



UNION OF TURKISH BAR ASSOCIATIONS

**DEMOCRACY  
AND  
THE JUDICIARY**

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4-6 JANUARY 2005

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## INTRODUCTION

This book is a collection of the papers presented during the international Symposium "*Democracy and the Judiciary*" which was held in Ankara on 4-6 January 2005 and organized by the Union of Turkish Bar Associations. The Turkish version of the book had been published at the end of the last year and had been found very inspiring by the Turkish readers. However, it took more time to publish its English version than expected, but as it had been something planned from the very beginning of the organization of the Symposium, the editorial board never thought of dissuading from this aim. With this introduction I intend to shed light on the reasons which drove the Union of the Turkish Bar Associations for organizing such a symposium. I also would like to introduce the outstanding works of the participants, collected in this volume.

First of all, the motives that drove the Union for organizing such a symposium should be set forth. 'Why the topic "*Democracy and the Judiciary*" was chosen for an international symposium?' The answer of the question can partially be found in the "*Opening Speech of the President of the Union of Turkish Bar Associations*", which appears in the very beginning of the book. I may add to those mentioned by the President as one of the members of the organization committee.

Undoubtedly, the choice of the Union of Turkish Bar Associations can not be abstracted neither from the problems of the Turkish democracy, nor from the issues concerning with the reform processes of the Turkish judiciary. Additionally, the uneasy relationship between the actors of these two institutions, i.e. the democratically elected actors and the judiciary, leads to complicated circumstances, where crisis is an occasional outcome. Indeed, it is not hard to estimate that this problematic relationship is underpinned by some deep political problems of the society as elaborated by Professor Özbudun and Ulusoy in their papers in this book. While Özbudun draws attention to the functions of the Turkish judiciary by utilizing Ran Hirschl's approach and assessing the position of the judiciary as being in a more hegemonic position (*'hegemonic preservation thesis'*), Professor Ulusoy focuses on the background of the rising tension between the judiciary and the political power caused by the fault lines inherent in the society. In this regard, the tension between the constitutional adjudication and the parliamentary democracy is apparent in the Turkish democracy. The approaches of the above mentioned participants best illustrate the reason of the organizers to hold such a symposium: a better understanding of the judiciary-democracy relations from a comparative perspective.

Coming to the problems of judiciary-politics relations in Turkey, we should also note that Turkey has a long tradition of constitutional review of legislation which was established by the 1961 Constitution. Although the Constitutional Court has exposed an outstanding performance, some problems of the political life have put the Court under extreme stress incomparable to that is put on its western counterparts. For instance, the jurisdiction of the Court in banning the political parties has been one of the main reasons, which made the Court as the main target of criticisms from several civil and political actors. However, this fact can neither be thought separately from the politics in general, nor from the constitutional framework drawn for the Court to work within. When the reform process started to transform the legal framework

during the Turkey's accession process to the EU, the Court also started to abandon the activist approach, which had been the main source of criticisms at that time. On the other hand, problems about the secularism, which has been symbolized by the head-scarf issue is to be dealt with by the Constitutional Court. This fact also puts the Court in a referee position in the midst of a controversy which is underscored by the deep cleavage inherent in the society. In this regard, the Court did not hesitate to act as a protector of the fundamental values of the Republic. This attitude, however, inevitably leads to the rising of the controversies between the political actors and the Court. For instance, in last April the Speaker of the Parliament even mentioned about the possibility of the abolishment of the Court by the Parliament which caused a new political crisis in Turkey.<sup>1</sup> However, one should not be worry about the future of the Turkish Constitutional Court by only taking into account these outrageous reactions of the politicians, as the legitimacy and the status of the Constitutional Court in Turkey is generally indisputable. On the other hand, the Constitutional Court itself explicitly emphasized the urging need for a reform in 2004, and interestingly, the other Supreme Courts, namely the Supreme Court of Appeals and the Council of State, were the ones reacting adamantly to this proposal. The main concerns of the other courts were that the Constitutional Court would become a supreme court replacing their positions and invalidating their jurisdictional authority. The organizers of the Symposium also aimed at shedding light on the organizations and authorities of the other Constitutional Courts from a comparative perspective in order to make a contribution to the controversy going on between the Constitutional Court and the other courts in Turkey. After reading the paper of Renata Uitz which focuses on the controversy concerning the relations between the Consti-

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<sup>1</sup> The Speaker of the National Assembly, Bülent Arınç, said that "the parliament is capable of everything, including the abolishment of the Constitutional Court". See 'Constitutional Court Contreversy Intensifies', Turkish Daily News, 3 May 2005, <[www.tdn.com.tr](http://www.tdn.com.tr)>.

tutional Court and the other Courts in Hungary, as well as the papers of Professor von Beyme and Dr. Görisch which eminently show the effective use of constitutional complaint in Germany, we can say that this particular aim of the organizers has been achieved.

As put forward above, although the main topic of this symposium book is the "*constitutional courts*" and the other judicial bodies with the jurisdiction to review the constitutionality of laws, the other courts which have decisive roles in the maintenance of constitutional rights and consolidation of democracy are not out of the scope in general. Indeed, the review of the constitutionality of laws by the courts has been a hot topic in the last three decades all around the world, not only because it creates a tension between the elected representatives of the people and the appointed judges with no or less democratic legitimacy, but also because it created a much powerful judiciary which is hardly envisaged in the notion of the judicial review process in advance.

The main sections of the book reflects the organization of the Symposium and these are, "*Constitutional Democracy and Limited Government*", "*The Crisis of Representative Democracy and the New Rising Star: the Judiciary*", "*The Role of the Judiciary in Consolidating Democracy*" and "*The Status of the Judiciary in the Democratic Systems: A Democratic Power or a Bureaucratic Hegemony?*" It should be noted that the part named as "*The Role of the Judiciary in Consolidating Democracy*" is divided into two parts where in one part the topic is considered from the perspective of "*the old democracies*" and in the other from the perspective of "*the new democracies*".

It should be noted that the first two parts are more theoretical. In the first part, titled as "*Constitutional Democracy and Limited Government*" Michel Troper, Christian Starck, Ulrich Karpen and Mithat Sancar take part. These papers all deal with the terms of "*constitutional democracy*" and "*limited government*" by elaborating the historical and institutional per-

spectives. While Professor Starck and Karpen investigate the issues from the German perspective, Professor Troper's paper reflects more on the French experience. Mithat Sancar, in turn, reviews the general theories related with the limited government and the judicial supervision of legislation, putting particular emphasis on the different models of democracy and their relations with the "limited government."

The second part is titled as "*The Crisis of Representative Democracy and the New Rising Star: Judiciary*", which is less theoretical in content. The first paper, submitted by Professor Klaus von Beyme, considers the topic in the light of the German experience. This paper of von Beyme is extremely illuminating for the students of German constitutional politics and the German Constitutional Court. On the other hand, Professor Fazıl Sağlam, who recently retired from the bench in the Turkish Constitutional Court, calls attention on the contribution of the Constitutional Court and other courts in the consolidation process of democracy in Turkey. Although there are also some negative attitudes of the courts with respect to the consolidation of Turkish democracy, he illustrates the effects of the courts from a quite optimistic perspective, as the author himself also underlines in his work. Professor Sağlam's paper is an interesting work for those who want to learn more about the Turkish constitutional politics and the effect of the judiciary in this respect. In this part, the last participant is Professor Pasquino, who made an oral presentation, focusing particularly in the historical background of the institutions of "democracy" and "limited government".

The title of the third section is "*The Role of the Judiciary in Consolidating Democracy*" and as mentioned above composes of two parts. In the first part, the role of the judiciary in the so-called old democracies is taken into consideration, which signify those democratic regimes in Italy, USA, Germany and France. Professor Pasquino also made a presentation in this session telling about the Italian experience of constitutional review of legislation. The role of the Supreme Court of the

USA is studied by Professor Cornell Clayton from the Washington State University, who is well known for his works on the Supreme Court and for his *“political regimes approach”*. His approach is very helpful to understand and explain the role of the Supreme Court in the US constitutional politics, and also elaborates the understanding of the institutional standing of the courts in the representative democracies in general. In this part, there is also another contribution by a German scholar Christoph Görisch, who underlines the significance of the German Constitutional Court in the the consolidation of the German democracy. The last contributor to this part is Alain Pariente, who highlights the main outlines of a rather unique example of France in the field of constitutional adjudication.

The second sub-title of this part is the *“new democracies”* and this part opens with the work of Khanlar Hajiyev, who is the former Chief Justice of the Azerbaijan Constitutional Court. His work not only tells about the difficulties, lived in entrenching the judiciary in a new democracy, which hardly had any kind of institutional infrastructure necessary for the aim of building a limited government, but also predicts the problems, which will occur probably in the near future. In this part, the second paper is by Professor Feldbrugge who has a vast experience and knowledge on the so-called *“post-communist democracies”*. The paper of Professor Feldbrugge focuses on the Russian case, which is a unique work for those who are interested in the organizational structure of the Russian state and the Russian judiciary. Professor Feldbrugge sheds light on the constitutional politics of the Russian democracy and particularly considers the Constitutional Court-President relations, which have been very problematic since the beginning of the last decade. The work of Renata Uitz, which is about the Hungarian case, has at least two significant dimensions. First, it sheds light on the experience of post-communist Hungary with respect to the establishment and consolidation of the judicial review of legislation. Second, it examines the reasons and outcomes of the conflicts between the Constitutional

Court and the other judicial bodies in the field of constitutional adjudication. Since this kind of jurisdictional dispute exists also in Turkey, which can be named as a “cold war” in the area of the judicial review of legislation, the paper of Uitz is very inspiring for the Turkish readers, which I believe would also be useful for the other countries encountering the same problem. The last participant to this part is Radoslav Prochazka who is known for his works on the “*post-communist experience of the judicial review of legislation*” and focuses on the three countries, namely Poland, Czech Republic and Slovakia. He not only considers the task of establishing and entrenching a judicial body, but also tells about the true political stories of these countries when accessing to the democratic era.

In the last part the participants focus more on the problems of the judiciary in Turkey particularly with the historical and structural dimensions. While Professor Özbudun considers the role of the Turkish Constitutional Court, Professor Ulusoy focuses on the problems of administrative courts and the last participant Professor Mahmutoglu deals with the general problems of the Turkish judiciary. The paper of Professor Özbudun is an invaluable source not only for those who are interested in the Turkish constitutional politics, but also for the students of the Turkish political history.

In conclusion, first I would like to thank to the participants to the symposium on behalf of the Union of Turkish Bar Associations. And last but not least, I also would like to thank to the General Editorship of the Union for their patience and collaboration.

Dr. Ozan Ergül  
Editor

**Opening Speech by Attorney Özdemir ÖZOK  
President of the Union of Turkish Bar Associations**

ÖZDEMİR ÖZOK

Dear guests, welcome to the "*Democracy and Judiciary*" symposium. We are honored to see you here. I greet you on behalf of the professional organization of the Turkish attorneys.

Our country is in a very rapid transformation due to the accession process to the European Union. There is no doubt that this transformation is being realised without sufficient discussions and scrutiny and lacks the real internalization of the relevant domestic actors. Additionally, the serious inconsistencies of these actors regarding the consideration of specific accession policies is a problem of evaluation of the modern institutions and concepts. With this problem in mind, we found it appropriate to discuss the institutions of "*democracy and the judiciary*", those which the state authorities seem to be unable to internalize completely. "*Democracy and the judiciary*" today constitute the main standpoint of modern states and their mutual relation will be considered in this international conference.

ÖZDEMİR ÖZOK

In the contemporary constitutions, the modern state is primarily called as the "*Rechtsstaat*". The *Rechtsstaat* is a form of state in which all the actions and practices shall be in accordance with the law; that is based on human rights, that preserves and consolidates these rights and liberties, that establishes a just judicial system in all fields and maintains it, that avoids attitudes contrary to the constitution, that puts law above anything else, that is engaged with the constitution and the supreme rules of law and is open to judicial review and as a result of the latter that accepts the authority of courts to overrule its acts whenever it crosses the boundaries of law. Briefly, the principle of the rule of law stipuates the dependency of the rulers on law as well as the citizens, and acknowledge the supervisory power of the independent judiciary.

On the other hand, the democratic system may be described as a polity where the establishment of the political decision making institutions are based on the the equal and just representation of the real owner of the sovereignty, that is the people. However, the model of democracy of our times is conceived as a process that shows its effects constantly, rather than being a formal process that is realized only by the repeated elections. In this respect, the citizens participate in and supervise over the government in the name of democracy by means of the political parties, professional organizations and the media. What makes the modern democracies efficient and crucial is this social consciousness and continuity.

The concepts of the rule of law and democracy are interconnected in our times. Taking this fact into consideration, it is possible to say that there can be no democracy without law and no law without democracy.

In the simplest way democracy can be described as the "rule of the majority". As a result of the principles of "rule of law" and "the separation of powers", the concept of "constitutional democracy" has developed. The constitutional democracy which reflects the understanding of a limited government rather than an arbitrary one, deems it necessary that the rulers and the will of the majority be limited by the law and in the highest rank by the constitution. On the other hand, as one political scientist has mentioned, even when democracy as a method is accepted as the government of the majority, it may also appear as the "government of the minorities". There is no doubt that in this consequence there is the major effects of the political parties, electoral systems, the diversity in the real politics, and the ignorance of politics by the people which culminate in the decrease of political participation. Both as a majority rule or a minority rule due to the reasons enumerated, democratic governance has a vital aspect which is the government dependant on law and respectful to the fundamental rights and freedoms and this objective can be maintained only by the supremacy of the constitution and the existence of an efficient judiciary. As a result of this necessity, today the limitation of the power by the judiciary is accepted as a legitimate function that is carried out in the framework of law.

The protection of the fundamental rights and freedoms depends on the existence of an independent judiciary. The Turkish Constitution of 1961 has established and formed the independent judiciary of this type for the first time in Turkey. Many concepts and principles which are proposed to us as the Copenhagen criterias has already been acknowledged with the Constitution of 1961. The second article of the 1961 Constitution is as such: "*The Turkish Republic, is a nationalistic, democratic, secular and social state governed by the rule of law, based on human rights and fundamental tenets set*

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*forth in the preamble.*" The Constitution, stipulating clearly the importance of the "human rights" was emphasizing two other important principles, namely "secularity" and "social state" in the name of democracy.

The 1961 Constitution which contained contemporary rules regarding the democracy and the judiciary is replaced by the 1982 Constitution which reflected an understanding of an intensive statehood and loosened the respect to the individual rights and freedoms. The Union of Turkish Bar Associations who had held an assembly for the purpose of deliberating the draft of the 1982 Constitution had shared its ideas with the public regarding the 1982 Constitution at that time. The Union of Turkish Bar Associations, not only today but from the day of its establishment, struggled continuously in the name of democracy, for the consolidation of human rights and the supremacy of law, and as a *sine qua non* for all these achievements, for the establishment of an independent judiciary.

Dear guests,

The accession process to the European Union has particularly intensified during the 55<sup>th</sup> and 56<sup>th</sup> Governments and the adaptation process was started flagrantly during the 57<sup>th</sup> Government. This process aims at the transformation of the state-citizen relationships on a more modern basis as well as some concrete radical alterations in the legal system such as the amendments to the laws of political parties and the electoral system. Unfortunately, all these initiatives were due to an early general election which was not timely.

The 58<sup>th</sup> and the 59<sup>th</sup> Governments which came to power after the elections held in November 2002 have been loyal to the European Union accession process, even if they were sometimes in contradiction with the policies they defended

before they were elected. They made amendments in favor of democracy, human rights, the supremacy of law and the independence of the judiciary. I do not wish to waste your time recalling all of these. However, these legislative amendments could not respond to the necessities and at the same time they were neither prepared by the authorities which made them, nor they were internalized by the performers. Because of this, especially in practice many important problems can be observed. Additionally, what has been done is far behind what is needed. The amendments are made by the imposition of the European Union and some of them can not be considered as totally new for this country. There had been much more better regulations in the 1961 Constitution. However, these regulations had been altered during the 1971-1973 amendments to the Constitution and were completely abolished with the 1982 Constitution. Today, we struggle for regaining those we have lost with no reason, with the help of the so called "*National Program*" composed by Turkey in order to conform to the road map drawn by the European Commission. There is no doubt that when all these are realised there will be important gains in the fields of democratization, human rights, rule of law and the independence of the judiciary.

Republic of Turkey which has made its choice for the European civilization with the 1923 revolution and turned its face to the West made its first appeal to the European Community in July 1954. This 45 years long process between the European Union and Turkey which started with this appeal entered into a new stage on 17 December 2004 with the summit meeting in Brussels.

Although there seems to be mines that risk to damage, the decisions taken in this summit meeting are very important to a large extent as they aim at inviting Turkey for the

ÖZDEMİR ÖZOK

negotiations as a member candidate. There is no doubt that in reaching this stage the leaders of the present government as well as the former leaders of the late governments has also played a crucial role. We appreciate the efforts of those who struggled for this end.

There is also great responsibility that has to be undertaken by the Union of Turkish Bar Associations and lawyers at this stage, which has been defending the supremacy of law, democracy and human rights. One of the most important guarantees of the European Union-Turkey relations are our lawyers and the bar associations that follow the path established by Mustafa Kemal Atatürk and his friends.

Dear guests,

I would also like to talk about my opinions about the recent discussions on the "*presidential system*". The "*presidential system*" first brought into the consideration of the public by the Chair of the Constitutional Commission of the Parliament, was later reiterated by the Minister of Justice Department and the Prime Minister.

The claim that the "*presidential system*" is the only solution to maintain the political stability by paving the way for a stronger executive body and administration is mentioned frequently in the recent times. However, in general, proponents of this claim undervalue the new and modern democratic systems and the acquisitions which guarantee the civil rights against the administration.

Different governmental systems may exist in a democracy depending on the difference of the representative institutions elected by the people. Indeed, the governmental systems, with the exception of the judiciary, which must always be independent, are determined according to the

construction of the “executive” and “legislative” organs and their relationships with each other. In the classical categorization of governmental systems there are the “parliamentary governmental system”, “presidential system” and the “semi-presidential system” which is seen more often in the last 50 years. The “presidential system” may be described as such: The president who is the head of both the executive and the government is elected by the people. In this system the legislative organ can not remove the president from the office, and the president can not dissolve the legislative body. The executive body has only one leader and those who are assigned in the cabinet of the president as secretaries are only his consultants and assistants. The anecdote from the meeting that Lincoln made with his secretaries and voted on a specific issue illustrates this best: “7 no and 1 yes. The yes win.” This event proves that this system puts the president in the center. The only country where the presidential system works perfectly within the democracy is the USA. The statement of a famous scientist, “USA is not a democratic country because it is governed with the presidential system, but rather it is democratic despite of the presidential system” is clearly emphasizing that the democratic system and the democratic traditions are vastly developed in the USA. The reason that the USA is a democratic country despite of the presidential system lies in the fact that there are efficient hindrances that prevent the presidential system from becoming a dictatorship. One of the most important hindrances is the existence of a very efficient judicial system. The judicial system in the USA is so efficient that, it is even possible to claim that “in the USA it is the judges who established democracy”. What is essential for a democracy is the protection of the civil rights against all the powers. This is guaranteed by the US judiciary and this power is used for protecting and consolidating the civil rights, not for restricting them. Another important element

ÖZDEMİR ÖZOK

that makes the presidential system successful as applied in the USA is the existence of a party system with two major political parties. The general opinion of the experts on the political science is that in a fragmented system with many political parties, the presidential system would lead to the collapse of democracy. We know that a democracy that works properly with all its institutions, a judiciary which is completely independent and a powerful political structure with a dual party system are the essential conditions of the presidential systems.

With our democratic structure that works irregularly, our judiciary which is in the shade of the political power and our fragmented political structure -according to the political scientists probably which will continue to be so in the next 25-30 years- how well are we ready for a presidential system? I leave the matter to the judgment of the public opinion.

In principle, law is a local discipline. On the other hand, the situation where law is most close to be a scientific field of activity is seen in the comparative researches. The organizers of this symposium aim the consideration of the functions, working and the efficiency of the judicial review in a comparative perspective which is vital for the maintenance of the limited government and constitutional democracy. In this regard I strongly believe that the brain storm and the exchange of information which will occur during the syposium will serve to this end.

I wish that this symposium will make a significant contribution to the consolidation of our democracy and the independent judiciary. In this regard I first thank to each of my colleagues who struggled for the organization of this symposium; and secondly to the participants who will make presentations all through the symposium, and lastly to you for listening to me patiently.

# **FIRST DAY FIRST SESSION**

**Constitutional Democracy  
and Limited Government**

**Chair of the Session**

Prof. Dr. Erdal ONAR  
(Ankara University School of Law)

**Prof. Dr. Michel TROPER (Director of the Theory of Law Center, University of Paris X Nanterre)\***

MICHEL TROPER

The general question regarding the relationship between constitutional government and democracy could be comprehended in a normative and descriptive manner:

a. From a normative point of view, the question can be put this way: If constitutional government is comprehended as limited government, can democracy be comprehended as a constitutional government? Democracy is sometimes defined as a government where the sovereignty rests with the people and sovereignty is comprehended as an absolute and unlimited power.

However, when it is perceived as mentioned above, the idea of a limited democratic government implies a contradictory meaning. The question of whether democracy is a constitutional government or not is not raised when this definition is considered, that question might only be raised when other definitions of democracy are referred: for example; when de-

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\* Paper presented by Professor Troper is titled "Limited Government, Rule of Law and Democracy". Translated by D. Derya Yeşiladalı, Lawyer, Union of Turkish Bar Associations.

MICHEL TROPER

mocracy is defined as a system where the power of people is exercised by their representatives, it is than possible to limit the power of the representatives without limiting the power of the sovereign people.

At this point, the question to be asked is whether it should be done or not? There are two favourable arguments to that question. In the French tradition, until the 5<sup>th</sup>. Republic, it has been considered that the representatives were sovereigns having all the powers of the represented and their powers could not be limited. However, the American tradition has just the opposite approach.

b. The question can be approached from a descriptive point of view: If a representative government is accepted as a limited government and if the representative government is required, how is it going to be established? What are the appropriate means? This question concerning the relationship between the means and the objective is descriptive. At this point, concepts such as; "*separation of powers*", "*Rule of Law*", or "*State of Law*" (État de droit) occur. For each and every concept we are going to examine whether the principles, recommended by the said concept, are effective in achieving the desired objective: the limited government.

As the question of separation of powers is not posed by the organizers of this Symposium it will very slightly referred. "*Separation of Powers*" is an ambiguous expression; and it means;

- an organization where public authorities are specialized and mutually independent in one or the other of the important(significant) state functions;

- an organization, where the powers are in equilibrium and where they can control each other mutually.

The first definition is not effective in reaching the required result because the legislative function is by definition superior

to the executive function; in other words as it is seen in the practice of parliamentary regimes, the authority in charge of the legislative function shall inevitably dominate the other.

The second definition is only effective in cases where diverse authorities are not in the hands of the same political party or not in the hands of the coalition parties; because if the same party should be dominant there will be no equilibrium. The situation in France is a typical example to this definition.

I will therefore examine the "*Rule of Law*" and "*State of Law*". The two concepts are sometimes incorrectly addressed synonymously. Let us take the current definition of "*Rule of Law*" by Finnis for example:

- i. its rules are prospective, not retroactive, and
- ii. are not in any other way impossible to comply with; that
- iii. its rules are promulgated
- iv. clear
- v. coherent one with another
- vi. its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that
- vii. those people who have authority to make, administer and apply the rules in an official capacity are accountable, do actually administer the law consistently.

The consequence of this definition of the "*Rule of Law*" is only a description of an ideal as Finnis completely accepts, and it does not indicate the means to realize this ideal.

The "*State of Law*" is a different doctrine. It demonstrates that laws should be prospective, their subject matter should not be impossible, they should be clear and should the doctrine also shows the means to achieve the setting up of specific rules in compliance with general rules.

MICHEL TROPER

As we stipulate and want a limited government and democracy, it must be examined whether the means proposed by the State of Law are effective in achieving it, and whether it does or does not limit the democracy in a degree so as to eliminate democracy. However, the answers to these questions vary depending on the meaning of the notions of State of Law and democracy.

This examination should be done in two levels. First, we should look for the possibility of a State of Law to limit democracy without eliminating the democracy which is described as the government of people by their representatives. If it is concluded that it is impossible to achieve that then the attempts to redefine the democracy should be considered.

### **I. The Impossibility of Submitting Strict Democratic Government to Law**

In all State of Law doctrines it is a common approach that people imagine a state where they are not subject to the authority of other people but to law. However, a distinction should be made between these two doctrines. For the first type this objective is achieved if the state is obedient to law, for the second the State should act as it is envisaged by law.

#### **A. Democratic Government Obedient/Subject to Law**

Although the thesis concerning the subservience of the governing authority to the law is not created by the said body, it is assumed that there is a law limiting them. This theory has two varieties.

In accordance with the first one; the law which is exterior and superior to the state is the natural law.

Let us put aside the question whether, in fact, natural law exists or no; because, even if it exist, as long as the public authorities are not empowered with the rules of positive law

to repeal the decisions which are in contradiction with the natural law or they are not authorized to apply sanctions to acts violating natural law, therefore it might be observed that natural law will be deprived of imposing sanctions. Accordingly, whether democratic or not, it is not the natural law which limits the political power.

In the second variety, which is sometimes referred to as positivist, the state is supposed not to be subordinated to natural law but only to the previous positive law. In this context, reference is often made to Solon or Lycurgus or even to the presumption of declaration of human rights which the legislator is obliged to observe. However, this approach has difficulties. One of the difficulties is logical: If the people or their representatives can be limited by rules beyond themselves, then this system cannot be considered to be democratic. If however, it is considered that these rules arise from the people, then the system is democratic; yet this is not a limitation but an auto limitation. The other constraint is legal: A Declaration of rights cannot be binding on its own, and in the absence of an authority identifying and controlling violations and therefore it cannot be said that it is capable of limiting the power. In the existence of such authorities there is a limit, but as the said authorities have discretionary powers to interpret the Declaration of rights, they are the ones defining the limits, and such a system is not democratic.

Accordingly, a State of Law limited by law is a illusion. Such a State does not exist.

Therefore, we are going to examine the state of law as a state which is not in conformity with a law exterior and superior to it, but as a state which acts in accordance with the law.

## **B. DEMOCRACY ACTING BY AND THROUGH LAW**

The substance of the idea supported in the 18<sup>th</sup> century, implies that the state or rather the public authorities may only

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act for the application of one law, in other words, they might act for the application of a general and abstract rule. The state of law, which is understood like that, is a structure which includes the hierarchy of norms. This hierarchy constitutes the guaranty for political freedom. This has two fundamental reasons. The first reason is connected with the political freedom itself. The definition by Montesquieu, who defines political liberty as being subject to law and being subservient to hierarchy, is a way of guarantying pre-visibility. The second reason is legal: Concrete situations are dealt with concrete decisions and as it is not possible for the law to directly govern concrete issues the legislator is obliged to promulgate general and abstract law. That law will be applicable to the legislator as well and it is on behalf of the legislator that the law is neutral and moderate.

In reality, as Kelsen points out, if the state of law is reduced to the hierarchy of norms, the state and the judicial system will be confused; and as each judicial system has a hierarchy in its own, than each state is necessarily a state of law. Accordingly, a democratic state should not be considered to be a state of law more than a despotic state. Therefore, the limitation of power in a state of law does not have any guaranty.

The reason why a state of law is not considered to be a state whose power is limited depends on three basic factors. On one hand, it is presumed that laws are adopted by the people or their representatives in a representative democracy and accordingly it is easy for them to adopt laws that are oppressive, retroactive and applicable to abstract situation. On the other hand, the hierarchy of norms envisages that if a human act is done in compliance with the superior norm, then it should be considered as a norm, but this superior norm might as well be a discretionary norm which gives judges and administrators, more or less, discretionary power (and it is often the case). Accordingly, in reality concrete orders addressing the citizens are never derived from more general or elevated norms; and they reflect the preferences and will of the ones who promulgate them but not of the people or the elected representatives. Con-

sequently, it is not possible to implement the law without interpretation and as the power of interpretation is not connected to knowledge but will, it implies the recreation of laws.

An objection might be made for the establishment of mechanisms to control the executive authorities (for example, administrative courts) or even the legislative power itself. In this context, it is true that there is veritable limitation; however the discretionary power of the controlling authorities makes it impossible to declare the system as a democratic system.

Therefore, as long as democracy is understood to be the government of people or their representatives it will be unsuccessful to limit democracy by envisaging a state of law. In accordance with the qualities of the state of law either the powers of the representatives are not limited, or if limited there is no democracy. For that very reason, in order to save the doctrine of limited power which is compatible with democracy, some propose to alter the concept of democracy.

## II. INTRODUCING NEW CONCEPTS OF DEMOCRACY

As the powers of the elected representatives are limited and as a consequence, the control of these limits rests with the unelected authorities, it should either be accepted that the system is not democratic but a mixed system or the definition of democracy should be reviewed.

### A. The Contents of the Concept

We are faced with the pure product of the difficulties of the arguments regarding the state of law. The defenders of the ideology of the state of law declare that the system they propose is in contradiction with democratic principle if we only comprehend that democracy is the domination of the majority. However, it is impossible to reduce democracy this degree,

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because as the volition of the people is not the volition of the majority, therefore it is not the volition of the parliamentary majority. As it is impossible to identify the volition of the people, it should be accepted that this volition is expressed through some values and principles referred to as the state of law.

However, in order to name the entire values and principles as the state of law, the values and principles should be attached more or less in a loose manner to the volition of the people. For example; it can be supported that fundamental principles are stipulated in the constitution and as a result, it is the people who desire it. Therefore, as Bruce Ackerman states; we can say that there is dual democracy. The people will sometimes get involved with daily politics just by electing the representatives empowered with legislation; or they will sometimes express themselves at a higher level by imposing a change in the constitution.<sup>1</sup> Classical democracy depends on the speculation that the parliamentary majority represents the people. The courts demolish this approach by annulling a law because it is unconstitutional and thus impose the volition of the people as it is stipulated in the constitution. If, however, the real people do not agree with the interpretation of the court, they will change the constitution either through modifying the constitution or, as in the New Deal period, will change the constitution by other means.

In France, George Vedel supports a similar idea.<sup>2</sup> The sovereign people, in other words the power, may supersede the decision of the constitutional judge by accepting as a provision of the constitution a law which was found to be in contradiction with the constitution and the fundamental principles guaranteed by the constitution; just as the French Kings, who refused the opposition of the old domestic courts in registering

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<sup>1</sup> Ackerman, B. (1991), *We the People I.*, Cambridge, Mas., Harvard UP.

<sup>2</sup> Vedel (Georges) (1992), Schengen et Maastricht (à propos de la décision n°91-294 DC du Conseil constitutionnel du 25 juillet 1991, ds. *RFDA*, pp. 173; *Le Monde*, jeudi 1er juillet 1999, La Constitution est-elle devenue "ringarde"?

the laws, by convening the court of justice. Therefore, to obey the fundamental principles shall mean to respect the volition of the sovereign people.

In cases even if those principles are not described in the constitution, it must be accepted that they are the expressions of the volition of the "*perpetual people*" or "*transcendent people*" as stated by Maurice Gauchet.<sup>3</sup> It is up to the constitutional judge to impose the said volition and to state that; "*it is required that the last word shall be put by the volition of the people*". In some legal systems, the real people do not have the power to impose their interpretation regarding the volition of the transcendent people by changing the constitution because, it is not possible to change the constitution vis-à-vis fundamental principles.

Provided that state of law is comprehended as entire fundamental principles; the idea of democracy, which means at the same time the state of law, has been developed, specially and in a great extent within the framework of European constitution. Therefore, it is not easy to affiliate these principles to the volition of the sovereign people. Although it can be supported that these are described in international treaties approved by the sovereign people of different countries, it is often emphasized that the values described in the said treaties are similar to the ones in national constitutions, and what is more, complying with the treaties is analogous to comply with the constitution. In this context, the jurisprudence of the Luxemburg Court is mentioned which makes reference to the common constitutional tradition of member states. Therefore, the European constitution, and in a general sense the establishment of an international community sets forth the creation of a common European law based on state of law and protection of fundamental rights. From now on, there will not be any place for political decision because, these transnational principles shall be established entirely by judicial in other words neutral procedures.

<sup>3</sup> Gauchet, Marcel (1995), *La Révolution des pouvoirs. La souveraineté, le peuple et la représentation, 1789-1799*, Paris, Gallimard.

## B. In Contrast to Enlarged Concept

It is obvious that we can freely make a definition and the political system can be defined as democracy which is extremely different from the definition of democracy made until now. However, one should be aware of this difference and should not think that the same is meant.

As the classical concept of democracy corresponds to a system where the people are sovereign; the new concept corresponds to a system where the people are the only sovereign; not during the establishment of ordinary rules, but during the acceptance of the initial constitution or the ratification of European treaties or when they use their power only during special occasions. Democracy, in classical terms, means together with aristocracy and monarchy one of the three kinds of government and it designates an attribution of power. The enlarged term envisages a social regulation where sovereignty leaves its place to law, and where political power may only be exercised in conformity with fundamental principles.

It can be argued that the concept of classical democracy is created as a principle of imputation. Therefore, as a matter of fact, all decisions can be directly or indirectly attributed to the determination of the people. However, this principle of imputation is seriously jeopardized because the decisions taken are merely the application of the fundamental principles and it is not possible to attribute them to the people. The attribution of fundamental principles to people is only possible through complex institutions, which is not transposable to every legal or political context. This is the situation within the European context.

This problem is encountered whenever it is mentioned that the sovereign is in fact born in extraordinary situations or the only sovereign is the transcendent people or it is the sovereignty of the principles of democracy. Neither the treaties nor the secondary European legislation is regarded as the

expression of the will power of the sovereign. On the other hand, it is not possible to accept that the secondary legislation is the expression of the volition of the authorities who promulgate them. For that reason, it is impossible to consider that the act of interpretation is a way of searching for an intention. Accordingly, the European texts are interpreted in conformity with objective values; in other words, values such as economic enlargement or competition are considered to be independent from political power because of the necessity of facilitating the European integration. These are obviously proclaimed in the treaties; however, as human rights are stipulated positively through national constitutions they are considered to be natural rights, similarly the treaties are interpreted to objective values but not to express the volition of the negotiators. These values are, naturally principles to be conceived as relating to the market and principles the contents of which may be comprehended by the help of legal theory or economical analysis. To summarize it; it is up dating the doctrine of old natural law.

Therefore, the new understanding of democracy shall be the sovereignty of values and the end of politics. However, in reality, the idea of sovereignty of principles, meaning the absence of political power, depends on two prejudices: These prejudices are; that these principles are objective are understandable and the decisions taken in conformity with these principles might still be attributed to the people.

The point to be emphasized regarding these principles is that they should be adopted and interpreted by the judge and this act of interpretation should imply the decisions and choices which depend on preferences and ideologies. These principles, even if they are stipulated in the constitutions and declaration of rights, are confusing and ambiguous; on the other hand many principles are "*discovered*" by the judge either by making a weak connection or not to the text. Needless to say, the act of interpreting originates from the difficulties of legal reasoning; however, during this process the proportion of the decisions originating from preferences and ideologies should

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not be ignored. This can easily be seen during the casting of votes at the end of every adjudication.

On the other hand, even if envisaged in the texts, principles are different from one country to the other and there might be differences between national and European law. Here, I am going to give you two examples; the nationalization of public services and enterprises in the nature of monopolies and the secular state the principles which are both described in the French constitution are not defined in the European treaties. However, even if texts provide similar provisions they are implemented in different jurisdictions within a different context and accordingly are interpreted differently. It should especially be noted that a principle is rarely applied to a concrete event. It is often seen that contradictory principles are applied to the same event and the applying authority should make an equilibrium between those principles and maintain reconciliation by deciding which of them would be superior to the other. It is required to resolve the disputes between principles such as; equality and freedom, freedom and public order or freedom and secularism. Nevertheless, it is obvious that the choices made regarding the said issues should be made with judgment, and they are, to a great extent, political choices. Therefore, the meaning of general legalization movement is never meant to free the decisions from political influence but it is only getting it from the traditional owners of political power. In other words, the authority to decide is transferred from the parliament to national or international judiciary.

It can be stated, save to the theories of Ackerman, Gauchet and Vedel, that principles can be attributed to the sovereign public at the national level even if it is only a fiction that people want. However, this is impossible in case of European law. It can be said that; the decisions taken by the representatives are the decisions of the people at the national level and when the powers of the representatives are limited by principles, these principles are accepted by the people and the people have the power to change these principles in a constitutional level. In

the European context it is not possible to comprehend this construction because no one will think of any European people who will conform to the decisions of supranational authorities or the principles attached to those decisions nor could these decisions and principles be imputed to the national people. Even if it is admitted that treaties are accepted by the national people they do not have the means to modify the interpretation of the principles covered by the treaties or interpreted by the European jurisdictions, through an authority equivalent to the European Court of Justice.

Moreover; the secondary legislation, which is not promulgated for or by the sovereign people, may cover provisions contrary to national legislation which is presumed to be the expression of the general volition or even to the national constitutions because there is not any procedure to control the conformity of these provisions to the national constitutions.

Consequently, democracy which is a state of law is not a kind of democracy. It is a type of aristocracy.

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### I. The Idea and its Realization

1. The democratic constitutional state has gradually developed in Europe and in the United States over the last 200 years and has had different forms of appearance. The democratic constitutional state must be seen as an important cultural achievement with its origins way back in the European history and in Antiquity. It is based on an image of individuals as responsible and free persons.

2. The importance of the individual is a key aspect of European culture and derives from the theological-biblical conviction of each person's responsibility before God. This theological individualism was influenced by a secularization process during the age of humanism and enlightenment. From this process emerged the individual's legal status that decisively affected European history and European law. In practice, individuals are integrated in numerous supporting and guiding institu-

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\* Paper presented by Professor Starck is titled "Constitutional Democracy and Limited Government".

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tions, such as the family, the church or workplace. Today, these institutions might have a different appearance and their influence might have decreased; nevertheless they still exist.

3. From a world-historical point of view the emphasis on the individual person and on their surrounding institutions helped Europe to develop a tendency against despotic forms of government. Although despotic governments existed in Europe, the idea of anti-despotism lasted and eventually found its expression in mixed constitutions and the separation of powers.<sup>1</sup> The idea of separating power in order to control it is based on the following anthropological assumption: persons who rule over other persons tend to misuse their power and therefore need to be controlled.<sup>2</sup> For this reason the organisation of government has to ensure that the exercise of power is limited.<sup>3</sup> In this context, we can only refer to the oft-cited Montesquieu and the American Federalist.<sup>4</sup> Early forms of power limitations even existed in some European states during the age of Absolutism, such as the recognition of natural law and international law as legal systems prior to the ruling monarchy.<sup>5</sup>

4. The common philosophical background was adopted and developed into constitutional institutions differently by each European state. In England the guarantee of applying laws according to the "*Rule of Law*" was early developed and goes back to the natural-law founded competence of law courts. English monarchical absolutism was already overcome in the 17<sup>th</sup> century and this defeat led to the sovereignty of "*King in Parliament*". 100 years later the sovereignty of the people was proclaimed in France. In the United States of America, the sovereignty of the people (meaning the white settlers) was the idea on which the state was founded: "*We, the people of the United*

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<sup>1</sup> Christian Starck, *Der demokratische Verfassungsstaat*, 1995, pp. 11.

<sup>2</sup> Christian Starck, *Freiheit und Institutionen*, 2002, pp. 37.

<sup>3</sup> Christian Wolff, *Ius Naturae methodo scientifica pertractatum*, 1764, lib VIII, cap. 1, § 73: imperium semper limitatum

<sup>4</sup> James Madison (No. 51) and Alexander Hamilton (No. 9).

<sup>5</sup> Christoph Link, *Herrschaftsordnung und bürgerliche Freiheit*, 1979, pp. 89.

*States ... do ordain and establish this Constitution of the United States of America.*" In Germany the constitutional monarchies developed a state governed by the rule of law. The sovereignty of the people was established at the end of world war I.

5. The constitutional state developed very differently in each country, but however one homogenous theory lies at its foundation. As a consequence, personal liberty gained importance and was protected mainly by two legal principles: the separation of powers and the rule of law. Both legal principles are described as essentials of every constitution in Art. 16 of the French Declaration of Human and Civil Rights in 1789. In order to protect both principles, constitutional states have developed important legal methods and techniques, partly based on experiences with limited government and earlier theories about the "*imperium limitatum*".<sup>6</sup> Those legal methods and techniques can be summarized as follows.

6. The separation of powers requires constitutional rules about the highest governmental bodies, their creation, their spheres of responsibility, their functions and their rules of procedure. According to the theory of constitutionalism, these constitutional rules have to provide a system of checks and balances as well as an effective protection of personal liberty, which in turn requires independent courts. On the other hand, the division, restraint and control of public authority is not permitted to extend to the point where the state lacks the power to fulfil its main functions: keeping internal and external peace as well equalizing social disparities.

7. Furthermore, public authority is limited by constitutional guarantees of civil rights. Civil rights are the citizen's and human rights of protection from state interferences.<sup>7</sup> Certain civil rights are written down in a charter or have been developed by case-law. To make personal liberty and public interests compatible and in order to keep internal peace, civil rights need to be

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<sup>6</sup> See note 3.

<sup>7</sup> Starck (note 1), pp. 143.

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limitable. Usually, legislation restricts civil rights by enacting laws which either define given constitutional limitations of civil rights or are based on the original state objective of public security. As long as legislation was considered as the only guarantor of rights, it was sufficient that independent courts reviewed administration judicially to ensure that the application of laws was correct and equal.

8. The constitutional guarantee of rights is based on an inner logic. In many places this logic led to the protection of rights even against legislation. This was derived from the supremacy of the constitution, firstly stated by the Supreme Court of the United States of America in 1803.<sup>8</sup> That the constitutionality of laws can be judicially reviewed has been a late achievement of the constitutional state and one which is not yet common in all European states. The Court responsible uses legal methods in order to decide whether a law violates a civil right and therefore is unconstitutional, or whether a law limits a constitutional right correctly. The Court considers whether the law protects the rights of others or a good of public interest in an appropriate way,<sup>9</sup> or, in the words of the US Supreme Court, whether the law reacts to a clear and present danger. Other relevant issues for the Court's decision are facts established by the legislator as well as the legislator's prognosis. However, the Court has to respect the legislator's discretion, which derives from the different functions of parliament and constitutional court and which is expressed in provisions of their organisation and procedure.<sup>10</sup>

9. The separation of powers and the guarantee of rights are the main characteristics of the constitutional state. They are precisely defined instruments of the constitutional state and protect the citizens from illegitimate state-interferences. To illustrate the idea and dimension of the guarantee of rights, it

<sup>8</sup> *Marbury vs. Madison*, 2 Law Ed. U.S. 60, 73 (1803).

<sup>9</sup> Christian Starck, *La constitution cadre et mesure du droit*, 1994, pp. 90.

<sup>10</sup> Christian Starck, "Gewaltenteilung und Verfassungsgerichtsbarkeit", in: Christian Starck (ed.), *Fortschritte der Verfassungsgerichtsbarkeit in der Welt – Part 1*, 2004, pp. 117.

has to be seen in the context of other state-objectives. Important state-objectives are the protection of internal peace and the equalization of social disparities.<sup>11</sup> In the constitutional state certain legal instruments have been developed which provide for the guarantee of rights and the separation of powers in order to protect freedom. Other state-objectives are not expressly regulated in certain constitutional legal instruments, however, they represent the foundation of the constitution and legitimate the state. Those state-objectives are mentioned unsystematically in the constitution, if at all, for example in the preamble, in provisions about constitutional principles, in constitutional limitations of civil rights and in constitutional statutes concerning state-organisation.

## II. The Triumph

### 1. The End of Socialist and Dictatorial Regimes in Europe

10. At the current time the democratic constitutional state has triumphed. This is mainly a result of the fall of socialist regimes in 1990, which must be considered as a turning point of a world-historical dimensions. The idea behind the socialist state is the happiness of people, but without respecting and protecting their personal liberty and without binding legal principles. Socialist state theory is based on the thought of Marx and Lenin. It contradicts the idea of the democratic constitutional state in at least 3 ways:

- no democracy, but dictatorship of the party in the name of people. At first, people need to be educated. Therefore, there are no free elections or party-pluralism.
- no separation of powers, no supremacy of the constitution, but sovereignty of the dictatorial party.
- no guarantee of personal liberty, freedom only within the limitations drawn by the sovereign party.

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<sup>11</sup> Starck (note 1), p. 231, pp. 235.

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11. The fall of the socialist state was not a temporary political and economic weakness caused by developments in the former Soviet Union. The main reason for its breakdown is to be seen in its disregard for freedom, that is, its disregard of the natural human ability to act freely and responsibly in all areas of life. People were expropriated, tortured, and controlled by the central dictatorship of the party, which rejected any kind of pluralism and claimed to be the only source of truth. Political criticism could have had a purifying and stabilizing effect on the system. But criticism was hardly allowed and bore the tremendous risk for the critics of being persecuted and deprived of their citizenship. The fall of Socialism in Eastern Europe led to a rediscovery of "*the sovereignty of law*", even in the West, where socialist state theory fascinated parts of society and replaced and glossed over the reality in socialist states.

12. A phase that preceded the fall of Socialism in Eastern Europe was the transformation of the authoritarian dictatorships in Greece, Portugal and Spain into democratic constitutional states in the seventies.

## **2. The general legal principles common to the member-states as a foundation for the European Community**

13. The current prominence of the idea of the constitutional state at the moment derives from Europe as well. The former socialist states in Central Europe successfully made the effort to meet the standards which are required for becoming a member-state of the European Community. In the eighties, Greece, Portugal and Spain became members of the European Community, but only after they had developed constitutional state structures. So far, democratic and constitutional state structures seem to provide the best conditions under which economic growth is compatible with environmental care. These structures allow politics to cope with new developments, inventions and ideas.

14. The European Community could only be established because the member-states have certain general legal principles in common. Community Law was developed on the basis of these general legal principles. The intensive cooperation of the European Community member-states was a pragmatic way of becoming aware of the roots constitutional states have in common, which lie underneath the institutional diversities of member-states. Apparently, despite these diversities, effective cooperation is possible, because the judicial and constitutional systems are related.

15. Regarding the development of the European Union itself, the requirements for becoming a member-state follow the idea of constitutionalism. As already mentioned above, a democratic and constitutional organisation of the states is demanded. In addition, the following is just as important: The member-states represent nations, which fought for their constitutional structures and gradually developed them. An important element of these structures is the democratic embodiment of public authority, which is expressed in general and equal elections.<sup>12</sup> Accordingly structured states are indispensable to the European Union. Without respecting the member-states and their remaining essential competences, the European Union would be a centralized super-state, which would hardly agree with the European democratic and constitutional tradition.

### III. Internal Threats

16. The democratic constitutional state is not only endangered by a European Union "*centralism*" but is also exposed to internal threats.

17. Western societies take the democratic constitutional state for granted and no longer consider it as an achievement especially worth protecting. Usually, the control-mechanisms of the democratic constitutional state work effectively. Its struc-

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<sup>12</sup> Starck (note 2), pp. 285.

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tures enable the state to fight corruption and to handle new situations and inventions. Although it was often controversial, environmental protection is an evidence of these effective control-mechanisms.

18. Often, the balance between constitutional and democratic institutions as well as their control-mechanisms are misjudged. For the political culture, it is a disadvantage that the importance of statutes concerning the allocation of responsibilities as well as the importance of structural- and procedural law is not appreciated. But even in matters of liberty and its restrictions, there is confusion and a lack of knowledge. State-interferences in civil rights have the purpose of protecting the safety of others. These interferences are often criticised as illiberal by those who are not threatened but in a secure situation themselves.

19. The welfare state imperative is an important constitutional principle, which demands a social balance, legitimates the state and guides legislation.<sup>13</sup> Social balance is not only achieved by way of large social insurance systems and direct state-payments. Nowadays, almost every law has a social aspect. All of this is owing to the democratic constitutional state. Not only does it provide the necessary legal system, but it also establishes an economic basis for social balance by protecting economic civil rights on a constitutional level.

20. The development of the welfare state poses a threat to the democratic constitutional state. The cost of social welfare is the largest part of national budgets already. A further increase of those expenses would raise labour costs and as a consequence, taxes and social contributions would increase as well. Eventually, rising social costs would damage the economic basis of the welfare-state. One further aspect: The more social benefits a state provides, the more important become administrative controls to ensure that the legal requirements set

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<sup>13</sup> Starck (note 1), pp. 265.

up for receiving social benefits are fulfilled. Otherwise, social insurance systems could easily be misused. Administrative controls are sometimes criticised as illegitimate violations of privacy. This criticism misjudges the distinctive structure of the social balance system in the democratic constitutional state. Finally, the welfare-state requires responsible citizens, who act accordingly and are willing to establish the economic basis for social benefits. Citizens need to keep personal self-realization and social duties in balance.

21. Hence, the democratic constitutional state is put at risk whenever the economic conditions for social balance are neglected or the distribution of social benefits is unjust or whenever the personal responsibility of citizens is lost.<sup>14</sup>

22. To the extent that the democratic constitutional state, its protection of personal liberty, its social commitment and its essential legal and economic conditions are taken for granted, there could again arise a desire for a better, post-modern society. But this "good" intention is used to introduce new methods, which are not the methods of the democratic constitutional state. Here lie the threats to the democratic constitutional state. An early political education in school is important to prevent those internal threats.

23. The consultations about the amendments to the German Constitution and about the new Länder Constitutions in Eastern Germany showed very clearly that public opinion and the mass media were mainly interested in popular topics, such as the incorporation of social rights or other social promises. Even among participating parliamentarians and their consultants it was not clear how these social amendments would affect the relation between parliament and government. It was even suggested that in social or environmental cases the state-objectives should guide the court's decision. But this would affect the sensitive institutional relationship between political and

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<sup>14</sup> Starck (note 1), pp. 286.

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24. Cooperation between the institutions of the democratic constitutional state provides freedom within the limitations drawn by the compatibility of public and individual interests and social balance within the framework of personal responsibility. These simple and clear perceptions form the basis for any serious legal effort to understand constitutional state-institutions and interpret the relevant constitutional statutes. Legal methodology helps in interpreting constitutional statutes. It is not a detached philosophical discipline, but a basic tool for any lawyer operating in the democratic constitutional state.

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## I. Principles of the Free Democratic Order

### 1. Social Principles

The Constitution is the basic decision of a people about how it wants to live. Whether written or not: Every people has a set of deepest norms by which it governs its political life. The Constitution is the framework law for politics and the social, economic and cultural spheres of civil society. Constitutions of the "*Western Constitutional State*" -type, in brief characterized as "*Free Democratic Order*" - like the Basic Law of all European States; the USA, Canada s.s.o. as well as the Draft of a Treaty of a Constitution of the European Union of June 13, and July 10, 2004 - rest on three social principles: personality, solidarity and subsidiarity. "*Personality*" means, that human being and his/her dignity is the primary value of society and government, outstanding and inviolable. "*Solidarity*" indicates, that individual rights are not under all circumstances unlimited and is as well the preeminent pillar of the social state. "*Subsidiarity*"

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\* Paper presented by Professor Karpen is titled "Limited Government, Rule of Law".

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is the basic decision for the "bottom-up" structure of society. Responsibility for necessary action should rest preferably with the lower level and should climb up -family, local community, regional level, the state- only if necessary to fulfil tasks in a proper manner. Subsidiarity finally may be understood as an element of "personality". The person is in the centre of community, municipality, nation. State and government are for the good sake of the people, not are the people for the will and aims of the state.

## 2. The Free Democratic Order

This is the reason, why in a free and democratic state all state authority is derived from the people and is basically limited -according to the constitution-, whereas the individual's sphere of responsibility and action or no action is unlimited, of course in the perspective of equal responsibilities and rights of others. In constitutional terms a state of that value orientation is based on the principles of freedom, as protected by human and vicils rights and separation of powers, democracy and the social state. Democracy provides for free, active participation in common interests. Human rights in principle are rights "man versus the state", protecting the individual of unauthorized infringements of the "almighty state power". The separation of powers-principle is the set of constituional instruments, to prevent from any form of power concentration. Power might be dangerous, so one better distributes it among many partners. All communities in the state and the state organs have the responsibility to guarantee a minimum standard of living for every citizen, and the individual in general has a constitutionally based right to shere these state offerings, which is the social -state- interpretation of human rights.

## 3. Civil Society and State

From social principles and constitutional protection of individuals follows the notion, that one has to perceive state and

government on the one hand side and civil society as an entity of free and autonomous individuals as separate. Not every duty, which has to be fulfilled for the common wheel, is a state responsibility. Civil society can and has to accomplish duties in her own capacity, enabled by the pluralism of talents and qualifications of individuals. State and civil society are separate, the state being an agent for society. *"If State and society become identical, the lights of freedom are extinguished"* (Ossenbühl). Human Rights and separation of powers as the key elements of the constitution protect civil society and its elements, the individuals, from an (unfriendly) takeover of government. *"Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée n'a pas de constitution"* (Article 16 of the French Declaration of Human Rights of 1789).

#### 4. Limited Government

Consequently state has a limited set of responsibilities. It is true, that in recent times the welfare state in many cases was overburdened –and gladly accepted that for improving its good profile for the voter– with too many tasks. Finally the state ran out of sufficient financial resources. Today there is a trend to go back to a *"slim state"*, to put the state *"on a diet"*. The common interest may need the state in many fields as a supervising, monitoring agent, but not as an operating factor in all or at least too many fields. This is in particular true for the economic and cultural areas of activities in the common interests. Enterprises, trade, small and middle size business, big business is not the state's responsibilities. Subsidies for branches, enterprises should be reduced or avoided, in order not to interfere into competition on the market. Private schools and even private universities very often do better than public ones. Of course infrastructure –roads, railroads, electricity, water supply, waste-handling– must be planned and guaranteed in quantity and quality by the state, but may well be operated by private enterprises. Consequently privatization is on top of the agenda of many states, privatizing banking, air lines,

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railroads, telecommunication a.s.o. What rests with the state in those cases are "regulatory agencies" – mostly outsourced from government –, which set and monitor standards and certify acting enterprises. The very core of state responsibilities are, however, untouched: foreign relations, defense, justice, tax-raising and budget-spending, the interior, standard-setting for education, science, research. Monitoring the value of money is not a governmental responsibility, but rather the task of an independent central bank. The same is true for monitoring and protecting a fair market competition. What is needed, is an independent anti-trust-legislation and agency. For all state activities, be it in operating, be it in controlling fields, are reliable data essential. Thus a sound collection and processing information for statistics – authorized by a law – is indispensable.

## II. Development of Civil Society

### 5. Nation and Civil Society

State and government are representing the people as a nation in unity under the constitution. But, on the other hand, the other perspective of the people is civil society, as imprinted by pluralism: of groups, political opinions, creed, ethnical groups, partnerships in the world of work a.s.o. Again: civil society must be looked at as being separate from state and government. *"The distinction between state and civil society is an indispensable prerequisite of human freedom"* (Karpen).

### 6. Civil Society and Human Rights

The freedom of individuals and groups in civil society is shielded from illegal governmental inroads by Human Rights as a vital part of every liberal constitution. Human Rights and Basic Freedoms are protecting persons as individuals and groups. The freedoms of individuals – life, profession, property a.s.o. – must not be listed in detail. It is – however – necessary, to underline, that the freedom of associating with

others is essential for allowing for pluralism. As there is no established "true" way of life and thinking, no "right" political opinion, no "only one" exclusive religion, the Constitution must provide for enough "open space" for society to gather voluntarily in associations, partnerships, ethnic groups (majority and minorities), unions, political partners, religious groups, churches a.s.o. State and nation represent the people in unity, civil society the same people in pluralism as the colorful, vivid, competitive differentiation of people, because after all people are different.

### 7. Civil Society and Group Rights

Since every country has its own society and its own nuclei of group-building, an in-depth analysis of pluralism in society will demonstrate - from country to country - different strengths, strong points and deficiencies of group-building and activities. In all countries as formed according to the free democratic type of constitution, some basic "clusters" of group-freedoms can be underlined. There is - first - the freedom to establish political parties and participate under the guarantee of free and equal chances and fair competition in elections and on the "market of opinion-making". Furthermore state and religion must be separate, in the notion, that neither does the state prescribe a religion nor give preference to one set of religious beliefs nor control religious groups, without few exceptions within the protective power of the constitution. Tolerance is probably the most important -unfolding of pluralism. Of course this is true vice-versa: no religion may pretend to know the "right road" of politics and how to run government. The political direction is formed in parliament as the result of competition of political ideas, nowhere else. Thirdly the economic sphere should be directed mainly by the partners of production in a free state: the associations of employers and the unions. They negotiate partially in partnership, partially in opposition, about working conditions, tariffs, participation of worker-representatives in boards of directors a.s.o. Again the same principle: since nobody

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including government, could know what the "*fair price*", the "*fair salary*" could be, it is the responsibility of the partner in the respective field to decide on the standards in time. Under guidance of fairness and parity. These are the principles of the International Labour Organization (ILO). And finally a substantial share of autonomy is needed in teaching, science and research, given to the respective institutions, because it is science, which knows and applies methods to approach truth.

### 8. Civil Society and Individual Rights

Of course "*civil society*" to a certain extent is an abstract term: what commits, is the individual, in groups, in parties, in unions a.s.o. Consequently it is the set of individual rights, which establishes a vital pluralistic society. One has to mention primarily the right of free opinion and speech. Without protecting it sufficiently, neither political life nor pluralistic society could work fruitfully for the common weal. This right is supported by the right to freely assemble and demonstrate, within the frame set by the constitution. In modern states freedom of press and broadcasting as powerful reflectors and as well producers of public opinion need special and well balanced protection of human rights. Protection of minorities, especially in view of cultural activities of their members. The right to move freely throughout the country and to migrate are supporting in particular minority-rights. Men and women shall have equal rights. To implement this crucial element of an open society all social powers are called upon to do within their reach, what could and should be done. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. All churches and religious groups and their members must enjoy the freedom to express their belief privately and in public. Free gathering and independent training of ministers is essential for a flourishing and tolerant religious life.

Experiences in various countries demonstrate that individual rights are best protected, when and as far the individual

is entitled to defend them personally before a court and – since these rights are rested in the constitution – preferably before the Constitutional Court. As long as an individual complaint of illegal inroad into human rights is not provided for in the constitution of a country, a legal proceeding before the European Court for Human Rights (Strasbourg) according to the Convention For The Protection of Human Rights and Fundamental Freedoms (1950) is possible as well as before the European Court (Luxembourg) according to the Treaties For The European Communities and the European Union (1992, 1997). The latter proceeding is admissible for member states as well as associates.

### III. State Functions and Separation of Powers

#### 9. Separation of Powers as an Instrument of Limited Government

Legislative, executive and jurisdiction discharge their respective function as separate from each other. In the parliamentary system, parliament and government are, however, are connected in that sense, that government is appointed by the legislature and needs laws and budget, as approved by parliament, to properly fulfil its responsibility. Jurisdiction, on the other side, is independent and subject only to constitution and law. As mentioned before the separation of powers-mechanism has been developed in order to limit and canalize governmental power and to enable democratic government.

#### 10. The Legislative

The legislative branch of government did and has to do a lot to enable this country to be a member state of the European Union. It has approved a new Penal Law, it has abolished the State Security Courts, opened access to Courts of Appeal. Two major amendments of the constitution and some eight packages of new laws – namely in the fields of penal and civil law

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– demonstrate a strong political effort to reach integration. On the other hand there are some more legislative acts needed to reach the standards of the free democratic order of European member states-constitutions and the “*European Constitution*”. This is true for a Penal Court Procedure Act, an act to regulate on the Execution of Sentences and Prisons, a new Police Law a.s.o. For a liberal function of Civil Society a law of Associations is indispensable. The Budget needs to be complete in approving, executing and controlling. Parliament will adapt national laws to Free-Democratic-Order-type systems, after thorough comparison of legal systems, and approach adoption of the *acquis communautaire* of the European Union.

### 11. The Executive

A qualified, sufficiently staffed and equipped administration is vital for the modern state. This is true in particular in view of the fact, that it is the administrative function, its offices, its personell, is the power, which represents “*the state*” versus the citizen. This is true for all fields of administration, be it in economy, culture, labour, environment protection, road- and other infrastructure-buiding a.s.o. Administrators must be well trained and retrained and sufficiently payed, to avoid corruption. It takes a long time and good trainignr to develop loyalty of state agents to the country, to meet ethical standards of working for and communicating with the people. It has to be noted as progress, that long lasting States of Emergency have been lifted, that political control of the armed forces has been reached, a Reform Monitoring Group for making Human Rights effective has been established in government. Administration needs transparency, efficiency and effectiveness, namely in the field of public contracts. Influence into economic activities otherwise has to be reduced and limited to controlling, including trust-control- Procedures of administrative bodies have to be laid down in laws, as enacted by parliament, must be uncomplicated, transparent and fast. Some European countries introduced laws of Free Access to administrative proceedings

and files, which adds quite a bit of reliability, conscience of administrators and public confidence into a fair administration.

## 12. The Judiciary

All measures have to be taken to guarantee independence of judges and courts. Court Procedure Acts are as important as substance laws in the respective fields, since "*due process of law*" and the right for a "*fair trial*" are essential Human Rights. This includes basically the right of the citizen to sue government and administration of false implementing Constitution and law. Because after all, the "*Free Democratic Order*" implements the "*government of law*", not of individual discretion and free will.

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During the 1960s and 1970s, the concept of “*constitutional democracy*” attracted marked popularity in Europe and the US for various reasons. Over the last few years, it has gained popularity in our country too. The main reason for its popularity in the west lay with the attempt to emphasize the difference between “*western democracy*” and the former eastern bloc countries, which branded themselves as truly democratic, or as “*people’s democracies*”.<sup>1</sup> In Turkey, however, the concept has been utilised in connection with the attempt to redefine democracy on the basis of the judiciary. In this context, it indicates the intention of casting the judiciary as the primary or central actor in the redefinition of democratisation and democracy.<sup>2</sup>

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\* Paper presented by Professor Sancar is titled “Constitutional Democracy: Obstacle To, Or Safeguard Of Democracy?”.

<sup>1</sup> See Carl J. Friedrich, *Sınırlı Devlet, (Limited Government)*, translated by Mehmet Turhan, Gündoğan Yay., Ankara 1999, p.59.

<sup>2</sup> See e.g. Bakır Çağlar, “‘Hukuk’la Kavranan Demokrasi ya da ‘Anayasal Demokrasi’ (‘Democracy Comprehended with ‘Law’ or ‘Constitutional Democracy’, Anayasa Yargısı 10, Ankara 1993, p.237. According to Çağlar “constitutional democracy” translates itself as ‘plural’ legitimacy for it grounds its legitimacy in various resources and does not originate solely

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The same objective can also be observed in this conference, which is titled "*Democracy and the Judiciary*", and in which the presentations seem to focus mainly on "*the judiciary*". The relationship between these concepts is also reflected in the titles of the sessions.

### I. The Complex Relationship between Constitutionalism and Democracy

To view the concepts of "*a constitution*" and "*democracy*" together does not immediately appear problematic, nor to involve conflict. This kind of approach (which is, inevitably, bound to remain superficial) understands the concepts to be different dimensions of the same political ideal, which therefore complete each other, and rules out the possibility of a tension or conflict between them. However, when we take a closer look we can see that the relationship between them is not a corresponding or complementary one. The former, "*constitutional*", originates from the term "*constitutionalism*"; whereas the latter, "*democracy*", comes from the principle of 'popular sovereignty'. In terms of these briefest of definitions: while the former expresses the notion of limited government, the latter stands for the self-government of a people. When taken at face value they can, in fact, be seen and interpreted as standing in an irresolvable conflict with each other.

The purpose of this short introduction is to highlight the semantic confusion surrounding the concept of "*constitutional democracy*",<sup>3</sup> and to show that, contrary to first assumptions, there is no natural bond between the idea of a "*constitution*" and that of "*democracy*". To bring them together is bound to generate problems. In the first place, one of the main functions of the constitution is to pre-order or regulate certain issues; to debilitate or limit considerably the capacity of society to deal

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from electoral democracy; it has other sources, factors. In this respect there is also a 'law of the judges' or 'legitimacy of the gown' next to that of 'electoral legitimacy' (p.242).

<sup>3</sup> Friedrich, p. 60.

with these issues; or, in other words, to move the issues beyond the democratic process. Ultimately, this means that the body authoring the constitution must negotiate decisions that are considered to be binding on future generations. To suggest that there is a tension between “*a constitution*” and “*democracy*” is not an imaginary act, then, but is a long established fact, the origins of which can be traced down to the early constitution-*alists*. Locke, for instance, dismissed the possibility of such a situation, which we may now consider normal. In his “*Two Treatises of Government*”, he argued that nobody has the right to enter into a contract that binds his children.<sup>4</sup> On the other hand, when we remind ourselves that constitutionalism was originally of an aristocratic and not a democratic nature,<sup>5</sup> it is better to understand the origins of this debate as stretching back to the historical period in which the concepts emerged. It should also be added that the principle of the “*rule of law*”, which is now regarded as the symbol of the principle of limited-government constitutionalism, was first coined in Germany as an alternative to republican and democratic views. The concept of the “*Rechtsstaat*” formed the theoretical basis of an attempt to re-organize the state without abolishing the monarchy.<sup>6</sup>

In attempting to group the arguments surrounding the relationship between the two concepts, mention can be made of two extreme and further hybrid positions. At one extreme, lie the “*utopian democrats*”, who view the constitution itself as a disturbance, a form of injustice. At the other end of the scale, are the radical constitutionalists who see democracy as a threat. Whereas the former worry about democracy being paralysed

<sup>4</sup> For an analysis of the views of Locke and other leading theorists of constitutionalism on this see Stephen Holmes, “Verfassungsförmige Vorentscheidungen und das Paradox der Demokratie” in Ulrich K. Preuss [ed.], *Zum Begriff der Verfassung. Die Ordnung des Politischen*, Frankfurt am Main 1994, p. 138.

<sup>5</sup> Friedrich, p. 60.

<sup>6</sup> Heinrich Amedeus Wolff, “Das Verhältnis von Rechtsstaatsprinzip und Demokratieprinzips, Stat - Souveränität - Verfassung. Festschrift für Helmut Quaritsch zum 70. Geburtstag, Berlin 2000, p. 73.

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by constitutional limitations, the latter fear multiplicity pulling down the constitutional restraints and, in particular, destroying civil liberties. Despite this major difference, both positions agree on the deep-seated, even irresolvable tension between constitutionalism and democracy. In other words, their main arguments result in acknowledgement of the fact that, since there is such an unbridgeable gap between these concepts, the term "*constitutional democracy*", by claiming to accommodate both of them, is contradictory.<sup>7</sup>

Besides these two positions, mention can be made of further approaches that start from the assumption that constitutionalism and democracy do not necessarily exclude each other, but, on the contrary, are firmly bound up with one another. Acknowledging such a relationship does not, however, solve the problem; it provides a novel and quite complex dimension to the problem. The question of how to construct this relationship and the arguments to be used when laying the foundations for it are of central importance. The answers to these are not merely theoretical, since they are crucially important in determining the structure of the legal and political system.

## II. Constitutionalism Sceptical of Democracy

Among the positions which argue that constitutionalism and democracy are compatible, some accept that "*constitutionalist democracy*" is a limitation upon democracy and see this limitation as a necessity. We can group these into two:

### 1. Limited Democracy

In the first group is classical liberalism, which emphasises constitutionalism and argues that democracy should be subject to limitations. The main argument is explained by reference to the need for the protection of civil liberties. According to classical liberalism, there can be no legitimate consensus against civil

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<sup>7</sup> Holmes, p.135.

liberties since they are embedded in human nature. Therefore, no matter how undemocratic it may be, these liberties must always assume absolute priority to any consensus. In fact, the fear of the “*masses*”, which has always accompanied liberalism, can be seen to underlie this belief. In its very early stages, liberalism rejected the “*radical democracy*” model, outlined by Rousseau. The reasoning was that the sovereignty of the general will also contained within it the potential to destroy the very individual freedom that it aspired to achieve. The aim of liberalism, in contrast, was to secure the freedom of the individual against both the sovereign and the people. From the times of Benjamin Constant, the French Revolution and its aftermath had been a constant source of worry for liberalism.<sup>8</sup> The attitude of liberalism and the bourgeoisie towards universal suffrage during the nineteenth century is an indicator of their reservations not only about “*radical democracy*” but also about the democratic mechanisms that could enable the masses to gain strong political influence.<sup>9</sup>

## 2. Militant Democracy

The other position, which recognises the need to limit democracy, emphasizes the need to preserve democracy itself. The idea that the limitation of democracy by a constitution is necessary to protect the former as a democracy not limited by the constitution would lead to self-destruction. This approach, which is branded as “*militant*” or “*combative*” democracy, argues in favour of limitations upon democracy that extend to the domain of political rights and individual freedoms. In this approach, which was influential in Germany in the late 1960s and 1970s, and which we recognize from the state governing

<sup>8</sup> Theodor Schieder, “Die Krise des bürgerlichen Liberalismus. Ein Beitrag zum Verhältnis von politischer und gesellschaftlicher Verfassung” in *Liberalismus*, Lothar Gall [ed.], 3. edn., Königsten/Ts. 1985, p. 189.

<sup>9</sup> For details see Tunçer Karamustafaoğlu, *Seçme Hakkının Demokratik İlkeleri*, (The Democratic Principles of Right to Vote), AÜHF Yay., Ankara 1970, p. 69.

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practices in our country, it is not, in fact, possible to identify a type of constitutionalism that recognises commitment to the constitution. Here the “*militancy*” or the “*combativeness*” of democracy is to be found not only in some constitutional provisions and their articulations in secondary legislation as stringent safeguarding measures and interdictions. This order is by nature militant; that is to say, if need be it can produce practices other than the ones ordered by the constitution. The judgements of the German Constitutional Court in this period do not leave any doubt. It stated that the German Federal Republic, in contrast with the Weimar Republic, is a kind of democracy which does not accept the misuse of basic rights against the constitutional order which is based on freedom and expects its citizens to defend this order.<sup>10</sup> This democracy does not tolerate the enemies of this basic order even when their acts are formally legal.<sup>11</sup>

The main aim of this approach is not to protect democracy, but, by way of controlling and imposing restraints upon pluralism, to place democracy under custody. As a result, there is a desire to build a system in which there is no need to legitimise the public-political actors, initiatives, processes, the public sphere as a whole, and all the citizens in their wholeness through political processes based on pluralism, and which subordinates legitimacy to the sovereignty of certain self-defined values.

### III. Constitutionalism Reconciled With Democracy

Further to these approaches, which openly acknowledge the need to limit democracy, there are others that found the basis for the togetherness of a constitution and democracy not by limiting democracy, but by securing its conditions of operation. Here I will limit myself to a brief summary of two

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<sup>10</sup> BVerfGE 28, 48; for an account of ‘militant’ or ‘combative’ democracy by the Court see BVerfGE 5, p.85, 134.

<sup>11</sup> BVerfGE 30, 119-120.

of these approaches. Although it is possible to bring together numerous theories with different reference points under this group, presenting all of them, even in a nutshell, would be well beyond the limits of this paper.

### 1. Formal Democracy Theory

According to the theory of formal democracy, which has been associated with J. H. Ely in the USA, it is wrong to view all constitutional limitations as essentially anti-democratic: they can, in fact, foster democracy. Like all human artefacts, democracy is not perfect. Being imperfect it needs modification, and this cannot always be achieved with democratic tools alone. When constructing democracy, employing limitations that are aimed at safeguarding its conditions of operation does not contradict the core of the democratic structure. In this vein, for instance, the judiciary is seen as the organ which protects the primary operational principals of democracy, and has bestowed it upon the role of the “guardian”. Elected members of government, who may be held politically accountable, determine the substantial values. But the task of supervising adherence to the basic rules of decision-making is ascribed to the judiciary. That said, the function of the judiciary should not extend any further: the task of the judiciary is not to create values, determine the substantial values of politics, or to replace the process of political decision-making. It is to supervise political decision-making to ensure that it is democratic. What the constitution prescribes is not the substantive outcomes of the political process, but the preliminary conditions and forms of that process. As long as the political process is practised fairly, the substantive outcomes, having met the condition of not violating the constitutional protections, must be regarded by the courts as legitimate. Judicial review involves the use of substantive criteria to limit the actions of the legislative body – the main actor of the democratic political process – and therefore leads to an undemocratic path.<sup>12</sup>

<sup>12</sup> J. Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cam-

## 2. Discursive Democracy

In favour of a similar approach, Habermas, using a complex theory based on a "*rights system*", posits a firm relationship between rule of law (constitutionalism) and democracy. He argues that this relationship is not only historical-coincidental but is also present at an inner and conceptual level. According to Habermas, whose views can be analysed under the title "*discursive democracy*"<sup>13</sup> ("*deliberative democrac*"), the inner relationship between rule of law and democracy emerges, on the one hand, from the concept of modern law itself, and on the other hand from the conviction that positive law cannot anymore look to a higher law for legitimacy. Modern law finds its legitimacy in the autonomy that is equally distributed among the citizens. Here there is a conditional (mutually cooperative) relationship between private autonomy and public autonomy. That is to say, the principles of human rights and popular sovereignty form the normative basis of the democratic rule of law. These principles are at the same time the only source from which modern law can derive its legitimacy. These two principles do not contradict or exclude each other; there is an inner relationship between them and they co-operate. Habermas although acknowledging the delicate position of the judiciary, and the constitutional judiciary, in particular, does not abandon the institution altogether. He highlights, however, the possibility of a constitutional judiciary, which in his view lacks democratic legitimacy, turning into an authoritarian organ and thereby

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bridge 1980, p.15 vd.; for more information on this see also Winfried Brugger, *Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika*, Tübingen 1987, p. 367 vd.)

<sup>13</sup> In his *Structural Transformation of the Public Sphere* Habermas refers to the idea of discursive democracy as a concept that finds its roots in the intuitive ideal of a democratic partnership in which the conditions and principles of coming together are negotiated by public debate and deliberation among equal citizens (Jürgen Habermas, *Kamusalığın Yapısal Dönüşümü*, translated by Tanıl Bora - Mithat Sancar, İletişim Yay. 1997, p. 44). For more information on this model see Oliver Gerstenberg, *Bürgerrechte und deliberative Demokratie. Elemente einer pluralistischen Verfassungstheorie*, Frankfurt am Main 1997.

converting the system into a “*judicial paternalistic*” one, should it exercise its review with the aim and mission of realizing substantive values.<sup>14</sup>

The central point in Habermas’s theory, which I will not examine in detail here, can be summarized as the effort to create a synthesis between rule of law (constitutionalism) and democracy without reducing democracy to the “*majority principle*” and, at the same time, without undermining the principle of “*popular sovereignty*”. In a system based on such a synthesis, the way to reach “*rational decisions*” is not through unconditional trust in the majority, but through realizing and securing the conditions for a political, scientific and cultural thought and will formation-process that is not guided by the state, and is not centralistic but pluralistic.<sup>15</sup>

#### IV. Democratic Processes and the Multiplicity

It is unanimously accepted that the “*majority principle*” is the major condition of political decision-making – in particular, of the democratic law-making process – and therefore a reflection of “*popular sovereignty*”.<sup>16</sup> However, that the majority principle constitutes the core element of the equality principle of the citizens’ decision-making process does not mean that it is, by itself, sufficient to guarantee democracy. The legitimacy of the majority principle is bound up with the recognition of the minority view as an equal value alternative. That is to say, the majority principle can only operate properly on grounds that prevent discrimination against the minority, and on the acceptance of a consensus that would

<sup>14</sup> For Habermas’s views on this see Mithat Sancar, “Demokrasi – İnsan Hakları – Hukuk Devleti: Zorlu Bir Birlikteliği Çözümleme Denemesi” (“Democracy-Human Rights-Rule of Law: An Attempt to Analyse a Difficult Togetherness) in *Toplum ve Bilim* 87, 2000-2001, p. 7.

<sup>15</sup> Sancar, p. 25.

<sup>16</sup> Bkz., Henry B. Mayo, *Demokratik Teoriye Giriş* (An Introduction to Democratic Theory), translated by Emre Kongar, Türk Siyasi İlimleri Derneği Yay., Ankara 1964, p. 140.

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grant to the minority those rights which can be utilised in the minority becoming the majority. This consensus also prevents the abolition of the majority principle itself. Democracy first of all requires the institutionalization of those principles that are the subject of the consensus.<sup>17</sup> Through this institutionalization, the majority principle frees itself from becoming an arbitrary and absolute rule of the majority and becomes a formula for a majority rule that is respectful of the rights of the minorities.<sup>18</sup> The majority principle, when understood as the basis for an unlimited majority rule, means that a part of the people is excluded from "the people" as a basic element of democracy in its classic definition: the "self-determination of a people". Identifying democracy with sovereignty of the majority transforms a part of the demos into an object that is not demos. In contrast with this a democracy which is understood as the sovereignty of the majority that is limited by the rights of the minority becomes an expression of the people which brings together majority and minority.<sup>19</sup>

On the other hand, "the right of the minority to become the majority", which is a principal condition of the majority principle, makes sense only when the minority gains full and equal access to the rights that are provided to the majority. And this requires the right and freedom not to identify with the majority and the sovereign, an open and undistorted system of communication, and a legal and creational security in all aspects.

Once such a relationship is established between the majority principle and democracy, it can be said that imposing limitations upon the majority principle and creating mechanisms to protect these limitations on the whole do not debilitate the democratic process but on the contrary facilitate it, through

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<sup>17</sup> Dieter Grimm, "Reformalisierung des Rechtsstaats als Demokratiepostulat?", JuS, 1980, p. 708.

<sup>18</sup> Bkz., Giovanni Sartori, *Demokrasi Teorisi Geri Dönüş* (The Theory of Democracy Revisited), translated by Tunçer Karamustafaoğlu - Mehmet Turhan, Türk Demokrasi Vakfı Yay., Ankara 1993, p. 33.

<sup>19</sup> Sartori, p. 34-35.

the promotion and guarantee of pluralism. To impose limitations on the majority principle for reasons other than securing pluralism would only help to place the bureaucratic loci of power in the centre of the system. This would subsequently damage the essence of democratic thought, a politics open to various social alternatives, and the security of a political public. What is more important here is to realize and protect the conditions for a political, scientific and cultural thought and will-formation process, which is pluralistic and decentralized and not run by the state.<sup>20</sup>

In such a system, the real function of a constitutional judiciary is to supervise the protection of this openness. In this respect, a constitutional judiciary ought to refrain from removing issues that are the subject of political conflict and debate beyond the political sphere by "legalizing" them. In such a case, the role of the constitutional judiciary extends beyond the drawing up of boundaries between the organs of the state to include, also, the narrowing or widening of the political or public sphere.<sup>21</sup>

#### V. "Constitutional Democracy" As a Means to Revive the Historical German Rechtsstaat

The approaches that are aimed at perfecting the democratic process, whether inspired by the liberal tradition or aspiring to authoritarian outcomes, can be said to have kinship with the Sonderweg (particular path) of German constitutional history. In other words, the efforts to redefine democracy on the basis of empowering statist-bureaucratic interference and/or centralizing the judiciary can be viewed as an effort to revive the "peculiar Rechtsstaat" frame which was created by the German Sonderweg. The 1848/1849 movement – an overdue bourgeois

<sup>20</sup> Friedhelm Hase/Karl Heinz Ladeur/Helmut Ridder, "Nochmals: Reformalisierung des Rechtsstaates als Demokratiepostulat?", JuS, 1981, p. 796.

<sup>21</sup> Bkz., Hase/Ladeur/Ridder, p.795, 797.

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revolutionary attempt that resulted in defeat - impeded the will of the bourgeoisie to shape society and fostered a notion of the state that is self-legitimised. Having lost the chance and hope of capturing political sovereignty, the German bourgeoisie consoled itself with the attempt to subject state power to law and to supervise its use by legal mechanisms. So the principle of the rule of law, prevented with the defeat of the German bourgeoisie from achieving a transformation from the bottom, was put to use as a means of controlling the government by and with the help of law. The Rechtsstaat was originally designed to contain the elements of authoritarianism and bureaucracy. In this sense, the Rechtsstaat can be said to have been devised against a monarchic-autocratic system which was understood, at a particular period, to be impossible to get rid of and, therefore, to be suffered.<sup>22</sup> In other words, the principle and the theory of the rule of law developed more in relation with the state against the hegemony that the bureaucratic-statist power possessed over civil society than in the spheres outside the state. It placed its emphasis more on the thought of an internal supervision of the political power than on the "*process of law-making by the ones that are subject to it*", which is the creative and dynamic element of the principle of the sovereignty of law. Thus the German model of the rule of law posited the judiciary and judicial review as the most important guarantees of democracy and, in a way, developed a "*judicial state*". The protective measures of the Rechtsstaat could be applied without reliance on democratic representation; the principle of universal and equal suffrage. In this model, in contrast to the democratic tradition of the British principle of the "*rule of law*", the passive and conservative elements of the Rechtsstaat prevailed.<sup>23</sup> To make a comparison, the German concept of Rechtsstaat emerged as the political expression of the desire to preserve the already

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<sup>22</sup> Fritz Scharpf, *Die politischen Kosten des Rechtsstaates*, Tübingen 1970, p. 58.

<sup>23</sup> Ulrich K. Preuss, "Die Rolle des Rechtsstaates in der Transformation postkommunistischer Gesellschaften, Rechtsstaat - Ursprung und Zukunft einer Idee, *Rechtstheorie Sonderheft Jugoslawien*, Ed. Danilo Basta - Werner Krawietz - Dieter Müller, Berlin 1993, p.185-186.

existing, whereas democracy was demanded by the projects taking society as its active subject.<sup>24</sup>

There is an overlapping similarity between the parliamentary system of the constitutional monarchy and the EU system today. With its current structure the European Parliament instead of meeting the democratic demands is rather a body that is in concord with the notion of *Rechtsstaat*.<sup>25</sup>

This, in fact, is not a situation peculiar to Germany but a reflection of political dynamics under similar conditions. Seen in this light, in the EU circles for instance, the employment of the "*Rechtsstaat*", with a special emphasis on the principle of the "*rule of law*" when explaining the structure of the system, cannot be taken as a coincidence. There is a "*structural overlapping*" between the historical German *Rechtsstaat* system and the democratic legitimacy deficit of the EU. The European Parliament with its current structure is a system more in concord with the notion of *Rechtsstaat* and is far from being one that is capable of meeting democratic demands.<sup>26</sup>

## VI. Conclusion

When we take into account elements such as the recognition of the individual as a legal subject against state power, the legalisation and judicial protection of individual freedoms, a judiciary independent from the political system, the legality principle, the prohibition of retroactive law-making, and finally the making of law by those who are subject to it, we can suggest that there is a firm inner relationship between constitutionalism and the principle of the rule of law freed from the German tradition of *Rechtsstaat*, and pluralistic democracy. These elements help put the political authority under pressure to rationalize, and legitimize its acts, and transform unconditional obedience to the state from being the norm to an exception. For example,

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<sup>24</sup> Dieter Grimm, *Deutsche Verfassungsgeschichte 1776 - 1866*, Frankfurt am Main 1988, p. 226-227.

<sup>25</sup> Wolff, p. 78.

<sup>26</sup> Wolff, p. 78.

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in the sense of rational natural law, the freedom of individuals constitutes the theoretical starting point, the basis and telos of legitimacy of political sovereignty. When applied properly the principle of the rule of law provides the necessary institutional conditions for the formation and development of a civil society outside the state. Such a sphere does not, of itself, constitute and replace a democratic body. If it is accepted that at the core of democratic institutions lies the capability of making collectively binding decisions on the basis of freedom, it should also be accepted that a civil society sphere is a necessary condition of democracy; because this sphere safeguards the realization of the structural conditions for securing the freedom of the autonomous will-formation of the individuals.<sup>27</sup> Viewed in this light, constitutionalism (the rule of law) does not appear to be only of negative character for the reason that principles/institutions against the political order, whose conditions have previously been created, that lack a political essence, serve merely to inspect and impose limitations. On the contrary these principles/institutions have the positive potential to increase the ability of the political sphere. As long and to the extent that this core is preserved and adhered to the constructions that bring democracy and constitutionalism together would not have a problem with the essentials of democratic thought. But a rhetoric of “*constitutional democracy*” (rule of law) in which democracy and pluralism are left behind or blurred cannot solve the problems and conflicts by political process and methods, and cannot free itself from being the symbol of a bureaucratic/statist order which depends mainly on “*solving*” these issues by bureaucratic custody and/or judicial method and mechanisms.

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<sup>27</sup> Preuss, p. 187-188.

**FIRST DAY  
SECOND SESSION**

**The Crisis of Representative Democracy  
and the New Rising Star: The Judiciary**

**Chair of the Session**

Prof. Dr. Erdoğan TEZİÇ  
(President of the Supreme Council  
of Higher Education)

**Professor Pasquale PASQUINO (Research Director at CNRS; Visiting Professor in Politics and Law at NYU)\***

Thank you I was not expecting to speak first, but I can try to do it. I thank the Union of Turkish Bar Associations for giving me this opportunity. It is interesting for me to be here and to learn from the Turkish colleagues the question they discuss and debate, and thus notably in connection with this European Union enlargement process. I decided that it always happens to me. I write a paper to the conference and I go there and then I listen to the other participants and I change my mind. I listen too much perhaps. So I do not think exactly what I wrote three days ago, because this morning people introduced new perspectives, so I want to try to say something from my paper and something connected with the discussion of this morning.

First of all, I understood that this meeting is about judicial power and good government. I will come back to this point of a “good government”. I believe that you as the members of the Turkish Bars have a crucial role to play in judicial power. If I understand it correctly, the Turkish Constitution is in some respects similar to the Italian one; meaning that cases can be sent from ordinary courts to the Constitutional Courts to ask the opinion and the advice of the Constitutional Courts before

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\* Text of the oral presentation made by Professor Pasquino.

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deciding on a concrete case. And at least in Italy and I suppose that it is the same here too, lawyers and councils play a crucial role pushing the judges to question the Constitutionality of statutes. I believe that it is perfectly appropriate for the lawyers to open a discussion about the role of the judicial power, because we are good lawyers. There will be no independent judicial power without good lawyers. China had a system of Quasay Court, which was never independent. That is the reason of banning the lawyers. So that is to say, that I am pleased to be here with lawyers. Now moving from lawyers to judicial power and it's connection with good government. Let me say briefly some thoughts about the discussion of this morning about democracy. Let me think that it may be useful to remind some few historical elements. Democracy in the serious and proper sense of the world is an old institutional scenting realized on the shores of the Greek and Turkish World in the 5<sup>th</sup> Century before Christ. In the cities Athens in Greece and Syracuse in Southern Italy societies properly called their system of government *democratia*. This meant community governing itself, where the *demos*, which does not mean the people, means the lower middle classes or the poor, to use the word, they controlled all the important governmental institutions. Not only the ecclesia, but also the Court, the *dikastai*, where the public judicial power took important political decisions. And this even able to reverse the decisions made by the Assembly. In the Greek democracy there was not a real body exercising legislative power. In the fourth century they introduced the special court called *nomothetae*, which was in charge of passing a new *nomoi*. This form of government was invented in Greece and Turkey. You should be proud of that. After that it disappeared and later on in the 17<sup>th</sup> and 18<sup>th</sup> century in England, France and United States they invented a new form of government that they called republic or representative government. For a very strange reason, later on this form of government is called democracy, but this is an accident of the history. I do not know the reason, but the founding fathers were very keen on insisting upon the fact they were establishing representative government, not a democracy.

We have been, and I will explain to you what I mean with “we”, countries like Germany, Italy, in essence Turkey after the Second World War. We have been reestablishing the representative democracy after authoritarian regimes cleaned that representative government such as it was invented and established in England or in France. It was not a good form of government. Representative government or parliamentary sovereignty was not the right institutional selection to establish political and legal order. This assignment of parliamentary democracy on almost all the European continent let the founding fathers of the reestablished post authoritarian constitutional states introduce a new form of government where three actors play a crucial role. Parliaments with two chambers now established through universal suffrage, where both the men and women had the right to vote, which was not the case in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Constitutional courts were able to modify or conceal the decision made by the Parliament and what people normally call the people, I call them the voters. The voters were able to vote in regular, competitive and repeated elections to challenge the government if whatever reason they do not like it. Nowadays people are quite lazy. They still call the system democracy. This is an invention, which is, as I told you, as a reaction to authoritarianism. In the present World, now we use the form of the German Federal Republic with 3 elements. As I told you, these are the parliament, the powerful Constitution Court and the crucial role of the voters. You can call this form as you like. You can call it democracy or something else. That is a question of personal preferences. This form of government is what is basically implied with some additional elements.

I will tell you the so-called Copenhagen criteria. You know that the European Council in June 1993 said that in order to access to the European Union, the candidate, the member state have to fulfill these so-called Copenhagen Criteria and they are spelled out in the following way. As I can remember they are: democracy, protection of rights, protection of minorities and the acceptance of the rule of the free market. This is the order element, free market and competition, which is not part of the

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Constitutional State. Now I am presenting to you as the only good form of the government.

Both in my personal opinion and in the opinion of the members of the European Council it is this way since the meeting in Copenhagen, I believe that. I want to focus briefly on the 3 pillars of this structure. There are the voters. There is the Parliament; there is the Constitutional Court. Why do we need the Constitutional Court? The reason seems to me quite simple if we go back to the origin of the modern state. The modern state is an instrument invented during the religious civil war in Europe, in order to guarantee peace, security and to begin with human survival what Thomas Hopes called the natural right of self-preservation. So, I believe that the starting point of any sound theory is a doctrine of rights, as our German colleagues were reminding us this morning, we can not abandon even Thomas Hobbes believes that there is no rationality in establishing the political power if we abandon the right of self preservation. We have to resist to any political power infringing upon our right to self-preservation. It is because the state is the only justification as an instrument of human rights. Now since Hobbes, we developed the idea of that we have some more rights other than just the self preservation and that the powerful State may be a danger in order to protect our rights. So that's why we start from Thomas Hobbes' believable theory, like any sound political and legal thinker introduced the idea of. Michel Trope was not discussing this in the morning, because he is a specialist of that and that would have been boring for him to speak about it. Separation of powers, he knows like me that all the possible political and constitutional theories based on the doctrine separation of powers. Now in my understanding the State has to protect our rights and therefore can not have the form of a monocratic power. The power of the State has to be divided in order to have a protection of our rights. That is why we need a mechanism to solve the conflicts which occur among the branches of the State. The first power of the constitutional courts is what Germans call *Orgenstreit*. This is the direct jurisdiction on the conflicts among the State branches.

If we deny that, we move back to the form of a parliamentary sovereignty and it can take the form of an absolute power and I don't think anyone is anymore ready to accept or abandon this type of separation of powers. So, we need a court because no one else can adjudicate the conflicts.

There is an alternative to ask to the people every time a problem occurs, for instance, imagine that you have to go and ask to the people 6000 times in a year. If you are a populist vision you can say "*let's make 6000 referenda each year*". I won't discuss that, because I don't want to loose my time. There is another reason, we need a constitutional court not only for the adjudication of the dispute between the state organs, especially the ones between the branches of the central government and the local governments, where there is a federal State. There is another type of conflict, the type of conflict emerging between a citizen and the government. This type of conflict can not be adjudicated by democratic processes. Democracy is a solution for collective actions when the working class was excluded from the universal suffrage, when the men were excluded from the universal cooperative collective action. This can be used mobilizing people through political parties, unions whatever form of lobbying and organization to get the interests or the concerns of these people. This can be achieved, but what will happen when the insulated minorities and minorities which by their nature will never become a majority or isolated individuals have a conflict with the government? It is human decency to imagine there is a judge in Berlin or in Istanbul to adjudicate the conflict between these insulated minorities or isolated individuals. We are more and more, unfortunately I mean, isolated individuals. We need a legal protection, because the government has human agency and may abuse its power. Officials, members of the government, administration even ordinary judge may abuse its power and we need an ultimate protection. So that is my story. I want to add something about Turkey and European Union. The debate is partially misleading. Turkey will be a part of the European Union. That is not the question I believe. What I believe is that Turkey has to help

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us in Europe to define what the European Union will be, this is my personal opinion. I am from southern Italy. I think that there are more similarities between Istanbul and Naples than there is between Naples and Copenhagen or Edinburgh. I think the real problem in the European Union is United Kingdom and some Scandinavian countries, which are somehow hostile to Union for opportunistic reasons. Now we are at a turning point. Europe is under many popular referenda that may change things. You have to be not nervous. What is going to happen? We don't know yet. I don't know what will happen in next 5 years in the European Union. Maybe, just something to accommodate capitalist consumers. Why not? Maybe it can be a political power. You should make up your mind. Do you want to be a part of this political power, or to become the part of the powers of United States or Asia? Do you want to join to United States like sometimes Polish seems to be willing? So don't rush, because you don't know what will happen. It is like a marriage. It is better not to rush, in order to see how the party looks like. You don't know it yet. It will become maybe a monster and you should be better of not being with this European Union or maybe it would maybe be interesting. However, remember that it is probably difficult like a marriage. You can always divorce as it is possible, but the moral costs are high. So be skeptical about the Europe. Ask Europe to clarify what they want to do. I personally believe that you will join Europe, but be careful, and it may have costs not only benefits. Thank you.

**Prof. Dr. Klaus von BEYME (Heidelberg University)\***

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**Introduction: The rise of the Austrian-German model  
against the American type of judicial review**

There are two models of judicial review which Hans Kelsen (1942) already outlined in his American exile – oddly enough in a Political Science Journal – at a time when the Austrian model temporarily was defunct:

1. The American model where courts of justice decide “*incidentally*” on the constitutionality of laws in a kind of “*diffuse mode of control*.” This model is diffuse, concrete and binding as between the parties. The Supreme Court developed the extension of “*judicial review*” only in 1803 in the important decision “*Marbury v. Madison*” and it was concentrated on the protection of individual rights. In the light of former colonial history America did not accept special courts because the American states were afraid of a continuation of the “*Star chamber proceedings*” of the British Crown. The drafters of the American

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\* Paper presented by Professor Dr. Von Beyme is titled “The German Constitutional Court – A Model For New Democracies?”.

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Constitution considered and deliberately did not accept a form of abstract review, a "*Council of Revision*", a body which would have been composed of members of both the executive and judicial branches and invested with the power of rejecting congressional laws (Reitz in: Kenney et al. 1999: 66).

In the old common law tradition American Courts interpreted the Constitution like any other legal document. The Supreme Court had to be placed into the common law which was a kind of Federalist ideology which believed in the enlightened elites and tried to harmonize the idea of the people's sovereignty with the separation of power and checks and balances (Griffin 1996: 13, 17). The Supreme Court was the least democratic decision-making body and it was meant by the Federalist party to serve - as the Senate - as another check on volatile democratic decisions in an elitist deliberating body with no direct access of the people. The presidential system needed an arbiter between the executive and parliament - as well as between the federation and the states.

This model has been explained as a consequence of the "*Anglo-Saxon law tradition*" in federal states (Shapiro in: Kenney et al. 1999: 195). In its combination with concrete review only it seems to be predominantly policy-oriented - with an inclination for "*social engineering*". Some authors have explained the exclusive concrete control of norms as a consequence of an anti-statist market tradition (Reitz in: Kenney et al 1999: 81) - whereas the opposite European model shows remainders of paternalistic "*statism*". This is particularly true of France which accepts judicial review only in the abstract form "*ex ante*". Once a law has been promulgated no judicial review is possible any more. In spite of this individualistic bias the policy views were so dominant that not only individuals but associations and social movements picked up policy-based grievances and turned them into constitutional suits.

2. The second model is called "*the Austrian model*". Courts decide principaliter about the constitutionality of laws. It is centralized, abstract and binding universally. Hans Kelsen de-

veloped it in the first Austrian Republic after the collapse of the Austrian-Hungarian Monarchy in 1920. It was very much in tune with his *"Reine Rechtslehre"* (pure theory of law). Kelsen (1960: III, 277ff) fought for a "pure" theory of law, without political ideology and non-juridical scientific deductions. Kelsen was invoked by many scholars, but the Austrian-German model in many points does not follow Kelsen, especially not in his *"enlightened positivism"* (Richard Thoma).

The Austrian type of judicial review had precedents in the common history of the *"German Confederation"* (1814-1866). During the 1848-49 revolution, the all-German parliament in Frankfurt - at that time still including Austria - established an *"Imperial Court"* in the Constitution, with many important procedures. Even the constitutional complaint against the violation of state or Empire-constitutions was already envisaged (§ 126, f and g). Unfortunately for Central European history this constitution and its institutions did not survive the restoration after 1849. After the collapse of the authoritarian monarchies after 1918 and the fascist systems after 1945 this model seemed to be more appropriate for the *"new democracies."* Constitutional law had developed a primordial role in the legal system. The conventional *"Rechtsstaat"* (legal state with the priority of "law" over democratic decisions in parliament) - as a result of the principle of *"popular sovereignty"* - was insufficient to protect the legal state against attacks from changing majorities. Kelsen (1922: 55) confessed that not America served as a model: *"In all the drafts, the Swiss Constitution served as an example, alongside the Imperial German one"*. The American model was not accepted for the European type of judicial review. But without the intellectual support America provided, judicial review after 1945 would not have reached positive acceptance so quickly (cf. von Beyme 1987: 91f).

3. Older, well established systems, which turned to full democracy after 1918 by granting universal suffrage, like Great Britain and Sweden, recognized the principle that the constitution is binding for the legislation. But since constitutional conflicts were rare, they did not install a special constitutional

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court. The Scandinavian tradition of the Ombudsman seemed to be an equivalent for the protection of individual rights. It proved, however to be compatible with a constitutional court, as the introduction of the ombudsman in many European countries with constitutional review has demonstrated. The German copy of the Swedish "*militie ombudsman*" (Wehrbeauftragter) was not a mere duplication of protective activities.

After World War II the American model apparently had a chance to spread – though it is (except for Japan) an exaggeration that judicial review was accepted "*at the point of a gun*" by the defeated nations (Shapiro in: Kenney et al. 1999: 196). Japan followed the American model, but judicial review did not develop to European standards. It had, however, the virtue to falsify the prejudice that the American model leads to a "*government by judges*". Italy and Germany followed the Austrian tradition. Italian constitution-makers explicitly referred to Kelsen (Rolla/Groppi in: Sadurski 2002: 143, 144), while Germany in this respect had traditions of her own and never seriously considered the American model.

France remained reluctant to share policy-making authorities with judiciaries. The "*conseil constitutionnel*" was meant to serve as a "*political body*" and originally was not regarded as a court (Stone 1992: 96ff). It developed into the direction of a constitutional court only when de Gaulle in his 5<sup>th</sup> Republic with a revival of the "*semi-presidential system*" (which had existed already in the 2<sup>nd</sup> Republic, 1948-1958) looked for an additional countervailing power against the legislative. De Gaulle suspected that parliament with its decisional caprices and permanent governmental crises had ruined the fourth French Republic. The restriction of judicial review to *ex ante* decisions and "*abstract control*" was a strategic move to limit the judicial review and to reconcile a hostile political culture still believing in "*sovereignty of the people*." Initially the Conseil constitutionnel was considered as a "*hybrid organ*" with characteristics of a "*third legislative chamber*" (Reitz in: Kenney et al. 1999: 69). The extent to which the conseil – and sometimes

the German Constitutional Court – are involved in the heat of legislative battles is alien to American understanding of constitutional justice. American cases often reach the Supreme Court only after many years when the smell of gun powder in parliamentary battles has evaporated.

The American model seems to be rather conservative. Since constitutional change is rarely done via constitutional amendments (only 27 amendments, and deducting the bill of rights, only 17 amendments in more than 200 years!) change is accomplished by judicial review. The principle of *stare decisis*, to stick to the precedents, was needed in a common law system without excessive codification as in the Roman law tradition. This principle – according to the Federalist elitist hopes – protects against too rapid changes, cemented by life-tenure for the judges which invites “*court packing*” especially in conservative periods. For the countries which had to reconstruct the systems after decades of authoritarian rule this conservatism was less attractive, because large parts of the laws had to be democratized and the property structures had to be revolutionized.

The European model – as opposed to the American type – was more appropriate for parliamentary systems and for the Roman law tradition. But it hardly ever became truly Kelsenian. Kelsen’s institutional blueprint was modified in one crucial aspect. Kelsen had argued that constitutional courts should be denied jurisdiction over constitutional rights, in order to ensure that judicial and legislative functions remain as separate as possible. Since World War II, Europe has experienced a “*rights revolution*” (Stone Sweet 2000: 38). The excessive codification of rights on all levels imposed the burden of protecting these rights on the European constitutional courts.

During the “*third wave*” of democratisation in South and Eastern Europe America was the liberating power only in a very indirect way. There was no additional momentum for European “*constitutional engineers*” accepting the American model. The second president of the Russian Constitutional Court, Vladimir Tumanov (in: Frowein 1998: 538), mentioned that most Russian

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experts thought that the American model was appropriate, until they discovered that Russia had no common law tradition. Already the ultra-active concept of the Court under his predecessor Zorkin until 1993 prevented a deep influence of the US-model. The only American influences discovered (Schwartz 1993: 166) were – contrary to most new democracies – political question limits to restrain the jurisprudence. American liberals urged the new activist constitutional courts in Eastern Europe – in particular the Hungarian Court – to abandon abstract review altogether and, hence, to follow the US path (Ackerman 1992: 108f) – without success. The abolition of “*abstract judicial review*” has been discussed even in Germany and Spain, but in Eastern Europe the Austrian-German model was popular because the rebellious minorities looked for protection against the ancient-régime majorities (Schwartz 2000: 30).

My former assumption that judicial review developed most easily in countries where the legal state (*Rechtsstaat*) was working before the introduction of democracy and federalism were established has been challenged (von Beyme 1988: 37; Sadurski 2002: 164). Federalism did not play a major role in Eastern Europe for the engineering of Constitutional courts – not even in Russia, the only surviving federal system in the former Communist camp (von Beyme 2002). The legal state argument is, however, still valid. Only the Czech Republic had democratic experiences before 1945 – but all the quasi-authoritarian states have developed some minimal standards of the “*Rechtsstaat*” before they turned to Communism.

Moreover most of these new democracies had their experiences with a “*Rechtsstaat*” in the Roman law tradition. The anti-state feelings of the velvet revolutionaries with their dominant ideology of “*civil society*” might have preferred the American model. But “*angst*” – the German word for fear, shows up even in Anglo-Saxon books (Sadurski 2002: 10) – led to the model which was most distrustful against power, e.g. the German model.

Nowhere, however, a "pure" model developed. Greece came close to the dispersed American type. In some countries, such as Poland, Hungary and Estonia), the constitutional courts have a power to decide about constitutionality before the law enters force – a system which Germany had abandoned very early. Romania – with its traditional orientation towards France – accepts abstract review only before the promulgation of a law. The treatment of constitutional courts in the constitution in most cases did not follow the Austrian-German model, neither did the modes of election of the judges.

The Austrians had re-invented a model, but Germany elaborated this type of judicial review and developed it into a powerful institution - with some impact from Madrid to Moscow. The "Austrian-German model" of judicial review in many countries went in the direction of a German model - not because of German legal imperialism, but because the position of the German Constitutional Court within the whole political system was far superior to the Austrian "arch-model". The Karlsruhe Court was widely studied and had some influence, not only because of a German inclination for systematic thinking and excessive documentation:

1. In the German Constitutional Court a harmony of professional application of norms was combined with a systematic basis of values and went beyond Kelsen.

2. No other Court developed such a flexible variety of procedures for meeting the needs of post-authoritarian societies.

3. The needs of a welfare state had to be combined with the principles of democracy and individual rights.

4. Germany in 1990 became the only Western country which developed a model for meeting the needs of the population in former Communist countries.

5. The adaptation of the national law to European needs in Germany was at least interesting for other countries – though not always a model.

### 1. Application Of Norms, Combined With A Systematic Base On A Theory Of Values

Germany was most resentful for her history and tried to create a systematic barrier against the abuse of power. The third wave of democracy, since 1974 in Southern Europe and since 1989 in Eastern Europe created a search for a model without an example in history. This led to a vivid interest in "*abstract judicial review*" – even in Estonia which sometimes was dubbed as following the American model (Halmai in: Frowein/Marauhn 1998: 565). The excessive protection of rights sometimes was suspected to lead to paralyzing the democratic part of the Constitution (Polakiewicz in: Frowein 1998: 578).

Kelsen's model in many respects was not followed because of his methodological positivism. "*Values*" were at stake for the "*velvet revolutionaries*". They were not interested in positivistic applications of norms only, but had to fill the Constitution with meta-positivistic values in order to promote the legal state and democracy (Hofmann in: Frowein 1998: 570). There are not only rights and organizational articles in the constitutions but also general principles in preambula and the declarations of state goals (Staatszielbestimmungen). Turkey makes excessive use of this possibility – from patriotism to welfare (preamble, general principles, art. 1-5). The needs in these declarations can hardly be met by positivistic applications of limited norms.

It was not easy to build the principle of judicial review into a system so deeply shaped by Roman law tradition. The authoritarian tradition in Germany, moreover, denied to judges the authority to override the laws of the state. The German concept of the legal state, the Rechtsstaat, was conceived as apolitical and neutral towards the issue of power. It did not presuppose political principles such as "*parliamentary sovereignty*" in Britain or "*judicial review*" in the United States.

After 1945, a fundamental change was planned by the founders of the new system. The competences of the Constitutional Court were far more extended than in most systems.

In many respects it differed from its model, the Supreme Court of the United States, which was also an appellate court in civil and penal matters for federal courts. Judicial review was highly centralised in Germany which created new dangers not sufficiently anticipated by the founding fathers. In Germany, the monopoly of judicial review in one body creates greater dangers on encroachment on the other constitutional powers in the system than in the United States. Moreover, the US Supreme Court only has jurisdiction in matters of concrete judicial review and it does not interfere in conflicts between institutions to the extent of the German *Organstreit*. Foreign observers have called the German Constitutional Court the "*most original and interesting institution in the West German system*" (Alfred Grosser). It was shaped not only by progressive motives. The deficiencies of a democratic tradition, and the German tendency to emphasise legal principles more strongly than political participation, certainly played a role when the new institution was created

The Constitutional Court was the institution with the highest reputation, especially in times when Parliament and the parties were discredited because of their egotism or their inactivity. The reputation of the Court was far above Parliament, Government and even the churches (Gabriel 1997).

Judicial politics in Germany was always built on the "*spirit of consensus*". Leftists suspected that this meant "*adaptation to power*" (Preuss 1987). This was certainly more true after 1990 than before. This function of mediation has sometimes been abused by the parties in Parliament, as in the case which the liberals (FDP) carried to the Constitutional Court, asking for a decision whether Germans should serve on AWACS aeroplanes on behalf of the UN (BVerfGE 90: 286ff). The decision was used by the plaintiff as a "*sham trial*" for a "*political question*" - in a situation where the liberals were in the very government which had decided to support the United Nations in military actions. After the Nazi illegal, the American doctrine of political question was not accepted. The Germans

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want a "*lückenlosen Rechtswege-Staat*" – a system in which no governmental act is exempt from judicial review. In Turkey the President of the Republic and the Supreme Military Council are outside the scope of judicial review (Art 125) – provisions hardly acceptable in the European Community. In the Weimar period even in Germany the doctrine of "*justizfreie Hoheitsakte*" prevailed, e.g. that certain government actions, in foreign and military affairs and in internal security matters, were exempt from judicial review. The consequence of this ultra-legalistic concept in the Federal Republic is, however, that the Court is frequently drawn into political quarrels which the American Supreme Court would bluntly refuse to consider. Most of the conservative constitutional lawyers agreed: in this case the Court should have refused to accept the matter (Scholz 1999: 8). The danger of abusing the Court for political matters came to the fore when in a decision on "*freedom of opinion*" the Court had to decide whether soldiers may be called "*murderers*" by their leftist critics (BVerfGE 92, 2ff), or when the Court had to liberalize the prosecution of "*sit-ins*" in front of nuclear power stations or military establishments (BVerfGE 92, 1ff).

## 2. A Flexible Model With A Variety Of Procedures For Flexible Response To Social Needs

The German model offered a wide variety of procedures for a flexible response to social and political needs. The possibility of "*abstract control of constitutionality*" on the one hand, and the enormous importance of "*constitutional complaints*" in Germany on the other hand was appealing to the new democracies. The Czech constitution-makers explicitly referred to the German Basic Law, and Hungarian scholars spoke about the Austrian-German model (in: Sadurski 2002: 397, 190). An international comparison (Tomuschat in: Badura/Dreier 2001, vol. 1: 268) came to the conclusion that Europe was mostly inspired by the German and the Spanish Courts.

Legally, Parliament can participate in the proceedings of the Constitutional Court in several ways:

- as complainant;
- as defendant (§ 63, Law on the Constitutional Court);
- as co-complainant in a judicial procedure which the Bundestag has not initiated (§ 65.2, Law on the Constitutional Court);
- as witness or adviser (§ 94.1, § 23.2 Law on the Constitutional Court).

The Court is in a strong position vis-à-vis the Bundestag. Parliament may have the first word, but the Constitutional Court has the last one. Three types of proceedings are available:

- judicial review of norms;
- challenges to the law's constitutionality brought by citizens;
- disputes between state agencies in front of the Court.

The sentences of the Constitutional Court can have serious ex post facto consequences for legislation. They have, however, an impact even ex ante because the legislators frequently act in a kind of "*anticipatory obedience*" to the Court. Oppositional threats "*to carry a bill to Karlsruhe*" are quite normal in parliamentary debates.

Three indicators reveal the influence of the Constitutional Court on legislation:

1. the number of laws which have undergone judicial review;
2. the number of laws invalidated by the Court;
3. the preventive threat of taking a case to Karlsruhe in the parliamentary debates.

The impact of the Constitutional Court on legislation is not reflected in the statistics of the Court. It is treated as a kind of

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"political question" - left to political scientists, who have only conducted selective studies on some laws (Landfried 1996). There is one study which selected most of the key decisions from 1949 to 1994 which casts some light on the role of the Constitutional Court on the transformation process (von Beyme 1998). These studies falsify the common prejudice that the Constitutional Court is a "cemetery of important parliamentary laws":

- Since the fifth legislature (1965-69) the number of laws declared null and void has decreased on an annual basis. In this case the norm has to be substituted.

- A milder form of critique of the legislator can be manifested in the form of words that a law is incompatible with the Basic Law. In this case the legislator has various options by which to correct its work and the norm cannot be applied. The judgment on the "Law on Allowances for Deputies" showed, however, that the room for manoeuvre is not much greater than in the case of a law being declared null and void.

- The request to keep to a mode of interpretation of the law compatible with the constitution apparently binds the hands of the legislators least. This flexible sanction is the "*verfassungskonforme Auslegung*", a law has to be interpreted in narrow limits compatible with the constitution. This type of sanction warns the legislator to overstretch the interpretation of the constitution and contains the caveat: "*no further steps in this wrong direction!*" For innovative treaties (for example, Moscow, Warsaw, Maastricht) the Constitutional Court used to take resort to this kind of intervention. It respects the prerogative of Parliament but, since there is no political questions doctrine (that is, refusal of a case because it is not judicial but political and thereby falling under the auspices of another institution) accepted in Germany, it means no further interpretation or amendment of the regulation is considered constitutional. In such a case, the Court detailed instructions on which application of the law is the only legal one. This type of intervention is also increasing in other countries - for example, in France with the "*déclaration de conformité sous réserve*" (Favoreu in: Landfried 1988: 100).

- Most of the key decisions which underwent judicial review were declared compatible with the Basic Law, among them far-reaching innovations such as the "*Reform of the Penal Law*" (1969) or the "*Law for Promoting the Labour Market*" (1969).

- In rare cases the indirect control of norms on the basis of a challenge to the constitutionality of a law has led to the quashing of the judgment of a lower court (3 out of 108 judgments in the sample).

The Constitutional Court does not act at its own initiative, but only when called upon. Its role as a "*guardian of the constitution*" is deliberately passive, since an active role would endow the Court with excessive weight over the other constitutional powers.

The quantitative importance of its competences differ. Constitutional complaints form the bulk of proceedings. Proceedings on the control of concrete norms are second in importance (cf. Table 1). The constitutional complaints made in 1969 have been integrated into the Basic Law by amendment (Art. 93, section 1, no. 4a). This is the most important part of the court's activities for the individual citizen. Citizens who feel that their civil rights have been violated can initiate a constitutional complaint, although their own rights have to be violated by a governmental act - there is no popular complaint on behalf of a third party, as is provided for in the Bavarian Constitutional Court. The number of those entitled to a constitutional complaint has sometimes seemed to increase so rapidly that the efficient protection of civil rights was endangered and the Constitutional Court degenerated to an appellate court for many proceedings with many far-fetched justifications. A good many of the constitutional complaints do not find their way to the Court but are filtered out by a special committee of both Senates (consisting of three judges). The most important reasons for the refusal to hear cases are the passing of time limits and that complaints do not fall within the Court's jurisdiction but under that of the ordinary courts of justice. The judicial review of norms below the constitutional level comes

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under the competence of the Constitutional Court only when it rules that subordinate courts violated or ignored constitutional norms concerning civil rights. Only a small proportion of the proceedings finally lead to laws being overridden or to the annulment of court sentences and administrative decrees.

The object of protection is not the persons or institutions who sue for their rights. The legislature is to be protected against the possibility that courts obviate or ignore its laws. Only the Constitutional Court can review laws, whilst decrees can be reviewed by any court below the constitutional court level. In no other sphere has the Constitutional Court respected the principle of "*judicial restraint*" so much and so strictly scrutinised petitions. In no other sphere of the Constitutional Court's jurisdiction is the discrepancy between the number of decisions and of proceedings ended by a withdrawal as striking as in the case of jurisdiction over concrete norms.

Proceedings for abstract judicial review, which can be called on by the Federal Government, state government or at least one third of the members of the Federal Diet, independently of a concrete impending case, are mainly perceived as an instrument for protecting minorities and the opposition. Bavaria (under Christian Democratic dominance) and Hesse (as long as it was ruled by the Social Democrats) were the outriders in the application of this means in the name of their respective oppositions in the Bundestag. Since 1969 and the growing polarisation of parties, the control of abstract norms has mainly been used by the Christian Democrats. Particularly prominent decisions have included those on the German treaty (Deutschlandvertrag 1952) (BVerfGE 1, 396), the question of the Saar (BVerfGE 4, 157), party finance in 1966 (BVerfGE 20, 56), the supervision of telephones in 1970 (BVerfGE, 30, 1) the basic treaty between the two German states (Grundlagenvertrag) in 1973 (BVerfGE 36,1), the decision of the Federal Council and abortion in 1975 (BVerfGE 39,1). Recent criticism that the Constitutional Court has abandoned the principle of judicial restraint is mainly related to the proceedings on abstract norms. Criticism is growing since the court has sometimes mixed up

the different types of proceedings. A decision concerning the sessional expenses of Deputies (BVerfGE 40, 296f) has rightly been called a quasi-control of abstract norms disguised as a constitutional complaint (Eckertz 1978: 190).

Federal-state conflicts have been of less importance than originally expected, but the rare cases have had far-reaching political implications. The decline in importance of the Länder, the growing interlacing of the parties on national and state level, the administrative controls which rarely admit cases of federal supervision of acts initiated by the Laender, have all contributed to a decline in this form of litigation. Some of the cases were not typical pieces of litigation between the Federation and the Laender, but controversies between the government and the opposition parties disguised under the procedural form of a federal-state conflict (e.g. Referendum on atomic armament in Hesse (BVerfGE 8, 122f, TV litigation (BVerfGE 12, 205f).

Conflicts between high federal organs have also been rare (135 decisions by the end of 2002). One of the reasons for this was the overlap with the proceedings on the regulation of abstract norms, which in case of doubt was considered the more promising form of litigation. On the other hand, the Court was inclined to postpone decisions in these conflicts so that these cases lost their urgency. The proportion of withdrawals by parties was, therefore, particularly high. In the sphere of electoral law, parties were even able to act as litigants, as happened in the proceedings on party finances and the five-percent clause.

The remaining sphere of jurisdiction is the outlawing of political parties. This has happened only twice so far, in the 1950s. In 1952 the neo-fascist SRP was proscribed (BVerfGE 2,1) and in 1956 the Communist Party, KPD, was similarly treated (BVerfGE 5, 85).

There is a debate on the overload of the Constitutional Court which envisages a bundle of measure. Only the most efficient way of borrowing from the American model the "*political questions doctrine*" was refuted by a Committee put into operation by the ministry of justice (Entlastung 1998: 20).

**Table 1: Workload of Federal Constitutional Court  
(1951 - 31 December 2003)**

Proceeding	Cases filed	Cases decided	Cases terminated without decision
Forfeiture of basic rights (Art. 18 GG)	4	3	1
Prohibition of parties (Art. 21, 2 GG)	8	5	3
Election disputes (Art. 41, 2 GG)	151	120	24
Presidential impeachment (Art. 61 GG)	-	-	-
Conflicts between high federal organs (Art. 93, 1 Nr. 1 GG)	136	72	60
Abstract judicial review (Art. 93, 1 Nr. 2 GG)	152	91	52
Federal Land conflicts (Art. 93, 1 Nr. 3 GG)	39	25	14
Other public law conflicts (Art. 93, 1 Nr. 4 GG)	73	37	36
Impeachment of judges (Art. 98, 2, 5 GG)	-	-	-
Constitutional disputes within Länder (Art. 99 GG)	24	17	5
Concrete judicial review (Art. 100, 1 GG)	3225	994	2029
International law disputes (Art. 100, 2 GG)	24	7	8
State constitutional court certifications (Art. 100, 3 GG)	8	5	3
Disputes concerning the continued validity of federal law (Art. 126 GG)	151	19	132
Interlocutory order and other proceedings (32 BVerfGG)	1486	1075	406
Constitutional complaints (Art. 93, 1, Nr. 4a and b GG)	141023	3900/ 117994	16517
Total	146539	124526	19304

Source: Unpublished statistical summary prepared by the Constitutional Court, Karlsruhe, 2004

### 3. A Balance Between Individual Rights And Social Needs In A Welfare State

The former Communist countries had to balance the needs for freedom and democracy with the attitudes of the people who were accustomed to excessive welfare regulations. Germany was a highly developed welfare state – though East Europeans in the surveys preferred to dream of a “*Swedish model*.” The German Constitutional Court was, however, a model for dealing with problems of the welfare state and for adapting the Communist welfare state to a liberal democracy. The figures of empirical studies show that social policy was the policy area with most of the conflicts which led the Constitutional Court to declare a law null and void. It seemed worthwhile to study the reflection of economic and social conflicts in the light of Constitutional Court decisions (von Beyme 1998: 105ff)

**Table 2. Policy Fields In Which Laws Were Declared Null And Void Or Not Compatible With The Basic Law (1951-91)**

Social Policy	61
Tax and fiscal policy	35
Legal policy	29
Regulations among the state agencies	25
Economic policy	12
Transfer policy	9
Educational policy	7
Labour market policy	6
Health policy	4
Environmental policy	1
Military policy	1
Others	7

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The Constitutional Court has intervened in the legislative process since 1951. If we look at the statistics of laws which have been declared null and void or incompatible with the Basic Law, a clear hierarchy of policy arenas is visible: social, finance and legal policy attract most of the interventions (table 2). The key decisions which attracted the Constitutional Court's interventions is an indicator for legislative conflicts: 40 % of the key decisions were confronted with the Court. The Constitutional Court issued 108 judgments concerning 60 laws. An important question is to what extent the oppositional parties use the Constitutional Court for their veto politics: 27.7 % of all the judgments preclude an action by the oppositions because they were issued in later legislatures. Later judgments normally add amendments to a law, although not necessarily only those parts which have recently been amended.

The Constitutional Court has hardly ever prevented a key decision, although the whole or parts of 14.8 % of the laws were declared null and void. In one-fifth of the cases (19.4 %) the law was declared as being incompatible with the Basic Law. The judgments containing a negative intervention against the legislator are most frequent in legal policy (21.8 %) and social policy (19.4 %). In both fields the opposition cannot be blamed for the interventions because the laws were passed with large majorities, thus including most of the votes of the opposition. The size of a majority does not protect, however, against unconstitutionality of a law (for example, the "*Party Law*" 1967). There were even unanimous decisions ("*acceleration of the procedure for asylum-seekers*" 1978) which failed to be accepted by the Court in Karlsruhe.

Extensive laws which created new rights and possibilities for the citizens most frequently underwent judicial review (64.7 %), followed by regulative measures (42.4 %). The latter were most frequently among those laws declared null and void (21.7 %), followed by the redistributive laws (18.1 %). Protective measures most frequently ended by being declared as incompatible with the Basic Law (35 %), although the deci-

sion in Parliament in this type of regulation tended to be less conflict-ridden than others, since the federal units often drive the issue to the Court because they have to implement it and costs are involved. Extensive measures were most frequently earmarked with the clause that the interpretation has to be strictly within the limits of the Constitution (33.3 %). Judgments were quashed exclusively in legal policy.

The ex-ante impact of the Constitutional Court has contributed to the fact that the legal control of a bill has been shifted from the Ministry of Justice to informal steering bodies. In the parliamentary stage of the decision-making, ex-justices of the Constitutional Court have often been invited to parliamentary hearings, not because they were experts on the substance of the law, but only to hear their opinion on the possible reactions of the Constitutional Court.

In many debates the threat to take the issue to Karlsruhe is present - even in 12 % of those 'key decision' laws for which this ultimately did not happen. The "*Karlsruhe astrology*" sometimes developed strange forms. Entire constitutional mandates were interpreted in some judgments. In other cases, opinions of judges were constructed without recourse to a specific decision (12<sup>th</sup> BT 30.6.1994: 20949C, 20958A) Over-interpretation of judgments are used to functionalize the Court. Individual phrases of judgments are discussed without evaluating the context and considering whether the phrase was taken from the basic reasons of a judgment or merely obiter dicta which are increasingly invading the Constitutional Court's judgment.

The ex-ante impact of the Constitutional Court has three variations in the parliamentary debates:

- threat and counter-threat in the struggle between parties;
- hidden conflict in the governmental coalition;
- the development of an inter-party consensus.

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Political conflict is unpopular in Germany. Most citizens would prefer to settle disputes through the courts. An early example of this attitude was exemplified by the conflict about the 'European defence community' (1954). The Christian Democrats tried to sue the SPD opposition. The Court turned this down (BVerfGE 2, 145). The SPD opposition tried to outlaw the treaty, but the Court ruled that a Bill - not yet passed by Parliament - could not be subject to judicial review (BVerfGE 1, 396). The Court, at this early stage of consolidation of democracy, had to teach the political parties the lesson that the majority and the minority of Parliament are not entitled to act as complainant and were directed back to the road of political settlement of disputes (BVerfGE 2, 144, 170f, 178) instead of asking for a preventive control of norms which did not yet exist.

In later cases Parliament began to perceive that the threat of the Court was no substitute for a political decision (9<sup>th</sup> BT 26.5.1981: 2057 B, 2058 B). Sometimes the opposition's attempt to terrorize the government with these threats were met with humour, as in the case of the 'Law on the Promotion of Vocational Training' (1981): *"In the future each Federal minister will have to carry the Constitution day and night under his arm to make sure that not a minor paragraph of the Bill can be found which serves as pretext that the Constitutional Court tries to enter into political decisions"* (9<sup>th</sup> BT 1.10. 1981: 3190A). Threats by a conservative Land, like Bavaria, were countered with irony: *"They did not vote for the Constitution, but they use it as a base to sue the government"* (ibidem, 3195 C).

The Green Party as a new opposition initially criticized the conservative judgments of the Constitutional Court but, as soon as they realized the usefulness of the strategy, they also used threats of the Court - even in matters which did not consider only the constitutionality of the Bill, but also its feasibility (10<sup>th</sup> BT 26.9. 1985: 119231). In other words, judicial activism was criticized, but invited when it seemed to benefit the party's strategy.

Occasionally a dissent in the coalition was rhetorically

taken to Karlsruhe as in the case of the ‚Second Law for Fortune-Building‘ for all citizens (4<sup>th</sup> BT, 5.5.1965: 90051).

In some cases, the interventions of the Constitutional Court were so substantial that an inter-party consensus grew in order to avoid repeated sanctions from the Constitutional Court, as in the case of the regulations of abortion (12<sup>th</sup> BT, 25.6.1992: 8241 B, 9960ff). Opposition against the ‚counter-captains of Karlsruhe‘ sometimes entered the debate (7<sup>th</sup> BT 7.9.1975: 13885B, 12<sup>th</sup> BT 26.5.1994: 19971C). Not all the cases where parliamentarians and their juridical experts launched constitutional defeatism against a Bill ended up before the Court (for example, the ‚Law on Chemicals‘ 1980). Moreover, experts were hardly ever unanimous even on the legal aspects. In a hearing on the ‚Codetermination Bill‘ in December 1974, six experts thought that the Bill was constitutional, whereas five others raised doubts on this (Minutes of the hearing, BT 19.12.1974: 36). Only rarely did a constitutional lawyer admit that *“all the jurists also conduct legal policy”*.

In some cases the counterarguments against the anticipatory obedience to the Court were those of time: the Court in the meantime will have noticed that there had been a change in the legal mood of the population which it would be unable to ignore in a future decision (12 BT 26.5.1994: 8250 D). In other words, a historical change of values was set against the assumption of permanent values on the basis of a natural right doctrine in the Court.

When certain Deputies took the Court’s judgment for granted without admitting the right of politicians to criticize them, the opposition made clear that it is close to the essence of democracy that even *“a criticism which turns out to be wrong has a right to be uttered”* (H-J. Vogel: 8th BT, 8.6.1978: 7562C). In some of the crucial laws, the constitutional misgivings were launched by the interest groups concerned. When the majority chose to ignore them (12th BT, 9.12.1992: 10915B) as in the case of the *“structural reform of the health system”* (1992) it was a victory of the political decision, no longer intimidated by Court judg-

ments which had been functionalised by vested interests.

The all-party consensus to agree on the necessity of political decisions against a narrow legalism sometimes developed because the Constitutional Court expanded its competences:

- The Court's statement of facts was increasingly transformed into a prognosis of future development (Philippi 1971: 193);

- The Court developed a tendency to regulate a whole complex instead of confining itself to the issue at stake. The judgment on the 'Allowances of the Parliamentarians' (BVerGE 40: 296) was thus transformed into an 'abstract review of a norm' even though only a very concrete challenge to its constitutionality was on the judges' table. The Court increasingly leaves judgments on legality and enters into the political feasibility of policies. There is a danger that the Constitutional Court starts from the assumption that it has greater wisdom than Parliament, even in political matters.

- The Court's judgments are full of restrictions for political actors in the future. The obiter dicta - which are only loosely related to the issue - are proliferating. Since the 1970s decisions increasingly make appeals for action to the legislator. This was sometimes necessary to protect such human rights as in the 'equalization of legitimate and illegitimate children.' In many other key decisions, however, as in the Party Laws, the decisions on education, abortion or in the 'basic treaty with the GDR' (1973), the sentences put Parliament under the tutelage of the Constitutional Court.

Negative consequences of the expansion of competences of the Constitutional Court are:

- the retardation of political decisions because the legislator waits until the judgment is issued;

- further devaluation of the Deputies' judgment;

- strengthening of the influences of bureaucracies and parties outside parliament.

In the 1970s judicial activism was directed against the Social Democratic government and caused much criticism. In the 1990s a series of judgments was directed against the conservative government and provoked wide criticism even among the most conservative constitutional lawyers who normally refrain from criticizing the Constitutional Court. The propaganda for a "*lean state*" threatened to turn into a promotion of an "*opulent judicial review*". The waves of judicial activism and judicial restraint will probably never find a balance acceptable to all parties and politicians.

#### 4. The Court Functions As Guardian Of "*Due Process*" In A Transition To Democracy In East Germany

The Constitutional Court acted as a mediator between East and West and on the whole was highly respected even in the Eastern Laender. The Round Tables of the democrats – including former communists – had no alternative. If the GDR would have persisted, the model of Karlsruhe would have been copied in East Berlin as the drafts for a new GDR constitution showed. This consensus has been called "*meta-law*" or "*constitutional patriotism*" which guided the unification process much more than ethnic nationalism. This consensus – comprising many citizens with the exception of those who want radical majority decisions – led to the apolitical climate in which many citizens prefer a "*neutral*" decision from Karlsruhe to a "*partisan parliamentary decision*" in Bonn or Berlin. There was always in the German tradition a certain distrust for majority decisions and a legalism which was already discovered by Almond and Verba in their seminal study on "*Civic Culture*" (1963) and which had survived 44 years of the division of two Germanies.

Germany is the deviant case in transition studies and hardly mentioned in comparative volumes. West Germany has exported its model to the East. The majority of the voters invited Bonn to

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do so. They wanted quick unification, not because of nationalist feelings – though they had a more traditional patriotism than the West Germans if we trust the surveys (Westle 1999) – but because of “*DM-Nationalism*” as Habermas called it, with moral disappointment. Even the former communists wanted unification – only more slowly, more confederative and closer to a “*third road*” between market economy and planned society.

The first function of the Constitutional Court fortunately did not have to be used: it was the living guarantee of reunification – even against the will of a parliamentary majority in the West. As in Ireland for many years the preamble in the Basic Law required reunification as a kind of moral duty. If the Bundestag had declined the offer of the GDR for an immediate “*Anschluss*”, the East German government could have complained in Karlsruhe and the Court would certainly have imposed unification on the legislator. This hypothetical “*worst case scenario*” did not happen – but it shows already that the mere existence of the Court has anticipating motivating power in the political arena. The normal threat in the debates reads: “*your opinion is not Karlsruhe proof*”. This scenario, however, might have happened if the legislator knew the costs. Many economic experts calculated 200 billion DM and did not anticipate that West Germany has to pay almost this sum every year.

The introduction of market society on the territory of the former GDR in some respects resembled the age of “*gold-digging crowds*” in America when they overran the new Laender. The Court protected the chances of Eastern citizens, employees and parties. The first important decision was in favour of the smaller East German parties by ruling that the five-percent-threshold during the first all-German elections should not apply to the whole territory but that the votes should be counted separately in East and West. Many commentators thought that the former communists would disappear soon but this was a fundamental error because they regularly obtain about one fifth of the Eastern votes. In the meantime they even entered into a formal coalition in a regional government (Mecklenburg-Pommern-

nia). The PDS benefited most from this decision because all the other Eastern parties disappeared in the meantime. The Greens also benefited because they were the only "*non-colonizers*" and decided not to form a list of alliance between the parties in the two territories. Because the Greens in the West failed to pass the threshold, only the Eastern Greens were represented from 1990 to 1994 in the Bundestag. This would not have been possible without the decision of the Federal Constitutional Court. The PDS did not win all the trials it initiated. In its attempt to keep the money of the former state party SED the Court ruled against the former communists (BVerfGE 84, 304ff).

The image of the first "*liberal*" Senate of the Court was challenged when it ruled that former GDR employees who had been suspended after unification because their institutions had been abolished, according to the Court's opinion were legally dismissed. For six months (9 months for older people) they got 70% of their former salary. 309 Eastern citizens had complained, arguing that they were discriminated because of the "*collective lay-offs*". The Court, however, did not recognize a violation of "*human dignity*" in the collective lay-offs. But it ruled that for women with children, the handicapped and elderly people certain improvements have to be envisaged in order to avoid poverty (BVerfGE 85, 167ff).

After the peaceful revolution of 1989 many conservatives and liberals in the West thought they could reverse all the decisions of the former communist government. The expropriations were highly disputed. Only those implemented by the Soviet Military Administration (SMAD) were recognized because they were beyond German control at that time and even the Basic Law was not yet valid in the West (and the East because since 1949 the Western constitution claimed to be valid for all the Germans). The government argued that Gorbachev had exchanged this recognition for his agreement to reunification. After his resignation in 1991 he publicly challenged this opinion. In April a new case was pending against the "*compensation law*" (EALG) passed by Parliament in 1994. The complainants

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argued that the Federal Government wanted to finance reunification by the expropriation of former owners in East Germany. The law was based on the device of "*restitution before compensation*" but admitted numerous exceptions. The former owners who challenged the law asked to call Gorbachev as a witness. The Court declined the demand. This was justified because previous decisions from 1991 to 1996 were not based on the argument that the Soviets had interfered but rather on arguments of justice and feasibility.

It is doubtful that Gorbachev had asked for such a clause to preserve the status quo of Soviet expropriations in Germany. But there was no doubt that the last communist government under Modrow (until March 1990) had pressured for such a clause. The issue affected mainly the owners of great estates above 100 hectares and certain owners of industrial enterprises who were allegedly guilty of war crimes—a notion which the Soviets in 1946 used quite often against everybody whose political opinions they resented. The recognition of these expropriations until 1949 were written down in the treaties with the GDR even under the new democratic government de Maizière (March-October 1990). The Court obviously followed the government's "*raison of state*" in external and domestic affairs.

Even the Christian Democrats in their majority did not want a complete reversal of all property relations in East Germany. The state run factories were handed over to a parastatal trusteeship organization (Treuhand) which had to square the circle via expelling the "*devil of communist state monopoly*" by the "*beelzebub of a democratic para-statal centralized monopolistic institution*". The Treuhand did successfully so until the end of 1994. Also in this decision (BVerfGE 84: 90ff) the Government was granted wide scope for manoeuvring. The reconstruction of East Germany – according to the Court's majority – should be "*just and fair*" but should not entail huge costs by private restitutions and endless litigation. The reconstruction of the "*status quo ante*" was not considered as feasible. This wise compromise was facilitated by the fact that West Germany had also recompensated East Germans who came as refugees

to the West (about three and a half million) for their losses of property in the GDR - as Adenauer had done before with the Germans expelled from the Oder-Neisse-territories.

The Constitutional Court had to interpret the Unification Treaty twice. In both cases it did so with great "*judicial restraint*". Before 1990 the Court was frequently criticized that it lacked judicial restraint by its moralizing approach to many issues. It was now blamed for decisions which did not show any moral compassion for the injustice suffered by the East Germans under communist rule (Fromme 1996:1). In both cases the Court did not challenge the "*indemnity clause*" of the Unification Treaty (II.4.5) which changed Article 143 of the Basic Law and provided that GDR law may deviate from the Federal Law until the end of 1992. Frequently the Court was also accused of ignorance about the situation in the East. The problem was not easily to be cured because hardly any jurist - who had not cooperated with the state security - could be found on Eastern territory. So the new Laender for a long time remained without representation on the Court.

Widely discussed was also a decision which ruled that GDR spies were not liable, as long as they had respected GDR law (BVerfGE 93,1). German courts have sentenced GDR soldiers who killed refugees from the GDR at the wall in most cases "*on probation*". They were free because it was clear that they would never be able to do it again.

An important issue was abortion. The GDR had far more liberal provisions than West Germany with its considerable share of Catholic population - almost absent in the East (5%). The Western majority imposed its restrictive laws on the new Laender. The Constitutional Court in the abortion cases (BVerfGE 88: 203ff) departed from its normal moderation. The legislator was trimmed by detailed prescriptions as to how the compromise should read and probably exceeded the Court's competences. The peaceful revolutionaries of the GDR in many cases were deeply disappointed. One of their leading figures, Bärbel Bohley, put it bluntly: "*We wanted justice - but we got*

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*only the legal state*". It needed a certain time of socialization in Western political culture to recognize that there is no justice per se – and that the legal state is the best one gets on earth

### 5. German Predicaments On The Road To European Integration

In foreign policy the Court's impact is limited. In domestic decisions it can immobilize forthcoming amendment policy, as in the case of the codetermination judgments. In foreign policy issues the Court – normally liberal in matters of basic rights of the citizens – has sometimes shown a conservative attitude. If we compare judgments which renounced territories which were formerly part of the German Empire, the judgment of the "*Saar statute*" sounded as though it was expressing confidence in Adenauer's foreign policy, whereas the judgment on the "*Treaty with the GDR*" and Poland sounded rather like a vote of censure against Brandt's Ostpolitik.

The hope of the new East-European democracies to get access to the European Community may have motivated some constitution-makers to follow the "*European model*" – though at the stage of transition – before consolidation of democracy – this expectation was still fairly weak in Eastern Europe. Louis Favoreu found an additional reason against the American model: it would have needed a greater amount of purification of the legal system if all the judges were involved in judicial review on constitutional matters. The European model seemed to make it sufficient to establish a reliably democratic Constitutional Court for constitutional control. The Russian example under Zorkin in the first round of judicial review in Russia until 1993 showed, however, that even the "*purification*" at the peak of the judicial hierarchy was not always a guarantee for a safe road to constitutional democracy (cf. von Beyme 2002: 318). In this case the president of the constitutional court himself politicized the activities of the Court. In two cases the constitutional courts, in Poland and Yugoslavia were older than the transition to democracy. In some system "*old institutions*" such

as the presidency were more prominent in promoting the values of democracy than the new institution of a constitutional court, as under Wałęsa in Poland or under Yeltsin in Russia (Sadurski 2002: 174f).

The triumph of judicial review in the European Union led to a discussion in some countries of this group whether a constitutional court might be necessary to cushion the impact of sentences from the European Courts. The Europeanization of law on the Continent and elsewhere is progressing. An individual act of leaving the EU is considered as *"illegal"* (Frowein in: Badura/Dreier 2001: 212). The alternative might well be an attempt to harmonize national and European law via a Constitutional Court. Some countries – such as Germany and Italy – which followed a strict doctrine of the priority of law (*Gesetzesvorbehalt*) – had to accept the possibility to implement community law via decrees which otherwise would have been unconstitutional in the German context. Italy created for this purpose a special regime of legal enactment by laws of 1987 and 1989 (von Bogdandy 2000: 249).

The budding European legal system increasingly undermines the national consensus. The Constitutional Court has an important function to harmonize European and domestic concepts of social harmony. German reunification caused much international turbulence – but for the West Germans themselves the Europeanization process after the Maastricht Treaty had much more impact, excepting the financial burden caused by unification. 20% of all parliamentary decisions are already mere implementations of *"guidelines"* or *"decrees"* issued in Brussels – in agrarian politics even 80%. The European Court of Justice in Luxemburg and the European Court for Human Rights in Strasburg effectively streamline the legal systems in Europe. The German Constitutional Court became worried by this development. In a Maastricht decision it tried to set limits to Europeanization, a naive and probably futile attempt. The Court ruled – linguistically Germano-centered – that Europe is neither a *"confederation"* nor a *"federation"* but something in

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between which was dubbed "*Staatenverbund*", an untranslatable monsterword which only the Swedes can accept (statsförbundet). There is simply no word for this German construction and will inevitably be translated as "*confederation*" or "*federation*" (BVerfGE 89, 155ff). The President of the Constitutional Court, Papier (2004: 5), tried to reconcile conflicting exigencies in multi-level European system. For the time being he held that national sovereignty does not contradict international norms as long as the Basic Law is interpreted "*völkerrechtsfreundlich*", eg. in a way open for transnational values.

Germany used to be the "*obedient disciple*" of Europe after war. But in the meantime, under the pressure of the double financial burden of reunification and of the highest contributions to the Community which certainly exceed any fair calculation of the per-capita inputs in comparative perspective, the Germans are no longer the "*good guys*" and try to calculate the costs of further integration. Because they have - among the bigger countries - by far the highest proportion of foreigners and asylum seekers, they started to find restrictions. The Court tried also to build up barriers against too much of a "*multicultural society*" and challenged electoral rights for foreigners (BVerfGE 83, 37ff). Other cases of judicial activism had little to do with the process of consolidation of unified Germany. A laicist minority found it unacceptable that a crucifix is required in every class room in Bavaria. The Court accepted that this custom contradicted Art. 4 of the Basic Law on freedom of religion. This sentence - acceptable in a postmodern society - was nevertheless a flop because the Court did not work carefully enough and had to issue a second version of the guidelines of its decision in order to clarify the matter.

On the whole the Constitutional Court has acted in a very responsible way since 1990. It should, however, consider more judicial restraint in order not to delegitimize itself, if it wants to retain the highest degree of popular trust vis-à-vis the other institutions of the Federal Republic.

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**Prof. Dr. Fazıl Sağlam (Justice Of The Turkish Constitutional Court)\***

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Dear presidents, dear colleagues and the distinguished guests; before starting my speech, I would like to mention that this task given to me was a fait accompli. I asked dear Şahin Mengü, Secretary General of the Union of Turkish Bar Associations not to give me a part in this symposium due to my workload in the Court. I expected that he would find this reasonable, however when I received the invitation for this symposium I saw my name on the program. That would be a lie if I say that I wasn't a little bit angry, but when I saw the distinguished names on the program I was also honored. I comforted myself saying "*at least I will have the opportunity to be together with them and to listen to them.*"

For instance, I know Prof. von Beyme very closely from Germany who participates to this symposium and Prof. Starck, who could not come due to his health problem. I have met Prof. Beyme in Heidelberg while I was working on my doctoral thesis. Probably he doesn't remember me, but I have attended

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\* Paper presented by Professor Sağlam is titled "The Rising Star in a Democratic Rechtstaat: The Judiciary".

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his classes and I must say it has been a very interesting experience. When I entered in his class his students were uprising, because Prof. Beyme, as far as I can remember now, had given a bibliography of 5-6 pages long to his students and nearly the %70 of this bibliography consisted of books written in English. Of course this situation made the German students uprise. I observed that meeting with great pleasure, because I remember Prof. Beyme, explaining to his students with his ironic style why it was so important for someone studying political science to know English. Later in Hagen, in the 1990's, I had the chance to meet Prof. Beyme in two other seminars. I am very glad to be with him once again.

Of course there are our precious colleagues too. Namely, Prof. Teziç the chairman of this session and Prof Özbudun who will be the chairman of the session which will be held tomorrow. I would like to thank again to the Union of Turkish Bar Associations for giving me the chance to be together with them.

Now, I would like to mention again our subject. Our title is *"The Crisis of Representative Democracy and the New Rising Star: Judiciary"*. My presentation will be concerning more with the *"New Rising Star: Judiciary"* part of the main subject. There is no doubt that our judiciary was a *"rising star"* between the years 1961-1980. I mean the period of the 1961 Constitution. In this period, the judiciary which was completely independent both from the legislative and the executive power and which constituted its institutions with a kind of cooptation method played an important role for the establishment of the Rechtsstaat in Turkey. However, as you know, after 1980 there have been other rising values, and the shining of the judiciary started to fade. However, the fundamental structure built with the 1961 Constitution was so solid that instead of all the negative structure of the 1982 Constitution, and the practices of the new rising values as well as the new approaches, the judiciary kept its quality as a major element that maintained the supremacy of human rights and the rule of law. Soon I will give you some

examples in order to prove this statements, some of which probably most of us will hear for the first time.

Before doing that, firstly I would like to mention something that I find closely related with our subject. I was invited to Berlin in May to make a presentation. It was an academic meeting, which was organized by German scholars on a specific subject every year, and it was called "*Bitburger Gespräche*". The main subject of this year was: "*The Problems Concerning the Accession of Turkey to the European Union*". The subject proposed to me was: "*Die Türkei auf dem Weg in den Rechtsstaat*" which means "*Turkey on the way to Rechtsstaat*". When this topic was proposed to me, the first word I could think about was "*prejudice*". However, I thought on the topic. "*Are the "new rising values" in my country treating the judiciary in a different way?*", even though they lack proper information on the subject. So, our responsibility is to eliminate this prejudice and to show that instead of all the defects and problems, Turkey is still a Rechtsstaat. I will try to explain this to you with some judicial decisions given in different fields.

### **I. The Decisions of the Supreme Courts in Turkey that Exceed the Restrictions with Respect to the Exceptions of the Judicial Review**

One of the most important aspects of a Rechtsstaat is that, there should not be any field which is an exception to the judicial review. As we know, different from the 1961 Constitution, in the 1982 Constitution many exceptions are enumerated which are kept outside the jurisdiction of the judiciary. Now, I will give you some examples that show how these exceptions were indirectly made subject to the judicial review.

1. The first example is from the Constitutional Court: As we know with respect to the Article 148 of the Constitution, it is not possible to argue the unconstitutionality of the "*decrees having the force of law*" which are issued during the state of

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emergency. However, the Constitutional Court has loosened this ban with the reasoning given below:

*"The decrees having the force of law stipulated in the Article 121 of the Constitution are only the decrees that make regulations during the state of emergency and on the territory of the state of emergency and which make regulations on matters necessitated by the state of emergency. However, against the decrees carrying these conditions ... no suit can be brought claiming the unconstitutionality of the decrees. . If the regulation that takes effect with the decree is effective in another time period or territory other than the state of emergency has been declared, or in other words if such a decree is effective even after the state of emergency is terminated, then such a decree can not be considered as a decree having the force of law even if it is related to matters necessitated by the state of emergency ,"*<sup>1</sup>

The Constitutional Court, concretizing this reasoning on some certain clauses relevant to the decrees having the force of law which are issued during the state of emergency, annulled the clauses of these decrees which went beyond the limits of the territory and the period of the state of emergency and which made amendments to the ordinary laws.<sup>2</sup>

2. I want to give the second example from the Council of State: The decision of the Assembly on the Unification of Conflicting Judgements of the Council of State, dated 7 December 1989 and numbered E. 88/6 and K. 89/4.<sup>3</sup> This is of course a very well known decision. One of the founders of this decision is now with us in this room.

This decision of the Council of State is related to the interpretation of the clause which is envisaged in the second article of the Martial Law. This clause gave way to the dismissal of

<sup>1</sup> Decision of the Constitutional Court, 10 January 1991, E. 90/25, K. 91/1: Journal of the Constitutional Court Decisions, Issue 27, Vol. 1, p. 105.

<sup>2</sup> Decision of the Constitutional Court, 10 January 1991, E. 90/25, K. 91/1: Journal of the Constitutional Court Decisions, Issue 27, Vol. 1, p. 107. In addition, see the same journal, p. 402-405.

<sup>3</sup> Official Gazette 9 February 1990 - Issue 20428.

the civil servants due to the demand of the martial law commanders stating that those servants “*can not be assigned in civil services again*”. As you know, the constitutionality of this clause which has been accepted under the military rule (after the 1982 military intervention), could not be reviewed due to the Constitutional ban (Provisional Article 15 of the 1982 Constitution which is abolished with the 2001 amendment). There were many civil servants that could not return back to their jobs even after the Martial Law was terminated and even if there were no judicial or administrative procedures concerning them. The Assembly on the Unifications of Conflicting Judgements of the Council of State managed to overcome this injustice that is completely incompatible with the rule of law principle. The reasoning of the decision reads as follows:

*“(...) The rationale of the Law numbered 2766 and the debates that took place in the Consultative Council show that the clause “they can not be assigned in civil services again” is considered as a permanent prohibition. However, it is clear that an interpretation that depending only on the rationale of the Law will take us to a conclusion which is determined at the time when the Law was accepted. Reaching to a conclusion culminating in the prevention of the reassignment of those officers dismissed upon the request of the martial law commander, with such an interpretation which is vastly narrow and limited would bring along many unjust and negative practical implementation problems together. For instance, while some citizens who have not been given the opportunity to make defence and those who have not been sentenced by any judicial decision are deprived of this right, those who have been sentenced in accordance with the Penal Code can enjoy this right when they are granted a probation or a restitution of the deprived rights is decided, or when the judicial records are cancelled, which result to put some citizens in a more disadvantaged legal status compared to those who have been sentenced by a judicial body (...) As the bills gain an objective identity and are abstracted from their rationale after they are accepted as laws, the rules inherent in the laws shall be interpreted and implemented in accordance with the necessities of the society, the development of the society and the supreme laws.*

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*As envisaged in the judgement of the Constitutional Court (dated 28 September 1984, Decision No 1), it is an obligation "to interpret the rules of the laws which are in the scope of the Provisional Article 15 of the Constitution in accordance with the fundamental principles of the Constitution and the fundamental principles of the law pre-eminent over these principles, as far as possible" as this a requirement of the rule of law (...)*

*On one hand (...) as the maintenance of a justifiable balance between the act that can not be reviewed and the sanction envisaged by this act is a necessity of justice and the rule of law (...) on the other hand, the provisional character of the martial law underpinned by the Article 122 of the Constitution which is subject to the conditions regulated by this article also makes the measures taken by the martial law commander provisional (...) Articles 15 and the 122 of the Constitution state that in case of martial law the fundamental rights can be limited only to the extent necessitated by the state of emergency. (...) The clause of the amended Article 2 of the Martial Law Act numbered 1402 by the Law numbered 2766 stating that "they can not be assigned in public service again" can be considered as limited to the duration of martial law and can be accepted as efficient only during the martial law."*

3. The third example is from the High Military Administrative Court Of Appeals (HMAC). One of the decisions taken by this court in 1998 maintains the indirect judicial review of the Supreme Military Council (SMC) decisions which are not subject to the judicial review as regulated by the Constitution and is very important in this respect. HMAC, in this decision, did not hesitate to perform an indirect judicial review by deciding that the decision of SMC is non-existent.<sup>4</sup> The case was about the dismissal of a non-commissioned officer working for the armed forces due to the disciplinary sanctions decided by

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<sup>4</sup> Decision of the 1st Chamber of the High Military Administrative Court of Appeals, 22 January 1998, E. 97/149, K. 98/200: Journal of the High Military Administrative Court of Appeals, Issue 12, Ankara 1998, pp. 1132-1152.

the SMC when the officer's retirement procedure was going on due to his mental illness reported by the military hospital. HMAC gave the verdict below while deciding on the case sued for the annulment of the SMC decision:

*" (...) where the health report regarding the plaintiff stating that he can not work in the armed forces due to his mental illness had been finalized and his retirement procedure had started and his status in the military had been terminated because of this final health report, the Force Commander, long after this procedure had started, has no constitutional and lawful authorization and duty on dismissing the plaintiff ex officio from the armed forces on the grounds that he lacked discipline and acted immorally (...)*

*(...) and the act on the dismissal of the plaintiff is non-existent because of the heavy diversion of authority, no validity can be given to the SMC decision which must be built on this decision in accordance with the Article 50/c of the Law numbered 926. (...)*

*(...)With this reasoning the invalidity and non-existence of the act dismissing the plaintiff due to his lack of discipline and immoral acts is determined (...)."*

Now I am asking: How many people are there in Turkey who know this decision?

## II. Decisions as Law Reforms

Many decisions of the Constitutional Court carry a role as an initiator of the reforms made on Civil Law and Criminal Law. I am resuming some of them for you.

1. Article 443 of the Civil Law, which regulated the partition of the heritage between the lawful and unlawful children in a different manner, was annulled with the decision of the Constitutional Court dated 11 September 1987, on the grounds that it contradicted with the principle of equality and the right of inheritance.<sup>5</sup>

<sup>5</sup> Decision of the Constitutional Court, E. 87/1, K. 87/18: Journal of the Constitutional Court Decisions, Issue 23, pp. 297-313.

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2. Similarly, Article 229 of the Civil Law which impeded *“the recognition of a child by his father born as a result of the adultery of the man”* is also annulled by the Constitutional Court on the grounds that it violated the principle of equality.<sup>6</sup> The court also reviewed the subject in respect to the Article 12 of the Constitution. This article which stipulates that *“everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable”* is very important, because it exemplifies that the rights and liberties which are not mentioned clearly in the Constitution can be considered in the frame of this article.

3. The Constitutional court annulled the Articles 441 and 440 of the Turkish Penal Code which regulated the adultery of men and women differently with the decisions given in 1996 and 1998 on the grounds that they contradicted the principle of equality.<sup>7</sup>

4. Article 159 of the Civil Law which puts the working or performing an art of a woman subject to the permission of her husband is annulled by a decision given in 1990 by the Constitutional Court, on the grounds that it violated the principle of equality and the right to work.<sup>8</sup>

### III. Decisions That Are Relevant To The Protection Of Fundamental Rights And Freedoms

1. The decision given by the Constitutional Court in 1990 is related to the second additional article of the Anti-Terrorism Act. This article regulates the operations made against terrorist

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<sup>6</sup> Decision of the Constitutional Court, 28 February 1991, E. 90/15, K. 91/5: Journal of the Constitutional Court Decisions, Issue 27, Vol. 1, pp. 161-183.

<sup>7</sup> Decision of the Constitutional Court, 23 September 1996, E. 96/15, K. 96/34: Journal of the Constitutional Court Decisions, Issue 32, Vol. 2, p. 800; and Decision of the Constitutional Court, 23 June 1998, E. 98/3, K. 98/28: Journal of the Constitutional Court Decisions, Issue 35, Vol. 1, p. 205.

<sup>8</sup> Decision of the Constitutional Court, 29 November 1990, E. 90/30, K. 90/31.

organizations, and the authority of using arms by the armed forces in cases of disobedience to the order of surrender and usage of arms against the forces. In such conditions, to neutralize the perpetrators the officers can use their arms without hesitation against the target. The Court's reasoning for the annulment of this regulation is as such:

(With the Article 17 of the Constitution) *"... the state is responsible for taking all the measures to maintain the right to life, which is under the guarantee of the Constitution. The use of arms can only be permitted by Law in cases of unavoidable necessity.*

*While mentioning only the initiative to use arms in the regulation, only using the firearm against the target by the policemen is mentioned; therefore, without even paying attention to the type of the arm to be used by the suspects, the officers were given the authority to use firearms even for the cases where the danger could be prevented by a minor interference.*

*In this respect, the regulation that vests the authority to use firearms without hesitation at any time the suspects do not obey the order of surrender is not an unavoidable necessity. In some cases it is possible for the authorities to neutralize the suspects without using methods that endanger the life of the suspects. In respect to the characteristics of the situations, the use of firearms without hesitation against the target causes the violation of the right to life. Due to this reason, it is in contradiction with the Article 17 of the Constitution and shall be annulled."*<sup>9</sup>

This reasoning of the Constitutional Court, is a typical implementation of the "principle of proportionality", which is a sub-principle of the principle of necessity

2. The decision given by The General Assembly of the Criminal Division of the Supreme Court of Appeals in 2002, carries a decisive role on the sanctions that would be given to people who has a role in the practice of torture, directly and

<sup>9</sup> Decision of the Constitutional Court, 6 January 1999, E. 96/68, K. 99/1: *Official Gazette* 10 January 2001- Issue 2429.

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indirectly.<sup>10</sup> The parts of the decision that reflects these two aspects are given below:

a. *"... when the concrete case is considered, there is no doubt that (the suspect chief police officer and the policeman) has made the two people they arrested undress completely, given them electric, squeezed their testicles and insulted them in order to make them confess their crimes.*

*In a democratic Rechtsstaat, although to maintain evidence is the primary aim of the investigation and the duty of the police forces, this aim and duty can not be a reason for violating the human rights and unlawful action. The armed forces shall carry out their duties of maintaining evidence in a manner respectful to human rights and in compliance with the law (...)*

*(...)The actions attributed to the suspects, constitute the crime mentioned in the Article 243/1 of the Turkish Penal Code for each injured party and the local court decision that considers the actions of the defendants as a simple action that violates human rights and concluding that the crime regulated in the Article 245/1 of the Penal Code has been committed instead of the crime in the Article 243/1 is not valid.*

b. *The crime of negligence of duty regulated in the Article 230 of the Turkish Penal Code stipulates (...) that the person considered as an officer when the crime was committed (...) carries his duty on not in compliance with the law and regulations.*

*In the case that is under consideration (...) the fact that the physician wrote a health report of the suspect based on the oral declarations spelled out nearby the officers and without any physical examination contravenes the related law and regulations (...) and is therefore the violation of duty."*

3. Now I will try to summarize the two decisions of the Constitutional Court and the Supreme Court of Appeals which considers the freedom of religion and conscious:

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<sup>10</sup> Decision of the General Assembly of the Criminal Division of the Supreme Court of Appeals, 15 October 2002, E. 2002/8-191, K. 2002/362.

a. The Constitutional Court, in a decision given in 1987, annulled a clause of the Turkish Penal Code treating and distinguishing the religions as celestial and non-celestial religions, and punishing only the crimes committed against the first group of religions, stipulating that such acts are against the freedom of religion.<sup>11</sup> For the Constitutional Court:

*"(...) for Islam, Judaism, Christianity and Islamic faith are celestial religions that comes from a divine source.*

*(...) the religions which are not celestial are grouped under three categories as tribal religions, national religions and universal religions (...)*

*(...) The legal benefit aimed to be protected when accepting the crimes committed against the freedom of religion is not directly the religion itself, but the personal religious faith and feelings (...) (therefore) the concept of 'celestial religions' restricts the field of implementation of the Article 175 to a great extent giving way to the exclusion of some religions and beliefs from this protection.*

*In the modern state, religion is not a condition for someone to acquire some rights. Today the state is an institution which respects the religious freedoms, that takes into its scope different religions and sects and the people who believe in them (...) The same thing is valid for the ones who don't have a belief in any of the religions (...) Preferring one of the religions as a state would be against the principle of equality regarding the citizens who believe in a religion other than that. The secular state is the state which treats all the citizens equally without paying attention to their religious beliefs.*

*(...) state should not make any differentiation between the people who have different beliefs when using the punishment authority that belongs to her (...) freedom of religion is not a basic right which belongs to the people who has faith only in celestial religions. Everybody living on the lands of the country has the same freedom (...)."*

<sup>11</sup> Decision of the Constitutional Court, 4 November 1986, E. 86/11 and K. 86/26; *Official Gazette* 22.2.1987, Issue 19380; after the annulment decision of the Constitutional Court, this kind of discrimination was not repeated.

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b. The “*Jehova’s Witnesses*” decision of the 9<sup>th</sup> Criminal Chamber of the Supreme Court of Appeals is also related to the freedom of religion. The decision of the Ankara State Security Court was stating that, “*the witnesses of Jehova is not a religion (...) Because it is not a religion, they can not enjoy the rights which are recognized for the religions and the believers of those religions such as the right to believe and perform his/her religion or to make the propaganda of his/her religion*”. This decision of the Court was overruled by the Supreme Court of Appeals. The reasoning of the Court is as follows:

*“As a result of the freedom of religion, there is no differentiation between the actual religions or religions that might emerge in the future, and the decision to believe in any of these religions is left to the free will of the people. For this reason, the people are free to have a belief in any religion whether it is universal or not, with the condition of not breaking the general restrictions mentioned in the last paragraph of the Article 24 of the Constitution. It is not a condition that the religion in question should be an independent one in order to enjoy the freedom of religion.*

*There may be some faiths which carry some qualities that are against the secular principles and order. People can not be blamed for their faiths as such. There is no obligation to think in complicity with the secular system or to have a religious belief. What is obligatory is to act in compliance with the secular system. As long as a the believers of a religious faith which is in contradiction with the secular order are not organized to impose their religious belief as an obligation or an universal belief, or do not make the propaganda of their belief in respect to those aims, no claim of unlawful act can be set forth. This understanding is valid for all other religions or religious believes (...)*

*Under the light of the fundamental tenets, whether the Witnesses of Jehova is considered as an independent celestial religion, a sect or a brotherhood or as a religious society, it is indeed a religious view and a system of thought and in respect to this it is under the guarantee of the Constitution.”*

When the State Security Court insisted on its own decision in spite of this decision given by the Supreme Court of

Appeals, the case was brought before the General Assembly of the Criminal Chambers of the Supreme Court and the General Assembly approved the decision of the Chamber of the Supreme Court of Appeals.<sup>12</sup>

4. The decision given by the 8<sup>th</sup> Criminal Chamber of the Supreme Court of Appeals in 2002 is a new interpretation shedding light on the concept of spontaneous meeting which is not mentioned in our laws.<sup>13</sup> According to this interpretation spontaneous meeting does not constitute the crime of illegal meeting and demonstration. The reasoning for the decision is as such:

*“Even though the activities of the Eurogold Company which was carrying on gold researching activities with cyanide in Ovacık-Bergama were stopped due to a denunciation, with the thought that the company kept on his activities, the people coming from different surrounding villages made a demonstration on the Çanakkale highway without taking such a decision in advance. This demonstration which was an expression of a social reaction does not carry the crime of an illegal meeting or demonstration which is mentioned in the Article 28/1 article of the Law numbered 2911 (...)”*

5. Another very important decision related with the freedom to organize labour unions was given by the Military Court. The Turkish Revolutionary Labour Unions Confederation (DİSK) and the 28 labour unions which are members of this confederation were disbanded by the Second Military Court of İstanbul. This decision taken was annulled by the 3<sup>rd</sup> Chamber of the Military High Court of Appeals, although a prohibitive clause in the Law of Labour Unions existed.<sup>14</sup> The Martial Court, gave its decision of closure due to the 30/4<sup>th</sup> article of the Law on Labour Unions code 274.<sup>15</sup> The first paragraph of the Article

<sup>12</sup> Decision of the General Assembly of the Criminal Chambers of the Supreme Court of Appeals, 26 May 1985 and E. 85/9-596, K. 86/293.

<sup>13</sup> Decision of the 8th Chamber of the Supreme Court of Appeals, 27 June 2002, E. 02/949, K. 02/7518

<sup>14</sup> Decision of the 3rd Chamber of the Military High Court of Appeals, E. 1991/122, K. 1991/437.

<sup>15</sup> When the Martial Court gave this decision Labor Unions Law numbered 2821 was in effect. However, the Court considered that the provisions of

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15 of the Martial Law, gives the authority to annul the labour unions, if there is evidence that the labour unions carry on activities which underpinned the declaration of the state of martial law. However, the Law numbered 274 stipulates that if the union is established to maintain the dominance of one social class over another, this is also a reason for disclosure. The Anti-Terrorism Act (numbered 3713) which took effect in the appealing stage of this case, abrogated the Articles 141 and 142 of the Turkish Penal Code and Articles 5/7, 8 and 6/2 of the Law of Associations on the grounds that it restricts *“the freedom of expression and the right to organize associations which do not apply violence, and therefore hinders the way to a democratic society.”*

6. Another decision of the Military High Court of Appeals can be given as an example. This decision given in 1995 was about the declarations of a retired nurse who attended a TV programme of a local channel in Trabzon. The retired nurse has made statements on compulsory military service and the combats that take place in the South Eastern Anatolia. To highlight the importance of the decision I am quoting some parts of the statements of the nurse: *“(...) today there is a war going on in the South East. Our children are forced to go there but the children of the rich people don't. I have a son who is in the age of military service. I am telling this frankly here that I won't let my son go there. The reason for this is that they give a medal to the mothers of the young men who die there only for a show. Why should I send my son to Southeast to torture the people living there? Yes, they are torturing people there. (...) They start fire in the villages. Do they start the fire or not. Maybe it is a helicopter of PKK who bombs, I don't know. Do they have a helicopter or not? (...) But I am not defending the PKK here; I would like to mention this also. I will never defend them. What I defend are our children. They are dying for no reason (...)”* Because of these statements, the defendant was sentenced to two months of prison by the first instance military court. However, the 3<sup>rd</sup>

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the previous Law numbered 274 were in favor of the defendants regarding the disclosure of the labor unions and applied the provisions thereof.

Chamber of the Military High Court of Appeals annulled this decision with the reasoning given below:<sup>16</sup>

*"The claims of torture and giving the villages on fire in the territory of the state of emergency, is not something which is set forth for the first time by the defendant. As long as these subjects are not debated and made clear, it is impossible to maintain the peace in the country. In a democratic society and in a Rechtsstaat, there is no alternative for solving the problems. Additionally, there is no evidence that the defendant is trying to impose her ideas against the military service to other people. (...) Even though some of her expressions go beyond her aims, when her speech is considered as a whole, it is seen that she did not use these expressions to impose negative feelings about the military service."*

The final decision on this case was given by the Plenary Assembly of the Chambers of the Military High Court of Appeals upon the application by the Attorney General of the Military High Court in accordance with the decision given by the 3<sup>rd</sup> Chamber.<sup>17</sup>

#### IV. Examples From The First Instance Courts' Decisions

1. The decision numbered E. 96/476 and K. 97/8 and dated 20.1.1997 of the Bakırköy Felony Court which was not appealed and hence became final is an interesting example, because it carries parallel features with the decisions of ECHR regarding the freedom of expression. Çetin Altan (a former deputy and a famous writer) was sued with the claim of insulting the Turkish Republic, because he answered one journalist who was making an interview with him as such: *"I wish that the state stops acting like a gang and act in the limits of the law. I have been writing for 50 years. They are not influenced at all, but if I live another fifty*

<sup>16</sup> Decision of the 3<sup>rd</sup> Chamber of the Military High Court of Appeals, 24 October 1995, E. 95/760, K. 95/756.

<sup>17</sup> Decision of the Plenary Assembly of the Chambers of the Military High Court of Appeals, 7 December 1995, E.95/128, K.95/124.

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*years I will keep on writing the same things.” After considering the interview as a whole, the court decided that there were no elements of the alleged crime. The decision carries an importance also because it was given despite the existence of the Article 159 of the Turkish Penal Code (Later this article is abolished). The architect of this decision Justice Ali Güzel –a member of the Constitutional Court at present- is now with us. When he learned that I was preparing for such a presentation and made a selection of judicial decisions, he brought me this decision saying: “We gave this decision in 1997, but at the time we were not even aware of such formulas of ECHR about the freedom of expression. But all the roads end in Rome. With common sense it is possible to end up in the same point. We told similar things at that time too.”*

Now I am reading some parts from the reasoning of this decision:

*“Expression of the ideas and criticisms is a necessity of democracy and civilization. The existence of the freedom of expression is possible not with the expression of the ideas of the majority or of the forces who is in power but with the expression of the ideas opposing to them. The tolerance shown for different ideas is a major step in eliminating the mistakes and the progress of the society. The true guarantee of a democratic society based on the rule of law lies in the sensitivity and the consciousness of the people.*

*Considered in respect to these principles, it is seen that Çetin Altan whose interview is in question, was expressing his wishes to ameliorate the society and the state and at the same time in his critics he is expressing his reaction against the manners, views and practices that he found inappropriate. The sensitivity of the society is possible with the dependency to the rule of law. It should be pointed out that the differences in the form of expression should be tolerated if the plurality is accepted.*

*The interview in question, when taken into consideration as a whole, expresses the thoughts and criticisms of the person interviewed. Therefore the alleged crime is not committed.”*

**As a conclusion:**

The decisions that I presented here are not the products of a long research. With a little effort it is possible to find similar examples. Of course, it is impossible to say that all the judicial decisions carry the same peculiarities. There exist decisions, which should be criticized. However, it should not be forgotten that the judiciary is a part of the society. If it can produce such decisions in spite of this fact, this means that it deserves to be described as a "*rising star*".

If the constitutional and legal reforms that were realised in the last years are taken into consideration with attention, they can pave the way for the judiciary. Although some of these reforms were realised thanks to the influences of some exterior dynamics, the judiciary has the talent and the experience to internalize them. On the other hand, it is seen that in the last years the first instance courts are exposing a more liberal approach and they appeal to the Constitutional Court when they face with problems caused by the Laws and which they can not solve themselves. They also refer to the decisions of European Court of Human Rights very often, both when they appeal to the Constitutional Court claiming the unconstitutionality of a law and when deciding on the merits of a case. It is possible to claim that the human rights education given to the attorneys, judges and the public prosecutors has played a great role in this progress. However, it should not be forgotten that the 2001 amendments to the Constitution also played a decisive role in this progress, too.

In addition, it is not hard to estimate that this progress will show a more intense augmentation due to two other reasons.

- The fact that the decisions of ECHR are accepted as a reason for granting a new trial in the juridical and administrative judiciary. This is something which will maintain the direct influence of the decisions of ECHR on the courts.

- The constitutional amendments made in 2004 has attributed the international agreements relevant to human rights a

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supreme authority over the domestic law (Last Paragraph of the Article 90 of the Constitution). This regulation is at first place directed to the courts with special jurisdiction. In other words, the first instance courts that function in the fields of administrative and military judiciary and their appealing authorities are subject to this clause of the Constitution. While practicing this clause, the courts will question whether there exists a conflict between the domestic law and the regulations of the international agreement or not. If they determine such a conflict, they will obey to the clauses of the international agreements. However, it is very difficult to determine these conflicts only by looking at the texts of the international agreements, since the clauses of the international agreements are much more abstract than the domestic laws. On the other hand, the norms of the European Convention on Human Rights are elaborated by the decisions of the ECHR. In this respect, it is nearly impossible for the courts to apply the new regulation regulated in the amended Article 90 of the Constitution without looking at the decisions of the ECHR. This is a second factor that will increase the effect of the ECHR on the Turkish judicial system.

I am aware that I have been very optimistic. Going further, I can say that I am doing this consciously. I do know that we have lots of problems and defects regarding our judiciary. However, I want to tell this: Turkey has a vast experience on Rechtsstaat that we can't even compare with the experiences of the countries that gained their freedom with the collapse of the Soviet Union and which subsequently started the accession process to the European Union. If this experience wouldn't exist, even the most ideal reforms that would be made on the field of judiciary wouldn't work out. The advantage of Turkey is that we have an experienced judicial body which has the talent to put all the reforms to be made in the field of judiciary into realization.

To conclude, I would like to mention three main defects that I consider important in the field of judiciary.

**First:** The judges and the Supreme Council of Judges and Public Prosecutors who are the focal point of the independence of the judiciary must be rescued from the *de facto* domination of the executive body and politics and should be restructured in accordance with the 1961 model.

**Second:** The professional education of the judges should be maintained through an independent academy of justice and especially they should be given a foreign language education which will make them able to use a foreign language in their profession efficiently. This point now gained a greater importance as we are now in the accession process to the European Union. If we don't consider the professional and foreign language education of the judges important, we will face important problems in harmonizing our law with the law of the European Union countries.

**Third:** To maintain the efficiency of the constitution in all fields of law, the constitutional complaint must be adopted for the individuals and the Court should be restructured in a two chamber model in order to use this authority efficiently.

# **SECOND DAY FIRST SESSION**

**The Role of the Judiciary in  
Consolidating Democracy:  
“Old Democracies”**

**Chair of the Session**

Prof. Dr. Ergun ÖZBUDUN  
(Bilkent University)

Professor Pasquale PASQUINO (Research Director at CNRS; Visiting Professor in Politics and Law at NYU)\*

PASQUALE PASQUINO

Thank you very much Mr. President. I want to give you some brief information about the Italian Constitutional Court. The institution was established by the Italian Constitution after the Second World War in 1947. However, the court has started to work in 1956 due to several reasons. The debates concerning the establishment of this organ in the constitutional assembly were extremely interesting. Probably, so far I know these were mostly interesting debates, because when in 1919 the Austrian Constitutional Assembly established the first European Constitutional Court upon the proposal by Hans Kelsen, there was surprisingly no debate. Everyone agreed in Austria. On the contrary, in Italy there were tough discussions, because both the socialists and the communists and the few liberals opposed to the proposal which came from the democrats and a small non Marxists party on the left. These debates supply sufficient information where one can find the main arguments in favor of and against the constitutional adjudication. However, I can not get into details at the moment. These long discussions which took place in the fall of 1947 is probably the most interesting discussions concerning the establishment and the introduc-

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\* Text of the oral presentation made by Professor Pasquino.

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tion of a constitutional court. The Italian Constitutional court was, according to, what we call now, the European model, the Kelsenian model, a specialized body with the monopoly of constitutional adjudication. See that the original American model, judicial review is deeply different as there is no specialized organ in charge of constitutional adjudication. Instead any court and the Supreme Court as the supreme appellate court have the last word in constitutional adjudication. Therefore this work is done by the judicial system as a whole. This is not the case in Europe. And that was also a question debated in the Italian Constitutional Assembly. Why to choose a specialized organ? I want to give you some information about the three following points, which seem to me important to understand the working of these organs and the differences between them. The composition of the court, the way our justices are appointed. The jurisdiction, as how we say in Germany the competencies, the power of the organ and the third, perhaps more important one, the mechanism of referral. Finally, the effect of constitutional judicial review in the Italian political system in general.

The Court is composed of fifteen justices, who have nine-year mandate that cannot be renewed. Sociologically speaking, 2/3 of the members of the Italian Constitutional Court have been and are still now law professors. To be a member of the Italian Constitutional Court one has to be either a judge in the High Court or a law professor or a lawyer with twenty years of professional experience. Therefore, it is not only a specialized court; it is also a court of specialists. We see that this is not a requirement in France. In France, even philosophers or sociologists, may be members of the Constitutional Council. In Italy only people like you, law specialists can be appointed as a judge. Therefore, members have been mostly law professors, prominent law professors and high judges. The parliamentary procedure regarding the appointment of the justices is a little bit complex. One third of the members, which makes five, are appointed by the high courts, Italian Council of State, the Italian "*Court de Cassation*" and the Italian Court of Accounts. So, one third is made up of high justices. One third is appointed by

the two houses of the parliament in accordance with the procedure which resembles the German system. The super majority of the two houses together have to choose five judges, which is important, as simple majority for the appointments by the parliament is not enough. So you need the approval of the opposition in the parliament to appoint a judge which seems quite wise. The last one third is appointed by the President of the Republic. Now, my personal opinion is, this seems not a very wise rule. Up to now, the Italian President of the Republic has normally been appointing prominent law professors. But since this is a monocratic decision and since there is no reason to be sure that the President will be always a wise person, giving the authority to appoint five justices to the President seems unwise. Since the Italian President has no democratic legitimacy, fortunately he attempts not to appoint his friends, but mostly prominent law professors. It would not be decent for a democratic President to appoint his friends. If you have democratic legitimacy you can do whatever you want. That is the danger of democratic legitimacy. However, decency has to do with self restraint and as I told you we were lucky up until now we had self restraining Presidents. But God knows what is going to happen in the future. So, I believe that the only good mechanism of appointment is the German one, which Italy applies for only one third. I mean the super majority principle. The Parliament jointly with the opposition has to choose wise and non-extremist people to this very important and sensitive institution.

When we come to the competencies of the Court, the rules are very simple in principle. The court is a judge of statutes. Acts of administration can not be referred to the Court. Only laws, statutes can be brought before the Court in accordance with the procedures which I am going to tell you. The court has to adjudicate according to the Kelsenian model concerning the compatibility of the laws with the constitutional principles and values. What is more interesting is to analyze the mechanism of referral. The courts are passive organs all around the World, which means that they can not make any decision *ex officio*.

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They have to be asked to make a decision. As Kelsen said, in the crucial text of 1928 about the constitutional adjudication, the mechanism which opens the door of the court it is extremely important. That is the mechanism of referral. In Italy, simplifying the key of the door of the Constitutional Court is in the hands of the ordinary judges. More than 90 % of the referrals are sent to the court by ordinary judges. Either because they have some reason, I tell you why, or because, councils, lawyers in the trial ask the judge to send a question to the Constitutional Court. So, as I told you yesterday, it seems to me that this is also the mechanism in Turkey. Therefore, lawyers and ordinary judges have a crucial role in the working of this mechanism, since actually it is up to the ordinary judges to send a referral or not to the Constitutional Court. The Italian judges have been quite willing, starting from the 70's, to send cases to the Court. This is underpinned by two reasons. First, according to the constitutional law, they may send referrals to the Court if they have even a slightest doubt about the constitutionality of a law. To clarify, during a trial, the judge, either because he or she thinks so, or because the parties in the trial ask them, may send a referral to the Court before deciding on the merits of the case. That is the difference with the United States system. Before the decision, one judge can send a question to the Court asking, "*Should I apply this law or not?*", "*do you think that the law I should apply is constitutional or not?*" Thus, the trial is suspended and the question is sent to the Constitutional Court. That is the question concerning the constitutionality of a statute the judge should apply in the case. The Constitutional Court is not a court deciding the case; it is only a Court answering a question about the constitutionality of statutes. So the ordinary judge at high level, the district court, the Appellate Court or the "*Cassation Court*", can send a question concerning a law. When this done, they wait for the answer and then the Constitutional court in Rome send the answer. Afterwards they go on with the trial, applying the law or not applying the law according to the answer of the Constitutional Court. There is a sort of an intimate dialog between ordinary judges and the Constitutional Court.

This is a mechanism of questions and answers. However, the Constitutional Court is not a part of the judiciary in Italy. In the Italian Constitution, the Constitutional Court is a part of the organs for guaranteeing the constitution. It is not such a judicial body. It is a court but is not a part of the judiciary. It is the guardian of the constitution with the president. Italy was able to put together both the president and a judicial body in order to protect the constitutional order. The dialog is between the ordinary judges asking questions, and the Constitutional Court sending answers concerning the applicability and effect of some statutes. Now, the effect of that is important, because as you know Italy, like most of the European political and constitutional systems has a parliamentary governmental system. This is a system where political parties and majorities control both the parliament and therefore the legislative power and the executive power. The old system of checking balances in the thought of Montesquieu where you have an independent executive, the king, and an independent parliament, watching each other and moderating each order. With the emergence of the representative government and political parties this old system of moderation was destroyed. For sure, the executive is not a check upon the parliament and vice versa is also valid. The executive is politically accountable to the majority under the control of the same political party or same political alliance. So, we moved into a -because of the parliamentary state- sort of a new absolutist system where the conjunction between ordinary courts and constitutional courts is the only counter power. This is the only possibility of having moderation. That is why politicians who do not like moderation try to reduce the independency of the judiciary and to modify the structure of the constitutional court. This is, in their view necessary for avoiding counter power. No one likes counter powers except the academics who do not have any power. On the other hand political actors do not like it. Why should they? Fortunately the founding fathers of the Italian constitutional system having the experience of fascism, prison and oppression, had good reasons to like counter power. So, they invented this mechanism

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because it is pretty clear that the people, who introduced that, had in mind counter powers and moderation. The man who is at the origin of this structure is one of the greatest Italian lawyers, Piero Calamandrei who wrote the draft for the constitutional adjudication in the constitutional assembly.

Now, I want to finish just saying two things. That is the effects of the court decisions. Decisions have three major effects. First, since Italy changed its constitution but did not change its penal code after the Second World War, we had a very good fascist criminal code. I say very good, because the guy who wrote that was Alfredo Rocco and he was an eminent lawyer. Therefore, Italy was able to export its penal code to Cuba, which was a conservative country at that time, and to Stalinist Russia. It was a pretty successful Code, not only among the democratic countries but in general. It was a good idea to export to the authoritarian countries a penal code. So, the code was technically good but it was fascist in nature. Therefore, the Constitutional Court had to clean up the criminal code from the fascist views in the sixties. This has been the first important and a finished job. The second task was to rewrite the laws, not because the legislator was wrong or abusing its power, but because the legislator writes statutes under a veil of ignorance, meaning that they do not know what is going to happen while implementing the laws. Legislator has to write a general and an abstract law, and then people start to apply it. Then you see something you could not expect. So, there is the possibility to constitutional adjudication to modify laws, not because you think that the legislator was wrong. That would be childish to think that constitutional adjudication is simply opposing to the legislator. Instead it may be helping the legislator to find a better formulation; a constitutional interpretation to cope with an unexpected effect or a consequence. And the third aspect, which is very unique to the Italian system is that, Constitutional Court has to make decision on the constitutionality of popular referendums. In Italy, as you may know, there are some direct democracy elements in the system. And the most used one has been the mechanism of abrogative referendum. So, any

law passed by the Parliament, since we do not believe that the Parliament or the people are in a sort of a mystic union, so we believe that there might be a parliamentary decision, which does not comply with the general will. We don't believe that the parliament has the monopoly of the general will. It is possible that the parliament decided "A" and the public opinion want "B". So, the public opinion may be asked to decide to abrogate a law passed by the parliament. In Italy sovereignty is paired between the parliament, the court and the people. And there is, by the way, the following constitutional provision that before having a referendum the Court has to decide if the referendum is constitutional. Suppose you want to propose a referendum to abolish women's right to vote. Well, the court will say "*no, you sovereign people, you can not deprive women of the right to vote*". Because this is a constitutional right, which is at the origin of the system, when we established the Italian republic, women had the right to vote. And you may want to make a revolution against the women but you cannot abolish that through a referendum. So, the court is not only the guardian of the parliament, but it is also the guardian of the popular decisions in the sense that popular decision can not concern everything but only what is compatible with constitutional principles and values. I thank you all for listening to me.

Professor Cornell CLAYTON (Washington State University)\*

CORNELL CLAYTON

In addressing the role of courts in American democracy I wish to focus my comments on what the American experience has to offer lawyers and constitutionalists in Turkey and in Europe more generally. In particular, I wish to challenge the idea, common in the US and also in Europe, that courts, and more broadly the institutions of the "*rule of law*," are counter-majoritarian institutions. Thus I hope to challenge the idea that courts and the rule of law are, by themselves, protections against the arbitrary exercise of power or protections of democracy against itself. If restricting the exercise of arbitrary power is our goal, the answer lies in democratic politics not law. If we get the politics right the law will take care of itself.

In English the word "*bar*" has more than one meaning. Besides the bar that lawyers belong to, there is also the bar where one can enjoy certain beverages. Both types of bars are important to legal and political theorists, and today I turn to

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\* Paper presented by Professor Clayton is titled "Courts, Democracy, and Constitutional Change in the United States: Reflections on the 2004 Election".

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the latter type of bar for my inspiration. More than a century ago the American satirist, Peter Finley Dunne, created a fictional bartender-philosopher named "Mr. Dooley." One of his character's more important insights regarded the role of courts in a democracy. Those who fretted about the undemocratic nature of judicial review, Mr. Dooley counseled, need not be concerned, "*th' supreme coort*", he said, "*follow th' iliction returns*" (Dunne 1901).

What a fictional bartender understood in 1901 still escapes many legal and political commentators today whom alternately champion or bemoan the judicialization of politics. The simple fact is that the role of courts in any democracy is always tied to broader political structures and developments. In this sense, it is nearly impossible to say anything interesting about the role of courts in democracies in general. The judicial role, both as a normative and a descriptive matter, will differ in different countries and in different political periods or contexts.

This point is clear if we look at a few recent examples of judicial interventions into democratic politics. In the Ukraine, for example, the Supreme Court recently took the extraordinary step of overturning a presidential election after there was widespread electoral fraud by the governing party. This no doubt will be hailed by many as the act of a heroic judiciary, stepping up to safeguard democracy against political corruption. I certainly do not mean to diminish the courage of the judges on that court. Indeed, given the fact that the governing party may have poisoned the opposition candidate, these judges literally put their lives, not just their professional careers, at risk. Still, it would be hard to imagine the Ukrainian Court's action in a different political context. Not only was there a constitutional framework authorizing judicial intervention in the election, but also support from the Ukrainian Parliament for the Court to do so. There was also a powerful opposition party, supported by the majority of Ukrainians, which had thousands of supporters demonstrating in the streets of Kieve. The independent action of Ukrainian Court, in other words, was produced not only

by the brave action of individual judges, but by a political and institutional context that made such action possible.

Similarly, four years ago, the US Supreme Court decided the outcome of a presidential election in the United States. It did so by a five-to-four decision and on the basis of legal principles that it limited to that case alone. This was not a decision of "law," it was an exercise of pure political power (Miller 2004). Indeed, the decision in *Bush v. Gore* (2000) was seen by many commentators as judicial independence run amok, an arrogant judiciary riding roughshod over democracy (Balkin and Levinson 2001). Other commentators saw it as an act of judicial statesmanship, an example of how an independent judiciary transcends partisan politics to resolve a constitutional crisis (Posner 2001). Regardless of how one sees *Bush v. Gore*, the Court's action would have been inconceivable in a different political context. What made the Court's exercise of power in that case possible was a unique set of political-institutional factors: (1) there was an established legal framework (going back to at least *Baker v. Carr* 1962) legitimizing judicial intervention in elections; (2) the leaders of both major political parties accepted that it was an appropriate role for the Court to resolve the dispute even before the case was heard; (3) there was a virtual dead-heat in the popular vote which clouded claims about democracy, and a closely divided public, half of which would support the Court's decision either way the case was decided; and (4) the justices knew that Congress would be controlled by the Republican Party, and thus had no fear of Congress challenging their decision. All of this created a context where a Supreme Court, with nine non-elected judges, decide the outcome a national presidential election. There was no revolution in the streets, no real threat to the legitimacy of Bush's presidency, and no long-term damage to public confidence in the Court itself.

My point is not to argue that courts are unimportant to democracy, but rather to suggest that how courts matter depends on broader forces defining the overall constitutional regime of

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which they are part. With this in mind, let me turn to the role of courts in the American political system, and in particular I want to encourage you to think about the recent presidential election in a broader historical context. If we do, there is every reason to believe that the U.S. is at a crucial juncture in its constitutional history, one being largely over-looked by popular media and even by many legal and political scholars. In short, I will argue that George Bush's reelection may represent the completion of a transformation in the American constitutional system that began with the election of Ronald Reagan in 1980. In this sense, Bush's presidency may have profound, long-term consequences for American constitutional development well beyond what one might normally anticipate from a two-term president.

### The Idea of "Constitutional Regimes" and the Role of Courts

The American Constitution is typically thought of as the oldest continuous written constitution in the world. Yet anyone who has studied American history knows that today's political system bears little resemblance to the constitutional order of 1789. While some changes to the American constitutional system have occurred in an evolutionary manner, others have not. Indeed, constitutional historians identify periods of relatively abrupt change during which the American constitutional system has undergone tectonic shifts that realign the entire political system. These periods of change produce stable sets of institutional arrangements through which ordinary political decisions are made over a sustained period, or what some have called "*constitutional regimes*" or "*constitutional orders*" (Ackerman 1991, Clayton and May 2000, Tushnet 2003).

Political scientists have tended to explain these periods of constitutional transformation by focusing on patterns of electoral-party politics and especially on the role of "*critical elections*." These elections (usually presidential elections) produce dominant political parties or group coalitions for a

generation or more in their wake (such as the 1932 election that produced the New Deal Democratic Party, or the 1860 election that produced the Republican Party of Lincoln). The ideology of these dominant group or party coalitions in turn shape the terrain of political debate and structures public policy-making, creating durable "*political regimes*." The classic statement of this understanding of American political history is Dean Walter Burnham's magisterial study, *Critical Elections and the Mainsprings of American Politics*, that was published some 35 years ago. A more recent and important addition to this literature is Stephen Skowronek's book *The Politics Presidents Make* (1997), which examines the key role played by presidents in the building of political regimes. Specifically, Skowronek argues that "*transformative presidents*," such as Lincoln or Franklin Roosevelt, use critical elections to confront and change existing constitutional structures so as to entrench their ideological values and perspectives long after they leave office.

In the legal academy, on the other hand, scholars tend to explain periods of constitutional change by focusing on what Yale Law Professor Bruce Ackerman has called "*constitutional moments*" (Ackerman 1991). In this view a realignment of politics is brought about through the acceptance at a given point in history of a new normative constitutional vision, one that is both coherent and embedded in legal documents, practices, or judicial understandings. More recently, law professors Jack Balkin and Sandy Levinson (2001) have argued that such periods of constitutional change do not need to be sudden, as in a particular election, but can occur more gradually through a process of "*partisan entrenchment*," as one party gradually extends its control over all three branches eventually including the judiciary.

Regardless of how one characterizes the rise and decline of constitutional regimes in American history, it's clear that they have had profound consequences for the role of courts in American democracy.

Unfortunately, scholars of courts in the U.S. have largely missed this fact. Indeed, for the past half century scholarship

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on the role of the Supreme Court in American democracy has been based around a premise posited by Alexander Bickel in his famous book *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). Bickel argued that the power of judicial review was fundamentally “*counter-majoritarian*” in nature, and that the need to reconcile the exercise of that power with democracy constituted the central problem for American constitutional theory. Ever since, scholarship within the legal academy has, with few notable exceptions, focused almost pathologically on this single question, rarely examining the empirical assumptions behind it (Friedman 2001).

To be sure, when the Supreme Court strikes down an act of Congress or invalidates an executive branch policy it defies specific expressions of majoritarian sentiment. That fact alone, however, does not make such decisions undemocratic or even counter-majoritarian. Many of you may be familiar a now well-developed line of normative constitutional argument, beginning with John Hart Ely important work *Democracy and Distrust* (1980), that differentiates between majoritarian and democratic principles, and defending counter-majoritarian judicial review – say when the Court strikes down majoritarian laws restricting free speech or political participation by minority groups – as consistent with democracy properly understood. My concern here, however, is not about how best to understand democracy, but rather with the empirical validity of Bickel’s premise that the Court in exercising judicial review acts in a counter-majoritarian way at all.

There is now a large body of empirical research in political science and history that demonstrates that this is rarely the case. For example, in his classic 1957 study, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, Robert Dahl analyzed cases where the Court had struck-down federal statutes and found it rarely invalidated policies favored by the current dominant political party coalition. In almost every case, the exercise of judicial review targeted older laws that had been passed by majorities that were no longer in

power. Similarly, other scholars found that when the Court struck-down state and local laws, it did so in order to extend the political values of the national governing coalition to regional outliers -- as, for example, when the Court struck-down racial segregation policies in the South in *Brown v. Board of Education* 1954 (Casper 1976). Others have pointed out that far from opposing the exercise of judicial review, national political elites often invite judicial activism in order to address politically intractable policy issues such as the slavery question or to more effectively entrench certain policies, as may have been the case with abortion rights (Graber 1993).

In effect, then, judicial review, rather than a check on majoritarian power, is better understood as a mechanism for repealing inherited and outdated legislation, extending national policies to recalcitrant local jurisdictions, and shifting responsibility for dealing with more intractable policy problems. In this sense, the federal courts have traditionally served as institutions that legitimize the ideological agenda of the dominant national party coalition, and for delegitimizing the policies of previous or alternative political groups. And building on this key insight, political scholars have developed a large body of empirical research that ties judicial decision-making to specific patterns of party politics, critical elections, and the policy agenda of the national governing coalition (Shapiro 1964, Funston 1975; Adamany 1980, Lasser 1985, Gates 1987, 1989, Clayton and May 2000, Halpern and Lamb 1998, Pickerill and Clayton 2004).<sup>1</sup>

The fact that the policymaking role of the federal courts is fundamentally tied to relationships within and between the democratically elected branches of the national government should not be surprising. Federal judges in the U.S. are ap-

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<sup>1</sup> Other scholars have shown how national elites have expanded judicial power in the past in order to entrench policies that are the process of becoming politically vulnerable (Gillman 2002, Hirschl 2004). For an excellent overview of political regimes literature examining the role of the courts see Gillman 2004.

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pointed by national party leaders, who attempt to ensure that the judges they select share their party's political ideology and policy agenda. That is why presidents and senators overwhelmingly select judges from among their own party activists or loyalists (Goldman 1999). Even with life tenure for judges, the ordinary turnover of judicial personnel insures that courts remain firmly under the control of the governing political regime. At the Supreme Court level, for example, there has been historically an appointment to the Court on average every 2 years.<sup>2</sup> That means, on average, if a party maintains control of the elected branches for ten years or more it is likely to have appointed a majority of the justices on the Court. Moreover, the judiciary was constitutionally designed to be dependent on the elected branches in numerous other ways – Congress' power to impeach judges, to control the courts' jurisdiction, to set the level of staffing and budgets, and through the power to enforcement or not enforce judicial decisions. Given these institutional dependencies, it would be remarkable indeed if the federal courts were ever out of sync for long with the values and policies of the dominant party coalition. Indeed, these constitutional features of judicial dependency are what Alexander Hamilton referred to in Federalist No. 78 when he predicted that the judiciary would be the "*least dangerous branch.*"

Now I am not suggesting here that the Supreme Court's decisions always advance specific values or policy goals of the dominant party coalition. The institutional features that fix the Court to the political system operate at a macro-level and do not produce lock-step coordination. Under some circumstances the Court may deviate quite far from specific policy preferences of the dominant political coalition, so long as it does not challenge the coalition's core ideological values and constituencies. It is also possible that changes in the Court's personnel and attitudes will lag developments in the elected branches, espe-

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<sup>2</sup> Including elevations to Chief Justices, there have been 114 appointments to the U.S. Supreme Court. Between 1789 and 2004 there has been on average one appointment every 1.89 years.

cially during periods of rapid and sweeping electoral changes. During such periods it is possible for the Court to set itself up against the ruling political coalition for a short period of time, as the Court did between 1932 and 1937 when it struck-down key parts of Franklin Roosevelt's New Deal (Ackerman 1991, Leuchtenburg 1995). Such non-majoritarian behavior by the Court, however, will always be temporary and short-lived as the political processes of judicial selection will eventually bring the Court into line with the dominant political values and preferences. In general then, federal courts in the United States have historically acted as reliable partners in extending, entrenching, and legitimizing the political agenda of the dominant party coalition, not as effective counters to it.

### The New Deal Constitutional Regime And The Processes Of Regime Change

If it is easy to identify past constitutional regimes and the role played by courts in their construction and maintenance, it is more difficult to know if the U.S. is in a period of regime change currently, and, if so, what role the Supreme Court is playing in the process. To understand this problem it is helpful to know something about previous periods of regime change. For example, the ascendancy of the Republican Party after the election of Lincoln in 1860 is usually seen as a critical election that transformed American party politics for the next sixty years. Lincoln's Republican Party went on to reshape the American constitutional order through a series of constitutional amendments and statutory reforms that helped to nationalize and democratize American politics. Similarly, the election of Franklin Roosevelt in 1932 is generally viewed as another critical election, and the reforms ushered in under the New Deal led to the establishment of another constitutional order (Burnham 1970, Ackerman 1991, Skowronek 1997).

What both of these periods of constitutional regime change had in common was an extended crisis that allowed partisan attachments of voters and the constitutional vision of a "trans-

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*formative president*" to become "*sticky*" and to solidify in the political system. In the case of Lincoln it was the Civil War and the aftermath of Reconstruction. In the case of Franklin Roosevelt it was the Great Depression and WWII. Not enough attention has been paid to the role of crises in the entrenchment of regime change but it is clear that they are important. In past periods of change, a sense of crisis was used by presidents to demobilize and delegitimize political opposition, while simultaneously allowing him to plausibly claim that constitutional change was necessary for the very survival of the constitution itself (Ackerman 1991).

These two previous periods of constitutional regime change, however, differ in important ways. In contrast to the Civil War period, the New Deal did not produce formal constitutional amendments. Instead, the mechanisms for constitutional change were simply alterations to existing political practices and judicial re-interpretation of certain constitutional-legal doctrines. Indeed, after his reelection in 1936, Franklin Roosevelt threatened to "*pack*" the Supreme Court (expanding its size from 9 to a maximum of 15 justices) if it did not change its interpretation of the Constitution to permit his New Deal programs. In the now familiar story, the Court blinked first in this confrontation, and in early 1937 it began upholding Roosevelt's policies. Roosevelt went on to appoint the next nine justices to the Supreme Court, guaranteeing that his New Deal political ideology would be constitutionally entrenched by the Court for years to come (Leuchtenburg 1995).

The New Deal Supreme Court realigned constitutional doctrines in numerous ways. For instance, it:

- abandoned the doctrine of "*vested rights*" or the Lockean idea that natural rights imposed limitations on government power (repudiated in *West Coast Hotel Co. v. Parrish* 1937)
- it discarded the so-called "*non-delegation*" doctrine, which had kept Congress from delegating policymaking authority to a regulatory bureaucracy (declared "*moribund*" in *FPC v. New England Power Company* 1974)

- it dismantled the doctrine of “*dual sovereignty*” under the 10<sup>th</sup> Amendment which had been used to limit federal regulatory power (repudiated in *United States v. Darby* 1941)
- it backed away from its narrow view of Congress’ ability to tax and spend for purposes of social welfare programs (repudiated in *Steward Machine Co. v. Davis* 1937)
- and it abandoned its cramped understanding of Congress’ interstate commerce clause powers, which had been used to invalidate federal economic and welfare legislation (abandoned in *NLRB v. Jones and Laughlin* 1937 and *Wickard v. Filburn* 1942).

The changes made in these and other legal-constitutional doctrines thus paved the road for the New Deal political coalition to construct the modern social-welfare, regulatory state in the U.S. Moreover, as the Court legitimized the expansion of federal regulatory power, it also carved-out a new role for itself by developing a modern “*Due Process*” and “*fundamental liberties*” jurisprudence under the 14<sup>th</sup> Amendment. The doctrines associated with this jurisprudence allowed courts to become proactive and not just a passive or reactive partners with the New Deal political coalition in promoting policy change. Under the doctrine of “*incorporation*” and the doctrine of “*substantive due process*,” the Court advanced the New Deal political agenda in areas ranging from race relations, to criminal justice reform, to gender equality and protection of social and religious minorities (Klarman 1996, Powe 2003, Kersch 2004, McMahon 2004).

### The New Right Constitutional Regime And The Supreme Court

Today there is a growing debate about whether the New Deal constitutional regime is being replaced by a “*New Right*” regime composed of the ideas and groups that have galvanized the Republican Party since the election of Ronald

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Reagan in 1980.<sup>3</sup> The groups associated with this New Right party coalition include the religious right, neo-conservatives, and economic libertarians or so-called free-market liberals (Peele 1984). It remains to be seen whether this coalition of, sometimes disparate, groups in fact shares a coherent constitutional vision or whether their separate visions will prove to be incompatible. Nevertheless, some of the ideas associated with the New Right party coalition since Reagan are quite clear: the devolution of federal power to state and local governments; economic individualism and privatization of responsibility for social-welfare; the use of markets and market principles in lieu of administrative regulation of business, the economy, and the environment; and religious or moral revivalism often referred to as "*the politics of values*" or "*culture wars*" (Peele 1984, Pierson 1994, 1996, Whittington 2001, Hacker 2002, 2004, Pickerill and Clayton 2004 ).

One thing certain is that the New Deal Democratic Party coalition no longer exists. One can point to various reasons for its collapse, but two reasons seem obvious. First, the modern civil rights movement led the South to defect from that coalition and to the demise of the southern wing of the Democratic Party. Secondly, economic restructuring and the shift away from heavy industry toward high-tech and information technology during the latter half of the 20<sup>th</sup> Century dramatically reduced the power of a second key group in the New Deal coalition, organized labor (Cohen et. al. 2001).

As the New Deal electoral coalition weakened, central elements of its constitutional vision have come under attack. Recall that the New Deal constitutional order was constructed through changes to political practice and judicial reinterpretation of constitutional doctrines, not by formal amendments to the Constitution. Consequently, changes to that constitutional order likely will proceed in the same way, and so we should

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<sup>3</sup> For competing views on this see Smith and Hensley 1994, Simon 1995, Ackerman 1998, Halpern and Lamb 1998, Balkin and Levinson 2001, Tushnet 2003.

pay special attention to how such practices and doctrines are today being altered.

President Reagan clearly intended to transform existing constitutional structures in order to reflect the New Right's ideological agenda. Indeed, his Office of Legal Policy produced a series of reports that created a blue-print for the constitutional changes that his administration hoped to make through strategic litigation and judicial selection (one of these was aptly titled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* 1988). Some of the specific doctrinal changes sought by the Reagan administration included: a transformation of federalism under the 10<sup>th</sup> Amendment; a reduction in the scope of federal regulatory authority under Article I; expanded protection of private property rights under the "*takings clause*" of the Fifth Amendment; and a retrenchment of rights associated with Court's post-New Deal 14<sup>th</sup> Amendment jurisprudence, especially in the area of criminal justice (Johnson 2003).

The justices who make up today's Rehnquist Court have served together since 1993, longer than any natural Court since the turn of the last century. Six of the nine members of this Court were appointed (or elevated in the case of Rehnquist) by Reagan or his Vice-President George H. Bush. Each shares, more or less, the New Right political ideology. Moreover, this Court is arguably the most activist Court since the 1930s, and possibly the most activist in history (Keck 2004). Not only did it intervene in a presidential election four years ago to ensure that a New Right president would be in office, but over the past decade, the Supreme Court has handed down a succession of decisions challenging central elements of the New Deal constitutional order (Balkin and Levinson 2001). For example:

- The Court, for the first time since 1937, has struck down several federal regulatory statutes on the grounds that Congress has exceeded its authority under the Interstate Commerce Clause.<sup>4</sup>

<sup>4</sup> *Gregory v. Ashcroft* 1991, *United States v. Lopez* 1995, *United States v. Morrison* 2000.

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- It has severely restricted Congress' power to legislate and protect minority groups under Section 5 of the Fourteenth Amendment.<sup>5</sup>

- It has rehabilitated the doctrine of dual sovereignty under the 10<sup>th</sup> and 11<sup>th</sup> Amendments, using it to strike down a slew of federal regulatory mechanisms and programs.<sup>6</sup>

- It has expanded constitutional protection of private property rights and corporations. For instance, the Court has constitutionally indemnified corporations from private damage suits, extended free-speech rights to protect corporate advertising, used First Amendment principles to shield corporations from government regulatory programs, and used the "takings clause" to protect corporations from federal mandates requiring that they provide certain benefits to workers.<sup>7</sup>

- Finally, while the Rehnquist Court has continued the post-New Deal expansion of some rights under its "fundamental liberties" jurisprudence, it has moved decisively to curb many others. For example, it has clearly retrenched rights of the accused and convicted,<sup>8</sup> reduced the space that separates church and state under its Establishment Clause jurisprudence,<sup>9</sup> refused to extend the right to privacy into such areas as doctor-assistant suicide or drug searches in schools and the

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<sup>5</sup> *Boerne v. Flores* 1997, *Adarand v. Peña* 1995, *Kimel v. Florida* 2000, and *United States v. Morrison* 2000.

<sup>6</sup> *Seminole Tribe v. Florida* 1996, *Alden v. Maine* 1999, *Florida Prepaid v. College Savings Bank* 1999, *Kimel v. Florida* 2000, *University of Alabama v. Garrett* 2001, *Gregory v. Ashcroft* 1991, *New York v. United States* 1992, *Printz v. United States* 1997, and *Mack v. United States* 1997.

<sup>7</sup> *BMW v. Gore* 1996, *44 Liquor Mart v. Rhode Island* 1996, *Thompson v. Western States Medical* 2002, *United States v. United Foods* 2001, *Eastern Enterprises v. Apfel* 1998.

<sup>8</sup> *Minnesota v. Dickerson* 1993, *Ohio v. Robinette* 1996, *Thorton v. United States* 2004, *Arizona v. Evans* 1995, *Chavez v. Martinez* 2003, *United States v. Pantane* 2004, *McCleskey v. Kemp* 1987, *Payne v. Tennessee* 1991, *Lockhard v. Frewell* 1996, *Felker v. Turpin* 1996, *Calderon v. Coleman* 1998.

<sup>9</sup> *Lamb's Chapel v. Moriches Union Schools* 1993, *Rosenberer v. University of Virginia* 1995, *Agostini v. Felton* 1997, *Mitchell v. Helms* 2000, *Zelman v. Simmons-Harris* 2002.

workplace, and it has narrowed (and may yet) eliminate the abortion right.<sup>10</sup>

Despite these developments, it would be premature to mourn the passing of the New Deal constitution or to herald the arrival of a New Right constitutional regime. Mark Tushnet, for instance, has recently argued that the Rehnquist Court has thus far only adopted a "*chastened*" version of the New Deal constitution (Tushnet 2003). Still, these and other recent decisions by the Rehnquist Court do create certain "*path dependent*" forces that at the very least will restrict some avenues of future constitutional development (Pierson 2000). Thus the United States seems clearly at an important juncture in its constitutional history. Whether it is a turning point toward a New Right constitutional order or simply the continuing decline of the New Deal order remains to be seen. George Bush's reelection, however, may become crucial.

### George W. Bush: Completing The Reagan Revolution?

While it is too early to tell what will happen in a second Bush term there are at least three major indicators that Bush's reelection may be pivotal in completing the constitutional regime change initiated by Reagan. First, the reelection of a Republican president to a second term, with expanded and more conservative Republican majorities in both houses of Congress, is unprecedented in the post-1932 period of American politics. Election scholars have called Reagan's election an "*incomplete*" or "*partial realignment*" since it did not also bring in Republican control of Congress (Beck 1988). Future political historians may well conclude that Bush's 2004 reelection, with a decisive popular vote and increased Republican majorities in Congress, has completed the critical electoral realignment that began with Reagan.<sup>11</sup>

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<sup>10</sup> Washington v. Glucksburg 1997, Vernonia School District v. Acton 1995, Planned Parenthood v. Casey 1993.

<sup>11</sup> Bill Clinton's election in 1992 with a Democratic majority in both houses

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Second, more than any president since Reagan, George W. Bush shares the New Right's constitutional vision. During the first term, the Bush administration's massive tax cuts, its efforts to privatize social welfare, its anti-regulatory and pro-business economic policy agenda, and its conservative, overtly religious, cultural policy views (as represented especially in the administration's faith-based initiative, its anti-abortion and anti-stem cell research policies, and its advocacy for an anti-gay marriage amendment), all tracked the political-constitutional vision developed during the Reagan presidency (Johnson 2003, Campbell and Rockman 2004). Moreover, like Reagan, the Bush Justice Department, under Attorney General Ashcroft, pursued an ambitious New Right legal policy agenda and an aggressive judicial selection strategy aimed at elevating New Right jurists to the bench (O'Brien 2004). It is predictable that these patterns will continue during a second Bush term, a period in which the President is likely to fill at least one, and probably two or three, vacancies on the Supreme Court.

Finally, President Bush built his reelection campaign around the crisis confronting the nation after 9/11 and his role as the commander-in-chief in the war on terrorism. During the first term, the President used the "*terrorism crisis*" to consolidate and expand the constitutional powers of the executive (Kassop 2004). Moreover, the sense of crisis projected by the Bush reelection campaign (nicely encapsulated by the infamous "*wolfs are in the woods*" campaign ad) effectively demobilized political opposition and was used to legitimize many of the administration's otherwise constitutionally dubious policies (such as the Patriot Act, the assertion of broad presidential powers over national security and executive secrecy, and the conduct of a unilateral foreign policy). Given the success that the administration had using the "*terrorism crisis*" to justify

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might have produced a party realignment around "New Democratic" values and groups. The Democrats' subsequent loss of control over both houses of Congress, Clinton's impeachment by House Republicans in 1998, and Albert Gore's narrow loss of the presidential election in 2000, appear to have blunted that possibility.

constitutional changes during the first term and to win a second, it may well be that the terrorism crisis solidifies partisan attitudes and allows New Right ideological values to stick and become entrenched.

Of course, it is possible that the Bush administration's "*war on terrorism*" will produce the opposite effect. The situation in Iraq, for instance, could continue to deteriorate and eventually erode, rather than solidify, the electoral base of the New Right regime. Clearly if the Civil War had turned out differently, or if FDR had continued to preside over a country in economic depression or a failed war policy in WWII, the course of American constitutional history would have been much different. Thus, it is entirely possible that the Bush administration's policies to address the "*terrorism crisis*" will produce political dynamics that unhinge, rather than entrench, New Right constitutional aspirations.

Short of this it is also not clear, as I mentioned before, that the various groups associated with the New Right electoral coalition share a compatible constitutional vision. Surely some of the preferences of the Religious Right, such as censoring media corporations or protecting traditional community against market forces, will not be acceptable to libertarians and free-market liberals. The New Right political coalition could conceivably collapse from internal stresses caused by its own internal cleavages, especially as these groups compete to solidify their policy preferences in constitutional positions and doctrines. Indeed some of the recent conflicts between conservative members of the Rehnquist Court over such issues as free expression, abortion, gay rights, and affirmative action, may reflect the fault-lines within the coalition as they are being played-out through the jurisprudential views of different justices. In any case, whether some overlapping constitutional vision can be constructed is an interesting question that merits more scholarly attention.

All this is to say that it is indeed a particularly fascinating time to think about Court, the presidency and the future

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of constitutional development in the United States. Clearly the Court has been following the election returns, what recent election returns mean for longer term constitutional structures should soon become evident.

In the meantime I do not wish to be misunderstood about how I view the role of the Supreme Court in American democracy. The Court can, and has, played an influential role in the development of democratic politics in the US, though not in the way that it is often thought. Its role has been largely at the margins. It has legitimated the transition of power from one constitutional regime to the next, it has prevented temporary majorities from oppressing minority rights (though not always and never for very long), and at times it has played an important role in shaping the contours and language of democratic deliberation. These are not unimportant roles but they are not the same as the guardian of liberal right or democratic values against majoritarian sentiments. Those who think courts and rule of law can alone play such a role put their faith I am afraid in a chimera, or, in the words of Jerry Rosenberg, a hollow hope (Rosenberg 1991). Those of us interested in limited government and protecting liberal democratic rights and values against majoritarianism therefore should spend more time thinking about democratic mobilization and encouraging governing majorities to embrace such values.

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Zelman v. Simmons-Harris, 536 U.S. (2002).

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### A. Introduction

This report deals with the role of judiciary on consolidating democracy from the German point of view. As the occasion of the report is a symposium in Turkey, I would like to start with a little glimpse at the Turkish constitution before I turn to the German law.

Article 9 of the Constitution of the Republic of Turkey provides that the courts decide "*on behalf of the Turkish Nation*". It is quite obvious that this phrase refers to the essential democratic declaration in Article 6 of the Turkish Constitution. According to this provision, Sovereignty is vested in the nation without reservation or condition. In Germany this general principle of national sovereignty or sovereignty of the people is laid down

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\* Paper presented by Dr. Görisch is titled "The Role of Judiciary on Consolidating Democracy under the German Basic Law".

According to the original character of an oral report, the references given in the footnotes are not exhaustive, but limited to the literal quotations (which are translated if not being originally in English) and the court decisions mentioned explicitly.

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in Article 20 of the Basic Law. "All state authority is derived from the people", as it is said here. That the decisions of the courts shall be issued "in the name of the people", is also provided explicitly in Germany, namely in the statutory rules of procedure for the different branches of the judiciary. Every single judgement starts with the words "in the name of the people" and thus documents the essence of the democratic foundation of the state. As a result, judiciary in Germany as well as in Turkey is put on a clear democratic basis.

But in Germany at least, no legal consequences are derived from this declaration of statutory law on the rootage of judiciary in the sovereignty of the people. It is seen primarily as an appeal to the mental attitude of the judges, so to speak the denotation of a "judicial ethos in the democratic state".<sup>1</sup> If the words "in the name of the people" are missing accidentally, the court judgement is effective anyway. A direct connection from the court to the people with respect to the decision of a single case is not seen in these words either, quite the reverse: It is pointed out, that "in the name of the people" is exactly the opposite of "by the people". Thus the people as such shall not take part in the judiciary. This corresponds to the constitutional principle of judicial independence. Altogether the consideration of the provision, according to which all court judgements shall be issued "in the name of the people", in the present context mainly results in the apparent conclusion that the judiciary is subject to democratic requirements, too.

### B. Functional Contribution

However, this conclusion can be derived from the general principle of the sovereignty of the people as well. As an exercise of state power, judiciary needs democratic legitimation. In general this "connection of responsibility between the people and the state power" is created by the election of the parliament in

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<sup>1</sup> Jutta Limbach, "Im Namen des Volkes" (1999): 105, 113.

particular.<sup>2</sup> In the representative democracy of the Basic Law, the parliament, elected directly by the people, is the central decision-making organ. It conveys personal as well as factual legitimation to the judiciary: Both, the appointment of the judges –personally– and the contents of their decisions –factually– must be traceable to the parliament.

### I. Commitment to the Laws

The factual legitimation with regard to the contents of the judgements follows from the judges' commitment to the statute law. The laws of the parliament are enacted by the elected representatives of the people and thus convey straight democratic legitimation. Additionally, the parliamentary process guarantees to a great extent publicity of dispute and decision-making, in other words: democratic transparency. Because of those two factors – direct legitimation and high procedural transparency – the laws of the parliament occupy a key position in the representative democracy of the Basic Law.

In contrast, the original task of the courts is the final settlement of concrete cases of conflict. This state activity is factually legitimated by the laws of the parliament, because the decision has to be made according to legal standards only. With his interpretation of the laws and their application to the respective case, the judge has got a decisive influence on the laws. Thus every judgement contains an element of "*creation of new law*".<sup>3</sup> This forming influence on the law, the judge has to apply, in principle is commonly accepted. Apart from the concrete case, the judicial decision often has a prejudging effect with respect to the future application of the respective provision –even if under the Basic Law, which is attached to the Continental-European tradition, this prejudging effect might be not as strong as in the Anglo-American case law-system. Altogether

<sup>2</sup> 93 Entscheidungen des Bundesverfassungsgerichts [hereafter: BVerfGE] (1996): 37 (66).

<sup>3</sup> Michael Reinhardt, *Konsistente Jurisdiktion* (1997): 86.

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the judiciary, starting out from the respective individual case, has got a decisive forming influence on the parliamentary law. Hence, the judiciary bears a democratic responsibility in two ways: On the one hand the courts control the application of the laws by the other state authorities and by the citizens. This is the specific task of the courts in the system of separation of powers and their general contribution to the maintenance of democracy. On the other hand the courts themselves are bound by the laws, when ruling. Because of the courts' power of the final decision, their own legitimation, which consists of being bound by the laws, is not subject to any direct outside control. Therefore the democratically legitimated legislature is widely dependant on a judiciary that observes its commitment to the laws by itself and does not cross the boundary between application and creation of law high-handedly. Just because the judicial commitment to the laws is not subject to any outside control, it must be seen as a particular functional contribution to the consolidation of democracy, if the judiciary stays within its legal limits and thus complies with the requirement of factual legitimation so to speak "*voluntarily*" - even if this actually means nothing more for the courts than acting legally.

Against this background the boundaries of judge-made law are controversial and disputed. In general, all relevant decisions have to be made by the parliament, which is the crucial democratic organ under the basic law. Therefore judge-made law is questionable, if it is extra-legal or even contra-legal. But in the field of purely private-law disputes, that means disputes among the citizens, the courts are obliged to make a decision in any case. This duty is valid, even if the legislature stayed inactive. Thus the courts are obliged to decide private disputes, even if legal regulations are missing. The democratic argument, saying that the legislature itself should have regulated a certain matter, must not be aimed at the citizens and therefore fails here. If, in contrast, an official action of the state against a citizen needs a legal authorization which is missing in the respective case, then the courts are not allowed to create it on their own. Thus, with respect to governmental intervention

into the citizen's sphere the requirement of legal authorization applies also to the courts.

If there is no legal gap, in other words: if legislature has issued a certain regulation, the courts are bound by the legal provisions, no matter whether they judge a private law case or a public law case. In principle, the courts are never allowed to judge contra-legal, that means to ignore or to change a legal regulation. But the Basic Law not only says that the executive order and the judiciary shall be bound by the law, it says explicitly that they shall be bound by "*law and justice*". Justice, which is taking precedence over the law, might come primarily from the constitution. The constitutional order of the Basic Law and the basic rights in particular even bind the legislature explicitly. Nevertheless, not every judge is allowed to ignore a law, which to his mind is unconstitutional, for the Basic Law provides special procedures to annul or abrogate unconstitutional laws of the parliament. While the courts have decided occasionally that there is room for contra-legal judge-made law in exceptional cases, this is disputed by the majority of constitutional law scholars. Hence, democracy can be threatened by the courts on this spot: Every disregard or flouting of the statutory law means a weakening of the parliamentary democracy in principle.

Warnings about an increasing "*state of judges*" or "*judicial state*"<sup>4</sup> are justifiable, if they just shall remind of these dangers of the judicial activity. But if the current judiciary is queried fundamentally, the reproaches often seem to be exaggerated. A reference to the permanently growing amount of judge-formed law is not enough. Judge-formed law does not automatically mean unauthorized judicial creation of law. The increasing relevance of judicial activities is caused primarily by the general

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<sup>4</sup> Cf. latterly Norbert Leser, in: *Staatsrecht und Staatswissenschaften in Zeiten des Wandels*, Festschrift für Ludwig Adamovich, ed. by Bernd-Christian Funk et al. (1992): 331 et seqq.; Bernd Rütters, *57 Juristenzeitung* (2002): 365 et seqq.; Klaus Weidmann, *22 Juristische Arbeitsblätter* (1990): 10 et seqq., for instance.

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flood of legal regulations and the growing amount of comprehensive or blanket clauses in particular. But that development does not affect the commitment of the courts to the laws as such. The principle of democracy does not demand from the courts to react on this development by exercising special restraint. The contribution of the courts to the consolidation of democracy, if they stay within their legal limits, is not diminished by an increase of the judge-formed law caused by the legislator.

However, it is a special difficulty of the judicial activity that the boundaries are fluid not only between application and forming of the law, but also between extra-legal and contra-legal judge-made law. The exact scope of the judicial competence to decide can only be determined in the individual case by a concrete valuation. Already within the sphere of application of the laws, it is a question of valuation, what degree of importance the court attaches to the intention of the legislator in comparison with the other, objective rules of interpretation. The elements of valuation enlarge the democratic responsibility, which is imposed on the courts, when they have to decide about the scope of their commitment to the laws on their own. Accordingly, a contribution to the consolidation of democracy can be seen in the fact that the courts emphasize the significance of the parliamentary law increasingly when defining the boundaries of their own activities.

## II. Justice and Integrational Effect

Anyway, the courts still draw the boundaries of permissible judge-made law a bit further than the legal scholars do, who feel strictly obliged to the principle of commitment to the laws. But in doing so, the courts maybe also pursue a democratic aim. Although a "*crisis of trust in the judiciary*"<sup>5</sup> is claimed from time to time, the courts still hold a special position of trust of the people. With their competence of the final decision of

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<sup>5</sup> Cf. Ernst Benda, 36 *Die Öffentliche Verwaltung* (1983): 305.

individual cases, the courts are in charge of how the statutory law comes back to the people, where it originally came from with the parliamentary elections as the starting point. This responsibility of the courts includes the task to ensure justice with regard to the individual cases. As I said before, the Basic Law states explicitly that the judiciary shall be bound not only by the law, but "*by law and justice*". It is seen as a democratic requirement, too, that the trust of the people in a not mere legal, but also just judgement is not disappointed. According to this, the people still do not have any direct influence on the judicial activities, but pursuant to the principle of sovereignty of the people the judiciary must be traceable to the popular will as such and not only to the will of the peoples' representatives. In this respect all courts have the task "*to keep law and society in line with each other and thus contribute to the integration of the polity*" (Reinhard Zippelius).<sup>6</sup> In doing so, the courts help to reduce the distance between people and state. This is also a contribution to the consolidation of the representative democracy.

Nevertheless, the general commitment to the laws as the fundamental democratic requirement is not placed at the courts' disposal. The legislative regulation itself expresses the convictions of the majority of the society and therefore must always be the starting point for the judge, when he decides according to "*law and justice*". Beyond the application of the laws, a competence of the courts to act contra-legal is thus conceivable only very exceptionally, so to speak as an utmost "*emergency competence*",<sup>7</sup> which will always be highly problematical. But at least within the limits of commitment to the laws, a certain interpretation of a law might be permissible or even required with respect to the democratic meaning of individual justice and integrational effects.

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<sup>6</sup> Cf. Jutta Limbach, *supra* note 1, at 180 et seq.

<sup>7</sup> Fritz Ossenbühl, *Richterrecht im demokratischen Rechtsstaat* (1988): 19.

### III. Special Position of the Federal Constitutional Court

Under the Basic Law, one court plays a very special role in the present context. This is the Federal Constitutional Court. The commitment of the judiciary to "*law and justice*" is valid for this court only in a limited way, since it does not have to rule on the legality of state actions, but only on the constitutionality. It therefore controls the acts of the parliamentary legislature as well, and it has got the competence to annul or abrogate unconstitutional legal provisions. This competence is exercised not only in the special procedures of judicial review, but also within the framework of a constitutional complaint, which may be filed by any person alleging that one of his basic rights has been infringed by public authority.

Hence, in historical and international comparison the Federal Constitutional Court is vested with far-reaching competences by the Basic Law. With respect to the Federal Constitutional Court, the relationship between judiciary and parliamentary legislature is problematic in a specific way because of this court's competence of judicial review, which includes the competence to abrogate or annul a parliamentary law. Such "*a judicial norm control seems to be the very opposite of democracy at first sight*".<sup>8</sup> But the competence to declare a law unconstitutional can only be seen as a problem with regard to the democratic majority rule, if one focuses on the present majority in parliament. In contrast, according to the concept of the constitutional state, to which the Basic Law is obliged, the specific majority, which created or amended the constitution, takes an enduring precedence over the present majority of the parliamentary legislature. The Basic Law states explicitly that the legislature shall be bound by the constitutional order. But the constitution is not "*self-evident*".<sup>9</sup> It needs to be put in concrete terms for the individual cases like every parliamentary law. Accordingly, the constitutional idea of democracy more

<sup>8</sup> Jutta Limbach, *supra* note 1, at 130.

<sup>9</sup> Gary S. Schaal, 39 *vorgänge - Zeitschrift für Bürgerrechte und Gesellschaftspolitik* (2000) 2: 44.

or less demands a judicial control to ensure the constitutionality of all state activities. Therefore it can be seen as a necessary consequence of the idea of the constitutional state that this control also extends to the democratic legislator.

The specific problem of this judicial competence is the vagueness of the wording, the text of the constitution. “A constitution has to be short and dark”, as it has been expressed before.<sup>10</sup> The text of the Basic Law is characterized by this specific vagueness and generality, too. As a result, there is much more scope left for the interpretation of the constitution compared with the “ordinary” laws. But it is mainly the legislature, which is vested with this scope of interpretation. The legislator putting the constitution into concrete terms is not as limited as the administrative authorities executing the laws. This results in the “priority of legislature in the process of putting the constitution into concrete terms”.<sup>11</sup> Even the Federal Constitutional Court has declared the legislator to be the “primary interpreter of the Basic Law”.<sup>12</sup> The constitutional judiciary has to respect this scope reserved for the legislator’s political decisions. Whereas the text of the constitution is quite vague according to the legislative competence of decision-making, for the Federal Constitutional Court it works as a control standard. Therefore the Federal Constitutional Court has to find out very exactly and cautiously, how far the legislative competences go. This has nothing to do with “judicial self-restraint”, but follows from the character of the constitution as the Federal Constitutional Court’s test standard or scale of scrutiny.<sup>13</sup> For example, the contents of the basic rights are recognizable “relatively clearly” in so far, as they work as defense rights against governmental

<sup>10</sup> The phrase is ascribed to Napoleon or Sieyès alternatively, cf. Dieter Simon, *Die Union - Vierteljahreszeitschrift für Integrationsfragen* 2/01 (2001) 2: 49 (50), on the one hand; Werner Frotscher/Bodo Pieroth, *Verfassungsgeschichte*, 3<sup>rd</sup> ed. (2002): 43 (paragraph 84), on the other hand.

<sup>11</sup> Georg Hermes, 61 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (2002): 119 (129 et seqq.).

<sup>12</sup> 101 BVerfGE (2000): 158 (236).

<sup>13</sup> Cf. Klaus Schlaich/Stefan Koriath, *Das Bundesverfassungsgericht*, 5<sup>th</sup> ed. (2001): 339 (paragraph 493), 352 (paragraph 518 et seqq.).

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interference with civil liberties.<sup>14</sup> In contrast, claims to a certain protective state activity can hardly be derived from the Basic Law. Therefore it is more likely that the Federal Constitutional Court might require from a state authority to omit an action which infringes the basic rights of a person than to carry out a protecting measure actively. In comparison to the basic rights, the organizational provisions of the constitution concerning competences and procedures are generally more detailed, which leads to a stricter scrutiny by the Federal Constitutional Court. By the way, if the constitutional court is as precise and careful in putting the constitution into concrete terms as it is its task, it is not a weakening, but a strengthening of the legislator's decisions, if the Federal Constitutional Court declares only a certain result of interpretation of a law as being in conformity with the constitution instead of completely abrogating the respective law. Assuming a precise judgement, this is not an unauthorized restriction of the legislator's range of decision-making.

Due to its power of the final decision, the Federal Constitutional Court itself is responsible for staying within the boundaries that are imposed on its activity by the constitution as the scale of scrutiny which transfers factual legitimation to the court at the same time. Here again, as I pointed out already with regard to the ordinary courts, it must be seen as a specific contribution to the consolidation of democracy, if the Federal Constitutional Court does not go beyond its constitutional limits high-handedly. In this respect, one might speak of "*judicial self-restraint*". If the courts comply with this demand, the contribution to the consolidation of democracy is to be estimated particularly high, even if this again means nothing more for the court than acting lawfully. But one must not misjudge the difficulty, which results from the requirement to apply the vague text of the constitution as a control standard.

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<sup>14</sup> 39 BVerfGE (1975): 1/68 (71) - dissenting opinion.

"All in all", the Federal Constitutional Court has fulfilled these demands<sup>15</sup> despite all criticism from legal scholars with regard to certain judgements. At least, this was said on the occasion of the 50<sup>th</sup> anniversary of the foundation of the court in 2001. "*The Federal Constitutional Court has become a true guardian of the constitution*", as has been resumed on this occasion.<sup>16</sup> Otherwise the Federal Constitutional Court could hardly have become an "*example in a world that continues to undergo democratization*".<sup>17</sup> But also in Germany the court has earned an outstanding reputation and contributed much to the integration of the polity –although there were some heavily discussed decisions at times or even periods. The success of the Federal Constitutional Court is not least owed to the possibility of constitutional complaint, which I have already mentioned. With such a complaint every citizen can directly turn to the Federal Constitutional Court. Especially by its far-reaching basic rights jurisdiction the Federal Constitutional Court is established as a so to speak "*citizen's court*".<sup>18</sup>

The Federal Constitutional Court's functional contribution to the consolidation of democracy thus differs from the one of the ordinary courts not essentially, but gradually. The Federal Constitutional Court comparatively takes a higher responsibility, because it controls the directly legitimated democratic legislature and the binding effects as well as the publicity effects of its decisions usually reach further than those of the ordinary courts' decisions. Among the citizens the Federal Constitutional Court enjoys an even better reputation than the ordinary courts, and this also shows that the Federal Constitutional Court has complied with its democratic responsibility at large.

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<sup>15</sup> Gerhard Casper, 2 German Law Journal [www.germanlawjournal.com] (2001) 18: paragraph 29 (with regard to the "cautious [jurisdiction] as concerns 'positive rights'" in particular).

<sup>16</sup> Rupert Scholz, *Aus Politik und Zeitgeschichte* (2001) 37-38: 6.

<sup>17</sup> Gerhard Casper, *supra* note 15, at paragraph 17.

<sup>18</sup> Jutta Limbach, *supra* note 1, at 151.

### C. Application of Democratic Regulations

But the judiciary makes not only a functional contribution to the consolidation of democracy, but also a contribution as regards content. The principle of democracy derived from the Basic Law is put into concrete terms from case to case by the jurisdiction of the Federal Constitutional Court in particular. With regard to this, two “*threads*” can be separated from each other.<sup>19</sup> One thread consists of the procedural and institutional, in other words the organisational fundamentals of democracy, the other thread consists of the citizens’ liberty rights and their rights of political participation, in other words the individual rights as the second fundament of democracy. I will give a few examples for both threads from the jurisdiction of the Federal Constitutional Court.

#### I. Democracy as Part of the Organisational Law

In the field of organisational law the Federal Constitutional Court has derived the necessity of sufficient democratic legitimation of state activities in various constellations from the principle of the sovereignty of the people.<sup>20</sup> Under the representative system of the Basic Law, the elections are the “*most important element of democratic development of opinions and legitimation*”.<sup>21</sup> The Federal Constitutional Court has rendered important judgements in this area, too, for example concerning the equality of opportunities for the political parties in the election campaign. The public relations work of the government right before the elections in principle has been ruled out, because the governing party would otherwise receive an unfair advantage.<sup>22</sup> But this ruling only refers to the direct governmental exertion of influence in favour of one single party. Another case concerned the consideration of the different relevance of

<sup>19</sup> Gary S. Schaal/Sabine Friedel/Andreas Endler, *Die Karlsruher Republik* (2000): 130 et seq.

<sup>20</sup> 93 BVerfGE (1996): 37 et seqq.; 107 BVerfGE (2004): 59 et seqq.

<sup>21</sup> Rupert Scholz, *supra* note 16, at 11.

<sup>22</sup> 44 BVerfGE (1977): 125 et seqq.

the various parties with respect to the official providing of basic conditions for the election campaign, such as the allocation of broadcasting times for the election propaganda. The Federal Constitutional Court here allowed a different treatment of the parties according to their relevance.<sup>23</sup>

With regard to the political parties themselves, the Federal Constitutional Court has emphasized their outstanding democratic significance not only for the parliamentary elections, but also outside the public field for the formation of the political will of the people in general. Because of this intermediate position of the political parties between people and state, a party financing by the state was admitted only to a limited extent.<sup>24</sup> On the one hand as a so-called “*militant democracy*”, the Basic Law furthermore declares political parties that seek to undermine or abolish the free constitutional order as unconstitutional, that means prohibited.<sup>25</sup> Only the Federal Constitutional Court shall rule on the question of unconstitutionality, and the court has interpreted the requirements of a prohibition of a political party very strictly, because on the other hand the parties enjoy a “*heightened guarantee of protection and existence*” due to their specific democratic importance.<sup>26</sup> Altogether two parties have been prohibited until now, both in the first years of the Federal Republic.<sup>27</sup>

Back to the parliament: Its position as the central decision-making organ in the representative democracy of the Basic Law has been put into concrete terms by the jurisdiction of the Federal Constitutional Court substantially. The doctrine, I have already mentioned, that all essential decisions have to be made by the directly legitimated democratic legislature, in other words: the so-called doctrine of “*parliamentary proviso*”, is a result of this jurisdiction. According to this, state interfer-

<sup>23</sup> 24 BVerfGE (1969): 271 (277) with further references.

<sup>24</sup> 85 BVerfGE (1992): 264 et seqq.

<sup>25</sup> Jörn Ipsen, in: Grundgesetz, ed. by Michael Sachs, 3<sup>rd</sup> ed. (2003): 925 (paragraph 143 relating to article 21), 929 (paragraphs 166 et seq., 170 relating to article 21).

<sup>26</sup> Recently 107 BVerfGE (2004): 339 (359).

<sup>27</sup> 2 BVerfGE (1953): 1 et seqq.; 5 BVerfGE (1956): 85 et seqq.

ences with civil liberties need to be authorized by parliamentary law in particular.<sup>28</sup> Especially concerning the field of military activities, the Federal Constitutional Court has defined the German military forces as a “*parliamentary army*”. Thus the basic decision on a concrete military operation abroad has been reserved to the parliament as well.<sup>29</sup> Furthermore the Federal Constitutional Court has specified the internal parliamentary rights of participation for the parliamentary groups and for the individual members of parliament, particularly for those of the oppositional minority, in many cases.<sup>30</sup>

Finally the Federal Constitutional Court had to decide about the democratic requirements of the Basic Law with regard to the process of the European unification. According to the judgement on the Maastricht Treaty, the Basic Law requires not only an increasing democratization on the European level, but also that the federal parliament retains “*functions and powers of substantial importance*”.<sup>31</sup>

## II. Democracy as Part of the Individual Rights

Now I turn to the jurisdiction concerning democracy as part of the individual rights. The right to vote has an outstanding significance as a participatory right of the citizens as well. Some important decisions of the Federal Constitutional Court dealt with this right, for example with respect to the principle of equal election. For instance regarding the rule that political

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<sup>28</sup> 57 BVerfGE (1982): 295 (321) [= 2 Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, hereafter: Decisions FCC (1998) 1: 199 (209)]; recently 108 BVerfGE (2004): 282 (311 et seq.).

<sup>29</sup> 90 BVerfGE (1994): 286 (381 et seq.).

<sup>30</sup> Cf. Siegfried Magiera, in: Grundgesetz, supra note 25, at 1229 (paragraph 58 et seq. relating to article 38: general survey of judgements); Michael Sachs, *ibid.*, at 811 (paragraph 26 relating to article 20: survey of judgements concerning minority protection in particular).

<sup>31</sup> 89 BVerfGE (1994): 155 (186) [translated by Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2<sup>nd</sup> ed. (1997): 182 (185)].

parties must obtain a minimum of five percent of the vote to get into parliament, an adaptation to the specific challenges of the German reunification was admitted.<sup>32</sup> On other occasion the Federal Constitutional Court characterized the vote to right as a “*central citizens’ right*”<sup>33</sup> and therefore refused a communal voting right of foreigners, before the Basic Law has been explicitly amended on this matter.<sup>34</sup>

The Federal Constitutional Court emphasizes the democratic significance of civil liberty rights. Particularly the freedom of expression is interpreted widely by the court, since for “*a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible*”.<sup>35</sup> The freedom of assembly has been closely connected with this by the court: “*The freedom of assembly has got a specific constitutional significance in the liberal democratic order of the Basic Law due to its connection with the process of the formation of the people’s will. Namely for democracies with a representative parliamentary system and few participation rights in the form of plebiscites, the freedom of collectively expressing an opinion works as an important functional element. This basic right guarantees the protection of minorities in particular and provides a possibility of expression also for those people, who do not have any direct access to the media*”.<sup>36</sup>

#### D. Summary and Perspective

With these words of the Federal Constitutional Court I conclude. To sum up: Within the parliamentary democracy of the Basic Law, the courts contribute to the consolidation of

<sup>32</sup> 82 BVerfGE (1991): 322 et seqq. in particular.

<sup>33</sup> Rupert Scholz, supra note 16, at 11.

<sup>34</sup> 83 BVerfGE (1991): 24 et seqq.

<sup>35</sup> 7 BVerfGE (1958): 198 (208) [= 2 Decisions FCC (1998) 1: 1 (7); also translated by Donald P. Kommers, supra note 31, at 361 (364 et seq.)].

<sup>36</sup> 54 Neue Juristische Wochenschrift (2001): 2459 (2460) with reference to 69 BVerfGE (1985): 315 (346 et seq.) [= 2 Decisions FCC (1998) 1: 284 (294 et seq.)].

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democracy in two ways: firstly in a functional way by exercising their judicial task as such responsibly and secondly as regards content by putting the principle of democracy under the Basic Law in concrete terms from case to case. I tried to describe both effects of the judicial activity from a German point of view in particular. Actually they are no German speciality, but typical for the old democracies of the Western constitutional tradition. Thus, after having started with a little comparative consideration of the Turkish and the German Law, I am back in the international context at the end of my report.

**Assoc. Prof. Dr. Alain PARIENTE (Université Montesquieu-Bordeaux IV)**

ALAIN PARIENTE

Does the Constitutional Council weaken democracy in France? This question, which is both provocative and contrary to the title of this communication, is nonetheless part of a more general reflection on the role played by constitutional courts in democracies. The creation of the Constitutional Council and the development of its jurisprudence which protects fundamental rights, is both praised by defenders of human rights, and, from time to time, criticised by governments who are limited and unable to always act freely. However, the work of the Constitutional Council also raises questions about the notion of democracy itself. Over the past fifty years, the Constitutional Council has proved itself to be the keystone in the construction of the *Etat de droit* in France. The acceptance of the principle of constitutional control was not, however, a straightforward process in France, and the affirmation of this principle was slow to take shape. After the Revolution of 1789, the reluctance with regard to the judicial power embodied by the parliaments,

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\* Paper presented by Dr. Pariente is titled "The Role of the Constitutional Council in the Consolidation of Democracy in France".

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and the creation of the principle of national sovereignty, prevented the emergence of this type of control.<sup>1</sup> According to J. J. Rousseau,<sup>2</sup> the law, as the expression of the general will, is presumed to be beneficial to citizens. This marks the triumph of *légicentrisme* - the omnipotent nature of law - and the coming of the legal state. According to this concept, although constitutional control is not excluded in principle, it cannot be exercised by a judge. Thus, several attempts at a political type of constitutional control emerged during the revolutionary period. Examples of this are the constitutional jury, cherished by Sieyès, or the role played by the Senate in Year Eight, later reinstated by Napoleon III. However, these methods of control were not effective and the doctrine at the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> century showed signs of concern. Léon Duguit thus pleaded for the founding of an effective method of constitutional control.<sup>3</sup> However, it was necessary to wait until the Constitution of the Fourth Republic, on the 27<sup>th</sup> October 1946 for a Constitutional Committee to be established. However, the committee's powers and actions were minimal and it was only in 1958, with the creation of the Constitutional Council that recognition was given, by the Fifth Republic, to the legitimacy and importance of constitutional control of laws. Since then, the Constitutional Council has firmly ingrained itself in the legal and political landscape in France. This began with the decision of the 16<sup>th</sup> July 1971,<sup>4</sup> a significant date which symbolises the true birth of the Constitutional Council, due to the decision to include the preamble of the Constitution in the norms of reference of constitutional control and the potential decisions which were to flow from this. Since then, the Constitutional Council's decisions have prominently marked French current

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<sup>1</sup> On this question, see M. Borgetto, *La genèse du contrôle de constitutionnalité des lois en France (1789-1958)*, *Les Cahiers du Conseil Constitutionnel*, n° 1, 1996, p. 19.

<sup>2</sup> J. J. Rousseau, *Contrat social*, livre I, chapitre VII.

<sup>3</sup> L. Duguit, *Traité de droit constitutionnel*, 2<sup>ème</sup> édition, tome 3, p. 718 et s.

<sup>4</sup> *Cons. Const.*, *Liberté d'association*, *Décision n° 71-44 DC du 16 juillet 1971*, GDCC, n°19

affairs. We may cite as an example the Council's decision on nationalisation in 1982,<sup>5</sup> which translated the desire for judicial supervision of government action, a desire provoked by the major political event constituted by the arrival of Socialists in power in 1981. We can also remind ourselves of the Council's participation in the recognition of the importance of International Law and Community Law, illustrated by its decision of 19<sup>th</sup> November 2004 in relation to the treaty establishing the European Constitution.<sup>6</sup> The work of the Constitutional Council equally stands out in our minds in relation to the incidental statements it has made regarding the penal status of the head of State.<sup>7</sup> Thus, the Constitutional Council is omnipresent within French democracy, which brings us back to our initial query: does the Constitutional Council serve the purposes of democracy? Without controversial connotation, the question is posed objectively. Is the role of the Council truly to serve democracy, or is it merely to ensure the supremacy of the Constitution and, as such, that of the hierarchy of norms? The conflict underpinning this question is that between the principle of the *Etat de droit* and democracy. Since the term *Etat de droit* has no exact equivalent in the English language -the term "*Rule of Law*" having a slightly different meaning- the French term will be adopted for the purposes of this article. Constitutional control is historically and logically, according to Hans Kelsen, the essential instrument for the construction of the *Rechtstaat*. The European constitutional courts, constructed on the model outlined by Kelsen, have gradually elaborated the pyramid of norms synonymous with the *Etat de droit*. The incomparable success of this conception of the state has overtaken the traditional definition of democracy, in which the intervention of the people is necessary. "*Government of the people, by the people, for the people*" is one of the principal definition of democracy. The

<sup>5</sup> Cons. Const.,Loi de nationalisation, Décisions n° 82-132 DC du 16 janvier 1982, n° 82-139 DC du 11 février 1982, GDCC, n°31.

<sup>6</sup> Cons. Const.,Traité constitutionnel, Décision n° 2004-505 DC du 19 novembre 2004, J.O., 20 novembre 2004

<sup>7</sup> Cons. Const.,Statut de la Cour pénale internationale, Décision n° 98-408 DC du 22 janvier 1999, Rec., p. 29.

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regime of representative democracy has somewhat modified the definition of the people, but has not removed the necessity for its presence. In the current criteria for democracy the *Etat de droit* seems to be well placed such that it is no longer possible for a democracy not also to be, at the same time, an *Etat de droit*. However, does this necessarily mean that democracy can be reduced to the concept of an *Etat de droit*? This conceptual confusion is illustrated by the role of the Constitutional Council, which plays a decisive role in the reinforcement of the *Etat de droit* in France, but which also has an equivocal role in the strengthening of democracy by modifying the very content of the notion of democracy.

### **I. The Decisive Role Played By The Constitutional Council in The Reinforcement Of The *Etat De Droit* in France**

The concept of the *Etat de droit* was gradually established in France from 1958 onwards. The creation of the Constitutional Council enabled the installation of this concept, although this was not in reality the role entrusted to the Council. As J. Chevallier shows, the *Etat de droit* developed in two directions: a formal direction and a substantive direction.<sup>8</sup> The Constitutional Council played a key role in the development of both aspects, as much by guaranteeing the hierarchy of norms as by developing fundamental rights.

#### **A. The Affirmation of The Constitutional Council As Guarantor of The Hierarchy of Norms**

The hierarchy of norms is the principal tenet of the *Etat de droit*. According to Kelsen, the organisation of the internal state order is essential and thus the implementation of a structure comprising levels which are superposed and subordinated to each other becomes necessary. The metaphor of the Kelsenian

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<sup>8</sup> J. Chevallier, *L'Etat de droit*, coll. Clefs, Montchrestien, 1992

pyramid expresses this system, in which norms are founded one upon the other and derive their validity from the ultimate norm: the Constitution. The creation of constitutional control in France in 1958 represents the arrival of a concrete hierarchy of norms. As such, the Constitutional Council was active in the implementation of this hierarchy.

First of all, in relation to the lower level of the pyramid, constitutional judges have established a link between laws vote by parliament and *règlements* (this French word have not an exact translation). The French system, elaborated in 1958 is, in this respect, original. The Constitution lays down, in article 34, an exhaustive list of all those areas which make up the domain of the law, which is to be voted on by parliament; then in article 37 it refers to the power to make *règlements*, a power exercised by either the President of the Republic or the Prime Minister. The Constitutional Council is responsible for overseeing the distribution of powers between the executive and the legislature. The reason for its creation, in 1958, was even to protect the executive from any possible encroachment upon its domain by the legislature. From a formal point of view, the specific character of the established legal order is clear: alongside the hierarchy constituted by law and *règlements*, there exists a separate legal order composed of so-called autonomous *règlements*, to be found in Article 37 of the Constitution. The work of the Constitutional Council has been decisive in reducing the particularity of the French system, through the implementation of a legal order which is both unique and hierarchical. Since 1965, the Council no longer refers solely to article 34 in order to determine the extent of the law's domain;<sup>9</sup> moreover, the Council has altered the boundary between laws and *règlements* in favour of the law.<sup>10</sup> Gradually, the unique nature of the legal order has been established, autonomous *règlements* are now exceptional and the formal hierarchy between *règlements* and

<sup>9</sup> Cons. Const., Décision n° 65-34 L du 2 juillet 1965

<sup>10</sup> Cons Const., Blocage des prix et des revenus, Décision n° 82-143 DC du 2 juillet 1982, GDCC, n°33.

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laws has been confirmed in favour of the latter. Thus, laws are superior to règlements and are inferior to the Constitution.

However, the control ensured by the Constitutional Council takes place before the promulgation of the text and consequently there are drawbacks in this method. An unconstitutional law can therefore continue to exist in the legal order should the text fail to be submitted to the Constitutional Council. Judges have agreed to the possibility of constitutional control of a promulgated law through the scrutiny of measures which have not yet been promulgated, but which have the effect of "*modifying, completing or affecting*" the domain of a law already promulgated.<sup>11</sup> This decision allows us to control laws which are already published, in order to assure the hierarchy of norms and the supremacy of the Constitution.

The Constitutional Council has equally contributed to the full application of the existing hierarchy between international treaties and laws, which is outlined in Article 55 of the Constitution and which confers upon ordinary judges the power to implement these measures<sup>12</sup> Constitutional judges were confronted with the question of the place of the Constitution in relation to international law. Article 54 of the Constitution requires judges to examine those treaties susceptible of being ratified from a constitutional viewpoint and any contradiction means that the Constitution must be revised. Nevertheless, constitutional judges have reaffirmed the primacy of the Constitution in the internal order, after the issue was explicitly raised by the Council of State<sup>13</sup> and the Cour de Cassation<sup>14</sup> The decision of 19<sup>th</sup> November 2004 is a clear reminder of this primacy.<sup>15</sup>

<sup>11</sup> Cons. Const., Etat d'urgence en Nouvelle-Calédonie, Décision n° 85-187 DC du 25 janvier 1985, GDCC, n°37.

<sup>12</sup> Cons. Const., IVG I, Décision n° 75-54 DC du 15 janvier 1975, GDCC, n°23.

<sup>13</sup> CE, ASS, 30 octobre 1998, Sarran.

<sup>14</sup> C. Cass, Ass. Plen., 2 juin 2000, Mme Fraisse, Dalloz 2000, IR, p. 180

<sup>15</sup> Cons. Const., Traité constitutionnel, Décision n° 2004-505 DC du 19 novembre 2004, préc

The Constitutional Council has therefore established this aspect of the *Etat de droit*, namely respect for the hierarchy of norms. At the same time, the second aspect of the *Etat de droit* brings it closer to the British notion of the Rule of Law, in other words the guarantee of substantial rights which has been developed, in France, by constitutional judges.

### B. The Development By The Constitutional Council of The Guarantee Of Fundamental Rights

Before the major decision of 16<sup>th</sup> July 1971, the Constitution was not the natural means through which to express fundamental rights. The Constitutional Council, by incorporating the preamble of the Constitution into its norms of reference, enabled the transformation of a constitutional text into a charter of fundamental rights, shaped by its jurisprudence. The "*constitutional block*" (that is, all those measures of a constitutional value, with which the law must conform) includes the articles of the Constitution; the preamble of the 1958 Constitution which refers to the Declaration of the Rights of Man and the Citizen 1789; the preamble of the 1946 Constitution which refers to "*fundamental principles recognised by the law of the Republic*" and "*principles particularly necessary in our time*", and finally "*organic*" laws (those which complete the Constitution). The Constitutional Council has added to this list the notion of "*principles with a constitutional value*". It also uses the notion of "*objectives with a constitutional value*" to represent the constitutional requirements of which the legislature, under the control of judges, is the guarantor.

These methods of guaranteeing fundamental rights are used in all areas in which these rights are expressed. However, some of them require a more extensive control than others. Thus, freedom of the press has been recognised as "*one of the essential guarantees for respect of other rights and freedoms*". The Constitutional Council has, in this sense developed a jurisprudence, which prevents the legislature going back on pre-existing guarantees. Basically, every time progress is made in

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the field of fundamental rights, this becomes the new basis for future legislation. This jurisprudence, known as "*the irreversible effect*" (*l'effet cliquet*) reinforces and adds to the protection of fundamental freedoms. Furthermore, the Constitutional Council has implemented the technique of interpretation reserves, which are useful both as a means of limiting the scope of the legislative text detrimental to freedoms and allowing this text to be brought into force subject to a specific interpretation of the criticised measures.

Those areas which are guaranteed by the Constitutional Council stem from the founding texts of the French regime, notably the Declaration of the Rights of Man and the Citizen, 1789, and the preamble of the 1946 Constitution. Basing itself on the Declaration of 1789, the Constitutional Council has given a constitutional value to several fundamental rights. Thus the Council recognised the principle of equality in 1973,<sup>16</sup> although the application of this principle may be modified by the judge in relation to the differing circumstances of the individuals involved, and where this is justified by the notion of general interest. The non-retroactive nature of penal law and the proportionality of sentences, but equally the right to ownership and freedom of undertaking have also been added to the Declaration of 1789. At the same time, the preamble of the 1946 Constitution has been used by invoking fundamental principles recognised by the laws of the Republic. The Council has thus notably established freedom of association, personal freedom and freedom of conscience. Social principles such as the right to strike, right of asylum and the right to healthcare have also been recognised by the Council. Through their jurisprudence, judges seek to reconcile, as far as possible, the different rights in existence.

In any event, the protection of fundamental freedoms by the Council is not unchangeable. The protection offered may

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<sup>16</sup> Cons. const., Taxation d'office, décision n° 73-51 DC du 27 décembre 1973, GDCC, n° 21

be reduced by the modification of the norms of reference of control. Thus, the jurisprudential treatment of the notion of personal freedom provides us with a revealing example of this evolution. This freedom, absent for a long time in the Council's decisions and not present in any constitutional text, recently made its appearance. It is distinct from the notion of individual freedom, which, according to Article 66 of the Constitution, is guaranteed by the judiciary. The Council has increased the field of application of personal freedom by attaching to it certain freedoms previously linked to the concept of individual freedom.<sup>17</sup> Personal freedom, defined in this way, is not based on the same norm of reference and therefore does not benefit from the same protection implying the necessity of judicial intervention. As a consequence, the Council therefore reduces the guarantees associated to these freedoms.

This example demonstrates that the construction and the consolidation of the *Etat de droit* in France, carried out by the Constitutional Council, does not necessarily imply the reinforcement of guarantees for individual freedoms, even if this is frequently presumed to be the case. As far as democracy is concerned, the situation is even more ambiguous and the role of the Constitutional Council truly equivocal.

## II. The Equivocal Role of The Constitutional Council in The Strengthening of Democracy in France

The Constitutional Council has no power to resolve political disputes. Consequently, it does not intervene as a regulatory authority, contrary to other supreme courts such as those in Germany or in Italy, where the constitutional courts derive from the Constitution the power to settle differences between political institutions. On the other hand, the Constitutional Council facilitates the functioning of democracy by clarifying, even reinforcing, the "*rules of the game*" according to which

<sup>17</sup> Cons. const., Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité, décision n° 2003-484 DC du 20 novembre 2003, J. O., 27 novembre 2003, p. 20154.

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democracy should adhere. Beyond this however, the Council influences the very notion of democracy, which leads us to enquire into the present scope of this concept.

### A. The Action of The Constitutional Council in The Functioning of Democracy

Constitutional judges have specific powers to ensure the regular functioning of public powers and, as a result, of democracy. Thus, the Constitutional Council is in the first place an electoral judge responsible for checking that national elections are carried out in conformity with the Constitution. The extent of this power has been established both through texts and through practice. In the texts, the power of the Council relates to the election of the President of the Republic (Article 56 of the Constitution), legislative and senatorial elections (Article 59) and the holding of referenda (Article 60).

At the same time, the Constitutional Council is responsible for intervening during periods when democracy is at its most vulnerable. Such is the case when the President of the Republic is unable to carry out his functions: this impediment may be temporary, following an illness, or permanent in the case of death. In this situation the interim period is undertaken by the President of the Senate and organised under the control of the Constitutional Council. The application of Article 16 of the Constitution which confers unlimited powers upon the President in exceptional circumstances, constitutes another example of this. In this case the Constitution requires the opinion of the Constitutional Council to be sought which, although not binding, will in practice be decisive in the subsequent analysis of the President's decision.

In another vein, the Constitutional Council is the driving force behind the implementation of local democracy, which was initiated during the 1980s and was recently reinforced by the constitutional revision of 28<sup>th</sup> March 2003, beginning what is known as Act Two of decentralisation. To that effect, the Constitutional Council has, since 1982, secured the foundations

of decentralisation. Judges have carried out a decisive reconciliation between those principles governing the unitary French State – essentially that of the indivisibility of the Republic – and the principle of the free administration of local authorities. The Council has thus ensured that the laws regarding decentralisation do not present a challenge to the unitary nature of the French State.

Furthermore, the Constitutional Council has highlighted the importance of pluralism in a democracy. In 1990, the Council established the “*pluralism of ideas and opinions*” as a “*foundation of democracy*”.<sup>18</sup> As such, the Council does not merely aid the functioning of democracy; it also produces its own definition of the notion.

### **B. The Influence of The Constitutional Council On The Conception of Democracy**

This has a double aspect. It refers, first of all, to that which the action of the Constitutional Council has directly changed in the conception of democracy in France. As such, the definitions of democracy contained in the Council’s jurisprudence can be highlighted. The affirmation of pluralism as the foundation of democracy, or the constitutional judge’s analysis of the separation of powers serve to define the Council’s interpretation of the notion of democracy. This direct role exercised by the Council does not, however, have a concrete influence on democracy, as the Council’s decisions are restricted to a mere declaration of whether the law in question conforms to the Constitution or not.

On the other hand, the role of the Council influences the conception of democracy in an indirect manner. This relates more generally to the existence of Constitutional Council itself and its importance in assuring that the Constitution is respected

<sup>18</sup> Cons. Const., Loi relative à la limitation des dépenses électorales et à la clarification des activités politiques, décision n° 89-271 DC du 11 janvier 1990, Rec., p. 21.

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and legitimised. Without entering into the details of the status of judges in a democracy, it is necessary, nonetheless, to outline here the main issues of debate in relation to the legitimacy of the Constitutional Council and, moreover, the link between the Council's role and the development of democracy. For those in favour of the influence of constitutional justice, the judge is a decisive actor in democracy, because of his role in the construction of the *Etat de droit*. According to certain authors, the Constitutional Council participates in the elaboration of law in the same way as the parliament.<sup>19</sup> Such analyses advocate the creation of a new conception of democracy: constitutional democracy, stemming from the judge and allowing for an *a posteriori* legitimisation of the judge's role. The risk of excess inherent in this approach is real and referred to by several authors.<sup>20</sup> The principle criticism concerns the democratic legitimacy of the institution itself. The technique of legitimisation *a posteriori* conflicts with the traditional definition of democracy. The debate is not between opponents and supporters of the Constitutional Council, but rather it represents present enquiries into the notion of democracy.

Certain evolutions would allow us to reconcile the two notions. These relate to the appointment of judges and the possibility of citizens being able to bring cases before the Constitutional Council. Alongside the *de jure* members of the Council, made up of former presidents of the Republic, the appointed members are designated by the President of the Republic, the President of the National Assembly and the President of the Senate. Each of these authorities name one member every three years. Members are appointed for a total of 9 years. There are no age or professional qualifications required for membership of the Council. Numerous criticisms have been made of

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<sup>19</sup> See D. Rousseau, *Droit du contentieux constitutionnel*, 6<sup>ème</sup> édition, Montchrestien, 2001, p. 480.

<sup>20</sup> See notably E. Desmons, *Le normativisme est une scolastique (brèves considérations sur l'avènement de la démocratie spéculaire présentée comme un progrès)*, *Droits*, n° 32, 2000, p. 20.

this system of appointment. The main criticism concerns the politicisation of the Council, linked to the functions exercised by those who appoint members. The election of constitutional judges by a qualified majority of members of parliament, as is the practice in certain European countries, would introduce a real democratic legitimacy into the institution.

The possibility for citizens to bring proceedings before the Constitutional Council has been a recurrent question since the beginning of the development of constitutional jurisprudence relating to rights and freedoms. For a long time, the regulatory function carried out by the Constitutional Council between the executive and the legislature was considered to be sufficient, giving a limited right to bring proceedings before the Council. The reform carried out in 1974 allowing the instigation of proceedings before the Council by 60 deputies or 60 senators, has been accompanied by the changing role of jurisdiction. The possibility for citizens to bring proceedings directly was raised and a constitutional reform project was proposed to that effect in 1990, but the revision was never brought to completion. The various attempts at reform did not, in reality, envisage the possibility for citizens to instigate proceedings directly in the Council, but more precisely a mechanism allowing individuals to raise, before an ordinary judge, a question of constitutionality. The tribunal concerned would then pass on the individual's request to the Constitutional Council, which would reach a verdict on the question before the case could continue. The various hypotheses have not yet been fully formalised and despite the material difficulties, it seems that direct recourse to the Council by citizens would be the clearest way to enhance the democratic elements of the current system.

Whatever changes are to be made to the ways of accessing and to the functioning of the Constitutional Council, it is clear that the Constitutional Council does nothing to improve upon the traditional definition of democracy in France: "*Government of the people, by the people, for the people*". If we assert that democracy is synonymous with the *Etat de droit*, then obviously the

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Constitutional Council has a decisive role in its current consolidation in France. However, in reality, the two notions remain distinct. The *Etat de droit* advances the cause of human rights but cuts itself off from the traditional notion of democracy. One solution, which would serve to bring these concepts closer together, would be to include the classic mechanisms of democracy in every *Etat de droit*. Thus, without seeking to democratise the institution of constitutional judge, a question which does not have its place in this debate, it would be advisable for those in power to use those methods of popular consultation which are the most obvious. For example, the use of referenda, the taking into account of electoral results beyond the simple election in question; basically consideration of the citizen as an actor in the 'game' of politics. In this way, the debate about the legitimacy and the place of the constitutional judge within a democracy would become less problematic. Constitutional justice would play its full role in the consolidation of the *Etat de droit* by scrupulously controlling the hierarchy of norms, but this would be completed by the recognition of a right of action belonging to the people, and by giving responsibilities to those in power. The Constitutional Council and popular consultation are the indispensable actors in French democracy. This double aspect enables us to limit the potential excesses of democracy and prevents the creation of a legal Republic without democratic legitimacy. As well as providing legal techniques, democracy must above all ensure that it does not lose its link with the people, with whom sovereignty resides.

# **SECOND DAY SECOND SESSION**

**The Role of the Judiciary in  
Consolidating Democracy:  
“New Democracies”**

## **Chair of the Session**

Attorney Vedat Ahsen COŞAR  
(President of Ankara Bar)

**Dr. Khanlar HAJIYEV (Judge, European Court of Human Rights)**

KHANLAR HAJIYEV

Dear participants of the Conference,

I accepted with gratitude the invitation to this conference not only to listen to the interesting presentations but also to share with some ideas regarding the role of the jurisdiction in a democracy. This problem is particularly urgent for the countries, which acquired the independence relatively lately, and their efforts are directed to tackle the challenges of post-Soviet life and to reform the political and legal system, to establish the efficient economy. Looking at the traversed path, one should fairly admit that in its very beginning Azerbaijan faced with the following problems: loss of control over some part of its territory, enormous number of the refugees, internal clashes between different political forces in their struggle for power. Thus, I would call the year of 1995, the starting point of serious reforms -the year of the adoption of the Constitution of Azerbaijan Republic. It proclaimed the statement of the sovereignty of the people, the establishment of independent, secular, demo-

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\* Paper presented by Dr. Hajiyev is titled "The Role of The Judiciary in The Consalidation of Democracy".

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cratic state based on the separation of powers, the statement of the priority of human rights and foundation of the market economy relations, and a provision that stipulates the respect for property right by the state. Namely the Constitution acted as a starting point for the reforms in the country.

The main stages of cooperation between Azerbaijan and the Council of Europe started in these years. This proceeded from the fact of serious political and legal changes in the country and intentions to direct the efforts to the famous standards of legal statehood in democratic Europe. The democracy, state governed by the rule of law and the protection of fundamental rights are three interrelated ideals of the legal development and objectives of the members-states of the Council of Europe. Their achievement required from the country the development of the laws and construction of the legal system taking into account the demands of the European Convention on Human Rights and Freedoms.

Till the accession to the Council of Europe, in Azerbaijan there were obvious differences between the legislation and the implementation practice and the so-called European standards. It was necessary to remove the contradictions between the laws of the country and the demands of Convention. The first steps were taken in 1996 with the adoption of the law *"On Courts and Judges"* that supposed the establishment of a new judicial system that consists of the court of first instance, Court of Appeals and Court of Cassation. All the judges got equal status. The Supreme Court of the country was transformed into the Court of Cassation that could settle the matters of law; it was purified from the tasks of consideration of the appeals of first instance courts and the supervision of state powers, which were typical for its activity during the Soviet period.

Later on the laws of criminal procedure and civil-procedure were adopted. For the formation of the constitutional state their significance is difficult to overestimate. The matter was solved on the judicial review on major procedural acts such as the arrest, telephone tapping, and searches. These rules were

reflected in other laws regulating the activity of the police and the Prosecutor's Office. The latter was deprived of the main tool that is the general supervision, which made it powerful organization during the Soviet period.

Thus, it is short enough, although an incomplete list, but the main idea that underlies is to restore the worthy place of the court and, above all, to return the confidence of the population in the impartial and independent referee in the solution of the disputes between the citizens, as well as the citizens and the state.

I would like to mention one more urgent issue - the establishment of the Constitutional Court in 1998. According to the Constitution, it was empowered with the significant powers the fundamentals of which were the establishment of the constitutionality of the laws and other legal acts, the interpretation of the statutes and Constitution, the resolution of the disputes between the branches of power. In the first years of its activity, the Constitutional Court got concentrated on the review and recognition of the state norms that hampered the democratization and humanization of the legislation, constitutional interpretation of many standards providing for the rights and freedoms, protection of the social rights of citizens. At the same time, it is notable that the country fulfilled the obligation taken during the accession to the Council of Europe, and in the beginning of the last year, the citizens received a right to appeal with the individual complaint to the Constitutional Court that should serve for the efficiency of the protection of fundamental rights.

Thus, we may ascertain that in the country a new legal system is formed on the basis of new legislation. We can not consider this process to be finalized as there is need to improve the institute of advocacy without which it is impossible to think of a fair justice, to establish the administrative justice for due protection of the rights of the citizens from the arbitrariness of the authority, to strengthen the independence of the judges. Many international experts witness that the change

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in the implementation of the laws passes more slowly than the lawmaking process. Sense of justice of the citizens cannot break away the traditions and conditions in a single-stage while it was formed during a long time. We should especially note the low level of professional legal culture that results in the realization of social relations in economical and social fields in non-legal forms.

It would be unfair not to mention the strengthened role of the Ministry of Justice. Of course, the positive fact that Azerbaijan was one of the first countries in the post-Soviet space to subordinate the penitentiary entities to this institution. At the same time, its role is dominating as regards the selection and appointment of the judges of ordinary jurisdiction. The council of justice is actually headed by this institution. The last essential renewal of the judiciary manpower after the termination of the activity of the judges did not serve for the consolidation of the confidence of the citizens in the justice.

It should be noted that the Constitution strengthened already generated fundamentals of strong executive power. To some extent, previous events promoted this. But the political traditions of the executive lasted when other branches of the authority - the legislative and judicial branches - were deprived of real supervision powers. This may explain the reasons when the authority itself initiates the reforms and holds them. However, this is not preceded neither with the discussions in the society, nor with the discussions of alternative drafts. Meanwhile, it should be admitted that namely with the strong executive power the people pin their hopes on stability. In the result, we may observe the contradictory process. The existence of strong executive power is explained with the traditions and necessity to keep the stability without which it is difficult to hold reforms.

On the other hand, undoubtedly long and predicted stability may be based on fair organization of the state with developed institutes of civil society. Moreover, the idea of the

rule of law supposes that the legislator holds a big conscious of responsibility in addition to its grand power.

The law is not just legislation. It consists of a number of other elements such as the legal perception, legal values, the system of interpretation, legal education and so on. It is fairly admitted that not any state structure may be considered as the constitutional one. Here the fundamental norms are established that regulate the activity of the authorities and set limits on the activity of citizens. The constitutional state may be considered as the state structure the fundamental norms and laws of which are based on specific values. The efficient national tools are established for the protection of these values.

The European Convention does not define the political structure of the state. It is natural, as its task is to ensure the fundamental rights and freedoms of the citizen. At the same time, some of its regulations concern the state structure. The preamble of the Convention points out that the fundamental rights and freedoms are best ensured through really democratic political regime. It is obvious that the provision or observance of the conventional norms and case-law of the European Court supposes the existence of efficient legal system and political and legal democratic culture of the officials working in this system. Thus, the Convention demands from the states to ensure the political and constitutional terms required for their effective implementation. The most important demand of the Convention is to provide everyone with the access to independent, impartial and competent court whose judgment has legal effect. By implication of these demands we may conclude that the essential precondition for the establishment of really democratic political system is the necessity to observe strictly the principle of the separation powers. The protection of rights and freedoms provided by the Convention is first of all the task of the participant states. Namely, according to the Article 1 of the Convention, they ensure the rights and freedoms to everyone under their jurisdiction. The role of the European

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Court is subsidiary, i. e. carries additional character. The task of the bodies of the Convention is to direct and contribute to the national legal institutions, guarantee the necessary level of protection of human rights through its own legal institutions and procedures (Macdonald R., Matscher F., Petzold H. *The European System of the Protection of Human Rights*. 1993, p. 41). Mentioning the principle of subsidiarity, the European Court as if stresses the role of national law order in the protection of human rights in its judgments, though it never directly takes the passive position in the protection of rights and freedoms stipulated in the Convention and the protocols attached to it, fulfillment of the liabilities taken by the states. In the *Babayev vs Azerbaijan* case, the European Court found the remedy of the Plenum of the Supreme Court of Azerbaijan to be inefficient which should be closed for the application to the Strasbourg Court. The access to the first instance court, which is the additional cassation according to the national legislation, is fully dependent on the Chairman of the Supreme Court that on the basis of the application has right to solve the matter regarding the presenting the case for legal investigation by the Plenum of the Supreme Court.

The present position of the Court should not be considered as refusal of given degree of jurisdiction. The Court repeatedly underlined that it does not give any guidelines concerning legislative, judicial or other activity of states, although, the influence of the court's decisions on their legislation and legal order should not be denied. However, this is in a sense the impulse to state, which should think and evaluate the fourth degree of jurisdiction in respect of legal distinctness and of applied procedures.

As regards the presence of the multi instances of court examination in judicial system of Azerbaijan Republic, it is important to stress that it is not enough if the court of first instance acting in full compliance with requirements of fair justice. It is necessary that all judicial instances right up to Constitutional Court meet these requirements. In decision on case of *Ekbatani*

vs Sweden of 26 May 1988, the Court noted: "*Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision at first instance; indeed, according to the Court's consistent case-law a State which institutes courts of appeal or cassation is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in this Article*".

The estimation of reasonable terms of court examination takes the significant importance for the country with such judicial system. European Court considers that the delay of justice is equal to the denial of justice. Court pays main attention so that the duration of trial would not undermine its effectiveness and confidence to justice.

The efficiency of jurisdiction in a greater extent depends on judicial system functioning in the state and in greater extent depends on the judges themselves. In the democratic society the safety of citizens depends on the rule of law and courts had the main role in its ensuring.

At the beginning of the independence of our country, being the author of one of the advanced conceptions of judicial-legal reform, I proposed and then prepared the draft which assumed the creation of judge's community that could itself discuss and resolve many issues of judiciary. The draft did not pass. Instead of it, as I mentioned before, the role of Ministry of Justice became stronger even greater. Certainly, I should nevertheless recognize that the presented draft had defects connected with the possible creation of corporative institution of judges, which was of the same interests. But now, after almost more than ten years, I am sure that this would be better than absolute entrusting of this problem to the executive power, which could not create strong and independent judicial authority that could effectively protect the violated rights. I think that actuality of problem by itself dictates the necessity to get back in our country to wide discussion concerning this issue. The creators of American Constitution understood that independence of courts is especially important for the Consti-

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tution, which limited the power of government over personal-  
ity. As A. Hamilton said: "without it all the attempts to save  
individual rights and freedoms will not have any result". He  
considered that the judicial system the most weak between  
three branches of power and all the possible concerns should  
be realized to make it able to protect itself. These words are  
vital for my country especially now.

Here are just some thoughts. I think that the persistent work  
in the coming ten years will admit us to say with confidence that  
one of the valuable merits of our nation is its trust to justice.

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### **Introduction**

A constitutional court, as a specific institution at the highest level of the organization of the national state, is a relatively recent invention. It obviously presupposes the existence of a formal constitution, a document presenting itself as such, and this concept dates from the Era of the Enlightenment and the creation of the first major new constitutions, those of the United States (1789) and France (1791). Many European monarchies adopted constitutions in the course of the 19th century, usually as the result of the consolidation of parliamentary democracy. All of this suggests that constitutions tend to be created at moments of political metamorphosis, when the need is felt to reformulate the basic arrangements underlying the politico-legal structure of the state. In this "*material*" sense constitutions had frequently appeared in previous ages, going under the most diverse names. In order to establish effective and mutually

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\* Paper presented by Professor Feldbrugge is titled "The Constitutional Court of Russia and the Consolidation Of Democracy". (References to Russian Constitutional Court cases in this paper are based on the work of the late Dr. G.P. van den Berg, quoted in note 12.)

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advantageous government, interested parties had for many centuries been inclined to set down in writing their most important reciprocal rights and duties. The contractual nature of such constitutions *avant la lettre* can actually be regarded as one of the defining characteristics of European political culture.

The novelty of modern constitutions, however, is not in the name alone, but, more importantly, in the awareness, or the claim, that the constitution is more than an ordinary law, that it is actually the source of the very validity of the ordinary law. This immediately raises the question of the source of the constitution's legitimacy. The standard answer is a reference to the sovereign people. Other solutions may involve a reference to the Deity or, in older constitutions of monarchies, to the sovereignty of the monarch. The least ideological and most realistic, but rarely preferred option is a reference to the drafting assembly, a gathering of individuals who usually claim to represent larger contingents of citizens.

Ever since the American Revolution, the drafting of a constitution has been considered as almost inevitable in the case of full regime change—a revolution or a political event of similar magnitude. This stands to reason, because the new regime cannot invoke the past, the order established of old, in order to justify and legitimize its rule. Reference to the will of the people then represents the most obvious and least rebuttable, although not logically compelling, approach to anchor the new constitution. The question then remains why, along with a constitution, a constitutional court is also necessary or at least desirable. At least part of the explanation lies in the development of the Supreme Court of the U.S.A.

Art. III of the U.S. Constitution did not expressly grant the Supreme Court the power to test the constitutionality of (federal) law, but already in the famous and very early case of *Marbury v. Madison* (of 1803) the Supreme Court claimed jurisdiction in such cases. From then on, the U.S. Supreme Court functioned not only as an ordinary supreme national court, but also as a constitutional court.

The victorious progress of the separate constitutional court began in earnest after World War II, when the establishment of a Federal Constitutional Court (Bundesverfassungsgericht) was provided in the 1949 Federal Constitution of Germany. Initially, the jurisdiction of the German Federal Constitutional Court consisted mainly of watching over the constitutionality of legislation (in a wide sense) and controlling or policing the border area of the separate jurisdictions of the Federation and the Länder. Then, in 1969, an amendment to the relevant provision of the German Constitution (Art. 93) added any acts of public authority which violated certain rights of citizens or local government.

From then on, constitutions all over the world began to institute constitutional courts. The French Constitution of 1958 (the De Gaulle Constitution) provided for a Constitutional Council. The name is no coincidence, because the French body is something less than a full constitutional court. It checks the constitutionality of laws and ordinances before they enter into force, although not in all cases (Art. 61). "*A provision held to be unconstitutional may be neither promulgated nor put into effect.*"<sup>1</sup> Once a statute has entered into force, it is unassailable, except by the legislature itself, as in other European countries which reject constitutional review of statutes (such as the U.K., the Netherlands, Switzerland, and others).

Considering the wide-spread popularity of constitutional courts, it is worth observing that they are not without their drawbacks, particularly in connection with the parallel popularity of the concept of the sovereignty of the people. The ordinary way in which the sovereign people is supposed to express its will is through its chosen representatives, the parliament, and, in countries governed by means of a presidential system, through the popularly elected president as well. The establishment of a constitutional court adds a second ruler, or a third, in presidential systems. Constitutional courts have the power

<sup>1</sup> Art. 62, first sentence, quoted from S.E. Finer, V. Bogdanor, B. Rudden, *Comparing Constitutions*, Oxford, 1995, 231.

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to countermand laws which are supposed to reflect the will of the people and by doing this they may change the country's legal system.

There are two possible objections to this conclusion. One is that the constitutional court does not actually change the law but only clarifies the genuine meaning and content of the highest law of the land. The other objection is that all courts occasionally amend the law through their judgments and that there is therefore no sufficient reason to worry about constitutional courts doing the same.

The first objection is based on the philosophical assumption that laws possess some kind of inherent and immutable meaning, of which the words of the legal text represent only an imperfect reflection. This appears to be proposition that is untenable in principle and unworkable in practice.

The second objection fails to notice that the actual powers and possibilities of the ordinary court to change the law are very modest and restricted, both in principle and in practice, as compared to the generally sweeping powers of constitutional courts.

For these reasons it is desirable, from the point of view of legal policy, to avoid the emergence of too great a distance between the constitutional court and the "*will of the people*". In this respect the American system is reasonably effective, because it ties the composition of the Supreme Court to the vicissitudes of the political life of the country, albeit with a retarding mechanism conditioned by the lifetime appointments of its members.

### Referee and Ombudsman

During the last half century, constitutional courts have sprouted all over the world. Their basic duties could be described loosely as those of a referee and of an ombudsman. The constitutional court serves as a referee, or as a policeman,

to maintain proper order among the highest bodies of the state. This concerns in particular the maintenance of a certain balance among them, or, looking at it from a different angle, safeguarding the separation of powers. Additionally, in states having a federal or at least decentralized system of government, the constitutional court may be entrusted with protecting the powers of the respective parties.

Where basic civil rights and freedoms are concerned, a constitutional court may offer the ultimate refuge, at least at the level of the sovereign state, for citizens who claim their rights and freedoms have been violated – the ombudsman function.

These two aspects together, the maintenance of constitutional order (as the basis for the rule of law) and the safeguarding of human rights, may be regarded as the main preconditions for a politico-legal system which we describe as democratic. In this sense a constitutional court is to be seen as an important instrument to promote and consolidate democracy. The purpose of this paper is to examine how well the Constitutional Court of the Russian Federation has succeeded in this respect.

The absence of a separate constitutional court in a number of established democracies can be explained by reference to historical factors. In the United States, as already indicated, the Supreme Court serves as an ordinary supreme court and a constitutional court. In several of the old European democracies (e.g. the U. K., France, the Netherlands, Switzerland), the supremacy of parliament is held to imply that parliament has the power to judge the constitutionality of the bills before it. Once a law has been promulgated, its constitutionality can no longer be impugned. In France, nevertheless, as pointed out, the Constitutional Council fulfills part of the traditional functions of a constitutional court. Moreover, the existence of several international or supranational treaty networks in the area of human rights takes away the need to have a special national forum to adjudicate citizens' complaints in this field. If citizens in the countries concerned are usually prevented from pleading

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the unconstitutionality of laws which they claim violate their constitutional rights, they can effectively bypass this obstacle by pleading violation of their human rights under international rights in their national courts. And even if their complaints would remain unsatisfied there, they normally have access to higher international judicial bodies.

For all these reasons no great urgency to establish constitutional courts is felt in such countries.

In Russia, however, the Constitutional Court is endowed with all the usual powers and functions of a constitutional court.

### **The Russian Constitutional Court: Historical Background**

The current terminology concerning developments in Russia during the last two decades (the downfall, break-up, implosion, collapse etc. of the Soviet system) suggests that the old totalitarian system disappeared more or less spontaneously and was replaced by something quite different, a professedly democratic system. Such a view disregards the enormous reforming effort undertaken by the Gorbachev regime. As it discarded elements of the old order, it replaced them by new ones. During the Gorbachev years, the old 1977 Constitution of the USSR (the Brezhnev Constitution) was gradually amended beyond recognition, as a democratic system of government was being established. These efforts also included the question of constitutional jurisdiction. Part of the major wave of amendments introduced in 1989 (designed to transform the USSR into a parliamentary democracy and to establish the rule of law) was the setting-up of a Committee of Constitutional Supervision. The new provision devoted to it, Art. 124, was the longest of the entire 1977 USSR Constitution (in the ultimate form it had assumed by the end of 1991, when the USSR ceased to exist). Notwithstanding its name, the Committee came close to being an actual court. Its powers in upholding the Constitution

were described fairly generously. Where it concluded that a specific act was unconstitutional, its conclusion suspended the effect of the act; and if the act also violated the rights and liberties of citizens it lost its force by the conclusion itself. It would therefore be incorrect to characterize the Committee as a purely advisory body.

According to the practice still prevailing in 1989, the Russian Federation followed the example of the USSR and also set up a Committee of Constitutional Supervision. The next year, this Committee was transformed into a full Constitutional Court (art. 119 of the RSFSR Constitution),<sup>2</sup> and the duties of the Court were defined in Art. 165-1 (: mainly checking the constitutionality of laws and other legislative acts, and the solution of jurisdictional conflicts between the federal state agencies and other state agencies).<sup>3</sup> Detailed regulation was referred to special legislation. Such a Law on the Constitutional Court was adopted in 1991 and the first years of activity of the Russian Constitutional Court were governed by this Law, although there were quite a few inconsistencies in the relationship between the Law and the constitutional rules concerning the Court.

The principal duties of the first Russian Constitutional Court were, according to the Law, constitutional supervision of laws and other normative acts, and constitutional supervision of the practice of the application of the law. Unlike the Constitution itself, the Law also answered the crucial questions of who were entitled to address complaints to the Constitutional Court and what would be the consequences if a normative act would be considered as contrary to the Constitution. Complaints concerning the unconstitutionality of the application of the law could be filed by anyone whose basic rights were

<sup>2</sup> Law of 15 December 1990, *Vedomosti Sezda narodnykh deputatov RSFSR i Verkhovnogo Soveta RSFSR*, 1990 No.29 item 395.

<sup>3</sup> Introduced by Law of 21 April 1992, *Ved. S. n. d. RSFSR i V. S. RSFSR*, 1992 No. 20 item 1084.

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violated or left undefended, provided all other remedies had been exhausted.

The Russian Constitutional Court displayed great activity in its early years; in the struggle between President El'tsin and the Russian parliament (the Supreme Soviet) in the course of 1993, the Constitutional Court, and especially its president, V.D. Zor'kin, played a crucial role, incurring the wrath of the President, which led to its suspension on 7 October 1993.<sup>4</sup> The new Russian Constitution of 12 December 1993, which drastically adjusted the politico-legal balance of power between parliament and President in favour of the latter, again provided for the establishment of a Constitutional Court, referring detailed regulation to a new Law on the Constitutional Court.<sup>5</sup>

Such a Law was enacted on 21 July 1994 (hereafter quoted as LCC).<sup>6</sup> In February 1995 the Court was able to resume its

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<sup>4</sup> There can be no doubt that the suspension of the Constitutional Court in 1993 was entirely unlawful under the then prevailing constitutional system. Art. 121-6 of the then valid Constitution of the Russian Federation provided that "The powers of the President of the Russian Federation may not be exercised in order to ... dismiss or suspend the activities of any lawfully elected agencies of state power ..." and according to Art. 164 par. 2 the justices of the Constitutional Court were elected by the Congress of People's Deputies of the Russian Federation (the "large" parliament). A commentary to the decisions of the Zor'kin Court was published by A.A. Belkin, *Kommentarii k resheniiam Konstitutsionnogo Suda Rossiiskoi Federatsii 1992-1993*, Sankt-Peterburg, 1994.

More on the 1991-1993 Court: U. Steingröver, *Anfänge der Verfassungsgerichtsbarkeit in Russland*, Frankfurt a/Main, 2000; and A. Blankenagel, "Detstvo, otrochestvo, iunost'" *rossiiskogo Konstitutsionnogo Suda*, Moskva, 1996.

<sup>5</sup> This Law is designated by the Constitution as a federal constitutional law (Art. 128 par. 3). Such laws must be adopted by a qualified majority in both chambers of the Federal Assembly (Art. 108: three quarters in the Council of the Federation and two thirds in the State Duma, both numbers to be calculated on the basis of the full strength of the chambers). The same requirements apply to amendments of federal constitutional laws (Art. 136).

<sup>6</sup> *Rossiiskaia Gazeta*, 32-6-1994; *Sobranie zakonodatel'stva Rossiiskoi Federatsii*, 1994, No.13, item 1447. A semi-official commentary (six of the twelve authors were justices of the Constitutional Court) of the LCC is: N. V. Vitruk, L.V. Lazarev, B.S. Ebzeev (eds.), *Federal'nyi konstitutsionnyi zakon*

activities. The LCC has since been amended twice: on 8 February and 21 December 2001.<sup>7</sup>

The present Court is to be regarded as the legal continuation of the Russian Constitutional Court as it functioned before its suspension on 7 October 1993. Not only does the Court refer frequently to the decisions taken during its 1992-1993 sessions, but there was also strong personal continuity between the 1992-1993 Court and its successor in 1995. The Court has occasionally also referred to decisions of the USSR Committee on Constitutional Supervision.<sup>8</sup>

A number of the 89 federation subjects<sup>9</sup> of the Russian Federation have set up their own constitutional courts (charter courts). An examination of their function and activities is beyond the scope of this paper.<sup>10</sup>

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*O Konstitutsionnom Sude Rossiiskoi Federatsii. Kommentarii*, Moskva, 1996, hereafter quoted as "Commentary". B.S. Ebzeev published another commentary (not available to me), *Kommentarii k postanovleniiam Konstitutsionnogo Suda Rossiiskoi Federatsii*, 2 vols., Moskva, 2000.

<sup>7</sup> *Sobranie zakonodatel'stva Rossiiskoi Federatsii*, 2001, No.7 item 607 and No.51 item 4824.

<sup>8</sup> Altgovzen ruling, 040292 (*Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 1993 No.1), referring to the Age discrimination in labor opinion of 040491 (*Vedomosti S'ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR* 1991 No.17 item 501); Sitalova ruling, 250495 (*VKS* 1995 No.2/3, 32), referring to the *Propiska* system opinion of 111091 (*Ved. S. n. d. SSSR i VS SSSR* 1991 No. 46 item 1307).

<sup>9</sup> The present Russian state is conceived of as a federation of 89 members, called federation subjects: 21 republics (with an eponymous non-Russian ethnicity), 6 territories (unusually large and sparsely populated provinces), 49 ordinary provinces, the cities of Moscow and St.Petersburg, the Jewish autonomous province, and 10 autonomous districts (inhabited by small ethnic minorities and situated within a territory or province). At present there is a movement to reduce the number of federation subjects. As a first step the province of Perm' and the autonomous district of the Komi-Permiak will be merged as from 1 December 2005 (*Rossiiskaia Gazeta*, 26 March 2004).

At the administrative level, but without constitutional recognition (as yet), the present federation subjects are grouped together since 2000 in 7 federal districts: Central (Moscow), Northwest (St.Petersburg), South (Rostov-na-Donu), Volga (Nizhnii Novgorod), Ural (Ekaterinburg), Siberia (Novosibirsk) and Far East (Khabarovsk).

<sup>10</sup> On these courts, see M. A. Mitiukov, *Konstitutsionnye i ustavnnye sudy*

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## Publication of Constitutional Court Decisions

Any examination of the impact of a constitutional court on the legal and political system requires not only the study of the basic legal documents which concern the activities of such a tribunal (the relevant constitutional provisions and other special legislation), but also the decisions of the court itself. In Russia, all final Constitutional Court decisions on the merits of the cases mentioned in Art. 125 Constitution must be officially published (art. 78 LCC).<sup>11</sup> The many hundreds of decisions, published in the official sources or in other collections, offer a very detailed picture of the role the Court and its forerunners (the USSR and RSFSR Committees and the pre-1994 Russian Constitutional Court) have played in shaping the legal and political system of present-day Russia.

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*sub"ektov Rossiiskoi Federatsii*, Moskva, 1999; V.A. Kriazhkov, *Konstitutsionnoe pravosudie v sub"ektakh Rossiiskoi Federatsii (pravovye osnovy i praktika)*, Moskva, 1999; V.K. Bobrova, V.V. Krovel'shchikova, M.A. Mitiukov, *Zakon ob ustavnom sude sub"ekta Rossiiskoi Federatsii: kakim on mozhel byt'*, Moskva, 2000; B. Gässner, *Zur Verfassungsgerichtsbarkeit in den Subjekten der Russischen Föderation unter besonderer Berücksichtigung der Normenhierarchie*, Berlin, 2004; O. Yushkova, G. Stolz, "Die Entwicklung der Verfassungsgerichtsbarkeit in den Subjekten der Russischen Föderation im Vergleich zur Entwicklung der deutschen Landesverfassungsgerichtsbarkeit", *50 Osteuropa Recht* (2004), 1-10.

<sup>11</sup> Art. 78 LCC mentions "the official publications of the organs of state power of the Russian Federation ..." (this would first of all be the *Rossiiskaia Gazeta*), as well as the *Courier of the Constitutional Court of the Russian Federation (Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii)*, hereafter quoted as VKS.

The decisions mentioned in art. 78 are the ones termed *postanovleniia* (translated as "rulings" by van den Berg) and *zakliucheniiia* ("conclusions" - concerning presidential impeachment). Of course the Constitutional Court takes other, in principle although perhaps not always in practice, less important decisions (*opredeleniia*, translated as "decisions" by van den Berg). Such decisions are often published, and when published have been included in van den Berg's collection, but many apparently remain unpublished. Whether this should be regarded as a major shortcoming in the promotion of the rule of law in Russia is an open question. For an argument in favour of full publication, see W. Simons, "Russia's Constitutional Court and a Decade of Hard Cases: A Postscript", *28 Rev. CEE Law* (2002-2003), 655-678.

Access to this material (for the period of 1991-2001) for Western readers has been made possible by the work of the late Dr. G. P. van den Berg who has provided summaries in English of all available decisions of the Constitutional Court (and of constitutional or charter courts of federation subjects), as well as an English translation of the Constitution of the Russian Federation with extensive annotations based on decisions of the Constitutional Court.<sup>12</sup>

### The Present Court

The leading roles on the politico-legal stage are usually played by agencies which are commonly designated as parliament and President, among whom the principal and decisive legislative and executive powers are divided. A constitutional court may play a less prominent, but still crucial role as an arbitrator between the various legislative and executive agencies. Additionally, such a court may of course be entrusted with the defence and protection of basic constitutional rights of citizens and corporate entities. In both respects the appointment and composition of a constitutional court are matters of great political sensitivity.

The other major question concerning the constitutional court is about its powers. This question consists of four main elements:

- What kind of issues may be submitted to a constitutional court (jurisdiction)?
- Who is entitled to submit such issues (access)?

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<sup>12</sup> G. P. van den Berg, "Russia's Constitutional Court: A Decade of Legal Reforms; Part 1: Summaries of Judicial Rulings", 27 *Rev. CEE Law* (2001), 175-563, and G.P. van den Berg, "Russia's Constitutional Court: A Decade of Legal Reforms; Part 2: The Constitution of the Russian Federation Annotated", 28 *Rev. CEE Law* (2002/2003), 273-653.

References in this paper to decisions of the Russian Constitutional Court are to the summaries in Part 1 of van den Berg's work (which is arranged chronologically) and give the date and short name of the decision.

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- What kind of decision can the constitutional court take?
- How are such decisions implemented (implementation)?

These five questions will be addressed briefly, in respect of the Russian Constitutional Court.

### Appointment and Composition

The 19 justices (cf. Art. 125 Constitution) are appointed by the Council of the Federation, on the proposal of the President (Art. 128 p.1). This arrangement grants the President a preponderant influence in the composition of the Constitutional Court.<sup>13</sup> Further details of the justices' appointments are assigned to the LCC (see art. 9). According to this article, individual members of the Council of the Federation and the State Duma, as well as the parliaments of the federation subjects, the two other high courts, federal legal agencies,<sup>14</sup> All-Russian (i. e. national) legal associations,<sup>15</sup> and law faculties and institutes (*"legal academic and educational establishments"*) have the right to nominate Constitutional Court candidates to the President.

The Council of the Federation appoints the justices one by one, by a secret vote, a full majority being required (i. e. a majority of all the members of the Council).

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<sup>13</sup> At the time of writing, President Putin's constitutional reform plans had not been ultimately approved by the Russian parliament. Presuming that the plans will go through, they will result in a decisive influence of the Russian President at the executive level of the 89 "federation subjects" and thereby in the appointment of half the number of the members of the Council of the Federation. This fact, combined with the President's exclusive power to propose members of the Constitutional Court to the Council of the Federation, would give the President a controlling power in the composition of the Court.

<sup>14</sup> The Commentary (p.64) mentions the Ministry of Justice, the Ministry of Internal Affairs, the FSB, and the General Procuracy.

<sup>15</sup> The Commentary (p.64) mentions the Union of Advocates and the Congress of Judges.

The term of office of the justices is 15 years, with a possibility of reappointment (before the 2001 amendments the term was 12 years; under the 1991 Law the justices were appointed for life). The retirement age is now set at 70 (previously 65).

A justice will continue to function until a successor has been appointed, and also until a decision has been taken in a case which had been started with his participation.<sup>16</sup>

A justice of the Constitutional Court may be suspended (in case of criminal prosecution or ill health, art. 17) or lose his position altogether (art. 18). No less than 12 grounds for losing the position of justice are mentioned in this provision, some of them uncontroversial (voluntary retirement, death, etc.), but others are potentially sensitive, especially point 6: "*an act which reflects on the honour and dignity of a judge*". In this case a full two thirds majority vote of the Court itself is required to make a proposal to the Council of the Federation, which decides. In most other cases the Court itself decides.

The Constitutional Court may act in plenary sessions or through its chambers. It is divided into two chambers, of 10 and 9 members. The membership is determined by casting lots and must change at least every three years. The institution of separate chambers was an innovation in 1994 and had a purely practical background; cf. art. 20 LCC. The plenary session is entitled to deal with any question within the jurisdiction of the Court and has exclusive jurisdiction in a number of important questions, enumerated in art. 21 LCC. The jurisdiction of the chambers is spelled out in art. 22 LCC.

The Constitutional Court can function when it is at least at three quarters of its full strength (art. 4 LCC), i. e. 15 members. This is a general requirement and must be distinguished from the quorum requirement: the number of members required to take part in plenary sessions or sessions of the chambers

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<sup>16</sup> These two conditions are cumulative, not alternative; according to the Commentary (p. 66) this is required by the strict quorum rules of the LCC.

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(see art. 30 LCC: two thirds of the full number of members for the plenary session, and three quarters of the full number of members of the chamber concerned).<sup>17</sup>

### Jurisdiction and Access to the Constitutional Court

In the legislative method adopted by the Constitution, the jurisdiction of the Court, i. e. the definition of the kinds of issues which may be submitted to the Court, is linked to the enumeration of the persons and agencies entitled to submit issues. It is therefore more convenient to discuss these two questions together.

Art. 125 Constitution contains the basic description of the jurisdictional powers of the Constitutional Court, although Art. 128 par. 3 adds that the powers (*polnomochiia*) of the Court will be regulated by a federal constitutional law (the LCC). The powers of the Court can be distinguished as follows:

1. checking constitutionality;
2. resolution of jurisdiction disputes between state agencies;
3. interpreting the Constitution;
4. supervising aspects of the presidential impeachment procedure.

#### 1. Checking Constitutionality

The first and principal power, checking constitutionality, can be subdivided in:

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<sup>17</sup> According to the Commentary (p. 127), the calculations should be made on the basis of the actual number of participating justices. This may lead to a considerable reduction of the actually operative quorum; if, e.g., the full Court would consist of 17 justices (on account of there being two vacancies), then one chamber could have 9 members; if two of these would be ill, then the quorum would have to be calculated on the basis of 7 justices, resulting in 5.

1a. checking the constitutionality of normative acts ("*abstract norm control*", in the terminology of van den Berg), and

1b. checking the constitutionality of a law applied (or applicable) in a concrete instance. In this respect the influence of the German Federal Constitution is noticeable.

What the Court will actually check is spelled out in greater detail in the LCC (arts. 86, 99, 104).

As to 1a., the Court will examine the constitutionality of:

- federal laws and of normative acts of the President, the Council of the Federation, the State Duma, and the government;
- constitutions/charters,<sup>18</sup> laws and other normative acts of federation subjects, adopted in matters referred to the jurisdiction of agencies of state power of the Russian Federation and to the joint jurisdiction of such agencies and the agencies of state power of federation subjects;
- "*compacts*" (dogovory = treaties) between (agencies of state power of) the Russian Federation and (agencies of state power of) federation subjects, or between (agencies of state power of) federation subjects;
- international treaties of the Russian Federation which have not (yet) entered into force.

The Constitutional Court regards its power to engage in "*abstract norm control*" as exclusive, in its interpretative ruling concerning elections in the provinces of Perm' and Vologda (see below).

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<sup>18</sup> The 21 (ethnic) republics have constitutions, while similar basic acts of the other 68 "federation subjects" (territories, provinces, etc.) are called charters (*ustavy*); the difference is mainly terminological. Similarly, republics have "parliaments" (different names are used) who make "laws" (*zakony*), and "governments", while the other federation subjects (mostly provinces (*oblasti*) have "representative bodies", making "normative acts", and "executive bodies". Again, the difference is not very great, and in this paper the terms "parliament", "law", and "government" will be used, for the sake of simplicity.

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In all these cases the right to submit the matter belongs to:

- the President of the Russian Federation;
- the Council of the Federation;
- the State Duma;
- one fifth of the members of the Council of the Federation or of the Duma deputies;
- the government of the Russian Federation;
- the Supreme Court of the Russian Federation;
- the High Arbitration Court of the Russian Federation;<sup>19</sup>
- agencies of the legislative and executive power (parliaments and governments) of the federation subjects.

It is worth noting that, under the Constitution, the Constitutional Court has not been granted the power to assume cases of its own accord; in this respect it lacks equality with the other two supreme tribunals.

This is the more remarkable when we look at the second area of constitutionality checks, concerning the applicable law in concrete instances (1b.). In this case the Constitution provides that the Court will examine the constitutionality of a law (the Constitution uses the term *zakon*, statute, which excludes other "*normative acts*") which has been applied or which is applicable in a concrete case where this is requested by a court, or where a citizen complains that application of a law would violate or has violated his constitutional rights and freedoms (these rights and freedoms have been enumerated in Chapter 2 of the Constitution). According to this provision,

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<sup>19</sup> Ordinary civil and criminal cases are tried by the general courts, with the Supreme Court at the top, while economic cases (quantitatively and financially the more important category) are referred to "arbitration" courts, with the High Arbitration Court at the top. The whole system is a leftover from Soviet times.

therefore, any court may submit any law to the scrutiny of the Constitutional Court, the only condition being that the issue of the constitutionality of the law in question has emerged in the course of a concrete case.

As a brake on judicial activism on the part of the Constitutional Court, this system may be less effective than it looks. The Constitutional Court cannot intervene independently when it perceives unconstitutionality of a normative act, but in cases of real importance, somebody can probably be found who is willing to file a complaint.

A very substantial body of Constitutional Court case law has emerged concerning its own powers to be the judge of the constitutionality of legislation.

"*Abstract norm control*" is considered an exclusive right of the Constitutional Court (Abstract norm control Art. 125 interpretation, 160698).<sup>20</sup> The Court argued that the other two supreme courts, entitled to refer laws and other specifically named normative acts to the Constitutional Court in order to examine their constitutionality, are thereby deprived of the right to judge such issues themselves. Where the issue of the constitutionality of statutory law (*zakon*) arises in a concrete case, the (ordinary) court has a duty to refer to the Constitutional Court. The constitutionality of other normative acts, where this issue arises in a concrete case, must be judged by the ordinary court itself (Perm' Vologda elections ruling, 300497).

The procedural details of "*abstract norm control*" are regulated in the LCC, chapters IX (the normative acts mentioned in Art. 125 point 2 Constitution, except international treaties) and X (international treaties). The reason to treat these two categories separately is that only international treaties that have not yet entered into force are subject to the Constitu-

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<sup>20</sup> The same position had already been taken, but specifically with regard to the constitutionality of the charters and laws of provinces in the Perm' Vologda elections ruling of 300497 (VKS 1997 No.4, 24).

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tional Court's scrutiny; this part of the Constitutional Court's task is very similar therefore to the general task of the French Constitutional Council.

Once an international treaty to which the Russian Federation is a party has entered into force in Russia, treaty provisions which contradict domestic law will prevail over the latter (Art. 15 par. 4 Constitution). The Constitutional Court does not consider itself competent to judge whether a federal law complies with treaty provisions; this would be a matter for the ordinary courts.<sup>21</sup>

With regard to the activity of the Constitutional Court in the area covered by 1b. (constitutionality checks in concrete cases), the Court distinguishes sharply between checking the applicable law (which it regards as its duty) and examining the application of such a law (to which it does not regard itself as entitled); Volkov decision, 1995.<sup>22</sup>

Although constitutionality checks in a concrete case are regulated in a single paragraph (4) of Art. 125 Constitution, the two categories mentioned are quite different but possess two common characteristics. The first one is that par. 4 is the only part of Art. 125 which explicitly provides that the Court will engage in checking constitutionality "*in the manner established by federal law*"; this law is primarily the LCC, and the actual contents of the right granted by Art. 125 par. 4 are therefore mainly determined by the LCC. The second common factor is that constitutionality checks in concrete cases are limited to statute law (*zakon*) which is part of the federal jurisdiction. Where the claim is that constitutional rights have been violated by other acts (including "*normative acts*"), the ordinary court

<sup>21</sup> Bills of exchange decision, 041297 (published in G.A. Gadzhiev, S.G. Pepeliaev, *Predprinimatel', nalogoplatel'shchik, gosudarstvo. Pravovye pozitsii Konstitutsionnogo Suda Rossiiskoi Federatsii*, Moskva, 1998, 497).

<sup>22</sup> Not published, but communicated in N.V. Vitruk, L.V. Lazarev, B.S. Ebzeev (eds.), *Federal'nyi konstitutsionnyi zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii"*. *Kommentarii*, Moscow, 1996, 202-203. The editors Vitruk and Ebzeev were justices of the Court at the time.

has jurisdiction. Equally, the ordinary court will deal itself with questions concerning the constitutionality of “*other normative acts*” (not being a *zakon*), because then it is a simple matter of hierarchy of norms (statute law, including the Constitution, will always supersede norms of lower status).

Arts. 96-100 LCC regulate the procedure for dealing with complaints about the violation of the constitutional rights and freedoms of citizens.<sup>23</sup> Although the Constitution only mentions “*citizens*”, art. 96 LCC explicitly allows collective complaints and complaints by “*citizens’ associations*”. It then adds “*and other organs and persons indicated by federal law*” According to the Commentary (p. 295), this would allow for the future inclusion of such officials as the Plenipotentiary for Human Rights (the Russian ombudsman, Art. 103 Constitution). At the same place the Commentary points out that “*citizens*” would include foreign citizens, because according to Art. 62 point 3 Constitution, foreigners enjoy the same rights as citizens, barring special legislation.

The procedure for dealing with requests by courts to adjudicate the constitutionality of statute law which the court is to apply in a concrete case is regulated by arts.101-104 LCC. The Constitutional Court has stated clearly that Art. 125 par. 4 does not so much empower the ordinary court to approach the Constitutional Court to seek clarification concerning the constitutionality of a specific law (*zakon*), but rather puts it under an obligation to have the law deprived of its legal force.<sup>24</sup>

When the Court has ruled in an individual case, the effect of its ruling nevertheless is general; Kagirov decision of 040399. This decision concerned the question of the constitutionality of a law of the republic of Bashkortostan; two similar earlier decisions were quoted, concerning the Udmurt and Komi republics.

<sup>23</sup> Cf. V. O. Luchin, O.N. Doronina, *Zhaloby grazhdan v Konstitutsionnyi Sud Rossiiskoi Federatsii*, Moskva 1998.

<sup>24</sup> Abstract norm control Art. 125, 160698 (VKS 1998 No.5, 51).

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## 2. Resolution of jurisdiction disputes

The resolution of jurisdictional disputes (2., as mentioned above) between state agencies is subdivided by the Constitution as follows:

- disputes between federal (central) state agencies;
- disputes between federal state agencies and state agencies of federation subjects;
- disputes between central state agencies of federation subjects.

The duties of the Constitutional Court under this heading are of crucial importance for the functioning of the constitutional system of government, and the second of the three categories in particular for maintaining a proper balance between the federal level and the next lower level. Within the framework of this paper it would take too much space to examine this latter question in detail, because it would involve a discussion of the complicated three-way system of distributing powers between the federal level and the level of the federation subjects, a system not unlike the one in force in Germany: federal jurisdiction, joint jurisdiction, and jurisdiction of the federation subjects.<sup>25</sup>

The other two categories (disputes between central (federal) state organs and disputes between central state agencies of federation subjects) have produced a sizable body of decisions of the Constitutional Court. A discussion of this matter would, however, lead too deeply into Russian administrative law.

Special procedural rules for the jurisdictional disputes of Art. 125 par. 3 Constitution are to be found in arts.92-95 LCC.

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<sup>25</sup> Two important cases in this category are the Water objects decision of 040297 (published in Gadzhiev, Pepeliaev – see note 22 – 483; in which the Court ruled that the unilateral definition in a federal law of what constitutes joint jurisdiction may give rise to a competence dispute) and the Forest Code decision of 061197 (published in Gadzhiev, Pepeliaev, 496; in which the Court ruled that a complainant may not raise a competence dispute and, at the same time, contest the constitutionality of an act).

### 3. Interpretation of the Constitution

According to Art. 125 point 5 Constitution, the Constitutional Court provides an interpretation of the Constitution at the request of the President, the Council of the Federation, the State Duma, the government of the Russian Federation, or the legislative agency (parliament) of a federation subject.

This list of possible initiators of a constitutional interpretation procedure before the Court is shorter than the list of agencies with the right to request "*abstract norm control*" (Art. 125 par. 2 Constitution). The two procedures are of course closely related, because a decision to consider a "*normative act*" as in violation of the Constitution presupposes a specific understanding of a specific constitutional provision, in which an interpretation of the Constitution may be implied. Nevertheless, the focus of the two procedures is different; in one case it is the constitutionality of a normative act, in the other the way a certain constitutional provision ought to be read. The Constitutional Court has attempted to clarify the difference in the Procurator General decision of 040399.

The Constitutional Court considers itself as the only agency with the right to interpret the Constitution.<sup>26</sup>

The LCC does not contain any specific procedural rules in this case; of the two provisions devoted to the handling of requests for an interpretation of the Constitution, art. 105 LCC merely rephrases Art. 125 par. 5 Constitution and art. 106 LCC adds that an interpretation of the Constitution, given by the Constitutional Court, is official and generally binding. As the Commentary explains (p. 325), it becomes part of the Constitution itself.

The Court is flexible in its choice of method of interpretation. In the Capital Moscow ruling of 190592, the Court referred to what it believed the makers of the Constitution had in mind.<sup>27</sup>

<sup>26</sup> Perm' Vologda elections ruling, 300497 (VKS 1997 No.4, 55).

<sup>27</sup> A rather complicated exercise, considering that the RSFSR Constitution

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In the Quorum Article 103 interpretation of 120495, the Court interpreted the term "*total number of deputies/members*" (which turns up in a number of constitutional provisions) as to mean the respective theoretical numbers of deputies/members of the chambers of the Federal Assembly (178 for the Council of the Federation and 450 for the State Duma), instead of the total number of actual deputies/members (almost always less than the theoretical strength). The Court based its decision mainly on general democratic theory.

Art. 74 LCC also contains several pointers concerning methods of interpretation. It instructs the Court to consider not only the literal meaning of the act which is being examined, but also the meaning which it may have acquired through official [by other courts]<sup>28</sup> or other interpretation, or through the practice of implementation; the place of the act within the legal system should also be taken into account.

Questions of interpretation of the Constitution belong to the most important duties of the Court and must be dealt with in plenary sessions (art. 21 LCC); they also require a two thirds majority (art. 72 LCC).

#### 4. Presidential Impeachment

The Constitutional Court, according to Art. 125 point 7 Constitution, is involved in the procedure of impeaching the President in a supervisory capacity. After the struggle with the

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in force in 1991 was a patchwork of many chronological layers of amendments. Another point of interest in this ruling was that it addressed an innate problem of Russian law, caused by the absence of the article in the Russian language. When the RSFSR Constitution established that a certain question had to be regulated by *zakon*, did this mean "a law" (a single statute) or "law" (statute)? In this case, where the matter in question had been regulated by two separate statutes, the Court ruled that the maker of the Constitution actually had had one law in mind.

<sup>28</sup> The Commentary (p.233) refers specifically to the "guiding explanations" (*rukovodiashchie raz"iasneniia*) which the Supreme Court and the High Arbitration Court are entitled to issue.

parliament in 1993, in which the President emerged victorious, the new Constitution of the Russian Federation has made successful impeachment more arduous. It is regulated now in Art. 93 and the State Duma, the natural protagonist of the President, appears as the prosecuting agent. The Supreme Court should affirm that the President is guilty of a serious crime; the Council of the Federation may then remove the President from office, after it has elicited a conclusion from the Constitutional Court that all procedural requirements have been observed. As qualified majorities are required and the President will usually have a built-in majority in the Council of the Federation, successful impeachment is well-nigh impossible.

Arts.107-110 LCC regulate the special procedure for the Constitutional Court's involvement in impeachment of the President. Obviously, impeachment is a matter for the plenary session of the Court (art. 21 LCC).

### Procedure

A considerable part of the LCC (Chapters V-VII, arts.36-83) is devoted to the procedure followed in proceedings before the Constitutional Court. Such procedures differ indeed in several aspects from ordinary civil, criminal or administrative procedures. In the latter the adversarial aspect is generally dominant; the court is faced with two civil parties, or with a prosecutor and a defendant, or with an administrative agency and an aggrieved party. In Constitutional Court cases there will often be only one actual party, the other one being present only in the abstract (a legislator as the author of a normative act which is alleged to be unconstitutional). Many legal systems introduce an attorney-general-type official in such situations, to represent an alternative position, but the Russian law has avoided this option.

Another difference is in the absence of appeal or other remedies (but see footnote 34, Dudnik decision).

But perhaps the most important characteristic which sets the Constitutional Court apart from all other courts is its

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quasi-legislative position. It is, as has been remarked in the State Duma during the discussion of the LCC bill, a negative legislator at least; it has the unique power to throw out legislation passed by the Federal Assembly and signed into law by the President. Moreover, its decisions also have a law-creating effect. This by itself is not remarkable, because the same may be said about the decisions of the other two high courts.<sup>29</sup> But while the "case law" created by the Supreme Court and the High Arbitration Court has a status similar to that of superior courts in other systems of codified (civil) law, the Russian Constitutional Court enjoys more ample powers. It can actually push the ordinary legislature deliberately in a certain direction, by more or less prescribing it what kind of legislation ought to be adopted (see below).

For all these reasons a specially designed procedure is required. On the other hand, the tasks of the Constitutional Court are quite diverse. This has resulted in the present organization of the LCC, which first supplies a number of general procedural rules and then deals separately with the procedures applicable for the various tasks outlined in Art. 125 Constitution.

### Decisions and Implementation

Chapter VIII (arts. 71-83) LCC is devoted to the decisions taken by the Constitutional Court. The chapter also regulates the implementation or enforcement of Constitutional Court decisions, so the two subjects will be treated together here.

Chapter VIII, in particular arts. 79-80, was the subject of the most significant revision in 2001, to be discussed below.

Decisions in the Constitutional Court are taken by ordinary majority vote, except (as mentioned above) in a case of formal constitutional interpretation.<sup>30</sup> As there will often be an even

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<sup>29</sup> Cf. P. Maggs, "Judicial Precedent Emerges at the Supreme Court of the Russian Federation", 9 *Journal of East European Law* (2002), 479-500.

<sup>30</sup> No special majority is required in the case of presidential impeachment.

number of justices, tied votes may easily occur. If the case is about the constitutionality of a normative act,<sup>31</sup> then its constitutionality is assumed in such a case. Jurisdiction questions always require a majority decision.<sup>32</sup> Justices are not allowed to abstain. For all these questions, see art. 72 LCC.

Art. 73 LCC mentions the term “*legal position*” (*pravovaia pozitsiia*), which refers to a key concept in the practice of the Constitutional Court. According to this provision, if a majority in one of the chambers is inclined to the view that a decision should be taken which does not agree with a legal position previously taken by the Court, the case is referred to the plenary session of the Court.

One of the conclusions the Court has drawn from the text of art. 73 is that it may change its legal position.<sup>33</sup>

A legal position may concern the interpretation of a constitutional provision or the contents of other normative acts, examined in the course of a procedure before the Constitutional Court.<sup>34</sup> Such legal positions possess general binding force, on the basis of art. 6 LCC, as the Court has repeatedly pointed out.<sup>35</sup> The Court will normally follow precedent and abide by its previous legal positions.<sup>36</sup>

Art. 76 allows dissenting opinions, both against the judgment as a whole or against parts of it. Such opinions are published together with the judgment.

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The Constitutional Court becomes involved in such cases at a late stage, when the major and difficult hurdles in the State Duma and the Supreme Court have already been taken; moreover, the Constitutional Court only checks the correctness of the procedure.

<sup>31</sup> As well as so-called compacts (treaties between state agencies) and international treaties.

<sup>32</sup> The Commentary suggests (p. 227) that the general rule in case of a tied vote is to re-open the examination and deliberation of the case.

<sup>33</sup> Dudnik decision, 130100 (VKS 2000 No.2, 44).

<sup>34</sup> Commentary, p.229.

<sup>35</sup> E.g. in the Karatuzskoe court clarification of 071097 (VKS 1997 No.5, 44).

<sup>36</sup> Cf. Lawyer Kezerova decision of 041297 (VKS 1998 No.1, 49).

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There is no appeal against decisions of the Constitutional Court (art. 79 LCC), but the Dudnik decision cited above indicates that a persistent complainant may succeed in persuading the Court to change its position.

Where the Court reaches the conclusion that a certain normative act, or certain provisions in it, are unconstitutional, they lose their force forthwith (art. 79 LCC).

Moreover, as stipulated in the same provision, the conclusion of the Court does not require the confirmation of anybody else to be effective (a thing easier said than done, as will be discussed below).

International treaties (which, as pointed out above, can only be contested before the Constitutional Court before entering into force) deemed unconstitutional by the Court, may not be ratified; if the treaty has already been ratified (but has not yet entered into force), the government has to make every effort (denunciation, renegotiation, etc.) to correct the situation.<sup>37</sup>

Art. 79 also provides that judgments of courts and other official bodies, based on acts which have been deemed unconstitutional, may not be executed and must be reviewed in the manner established by law.

Furthermore, art. 79 specifically forbids the renewed issuance of an act which had been designated as unconstitutional by the Court. The Commentary (p. 247) adds that the remedy in this case is defective; the Court cannot act itself and has to wait until a complaint is made, when it can declare the new act unconstitutional again.

The effect of a decision of the Court, containing a new legal position, is very similar to that of a new law. This may create transitional problems and the Court has often manoeuvred carefully to avoid undesirable effects of full-scale retroactivity. The main basis of the Court's flexibility in this respect was

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<sup>37</sup> Commentary, p. 248.

art. 80 LCC which in its original very brief version provided that the Court's decisions were subject to immediate execution after publication [of the judgment] or after its official text had been delivered, "*if no other terms have been specially indicated in it*". The Court used this provision rather creatively to add various conditions to the terms indicated in the judgment. In the Alcohol license fee ruling of 180297, for instance, the Court established that a government decree on alcohol license fees was unconstitutional, but allowed a six-months period to correct the matter, arguing that the fee was part of the state budget and that its immediate abrogation could result in the violation of other constitutional rights and freedoms.

In some circles, the Court's handling of such problems was perceived as judicial activism and a lively debate about the extent of the Court's powers arose.<sup>36</sup> In the minimalist view, the Court would issue an opinion on constitutionality and then it would be up to the competent authorities (President, government, Duma, local government, etc.) to take the appropriate steps to correct the situation. As the opponents of this view retorted, this would reduce the Court to little more than an advisory body. And given the slowness and inefficiency of existing legislative and administrative processes, such a solution might result in practical irrelevancy of Constitutional Court decisions. On the other hand, there was understandable hesitation about granting the Court a completely free hand in rampaging through the elaborate structure of federal and lower level legislation.

After an acrimonious political struggle, a solution was adopted which was largely favourable to the Court. It was embodied in a new and much extended wording of par. 4 of art. 79 and the replacement of the very short art. 80 by an extremely long new article.

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<sup>36</sup> More extensively on this debate: A. Trochev, "Implementing Russian Constitutional Court Decisions", 11 *East European Constitutional Review* (2002), 95-104.

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The basis of the new arrangement is now the new par. 4 of art. 79 which provides generally that, once a normative act has been found in breach of the Constitution (either completely or in part), the issuing agency or official "*consider the question of adopting a new normative act*". Such a new act must contain provisions to cancel the unconstitutional act (or the unconstitutional part of it). The last sentence of par. 4 adds the sanction: "*Until the new normative act has been adopted, the Constitution of the Russian Federation applies directly.*"

Whether such a drastic solution works in practice is an open question. It would require the relevant authorities to invent new approaches, respecting the position taken by the Constitutional Court.

The further procedure is described in detail in the new art. 80. It distinguishes between five different situations of a partially or completely unconstitutional act, depending on the author of the normative act found to be unconstitutional. (1) If a new federal law (*zakon*, statute) or an amendment in a statute is required, the government must within three months present a bill in the State Duma; the Duma then has to consider the bill without delay.<sup>39</sup> (2) If a presidential edict or governmental decree is subject to replacement or amendment, the President or the government respectively have two months at their disposal. (3) When the corrections to be made concern the constitution (charter) or a statute of a federation subject, the appropriate agencies must within two months put a proposal before the legislative agency of the subject. If the correction has not been realized within six months, the federal authorities may start the procedure for dismissing the authorities of the federation subject who are at fault. (4) The same procedure applies, but with a short term of two months only, when the issue is about an unconstitutional normative act of the executive of a federation subject. (5) Finally, a compact between federal agencies and

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<sup>39</sup> *vo vnecherednom poriadke*, which means that the bill will jump the queue and get right to the head of it.

agencies of a federation subject, or between several federation subjects, which has been found unconstitutional (wholly or in part), must be cancelled or corrected within two months.

An unusual procedure is provided by art. 83 LCC: the Constitutional Court may be asked for a clarification of one of its decisions by any of the agencies having the right to address requests to the Court and also by the agencies or persons to whom the decision was directed. According to the Commentary, the Court may refuse to issue a clarification (p.256). In the Voronezh advocates decision (201101), the Court refused to answer the question whether a new law was in accordance with an earlier ruling of the Court.

### Evaluation

Reference has been made, at the start of this paper, to the traditional double role of a constitutional court, that of a referee at the highest level of the national state, and that of a court of last resort for citizens who believe their constitutional rights and freedoms have been violated (the ombudsman function). A proper execution of these functions will contribute significantly to the furthering of democracy, if at least democracy is held to embrace more than just the establishment of political rule on the basis of a majority verdict of the electorate. We would indeed not call a government lacking such legitimation democratic, but an electoral victory is only an inevitable precondition for a democratic political organization of social life. What really is required is the rule of law, or in other words the establishment of a Rechtsstaat, and respect for the rights of the individual. In this regard the importance of the constitutional court, in its double role, is immediately obvious.

The two roles are connected, because the satisfaction of justified claims of citizens about violations of their constitutional rights will normally involve the correction of unconstitutional actions of state agencies, forcing the latter to observe the rules laid down for the proper functioning of the state.

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In upholding the Rechtsstaat, the constitutional court in a federal state, such as Russia, as has been pointed out before, is the guardian of constitutionality in two separate spheres: it is tasked with the maintenance of the constitutional equilibrium between the highest agencies of the state, and it supervises and polices the border between the jurisdictions of the federal state and its constituent parts. These two spheres, again, are interconnected, because the federation subjects (as they are named in Russia) are not uninterested in the outcomes of the continuous tussle for supremacy between President and parliament, and, particularly through the Council of the Federation, they have various means at their disposal to intervene.

The first duty of the Constitutional Court (the referee role, upholding the Rechtsstaat, maintaining the balance between the central agencies of the state, and between the federal level and the members of the federation) has inevitable political aspects. Although the discourse of the Court has to stay within the bounds indicated by the text of the Constitution, its official task of interpreting the Constitution makes it a co-determinant in what the Constitution actually says. An interpretation of the Constitution presupposes an understanding of what the Constitution ought to say, because the Constitution, as argued above, is only a text and does not have an underlying hidden meaning which could be revealed through impartial investigation. This makes the selection of Constitutional Court justices such a crucial issue. The high professional qualifications for appointment to the Constitutional Court are defined in art. 8 LCC and appear to be adequate; but in the selection of justices they only constitute a first threshold. Anybody involved in the nomination, from the President down, will be far more interested in ascertaining the political views of the candidate.

The "*personalization*" of the Constitutional Court has received a strong boost by the admission and publication of separate and dissenting opinions. Although the overwhelming majority of Constitutional Court judgments is passed without such opinions, certain justices (esp. Vitruk and Kononov) stand

out by the frequency of their separate or dissenting opinions.<sup>40</sup> Several justices have also not hesitated to take part in the public debate about the role of the Court, especially in the years before 2001 (when the LCC was amended).<sup>41</sup>

In a nascent and still very imperfect democratic system, such as emerged in Russia after the breakdown of the Soviet system, a constitutional court that would resign itself to the fine-tuning of constitutional relationships between the main agencies of the state would miss great opportunities to further democracy. In the early years of the El'tsin presidency, when the balance between parliament and President appeared to be in favour of the former, the Constitutional Court became deeply involved in the tug-of-war between the two. The president of the Court at that time, V. D. Zor'kin, came down strongly on the side of the parliament (the Supreme Soviet at that time). He was blamed widely, in Russia as well as abroad, for partisanship and for excessively exposing himself politically. Certainly, Zor'kin's activities during those days had a divisive effect on the Court itself and were occasionally hard to reconcile with judicial prudence and reticence. On the other hand, a Constitutional Court president who would have remained silent in the face of the outrageous violations of the established constitutional order, as committed by President El'tsin, would have done far more harm to the Court.<sup>42</sup>

The whole Court was punished by being suspended for more than a year (October 1993 -February 1995), after El'tsin had dismissed the parliament and forced through his own

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<sup>40</sup> In van den Berg's publication, which covers the period of 1992-2001, I counted 24 of such opinions of Kononov and 23 of Vitruk; runners-up were Morshchakova (13), Luchin and Ametistov (9 each), and Ebzeev (8).

<sup>41</sup> See A. Trochev, "Implementing Russian Constitutional Court Decisions", 11 *East European Constitutional Review* (2002), 95-104.

<sup>42</sup> In fairness to El'tsin it should be added that after he had emerged completely victorious in his struggle with the parliament, Zor'kin was not robbed of his seat on the Constitutional Court (he was actually re-elected president of the Court in the spring of 2003).

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Constitution. It is perhaps typical of Russian political culture that almost all the old justices retained their seats on the Constitutional Court, which then proceeded to conscientiously interpret and apply the El'tsin Constitution. This Constitution stacked the cards strongly in favour of the President, leaving only a modest role for the State Duma, the popularly elected parliament. Initially, the Duma elected simultaneously with the adoption (through a referendum) of the new Constitution, was very hostile to the President. (This of course vitiated post factum the claim of the El'tsin party that the autumn coup of 1993 was necessary because of the lack of representativeness of the old parliament, the Supreme Soviet.) With the advent of President Putin the situation changed; especially after the most recent elections, President and government enjoy a very comfortable majority in the Duma. This has taken most of the tension and acrimony out of the Constitutional Court's involvement in demarcating the borderline between the respective jurisdictions. The most important remaining bone of contention is the quasi-legislative power which has resulted from the Constitutional Court's view of its own role. This is a constant source of irritation for the State Duma, which understandably guards its prerogatives as the basic legislative agency. The Constitutional Court on the other hand is anxious not to be demoted to a body which only produces opinions, which then must be implemented by others. This tension is perhaps inherent to the presence of an effective constitutional court. Otherwise one can say that the situation in Russia, in this particular field, has become fairly normal.

The same cannot be said of the related field of relations between the federation and the federation subjects. The support El'tsin needed for his political survival had been bought dearly. Control over the economy had largely been handed over to a small band of new entrepreneurs, the so-called oligarchs, in exchange for their financial support; the ruling circles in the federation subjects had been encouraged to take over as much power as they could "bite off", in exchange for propping up El'tsin's position at the centre of the state. As a

result, when Putin came to power, the two most urgent targets were the recuperation of central control in those two areas. In the management of federal-regional relationships, in so far as constitutional aspects are concerned, the Constitutional Court is a major player. It is therefore no surprise that this Court was looked upon as a natural ally by the central government in its attempt to recoup from the federation subjects what had been disbursed during the El'tsin era. Although this was in one sense a highly political employment of the Constitutional Court, it was not lacking a secure constitutional basis. The haphazard dissipation of central powers in the past, in favour of the more ambitious and aggressive federation subjects, had largely been in disregard of the Constitution; federation subjects had proclaimed "*sovereignty*" and the superior force of their own legislation, and the central government has only protested faintly or acquiesced completely.

Finally, to turn to the second main role of the Constitutional Court, that of guardian of individual constitutional rights, in this field the record of the Russian Court is impressive. By their very nature, such rights usually have to be upheld against the state. Genuine enforcement of civil rights was therefore unthinkable under the Soviet system. Although there was a willingness, in principle, among the new Russian political leadership to take such rights seriously, the accumulated bureaucratic routines of seven decades of Soviet power constituted an enormous practical obstacle. The task of the Constitutional Court was simply to act as a pioneer, a guide, a teacher. By its numerous decisions in the field of constitutional rights it broke the ice, often by invalidating whole chunks of important legislation. In particular the impact of Constitutional Court decisions on the Code of Criminal Procedure is to be noted. Of all the old codes of the Soviet period, this one (of 1960) was the last one to survive, until it was finally replaced by a new Code in 2001.<sup>43</sup>

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<sup>43</sup> Code of Criminal Procedure of the Russian Federation of 18 December 2001, amended by laws of 4 July 2003, 8 December 2003 and 22 April 2004.

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At that time the Code had become a patchwork of hundreds of amendments, many of them necessitated by Constitutional Court decisions which had invalidated large parts of it.<sup>44</sup>

But also in the field of private law the achievements of the Court have been impressive. The relevant provisions of the Constitution which allow the Court to get involved are especially Arts. 34 (freedom of economic activities), 35 (private ownership), 36 (ownership of land) and 37 freedom of labour). The interpretation of these provisions can be combined with the application of Art. 19 Constitution (the equality principle).<sup>45</sup>

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<sup>44</sup> Cf. Samigullina ruling (131195, VKS 1995 No.6, 18), Kulnev ruling (020296, VKS 1996 No.2, 2) and Kulnev clarification (060697, VKS 1997 No. 5, 7), Shchelukin ruling (130696, VKS No. 4, 2), Karatuzskoe court ruling (281196, VKS 1996 No.5, 15), Gurdzhiiants ruling (270396, VKS 1996 No. 2, 34 this ruling also concerned the famous case against naval captain Nikitin), Irkutsk court ruling (200499, VKS 1999 No. 4, 41), to mention only several prominent cases. Even under the new Code of Criminal Procedure, the Constitutional Court has continued its critical scrutiny, see decision of 8 December 2003 (VKS 2004 No.1, 3), concerning a number of Code provisions found to be unconstitutional.

The case against naval captain Nikitin, accused of handing over military secrets to Norway, is discussed by several authors who participated in the case in various capacities in 9 *East European Constitutional Review* (2000) No.4, articles by K. Johnson, V. Tereshkin (interview with trial judge), M. Matinov and Y. Schmidt, E. Barikhnovskaya, and I. Pavlov.

<sup>45</sup> This aspect is elaborated by R. Dragneva and W. Simons, with particular regard to the freedom of contract in "Rights, Contracts and Constitutional Courts: The experience of Russia", in F. Feldbrugge, W. Simons (eds.), *Human Rights in Russia and Eastern Europe; Essays in Honor of Ger P. van den Berg; Law in Eastern Europe*, No. 51, The Hague/London/New York, 2002, 35-63.

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In post-communist Eastern Europe constitutional courts were established in the wake of democratic transition. They were regarded to be instrumental for the enforcement of the new constitutional order and for the protection of constitutional rights.<sup>1</sup> Most East European constitution-makers opted for a centralized, Kelsenian model of constitutional review,<sup>2</sup> thus abandoning the model of decentralized constitutional review practiced prominently in the United States.<sup>3</sup> Although reasons

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\* Paper presented by Dr. Uitz is titled "Lessons On Limited Government, Constitutionalism and the Rule of Law: Post-Communist Democracies Trapped Between Constitutional Courts and Supreme Courts".

<sup>1</sup> See e. g. Herman Schwartz, *The Struggle For Constitutional Justice In Post-communist Europe* (2000); Jacek Kurczewski & Barry Sullivan, "The Bill of Rights and the Emerging Democracies", 65 *Law & Contemporary Problems* 251, 272 et seq. (2002).

<sup>2</sup> A notable exception is Estonia where constitutional review is performed by a specialized constitutional review chamber of the Supreme Court.

<sup>3</sup> For an excellent comparison of the justifications offered by Chief Justice Marshall and Hans Kelsen from the perspective of the legitimating force of their concepts See Carlos Santiago Nino, *The Constitution Of Deliberative Democracy* 189-196 (1996).

For a profound assessment of the characteristics of the "European model" of constitutional review See Louis Favoreau, *Les Cours Constitutionnelles* 5-28 (1996).

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behind the rejection of the U.S. model differ in the various countries, a degree of distrust in the ordinary judiciary seems to be traceable in almost all cases.

Distrust in the judiciary to conduct constitutional review is not a genuinely East-European phenomenon. The establishment of the French Constitutional Council was heavy with long-held aversions towards the ordinary judiciary, a sentiment fueled by centuries-old accusations of judicial corruption and fears of judicial arbitrariness.<sup>4</sup> Indeed, such considerations might still not be ignored when evaluating the failure of a recent proposal to introduce individual constitutional complaint in France. Furthermore, complicity of the judiciary in the actions of the previous oppressive regime might also make judges suspect when it comes to trusting the new constitution with the old judges, as the case of South Africa clearly demonstrates. While according to commentators South African judges would have had the opportunity to ease the grip of apartheid via developing common law, the judiciary clearly missed this chance. Moreover, Webb argues forcefully that it is exactly the tainted history of the judiciary that prompts the South African Constitutional Court to frequently consult international law and foreign constitutional jurisprudence in its decisions.<sup>5</sup>

In post-communist Eastern Europe ordinary courts did also administer the law of authoritarian regimes, and victims of certain judgments rendered out of political considerations were rehabilitated and even –at least partially– compensated. Nonetheless, in post-communist countries reluctance to accept ordinary courts as guarantors of the new constitutions was primarily triggered by a fear of incompetence. As Cappelletti suggests, such concerns are not limited to post-communist

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<sup>4</sup> Didier Maus, "The Birth of Judicial Review of Legislation in France", in: *Constitutional Justice Under Old Constitutions* 113-143 (Eivind Smith ed. 1995) and Claire Germain, "Approaches to Statutory Interpretation and Legislative History in France", 13 *Duke J. of Comp. & Int'l L.* 195 (2003).

<sup>5</sup> Hoyt Webb, "The Constitutional Court of South Africa, Rights Interpretation and Comparative Constitutional Law", 1 *U. PA. J. CONST. L.* 205, 208 (1998).

courts. Reservations about ordinary courts as constitutional adjudicators reflect the perception and self-perception of continental judges as career officials whose task is to apply the law faithfully, but not to alter it.<sup>6</sup> While ordinary courts in Slovenia may refuse to apply executive norms which they deem to be unconstitutional or unlawful (*exceptio illegalis*),<sup>7</sup> such decisions, are distinguished from instances of constitutional review in Slovenia.<sup>8</sup> A similar reluctance can also be sensed in Croatia where *exceptio legalis* in an ordinary court is combined with a referral of the issue to the Constitutional Court.<sup>9</sup>

The behavior of ordinary courts in some post-communist countries seems to support this hypothesis. Article 4 of the Czech Constitution provides that "*fundamental rights and freedoms shall enjoy the protection of judicial bodies.*" This rule, thus, entrusts ordinary courts to apply the rights provisions of the Czech Constitution in individual cases. Courts of general jurisdiction, however, are rather reluctant to act upon this authorization – an inaction criticized even by the Czech Constitutional Court.<sup>10</sup> This is all the more surprising in the light of the fact that in the Czech Republic it is the duty of ordinary courts to review the legality of sub-statutory norms.<sup>11</sup> Also, in addition to entrusting the Constitutional Court with an exceptionally

<sup>6</sup> "Cappelletti on quote in Favoreu", *Les Cours Constitutionnelles*, 9.

<sup>7</sup> Article 125 of the Slovenian Constitution.

<sup>8</sup> See para 15 of *The Relations Between Constitutional Courts And Other National Courts, Including The Interference In The Area Of The Action Of The European Courts, Report Of The Constitutional Court Of The Republic Of Slovenia Prepared For The 12th Congress Of The Conference Of European Constitutional Courts*, available in English at <http://www.confcoconsteu.org/reports/Slovenia-EN.pdf>.

<sup>9</sup> See Article 35(2) of the Croatian Act on the Constitutional Court. Available in English at [http://www.usud.hr/html/the\\_constitutional\\_act\\_on\\_the\\_.htm](http://www.usud.hr/html/the_constitutional_act_on_the_.htm).

<sup>10</sup> See Judgment of 6 June 1995, I ÚS 30/94, in *The Relations Between Constitutional Courts And Other National Courts, Including The Interference In The Area Of The Action Of The European Courts, Report Of The Constitutional Court Of The Czech Republic Prepared For The 12th Congress Of The Conference Of European Constitutional Courts*, available in English at <http://www.confcoconsteu.org/reports/Tsjechie-EN.pdf>, para 4.

<sup>11</sup> Article 95(1) of the Czech Constitution.

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broad jurisdiction to perform constitutional review, the Hungarian Constitution also provides, that ordinary courts shall have jurisdiction to hear claims arising from the infringement of fundamental rights.<sup>12</sup> Thus, under this provision, ordinary courts could take rights claims based on the constitution itself.<sup>13</sup> Nonetheless, in the first five years of the new Hungarian democracy no such case was heard in ordinary courts.<sup>14</sup> While in the following years, ordinary courts became somewhat braver, cases brought under the constitution to ordinary courts are still rather rare. This state of affairs is all the more troubling as accession to the European Union is expected (or, better, feared) to bring new claims involving constitutional and fundamental rights not before constitutional courts, but before courts of ordinary jurisdiction.

Constitutional courts were entrusted with a special task which no other body was believed to be capable of performing in post-communist countries. Moreover, as constitutional courts were established in the institution-building wave of democratic transition, these untainted bodies came to enjoy tremendous institutional legitimacy. Even in Slovakia, where confidence in ordinary courts is low and public opinion is highly critical of the judiciary, this widespread negative public attitude did not reach the Constitutional Court.<sup>15</sup> The reputation of some constitutional courts might have tarnished when constitutional review fora got exposed to highly controversial issues such as the constitutionality of transitional justice measures, economic reconstruction and other issues which deeply divide society. At the same time, post-communist judiciaries went through changes as well: reforms involving the structure of the judici-

<sup>12</sup> Article 70/K, Hungarian Constitution.

<sup>13</sup> Article 36(1) of the Croatian Act on the Constitutional Court provides that "Every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations."

<sup>14</sup> Andras Sajó, "Rights in Post-communism", in: *Western Rights? Post-communist Application* 153 (Andras Sajó ed. 1996).

<sup>15</sup> "Judicial Independence in Slovakia", in: *Monitoring The Eu Accession Process: Judicial Independence* 403 (2001).

ary and the prosecution, the training of judges in office and the entry of a new generation of judges, as well as a reform procedural codes and substantive law all contribute to altering the inherited judicial machinery.

The following analysis attempts to examine how the interaction of constitutional courts and supreme courts contributes to preserving constitutionalism and the rule of law in post-communist democracies. The analysis explores whether patterns of interaction explaining the coexistence of high judicial instances in terms of discourse and mutual exchanges are applicable in post-communist democracies. The paper does not offer a detailed, systematic overview of the relevant jurisprudence of all East European countries. Rather, based upon the experience of various post-communist countries, the paper will attempt to concentrate on such conflicts and problems in the relationships of constitutional courts and ordinary courts which have a bearing on the protection of constitutional rights. It is believed that such a focus will be helpful to highlight the practical consequences of an unruly relationship between constitutional courts and supreme courts. In addition to discussing the jurisprudence of post-communist constitutional courts, the analysis extends to the jurisprudence of other constitutional review fora, where appropriate.<sup>16</sup>

The first part of the paper covers those cases in which constitutional courts dealt with disputes concerning the integrity of the judiciary. This part covers the constitutional review of judicial appointments and instances when constitutional courts acted to protect judicial jurisdiction. Thereafter, the second part analyses the role of constitutional courts in protecting constitutional rights in individual cases that were brought to the attention of constitutional courts via individual constitutional complaint. The last part of the paper discusses such examples where constitutional courts indirectly review the jurisprudence of ordinary courts. The paper argues that even the most care-

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<sup>16</sup> The present analysis does not extend to developments in the Russian Federation and the Baltics.

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fully designed delimitation of powers between constitutional courts and supreme courts may lead to conflicts between the two high judicial instances entrusted with safeguarding fundamental rights, constitutionalism and the rule of law.

### 1. Constitutional Courts Protecting The Integrity of The Judiciary: Safeguarding Judicial Independence and Beyond

An independent judiciary is essential for an effective system of rights protection, even in such cases, where ordinary courts do not hear claims raising constitutional issues directly. Due to the nature of the jurisdiction of constitutional review fora, constitutional courts might face claims which directly affect the structure and operation of the ordinary judiciary. Such claims might include the constitutionality of establishment or abolition of various courts, qualifications for judicial appointment or promotion, alterations of the remuneration of judges, disciplinary sanctions and rules of removal, and other violations of judicial independence. When dealing with such claims, the decision of a constitutional court does directly affect the composition, operation and integrity of the judiciary.<sup>17</sup>

#### Control Over Judicial Appointments

Frequently, violations of judicial independence arise from attempts of the political branches to influence judicial appointments. In its decision on judicial appointments the

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<sup>17</sup> Settlement of jurisdictional disputes between courts (competence disputes) is not covered by the present analysis. The following analysis does not claim to cover all problems concerning the judiciary in post-communist countries. Furthermore, in post-communist countries the reform of the prosecution might pose additional opportunities for constitutional courts to redefine procedural safeguards and this way enhance the integrity of judicial decision making. For a detailed, comparative analysis see Jonathan Siegelbaum, "The Right amount of Rights: Calibrating Criminal Law and Procedure in Post-communist Central and Eastern Europe", 20 *Boston University International Law Journal* 73 (2002).

Hungarian Constitutional Court held it to be a requirement of constitutional significance that in the course of the appointment of judges the decision or the effect of the decision of the representative of the other branches, or any other factor shall be neutralized by the substantive influence of the judiciary. This requirement shall also apply to the election of higher ranking judicial officials.<sup>18</sup> This position does not preclude all executive influence over judicial appointments per se.

The decision echoes the words of the German Federal Constitutional Court finding that separation of powers does not command an absolute separation of all three branches; rather, the political branches and the judiciary should mutually cooperate, while not encroaching upon the "*core functions*" of the other branches.<sup>19</sup> Indeed, eliminating overwhelming interference by other branches in the appointment, promotion, dismissal of judges is crucial for making the judiciary a self-sustaining body.<sup>20</sup> Constitutional courts, as guardians of separation of powers, have an important role in safeguarding this balance.

A less typical case concerning judicial appointments was heard by the Croatian Constitutional Court. In the case in a constitutional complaint judges of ordinary courts challenged the decision of the High Judiciary Council concerning their promotion to the Supreme Court. According to the judge's constitutional complaint, the refusal of their appointment violated judicial independence. The Croatian Constitutional Court said that

The allegations of the complainants about the violation of the constitutional principle of the independence of judges and their immunity (Articles 115 and 119 of the Constitution)

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<sup>18</sup> 38/1993 (VI. 11.) AB decision.

<sup>19</sup> See the Judicial Qualifications case, 34 BVerfGE 52 (1972). Available in English in Donald P. Kommers, *The Constitutional Jurisprudence Of The Federal Republic Of Germany* 145-148 (2nd ed. 1997).

<sup>20</sup> There are numerous cases to this effect, the discussion of which is beyond the ambitions of the present paper.

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are founded, because the High Judiciary Council reached its decisions on individual candidates, among other things, on the basis of the opinions of the President of the Supreme Court, which contained judgements about the validity of specific court decisions in the reaching of which the candidates had participated.

The validity of the specific court decisions may only be examined by the competent court pursuant to remedial proceedings, i.e. by the Constitutional Court pursuant to a constitutional complaint. In appraising the work of a judge, only the appraisals of higher courts pursuant to the decisions on the remedies can be taken into account.

In the above case, the constitutional principles from Articles 115 and 119 were also violated because the High Judiciary Council in the appointment procedure decided on the basis of opinions which contained the judgements on the appropriateness of individual judges through the judgement of specific court decisions reached by the panels of judges.

This also violated the legal provisions on the secret and confidential court deliberation and vote...<sup>21</sup>

The case is especially delicate: while on its face the constitutional complaint is directed against the decision of the high Judiciary Council, on the merits the challenge is directed against opinions of the chief justice of the Supreme Court. The decision of the Croatian Constitutional Court intends to keep a delicate balance and hear the constitutional complaint filed by judges on the merits, while still keeping out from the internal affairs of the judiciary.

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<sup>21</sup> Decisions No. U-III-520/95, U-III-530/95, U-III-534/95, U-III-537/95 and U-III-540/95 of 30.11.1995 on quote in the Croatian national report presented at the 10th conference of European Constitutional Courts on Separation Of Powers In Connection With Jurisdiction Of The Constitutional Court, available at <http://www.mkab.hu/conference/okhe/croathe.htm>.

## Protecting The Structure Of The Judiciary

The integrity of the judiciary is also conditioned on the constitutional guarantees of the structure of the judiciary (internal hierarchy of courts). While a detailed exposition would far exceed the limits of this paper, a few examples from recent years are worth mentioning. As for the overall structure of the judiciary, it is easy to see how delaying the creation of an additional level of appellate courts (district courts) introduced via a constitutional amendment in 1997 and still not fully implemented could interfere with the performance of the judiciary – as happened in Hungary.

After many alterations in the location, jurisdiction and operation of the district courts,<sup>22</sup> in 1999 the Hungarian parliament decided to go ahead with one central district court.<sup>23</sup> The constitutionality of this solution was challenged and in 2001 the Constitutional Court found that delay in creating district courts amounted to an unconstitutional omission.<sup>24</sup> The Constitutional Court had a relatively sound basis for its decision, as the wording of the amended Article 45(1) of the Constitution expressly lists district courts among other courts of general jurisdiction. The provision however does not mention the number of district courts.<sup>25</sup> In its decision the Constitutional Court stressed, parliament is free to set the manner and pace of measures necessary for establishing district courts within the confines of the language of the Constitution. However, as the wording of Article 45(1) provides for more district courts,

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<sup>22</sup> Establishing such district courts was meant to introduce a 4-level in the judicial hierarchy, thus, allowing for an additional separate forum of appeal / review, while it was also meant to ease the workload of the Supreme Court. Various turns are discussed in detail at “Judicial Independence in Hungary”, in: *Monitoring The Eu Accession Process: Judicial Independence*, *supra* note 15, 192-193.

<sup>23</sup> As of today, three district courts operate, with two more to start working on January 1, 2005. <http://www.itelotabla.hu/>

<sup>24</sup> Decision 49/2001 (XI. 22.) AB

<sup>25</sup> In this respect Article 45(1) is similar to Article I, Section 1 of the U.S. Constitution or section 100 of the Canadian Constitution Act, 1867.

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establishing only one court does not meet the requirement set forth in the constitution, and constitutes an unconstitutional omission.

In the case the Hungarian Constitutional Court used a rather simple textual argument: the language of Article 45(1) of the Constitution refers to district courts – which means more than one court. In addition to this premise, the Constitutional Court did not invoke further guarantees stemming from the rule of law or constitutional rights, and did not establish further criteria of constitutionality to be met by future legislation. While the judgement might sound simplistic, it is crucial to see that the case dragged the Constitutional Court itself into a highly exposed and sensitive political controversy. Indeed, some of the justices found that in the case there was not even ground for finding an unconstitutional omission.<sup>26</sup> This detail is crucial, as when the Constitutional Court finds an unconstitutional omission, it may set a deadline for filling the gap.<sup>27</sup> Thus, the Constitutional Court may impose a clear obligation on the legislature to make law, creating a surface for potential conflict with the political branches. While the Constitutional Court has no means to enforce this judgment, missing the deadline might embarrass the political branches even in a case where the Constitutional Court did not establish further constitutional criteria as for the contents of legislation to be passed.

### Protecting Judicial Jurisdiction

The protection of judicial jurisdiction, and the preservation of certain procedural safeguards are also depositories of safeguards of judicial independence. The protection of judicial jurisdiction and judicial decision-making typically become an issue when non-judicial bodies are authorized to impose or

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<sup>26</sup> See the dissenting judgment of Justice Erdei (joined by Justice Harmathy).

<sup>27</sup> See Article 49(1) of the Law on the Constitutional Court (Act No. 32 of 1989). In the case the deadline was December 31, 2002.

review sentences in disciplinary or criminal cases,<sup>28</sup> or when specialized bodies or independent tribunals are granted jurisdiction in certain cases. May post-communist constitutions not give detailed guidelines on these matters, the jurisprudence of the European Court of Human Rights under Article 6(1) of the European Convention provides guidance.<sup>29</sup>

In the case of *Belilos v. Switzerland*<sup>30</sup> the ECHR found that the Swiss attempt to restrict the scope of Article 6(1) in an “*interpretive declaration*” of doubtful clarity<sup>31</sup> violated Article 64(1) of the European Convention on the prohibition of general reservations. In order to establish the purpose of the alleged interpretive declaration, the European Court took into consideration various statements made by Swiss officials, and legislative efforts in Switzerland to considerably expand administrative jurisdiction on the expense of judicial jurisdiction. While the decision of the European Court did not affect the validity of the Swiss national rules on administrative procedure, the case is an important reminder on how far a government may go in order to shield the resolution of citizens’ controversies from being decided –or at least reviewed– in court.

<sup>28</sup> For non-East European examples see *Hinds v. The Queen*, Privy Council (Jamaica) [1977] A.C. 195.

<sup>29</sup> Article 6 (1) of the European Convention reads as “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

<sup>30</sup> Appl. No. 00010328/83, of April 29, 1988.

<sup>31</sup> The declaration read as “The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.”

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In the light of the above cases it is not surprising that post-communist countries joining the Council of Europe made lengthy reservations to Article 6(1), attaching detailed catalogues of provisions from procedural laws the application of which had to be exempted from review.<sup>32</sup> Note, however, that such a reservation might only be considered as a temporary measure. The redrafting of procedural codes in post-communist countries shall also eliminate such legal solutions which made these reservations necessary.

In addition, new or reformed procedural rules should provide for such fora which can be considered independent and impartial tribunals for the purposes of the applications of Article 6(1) of the European Convention. In the recent judgment of *Morris v. U. K.*<sup>33</sup> the European Court of Human Rights stated that:

*"58. ... in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and its term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.*

*As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.*

[...]

*73. ... [T]he power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal". The principle can also be seen as a component of the "independence" required by Article 6(1)."*<sup>34</sup>

<sup>32</sup> Check e.g. the Russian reservation to Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (Rome, 1950).

<sup>33</sup> Application no. 38784/97, Judgment of 26 February 2002.

<sup>34</sup> In the case the European Court continued by saying that "the very fact that the review was conducted by such a non-judicial authority as the

Whether a body can be considered an independent and impartial tribunal, or, is an administrative decision-making forum within the executive is, thus, a matter of characterization. On the national level, such decisions are most likely to pertain to constitutional courts.

The Polish Constitutional Tribunal, for instance, examined the constitutionality of the bar on judicial review of disciplinary decision in the Prison Service over prison officials. The Constitutional Tribunal saw this bar as a violation of the constitutional right to access to court. The Tribunal derived this right from the rule of law and from Article 45(1) of the Polish Constitution which provides that *"Everyone has the right to the fair and public consideration of his / her case without undue delay by the court with jurisdiction, which is independent and impartial."* In the case the Constitutional Tribunal stressed that:

*"the widest possible range of matters should encompass access to courts, while the directive banning a narrower interpretation of access to courts flows from the democratic rule of law. The Constitution has introduced the presumption of the judicial path, with respect to which all restrictions and limitations upon the judicial protection of an individual's interest must follow from the provisions of fundamental statute. [...] [T]he restrictions and limitations cannot ... in general exclude the judiciary path."<sup>35</sup>*

As the above cases demonstrate, criteria for ascertaining whether a body can be considered an independent and impartial tribunal (court) can be derived from constitutional rights (e. g. access to court). Lack of access to a judicial forum may impair the chances of effective rights protection, or having to submit to the jurisdiction of non-judicial fora might violate

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*"reviewing authority" is contrary to the principle cited at paragraph 73 above.*" [para 75.]

<sup>35</sup> Judgment of 16 March, 1999 (SK. 19/98), available in English translation in: *A Selection Of The Polish Constitutional Tribunal's Jurisprudence From 186 to 1999*, 294, 298 (1999). Note that in a previous case concerning disciplinary procedures against bailiffs the Constitutional Tribunal did not find a constitutional violation, as following the decision of the disciplinary body there was access to review in an ordinary court. [Judgment of 8 December, 1998, K. 41/97].

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## 2. Constitutional Courts in The Neighbourhood of Ordinary Courts

Constitutional courts get to directly interfere with ordinary courts not only in cases, where constitutional review for a scrutinize threats to the integrity of the judiciary. Constitutional courts also examine the jurisprudence and decisions of ordinary courts. Although constitutional courts usually do not have jurisdiction to review the instructions of supreme courts aimed to achieve the uniform interpretation of the law by ordinary courts, constitutional courts tend to find their way to the jurisprudence of ordinary courts in an indirect fashion. Very often constitutional courts look into how a statutory provision is interpreted and applied by ordinary courts. In such cases the constitutional court looks into how the law is applied in the jurisprudence of ordinary courts, to ascertain about the real-life interpretation of a norm. This is a technique often applied by the Hungarian Constitutional Court or the Polish Constitutional Tribunal.<sup>36</sup> Note that the Polish Constitutional Court is authorized to request high courts “for information concerning the interpretation of a specified legal provision in judicial decisions”.<sup>37</sup>

Reviewing the “living law” instead of the “law in books” might create tension between supreme courts and constitutional courts –after all, it is the task of the highest court of law

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<sup>36</sup> See para 39 of *The Relations Between Constitutional Courts And Other National Courts, Including The Interference In The Area Of The Action Of The European Courts, Report Of The Constitutional Tribunal Of The Republic Of Poland, Prepared For The 12th Congress Of The Conference Of European Constitutional Courts*, by Judge Jerzy Cierniewski, available in English at <http://www.confcoconsteu.org/reports/Polen-EN.pdf>.

<sup>37</sup> Article 22 of the Polish Act on the Constitutional Tribunal.

(and not of the constitutional court) to ensure that the uniform and constitution-conform application of the law within the judiciary. Nonetheless, in most cases, decisions of constitutional courts looking into the law as applied by ordinary courts usually remain unnoticed and generate little concern. On the other hand, instances where a decision of an ordinary court ends up in the docket of the constitutional court tend to trigger closer attention.

### Constitutional Complaint

Individual constitutional complaints are the easiest to trace among the means which might bring a decision of an ordinary court to the constitutional court. It is easy to see how such a jurisdiction might result in open conflicts between constitutional courts and supreme courts, after all, the constitutional court gets to reconsider intricate details of the decision of a lower court, a decision, which might have even passed the scrutiny of the supreme court. The German regulation served as a basic model for individual constitutional complaint adopted by most post-communist countries. With variations, among others Croatia,<sup>38</sup> the Czech Republic,<sup>39</sup>

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<sup>38</sup> Article 128 of the Croatian Constitution granting jurisdiction to the Croatian Constitutional Court to "decide on constitutional complaints against the individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia".

Available in English at [http://www.usud.hr/html/the\\_constitution\\_of\\_the\\_republ.htm#III](http://www.usud.hr/html/the_constitution_of_the_republ.htm#III).

<sup>39</sup> Article 87(1)(d) of the Czech Constitution grants jurisdiction to the Czech Constitutional Court "over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms". Available in English at [http://www.concourt.cz/angl\\_verze/constitution.html](http://www.concourt.cz/angl_verze/constitution.html).

Note that in the Czech republic territorial units and political parties may also file complaints to the Constitutional Courts, these complaints, however, are not to be confused with individual constitutional complaints discussed above.

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Hungary,<sup>40</sup> Poland,<sup>41</sup> Slovenia,<sup>42</sup> and recently Slovakia,<sup>43</sup> allow individual constitutional complaints against executive and judicial decisions.

Under Article 93(1)(4a) of the German Basic Law the Federal Constitutional Court shall have jurisdiction to hear constitutional complaints by an individuals who claims that his / her basic rights or other rights expressly mentioned in the provision has been violated by a public authority.<sup>44</sup> In its jurisprudence the Federal Constitutional Court has been consistent in finding that decisions of ordinary courts amount

<sup>40</sup> Arts. 1(d) and 48 of the Hungarian Act on the Constitutional Court. Note that the Hungarian Constitution does not specify the jurisdiction of the Constitutional Court in detail.

<sup>41</sup> See Arts. 79(1) and 188(5) of the Polish Constitution on "complaints concerning constitutional infringements". Pursuant to Article 79(1): "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution." Rights of foreigners for political asylum are cannot be enforced via constitutional complaint (Article 79(2), Polish Constitution.) Available in English at [http://www.trybunal.gov.pl/eng/Legal\\_Basis/Const\\_eng.htm](http://www.trybunal.gov.pl/eng/Legal_Basis/Const_eng.htm).

<sup>42</sup> Article 160 of the Slovenian Constitution, available in English at <http://www.us-rs.si/en/basisfr.html>.

Article 50(1) of the Slovenian Act on the Constitutional Court: "Any person may, under the conditions determined by this Law, lodge a constitutional appeal with the Constitutional Court if he believes that his human rights and basic freedoms have been violated by a particular act of a state body, local community body or statutory authority." Available in English at <http://www.us-rs.si/basis/act/acten.html#5>. In addition, the ombudsman may also file a constitutional complaint (constitutional appeal).

<sup>43</sup> Individual constitutional complaint was introduced in Slovakia in a constitutional amendment to Article 127 of the Slovak Constitution in January, 2002.

<sup>44</sup> Furthermore, according to Article 93(1)(4a) of the German Basic law constitutional complaints may also be brought for a violation of rights in Arts. 20 (4), 33, 38, 101, 103, or 104.

An English translation of the full text of the Act on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht) is available at <http://www.iuscomp.org/gla/statutes/BVerfGG.htm>.

to acts of public authorities for the purposes of filing a constitutional complaint. Note that this is a broad interpretation of the language of Article 93(1)(4a) of the Basic Law. In contrast, in Austria the Constitutional Court hears constitutional complaints against administrative decisions, but not judgments of ordinary courts.

According to Article 90(2) of the Act on the Federal Constitutional Court as a general rule, a constitutional complaint may only be launched if all remedies were exhausted. In Germany the complaint shall be filed within a month.<sup>45</sup> As an exception, the Federal Constitutional Court may hear a complaint before the exhaustion of all remedies if *"if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant."*<sup>46</sup> Similar provisions are traceable in post-communist countries with some minor differences. In the Czech Republic, Hungary and Slovenia the deadline for filing a petition is 60 days,<sup>47</sup> while in Poland it is 3 months.<sup>48</sup> In exceptional circumstances the Slovenian law expressly allows for late submissions.<sup>49</sup> Following the German model, post-communist constitutional courts also allow constitutional complaints following the exhaustion of all domestic remedies.<sup>50</sup> Various countries differ somewhat

<sup>45</sup> Article 93(1), Act on the Federal Constitutional Court

Note, however, that Article 93 (3) provides: "If the complaint is directed against a law or some sovereign act against which legal action is not admissible, the complaint may be lodged only within one year of the law entering into force or the sovereign act being announced."

<sup>46</sup> Article 90(2), Act on the Federal Constitutional Court

<sup>47</sup> Article 72(2) of Act of 16 June 1993, No. 182/1993 Sb. on the Constitutional Court. Available in English at [http://www.concourt.cz/angl\\_verze/act.html](http://www.concourt.cz/angl_verze/act.html).

Article 48(2) of the Hungarian Act on the Constitutional Court, Article 52(1) of the Slovenian Act of the Constitutional Court.

<sup>48</sup> Article 46(1) of the Polish Constitutional Tribunal Act of 1 August, 1997. Available in English at [http://www.trybunal.gov.pl/eng/Legal\\_Basis/Act\\_Trib97.htm](http://www.trybunal.gov.pl/eng/Legal_Basis/Act_Trib97.htm).

<sup>49</sup> Article 52(3) of the Slovenian Act of the Constitutional Court.

<sup>50</sup> See, e.g. Article 79(1) of the Polish Constitution, Article 48 of the Hungarian Act on the Constitutional Court, Article 51(1) of the Slovenian Act of the Constitutional Court.

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as to whether extraordinary forms of review must be fulfilled before turning to the constitutional court. The requirement of exhaustion of all remedies provided by the judiciary is intended to protect the integrity of the judiciary and thus minimize the potential of conflict between the judiciary and the constitutional court. The requirement also allows for the operation of the built-in correctional mechanisms of the judiciary. Nonetheless, considering the length of judicial proceedings in most countries, this requirement might lead to preserving an unconstitutional situation for an extended period and might result in irreversible consequences. In order to prevent such a situation, in a number of countries extraordinary direct access to the constitutional court is also available.<sup>51</sup>

Conditions for granting individuals direct access to the constitutional court vary. In Slovenia direct access essentially means an opportunity to address the Constitutional Court before the exhaustion of extraordinary judicial remedies,<sup>52</sup> while in the Czech Republic it may be granted, "*if: a) the significance of the complaint extends substantially beyond the personal interests of the complainant, so long as it was submitted within one year of the day when the events which are the subject of the constitutional complaint took place, or b) the proceeding in an already filed remedial procedure under (1) is being considerably delayed, which delay gives rise to or may give rise to serious and unavoidable detriment to the complainant.*"<sup>53</sup> The Czech exception is especially interesting, as it requests the Constitutional Court to consider the broader context of the case, and, thus, essentially invites the Constitutional Court to conduct an inquiry well beyond the confines of the challenged court decision.

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<sup>51</sup> There is no extraordinary direct access to the Hungarian Constitutional Court.

<sup>52</sup> Article 51(2) of the Slovenian Constitutional Court.

<sup>53</sup> Article 75(2) of the Czech Constitutional Court Act. As a general rule, all remedies must be exhausted before turning to the Czech Constitutional Court. Article 74 of the Czech Act on the Constitutional Court.

Cf. Art 31 of the Croatian Act on the Constitutional Court requiring the Constitutional Court to reject late applications.

Extraordinary direct access to the constitutional court has the potential of putting the constitutional court in charge of running the judiciary – a job entrusted with the highest court of ordinary jurisdiction. Still, the following words of the South African Constitutional Court in *Bruce v. Fleecytex*<sup>54</sup> suggest that allowing direct access in really exceptional cases might even be in the interest of a constitutional court itself. In the case the South African Constitutional Court noted that it is

*"[n]ot ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."*<sup>55</sup>

Note that while individual access to the German Federal Constitutional Court is a mighty means of rights protection, access to the Federal Constitutional Court is not automatic: before reaching the merits of the case, a chamber of the Federal Constitutional Court renders decisions on admissibility.<sup>56</sup> Similar procedures are established in all post-communist countries. These admissibility decisions usually do not go beyond checking the compliance of the complaint with admissibility criteria established in the law; in these countries admissibility decisions are usually not discretionary as leave of appeal in common law countries or the certiorari power of the US Supreme Court.

Nonetheless, judicial statistics suggest that even checking formal criteria for admissibility, or striking out manifestly unfounded complaints (as in Poland) have an important screening

<sup>54</sup> *Bruce v. Fleecytex*, 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 7.

<sup>55</sup> *Bruce v. Fleecytex*, *supra* note 52 at para 8.

<sup>56</sup> Article 93a, Act on the Federal Constitutional Court.

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function.<sup>57</sup> In Slovenia, in 1995 about 10 per cent of all constitutional complaints were found to be admissible (25 out of 205), while in 2000 the number was 6 per cent (27 out of 450).<sup>58</sup> In Poland, between 1997 and 2000, 13 per cent of constitutional complaints were referred to examination (77 out of 580), and 8 per cent were decided on the merits (48 out of 580) – and the Constitutional Tribunal received another 1931 letters in place of constitutional complaints which were not prepared with the assistance of an attorney.<sup>59</sup> The willingness of constitutional courts to restrict themselves to dealing with only a small fragment of constitutional complaints launched might be due to a number of factors and certainly might be interpreted in numerous ways – addressing these considerations is beyond the aspirations of the present paper. Still, the figures suggest that constitutional courts in post-communist countries do not seem to be per se enthusiastic about examining judgements rendered in ordinary courts.

The virtue of this reserved approach is that the attitude of the constitutional courts minimizes direct interference among constitutional courts and supreme courts. The peril cloaked by this approach, though, is that constitutional courts may systematically refuse to consider such judgments and trends of judicial interpretation which result in violations of constitutional rights. Unless decisions of constitutional courts on refusing applications for constitutional complaints are published, such a suspicion is difficult to wipe out. Indeed, as many other problems discussed in this paper, the latter is not a post-communist

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<sup>57</sup> The Croatian Constitutional Court may return such applications which are not intelligible. See Article 18(2) of the Act on the Croatian Constitutional Court.

Further admissibility criteria usually include mandatory legal representation (e.g. Germany, Poland), a written form, attachments on procedural history and relevant legal provisions. As a rule, constitutional complaints shall be filed in writing.

<sup>58</sup> See table in para 29 of the *Slovenian Report to the 12th Conference of European Constitutional Courts*, *supra* note 8.

<sup>59</sup> Available at [http://www.trybunal.gov.pl/eng/Judicial\\_Decisions/statistics.htm](http://www.trybunal.gov.pl/eng/Judicial_Decisions/statistics.htm).

phenomenon either: the US Supreme Court is often criticized for not justifying denials of certiorari in detail.<sup>60</sup>

Apart from the chance to open the case, the other critical point which might further conflicts between constitutional courts and supreme courts is certainly the issue of redress. Depending on what kind of remedy the constitutional court might award upon ascertaining about the violation of a constitutional right, individual constitutional complaints might become real means of right protection or yet another rarely used ground of jurisdiction. In Germany, constitutional complaints are frequently filed and are regarded to be an efficient form of remedy, despite the fact that the German Constitutional Court is rather strict about enforcing admissibility criteria. The popularity of the constitutional complaint procedure is partly due to the fact that the Federal Constitutional Court may order a variety of remedies upon a constitutional complaint.

Among the remedies available upon constitutional complaint preliminary measures of protection shall be distinguished from remedies awarded following the resolution of the case. Under Article 32(1) the Federal Constitutional Court *"may deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment, ward off imminent force or for any other important reason for the common weal."*<sup>61</sup> A temporary injunction suspending the application of a law may also be issued upon a constitutional complaint.<sup>62</sup> Some post-communist constitutional courts also have the power to issue temporary measures. As a preliminary measure, the Slovenian

<sup>60</sup> Dissents to denial of certiorari are rare and indicate a severe tension within the Court. Note that the refusal to accept a constitutional complaint does not require reasons in Germany either. See Article 93d(1) of the Act on the Federal Constitutional Court.

<sup>61</sup> See furthermore Article 32(7) of the Act on the Federal Constitutional Court providing that (7) If a panel does not have a quorum, a temporary injunction may be issued in particularly urgent cases if at least three judges are present and the decision is taken unanimously. It shall cease to have effect after one month. If it is confirmed by the panel, it shall cease to have effect six months after the date of issue.

<sup>62</sup> Article 93d(2) of the Act on the Federal Constitutional Court.

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Constitutional Court may also suspend the implementation of the challenged law, "*if irreparable and damaging consequences may occur through its implementation.*"<sup>63</sup>

The Polish Constitutional Tribunal may issue a preliminary injunction to stop the enforcement of the challenged decision, "*if the enforcement of the said judgement, decision or another ruling might result in irreversible consequences linked with great detriment to the person making the complaint or where a vital public interest or another vital interest of the person making the complaint speaks in favour thereof.*"<sup>64</sup>

Similarly, although filing a constitutional complaint with the Czech Constitutional Court does not have an automatic suspensive effect on the enforcement of the challenged measure,<sup>65</sup> upon the request of the complainant the Constitutional Court "*may suspend the enforceability of a contested decision, if such would not be inconsistent with important public interests and so long as the complainant would suffer, due to the enforcement of the decision or the exercise of the right granted to a third person by the decision, a disproportionately greater detriment than that which other persons would suffer while enforceability is suspended.*"<sup>66</sup> Furthermore, the Czech Constitutional Court may order provisional measures "*[i]f a constitutional complaint is directed at some encroachment of a public authority other than a decision by it, then in order to avert threatened serious harm or detriment, in order to forestall a threatened intervention by force, or from some other weighty public interest, the Court may enjoin the public authority from continuing in its action.*"<sup>67</sup>

To summarize, while the German Federal Constitutional Court and the Slovenian Constitutional Court may order the suspension of the challenged law, provisional measures granted

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<sup>63</sup> Article 39 of the Slovenian Act on the Constitutional Court.

<sup>64</sup> Article 50(1) of the Polish Constitutional Tribunal Act.

<sup>65</sup> Article 79(2) of the Czech Act on the Constitutional Court.

<sup>66</sup> Article 79(2) of the Czech Act on the Constitutional Court.

<sup>67</sup> Article 80(1) of the Czech Act on the Constitutional Court.

by the Polish and the Czech constitutional courts aim to halt the enforcement of the challenged public act. Note also, that the power of the Czech Constitutional Court also extends to take provisional measures against such acts of public authorities, which are not touched by the constitutional complaint itself.

If the constitutional complaint is upheld, the Federal Constitutional Court shall specify which constitutional provision was violated by the act or omission of the public authority.<sup>68</sup> At the same time, the Federal Constitutional Court shall quash the challenged decision and “refer the matter back to a competent court”,<sup>69</sup> and shall find the law null and void.<sup>70</sup> Thus, in its decision upon an individual constitutional complaint, the Federal Constitutional Court does not act as an appeal forum. Instead, the German Constitutional Court checks whether ordinary courts applied legal rules in a manner compatible with the Basic Law. While in certain cases the Constitutional Court even demonstrates how to apply the principles in the context of the actual case, the decision of the Constitutional Court will, not replace the decision of the lower court.<sup>71</sup> Similar provisions govern remedies available upon constitutional complaints in other countries.

The significance of remedies awarded upon constitutional complaint is best illustrated with the following example. Although the Hungarian Constitutional Court can also entertain constitutional complaints, until the enactment of an act of parliament on the implementation of remedies awarded in individual complaint cases in 1999, the Constitutional Court was empowered by the Act on the Constitutional Court to award individualized remedies only in criminal cases.<sup>72</sup> In an early case, despite the lack of an express statutory authorization,

<sup>68</sup> Article 95(1), Act on the Federal Constitutional Court.

<sup>69</sup> Article 95(2), Act on the Federal Constitutional Court.

<sup>70</sup> Article 95(3), Act on the Federal Constitutional Court.

<sup>71</sup> See, e.g. Luth, BVerfGE 7, 198 (1958). Available in English in Kommers, *The Constitutional Jurisprudence*, supra note 19, 361-368.

<sup>72</sup> Act No. 45 of 1999.

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the Hungarian Constitutional Court annulled the decision of a lower court and the entry in the birth registry based on the judgment, as an individual remedy.<sup>73</sup> This decision triggered so much criticism and hostility, that the Constitutional Court did not attempt a similar move ever after. Rather, the Hungarian Constitutional Court tends to exempt the individual complainant from the application of the unconstitutional norm on the basis of Article 43 (4) of the Act on the Constitutional Court, irrespective of the date of invalidity applicable in all other cases (*erga omnes*).<sup>74</sup> In a subsequent case, the Constitutional Court decided to open an extraordinary remedy for a complainant, and ruled that the complainant's case shall be reconsidered in an extraordinary review procedure before courts of ordinary jurisdiction.<sup>75</sup> Ordinary courts, however, refused to perform extraordinary review, as the Code of Criminal Procedure did not include such a ground for extraordinary review.<sup>76</sup>

In lack of an individual remedy, in Hungary applicants may well decide to file an *actio popularis* instead of an individual complaint.<sup>77</sup> This way applicants do not have to meet the more stringent admissibility criteria applicable to individual complaints. Still, in an abstract review procedure the Hungarian Constitutional Court does not get to review whether a legal norm was applied in a constitutional manner in an individual case. Also, if the Constitutional Court finds that a legal norm is unconstitutional, the complainant who brought the unconstitutionality to the attention of the Constitutional Court does not receive a remedy – even if she suffered from the application of the invalidated norm. Thus, the Hungarian case demonstrates

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<sup>73</sup> 57/1991 (XI. 8.) AB decision, the so-called Janossy case. Available in English in Laszlo Solyom - Georg Brunner, *Constitutional Judiciary in A New Democracy, The Hungarian Constitutional Court* (2000).

<sup>74</sup> See e.g. 32/1990 (XII. 22.) AB decision, 25/1993 (IV. 23.) AB decision, 39/1994 (VI. 30.) AB decision.

<sup>75</sup> 23/1995 (IV. 5.) AB decision

<sup>76</sup> 28/1998 (VI. 9.) AB decision

<sup>77</sup> Under Article 21(1) of the Hungarian Act on the Constitutional Court, anyone may challenge the constitutionality of legal norms in an abstract review procedure.

how lack of available remedies may deter applicants from enforcing their constitutional rights via individual constitutional complaint.

### Judicial Referrals To The Constitutional Court

Compared to individual constitutional complaints, judicial referrals might be less intrusive upon the judiciary. After all, usually it is for the ordinary court to decide whether or not to make a referral when it finds the constitutionality of an applicable norm doubtful. Depending on national rules, such referrals may only be made by the highest court, or any lower court. While in most post-communist countries, usually all ordinary courts can make referrals to the constitutional court, in Austria referrals concerning the constitutionality of acts of parliament can only be made by appellate courts and the Supreme Court –while lower courts may refer questions about the constitutionality of ordinances (executive norms).<sup>78</sup> Note also, that while in Croatia any court may submit referrals to the Constitutional Court, the Constitutional Court is required to inform the Supreme Court about such request.<sup>79</sup>

In order to analyze whether judicial references might trigger conflicts between constitutional courts and supreme courts, one must explore whether constitutional courts are bound by the terms of the reference, and if so, to what extent, and it is also interesting to examine the conditions upon which ordinary courts might or must refer questions of constitutionality to the constitutional court. Answers to these questions give at least an idea on the extent to which a constitutional court may interfere with the operation of the judiciary upon a simple referral.

If the constitutional court is strictly bound by the terms of the ordinary court's reference, the constitutional court might be unable to reach a constitutional problem even when it is

<sup>78</sup> See Article 89(2) of the Austrian Constitution. Available in English at [http://www.oefre.unibe.ch/law/icl/au00000\\_.html#P002\\_](http://www.oefre.unibe.ch/law/icl/au00000_.html#P002_).

<sup>79</sup> Article 35(3) of the Croatian Act on the Constitutional Court.

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brought to its doorstep. Tying the procedure of the constitutional court closely to the reference made by the ordinary court would mean, that the constitutional court may only consider the constitutionality of the provisions mentioned in the reference, and, also, that the constitutional court may find the provisions unconstitutional solely on such grounds suggested by the referring court. This approach would allow minimal interference of the business of ordinary courts. Nonetheless, considering that one of the main reasons for the creation of constitutional courts in post-communist countries was the fear that ordinary courts might not be able to handle constitutional issues properly, such a solution might make judicial reference ineffective. On the other hand, liberating constitutional courts from the terms of the reference altogether might create opportunities for serious clashes between constitutional courts and supreme courts.

As a matter of jurisprudence, the Polish Constitutional Tribunal is bound by the ordinary court's request in more respects: the Constitutional Tribunal may only review those legal provisions which were mentioned by the referring court, and the Tribunal is also bound by the considerations for unconstitutionality expressed by the referring court.<sup>80</sup> The Czech Constitutional Court enjoys more freedom: the Czech Constitutional Court cannot expand the request of the ordinary courts and review the constitutionality of provisions not touched by the reference of the ordinary court. At the same time, however, the Czech Constitutional Court can disregard the reasoning of the ordinary court.<sup>81</sup>

In contrast with these solutions, the Slovenian Constitutional Court is not bound by the terms of the ordinary court's reference. Indeed, the Slovenian Constitutional Court is required to review *ex officio* all such rules which are in connection with the provisions the constitutionality of which is doubtful

<sup>80</sup> See para 18 of the *Polish Report to the 12th Conference of European Constitutional Courts*, *supra* note 34.

<sup>81</sup> See para 20 of *Czech Report to the 12th Conference of European Constitutional Courts*, *supra* note 10.

for the referring court (the “*principle of linking issues*”<sup>82</sup>). Note that the Slovenian Constitutional Court cannot simply disregard the arguments of the referring court, it must explicitly dismiss the arguments of the referring court; nonetheless, the Slovenian Constitutional Court may find different grounds of unconstitutionality.<sup>83</sup>

As Pasquino points out, in the case of judicial referral the real difference is made by the “*threshold of doubt*” which the question referred to the constitutional court might have to meet. In order for a judge to refer a case to the Italian Constitutional Court, it is sufficient to show “*reasonable doubt*” about the constitutionality of the law and the potential effects of its enforcement. In contrast, German judges have to pass a higher threshold of doubt. While referrals from ordinary courts flood the Italian Constitutional Court, in Germany, referrals are scarce and come even close to being formally abolished.<sup>84</sup> Apart from the problem of the threshold of proof, judicial referrals might hurt more than help. In case there is not deadline of the procedure of Constitutional Court, the case referred to the Constitutional Court for the determination of a constitutional issue, might be pending for years before the decision of the constitutional court – a factor, which does not contribute to rights protection.

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<sup>82</sup> Article 30: “In deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court shall not be bound to a proposal from this demand or initiative. The Constitutional Court shall be entitled to assess the constitutionality or legality of other provisions of this or some other regulations or general acts issued for the exercise of public authority whose constitutionality or legality have not been submitted for assessment, if such proposals are mutually related, or if this is urgent for the solution of the matter”, Slovenia – Act on the Constitutional Court.

<sup>83</sup> See para 17 of the *Slovenian report to the 12th Conference of European Constitutional Courts*.

<sup>84</sup> Pasquale Pasquino, *Access to Constitutional Courts*, 3 (conference paper, Washington University, St. Louis) at <http://law.wustl.edu/igls/Conconfpapers/Pasquino.pdf>; also, Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in Austria, Germany and Russia*, 12 TUL. EUR. & CIV. L F. 25, 32 (1997).

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An important issue regarding judicial referrals is whether ordinary courts have discretion to refer cases to the constitutional court, or, if such referrals are mandatory. In a case brought to it via a constitutional complaint, the Czech Constitutional Court found that the trial judge erred when it failed to refer a question to the Constitutional Court in the course of the ordinary proceedings. The decision of the Czech Constitutional Court clearly suggests that ordinary courts do not have unlimited discretion in deciding on constitutional referrals.<sup>85</sup> On the other hand, the case also shows that a constitutional complaint can supplement judicial referral in rights cases. As the Czech case demonstrates, an individual complaint may become a remedy in case the trial court refuse to refer a question of constitutionality to the constitutional court. Note that without a constitutional complaint no other remedy might be available for such an infringement.<sup>86</sup> Thus, these two ways of individual access to constitutional justice can coexist in a manner which enhances the chances of rights protection.

### Reconsidering The Access of Individuals To Constitutional Courts

As the above examples show, individual constitutional complaints and judicial referral are capable of triggering serious tension between constitutional courts and supreme courts. Therefore, it might be important to look into the role of allowing access to individuals to constitutional courts.<sup>87</sup> At this point it is important to note, that in post-communist countries, apart from constitutional courts, there are not many alternative fora of rights protection.<sup>88</sup> Thus, it is possible to argue that con-

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<sup>85</sup> Discussed at para 12 of the *Czech report to the 12th Conference of European Constitutional Courts*.

<sup>86</sup> See e. g. para 11 of the *Slovenian report to the 12th Conference of European Constitutional Courts*.

<sup>87</sup> After all, in France individuals were denied access to the Constitutional Council in recent years.

<sup>88</sup> Although the Polish ombudsman might be an exception, it is crucial to see, that ombudsmen in most countries did not acquire a similar status, and also, that the success of an ombudsman to a large extent depends on

stitutional review fora are the most significant institutions of constitutional rights protection in post-communist countries.

Furthermore, rights protection is still among the most prominent justifications for legitimizing constitutional review. Even such minimalist attempts as Ely's representation reinforcement theory find protecting the rights of "*discrete and insular minorities*" to be a legitimate ground for a counter-majoritarian body to interfere with the operation of the democratically elected branches of government.<sup>89</sup> In addition, judicial activism is defended forcefully with reference to rights protection considerations.

Several practical considerations also seem to support letting individuals access constitutional courts. The most common argument in favor of concrete review over abstract review is that the facts of the actual case and practice of application of the challenged norms delineate the issues for review fora and make the decision about the constitutionality of the norms more informed.<sup>90</sup> Although, as former Chief Justice Sólyom noted in the context of the abstract review jurisprudence of the Hungarian Constitutional Court, in many cases the concrete cases are perfectly traceable behind a petition for abstract review.<sup>91</sup> This observation, however, needs to be reconsidered in the light of the lack of individual remedies in the Hungarian context.

Note also that constitutional courts and supreme courts read the language of the law from different perspectives. When assessing the role of public figures and the significance of the

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his / her own skills and personal legitimacy, a factor is which hard to ensure or reinforce via legal means.

<sup>89</sup> John Hart Ely, *Democracy And Distrust, A Theory Of Judicial Review* (1980).

<sup>90</sup> E. g. Wolfgang Zeidler, "The Federal Constitutional Court of the Federal Republic of Germany, Decisions on the Constitutionality of Legal Norms", 62 *Notre Dame L. Rev.* 504, 505 (1987).

<sup>91</sup> Laszlo Solyom, "Az Alkotmánybíróság hataskorenek sajátossága [The peculiarity of the jurisdiction of the Constitutional Court]", 5-34, in: *Tanulmányok Benedek Ferenc Tiszteletére* [Essays in the Honor of Ferenc Benedek] 22 (1996).

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defense of truth in the context of the criminal prohibition of libel against public officials,<sup>92</sup> the Hungarian Constitutional Court and the Hungarian Supreme Court took surprisingly differing positions. When testing the constitutionality of the criminal law provision, the Constitutional Court emphasized that speech relating to public officials is about discussing public affairs. Using this premise the Constitutional Court concluded that the reputation of public officials is subject to a lower level of constitutional protection than the reputation of ordinary persons.<sup>93</sup> The Hungarian Supreme Court, however, was not concerned about the contribution of libelous speech to the public discourse. Instead, the Supreme Court was looking for standards to assess whether the allegedly libelous utterance is a statement of fact or an expression of opinion.<sup>94</sup> According to the Constitutional Court, the fact that the statement is capable of injuring another person's reputation is a subjective (cognitive) factor, while for the Supreme Court this is an objective factor. While the Supreme Court viewed the defense of truth as an appropriate means to establish criminal responsibility, the Constitutional Court was of the opinion that the defense of truth imposes a disproportionate limitation on free speech—partly because it leaves too much room for discretion.

Furthermore, the lack of effective remedies for the infringement of constitutional rights does not look too promising knowing that in most of the post-communist countries, if rights claims are not addressed domestically, they can be taken to the European Court of Human Rights.

### 3. Further Guidance From Constitutional Courts: Constitution-conform Interpretations of Legislation

The above analysis covered cases, where constitutional courts engage directly with the organization or decisions of

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<sup>92</sup> Article 232 of Act No. 4 of 1978 on the Criminal Code.

<sup>93</sup> 36/1994 (VI. 24.) AB decision.

<sup>94</sup> BH 1994.171.

ordinary courts. In constitutional jurisprudence, however, there are numerous instances, in which constitutional courts reach for the terrain of ordinary courts in a roundabout manner. Such attempts of constitutional review are not always welcome by Supreme Courts. The Slovakian Supreme Court, for instance, “finds inappropriate the incidental review by the Constitutional Court of its actions, as it argues that it does not fall under the scrutiny of judicial review”.<sup>95</sup>

### Conditions Of Constitution Conform Interpretation

Another means developed by constitutional courts to interfere with the work of ordinary courts is to instruct ordinary courts to apply a particular interpretation of a legal norm. This usually happens, when the norm has more plausible interpretations, only one of which is in conformity with the constitution. In Canada [“reading down” and “reading in”]<sup>96</sup>, France [“*sous réserve*”],<sup>97</sup> Germany [“*verfassugkonforme Auslegung*”],<sup>98</sup> in Poland<sup>99</sup> and in Hungary [“*condition of constitution-conform application*”

<sup>95</sup> *The Relations Between Constitutional Courts And Other National Courts, Including The Interference In The Area Of The Action Of The European Courts, Report Of The Constitutional Court Of The Slovak Republic Prepared For The 12th Congress Of The Conference Of European Constitutional Courts*, available in English at <http://www.confcoconsteu.org/reports/Slovakije-EN.pdf>.

<sup>96</sup> For reading down see e.g. *McKay v. Queen*, [1965] S.C.R. 798: if an enactment is “capable of receiving a meaning according to which its interpretation is restricted to matters within the powers of the enacting body, it shall be interpreted accordingly.”

The leading case on reading in is *Schachter v. Canada*, [1992] 2 S.C.R. 679 [paternity benefits]. See also *Vriend v. Alberta* [1998] 1 S.C.R. 493 [sexual orientation as a ‘read in’ ground of impermissible discrimination].

<sup>97</sup> The Constitutional Council applied the technique very early when reviewing the constitutionality of the House Rules in DC 59-2 du 17, 18 et 24 juin 1959. Subsequently, the Constitutional Council applied the same technique in a number of cases. See Favoreu-philip, *Grandes Decisions*, 45.

<sup>98</sup> See e.g. in *Emergency Price Control* [8 BVerfGE 274 (1958)]. In Kommers, *The Constitutional Jurisprudence*, supra note 19, 137-139.

<sup>99</sup> See para 41 of the *Polish Report to the 12th Conference of European Constitutional Courts*, supra note 34.

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and "condition of constitution-conform interpretation")<sup>100</sup> constitutional review fora have invented such solutions. In a decision the Czech Constitutional Courts stated expressly that

*In a situation when a certain provision of a legal regulation enables two various interpretations, and one of them is in conformity with constitutional acts and international treaties ... and the other is in conflict with them, there is no reason for the annulment of such provision. When applying this provision, the task of the courts is to interpret the given provision in a constitutionally conforming way.*<sup>101</sup>

The Hungarian Constitutional Court submitted in a similar vein that

*In the course of reviewing the constitutionality of a norm the Constitutional Court shall specify the conditions of its constitutionality ... If the constitutionality of the norm is challenged because its incompleteness or lack of clarity, the Constitutional Court may explicitly determine the scope of the norm's constitution-conform interpretation and may set those constitutional conditions which the interpretation of the norm shall meet.*<sup>102</sup>

By time the Hungarian Constitutional Court connected the conditions of the constitution-conform application with another judge-made principle: the preference for preserving the law in force.<sup>103</sup>

According to Justice Zeidler, the German Constitutional Court may prescribe an interpretation as constitutionally con-

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<sup>100</sup> The condition of constitution-conform interpretation as a sui generis sanction was developed by the Constitutional Court. Andras Hollo, *Az Alkotmánybíróság, Alkotmánybíráskodás Magyarországon* [The Constitutional Court, Constitutional Review in Hungary] 72 (1997).

<sup>101</sup> Decision Pl. US 48/95, on quote in para 41 of the *Czech report to the 12th Conference of European Constitutional Courts*.

<sup>102</sup> 38/1993 (VI. 11.) AB decision on the constitutionality of certain norms applicable to the appointment of judges and judicial officials, ABH 1993, 266 [opinion of Chief Justice Solyom].

<sup>103</sup> 22/1995 (III. 31.) AB decision, ABH 1995, 113.

form which was rejected by courts of regular jurisdiction before, but the condition set by the Constitutional Court must not be in conflict with the wording of the provision and the “*clearly expressed intent of the legislature*”.<sup>104</sup> When establishing conditions of constitution-conform interpretation, the Slovenian Constitutional Court also might depart from interpretations of a legal norm used by ordinary courts.<sup>105</sup> Such a departure from the interpretation provided by ordinary courts might often result from the fact that the very constitutional violation was caused by the specific interpretation followed by ordinary courts. Note that according to Laszlo Solyom (former chief justice of the Hungarian Constitutional Court) with setting conditions of constitution-conform application the Constitutional Court found a way to review the jurisprudence of ordinary courts in all cases, where the jurisprudence of ordinary courts could be elevated to the level of constitutional norm control.<sup>106</sup>

These solutions are usually based on the presumption of constitutionality of the challenged norm. In the words of the German Federal Constitutional Court:

For it is not only to be assumed that a statute is compatible with the Basic Law, but the principle that finds its expression in this assumption, also requires that, in case of doubt, the statute be interpreted in conformity with the Constitution.<sup>107</sup>

Alternatively, such a solution might be based on a preference for preserving the integrity of the legal system. Undoubtedly, these solutions aim to limit the amount of invalidated legislation, an aim which is considered to be a virtue of judicial deference.

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<sup>104</sup> Zeidler, *supra* note 88.

<sup>105</sup> Para 26 of the *Slovenian Report to the 12th Conference of European Constitutional Courts*, *supra* note 8.

<sup>106</sup> Solyom, *Az Alkotmánybíróság halaskorenek sajátossága*, *supra* note 89, 30.

<sup>107</sup> Provisional accommodation of Germans on the territory of the Federal Republic of Germany, BVerfGE 2, 266, 282. On quote in para 41 of the German report to the 12th Conference of European Constitutional Courts.

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Note, however, that a condition of constitution-conform interpretation attached by the constitutional court may hardly be considered anything other than a supplement to an already existing norm. Furthermore, the conditions of constitution-conform application impose burdens directly on those who are supposed to apply the challenged norm in question. In this respect one may question not only the capacity of the addressee to comply with the conditions of constitution-conform application, but also the enforceability of the condition in case of non-compliance. After all, in such cases constitutional courts uphold a norm which was admittedly unconstitutional, and the constitutionality of which depends on the observance of a condition established by the constitutional court. In addition, except for the Canadian Supreme Court, most constitutional review fora lack the mandate to prescribe a condition for upholding the constitutionality of a legal norm as a sanction or remedy provided for in the law.<sup>108</sup>

The situation becomes all the more bothersome, when the supreme court is uncertain about the binding force of the constitutional court's decision. In this respect the Czech Constitutional Court ruled that

*"The issue of the binding nature of Constitutional Court judgments which, in the present state of the law and in spite of the fact that it represents the conditio sine qua non of the constitutional judiciary, brings no small amount of difficulties in its wake.*

*Both in theory and in practice, problems relating to the interpretation of that binding force, in relation particularly and above all*

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<sup>108</sup> The Canadian courts have a general constitutional mandate to craft any remedy which they consider appropriate and just in the circumstances [S. 24, Canadian Charter of Rights and Freedoms].

Note that Article 52 of Bill No. T/3067 proposing a new act on the Hungarian Constitutional Court provides that as an exceptional measure, the Constitutional Court may prescribe a condition of constitution-conform application, in case it does not violate the rule of law. This provision is phrased in terms which are much more restricted than the Constitutional Court's current jurisprudence on imposing conditions of constitution-conform application.

*to the jurisdiction of ordinary courts at whatever level, still remain without clarification. This is so for a number of reasons: among them are the lack of consistency of the procedural codes (in both branches of general judicial authority), which do not take into account either the jurisdiction (or the cassational authority) of the Constitutional Court so that and do not prescribe, in the case the Constitutional Court annuls the decision of an ordinary court, the direct procedural steps for subsequent proceedings in the same matter.*

*All of the above-indicated controversies relate exclusively to the "absolute" binding force of Constitutional Court judgments, but not to the binding force of a judgment in relation to a specific matter (merits) being adjudged (decided) by the Constitutional Court.*<sup>109</sup>

A similar problem arose in Croatia where the Supreme Court refused to cooperate with the constitutional court altogether.<sup>110</sup> In 1995, a common legal opinion of the full session of the Civil Law branch of the Supreme Court ruled unanimously that the reasoning expressed in the decisions of the Constitutional Court, by which the judgment of the Supreme Court has been quashed, is not binding on ordinary courts. The act on the Constitutional Court of 1991 provides that the decisions of the Constitutional Courts are binding, but the act does not mention the reasoning leading to the decision itself. It is only mentioned in the Rules of the Constitutional Court that the reasoning is binding as well.<sup>111</sup> The new act on the Constitutional Court drafted in the aftermath of the controversy provides that both the decision and the reasoning of the Constitutional Court's judgment should be binding.

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<sup>109</sup> III. ÚS 425/97.

<sup>110</sup> I would like to thank Mr Zvonimir Mataga to bring this case to my attention.

<sup>111</sup> The decision of the Supreme Court is fuelled by a political conflict between the two courts. The Constitutional Court decided to systematically invalidate the decisions of the Supreme Court in order to "pester" the Supreme Court packed with President Tudjman's nominees.

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## Conclusion

Conflicts and clashes between constitutional courts and supreme courts might give rise to a fairly simple-sounding question, as if asking, which court is the highest court of the land: is it the constitutional court or the supreme court. Putting the problem like this, although might reflect the microcosm of an individual dispute, is not sensitive to the broader context and disregards the broader context of constitutional review. In a broader context, this problem is usually translated as a quest for finding an ultimate constitutional interpreter, a forum which has the monopoly of constitutional interpretation.

At this point it is crucial to keep in mind, that courts exercising judicial review –whether they are constitutional courts or courts of ordinary jurisdiction– are not the exclusive interpreters of the constitution. In the last decade numerous theories flourished exposing and explaining the interaction between constitutional review fora and the political branches, and even beyond, in the broader context of public discourse. All constitutional players get to interpret the constitution –courts are in the position to decide on such constitutional issues which are brought before them, and while their decision is final and binding, a court judgment is not the final say in the matter: following the decision of the court, other branches of government get to and do react. The response of the political branches to a constitutional court decision does not necessarily take a constitutional amendment. The government is at liberty to introduce legislation in response to the court's decision. Research by political scientists and lawyers exploring such phenomena on the lines suggested by discourse theory convincingly justify this finding. Thus, viewing constitutional adjudication in its broader context of operation, the issue of the monopoly of constitutional interpretation and the search for the ultimate interpreter of the constitution becomes moot.

In a legal system, where ordinary courts are not comfortable with handling cases involving constitutional rights claims, arguments in favor of allowing individuals to take their cases to

the constitutional court seem to be rather weighty. Is it possible to design a system of rights protection where constitutional court and supreme court do not enter open or hidden conflicts all the time? After all, such conflicts do not only impair the enforcement of constitutional rights protection, but seem to run counter to all considerations of constitutionalism and the rule of law.

Some of the above examples suggest that carefully drafted statutory provisions on jurisdiction and admissibility criteria might help easing tensions between constitutional and supreme courts. Whether access to a constitutional court should only be allowed in order to challenge a final judgment, or alternatively, in addition to being a final instance in constitutional matters, the constitutional court should also be open to direct applications in extraordinary circumstances (such as the case in South Africa), is a policy decision. While the latter solution might offer extra protection to constitutional rights, it is only capable to fulfill its function properly, if criteria for direct access are prescribed in unambiguous terms and applied in a principled and reserved manner. Otherwise, the emergency access to the constitutional court might generate further clashes between the constitutional court and the supreme court, instead of easing their relationships. In addition, prescribing remedies awarded in the course of constitutional review is also crucial: the lack of such rules might easily undermine the attempts to file individual constitutional complaints, and such a gap in regulation might invite the constitutional court to develop other remedies via interpretation.

As Nino makes it clear *"it is not true that a system which does not utilize judicial review is a logical impossibility or that system negates the supremacy of the constitution.... The power of judicial review is a contingent arrangement even when the system has a supreme constitution."*<sup>112</sup> When aiming to resolve conflicts between competing (and often enemistic) constitutional courts and supreme

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<sup>112</sup> Nino, *The Constitution Of Deliberative Democracy*, supra note 3, 196.

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courts one does not get too far by seeking to emphasize the supremacy of one over the other. The above analysis makes one see that in running the project of constitutionalism and the rule of law both judicial instances have crucial mandates to fulfill. Most importantly, in contemporary democracies constitutional courts and supreme courts are contingent on each other's success in performing their own constitutional mandate.

**Assoc. Prof. Dr. Radoslav PROCHAZKA (Trnava University)\***

RADOSLAV PROCHAZKA

I would first like to thank the Union of Turkish Bar Associations for giving me the opportunity both to learn from as impressive speakers as have spoken so far and will speak later, and to address this distinguished forum.

I will use my time to share with you a very specific experience of what constitutes the major theme of this conference, namely the role of law and the judiciary in consolidating democracy. That special experience relates to the post-revolutionary development in Central Europe, more specifically in Poland, Czech and Slovak Republics and Hungary. Professor Uitz is an incomparably more competent expert on Hungary than I could ever hope to be so I will mention Hungary only in passing and focus on the remaining three cases.

Why do I label that experience specific? Well, probably because it's a personal one and one tends to see as special that of which he believes to be a part. But a more relevant reason

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\* Paper presented by Dr. Prochazka.

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lies in the fact that in Central Europe post-1989 consolidating democracy meant building it. Not from the scratch, of course, as if there were no institutions and norms to rely upon but the process was one of founding a constitutional democracy, replacing the ancien regime with fundamentally new paradigms and practices. You see, I take it that in order to consolidate something, you first need to institute that something. In other words, there must be relatively solid democratic foundations - both cultural and institutional - established before you can even think of consolidating them. In short, for me consolidation has an evolutionary sound to it. The Central European experience, if there is such a thing, was different in that the founding of the new regimes had a revolutionary dimension, in both symbolic and practical terms. More specifically, the emerging elite had been in urgent need to protect the new and unstable democratic pillars as soon as their very foundations were laid. The attempted coup in the Soviet Union in 1991 spread, even though for only a few weeks or days, a panic amongst the local central European leaders and added to the general feeling of some elementary uncertainty as to where their countries could be heading in the years to come. Add to it the new regimes' vehement urge to complete the geopolitical realignment and what you get is two parallel, or intertwined, development trajectories: one aimed at placing the respective countries firmly in the Western world in both symbolic and systemic terms, and the other aimed at consolidating the emerging foundations by means of specific reforms, be their institutional, social or economic. Law played an extremely instrumental role in this development, and naturally so.

I dare to distinguish three main roles that law played in the overall social and political transformation. One was symbolic: law was used to evidence and bring about the divorce with the legacy of the past, that legacy being both cultural and institutional. Two, it played a practical political role, being a major vehicle for economic, social and institutional reforms. Three, it played a protective role, consolidating by means of

specific transitional measures, the new institutional and policy achievements of the on-going transformation.

Mind you, there were and continue to be substantial differences between the respective countries. Specific transitional measures, going against some established tenets of the rule of law, were put to most dramatic and spectacular effect especially in Poland and the Czech Republics while in Hungary transitional legislation was in my mind used mostly to advance the country's social policy landscape. I will mention more of these differences later on.

As for the role of the judiciary, one needs to distinguish between constitutional review performed by specialized tribunals and so-called ordinary adjudication designed to provide protection for the basic, even mundane, interests of the law's addressees. I will now focus mostly on the former layer.

As much as there had been substantial differences between the roles constitutional courts played in their respective countries, there had also been substantial similarities. I believe the most elementary one being their increased awareness of the importance of their own role in the founding, that is in the process of establishing the new regimes as liberal *Rechtsstaat* democracies. The exigencies of transition to which the emerging polities and their constitutional courts had to respond were similar across the region – history's end required that the rule of law be domesticated and the Visegrád nations founded as modern constitutional democracies. This has catapulted the courts into the centre of domestic constitutional politics. Their interpretive and adjudicative undertakings therefore reflected a uniform mission: that of carrying the polities through the transition by building the fundamentals of constitutional law and practice.

To put this more bluntly, all the region's constitutional courts, even though in different ways and to a different extent, conceptualized themselves, and more or less successfully forced

other actors to see them as, co-founders and co-leaders in the transformation process.

However, the degree of the courts' engagement in the reconstruction of their polities – that is, the extent to which they strove to accomplish their founding missions – varied, as did the method of this engagement, namely the adjudicative and interpretive techniques that the respective courts employed in order to complete the founding. This basic difference lies in what elements of the transitional equation did the courts perceive as in need of their protection.

Let me make a brief detour here. I identify two major transitional dilemmas common to the region as a whole. Both of these dilemmas stemmed from the tension between a legitimate and an efficient pursuit of the transitional policy agenda. Perfect legitimacy and unconstrained efficiency were the transitional Scylla and Charybdis, the points between which the courts – and the governments themselves – were to operate, and between which a middle ground was to be found. The first dilemma reflected the courts' awareness of the need to instil legitimacy into the emergent regimes by grounding them firmly in Western standards of democratic participation and protection of rights, and their simultaneous awareness of the need for urgent and efficient implementation of transformation policies. Where the local political economy emphasised the efficiency element of the transitional equation, the respective courts proved ready to exhibit a particular kind of self-restraint, one that they would most often justify as reflecting so-called transitional peculiarities. Where the constitutional courts deemed the transitional equation to be lacking in legitimacy, constitutional review proved more prohibitive to unrestrained pursuit of legislative agendas.

The second dilemma stemmed from the tension between the exigencies of incomplete constitutional reform and the courts' limited authority. Where the foundational arrangements were provisional and required extensive elaboration and specification, the courts proved ready to disregard constraints

attendant on their authority as negative legislators. Where the relevant texts were deemed to provide a sufficient guideline, the courts were less willing to create rules of law in addition to, or even in spite of, the available texts.

Thus two dividing lines emerge within Visegrád constitutional jurisprudence, each giving rise to two relatively distinct groups. The first dividing line has to do with a constitutional court's tendency to adhere to, or oppose, the legislature's policy choices, mostly but not only with respect to transitional agendas. For different reasons and in different fashions the Hungarian and Slovak constitutional courts appear to have been more willing in the past decade and half to challenge the substantive policy dossier of their respective parliaments than the Polish and Czech constitutional courts. But while the Polish Tribunal and the Czech Court have in general subscribed to the ideologies fostered by post-revolutionary leaders, they have been more active than the Hungarian and the Slovak Constitutional Courts in communicating with, and imposing their notions of constitutionalism upon, the ordinary courts.

The other dividing line concerns the provisionality of foundational texts. The Hungarian Court and the Polish Tribunal reached outside the patchwork of constitutional amendments with such vigour and confidence that the respective texts appeared as mere orientational guidelines rather than strict imperatives. The Czech and Slovak Courts were more or less happy working with what was available *expressis verbis*.

To sum this up, the region's constitutional courts have been using their adjudicative equipment mostly to confront those government agents that they deemed capable of threatening their notions of what the founding of a constitutional democracy entailed. In other words, the targets of the courts' activism differed depending on where the courts anticipated the threat to their idea of a safe way between the transitional Scylla of legitimacy and the Charybdis of efficiency to come from. The courts were not only assigned a range of opponents; they also discriminated between them and, so to speak, chose to pick

fighters with those they felt they needed to challenge in order to see (their versions of) the transition come through as planned.

Let me now give you some specific examples of this general outline.

The Polish constitutional court, for instance, was until the late 1990's confronted with two serious limitations. One had to do with its crippled powers, as its unconstitutionality findings could be overturned by a qualified majority of the parliament and it also was prevented from using some specific adjudicative tools. The other related to the fact that until 1997 Poland lacked a complete catalogue of human rights. The Tribunal dealt with these limitations in an interesting, maybe even paradoxical way.

The first paradox lies in the fact that the crippling of the Tribunal's powers has not prevented it from actively responding to the exigencies of transition by furnishing through constructive interpretation those tenets of constitutional law for which the law makers were unable to provide. In this respect, the most spectacular display of the tribunal's interpretive activism was its extensive use of the *Rechtsstaat* clause in providing for those rights that the constitutions failed to mention explicitly. So the Tribunal would locate in the *Rechtsstaat* clause several mechanisms aimed at protecting a citizen, the most prominent of which became the extensively conceptualised right to court. Constructing a missing rule if necessary instead of evading hard cases by pointing out the unavailability of textual mandates became a routine practice for the Tribunal. But the very same fragmentation of the transitional arrangements that allowed the Tribunal to get away with infusing suprapositive layers into the legal system simultaneously led it to approach the constitution as an axiological depository of values. And here comes the second paradox: the constructivist nature of its interpretive enterprise would in many instances result in the "*invention*" of a right neglected by the written text, and at other times allow for the limitation of that or another right by the Tribunal's extensively charitable understanding of such

constitutional generalities as the principle of social justice or public welfare. This latter tendency was most visibly on display when the Tribunal was confronted with the parliament's efforts to advance a new social agenda. Instead of trying autonomously to delineate the basic contours of the country's transition, as the Hungarian would routinely do, the Polish Tribunal proved willing to employ its activist approach in the service of a particular ideological concept of transformation and would often lend the legislature a helping hand in protecting the political essentials of the transitional agenda.

Similar conclusions apply to the Czech Republic, whose constitutional court also proved relatively lenient in supervising those statutory measures that were aimed at effectuating the institution of new political, economic, and social paradigms. Not only its self-understanding as an agent of social transformation, but also the justices' ideological inclinations led the Court to embrace the ideology on which the new regime was founded and defer regularly and consistently to the Parliament's key policy choices. After all, the Czech Court jurisprudential agenda of value-laden constitutionalism, which was to serve the needs of substantive justice and was to reflect the *jusnaturalist* revival, coincided to a notable extent with the agenda of the post-revolutionary leadership.

On the other hand, both the Czech and the Polish constitutional courts tended vigorously to require that the ordinary courts observe in their decision-making the emerging axiological foundations of the new regimes. Their permissiveness in scrutinising legislation – that is, a form of soft abstract review – was accompanied by their assertiveness in the intra-judicial colloquy, i.e. their efforts to infiltrate the lower levels of legal discourse with their notions of natural law, substantive justice, political morality, fairness or teleological interpretation. So the Czech Court proved more or less resistant to the idea of imposing its own constitution upon the Parliament, not least because it was rather happy with the legislature's transitional agenda, and focused on making sure that it was in fact implemented as

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fully as possible by the agencies so commissioned. It therefore took it upon itself continuously to educate the ordinary courts in the culture of modern constitutionalism and was very active in trying to ease the grip on ordinary adjudication of the local tradition of positivist formalism.

The Slovak constitutional court operated under different circumstances. The government's authoritarian tendencies and the frequency and poise with which it would disregard constitutional imperatives indicated clearly that efficient rather than legitimate leadership was to dominate Slovakia's transitional equation. The Slovak Court thus found itself operating in an environment that not only encouraged delegation to it of policy disputes, but in which such a delegation proved necessary for the preservation of the very basics of the rule of law. The Court accepted the invitation and, instead of diversifying its contribution to the country's constitutional development, focused on making a good use of its counter-majoritarian arsenal. Between 1994-1998, when the danger of authoritarianism seemed most imminent, it invalidated in whole or in part approximately 60 percent of the contested regulations. But instead of employing its adjudicative equipment to either help consolidate the axiological foundations of the emerging regime or impose its vision of a great society upon the political arena, the Slovak Court was forced to try saving the nation rather than founding it. The more ignorant the then governing majority would become of the exigencies of the European integration process or of the essentials of liberal democratic constitutionalism, the more focused and more narrow the Court's adjudicative efforts. As much as the mode of the Slovak Court's abstract review was prohibitive in that it served to frustrate the government's attempts at establishing unconstrained majoritarianism, it also was defensive in that the Court was mostly concerned with remedying frequent and apparent excesses rather than with developing and asserting an autonomous jurisprudential agenda.

In addition, the Court's incessant exposure to the then

governing majority's authoritarian tendencies led it to vacate the realm of educating the ordinary courts. It understood ordinary adjudication to be an institutionally self-contained branch of power immune from interference even by a constitutional court, except for a limited range of circumstances. So the Slovak Court let the ordinary courts figure things out on their own and confronted those who kept undermining the country's ongoing founding as a Rechtsstaat, that is, the country's founding fathers themselves.

It took only a few years for the post-communist citizenries to become accustomed to the availability of mechanisms designed to protect their autonomy and rights from excessive interference by government. The notion that a citizen is both worth, and entitled to, institutional protection against government abuse has become a constitutive element of the consciousness of the former Homo sovieticus. To hold a government accountable for its exercise of power and to expect that it address and redress one's justified grievances was nothing short of revolutionary, and is now nothing short of normal, for a majority of the respective populations. The constitutional courts' role in bringing about this state of affairs has been, and continues to be, crucial.

Indeed, at a time when answers had to be given to questions such as when a president's term expires, under what conditions can he dissolve the legislature, how strong a guarantee is a statute of limitations for crimes left deliberately unpunished, what is the nature of property restitution, and so on, instruments such as interpretive constructivism, considerations of "*transitional specifics*", an "*invisible constitution*", or discrimination between pre-revolutionary and post-revolutionary law might have been a viable way of the constitutional courts' engagement in the process of founding. With most of these questions settled, references in constitutional jurisprudence to the exigencies of the change of regime appear less suited for what seem to be relatively stabilised democracies. One of the imminent paradigm-shifts therefore will concern the transformation of

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transition-specific jurisprudence into normal-development jurisprudence. All of the courts now seem perfectly willing to domesticate in their jurisprudence an "*ordinary day*" approach to issues of constitutional politics.

The exigencies of the respective countries' political development may delay this paradigm-shift for a while and as much, if not more, activism as we have seen so far still may have to be required from certain courts in the region in order for "*Europe*" to prevail in their domestic discourses. But the more distant the founding, the less politically and doctrinally feasible the courts' involvement in outlining political, social, and economic agendas. In short, the region will not be post-communist forever; after all, it is already newly European more than it is anything else. And it is in fact the elimination of both the "*post*" and the new elements that makes up for the biggest challenge awaiting the Visegrád courts. Having more or less successfully accomplished their founding agendas, they are poised to move on and into a space that will be dominated by the exigencies of a different transition; that from a nation state to a member of an increasingly federalised supra-national structure. Thank you for your attention.

## **THIRD DAY**

**The Status of the Judiciary in the  
Democratic Systems:  
A Democratic Power or  
A Bureaucratic Hegemony?**

### **Chair of the Session**

Attorney Özdemir ÖZOK  
(President,  
The Union of Turkish Bar Associations)

Prof. Dr. Ergun ÖZBUDUN (Bilkent University)

ERGUN ÖZBUDUN

The most significant aspect of constitutionalism at the end of the twentieth and the beginning of the twenty-first centuries is the unprecedented expansion of constitutional review. The judicial review of the constitutionality of laws, once considered a peculiarity of the American system of government, was adopted after the Second World War in Germany, Italy, and Austria, to be followed by the French Constitutional Council established in 1958, and the Turkish Constitutional Court established by the Constitution of 1961. In the Third Wave of democratization which has begun with the Portuguese revolution of 1974, first the three South European countries and then Central and Eastern European countries have, without an exception, adopted a system of the judicial review of constitutionality. All of these countries, with the single exception of Greece which has opted for a mixed system of judicial review, have adopted a centralized system of constitutional review. In other words, they have established special constitutional courts for adjudicating constitutional issues, instead of leaving it to general courts. Systems

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\* Paper presented by Professor Özbudun is titled "Political Origins of The Turkish Constitutional Court and The Problem of Democratic Legitimacy".

of constitutional review have also been adopted by a number of countries outside the European Continent.

No doubt, this change involved a significant transfer of power in favor of the judiciary and at the expense of the legislatures. So much so that Ran Hirschl terms this new constitutional trend as "juristocracy." He states that "*there is now hardly any moral or political controversy in the world of new constitutionalism that does not sooner or later become a judicial one. This global trend toward juristocracy is arguably one of the most significant developments in late-twentieth- and early-twenty-first-century government.*"<sup>1</sup>

This trend clearly leads to important academic and practical problems. First, how can we explain this sudden global expansion of constitutional review? What are the factors that have led political elites to transfer an important part of their decision-making powers to the judiciary? How can we account for the differences in the timing and the type of the judicial review among countries that have adopted such systems? Finally, what are the implications of this trend toward juristocracy in terms of the democratic theory and practice? How can we reconcile the exercise of broad governmental powers by non-elected and non-accountable constitutional judges with the principle of democratic legitimacy? What kind of methods or instruments can be proposed to reconcile these two seemingly irreconcilable principles? Although such questions have been widely discussed in Western political science and comparative constitutional law literature, they are rarely discussed in Turkey at the academic level.

### Political Origins of Constitutional Review

In a system of rigid constitution, constitutional review undoubtedly receives its formal-legal legitimacy directly from

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<sup>1</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Massachusetts and London, England: Harvard University Press, 2004), 1.

constitutional provisions. However, this is not sufficient to explain its sociological legitimacy. In other words, it does not explain why the constituent powers and, more correctly, the political elites who exercise it have made a choice in this direction. Although a number of theories have been put forward to explain this puzzle, especially two of them seem to have the greatest explanatory power in terms of the sociological origins of constitutional review.

The first of these can be termed the evolutionist theory or the social contract theory. This view holds that, especially after the end of the Second World War, the protection of fundamental rights and liberties has gained priority in Western societies, and the judicial review of the constitutionality of laws has come to be regarded as the best means to achieve this end. In this sense, the post-War constitutions reflect a new social contract, namely a conscious choice of the constituent peoples in favor of a pluralist model of democracy and against a majoritarian conception of democracy. In this view, democracy is not synonymous with the power of the majority; in a real democracy, minorities must have legal guarantees protected by a constitution that can not be easily changed even by a majority vote. The protector of these guarantees are impartial constitutional judges free from the pressures of party politics.<sup>2</sup> Alec Stone Sweet argues in the same vein that *"The calculus: is the polity better off without constitutional rights? and should legislators alone decide how constitutional rights are to be enjoyed and protected in law? The answer to both questions, in most of Europe today, is a clear and resolute No ... We get closer to reality if we go beyond the question of whether constitutional judges legislate when they protect rights, and ask instead: do constitutional judges, in fact, protect rights better than governments and parliaments do, or would do in the absence of constitutional review? To the extent that we can answer this question in the affirmative, the legitimacy of constitutional review is that much more secure."*<sup>3</sup>

<sup>2</sup> *Ibid.*, 32-33.

<sup>3</sup> Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000), 151.

A second, and in my view a more convincing, theory on the political origins of constitutional review has been put forward by Ran Hirschl. Hirschl has developed his theory, which he has termed "*hegemonic preservation*", on the basis of a detailed study of four countries (Canada, Israel, New Zealand, and South Africa) that have remained until recently under the strong influence of the British legal system and have therefore avoided constitutional review. In all four countries detailed bills of rights have been included in the constitutions in the 1980s and the 1990s, and as a consequence the judicial review of constitutionality has been adopted or substantially expanded. In Hirschl's view, the fundamental reason behind this recent trend is not a suddenly appeared idealist thought to provide a better protection of human rights, but the desire of once dominant and now threatened political elites to protect their status by means of constitutional guarantees. Those political elites that perceive their declining electoral support and do not wish to submit their fundamental values and interests to the uncertainties of the mechanisms of majoritarian democracy, have preferred to leave the protection of such interests to an independent judiciary whom they hoped to influence more easily. Such efforts by political elites were joined by economic elites who wished to put their fundamental interests such as property rights, freedom of contract, and freedom of private enterprise under constitutional guarantees. Finally, the coalition was joined by judicial elites who naturally desired to expand their influence within the political system. In all four countries, constitutional review was adopted as a consequence of the joint efforts of these three elite groups. It appears that the choice in favor of constitutional review involves a cost-benefit analysis on the part of the political elites. Although they incur a certain cost by transferring some of their powers to the courts, they also gain a benefit by securing a more guaranteed protection for their fundamental interests and values. No doubt, the success of this calculus depends upon the constitutional courts' behaving in the interests of political elites who created or empowered them. While there is

no long-term guarantee for this, practices in these four countries have shown that the courts have, in general, behaved in the directions that political elites expected them to behave.<sup>4</sup>

In my view, Hirschl's theory is the most convincing one to explain the emergence of constitutional review in Turkey. There is broad consensus among Turkish political scientists that the fundamental dividing line in Turkish politics is the one between central military and the bureaucratic elites, and the peripheral forces, namely a center-periphery cleavage.<sup>5</sup> Here, what is meant by the periphery are all social forces that do not belong to the military-bureaucratic ruling class. This class has dominated Turkish politics since the nineteenth-century modernizing reforms, and its representatives the Union and Progress and the Republican People's Party (RPP) maintained their monopoly of power uninterruptedly until the first free elections of 14 May 1950. The 1950 elections resulted in the sweeping victory of the Democratic Party (DP) that effectively mobilized the peripheral forces. The Constitution of 1924, which was a product of the military-bureaucratic elites, concentrated all powers in a single legislative assembly, dominated by the single-party RPP, did not adopt constitutional review, did not grant independence to the judiciary, and did not provide effective guarantees for fundamental rights

<sup>4</sup> Hirschl, *Towards Juristocracy, passim, and especially 50-99*.

<sup>5</sup> Şerif Mardin was the first scholar who called attention to this cleavage: "Center-Periphery Relations: A Key to Turkish Politics?" *Daedalus* (Winter 1972): 169-90; see also, Ergun Özbudun, *Social Change and Political Participation in Turkey* (Princeton: Princeton University Press, 1976), chap. 2; Metin Heper, *The State Tradition in Turkey* (Washington: Eothen, 1985). Other authors referred to the same cleavage by different terminologies. For example, Emre Kongar argues that the fundamental cleavage in Turkish politics is between the statist-elitist and the traditionalist-liberal fronts: *Türkiye'nin Toplumsal Yapısı* (The Social Structure of Turkey), Vol. 1 (İstanbul: Remzi Kitabevi, 1985). İdris Küçükömer sees the cleavage between the Islamist-Easternist and the Westernist-secularist fronts. However, contrary to the generally accepted view, Küçükömer characterizes the Islamist-Easternist front as leftist, and the Westernist-secularist front as rightist: *Düzenin Yabancılaşması: Batılılaşma* (The Alienation of the Order: Westernization) (İstanbul: Ant Yayınları, n.d.), 82.

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and liberties. In short, it reflected the notion of majoritarian democracy in the purest sense, rather than a pluralistic democracy.

So long as legislative majorities are assured through single-party elections, the absence of constitutional review and of the independence of the judiciary gave the military-bureaucratic elites a great advantage to legislate and implement their political programs. But the coming to power of the peripheral forces with the 1950 elections changed the situation radically. Starting from 1950, the RPP, as the representative of the military-bureaucratic elites, strongly insisted on the adoption of constitutional review and the independence of the judiciary. The demand for the establishment of a constitutional court was expressed in the 1957 election platform of the RPP and its Declaration of First Objectives issued on 14 January 1959. However, this time the DP, itself enjoying the advantages of majoritarian democracy, did not look at such demands favorably. The two private member's bills presented to Parliament in the 1950s that proposed to grant review powers to general courts were not even debated in Parliament.<sup>6</sup> In fact, in the 1950s, particularly in the 1957-60 period, many laws with very dubious constitutionality were passed, and this was one of the factors that prepared the political climate for the 27 May 1960 military intervention.

The 1960-61 Constituent Assembly, strongly dominated by the state elites and its representative RPP, adopted constitutional review without much debate, and the Constitutional Court became operative in 1962. In addition, the 1961 Constitution contained a detailed bill of rights and strengthened the independence of the judiciary. The basic philosophy of the 1961 Constitution was to replace majoritarian democracy with a pluralist democracy where fundamental rights and liberties

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<sup>6</sup> Erdal Onar, *Kanunların Anayasaya Uygunluğunun Siyasal ve Yargısal Denetimi ve Yargısal Denetim Alanında Ülkemizde Öncüler* (Political and Judicial Review of the Constitutionality of Laws and the Pioneers in Our Country in the Field of Judicial Review) (Ankara, 2003), 187-201.

were put under effective judicial guarantees. No doubt, this reflects a conscious choice on the part of the state elites who suffered a great deal under the majoritarian practices of the 1950-60 period.

Since the members of the outlawed DP were completely excluded from the process of constitution-making, their views on the innovations of the 1961 Constitution can only be indirectly ascertained. The deposed President of the Republic Celal Bayar argued that the 1924 Constitution was more in line with Atatürk's conception of unlimited national sovereignty, since it had concentrated all power in the Grand National Assembly as the representative of the Turkish nation. In Bayar's view, the 1961 Constitution brought new partners in the exercise of national sovereignty, such as the military and the intellectuals. The military participates in the exercise of national sovereignty through the National Security Council, and the intellectuals through universities, the independent Radio and Television Corporation, the State Planning Organization, even through the non-elected members of the Senate. Thus, according to Bayar, the 1961 Constitution represented a return to the tripartite Ottoman ruling tradition where power was shared among the Court, the army, and the ulama (religious scholars). The Justice Party (JP) which emerged as the principal heir to the DP after the 1961 elections also had ambiguous ideas about the Constitution. While the JP did not wholly repudiate the Constitution and was careful to function within its limits, it has often complained that it has made the state ungovernable; more specifically, it has insisted on the need to strengthen the executive and to give priority to those institutions that represented national sovereignty. The 1961 Constitution limited the unconditional sovereignty of the majority through its principles of constitutional supremacy, constitutional review, separation of powers, and the independence of the judiciary. The JP, on the other hand, advocated unconditional national sovereignty, or in more practical terms, the unbridled power of parliamentary majorities and

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of the government which derived from it.<sup>7</sup> The JP's attitude was also undoubtedly related to its majority position in the 1960s.

The 1982 Constitution, which was also the product of the state elites, did not significantly change the powers of the Constitutional Court. On the contrary, the Court was conceived as an instrument that will protect the fundamental values and interests of the state elites. The Kemalist system of thought, which is the basic ideology of the state elites, was reflected in many provisions of the Constitution such as those safeguarding Atatürk reforms, secularism, and the national and territorial integrity of the state. Similarly, the 1982 Constitution contains many provisions that reflect a deep distrust for political elites representing the majority of the population. It can be argued that in the 23 year practice of the 1982 Constitution, the Constitutional Court has behaved essentially in the direction of the expectations of the state elites that created and empowered it. This attitude can most clearly be observed in the party prohibition cases. The Constitutional Court has consistently closed down Islamist and ethnic Kurdish political parties through a rigid interpretation of the Constitution and the Political Parties Law. Thus, it has given absolute priority to protecting the national and unitary state, and the principle of secularism, the two basic pillars of the Kemalist system of thought. A Turkish constitutionalist describes this attitude of the Constitutional Court as representing an "ideology-based" paradigm in contrast to a "rights-based" paradigm.<sup>8</sup>

<sup>7</sup> Bülent Tanör, *İki Anayasa, 1961-1982* (The Two Constitutions, 1961-1982) (İstanbul: Beta, 1986), 29-37, 61-67. For the frictions between the Constitutional Court and the Justice Party governments in the 1962-1977 period, see Artun Ünsal, *Siyaset ve Anayasa Mahkemesi: "Siyasal Sistem" Teorisi Açısından Türk Anayasa Mahkemesi* (Politics and the Constitutional Court: The Turkish Constitutional Court from the Perspective of the "Political System" Theory) (Ankara: A.Ü. Siyasal Bilgiler Fakültesi Yayınları, 1980), 291-310.

<sup>8</sup> Zühtü Arslan, *Official Discourse and Political Rights: A Critical Analysis of the Turkish Constitutional System* (unpublished doctoral dissertation presented to the Law School of the University of Leicester, 1996), 244-82; also by the same author, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court," *Critique: Critical Middle Eastern Studies* (Spring 2002), 11 (1): 9-25.

Similarly, many decisions of the Constitutional Court reflected a distrust in the mechanisms of majoritarian democracy, parallel to that of the state elites that empowered it. For example, this attitude can be observed in its decisions limiting the scope of law-amending executive ordinances (decree-laws) and of the martial law or emergency regime ordinances.<sup>9</sup> Although at first sight these decisions appear to protect the rights of the parliament against the executive, in fact they reflect a distrust of majoritarian democracy, since in a parliamentary system the government derives its powers from the parliamentary majority.

### The Problem of the Democratic Legitimacy of Constitutional Review

No matter how we explain the emergence of constitutional review, the problem of its democratic legitimacy continues to be a matter of debate, both from a theoretical and practical perspective. Constitutional review involves a transfer of important political decision-making powers to a nonelected and nonaccountable body. Consequently, the principle of the separation of powers has lost its original meaning and was replaced by a confusion of legislative and judicial powers. Many decisions of constitutional courts are undoubtedly political in nature. In a sense, constitutional courts function as second chambers, thus leading on the one hand to the politicization of the judiciary and on the other to the judicialization of politics. Legislatures pay a special attention to constitutional court decisions in order to avoid an annulment judgment, and the legislative process is largely dominated by judicial considerations. As Stone Sweet has argued, "*whenever legislators engage in constitutional decision-making, they behave as*

<sup>9</sup> Turkish Constitutional Court decisions, E. 1988/64, K. 1990/2, 1.2.1990 (*Anayasa Mahkemesi Kararlar Dergisi, AMKD*) (Constitutional Court Reports), no:26, 63-64, 68, 73; E. 1989/4, K. 1989/23, 16.5.1989, AMKD, no. 25, 245; E. 1990/25, K. 1991/1, 10.1.1991, AMKD, no. 27, Vol.1, 100-102, 105-107; E. 1991/6, K.1991/20, 3.7.1991, AMKD, no. 27, Vol.1, 405-14.

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*constitutional judges... We observe parliaments behaving as constitutional judges most clearly when we pay attention to the politics of abstract review. The risk or threat of referral by the opposition triggers constitutional deliberations. These deliberations typically result in reasoned judgments about how best to protect rights, and about how best to balance rights with constitutional interests. Law-makers not only deliberate constitutional law, they defend their decisions as judges do, with reference to legal materials. This behaviour is embedded in what can be conceived as an extended judicial process. When parliaments engage in constitutional decision-making, they behave as constitutional review bodies of first instance, over which constitutional courts exercise a kind of appellate control.”<sup>10</sup>*

Among the formulas put forward to solve this dilemma, Hans Kelsen's views are of prime importance, since he was the leading figure behind the establishment of the European-type centralized constitutional review. In his view, “to annul a law is to assert a general [legislative] norm, because the annulment of a law has the same character as its elaboration –only with a negative sign attached... A tribunal which has the power to annul a law is, as a result, an organ of legislative power.” However, Kelsen makes a distinction between positive and negative legislation and describes constitutional judges as “negative legislators” while parliaments are “positive legislators”. Furthermore, “Kelsen believed that constitutions should not contain human rights, which he associated with natural law, because of their open-ended nature. Adjudicating rights claims would inevitably weaken positivism's hold on judges, thereby undermining the legitimacy of the judiciary itself, since judges would become the law-makers.”<sup>11</sup> It is very doubtful, however, whether Kelsen's views preserve their validity in our times, since most modern constitutions contain detailed bills of rights. Furthermore, the distinction between negative legislators and positive legislators is not clear, since the annulment judgement creates a new legal situation and its reasoning limits the freedom of action of the legislature in the preparation of a new law.

<sup>10</sup> Stone Sweet, *Governing with Judges*, 102-103.

<sup>11</sup> *Ibid.*, 35-36.

A similar view on the question of the democratic legitimacy of constitutional review has been expressed by John Hart Ely, the author of a very influential book on the American judicial review system. In his view, so long as the judges exercise their review powers on "*legitimate processes*" instead of "*legitimate outcomes*," there is no conflict between democracy and constitutional review. In other words, judges should not make a choice between competing values and political conceptions, and leave such choice to the discretion of elected political authorities. Judicial review should limit itself to matters concerning the proper functioning of the democratic process. By this, Ely particularly means a judicial review which would strengthen the representative character of democracy and grant equal participatory rights to all citizens. It thus seems that the legitimate constitutional review in Ely's mind is more concerned with matters of procedures and processes than those of substance.<sup>12</sup> It is difficult to understand, however, how constitutional review can be limited to procedural matters in a constitutional system which contains a detailed bill of rights, since a great majority of judicial decisions on fundamental rights involves basic political values and choices, rather than the processes.<sup>13</sup>

In conclusion, it may be said that there is no easy solution to the problem. It appears that the democratic legitimacy of constitutional review can be defended only on pragmatic grounds, that is to say, by reference to the currently strong belief in Western societies that the courts can protect fundamental rights better than the legislatures. On the other hand, there is no denial of the fact that constitutional review has become a very essential feature of contemporary constitutionalism. A return to the methods of the majoritarian democracy is neither predictable, nor desirable. Nonetheless, it will be useful

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<sup>12</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Massachusetts: Harvard University Press, 1980).

<sup>13</sup> For a similar criticism, see Christine Landfried, "Introduction," in Christine Landfried, ed., *Constitutional Review and Legislation: An International Comparison* (Baden-Baden: Nomos Verlagsgesellschaft, 1988), 16-18.

to think about the ways in which the democratic legitimacy of constitutional review can be bolstered.

One such method would be to give primacy to political authorities, and especially to the legislatures that represent the popular will, in the selection of constitutional judges and to limit their terms of office. The selection of constitutional judges in major European countries conforms to this pattern. In France, of the nine members of the Constitutional Council, three are chosen by the President of the Republic, three by the Speaker of the National Assembly, and three by the Speaker of the Senate. In Germany, eight of the sixteen members are elected by the Bundestag (first chamber) and eight by the Bundesrat (second chamber). In Italy, out of the fifteen members, five are elected by the government, five by the judiciary, and five by the joint session of the two chambers. In Spain, out of the twelve members, two are selected by the government, two by the judiciary, four by the Congress, and four by the Senate. Term of office is nine years in France, Italy, and Spain, and twelve years in Germany. In Germany and Italy a two-thirds majority is required for members to be elected by legislative assemblies, while in Spain the required quorum is three-fifths. Thus, representation of the minority parties in parliament is assured.<sup>14</sup>

Under the 1961 Turkish Constitution (art. 145), a majority of constitutional judges (all in all fifteen regular and five substitute members) were chosen by the other high courts. However, the National Assembly chose three, the Senate of the Republic two, and the President of the Republic two (one of whom would be among the three candidates nominated by the Military Court of Cassation) members.

The 1982 Constitution provided that all eleven regular and four substitute members of the Constitutional Court are to be appointed by the President of the Republic. However, the

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<sup>14</sup> Stone Sweet, *Governing with Judges*, 49; Landfried, "Introduction," 9.

President appoints eight regular and three substitute members from among three candidates nominated by the other high courts (the Court of Cassation, the Council of State, the Military Court of Cassation, and the Supreme Military Administrative Court) and the Supreme Board of Higher Education. The President has a free choice only with respect to three regular and one substitute members. Thus, the legislature is completely excluded from the process. It appears that the 1982 Constitution further restricted the ties between the Constitutional Court and the elected political elites. Although it can be argued that the President is an elected office holder (elected by the Grand National Assembly), at the time of the entry into force of the 1982 Constitution, General Kenan Evren, the leader of the 1980 military intervention, had been elected (through a single-candidate election) as the President of the Republic for a period of seven years. Thus, it may be concluded that the 1982 Constitution established a Constitutional Court that is exceedingly open to the influence of the state elites and almost entirely closed to that of political elites. The fact that neither the 1961 nor the 1982 Constitutions limited the term of office of the members also makes it difficult for changes in the public opinion to be reflected in the composition of the Constitutional Court.

In 2004, the Constitutional Court proposed a constitutional amendment which provided for a modest role for the legislature in the selection of the constitutional judges. According to this proposal, the Court would be composed of seventeen judges, eleven of whom to be elected by the high courts, four by the Grand National Assembly, and two by the President of the Republic. The assembly, however, was not given a completely free choice in this matter. It was supposed to elect one member from among the three candidates nominated by the Supreme Board of Higher Education, one member from among the three candidates nominated by the Union of Bar Associations, and two members from among the presidents and members of the Court of Accounts. The proposal provided for a twelve-year term of office for members. Even this modest reform proposal met with stiff reactions from the presidents of the other high

courts, which is an indication of the extent to which the composition of the Turkish Constitutional Court differs from that of its European counterparts.

Another factor which may possibly increase the democratic legitimacy of constitutional review would be an attitude of judicial self-restraint on the part of the constitutional judges especially in matters concerning fundamental political choices and value judgements. Obviously, constitutional judges are influenced by their own values, and one cannot conceive of an entirely value-free judicial process. On the other hand, constitutional judges take into account the attribution of legitimacy to the Court and its decisions by the public, and in this sense, think strategically. This may lead them to an attitude of self-restraint. Constitutional judges should also avoid giving the legislatures positive instructions in their annulment decisions. Such instructions excessively limit the legislature's freedom of action, and put the court in the position of positive legislator. A similar danger arises from the constitutional courts' decisions involving "*interpretation in conformity with the constitution*," a practice often used by the French Constitutional Council and the German and Italian Constitutional Courts. This method involves a declaration by the constitutional court the only interpretation of the challenged law in conformity with the constitution, instead of annulling it. It has been argued that "*a clear-cut invalidation of a law can give the legislature more room for political maneuvering, in that a new law can be enacted. However, the declaration that only one particular interpretation of a law is constitutional often entails precise prescriptions and can quite easily result in law-making by the Constitutional Court.*"<sup>15</sup> The Turkish Constitutional Court's second decision concerning the wearing of headscarves at the universities is a good example of this technique.<sup>16</sup>

<sup>15</sup> Christine Landfried, "Constitutional Review and Legislation in the Federal Republic of Germany," in Landfried, ed., *Constitutional Review and Legislation*, 154.

<sup>16</sup> Alexander von Brünneck, "Constitutional Review and Legislation in Western Democracies," in Landfried, ed., *Constitutional Review and Legislation*, 243, 253; also, Hirschl, *Towards Juristocracy*, Chap. 5.

An activist posture by constitutional courts in matters concerning civil and political rights is to be welcomed in the interests of the consolidation of democracy. The same can not be said, however, in matters related to fundamental economic choices. Constitutional courts in most Western countries leave the legislatures a much greater margin of appreciation in economic and social matters, while subjecting them to a much stricter scrutiny on civil and political rights. This is in the nature of things, since a constitution, which should be an ideologically neutral instrument as far as possible, should not impose the same social and economic choices on all contesting parties. If it does, the essential meaning of multi-party politics and inter-party competition will be lost.

**Assoc. Prof. Dr. Ali ULUSOY (Ankara University School of Law, Department of Administrative Law)**

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Firs of all I would like to thank to the Union of Turkish Bar Associations in the name of the President and all the members of the Union for organising this symposium. In additon, I would like to give my special regards to a precious academician of our Ankara University Law School, namely Dr. Ozan Ergül, who exposed great effort for the organization of this symposium.

The subject of my paper is "*The Position of Administrative Courts In Democratic Systems*". I will try to present my paper under four main headlines. First, -we may say that is generally an analysis and a determination concerning the public law- the *de facto* separation of powers in Turkey. I think that there is a dual *de facto* separation of powers in our country. That is to say, I think that in Turkey actually there is a dual separation of powers and that is the separation of the political power and the judicial power, rather than the separation of powers model as pronounced firstly by Montesquieu. I will present an assesment of this issue as an introduction. Then, I would like to

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\* Text of the oral presentation made by Professor Ulusoy.

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mention the main areas of conflict between the political power and the judicial power, which is something observed very often especially in the recent years. I will talk about particularly on two main conflict issues here: First, I think that there is a field of conflict about privatization and economic liberation, which is also previously mentioned by Prof. Özbudun in this conference. Second, I think that there is a conflict on laicism, again a subject commonly discussed, and I will make short notices about this subject. Then, I would like to mention the relation between the administrative courts and the politics. Firstly, I would like to talk about the historical structure of administrative courts in which the politics is really intricate. After that, I would like to talk about the influences of administrative courts on the political decisions of the government asking "should it or should it not review such decisions or is there a limit when doing that?". And then, again an issue related to this, I would like to talk very shortly about the judicial review of the administrative discretion authority. Finally, under "the democracy and administrative courts" title, I will end my presentation with the analysis on present judicial organisation with civil courts and administrative courts as well as military courts in office and its assessment from the point of freedom to claim rights. I will also mention the contribution of the administrative courts to the development of the rule of law principle in Turkey.

First of all, everybody knows that in modern democracies, one of the main standing points of the modern state system is the separation of powers, as Montesquieu has showed long ago. The main reason for this separation between the legislation, execution and judiciary is, to simplify, to create three different gravity points in the administration of the state and to maintain the balance between the powers; thus, to hinder the gathering of the public power in one hand.

However, why isn't there a dual division as the political power and the judicial power? To give a simple example, as you know well, if we try to stabilize something on the air and put it only on two legs, we can not succeed (if the legs are not

stable). However, with three legs, it is easier to maintain the balance.

Setting forth this question as such is also possible: In a parliamentary system it is hard to claim especially that the legislation and the executive body are separated in a strict manner, as we all know. In the parliamentary systems, legislation and execution are generally interdependent. The members of the government come out from the legislation, and the government stays in office thanks to the confidence of the legislation. At the same time, when we consider also the concept of the party discipline, we know that the legislation and the execution are not always separated in a strict manner. In the presidential governmental systems they may be separated more clearly, but it is not the case in the parliamentary systems. But still, although it is not a clear separation, it is possible to speak about a separation between the legislation and the execution in the parliamentary systems, too. For instance, the legislative activities are mainly carried on by the legislative body. The legislative body might supervise the government when it deems it necessary and we all know that it is not possible to say that this supervision mechanism is completely eliminated.

In the Turkish system, although apparently there is a distinction between the legislative body and the executive body, in reality, this distinction is quite ambiguous. For instance, in the present situation, we all know that the legislation is conducted almost completely by the government. It is something observed rarely that the legislation controls the government policy. Legislation and other legislative activities are almost completely under the control of the government. As a result, we can see that the separation between the legislative power and the executive power disappeared almost completely.

Actually, the main reason for this is the electoral system applied in our country. According to the electoral system applied in our country, namely the "*d'Hont system with national threshold*", there are large constituencies and in each constituency many deputies can be elected. These deputies are the

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candidates nominated by the party leaders. Therefore to say this may be a little exaggeration but not totally wrong: The deputies which should be the representatives of the people and elected by them are actually "*appointed*" by the party leaders or the election is the approval of these by the people in a referendum.

As a result, the deputies who should be the representatives of the people are not elected directly or personally by the people, at least they don't feel like they are the representatives of the people, but they rather feel that they are elected thanks to the personal confidence of the party leaders or their "*permission*". In this case, inevitably, after being elected as a deputy, it becomes almost impossible for them to supervise the executive body while working in the legislative body, because they don't feel themselves in a secure position and do not want to oppose to their party leaders in order to be re-elected again, and they can not feel the support of the people in complete. The inevitable outcome of this is the elimination of the separation of the legislative and the executive powers and the unity of these two state powers.

As a result of the unity of the legislative power and the executive power, an even more powerful "*power*" (the political power) comes out and this gives way to the conflicts between this united power and the judicial power. In this case, we actually see the conflict of "*political power-judicial power*". As a result of this, the judicial power has to face this united power and this fact inevitably causes some conflicts between the two.

Moreover, judiciary is in a way and maybe indirectly, trying to fullfill the the gap of supervision of legislative body over the executive body. It is possible to give some very striking examples to this: the chair of a parliamentary committee, namely the constitutional committee alluded that the reason of not lifting the immunities of the deputies was the distrust of the government to the judiciary. We also know that the Minister of Education accused the Council of State for taking decisions on political grounds and for not being impartial when the

Council of State annulled an act of the Ministry of Education. Similarly, we see that the Prime Minister, on several occasions, complained about the bureaucracy and probably the bureaucracy he complains about is the judicial bureaucracy, because the high ranks of the administrative bureaucracy is appointed by the government anyway. Thus, this kind of a conflict is actually taking place.

In reply to this, the judiciary accuses the political power for oppressing him. We all know the latest developments about the Supreme Court of Appeals.

For bringing a rational solution to this problem, my personal opinion is to make a radical change in the electoral system. In my opinion, what has to be done is to replace this electoral system with the *"one candidate constituency with a second ballot majority system"*. Only in this way the deputies can feel that they are elected directly by the people and again only in this way they can have the support of the people. Besides, in this way, even if not absolutely, the deputies can at least find in themselves the courage to supervise the government.

To speak briefly about the *"main fields of conflict in the judiciary-politics relations"*, the two striking examples are *"privitazation-economical liberalization"* and *"laicism"*.

As for *"privatizations and economical liberalization"*, we all know that nearly all the political parties which governed the country since 1980's have been the supporters of privatization and economical liberalization. There is no exception to that. While some were more radical supporters of economical liberalization, the others had a more precautionary approach, but in general we know that all the parties have supported this -at least the ones represented in the parliament.

However, it is possible to say that the judicial power, especially in its decisions on economical liberalization and privatization in the begining of the 1990's, has been suspicious about the regulations made by the political powers regarding

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the privatization policies. Prof. Özbudun also mentioned this. For instance, the concept of "*public service*" as described in the decisions of the Constitutional Court in the beginning of the 1990's is indeed not a term used in the modern administrative law, but it is the term which is set forth at the end of the 19<sup>th</sup> century and at the very beginning of the 20<sup>th</sup> century by Duguit. This term is no longer used in the modern administrative law as it had been used at those times. Today what is defended in modern administrative law is not the concept of "*public service as a necessity of quality*", but rather a relative public service approach.

At this point, however, we should not be unfair to the judicial power. It may be possible to say that the judicial bodies are a little suspicious about the privatizations and economical liberalization in general, but to say that the judiciary wants to block the privatizations would be unfair.

Lets give some examples to the privatizations that we consider that important. For example, why was the privatization of the Turkish Telekom Company -today there is a new attempt for its privatization-was overruled? It was overruled due to a problem of authorization. In this event, the authorities that should be used by the Council of Ministers were used by the Supreme Committee of Privatization, that is, it was not something about the merits. Why were the privatizations of the electricity distribution network overruled? Because the awarding process was not well organized, due to the lack of a contract which should consider the peculiarities of each distribution district and the planning of future investments. These are mostly procedural problems. Again, the last TÜPRAŞ (Turkish Petrol Refinement Industry) privatization was cancelled because of some procedural problems.

Because of such decisions, there appears an image in the public opinion that the judicial bodies are against the privatizations and economical liberalization, but this image has to be reconsidered with caution. It is possible to say that the judicial bodies are a little suspicious about the economical liberaliza-

tion, but it is not true that it is completely blocking it, because the political powers have not presented privatization proposals which followed appropriate procedures.

In addition to that, when we look at the precedents, especially in the last years, it is possible to claim that the approach of the Constitutional Court and the Council of State is more moderate than before. For instance, the Constitutional Court in its decision concerning the privatization of the Turkish Telekom (Act numbered 4502), we see an approach which can be resumed as, *“as long as an appropriate legal framework is followed, privatizations and liberalization can be sustained for the economical activities of the public and this is under the discretion of the government.”* It should be mentioned that this approach of the Constitutional Court is very different and moderate compared with its former jurisprudence. Again, we can say that the Council of State is exposing great sensitivity about the awarding procedures and other economical issues including the competition in the economic affairs. Consequently, it is possible to say that there is an important progress on the judiciary side regarding the privatization issue.

Naturally, the constitutional amendment of 1999 should also be mentioned briefly here: The constitutional amendment which gave way to arbitration process to settle the disputes arising from the contracts under which concessions are granted concerning public services. You know that at the time there was a coalition government. This means there wasn't a single party in the government. In spite of this fact, the 4/5 of the National Assembly accepted the constitutional amendment on this issue and the amendment mentioned above was indeed a shift towards an economical liberalization.

Is the moderation of judicial body on the issue of privatization closely connected with the clear expression of the political actors that they are proponents of privatization at the time of this constitutional amendment? This is a problem that should be discussed on different grounds.

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Secondly, another subject of conflict between the political power or politics and the judiciary is laicism. There are many arguments about this subject as you all know. I don't want go into the details, but it is possible to say this: Probably the most original aspect of the Republican Revolution in Turkey is the revolution on laicism. It can be summarised as taking the sovereignty from the "divine" and purifying by way of getting rid of the divine references and in this meaning a transformation to a "secular" understanding.

It is possible to claim that the politicians, since the end of the single-party period and the transition to multi-party democracy, had the tendency to "moderate" and even "loosen" the rules about the laicism envisioned by the Republican Revolution. And we know that the judiciary always reacted very strictly and "categorically" against this attitude. In my opinion, this reaction occasionally even crossed the limits. For example, again in my personal view, the ban on wearing head-scarf for the university students and finding this ban compatible with the law is a reaction which goes beyond the limits. However, in general, it is possible to say that such a conflict between the judiciary and the politics has always existed. The political actors have the tendency to loosen the rules about laicism established by the Republican regime and in reply the judiciary has always reacted very strictly against this.

Now we come to the "administrative courts-politics relations". Actually the formation of the administrative courts is itself a political event, because, apart from the general judicial bodies, the formation of the administrative courts as a separate judicial branch originates from the French Revolution. Just after the French Revolution the revolutionists formed a new system to be controlled by the general judicial bodies of the time, because they saw the judiciary as the judges of the King, consequently the "men of the ancient regime".

The revolutionists who realized the French Revolution had a logic on this subject as such: "We will control the administrative decisions in the administrative body by forming a mechanism.

*Anyhow, the control of the administration by the judiciary is contrary to the separation of the powers, because since the power of execution and judiciary are independent from each other, the control of the execution by the judiciary would be incompatible with this separation of powers.*" But, of course, in the background of this approach, there was the tendency to prevent the control of their activities by the judges they saw as the "men of the ancient regime". In this way, they formed the Council of State (Conseil d'État) as a supervisory body in the administration. In the historical process, the Council of State (Conseil d'État) transformed from an administrative body into a judicial body. But in spite of all these factors, there are still some traces of the judicial character of Conseil d'État. For example, the members of the Conseil d'État don't have the status of the classical judges, but they are civil servants. However, this does not mean that the government can dismiss a member of the Council of State whenever he wants. On the other hand there are examples of that in history, too. For example, at the time of the Algeria problem, de Gaulle dismissed two members of the Council of State whose decisions he did not like. However, today it is not possible to speak of such an action.

This situation creates a problem today: The main role of administrative courts is to control the administration. However, we also know that today the relations between the administration and the individuals are more complicated and now a big change is taking place in the understanding of the one-way functioning of the judicial activities by the administration. Besides, in the administrative judiciary they are sliding towards the contract relations: For example, let's say that there is a company by which the administration signed a contract for a certain public service and that there are some areas that this company serves. That is, in the terminology of administrative law, there are new triadic judicial relations. Consequently, the conflicts between the administration and the individuals are not taken into consideration with an administration centered understanding, but rather with a more individual centered understanding.

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At this point there appears a practical problem: the main function of the administrative judiciary is identical to the "*supervision over the administration*" in conventional understanding. Again in the administrative law the argument is as such: Here, on one hand there is the public interest and on the other hand there is the individual interest; the function of the administrative judiciary is to balance the two interests. However, the public interest is always superior to the individual interest and this has to be considered as very crucial. Here, what is in question is the balance between the public interest and the individual interests. This balance is concealed in the control of the administration.

However, today, at a time when the judicial relations are complicated and when the individual interests gain importance, critics as such appear: The duty of the judge, is not to balance the interest of the individual and of the administration, because in this case there can be many ambiguities. It becomes difficult to foresee in which circumstances the decision should be in favor of the individual or in favor of the administration, which is something producing legal instability. Because of this fact, the duty of the judge is not to balance the interests, but to maintain the justice, that is to solve a legal conflict. To do this on just grounds; to give the due to whom deserves it, the crucial point is the tendency towards the logic of solving a legal disagreement with justice. And this may of course lead to conflicts between the French type of administrative law and the concepts of the administrative judiciary.

In this respect, another argument comes out in this question: "*Should the administrative judiciary inspect the political decisions of the government?*" There is one traditional understanding in administrative law about this: The pure political decisions of the government is not subject to the review by the administrative courts. As a concept of administrative law this may also be called the "*disposal acts of the government*", that is, the political decisions of the government. This was carried out very often in the administrative law traditionally, but today this kind of

an application is rare. Even more, our Council of State eliminated this kind of application almost completely. All decisions of the government which are administrative "*in appearance*" can be controlled by the judiciary. The constitution also gives way to this, with the exception of some decisions which can not be reviewed. In France this concept is eliminated almost completely, but in this country the very exceptional examples of the disposal of the government can still be found. The main problem here is to decide which decision of the government is political or not, how can we understand that, is there an applicable criteria for that? There is not, or at least it hasn't been found by the administrative law yet. Sometimes a decision can carry both administrative and political characteristics. And this may cause very complicated situations. Consequently, distinguishing them in practice is a very hard task.

There is a very important problem with "*the judicial review of the discretion authority of the administration*". We may speak about a dialog of the blinds and deafs in our country regarding this subject. The political power always defends this argument: "*If the law gives an authority, a right to choose, the administrative courts should not review this kind of discretion. If it does review such acts, such a review is not performed in terms of legality, but rather in terms of appropriateness, which is something prohibited by the Article 125 of the Constitution.*" Against this argument, the administrative courts argue: "*In a democratic country, in a Rechtsstaat, nobody who enjoys the public power can act arbitrarily, because these powers must be used on behalf of the public. Consequently, in a Rechtsstaat nobody can say 'I can use this authority as I want'. The administration has to prove that it uses this authority for the benefit of the public.*" In my opinion this is a correct argument. In a Rechtsstaat nobody can take arbitrary decisions, especially if this authority is used in the name of the public. However, I assume that there is a problem which arises from the insufficient practice of this principle, that there is a "*dosage problem*" in the control of this discretion authority. To which limits this authority of the administration will be reviewed, with which density it will be controlled, on which grounds it will be re-

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viewed? There should be a possibility of foreseeability when enjoying this authority, that is to say, the individuals should be able to know with which criterias and in what limitations the administration will be controlled. If that is not the situation the possibility of foreseeability can not exist. The French Council of State applies these criteria to a great extent, I mean that today we know that to which degree the French Council of State may use its authority of judicial review. However, to say the same thing for our Council of State is not that easy, as on similar subjects we can find different jurisprudence. Our Council of State does not expose a very stable attitude in respect to this kind of judicial authority.

Finally, I want to speak briefly on "*the democracy-judiciary relations*". First of all, we again have an important problem here: "*A multi-headed judicial system*". We know that our system is a member of the Continental European systems, which means that there is a distinction between the juridical judiciary and the administrative judiciary (administrative system), which means there is not a single judicial body. However, as you know, in the Continental European systems there are only two main judicial branches. If we leave the constitutional judiciary (Constitutional Court) aside -because it has a more special status-, there are the juridical judiciary and the administrative judiciary. However, in Turkey there are eight different Supreme Courts. The Constitutional Court, Council of State, Supreme Court of Appeals, Military Supreme Court of Appeals, High Military Administrative Court of Appeals, the Supreme Election Council -indeed, we may say that it is a supreme court, because its decisions are final-, Court of Jurisdictional Disputes and even the Audit Court. Although the status of Audit Court as a judicial body is questionable, we may accept it as a judicial body when considering its jurisdiction on the disputes related to the accounts. As a result we see that there are eight different supreme courts and at least five different judicial branches in Turkey.

In practice this situation may be a real threat to the constitutional freedom to claim rights especially in respect to administrative judiciary. The decisions of the administrative bodies which carry out economical activities are being reviewed partly in administrative judiciary and partly in juridical judiciary. However, today things are so complicated that it is almost impossible to estimate which judicial branch to appeal for a decision of such an administrative body. The lawyers, even the administrative lawyers can not decide on this kind of jurisdictional problem. In my opinion, this is impairing the freedom to claim rights to a great extent, because the ordinary citizens sometimes can't know which court to appeal or if he/she is mistaken in choosing the right court he/she might lose some of his rights especially due to the prescription rules. If somebody applies to a court which has no jurisdiction on the relevant dispute, the court will take a decision saying that it is beyond its jurisdiction, and this decision shall be reviewed by the appellate court and then will become a final decision. However, this procedure will take nearly two years. A person who appeals to a court for an administrative act may only learn the right court to appeal after two years pass. This is something which really impairs the right to claim rights in my opinion. I think that the judicial system should be simplified, and in this regard the military judicial branches should be abolished and these should be transformed into first instance courts. Their decisions should be reviewed by the ordinary supreme courts. Moreover, the separation of the jurisdiction of judicial branches should be both simplified and clarified.

Finally, what are the practical contributions of the administrative courts to the development of the principle of rule of law and democracy? First of all, actually the most efficient way that forces the administration to act lawfully is to make the acts of the administration subject to judicial review and vest the authority to overrule those unlawful acts in the judiciary. As this imposes on the administration the duty to follow the law in a regular and strict manner, the administrative courts

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contribute to the development of the rule of law and the democracy to a great extent.

Again, we observe that Turkish administrative courts have made interpretations in such a way that it is now possible to review some administrative acts which are originally rendered immune to the judicial review. For instance, some acts of the President of the Republic which he makes alone, or the decisions of the Supreme Military Council are among these. In my opinion, this is a remarkable contribution to the development of the democracy. For instance, the Council of State decided that the assignment of the university rectors is subject to judicial review, even if it is a procedure carried out by the President of the Republic alone. The High Military Administrative Court of Appeals, on the other hand, has decided to make some decisions of the Supreme Military Council subject to judicial review. Consequently, we can say that there are some extending decisions of the administrative courts in this respect and these make a significant contribution to the principle the of rule of law.

According to me, another very important example is the sensitivity shown by the Council of State to the development of democracy. Especially in the protection of the local governments against the central government, I think that the Council of State is showing a great sensitivity and in this respect contributes largely to the development of local democracy.

I would like to thank you all for listening to me patiently.

**Assoc. Prof. Dr. Fatih Selami MAHMUTOĞLU (Istanbul  
University School of Law)**

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Dear guests, before beginning to my speech, I greet you all with all my respect.

The most unfortunate speaker of a conference is the last speaker. I don't know how they will translate this but, "*a slow-poke gets out in the cold*".

Actually, I let myself carried away with the discussions on the Penal Code so much that, when the Union of Turkish Bar Associations offered me such a subject to talk on, I had some difficulties in concentrating myself on the subject. However, when listening to the other speakers, I thought that to speak about the issue which I have chosen would be appropriate. Considering the fact that I would be the last speaker, even if it is not appropriate to my personal character, I decided to make a speech which is rather radical and irritating.

We read books. Some of the books we read when we are young, and some when we get older. Not so long ago, I saw

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\* Text of the oral presentation made by Professor Mahmutoglu.

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a translation of a young lawyer when I read the statements of an Italian philosopher who lived in the 18<sup>th</sup> century, I said to myself that I should evaluate the subject of my speech from his point of view. I thought it would be more interesting. I don't like reading a text, but as his expressions are so clear and simple, with your permission, I will go on by reading some parts of the text: *"There is nobody on earth, who would give up his freedom only for the benefit of the public. This utopia exists only in the novels. What each of us want is not to be bound to the contracts that bound other people. Men want to be the center of attraction of the agreements, arrangements made on earth and to benefit from them. But the reality is this: Each person wants to give up only a little part of his freedom for the benefit of the public."* This phrase affected me a lot, I will complete it with another: *"Which makes him defend it against others is this little part. It is this little sacrifice that gives the men the right to punish others. All governing activities that go beyond these limits and that diminish from this ground mean to abuse the usage of the power. It is incompatible with justice and is never legally legitimate. The monarch that represents the same public, legislates the laws which binds all the members of the society. But to judge someone who does not respect these rules is not his duty."* This is the point which concerns us in respect to our subject. *"Because when there is a crime committed, the public divides into two. One side is the side which argues that the contract is violated and represents the monarch, the other is the side which refuses this violation and defends the one who has committed the crime. If that is the case, there must be a third side to judge this crime."* Beccaria who was born in 1730 in Italy has blazed a trail writing these sentences. He told that: *"In the name of well-being, security and peace, the people sacrifice at least a part of their freedom to benefit from the freedom left."* The sovereignty of the people, is the total of these sacrificed parts. We are not discovering this author today but there is difference in reading him in our twenties and reading him in our forties. To be honest, I am really impressed.

As my dear colleagues mentioned before, the relations between the legislative-executive-judicial bodies is very important. As a criminal lawyer, I thought on how I should

explain that in this respect whether the judiciary is a bureaucratic hegemony or not. First of all, there are some points that we know about the answer to that question. I will mention these things that we already know as topics. I really don't want to annoy you with these. However, it would be useful to remember some main conditions: Firstly, we want the courts to be independent. What I mean by the independency of the courts is not only the independency of the courts, but also of the judges. In this respect what bothers me most is the law education in our country and the direction followed by the judges after this education. I have some things to tell about this later. The courts and the judges have to be independent. It is not an independency against the legislative and the executive bodies, but also the independency against the other judicial bodies. Many of our laws maintain the security of this independency. Of course, the laws are not enough to solve all the problems on their own. Imagine a country in where twenty people die because of traffic accidents every day. In this case, is there a problem with the Law on Traffic? Does it say in the law "*drive while you are drunk*"? Why does it happen this way? The fact that these accidents take place, shows that the written regulations can not solve our problems. Maybe a fourth topic in respect to the independency of judiciary is the independency of the judge against himself. Maybe, this is the most important aspect of all.

In this respect, let's talk about a film where they obtain some illegal evidences. A young girl is raped and then murdered. They catch the suspects and their lawyer argues that the evidences against them were obtained in illegal ways. But the evidence proves the crime very clearly. The judge neglects the evidence, saying that it was obtained illegally. And the suspects are set free and are acquitted because there are no other evidences. The father of the young girl who is murdered blocks the judges' way after the trial, saying "*As long as people like you give decisions as such, our children won't be able to walk in the streets anymore. I hope, you will live the same thing with your child.*" Here the answer of the judge is very interesting, "*As a*

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*citizen I would kill those people with my own hands, but as a judge I had to give such a decision.*" This approach is very crucial. The agents of justice can neither take conjectural decisions nor judge in accordance with their personal point of view. This independency is indeed the basic independency, and we should never undervalue it. So, while maintaining the justice, this independency should be in front of the judicial body, legislative body and the executive body, but the fourth aspect which I have mentioned is the most crucial one. If we don't get to find such a profile, we can not solve our problems. And then, the justice turns into a great bureaucratic hegemony for the citizens and conjectural verdicts appear. We may face exaggerated, unjust verdicts -I find this very important.

What is this independency? This independency is related to the right to fair trial, which is a subject mentioned very often in our country. Right to fair trial is now in our terminology. We use some different terms like honest judging, perfect judging, but we may probably say that the concept of right to fair trial is accepted to a great extent in our country.

I will tell what the right to fair trial includes as topics, but I would also like to evaluate the subject in respect to the point that the actual criminal law has arrived. The modern criminal law is made up of three main policies. The first of these is the principle of negligence. This is the principle of the criminal law that can never be ignored. There is no place for concepts like equity, absolute liability or objective liability in criminal law. Let's mention a detail; is this aspect really respected in our country? We should not be unfair, but it is impossible to neglect the cases where this principle is not respected, and if we ask the same question in respect to the criminal law, we may say that some regulations that we criticize because we do not accept, have been ameliorated to a certain degree.

I say "to a certain degree" because there is a very serious law inflation and we have some difficulties in following them. The new Penal Code expresses clearly that "objective liability" can

not exist, but they also have accepted some new laws before the Penal Code to take effect. Let me give an example: It is an actual event but it might be kept out of attention: the Press Law. I don't know to what extent it had been debated among experts, but what is surprising is that even the members of the press are pleased with it. For example, even if the author is not punished, it is regulated in the law who would be punished. This is an objective responsibility. The Banking Law numbered 5020, is a subject that I know closely. Look at the Article 22 paragraph 4 of the Law 5020, and then look at its consequences. You will see that this is an objective responsibility. In this point we have to be sincere and if we are voting basic laws we have to respect them. While the situation about the principle of negligence is as such, we also have to talk about the principle of legality in Criminal Law. I will show you two articles showing how the principle of legality is being violated in Turkey. If you understand them I will congratulate you. Read the Article 15 paragraph A of the Banking Law. Even one of the sentences is one page long, you make a reference to a related article and you violate this basic principle in respect to clarity and definiteness. Haven't we said this for many years? A crime can not be stipulated with the administrative regulations in respect to the preservation of fundamental rights and freedoms. What is the most important evidence for that? For example, even the law amending ordinances were a subject of debate. Yes, there is an authority vested in the administration but can we regulate fundamental rights and liberties with law amending ordinances? Did Turkey fail on this subject or not? Yes, it failed. I always say, we don't analyse as we should.

There are very special reasons for me to say all this: If you ignore these fundamental principles of the criminal law, our problems will increase. And then, the citizens will call for "help" and say, "I hope I will never need to apply to courts one day." I saw the news on the paper the day before. One citizen says: "Punish me. I am fed up with coming to the court." This is really tragicomical.

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I will not speak about the material, conceptual or formational aspects of the rule of law. We say that the principle of humanism is for acquiring the individual to the society. Indeed, the criminal law in its wider meaning does not concern only the substantial criminal law. It includes the criminal procedure law and the law of execution. Is it possible for someone to be socialized in our prisons? On the contrary: The prisons can increase the tendency for crime, even of those individuals who does not have such tendency. If we express these problems properly, we would be more constructive. I don't blame the state officer in the highest rank who says "*we entered twenty prisons*", because I might have said the same thing if I were in his position. The state "*does not enter the prisons*", it should be already there. Can you think about it, we see that in our prisons some terrorist organizations can freely carry out their meetings or the men and women can get together very easily? Can this be accepted? We have to think about all these problems together. If Turkey is going to draw a new guideline for itself, we have to be more sincere about it.

It is easy for us to speak from where we are. For example, an anecdote from Antalya: Prof. Bahri Öztürk, Adem Sözüer and I were speakers on a panel. One of the judges asked a question about conditional release. My wife was also one of the attendees to the conference. I gave an answer to the question, the judge who asked the question was not pleased with my answer. Mr. Öztürk also answered his question, he was still not pleased. Mr.Sözüer said "*I abstain*". My wife heard that one of the audiences saying after all this, "*These professors read and write but they understand nothing. These things are not that easy.*" Yes, the judge has to solve the problem of the citizen promptly. On the contrary, I have the luxury to speak here. What I want to say is that we should not blame A or B for all the problems of the citizens. Each of us should well criticize an institution, so that we would be useful. Turkey has to leave its habit of "*touchiness*", that is for sure.

Lets mention some aspects of the right to fair trial. Right to fair trial in a court, which is legal, independent and unbiased. Recently the ECHR stated, *"solve your problem regarding the military judges in the state security courts."* Do you think we can not solve these problems? Of course, we can.

Secondly, I mean you may find it ridiculous, but the right to fair trial within a reasonable time. I really can't bear that Turkey is being accused for such infringements. They sentence us to pay compensation because of arrestments and the length of the trials. The day before a journalist asked me a question: *"Dear Professor, the case has been going on for twenty three years. What can you say about this?" "What do you expect me to say? Time passes very quickly"* I answered him. Let me tell you something about the problem of the gentleman: It is the government who puts down the expropriation clause. The year that this is done is 1976, the date that I received the case is 1999. I said to myself, *"There should be a mistake here. It is maybe 1996 not 1976."* They told me *"No, no the date is true"*. I asked my colleagues in the administrative law department, *"How can this be true?"* The law for expropriation has been passed in 1984. The law says that when someone objects to the expropriation process which is not completed in two years time, the expropriation clause drops spontaneously. Look at the relation between the state and the citizens. I was happy, with the law in my hand and I went to the District Office of Highways and said, *"Mr. Director, can such a thing happen?"* He answered me, *"You are right, the law tells us to do that."* Then I told him to *"Terminate the decision"* and added, *"Wouldn't you be dissappointed if your case continued without any progress for twenty two years?"* He replied, *"We would be taking a risk in this case, let's solve this problem in the court, we can't do it ourselves."* This is how he explains abusing his duty. When you go to the Land Registry Office, they say the same thing. This is the relation between our state and its citizens. Please pardon me, but when I go to the Registry office, I can't even take my registration certificate easily. Now the land registry office of Urfa or Van will say *"We do our jobs"*, but please don't say that.

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I am not pleased with this situation. I am disturbed with the approaches of the civil servants when I go to a public bank. This is a state-citizen relation which is not healthy, which is not on just grounds. The citizens are not being considered as individuals. The citizen is not a subject, just like the lawyers. Now the lawyers want to be subjects too. I agitate a little bit, pardon me for that.

I am abusing my time, but I am the last speaker anyway. The attorneys, we know that they also have problems. I mention it in all the meetings, "*We, the professors don't write efficient books, we are weak at this point.*" Saying this I start criticizing myself, so that the others do not get angry with me when I say "*the judge is weak*", or "*your indictment is weak*". Because of this, they established an institution which is called the refusal of the indictment with the new Law on Criminal Procedure. We are aware of these problems, and there are lots of things that should be done. Is our problem related with the question whether the prosecutors should keep on sitting nearby the judges or not? What difference would it make? What is important is the quality of the public service provided. However, our starting point should be a fundamental principle. Let's imagine that one of my relatives tell me: "*My child is one of your students.*" Let's say that he repeated this three times. It would be impossible for me to read his paper objectively. To be realistic, I would have a tendency to assess his exam paper in favor of him. If you build a relationship between the judges and the public prosecutors, then what will be the lawyers' position? You put the suspect there, he is shaking to get some help from his lawyer, to catch an eye contact with him. Let him sit with his lawyer and you sit on the lower part with the injured party. You went to your most important case and found the judge and the attorney having a picnic together, "*sir, we are sitting together, we collected some fruits*", well done! Does Turkey want to establish criminal police? You go to the parliament, they say "*yes*". So, should the attorney descend from there? They say "*yes*". So, what hinders this? If the parliament also has the same opinion,

who hinders this? You say to attorneys, with a diplomatical language, "*the police is not under your command*". Can there be such a preliminary criminal investigation? Because the investigation proceeding is not done properly, you turn the trial in the court into a preliminary investigation. We say "*if the police serve for you in a hierarchy, if you have some buildings where there are other technical opportunities, would it not be better?*" And the police opposes to this, "*Am I going to be a purse snatcher?*" they say. You turn to the prosecutor and he says "*Am I a policeman?*" Doesn't all this mean that we oppress the citizens, and that we torture them bureaucratically?

Can we talk about a proper investigation procedure? You are lawyers, how can you judge on this? In my opinion, we have to do something about it. You go to the Minister of Justice, why? But be careful, a system of permission is already in effect for applying there. I mean the abusement of duties of course. I am subject to the Law of Universities numbered 2547, how can you try me? I am a civil servant. Can I be tried easily like an ordinary citizen? No. A judge, an attorney all the same... The last time I came to Ankara we were sitting with the President of the Union of Turkish Bar Associations. The telephone tapping case was on the agenda of Ankara. Let me ruin the meeting by mentioning this critical fact. One of my statements in a meeting regarding the rule of law was exactly as such: It is not important that in a country the telephones are tapped or not, or if this is being done legally or not. When I made such a statement, I was like the Bektâşi who says, "*Don't perform the prayer*". If you suspect that your telephone is being tapped, we can't talk about the rule of law in our country. I say this frankly, the telephones of most of us are being tapped illegally in Turkey. It is absurd, last night on the news, they said "*the evidence which is obtained illegally can not be used in the trials*", but in respect to our press this is not valid. All the conversations are on the press. In this situation, we violate another principle too. How will we explain this to the citizens? You gave a dicipline penalty to one group of judges, didn't you? In this case, I will tell you

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that this evidence can not be used in any area of discipline at all. Not only in the criminal trials, but also in the disciplinary procedures. Are you saying indirectly that these evidences are illegal? What is the nature of tapping one's telephone? When I tap the telephone of A, can I know in advance whom he will speak on the phone with, with people B, C, or D? What are the just grounds here? If there is evidence that somebody committed a crime and if you know that, you can promptly obtain the authority to record his telephone conversations. How can we explain this to the citizens? The permission of indirect listening passed immediately. Some of the judges involved in this are being tried, some have retired. From the point of view of the citizens, look at these events, who are we trying? We take the citizen, we place him somewhere.

I have some other topics; let me speak briefly about them and then I will finish by summarizing these topics. The preliminary criminal procedure which is not carried on seriously, indictments which are not efficient, the limitation of the right to defend, evidence obtained illegally, and I don't even mention the arrestments. I don't know if you had the opportunity to read the recently amended regulations in the Law on Criminal Procedure? There are so many meetings held for the new Law. I was invited to one of them, and when I attended the meeting I said frankly, *"I didn't have the opportunity to concern with the new Law on Criminal Procedure. But give me a topic and, I will make presentation on it, I don't want to be ashamed in front of you"*. I talked about arresting procedure and judicial review. As you know, the code numbered 3842 led to very important and modern developments in Turkey which took effect in 1992. It stipulated that the evidence obtained illegally can have no effect on the verdict. Other than that it also regulated the principle of proportionality in the area of protective measures, in particular the arrestment. More important, it stated that the arrestment of the suspect can not be longer than six months during the preliminary proceeding and two years during the trial proceeding. In the new law, the system is determined due

to the jurisdiction of the courts. When the courts which have the jurisdiction to try the minor crimes, the arrestment of the suspect may be up to six months, and if necessary this can be extended for another four months. In other words ten months in total. One of the audiences said, "*could you interpret the next article for me?*" First I read it like this: "*the time spell for arrest for the crimes that is in the responsibility of the criminal court is two years.*" Ok, this time spell is reasonable. "*It may be extended to three years.*" This was what I understood at first sight. But if you read the sentence carefully, indeed it says: "*The time spell for extention can not be over three years.*" You give an extention of three years that may pass the real time of arrest, why? Isn't this something which would probably cause problems?

Coming to the confiscation; now there is also confiscation of the benefits too, which can be rendered something positive; it should have been this way, especially when the developments in the money laundering mechanisms are taken into consideration. This is good, too. You give your car to your friend, he wants it for the weekend and then he makes drug dealing with your car. All your property is gone. We should not see the case from this point of view of course. We leave the principles away here. The principle of *non bis idem*, because of the same action you can not be punished more than once. This is a universal principle. We shouldn't be considering this only as a necessity of sovereignty because we live in a country which have many citizens living abroad. This is a principle we have to accept even the crime is committed elsewhere.

There is something new. I see it in the crimes regulated in the scope of banking activities. The public prosecutors give a decision to suspend investigation and then the court of felony approves it. The Military Supreme Court has a very good interpretation on this: "*the decision to suspend the preliminary investigation due to the lack of ground is not absolute. Only if it is supported by a judicial decision it becomes unconditional. If there is new evidence, a new case appears, and another trial can be carried*

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on." In Turkey, this kind of a decision can be reviewed by way of a written order by the Minister of Justice. You can read such news, and this leads to the provisional decisions.

How will we raise our judges and attorneys up? This is crucial. If we have to save citizens from the bureaucratic hegemony, there are many colleagues who are more experienced than us. I suppose that you will all agree on this: What can do a judge who is in the age of twenty three or twenty four? When he does not have any experience at all? Indeed, at this age they should not be judging alone. When he is most inexperienced, he is sent to an area where he is left alone. After that you send him in a social environment, he becomes an asocial judge or a public prosecutor. Moreover, initially he/she is appointed as a judge in the civil law courts, however, after ten years he/she can be assigned as a judge in a criminal court. If this is not a bureaucratic hegemony on the citizens, what is it? Is this situation different when concerning the public prosecutors? The lawyers here, they smile. What is your job? There is no expertise in Turkey in the field of practicing lawyers. You know who to go when you have a cardiac problem or you know where to go when you have problem with your kidney. The time of "I can do anything" is over. It is very absurd. The citizen turns his head and sees the lawyer. We have to bring expertise to these areas. When I was working on the banking law, my knowledge on the criminal law was not enough, therefore I had to study the law of contract and commercial law. You are obligated to work like this. This is why expertise is so important.

I couldn't express myself well yesterday and also for the sake of being conceptual I said something wrong. I said, "*the trial of the deputies due to their offices*". I mean the trial by the Constitutional Court of the President of the Republic, the Prime Minister and other ministers. The Constitutional Court, I hope we will move the Constitutional Court to İstanbul, Bosphorus, and it will work better there. You will ask me what does it have to do with İstanbul? There, there is more liberty. They might be annoyed here, in all this bureaucracy. You have to place it

somewhere else. I hope it will be realized. We would be honored to host them in Istanbul. But now, the parliament takes a decision, we send these people to the Constitutional Court to be tried. Does the attorney prepare an indictment there, does he have the power to do so? No, he doesn't. But he interferes, explains his opinion, "*the case is such...*" The Constitutional Court should have the authority to review the laws, decrees having the force of law and the standing orders of the parliament. But in the event of acting like a criminal court they apply criminal procedures. Do they have the competent justices for doing that? No. Is the verdict absolute, in other words is there a legal remedy for appealing its decisions? Yes, but when you appeal to the European Court of Human Rights this causes a problem. I don't particularly address them. There are some things I could say about this court too. We made a very big mistake in the regulation of the reinstatement of the trial. But anyway... Does this suit the criteria I mentioned before?

I emphasize once again: The Constitutional Court should exist. Another issue, the district courts of appeals.. In the meeting which took place in Istanbul, one of our friends gave some numbers while making statements on this issue. I said "*we are screwed*". In respect to the Criminal Law, it happened as such. All the energy I have for the country I try to use it efficiently. For example, I don't know all the details about this subject. It is distant from us. But, I don't know how to tidy up this.

If you try to solve some particular problems with the criminal law, you can't get a favorable result. I will not mention the names because the trials are going on. Turkey faced a very severe earthquake in 1999. We may enumerate some reasons for that: improper constructions, the constructions built on the fault lines, the intensity of the earthquake. But we try to solve all of these problems with two judicial verdicts. It is the same approach in the area of banking and elsewhere. We shouldn't do that. These may become the problems of the criminal law, but the criminal law is not the means for solving these problems.

If you try to solve them with the criminal law, may you recover soon! I hope none of us will have to solve his/her problems in the courts. I wish to have given another massage. I am a child of this country, I love it, I am honored to live here, I am happy to be with you all here. As I have said I wanted make a different speech before coming here, but I couldn't.

I would like to thank to the Union of Turkish Bar Associations for inviting me and you for listening to me.

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