 of the French Constitution of 1958 and Article 20, 1 co., Grundgesetz Aleman. Regarding the topic of solidarity, the Constitution of Romania places itself in the same tradition as many other European constitutions: In 1946, the Preamble of the French Constitution stated: "*La Nation assure à l'individu et à la famille les conditions nécessaires à leur développement*" (point n. 10); similarly, Article 2, 1 co., of the Grundgesetz states: "*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit*". The Spanish Constitution assigns to the public power the duties of the promotion of "*Las condiciones favorables para el progreso social y económico y para una distribución de la renta regional y personal más equitativa, en el marco de una política de estabilidad económica. De manera especial, realizarán una política orientada al pleno empleo*" (Article 40, 1° co., Cost. Espana). Also, the Constitution of Romania gives particular attention to guaranteeing social assistance in Articles 34 and 35: "Article 34 states: (1) The right to the protection of health is guaranteed. (2) The State shall be bound to take measures to ensure public hygiene and health. (3) The organisation of medical care and of a social security system in case of sickness, accidents, maternity and recovery, the control over the exercise of medical professionals and paramedical activities, as well as other measures to protect the physical and mental health of a person shall be established according to law". According to Article 35: "(1) The State shall acknowledge the right of every person to a healthy, well preserved and balanced environment. (2) The State shall provide

[12] Amended and completed by Law No. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003, republished by the Legislative Council on the grounds of article 152 of the Constitution, with updated denominations and renumbered texts (article 152 became, in republished form, article 156), in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003.

legislative framework for the exercise of such a right. (3) Natural and legal entities shall be bound to protect and improve the environment." These provisions are similar to those in the Italian Constitution Article 32, 2 co. or Article 12, 2 co. Cost. Switzerland.

Article 46 of the Constitution of Romania establishes an obligation to public health, education, training and social integration of people with disabilities, similar to Article 21 of the Constitution of Greece or Article 71 of the Constitution of Portugal. Article 45 of the Romanian Constitution states that abandoned children have the right to the protection of the state and society.

Concerning the promotion of access to culture, Article 32 of the Constitution of Romania states: (1) the right to education is provided by compulsory general education, by education in high schools and vocational schools, by higher education, as well as other forms of instruction and postgraduate improvement. (...) (3) the right of persons belonging to national minorities to learn (...), and their right to be educated in this language are guaranteed; ways to exercise these rights shall be regulated by law. (4) State education shall be free, according to law. The State shall grant social scholarships to children or young people coming from disadvantaged families and to those institutionalized, as stipulated by law. (5) Education at all levels shall take place in state, private, or confessional institutions, according to law. (6) autonomy of Universities is guaranteed.(...)

The democratisation of countries in Central and Eastern Europe and also the concrete actuation of the principle of solidarity have been guarded by the constitutions and the interpretations of the constitutional courts. The Romanian Constitutional Court gained competences only in 2003 after the review of international treaties and other agreements and the mediation of inter-institutional conflicts.

Bulgaria adopted a similar approach to solidarity in its last Constitution adopted on July 12, 1991. In its application for membership in the EU, Bulgaria underlined the principles of solidarity within its latest Constitution according to the Opinion of the Commission. As a result of the Copenhagen decision, applications for EU membership were received from Hungary and Poland in 1994, and Bulgaria, Estonia Latvia, Lithuania, Romania and the Slovak Republic in 1995. These applications had been aided by support provided to them since the collapse of communism, most notably through European agreements which enabled them to participate in the economic, political, and trading aspects of European integration (Blair, 2005).

The Opinion of the Commission affirmed that the right to subsistence and social security was included in the Bulgarian Constitution. The freedom of as-

sociation is recognised and respected in practice. The Labour Code adopted in 1992 recognises the right to strike, but prohibits it in bodies providing essential services to the population. In the beginning, strikes for political purposes were prohibited, but the Constitutional Court criticised this provision in September 1996. The government in Bulgaria no longer imposes obstacles to the exercise of the right to strike.

Bulgaria has been a member of the Council of Europe since 1992, and it ratified the ECHR and its Additional Protocols Nos. 1, 2, and 11 in September 1992. It also grants individuals the right to apply to the EU court if they feel the rights which they possess by virtue of the Convention are being violated. Bulgaria has adopted a number of internal regulations to ensure compliance with human rights and minority rights. This is also assured by the application of certain international conventions which constitute part of the EU *acquis*.

At the moment, Article 4 states: "(1) (...). (2) The Republic of Bulgaria shall guarantee life, dignity, and the rights of the individual, and shall create conditions conducive to the free development of the individual and civil society." Article 6 states: "(1) All persons are born free and equal in dignity and rights. (2) All citizens shall be equal before the law. There shall be no privileges or restriction of rights on grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status, or property status".

In general, during the 19th century, the Theory of State (Allgemeine Staatslehre) tried to identify a very small number of state purposes (Staatszwecke) that were presumably immutable because of the "nature" of the concept of the "state" and were necessary features of every state (e.g., security, welfare); however, contemporary constitutionalism typically relies on a large number of diverse goals specified within the constitution. These goals are legally binding, but only indeterminately, as guidelines for the interpretation of more specific rights, duties, and organisational precepts within the constitution. They are usually mentioned among the foundational provisions at the beginning of a constitutional document: According to Article 51(1): "Citizens shall have the right to social security and social assistance. (2) The State shall provide social security for the temporarily unemployed in accordance with conditions and procedures established by law. (3) The elderly without relatives who are unable to support themselves, as well as invalids and the socially weak shall receive special protection from the State and society". Article 52 (1) states: "Citizens shall have the right to medical insurance (...). (2) Medical care shall be financed from the state budget, by employers, through private and collective health-insurance schemes (...). (3) The State shall protect the health of all citizens and shall promote the

development of sports and tourism. (...) (5) The State shall exercise control over all medical facilities (...)".

The above-mentioned approach is also adopted in Article 31 of the Charter of Fundamental Rights and the Czech Republic Constitution. Article 22 of the Aleman Constitution provides that the State will ensure the health of the people (1 co.), and the Spanish Constitution recognises the right to the protection of health (Article 43, 1st co.).

7. *INDIVIDUALISATION* AS A TREND IN THE EUROPEAN CONSTITUTIONS

This paper does not analyse whether "constitutional social rights" have been implemented in ordinary law. We all understand the preference for redistribution and solidarity, but the real reference must be to the second level legislation, which concretises the realised redistribution and the welfare of the state.

Nevertheless, the main point is that, according to the national level of law and competences, in the case of the free circulation of EU citizens, after a period of three months or five years of residence in a host Member State, a conflict can arise based on a number of claims, namely: a) the states' right to maintain the integrity of their welfare systems, and b) claims to equal treatment according to the EU citizenship rules.

Therefore, fiscal competition, for example, could drive regional migration flows towards more generous welfare states, which attract low-income immigrants in search of stronger protection, leading to possible consequences in the levels of inequality and development of the origin and the destination regions.

Thus, if the constitutional value of the solidarity principle influences the different approaches regulating inequality and redistribution at the EU level due to the right of free circulation, at the same time, the contraction of the "European social model" is a challenging task, because of the lack of normative references and political formulations.

The balance is to be found in the tradition of modern constitutionalism and in the claims for modernisation and transformation imposed by the European Union itself.

Modern constitutions ensure dignity, freedom and autonomy to persons to enable them to achieve their goals, i.e., they offer complete protection to individuals. The value of the constitution is the binding protection of the individual. This protection must be established when judges apply constitutional rules that concretise and conform to the objectives pursued by an anthropocentric view of

modern constitutionalism. Thus, the fundamental guardians of the European Union social model - in light of the "solidarity principle" - are the Constitutional Courts, but also - in the European multilevel juridical approach - the EU Court of Justice and the Strasburg Court. Constitutional rights may have effects because the anthropocentric approach adopting the full respect for human dignity is a primary trend in constitutional interpretation in the European Union States. Human dignity is the source of the fundamental rights in both written and unwritten constitutions.

The fundamental guardians of the constitutional solidarity principle are the Constitutional Courts, the EU Court of Justice and the ECHR (§4) in the European multilevel juridical approach. Constitutional social rights have been considered in diverse ways. There has always been doubt about whether or not it is possible to directly apply constitutional rules. Social rights were/are often considered as having only a programmatic nature or as political assurances. At the end of the 20th century, and the beginning of the 21st century, the significance of solidarity expressed in the law and in social rights had no affect even when it was recognised, due to its generic and non-technical formulation (Crisafulli, 1952).

Constitutional rights may have horizontal effects because *individualisation* is one of the primary trends in the constitutional law of the European States (Arnold, 2003a).

An anthropocentric approach recognising the full respect for human dignity is an essential basis for the defence of fundamental rights. To ensure their safety, two requirements must be met: They must be largely complete and functionally efficient. There is one requirement that is based on the fundamental rights concept which is represented in contemporary societies: the obligation for the State and the society and its values to be connected in light of the supreme value of human dignity.

Human dignity is the source of fundamental rights in both written and unwritten constitutions (common law).

Modern constitutions ensure dignity, freedom and autonomy to persons to enable them to achieve their goals: They offer complete protection to individuals. The value of the constitutions is the non-binding protection of the individual (Arnold, 2003b).

Whether a modern constitution does or does not include rights (including social rights) that guarantee complete protection to individuals in relation to the "new" dangers that threaten individual freedom, this protection must be qualified when judges apply constitutional rules to concretise and conform to the objectives pursued by an anthropocentric view of modern constitutionalism.

Within the interstices of the rules, the constitutional courts (Arnold, 2013), including those in the post-communist countries of the EU Member States, continue to provide interpretations aimed at ensuring the complete protection of the individual. In the EU Member States that are post-communist countries, the importance of the constitutional courts must be highlighted in light of the multilevel approach of the "European" judicial model.

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THE ROLE OF CONSTITUTIONAL JUSTICE IN THE DEVELOPMENT OF ELECTORAL RIGHTS: THE SEARCH FOR BALANCE BETWEEN INDIVIDUAL RIGHTS AND PUBLIC INTEREST[1]

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INTRODUCTION

Recent negative electoral practices experienced by states encourage to seek for more fair and credible elections or other ways for improving the implementation of electoral rights (for example, by extending voting rights following the case law of the European Court of Human Rights) – the right to vote and the right to be elected (or 'active' and 'passive' electoral rights, or voting and candidacy rights), which are important elements in the integral and interrelated system of human rights entrenched in democratic states under the rule of law. In this context it is important to take into account the general trend that constitutional courts throughout the world have become more and more actively engaged in evaluating the design of democratic institutions and process[2].

Certainly, in a democracy a judge of constitutional court while fulfilling his mission to protect constitution and democracy, uses the means of interpretation, balancing and weighing of constitutional values; by doing this he searches for and identifies a proper balance between conflicting values[3]. The proportionality test is a common and shared practice among European constitutional courts and around the world – a seemingly common methodology for evaluating many

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[2] DURANTI, F. Constitutional Dialogues on Electoral Law. Comparative Law Review, 2015, vol. VI, no. 1. Available at <https://ssrn.com/abstract=2734026>. ***In*** Pildes, R. Elections, ***In:*** Rosenfeld, M., Sajó A. (eds.). The Oxford Handbook of Comparative Constitutional Law, Oxford: Oxford University Press, 2012, p. 530.

[3] BARAK, A. Teisėjo vaidmuo demokratinėje valstybėje. Konstitucinė jurisprudencija, 2006, Nr. 1 (sausis-kovas), p. 301.

constitutional claims[4] in concrete situations, including cases related to limitation of individual rights, among them the electoral rights, which requires to identify the balance between these rights and public interest. These instruments of constitutional review – tests of balancing and proportionality[5] – when there is a close relationship between the notions proportionality and those of balancing and equilibrium (when the test of proportionality is grounded on the balancing, i. e. the search for equilibrium between competing interests), are frequently applied by the Constitutional Court of the Republic of Lithuania (hereinafter – the Constitutional Court or the Court) as well as by other constitutional courts. Their frequent and ordinary application is a good reason to deal with them in this article with the aim to share the relevant experience. Moreover, the application of these instruments is frequently researched in various monographs (for example, R. A. Alexy, A. Barak, J. Christoffersen, F. Urbina) and other international or national publications of the smaller volume; however, it is most often addressed in the context of various human rights (including the jurisprudence of the European Court of Human Rights[6]) than concentrating solely on electoral law.

This article deals with the wide case-law of the Constitutional Court of the Republic of Lithuania on electoral law[7], which involves three issues related to the topic constitutional justice in developing individual rights. They can be described as the problem of finding a balance between individual rights and public interest in ensuring the principle of equal elections, the fairness and transparency of the electoral process, and the universal elections with justifiable restrictions on the passive electoral rights. In these cases the Court had to cope with the balancing of different constitutional values. The Court had to decide which

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[4] DURANTI, F. Constitutional Dialogues on Electoral Law. Available at <https://ssrn.com/abstract=2734026>. *In***:** Jackson, V.C. Constitutional Law in an Age of Proportionality, in Yale Law Journal, Vol. 124, 2015, p. 3094.

[5] In this context in scientific literature they are often discussed in tandem; they resemble each other in important aspects. However, it is acknowledged that balancing has never attained the status of an established doctrine in the US constitutional law in the same way that proportionality has in European constitutional law. See: COHEN-ELIYA, M., PORAT, I. American Balancing and German Proportionality: the Historical Origins. *International Journal of Constitutional Law*, Volume 8, Issue 2, 1 April 2010 or available at <https://academic.oup.com/icon/article/8/2/263/69999>.

[6] The rights provided by Arts 8-11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Art. 1 of the First Protocol thereto are in particular related with the application of the test of proportionality.

[7] In this article the case-law of the Court on referendums will not be addressed as it could be the issue for separate consideration.

of the colliding constitutional values would be denied if not defended, or could suffer greater damage comparing with the other if not given a priority, i. e. as to whether the priority should be given to individual rights or to public interest, such as the stability of local self-government and the system of public power in general. These cases involved passive electoral rights as one the constitutional values competing with the public interest.

Before dealing with these cases, the first two parts of this article provide the review the particular competence of the Constitutional Court in the sphere of electoral law as well as the constitutional jurisprudence on the main democratic electoral principles and procedures, including the basis for balance between individual rights and public interest.

1. COMPETENCE OF THE CONSTITUTIONAL COURT IN THE SPHERE OF ELECTORAL LAW

The powers of constitutional courts to adjudicate or supervise the matters of electoral law are regarded as their ancillary powers, which are the most frequent exercised by constitutional courts[8]. In this regard, the Constitutional Court of the Republic of Lithuania has two essential functions: first, the control of constitutionality of electoral legislation by exercising the general power to assess the constitutionality of laws passed by the parliament (Art. 105(1) of the Constitution of the Republic of Lithuania (hereinafter – the Constitution))[9]; secondly, verification of the results of elections, i. e. establishment of the violations of electoral laws occured during the elections of the President of the Republic or the elections of Members of the Seimas (Article 105(3) of the Constitution))[10].

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[8] Some other frequent ancillary powers of constitutional courts may be review of treaties, adjudication of charges against the executive, adjudication of charges against illegal political parties, review of states of emergency. See: GINSBURG, T., ELKINS, Z. Ancillary Powers of Constitutional Courts. Texas Law Review 87, 2008 or available at <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2439&context=journal_articles>.

[9] This provision of the Constitution states that "The Constitutional Court shall consider and adopt decisions on whether the laws of the Republic of Lithuania or other acts adopted by the Seimas are in conflict with the Constitution of the Republic of Lithuania". Text of the Constitution is available at: <http://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192>.

[10] According to this provision of the Constitution, the Constitutional Court presents conclusions on whether there were the violations of election laws during the elections of the President of the Republic or the elections of the Members of the Seimas.

As the case-law of the Constitutional Court of the Republic of Lithuania is not limited solely to the control of constitutionality of electoral legislation[11], it is worth dealing with the second function of the Court (verification of the electoral results), which is also significant in developing the official constitutional doctrine on electoral rights. One can notice that the scope of this function of the Lithuanian Consyitutional Court differs from that assigned to other constitutional courts.

The Constitutional Court of the Republic of Lithuania presents conclusions[12] concerning the violations of election laws committed during the elections of the President of the Republic or the elections of the Members of the Seimas, i.e. regarding the elections of the highest state authorities. Thus the Court has no power to provide conclusions on whether there were the violations of electoral legislation during the elections of the municipal councils or the elections of the European Parliament. The decisions of the Central Electoral Commission regarding the final results of the elections to municipal councils and to the European Parliament can be challenged before the Supreme Administrative Court of Lithuania. This regulation conforms with the prevailing practice of other European states to share the competence in the sphere of judicial control of legality of elections. For example, in France the Constitutional Council investigates complaints on national elections, while the Council of the State deals with complaints on elections of municipal councils and administrative elections[13]. The Constitution of France provides that the Constitutional Council ensures the proper conduct of the election of the President of the Republic; it examines complaints and proclaims the voting results (Art. 58), the Constitutional Council also rules on the proper conduct of the election of Members of the National As-

[11] One can note that from the Consntitutional Court has developed the official constitutional doctrine in almost twenty acts (rulings and decisions) on various aspects of elections of the President of the Republic, elections of the Seimas, as well as elections to the municipal councils and the European Parliament. Not less than 1/5 of all the Members of the Seimas, the courts (initiating the control of applicable electoral laws) and the Government can apply to the Constitutional Court regarding the constitutionality of laws.

[12] While the Court more often enacts rulings and decisions, the conclusions of the Court are a separate kind of acts of the Court. Only the Seimas and the President of the Republic can request the conclusion of the Court.

[13] GHEVONTIAN, R. Teisė ir faktai bylose dėl rinkimų skundų. In Teisė ir faktas konstitucinėje jurisprudencijoje. Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 2005, p. 112.

sembly and Senators in disputed cases (Art. 59)[14]. On the other hand, there are states, where constitutional courts are entitled to verify the legality of municipal or European elections (for example, the Constitutional Court of the Republic of Austria and the Constitutional Court of the Slovak Republic may control of the legality of municipal elections, both these courts and the Constitutional Court of Slovenian Republic can assess the legality of elections to the European Parliament[15]).

However, the powers of the Constitutional Court of the Republic of Lithuania are wider than those of the most other constitutional courts to the extent that the Lithuanian Constitutional Court is entitled to examine legality of the elections of the President of the Republic. However, all five conclusions on the legality of elections by the Constitutional Court of the Republic of Lithuania[16] (and three decisions on refusal to open the case[17]) were adopted on the legality of parliamentary elections.

One can note another peculiarity of the powers of the Lithuanian Constitutional Court with regard to the establishment of violations of electoral legislation: according to Art. 107 of the Constitution, the Seimas is entitled to take a final decision on electoral results relying on the conclusions of the Constitutional Court[18].

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[14] The Constitution of the French Republic of 1958. In *Pasaulio valstybių konstitucijos*. III tomas. Vilnius: Mykolo Romerio universitetas, 2016, p. 331.

[15] PŪRAITĖ-ANDRIKIENĖ, D. Konstitucinės justicijos procesas Lietuvoje: optimalaus modelio paieška. Daktaro disertacija. Socialiniai mokslai, teisė (01 S). Vilnius: Vilniaus universitetas, 2017, p. 387.

[16] Conclusion of 23 November 1996 on the election to the Seimas of the Republic of Lithuania; Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas; Conclusion of 7 November 2008 on violations of the Law on Elections to the Seimas; Conclusion of 10 November 2012 on the violations of the Law on Elections to the Seimas during the 2012 elections to the Seimas; Conclusion of 26 October 2012 on the recognition of the results of elections to the Seimas in a single member constituency as invalid. From these only in one Conclusion of 10 November 2012 the Constitutional Court recognised that decisions of the Central Electoral Commission had violated the provisions of the Law on Elections to the Seimas. All acts of the Constitutional Court are available at: <http://www.lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2017>.

[17] Decision of 8 November 2008 on refusing to consider an inquiry; Decision of 10 November 2008 on refusing to consider an inquiry; Decision of 8 June 2014 on refusing to consider an inquiry regarding a conclusion.

[18] There are recommendations to amend this constitutional regulation by replacing the current model where two institutions (judicial and political), i.e. the Constitutional Court and the Seimas, have functions in repairing the violations of electoral legislation. It is proposed to entrust this function with a single judicial institution, i.e. the Constitu-

In some countries, e.g., Germany[19], Moldova[20] and Slovenia[21], the constitutional courts are entitled to determine the final electoral results. However, in Lithuania no state institution or state official, no other subject may change or revoke the conclusion of the Constitutional Court[22] (i.e., neither the content, nor the facts established in this conclusion).

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tional Court, which would have the powers to decide whether there were the violations of election laws as well as to adopt the decision (if violations are established) on final results of elections by ensuring their legality (e.g., to annul the results in a certain constituency or to acknowledge that certain persons are not elected to the Seimas). It is argued that "as the determination as to whether the election laws were violated during the elections to the Seimas or the President of the Republic are a matter of the legal rather than a political assessment, as well as the establishment of the election violations, the adoption of decisions on the invalidation of the election results, determination of the persons who have submitted their candidacies to the elections, are elected as the members of Seimas or as the President of the Republic, who are not elected, who cannot be regarded as elected, is the subject of legal but not political assessment". See: PUKANASYTĖ, I. Rinkimų teisė Lietuvos Respublikos Konstitucinio Teismo ir Europos Žmogaus Teisių Teismo jurisprudencijoje. Daktaro disertacija, socialiniai mokslai, teisė (01 S). Vilnius: Mykolo Romerio universitetas, 2014, p. 73-74.

[19] Art. 41 of the Basic Law of the Federal Republic of Germany states that: "(1) Scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a Member has lost his seat; (2) Complaints against such decisions of the Bundestag may be lodged with the Federal Constitutional Court; (3) Details shall be regulated by a federal law". See: the Basic Law of the Federal Republic of Germany. *In* Constitute Project. Available at: <https://www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en>; *Pasaulio valstybių konstitucijos*. III tomas. Vilnius: Mykolo Romerio universitetas, 2016, p. 1301.

20 Under Art. 135 of the Constitution of the Republic of Moldova the Constitutional Court of the Republic of Moldova confirms the results of national referendum ((1) d)), the elections of the Parliament and of the President of the Republic of Moldova, validates the mandates of deputies and of the President of the Republic of Moldova ((1) e)). Available at: <http://www.constcourt.md/public/files/file/Baza%20legala/Constitutia_engl___13.11.17.pdf>.

[21] The Constitution of Republic of Slovenia provides that, in accordance with the law, an appeal may be made before the Constitutional Court against a decision of the National Assembly (the National Assembly confirms the election of deputies) (Art. 82(3)). Available at: <http://www.us-rs.si/en/about-the-court/legal-basis/>.

[22] In its Conclusion of 27 October 2010 the Constitutional Court emphasised that "the conclusion of the Constitution Court that a person has grossly violated the Constitution (and thus has breached the oath) is final. No state institution, no state official, no other subject may change or revoke such a conclusion of the Constitutional Court". These provisions could be applied to all conclusions provided by the Constitutional Court (i.e., also to the conclusions on the results of elections, i.e. regarding the violations of electoral legislation).

Thus, it can be concluded that the competence of the Constitutional Court of the Republic of Lithuania in the sphere of electoral law is twofold: control of constitutionality of electoral legislation and verification of the results of elections. Both these complementary functions contribute to the exercise of the main mission of the Court to act as the guarantor of the supremacy of the Constitution and the rule of law by administering constitutional justice in electoral cases, where the Court develops the constitutional jurisprudence and ensures the compliance of electoral process with the democratic electoral principles, including the balancing of different constitutional values, such as individual electoral rights and public interest of fair elections.

2. CONSTITUTIONAL JURISPRUDENCE ON DEMOCRATIC ELECTORAL PRINCIPLES AND RESTRICTION OF HUMAN RIGHTS

The Constitutional Court of the Republic of Lithuania has noted that the Constitution consolidates the principles of democratic elections and democratic electoral procedures[23]. The Court stated that one of fundamental characteristics of a democratic state is democratic elections of representative institutions of state authority[24]. Democratic elections are an important form of participation of citizens in governing the state, as well as it is a necessary element of the formation of state political representative institutions. Elections may not be regarded as democratic, nor their results as legitimate and legal, if they are held by breaching the principles of democratic elections established in the Constitution or democratic electoral procedures[25].

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[23] Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas.

[24] Conclusion of 23 November 1996 on the election to the Seimas of the Republic of Lithuania; Conclusion of 7 November 2008 on violations of the Law on Elections to the Seimas; Ruling of 29 March 2012 on the legal provisions regulating the relations linked with the payment of the election deposit, submission of declarations of candidates, reaching the election threshold, conclusion of the agreement with the political campaign treasurer and distribution of state budget funds among political parties.

[25] Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas; Ruling of 1 October 2008 on elections to the Seimas; Conclusion of 7 November 2008 on violations of the Law on Elections to the Seimas; Ruling of 9 November 2010 on elections to the European Parliament; Conclusion of 26 October 2012 on the recognition of the results of elections to the Seimas in a single member constituency as invalid; Conclusion of 10 November 2012 on the violations of the Law on Elections to the Seimas during the 2012 elections to the Seimas; Ruling of 27 May 2014 on changing the final results of the election to the Seimas; Ruling of 13 October 2014 on names of public election committees.

The Court held that the Constitution provides the following principles: the constitutional principle of free and democratic elections[26]; elections should be democratic, free and fair[27]; the principle of fair competition in elections, the principle of transparency of the electoral process and the principle of justice[28], the requirement of fairness and transparency of the electoral process[29], etc. More specifically, the Court enumerated such universally recognised democratic principles of elections to representative political institutions as, e.g., universal, equal, and direct suffrage, secret ballot, free and fair competition for the mandate, real opportunity for voters to choose from several candidates, free, without being subjected to control, expression of the will of voters during the voting; transparency and publicity of the formation of a representative political institution[30]. These pronciples serve as criteria for the Court to decide on constitutionality of electoral legislation and legality of elections.

In interpreting the democratic electoral principles, the Court is open to international standards, e.g., the standards of good practice in electoral matters, as consolidated in the documents of the of the United Nations, legal sources of the Organisation for Security and Co-operation in Europe[31], the jurisprudence of the European Court of Human Rights (in particular, related to Art. 3 of the

[26] Ruling of 25 May 2004 on the Law on Presidential Elections.

[27] Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas; Conclusion of 7 November 2008 on violations of the Law on Elections to the Seimas; Conclusion of 26 October 2012 on the recognition of the results of elections to the Seimas in a single member constituency as invalid.

[28] Ruling of 17 November 2011 on publishing information about candidates for members of municipal councils and on incompatibility of the office of a member of the municipal council with other offices.

[29] Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas; Ruling of 29 March 2012 on the legal provisions regulating the relations linked with the payment of the election deposit, submission of declarations of candidates, reaching the election threshold, conclusion of the agreement with the political campaign treasurer and distribution of state budget funds among political parties; Ruling of 11 May 2011 on elections to municipal councils.

[30] Ruling of 9 November 2010 on elections to the European Parliament.

[31] E.g., the UN Universal Declaration of Human Rights (in the context of interpreting the universal and equal suffrage, secret voting and equivalent procedures), the UN International Covenant of Civil and Political Rights of 1966 (in the context of interpreting the universal and equal suffrage, secret voting and equivalent procedures), the OSCE Bureau of Democratic Institutions and Human Rights guide on monitoring elections of 2010 (in the context of the right to the free elections). See: Ruling of 20 October of 2015.

First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms)[32], and the EU law[33].

It is worth noting general provisions developed by the Court on ensuring the balance of constitutional values as to whether the priority should be given to individual rights or to public interest goals. According to the Court, from the social standpoint, the public interest[34] as well as the person's rights is considered to be a constitutional value[35]. Public interest is a common interest of the state, all of society or part of society, which reflects and expresses the fundamental values which are entrenched in, as well as protected and defended by the Constitution[36]; the implementation of this interest is one of the most important conditions of the existence and evolution of society itself[37]. However, according to the Constitution, there is a need to balance the rights of a person and the public interest.

In case of a real clash of these constitutional values, this clash is evaluated in constitutional justice cases individually, ensuring that the balance of these values which is entrenched in the Constitution is not violated. While examining

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[32] For example, the Constitutional Court referred to this case law in its Ruling of 13 October 2014 in the context of interpretation of the principles of elections to the European Parliament, as well as in its Ruling of 20 October 2015 in the context of interpretation of the right to the free elections, etc.

[33] For example, the Court in its Ruling of 9 November 2010 referred to the Treaty of the European Union in the context of elections to the European Parliament, etc.

[34] In the case law of the Court it is named differently, also as the constitutionally important objectives, vitally important or other interests of society, which are of utmost importance.

[35] Ruling of 6 May 1997 on the ownership rights of functionaries; Ruling of 13 December 2004 on the state service.

[36] Ruling of 21 September 2006 on drawing up and announcing the reasoning of court decisions, on the institute of a decision adopted *in absentia* and on appeals; Ruling of 3 April 2015 on the selection of the company implementing the project of a terminal of liquefied natural gas and on funding this project.

[37] Ruling of 6 May 1997 on the ownership rights of functionaries; Ruling of 13 May 2005 on the Law on Hunting; Ruling of 21 September 2006 on drawing up and announcing the reasoning of court decisions, on the institute of a decision adopted *in absentia* and on appeals; Ruling of 12 December 2005 on the Law on the Reorganisation of the Joint-stock Company "Mažeikių nafta"; Ruling of 15 May 2007 on state secrets and official secrets; Ruling of 30 June 2008 on recovering a state loan; Ruling of 6 January 2011 on compensation for infringement of the rights of an author and related rights; Ruling of 2 April 2013 on the amendment to the agreement on the privatisation of the joint-stock company "Alita".

whether the limitation of human rights in the concrete case is in compliance with the requirement of the equilibrium of constitutional values and adopting the decision on the balance of concrete clashing vales, the Court pays attention to the fact that "at the junction of the values protected by the Constitution decisions ought to be found ensuring that neither of these values would be denied or unreasonably limited"[38]. In more detail, the equilibrium of the human rights and the other constitutional values could be violated in case of a breach of the requirement on limitation of human rights and freedoms, also in respect of the public interest (which are formulated by the Court), that under the Constitution it is permitted to limit the rights and freedoms of the person, if the following conditions are followed[39]: this is done by means of a law; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally important objectives; the limitations do not deny the nature and essence of the rights and freedoms[40]; the constitutional principle of proportionality is followed. The latter principle formulated in the constitutional jurisprudence of the Court as the derivative constitutional principle, for the first time was mentioned by the Court referring to the jurisprudence of the European Court of Human Rights (in the ruling of 18 April 1996); after that the Court formulated the authentic constitutional doctrine, which is grounded on the constitutionally motivated necessity to keep the equilibrium between a person's rights and public interest[41]. For example, the Court held that the constitutional principle of

[38] Ruling of 16 March 1999 on the Law on Museums; Ruling of 23 October 2002 on the protection of the private life of a public person and the right of the journalist not to disclose the source of information; Ruling of 4 March 2003 on the restoration of the ownership rights of citizens.

[39] *Inter alia* Ruling of 14 March 2002 on the qualification requirements for the owners of pharmacies; Ruling of 13 December 2004 on the state service.

[40] The Court noted the essential provision, which must be followed, that the fundamentals of the content of any basic human right may not be violated by means of the limitations. If a right were limited to the extent that reasonable limits would be exceeded, or its legal protection would not be ensured, in that case there would be grounds to assert that the fundamentals themselves of such a right are violated, and that would be equivalent to the denial of this right. See: Ruling of 18 April 1996 on the Law on Commercial Banks; Ruling of 23 February 2000 on the introduction of the tax stamps of the 1998 standard for marking tobacco products and alcoholic drinks.

[41] KŪRIS, E. Konstitucinių principų plėtojimas konstitucinėje jurisprudencijoje. In Lietuvos Respublikos Konstitucinio Teismo ir Lenkijos Respublikos Konstitucinio Tribunolo konferencijos medžiaga. Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 2002, p. 76.

proportionality, which is one of the elements of the constitutional principle of a state under the rule of law, means that the measures provided for in the law must be in line with the legitimate objectives which are important to society, and that these measures do not have to restrain the rights and freedoms of a person clearly more than necessary in order to reach these objectives[42].

3. FINDING A BALANCE BETWEEN THE PASSIVE ELECTORAL RIGHT AND PUBLIC INTEREST

The general overview of the above mentioned principles helps to present the case-law of the Constitutional Court of the Republic of Lithuania with regard to the balancing of constitutional values (passive electoral rights and public interest) in the sphere of electoral law. As mentioned, there are three fields where this balance has been sought: ensuring the principle of equal elections, the fairness and transparency of electoral process, and the universal elections.

3.1. Equal Elections

As also noted by the Venice Commission, equality in electoral matters comprises a variety of aspects (including the principles to be respected in all cases are numerical vote equality, equality in terms of electoral strength and equality of chances; equality of outcome achieved, for instance, by means of proportional representation of the parties or the sexes, cannot be imposed[43]). Similarly, the Constitutional Court of the Republic of Lithuania has revealed several aspects of the concept of the content of the principle of equal electoral rights (especially, in the context of the passive electoral right). The latter aspects relate to[44]: 1) the determination of election results[45]; 2) the nomination of candidates in a

[42] See, among others, the Ruling of 29 December 2004 on the prevention of organised crime.

[43] European Commission for Democracy through Law (Venice Commission). Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report. Adopted by the Venice Commission at 52nd session (Venice, 18-19 October 2002). Strasbourg, 23 May 2003, available at: <http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx>.

[44] Ruling of 17 November 2011 on publishing information about candidates for members of municipal councils and on incompatibility of the office of a member of the municipal council with other offices.

[45] Ruling of 11 May 2011 on elections to municipal councils.

proportional electoral system[46]; 3) the size of the electoral thresholds when the lists of candidates are nominated and elections are held only on the basis of a proportional or mixed electoral system[47]; 4) the public announcement of information on candidates to voters[48]; 5) participation of public election committees (collective subjects) in the electoral process not under the name chosen by these committees, but under a letter given to them[49].

As follows from the jurisprudence of the Constitutional Court, two of the aforementioned aspects, namely the nomination of candidates in a proportional electoral system and the participation of public election committees in the electoral process not under the name chosen by these committees, but under the letters granted to them (by the Central Electoral Commission), are important with regard to the search of balance between passive electoral rights and public interest. The relevant cases demonstrate the presumption of a priority of public interest, i.e. the formation and stability of the elected institutions, when only single violations of the principle of equal elections are found, which do not amount to essential breaches that could deny the essence of equal elections. In these cases, although non-compliance with the Constitution was found, it was not sufficient to declare invalid the respective elections by giving the priority for the necessity to maintain the already formed institutions, i.e. the violations found were not so essential as to deny the representative nature of the elected institutions. Therefore, the respective rulings played rather the preventive role for elimination of violations in future elections.

1. By the **Ruling of 9 February 2007** the Constitutional Court for the first time elaborated on the consequences of its decision to recognise unconstitu-

[46] Ruling of 9 February 2007 on elections to municipal councils; Ruling of 1 October 2008 on elections to the Seimas; Ruling of 9 November 2010 on elections to the European Parliament; Ruling of 11 May 2011 on elections to municipal councils.

[47] Ruling of 9 February 2007 on elections to municipal councils; Ruling of 1 October 2008 on elections to the Seimas; Ruling of 9 November 2010 on elections to the European Parliament; Ruling of 11 May 2011 on elections to municipal councils; Ruling of 29 March 2012 on the legal provisions regulating the relations linked with the payment of the election deposit, submission of declarations of candidates, reaching the election threshold, conclusion of the agreement with the political campaign treasurer and distribution of state budget funds among political parties.

[48] All enumerated aspects have been systematised by I. Pukanasytė. See: PUKANASYTĖ, I. Rinkimų teisė Lietuvos Respublikos Konstitucinio Teismo ir Europos Žmogaus Teisių Teismo jurisprudencijoje. Daktaro disertacija, socialiniai mokslai, teisė (01 S). Vilnius: Mykolo Romerio universitetas, 2014, p. 83.

[49] Ruling of 13 October 2014 on names of public election committees.

tional the provision of electoral legislation for the ongoing electoral process and the results of the elections (one provision of the Law on Elections to Municipal Councils was found incompatible with the Constitution at the time when the electoral campaign was going on[50]). The Court formulated the criteria that must be taken into account when deciding on the legality of elections and balancing the respective constitutional values.

Under the impugned legal provision, a proportional system of elections to municipal councils was established, according to which only candidates included in the lists of political parties, i.e. nominated solely by political parties, were eligible to stand for elections. Other individuals were not able to be candidates in these elections as the possibility of nomination by unions (associations) other than political parties was not foreseen by the law (i.e., this legal regulation was more favourable to members of political parties who were more likely to be nominated to municipal councils compared with other persons). According to the Court, such legal provision was in deviation from the requirement arising out of the Constitution (*inter alia*, Art. 119(2)) that in case, when the legislature chooses only a proportional system of elections to municipal councils (i.e., the system where individuals cannot be nominated as single candidates to municipal council), all the permanent residents of the territorial units of the Republic of Lithuania must have the opportunity to be elected to the respective municipal councils being included in either the list of candidates nominated by a political party or the list composed by other subjects, including the organisations other than political parties (e.g., *ad hoc* electoral committees). Therefore, the provision on the exclusive right of political parties to nominate candidates for municipal elections was found incompatible with Art. 119(2) of the Constitution, which establishes the principles of elections to municipal councils, including that of equal elections[51].

However, the Constitutional Court also held that the reason of non-compliance with the Constitution lies not in the proportionate system of elections to municipal councils *per se*, but rather in the established procedure for nomination

[50] In cases when the Constitutional Court presents conclusions regarding violations of election laws during the elections of the President of the Republic or of the Members of the Seimas, on the basis of the conclusion a final decision determining the results of the elections has to be taken by the Seimas (Art. 107(3) of the Constitution).

[51] According to this provision of the Constitution, members of municipal councils are elected for a four-year term, as provided for by law, from among the citizens of the Republic of Lithuania and other permanent residents of the respective administrative units by the citizens of the Republic of Lithuania and other permanent residents of these administrative units on the basis of universal, equal, and direct suffrage by secret ballot.

of candidates. This procedure is a separate element of the system of elections. Therefore, according to the Court, there were no legal grounds to hold that the proportionate system, which was established by the Law on Elections to Municipal Councils, virtually as such denied other imperatives following from the Constitution for the legal regulation of elections to municipal councils. Therefore, the deficiency found in the procedure of nomination of candidates could not be considered as precluding the democratic formation of self-government institutions and the exercise of the right of self-government or fundamentally denying the constitutional concept of local self-government.

Public interest was employed by the Court as another argument for maintaining that the non-compliance with the Constitution of one element of the procedure of nomination of candidates was not sufficient to hold that the whole municipal elections would not have been free and democratic. The Court emphasised the consequences of its decision had it revoke, postpone or suspend the then fothcoming municipal elections: according to the Court, such a situation would have inflicted much more damage on the expectations of voters and on the stability of not only local self-government, but of the whole system of public power. Apparently, the Court had to deal with the question of balance of constitutional values, as to weight whether to give priority to individual passive electoral rights (i.e., rights of those members of territorial communities (permanent residents of administrative units) who claimed willing to stand in elections but not as nominees by political parties) or to public interest goals (i.e., stability of local self-government and the whole system of public power). The Constitutional Court took into account the fact that the defect in the procedure of nomination of candidates had not prevented in general persons from being elected to the respective municipal councils through the existing (though with the deficiency) system. Thus, stability of the system of public power is considered to be a more important constitutional value when the legal regulation does not in essence deny individual passive electoral rights.

2. In its **Ruling of 13 October 2014** on the names of public election committees the Constitutional Court has also addressed the issue of legality of the elections following the declaration of unconstitutionality of the impugned provision of the electoral legislation. The Court found unconstitutional the provision of the Law on Elections to the European Parliament, which established that, regardless of the fact that election committees may choose name, they are not entitled to take part in the elections under the chosen name, but only under the alphabetic letter assigned to them by the Central Electoral Commission. The Court held that in such a way the implementation of passive electoral rights of the persons entered on the lists of election committees was burdened, the

principles of the transparency of the electoral process, of the equality of collective subjects in the elections, and of fair competition were not complied with. In other words, the inequality between the nominees of election committees and those of political parties was established in the legal regulation of names of the lists of candidates; therefore, this regulation was found incompatible with Art. 34(2) of the Constitution that states about equal passive electoral rights. However, the Court also emphasised that, although the impugned legal provision made it more difficult for the candidates nominated by election committees to implement their passive electoral right, it did not deny the passive electoral rights of these candidates in general and did not seriously impair any constitutional principles of democratic and free elections. Therefore, the Court held that the legality of the elections to the European Parliament could not be questioned on the grounds that the impugned legal provision was found unconstitutional. Thus, again, while ensuring the equality of passive electoral rights for the future, the priority was given to considerations of a public interest, i.e. the stability of political power, when the very essence of the representative democracy had not been denied.

3.2. Fairness and Transparency of Electoral Process

As free elections comprise an essential qualifying condition for any liberal democracy, they need to be as fair and credible as possible[52]. The Code of Good Practice in Electoral Matters (which is considered to contain a *de minimis* selection of principles, completed by some other recommendations based on good practice), which envisages certain aspects of free suffrage – freedom of voting procedure and accurate assessment of the results, also provides for the necessity to take action for combatting any kind of electoral fraud (for example, to prevent or punish attempts to buy votes and election fraud during voting procedures)[53].

In addition to other constitutional principles of electoral law, the Constitutional Court of the Republic of Lithuania in its jurisprudence has highlighted the principle of fairness and transparency of electoral process, although this principle in the Constitution is not entrenched *expressis verbis*. In its case law, the Constitutional Court has revealed some aspects of the content of this principle: 1) the obligation for nominees or candidates to provide voters with sig-

[52] Electoral Rights in Europe – Advances and Challenges. Edited by Helen Hardman, Brice Dickson. New York: Routledge, 2017.

[53] Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002). Available at: <http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx>.

nificant information about themselves[54]; 2) election funding[55]; 3) prohibition of direct and indirect bribing voters for votes[56]. Three acts of the Court can be discussed in the context of balancing passive voting rights and public interest. They are relevant to the obligation to provide information and the prohibition bribery of voters.

1. **The obligation to provide information**. While ensuring the right of citizens to participate in the governance of their state through democratically elected representatives, the legislator must create preconditions to express freely the will of voters and to reflect the genuine will of voters by the elected institutions. This means ensuring the transparency of the election process, fair competition among candidates and the publicity of information about them that might be important for voters[57].

The interest of the public to be informed is especially important in the process of elections to political representative institutions, including municipal councils. During the election process real possibilities must be created for voters (who decide on the eligibility of candidates to be elected) to receive information about the major facts of candidate's life. This information may be significant when representing the interests of voters and handling public affairs. The information about the fact that a candidate has been found guilty of a criminal offence by an effective court judgement is to be viewed as the information signifi-

[54] Ruling of 29 March 2012 on the legal provisions regulating the relations linked with the payment of the election deposit, submission of declarations of candidates, reaching the election threshold, conclusion of the agreement with the political campaign treasurer and distribution of state budget funds among political parties.

[55] Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas; Ruling of 29 March 2012 on the legal provisions regulating the relations linked with the payment of the election deposit, submission of declarations of candidates, reaching the election threshold, conclusion of the agreement with the political campaign treasurer and distribution of state budget funds among political parties; Conclusion of 26 October 2012 on the recognition of the results of elections to the Seimas in a single member constituency as invalid; Conclusion of 10 November 2012 on the violations of the Law on Elections to the Seimas during the 2012 elections to the Seimas.

[56] Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas; Conclusion of 26 October 2012 on the recognition of the results of elections to the Seimas in a single member constituency as invalid; Conclusion of 10 November 2012 on the violations of the Law on Elections to the Seimas during the 2012 elections to the Seimas.

[57] Ruling of 17 November 2011 on publishing information about candidates for members of municipal councils and on incompatibility of the office of a member of the municipal council with other offices.

cant for voters. The information ought to be presented in a proper manner that does not mislead voters, candidates must indicate when, as a result of which precisely criminal offence and by an effective court judgement of which country, they have been found guilty.

Taking this into account, in the **Ruling of 17 November 2011**[58] the Court gave the priority to public interest of the society to be informed about a person seeking to be elected as a member of the municipal council and who has been found guilty of a criminal offence by an effective court judgement. The duty to provide this information to the public was found in line with the legitimate objective – the interest to be informed when electing members of municipal councils – which is important to society; it does not restrict the rights of candidates more than necessary in order to reach the said objective. Also it may not be treated as being a disproportionate measure, as it does not deny the essence and equal passive electoral right of candidates. Thus, this duty is constitutionally grounded as follows from the principles of publicity, transparency and fairness of elections.

2. **Prohibition of bribery of voters**. The Constitutional Court of of the Republic of Lithuania held that representative political institutions that these institutions may not be formed in a way so that there might arise doubts as to their legitimacy and legality, *inter alia***,** in violation of the principles of a democratic state under the rule of law during elections. Otherwise people's trust in the representative democracy, state institutions, and the state itself, would be undermined.

Democratic elections are an important form of citizens' participation in the governance of the state, as well as it is a necessary element of the formation of state political representative institutions. Therefore the Constitutional Court has formulated a presumption that elections may not be regarded as democratic, nor their results as legitimate and legal, if the elections are held by trampling on the principles of democratic elections established by the Constitution, or by violating democratic electoral procedures[59].

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[58] In this ruling the Court investigated the impugned legal regulation whereby it was established that a candidate for a municipal council member had to make it public if he/she had been found guilty of a criminal act by effective judgment of a court where such a criminal act was later decriminalised.

[59] Conclusion of 5 November 2004 on violations of the Law on Elections to the Seimas; Conclusion of 7 November 2008 on violations of the Law on Elections to the Seimas; Conclusion of 26 October 2012 on the recognition of the results of elections to the Seimas in a single member constituency as invalid.

In its **Conclusion of 26 October 2012** the Constitutional Court decided on whether the Law on Elections to the Seimas was violated when by decisions of the Central Electoral Commission the results of the elections to the Seimas in a concrete constituency were recognised as invalid due to mass and systematic violation of the prohibition on bribing voters.

The Court noted that mass or systemic bribing of voters, *inter alia* by offering gifts or other rewards inducing voters to attend or not to attend elections or to vote for or against one or another candidate during the electoral process (*inter alia* during the election agitation campaign and the period of voting) is to be regarded as a gross violation of the principles of democratic, free and fair elections, *inter alia* that of the fair and transparent electoral process. Such violations of the electoral principles create preconditions to reasonably doubt the legitimacy and legality of the election results, thus, can limit or deny altogether the expression of the supreme sovereign power of the Nation through the representation of the Nation – the Seimas. Accordingly, the Constitutional Court presumed that such violations should in themselves be considered as having a significant impact on the outcome of the election; in the case considered by the Court there were no circumstances that would invalidate this presumption (that violations of the Law on Elections to the Seimas that had been determined by the Central Electoral Commission had a significant effect on the results of elections). According to the Court, in order to ensure that the genuine will of the electorate were not distorted, the Central Electoral Commission, after having detected serious violations of the Law on Elections to the Seimas, was allowed to take only the most stringent measure under the Law on Elections to the Seimas – the invalidation of results of elections.

Thus, in defending the public interest to safeguard the genuine expression of the will of voters, the Constitutional Court has formulated the presumption of invalidity of elections in case of grave breaches (by mass or systemic bribery of voters) of the principles of democratic elections established by the Constitution, in particular that of the fair and transparent electoral process.

In its **Conclusion of 10 November 2012** the Constitutional Court investigated whether the Law on Elections to the Seimas had been violated in approving the final results of the elections to the Seimas when the Central Electoral Commission determined the results of the election in the multi-member constituency and in several single-member constituencies.

The Court drew the conclusion that the Law on Elections to the Seimas had been violated when the Central Electoral Commission decided to include the concrete persons in the final list of candidates of a particular party, and when it decided that certain individuals had been elected to the Seimas in the multi-

member constituency on the basis of the list of candidates of that party. The Court made such a conclusion due to the fact that the Central Election Commission did not comply with the requirements arising from the Constitution and the Law on Elections to the Seimas to assess the specific circumstances of the election process that are important for determining the results of elections. The massive bribery of voters by encouraging them to give priority votes to persons entered on the party list of candidates had been established; and there were no circumstances that would deny the presumption of invalidity of results in respect of those candidates due to the gross violations of the Law on Elections to the Seimas. The established violations were essential for determining the final place of those candidates in the party list, i.e. to determine the preference votes casted individually for those candidates. Therefore those candidates had to be removed from the final party list.

The Constitutional Court noted that bribery of voters by encouraging them to give priority votes to one or another candidate may distort the genuine will of the electorate, therefore, in every situation where the Central Electoral Commission approves the final order of candidates in the lists, it has the duty to ascertain that there are no reasonable doubts that the genuine will of the voters could be distorted when the preference votes were casted for one or another candidate entered on the list.

On the other hand, the Constitutional Court also ruled that the extent of the established violations in electing members of the Seimas in the multi-candidate constituency had not been large enough to be essential for the determination of the number of mandates distributed for the lists of candidates. According to the Court, the invalidation of the whole of results of voting in the multi-candidate constituency should be applied only as an *ultima ratio* measure in the light of the damage that could be inflicted on voters' expectations and the stability of the state power system.

Thus, in case of a proportionate electoral system, the public interest considerations seems to be different in case of determining the whole results of elections in the multi-candidate constitutency and the results of each individual candidate. If the election of individual candidates had been sought by means of bribery of voters, then the interest to guarantee fairness and transparency of the elections (in particular, the genuine expression of the will of people) should employ the presumption of invalidity of the results in respect of those candidates and they have to be eliminated from the final list of candidates. However, for the invalidation of the whole of results in the multi-candidate constituency much higher threshold of violations is required; they should be so serious and massive as to cast a reasonable doubt on the final distribution of mandates between the

lists of candidates, i.e. the invalidation of the whole of results should be applied as an *ultima ratio* measure when the genuine will of voters regarding preferences between different lists of candidates cannot be established. This can be explained again by the public interest in stability of political power, in particular of representative institutions that can be dissolved only in extreme cases.

3.3. Universal Elections

In the light of the principle of universal elections the issue of disqualification of certain candidates is of utmost importance. Here the balance between the right of individuals to stand in elections and the public interest to prevent certain persons from standing in elections should be found. As the Lithuanian experience demonstrates, this balance can be established differently by the Constitutional Court and the European Court of Human Rights (hereinafter – ECtHR). The case of the former President of Lithuania Rolandas Paksas, who was removed from office due to the impeachment in 2004, might serve as an example.

The Constitutional Court consolidated its position (*inter alia* in the **Ruling of 25 May 2004** and **the Ruling of 5 September 2012**) on the unlimited prohibition for the person who was removed from office under the impeachment procedure to hold office again if the beginning of the latter is connected with taking an oath: a person who had grossly violated the Constitution and breached his oath and, as a result of this, was removed from office under the impeachment procedure could never again stand in elections for an office requiring an oath to the State of Lithuania[60]. Meanwhile, by the judgment of the Grand Chamber of the ECtHR of 6 January 2011 in the case of *Paksas v. Lithuania***,** a permanent constitutional disqualification from standing in parliamentary elections was declared to be disproportionate from the point of view of the European Convention on Human Rights, i.e. it constituted a violation of Art. 3 of Protocol No. 1 to the Convention[61].

Thus, a divergence between the interpretation of the Constitution as provided by the Constitutional Court and the interpretation of the Convention by the ECtHR occurred. This divergence resulted from the fact that the Constitutional Court of the Republic of Lithuania and the ECtHR assessed the situation regarding one's ineligibility to stand in parliamentary elections from different positions. The Constitutional Court emphasised the importance of the public interest in the loyalty to the State of Lithuania of those officials whose office

[60] Ruling of 25 May 2004 on the Law on Presidential Elections.

[61] *Paksas v. Lithuania* (GC), application no. 34932/04, Judgment of 6 January 2011.

is linked with taking the oath set forth in the Constitution. The ECtHR interpreted the same situation by placing the emphasis on the right of the electorate to determine and decide whom they would like to see as their representatives. In essence, the different understanding of the public interest appeared: the Constitutional Court emphasised the public interest to preclude those who can be considered as not loyal to the constitutional order (due to a gross violation of the Constitution and breach of an oath) from taking the highest public offices; the ECtHR put the emphasis on the public interest to have the choice for the electorate from all the possible candidates, including those whose loyalty to the constitutional order can be reasonably doubted.

The Constitutional Court of the Republic of Lithuania held that impeachment is one of the form of public and democratic control over the state officials, one of the measures of self-protection of the state community, the civil Nation, the way of its self-defence against the top officials of state power, who disregard the Constitution and laws, where they are no longer permitted to hold a certain office, as they do not fulfil their obligation to unconditionally follow the Constitution, law, as well as the interests of the Nation and the State of Lithuania. The person, whose actions were recognised by the Constitutional Court as the ones that grossly violated the Constitution, and who has been removed from the office by the Seimas, the representation of the Nation, according to the impeachment procedure, will always remain the one who breached the oath taken to the Nation, who grossly violated the Constitution and who was removed from office for this reason. The removal of the President of the Republic from office, as well as of any other person indicated in Art. 74 of the Constitution (including the Member of the Seimas), who has breached the oath and grossly violated the Constitution, according to the impeachment procedure, is not an end in itself. According to the Constitution, the purpose of the constitutional institute of impeachment is much broader: its purpose is to prevent the persons who have grossly violated the Constitution and breached the oath from holding the office provided for in the Constitution, the beginning of which, according to the Constitution, is linked with taking the oath specified in the Constitution.

In the judgment of the ECtHR it was acknowledged that the individual right at issue is not absolute and that certain limitations of this right are permissible, but that these limitations may not be of a permanent character. While analysing the ruling of the Constitutional Court, the ECtHR recognised that the measure in question – removal from the office applied for a breach of an oath and a gross violation of the Constitution – formed a part of self-protection mechanism for democracy through "public and democratic scrutiny" of those holding public office. Nonetheless, the ECtHR decided that the prohibition, the imposition of

which deprives of the right and possibility for the person concerned on the whole to stand as a candidate in elections to the institution that is the representation of the nation, was too strict, and that, under the provisions of the Convention, "the decision to bar a senior official who has proved unfit for office from ever being a member of parliament in future is above all a matter for voters, who have the opportunity to choose at the polls whether to renew their trust in the person concerned". The ECtHR emphasised that the "free expression of the opinion of the people in the choice of the legislature must be ensured in all cases"[62].

It should be noted that this situation of divergence between the interpretation of the Constitution as provided by the Constitutional Court and the interpretation of the European Convention on Human Rights by the ECtHR while identifying a fair balance between the public interest and individual rights is a single situation. As mentioned, the Constitutional Court rely on the ECtHR case-law, while in this case the situation was examined by the ECtHR already after the ruling of the Constitutional Court and not necessarily in a better grounded way.

CONCLUSIONS

By carrying out two complementary functions in the field of electoral law – the general control of constitutionality of all electoral laws and the special function of providing conclusions on legitimacy of parliamentary and presidential elections – the Constitutional Court of the Republic of Lithuania plays a significant role in developing electoral rights. The Court reveals and develops the content of the constitutional principles of democratic elections as well as safeguards them also in concrete situations when balancing individual electoral rights and public interest considerations of stability of political representative institutions.

The practice of the Constitutional Court of the Republic of Lithuania clearly demonstrates that in balancing the colliding constitutional values – individual electoral rights (especially the right to stand as a candidate) and public interest to have stable representative institutions – it is possible to find the solutions that would ensure that none of these values is denied or unreasonably restricted. Although in most of the situations the priority has been given to the public interest to have stable functioning state institutions, the essence of passive electoral rights has not been denied as well. The Court jurisprudence

[62] National Report of the Constitutional Court of the Republic of Lithuania, prepared for the XVIth Congress of the Conference of European Constitutional Courts, Vilnius, 2013. Available at: <http://www.confeuconstco.org/reports/rep-xvi/LB-Lituanie-EN.pdf>.

also provides the guidelines for the future elections to improve the protection of individual rights.

For example, while acknowledging certain violations of equality in passive electoral rights resulting from the established monopoly of political parties to nominate candidates, the Constitutional Court had also to preserve the stability of the already elected municipal authorities; therefore the elimination of the said monopoly of political parties and the possibility to have non-party candidates was proclaimed as *lex ferenda* without questioning the legitimacy of the ongoing elections. The similar approach was taken when the Constitutional Court abolished the discriminatory legislation that prohibited non-party lists to use the chosen names.

Ensuring fairness and transparency of elections, the Constitutional Court clearly prefers the publicity of information about candidates, i.e. the public interest that voters should have all the information relevant to their choice. On the other hand, it is hard to imagine fair and democratic elections if the fraudulent means, such as bribwry of voters, are to be employed. Therefore, in defending the public interest to have the genuinely representative institutions formed on the basis of real and true will of people, the Constitutional Court has formulated the presumption of invalidity of the results of elections in case of the established mass or systematic bribery of voters; in this case the legitimacy and legality of elections can be reasonably doubted. However, this presumption is more absolute in the majoritarian system of elections with regard to the results in single-candidate constituencies. In case of a proportionate electoral system, it has slightly different application again due to the considerations of public interest in stability of political representative institutions: the presumption of invalidity of the results should be first applied in respect of those candidates whose election is sought by fraudulent means by eliminating them from the final list of candidates; however, the invalidation of the whole of results in the multi-candidate constituency should be applied as an *ultima ratio* measure when the violations are so serious and massive as to cast a reasonable doubt on the final distribution of mandates between the lists of candidates.

Balancing of individual and public interests is inevitable also in ensuring universality of elections. On the one hand, there is the right of citizens to stand as candidates in elections and the corresponding public interest to choose from variety of candidates. On the other hands, it is reasonable to expect from the candidates loyalty to democracy and the constitutional order; therefore, there is also the public interest to prevent those whose loyalty to the constitutional order can be reasonably doubted from taking the top state offices. The balance between the protected values and the public interest in exceptional cases can be

differently understood by national constitutional court and the ECtHR. However, this difference is not always in favour of the ECtHR: the position taken by the ECtHR that even the persons who have committed gross breaches of the Constitution and their oath should nevertheless be entitled to stand in elections can be a subject criticism (as the eligibility of those person to stand in elections can create a danger for democracy).

Democracy in itself is impossible without democratic elections that are the only means to form the representative institutions. Therefore, it is natural that priority is given to the public interest to maintain the representative institutions rather than to the immediate protection of individual rights. Only when violations of the latter rights acquire mass and systematic character, they can shake the fundamentals of representative democracy and then the public interest can be defended only by holding new elections.

THE MISSION OF CONSTITUTIONAL COURTS IN TIMES OF POLITICAL INSTABILITY

TOMA BIRMONTIENE*

INTRODUCTION[1]

The role of a constitutional court in ensuring values protected under the constitution is crucially important and its significance is currently no longer disputed. However, the question remains as to the limits defining the boundaries of such activity. This question becomes even more evident in times of political instability. Being a relatively theoretical concept in itself, political instability generally coincides with a constitutional crisis, when the state authorities for various reasons fail to properly implement their functions. And it is not infrequently that the intervention of the constitutional review institution becomes inevitable in this situation.

National constitutional regulations entail varied capacities of the constitutional court (constitutional review institution) to act in seeking to avert a constitutional crisis or reduce its effects. It is common for these attempts by the constitutional review institution to result in the interpretation of constitutional provisions, which is the case in relation to the ruling of the Constitutional Court of the Republic of Lithuania of 10 January 1998.[2] In this ruling, interpreting the relevant provisions of the Constitution (1992), the Constitutional Court not only clarified the powers of the President of the Republic in forming the government, but also interpreted that the form of government in Lithuania is a parliamentary republic with certain elements of a semi-presidential republic.[3]

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[1] Before its delivery for publication, the present article was updated in view of certain significant judgments given by the Constitutional Court of Moldova in 2017 given their relevance to the issues under consideration.

[2] The ruling of the Constitutional Court of Lithuania of 10 January1998, available at www.lrkt.lt.

[3] Following the election of the President of the Republic of Lithuania, the conflict between the Prime Minister and the President of the Republic concerning the powers of the President of the Republic (and of the Parliament) in appointing and dismissing

Other cases within this group of decisions also include the judgment of the Constitutional Court of the Republic of Moldova of 29 December 2015,[4] which in a similar vein interpreted the constitutional powers of the President of the Republic in proposing a candidate to the Parliament for the position of the Prime Minister.[5] The above-mentioned decisions of both the Lithuanian

from office the Prime Minister (and the Government) resulted in a constitutional dispute and, consequently, the adoption of the ruling of the Constitutional Court of 10 January 1998. Having interpreted the provisions of the Constitution, the Constitutional Court held that the form of government in Lithuania is a parliamentary republic with certain elements characteristic of a semi-presidential republic. In this ruling, the Constitutional Court clarified that, based on the competence of state institutions as established by the Constitution, the model of government of the state of Lithuania should be categorised as the form of parliamentary republic. At the same time, the Constitutional Court noted that the form of government of the state of Lithuania also has certain characteristics of the so-called mixed (semi-presidential) form of government. This is reflected in the powers of the Parliament (Seimas), the powers of the Head of State – the President of the Republic and the powers of the Government, as well as in the legal arrangement of their reciprocal interaction. Under the constitutional regulation (the Constitution of the Republic of Lithuania 1992), the President of the Republic is elected in direct elections. The Lithuanian constitutional system consolidates the principle of the responsibility of the Government to the Seimas, which determines the manner of the formation of the Government; the constitutional framework of the branches of state power entails that only the Government that has the confidence of the Seimas may accomplish its powers based on the principles of parliamentary democracy, which are consolidated in the Constitution.

[4] The judgment of the Constitutional Court of Moldova No. 32 of 29 December 2015 on the constitutional review of the Decree of the President of the Republic of Moldova No. 1877-VII of 21 December 2015 on appointing a candidate for the position of the Prime Minister, available at

http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=553&l=en

[5] The Constitutional Court of Moldova, in its judgment of 29 December 2015, faced analogous issues concerning the form of state government implied by constitutional provisions and the constitutional powers granted by these provisions to the President of the state in forming the Government and in choosing a candidate for the office of the Prime Minister for a new government. In its judgment at issue, the Constitutional Court of Moldova extensively analysed the constitutional grounds for the constitutional obligation of the President of the Republic in designating a candidate for the office of the Prime Minister. The Constitutional Court held that the relevant constitutional provisions (Article 98(1) of the Constitution) should be interpreted taking into account the parliamentary form of government of the Republic of Moldova. The Court found that the constitutional provisions provide for the exclusive prerogative of the President

and Moldovan Constitutional Courts were decisive in averting the deepening constitutional crises.[6]

Constitutional review institutions, interpreting the provisions of the respective constitutions, are obliged to ensure that the arrangement of state powers is compliant with the principle of the separation of powers, as well as that the functioning and empowerment of state authority institutions is effective and well-balanced. Questions related to the form of government of a state usually arise upon the restoration of statehood, enactment of a new constitution, or adoption of substantial constitutional amendments, forcing to reconsider questions that seemed to have been answered. Thus, while interpreting the provisions of the constitution, constitutional courts draw the limits of powers conferred on presidents and prime ministers, and they decide complicated delicate issues in an attempt to find answers dictated by the constitution for solving a situation of political instability or even a constitutional crisis.

However, the actions of state authorities (highest state officials) that go beyond the constitutionally defined limits, or disagreements over the scope of the implementation of their powers, can give rise to the question of last resort measures – the application of constitutional liability, which may take various forms. If the constitutional review institution declares a person to have grossly violated the constitution and breached the oath of office, the enforcement of constitutional liability may result in the removal of the highest official concerned from office (through the impeachment procedure) or the temporary suspension of powers (establishment of interim office) of such an official (President of the Republic).

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of the Republic to designate a candidate for the office of the Prime Minister. At the same time, the Constitutional Court noted that, although it is exclusive, the designation prerogative cannot be discretionary, since the President of the Republic may designate a candidate for the office of the Prime Minister only following consultations with parliamentary factions, (both the support of the parliamentary majority and possible constructive cooperation with the minority, which is in the opposition, is needed). The essential element of the procedure for the formation of the Government is the vote of the Parliament; the Government will only be politically responsible before the Parliament that can dismiss it.

[6] For more on these judgments of the Constitutional Courts, see Birmontienė T., "Unison in Constitutional Interpretation. Doctrinal Developments by the Lithuanian and Moldovan Constitutional Courts", *Polish Law Review*, Issue 2, Volume 2, Gdansk, 2016, p. 47-59. (www.polishlawreview.pl.)

The impeachment processes that have recently taken place in South Korea[7] and Brazil,[8] where the Parliaments and the judiciary encountered the issues of constitutional liability of the Presidents of their states, once again highlighted responsibility falling on political and judicial authorities in acting under the conditions of political instability.

This article aims to overview in brief in what ways the Lithuanian and Moldovan Constitutional Courts dealt with the issues related to the constitutional liability of the highest state officials whose actions had conditioned constitutional crises, and why the decisions delivered by these courts were different.

IMPEACHMENT AS AN INSTRUMENT OF CONSTITUTIONAL LIABILITY: EXPERIENCE OF THE CONSTITUTIONAL COURT OF LITHUANIA

The constitutions of democratic states treat impeachment as a special procedure through which the issue of the constitutional liability of the highest state officials is decided. The impeachment institution has undergone changes and, at present, where impeachment proceedings are consolidated in the constitution, the role of courts, including that of the constitutional court, is growing.

If the constitution provides for the powers of the constitutional review institution in the impeachment process, the constitutional review institution takes part in impeachment proceedings along with the parliament (e.g. in Lithuania, Germany, Austria, Italy, the Czech Republic, South Korea, etc.). The role of constitutional courts in impeachment proceedings varies among states. In certain states, it is the constitutional court that pronounces the final word (Germany, Austria and South Korea); whereas, in Lithuania (also in Italy), after a conclusion is given by the Constitutional Court, the final decision is taken by the parliament. In other countries, it is not the constitutional court but another higher court (e.g. the High Court of Cassation and Justice in Romania) that ta-

[7] The National Assembly of South Korea voted on 9 December 2016 in favour of the impeachment and temporary suspension of the duties of President Park Geun-hye (due to corruption and influence peddling). The Constitutional Court of Korea upheld the impeachment on 10 March 2017 removing the President from office. Another pertinent decision of the Constitutional Court of Korea was made when, in March 2004, the National Assembly of South Korea impeached President Roh Moo-hyun and brought about the immediate suspension of the presidency, but, two months later, the Constitutional Court of Korea restored the *status quo* by dismissing the impeachment and reinstating the powers of the President.

[8] On 31 August 2016, the Brazilian Senate impeached President Dilma Rousseff for illegally manipulating governmental accounts.

kes part in the impeachment process and makes the final decision. In Romania, the Constitutional Court participates in a special procedure for the suspension of the President of Romania from office and serves as an advisory body, while the question concerning the suspension of the President of Romania is ultimately decided by referendum. These questions are similarly dealt with under the constitutional arrangements of Moldova.[9]

Thus, the constitutions of most states consolidate certain elements of impeachment; however, the chosen impeachment models can differ. The specific character of these models is determined by the role of courts, in particular constitutional courts, involved in impeachment. Different chosen constitutional impeachment models determine the different procedure of this constitutional sanction and the different powers of the authority institutions involved – parliaments and (constitutional) courts. Nevertheless, it is very important to keep a balance between impeachment as a political process and its legal assessment.

Lithuanian constitutional law has so far been dynamic, fast-evolving and able to have a significant impact on the whole Lithuanian legal (and political) system. The Lithuanian constitutional legal doctrine is characterised by the diversity of issues considered and the development of the constitutional doctrine in relation to such specific legal institutions as constitutional liability applied through impeachment, which is especially rare in other national constitutional legal doctrines. The constitutional doctrine on impeachment constitutes an aspect in Lithuanian constitutional law that distinguishes Lithuania from other European states. The period from 2004 to 2017 witnessed the adoption by the Constitutional Court of Lithuania of some highly important acts[10] in which the issue of constitutional liability was considerably elaborated. Thus, compared to other European constitutional courts, the jurisprudence of the Constitutional Court of Lithuania is marked by the relatively broad interpretation of the institution of constitutional liability applied through impeachment.

The Constitutional Court of Lithuania began formulating the elements of the legal institution of impeachment as far back as in its ruling of 11 May 1999.[11]

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[9] Constitution of the Republic of Moldova (1994), the Articles 89-91 (http://constcourt.md/public/files/file/Baza%20legala/Constitutia_engl___13.11.17.pdf)

[10] *Inter alia*, the rulings of the Constitutional Court of 25 May 2004, 5 September 2012 and 22 December 2016; the conclusions of the Constitutional Court of 31 March 2004, 27 October 2010, 3 June 2014, 19 December 2017 and 22 December 2017. *All acts of the Constitutional Court of Lithuania are available in Lithuanian and English available at* www.lrkt.lt

[11] The Ruling of the Constitutional Court of Lithuania of 11 May, 1999 (available at www.lrkt.lt)

Later it was further significantly developed, *inter alia*, in the rulings of 25 May 2004 and 12 September 2012. Various aspects of the constitutional concept of impeachment were also revealed in other acts of the Constitutional Court: *inter alia*, the conclusion of 31 March 2004, the rulings of 15 April 2004 and 24 February 2017, and the conclusions of 27 October 2010, 3 June 2014, 19 December 2017 and 22 December 2017.

In the ruling of the Constitutional Court of 11 May 1999, the constitutional institution of impeachment was construed as *independent* but also as interrelated with other different provisions of the Constitution (e.g. the provisions of Item 5 of Article 63, Paragraph 2 of Article 86, Item 5 of Article 88, Paragraph 1 of Article 89, Article 105, Item 5 of Article 108 and Article 116 of the Constitution), which should be assessed as constituting the constitutional basis for the institution of impeachment. The provisions of the Constitution consolidating the institution of impeachment may not be dissociated from the striving for an open, just and harmonious civil society and a state under the rule of law, which is enshrined in the Preamble to the Constitution; nor can it be separated from the provision of Article 1 of the Constitution that the state of Lithuania is a democratic republic, the provision of Article 4 of the Constitution that the nation executes its supreme sovereign power directly or through its democratically elected representatives, or the provisions of Article 5 of the Constitution that the scope of power is limited by the Constitution and that state institutions serve the people. The constitutional principle of a state under the rule of law requires that all state institutions and officials act only on the basis of the Constitution and law and in compliance with the Constitution and law. The Constitutional Court has construed the legal concept of impeachment by, first of all, interpreting the provisions of Article 74 of the Constitution.[12]

In its ruling of 11 May 1999, the Constitutional Court formulated the constitutional concept of impeachment and noted that impeachment is one of the measures for the self-protection of civil society. Through making the provision for a special procedure for the removal of top officials from office or the revocation of their mandate, public and democratic control *is ensured* over the activiti-

[12] The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, as well as any members of the Seimas, if they grossly violate the Constitution or breach their oath, or are found to have committed a crime, may be removed from office or have the mandate of a member of the Seimas revoked by a 3/5 majority vote of all the members of the Seimas. This is performed according to the procedure for impeachment proceedings, as established by the Statute of the Seimas.

es of the said officials, who are at the same time granted additional guarantees so that they could fulfil their duties on the basis of law.

The constitutional institution of impeachment is interrelated and integrated with other important constitutional institutions such as the oath of office and electoral rights. The alteration of any of the elements of these institutions would simultaneously result in the change in the content of other related institutions, i.e. the system of values entrenched by these constitutional institutions would also be altered.

During the impeachment proceedings, the Constitutional Court of Lithuania adopted several significant conclusions, in which it declared the President of the Republic and five members of the Seimas (Parliament) have grossly violated the Constitution and breached their oath of office.[13] In the jurisprudence related

[13] On 31 March 2004, subsequent to an inquiry submitted by the Seimas, the Constitutional Court adopted the conclusion stating that the actions of the President Rolandas Paksas of the Republic of Lithuania had been in conflict with the Constitution and that he had grossly violated the Constitution; as a result, on 6 April 2004, the Seimas removed Rolandas Paksas from office.

In its conclusion of 27 October 2010, subsequent to an inquiry submitted by the Seimas, the Constitutional Court assessed the constitutionality of the actions of two members of the Seimas. Seimas member Linas Karalius, against whom an impeachment case had been instituted due to his failure, without important and justifying reasons, to attend the plenary sittings of the Seimas, was found by the Constitutional Court to have **grossly violated the Constitution and breached his oath.** By his actions, the other Seimas member, Aleksandr Sacharuk, who had used his certificate of a member of the Seimas at the plenary sittings of the Seimas for *deliberate voting (8 times) instead of Seimas* member Linas Karalius, was also found to have *violated the Constitution* and breached the oath of office. Nevertheless, the Seimas revoked only the mandate of Linas Karalius, while Aleksandr Sacharuk continued to hold office as a member of the Seimas.

Subsequent to an inquiry submitted by the Seimas, in its conclusion of 3 June 2014, the Constitutional Court assessed the constitutionality of the actions of Seimas member Neringa Venckienė, against whom an impeachment case had been launched. The Constitutional Court recognised that Seimas member Neringa Venckienė, who had without a justifiable reason failed to attend 64 plenary sittings of the Seimas and 25 sittings of the Committee on Legal Affairs of the Seimas, had discredited the authority of the Parliament as the representation of the nation and had breached her oath and grossly violated the Constitution.

In its conclusion of 19 December 2017, subsequent to an inquiry submitted by the Seimas, the Constitutional Court assessed the constitutionality of the actions of Seimas member Kęstutis Pūkas, against whom an impeachment case had been instituted. The Constitutional Court came to the conclusion that he had degraded the dignity of the persons holding the positions of his secretaries assistants and that of the persons apply-

to impeachment, major significance should be placed on the conclusion of 31 March 2004, in which the Constitutional Court recognised that the President of the Republic had grossly violated the Constitution by his actions. This conclusion was delivered in time of political instability, when the doubts arose not only regarding the funding of the election campaign of Rolandas Paksas as a presidential candidate, but also regarding his further actions after his election as the President of the Republic. The conclusion of the Constitutional Court whereby he was declared to have grossly violated the Constitution considerably influenced the circumstances of the then constitutional crisis and made it possible to legally assess the actions of the elected President of the Republic. Based on the conclusion of the Constitutional Court, the Parliament removed him from the office of the President of the Republic.[14]

It is worth mentioning that peculiar situations in the past experience were not avoided. Under the former legal regulation consolidated by the previously applicable provisions of the Statute of the Seimas, impeachment proceedings could in some cases be held only in the Parliament, without the involvement of the Constitutional Court. This probably determined the situation when, after the Seimas did not approve the revocation of the mandate of Seimas member Audrius Butkevičius on 15 June 1999, he continued to be a member of the Parliament even though he had been convicted by a court for the commission of a crime (attempt of serious fraud) and *continued holding the mandate of a parliamentarian* for a certain period of time while *serving sentence in prison*. This was

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ing for these positions, interfered with their private life (**harassment based on gender)** and discriminated them. Due to these actions, he was found to have **grossly violated the Constitution and breached his oath of office.**

In its conclusion of 22 December 2017, subsequent to an inquiry submitted by the Seimas, the Constitution Court assessed the constitutionality of the actions of Seimas member Mindaugas Bastys, against whom impeachment proceedings had been instituted in the Parliament. The Constitutional Court held that Seimas member Mindaugas Bastys **had grossly violated the Constitution and breached his oath of office** insofar as, in providing answers to the Questionnaire for persons who are candidates to obtain authorisation to handle or access classified information, he had concealed information about his relationships and violated the requirement laid down in the Law on State Secrets and Official Secrets to provide information about relationships affecting the decision to grant authorisation to handle or access classified information; thus, acting in bad faith, he had sought to obtain authorisation to handle or access classified information; upon obtaining this authorisation, due to his relationships, he could pose a threat to the protection of state secrets.

[14] On 6 April 2004, the Parliament removed Rolandas Paksas from office of the President of the Republic.

one of the reasons for the Constitutional Court to develop and strengthen the constitutional doctrine of impeachment proceedings.

Although, as mentioned, the elements of the constitutional doctrine of impeachment were started to be developed as early as in the ruling of 11 March 1999, the official doctrine of this constitutional sanction was formulated by the Constitutional Court in its ruling of 25 May 2004[15] and was later significantly developed further in the ruling of 5 September 2012.

The constitutional institution of impeachment in the constitutional doctrine is understood as one of the forms of public democratic control. In the jurisprudence developed by the Constitutional Court, the application of the constitutional sanction of removal from office in respect of the persons specified in Article 74 of the Constitution – the President of the Republic, the members of the Seimas, the president and justices of the Constitutional Court, the president and justices of the Supreme Court and the president and judges of the Court of Appeal – is regarded as one of the self-protection measures of the national community – the civil nation; a way of self-defence from the said highest state officials if they ignore the Constitution and law, so that they are prohibited from holding the respective office once they have failed to fulfil their obligations to unconditionally follow the Constitution and law and to pursue the interests of the nation and the state of Lithuania and have discredited state authority by their actions. Thus, the process of impeachment is aimed at deciding the issue of constitutional liability.

[15] It should be noted that the principle formulated by the Constitutional Court in its ruling of 25 May 2004 determined the collision of jurisprudences. The principle, as set out in the ruling of the Constitutional Court of Lithuania of 25 May 2004, that a person removed from office through the impeachment procedure is barred in the future from taking up any office, including the office of a member of the Parliament, that under the Constitution requires taking the oath led to the collision of the jurisprudences after the European Court of Human Rights delivered the judgment of 6 January 2011 in the case of *Paksas v. Lithuania*, in which the Grand Chamber, *inter alia*, recognised that the applicant's disqualification from standing for election to the Seimas constituted a violation of Article 3 of Protocol No. 1 to the Convention. After examining this legal situation, determined by the collision of the jurisprudences, in its ruling of 5 September 2012, the Constitutional Court of Lithuania, *inter alia*, noted that Paragraph 1 of Article 135 of the Constitution gives rise to the obligation for the Republic of Lithuania to remove the incompatibility of the provisions of Article 3 of Protocol No. 1 to the Convention with the Constitution, *inter alia*, Paragraph 2 of Article 59 and Article 74 thereof. The Constitutional Court ruled that, taking account of the fact that the legal system of Lithuania is based on the principle of the superiority of the Constitution, the only way to remove this incompatibility is the adoption of relevant amendment(s) to the Constitution.

The persons specified in Article 74 of the Constitution may be removed from office (have their mandate of a member of the Seimas revoked) through the impeachment procedure for actions provided for in the Constitution: a gross violation of the Constitution, a breach of their oath or commission of a crime. The constitutional grounds for impeachment are not identical. The Constitutional Court has more than once held that a breach of the oath is at the same time a gross violation of the Constitution; and a gross violation of the Constitution also entails a breach of the oath. However, not every violation of the Constitution is in itself a gross violation of the Constitution;[16] while deciding whether the actions of the President of the Republic or a member of the Seimas grossly violated the Constitution, in each case it is necessary to assess the nature of the committed actions and other circumstances.

Impeachment may not be equated with criminal liability, even where a crime constitutes the grounds for instituting this procedure Unconstitutional actions committed by the above-mentioned persons can lead not only to constitutional liability, but also to another type of legal liability, this depends on the nature of unlawful actions. The purpose of this sanction is to remove a person indicated in Article 74 of the Constitution specifically from the office held by that person – such office that the person entered after taking the respective oath and was holding at the time when he/she breached his/her binding oath.

Under the Constitution, only two state authority institutions – the Seimas and the Constitutional Court – have powers in impeachment proceedings. An impeachment case may be instituted exclusively upon the motion by members of the Seimas. Thus, the initiative for the application of this constitutional sanction is vested in the Parliament. The Constitutional Court gives conclusions on whether the concrete actions of the members of the Seimas and state officials against whom impeachment proceedings have been instituted are in conflict with the Constitution, whether the said persons have grossly violated the Constitution and breached the oath, or whether they have committed a crime. A conclusion of the Constitutional Court that the person concerned has grossly violated the Constitution (thus also breached his/her binding oath) is final.

Based on the conclusion of the Constitutional Court, *inter alia*, the question of impeachment is finally decided by the Seimas. Under Article 74 of the Constitution, through the impeachment procedure, the Seimas may revoke the mandate of a member of the Seimas or remove the person from office by a 3/5 majority vote of all the members of the Seimas; such a decision of the Seimas is final. A person who has been held constitutionally liable – has been removed from office or his/

[16] The conclusion of the Constitutional Court of 31 March 2004.

her mandate of a member of the Seimas has been revoked is barred in the future from holding any office provided for in the Constitution that may be taken up only after the person takes the oath established under the Constitution.

THE CONSTITUTIONAL INSTITUTION OF INTERIM OFFICE: EXPERIENCE OF THE CONSTITUTIONAL COURT OF MOLDOVA

While implementing its mission to protect the constitution and safeguard the system of state institutions and the constitutionally implied balance of their powers, the constitutional court not infrequently faces demanding challenges. Disagreements between state authority institutions sooner or later assume legal significance – through the adoption of or a refusal to adopt (omission) a particular legal act; in a short while, such decisions of state institutions reach the constitutional court, which is obliged to settle the disagreements between state authorities by adopting a proper solution with a view to averting the situation of deepening political instability. Of particular difficulty prove to be situations in which the state authority institutions concerned ignore the decisions of the constitutional court and, by their failure to act, cause constitutional crises to arise. This type of situation arose in Moldova in 2017, when disagreements between the President of the Republic and the Prime Minister over the formation of the Government resulted in a constitutional crisis.

The long-standing conflict between the President of the Republic and the Government originated after the presidential elections in the fall of 2016. Bringing political instability, the conflict between the President of the Republic, elected by a popular vote in November 2016, and the Prime Minister occurred at the beginning of 2017 concerning the appointment of ministers. The matter in dispute was referred by the politicians to the Constitutional Court, which was requested to interpret the relevant constitutional provisions on the powers of the President of the Republic in forming the Government.

In its judgment of 24 of January 2017,[17] the Constitutional Court of Moldova interpreted Article 98(6) of the Constitution[18] and formulated the principles and

[17] Judgment of the Constitutional Court of Moldova of No. 2 of 24 January 2017 on the interpretation of para.(6) of the Article 98 of the Constitution, available at http://constcourt.md/ccdocview.php?tip=hotariri&docid=631&l=ro

[18] Article 98(6) of the Constitution of the Republic of Moldova (1994) provides that, "In the event of the governmental reshuffle or vacancy of office, the President of the Republic of Moldova shall revoke and appoint, upon the proposal of the Prime Minister, some members of the Government."

some rules of procedure for the governmental reshuffle and the sharing of competences between the President of the Republic and the Prime Minister within this procedure. This constitutional doctrine is grounded on the presumption that, in the parliamentary system of government in Moldova, the President of the county does not bear political responsibility for the work of the Government and his role in shaping the composition of the cabinet is a limited one. This presumption was developed in the previous jurisprudence of the Constitutional Court, *inter alia*, its judgment of 23 of March 1999.[19] In the judgment of 24 of January 2017, the Constitutional Court stressed that the President may decline the proposal of the Prime Minister to appoint a person for a vacant ministerial office and to ask for another proposal, thus without generating a source of an institutional deadlock or annulling the competences of the Prime Minister within the co-decision procedure in a cabinet reshuffle. Rejecting a candidate proposed by the Prime Minister for a vacant ministerial office may occur only once and the refusal must be a reasoned one. If the President of the Republic does not accept a candidate, the Prime Minister is entitled to come up with a second proposal for a candidate for the office of a minister or with the same proposal, and the President is under the duty to appoint the proposed candidate.

Thus, having interpreted the provisions of the Constitution and having clarified the particularities of a parliamentary republic in its judgment of 24 January 2017, the Constitutional Court formulated a rather stringent doctrine, under which the substantial powers in forming the Government are conferred on the Prime Minister, while the President of the Republic is vested with more formal powers in cases where a reshuffle of the already composed government takes place. According to this doctrine, even after a candidate for the position of a minister has been declined by the President of the Republic, the Prime Minister may once again propose the same candidate and, under the Constitution, the President of the Republic is bound to appoint such a minister.

However, as the subsequently unfolding developments showed, the President of the Republic did not pay regard to the doctrine formulated in the abovementioned judgment. The institutional deadlock was preceded and accompanied by multiple statements by the President, issued by him personally or by his entourage, which indicated his intention to block all the institutions that enjoy shared competences, including the intention to refuse the promulgation of laws in the event of their repeated voting in the Parliament, the refusal to swear in

[19] Judgment of the Constitutional Court of Moldova of 23 of March 1999 on interpretation of Article 82 para. (1) of the Constitution, available at http://constcourt.md/ccdocview.php?tip=hotariri&docid=308&l=en

judges and ministers, as well as the lack of respect for the Constitution, the Constitutional Court and its judgments.

As the conflict, *inter alia*, the disagreement over the appointment of the Minister of Defence, was deepening between the President of the Republic and the Prime Minister, after the repeated proposal by the Prime Minister to appoint the same candidate for the position of the minister, the Government applied to the Constitutional Court with a request to interpret Article 98 para.(6) of the Constitution, *inter alia*, from the aspect of solving of the situation in order to avoid an institutional deadlock in the event the President of the Republic infringes the constitutional duty to swear in the minister following the repeated proposal made by the Prime Minister.

On 17 October 2017, the Constitutional Court adopted a doctrinal judgment[20] interpreting the provisions of the Constitution in a situation related to the failure of the President of the Republic to carry out constitutional duties. The Constitutional Court noted that the governmental complaint stemmed from the non-enforcement of the judgment of the Constitutional Court of 24 January 2017. It was reiterated that the interpretative judgments of the Constitutional Court represent the texts of constitutional value and are an integral part of the Constitution; together with the provisions they are interpreting, these judgments form a common body and are mandatory for enforcement by all state institutions; they apply directly, without any other formal condition.

The doctrine formulated in the judgment of 17 October 2017 should be treated not only as the constitutional justice doctrine clarifying the question concerning the resolution of situations related to the non-enforcement of the decisions of the Constitutional Court, but also as the doctrine on the application of the constitutional sanction to the highest state officials.

In the judgment of 17 October 2017, the provisions of Article 98 para. (6) of the Constitution are interpreted in conjunction with Articles 1, 56, 91, 135 and 140 of the Constitution and reflect a set of connected elements and principles of constitutional value, such as the rule of law, checks and balances, constitutional loyalty, the supremacy of the Constitution and the binding nature of the judgments of the Constitutional Court. The Constitutional Court also referred to the experience of other courts in solving problems related to constitutional

[20] Judgment of the Constitutional Court of Moldova no. 28 of 17 October 2017 on the interpretation of Art.98 para.(6) combined with Art. 1, 56, 91, 135 and 140 of the Constitution (nonfulfillment of constitutional duties by the President of the Republic), available at http://constcourt.md/ccdocview.php?tip=hotariri&docid=635&l=ro

crises.[21] In the judgment in question, the Constitutional Court developed the general doctrine aimed at providing an answer to the particular issue relating to obstruction by the President of the Republic of a governmental reshuffle, and stressed that there is a need for general mechanisms that would put an end to a situation of unconstitutionality triggered by the deliberate inaction of the President of the Republic in meeting his/her constitutional duty.

While interpreting the constitutional duties of the President of the Republic, the Constitutional Court underlined that the President is an important element of the political system, "but he is not a partisan of politics"; "the President of the country " is not omnipotent" and is just under the obligation of constitutional devotion to observe the limits imposed by the Constitution and bears responsibility for the fulfilment of his attributions in good faith. By taking the oath, the President of the Republic of Moldova unconditionally, publicly and solemnly undertakes the obligation to act exclusively in the spirit of loyalty towards the Constitution and not to violate the oath under any circumstances. The Constitutional Court reiterated that, on the one hand, the violation of the oath is a serious violation of the Constitution; while, on the other hand, a serious violation of the Constitution is a violation of the oath; the severity of this violation may raise the issue of the incompatibility of the President of the Republic with his/her position and, thus, also the application of constitutional liability.

The Constitutional Court found that the deliberate refusal of the President of the country to fulfil the constitutional duty to appoint a person repeatedly proposed by the Prime Minister represents a serious violation of the constitutional obligations and oath of the President of the state – a circumstance that justifies the initiation by the Parliament of the procedures to suspend the President of the Republic according to Article 89 of the Constitution.

The Constitutional Court held that the Constitution of the Republic of Moldova does not provide express solutions concerning the manner in which the extraordinary situation created by the deliberate inaction of the President of the Republic should be handled; the text of the Constitution is built on the premise of good faith, including the aspect referring to the exercise by public officials of their constitutional tasks. The Constitutional Court recalled that any interpretation of constitutional provisions derives from the nature, objectives and the spirit of the Constitution itself; the Constitution is to be regarded as a "living instrument", which must be interpreted in the light of current social and political

[21] While examining the case, the Constitutional Court also considered the experience of Lithuania and Belgium in relation to solving constitutional crises generated by a refusal of the Head of State to promulgate or countersign the laws.

realities, so as to guarantee the continuous and effective functionality of state institutions; no provision in the Constitution may be interpreted as allowing a deadlock in the functioning of state institutions or the creation of a state power vacuum.

Through the functional interpretation of the Constitution, the Constitutional Court identified mechanisms for replacing the role of the President of the Republic within the constitutional procedures that would make it possible to unblock the functionality of the state institutions concerned. The Constitutional Court emphasised that, in the case of institutional deadlocks, when the competences of some institutions are not exercised by persons entitled to represent them, irrespective of the reasons that have caused these deadlocks, the constitutional provisions provide for their replacement by establishing interim office. The Constitution contains rules providing for the temporary or permanent impossibility of continuing the exercise of the mandate (these situations, provided for both in Article 90 and Article 91 of the Constitution, lead to the establishment of interim office).

The Constitutional Court came to the conclusion that the inaction of the presidential institution, by failing to perform its duties either on *objective* or *subjective* grounds, by deliberately refusing to exercise its competences, has *identical* consequences, i.e. results in a deadlock of other institutions, and stressed that the establishment of interim office, caused by a deliberate refusal to execute one or more constitutional duties, i.e. a refusal by the President of the Republic to execute his/her constitutional duties, constitutes the temporary impossibility of exercising presidential power(s) in question and justifies the establishment of interim office, which is ensured, in the given order, by the President of the Parliament or the Prime Minister in order to exercise the said constitutional duties of the President of the Republic. The establishment of interim office, caused by a deliberate refusal to execute a presidential constitutional duty, and the circumstances justifying the interim office of the President of the Republic must be ascertained in each particular case by the Constitutional Court.

On 20 October 2017, subsequent to the application by the Government, the Constitutional Court of Moldova delivered an Opinion[22] and justified the interim office of the President of the Republic of Moldova within the procedure of reshuffling the Defence Minister. In order to execute the interim office of the President of the Republic, the President of the Parliament or the Prime Minister

[22] The opinion of the Constitutional Court of Moldova of 20 October 2017, available at http://constcourt.md/ccdocview.php?tip=avize&docid=57&l=ro

had, in the capacity of the Interim President, to issue the decree on the nomination for the office of the Defence Minister and had to administer the oath.

Thus, the Constitutional Court formulated the important doctrine of the so-called *interim office of the President of the Republic*. It may be applied exclusively in the event of such failure (omission) by the President of the Republic to fulfil his/her constitutional duties that results in *inter alia* a deadlock of the functionality of state institutions (or other serious dysfunction of the state institutions).[23] In each particular case, a situation requiring the establishment of the interim office of the President of the Republic must be ascertained by the Constitutional Court. The powers of the Constitutional Court to justify the necessity for interim office should be regarded as a constitutional guarantee preventing the abuse of this institution.

Although the new doctrine formulated by the Constitutional Court of Moldova was developed in relation to the inaction of the President of the Republic thereby a deadlock situation is caused in the state, this doctrine can also be applied in cases where a specific action by the President of the Republic – the adoption of a legal act is in conflict with the Constitution, and the necessity arises to adopt another legal act, which the President of the Republic refuses to adopt, and this ultimately results in a constitutional crisis in the state (a deadlock in the functionality of state institutions).

At the same time, the doctrine in relation to the interim office of the President of the Republic can also be viewed as a constitutional sanction applied to the President of the Republic for failure to fulfil constitutional duties, since, at the time of the application of this sanction, the powers of the President of the Republic are temporarily limited, even though in respect of one particular case of inaction. In contrast to impeachment, the application of interim office limits the duties of the highest state official – the President of the Republic only on a

[23] On 2 January 2018, the Constitutional Court of Moldova delivered an opinion on the ascertainment of the circumstances justifying the interim office of the President of the Republic of Moldova within the governmental reshuffle. In order to exercise the interim office, the President of the Parliament or the Prime Minister had, in the capacity of the interim President of the Republic, to issue the appointment decrees for the offices of Vice Prime Ministers, the Minister of Justice, the Minister of Economy and Infrastructure, the Minister of Foreign Affairs and European Integration, the Minister of Health, Labour and Social Protection and the Minister of Agriculture, Regional Development and Environment and to administer their oath.

On 5 January 2018, the Constitutional Court of Moldova adopted an opinion and ascertained the circumstances justifying the interim office of the President of the Republic of Moldova in promulgating a law.

temporary basis, so that the conditions are created for another state official to temporarily hold the office of the President of the Republic and to fulfil a duty established for the President of the Republic under the Constitution. As in the case of the application of impeachment, the establishment of interim office may be applied exclusively in respect of the highest state officials, i.e. the President of the Republic.

Furthermore, the doctrine formulated by the Constitutional Court of Moldova in relation to the interim office of the President of the Republic can be regarded as a certain alternative to impeachment in those cases where the established legal institution of impeachment entails a rather lengthy and complicated procedure for the application of constitutional liability, which is the case in Moldova, where the impeachment of the President of the Republic, under the provisions of the Constitution, requires not only consent by the Parliament expressed by at least two-thirds of its members, but also a national referendum.

Consequently, the recent doctrine formulated by the Constitutional Court of Moldova in relation to constitutional liability shows that changing political reality poses new challenges to constitutional courts in performing their particularly important function of the protection of the constitution.

SOME CONCLUDING REMARKS

Constitutional courts, in carrying out their basic task to protect the constitutional order, interpret the constitution and thoughtfully employ a set of purely legal tools. In doing this, they need to understand that their actions have real-life consequences. Constitutional courts can help the respective constitution to function more effectively and to better achieve the constitutional objective of creating workable democratic governance, thereby preventing constitutional crises.

In order to avert or reduce the effects of a constitutional crisis, constitutional courts use various instruments, of which the strictest one is the constitutional sanction of impeachment – the institution of constitutional liability. The Lithuanian constitutional legal doctrine is characterised by the broad development of the constitutional doctrine of constitutional liability applied through the impeachment procedure. The constitutional institution of impeachment, formulated by the Constitutional Court of Lithuania, primarily, in its jurisprudence of 2004 at the time of deciding the issue of the constitutional liability of the President of the Republic, causing the then constitutional crisis, and, subsequently, developed further and applied in deciding the questions of the constitutional liability

of the members of the Parliament, should be viewed as an effective legal measure for avoiding or reducing the consequences of a constitutional crisis.

The latest political developments in Hungary and Poland, including the developments formerly faced by Georgia, which have testified to the attempts to limit the powers of the constitutional courts, as well as such vicissitudes in constitutional amendments that essentially alter the constitution as in the case of Turkey (2017), thereby a new form of government is created and parliamentarism is restricted in the state, should encourage the constitutional courts to seek new instruments for the protection of the constitution in order to safeguard the democratic values of a state governed by the rule of law. Political reality creates such situations involving the particular action (inaction) by the highest state officials that in no way could be *expresis vebis* envisaged by the constitutions adopted several decades (or more) ago. Therefore, it is necessary that constitutional courts are active and innovative. It is possible to state that precisely this type of activity by constitutional courts also includes the doctrine recently developed by the Constitutional Court of Moldova in relation to the application of constitutional liability – *the interim office of the President of the Republic* and the constitutional sanction – *the temporary limitation of the duties of the President of the Republic*.

ROLE OF THE CONSTITUTIONAL COURT OF MONTENEGRO IN THE PROTECTION OF INDIVIDUAL RIGHTS

DESANKA LOPIČIĆ*

Dear president,

Our gathering today is an opportunity to exchange experience and opinion on how and in what conditions our constitutional courts function, what they mean today in our constitutional legal systems, how they contribute to protecting the rights and freedoms of citizens and their trust in the rule of law.

Montenegro, after the restoration of independence, committed itself to draft and adopt its constitution modelled on the contemporary constitutionalism[1], to establish on it and in compliance with it its constitutional legal order of the internationally recognized state of Montenegro[2], which was constituted as an independent and sovereign state, of the republican form of rule[3] . In the Preamble of the Constitution of Montenegro[4], the fundamental normative principle is stated in detail - "the commitment of the citizens of Montenegro to live in a state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy and the rule of law". Those values are the foundation for the interpretation of the Constitution. By the provision of Article 6 paragraph 1 of the Constitution, the state guarantees the protection of rights and freedoms, and by Article 8 paragraph 1, it prohibits any direct or indirect discrimination, on any grounds[5]. Over one third of the constitutional text is related to the guarantees of freedoms and rights of man

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* *Judge of the Constitutional Court of Montenegro*

[1] *The Constitution was published in the Official Gazette of Montenegro, No.1/2007 and Amendments I to XVI –in 38/2013-1.*

[2] *"The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and g) capacity to enter into relations with the other states". (Article 1 of the International Convention on Rights and Obligations of States, concluded in Montevideo in 1933).*

[3] *Article 1 paragraph 1 of the Constitution.*

[4] *Article 1 of the Constitution.*

[5] *Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination (Article 8 paragraph 2 of the Constitution).*

and citizen. The Chapter on "Human rights and freedoms" more precisely defines individual human rights and certain principles and mechanisms of their protection. The Constitution guarantees equality of all the citizens before the law, irrespective of any specific quality or personal property[6], equality of women and men and it develops the policy of equal opportunities[7], the right to legal remedy[8], the right to legal aid[9], the right to local self-government[10], and the right to the healthy environment.[11]

Montenegro has created its constitutional legal order on the model of democratic constitutions on the grounds of which it has regulated its institutions and prescribed their respective competencies. Owing to such an approach a great number of values and standards of the Montenegrin constitutional legal order are similar to those that we find in the norms of the supranational law, particularly the one that is related to the right to regulate constitutionalization of a modern, democratic constitutional state of the rule of law, human rights, and fundamental freedoms. This is primarily related to the similarities in the competencies that have been assigned to the institutions that are engaged in the protection of human rights. Namely, the Constitution contains textually all the essential rules that characterize the contemporary constitutionalism, such as: „a) The government institutions and their respective competences are established by the Constitution, and b) Through constitutional elections, the people are assigned the ultimate power; c) Exercising of public powers, including the legislative power, is legitimate only if it is in compliance with the constitutional law; d) The Constitution stipulates the right and the system of constitutional adjudication for the protection of such rights. The framer of the constitution expressed great confidence in the institutions of the judiciary, and particularly in the institution of the constitutional judiciary to which in the immanent logic of the constitutional document the role of the "guardian of democracy" was given. We are talking about the concept the agent of which protects democracy from abuse and usurpation of power. By adopting the Constitution on the "tidal wave of the historical constitutional moment", the Montenegrin framer of the constitution conceived the constitutional provisions on the Constitutional Court

[6] *Article 17 paragraph 1 of the Constitution.*

[7] *Article 18 of the Constitution.*

[8] *Article 20 of the Constitution.*

[9] *Legal aid shall be provided by the bar, as an independent and autonomous profession, and by other services. Legal aid may be provided free of charge, in accordance with the law (Article 21).*

[10] *Article 22 of the Constitution.*

[11] *Article 23 paragraph 1 of the Constitution.*

in the manner that this constitutional legal institution differs from others by being formed as a potentially powerful means of defence against all possible temptations that any new democratic political community could face and so can the one in Montenegro as well.[12]

The Constitutional Court of Montenegro (hereinafter: the Constitutional Court), since 1963, has been continuously, in different forms of the social system, performing its function. Throughout that time, its role has been, by exercising its jurisdiction, to contribute to the respect of the constitutionality and legality and, in line with that, to contribute to the implementation of the values and goals of a desirable – ideal state. The period after Montenegro gained independence and autonomy, in the development of the constitutional judiciary, could be called: "the period of adoption and development of the European constitutional standards". It corresponds with the period of development of the Montenegrin state, which is marked by the processes of internal democratization and reform-wise adaptation of the entire system for the purpose of meeting of the commitments assumed by the ratified and published international agreements/treaties. The goal of that process, in the words of Jean-Marc Sauvé, is the endeavour to defend the traditions of our continent: the European humanism which is based on the demanding concept of the rights of persons and their human dignity and, at the same time, on the idea of the obligations and rights of the community.[13]

The concept of values and the foundation of the constitutional order of the new state constituted the premises on which the Constitutional Court has continued with its work as the highest legal body for the protection of constitutionality, legality, as well as the protection of human rights and fundamental freedoms, the independent state. According to its constitutional role, the Constitutional Court is the highest body of the constitutional guarantee, which, in its decisions, interprets fundamental constitutional values. Those decisions are permanent guidelines for the development of the Montenegrin constitutional law, so, the law that deals with the key mainstreams of the state and social development and have both the legal and political character. Their dual nature is the fact we have to accept. Regulation of social relations always implies interweaving of politics and the law. Namely, we are taking about the politics that is implemented by political stakeholders whom the people at the elections authorized to work on the attainment of their respective political goals. However, in the attainment of

[12] *Arsen Bačić & Petar Bačić, „Constitutional Democracy and Courts".*

[13] *Suvé, Jean-Marc: Operation and impact of the French State Council, Collected Papers of the Faculty of Law in Split (Online), god.45, No.1 (2008), p. 7.*

such goals, they must adhere to the generally accepted values and to the basis for their own activity, as it is actually defined in the Constitution.

By the new Constitution of Montenegro as an independent state, the competences and powers of the Constitutional Court are extended in such a manner that, in addition to the jurisdiction already prescribed by the former 1992 Constitution, the Constitutional Court was assigned the jurisdiction to appraise formal and substantial, not only the constitutionality of a law but also its harmonization with international agreements/treaties and the jurisdiction of subsidiary deciding on a constitutional appeal due to violation of human rights and freedoms guaranteed by the Constitution[14]. At the very beginning of the second period, the Constitutional Court demonstrated the intent to turn to the improvement of the constitutional democracy and to its own development, particularly the elaboration of constitutional court argumentation in substantiations of its decisions[15]. Starting from the concept of legal monism, the ''quasi-constitutional'' status of the Convention in the Montenegrin legal order and the constitutional requirement for the direct application of the Convention, the Constitutional Court of Montenegro, in its decisions, refers to the European Court of Human Rights and its jurisprudence. In such a way, two requirements are met at the same time, the first one – implementation of constitutional arguments in handing down decisions, and the second one – harmonization of the Montenegrin constitutional law with the European legal standards. Adaptation to such requirements takes time in the implementation of their constitutional court techniques and principles for interpretation. In its decisions, the Constitutional Court started to gradually accept specific principles for interpretation of the Constitution. It found the grounds in the jurisprudence of the European Court. We are talking about the principle of theological interpretation of the constitution, the principle of effectiveness of the protection of constitutional rights, the principle of democracy, the principle of the rule of law, the principle of legal security, the principle of legality, the principle of procedural fairness, the principle of equitable balance, the principle of proportionality and necessity, the principle of the area of free appraisal by the state, the principle of evolutional and dynamic interpretation of the Constitution, and the principle of prohibition of discrimination. Similarly, it started adopting different court techniques

[14] *Article 149 paragraph 1 points 1 and 3 of the Constitution.*

[15] *Generally one can say that, prior to the independence of the state of Montenegro, the Constitutional Court in its activity had seldom referred to international agreements/treaties. This is related to the Convention, although it became a part of the internal legal order in 2004.*

for establishing of constitutionally relevant substrate of a concrete case and for its disposal. In addition to the general "step by step" court technique, we are talking about the implementation of different tests in the constitutional court practice, such as the test of justifiability, the test of proportionality, the test of necessity in a democratic society, and the test of "the very essence of law", which the European Court uses in deciding cases. The use of constitutional argument when drafting substantiations of constitutional court decisions and change of legal opinion, which is the necessary precondition for adoption and application of the European legal standards, is a particularly difficult task of a reform nature. If those facts are taken into consideration, the conclusion can be drawn that the Constitutional Court has first to learn on its own and adopt the European and the contemporary comparative constitutional law, use them immediately when interpreting a provision of the Montenegrin Constitution and, at the same time, prepare and hand down important decisions.

The biggest novelty with respect to the change of the role and jurisdiction of the Constitutional Court was brought by the provisions of the Constitution, which establish direct protection of human rights and fundamental freedoms by the Constitutional Court through a constitutional appeal. This function has changed the character of the Constitutional Court, at the same time creating a clear turning point in its work. Although the function of a constitutional appeal is primarily individual protection of subjective rights guaranteed by the Constitution, at the same time, it also protects the Constitution as a part of the objective legal order. The Constitutional Court has based its practice of handing down of decisions on constitutional appeals on the jurisprudence and standards of the European Court, as well as on the jurisprudence of the constitutional courts of the majority of European states. Disposing of constitutional appeals, the Constitutional Court of Montenegro does not exercise general legal control of court decisions, nor it acts as the highest review instance with respect to regular courts, nor it hands down the final decision on the merits of cases. It only appraises whether courts, deciding on the rights and legal interests of citizens, have ensured the exercising and the protection of fundamental human rights and freedoms guaranteed by the Constitution, i.e. to what extent the actual courts and other authorities in performing their respective functions have manoeuvred within the Constitution. Deciding on a constitutional appeal the Constitutional Court appears not only as the protector of individual rights and freedoms at the national level, but also as the protector of the legal dignity of the state of Montenegro in the proceedings before the European Court of Human Rights and before other international institutions that supervise exercising of the rights and freedoms established in the European Convention and other international acts.

* * *

The protection of human rights has been and has remained the primary function of the judicial power, as independent and autonomous, but such power in modern European counties cannot be exercised without direct application and interpretation of the constitution (and the convention law), in which the role of the constitutional courts is unavoidable – they are the ones that are authorized to safeguard and, upon reading the constitution, finally say"what the constitution talks about" and ''what the constitution is".

Despite all the difficulties, implementation of the idea of human rights cannot be imagined without the activity of the Constitutional Court. The noblest task that the legal order and the authorities enforcing it have, i.e. the protection of the weaker, the protection of minorities is also to a particular extent the task of the Constitutional Court, which must actively sanction violations of the Constitution committed by the legislator, the executive power, and by the regular judiciary. All of this contributes to the fact that the Constitutional Court has a particularly important, difficult, and responsible role in the process of further development of the state of Montenegro, as an independent and democratic state, in ensuring incorporation of democratic values and the European standards by its decisions in the domestic legal order.

LATEST AMENDMENT OF THE POLISH LAW ON ASSEMBLIES INTRODUCING THE "CYCLIC" ASSEMBLIES IN THE LIGHT OF THE DECISION OF THE CONSTITUTIONAL TRIBUNAL OF 2017

ANNA RYTEL-WARZOCHA, ANDRZEJ SZMYT*

1. The Constitution of the Republic of Poland of 2 April 1997[1] in art. 57 provides that "The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedom may be imposed by statute". Art. 57 is the first provision in the subsection of the second chapter of the Constitution devoted to political freedoms and rights. There is no doubt that, together with the freedom of expression and the freedom of association, it creates the foundation of the libertarian status of an individual. The only restriction of the freedom of assemblies, which results directly from art. 57 of the Constitution is the requirement of their peaceful nature.

The second sentence of art. 57 allows to impose limitations on the freedom of assemblies, however, it provides that such limitations can be imposed only by a statue. This is a formal type of constraint. Against this background, there is a question whether the "comprehensive" regulation of restrictions must be included in a statute without further reference to implementing regulations or it is possible to regulate that issue also in regulations which are acts of a lower legal force than statutes. The Constitutional Tribunal in its judgment of 28 June 2000 (case no. K 34/99) clearly stated that the restrictions on the freedom of assembly could be imposed only by statutory provisions[2].

Nevertheless, the second sentence of art. 57 of the Constitution has also a consequence of a substantive nature. Since this provision does not contain any

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[1] Official Journal of Laws "Dziennik Ustaw", No 78, item 483, with later amendments.

[2] In this judgement (published in: "Jurisdiction of the Constitutional Tribunal" No 78, item 142) the Constitutional Tribunal has also emphasized that the purpose of the freedom of assemblies not only to guarantee the autonomy and self-fulfillment of an individual, but also to protect the process of social communication necessary for the functioning of a democratic society. So it is subject not only to the interests of individuals, but also the interest of the whole society. The freedom of assembly is a necessary element of democracy and a condition for the enjoyment of other freedoms and human rights related to the sphere of public life.

restrictive clauses, it means that it does not make any modifications to other constitutional provisions. In other words, the statutory restriction of the freedom of assembly should be governed by general provisions included in art. 31 para. 3 of the Constitution. It states that "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". The regulation provided by art. 31 par. 3 of the Constitution have been subject to numerous judgments of the Constitutional Tribunal.

2. On the day of the entry into force of the Constitution, the right to assembly was regulated by the Act of 5 July 1990 - the Law on Assemblies[3], which was then repealed by the new currently binding Law on Assemblies of 24 July 2015[4]. It introduced, among other things, a new definition of the "public assembly" and no longer linked the freedom of assembly to a specific number of its participants (previously it was at least 15 people). The new law has also introduced - for the first time in Poland - the definition of a "spontaneous" assembly which takes place in connection with a sudden and impossible to predict event related to the public sphere. Because of that, the organization of that assembly at another time would be pointless or unimportant from the point of view of a public debate. The spontaneous assembly cannot disrupt other assemblies, but is not subject to prior notification. The statutory solution concerning spontaneous assemblies implements the Constitutional Tribunal's judgment of 18 September 2014.

The Law of 2015 has also introduced a new "simplified" (in addition to "ordinary") mode of notifying the intention to organize an assembly. It is possible to use it when the organizer of the assembly assumes that the intended assembly will not cause traffic congestion, in particular will not cause changes in its organization. In this mode the local authority cannot issue a negative decision at the stage of processing the notification. However, the assembly can be solved by local authorities during its course if it threatens the life or health of people or the property of significant proportions, poses a significant threat to safety or order of road traffic on public roads or violates the Law on Assembly or criminal law and the organizer of the assembly despite being informed by the representative of the local authority about the need to dissolve the assembly does not do it.

[3] Official Journal of Laws "Dziennik Ustaw" 1990, No 51, item 279 (consolidated text: Official Journal of Laws "Dziennik Ustaw" 2013, item 397).

[4] Official Journal of Laws "Dziennik Ustaw" 2015, item 1485.

3. On 15 November 2016 the deputies from the ruling party submitted a draft of the amendment to the Law on Assemblies[5] to the Marshal of the Sejm. The draft included provisions which would enable organizers to request the voivode (governors) to allow for the organizing "cyclic" assemblies. An assembly can be recognized as "cyclic" if it is organized by the same organizer at the same place or on the same route at least four times a year or at least once a year on public holidays and national holidays during three consecutive years and aims to commemorate important events in the history of the Republic of Poland. The Sejm adopted the law on 2 December 2016 and sent it to the Senate which introduced some changes on 7 December 2016. On 13 December 2016 the Sejm adopted the amendments proposed by the Senate and the very next day the new law was sent to the President for his signature. However, on 28 December 2016, the President referred the law to the Constitutional Tribunal in the mode of preliminary (preventive) review. The decision of the Constitutional Tribunal was issued on 16 March 2017 (case no. Kp 1/17)[6]. The Tribunal recognized the contested provisions concerning cyclic assemblies as complying with the Constitution. As a result, the President signed the bill and ordered its publication[7].

In the new chapter of the Law on Assemblies ("Proceedings in case of cyclically organized assemblies" - articles 26a-26e) the legal status of cyclic assemblies has been clarified. The decision of the voivode allowing to organize cyclic assemblies is valid three years. The amendment of art. 12 of the Act stipulates that assemblies shall be considered as organized "at the same place and time" - in case of notices of intention to organize two or more assemblies – if the distance between them is less than 100 m. If it is not possible to organize them in a way that do not threaten the life or health of people or the property, the "order of submitting the notice" shall decide about the "priority of the choice of place and time of the assembly". However, there is an exception provided by the law in regard to the "cyclic" assemblies, which provides that they always take precedence over other assemblies. The new regulations stipulate that the voivod shall inform the authorities of local self-governmental unit in which the cyclic assem-

[5] The document of the Sejm of the VIII term of office, No 1044. The negative assessment of the draft was submitted by the Supreme Court ("*Remarks about the deputies' draft of the law on the amendment of the Act on Assemblies*") on 30 November 2016 (www.sejm.gov.pl). Positive assessment of the draft – see: Paweł Sobczyk, *Assemblies cyclically organized as the way to realize the constitutional freedom of assemblies*, [in:] *Human. Law. Society. Jubilee Book dedicated to Stanisław Leszek Stadniczenko*, (ed.) J. Jeżewski, A. Pawlak, Warszawa 2017, p. 919 and next.

[6] Official Journal of Laws "Monitor Polski" 2017, item 265.

[7] Official Journal of Laws "Dziennik Ustaw" 2017, item 579.

bly is to be held about his/her consent to organize it. The municipal authority is then obliged to issue a decision which prohibit the organization of another assembly, even if it has been already notified, which is going to be organized at the same place and time as the cyclic assembly. If the municipal authority fails to do it, the voivode shall immediately issue a "substitute order" including the above mentioned ban on the assembly. The law does not mention the right to appeal against the voivode's substitute order.

The transitional provisions of 2016 provide that the new rules shall be applied also to assemblies which had been notified by their organizers before the new law entered into force. Therefore, the priority is given to cyclic assemblies which are to be held in the same place and time as other pre-notified assemblies.

It should be mentioned, that the Constitutional Tribunal in its judgment of 16 March 2017 considered the transitional provisions to be compatible with the Constitution. The proceedings concerning the complaint about the "lack of" possibility to appeal from the substitute order of the voivode were discontinued. The Constitutional Tribunal pointed out that the current law allowed for a "pro-constitutional" interpretation of other statutory provisions in a way that did not exclude the admissibility of the right to challenge the order of the voivod. However, both issues were of secondary importance.

4. As it has already been mentioned, the request to review the constitutionality of the new regulations was submitted to the Constitutional Tribunal by the President of the Republic of Poland in the mode of preliminary review[8]. It related to the very essence of the regulation of cyclic assemblies. The President stressed that the guarantees provided by art. 57 of the Constitution concerned all forms of peaceful assemblies so there were no bases for differentiating the situation of assemblies on the basis of their frequency. The provisions concerning cyclic assemblies, according to the President, could undermine the guarantees of the constitutional freedom of assembly and bring legal uncertainty to those who wished to use that freedom. According to the President, new rules violated the principle of equality (art. 32 of the Constitution) due to differentiation of the legal situation of similar entities on the basis of a criterion that did not have a constitutional justification. The amendment limited the use of constitutional freedom without fulfilling the requirements provided by art. 31 para. 3 of the Constitution. However, the Constitutional Tribunal decided in its ruling on the constitutionality of the questioned provisions.

The Constitutional Tribunal recalled that the Law on Assemblies even before the amendment had already differentiated assemblies on ordinary and

[8] See: www.prezydent.pl (20 March 2017)

spontaneous. The introduction of the third group ("cyclic" assemblies) by the legislator was a manifestation of the realization of the constitutional freedom of assembly. It was a formula that set in order new facts. Their specificity required a separate regulation.

The Constitutional Tribunal has held that cyclic assemblies are usually linked to a specific date, place or event of historical importance. Because of that it is usually pointless to organize them at another time or place. The significance of their time and place therefore justifies granting the "priority" to such assemblies. According to the Tribunal, the new regulation falls within the framework of the legislator's discretion and is justified. The Tribunal noted that there are no obstacles to organize another assembly at the same time at a distance of more than 100 meters. The statutory limit concerning the "distance" between assemblies meets the requirement of proportionality and does not infringe the substance of the right to counter-manifestation. According to the Tribunal, the purpose of organizing cyclic assemblies justify granting them the priority also because it influences the shape of certain social attitudes important from the perspective of the state as a common good. Repeatability (cyclicality) has been found beneficial for ensuring public safety and order and thus for the implementation of the guarantee function of the state in the area of the freedom of assembly. The change of the rule of granting priority from the criterion of "time" (the moment of notifying about the assembly) to the "technical" criterion (meeting the requirements necessary for the recognition of the assembly as cyclic), falls within the limits of legislator's freedom. The Constitution allows for limiting the use of constitutional freedoms and rights when it is necessary to protect the freedoms and rights of others. Therefore, the statutory mechanism, which due to the existing collision of assemblies requires from the organizers of an assembly to adapt their intentions to circumstances resulting from the exercise of the constitutional freedom by others, is compatible with the Constitution. The new regulations, according to the Tribunal, do not violate the essence of the freedom of assembly but harmonize the exercise of this freedom by several interested parties, safeguarding public order and the common good at the same time. The legislature's interference in the freedom of assembly is proportional and constitutionally permissible, because it serves values such as public safety and order. It also allows to shape certain civic attitudes. The rule of precedence granted to cyclic assemblies has been balanced by the requirement to obtain consent for such assemblies[9].

[9] Approval note to the judgement presents A. Gajda, *Some remarks on the freedom of assemblies on the background of the recent amendments of the law – Act on Assemblies*, "Gdańskie Studia Prawnicze" 2017, vol. XXXVIII.

5. The decision of the Constitutional Tribunal (delivered by the bench composed of eleven judges) was settled with four separate votes, which included the allegation of violation of the constitutional freedom of assembly and the principle of equality. It should be also mentioned that the separate votes also referred to the incorrect composition of the adjudicating bench, which was related to the long lasting "political dispute about the Constitutional Tribunal". This dispute has led to the complete destruction of the Polish Constitutional Tribunal.

In regard to the main issue - the incompatibility with the Constitution of regulations restricting the freedom of public assemblies and equal treatment of the organizers of assemblies - the separate opinions of judges Małgorzata Pyziak-Szafnicka[10] and Sławomira Wronkowska[11] are particularly important. Their objections were also shared by judge Leon Kieres in his separate opinion. The essence of these objections can be summarized by the statement that the "differentiation" of the status of public assemblies has been made by the legislature in a way that cannot be justified on the ground of constitutional values.

6. It is significant that the argumentation presented by M. Pyziak-Szafnicka does not include objections that would exclude cyclical public assemblies as such. However, according to the judge, constitutional standards have been violated by the amendment which privileges cyclic assemblies by allowing to prohibit other assemblies that have been already notified to the municipal office (the violation of the rule "*prior tempore, potior iure*"). Such solution can be applied both in regard to assemblies already notified prior to the entry into force of the amendment and as a mechanism for the future. The privilege of cyclic assemblies is therefore treated as tantamount to the unequal treatment and restriction of the freedom of assembly of those persons who preceded the organizers of the cyclic assembly.

Judge M. Pyziak-Szafnicka has emphasized that the legislator does not formulate a "closed" catalog of purposes of cyclic assemblies. An open catalog of such purposes does not allow for an unambiguous indication of values which the legislator wants to pursue by introducing a new type of assemblies. The impossibility to indicate the constitutional value precludes the correct implementation of the test of the "proportionality" of the limitation provided for in art. 31 p. 3 of the Constitution. This must prejudice the unconstitutionality of the

[10] In particular, point I of the separate opinion (remarks presented under side numbers 390 – 406 of the Justification of the judgement)

[11] In particular, point I of the separate opinion (remarks presented under side numbers 423-439 of the Justification of the judgement)

statutory restriction of the freedom of assembly. As emphasized in the separate opinion, the Constitutional Tribunal's acknowledgment that the legislature enjoys the freedom to define conflict-of-law rules concerning the priority of assemblies is in contrast with the very essence of that freedom. The introduction of the assessment criterion allowing public authorities to compare the values and merits of assemblies, instead of a logical and objective criterion such as the time of notification, constitutes a denial of equality in the enjoyment of freedom guaranteed by art. 57 of the Constitution. The freedom provided by art. 57 of the Constitution cannot be regarded as an abstract, potential possibility regardless the content given to it by the legislator. In other words - it cannot be assumed that the organizers of a notified assembly that has been banned as a result of the subsequent consent of the voivode to organize a cyclic assembly still "enjoy" the constitutional freedom because they "may organize the assembly in another place or at another time". Art. 57 of the Constitution cannot be treated as an abstract idea. Although the second sentence of art. 57 of the Constitution authorizes the ordinary legislator to give a particular shape to public assemblies, it does not mean the admissibility of restrictions that lead to the denial of the freedom of assemblies.

7. Also, judge Sławomira Wronkowska in her separate opinion emphasizes the admissibility of introducing a new category of public assemblies by the legislator - provided that it can be reconciled with the requirements of art. 57 of the Constitution. This provision guarantees everyone the freedom to organize and participate in peaceful assemblies. The freedom of assembly includes, among others, the freedom of the choice of time, place and the course of the assembly, as well as the manner in which participants will express their views or manifest their beliefs. Referring to the previous case law of the Constitutional Tribunal, the judge emphasized that the rule of "the priority of notification" is constitutionally legitimate as it resolves conflicts arising from the notification of two or more assemblies to be organized at the same place and time. Such rule is not a manifestation of unequal treatment, because it is based on the criterion that is neutral and independent from public authorities.

The new institution of cyclic assemblies takes advantage of priority over other assemblies. At the same time, the legislator has decided that the significant criterion for differentiating the legal status of public assemblies is, among others, the purpose of the assembly. As highlighted in the separate opinion of S. Wronkowska, there is no explanation for granting a special statutory position to cyclic assemblies. It may result in the permanent deprivation of other entities of the opportunity to exercise their constitutional freedom of assembly

in a certain place and time. This particularly applies to counter-manifestations that are an integral part of the freedom of assembly and shall be protected - in line with the Convention for the Protection of Human Rights and Fundamental Freedoms[12] and the case law of the European Court of Human Rights in Strasbourg – in the same way as the assemblies against which they are organized. The state is therefore obliged to ensure the conditions for organization of both these assemblies despite the conflicts of freedoms and rights of various entities. The statutory limitation of the possibility to organize one of them cannot be a "protection" measure. The privilege of cyclic assemblies also violates art. 32 p. 1 of the Constitution as it is difficult to indicate - as an acceptable condition of unequal treatment - constitutional values, principles and norms justifying this inequality. The very purpose of the assembly, which is to celebrate "important and significant events for the history of the Republic of Poland" does not constitute sufficient justification.

Judge S. Wronkowska also took into account the context of the contested regulation as a "means" to prevent the actual collision of assemblies which are to be organized in the same place and at the same time. She has emphasized that constitutional and international requirements exclude the creation of statutory solutions that would automatically limit the right to organize parallel assemblies (in particular counter-manifestations). However, the statutory priority of cyclic assemblies in Poland - incompatible with art. 57 of the Constitutions – introduces the hierarchy of assemblies, contradicting the very essence of the constitutional freedom.

Noteworthy is also the special mode of obtaining consent for cyclical assemblies, namely not from the authority of the local self-government, but from the voivode (authority of governmental administration). He/She gives the consent, as emphasized in the separate opinion, on the basis of a generally formulated provision which includes evaluative expressions (f. ex. "important and significant" events), which gives him/her far-reaching freedom. The degree of linkages between the authority responsible for granting consent to cyclical assemblies and central political power, as well as making that consent subject to general conditions indicate the interference of the governmental administration in the constitutional freedom of assembly. This also raises doubts whether the adopted solution satisfies the requirement of art. 31 p. 3 of the Constitution, according to which the restriction of constitutional freedoms and rights can be introduced only by statute because there is a strict requirement that the statutory regulation must be of "special determinacy".

[12] Official Journal of Laws "Dziennik Ustaw" 1993, No 61, item 284 (art. 11).

8. As we have already mentioned, the Constitutional Tribunal has discontinued the proceedings - without delivering substantive decision – in regard to the allegation that the new law does not provide the possibility to challenge, by the organizer of the assembly, the substitute order of the voivode prohibiting the organization of the assembly "competing" with the cyclic assembly. Substantial objections in this matter are contained in the separate opinions of judges Leon Kieres[13] and Piotr Pszczółkowski[14]. They pointed out that there were no reasons for the Constitutional Tribunal to refrain from delivering substantial decision. It was also stressed that, as a result of the discontinuance of the proceedings, the President did not receive a response to one of three legal problems raised by him. It was emphasized in the separate opinions that the President's allegation against the new law concerned the "omission" of elements which were a condition of the compliance of this statutory regulation with the Constitution. Since the legislator introduced a new "mechanism" to the Act on Public Assemblies by providing a voivode with the competence to issue a substitute order in case of the failure of municipal authorities to issue a decision in this regard, the question of the "path of appeal" against such a substitute order should be also settled. The law on assemblies constitutes *lex specialis* so in the "absence" of provisions regulating the discussed question the general regulations concerning the supervision of government over the authorities of local self-government units cannot be applied. The modes of procedure initiated by the appeal to a common court, regulated in the Act on Public Assemblies and in the Act on Proceedings Before Administrative Courts are also different. Therefore, the challenged "omission" does not provide the special protection appropriate for the protection of the freedom of assembly. Due to the essence of this freedom, the general rules governing the proceedings before administrative courts do not meet constitutional requirements.

Judge P. Pszczółkowski, in his separate opinion, strongly emphasized the specificity of preventive constitutional review. The essence of this mechanism is that the Constitutional Tribunal, guided by the directive to cooperate with the President to safeguard the Constitution, should provide the President with answers to all his constitutional problems. The general rule, applied by the Constitutional Tribunal to recognize applications in the preventive mode of the constitutional review of a statute, should be the directive that requires to consider

[13] Remarks presented under side numbers 324 - 342 of the Justification of the judgement.

[14] Remarks presented under side numbers 352 – 377 of the Justification of the judgement.

the President's application to the full extent in order to exclude any objection concerning the constitutionality of the statute before it is signed and published. It was also emphasized that the Tribunal's decision to discontinue the procedure in respect to the allegation in question was both unjustified in the circumstances of that particular case and inconsistent with the substance of preventive constitutional review and the Tribunal's obligation to cooperate with the President in the course of the legislative process.

9. On March 18, 2017, the President of the Republic of Poland signed the amendment law and ordered its publication. According to art. 122 p. 3 sentence 2 of the Constitution, the President shall not refuse to sign the law which has been judged by the Constitutional Tribunal as conforming to the Constitution. On the eve of the signing of the Act, the President also referred to the Constitutional Tribunal pursuant to art. 110 p. 1 of the Act of 30 November 2016 on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal[15]. Under that provision, "at the request of the participant in proceedings, the adjudicating bench that has issued a ruling at a sitting in camera shall address any doubts concerning the content of the ruling, by issuing a decision in this respect". The President's doubts concerned the discontinuance of proceedings by the Constitutional Tribunal in regard to the lack of the possibility to appeal to the court against the substitute order of the voivode prohibiting the organization of the assembly. The President argued that because of the discontinuance of the proceedings the Constitutional Tribunal did not decide on the compatibility of the contested provision with the Constitution. However, there was no point to apply the aforementioned statutory procedure as it cannot lead to the change of the Constitutional Tribunal's decision. According to art. 190 p. 1 of the Constitution, the judgements of the Constitutional Tribunal shall be of universally binding application and shall be final.

To conclude, it is worth noticing that in the short practice of applying the new regulations, the possibility to repeal the voivode's substitute order by a court has been already recognized – however, only in strictly defined situations[16].

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[15] Official Journal of Laws "Dziennik Ustaw" 2016, item 2027.

[16] The Decision of the District Court in Warsaw of 10 May 2017, case No XXIV Ns 37/17; see: "*District Court in Warsaw revoked the order of the Mazovian Voivode prohibiting the so-called counter-manifestation to the Smolensk monthly - we publish the content of the ruling*" www.konstytucyjny.pl (15 May 2017).

CAN COMMON COURTS EXAMINE |THE COMPATIBILITY OF THE LAW WITH THE CONSTITUTION? (THE ISSUE OF CONCRETE REVIEW OF THE CONSTITUTIONALITY OF THE LAW IN POLAND)

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In Poland, lawyers are currently discussing the issue of whether common courts themselves can examine the compatibility of the law with the 1997 Constitution of Poland. This is a problem of great theoretical and practical importance. Several of its dimensions are presented in this paper.

1. The Constitutional Tribunal of Poland was created in the 1980s, still in the period of the so-called real socialism. It was established pursuant to the amendment of 26 March 1982 to the Constitution of the People's Republic of Poland of 1952. The introduction of a constitutional court into the Constitution was a major breakthrough in the principles of the political system of Poland at that time. The next step in the development of constitutional judiciary was the adoption of the ordinary law of 29 April 1985 on the Constitutional Tribunal. The Tribunal began to function on 1 January 1986 and issued its first judgement in May 1986. An important characteristic of the Tribunal's position between 1985 and 1997 was the fact that its rulings on the constitutionality of laws were not final. Judgements on the unconstitutionality of laws were subject to consideration by the Sejm. The decisions of the Constitutional Tribunal were final only with regard to lower order acts. In this period, the Tribunal was also subject to other restrictions concerning its powers (e.g. related to time or subject matter), which I will not discuss. Finally, the Tribunal obtained the status of a constitutional court par excellence in the 1997 Constitution of Poland. Its rulings became final and universally binding.

The 1997 Constitution provided the Tribunal with extensive jurisdiction to review the constitutionality of the law (Article 188 Paragraphs 1-3). In addition, the Tribunal was granted other powers, such as settling disputes over authority (Article 189) or determining whether or not there exists an impediment to the exercise of the office by the President of the Republic (Article 131 Paragraph

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1). Earlier, the Tribunal was granted the authority to examine the conformity to the Constitution of the purposes or activities of political parties (Article 188 Paragraph 4). The Tribunal exercises both posterior (repressive) and preventive review. The forms of the former include examining applications submitted to the Tribunal by generally-entitled entities (Article 191 Paragraph 1 Point 1) and individually-entitled entities (Article 191 Paragraphs 2-6), a constitutional complaint (Article 79 Paragraph 1) and a question of law (Article 193). Preventive review is exercised upon application, and the only entity authorized to initiate this kind of review is the President of the Republic of Poland (Article 122 Paragraph 3).

2. The Constitutional Tribunal, by virtue of the powers conferred by the 1997 Constitution as well as by its jurisprudence, has developed a significant position in the political system of Poland. It was the only unquestioned institution in the field of constitutional review. No one questioned either the role of the Tribunal or its judgments. Let me repeat that this authority of the CT resulted from the powers it had been granted as well as from its jurisprudence. By reviewing the constitutionality of the law, the CT co-decided on key issues of national and social life (e.g. treaties integrating Poland with the EU, the pension system or punishment for felling trees). This institution was a kind of a fuse preventing the adoption of unconstitutional laws.

In 2015, at the turn of the 7th and 8th term of the Sejm, there was a conflict involving the staffing of vacancies in the CT which appeared as terms of office of individual judges expired. First, the Sejm of the 7th term elected a total of five judges (on 8 October 2015) under Article 137 of the Law on Constitutional Tribunal of June 2015. The President of the Republic did not swear them in. The Sejm of the 8th term stated that the resolutions of the previous parliament on the election of these judges were not legally binding (on 25 November 2015). Then, the Sejm of the eighth term elected five judges (on 2 December 2015), who were sworn in by the President. In the judgement no. K 34/15, the Constitutional Tribunal ruled that Article 137 of the Law on Constitutional Tribunal of June 2015 is in compliance with Article 194 Paragraph 1 of the Constitution with respect to three judges (whose terms of office expired on 6 November 2015) but is unconstitutional with regard to the election of two judges (whose terms of office expired on 2 and 8 December 2015 respectively).[1]

Regardless of the aforementioned conflict over seats in the Tribunal, some politicians began to question the fundamental role of the constitutional court in

[1] Cf. the judgement of 3 December 2015 (K 34/15), OTK ZU 2015, 11A, item 185.

maintaining the principle of constitutionalism and to emphasize the role of the Sejm (parliament) as well as the principle of national sovereignty. Consequently, in the years 2015-2016 the Sejm adopted a series of the so-called remedy laws on the Tribunal, which limited its significance and, above all, shifted its position in the system of tripartite power. "Remedy laws" were not incidental activities of the legislator, but they essentially sought to introduce constitutional changes by means of ordinary laws. The position of the CT in the system of power was marginalized. Since the role of the Tribunal with regard to reviewing the constitutionality of the law as well as guaranteeing citizens' rights was undermined, a lively debate began in Poland on the importance of dispersed constitutional review. Even opponents of this kind of review began to appreciate its potential significance. The state of uncertainty in the law facilitates discussion on whether constitutional review should be shifted also to common courts.

3. First, I will present the institution of a question of law to the Constitutional Tribunal (Article 193 of the Constitution). This is the basic form of relationship between common courts and the Constitutional Tribunal (3.1.). At present, however, this institution does not function properly. Hence, the importance of the question concerning the role of dispersed constitutional review (3.2.).

3.1. Only courts may refer questions of law to the Constitutional Tribunal. It can be lodged at any stage of judicial proceedings by the adjudicating panel in a given case. Parties to the proceedings may only submit an application to file a question of law, but the decision is always vested in the court.

A question of law has to meet the following three conditions:

a) the subjective condition means that only a court may submit a question of law. It may be a common court, an administrative court, but also the Supreme Court or the Supreme Administrative Court. More precisely, the court which files a question is to be understood as the adjudicating panel of a particular court. The Tribunal plays no role in the procedure of submitting a question. This means that first the court itself has to carry out a review of the constitutionality of a particular legal provision before it lodges a question. The court should work towards an interpretation which is consistent with the Constitution.

b) the objective condition means that a question of law must concern a legal provision which is directly related to the case examined by the court. It must be a provision which has direct significance for the resolution of the case by a judge. Therefore, a question of law cannot be of an abstract nature, for example, it cannot concern the interpretation of a provision.

A question of law should concern a provision of the statutory act applied by the court or any other provision equal in rank to a statutory act, for

example, a provision of an international agreement which is equal in rank to a statutory act.

It is assumed, although this is debatable both in the literature and in the jurisprudence, that a question of law should not concern provisions of regulatory acts. For example, if a judge is to apply in a given case a provision of a regulation of the Council of Ministers, it is his or her duty to assess whether this provision is consistent with the provision of the statutory act. Regulatory acts must be consistent with statutory acts. In fact, the point is to review the legality of legal acts of lower rank than a statutory act. Therefore, in this part of the sources of law system which is situated below the level of statutory acts, the courts themselves have to carry out the review of legality of these basic legal acts.

c) the functional condition is the most important and, probably, the most difficult. It states that there must be a relationship between the Constitutional Tribunal's reply to the question and the resolution of the case by the court submitting the question. This relationship is referred to as relevance (relevant relation) or functionality of the question. The existence of this relationship must be demonstrated by the court which submits the question. The Tribunal examines carefully ex officio the existence of such a relationship. Its lack leads to the dismissal of the case by the Tribunal. This is a form of a preliminary review of questions.

If a court refers a question of law to the Tribunal, it has to suspend the proceedings in a given case. The court must wait for the reply of the Tribunal. After the Tribunal issues the judgement, the proceedings are resumed and the court decides on the case in accordance with the Tribunal's judgement.

If the Tribunal has accepted a question of law from a court, then this question is examined at a hearing. The Tribunal replies to the question by making a judgement. Such a judgement, as any other ruling of the Tribunal, is final and universally binding.

"Final" means that if a provision has been found unconstitutional, then it ceases to be legally binding as a result of the judgement of the Constitutional Tribunal.

"Universally binding" means that the judgement is binding not only for the court which submitted a question, but also for all courts and all legal entities. The judgement of the Tribunal is not therefore directed only to the court which submitted a question.

After the Tribunal has made a ruling, the court reopens the proceedings in the case to which the question relates. The court now has no doubts as to the constitutionality or unconstitutionality of the legal provision, which was referred to in the question. Accordingly, it makes a judgement. If the provision is consti-

tutional, the court reopens the proceedings and issues a ruling. If the provision is unconstitutional, the court reopens the proceedings and discontinues the case.

But, as I have already mentioned, the judgement of the Tribunal made in reply to a question submitted by a court is universally binding. This means that it is binding for all courts and all other entities. As a result, in similar cases before other courts it may be argued that a given provision has been reviewed by the Tribunal. It may be done, for example, by a party in a case. The court should then take the judgement of the Tribunal into consideration. In fact, this judgement is binding for the court.

Let me now present an example of a case examined by the Constitutional Tribunal which was submitted by a court as a question of law.

The Supreme Administrative Court referred a question of law (file no. P 5/14) concerning the constitutionality of the provisions of the Electoral Code regulating the subdivision of municipalities into constituencies in elections to local government councils.

In Poland, the subdivision into constituencies in parliamentary elections is regulated by a statute (the Electoral Code). However, in local government elections, the municipalities themselves subdivide their territory into constituencies. This is done by the resolution of the municipal council. Of course, the subdivision is not arbitrary. The number of constituencies must satisfy the so-called norm of representation (a particular number of seats must correspond to a particular number of inhabitants). In the process of setting the boundaries of electoral districts, some abuses may occur (in general, called gerrymandering). The resolution of the municipal council was opposed by the electoral commissioner. Each province has its own electoral commissioner, who is always a judge appointed by the State Electoral Commission. The municipality authorities did not agree with the decision of the commissioner and referred it to the District Administrative Court. Next, the case was referred to the Supreme Administrative Court, which in turn submitted a question of law to the Constitutional Tribunal.

In the question, the Supreme Administrative Court points out that in the current legal circumstances the provisions of the Electoral Code allow the National Electoral Commission and other electoral bodies to issue generally applicable laws. According to the Court, this is incompatible with the system of sources of law specified in the Constitution. The municipal council, as the body authorized to issue local laws, issued an act of local law which was published in the province's official journal of law. The electoral commissioner nullified this act by his decision. This is not, as the questioning court rightly says, a transparent situation in terms of the legal system and the rights of citizens. Neither the National Electoral Commission nor the electoral commissioner has the authority

to declare void or annul the resolutions of local law. In the current legal circumstances the Supreme Administrative Court has no authority to declare void a decision of an electoral commissioner or the National Electoral Commission. It could only examine the resolution adopted by the municipal council. Since the resolution of the municipal council concerning the subdivision of the municipality into constituencies is an act of local law, the administrative court should obtain the authority to review this law. It seems that the ambiguity of specifying the relationship between the resolution of the municipal council concerning the subdivision of the municipality into constituencies (as a universally binding act of law) and the decision of the electoral commissioner in this respect constitutes an apparent inconsistency within the legal system.

The key issue involved in the question concerns the degree of interference of a state electoral body (that is, the electoral commissioner and the State Electoral Commission) into the independence of the municipality. It is necessary to balance the interest of the municipality and its inhabitants on the one hand and, on the other hand, the role of state bodies which oversee the observance of the election law.

Thus it is clear that the institution of a question of law can be properly understood only against the background of all powers and the legitimacy of the Constitutional Tribunal. Over nearly twenty years of functioning, the construction of a question of law turned out to be a success, however, at present, due to the undermining of the position of the Constitutional Tribunal, it has lost its practical significance.

3.2. The fundamental question of my paper is: can common courts carry out judicial review of the constitutionality of the law on their own?

The fundamental question of my paper is not, however, whether courts can submit questions of law to the Tribunal (that would be trivial). I want to reverse this question and ask whether, in the face of the crisis in the functioning of the CT, common courts can exercise review of the constitutionality of the law.

Can common courts, to some extent, take over the role of the Tribunal? The answer to this question is related to the issue of direct application of the Constitution. On the one hand, only the Constitutional Tribunal carries out the judicial review of the constitutionality of the law. In Poland, a model of centralized review (Kelsen's model) was adopted. We use the pair of concepts "centralized review" vs. "dispersed review". These concepts are contrasted in an absolute way. If a court has doubts about the constitutionality of the law, it must refer a question of law to the Constitutional Tribunal. To sum up, a model of dispersed review was rejected in Poland.

Exceptions to the rule above concern the examination of the legality of lower order acts by courts: if a judge of common court finds a lower order act (e.g. a regulation) to be inconsistent with a statute, he or she may choose not to apply it. The judge has to omit it; it is a check on "the legality of the law"; the judge cannot comment on the law; the judge cannot repeal any law. This is a limit of this kind of review of the legality of the law.

Since 2015, in the face of the crisis in the functioning of the Constitutional Tribunal, the question of direct application of the Constitution has taken on particular importance. This principle (Article 8 Paragraph 2) has always been important. But now, in the situation of blocking the work of the Tribunal, the issue of direct application of the Constitution is even more significant.

The point is that direct application of the provisions of the Constitution is combined in the doctrine with the postulate of dispersion of the review of the constitutionality of the law, i.e. the issue that this review can be carried out by courts (all courts). In practice, it is emphasized that direct application of the Constitution by courts does not mean resolving cases directly on the basis of the provisions of the Constitution (these norms are too general). A form of direct application of the Constitution by courts is carrying out a pro-constitutional interpretation of the applied law or confirming its constitutionality. As a last resort, the most far-reaching procedure would consist in not applying a provision of a statute by a court. This could only happen if such a court decision was justified by the system of constitutional values. But I would like to emphasize that repealing a provision of a statute by an ordinary court would have to be something absolutely exceptional (ultimate). For example, I think about a statute which introduces torture.

An argument for dispersed judicial review is the following: judges of common courts are subject to "the Constitution and statutes" (Article 178 of the Constitution), so they may review the law. On the other hand, the most important argument against dispersed judicial review is the following: a judge of a common court has no right to repeal unconstitutional provisions; a judge can at most carry out "pro-constitutional interpretation" of the provisions of a statute. I think this is quite a lot.

CONCLUSION

To sum up, there is no definitive answer to the question whether dispersed review may develop and supplement centralized review in Poland. I ask myself if the dispersed review is only temporary tactics or our target (goal). I am aware

that I am moving within a contradiction, i.e. I am trying to combine centralized review with dispersed review. So far, in Poland, these two types of review have been treated as opposite to each other. From my experience as a former judge, in practice, there is no big difference between them. So maybe in the future the reconstruction of constitutional judiciary will develop in this way.

I believe, however, that an emphasis on the duty of courts to carry out a pro-constitutional interpretation of the law (following the principle of direct application of the Constitution) is valuable. This is an important solution for the period in which we live.

THE RIGHT TO PURSUE HAPPINESS

TUDOR PANȚÎRU*

FOREWORD

It is hardly possible to state under conditions of full certainty what happiness is, although there are a number of definitions of this term. The same relates to the concept of "law" which throughout centuries of countless explanations, failed to be formulated in a complete and satisfactory way. This field has been well ploughed and thoroughly cultivated throughout the ages, while the concept remains as enigmatic as it is familiar.[1] Despite this, currently we witness a trend calling for "happiness" to become a goal in governmental political agendas.[2] Adoption of public policies should take into account the index of happiness. And, it is well known, public policies are usually substantiated in laws. We thus come to the **relationship between happiness and law**.

In the academic law literature it has been stated that the new policy on happiness would defeat the failures of democracies' economic policies.[3] Furthermore, following the achievement of the ideal of happiness, the world would put it in a drawer on the one of justice. **"Who needs justice if we are all happy?"[4]**

The fulfilment of the condition of happiness should not imply ignoring the sense of justice. This is what this article aims to prove. Moreover, we will show the path of happiness in its relationship with the law, analysing the sources of the Founding Fathers of the United States, what made them to provide the ideal of happiness in the Declaration of Independence of the United States of America

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[1] John C. Ford - *The Natural Law and the Right to Pursue Happiness,* Natural Law Institute Proceedings No 4/1951, p. 104.

[2] Kurt Bayertz and Thomas Gutmann - *Happiness and Law,* Ratio Juris, no. 2/2012, p. 236. The British economist Richard Layard requests" a revolution in the government. Happiness should become the goal of our policies" (Richard Layard - *Happiness. Lessons from a New Science,* ed. Penguin, London, 2005, p. 145, *apud* Kurt Bayertz and Thomas Gutmann, op.cit., p. 236)

[3] Kurt Bayertz and Thomas Gutmann, op.cit., p. 237.

[4] Mirko Bagaric and James McConvill - *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, Deakin Law Review vol. 10, p. 2

(A). Once the sources of the Declaration' wording are revealed, we will review some US courts decisions that have approached the idea of happiness **(B)**, and we will make a parallel with the situation in Europe, pointing to the decision of the German Federal Constitutional Court in *Elfes* case **(C)**. Finally, we will argue the existence of the *right to pursue happiness* in the Constitutions of Romania and the Republic of Moldova **(D)**.

A. THE RIGHT TO PURSUE HAPPINESS IN THE DECLARATION OF INDEPENDENCE OF THE UNITED STATES OF AMERICA

Adopted on July 4, 1776, the Declaration of Independence is the first normative act of constitutional value of a democratic state providing the unalienable human right *to pursue happiness*. In its second paragraph, it proclaims as "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and *Happiness*." (emphasis added)

According to historical sources, the author of the Declaration is Thomas Jefferson, one of the seven representatives of Virginia in Congress.[5] Among other things, it should be mentioned that the Constitution of Virginia was adopted in the same year. Concerning the language related to happiness, this constitution has served as model to follow for most state constitutions in the pre-federal era.[6] As records show, Thomas Jefferson did not play any role in the adoption of this act. This Constitution, at least the section containing the terms "happiness" and "safety", was written by George Mason,[7] and it might be correct to search for Mason's museums. One of the remnants of his library is a volume of Cicero's

[5] Patrick J. Charles - *Restoring "Life, Liberty, and the Pursuit of Happiness " in Our Constitutional Jurisprudence: An Exercise in Legal History*, William & Mary Bill of Rights Journal vol. 20, no. 2, p. 476.

[6] Joseph R. Grodin - *Rediscovering the State Constitutional Right to Happiness and Safety,* 25 Hastings Constitutional Law Quarterly no. 1/1997, p. 8-9.

[7] Bernard Schwartz - *The Bill of Rights: A Documentary History,* Chelsea House Publishers, New York-Toronto-London- Sydney, 1971, p. 232.

Orationes, bearing his signature and date of purchase, which may found today in a museum in northern Virginia.[8] However, it is generally known that American statesmen of those times, people of ideas and raced intellectuals were not strangers to philosophy and especially to the works of Aristotle. References to Aristotle and to happiness as a political purpose "are found everywhere in American political writings",[9] while the principles stated in the Declaration are part of the political and philosophical heritage of that time.[10]

While formulating the definition of happiness, Aristotle analyses in *Nicomachean Ethics*, on the one hand, the concept of good and, on the other hand, human realities.[11] Happiness is the best, noblest and most pleasant thing in the world, and these attributes are not severed.[12] Its essence is the activity of soul in accordance with the intellect or not in absence of intellect; it must be in unison with virtue, with the most ideal virtue over a lifetime of perfection.[13] **Therefore, the happy man is the one who always acts in accordance with the ideal virtue, is endowed with sufficient exterior goods allowing him to apply the virtue throughout his life and not in syncope.** Aristotle suggests a "duty to be happy".[14] For him, *eudaimonia* ("happiness" or "prosperity") is the basic concept to define human perfection and a purpose of the community.[15] This latter aspect presents interest to us and we will keep it for the issue under discussion.

Neither Jefferson nor Mason ignored the treaties written by the philosophers of the Enlightenment period. John Locke was obviously among the promoters of the social contract who influenced the revolutionary America and his writings predetermined the **presence of the idea of happiness in America's constitutional acts.[16]** Their devotion Locke and particularly to his formulation - "**life, liberty and property**"- seems to be uncontroverted.[17]

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[8] Joseph R. Grodin, op.cit., p. 9.

[9] Pauline Maier - *American Scripture: Making the Declaration of Independence*, Knopf, New York, 1997, p. 170, *apud* Joseph R. Grodin, op.cit., p. 11

[10] John C. Ford, op.cit, p. 117.

[11] Stella Petecel - *„Duty" to be happy in Aristotle's Nicomachean Ethics, (orig. „Datoria" de a fi fericit,* in Aristotel - *Etica Nicomahică),* II-nd edition, Iri, Bucharest, 1998, p. 14

[12] Aristotel, op.cit., p. 40.

[13] Stella Petecel, op.cit., p. 15.

[14] *Idem.*

[15] Fred D. Miller, Jr. - *Nature, Justice and Rights in Aristotle's Politics,* Clarendon Press, Oxford, 1995, p. 18-19, *apud* Joseph R. Grodin, op.cit., p. 11.

[16] Joseph R. Grodin, op.cit., p. 12.

[17] Edmond N. Cahn - *Madison and the Pursuit of Happiness*, New York University Law Review No 27/1952, p. 267.

In the Second Treatise of Government Locke uses the term "property". "Though men as a whole own the earth and all inferior creatures, every individual man has a *property* in his own *person*; this is something that nobody else has any right to."[18] Another passage reveals that "though the things of nature are given in common, the man (namely his being master of himself, and *owner of his own person* and of the actions or work done by it) had in himself *the great foundation for ownership*".[19] Here, the word "property" represents a sum of all the interests and rights that a person values and wishes to safeguard in an organized political community. The conclusion which may be driven from Locke's work is that **peace, safety and commonweal** of people actually means termination of the society. Cahn believes that Jefferson has only expressed the American intellectual breath of the time.[20] And not only that. By the text "the pursuit of happiness" Jefferson provided a breath of idealism. Substituting Locke's "property" with "happiness" he not just included a broader concept in the Declaration, he also marked a complete separation from the *Whig* doctrine of property law.[21]

James Madison, the loyal correspondent of Thomas Jefferson, was as well conquered by Locke's work.[22] Madison has read the chapter "Power" in the *Essay Concerning Human Understanding*. This chapter abounds in words such as "everyone finds that pain and uneasiness are inconsistent with *happiness*, spoiling the savour even of the good things that we do have", "while we are in a state of uneasiness we can't sense ourselves as *being happy* or on the way to *happiness*", "the **removing of any pain** […] as the first and necessary step towards *happiness*".[23], "In this life, indeed, most people who are happy to the extent of having a constant series of moderate pleasures with no admixture of uneasiness would be content to continue in "this life" for ever; even though they can't deny that there may be a state of eternal durable joys in an "after-life", far surpassing all the good that is to be found in this one",[24] "I am sure that wherever there is uneasiness there is desire. Here is why: we constantly desire happiness; and to the extent that we feel uneasiness, to that extent we lack happiness and therefore desire to have it".[25] The Founding Fathers' republic is the republic of Locke as

[18] John Locke - *Second Treatise of Government*, section 27.
[19] John Locke, op.cit., section 44.
[20] Edmond N. Cahn, op.cit., p. 268
[21] *Idem,* p. 267.
[22] *Idem,* p. 265 and 269.
[23] John Locke – *An Essay Concerning Human Understanding,* p.80.
[24] *Idem,* p. 83.
[25] *Idem,* p. 81

well. For what Locke thought fit for the individual seen as a social particle, the Founding Fathers applied to the entire American nation. **As the people are "ultimate protector of the Constitution, the ultimate judge of the competition for power between state and federal authorities, and the ultimate safeguards well as the ultimate menace-to all fundamental rights".**[26]

The allegations that the true origins of happiness in the Declaration of Independence are based on the work of Cesare Beccaria[27] should not be ignored. In the introduction of the work "On Crimes and Punishments", Beccaria sees happiness as a basis for social organization and understanding or, in other words, for constitutionalism.[28] In formulating the fundamental normative principle that must underlie the adoption of all laws, he says: "If we look into history we shall find that **laws** which are, or ought to be, **conventions between men in a state of freedom**, have been, for the most part, the work of the passions of a few, or the consequences of a fortuitous or temporary necessity; not dictated by a cool examiner of human nature, who knew how to collect in one point the actions of a multitude, and had this only end in view, *the greatest happiness of the greatest number.* Happy are those few nations who have not waited till the slow succession of human vicissitudes should, from the extremity of evil, produce a transition to good; but, by prudent laws, have facilitated the progress from one to the other! And how great are the obligations due from mankind to that philosopher, who, from the obscurity of his closet, had the courage to scatter among the multitude the seeds of useful truths, so long unfruitful!"[29]

One thing is certain: **it is impossible to identify a single source for the philosophy of happiness underlying the Declaration**. Moreover, it should be emphasised that the idea embraced by the signatories of the Declaration concerns *temporal felicity*, which is the end of civil society.[30] The temporal happiness concerns the welfare of the body politic, its citizens, and must be ensured by the state. It should not be confused with *eternal happiness*, with salvation and eternal life, which is the function of the Church and which does not necessarily imply the presence of earthly happiness.[31]

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[26] Edmond N. Cahn, op.cit., p. 275.

[27] Garry Wills - *Inventing America: Jefferson 's Declaration of Independence*, Doubleday & Co., New York, 1978, pp. 150-158 and 248-255, *apud* Patrick J. Charles, op.cit.

[28] Garry Wills, op.cit., p. 252-255, *apud* Patrick J. Charles, op.cit.

[29] Cesare Beccaria *An essay On crimes and Punishments,* Albany, W.C. Lillte &Co, 1872, p. 12

[30] John C. Ford, op.cit., p. 125.

[31] *Idem,* p. 133.

Adoption of the Declaration pursued the goal of proclamation of sovereignty from the Crown and the British Parliament[32] and the establishment of a "government of the whole people".[33] Declaration's preservation of "life, liberty, and the pursuit of happiness" **was a guarantee upon which democratic republics became constituted**.[34] It is certain that the principle of happiness is most important one in the theory of rights proclaimed by the Declaration. It gives the US government a positive obligation: an obligation to provide individuals with the right environment to achieve maximum happiness, regardless of their social, economic, cultural condition, etc. According to William Pencak, the above states three guarantees of the Declaration imply four conditions any government must fulfil: **a) pass laws necessary for the public good; b) no group of people within a polity ought to be denied adequate representation of its collective interest; c) justice must be administered impartially; and d) people should not be robbed, murdered, or harassed by their government.**"[35]

The name attributed to the Founding Fathers is not a coincidence at all. Romans used to call *Patres patriae* those people who rule in a just manner and make happy in the times in which they live. Anyone who reads the Declaration of Independence of the United States of America, as well as any beneficiary of US

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[32] Patrick J. Charles, op.cit., p. 462.

[33] *Idem,* p. 463 – According to the Chief Justice of the Supreme Court, John Jay in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, the Declaration of Independence found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government.

[34] *Letter from Jedediah Huntington to John Trumbull, Governor of Connecticut* (22 July, 1776), in 1 *American Archives*, 5th ser., *supra* note 1, at 510, *apud* Patrick J. Charles, op.cit., p. 465.

[35] William Pencak - *The Declaration of Independence: Changing Interpretations and a New Hypothesis,* 57 Pa. Hist. 232 (1990), *apud* Patrick J. Charles, op.cit., p. 477.

domestic government policies, must recognize the merits of Jefferson or Madison who proclaimed the ideal of happiness and linked it to political reality, thus **laying the foundation for the nowadays powerful American democracy.**

B. AMERICAN CASE-LAW ON HAPPINESS

Since the idea of pursuit of happiness is not explicitly provided in the American Constitution, one of the scholars argues that it is essential for the Supreme Court of the United States of America to recognize the ideals of "life, freedom, and the pursuit of happiness" in the Declaration of Independence **as part of the pantheon of US constitutional jurisprudence.**[36]

The pursuit of happiness is still part of many of the constitutions of US states[37] and is considered by many to be a metaphor, a remnant from the last century. However, US courts have applied founding principles and historical guideposts to gauge the protective scope of certain constitutional provisions. Changes in technology, economics, foreign policy, and the evolution of societal ethics make it difficult to apply the Founders' interpretation of the law and its interrelation to society.[38] However, the basic democratic principle of preserving "life, liberty, and the pursuit of happiness" is primarily addressed to the Congress. As Chief Justice John Marshall wrote in *McCulloch v. Maryland* [17 US (4 Wheat.) 316 (1819)], "**construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.**"[39]

It has been suggested that, in the context of the 18th century, "the pursuit of happiness" should be read as meaning something more than running after happiness: "**it connotes a practice or activity, as when we speak of the** *pursuit* **of life**".[40]

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[36] Patrick J. Charles, op.cit., p. 458. In *Bute v. People of State of Illinois* 333 US 640 – 1948 The US Supreme Court stated that the constitutional text was largely conceived in the spirit of the Declaration of Independence which proclaimed the safeguard of such *inalienable rights* as life, liberty and the pursuit of happiness. However, the Court has never given an enforceable power to the right to pursue happiness.

[37] Approximately, in two thirds of them. See Joseph R. Grodin, op.cit., p. 1.

[38] Patrick J. Charles, op.cit., p. 517.

[39] *Idem.*

[40] Arthur M. Schlesinger - *The Lost Meaning of „The Pursuit of Happiness"*, 21 Wm.& Mary C.Q.Hist.Mag. 325-326 (1964), *apud* Joseph R. Grodin, op.cit., p. 18.

Most US courts have in no way considered happiness as a relic of the natural rights philosophy lacking any interest for the present.[41] Without claiming to exhaust all the cases relevant for our topic, we will review some of the cases that are part of what we call "the jurisprudence on happiness". One of the first cases that approached happiness and safety was *Beebe v. State* 6 Ind. 501 - 1855.[42] Here, the Supreme Court of Indiana overturned that state's prohibition law on the grounds that it is interfered with the right to "liberty and pursuit of happiness". That right, declared Judge Perkins in the companion case *Herman v. State* 8 Ind. (Tanner) 545-1855, "embraces the right in each *compos mentis* individual, of selecting what he will eat and drink..." The readers of Russian press and Russian blogs[43] will immediately trace a parallel with the situation related to food imports by the Russian Federation from European countries. Given the Ukrainian crisis and the introduction of economic sanctions against the Kremlin administration, Russian imports of food manufactured in the European Union have decreased drastically. A number of Russian citizens raised the issue of endangering their happiness. They are no longer the same if they give up the foods they consume daily or habitually and which are no longer found today on the shelves of Russian supermarkets. They have to abandon their pleasures. Judge Perkins further states that if the individual were denied the right to eat what he wanted as a component of the right to pursue happiness, the legislature could control individuals "as to their articles of dress and their hours of sleeping and waking." If people were not competent to decide such matters, they should be placed "at once in a state of pupillage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease, and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish."

Another example is the case *Territory v. Ah Lim* 24 P. 588 (Wash.) - 1890, in which the Washington Supreme Court rejected the defendant's argument that his right to the pursuit of happiness included the right to smoke opium in the privacy of his home.[44] The court declared that "the state has an interest in the

[41] Joseph R. Grodin, op.cit., p. 19.

[42] *Idem,* p. 22.

[43] See the open letter by Xenia Sobchak to the film director Nikita Michalkov where she addresses the issue of food provision following the limitation of imporeds on goods from the European union countries - http://snob.ru/profile/24691/blog/80450

[44] Joseph R. Grodin, op.cit., p. 23. In a similar case - BverfGE 90, 145, The Federal Constitutional Court of Germany has denied the existence of the right to consume cannabis, despite the fact that this is an act of private life, given the multitude of social consequences and relations.

intellectual condition of each of its citizens, recognising that the fact that society is but an aggregation of individuals. The moral or intellectual plane of society is elevated or degraded in proportion to the plane occupied by its individual members." "Opium smoking is a loathsome, disgusting and degrading habit, that it is becoming dangerously common with the youth of the country, and that its usual concomitants are imbecility, pauperism, and crime ... If the state concludes that a given habit is detrimental to either the moral, mental and physical well-being of its citizens, to such an extent that it is capable of becoming a burden upon society, it has the undoubted right to restrain the citizen from the commission of that act." On the basis of similar reasoning, the Alabama Supreme Court upheld in *Sheppard v. Dowling* 28 Sat. 791, 795 (Ala., 1899) the state's limitations upon the sale of liquor. "The law does not allow the pursuit of happiness in that direction. So his individual sense of bliss attained may result from carrying on the liquor traffic, but the law does not esteem that particular avocation, involving, as it does, in the eye of law, baneful consequences to society." Moreover, Romania is experienced in ethnobotanics in this regard. **The Law no. 143/2000 on the prevention and combating of illicit traffic and illicit drug use underwent a number of amendments, which have finally resulted in the prohibition of the consumption of certain psychotropic plants, after a large number of victims among young people was registered.**

An Ohio court held that school officials violated a student's right *to pursue and to get happiness*, under Article 1 paragraph 1 of the Ohio Constitution.[45] When they removed him as students body president, the board members barred him from extra-curricular activities, and penalized his grade point average because he insisted on violating the School Board's regulation of hair length and style: "In non-legal terms Section 1 establishes the principle that every American has the right to be let alone and to be regulated by the government only so far as such regulation is shown to be necessary to protect others or to advance legitimate government purposes. This constitutional provision places a heavy responsibility on any governmental body to justify its interference with the citizen's freedom, his right to enjoy liberty of decision and to seek happiness in his own way."

The US Supreme Court has embraced the idea of happiness, but upon the implicit preposition that the right to pursue happiness is an aspect of economic liberty.[46] In the case of *Lochner v. New York* 198 U.S. 45 (1905), it invalidated a New York statute that regulated work hours for bakers.

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[45] *Jacobs* v. *Benedict,* 301 N.E.2d 723 (Ohio Misc. 1973), *apud* Joseph R. Grodin, p. 24.

[46] Joseph R. Grodin, op.cit., p. 26.

In *State v. Cromwell*, 9 N.W.2d (N.D. 1943), the Supreme Court of Oklahoma held a statute which required a license for the professional practice of photography invalid on the ground that the asserted justifications for the statute were "fanciful".[47] The Court quoted Henry Campell Black, the author of Black's Law Dictionary: "The pursuit of happiness is really an aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guarantee of "liberty". The happiness of men may consist in many things or depend on many circumstances. It is clear that it must comprise personal freedom, exemption from oppression or individual discrimination, the right to follow one's individual preferences in the choice of an occupation, liberty of conscience, and the right to enjoy domestic relations and the privileges of the family and the home. **The constitutional right to pursue happiness can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, in respect to any of the particulars thus mentioned, except in so far as it may be necessary to secure the equal rights of others. Thus it appears that this guaranty, though one of the most indefinite, is also one of the most comprehensive to be found in the constitutions.**"

Summarizing what should the judicial remedy in order to guarantee the right to pursue happiness mean, Chief Justice Peters stated in her concurrence in *Moore v. Ganim* 660 A.2d 742 (1995), that "Judicial intervention will not be warranted to enforce the constitutional obligation except in the most extreme cases - where individuals demonstrate that (1) without government support, they actually will be unable to secure the necessaries of life such that they will face a grave threat to their health or welfare; and (2) for reasons beyond their control, they could not comply with the conditions the statute imposes. Judicial intervention to enforce a constitutional obligation only in such narrowly defined circumstances of severe deprivation meets all legitimate jurisprudential objections."[48]

C. THE *ELFES* CASE BEFORE THE GERMAN FEDERAL CONSTITUTIONAL COURT

It is said[49] that since the pursuit of happiness is taken to mean whatever an individual may seek for himself, "happiness" and "liberty" become equivalent terms. However, the concept of liberty promoted by Isaiah Berlin must be

[47] *Idem.*

[48] *Idem,* p. 33.

[49] Joseph R. Grodin, op.cit., p. 27.

emphasized here.[50] In its classical meaning, liberty means the absence of any obstacles with a view to fulfil people's desires. Not be prevented by others to do what you wish (which means to be happy). If liberty could be dictated by the fulfilment of desires, it could have been increased, Berlin says, by eliminating such desires, as well as by achieving them. "I could make people (including myself) free by making them give up their initial aspirations, which I decided not to satisfy."[51] I would give up all my desires and I would be loosen, i.e. free. **However, my freedom would be the freedom of a paralyzed man who feels no pain, a freedom seen as a safety of atrophied nerves. We do not, therefore, refer to this second concept of freedom.**

The American constitutional vision is centred **around human liberty in the classical meaning, that is, empower people to live their lives largely as they determine**.[52]

The German idea of freedom is different than the American. The German constitution is not anchored in value of liberty, rather in the value of human dignity. Notwithstanding this, we find an interesting approach by the German Federal Constitutional Court in the *Elfes* case[53]. In this case, the applicant was denied the request to extend the passport validity by the competent authority, without any justification but the reference to the Passport Act. The Court started its reasoning by stating that the right to leave the country is not part of the right to free movement. Despite this, the person is not deprived of constitutional protection. This right is part of the entitlement to free development of personality. And the free development of personality "cannot simply mean development within that central area of personality that essentially defines a human person as a spiritual-moral being. It is inconceivable how development within this core area could offend the moral code, the rights of others, or even the constitutional order of a free democracy."[54] In the Court's view, these limitations show that the Basic Law envisaged the freedom of action in a broad construction. Accordingly, the Court inferred from Article 2 section (1) of the German Constitution **the general right to freedom of action, with corresponding limitations**. Thus, the Court concluded that when vital areas are not protected by particular fundamental rights, the individual affected by

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[50] Isaiah Berlin – *Five essays on liberty and other writings* (orig. *Cinci eseuri despre libertate și alte scrieri)*, trad. Laurențiu Ștefan, ed. Humanitas, București, 2010, p. 74.

[51] Idem.

[52] Edward J. Eberle - *The German Idea of Freedom,* The Oregon Review of International Law, vol. 10, no. 1/2008, p. 2-3

[53] BVerfGE 6, 32 (1957).

[54] *Idem*

state interference may rely on this article if he considers that his/her freedom of action has been violated.

It is worth mentioning the condition emphasised by the Court, particularly that a law can only be regarded as complying with the constitutional order if it respects " the principles of the rule of law and the social welfare state".[55]

Dignity, the right to development of the personality, the horizontal outcome of fundamental rights and the two important concepts of the active role of the state - *Rechtstaat* (which requires respect for the principle of proportionality) and *Sozialstaat* (which obliges the state to adopt measures in order to guarantee the minimum level of material existence, to enjoy a personal safety standard and to be able to live without their dignity being affected) are internal prerequisites for the Germans to pursuing happiness.[56]

D. THE PURSUIT OF HAPPINESS IN THE CONSTITUTIONS OF ROMANIA AND OF THE REPUBLIC OF MOLDOVA

Whether we start from or end up with the pattern of happiness described by John Rawls, "a person's good is determined by what is for him the most rational long-term plan of life given reasonably favourable circumstances. A man is happy when he is more or less successfully in the way of carrying out this plan."[57] The achievement of happiness, according to Rawls, "depends on circumstances and luck."[58] If we accept this reasoning, we can only conclude that **the state can ensure only the premises of favourable circumstances, at most. State policies can operate only here.**

The guarantees of pluralism within the Romanian society (Article 8 of the Constitution of Romania and Article 5 of the Constitution of the Republic of Moldova), universality and equality (Articles 15 and 16 of the Constitution of Romania and of the Constitution of the Republic of Moldova), the amount of rights and freedoms set out in Chapter II of the Constitution and the condition of ensuring the market economy represents the full constitutional framework that can guarantee the right to pursue happiness.

The Constitutional Court of Romania, as well as the Constitutional Court of the Republic of Moldova, could have get inspired by the jurisprudence

[55] David P. Currie - *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany,* German Law Journal, vol. 9, no. 12/2008, p. 2209.

[56] For a detailed description of these values, see Edward J. Eberle, op.cit.

[57] John Rawls – *A Theory of Justice,* (In Romanian language: Editura Universității „Alexandru Ioan Cuza", Iași, 2012, trad. Horia Târnoveanu, p. 477.)

[58] *Idem.*

of the Karlsruhe Court. It could have deduced a general right to act or a general freedom from Article 45 of the Constitution, according to which "Free access of persons to an economic activity, free enterprise, and their exercise under the law shall be guaranteed.", combined with Article 33 para. (2) - "A person's freedom to develop his spirituality [...]". The assertion is reinforced by Article 1 para. (3) of both the Constitution of Romania and the Constitution of the Republic of Moldova, which list among the supreme values of the two states "the free development of human personality". It is precisely the value the Karlsruhe Court has invoked to establish the existence of a right of general freedom. Moreover, we note that **German constitutional values are similar to identification with the constitutional values of both our states: dignity, free development of personality, respect for fundamental rights and freedoms, the rule of law, democratic and social nature of the state, etc.**

In the German legal system, Article 1 para.(1) of the Basic Law referring to dignity also implies that "the individual should not be transformed [by the state] into an object of its own interests of welfare."[59] This approach eliminates from the very start any wide-ranging interventions in public policies which envisage happiness. The individual should be rather allowed to delineate his own life goals of happiness alone within constitutional limits. The state just needs to create the possibilities for him to do so. As the very perception of the individual that he is treated, for example, unequally and incorrectly, affects his feeling of happiness.[60] Therefore, the existence of an authority which could unilaterally determine what happiness is would be incompatible with constitutional democracy, while the government's failure to guarantee the equal and fair treatment of its citizens would be incompatible with happiness. The state must affect happiness as little as possible – there existing no *right to happiness*[61] and no obligation to achieve it, rather *a right to pursue happiness* in the manner one's chooses.[62] Reason is quite simple: happiness is an exclusively intimate matter. What makes me happy can upset my fellow. Or: the fact that I want to be happy does not necessarily mean that my fellow also wants to be happy.

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[59] BVerfGE 30, 1. See Kurt Bayertz and Thomas Gutmann, op.cit., p. 243.

[60] Kurt Bayerz and Thomas Gutmann, op.cit., p. 244.

[61] Not even the natural one. The observance of the moral law results in unhappiness for this or that individual. The individual has no right to achieve his happiness at the expense of the moral law. [.] In fact the doctrine of original sin and its consequences prepares us for much human misery not personally deserved. John C. Ford, op.cit., p. 139-140. Nothing can prevent us from admitting that admitting that life is inevitably unhappy for many people.

[62] *Idem,* p. 239.

CONCLUSIONS:

Under the influence of Aristotle, Locke, and Beccaria, the Founding Fathers of the United States have transposed for the first time a political-moral vision of happiness into a constitutional act. Most of US Constitutions also provide for the right to pursue happiness. Given that this value is a common concern for most human beings, the courts of these states inevitably deal with cases in which everyone's right to pursue happiness has been invoked. The courts weighed up whether the private interest in achieving happiness was not contrary to the interests of the society.

Starting from the fact that the pursuit of happiness means doing whatever you want, within the limitations imposed by the Constitution and laws (to the extent that these acts meet the requirements of proportionality in a broad sense), **happiness and freedom are equivalent terms**. The Karlsruhe Court deduced a right to general freedom from the right to free development of the personality. The *Elfes* decision of the German Federal Constitutional Court could become a model for the Constitutional Court of Romania and the Constitutional Court of Moldova, as the values of the German Constitution are similar to identification with the values enshrined in the Constitutions of both countries. In essence, the "rule of law" is nothing more than the translation of the word *Rechtsstaat*.

"The State and the law do not exist for the sake of happiness, rather for other values (e.g., safety)."[63] Ensuring happiness is not the mission of state and law. Their mission is to ensure the pursuit of happiness through simple paths that, in case they are correct, must be respected: **laws and constitution.**

[63] Kurt Bayerz și Thomas Gutmann, op.cit., p. 241.

INTEGRITY IN THE EXERCISE OF PUBLIC OFFICE AS A GUARANTEE OF FUNDAMENTAL RIGHTS

SIMINA TANASESCU*

The legal concept of integrity of public dignities and offices appeared in Romania during EU accession negotiations.

Yet it is fair to say that there are relatively few legal rules[1] that make explicit use of the concept of integrity, whether we are looking at international[2], regional[3], or national legal instruments[4]. A systematic analysis of international

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[1] However, in many pieces of regulation that establish obligations for specific socio-professional categories (Constitutional Court justices, magistrates, public servants, the military, freelance professions) there are related notions such as moral quality, civic and moral conduct, personal conduct, good reputation etc.

[2] The United Nations Convention against Corruption, adopted in New York on 31 October 2003, ratified in Romania under Law #365/2004, published in the Official Journal of Romania #903 of 05 October 2004. The Preamble of the Convention stipulates specifically that one of the intentions of this international legal instrument is to safeguard integrity and to foster a culture of rejection of corruption. Moreover, in Art. 5 integrity is at the basis of establishing and promoting effective coordinated practices aimed at the prevention of corruption, along with the other principles (rule of law, transparency, accountability).

[3] The Criminal Law Convention adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, ratified by Romania under Law #27/2002, published in the Official Journal of Romania #65 of 30 January 2002 and the Civil Law Convention on Corruption adopted in Strasbourg on 4 November 1999, ratified by Romania under Law #147/2002, published in the Official Journal of Romania #260 of 18 April 2002.

[4] Far from claiming the inventory here presented is complete, only some of the most relevant ones will be listed here: (i) Law #115/1996 on Asset Disclosure for dignitaries, magistrates, individuals holding managerial and supervisory positions, and public servants, published in the Official Journal of Romania #263 din 28 October 1996, (ii) Law #161/2003 on Steps to Ensure Transparency in the exercise of public dignities, public office and office in the business environment, to prevent and punish corruption, published in the Official Journal of Romania #279 din 21 April 2003, (iii) Law #144/2007 to Establish, Organize and Operate the National Integrity Agency, republished in the Official Journal of Romania #535 of 03 August 2009, (iv) Law #360/2002 on the Status of the Police Employee, published in the Official Journal of Romania #440 of 24 June 2002, (v) Law #303/2004 on the Status of Judges and Prosecutors, published in the Official Journal of Romania #826 din 13 September 2005, (vi) Law #7/2004 on the Code of Conduct of Pu-

documents shows that, at this level, integrity is not a goal per se, but a necessary condition and an instrument to fight corruption and strengthen the rule of law. In other words integrity serves the rule of law, and in turn the latter serves the citizen. Thus, the target of the legal norms on integrity is not the honest public servant who strictly abides by the rules, but ensuring integrity at the level of the exercise of institutional responsibilities as a necessary condition for the decrease and elimination of institutionalized corruption in society, and ensuring a better life for the citizenry. Besides, the legal concept of integrity in the exercise of public dignities and offices does not necessarily refer to a *personal, subjective* aptitude of individuals that oppose a society or other individuals who are morally corrupt. The legal concept of integrity operates in the public sphere of social relationships, not in the private sphere of individual thoughts and actions. Integrity evolves from morality (personal, by default) to ethics (specific to groups) to ultimately become a social value protected by a legal norm. This development from integrity seen as an inherent trait of an individual to integrity considered as characteristic for the public space, where social relationships are established and operating, was identified relatively recently in the philosophical and political thinking of the European society[5].

Consequently, the immediate goal of the integrity framework is eradicating corruption, while the long-term goal is to protect the fundamental rights. The ultimate goal of integrity is to ensure strict compliance with all legal frameworks governing the activity of public bodies in order to put in place the widest and most predictable area necessary for the full and complete exercise of the fundamental rights of citizens.

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blic Servants, published in the Official Journal of Romania #525 of 02 August 2007, (vii) Law #208/2015 on Elections for the Senate and Chamber of Deputies and on Establishing and Operating the Permanente Elections Authority, published in the Official Journal of Romania #553 of 24 July 2015, (viii) Law #571/2004 on the Protection of Whistleblowers in public authorities, public entities and other such entities, published in the Official Journal of Romania #1.214 of 17 December 2004.

[5] For a better understanding of integrity as a virtue of the person who seeks justice one needs to read Plato. For a better understanding of integrity as a virtue in the public space one needs to read Hannah Arendt. See Hannah Arendt, "Truth and Politics" in Peter Baehr (ed.), The Portable Hannah Arendt (London: Penguin, 2003), pp. 545-75. Also see Sophie Loidolt, "Hannah Arendt on Plurality, Spaces of Meaning, and Integrity" (available online at https://integrityproject.org/2014/09/30/hannah-arendt-on-plurality-spaces-of-meaning-and-integrity/, accessed on 22 April 2017) and Alex Beaumont, "Truth, Integrity and Democratic Politics" (available online at https://integrityproject.org/2014/08/18/truth-integrity-and-democratic-politics/, accessed on 22 April 2017).

Inspired mainly by international *soft law* sources, national integrity regulations typically distinguish between administrative aspects, who's role is primarily preventive (assets and interests disclosure, incompatibilities, conflicts of interests, bans on holding certain positions or exercising certain activities, as well as a specialized monitoring body) and criminal aspects, who's role is punitive (the crime of conflict of interests, the crime of corruption, and the creation of specialized enforcement bodies).

Thus, in Romanian law integrity covers administrative institutions, measures and penalties of administrative nature, all part of a policy meant to prevent corruption:

- Establishing administrative authorities with integrity-related responsibilities such as ANI (National Integrity Agency) or asset inspection committees,
- Disclosure of private assets and interests by individuals who hold public dignities or offices,
- Incompatibilities between certain public dignities and offices, and between public and private dignities and offices,
- Bans on holding and exercising certain public dignities and offices following a criminal conviction or the finding of a conflict of interests or incompatibility,
- The administrative conflict of interests as regulated in Law #161/2003, which requires the existence of a situation where the individual exercising a public dignity or office has a personal interest of a material nature and which may influence a non-biased exercise of their responsibilities.

The legal framework on integrity also includes the criminal side, which provides the sanctioning part of the policy. The most significant of those notions is the crime of conflict of interests which describes the actions (a higher degree of social harm than the mere existence of a conflict situation) of public servants who, in the exercise of their duties, engage in conduct or participate in the making of a decision which brought, directly or indirectly, a material benefit for themselves or other categories of individuals as described in Art. 301 par. (1) of the Criminal Code (also see Constitutional Court Decision #2/2014).

Inspired both by relevant international standards and monitoring put in place by the European Commission after Romania's accession to EU, the case law of the Constitutional Court of Romania specifically recognized the existence of a legal framework on integrity as an integral part of the rule of law, alongside the fight against corruption. In its Decision #582/2016 the Constitutional Court went even further and established an obligation on the part of the State to make

ethics and professional standards mandatory for those who provide public activities or services and for those who perform the actions of a public authority.

The Court's case law in this matter developed particularly after the creation of ANI (National Integrity Agency) as an operational entity and the introduction of the conflict of interests as a separate violation under the Criminal Code. Examining the constitutionality of both administrative and criminal stipulations, in terms of potential unconstitutional elements, the Court promoted high standards so as to guarantee full compliance with integrity in the public office and dignities as under the international and regional legal instruments Romania is a party to.

Out of numerous Constitutional Court decisions on this matter I have selected two which deal with the preventive elements of the legal framework on integrity and two concerning the punitive side.

First, we have Decision #418/2014, concerning the stipulations of Art. 25 par. (2) second thesis in Law #176/2010. The Court stated that *"once the existence of a state of incompatibility or conflict of interests has been established beyond recourse, the individual who has been found to be in that state shall be denied the right to hold any other elected office as under Art. 1 in this Law, for a period of 3 years after their term of office is over."* Thus, "*an individual who held, for instance, the position of local or county council member and who has been established to be in a state of incompatibility or to have violated the rules of conflict of interests can no longer, for a duration of 3 years after the end of their term of office, hold any other elected office (e.g. senator, deputy, mayor, local councilman, etc.)*."

Secondly, the Court demonstrated zero tolerance for the situation where individuals who have been convicted by a court to prison may hold public office or dignities. In its Decision #536/2016 the Court stated that *"an opportunity given individuals sentenced to a term of imprisonment but who do not serve that sentence in actual detention to continue unhindered in the exercise of a public dignity, with all the rights and obligations pertaining to the exercise of a public authority position, contradicts the principle of the Constitution's precedence and obligation to comply with the country's laws as established in Art. 1 par. (5) of the Fundamental Law, and undermines the citizens' confidence in the authorities of the State*." The same idea has been re-stated in Decision #680/2016, which reads: *"it is the criminal conviction itself that establishes the loss of integrity/honesty, which is a crucial component of the exercise of public office and without which the individual holding such office no longer has the legitimacy to continue activities. It is the criminal conviction that causes the change in the legal situation of the individual exercising public authority and disqualifies them, legally and morally, from holding a position such as the one they had. The benefit of the do-*

ubt, good-faith and loyalty have been removed as an effect of the final criminal conviction, so no matter how the sentence is served such an individual can no longer be entrusted by the State with the exercise of public authority because, as a result of their criminal conviction, the individual loses their legitimacy and ceases to be in agreement with the general interests they are mandated to protect under the law."

Thirdly, in regards to the crime of conflict of interests, the Constitutional Court has dealt with several motions and objections of unconstitutionality and, most often, has promoted a wide interpretation of the scope of this criminal violation. In its Decision #2/2014[6], the Court found that the active subject of the crime of conflict of interests is not only the individual who is under a permanent labor contract with a public authority, entity or other public-interest legal entity, and has a job description from them. The Court states that "*the crucial elements in including or excluding individuals from the scope of the criminal law are criteria such as the nature of the service provided, the legal basis for performance of that activity or the legal relationship between that person and public authorities, entities or other public-interest legal entities."* Also, in its Decision #88/2016[7] the Court stated that the crime of conflict of interests does not involve only the obtaining of undue material benefits, but in fact *obtaining any kind of benefits*. Criminalization of this conduct is not intended to simply punish situations where laws are violated in order to derive material benefits for the offender, but in situations where the impartial exercise of the public servant's official duties may be harmed.

Fourthly, and also in consensus with the Supreme Court, the Constitutional Court gave a wide interpretation to the notions of "public servant" and "official," whose scope is wider than the one defined in administrative law. The Court's view (see Decision #2/2014) is that, in terms of the approach to criminal conduct, the Criminal Code associates the notion of "public servant" with individuals who exercise a public-interest service for which they have been specifically mandated by a public authority or who are under the control or supervision of such authorities in terms of their public work.

In conclusion, the legal framework on integrity in force in Romania is well defined and properly interpreted in the case law of the Constitutional Court. In strictly quantitative terms, it seems to have caused only few conceptual controversies, which demonstrates society's strong adherence to the values expressed therein. Though it was mainly developed after Romania's accession to EU mem-

[6] Published in the Official Journal of Romania #411 of 03 June 2014.

[7] Published in the Official Journal of Romania #421 of 03 June 2016.

bership, it has been rarely challenged in terms of its constitutionality. Romania's citizens are therefore satisfied with legal developments and the case law in this matter and wish to see them continue along the same lines. Legal stability should normally bring a predictability of conducts and ensure a high a degree of citizen compliance with legal rules, and that stands true for dignitaries and public servants as well. We can only hope that the trend we have seen so far remains constant and will become stronger, in the best interest of citizens who wish nothing else than a clear, stable and predictable framework for the exercise of their fundamental rights.

CONSTITUTIONAL JUSTICE AND PROTECTION OF INDIVIDUAL RIGHTS AND FREEDOMS IN THE SLOVAK REPUBLIC

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1. ON FUNDAMENTAL RIGHTS AND FREEDOMS (POLITICAL RIGHTS) OF THE CITIZENS AND THEIR PROTECTION IN GENERAL

Guarantees of individual rights and freedoms of the citizens are the raison d´être of the constitutions in modern times: their securing is in fact the most important part of each constitution.[1] Individual rights are the negation of the all-powerful state. But for the Greeks the state was all-powerful and everything had to bow before the πολις.

The freedom, the most valuable feeling for the Greeks, was mixed with the political rights. Political rights of the Greeks have been summarized in the exercise of two acts: the first was the right of a citizen to participate in the people´s assembly (εκκλησιαξειν) as a political right related to the public life of an individual. The second political and at the same time also individual right was the right to αγοραξειν (access to the agora, where the whole private and public life is situated, freedom of movement, freedom of speech, in a broad sense of word this political right is identified with the individual freedom)

Examples (and we can safely use also the original Greek word παραδειγμα/ paradigm), from the jurisprudence of the Constitutional Court of the Slovak Republic (hereinafter as "Constitutional Court") focusing on the very recent protection of political rights as a part of the fundamental rights and freedoms vested in the Constitution of the Slovak Republic (hereinafter as "Constitution")

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[1] Compare with TRIANTAPHYLLOPOULOS, J.: Rechtsphilosophie und positives Recht in Griechenland. Köln 1972, p. 663.

are provided in the next sections of this contribution.[2] Hopefully they may answer the question where we are now in this respect, in a state ruled by law?

The development of the jurisprudence of the Constitutional Court on individual rights is linked with two pre-conditions which concern the doctrine of the protection of fundamental rights and freedoms, but which were not present from the very beginning in the decision-making activity of the Constitutional Court since its establishment in March 1993.

The first one was linked with overcoming a wrong attitude in the protection of individual rights derived from a misleading view on the "division of work" between the general courts and the Constitutional Court. It was argued that the general courts are obliged to protect the legality, since the Constitutional Court is obliged to protect the constitutionality. This mistaken view has been overruled later on, and the only one possible solution has been presented: all the courts (general courts and the Constitutional Court) have to protect fundamental rights and freedoms, when such a violation is occurring and when it is objected respectively (with regard to the principle of subsidiarity defined in the Constitution).

The second one concerned the introduction of a fully guaranteed constitutional complaint in Article 127 of the Constitution by the Amendment of the Constitution in 2001 (another part of this jurisprudence goes to plenary decisions in proceedings on compliance of statutes with the Constitution according to Article 125 of the Constitution).

So the aim of the next part of this contribution is the reference about the way of protection of fundamental rights and freedoms (to the use of the principle of proportionality and weighing principles)[3] by all the courts, covering up the Constitutional Court. Some of the cases which have been brought to the European Court of Human Rights (hereinafter as "European Court") against the Slovak Republic are included, too.

2.1. PROTECTION OF THE RIGHT TO LIFE: ABORTION CASE (DECISION NO. PL. ÚS 12/01 OF 4 DECEMBER 2007)

The case has concerned the compliance of certain provisions of the Abortion Act No. 73/1986 Coll. of the Slovak National Council, in the wording of the

[2] Just to remind the two ways of teaching/ learning distinguished by Seneca in his *Epistulae* 6,5: „*Longum iter est per praecepta, breve et efficax per exempla*"(Teaching/ learning by precept is a long road, but brief and beneficial is the way of example).

[3] See HOLLÄNDER, P.: Základné práva a slobody (Fundamental Rights a nd Freedoms) in: ČIČ, M. et al.: Komentár k Ústave Slovenskej republiky. (Commentary on the Constitution of the Slovak Republic). Bratislava 2012, p.74-82..

Act 419/1991 Coll. (officially also Act on the artificial interruption of pregnancy; hereinafter "Abortion Act") and of certain provisions of the Decree (Regulation) of the Ministry of Health of the Slovak Socialist Republic No. 74/1986 Coll., in the wording of the Act No. 98/1995 Coll. (§ 2 Section 3) by which the Abortion Act was exercised, with Article 123 in connection with Article 2 Section 2 of the Constitution decided in the plenary session of the Constitutional Court on 4 December 2007 (on a proposal originally brought to the Constitutional Court in 2001 by a group of 31 deputies of the National Council of the Slovak Republic; hereinafter "National Council").

The Constitutional Court has declared the objected provisions of § 2 Section 3 of the abovementioned Ministerial Decree, which had exercised the Abortion Act - on the possibility to artificially interrupt the pregnancy of the woman until 24 weeks of its duration in the case when the development of the foetus is genetically wrong – unconstitutional, on reasons of non-compliance with Article 123 in connection with Article 2 Section 2 of the Constitution.[4] In other words, § 2 Section 3 of the Ministerial Decree does not fulfil the criteria laid down for legal regulations in the sense of Article 123 of the Constitution.

The reasoning of the decision shows the position of the Constitutional Court towards the protection of the right of life guaranteed by the Constitution as it follows:

The right to life[5] represents the archway and the pillar of the whole system of the protection of fundamental rights and freedoms. The legal system of the Slovak Republic protects human life as a key value of the Rechtsstaat/ state governed by the rule of law.

The Constitutional Court holds the opinion that the unborn human life has the nature of an objective value.[6]

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[4] See Article 2 Section 2 of the Constitution: „*State authorities/ bodies may act solely on the basis of the Constitution, within its scope, and their actions shall be governed by procedures laid down by a statute.*" The wording of Article 123 of the Constitution: "*Ministries and other state administrative bodies shall, under the laws and within their limits, adopt generally binding legal regulations, provided they are empowered to do so by a law/ statute. These generally binding legal regulations shall be promulgated in a manner laid down in a law/ statute.*".

[5] Article 15 Section 1 of the Constitution states: "*Everyone has the right to life. Human life is worth protection even before birth.*"

[6] The legal opinion of the Constitutional Court was published in the full version in the *Collection of Findings and Rulings of the Constitutional Court of the Slovak Republic for the year 2007* (Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky 2007. Košice 2008) under I. Findings, No. 1/2007, PL. ÚS 12/01, pp. 19 – 74. The following part

The Constitution does not exclude balancing of fundamental rights and freedoms with constitutional values, but this balancing has a different quality from the balancing of fundamental rights and freedoms:[7] according to the Constitutional Court the protection of the unborn life has *"a normative status on the level of a constitutional imperative."*

According to the Constitution, the nasciturus is not a subject of law to whom the fundamental right to life according to Article 15 Section 1 of the first sentence of the Constitution belongs. However, the nasciturus may become a subject of law ex tunc, and thus ex tunc also a holder of fundamental rights, but under the condition that s/he will be born alive.

The right of privacy and to the protection of private life in connection with the principle of freedom in its basic limitation, leaning also on the fundamental right to human dignity, guarantees to an individual the possibility of autonomous self-determination. Within this scope and protected by the Constitution as well, there is also the possibility of a woman deciding on her own spiritual and physical integrity and its various layers, inter alia, also on the fact whether she will conceive a child and how her pregnancy will develop. By becoming pregnant (either in a planned or unplanned or voluntarily way or as a consequence of violence) a woman does not waive her right to self-determination.

Any limitation whatsoever on the decision-making of a woman on the issue of whether she inclines to tolerate the obstacles in autonomous self-realisation, and thus whether she wants to remain pregnant until its natural completion, represents interference with a constitutional right of a woman to privacy.

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of the article includes mainly the leading legal sentences from the official English translation of the decision published on pp. 707 – 711.

[7] Compare the argumentation line e. g. with the one which is part of the Decision of the Constitutional Court of the Federal Republic of Germany (Bundesverfassungsgericht = BVerfG) in its two respective leading cases BVerfGE, 39, 1 (Decision of 25 February 1975 linked with the provision of § 218a of the German Criminal Code) and BVerfGE 88, 203 (Decision of 28 May 1993). "*The Basic Law protects the human life, also the unborn. This obligation to protect has its reason in Article 1 Section 1. Human dignity also belongs to the unborn human life. Legal protection belongs to the unborn also towards its mother.*" In this respect compare also, e. g. the Abortion Case 24-2 (A) KCCR 471, 2010 Hun Ba 402, 23 August 2012) described in BRÖSTL, A.: On the Jurisprudence of the Constitutional Court of Korea. In: MOON, J. – TOMÁŠEK, M. et alii: Law Crossing Eurasia, From Korea to the Czech Republic. Passau – Berlin – Prague 2014, p. 143 ff. Finally, see another explanation of this decision in BRÖSTL, A. – GAJDOŠÍKOVÁ, Ľ.: Grundrechte in der Slowakei. F. Die einzelnen Grundrechte (I. Individualbezogene Grundrechte). In: MERTEN, D. – PAPIER, H. – J.: (Hrsg.): Handbuch der Grundrechte in Deutschland und Europa. Band IX. Grundrechte in Ostmittel- und Osteuropa. Heidelberg 2016, p. 244 ff.

Interference with the right to privacy is admissible only when it is in compliance with a law. This law has to fulfil a special material quality – it has to envisage some particular legitimate aims and at the same time it has to be indispensable to the interests of protecting such aims in a democratic society. Encroachment on privacy has to reflect the urgent the urgent social need for the protection of one or more legitimate aims and it has to be an appropriate means of such protection in relation to these aims.

On the one side, the lawmaker must not ignore the imperative contained in the wording of Article 15 Section 1 second sentence of the Constitution – the duty to provide protection to an unborn human life, and on the other side it has to respect the fact that everybody, including the pregnant woman, has the right to decide on her/ his private life and to protect the realisation of her/ his own idea thereof against unauthorised encroachment. The possibility for a pregnant woman to ask the relevant authority for an abortion is one of the alternatives through which it is possible to make use of the constitutional right to privacy and to self-realisation in connection with the principle of freedom.

It was the task of the Constitutional Court to seek a starting point from the collision between value protected by the Constitution (unborn human life) and limitable human – fundamental right (right of a woman to privacy). When limiting fundamental rights, their essence and meaning should be taken into consideration (Article 13 Section 4 of the Constitution). The constitutional value of unborn human life could therefore protected only to such an extent that this protection would not cause interference with the essence of the freedom of a woman and her right to privacy.

The lawmaker may – and in the interests of protecting the constitutional value of unborn human life must – lay down the procedure and the time limits for the cases in which a pregnant woman decides for abortion, whereby this procedure may not be arbitrary; it has to enable a pregnant woman to make a real decision on abortion, and also maintain respect for the constitutional value of unborn human life.

By the Abortion Act the lawmaker tries, on one side, to grapple with the constitutional imperative contained in Article 15 Section 1 second sentence of the Constitution, and on the other side with the fundamental right of a pregnant woman to decide for herself, which stems from the fundamental right according to Article 16 Section 1 of the Constitution and also from Article 19 Section 1 and 2 of the Constitution. If from this balancing the conclusion is drawn by the lawmaker that a pregnant woman has the right, without manifest restriction from the side of the state, to ask for abortion within a certain stage of the pregnancy, whereby in subsequent weeks, apart from some strict exceptions, the integrity of

the foetus will be strictly protected against the mother herself (but through the means of criminal law), this conclusion itself is not constitutionally impugnable as a breach of the constitutional imperative set in Article 15 Section 1 second sentence of the Constitution, but only under the condition that the lawmaker does not cause inadmissible excess.

The unconstitutionality of the Abortion Act does not arise moreover in connection with the fact that the legal regime of an unborn human life differs depending on the stage of pregnancy. The constitutional imperative constituting the lawmaker´s duty to protect the human life before birth does not require the conclusion that legal protection of a foetus against its mother has to be identical in each particular stage of prenatal development.

The choice of twelve weeks as a limit for carrying out an abortion upon the request of a mother cannot be considered, according too the opinion of the Constitutional Court, as an arbitrary one. This period derives from the time of creation of sensibility in the foetus, and is in accordance with prevailing European practice of relevant legislation of the states permitting abortion upon request.

The lawmaker is an authority entitled to determine the relevant maximum period for carrying out abortions, whereby the Constitutional Court reviews only potential excess in the course of considering this situation by the lawmaker; it does not review whether the period concerned is in optimum compliance with the current state of knowledge of medical science.

From the fundamental constitutional principles and also from the specific provisions of the Constitution containing the references to legal regulation it is possible to deduce that all fundamental social relations which are not directly regulated in the Constitution have to be regulated by an Act of the Parliament (National Council). This results particularly from the democratic nature of lawmaking and from the understanding of the principle of division of powers. at the same time every individual is protected against the arbitrariness of the public power.

The period for carrying out an abortion represents such an essential issue of legal regulation that it has to be regulated solely by a statute, and therefore any regulation by lesser laws (on the sub-statute level) is excluded.

2.2. PROTECTION OF CHILDREN´S LIFE – CASE NO. II. ÚS 152/03, CASE OF KONTROVÁ V. SLOVAKIA (APPLICATION NO. 7510/04), JUDGEMENT OF THE EUROPEAN COURT OF 31 MAY 2007

This case shows the problems in the field of protection of fundamental rights and freedoms at more levels (again including the Constitutional Court).

First of all on the circumstances or the facts of the case. The complainant/applicant (Mrs. Kontrová) was married and there were two children of the marriage: a daughter born in 1997, and a son born in 2001. On 2 November 2002 the applicant filed a criminal complaint against her husband with the respective District Police Department. She accused him on having assaulted and beaten her with an electric cable the previous day. She submitted a medical report by a trauma specialist indicating that her injuries would incapacitate her from work for up to seven days. The applicant also stated that it was a long history of physical and psychological abuse by her husband.

At an unspecified time between 15 and 18 November 2002 the applicant and her husband attended the District Police Station. They sought to withdraw the applicant´s criminal complaint. A police officer advised them that, in order to avoid a prosecution, they would have to produce a medical report showing that after the incident on 1 November 2002 the applicant had not been incapacitated from work for more than six days. The applicant produced such a document on 21 November 2002.

On 26 November 2002 the respective police officer decided that the above matter was to be dealt with under the Minor Offences Act (No. 372/1990 Coll.) and under section 60 (3) (a) of that Act, to take no further action.

In the night of 26 to 27 December 2002 a relative of the applicant called the emergency service of the District Police Department to report that the applicant´s husband had a shotgun and was threatening to kill the children and himself. The applicant herself made a similar phone call later that night. The phone calls were received by another police officer, who instructed a police officer to arrange for a police patrol to attend the premises. The patrol found the applicant in the village of Tušická Nová Ves. The applicant´s husband had left the scene prior to their arrival. The policeman took the applicant to her parents´ home and invited her to come to the police station the following morning so that a formal record of the incident could be drawn up.

In the morning of 27 December 2002 the applicant accompanied by her brother attended the Trhovište District Police Station where she spoke to a police officer.

In the morning of 31 December 2002 the applicant and her brother attended the Michalovce District Police Station where she talked to a police officer. She enquired about her criminal complaint of 2 November 2002 and also mentioned the incident of the night of 26 to 27 December 2002.

On 31 December 2002 between 11 a. m. and 11.15 a. m. the applicant´s husband shot their two children and himself dead.

On 31 January 2003 the Košice Branch of the Police inspection service charged the involved officer 1 with abuse of public authority (§ 158 Section 1 Letter c/ of the Criminal Code) on the ground of his failure to accept and duly register the applicant´s criminal complaint. On 3 February 2003 the officer 2 was charged with dereliction of duty on the ground of his failure to take appropriate action on the night of 26 to 27 December 2002, and on 7 February the officer 3 was charged with the abuse of public authority – both of them by the Inspection Service.

The three officers have been by the District Military Prosecutor on 4 August 2003 summoned for trial in the Michalovce District Court. The District Court dismissed the summons, later on the Regional Court dismissed an appeal by the District Military Prosecution. However, the Prosecutor General challenged the decision of the Regional Court by lodging an complaint in the interest of the law in the Supreme Court.

On 29 September the Supreme Court quashed both, the Regional Court´s decision and the District Court´s judgement. It found that the lower courts had assessed the evidence illogically, that they had failed to take account of all the relevant facts and that they had drawn incorrect conclusions.

In a new procedure in the District Court the officers were found guilty and sentenced to six, four and four months of imprisonment (with sentences suspended for 12 months). It was found that the accused had negligently breached the applicable service regulations and had thereby caused the death of the applicant´s children.

Further, on 26 February 2003, the applicant lodged a complaint under Article 127 of the Constitution with the Constitutional Court, when she formally directed her complaint against the District Police Department. She maintained that its officer´s failure to act had led to a violation of her right to protection of her personal integrity (Article 16 Section 1 of the Constitution), her right to protection from unjustified interference with her private life (Article 19 Section 2 of the Constitution) and her right to legal protection (Article 46 Section 1 of the Constitution).

On 2 July 2003 a three-judge senate of the Constitutional Court declared the complaint inadmissible, because of lack of its jurisdiction. However, the presiding judge did not share the majority view and wrote a dissenting opinion. According to him, in view of its primary purpose, namely to uphold and to protect constitutionality, *the Constitutional Court was free to examine complaints under the legal provisions which it considered to be the most relevant*. The case was to be examined primarily from the standpoint of the **right to life** and, in particular, the positive obligations inherent in that right.

On 26 February 2004 in a new complaint against the District Police Department brought to the Constitutional Court the applicant reiterated the arguments she had submitted in the previous complaint and added that the criminal proceedings (which was pending at the time of her first complaint) had ended without producing any positive results in respect of her complaints.

On 8 September 2004 the Constitutional Court declared the respective complaint inadmissible, holding that it has no jurisdiction to entertain it and it added more formal reasons in favour of its opinion (submission outside the statutory two-months time-limit, res judicata).

Finally the applicant went with her case to the European Court, when she alleged that the police had failed to take appropriate action to protect her children´s lives and her private and family life despite knowing of her late husband´s abusive behaviour and fatal threats, and that it had been impossible for her to obtain compensation for the non-pecuniary damage she had suffered. She relied on Articles 2, 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention").

The European Court holds that there has been a violation of Article 2 (right to life)[8] of the Convention and a violation of Article 13[9] taken together with Article 2 of the Convention, and it holds that the Slovak Republic is to pay the applicant EUR 25 000 in respect of non-pecuniary damage and EUR 4 300 in respect of costs and expenses.

3.1. FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION V. PROTECTION OF PERSONALITY. CASE OF THE EUROPEAN COURT FELDEK V. SLOVAK REPUBLIC (NO. 29032/95 OF 12. JULY 2001)

Freedom of expression (freedom of speech) is the first political right in the respective part of the Constitution. Article 26 Section 1 is introduced by the very important sentence: "*Freedom of expression and the right to information shall be guaranteed.*" More details than brings Section 2: "*Everyone has the right to express his or her opinion in words, writing, print, images or by other means, and also to seek, receive and disseminate ideas and information freely, regardless of the state borders. No approval process shall be required for press publishing.*

[8] Article 2 of the Convention: „*Everyone´s right to law shall be protected by law.*"

[9] Article 13 of the Convention: „*Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*"

Entrepreneurial activity in the field of radio and television broadcasting may be subject to permission from the state. The conditions shall be laid down by a statute."

In a brief description of the circumstances and of the background of the case it should be mentioned that in 1991 Mr. Dušan Slobodník, a researcher in the field of literature, published an autobiography entitled *Paragraph: Polar Circle*. He described in it, among others, his conviction by a Soviet military tribunal in 1945 on the ground that he had been ordered to spy on the Soviet army after having been enrolled, in 1944 when he was 17 years old, in a military training course organised by Germans. In the book Mr. Slobodník also wrote about his detention in Soviet gulags and his rehabilitation by the Supreme Court of the Soviet Socialist Republics in 1960. In June 1992 Mr. Slobodník became Minister for Culture and Education of the Slovak Republic.

The Poet Ľubomír Feldek has published a poem in the newspaper Telegraph of 20. July 1992 with the date 17. July 1992 (Declaration of independence of the Slovak Republic) with the title "*Good night, my beloved*" ("Dobrú noc, má milá"). One verse of the poem reads as follows: "*In Prague the prisoner Havel is giving up his presidential office, in Bratislava the prosecutor rules again. And the rule by one party is again above the law. A member of the SS and the member of the Secret Police (ŠTB during the communist regime in Czechoslovakia) embraced each other.*"

Later on Mr. Dušan Slobodník publicly declared that he would sue the poet for the above statement for defamation: in the position of a Minister of the Government he accused the poet because he felt offended by his poem: he argued in the way that the verses are addressed to him and they in a false manner refer to his fascist past

The case dealt with the limits of the critics of a public personality. The Minister won the case at the Bratislava City Court in Slovakia, but he lost against the applicant/ complainant at the European Court in Strasbourg.

The European Court found that the applicant´s statement was a value judgment the truthfulness of which is not susceptible of proof. It was made in the context of a free debate or an issue of general interest, namely the political development of Slovakia in the light of the country´s historical background. The statement concerned a public figure, a government minister, in respect of whom limits of acceptable criticism are wider than for a private individual.

The European Court holds that there has been a violation of the freedom of speech Article 10 of the Convention, and holds that the Slovak Republic is to pay the applicant SKK 65 000 of non-pecuniary damage, and SKK 500 000 in respect of costs and expenses.

3. 2. ON THE LIMITS OF THE RIGHT TO FREEDOM OF EXPRESSION (NEWSPAPER ARTICLE ON A JUDGE WHO PARTICIPATED IN HUNTING). DECISION NO. II. ÚS 184/2015 OF 11 NOVEMBER 2015

The newspaper-publisher has challenged the decision of the Regional Court No. 15 Co 144/2012 of 27 March 2013 within a proceeding on a constitutional complaint as a violation of its freedom of expression according to Article 26 Section 1 and 2 of the Constitution (quoted in connection with the previous case).

The case of a Judge of the Specialized Criminal Court has been reported by the daily newspaper Sme on under the titles "*The Judge has been hunting free of charge*" and "*The Judge has forbidden to publish any information about him*". The question was whether the hunting permission was a kind of gift, in the light of the argument that the hunting ground is a private one of his friend (a regional politician).

The Constitutional Court stated that the Regional Court has in its decision given too high preference and priority to the protection of privacy of the claimant before the freedom of expression of the complainant (newspaper-publisher) – the articles did not interfere into the sphere of privacy of the claimant/ accuser; the Regional Court also did not take into consideration that the respective Judge is bearing a lower degree of protection of its privacy than other judges of this Court, the articles have concerned his free-time activity (but also the private sphere of the judges can become a subject of criticism by the media, and in the circumstances of the case these articles have touched the sphere, which has become a subject of the public interest).

According to the Constitutional Court also the conclusion of the Regional Court that in the articles the information has been published in the form of facts which were not true was not convincing at all (due to the lack of causal links between the title and the content of the respective articles, and also from the point of view of an impropriate formalism in the evaluation of the respective sentences at stake).

4. RESTRAIN OF THE RIGHT TO PETITION (DECISION NO. II. ÚS 44/00) OF 5 JANUARY 2001)

According to Article 27 Section 1 of the Constitution "*the right to petition shall be guaranteed. Everyone shall have the right to address state bodies or local self-administration bodies in matter of public interest or of other common interest with petitions, proposals and complaints either individually or with others.*"

The exercise of this right shall serve the citizens as a means of the use of the freedom of expression. At the beginning of its second period (2000 – 2007) the Constitutional Court has dealt with the so-called "Tibet – Case" on an alleged violation of the abovementioned Article of the Constitution by improper actions taken by the City Police in Prešov.

The City Police in Prešov has been accused that on 10 March 2000 in the afternoon in the Main Street, where the petitioners (together with other persons) have organised a petition "For Hanging-Out of the Flag of Tibet." During this activity some participants have occasionally drummed on tam-tams (this performance was called by the City Police "musical production"). The petitioners declared that this performance had become a subject of attention of the City Police three times, when it has asked for various kinds of permissions ("permission for public space," "permission to a petition", "permission for a musical production"), despite the arguments used by the petitioners that the exercise of the petition right guaranteed by the Constitution does not submit to any permission or duty to announce (report) it.

The Constitutional Court has during the process of making evidence found out, that the employees of the City Police have proceeded in the way that by a permission they have not only conditioned the continuation of "the musical production", but also the petitioning itself ("*without the respective permission you must stop it*"). Because the petitioners did not succeed in presenting of such a permission, the City Police has decided not only on the cancellation of the "musical production", but also on the cancellation of the petition action of the complainants.

Because there is no permission foreseen, the non-presence of a written permission for a musical production accompanying the exercise of the right to petition does not empower any public authority to stop respectively to limit the exercise of the right to petition: neither the constitutional nor the statutory level of regulation of the above mentioned right does include such a condition of its exercise. In this respect the Constitutional Court had decided on the violation of the right according to Article 27 Section 1 of the Constitution by the acting of the City Police.

5. RIGHT TO A PEACEFUL ASSEMBLY (DECISION I. ÚS 193/03 OF 30 MARCH 2004)

The wording of Article 28 Section 1 of the Constitution is laconic and clear: "*The right to a peaceful assembly shall be guaranteed.*"

According to Article 28 Section 2 of the Constitution "*The conditions under which the right may be exercised shall be provided by a law cases of assemblies held in public places, if it is regarding measures necessary in a democratic society for the protection of the rights and freedoms of others, for the protection of the public order, health and morals, property or of national security. An assembly shall not be subject to a permission of a body of public administration*."

The next case is on an announced street procession and the street-crossing of cyclists in 2001 (I. ÚS 193/03) in connection with a violation of Art. 28 Section 1 and 2 of the Constitution.

On the initiative of the civil association "Live and let live" on 11 June 2001 in Bratislava a properly announced assembly has taken place (a street procession is in this sense also qualified as an assembly). Its aim was in the form of a of street-crossing of cyclists at chosen communications of the capital to point out on the need to a complex support of the public transport and to a more systematic solution of the situation in the transport in the city. A part of the assembly with the nature of a happening was also the blocking of a cross of a central square for about five minutes of time (including one minute of silence offered to all the victims of automobilism in Slovakia). The mayor of the city on the initiative of the District Directory of the Police has fined the association in an administrative proceeding of SKK 30 000, because the complainant has used several communications "*without a permission of the respective Road administration authority*" and "*in another than usual way*," when such acts have led to an interruption of the road traffic and to threatening its security and flow. After the recall the District Office has confirmed the decision of the Mayor. Afterwards, the accusation on of the legality of the decision of the District Office has been dismissed by the Regional Court.

The Constitutional Court stated that the complainant according to the known facts could realise the announced assembly including the street procession and he had been sanctioned afterwards. This circumstance it considered irrelevant one from the point of view of the evaluation whether the right of the petitioner had been violated or not, because as a limitation only the measures of the public authorities can be considered, which have been taken in advance or during the course of the procession or after the end of it. Thus the Regional Court by its judgement by which it "confirmed" the fine directed to the petitioner by the administrative authority in a direct connection with the assembly had – according to the decision of the Constitutional Court – violated the right to a peaceful assembly of the civil association "Live and let live" guaranteed in Article 28 Section 1 of the Constitution and in Article 11 Section 1 and 2 of the Convention.

6. CONSIDERATIONS ON THE RIGHT TO ACCESS TO ELECTED AND PUBLIC OFFICES UNDER EQUAL CONDITIONS

A number of complainants during the last years object the violation of their fundamental right anchored in Article 30, Section 4 of the Constitution in the wording: "*Citizens shall have access to the elected and public offices under equal conditions.*"

PL. ÚS 3/99 The complaints are connected with cases of non-appointments of the candidates for "constitutional offices" (e. g. Prosecutor General, Judge of the Constitutional Court, Judges of European Courts, Member of the Judicial Council etc.) and they are further linked with the change in the attitude of the Constitutional Court and the re-consideration the final responsibility (e. g. the prerogatives of the President).

The problem touched here is in fact linked with the "right to be appointed" as it can be read out from the complaints of the "candidates" to various offices foreseen by the Constitution. For example: in the case that a candidate who was elected (approved) by the parliament and who should be appointed by the President is rejected: the President has the right not to appoint him (according to the decision of the Constitutional Court PL. ÚS 4/2012 issued within the proceedings on the interpretation of the Constitution according to Article 128 of the Constitution: subject of interpretation was Article 102 Section 1, Letter t/). In cases of non – appointments the complainant/ unsuccessful candidate is going to bring his/ her complaint to the Constitutional Court referring to Article 30 Section 4 of the Constitution.

Should the Constitutional Court enter into the discretion power (into the prerogative as the final solution) of the constitutional authority in charge of the appointment? Should the Constitutional Court check this type of decision on arbitrariness? There are precedential decisions of the Constitutional Court issued in this sense (we have reported about them in the previous Regensburg Congresses). Among them is also the decision of the Constitutional Court on the violation of the right of the candidate for the office of the Prosecutor General from Article 30 Section 4 of the Constitution by the President of the Slovak Republic through his non-appointment (Čentéš Case: No. I. ÚS 397/2014-262 of 4 December 2014 amended by the decision No. I. ÚS 397/2014-379 of 11 December 2014). However, the question still remains: does such a right exist (the right to be appointed to a constitutional office), can it be derived from the abovementioned Article 30 Section 4 of the Constitution?

7. PROTECTION OF THE CITIZENSHIP OF THE SLOVAK REPUBLIC (CASE NO. PL. ÚS 11/2012 OF 17 SEPTEMBER 2014)

The Citizenship may also be considered as a constitutional principle or as value close to fundamental rights as it is sufficiently known from the rulings of some constitutional courts.

The Amendment of the Citizenship Act No. 40/1993 Coll. of Laws by the Act No. 250/2010 Coll., adopted in a fast-track legislative proceedings, first of all in respect to its newly introduced § 9 Section 1 Letter b) and Section 16, has been challenged at the Constitutional Court by a group of 30 deputies of the National Council.

The provision of § 9 Section 1 Letter b) stated as follows:

„*The state citizenship can be lost by … b) acquisition of a foreign citizenship on the basis of an explicit express of will*".

The connected § 9 Section 16 stated: „*A citizen of the Slovak Republic shall lose the state citizenship of the Slovak Republic by the day when s/he on the basis of an explicit expression of will – may it be a request, a declaration or any other act directed towards the acquisition of a foreign citizenship – voluntarily acquires a foreign citizenship*".

As a kind of explanation in § 9 Section 17 and Section 18 is added: „*There will be no such consequence (loss of citizenship according to the previous Section 16) in the case that a citizen of the Slovak Republic had acquired a foreign citizenship due to marriage with a citizen of a foreign state due to the fact that s/he had acquired the foreign citizenship during the of the common marriage.*"

Section 18: „*There will be no such consequence also in the case that the foreign citizenship had been acquired by birth.*"

Their main concern and objection was that the presented amendment of the Citizenship Act had regulated the *ex lege* loss of the citizenship, but it did not take into consideration the requirement of Article 11 of the European Convention on Nationality concerning decisions in the procedures relating to nationality (citizenship) that *"Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality contain reasons in writing.*"[10]

It should be argued that the respective Citizenship Act has been in fact a reaction on a Hungarian Statute, which by 1 January 2011 simplified conferring of

[10] It should be mentioned that the Preamble of the respective Convention among others refers to the „*noting the varied approach of States to the question of multiple nationality and recognising that each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality.*"

double-citizenship to "foreign Hungarians". (The last Congress of Comparative Constitutional Law in Regensburg 2016 was offered to the question of political decisions: this is another example.)

The Constitutional Court did not solve the problem of the objected incompliance of the Citizenship Act, in the wording of its Amendment from 2010, with the Constitution (the case registered under No. PL ÚS 11/2012 was brought to the Court by a group of deputies of the National Council), because it did not reach the necessary majority for making a decision (it means seven judges out of thirteen), and that is why the proposal was rejected because of procedural reasons.

The Ministry of Interior of the Slovak Republic tried to solve the problems concerning the losses of the Slovak citizenship. It did not do it in the way of a proposal to amend or change (or to correct) the valid Citizenship Act of 2010, but the another way around – by issuing an order that persons concerned may apply for an exemption for special reasons to get back the Slovak passport (personally by a written application at the respective District Office, at a diplomatic mission or a consular office). This order enables former Slovak citizens, who lost the Slovak citizenship after 1 January 1993 to recover its acquisition.

According to statistical data by the end of July 2017 there were 1907 people who have lost the Slovak citizenship (most often it happened in connection with the acceptance of the Czech citizenship (503 cases), German citizenship (445), Austrian citizenship (276), British citizenship (177), Hungarian citizenship (97, American citizenship (89), etc.

On the other side there is a reversal movement: due to the announced exception (e. g. legitimate or registered stay in a foreign state in the time of acquirement of the foreign citizenship) 376 people have asked for getting back the Slovak passport, 303 of them have got it back.

CONSTITUTIONAL AMENDMENTS OF TURKEY: REASONS, FACTS, AND CONSEQUENCES

HAKAN CANDURAN

At the end of a process, which is started with a legislative proposal before the Grand National Assembly of Turkey on 16th of December 2016, Turkey made a constitutional amendment, within the conditions of state of emergency, declared following the attempted coup of July 15, 2016. This was the 19th amendment that current constitution of Republic of Turkey has gone through.

At the referendum of April 16, 2017 pro-amendment votes won a bare majority with , 51.41% votes for "yes" and 48.59% votes for "no". Since the majority is not substantially constituted nor based on all segments of the population, the amendments became doubtful and indeed resulted with huge debates.

WAS IT A DEMOCRATIC PROCESS FOR MAKING A CONSTITUTION?

Current constitution of Turkey was amended 18 times till to the last one. The reason of such an enormous number of amendments is its feature of being a product of military coup of 1980. Particularly with the amendments of 2001, supranational treaties on human rights are put above the ordinary laws within the hierarchy of norms. With this, Turkey became a member of the family of European countries as regard the constitutional values.

Although sometimes certain NGOs suggested several constitutional amendments, present amendment contradicts with all of them. The common denominator of all suggestions was primarily strengthening parliamentarian regime and assuring social rights and freedoms along with judicial independence. However, new constitution is apart from this axis, for following reasons:

- The proposal of amendment prepared through the private negotiations of only two parties rather than the reconciliation of all parties represented at Grand Assembly.
- Our Bar Association was not asked for an opinion on the amendment. The preparation process of the legislation was performed without comprising a democratic constitutional public opinion. The authors of the legislation completed all the preparation process in a smoke-filled room.

At Grand Assembly, legislation process of the proposal was hasty. The public was devoid of information and could not participate to the debates. Parlia-

mentary debates were hold without adequate transparency. Television channel of Grand Assembly did not broadcast. The debates exceeding the late nights, insistently continued till to the mornings. During the poll, some deputies violated the principle of secret ballot. As a result, Act no. 6771 legislated in order to be presented to the public by the referendum, even though the public opinion is not adequately informed.

WAS IT A DEMOCRATIC REFERENDUM?

Since the majority was not enough for making a constitution, the Act no. 6771 had taken to the referendum following its legislation. When we look to the referendum process, we cannot say, with inner peace, that pros and cons of the amendment had expressed themselves coequally.

Let us list the facts:

- State of emergency is not abolished; the referendum took place under the condition of state of emergency.
- Both views were not equally presented on media. The arguments of "no" were almost absent on media; they could only find limited availability at a few newspapers, websites, and tv stations.
- Some public officers explicitly boosted the propaganda for "yes" and banned the publicity of "no".
- President of the Republic, who is supposed to be neutral due to constitutional status, ran a campaign on behalf of the amendments.
- Favors of "yes", conducted a campaign in manner that, as if it is not only a referendum but also a war for independence, which supposed to respond the perpetuity issues of the country and the "no" voters were alleged to be criminals.

As taken from the standpoint of referendum techniques, each article was not put to the vote separately for the sake of being able to know what to vote for. The amendments were given to the voters as a whole, on which they are asked to say "yes" or "no". It was not possible for the voters to have a complex consideration for each article. Voters voted on the base of their political closeness and –by seeing the referendum as a vote for confidence in the name of the president- on the base of their sympathy with the President Erdoğan.

The office for election in Turkey is the Supreme Committee of Elections, which is responsible for the elections and has judicial power. At the end of the referendum process, the Committee passed a judgment, rendering the whole voting process dubious. Committee decreed to accept the votes even if they or the

envelope had not been signed by polling council. The decree, is in contradiction with clear provisions of relevant law and even to the precedents of the Committee itself.

Present constitutional amendment of Turkey is carried out through an election, to be called as plebiscite, and with the doubtful decision of the Supreme Committee of Elections.

ARE THE CONTENT OF THE AMENDMENTS IS DEMOCRATIC?

The amendment is suggested by two political parties. These parties, which are placed on the right side of the political spectrum and namely *Adalet ve Kalkınma Partisi (AKP)* [Justice and Development Party] and *Milliyetçi Hareket Partisi (MHP)* [Nationalist Movement Party], took joint action in this process. But even this joint action did not ease the fears of the –at least a part of- electors of these parties, about the "one-man regime".

Many objected to the amendment, particularly the members of the left-oriented parties of the Grand Assembly, basing on the same worries. They argued that the amendments were prepared essentially for the sake of the President, who uses a *de facto* power even by violating the constitution in effect.

By this amendment, against the letter and spirit of the Constitution, a never-seen kind of governmental system, namely unity of powers, is established. Here are the evidences for our argument:

- By the amendment, the executive power is accumulated to the one man's hands.
- The President is equipped with the power of dissolution of parliament and mutual power of renewing the elections for Grand Assembly.
- The President has given the power of issuing statutory decrees, which alludes to partly assign of the legislative prerogative of the Grand National Assembly of Turkey.
- The President is given the power of proposing budget law.
- By the amendment, the members of present High Council of Judges and Prosecutors are reduced and it is renamed as Council of Judges and Prosecutors. The judges cannot directly elect for the council membership anymore.
- 13 of the members of Constitutional Court, which is reduced to 15, will be appointed by the President.
- The political irresponsibility of the President is kept. Only an almost unfeasible criminal mechanism of impeachment is envisaged.

- The President is equipped with the solitary use of the power in state of emergency.
- The President has given the privilege of being a member of a political party.

By the amendment, Mr. President Erdoğan is re-elected as the chairman of AKP at May 21, 2017. The election took place hurriedly, even without repealing the entangling provision of law. This is one of the most arguable provisions of the constitutional amendment.

The constitutional amendment does not bring a democratic presidential system, based on separation of powers. It provides some sort of unity of powers, which may never belong to any current democratic governmental system.

The Constitution stipulates the security of fundamental rights and freedoms of a society and separation of powers. After the amendments, there is a debate and concern among the lawyers of Turkey, whether there, still, is a constitution in the proper meaning of the word. Certainly we still have a formal constitution, but it is now doubtful whether it is real or nominal.

In short, the constitutional amendment that I wanted to brief shortly, opened the way for concerns about the secular and democratic features of the regime of Republic, since it may lead to a party-state.

NOTION OF 'ESSENCE OF THE RIGHT' AND THE TURKISH CONSTITUTIONAL COURT'S APPROACH AS A LIMIT TO THE RESTRICTION OF THE RIGHTS AND FREEDOMS

Dr. SELIN ESEN*

INTRODUCTION

The concept of 'essence of the right' is a criterion that is applied to define the content and utmost limit for restriction of a right. Historical reference of the notion of the 'essence' is Article 19.2 of the 1949 German Constitution. Also some other constitutions that were came into effect after the German Constitution, such as the 1961 Turkish, 1976 Portuguese, 1978 Spanish, 1991 Rumanian, 1992 Slovakian, and 1999 Swiss gave place this concept.

Likewise, some of the international human rights documents refer this notion. The International Covenant on Civil and Political Rights (ICCPR) does not explicitly provide the concept ofessence. However, Article 5.1 of the Covenant stipulates that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant". General Comment No. 31 of the Human Rights Committee refers the concept of essence regarding Article 2 of the Covenant[1] that defines the scope of the legal obligations undertaken by States Parties to the ICCPR. According to the

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[1] Article 2- Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

General Comment, any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[2] Also General Comment No. 3 of the UN Economic, Social and Cultural Rights Committee states regarding the International Covenant on Economic, Social and Cultural Rights (ICESCR) '...the obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.[3]

The concept of essence is a key criterion in the European Union (EU) law. Article 51.1 of the Charter of Fundamental Rights of the European Union stipulates that the limitations of the rights and freedoms recognized by the Charter must respect the essence of those rights and freedoms. That makes the protection of essence a general principle for the EU members, regardless of the existence the concept of essence in their constitutions. The European Convention on Human Rights (ECHR) does not explicitly indicate the 'essence of the right'. However, similar to Article 5.1 of the ICCPR, Article 17 of the Convention prohibits 'any State, group or person' from engaging in an activity or performing an act aimed at limitation to a greater extent than is provided for in the Convention. In reality, this is directed at States.[4] Still, as explained below, while reviewing restriction of the rights, the European Court of Human Rights (ECtHR) uses the notion of essence as a criterion in some of its rulings.

In this work, I will explain the concept of essence and its place in the ECtHR decisions and the Turkish constitutions and constitutional jurisprudence.

THE CONCEPT OF ESSENCE

'Essence' of a given right may be described as an essential content, indispensable part and minimum core of the right which makes the right meaningless when it is infringed upon. To put it in another way, 'essence' is an essential,

[2] UN Human Rights Committee, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting) [General Comment No. 31] § 6.

[3] U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, Supp. No. 3, Annex III, P 10, U.N. Doc. E/1991/23 (1991) [General Comment No. 3] § 10.

[4] William A. Schabas (2015), *The European Conventions on Human Right,* Oxford University Press, p.620.

absolute, or irreducible core of the right providing the individual a minimum secure and untouchable area which cannot be restricted more.[5]

There are two approaches regarding the understanding of the concept of essence, i.e. the absolute and the relative theory. The absolute theory is explained as core of the fundamental right, the smallest content of the right.[6] This theory claims that the essence can, as a matter of impossibility, never be balanced with another competing right or interest. In contrast the relative theory requires criterion of essence to be established individually, not only for each fundamental right, but also for each case.[7] This view allows for the balancing with other rights and interests and hence defining the essence in terms of proportionality. In short the relative theory permits balancing the essence of a right and other interests and thus bringing the concept of essence fairly close to proportionality. While the Portuguese doctrine shows awareness of absolute and relative theory with regard to essence of fundamental rights, staying rather neutral on this point; the Spanish doctrine – similar to the German doctrine – prefers the absolute theory over the relative theory, leading to the result that the notion of essence provides for an absolute protection that can never be (out)weighted by other competing interests.[8]

THE ECHR CASE-LAW

Even though the ECHR does not explicitly refer the concept of essence, The ECtHR uses it in some of its rulings. It seems that the Court adopts both the relative and absolute theories.[9] The Court considers that 'the limitations ... must not restrict or reduce the right in such a way or to such an extent that the very

[5] Ergun Ozbudun (2017), (Turk) Anayasa Hukuku, Revised 17th Edition, Yetkin, Ankara, p. 117; David Bilchitz (2003), "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence" 19 *S. Afr. J. on Hum. Rts*.,p.1; Julian Rivers(2006), "Proportionality and Variable Intensity of Review" 65(1) *The Cambridge Law Journal*, p. 180 and 184; Katharine G.Young (2008), "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" 33 *Yale J. Int'l L*., p. 113.

[6] Zafer Gören (2007), "Temel Hakların Sınırlandırılması- Sınırlamanın Sınırları" 6 (12) *İstanbul Ticaret Üniversitesi SosyalBilimler Dergisi*, p.52

[7] *Ibid*.

[8] Brkan (2017), p.7-8.

[9] Brkan (2017), p.11.

essence of the right is impaired'.[10] Restrictions that render the right inaccessible and avoid exercise of the right can be considered as a contravention of essence. To give an example, In the case of *McKay v. the United Kingdom* the ECtHR ruled that the strict time constraint imposed by Article 5(3) provides 'little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision.'[11] According to the Court, 'where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance'.[12] In the case of *Baka v. Hungary*, the President of the Hungarian Supreme Court whose mandate was terminated as a consequence of controversial constitutional amendments had no legal means to challenge this termination. Accordingly, the ECtHR considered the infringement of essence of the right of access to a court (Article 6(1) ECHR).[13] Also in the case of *Matthews v. the United Kingdom*, according to the Court, absence of elections in Gibraltar to the European Parliament denies the right to vote contravenes the very essence of the applicant's right to vote to elect the legislature (Article 3 Protocol No. 1).

The Court must ensure that the restrictions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.[14] For instance, in cases regarding the right of access to a court the ECtHR ruled that it 'must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not

[10] B. and L. v. the United Kingdom, no. 36536/02, § 34, 13 September 2005; Rees v. the United Kingdom, 17 October 1986, § 50; F. v. Switzerland, 18 December 1987, § 32; Muñoz Díaz v. Spain, no. 49151/07, 8 December 2009 § 78; Jaremowicz v. Poland, no. 24023/03, 5 January 2010 § 48.

[11] McKay v. the United Kingdom [GC], no. 543/03, 3 October 2006, § 33. Regarding prohibition of civil servants to form trade unions and to exercise their rights the right to organize *see* Demir and Baykara v. Turkey [GC], no. 34503/97, 12 November 2008, § 97 and Tüm Haber Sen and Çınar v. Turkey, no. 28602/95, 21 February 2006, § 38.

[12] Oya Ataman v. Turkey, no. 74552/01, 5 December 2006, §§ 41–42; Patyi v. Hungary, no. 35127/08, 17 January 2012, § 43.

[13] Baka v. Hungary [GC], no. 20261/12, 23 June 2016, §§120-122.

[14] Hirst v. The United Kingdom (no. 2) [GC], no. 74025/01, 6 October 2005, § 62; Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987.

pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[15]

It seems that the ECtHR to indicate that there is a certain degree of overlap between the criterion of essence and the principle of proportionality.[16] In the case of *Leyla Şahin v. Turkey*, the ECtHR confirmed this overlap by ruling that there is no such breach of essence if the restrictions of a right "are foreseeable for those concerned and pursue a legitimate aim".[17] in the case of *Heaney and McGuinness v. Ireland*, the ECtHR concluded that the essence was impaired due to the degree of compulsion against the applicants who were compelled to provide information relating to charges against them.[18] By following this approach, the ECtHR seems to confound the breach of essence of a fundamental right with a particularly serious breach of this right and thus confusing the test of breach of essence with proportionality balancing.[19] The ECtHR also establishes a relationship between the notions of `essence` and `necessity in a democratic society`. In the case of *Galstyan v. Armenia*, the Court stated that punishment of individuals for being 'present and proactive' at a demonstration but who were not charged with doing 'anything illegal, violent or obscene', and where the demonstration itself was not prohibited, threatened to impair 'the very essence of the right to freedom of peaceful assembly' and was therefore not necessary in a democratic society.[20]

THE CONCEPT OF THE ESSENCE OF THE RIGHT IN THE TURKISH CONSTITUTIONS AND THE TURKISH CONSTITUTIONAL COURT

The 1961 Constitutional Era

The notion of the `essence` or `core` of the right is an old concept as an utmost limit for restricting rights and freedoms in Turkish constitutional law. Indeed, it was introduced first in the 1961 Constitution that was inspired by the

[15] Baka v. Hungry[GC], no. 20261/12, 23 June 2016, §120; Jones and Others v. the United Kingdom, nos 34356/06 and 40528/06, 14 January 2014, § 186; Stanev v. Bulgaria [GC], no. 36760/06, 17 January 2012, § 230; Waite and Kennedy v. Germany [GC], no. 26083/94, 18 February 1999, § 59; Kart v. Turkey [GC], no. 8917/05, 3 december 2009, § 79; Cudak v. Lithuania [GC], no. 15869/02, 23 March 2010, §§ 54–55; Anakomba Yula v. Belgium, no. 45413/07, 10 March 2009, § 31; Bellet v. France, 4 December 1995, § 31.

[16] Brakan (2017), p.25.

[17] Leyla Şahin v. Turkey, no. 44774/98,10 November 2005, § 154.

[18] Heaney and McGuinness v. Ireland, no. 34720/97, 21 March 2001, §§ 55, 58.

[19] Brakan (2017), p.25.

[20] Galstyan v. Armenia, no. 26986/03, 15 November 2007, § 117.

German Constitution. The 1961 Constitution is the most democratic Constitution of the Turkish constitutionalism that prioritized the individual over the state and the rights and freedoms over the state authority. The 1961 Constitution was rest on the idea of `the main principle is freedom and restriction of freedom is an exception`.[21] Hence, one may claim that the existence of the notion of the essence in the Constitution is coherent with the understanding of the democracy of the 1961 Constitution. Article 11 of the 1961 Constitution stipulated that laws cannot infringe upon the essence of the fundamental rights and freedoms. In other words, the Constitution obligates the legislative body to respect the essence of the rights.

The Turkish Constitutional Court (TCC) used the criterion of essence in its decisions as of its establishment. Since the 1961 Constitution did not provide the definition of the concept of the `essence of the right` the Court defined the concept over the years.

According to the TCC "Provisions which, explicitly prohibit exercising of the right or freedom or implicitly render the exercise of a right impossible or hardly possible or inhibit aims of a right and deprive them of their effectiveness will infringe upon the essence".[22] "The restrictions set by the laws should not spoil the freedoms or render their exercise hardly possible nor neutralize their effects and aims".[23]

However, even though the Court used the concept of essence in many of its decisions during the 1961 Constitution was in force, it did not clarify and concretize the concept except for the reiteration of its abstract definition.[24]

The TCC doesn`t have a consistent approach regarding interpretation of the concept of essence of the right. The Court occasionally put restrictive interpretation on this concept. It did not establish a relationship between the concept of essence and additional constitutional guarantees, such as prohibition of torture or ill treatment, punishment incompatible with human dignity, censorship, or prior permission on formation of associations, trade unions, political parties or holding meetings and rallies. The Court disregarded that these guarantees to

[21] Mümtaz Soysal (1986), *100 Soruda Anayasanın Anlamı,* 6. Baskı, Gerçek Yayınevi, Istanbul, p.101.

[22] E.1962/208, K.1963/1, 4 January 1963, Official Gazette 13 March 1963-11354.

[23] E. 1963/25, K. 1963/87, 8 April 1963, Official Gazette 18 July 1963-11457; E.1976/27, K.1976/51, 18 and 22 November 1976, Official Gazette 16 May 1977-15939.

[24] Fazıl Sağlam (1982), *Temel Hakların Sınırlanması ve Özü*, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları: 506, S.B.F. İnsan Hakları Yayınları: 4, Ankara, p. 145. Esin Őrűcű (1975), "1961 Anayasası ve Anayasa Mahkemesine Gőre Hakkın *Özü*, Kavramı ve Műlkiyet Hakkının *Özü*", 41 (4-5) *Hukuk Fakultesi Mecmuası*, p. 156

provide an absolute protection and untouchable area for certain rights. In other words, the TCC did not embrace the fact that these constitutional guarantees partially embody essence of the right.[25] To give a case in point, according to Article 29 of the 1961 Constitution "Every individual is entitled to form associations without prior permission." The Court deemed a statutory provision that stipulates a prior permission for organization and activities of foreign associations in Turkey and membership of the Turkish citizens to these associations would not infringe the essence of the right to form an association prior permission. Because, the provision requires prior permission not for all associations, but only for foreigners as so as to control their harmful activities in the country.[26] It seems the Court implicitly accepts that essence of the right provides a guarantee only for national associations, although the Constitution precisely provides this guarantee to all. Similarly, in another case, the Court also deemed the provision that requires the approval of the Council of Ministers to establish an association that aims to make activities abroad or to start a branch office of a foreign association did not infringe the essence of the right of association.[27] The TCC also concluded that the provision empowering the administrative authority to ban foreign films would not infringe the essence of the freedom of science, art or expression. Because such authorization was a measure in order to provide public order and to protect morality and national security.[28] In these cases, the Court adopts the relative theory by evaluating public and national interests.

On the other hand, the Court sometimes interprets the concept of essence in accordance with the absolute approach. To give an example, the TCC ruled the statutory provision that empowers the competent authority to postpone meetings and demonstrations up to period of ten days for one-time infringes the essence of the right. According to the TCC, this provision requires the right to be exercised in accordance with time the administration upholds. The stipulation implicitly renders the right not exercisable even after termination of the period of the postponement. The impediment of exercising the right to hold meetings and demonstration marches on time will inhibit aims of the right and eliminate its effect.[29]

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[25] Sağlam (1982), p. 158-159

[26] E. 1963/128, K. 1964/8, 28 January 1964, Official Gazette 17 April 1964-11685.

[27] E. 1973/3. K.1973/37, 18,19 and 20 December 1973, Official Gazette 18 June 1974-14919.

[28] E.1963/204, K.1963/179, 8 July 1963, Official Gazette 13 November 1963-11554.

[29] E. 1976/27, K.1976/51, 18 and 22 November 1976, Official Gazette 16 May 1977-15939.

The 1982 Constitutional Era

The Original Text of the 1982 Constitution

The basic philosophy of the 1982 Constitution was to give priority to the authority of the state if the concepts of freedom and authority were ever in conflict. Hence, the approach of the 1982 Constitution to the rights and freedoms was to place more emphasis on their limitation rather than exercise.[30] The original text of the 1982 Constitution did not provide the concept of 'essence of the right' as a criterterion of the limit to the limitation of the rights and freedoms. Instead, it introduced in Article 13 criterion of the "the requirements of a democratic societal order".[31] According to the reasoning of the drafters of the Constitution the latter is more clear and easier to implement. Besides, this principle is provided by some of the international human rights documents.[32]

The reasoning of the drafters of the 1982 Constitution raised criticism. Accordingly, removal of the concept of essence as an utmost limit of limitation of the rights conforms to the authoritarian and state-centered characteristics of the 1982 Constitution.[33] Indeed, the criterion of the essence of the right provides an absolute core area in order to exercise the right. However, it may be possible to restrict the right touching its core, while implementing the criteria of "the requirements of a democratic societal order", because the concept of democratic society may vary. To put it another way, requirements of the democratic societal order is a volatile concept depending on the understanding of democracy and

[30] Ergun Ozbudun (2011), *The Constitutional System of Turkey: 1876 to the Present*, Palgrave Macmillan, USA, p.19 and 44; Selin Esen (2017) " Role of the European Court of Human Rights in the Turkish Constitutional Court's Rulings Regarding the Freedom of Association" in *Rule of Law, Human Rights and Judicial Control of Power* (Eds. Rainer Arnold and Jose Ignacio Martinez- Estay) Spinger, p.394.

[31] Article 13-Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant articles of the Constitution.

General and specific grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed.

The general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms.

[32] Mümtaz Soysal (1986), p.198.

[33] Bülent Tanör (1991), *İki Anayasa 1961 ve 1982*, 2nd Edition, Beta, Istanbul, p. 136.

commitment to the democratic values. Likewise, as stated above, the international human rights law embrace the concept of essence. Hence, one may claim that the actual motive of introduction of the principle of `requirements of a democratic societal order` and removal of criterion of essence was to empower of the authority against the rights and freedoms.[34]

Even though the original text of the 1982 Constitution did not provide the concept of essence, the TCC continued to use this criterion. To give an example, in 1994, the Court applied the concept while reviewing the constitutionality of a statutory provision that requires the electoral roll to be updated only based on two reasons, i.e. discharge from military service or transfer of a civil servant to another place. The TCC stated that, the provision that excludes some electorates who are not registered with various reasons in updating the electoral roll makes the right to vote of these citizens impossible. While this provision provides two groups of electorates to exercise their constitutional rights, it disregards other voters. Prevention of the exercise of the right to vote will infringe upon the essence of the right.[35] In another case, the Court ruled that a statutory provision that provides an interim administrative sanction of closure on workplaces which do not offer periodicals and non-periodicals for sale will breach the essence of the freedom of information.[36] Note that in the both cases the TCC adopts the absolute approach.

The Court uses this concept sometimes in a similar meaning with the requirements of a democratic societal order or it applies the latter as an integral part of the criterion of essence. The Court states that "Classic democracies are regimes where the fundamental rights and freedoms are widely recognized and best guaranteed. The limitations infringing upon the essence of the rights by rendering their exercise impossible cannot be considered as being in accordance with the requirements of a democratic societal order. Freedoms can only be restricted exceptionally and as long as the restrictions are necessary for the maintenance of democratic societal order."[37] Yet, the Court construes the `demo-

[34] Zühtü Arslan, "Temel Hak ve Özgürlüklerin Sınırlanması: Anayasa'nın 13. Maddesi Üzerine Bazı Düşünceler" (2002), 18 *Anayasa Yargısı*, pp 147-148.

[35] E. 1994/83, K. 1994/78, 16 November 1994, Official Gazette 18 November 1994-22115.

[36] E.1996/70, K.1997/53, 5 June 1997, Official Gazette 4 April 2003-25069.

[37] E.1985/8, K. 1986/27, 26 November 1986, Official Gazette 14 August 1987-19544; E. 1988/14, K. 1988/18, 14 June 1998, Official Gazette 14 July 1988-19872; E.1997/59, K.1998/71; 1997/75, 1999/10, 13 April 1999, Official Gazette 18 April 2000-24024; E.2014/177 K.2015/49, 14 May 2015, Official Gazette 11 June 2015-29389.

cratic societal order` as `contemporary liberal democracies and their main and universal characteristics.[38]

However, it suggests that the Court not always fully embraces this approach. To give an example, in a case in 1988, the TCC stated that to make a political party difficult or prevent it to participate elections will impair the essence of the right to be elected. However, the Court deemed the statutory provision that requires political parties to be organized in the provinces and sub-provinces and to be held their general conventions or to establish a group in the Parliament in order to participate the parliamentary and local elections does not infringe the essence of the right to vote and to be elected. According to the Court, provision raises difficulty for political parties to take part in the elections, but aim of the provision is to furnish political stability by preventing division of votes unnecessarily between too many political parties. Hence, it does not infringe the essence of the right or the requirements of the democratic societal order.[39] Rationale of the TCC raises criticism, since the statutory requirements for political parties to participate elections create unnecessary inconvenience that will not be compatible with the principal object of the political parties. Yet, there are other statutory provisions aiming at providing so called `political stability`, such as ten percent of nationwide threshold. Hence, one may claim that contrary to the reasoning of the Court, the provision is incongruous with the requirements of a democratic societal order. Note that the TCC seems to apply the relative approach while balancing between the right and the public interest. The Court sometimes used the concepts of essence and the requirements of a democratic societal order together with the principle of proportionality. According to the TCC, a limitation must not infringe upon the essence of the right and principle of proportionality in order to be compatible with the requirements of a democratic societal order.[40]

The 2001 Constitutional Amendments

The Parliament amended the 1982 Constitution extensively in 2001. The direction of the reforms was to furnish the Constitution a more liberal and democratic character. Indeed, official reasoning of the constitutional amendment on Article 13 was to re-formulate it in accordance with the principles in the ECHR.[41] Accordingly, the amendments reinstated the concept of the essence of the right and also added the principle of proportionality to Article 13 and also

[38] E. 1988/14, K. 1988/18, 14 June 1998, Official Gazette 14 July 1988-19872.
[39] E. 1988/14, K. 1988/18, 14 June 1998, Official Gazette 14 July 1988-19872.
[40] E.1999/1, K. 1999/33, 20 July 1999, Official Gazette 4 November 2000-24220.
[41] Türkiye Cumhuriyeti Anayasası Madde Gerekçeli (2011), TBMM, Ankara, p.21.

maintained the criterion of the requirements of the democratic societal order. The final version of Article 13 of the 1982 Constitution reads as follows:

"*Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic societal order and the secular Republic and the principle of proportionality.*"

The textual and systematic interpretation of the final version of Article 13 indicates that the provision makes a new order regarding the application of criteria on determination of the constitutionality of the restrictions on the rights and freedoms. Article 13 states in its first sentence that limitations of rights and freedoms must not infringe their 'essence', while the principles of 'proportionality' and 'the requirements of the democratic societal order' are mentioned only in the second sentence of this provision, elaborating on conditions under which limitations are allowed. Hence the determination of breach of essence would come first, followed by the proportionality and the requirements of the democratic societal order analysis if there is no breach of essence. If the Court deems that there is an infringement of essence, it will not use the proportionality test. This is because the essence lies beyond the proportionality exercise and there can be no possible justification for a breach of essence. Thus, the final version of Article 13 does not enable the TCC to alternate the concept of essence and the principle of proportionality.

As some scholars underscore, application of the criteria of `essence` and `requirements of the democratic societal order` as alternating and sometimes complementing each other may engender some issues. Essence of the right may be incongruous with the restrictions that are considered to be conformity with a democratic society. Hence, these criteria may not always complement each other. Even though some restrictions violate the essential core of the right, they may be regarded reasonable or necessary in a democratic society. This conflict may be seen clearly in some of the rights and freedoms, such as speech, communication and assembly. Application of two criteria in such a way as to complement each other may result in a limitation which infringes the essence of the right will necessarily be contrary to the requirements of the democratic societal order, and a restriction that does not violate the minimum core of the right will be consistent with the democratic order.[42]

The TCC maintains its case-law regard–ing the description of the concept of essence, also after the 2001 constitutional amendments came into force. The

[42] Arslan (2002), p. 151-152; Gőzler (2017), p. 397-398.

TCC reiterates that the essence means the core area of the right, hence it provides the individual a minimum secure area in order to enjoy the right.[43] Accordingly, restrictions that render enjoyment of the right hardly possible, hinder its aims, or neutralize its effects,[44] will make it unusable and restrict it extensively[45] will infringe upon the essence.

The Court seems to acknowledge 'essence' as an independent criterion by stating that notion of the requirements of the democratic societal order must be considered for interventions that do not infringe the essence of the right. Still, the TCC regards the concepts of essence, requirements of the democratic societal order and the principle of proportionally–– as parts of a whole and they form the fundamental criteria of a democratic state governed by the rule of law.[46] To give an example, the Court did not consider a provision that requires owners of immovable estates which were illegally seized, i.e. without expropriation, by the administration between 1959-1982 to open a suit in three months as a prescription period, a breach of essence of the right. The TCC considers three month period is sufficient for owners for consideration and preparation. According to the Court, otherwise, legal actions and rules will be under constant threat of litigation. That is incompatible with the principles of legal stability and legal security which are elements of the rule of law. For this reason, According to the Court, a reasonable balance should be maintained between the right to litigate and the requirements of the legal stability and legal security.[47]

In some of its decisions, the TCC attempts to define the concept of the democratic societal order.[48] Thus, the Court construes the concept of the require-

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[43] E. 2013/108, K.2014/15, 29 January 2014, Official Gazette 9 May 2014-28995: E. 2015/29, K.2015/95, 22 October 2015, Official Gazette 12 November 2015-29530; E.2017/49, K.2017/113, 14 June 2017, Official Gazette 11 August 2017-3015; also *see* Case of N.O. app no 2014/19725, 19 November 2015.

[44] E. 2013/54, K.2013/161, 26 December 2013, Official Gazette 29 May 2014-29014; E. 2015/41, K. 2017/98, 4 May 2017, Official Gazette 3 August 2017-30143; E.2017/27, K.2017/117, 12 July 2017, Official Gazette 22 September 2017-30188.

[45] E. 2017/110, K.2017/133, 26 July 2017, Official Gazette 28 September 2017-30194.

[46] E.2015/29, K.2015/95, 22 October 2015, Official Gazette 12 November 2015-29530; E. 2013/108, K.2014/15, 29 January 2014, Official Gazette 9 May 2014-28995.

[47] E.2010/83, K.2012/159, 1 November 2012, Official Gazette 22 February 2013-28567.

[48] According to the Court, not only the measure, but also conditions, cause, regime of the limitations of the fundamental rights and freedoms and guarantees such as legal remedies fall within the scope of the concept of the "democratic societal order". E.2011/123, K. 2013/26, 6 February 2013, Official Gazette 31 December 2013-28868; E.2015/29, K.2015/95, 22 October 2015, Official Gazette 12 November 2015-29530; E. 2013/108, K.2014/15, 29 January 2014, Official Gazette 9 May 2014-28995.

ments of the democratic societal order in accordance with the ECtHR`s definition of the principle of the necessity in a democratic society. According to the TCC, the concept of the requirements of the democratic societal order involves an aim to meet the pressing social need and proportionality of the measure in a democratic society.[49] Namely, the Court deems that limitations that infringe upon the essence of the right will a fortiori contradict to the principles of the requirements of the democratic societal order and proportionality.[50] To give an example, the Court reiterates that restrictions on the fundamental rights and freedoms that infringes the essence of the right and renders the exercise of the right impossible will not be consistent with the requirements of the societal order. Thereby, the Court considers that the statutory provision, that prohibits students, who are expelled from a institution of a higher education by reason of a disciplinary punishment, to continue their education in another institution of higher education contravenes the essence by rendering impossible to enjoy the right to education.[51]

The Court maintains its inconsistent approach regarding the criteria of essence of the right by sometimes applying it restrictively. For instance, in a case the TCC considered a statutory provision that provides an administrative control on written correspondence of convicts does not contravene the essence of the right. The provision furnishes the administration the power to stop written correspondence of the convicts that includes threat or defamation, endanger the peace and security of the penitentiary institution, targets officials, causes a correspond between members of the terrorist or other kind of criminal organizations, or inaccurate information that will cause panic. After reiterating the definition of the concept of essence, the TCC rules that the restriction does not prompt the exercise of the right of correspondence of the convicts hardly possible, nor does it present any obstacle to achieve the convict's aim, or it eliminates the exercise of the right.[52] The ruling of the Court raises criticism, because prevention of sending or receiving a letter may be justified under certain circumstances in a democratic societal order, but it will contravene the essence

[49] E.2015/29, K.2015/95, 22 October 2015, Official Gazette 12 November 2015-29530; E.2014/177, K.2015/49, 14 May 2015, Official Gazette 11 June 2015-29383.

[50] E.2006/142, K.2008/148, 24 September 2008 Official Gazette 25 December 2008-27091; E. 2013/1, K.2014/161, 22 October 2014, Official Gazette 11 November 2015-29529; E.2017/27, K.2017/117, 12 July 2017, Official Gazette 22 September 2017-30188.

[51] E. 2009/59, K. 2011/69, 28 April 2011, Official Gazette 12 July 2011-27992.

[52] E. 2013/54, K.2013/161, 26 December 2013, Official Gazette 29 May 2014-29014.

of the right of correspondence, since its exercise will be made seriously difficult, even it will be eliminated.[53] This case suggests that the Court still hesitates to consider the notion of essence as an absolute core of the right.

In another case, the Court regarded that the statutory provisions requiring all trade unions to be sector-based organizations and providing only confederations as labor organizations at higher level neither infringes upon essence of the right, nor is an disproportional intervention.[54] Article 51 of the Constitution that stipulates the right to organize labor unions does not restrict the type or level of the organizations, but the TCC reads the Parliament`s discretionary power broadly. Yet, such provisions to result in a ban are incompatible with Article 2 and Article 5 of the ILO Convention No. 87.[55] Interestingly, in this case, the TCC explicitly states that the constitutional norms must be applied in accordance with the principle of the unity of the constitutional norms and general principles of law. But it ignores Article 90 of the Constitution stipulating "In case of a contradiction between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provision of international agreements shall be considered" by disregarding entirely the relevant international human rights documents. This is why, it is highly doubtful that the statute is consistent with Article 51 and Article 90 of the Constitution and meets the criterion of the `requirements of the democratic societal order'.

In some cases the TCC embraces the relative approach prioritizing the right. For instance, the Court deemed unconstitutional a provision that provides teachers who work in public schools to request relocation once a year in summer time. According to the Court this provision makes teachers impossible to relocate during the year for the reason of health or spouse's work place. The TCC states that the enjoyment of the Constitutional rights and freedoms is possible with healthy individuals. Health services enable individuals exercising their rights. This is why this provision has a relation with the right to life. Health neither bears a delay nor is replaceable. Rejection to receive the requests for relocation for health reasons other than summer time interferes with the essence of the right to health. This provision does not strike a balance between public interest and protection of the family and the right to work under proper condi-

[53] Kemal Gőzler (2017), *İnsan Hakları Hukuku*, Ekin, Bursa, p.398.

[54] E. 2013/1, K.2014/161, 22 October 2014, Official Gazette 11 November 2015-29529.

[55] International Labor Conference (2010), 99th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), International Labor Office, Geneva.

tions that are guaranteed by the Constitution. This unbalanced provision makes teachers to exercise their constitutional rights difficult. This provision that does not observe fair and reasonable balance between individual and public interests infringe upon the essence of the constitutional rights of teachers.[56]

The TCC rarely gives place the absolute approach in its decisions. To give an example, the Expropriation Law stipulates that the right of litigation of owners, legal possessors or heirs regarding their immovable estate that was seized without expropriation by the administration for public service or public interest will be foreclosed after a lapse of 20 years. According to the TCC the scope and limits of the right to property is defined by law, but the Constitution does not give an absolute power to the Parliament on this matter. Indeed, expropriation provided in Article 46 of the Constitution, is a constitutional restriction to the right to property guaranteed in Article 35. According to the statutory provision, administrative seizures without expropriation will result in all consequences of a legal expropriation after a lapse of 20 years. Prevention of owner to exercise the right to litigate after a lapse of 20 years and transfer of the possession of the property to the administration without any compensation will infringe upon the essence of the right to property.[57]

The TCC also regarded unconstitutional a statutory provision stipulating to dismiss free defendant's case who lodged an appeal in case of defendant fails to attend the hearing. In this case the Court underscores that the right to defend oneself is guaranteed in Article 36 of the Constitution. Article 36 that stipulates the right to defend and the right to a fair trial before the courts `through lawful means and procedures` includes the right to legal assistance. To put otherwise, the right to legal assistance is a guarantee of the fair trial. Procedural rules that eliminate or deprive exercise of the right to legal assistance will infringe the essence of the right to fair trial. The Court concludes that the provision in question that leads defendant to lose the right to legal assistance is inconsistent with the fair trial.[58] Note that the TCC referred a decision of the ECtHR [59] that involves a similar subject-matter. The TCC follows the rationale of the ECtHR, however differently from the ruling of the ECtHR, the TCC uses the criterion of essence.

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[56] E.2011/123, K. 2013/26, 6 February 2013, Official Gazette 31 December 2013-28868.

[57] E. 2002/112, K. 2003/33, 10 April 2003, Official Gazette 4 November 2003-25279.

[58] E.2017/49, K.2017/113, 14 June 2017, Official Gazette 11 August 2017-30151.

[59] *Neziraj v. Germany,* no. 30804/07, 8 November 2012.

CONCLUSION

The notion of essence of the right is an important tool for determination the concept and utmost limit of the rights. Indeed, several national constitutions and international human rights documents gave place to this concept. Besides, the constitutional courts and international courts such as the ECtHR apply this criterion regardless of the constitutional or international texts provide it. The 1961 Constitution of Turkey was one of the oldest constitutions that provided the concept of essence. Accordingly, as of its establishment, the TCC has applied this criterion in its rulings. Notwithstanding the original version of the 1982 Constitution of Turkey revoked the essence of the right and install the principle of the requirements of the societal order, the Court sustained to implement the criterion of essence together with the latter. The 2001 constitutional amendments reintroduced the concept of essence as an independent criterion together with the principles of proportionality and the requirements of the societal order.

Even though essence of the right is an old concept for the TCC, it rarely has used it as a practical than a declaratory value. The Court infrequently benefited this criterion for definition of the concept of the rights. The Court uses both the absolute and relative theories. However, especially during the 1982 Constitution, the TCC implements the relative approach more. Hence, usually the Court applies it related to the principle of proportionality. However, notion of essence should be implemented independently. If there is a potential justification for a breach of a fundamental right, it is possible to balance the values protected by a fundamental right with other competing values. The outcome of such balancing can be either a justified or an unjustified breach of a fundamental right, but not a breach of the essence of this right. This is because the essence lies beyond the proportionality exercise and there can be no possible justification for a breach of essence.[60] Yet, the TCC`s approach on the notion of the essence is contradictory. The Court not always applies this concept in favor of the protection of the rights.

[60] Maja Brkan (2017), "In Search of Concept of Essence of EU Fundamental Rights through the Prism of Data Privicy" Maastrict Working Papers, https://www.eustudies.org/conference/papers/download/350, p.14.

CONSTITUTIONAL JUSTICE AND THE EVOLUTION OF FREE MOVEMENT OF PERSONS IN THE EU

NATALIA MUSHAK*

The right of the individual is a natural right that is inherent from the birth. It is one of the main values of human life and simultaneously cover all of the processes taking place in society. Any kind of violation of individual rights destroys the development of the democratic society.

One of the founding individual rights and principles is the right of free movement of persons. This right directly expresses one of four EU Freedoms – the freedom of Movement for persons.

Article 6 of the EU Treaty states that the Union shall respect all the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted in Strasbourg, on 12 December 2007.

According to cl. 1 Art. 6 of the Treaty on European Union, the Charter is one of the fundamental acts of the European Union. It means that its legal force is equal to the EU statutory documents. The Charter is formally independent source of law and is not the part of the Treaty on European Union and the Treaty on the Functioning of the European Union. Despite the fact that the Charter enshrines fundamental rights and principles of the legal status of human and citizen in all areas, its formal "recipients" are recognized only institutions, bodies and agencies of the EU, on the one hand, and Member States, on the other.

The Charter is divided into chapters dealing with the universal values of human dignity, freedom, equality, solidarity, citizenship and justice. It is designed to make more visible and explicit to the European Union's citizens the fundamental rights, which are already derived from a variety of international and European sources, such as the European Convention on Human Rights, the European Treaties and the case-law of the European Court of Justice. Alongside the standard civil and political rights and the rights of citizens deriving from the European Treaties, the charter incorporates fundamental social and economic rights, such as the rights of workers to collective bargaining, to take strike action and to be informed and consulted.

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The freedom of movement of persons includes the individual's right to live and work in the EU Member States. Nowadays, the legal basis of free movement of persons is defined by the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU), as amended and supplemented by the Lisbon Treaty, the acts of the institutions of the Union (EU secondary legislation – regulations, directives, recommendations and conclusions under Art. 289 TFEU) and the judicial practice of the ECJ.

There is no clear definition of "freedom of movement of persons" in the European Union, enshrined at the statutory and documentary level. The legislation of the European Union mostly applies the term of "freedom of movement of persons" without its explanation. Thus, Art. 26 of TFEU "Internal policy and activities of the Union" implies the adoption of EU measures on creation or functioning of the internal market where the internal market encompasses an area without internal frontiers in which the freedom of movement of goods, persons, services and capital is being provided. Part II of TFEU "Non-discrimination and the citizenship of the Union" (Art. 18 - 25 TFEU) sets up the citizenship of the Union and the citizens' right to free movement and residence in the EU Member States. Chapter IV "Free movement of persons, services and capital" (Articles 45-66 TFEU) defines the principles of free movement of persons within the Union.

Based on the provisions of EU law the scope of freedom of movement for persons can be extended to other countries because of their accession to the European Union. It concerns mostly those Member States that joined the EU in 2004 and 2007 accordingly.

The basis of freedom of movement for persons in the EU is the European citizenship (Art. 18-25 TFEU), which directly provides for a person to have the citizenship of one of the EU Member States. It means that without citizenship of the European Union a person cannot realize the freedom of movement for persons fully.

The provisions of freedom of movement for persons in the European Union have the impact into the nationals of the EU Member States and citizens of three countries of the EEA (European Economic Area) - Iceland, Norway and Liechtenstein, and Switzerland.

In regard of third-country nationals who are legally reside within the European Union, their legal status is regulated by the EU secondary legislation. On one hand, the third-country nationals have certain freedoms, especially those nationals who are of the family members of EU citizens, and, on the other hand, there are certain restrictions (for instance, the necessity to obtain the residence permission etc.).

At the level of the European Union there is the important mechanism of the protection of EU citizens individual and fundamental rights. It is the activity of the European Court of Justice (hereinafter – ECJ). For example, conducting the research of the practice of the ECJ in regard of freedom of movement for persons we found the ECJ Judgment 48/75, Royer case.

In accordance with the Judgement of the ECJ the court extended the principle of freedom of movement for persons within the European Union into the freedom of establishment and economic activity and freedom to provide services. In its Judgment the ECJ in 1976, based on a comparison of the abovementioned freedoms, stated that they are based on the same principles. Such principles are based on the arrival and residence within the EU of persons protected by the European Community law, and the prohibition of any kind of discrimination on national grounds.

It should be also noted that the European Court of Justice fulfills functions not only international, administrative and civil court, but also constitutional as well.

Fulfilling the role of the constitutional court, the European Court of Justice examines the legality of legislative acts adopted jointly by the European Parliament and the Council, acts of the Council, the Commission and the European Central Bank. Furthermore, the European Court of Justice is authorized to give proper interpretation of the constituent treaties and acts of the EU.

The national courts of the EU Member States may also apply to the European Court of Justice claiming to rule the prejudicial decision concerning the interpretation of the founding treaties, validity and interpretation of acts of the EU institutions, the interpretation of the statutes of bodies established by the Council (art. 267 TFEU). In the event of such appeal the proceedings within national court is being suspended before the ECJ delivers its own decision. After receiving the ECJ prejudicial decision the national court makes the final decision in relevant case.

It should be taking into consideration that the European Court of Justice may only resolve questions of law to be referred to it for consideration. He is not empowered to solve any question of fact and apply the law to the facts. It is the responsibility of national courts, as well as the interpretation of domestic law. The European Court of Justice may also declare that a rule has the direct action, and that EU law takes precedence over the national law of the EU Member States. In its own turn it can settle whether some specific provisions of the national law contradict with the EU law, and especially declare the relevant provision of domestic law invalid. It should be done by the domestic courts.

An example of the cooperation between national court and the ECJ was the ECJ Judgment in Case C-333/13 "Elisabeta Dano, Florin Dano v Jobcenter Leipzig", delivered 11 November 2014 [10]. The ECJ ruled the Judgement in the case of Romanian citizen Dano who came to Germany in 2010 in order to receive certain social benefits for herself and her son. Living in Leipzig from 2010, she did not work in Germany. All this time the German Social Service was paying to her cash benefits and other social assistance. Ms Dano also decided to receive cash assistance under the program for the unemployed, Hartz IV. However, this attempt was failed. Ms Dano claimed against the community agency, but social court of Leipzig, in view of the fundamental importance of the case, directed her to the European Court of Justice.

In its judgment the European Court of Justice found that Germany has a right to refuse to assist the unemployed migrants who did not work in the country. The European Court of Justice stated that economically inactive EU citizens traveling to another Member State solely to obtain benefits may lose access to some benefits. That is, through the interpretation of the European Court of Justice regulations and guidelines in the field of social assistance, the EU Member States on which territory the unemployed immigrants live from other EU countries, under certain circumstances, have the right not to pay any social assistance.

Where the period of residence is longer than three months but less than five years (the period which is at issue in the present case), one of the conditions which the directive lays down for a right of residence is that economically inactive persons must have sufficient resources of their own.

It prevents economically inactive European Union citizens from using the host Member State's welfare system to fund their means of subsistence. A Member State must therefore have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.

In this case, the European Court of Justice found that each individual case should be carefully checked due to the fact that the ECJ decisions should not cause the rejection of unemployed immigrants in the social support of other EU Member States.

Therefore, the prejudicial procedure provides the unique interpretation and application of EU law in all EU Member States. In this case the ECJ judgments are to be quasi-precedents. It means that such decisions form the ECJ system as well as the judicial system of EU Member States' national courts.

To our mind, an important attention should be paid to the definition of "persons who apply the right to free movement". In accordance with the Schen-

gen Borders Code, adopted by the European Parliament and of the Council in the form of Regulation 562/2006, they are: 1) the EU citizens under paragraph 1 of Article 20 TFEU and the third-country citizens that are members of the families of the Union citizens who exercise their right to free movement. Such right is also guaranteed by the Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; 2) third-country nationals (any persons who are not the citizens of the Union within the meaning of paragraph 1 of Article 20 TFEU and not subject to interpretation of the term "persons who have the right to free movement") and their families, regardless of their nationality which are based on agreements between the Union and its member states, on the one hand, and these third countries, on the other hand, to exercise their rights of free movement in the area that are equivalent to the rights of the EU citizens.

In its broadest meaning the freedom of movement of persons in the European Union consists of several blocks of legal norms. They are:

1) the norms and rules that govern the freedom of movement of the EU citizens (Articles 18-25 TFEU, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States);
2) norms and rules that regulate the free movement of workers and their families (Art. 45 – 48 TFEU, Art. 28 - 30 of the EEA Agreement etc).
3) norms and rules that regulate the movement of persons from third countries within the European Union (Art. 67-76, 77-80, 81-89 TFEU, Council Directive 2003/86/EC on the right to family reunification, Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents etc).
4) Schengen agreements incorporated by the Lisbon Treaty into the TFEU (Art. 67-76 TFEU).

It is worth paying attention also to the provisions of Title IV of the TFEU "Freedom of movement of persons, services and capital" and Chapter 1 "Workers". These legal provisions concern the freedom of movement of workers within the EU. According to Art. 45 TFEU within the European Union the free movement for workers is ensured. It stipulates the abolition of any kind of discrimination on grounds of nationality between workers of the EU Member States in regard of the employment, salary and other working conditions.

Thus, the right to free movement of workers within the European Union includes the following elements:

- right to accept the proposed work;
- right to free movement for this purpose within the EU territory;
- the right to reside on the territory of any EU Member State with the purpose of working in accordance with the legislative and administrative provisions that regulated the labor activity of the national workers.

The right to freedom of movement for workers the European Court of Justice attributed to the fundamental rights (Case 7/75 Mr. and Mrs. F. v. Belgian State [1975]). Due to the court Judgment, this right was also extended to the social sphere. Clause 4 of Art. 45 of TFEU specifically stipulated that the provisions of this article should not not apply to the employment in the public sector. In conformity with ECJ Judgment in case 167/73 Commission v. France [1974] the provisions of Art. 45 have the direct effect.

The case was linked to the Code of commercial navigation of France. This Code allowed setting limits to persons who are not citizens of France to be included into the ship team crew (maximum 25%).

The EU Commission lawsuit to the European Court of Justice stated that France violated art. 39 of the Treaty establishing the European Community (now – Art. 45 TFEU) as such restrictions could only apply to the EU Member States' nationals. The French government provided the legal statements that these restrictions were not practically applicable to citizens of other EU Member States. Moreover, it insisted that the norms and rules of the Treaty establishing the European community on the free movement for workers should not be applied to the maritime transport, as the Council of the European Community Council did not adopt any regulations under Art. 80.2 (now - Art. 100.2 TFEU).

The European Court of Justice, rejecting all the allegations of France, delivered the following Judgment. It stipulated that Art. 3 of the Code of commercial navigation of France was incompatible with Art. 39 of the Treaty establishing the European Community. Also it stated that the prohibition contained in the Treaty were absolute and provided to any EU Member State citizens the free access to labor in other EU Member States and according to Art. 234 (now - Art. 267 TFEU) provide them a guarantee against unfair employment conditions.

In order to implement the provisions of Art. 45 the EU institutions adopted the following basic documents: Regulation 492/2011 on the freedom of movement of workers; Directive 2004/38 on the right of citizens of the Union and their family members to stay and reside on the territory of the EU Member States etc.

Primarily the workers and their family members shall apply the freedom of movement within the EU. The rights of family members are derived from relationships with the workers. The main provisions of EU Regulation 492/2011

are: the equal access of EU Member States' citizens to such activities (art. 1); the prohibition of direct or indirect discrimination between the EU Member States nationals in access to their employment (Art. 3).

Conclusions. Thus, we can conclude that, firstly, the freedom of movement for persons within the European Union is one of the key and founding principles of the EU. Secondly, such freedom is based on the provisions of the Lisbon Treaties, EU secondary legislation, international agreements with third countries and international organizations. The great contribution to the evolution and further development of the freedom of movement of persons was made by the European Court of Justice. Fulfilling the role of the constitutional court, the European Court of Justice examines the legality of legislative acts adopted by EU bodies. Furthermore, the European Court of Justice is authorized to give proper interpretation of the constituent treaties and acts of the EU.

In conclusions we should stipulate the idea that the freedom of movement is one of the fundamental individual rights not only in the EU. It expands due to the ECJ practice, as the EU body of the constitutional jurisdiction.

CONSTITUTIONAL COURT OF UKRAINE AND POLITICS

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Abstract.The article is devoted to the legal analysis of judicial reforms in Ukraine, including the reform of the Constitutional Court of Ukraine aimed at providing guarantees of its independence, impartiality and due process of law regarding the possibility of implementing the legal status of Ukrainian citizens in relations with the State. Special attention is paid to the consideration of the institute of individual constitutional complaint as the real effective mechanism for the protection of human rights in Ukraine. The major hurdles on the way of the real judicial reform in Ukraine are elucidated by the references to some decisions of the Constitutional Court.

Keywords: judicial reform, Constitutional Court, constitutional jurisdiction, Judicial Control, Human Rights, Association Agreement.

The Association agreement between Ukraine and the European Union signed in 2014 foresees the implementation by Ukraine of the political, socio-economic, legal and institutional reforms in the country[1].

Those reforms are aimed at the formation between the EU and Ukraine of lasting relationship that is based on common values, namely respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, human dignity and commitment to the principles of a free market economy, which would facilitate the participation of Ukraine in European policies (Preamble).

In the process of building the rule of law state in Ukraine, one of its most important criteria is to create a fair, transparent and effective judiciary.

The judicial system of Ukraine has three major problems.

The first problem is that the judiciary is politically dependent. Today it is the President and the Verkhovna Rada that decide on the appointment and career of judges. High-ranking politicians tell the judges in which way the disputes shall be settled. As a consequence of such political dependence, the judges have got used to this system and consider it their role to serve the interests of the political power and earn money, instead of protecting human rights and asserting the rule of law.

The second problem is corruption which has penetrated into the judiciary and is convenient not only for judges, but also for those who have a chance to 'settle' their disputes in the courts by means of corruption.

The third problem is inefficacy of the judiciary. This issue needs optimizing human and material resources and streamlining the legal procedures.

Any reforms are null until there is justice that cannot ensure law and order.

Constitutional Court of Ukraine is this court, which is called to perform the most important task – to ensure the supremacy of the Constitution in Ukraine. However, as indicated by its rulings over the past years, it does not really succeed in this and therefore required fundamental changes. The legal experts tried to find out what changes are preferable. According to the poll, conducted in 2015 only 1% of the population fully trusts the CCU. 38.1% do not trust it at all, while another 30.3% mostly don't. This is not surprising given the fact

[1] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part. [Electronic resource]. – Mode of access: http: // www. europarl . europa . eu / RegData / docs _ autres _ institutions / commission europeenne / com /2013/0290/ COM (2013)0290(PAR2)_ EN . pdf

that, for example, on September 30, 2010, this Court issued a decision declaring unconstitutional the Law On Amendments to the Constitution of Ukraine of December 8, 2004[2]. The decision was based on a violation of the procedure for its consideration and approval. Due to this decision, the then authorities, de facto, restored the constitutional provisions of June 28, 1996 and Ukraine returned to the Presidential - Parliamentary form of Government. This became one of the key instruments of usurpation of power by the ousted President Viktor Yanukovych.

Another politically motivated decision of the Constitutional Court was issued on March 15, 2016. It regarded the official interpretation of the provision of Article 155: "…at the next regular session of parliament" regarding the adoption of the law on decentralization[3]. Thus, the CCU ruled that completion of the process of adopting by the Verkhovna Rada of earlier proposed amendments to the Constitution can take place at any regular session of the Verkhovna Rada. This decision paved the way for the adoption of the controversial Presidential proposal as to the decentralization of power in Ukraine and was politically motivated. Incidentally, it was the same panel of judges to consider this case as the one which on September 30, 2010, changed the Constitution of Ukraine in favor of the government at the time. Criminal investigation launched into that episode was never completed. It should be reminded that in 2015, the General Prosecutor's Office ("PGO") found that on September 30, 2010, the judges of the CCU issued a deliberately unjust decision[4] . According to the PGO, such actions resulted in grave consequences, such as changing the Constitution of Ukraine

[2] Summary to the Decision of the Constitutional Court of Ukraine No. 20-rp/2010 dated September 30, 2010 in the case upon the constitutional petition of 252 People's Deputies of Ukraine concerning the conformity with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Introducing Amendments to the Constitution of Ukraine" No. 2222-IV dated December 8, 2004 (case on observance of the procedure of introducing amendments the Constitution of Ukraine). [Electronic resource]. – Mode of access: http://www.ccu.gov.ua/en/docs/283?order=created&sort=desc

[3] Summary to the Decision of the Constitutional Court of Ukraine № 1-rp/2016 dated March 15, 2016 in the case upon the constitutional petition of 51 People's Deputies of Ukraine regarding the official interpretation of the provision "at the next regular session of the Verkhovna Rada of Ukraine", contained in Article 155 of the Constitution of Ukraine. [Electronic resource]. – Mode of access: http://www.ccu.gov.ua/en/docs-search?term_node_tid_depth=All&date_filter[min]=&date_filter[max]=&body_value=&field_textindex_value=&field_speaker_value=&page=10&title=&keywords

[4] Judicial reform in Ukraine. What to expect from it. [Electronic resource]. – Mode of access: http://euromaidanpress.com/2016/10/11/what-to-expect-from-judicial-reform-in-ukraine/

in an unconstitutional manner, that is, a return to the Constitution of Ukraine of 1996, by means of misappropriation of powers of the Verkhovna Rada. Four of these judges remain in office and continue their work as before, for the new President of Ukraine. The decision issued in March 2016 proves the point. All of this became possible because of impunity in spite of the fact that the activists from the Public Lustration Committee (NGO) demanded that the law enforcers check into violations of laws by the Constitutional Court judges and bring them to administrative responsibility. On the other hand, while the CCU began its consideration of the submission on the constitutionality of the Law On Cleansing of Power (lustration law), which aims at sacking officials who contributed to usurpation of power by former president Viktor Yanukovych, one-third of the current composition of the CCU is in a conflict of interest in this regard. Therefore, the judges cannot participate in the proceedings and must withdraw. The Constitutional Court, one-third of which is comprised of the same people who helped Yanukovych usurp power, is a threat not only to the lustration law, but potentially to all post-Maidan achievements, including electronic declaration of income and National Anti-Corruption Bureau. And the only reason why the judges are still not punished is the will of the current state leadership headed by President Poroshenko to keep the old system.

However, in addition to eliminating the consequences of the work of this Constitutional Court, its reform has started as well. But will these constitutional changes be able to ensure the independence of the Constitutional Court? The experts are not too optimistic. The former constitutional judge V. Shapoval does not consider the bill proposed an effective mechanism for the election of Constitutional Court judges by Parliament, the President and the Congress of Judges of Ukraine. After all, the relations between these institutions of power have not changed, and neither have the popular attitude. "A current policy of recruitment to the CCU is a president's preference of a personal nature. That's why we have such result of their work"[5].

In turn, chairman of the Center for Political and Legal Reforms I. Koliushko notes that, in order to heal the situation, an effective mechanism for recruitment to the Constitutional Court should be first worked out. In his view, a special commission should recruit constitutional judges. This commission should consist of retired CCU judges with impeccable professional reputation. The original composition of such a commission should be formed by the Ukrainian president

[5] Shutko L. Need for change: How to reform Constitutional Court. [Electronic resource]. – Mode of access : https://www.unian.info/politics/1316389-need-for-change-how-to-reform-constitutional-court.html

within 30 days from the date of entry into force of the mentioned law. And then the newly elected judges should elect their chairman. This formula may solve the problem with personnel in the CCU. As the current procedure of forming its composition, in which the selection of constitutional judges is performed by the parliament and the president, has not proved effective. Practice and activities of the Constitutional Court certify that its judges, most of them coming from the courts of general jurisdiction, find it methodologically difficult to work in the CCU. They continue to use the habit of applying law at their own discretion and look over their shoulders for hints from above. The experts from the Center for Political and Legal Reforms submitted this proposal to the Constitutional Commission on developing draft amendments to the Constitution (on judiciary), but then it somehow fell out from the draft. No one had heard from members of the Constitutional Commission why the proposal was not taken into account[6].

The constitutional experts are convinced that the proposed mechanism can also be risky because it can create a closed corporation and a rapid degradation of the whole system. The experts warn that if we continue to go on the path of formation of the Constitutional Court by a president, judges and Parliament, then nothing will change. After all, none of the three branches of government want to give up on their usual practice to have their confidants in the Constitutional Court, whom they can call in case of emergency or send their assistants for a meeting. What is more, after retiring in 49, the constitutional judges will look for a new job. Therefore, most of them, with the aim to secure their future, may begin to serve certain political forces and officials during their tenure at the CCU. In turn, new Constitutional judges (for instance, I. Slidenko and S. Shevchuk, elected by the Rada in 2014), believe that the problems with the performance of the constitutional judges appeared when majority of them was formed out of the judges of general jurisdiction courts. Because of this fact, the Constitutional Court has gained political pretext to its activities. To eradicate such praxis, he offers to introduce a quota of scientists from public constitutional law in the process of selecting constitutional judges.

On June 2, 2016, the Parliament of Ukraine adopted amendments to the Constitution of Ukraine in the sphere of justice and jurisprudence, which had been proposed by the President of Ukraine[7]. These constitutional amendments

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[6] Koliushko I. Changes to the Constitution / I. Koliushko //Constitutional Process in Ukraine. Political and Legal Aspects. - №1, 2016. P. – 43 – 45.

[7] Law of Ukraine "About judicial system and the status of judges" of June 2, 2016 No. 1402-VIII. [Electronic resource]. – Mode of access : http://cis-legislation.com/document.fwx?rgn=86945

were directed at decreasing the Court's political dependence and now give chance to move towards building independent constitutional jurisdiction. The changes came into force three months after their official publication (30th September 2016).

The Law of Ukraine on the Constitutional Court was adopted on October 3, 2017 ("Law")[8].

The Law still provides for the model of the Constitutional Court of Ukraine ("CCU") that has proved itself inadequate to secure the full independence of this institution from political interests of various groups or personalities. The political confrontation led to the fact that in 2017 the CCU made only one judgment.

On the other hand, the Law provides for the requirement for the obligatory competition to select candidates for the CCU. Unfortunately, the wording of this requirement is exceedingly general thus allowing for all kinds of distortions at the legislative level. For the same reason, it would have been much more progressive to insert directly into the Constitution explicit and detailed provisions on the procedure and grounds for dismissing judges of the CCU and on the guarantees of the Court's financial sustainability[9].

There are some other innovations introduced by the Law. Thus, the Constitutional Court will no longer be entitled to provide for official interpretation of parliamentary laws. Its interpretational authority will be limited to the Constitution only. At the same time, the Court's jurisdiction will encompass the constitutionality of questions put on referendum.

In addition, individuals shall have the right to lodge a constitutional complaint with the Constitutional Court if a parliamentary law is, in their view, breaching the Constitution, whereupon the Court may declare such law unconstitutional (currently, individuals may submit only requests for interpretation of the Constitution). An individual may exercise this right provided all other available legal remedies (an ordinary court procedure) have been exhausted. A special parliamentary law shall govern the procedure for exercising this right. This novelty corresponds to the practice of many European countries providing for a constitutional complaint as the last resort of individuals to protect their

[8] Law of Ukraine "On the Constitutional Court of Ukraine" amended by Law No 2147-VIII dated October 3, 2017. [Electronic resource]. – Mode of access : http://cis-legislation.com/document.fwx?rgn=99113

[9] Kyrychenko Y. The Constitutional Court of Ukraine: The Problem of Guaranteeing Independence. [Electronic resource]. – Mode of access : http://pravo.org.ua/ua/news/20872233-the-constitutional-court-of-ukraine-the-problem-of-guaranteeing-independence

rights[10]. However, the question remains whether legal entities may exercise this right alongside individuals. On 4th October 2017 the first constitutional complain has been submitted to the Court.

Finally, the Constitutional Court will be able to determine the moment from which an unconstitutional legal act becomes ineffective, which cannot have a retrospective effect, though.

The renewed law on Constitutional Court of Ukraine will show how the President is willing to release the Court from politics and the views of experts will be taken into account. If duly implemented in statutes, the constitutional amendments may give a chance for an independent and widely respected Constitutional Court of Ukraine.

[10] Study on Individual Access to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010). [Electronic resource]. – Mode of access: http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e