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## Judicial Activism in the Context of the Jurisprudence of the Constitutional Court

One of the indisputable features characterising modern democratic states and developed societies is the pluralism of opinions. The expressions of this pluralism can take various forms and entail the diversity of discourses at different levels. The variety of attitudes, ideas, and assessments is equally evident with respect to the jurisdictional activity of courts. In this context, the concept “judicial activism” has increasingly been employed and, at times, has even become a category defining constitutional justice.

Obviously, the concept of judicial activism as such already presupposes discussion on the feasibility of the application of this category in the context of the administration of justice: i.e. whether, in general, “activism” can be a criterion defining the administration of justice; whether, for the purposes of describing the activity in question, the category “judicial passivism” is similarly applicable;<sup>1</sup> what points of interconnection between these two concepts can be established and how these concepts can be demarcated; which of these two concepts is synonymous with the administration of justice compatible with constitutional principles, etc.

Consequently, once the terminology of judicial activism is employed to define the administration of justice, first of all, issues determined by

<sup>1</sup> The legal doctrine also employs the concept “restrained (reserved) justice”, as in Šileikis, E. Aktyvistinė konstitucinė justicija kaip subtili diskrecija inspiruoti teisinius modelius [Active Constitutional Jurisprudence as a Method to Influence Legal Issues]. *Jurisprudencija. Mokslo darbai*. 2006, 12(90), pp. 51–60: 54.

the uncertainties arising from the notion of this category itself need to be dealt with. An attempt to identify the boundaries of the category of judicial activism at the theoretical level reveals a multi-faceted nature of this concept. Therefore, a polemic regarding the application of judicial activism, as, in the case at issue, a certain category defining the jurisprudential activity of the Constitutional Court (the role of individual judges in implementing constitutional justice), is possible only after at least the essential elements of the notion of judicial activism are determined. Only after these elements are established, it is possible to assess whether a discourse on judicial activism, as a descriptive criterion of constitutional justice, is feasible and whether such a discourse could be and should be of a legal nature.

### I. The notion of judicial activism: between legal and other types of discourses

In order to define the concept of judicial activism or, at least, to identify the essential elements of the notion of this category, consideration should be given to the relevant circumstances of its origin and development. It was specifically the nature of the category of judicial activism itself that subsequently determined the nature of the related discourse.

In this context, it is particularly important that the concept “judicial activism” was for the first time used by Arthur Schlesinger Jr. in an article published in a popular magazine in 1947. The article profiled the then justices of the US Supreme Court and explained the alliances and divisions among them in the adjudication of issues concerned with the administration of justice. It is notable that the person who first introduced the said concept was not a lawyer and that the article in which the first use of this concept was made was intended for a general audience rather than specialists in a certain field.<sup>2</sup> Later, the concept became especially widely applied. It became part of the official terminology in the decisions of US courts, including the Supreme Court; the media and various scholarly articles began categorising the justices of the US Supreme Court into judicial activists and those who exercised their powers in a restrained manner. As the concept of judicial activism became commonplace, it also started to be applied with regard to the activity of international judicial institutions and judicial institutions in other continents.<sup>3</sup>

<sup>2</sup> Kmiec, K. D. The Origin and Current Meanings of Judicial Activism. *California Law Review*. Vol. 92, pp. 1441–1477: 1444–1463.

<sup>3</sup> Special attention in the context of judicial activism is paid to international and supranational courts as, for instance, the Court of Justice of the European Union and the European Court

In the context of the notion of judicial activism, it is especially important that this category emerged as a non-legal one and that it was initially applied in a non-legal context to describe the activity of the administration of justice. Furthermore, according to Schlesinger, judicial activists are those who believe that law and politics are inseparable and who see judicial decisions as result-oriented, because no decision is predetermined beforehand.

Thus, the inseparable link between law and politics lies at the very beginnings of the category of judicial activism. And although, over time, both the notion of judicial activism and the context of the application of this concept have changed, the category of judicial activism has remained not purely legal.<sup>4</sup> In addition, from the beginning of its emergence, this category was characterised by uncertainty; this has influenced the situation that even today there is neither the single all-inclusive definition of the concept of judicial activism, which would reveal the specific content of this category, nor its general notion (either at the theoretical or practical level).

Consequently, judicial activism is defined in various ways, highlighting different elements of the notion of this category and, simultaneously, unveiling the diverse variations of its content. For example, judicial activism can be defined as:

- an approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions;<sup>5</sup>
- such a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions; generally, it is also suggested to mean that the adherents of this philosophy tend to find violations of the Constitution and ignore precedents;<sup>6</sup>

of Human Rights. According to Adams, M., Waele, H., Meeusen, J., Stratemans, G. *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice*. Hart Publishing.

<sup>4</sup> This conclusion could not be denied also considering that, in principle, criticism over judicial activism was, for example, expressed by US Supreme Court Justices Alito, Scalia, and Thomas in their dissenting opinion in the case *Obergefell v. Hodges*. See the dissenting opinion of US Supreme Court Justice Alito, joined by Justices Scalia and Thomas, in the case *Obergefell v. Hodges*. 76 U.S. (2015). [Interactive]. [Accessed 10-05-2016] <[http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf)>

<sup>5</sup> According to *Encyclopaedia Britannica*. [Interactive]. [Accessed 10-05-2016] <<http://www.britannica.com/topic/judicial-activism>>

<sup>6</sup> *Black's Law Dictionary*. According to Ribeiro, G. A. Judicial Activism and Fidelity to Law in *Judicial Activism. An Interdisciplinary Approach to the American*

- the view that the Supreme Court and other judges can and should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society.<sup>7</sup>

The synonyms ascribed to the category of judicial activism also embrace such terminology as: “judicial legislation”; the interpretation of law in the light of the objective the judges are trying to pursue;<sup>8</sup> and “judicial politics”.<sup>9</sup> The manifestations of judicial activism have also been referred to as “the judiciary taking control of larger and larger swaths of territory that ought to be settled legislatively”.<sup>10</sup> The boundaries of terminology covering judicial activism extend to include epithets identifying judges as practising “politics in robes”;<sup>11</sup> in the context of constitutional justice, references are made to liberal judges who departed from the original meaning of the Constitution.<sup>12</sup> Some authors associate the concept of judicial activism with judicial activity that falls beyond the vested powers,<sup>13</sup> as well as with those most general cases where, in the course of administering justice, certain acts passed by the legislature are struck down as unconstitutional.<sup>14</sup>

In fact, all the above-mentioned examples confirm that judicial activism can be considered far more reaching than being merely not a purely legal category; it is a category of an interdisciplinary nature and contains more features of politics,

*and European Experiences*. [Interactive]. [Accessed 10-05-2016] <[https://books.google.lt/books?id=JK64CQAAQBAJ&pg=PA31&lpg=PA31&dq=black+law+dictionary+judicial+activism&source=bl&ots=1lstv5JF5Y&sig=yym6WNvgqojX\\_gOjddquxFQZY7Io&hl=en&sa=X&redir\\_esc=y#v=onepage&q=black%20law%20dictionary%20judicial%20activism&f=false](https://books.google.lt/books?id=JK64CQAAQBAJ&pg=PA31&lpg=PA31&dq=black+law+dictionary+judicial+activism&source=bl&ots=1lstv5JF5Y&sig=yym6WNvgqojX_gOjddquxFQZY7Io&hl=en&sa=X&redir_esc=y#v=onepage&q=black%20law%20dictionary%20judicial%20activism&f=false)>

<sup>7</sup> According to *U.S. Legal*. [Interactive]. [Accessed 11-05-2016] <<http://definitions.uslegal.com/judicial-activism/>>

<sup>8</sup> Llorens, A. A. The European Court of Justice, More Than a Teleological Court. *The Cambridge Yearbook of European Legal Studies*. Volume, 1999, pp. 373–398: 373.

<sup>9</sup> Those “activist” judges. *The Economist*. [Interactive]. [Accessed 10-05-2016] <<http://www.economist.com/blogs/democracyinamerica/2015/07/judicial-politics-0>>

<sup>10</sup> The authors of this idea are Antonin Scalia and Bryan A. Garner. According to Franek, M. Judicial Activism. A Tempest or a Teapot in a Teapot? *The Philadelphia Lawyer*. 2014. [Interactive]. [Accessed 10-05-2016] <[http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/TPL\\_Summer14\\_Teapot.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/TPL_Summer14_Teapot.pdf)>

<sup>11</sup> Grimmel, A. The Court of Justice of the EU and the Myth of Judicial Activism in the Foundational Period of Integration through Law. *European Journal of Legal Studies*. [Interactive]. [Accessed 10-05-2016] <<http://ejls.eu/16/196UK.htm>>

<sup>12</sup> Sandler, R. B. Is Judicial Activism Bad? [Interactive]. [Accessed 10-05-2016] <<http://www.rbs0.com/judact.pdf>>

<sup>13</sup> According to Franek, M. Judicial Activism. A Tempest or a Teapot in a Teapot? *The Philadelphia Lawyer*. 2014. [Interactive]. [Accessed 10-05-2016] <[http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/TPL\\_Summer14\\_Teapot.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/TPL_Summer14_Teapot.pdf)>

<sup>14</sup> According to *Judicial Activism Defined*. [Interactive]. [Accessed 10-05-2016] <<http://www.nationalreview.com/corner/352017/judicial-activism-defined-mario-loyola>>

the social area, or other areas, rather than those of a legal nature. In this respect, it would be completely reasonable to agree with the contention that, in all cases, discourse on judicial activism has an interdisciplinary nature and incorporates legal, social, economic, and political aspects; therefore, it cannot be restricted to just a single field of inquiry.<sup>15</sup> It is also obvious that judicial activism, as an especially wide-embracing category, in principle, due to uncertainty inherent in its concept, ultimately may not be covered under the generalised umbrella notion, which, in addition, would also be dependent on a particular discourse making use of this category.

Thus, it seems it would be hardly possible to provide not only the single universal definition for the category in question, but also to identify at least one of such elements of its notion that is common to all discourses. Nevertheless, the analysis of the provided examples of the definition for the concept of judicial activism makes it clear that judicial activism is a category of an evaluative nature, i.e. the application of this category in any discourse should be associated with the evaluative function. Indeed, this category is especially employed with the aim of attributing a particular evaluative dimension to the process and results of the administration of justice.

Consequently, in the context of the issues related to the definition of judicial activism, it becomes obvious that the application of this category, in principle, is an attempt to draw a distinction between, on the one hand, the exercise of judicial functions within the limits of discretion assigned to courts and, on the other hand, such administration of justice that goes beyond these limits. In the context of the issues under discussion, it is evident that, in cases where the category of judicial activism is applied, among other things, it is sought to separate the performance of the functions of the Constitutional Court involving the interpretation of law from the so-called judicial legislation, i.e. such exercise of judicial powers when, in the course of implementing justice, not only the content of a norm is revealed, but rather a qualitatively new norm is created, thereby, in principle, interfering with the implementation of the functions of the legislature or, even taking over these functions.

In this respect, it is important that the doctrine, at times, holds that there is a clear demarcation line between the interpretation of law and judicial activism: the former is a legitimate expression of the judicial function, whereas the latter is a certain form of degeneration, which manifests through arbitrary judicial interference in the political arena, while giving priority not to legal

<sup>15</sup> Pollicino, O. Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint. *German Law Journal*. Vol. 05, No. 03, pp. 283–317: 283.

values, but those of a different nature. However, the advocates on the opposite side of this discourse maintain that the judicial function *per se* implies not only the interpretation of law, but also lawmaking.<sup>16</sup> They emphasise that judicial discretion, as well as court-made law, does exist and does not reflect judicial imperialism, but rather uncertainty inherent in law itself; law is not mathematics.<sup>17</sup> Discretion is regarded as a measure by means of which law as the entirety of legal norms is implemented; discretion is viewed as a core component of law, since the implementation of legal norms is a process that requires interpretation and choice.<sup>18</sup>

Nevertheless, apart from differing views involved in this discourse and the validity of arguments substantiating them, the central axis of this discussion, it seems, lies in the possibility of assessing the implementation of discretion granted to a court (in this case, the Constitutional Court).

In general, bearing an evaluative nature, a discourse on the activist or restrained implementation of judicial powers, in principle, is aimed at assessing measures chosen for implementing powers in the process of administering justice. In fact, from the purely legal view, the choice of whether the granted powers are implemented in one or another way, as long as such a choice is made without violating the limits set by legal acts for implementing the granted powers, is no more than an expression of the exercised discretion conferred on the subject. In the same vein, in the course of implementing constitutional justice, a choice made by the Constitutional Court as to how to exercise the powers conferred on it, from the legal point of view, means no more but the implementation of the discretion granted to the Constitutional Court under the provisions of the Constitution.

In the light of this, it is possible to agree with prof. Aharon Barak, who, while contending that judicial discretion is part of the existence of law, notes that the possibility for a judge to choose is actually determined by the legal criteria of the lawfulness of a choice.<sup>19</sup> Therefore, as long as a court implements its discretion within the established limits and in observance of law, the assessment of such

<sup>16</sup> Pollicino, O. Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint. *German Law Journal*. Vol. 05, No. 03, pp. 283–317: 285–286.

<sup>17</sup> Barak, A. Teismo diskrecijos prigimtis ir jos reikšmė vykdant teisingumą [The Nature of Judicial Discretion and Its Significance for the Administration of Justice]. *Justitia*. 2005, No. 3 (57), pp. 22–29: 24.

<sup>18</sup> Gumbis, J. Teisinė diskrecija: teorinis požiūris [Judicial Discretion: Theoretical Approach]. *Teisė*. 2004 (52), pp. 41–51: 50.

<sup>19</sup> Barak, A. Teismo diskrecijos prigimtis ir jos reikšmė vykdant teisingumą [The Nature of Judicial Discretion and Its Significance for the Administration of Justice]. *Justitia*. 2005, No. 3 (57), pp. 22–29: 22, 24.

implementation of powers should be an element not of a legal discourse, but rather of a discourse in political science, or in sociological or interdisciplinary areas.

It needs to be noted that, from the purely legal point of view, discussions on judicial activism in the context of constitutional justice and, accordingly, on reflections of judicial activism in constitutional jurisprudence, or on the degree of restraint in the exercise of powers conferred on a court, could not be productive. After all, once it is established that the Constitutional Court has implemented its powers within the limits established by the Constitution, any further assessment, in purely legal terms, could not be substantive and, in principle, would have to be confined to identifying the form chosen by the Constitutional Court for implementing its powers conferred by the Constitution.

Obviously, in this discourse, it is not most important to reach conclusions (i.e. to ascribe the particular category to specific instances of the implementation of powers granted to the Constitutional Court), as such conclusions could hardly be legally significant; what is important is the passion of proving. The more so, the application of the terminology of judicial activism in the context of constitutional jurisprudence could imply the qualitative assessment of the implementation of constitutional justice (its process and results); but such assessment is questionable from the legal point of view. Thus, independent of the opinions expressed by a politologist, sociologist, historian, or just a good person as to whether the Constitutional Court is activist or restrained in the exercise of its powers, the Constitutional Court will still have the discretion to choose the forms of exercising the powers granted to it for implementing constitutional justice, while ensuring the adherence to human rights and the principles of the rule of law.

Such an approach to the issues in question, definitely, cannot and does not lead to any preconditions for underrating or doubting the feasibility of the assessment of constitutional jurisprudence by means of applying the category of judicial activism in other discourses (in political science, sociological or interdisciplinary areas). Nor does it create any preconditions for ignoring the related discussions. Nevertheless, in purely legal terms, it would be most meaningfully beneficial if a polemic of this nature regarding the results or even the quality of the results of the implementation of the powers of the Constitutional Court were avoided.

## **II. The reflections of judicial activism in constitutional jurisprudence identified at the academic level**

Although, from the legal point of view, as a category not of the legal level, but that of sociological, political science, or interdisciplinary discourse, judicial activism is not suitable for characterising the jurisprudential activity of

the Constitutional Court (or the role of individual judges in administering justice), nevertheless, in the context of the discussed issues, a mention should be made of certain reflections of judicial activism in the jurisprudence of the Constitutional Court of the Republic of Lithuania as identified in the legal doctrine.

Such examples of judicial activism may be relatively grouped as follows:

1. The “expansive” interpretation of the Constitution and the powers of the Constitutional Court.
  - 1.1. The powers of the Constitutional Court not to limit itself only to a linguistic interpretation of the provisions of the Constitution, but to choose the methodology of its interpretation.
  - 1.2. The powers of the Constitutional Court to assess the constitutionality of legal gaps.
  - 1.3. The powers of the Constitutional Court to assess the constitutionality of legal acts those are no longer in force.
  - 1.4. The powers of the Constitutional Court to assess the constitutionality of legal acts without taking into consideration the date of the beginning of their application, i.e. the powers to investigate the constitutionality of those legal acts that have not been applied yet.
  - 1.5. The powers of the Constitutional Court to assess the compliance of substatutory legal acts containing no legal regulation (legal norms) that, if existed, would exert direct influence on relevant legal relations with the higher-ranking legal acts.
2. The narrowing/extension of the limits of an investigation, i.e. conducting an investigation not within the limits set by the petitioner.
  - 2.1. Investigation into the compliance of an impugned legal regulation not only with the articles of the Constitution and/or laws indicated by the petitioner, but also with other articles.
  - 2.2. Investigation not only into the compliance of a legal regulation impugned by the petitioner, but also (or only) into a legal regulation that is, in a particular way, related to the impugned legal regulation, i.e. investigation into:
    - other provisions consolidated in the impugned legal act;
    - provisions consolidated in another (than the impugned) legal act;
    - provisions consolidated in a law the compliance of which with the Constitution is not challenged by the petitioner, but on which the impugned substatutory act is based.
  - 2.3. Investigation into a legal regulation impugned by the petitioner to a different extent (other than that specified by the petitioner).
3. The functions of the Constitutional Court related to the regulation and interpretation of the consequences of its ruling.

- 3.1. The postponement of the official publication of a ruling of the Constitutional Court.
- 3.2. The explanatory remarks in a ruling of the Constitutional Court on the constitutional requirements for a legal regulation of certain public relations.
- 3.3. The explanatory remarks in a ruling of the Constitutional Court regarding the application of a legal regulation found to be in compliance with the Constitution.

### 1. The “expansive” interpretation of the Constitution<sup>20</sup> and the powers of the Constitutional Court.<sup>21</sup>

#### 1.1. The powers of the Constitutional Court not to limit itself only to a linguistic interpretation of the provisions of the Constitution, but to choose the methodology of its interpretation.<sup>22</sup>

In this context, it should be noted that, according to the provisions of the official constitutional doctrine that reveal the powers of the Constitutional Court to interpret the Constitution:

- the Constitutional Court is the only subject empowered to officially interpret the Constitution; under the Constitution, it is only the Constitutional Court that enjoys the powers to officially interpret the Constitution; it does so while deciding whether legal acts are in conflict with higher-ranking legal acts (*inter alia*, with the Constitution);<sup>23</sup>

<sup>20</sup> It is emphasised in the legal doctrine that any alleged inconsistencies of the norms of the Constitution or any abstract formulations of such norms may and must be removed by the official interpreter who sees the Constitution as an integral legal act. Mesonis, G. Kai kurie Konstitucijos interpretavimo aspektai: *expressis verbis* ribos [Some Aspects of the Interpretation of the Constitution: The Limits of *Expressis Verbis*]. *Jurisprudencija. Mokslo darbai*. 2008, 5(107), pp. 19–27: 20, 21.

<sup>21</sup> There is an agreement in the legal doctrine that the provisions of the Constitution consolidating the jurisdiction of the Constitutional Court are formulated in a very laconic manner, therefore, the said provisions, as well as the other provisions of the Constitution, should be subject to interpretation. Sinkevičius, V. Lietuvos Respublikos Konstitucinio Teismo jurisdikcijos ribos [The Limits of the Jurisdiction of the Constitutional Court of the Republic of Lithuania]. *Jurisprudencija*. 2002, t. 30(22), pp. 132–147: 144.

<sup>22</sup> In this context, attention should be paid to the fact that, as it is noted in the legal doctrine, the discretion of the Constitutional Court was much broader during the first decade of the existence of the Constitution and the Constitutional Court, as it was still the period of the birth of the constitutional doctrine, in comparison with the later period when such development occurs on the basis of the already formed doctrine. Kūris, E. The Constitution, Constitutional Doctrine and Court’s Discretion. *Interpretation and Direct Application of the Constitution. The Baltic-Nordic Regional Conference. 15–16 March 2002, Vilnius*, pp. 10–47: 24.

<sup>23</sup> *Inter alia*, the Constitutional Court’s rulings of 30 May 2003 and 1 July 2004.

- while interpreting the Constitution, the Constitutional Court has the duty to take into consideration the aims of the constitutional regulation, which include, *inter alia*, the objectives upon which the functions of every interpreted constitutional provision are based and their purpose in the context of the overall constitutional regulation;<sup>24</sup> the official constitutional doctrine reveals, *inter alia*, interrelations among various constitutional provisions and how their content affects one another, a balance among constitutional values, and the essence of the constitutional legal regulation as a whole;<sup>25</sup>
- on the basis of the constitutional doctrine and precedents that it itself has formulated, the Constitutional Court must ensure the continuity (coherence and consistency) of the constitutional jurisprudence and the predictability of its decisions;<sup>26</sup> the Constitutional Court is bound both by the precedents that it itself has created and by the official constitutional doctrine, which it itself has formulated and which substantiates such precedents;<sup>27</sup>
- the formation of the official constitutional doctrine (both as a whole and on each individual issue of the constitutional legal regulation) is not a one-off act, but a gradual and coherent process; this process is uninterrupted and is never fully completed due to the fact that both the nature of the Constitution itself, as the legal act of supreme legal force, and the idea of constitutionalism imply that the Constitution cannot and does not contain any gaps or inner contradictions;<sup>28</sup> in the course of interpreting the norms and principles of the Constitution, which are consolidated, either explicitly or implicitly, in the text of the Constitution and which constitute a harmonious system, there is always a chance, if this is necessary due to the logic of a considered constitutional justice case, that the Constitutional Court will have to formulate such provisions of the official constitutional doctrine, i.e. to reveal such aspects of the constitutional legal regulation that have not been formulated yet in the acts of the Constitutional Court adopted in previous constitutional justice cases;
- the Constitutional Court enjoys the powers to reinterpret, where appropriate, the official doctrinal provisions; however, in cases where no such amendments to the Constitution have been adopted that, if adopted, would make it necessary to reinterpret certain provisions of the official

<sup>24</sup> *Inter alia*, the Constitutional Court’s rulings of 1 July 2004 and 13 December 2004.

<sup>25</sup> *Inter alia*, the Constitutional Court’s rulings of 14 March 2006 and 9 May 2006, as well as its decision of 3 May 2010.

<sup>26</sup> *Inter alia*, the Constitutional Court’s rulings of 28 March 2006 and 5 September 2012.

<sup>27</sup> *Inter alia*, the Constitutional Court’s rulings of 28 March 2006, 6 January 2011, and 5 September 2012.

<sup>28</sup> *Inter alia*, the Constitutional Court’s rulings of 25 May 2004 and 13 December 2004.

constitutional doctrine so that it could be corrected, it is allowed to reinterpret the official doctrinal provisions only if the necessity arises from the Constitution to deviate from an existing precedent and to create a new one.<sup>29</sup>

Thus, under the Constitution, in administering constitutional justice, the Constitutional Court, as the only subject with the powers to officially interpret the Constitution, is allowed to choose the manner of exercising such powers conferred on it, *inter alia*, it is allowed to choose the appropriate methods of the interpretation of the provisions of the Constitution.

It goes without saying, if discussed in discourses other than a legal one, such a manner of the interpretation of the provisions of the Constitution where the Constitutional Court chooses the methodology of interpretation by taking account, among other things, of other (explicit or implicit) provisions of the Constitution may be categorised as a certain feature of judicial activism. However, the limits of these powers of the Constitutional Court and, in part, the forms of exercising them are still determined by the Constitution itself. Therefore, from the legal point of view, the powers of the Constitutional Court to choose the methods of interpretation derive from the Constitution itself; in addition, choosing a concrete methodology is only a form of exercising the discretion granted to the Constitutional Court under the provisions of the Constitution.

### **1.2. The powers of the Constitutional Court to assess the constitutionality of legal gaps.**

The powers of the Constitutional Court to assess the constitutionality of legal gaps are derived from the very essence of the implementation of constitutional justice. Therefore, if laws (or their parts) fail to establish a certain legal regulation, the Constitutional Court has the powers to assess the constitutionality of such laws (or their parts) in cases where the failure to lay down the said legal regulation in precisely the said laws (or their parts) may lead to the violation of the principles and/or norms of the Constitution.<sup>30</sup>

<sup>29</sup> The Constitutional Court's ruling of 28 March 2006.

<sup>30</sup> *Inter alia*, the Constitutional Court's ruling of 25 January 2001, as well as its decisions of 13 May 2003 and 16 April 2004. In this context, a special mention should be made of the fact that, in the course of the activity of the Constitutional Court, there have been changes in its position on whether it has the powers to investigate the constitutionality of legal gaps: at the beginning of its activity, the Constitutional Court took the position that it should abstain from deciding the questions of legal gaps (the Constitutional Court's ruling of 21 April 1994 and its decision No. 5/94 of 11 July 1994); it was only later that the Constitutional Court held that, under the Constitution, it has the powers to investigate the constitutionality of legal gaps (*inter alia*, the Constitutional Court's decisions of 6 May 2003 and 8 August 2006).

For example, the constitutionality of a legal gap was assessed in the Constitutional Court's ruling of 11 July 2014. In this ruling, when assessing the constitutionality of the Law on Referendums insofar as, according to the petitioner, it did not provide for certain powers of the Central Electoral Commission, the Constitutional Court interpreted the powers of the Central Electoral Commission also by invoking the provisions of Article 6 "Requirements for Draft Laws, Other Draft Acts, and Draft Decisions Proposed To Be Put To a Referendum" of the Law on Referendums. The Constitutional Court held that the said provisions of the Law on Referendums had failed to establish a certain requirement, mandatory under the Constitution, for the text of a decision proposed to be put to a referendum, however, the requirements for the said text had been established only in Paragraph 1 of Article 6 of the same law. Therefore, the Constitutional Court held that there was a legal gap prohibited by the Constitution and recognised that the respective provisions of the Law on Referendums were in conflict with the Constitution.

### **1.3. The powers of the Constitutional Court to assess the constitutionality of legal acts that are no longer in force.**

The Constitutional Court has the powers (and, if petitioned by a court, it has the duty<sup>31</sup>) to assess the compliance of an impugned legal act that is no longer in force with a higher-ranking legal act.<sup>32</sup> The jurisprudence of the Constitutional Court shows that, subsequent to petitions filed by courts, the Constitutional Court must often (or, perhaps, most often) assess the compliance of namely a legal regulation that is no longer in force with higher-ranking legal acts.

For example, in its ruling of 15 March 2016 (No. KT9-N6/2016), the Constitutional Court assessed the compliance of a legal regulation that was no longer in force, but used to govern certain relations of sickness and maternity social insurance, with the legal regulation consolidated in higher-ranking legal acts; in its ruling of 26 January 2016, the Constitutional Court

<sup>31</sup> The duty to investigate the compliance of a legal act that is no longer in force with a higher-ranking legal act in cases where the petition is filed by a court is substantiated by the fact that the doubts faced by this court regarding the constitutionality of a certain legal act would not be removed if the Constitutional Court did not decide such a question in substance. If the doubts of a court regarding the constitutionality of an act applicable in the case considered by it are not removed, the application of such an act could lead to a violation of the constitutional rights and freedoms of persons (*inter alia*, the Constitutional Court's rulings of 5 April 2000, 10 May 2002, and 3 June 2002).

<sup>32</sup> Attention should be paid to the fact that the position of the Court on this issue has seen changes: at the beginning of its activity, the Constitutional Court used to interpret its powers as meaning that it was allowed to investigate the compliance of only effective legal acts with higher-ranking legal acts (the Constitutional Court's decisions No. 38/94 and No. 1/95 of 25 January 1995 and its decision of 14 March 1995).

assessed the constitutionality of a legal regulation that was no longer in force, but formerly governed the state pensions of officials and servicemen); in its ruling of 22 September 2015, the Constitutional Court assessed the constitutionality of a legal regulation consolidated in the Law on Immovable Property Tax, although the legal regulation was no longer in force; etc.

**1.4. The powers of the Constitutional Court to assess the constitutionality of legal acts without taking into consideration the date of the beginning of their application, i.e. the powers to investigate the constitutionality of those legal acts that have not been applied yet.**

In this context, it is important to note that, under Article 105 of the Constitution, the Constitutional Court considers and adopts decisions on whether the laws or other acts adopted by the Seimas are in conflict with the Constitution. According to the provisions of the official constitutional doctrine, the Constitutional Court has the said powers regardless of the beginning of the application of the impugned legal acts.<sup>33</sup>

For example, in its ruling of 19 September 2002, the Constitutional Court assessed the constitutionality of the Law on Telecommunications (wording of 5 July 2002), the application of which had to start on 1 January 2003, regardless of the fact that, at the time of the consideration of the case, the said law did not apply.

**1.5. The powers of the Constitutional Court to assess the compliance of substatory legal acts containing no legal regulation (legal norms) that, if existed, would exert direct influence on relevant legal relations with higher-ranking legal acts.**

These powers of the Constitutional Court derive from the very essence of the implementation of constitutional justice: the implementation of constitutional justice determines that the Constitutional Court also has the constitutional powers to assess and decide on the constitutionality of such provisions of substatory legal acts of the Seimas (*inter alia*, those of constituent parts of such acts) that express the will of the Seimas on a future legal regulation of certain social relations and form the basis for drafting and adopting the relevant legal acts.<sup>34</sup>

For example, when exercising such powers, in its ruling of 24 September 2009, the Constitutional Court assessed the compliance of the conception that had been approved by means of a government resolution and had prescribed the political guidelines for organising the national defence system with higher-ranking legal acts; in its ruling of 28 September 2011, it assessed the provisions of

<sup>33</sup> The Constitutional Court's ruling of 19 September 2002.

<sup>34</sup> The Constitutional Court's ruling of 28 September 2011.

the State Family Policy Concept that had been approved by means of a resolution of the Seimas and had defined certain guidelines for law-making related to the regulation of family relations.

**2. The narrowing/extension of the limits of an investigation, i.e. conducting an investigation not within the limits set by the petitioner.**

The powers of the Constitutional Court to conduct an investigation in a constitutional justice case not within the boundaries set by the petitioner are determined by the following factors:

- the Constitution is an integral act (Paragraph 1 of Article 6 of the Constitution); therefore, in cases where, subsequent to a received petition, the Constitutional Court investigates whether an impugned legal act (or its part) is in conflict with the articles of the Constitution (or their parts) indicated in the petition, it at the same time investigates whether the impugned legal act (or its part) is in conflict with the Constitution—an integral and harmonious system;<sup>35</sup>
- the Constitutional Court considers and adopts decisions on whether legal acts are in conflict with the Constitution (Article 105 of the Constitution); the Constitutional Court implements constitutional justice; the implementation of constitutional justice implies that, if a legal act (or its part) is in conflict with the Constitution, such a legal act (or its part) must be removed from the legal system;<sup>36</sup> the supremacy of the Constitution is thus ensured; therefore, having found the unconstitutionality of a law not impugned by the petitioner, but upon which the impugned substatory act is based, or upon which the other provisions of the impugned law are based, or upon which the provisions laid down in another legal act are based in cases where the said provisions are related in a certain manner to the impugned legal act, etc., the Constitutional Court must state that such a law is unconstitutional.

**2.1. Investigation into the compliance of an impugned legal regulation not only with the articles of the Constitution and/or laws indicated by the petitioner, but also with other articles.**

For example, namely such an investigation was carried out in the ruling of 29 October 2015 in assessing the constitutionality of certain substatory legal acts that had been adopted by the Government. In that case, the petitioner requested

<sup>35</sup> *Inter alia*, the Constitutional Court's rulings of 24 December 2002, 30 May 2003, and 10 October 2013.

<sup>36</sup> *Inter alia*, the Constitutional Court's rulings of 29 November 2001, 27 June 2007, 2 March 2009, and 1 July 2013.

an investigation into the compliance of the impugned legal regulation with Item 2 (the Government of the Republic of Lithuania executes laws, the resolutions of the Seimas on the implementation of laws, as well as the decrees of the President of the Republic) and Item 7 (the Government performs other duties prescribed to the Government by the Constitution and other laws) of Article 94 of the Constitution. Since the doubts of the petitioner regarding the compliance of the impugned legal regulation, among other things, with the Constitution, were virtually substantiated solely by the fact that the Government had not executed certain laws or had executed them improperly, i.e. that the Government had violated the requirements arising from Item 2 of Article 94 of the Constitution, but not those arising from Item 7 of the same article, the petition requesting an investigation into the compliance of the impugned legal regulation with Items 2 and 7 of Article 94 of the Constitution was treated as a petition requesting an investigation into the compliance of the impugned legal regulation with namely Item 2 of the said article.

In another case, the petitioner requested an investigation into the compliance of a certain aspect of a legal regulation of state pensions of officials and servicemen with the principle of the equality of the rights of persons, as consolidated in Paragraph 1 of Article 29 of the Constitution, and with the constitutional principle of a state under the rule of law. In its ruling of 6 May 2015, the Constitutional Court noted that, in interpreting the provisions of Paragraph 1 of Article 29 of the Constitution in the said case, account should also be taken of Article 52 of the Constitution, which lays down the grounds for pension provision and social assistance. Therefore, the Constitutional Court also assessed the compliance of the impugned legal regulation with Article 52 of the Constitution.

**2.2. Investigation not only into the compliance of a legal regulation impugned by the petitioner, but also (or only) into a legal regulation that is, in a particular way, related to the impugned legal regulation, i.e.:**

– **investigation into other provisions consolidated in the impugned legal act.**

For example, in its ruling of 28 September 2011, the Constitutional Court held that the provisions, impugned by the petitioner, of Item 1.6 of the State Family Policy Concept were closely related to the other, not impugned, provisions of the same item, therefore, an investigation into the compliance of the impugned provisions of the said Concept with the Constitution was regarded as inseparable from an investigation into the constitutionality of the other provisions of the same Concept. Upon assessing the compliance of such a legal regulation with higher-ranking legal acts, the Constitutional Court held that, to a certain extent, the entire Item 1.6 of the Concept was in conflict with

the provisions and principles of the Constitution, i.e. the Constitutional Court found the unconstitutionality of both the provisions impugned by the petitioner and those inseparably related with the impugned provisions as specified by the Constitutional Court.

– **investigation into provisions consolidated in another (than the impugned) legal act.**

For example, in its ruling of 1 July 2013, when deciding on the constitutionality of the legal regulation that had reduced, as a result of the economic crisis, the amounts of the additional pay of the officials of the Special Investigation Service for the qualification category, and having found that, according to the laws adopted due to an especially difficult economic and financial situation in the state, the additional pay for the qualification category had also been reduced for some other statutory state servants—the officials of the State Security Department, civil national defence service, the Second Investigation Department, and the Department of Prisons, the Constitutional Court also assessed the constitutionality of the latter legal regulation, which had not been impugned by the petitioner.

In another case, the Constitutional Court noted that, if the provisions of a legal act regulating the procedure for the adoption of an impugned law are found to be unconstitutional, the Constitutional Court must state that such provisions are in conflict with the Constitution. Therefore, having held that the Law Amending Article 125 of the Constitution, in view of the procedure of its adoption, was in conflict with Paragraph 1 of Article 147 of the Constitution, the Constitutional Court also assessed the constitutionality of the provisions, not impugned by the petitioner, of the Statute of the Seimas that regulated certain particularities of submitting and deliberating draft laws on amending the Constitution (ruling of 24 January 2014).

– **investigation into provisions consolidated in a law the compliance of which with the Constitution is not challenged by the petitioner, but on which the impugned substatutory act is based.**

For example, the petitioner impugned the provisions of a resolution of the Government insofar as the said provisions had commissioned the Ministry of Education and Science to establish the procedure for remunerating educators and other employees of budgetary establishments. Since, under the Constitution, the essential conditions for the work pay of persons who receive remuneration from the funds of the state (municipal) budget must be established by means of a law, but the Law on Education, on the grounds of which the impugned legal regulation had been adopted, had failed to establish the said conditions, the Constitutional Court held that the hierarchy of the legal acts stemming from the Constitution had been violated and the powers of the Government had been

expanded in a constitutionally unjustified manner. Consequently, in its ruling of 29 September 2015, the Constitutional Court recognised that a legal regulation that was laid down in the Law on Education, but had not been impugned by the petitioner, was in conflict with the Constitution.

**2.3. Investigation into a legal regulation impugned by the petitioner to a different extent (other than that specified by the petitioner).<sup>37</sup>**

For example, such an investigation was carried out by the Constitutional Court in assessing the constitutionality of the provisions of the Code of Criminal Procedure of the Republic of Lithuania (CCP) in its ruling of 17 February 2016. In that case, the petitioner requested an investigation into the constitutionality of Article 157 of the CCP, which had consolidated the legal regulation governing temporary removal from office insofar as, according to the petitioner, it had not established any prohibition, or had not provided for any additional criteria, precluding the removal of directly elected state politicians from office for an unlimited period of time. The Constitutional Court noted that the entirety of the arguments presented by the petitioner and the request, addressed to the Constitutional Court, formulated in the operative part of the petition made it clear that the petitioner doubted the constitutionality of the legal regulation governing temporary removal from office as consolidated in Article 157 of the CCP only insofar as it applied to directly elected municipal politicians. Since the regulation of Article 157 of the CCP applies only to those municipal council members (i.e. municipal politicians) who hold the office of mayor or deputy mayor, the Constitutional Court assessed the constitutionality of the impugned legal regulation only insofar as the said legal regulation applied to those directly elected municipal politicians who hold the office of mayor or deputy mayor.

**3. The functions of the Constitutional Court related to the regulation and interpretation of the consequences of its rulings.**

**3.1. The postponement of the official publication of a ruling of the Constitutional Court.**

It is clear from the official constitutional doctrine that the postponement of the official publication of a ruling of the Constitutional Court by which a certain law (or its part) is ruled to be in conflict with the Constitution is a precondition stemming from the Constitution in order to avoid certain

<sup>37</sup> It is clear from the case-law of the Constitutional Court that, when the Constitutional Court, in the course of investigating constitutional justice cases, determines the boundaries of the investigation, it is often (or, perhaps, most often) that the Constitutional Court changes namely the scope, specified by the petitioner, of the investigation into the compliance of an impugned legal act with higher-ranking legal acts; such a scope is determined by the Constitutional Court itself, or the scope set by a petitioner is changed either by narrowing or expanding it.

consequences, unfavourable to society and the state, as well as to human rights and freedoms, which might arise if the relevant ruling of the Constitutional Court were officially published immediately after it is pronounced publicly at the hearing of the Constitutional Court and if it became effective on the day of its official publication.<sup>38</sup>

For example, the Constitutional Court postponed, until 1 October 2013, the official publication of its ruling of 1 July 2013 by which it recognised that the provisions of the laws establishing the reduced remuneration of state servants and judges as a result of the economic crisis were, to a certain extent, unconstitutional. The official publication of the said ruling was postponed so that the legislature would have the time to adopt the respective amendments to legal acts in order to redistribute the financial resources of the state.

In another case, the Constitutional Court postponed, until 2 January 2016, the official publication of its ruling of 11 June 2015 by which it ruled the legal regulation governing the funding of municipalities to be unconstitutional. In the opinion of the Constitutional Court, if the said ruling had been officially published immediately, the legal regulation governing the funding of municipalities would have become vague.

**3.2. The explanatory remarks in a ruling of the Constitutional Court on the constitutional requirements for a legal regulation of certain public relations.**

For example, in its ruling of 11 July 2014, the Constitutional Court held that, in cases where a draft law amending the Constitution is proposed to be put to a referendum, the respective laws implicitly lay down the legal regulation (which is mandatory under the Constitution) consolidating the powers of the Central Electoral Commission to review the compliance of such a draft law with the requirements established in relation to its content and form. In addition, the Constitutional Court noted that the legislature, when regulating the relations connected to the organisation of referendums, must formulate legal norms in a clear and precise manner, so that they would be understandable to the participants of the legal relations connected to referendums. Therefore, the requirement of legal certainty and clarity would be better complied with if the Law on Referendums explicitly established the powers of the Central Electoral Commission stemming from the Constitution and currently implicitly consolidated in the Law on Referendums and the Law on the Central Electoral Commission.

<sup>38</sup> *Inter alia*, the Constitutional Court's rulings of 23 August 2005, 29 June 2010, 9 June 2011, and 6 February 2012.

**3.3. The explanatory remarks in a ruling of the Constitutional Court regarding the application of a legal regulation found to be in compliance with the Constitution.**

For example, in its ruling of 17 February 2016, the Constitutional Court held that the established procedure for the application of the procedural coercive measure—temporary removal from office—was in compliance with the Constitution. In addition, the Constitutional Court noted that namely the subjects empowered to adopt the respective decision on the application of the said measure have the duty to ensure that the rights of a concrete person with regard to whom such a procedural measure is applied are not violated. Therefore, the subjects (including a judge in pre-trial investigation, or a court) who have the powers to decide as to the application of temporary removal from office must, in every concrete case, ensure that this measure is applied only in cases where it is necessary to reach the objectives established in the law (to enable the speedy disclosure and thorough investigation of criminal acts, or to prevent new criminal acts), as well as that the application of this measure does not restrict the rights or freedoms of the person more than necessary to reach the specified objectives. A decision to apply this procedural coercive measure to a municipal council member holding the office of mayor or deputy mayor must be based on the evaluation of the nature of the office held by the person and the nature of the crime he/she is suspected (charged) to have committed.

Thus, it is clear that, even though, in principle, judicial activism is not a legally appropriate category for characterising the implementation of constitutional justice, however, upon assessing the constitutional jurisprudential reality, it is possible to identify such jurisprudential examples that, in certain other discourses (in political science or interdisciplinary areas) rather than in a legal discourse, could be attributed features characterising judicial activism.

On the other hand, the given examples of the constitutional jurisprudence are only certain variations of the exercise of the powers of the Constitutional Court as consolidated in the Constitution. In other words, both choosing the method of interpreting the Constitution and interpreting the powers of the Constitutional Court in one or another manner, as well as choosing the ways of their exercise, are unequivocally determined by the discretion of the Constitutional Court, stemming from the Constitution, to choose the forms of implementing constitutional justice. In this context, the exercise of constitutional powers without violating the requirements arising from the Constitution eliminates any possibility of a legal discourse on the reflections of judicial activism in constitutional jurisprudence.

**Summing-up**

Judicial activism is a non-legal category, which, nevertheless, is used in the context of administering justice. It is rather a category more characteristic of sociological, political science, or interdisciplinary discourse. Such a nature of this category and the practice of its application determine that both the said category and the discourse in which it is applied are interdisciplinary.

Judicial activism as an evaluative category is used for characterising the process of administering justice and, essentially, its results. By applying this category, attempts are made to describe the exercise of judicial powers by using the notions as the “activist” or “restrained” exercise of powers and the “activist” or “restrained” jurisprudence. If such characteristics are categorised as belonging to the process of administering justice, they become inseparable from an evaluation of the exercise of judicial powers. This means an evaluation of how a court exercised its discretion. However, from the legal point of view, an evaluation of the exercise, in accordance with law, of the discretion granted to a court could not be rationalised. Furthermore, such an evaluation basically implies a qualitative assessment of the activity of administering justice, however, in the legal sense, such an assessment would be doubtful.

It is clear that the choice made by the Constitutional Court on how to exercise its powers in implementing constitutional justice only means the exercise of the discretion conferred on it by the provisions consolidated in the Constitution. Therefore, in a legal discourse, any attempts to characterise the exercise of the said powers as “activist” or “restrained” would be fruitless and would lead to a deadlock. This is also confirmed by the analysis of those reflections of judicial activism in the jurisprudence of the Constitutional Court that have been identified in the legal doctrine: this identified activity is no more than the exercise of the constitutionally provided powers within the limits set by the Constitution. Therefore, regardless of any possible evaluations of constitutional jurisprudence in discourses other than a legal one within the context of judicial activism, the Constitutional Court will continue the exercise of the powers granted to it by the Constitution to ensure constitutional justice, as well as human rights and the principles of the rule of law.

Consequently, the categorisation of the terminology related to judicial activism as belonging to the activity of administering justice should be regarded not as an element of legal discourse, but rather that of sociological, political science, or interdisciplinary discourse. Still, this does not create any preconditions for abstaining from an assessment of or for doubting the value of one or another evaluation regarding the administration of justice (including constitutional justice) where such an evaluation is made in the course of applying the category of judicial activism in other discourses (sociological, political science, or interdisciplinary discourse).



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## **Mutual Trust, Mutual Recognition and the Protection of Fundamental Rights in the Case-Law of the Court of Justice of the European Union**

It is a democratic principle common to the constitutional traditions of the Member States that all citizens are equal before the law. That is so regardless of their sex, age, origin, religion, wealth, or political affiliation.

At EU level, the same holds true. The European Union is founded on the basic idea that its citizens are equal under the Treaties. There is nothing more repugnant to the values on which the EU is founded than to assert that some EU citizens are superior to others, or, as George Orwell had it in his celebrated allegorical novel, *Animal Farm*, that some are *more equal* than others<sup>2</sup>.

This applies not only to EU citizens in their individual capacity, but also to the Member States, as the entities through which EU citizens collectively exercise their democratic rights. In the EU legal order, the principle of equality is thus both a fundamental right, when applied to individuals, and a principle of governance, when applied to the Member States.

As a fundamental right, the principle of equality guarantees that comparable situations are not treated differently and that different situations are not treated in the same way, unless such treatment is objectively justified. As a principle of governance, Article 4(2) TEU provides that “[t]he EU shall respect the equality

<sup>1</sup> \* All opinions expressed herein are personal to the author.

<sup>2</sup> G. Orwell, *Animal Farm* (London, Penguin Classics, 2000).

of Member States before the Treaties”. Within the scope of application of EU law, the 28 Member States stand on an equal footing. Regardless of their date of accession, of their size, of their economic power, of their history, of their system of government, all Member States enjoy the same democratic legitimacy.

The EU is thus precluded from considering that some national democracies and the choices that they make are better than others. In the same way, the principle of equality of Member States before the Treaties means that all Member States are equally committed to upholding the rule of law within the EU, of which fundamental rights are part and parcel. In particular, all national courts, and especially all national supreme and constitutional courts, are under the same obligation to guarantee effective judicial protection to the rights guaranteed by EU law.

That may explain why, prior to accession, a candidate Member State is expected to demonstrate that its democracy conforms to common European standards and that the level of fundamental rights protection ensured by its public authorities is compatible with that guaranteed by the Charter of Fundamental Rights of the European Union (the “Charter”) which, as we all know, has the same legal force as the Treaties themselves. Once a candidate for accession becomes a Member State of the EU, it must, from day one, be treated in exactly the same way as all other Member States.

The principle of equality of Member States before the Treaties is, in my view, the constitutional foundation for the principle of mutual trust in the EU legal order. Since all Member States share the same degree of commitment to democratic values, fundamental rights and the rule of law, one may reasonably expect that they should trust each other, especially when acting in concert to achieve common EU objectives. Indeed, it is a matter of common sense that there is mutual trust among those who are friends and equals.

In that regard, the principle of mutual trust is of paramount importance for the establishment of an Area of Freedom, Security and Justice (“AFSJ”), an objective that is expressly recognised in the Treaty on European Union.

By establishing an “area of freedom”, the authors of the Treaties sought to abolish border controls within the EU. Without prejudice to the police powers retained by the Member States, EU citizens should be able to move from one Member State to another in the same way as they move within a single Member State.

By creating an “area of security”, the authors of the Treaties sought to prevent criminals from relying on free movement as a means of pursuing their activities with impunity. Similarly, European businesses and consumers should be able to exercise cross-border activities with legal certainty as to the competent court for any dispute that may arise and as to the applicable law. The same should

apply in the context of family law where legal certainty is essential for couples and families who have exercised their right to free movement.

Accordingly, the authors of the Treaties decided that the exercise of free movement should not undermine the powers of the competent national court and the effectiveness of the applicable national laws. As internal borders disappear, the arm of the law should acquire a transnational reach.

Furthermore, the authors of the Treaties took the view that the abolition of internal borders should also bring about the “Europeanisation” of external border controls, asylum and immigration policies. If free movement is to be facilitated by the elimination of internal borders, then it is imperative that the EU is entrusted with the necessary powers to adopt common standards that prevent third-country nationals who pose a threat to our security from entering the EU.

Last, but not least, in setting up an “area of justice”, the authors of the Treaties took the view that national courts were best placed to protect the fundamental rights of individuals. Indeed, it is a common feature of the constitutional traditions of the Member States that the judiciary – and not the political process – is entrusted with that task. Judicial dialogue and comity among national judiciaries was seen by the authors of the Treaties as the right avenue for the establishment and proper functioning of the AFSJ. That is why the establishment of such an area is, first and foremost, to be achieved through the mutual recognition of national judicial decisions.

The principle of mutual recognition means that judicial decisions – issued by the competent court and that fall within the scope of the relevant EU legislation – must be recognised and enforced throughout the EU. In favouring the effectiveness – in cross-border situations – of national judicial decisions in civil or criminal matters that may involve the application of coercive measures, such as a judicial decision ordering the return of a child or an arrest warrant, the principle of mutual recognition contributes to the effective exercise of public power by the Member States.

However, in enhancing the achievement of that objective, that principle inevitably has an impact on the exercise of fundamental rights. For example, the competent court under the Brussels II a Regulation may order a parent who has removed a child from his or her Member State of habitual residence to return the child to that Member State, thus placing a constraint on that parent’s right to a family life. Similarly, a person who is the subject of a European arrest warrant may be surrendered to the Member State that issued such a warrant against his or her will, thus limiting that person’s freedom.

That is why the principle of mutual recognition in the AFSJ is subject to strict conditions and limits. Limitations on the exercise of fundamental rights must, in accordance with Article 52(1) of the Charter, be “provided for

by law” and the operation of that principle therefore depends on the adoption of legislative acts at EU level, meaning that only the EU legislator may give concrete expression to the principle of mutual recognition. Consequently, judicial intervention at the behest of litigants is no substitute for legislative inaction on the part of the EU institutions. It is thus for the EU legislator to adopt the measures that are required to ensure that the principle of mutual recognition of judicial decisions is applied in a manner that takes due account of the essence of the rights and freedoms recognised by the Charter, and complies with the principle of proportionality.

The role of the European Court of Justice (the “ECJ”) is thus limited to interpreting the EU legislative acts that shape the principle of mutual recognition, and to enforcing their compatibility with fundamental rights: secondary EU legislation that seeks to facilitate the mutual recognition of judicial decisions in civil or criminal matters must indeed respect the fundamental rights enshrined in the Charter. As a result, the ECJ acts as the guarantor of fundamental rights in this field, operating as a constitutional check on the EU political process.

To sum up, it is because Member States, and particularly their national courts, are deemed equal before the Treaties that they are able to trust each other to protect fundamental rights adequately and it is because they trust each other that judicial cooperation in civil and criminal matters is feasible, through the mutual recognition of judicial decisions. The successful operation of the principle of mutual recognition is thus based on the assumption that Member States can – and do – trust each other as regards respect for fundamental rights.

This appears clearly from the ECJ’s Opinion 2/13 on the draft agreement on the accession of the EU to the ECHR.<sup>3</sup> Drawing on its previous rulings in *N.S. and Melloni*,<sup>4</sup> it held that “[t]hat principle requires, particularly with regard to the [AFSJ], each of [the 28 Member] States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”. That Opinion thus confirms that the principle of equality of the Member States before the Treaties is inherent in the principle of mutual trust.

The principle of mutual trust imposes two negative obligations on the Member States. First, they may “not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law”. Second, “save in exceptional cases”, Member States are prevented

<sup>3</sup> Opinion 2/13, EU:C:2014:2454.

<sup>4</sup> Joined Cases C-411/10 and C-493/10 *NS*, EU:C:2011:865, and Case C-399/11 *Melloni*, EU:C:2013:107.

from “check[ing] whether [another] Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.

Whilst the first obligation allows no room for exceptions, the second does so. In that regard, allow me to examine more closely those two negative obligations by reference to recent case law of the ECJ, notably in the context of the Framework Decision on the European arrest warrant (the “Framework Decision”).

As the “cornerstone” of judicial cooperation in criminal matters, the Framework Decision aims to replace the multilateral system of extradition between Member States that was often politically driven with a system of surrender that rests solely in the hands of judicial authorities. Accordingly, the surrender of those convicted of crimes, for the purpose of enforcing judgments, or of criminal suspects, for the purpose of conducting prosecutions, is based on the principle of mutual recognition of judicial decisions. This means that, under the Framework Decision, primary responsibility for protecting the fundamental rights of persons who are the subject of a European arrest warrant rests with the judicial authorities of the issuing Member State, i.e. the Member State where criminal proceedings are taking – or have taken – place.

It follows that the executing judicial authority may not make the execution of a European arrest warrant conditional upon compliance with fundamental rights as guaranteed in its own constitution. Otherwise, the principle of equality of Member States before the Treaties would be undermined. In the eyes of EU law, it is impossible both to consider all Member States to be equally committed to upholding fundamental rights, and yet at the same time to allow the executing Member State to impose its own constitutional standards on the issuing Member State. Any such imposition would be the beginning of the end for the principle of mutual trust.

Accordingly, when implementing the provisions of the Framework Decision that do *not* set out a uniform level of fundamental rights protection, the issuing judicial authority may apply its own national standards, provided that those standards are at least equal to the level of protection provided for by the Charter and that “the primacy, unity and effectiveness of [EU] law are not compromised”.

Conversely, when implementing the provisions of the Framework Decision that *do* set out a uniform level of fundamental rights protection, the issuing judicial authority must meet that level. Needless to say, the uniform level of protection provided for by the Framework Decision must be compatible with the Charter.

Since the EU judiciary enjoys exclusive jurisdiction to examine the validity of secondary EU law, it is not for national courts to undertake such an examination. Where doubts arise as to the compatibility of the Framework

Decision with the Charter, those courts are obliged to make a reference to the ECJ. In fact, that is precisely what the Belgian Constitutional Court did in *Advocaten voor de Wereld* and *I.B.*,<sup>5</sup> and the Spanish Constitutional Court in *Melloni*. In those three cases, those national constitutional courts each asked the ECJ to determine whether different aspects of the Framework Decision complied with the fundamental rights recognised by the EU legal order.

In the third of those cases, *Melloni*, the ECJ upheld the limitations that the Framework Decision had imposed on the rights of the defence of persons convicted *in absentia* who are the subjects of a European arrest warrant. The ECJ found that those limitations were compatible with the Charter, since they only apply to cases where those persons have voluntarily, unambiguously and unequivocally waived their right to be present at the trial in the issuing Member State. Conversely, where such a waiver cannot be either explicitly or implicitly deduced from the individual’s words and conduct, the Framework Decision does not prevent the executing judicial authority from requiring a retrial as a pre-condition for the execution of the arrest warrant, thus guaranteeing the rights of the defence of the person convicted *in absentia*.

In the case at hand, this meant that the Spanish Constitutional Court could not apply the higher standard set out in its own case law, according to which a retrial was always required. Thus, after the ECJ delivered its judgment in *Melloni*, the Spanish Constitutional Court decided to revisit its previous case law.<sup>6</sup> The Spanish Constitutional Court held that in the context of the Framework Decision the content of the right to a fair trial does not include all the guarantees enshrined in the Spanish Constitution, but only those that constitute the very essence of that right. Accordingly, it reasoned that, when Spanish courts are requested to execute a European arrest warrant, the content of the right to a fair trial is to be determined in the light of the international treaties to which Spain is a party. In that regard, the Spanish Constitutional Court decided to look at the case law of the ECtHR and to take due account of the ruling of the Court of Justice in *Melloni*. It thus found, following the line adopted by the ECJ in *Melloni*, that the Spanish Constitution does not prevent the Spanish judicial authorities from consenting to surrender a person who has been convicted *in absentia*, provided that the person concerned had, voluntarily and unambiguously, waived his right to be present at his trial and was properly represented at that trial by legal counsel.

<sup>5</sup> Case C-303/05 *Advocaten voor de Wereld*, EU:C:2007:261, and Case C-306/09 *I.B.*, EU:C:2010:626.

<sup>6</sup> Tribunal Constitucional, judgment of 13 February 2014.

In a more recent ruling, the German Constitutional Court also endorsed the level of fundamental rights protection provided for by the Framework Decision, as interpreted by the ECJ in *Melloni*.<sup>7</sup> With regard to persons convicted *in absentia*, that protection was consistent with the German Basic Law, in particular with the principle of “individual guilt” (the “*Schuldprinzip*”), a constitutional principle that forms part of Germany’s constitutional identity. Accordingly, it found that there was no need to make a reference to the ECJ.

That said, the German Constitutional Court held that the German Basic Law nevertheless requires the German judicial authority to check whether the execution of the European arrest warrant at issue complies with the *Schuldprinzip*. Where the person who is the subject of a European arrest warrant has presented convincing evidence demonstrating that the *Schuldprinzip* has been violated by the judicial authority of the issuing Member State, the German judicial authority is under an obligation to examine whether that is actually the case. In the proceedings at hand, the German Constitutional Court found that the Düsseldorf Higher Regional Court had failed to fulfil that obligation, since it agreed to execute the arrest warrant issued by the Florence Court of Appeal against a US citizen despite the fact that the individual in question had been convicted *in absentia*, had not been informed that the trial was taking place, nor of its outcome, and that there was no certainty that a retrial would be granted in Italy.

Most importantly, it was clear that the Higher Regional Court had misapplied the Framework Decision as implemented in Germany. Given that it was not established that the US citizen concerned had voluntarily, unambiguously and unequivocally waived his right to be present at the trial in Italy, the Higher Regional Court should have made the execution of the arrest warrant conditional upon a retrial. Contrary to the situation in the *Melloni* case, the limitations on the rights of the defence of the persons convicted *in absentia* set out in the Framework Decision simply did not apply.

In my view, two direct implications flow from *Melloni* and from the respective rulings of the Spanish and German Constitutional Courts. First, when interpreting and applying the Charter, the ECJ takes into account both the case law of the ECtHR and the constitutional traditions common to the Member States. Thus, in *Melloni*, the ECJ referred to the case law of the ECtHR applying Article 6(1) and (3) of the ECHR when establishing the circumstances under which a person may waive his right to be present at the trial. As those references show, the ECJ takes care to ensure that the EU level of fundamental rights protection of persons convicted *in absentia* is consistent

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<sup>7</sup> Bundesverfassungsgericht, order of 15 December 2015, 2 BvR 2735/14.

with that provided for by the ECHR. Similarly, as the rulings of the Spanish and German Constitutional Courts show, that level of protection also complies with that provided for by the “core provisions” of national constitutions.

Second, the fact that the Framework Decision complies with the Charter does not mean that European arrest warrants must always be executed automatically. The executing judicial authorities are under an obligation to verify whether the provisions of the Framework Decision that limit the exercise of the fundamental rights of the persons who are the subject of a European arrest warrant are, in fact, applicable to the case at hand. If they fail to do so, they run the risk of misapplying the Framework Decision, thus violating both EU law and their own national constitutional law.

It therefore follows from the existence of EU legislation harmonising the level of fundamental rights protection that the executing Member State may never impose its own domestic standards on the issuing Member State. If it has doubts as to the adequacy of the level of fundamental rights protection provided for by the Framework Decision as a matter of EU law, it must engage in a dialogue with the ECJ.

If the validity of the Framework Decision is upheld in the light of the Charter, the next question that arises is whether the executing judicial authority may verify whether the issuing Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. In that regard, the ECJ held, in its Opinion 2/13, that the executing Member State may do so, but only in exceptional cases.

In Joined Cases *Aranyosi* and *Căldăraru*,<sup>8</sup> the ECJ recently ruled that such an exceptional case may arise where the execution of a European arrest warrant was liable to give rise to breaches of the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Article 4 of the Charter. That might be the case, for example, where conditions of detention in the issuing Member State do not comply with Article 4 of the Charter because the prison facilities where the person surrendered is likely to be incarcerated are overpopulated or prison cells are too small.

The rationale behind such findings is that, unlike the principle of mutual trust and the fundamental rights that are *not* enshrined in Title I of the Charter, the prohibition on torture and inhuman or degrading treatment may not be subject to any limitations. That prohibition, which seeks to protect the very essence of human dignity, is absolute. As a matter of fact, the ECtHR has held, in the context of Article 3 ECHR, the provision that corresponds to Article 4

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<sup>8</sup> Joined Cases C-404/15 et C-659/15 PPU *Aranyosi et Căldăraru*, EU:C:2016:198.

of the Charter, that no derogation from that prohibition is allowed, not even in the fight against international terrorism and organised crime.

In addition, the ECJ set out a two-step analysis that the executing judicial authority is to follow when determining whether the execution of a European arrest warrant would, in the light of the conditions of detention in the issuing Member State, breach the prohibition set out in Article 4 of the Charter.

First, the executing judicial authority must determine whether there is a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State. That determination must be grounded in information that is objective, reliable, specific and properly updated concerning conditions of detention in the issuing Member State. Such a risk may only be said to exist where that information demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. As it had in the *N.S.* case, the ECJ held that such information may be taken from judgments of international courts, notably rulings of the ECtHR, reports and other official documents produced by international organisations such as the Council of Europe or the UN, as well as judgments delivered by the courts of the issuing Member State themselves.

Second, the executing judicial authority must carry out a concrete and precise assessment of the circumstances in the particular case at hand. This means, in essence, that it must verify whether there are substantial grounds to believe that the execution of the European arrest warrant at issue would entail a real risk that the prohibition enshrined in Article 4 of the Charter might actually be breached in practice in respect of the individual concerned. That further assessment is warranted because the existence of deficiencies in the prison system of the issuing Member State generally does not necessarily exclude the possibility that the competent authorities of that Member State may still be able to show that the person who is the subject of the European arrest warrant will not, in fact, be exposed to inhuman or degrading treatment. To that effect, the executing judicial authority must have recourse to the cooperation mechanism laid down in the Framework Decision which provides the competent authorities of the issuing Member State with an opportunity to prove that the person concerned will be detained in conditions which do not subject him or her to inhuman or degrading treatment.

Where, notwithstanding that additional information, the executing judicial authority still believes that the execution of the European arrest warrant at issue would give rise to a real risk that the prohibition enshrined in Article 4 of the Charter might be breached, then that judicial authority must postpone, rather than abandon, such execution. Postponing a warrant's execution in such circumstances ensures compliance with Article 4 of the Charter, whilst

preserving the effectiveness of the system of mutual recognition set out in the Framework Decision. Indeed, EU law cannot accept that a permanent state of mistrust should exist between two Member States' judicial authorities since that would lead to the fragmentation of the AFSJ. On the contrary, the issuing Member State must be given a new opportunity to regain the trust of the executing judicial authority.

That said, where the person who is the subject of the European arrest warrant at issue is provisionally detained in the executing Member State, such detention may not last indefinitely, but must comply with the Charter, in particular with the presumption of innocence and the principle of proportionality. If the Charter militates against that person's provisional detention, the executing Member State must nevertheless adopt alternative measures to prevent that person from absconding and to ensure that the material conditions necessary for his or her effective surrender continue to be fulfilled for as long as no final decision on the execution of the arrest warrant has been taken.

Needless to say, if the existence of a real risk of violating the prohibition enshrined in Article 4 of the Charter cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

This brings me to my final remark. The successful operation of the principle of mutual trust and the effective judicial protection of fundamental rights require the national courts, the ECtHR and the ECJ to engage in a constructive dialogue.

National courts, and in particular national supreme and constitutional courts, must ensure that the Framework Decision is properly applied. As the ruling of the German Constitutional Court that I mentioned earlier illustrates, an incorrect application of the Framework Decision may upset the delicate balance that the EU legislator has struck between ensuring the effectiveness of the principle of mutual recognition and respect for the fundamental rights of the person who is the subject of a European arrest warrant as recognised by the Charter. Such incorrect application may give rise to breaches of EU law, of national constitutional law and of the ECHR.

For its part, the ECtHR is a valuable ally for the executing judicial authorities in identifying the existence of a real risk of violating the prohibition enshrined in Article 4 of the Charter, since that provision corresponds to Article 3 ECHR. The case law of that court not only provides useful guidance as to the content that should be given to Article 4 of the Charter, but is also a valuable source of information with regard to the actual existence of deficiencies in the level of fundamental rights protection ensured by the issuing Member State. No one may argue that the executing judicial authority has made findings on the basis

of national bias, if its findings rely on the impartial authority with which rulings of the ECtHR are invested.

That said, as matters currently stand, the system of fundamental rights protection established by the ECHR does not expressly recognise the constitutional importance that the principle of mutual trust enjoys within the EU legal order. That is one of the considerations that led the ECJ to rule, in Opinion 2/13, that the draft agreement on the accession of the EU to the ECHR was incompatible with both the EU Treaties and the Charter. However, cases such as *Povse v. Austria* and *Avotiņš v. Latvia* appear to suggest that the ECtHR is willing to recognise the importance of that principle.<sup>9</sup> Notably, in the latter case, the Grand Chamber of the ECtHR held, after reaffirming that the *Bosphorus* presumption remains good law, that it “is mindful of the importance of the mutual recognition mechanisms for the construction of the [AFSJ]”. Accordingly, the adoption of the means necessary to achieve such construction is, in principle, a wholly legitimate objective from the standpoint of the ECHR. As a matter of principle, the ECtHR held that the ECHR does not oppose the mutual recognition of judicial decisions between EU Member States, provided that such recognition does not take place automatically and mechanically. This means that the ECtHR endorsed the way in which EU law allocates responsibilities between the Member State which is competent for adopting the judicial decision in question and that responsible for enforcing it. It thus agreed that, in the light of the principle of mutual recognition, the national court that adopts the contested decision has the primary responsibility for protecting the fundamental rights of the persons affected by that decision, rather than the court enforcing it. However, where a serious and substantiated complaint is raised before the court of the executing Member State to the effect that the protection of a ECHR right has been manifestly deficient in the issuing Member State (or the Member State of origin), that court may not refrain from examining whether the execution of such decision entails a violation of the ECHR. As regards Article 4 of the Charter, those findings are, in my view, fully consistent with the line of case law *N.S.*, *Aranyosi* and *Căldăraru*.

Last, but not least, the role of the ECJ is to make sure that the balance that the EU legislator has struck between the principle of mutual trust and the protection of fundamental rights complies with primary EU law, and in particular with the Charter. In so doing, the ECJ draws inspiration from the case law of the ECtHR and from the constitutional traditions common to the Member States, especially when determining the content of the fundamental rights

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<sup>9</sup> ECtHR, *Povse v. Austria*, judgment of 18 June 2013, ECLI:CE:ECHR:2013:0618DEC000389011, and *Avotiņš v. Latvia*, judgment of 23 May 2016, ECLI:CE:ECHR:2016:0523JUD001750207.

recognised in the Charter. That openness, on the part of the ECJ, to the views of national courts and the ECtHR, not only makes possible mutual influence and cross-fertilisation of ideas between those three judicial actors, but may also serve to prevent normative conflicts from arising.

Most importantly, the fact that the principle of mutual trust is not absolute should reassure both national supreme and constitutional courts, as well as the ECtHR, that the ECJ is seriously committed to the protection of fundamental rights. Indeed, cases such as *Aranyosi* and *Căldăraru* should silence those critics who argue that the ECJ gives too much weight to the principle of mutual recognition at the expense of fundamental rights. On the contrary, the ECJ has made it crystal clear that mutual trust must not be confused with blind trust and that the presumption, on which mutual trust is based, that all EU Member States comply with their fundamental rights obligations, is rebuttable.

Thank you very much.



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## **An Active Role of Constitutional Courts as an Objective Necessity**

- I. Introduction
- II. Judicial Restraint as the Norm
- III. The Need at Times for an Active Role of Constitutional Courts
- IV. Fields and Circumstances that Call for Greater Activity by the Court
  - 1. The Protection of Core Elements of Fundamental Rights
  - 2. The Protection of Minorities
  - 3. New Needs for Protection
  - 4. Essential Elements of Democracy and the Constitutional State
- V. Conclusion

### **I. Introduction**

Is so called “judicial activism” of constitutional courts an objective necessity? This question is just as relevant for a court like the Federal Constitutional Court of Germany, which can look back on more than 60 years of history, as it is for the Constitutional Court of the Republic of Latvia which is celebrating its 20th anniversary.

There is usually an undertone of criticism when a constitutional court is said to engage in “judicial activism”. The mention of judicial activism implies an allegation that the court is illegitimately arrogating law-making powers to itself, at the expense of both legislative and constitutional lawmakers, by attributing meanings to the constitution that it does not actually contain. In particular, these criticisms imply that the court has imposed too many and too rigorous

requirements for the legislator, with no sufficient basis in the constitution, and that the court has thereby restricted the scope for legislative design (which has the stronger democratic legitimation); this concerns the relationship between the constitutional judiciary and the sitting “ordinary” legislature. At the same time, the charge of judicial activism implies that the constitutional court has overreached its proper task of applying the constitution, and instead has taken on a constitution-making role belonging solely to the legislator duly empowered to amend the constitution. Thus, this concerns the relationship between the constitutional judiciary and the constituent power.<sup>1</sup>

In my discussion, I will first briefly demonstrate that rather than exercising so called judicial activism, the Federal Constitutional Court usually practices judicial restraint with regard to the legislator’s (II.). Then, I will briefly outline the reasoning why a constitutional court must nevertheless sometimes take an active role *vis-à-vis* the legislator (III.). Finally, I will address certain circumstances that may call for a more active role of the court (IV.).

### **II. Judicial Restraint as the Norm**

Judicial restraint towards the legislator is the empirical and normative norm in the case-law of the Federal Constitutional Court.

In practice, as measured against the total number of proceedings that the Federal Constitutional Court hears, the court objects to a law only very rarely.<sup>2</sup> This is not for lack of direct or indirect attacks on laws in constitutional complaints and other proceedings before the court, but rather results from the restraint that the Federal Constitutional Court exercises *vis-à-vis* the legislator.

The Federal Constitutional Court does not apply a *political question doctrine* in the strict sense; the *Grundgesetz* - the German Constitution or Basic Law -, rather lays claim to an all-encompassing effect over the power of the state;

<sup>1</sup> However, even in cases when the authority to shape the constitution has been appropriated, this will not necessarily be at the expense of the current legislator, because in some cases a constitutional court may even ease previous constitutional restrictions, thus opening up a greater scope of action for the current legislator, or it may provide a constitutional acknowledgment of developments that have already been accomplished in ordinary law. For example, the Federal Constitutional Court rejected the claim that some legislators raised in opposition to such an easing, that the protection of marriage and family would preclude same-sex partnerships and parenthood; see Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts – BVerfGE) 105, 313, 342 et seq.; BVerfGE 133, 59, 77 et seq.

<sup>2</sup> Between 1951 and 2015 the Federal Constitutional Court handled 216,741 cases; in 706 of these it ruled that a law or provision was wholly or partially unconstitutional. It is not known how many of the handled proceedings directly or indirectly raised the issue of a provision’s unconstitutionality.

there is no aspect of the political arena that is “exempt from the constitution” or from the Constitutional Court’s control, no matter how political the decision may be. However, the Federal Constitutional Court accepts that the legislator has a decision-making scope with regard to both substance and fact.

A substantial decision-making scope derives from the fact that the German Constitution often allows the legislator a range of permissible legislative options. The legislator particularly has a discretionary scope when different fundamental rights collide. As a rule, the Basic Law does not specify precisely how a conflict of fundamental rights should be resolved.<sup>3</sup> That decision belongs first and foremost to the legislator, not to the Constitutional Court.<sup>4</sup> This is even more the case where constitutional duties to protect fundamental rights are at issue (“*Schutzpflichten*”).<sup>5</sup>

The legislator also has a discretionary scope in factual matters. If the legislator is attempting to regulate a matter involving uncertainties of fact, he is given a certain prerogative of assessment and prognosis of facts.<sup>6</sup>

### **III. The Need at Times for an Active Role of Constitutional Courts**

Although, in principle, it is both appropriate in constitutional theory and common in practice that Constitutional Courts exercise restraint towards the legislator in a democratic constitutional state, such a court would fail in its duties if it did not at times take on an active role with regard to the legislator.

Though it is rare for the Constitutional Court to object to legislative provisions, it is also an entirely normal occurrence, often inherent in the constitution and in constitutional procedural law. Many modern constitutions and constitutional procedure laws explicitly task the constitutional courts with overseeing the legislator, objecting to violations of the constitution, and declaring the objectionable provisions void or inapplicable. Should the legislature violate straightforward and clear requirements of the constitution – which will seldom be the case in a healthy constitutional state – the constitutional court can and must order the legislator to respect constitutional bounds. But even in cases where the wording of the constitution leaves room for interpretation, a constitutional court cannot and must not entirely withdraw from its duty to oversee the legislator. Since constitutional texts are largely worded very

<sup>3</sup> By way of example, see the recent judgment of the Federal Constitutional Court, Judgment of the First Senate of 19 April 2016, – 1 BvR 3309/13, para. 40, 70.

<sup>4</sup> cf. e.g. BVerfGE 100, 289, 303 and 304; 96, 56, 63 and 64.

<sup>5</sup> cf. e.g. BVerfGE 88, 203, 261 and 262.

<sup>6</sup> cf. e.g. BVerfGE 50, 290, 335 and 336; 77, 84, 106 and 107; 103, 293, 307.

openly, especially where fundamental rights are concerned, a constitutional court’s oversight would otherwise become meaningless. Obviously, this was never the intent. Particularly the introduction of the constitutional complaint and various types of proceedings for the judicial review of statutes, show that the courts are specifically empowered to control the legislator even on the basis of these vague standards, and thus constitutional courts have performed been assigned the task of independently interpreting and developing the constitution for this purpose, and of measuring the laws on this basis. – This is illustrated, for example, by Art. 93a of the Federal Constitutional Court Act, which provides that a constitutional complaint must be admitted for decision if it has general constitutional significance. This is the case if the constitutional complaint raises a question that cannot be directly answered by the Basic Law.<sup>7</sup> Thus, the Federal Constitutional Court is explicitly called upon to clarify questions of constitutional law that are not clearly answered by the Basic Law itself.

The fine art of constitutional jurisprudence lies in striking the right balance between actively interpreting the constitution and exercising judicial restraint when addressing the mutually contradictory requirements of, on the one hand, the court’s mandate of constitutional review and thus further developing constitutional law, and on the other hand, the imperative to exercise restraint. There is no set formula on how to do this; the ideal level of activity for each court will presumably vary over time. However, a few fields and circumstances can be identified in which more activity by a constitutional court may well be warranted.

### **IV. Fields and Circumstances that Call for Greater Activity by the Court**

Allow me to describe four such fields.

#### **1. The Protection of Core Elements of Fundamental Rights**

A more active role of the Constitutional Court seems reasonable when the protection of core elements of fundamental rights is at stake, particularly if there is a strong relation to human dignity (Art. 1 I of the Basic Law). Constitutional review must be all the stricter, the more the legislator interferes with such rights. This applies, for instance, in matters of the deprivation of liberty, compulsory medical treatment<sup>8</sup>, or significant interference with

<sup>7</sup> BVerfGE 90, 22, 24.

<sup>8</sup> BVerfGE 128, 282 et seq.

privacy, such as the acoustic or visual surveillance of residences<sup>9</sup> or telephone surveillance,<sup>10</sup> or remote searches of computers.<sup>11</sup> It is the role of fundamental rights, and of the constitutional court that oversees compliance with them, to define the extreme limits of the rule of law even for a smoothly functioning democratic decision-making process.

## **2. The Protection of Minorities**

It would seem particularly likely that a constitutional court will become more active where protecting the freedom, equality, and non-discrimination of minorities is concerned. By their very nature, minority interests can only prevail with considerable difficulty in the political decision-making process. In a democratic constitutional state, it is one of the major functions of fundamental rights, and of the constitutional court, to protect minority interests. This obviously applies to rules protecting against discrimination and to the requirement of equal treatment. However, perhaps the most important reason for fundamental freedoms is also to be found here: essential freedoms must also be defended against a democratic majority. Consequently, a constitutional court will be more rigorous in its review of a law, and will scrutinise the justification for a restriction of freedoms more strictly, if the law restricts the freedom of a political, ideological, religious, ethnic, or other minority. One example from the case-law of the Federal Constitutional Court was the objection to a statutory obligation for public primary schools to hang up a Christian cross in each classroom; in order to protect the non-Christian minority of students the Court held that this obligation was unconstitutional.<sup>12</sup> Another example is the Court's decisions – seven in number, so far – on equality of same-sex partnerships.<sup>13</sup> Still another was the objection against the statutory prohibition on female Muslim teachers' wearing a headscarf at school.<sup>14</sup>

It comes as no surprise that this type of decision is not only met with approval from politicians and the public, but also encounters intense criticism, as in these cases the Constitutional Court is enforcing the interests of a minority against the will of the majority. However, one should not underestimate the patience, far-sightedness and maturity of citizens. The Federal Constitutional Court has consistently been held in high esteem by the population, even though it has

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<sup>9</sup> BVerfGE 109, 279 et seq.

<sup>10</sup> BVerfGE 113, 348 et seq.

<sup>11</sup> BVerfGE 120, 274 et seq.

<sup>12</sup> BVerfGE 93, 1 et seq.

<sup>13</sup> BVerfGE 105, 313 et seq.; 124, 199 et seq.; 126, 400 et seq.; 131, 239 et seq.; 132, 179 et seq.; 133, 59 et seq.; 133, 377 et seq.

<sup>14</sup> BVerfGE 138, 296 et seq.

repeatedly handed down unpopular decisions. It may be that many citizens are able to distinguish between their own disapproval of an individual decision, and their overall view of the Constitutional Court itself, which still seems to be seen as championing the “pursuit of justice” in contrast to the “pursuit of power” in politics.

## **3. New Needs for Protection**

In specific situations it may also be appropriate for a constitutional court to engage in a certain degree of creative activity when new types of risk to fundamental rights emerge. New risks may especially arise from technological developments. As an example from the case-law of the Federal Constitutional Court, I may mention the development of the fundamental right to informational self-determination.<sup>15</sup> Today, arguably the most significant element of this fundamental right – the right to data protection – is explicitly enshrined in Article 8 of the European Union's Charter of Fundamental Rights. In 1983, when the Federal Constitutional Court first examined the data protection aspects of a provision of law, this fundamental right did not appear textually anywhere in the Constitution. It was then derived by the Court from the right to the free development of one's personality (Article 2 section 1 in conjunction with Article 1 section 1 of the Basic Law). Initially, this new fundamental right to informational self-determination was justified mainly by the risks associated with automated data processing.<sup>16</sup> Precisely for that reason, it may also be seen as a response to a technological development, even though its effect nowadays extends far beyond the sphere of automated data processing. Already at the time, the Court established rather detailed requirements for the procedural design of a law on data protection: for example that the law must limit the collection and use of data to a specific purpose; that notification, information and deletion requirements be established; and finally that independent data protection officers must be involved.<sup>17</sup> While already this wealth of detail made the judgment an act of particularly active constitutional development one might even wonder whether the whole invention of such a fundamental right should not have been a task left to the constitutional legislator. Here, the Court might have exposed itself to the charge of activism in twofold manner: both with regard to the regular legislator, and with regard to the constitutional legislator. Yet such criticism did not dominate the reception of the judgment at the time; instead, the decision met with an overall positive response. It appears that the constitutional invention of data protection coincided with a generally emerging sense in the early

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<sup>15</sup> BVerfGE 65, 1 et seq.

<sup>16</sup> BVerfGE 65, 1, 42.

<sup>17</sup> BVerfGE 65, 1, 46.

1980s that data require protection. Today the fundamental right to data protection has become a distinctive component of the European protection of fundamental rights.

The fact that there was so little criticism of this Court decision, which may well have been the most creative piece of law-making in the history of the Federal Constitutional Court, reveals a more general phenomenon in the debate about judicial activism and judicial restraint: the charge of judicial activism is very rarely raised by those who approve a decision on a given matter. Rather, the demand for greater judicial restraint usually comes from those who also differ with the outcome of the decision itself. Thus, one must always bear in mind that the charge of judicial activism may be founded less on methodological criticism than on a disagreement about a particular matter.

The fundamental right to data protection in particular, which involves a higher-than-average degree of organisational and procedural content, ultimately demonstrates the advantage that the Court's development of the protection of fundamental rights may have over the amendment of the Constitution by the constitutional legislator: it is more flexible, and can therefore be fine-tuned more easily. In general, constitutional court decisions will be able to respond easier and faster to needs for adjustment than constitutional legislation, which must regularly overcome more formidable procedural and political obstacles. If necessary, a court can modify previously defined standards faster by easing or tightening requirements, replacing them with alternatives, or defining them more precisely. Thus, through a certain degree of experimentation, constitutional courts tend to be better positioned than the legislator empowered to amend the constitution to generate protective content appropriate for new needs for protection.

#### **4. Essential Elements of Democracy and the Constitutional State**

Above and beyond protecting fundamental rights, there are certain other fields in which an active role of the constitutional court seems plausible. For example, a constitutional court must also and specifically safeguard the essential prerequisites of a working democratic system – particularly against any legislator acting to advance “his own cause” – because otherwise the legislator would have the power to obstruct the political process by which a minority can become the majority. This is why, for example, the Federal Constitutional Court has repeatedly insisted that the legislator must safeguard equal opportunities for all political parties, and has quite explicitly applied very strict standards of review here: Legislative interference with the competition of political parties in a way that might alter their chances is subject to especially strict constitutional control, because otherwise a sitting parliamentary majority can, to a certain extent, advance its own cause by imposing rules that affect the conditions

for competition in the political arena.<sup>18</sup> Such considerations come to bear, for instance, in the review of statutory rules governing the financing of political parties, or in structuring the right to vote.

Stricter control would certainly also be called for if the legislator were to amend constitutional procedural law, and thus curtail the controlling function that the constitution has assigned to the court – a temptation that politicians cannot always resist, as can be seen in our midst today.

#### **V. Conclusion**

Quite obviously the relationship of a constitutional court to the political scene in general, and to the legislator in particular, is characterised by theoretical and practical tensions. In order for democracy, freedom, and the rule of law to truly prosper in a constitutional state, a constitutional court must recalibrate this relationship time and again; in doing so it must look for and find the appropriate mix of active development of the constitution and judicial restraint *vis à vis* the legislator.

However, we are seeing today that the question of the right relationship between the constitutional court and the legislator may also be conceived from the opposite perspective. At the moment, we face the question of which mechanisms still protect a constitutional state when it is not a court that behaves too much like a legislator, but the opposite: political actors who lose sight of a proper relationship between activism and restraint in their relation to the constitutional court, thus bringing ruin on the constitutional state by attacking and obstructing constitutional jurisdiction. Here there is an unequal distribution of actual power. It is unlikely that a constitutional court will be able to bring a legislator who has turned away from constitutionalism to come back and accept constitutionalism. In such a situation, one's hope turns not least of all towards the membership within the larger association of constitutions and constitutional courts that Europe and the European Union in particular offer us (“*Europäischer Verfassungsverbund*”); we will be watching whether this association will be able to stop political attacks on national constitutional courts.

The Latvian Constitutional Court deserves our gratitude for contributing toward strengthening constitutional jurisdiction in Europe by organising this conference.

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<sup>18</sup> BVerfGE 120, 82, 105.



Prof. Dr. **Gerhart Holzinger**  
President of the Constitutional Court of the  
Republic of Austria

## **Judicial Activism of Constitutional Courts in a Democratic State – the Austrian Experience**

Mr. President,  
Ladies and Gentlemen,  
dear Colleagues,

I would like to thank the Constitutional Court of the Republic of Latvia, and in particular its president, Prof. Aldis Laviņš, very cordially for having invited me to participate in this international conference on the occasion of the 20th anniversary of the Constitutional Court of the Republic of Latvia.

Constitutional justice is a key element of European rule of law. Both the Council of Europe and the European Union are founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Significantly, wherever constitutional courts have been established in Europe, the function of safeguarding these values is committed to these special jurisdictions. Constitutional justice thus carries a particular responsibility for building up Europe as a common area of freedom, security and justice.

In its 20 years of existence, the Constitutional Court of the Republic of Latvia has acquired such great merits by safeguarding democracy and the rule of law as well as by effectively protecting human rights in Latvia. Thanks to this remarkable success, it has become a highly respected member of the European and international community of constitutional jurisdictions.

I congratulate you, Mr. President, and your colleagues sincerely on this anniversary. I cordially wish the Constitutional Court of Latvia every success in the exercise of its highly significant and deserving function.

The present international conference hosted by the Constitutional Court of the Republic of Latvia deals with the relationship between constitutional justice and democracy.

This issue is not only extremely relevant, it also seems to be timeless. Practically from the onset, the idea of constitutional justice has been criticized for unduly distorting democracy since a court could not lend itself to take political decisions. Some people also claimed that if a court were authorized to set aside parliamentary statutes, this would be contrary to the basic principle of separation of powers.

However, as Hans Kelsen – the creator of the idea of constitutional justice – has pointed out so convincingly in many essays, this criticism is based on misunderstandings.

As regards the principle of separation of powers, its purpose is not only to insulate the various public powers from each other, but to establish a system of checks and balances. The aim of such a system is not only to prevent an excessive concentration of power in one single organ, but also to provide a safeguard for the lawfulness of every state action. From this point of view, constitutional justice is not in conflict with separation of powers, but rather an application of this principle.<sup>1</sup> It is a catalyst in a democratic society committed to the protection of human rights and the rule of law, which is, according to the well-known Swiss legal theorist Werner Kägi, “an order in which a politically mature nation recognizes its own limits”.<sup>2</sup>

The idea of constitutional justice therefore is based on the proposition that all state action must be based on the constitution and must be in conformity with the constitution as the highest-ranking norm of the legal order. This applies to any state action, i.e., not only to government and administration, but also to legislation and jurisdiction.

Only constitutional justice makes the constitution a legal norm in the proper sense of the word, i.e., a regulation with binding force. In turn, if it were not for constitutional justice, a constitution would be nothing more than a mere recommendation.<sup>3</sup>

<sup>1</sup> Hans Kelsen, „Wesen und Entwicklung der Staatsgerichtsbarkeit“, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 30, at 55 (1929).

<sup>2</sup> Werner Kägi, „Rechtsstaat und Demokratie“, *Festgabe zum 60. Geburtstag von Zaccaria Giacometti* 107, at 141 (1953).

<sup>3</sup> Kelsen, op. cit. (footnote 1), at 78.

In political terms, the most important aspect of constitutional justice is that constitutional disputes, i.e., disputes on the interpretation and application of the constitution, are not only political but also legal in nature and can therefore be decided by the judgment of a court based on the law, not on political considerations. In other words, constitutional justice provides a mechanism for transforming political controversies into legal conflicts that can be settled in a legal procedure.

However, the question arises whether constitutional review of parliamentary acts fits into a democratic system at all.

As Hans Kelsen has pointed out, this question must be answered in the affirmative if democracy is not understood as unchained majoritarianism, as “dictatorship by the simple majority”. Under the rule of law, a simple majority rule is only acceptable if it is exercised lawfully, i.e., in conformity with the constitution, which typically can only be amended by a qualified majority in Parliament and therefore essentially implies the permanent making of compromises between all relevant political groups.<sup>4</sup>

Yet, political majority groups may be inclined to compromise the rights of individuals or groups not represented by the majority. Democracy therefore requires some sort of “built-in brake” that will guarantee the respect for the basic freedoms of individuals and minorities.<sup>5</sup>

In summary, constitutional justice may contribute in an important manner to the functioning of democracy. To express it pointedly: Where a constitutional court reviews the constitutionality of a parliamentary act, it acts not only as the ultimate guardian of the constitution, but also as a guardian of democracy. Constitutional review therefore is not only a legal, but also a democratic function.

Kelsen took the view that parliamentary legislation may be deemed a kind of “application” of the constitution,<sup>6</sup> examining the constitutionality of parliamentary statutes is therefore in principle no different from examining the legality of administrative acts.<sup>7</sup>

However, in a hierarchical system of norms superior law only sets a certain framework for lower ranking law without determining it completely. Applying the law therefore inevitably implies a certain degree of discretion. This holds true especially with respect to legislation since the wording of a constitution

<sup>4</sup> Kelsen, op. cit. (footnote 1), at 81.

<sup>5</sup> Theo Öhlinger, “Constitutional Review. The Austrian Experience as seen from a Comparative Perspective”, *Zeitschrift für öffentliches Recht* 421, at 439 (1998).

<sup>6</sup> Kelsen, op. cit. (footnote 1), at 56.

<sup>7</sup> Kelsen, op. cit. (footnote 1), at 53.

is typically by far less precise than the wording of any statute determining individual normative acts.

In Austria, the case-law of the Constitutional Court was originally, until the early nineteen-eighties, marked by a quite distinct „judicial self-restraint“ leaving a fairly wide political margin of appreciation to the legislator. This approach may be put down to the influence of the strictly positivist Vienna School of Legal Theory, which asserted that constitutional justice should adhere strictly to the text of the constitution. Over the years, however, this so-called older case-law of the Constitutional Court met increasingly with criticism for schematically legitimizing political decisions (“adaptive jurisprudence” – *Anpassungsjudikatur*).

Yet, a constitutional court which takes itself seriously cannot restrict its function in this way. If a constitutional court took the constitution more or less literally, this would deprive the constitution of part of its normative force and, as a consequence, would lead constitutional justice itself practically ad absurdum.

In fact, the Constitutional Court of Austria abandoned its quite distinct judicial self-restraint in the nineteen-eighties. This change was largely inspired by the case-law of the European Court of Human Rights and of the German Federal Constitutional Court.

First, the Constitutional Court has agreed with the European Court of Human Rights that a bill of rights is intended to guarantee rights that are not theoretical or illusory, but practical and effective; and that such a bill is a living instrument which must be interpreted in the light of the present-day conditions. Fundamental rights therefore cannot be interpreted solely in accordance with the intentions of their authors as expressed long ago.<sup>8</sup>

Second, where fundamental rights are at stake, the Constitutional Court joined the European Court of Human Rights in adopting its approach that measures affecting such rights must be proportionate. To satisfy this proportionality test, any interference with fundamental rights by public authorities must have an aim that is legitimate and must be necessary in a democratic society for this aim. This is only the case, if the interference answers to a pressing social need and is proportionate to the legitimate aim pursued, and if the reasons adduced to justify it are relevant and sufficient.<sup>9</sup>

Balancing the public interests with individual rights, i.e., the core aim of the principle of proportionality, is obviously a delicate mission which may require a constitutional court to replace political choices with judicial value judgments.

<sup>8</sup> European Court of Human Rights, *Tyrer v. The United Kingdom*, no. 5856/72, 25 April 1978.

<sup>9</sup> European Court of Human Rights, *Lingens v. Austria*, no. 9815/82, 8 July 1986.

In the nineteen-eighties, when this new judicial approach gradually began to take shape, the Constitutional Court of Austria was then conversely criticized for unduly interfering with political decision-making.

These days, however, the new value-based interpretation of the constitution seems to be widely accepted. Throughout the last decades, Austrian democracy has again and again experienced a deadlock on various sensitive political issues, e.g., on non-discrimination on grounds of sexual orientation, and in many of these cases, this situation could only be overcome thanks to groundbreaking judgments of the Constitutional Court.<sup>10</sup> Thus, constitutional justice does not at all appear to be an obstacle to democratic decision-making but rather proves to be a means of keeping the political process running.

A possible reason for this widespread acceptance of constitutional justice in Austria may be that Austria is party to the European Convention on Human Rights since 1958 and, in particular, that since 1964 this international instrument is part of the Austrian constitution. Thus, the Convention has become the most important yardstick for constitutional review by the Constitutional Court.

In line with this, the need for, and the limits to, judicial activism exercised by a constitutional court obviously depend on the subject matter.

As regards the safeguard of fundamental rights and freedoms, which is the key function of a constitutional court, the public authorities including the parliamentary legislator are as a matter of principle better placed to make the assessment of the necessity and proportionality of measures restricting fundamental rights and freedoms. This calls for a certain degree of self-restraint on the part of the constitutional court which reflects the area of discretion or margin of appreciation which public authorities enjoy.

As the European Court of Human Rights has pointed out, the breadth of this margin varies and depends on a number of factors including the nature of the right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of "intimate" or key rights.<sup>11</sup> Where a particularly important facet of an

<sup>10</sup> See, in particular, Constitutional Court, no. G 6/02, 21 June 2002 (repeal of § 209 of the Criminal Code penalizing homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of ages); no. G 87/05, 10 October 2005 (repeal of provisions of the General Social Security Act restricting the right to co-insurance to heterosexual housemates); no. G 16/2013, 10 December 2013 (repeal of provisions of the Artificial Procreation Act preventing lesbian couples from insemination using donor sperm); no. G 119/2014, 11 December 2014 (repeal of provisions of the Civil Code excluding same-sex couples from jointly adopting a child).

<sup>11</sup> European Court of Human Rights, *Connors v. The United Kingdom*, no. 66746/01, 27 May 2004.

individual's existence or identity is at stake, the margin allowed to the public authorities will be restricted.<sup>12</sup> Finally, if the right at stake does not, by its very nature, allow for any exceptions, justifying factors or balancing of interests, as is the case with the absolute prohibition of torture and of inhuman or degrading treatment or punishment, there is no room for any margin of appreciation at all.<sup>13</sup> Where, on the contrary, there is no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.<sup>14</sup> There will also usually be a wide margin if public authorities are required to strike a balance between competing private and public interests or different fundamental rights and freedoms.<sup>15</sup>

However, irrespectively of such considerations, it should be borne in mind that judgments on the interpretation of the constitution tend to shape politics in any case. This impact is practically inherent to constitutional justice whatever decision the court takes. Whether a parliamentary statute is repealed as unconstitutional or, on the contrary, such a normative act is upheld as constitutional, the court cannot help specifying the constitution and thereby determining the scope of political appreciation left to parliamentary legislation. Constitutional justice therefore is a highly political function, even if the court feels committed to a quite distinct judicial restraint.

Ultimately, the legitimacy of constitutional justice and its effectiveness essentially depend on its independence. Only if a constitutional court is, and appears to be, independent of parliament, government and administration as well as political parties and economic or social interest groups, it will gain such confidence which courts in general, and constitutional courts in particular, in a democratic society must inspire in the public.<sup>16</sup>

<sup>12</sup> European Court of Human Rights (Grand Chamber), *Evans v. The United Kingdom*, no. 6339/05, 10 April 2007.

<sup>13</sup> European Court of Human Rights (Grand Chamber), *Gäfgen v. Germany*, no. 22978/05, 1 June 2010.

<sup>14</sup> European Court of Human Rights (Grand Chamber), *S.H. v. Austria*, no. 57813/00, 3 November 2011.

<sup>15</sup> European Court of Human Rights (Grand Chamber), *Fernández Martínez v. Spain*, no. 56030/07, 12 June 2014.

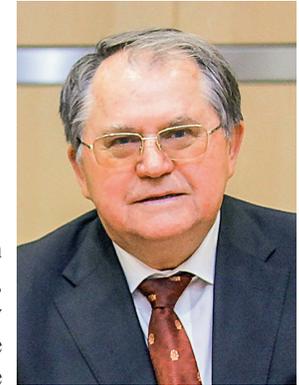
<sup>16</sup> European Court of Human Rights (Grand Chamber), *Micallef v. Malta*, no. 17056/06, 15 October 2009.

Mr. Chairman,  
Ladies and Gentlemen,  
dear colleagues!

As I have already stressed, constitutional justice is a crucial factor for the stability of a democratic state governed by the rule of law. However, it would be illusory to think of constitutional justice as the one and only safeguard for compliance with the constitution. In the end, the essential prerequisite for a functioning democracy committed to the rule of law are public awareness of the fundamental values of a democratic society and stable economic conditions. If these conditions are missing, or get lost, even highly efficient constitutional guarantees such as constitutional justice will eventually be doomed to failure.

As it was unfortunately the case in Austria: The Austrian Constitutional Court founded in 1920 looks back on a long and changeful history. After its promising start in the 1920s it ceased to exist from 1933 to 1945 during the years of the Austro-fascistic dictatorship followed by National-Socialist tyranny. The Constitutional Court could be re-established only after the end of World War II. And since then it is part of the success story of the Second Austrian Republic which is fortunately – contrary to the 1930s and 1940s – characterized by political stability and economic prosperity.

Thank you.



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Chairman of the Constitutional Court of Ukraine

## **Stages of the Constitutional Proceedings and the Limits of Activism of the Constitutional Court of Ukraine**

1. By virtue of the status of the Constitutional Court of Ukraine (hereinafter – the CCU, the Court), the main task of which is to guarantee the supremacy of the Constitution throughout the territory of Ukraine, the Court is authorised to actively influence the improvement of the legal system in the state, in particular, to hold unconstitutional specific legal acts that have infringed upon the constitutional principles, norms, or provisions. However, the activism of the bodies of constitutional jurisdiction is interlinked with the stages of constitutional proceedings and, therefore, has certain limits.

2. It is known that at the initial stage following the adoption of, e. g., a particular law, the constitutionality of which may be challenged, the CCU is a passive subject. This is explained by the fact that, according to the Constitution, the Court has neither the functions of initiating a review of the matters concerning the conformity of laws with the provisions of the Fundamental Law, nor the functions of a legislative initiative. The possibilities of initiating constitutional proceedings are activated by the legally defined subjects that have the right to appeal to the CCU on the issues the Court is authorised to consider.

An application to the Court by such a subject with a request to adjudicate an issue falling within the Court's jurisdiction serves as grounds for the Court to take a series of consecutive active steps to consider the respective application and to respond to the applicant in accordance with the procedure prescribed by law.

3. The first stage of this process is a preliminary examination of the submitted materials, which is carried out in order to verify their conformity with the statutory prerequisites for the initiation of constitutional proceedings. According to Article 45 of the Law of Ukraine *On the Constitutional Court of Ukraine*, the grounds for a refusal to initiate constitutional proceedings are as follows:

- 1) the Constitution of Ukraine and this Law do not provide for the right to a constitutional petition or a constitutional appeal;
- 2) a constitutional petition or a constitutional appeal does not meet the requirements envisaged by the Constitution of Ukraine and this Law;
- 3) the Constitutional Court of Ukraine has no jurisdiction over the issues raised in a constitutional petition or a constitutional appeal.

Since these provisions generally require an evaluation, the activism of the Court at this stage consists of the decision to initiate or to refuse to initiate constitutional proceedings, which the Court makes in its acts on its own initiative. In addition, the Court explains the grounds it has established for a refusal to initiate constitutional proceedings.

The CCU has established requirements as to the subjects of the right to apply and the form of application on the matters concerning the compliance of draft laws on amendments to the Constitution of Ukraine with the Constitution of Ukraine; the Court has determined that its jurisdiction does not cover legal acts that are invalid, are not in effect, or have exhausted their effects, and that the Court's powers do not include the constitutional review of legality of acts of bodies of state power, bodies of local self-government and the officials of those bodies; the CCU has also clarified that a diverging application of the provisions of the Constitution of Ukraine or laws of Ukraine as a reason for the interpretation of the Constitution and laws of Ukraine, in case the applicant is a citizen of Ukraine, a foreigner, a stateless person, or a legal entity, means a differing application of the same norms of the said legal acts by the Ukrainian courts and other bodies of state power under identical legally significant circumstances; etc.

4. At the next stage – the initiation of constitutional proceedings – the activism of the Court consists in stating the subject of the review, *i.e.*, in determining which provisions of the legal act would be subjected to review and in reference to which articles of the Constitution of Ukraine the compliance of those provisions with the Constitution would be reviewed.

5. Examination of a case is the third stage and the central part of the constitutional court's activity, in the course of which the Court studies the materials of the case and forms substantiated findings relating to whether the respective law (or a provision thereof) complies with the Constitution. When the contested law or a provision thereof is incompatible with certain articles,

principles or provisions of the Constitution, the activism of the CCU consists in the fact that it is not bound by the legal argumentation of the participants in the constitutional proceedings. The Court may take their positions into account when forming a conclusion, but it may as well work out its own legal positions, being guided by its own understanding of the sense and essence of constitutional principles and norms. The Court is also entitled to substantiate its decisions by a reference to the case-law of international judicial institutions whose jurisdiction is acknowledged by Ukraine, as well as to the provisions of international treaties ratified by Ukraine.

When the contested law is found to be compatible with the Constitution of Ukraine, the legal argumentation of the entity that initiated the constitutional appeal is *de facto* held to have been incorrect.

6. Activism in the course of constitutional proceedings can be conditionally divided into the compulsory activism, *i. e.* that which is exercised by the Court on a regular basis, and the optional activism, which the Court exercises at its discretion, depending on the facts of the case.

The compulsory activism includes an active use of the concept of the rule of law, the main element of which is the principle of fairness, observance of the balance between the interests of an individual, the society, and the state. In this regard, the Court indicated in its Decision no. 15-пr of 2 November 2004 that “one of the implications of the rule of law is that law is not restricted to legislation as one of its forms, but rather comprises other social regulatory means, such as morals, traditions, customs, etc., which are legitimized by the society and determined by the cultural level the society has reached as a result of its historical development. Found in all of these elements of law is a characteristic consistent with the justice ideology and the idea of law largely reflected in the Constitution of Ukraine”.

Moreover, the Court as a body guaranteeing the supremacy of the Constitution throughout the territory of Ukraine, cannot overlook the fact of an unconstitutional norm being present in the legal system of the country if it establishes such a fact while considering a case. Therefore, if in the course of consideration of a case there has been revealed a non-conformity with the Constitution of Ukraine of a legal act other than the contested one, which has an impact on adopting a decision in the case, such a legal act (or provisions thereof) is held unconstitutional, even if it has not been mentioned in the constitutional petition.

Thus, *e.g.*, in the course of considering a case on the official interpretation of the provisions of the Law of Ukraine *On the Prevention of Impact of Global Financial Crisis on the Development of Construction Industry and Residential Construction*, the Court found that one of the provisions to be interpreted did

not conform with the Constitution of Ukraine, and found that provision to be unconstitutional.

The Court also examines, on a mandatory basis, whether the constitutional procedure for consideration, adoption, and entry into force of laws has been observed.

The optional expressions of judicial activism in the course of constitutional proceedings include:

- 1) the Court's authority to issue binding instructions to other bodies of state power. In Decision no. 8-пп of 9 June 1998, the CCU indicated to the Verkhovna Rada (the Parliament) of Ukraine that upon amending the draft law on amendments to the Constitution the respective law may only be passed by the parliament after the CCU has provided a conclusion, according to which the amended draft law complies with Articles 157 and 158 of the Constitution of Ukraine. The failure to observe this requirement in the adoption of the amendments to the Constitution in 2004 became grounds for holding the respective law unconstitutional, for it had been adopted in violation of the constitutional procedure for its adoption and review (Article 152 of the Constitution of Ukraine);
- 2) returning to an earlier version of a legal act in cases when the amendments made to it have been found unconstitutional as a result of a violation of the constitutional procedure for its consideration, adoption, or entering into effect;
- 3) determination in a decision of the CCU of the procedure and deadlines for the implementation of that decision, demanding a written confirmation of execution of a decision;
- 4) filling legal gaps, oversights by the legislator in the legal system, where protection of human and citizens' rights and freedoms is concerned.

7. Thus, activism is an important constituent of the activity of constitutional jurisdiction bodies.

At the same time, manifestations of activism by a constitutional court must not aim at replacing the legislator, and, if the legislator has made a mistake, it is the legislator itself who must correct it.



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Vice President  
of the Constitutional Court  
of the Republic of Slovenia

## **Judicial Activism as an Objective Necessity, from the Perspective of the Slovene Constitutional Court**

### **1. Introduction**

In a democratic state, the relationship between the parliament, which exercises legislative power, and the Constitutional Court, which exercises (constitutional) judicial power, is a relationship between two central authorities of the state power based on the principle of the separation of powers. In addition to respect for human rights and fundamental freedoms, as well as free democratic elections in a state governed by the rule of law, it is precisely the principle of the separation of powers<sup>1</sup> that is one of the more significant constitutional elements that distinguish the constitutional regulation of the democratic Slovene state from the constitutional regulation of the Slovene federal unit of the former common Yugoslav federal state, of which the principle of the unity of powers

<sup>1</sup> According to the Constitutional Court of the Republic of Slovenia the principle of the separation of powers requires that individual branches of power be separated one from another, as a general rule in both the subjective and organisational sense, as well as functionally, and that a constitutional checks and balances mechanism must be established between them in order to prevent abuses of power with a view to ensuring respect for people and their dignity (Decision of the Constitutional Court No. U-I-158/94, dated 9 March 1995, Official Gazette RS, No. 18/95, and OdlUS IV, 20); however, between individual branches of power there must also exist mutual respect and, to a certain degree, adequate cooperation in order for the functioning of state power as a whole to be ensured (Decision No. U-I-83/94, dated 14 July 1994, Official Gazette RS, No. 48/94, and OdlUS III, 89).

was characteristic.<sup>2</sup> From the perspective of the principle of the unity of power, the introduction of constitutional courts in the former common Yugoslav state and in its federal units was in a way surprising. Thus more than 50 years have passed since in Slovenia the then existing Constitutional Court of the federal unit started functioning. However, in Slovenia as a democratic state governed by the rule of law the role and importance of the Constitutional Court, as well as its competences to adjudicate,<sup>3</sup> significantly differ from the role that the Constitutional Court had played under the previous regime. Consequently, one can say that constitutional review has a new quality from 1991 onwards. This was the moment the Constitutional Court became the highest body of the judicial branch of power for the protection of constitutionality, human rights, and fundamental freedoms.<sup>4</sup> In pursuing this mission it has played an important role in Slovene society for the last twenty five years. This role can also be examined in accordance with the “activist versus self-restraint” criteria of its case law.

Much has been said and written about judicial activism by legal theorists since the mid-twentieth century.<sup>5</sup> From these discussions one can conclude that this term does not have an unequivocal meaning. One of its meanings thus concerns the relationship between the legislature and the Constitutional Court with regard to the question of whether in the performance of its competences the Constitutional Court can enter the original sphere of the legislature – and

<sup>2</sup> “A characteristic of the principle of the unity of power is that it proceeds from the belief that the state power can only be uniform, because it is an expression of the people’s sovereignty. Consequently, it cannot be divided and it is centralised in a single authority of the state, as a general rule in the legislative body.” F. Grad, *Parlamentarno pravo* [Parliamentary Law], GV Založba, Ljubljana 2013, p. 67.

<sup>3</sup> The existence of a constitutional judiciary even before the independent democratic state was formed facilitated and accelerated the establishment of the Constitutional Court on new constitutional foundations. The Constitutional Court continued its work after the Constitution was adopted in 1991 (Article 7 of the Constitutional Act Implementing the Constitution of the Republic of Slovenia, Official Gazette RS, No. 33/91); however, it should be noted that at that time the judges of the Constitutional Court already had been elected by the legislative assembly that was constituted after the first democratic elections in March 1990.

<sup>4</sup> See the first paragraph of Article 1 of the Constitutional Court Act (Official Gazette RS, No. 19/94 *et seq.*).

<sup>5</sup> See, for instance, K. D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, California Law Review, October 2004, available at <[www.constitution.org/lrev/kmiec/judicial\\_activism.htm](http://www.constitution.org/lrev/kmiec/judicial_activism.htm)>, A. Harel, A. Shinar, *Between judicial and legislative supremacy: A cautious defense of constrained judicial review*, International Journal of Constitutional Law, 4 (2012), pp. 950–975, D. Rousseau, *The Conseil Constitutionnel confronted with comparative law and theory of constitutional justice (or Louis Favoreu’s untenable paradoxes)*, International Journal of Constitutional Law, 1 (2007), pp. 28–43, R. A. Posner, *The Rise and Fall of Judicial Self-Restraint*, California Law Review, 3 (2012), pp. 519–556.

therefore, whether its role as a so-called negative legislature, which goes hand in hand with the principle of judicial self-restraint, can be fully transformed into the role of a so-called positive legislature, which goes hand in hand with judicial activism. The question arises whether in the wake of an established unconstitutionality the Court may order a transitional rule, i.e. enter the field of the legislature by overtly temporarily regulating, with the legally binding force of law, the issues that were the subject of a constitutional review? This paper deals with possible answers to this question from the perspective of the case law of the Slovene Constitutional Court.

## **2. The Principle of the Separation of Powers and the Constitutional Court as a “Positive Legislature”**

From the principle of the separation of powers there follows the requirement that each authority is to responsibly carry out the tasks with which it is entrusted under the constitutional order. It is the democratically elected legislative authority that is called upon to regulate social relationships with binding legal force. In doing so, it must respect the Constitution. The Constitutional Court is entrusted with the task of monitoring whether the legislature remained within the constitutional limits. If these limits were exceeded, The Court is authorised to invalidate the laws at issue.<sup>6</sup> Therefore, the Constitutional Court is often called the negative legislature. Such a position requires that it limits the exercise of its competences to the scope imposed by the principle of the separation of powers. It is necessary to agree that the Constitutional Court must, as a general rule, remain within this scope. Nonetheless, it must be taken into consideration that the Constitutional Court is the guardian of the values enshrined in the Constitution<sup>7</sup> and among them especially individual liberty based on human dignity and respect for one’s human rights and fundamental freedoms. The Constitutional Court can only fulfil this mission if the effectiveness of the constitutional review is ensured. In fulfilling its role it can thus be activist already when interpreting constitutional provisions on

<sup>6</sup> On such basis, the term constitutional democracy became established, which expresses “that the assessment whether the decisions of the majority are correct is subject to a fundamental reservation, namely the reservation whether these decisions are consistent with the constitution.” W. Hassemer, *Ustavna demokracija* [Constitutional Democracy], Pravniki, 4–5 (2003), p. 214.

<sup>7</sup> “It is in the nature of a constitution that it includes a number of value-based criteria that must be individually defined, normatively concretised and, if necessary, also further developed.” M. Pavčnik, *Ustavnoskladna razlaga (zakona)* [(Statutory) Interpretation in Conformity with the Constitution], in: M. Pavčnik and A. Novak (Eds.), *(Ustavno) sodno odločanje* [Adjudication (before Constitutional and Regular Courts)], GV Založba, Ljubljana 2013, p. 69.

human rights and fundamental freedoms if such is required to protect them; especially in relationships between individuals and the state.

The Court may also adopt an activist approach when, in order for its role of guardian of the Constitution to be effectively implemented in the wake of an established unconstitutionality, it enters the field that otherwise belongs to the legislature. If it regulates temporarily, with the legally binding force of law, the issues that were the subject of a constitutional review in order to prevent human rights and fundamental freedoms from remaining unprotected until the legislature adopts a new law as a response to a Constitutional Court decision, such an interference into the field of the legislature should be allowed. I will focus precisely on this aspect of judicial activism in the case law of the Slovene Constitutional Court. Although I am favourably disposed to such activism and I believe that it is to be regarded with a positive meaning, I also believe that it should be limited mainly for two reasons: 1) there are certain issues which should belong exclusively to the legislature and 2) the Court is frequently unable to take this step because judges lack the knowledge and information necessary to legislate.

According to this special and distinctive form of judicial activism the Constitutional Court, in addition to establishing an unconstitutionality of a statute, enters the legislature's sphere in a completely overt manner. However, what it does is only temporary, until the legislature fulfils its role by itself. As the Court stated in a few past decisions, such a decision has the same binding force as a statute. The legislature can replace it with a new statute and whenever it acts in such way, the new statute can be examined in a new constitutional review on the ground of its consistency with the Constitution. In Slovenia, the Constitutional Court adopts such decisions on the basis of a statutory authorisation that enables it to determine the manner of execution of its decision.<sup>8</sup> The Constitutional Court has already been exercising this authorisation for more than twenty years – not only to determine, as is stated by law, which authority must implement the decision and in what manner such must be done, in order to ascertain, in such manner and if necessary, the effects of its decision, but also to entirely overtly temporarily regulate the questions that were the subject of the assessed statutory regulation.<sup>9</sup> Therefore, it can be

<sup>8</sup> The second paragraph of Article 40 of the Constitutional Court Act reads as follows: "If necessary, the Constitutional Court determines which authority must implement the decision and in what manner. [...]".

<sup>9</sup> "On the basis of this provision, the Constitutional Court can, *inter alia*, temporarily regulate the transitory state, until the legislature eliminates the unconstitutional situation established by a decision of the Constitutional Court. The provision of the second paragraph of Article 40 [of the Constitutional Court Act] does not determine conditions that would have to be fulfilled

claimed that also with regard to the interpretation of the statutory provision, which is the basis of the described measure, the Constitutional Court is activist.

When reviewing past decisions, it is possible to observe that the Constitutional Court exercises such authorisation approximately eight times per year, whereby sometimes it exercises such already when deciding on the suspension of the implementation of a law until the adoption of the final decision of the Constitutional Court on the matter.<sup>10</sup> To illustrate what this specific part of the decision-making process entails, let us review a few cases in which the Constitutional Court exercised this authorisation when it adopted the final decision on the case.

### **3. Examples of Activism in order to ensure the Protection of Human Rights**

As a response to the first decision of the Constitutional Court regarding the so-called "*erased persons*",<sup>11</sup> the legislature adopted a law that regulated the status of citizens of other successor states of the former Yugoslav Federation. By its second decision regarding the "*erased persons*",<sup>12</sup> the Constitutional Court decided that a certain part of this law was unconstitutional. At the same time, it decided that the permanent residence of the citizens of the successor states of the former Yugoslav Federation that had acquired a permanent residence permit on the basis of this law or on the basis of the Aliens Act was established on the basis of such permanent residence permit for the period from 26 February 1992 onwards if on that day these persons were removed from the register of permanent residents. The Constitutional Court also imposed on

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for it to be applicable, as its application is left to the assessment of the Constitutional Court in each individual case. [...] What is most important is that by a decision adopted on such a basis the Constitutional Court does not necessarily interpret the Constitution and therefore, in this part, does not carry out a review of constitutionality [...]. Consequently, the legislature may change the manner of implementation [...] by a law." See Decision of the Constitutional Court No. U-I-163/99, dated 23 September 1999 (Official Gazette RS, No. 80/99, and OdlUS VIII, 209).

<sup>10</sup> See, for instance, Order of the Constitutional Court No. U-I-417/02, dated 16 January 2003 (Official Gazette RS, No. 11/03); the case was joined to case No. U-I-346/02 and decided by Decision No. U-I-346/02, dated 10 July 7 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70).

<sup>11</sup> Decision of the Constitutional Court No. U-I-284/94, dated 4 February 1999 (Official Gazette RS, No. 14/99, and OdlUS VIII, 22).

<sup>12</sup> Decision of the Constitutional Court No. U-I-246/02, dated 3 April 2003 (Official Gazette RS, No. 38/03, and OdlUS XII, 24).

the competent ministry the duty to adopt supplementary decisions regarding the affected persons.

The decision was met with a strong reaction of politicians and some legal theorists, who raised the question whether administrative decisions may be issued directly on the basis of the operative provisions of the Constitutional Court's decision or whether a special law must first be adopted. The Constitutional Court clearly responded to that in conformity with the position adopted in a previous decision:<sup>13</sup> "The Constitutional Court itself 'prescribes', by the manner of implementation, the content of the norm (it fills-in the legal gap) in one possible manner (if there exist, of course, multiple possible manners) of the implementation of a decision. Authorities of the state competent for the implementation of a decision of the Constitutional Court (already on the basis of a law or determined by a decision, as is the case in the case at issue) must act in accordance with that part of the decision that determines the manner of implementation as long as the legislature (the National Assembly) does not prescribe it differently [...]."<sup>14</sup>

There were several such decisions related to the protection of the right to vote. In one case, the Constitutional Court established the unconstitutionality of a number of laws regulating elections. The challenged regulations namely enabled the revocation of the right to vote of persons whose capacity to contract had been revoked due to the extension of parental rights, although the extension was only due to the fact they could not take care of themselves, or their benefits and rights, due to a physical disability. The Constitutional Court invalidated the challenged statutory provisions with a one-year period of deferment and at the same time decided that within such period these persons have the right to vote.<sup>15</sup>

In another case, the Constitutional Court in part invalidated the statutory regulation of local elections which required that a list of candidates for elections to municipal councils is supported by a larger number of voters than the number of votes necessary to win a seat in the council. At the same time, the Court decided that until a different regulation is adopted, a list of candidates in local elections in a particular constituency can be nominated, by collecting signatures, by a group of at least fifteen voters who have permanent residence in the constituency.<sup>16</sup>

<sup>13</sup> Decision No. U-I-163/99, *op. cit.*

<sup>14</sup> Order No. U-II-3/03, dated 22 December 2003 (OdlUS XII, 101),"

<sup>15</sup> Decision of the Constitutional Court No. U-I-346/02, dated 10 July 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70).

<sup>16</sup> Decision of the Constitutional Court No. U-I-49/06, dated 22 June 2006 (Official Gazette RS, No. 70/06, and OdlUS XV, 56).

The Constitutional Court further established the unconstitutionality of acts regulating elections because they failed to regulate in sufficient detail the rules of voting by mail. It held that until the established unconstitutional legal gap is remedied, the envelopes containing ballot papers that reach the electoral commission by mail must either have a postal stamp or include attached documents from which the date they were mailed at the post office is evident.<sup>17</sup>

The Constitutional Court also established the unconstitutionality of the Elections and Referendum Campaign Act, which prohibited the publication of public opinion surveys seven days before elections. It held that until the established unconstitutionality is remedied, the publication of public opinion surveys on candidates, lists of candidates, political parties, and on the questions put to a referendum is not permitted twenty-four hours before the day of voting.<sup>18</sup>

In light of the established unconstitutionality of the Personal Income Tax Act – the latter namely failed to treat stepchildren the same way as other children from family units of persons subject to personal income tax – the Constitutional Court decided that until the established unconstitutionality is remedied, the tax deduction for stepchildren was to increase in the same manner as it does for other children.<sup>19</sup>

By another decision, the Constitutional Court established the unconstitutionality of the Enforcement and Securing of Civil Claims Act, because the objections of third persons who demonstrated with a high degree of probability that they have a right that prevents such enforcement could not be assessed by the executing court on the merits. It determined the manner in which courts are to treat such persons' motions for the postponement of enforcement until the established unconstitutionality is remedied.<sup>20</sup>

The Constitutional Court further established the unconstitutionality of the Police Act. The challenged regulation was so indefinite that it enabled the Police to verify the identity of a person only due to their appearance which allegedly raised the suspicion that they would commit, are committing, or have committed a minor offence or a criminal offence. The Court decided that until this unconstitutionality is remedied, the mere appearance of a person cannot

<sup>17</sup> Decision of the Constitutional Court No. U-I-7/07, Up-1054/07, dated 7 June 2007 (Official Gazette RS, No. 54/07, and OdlUS XVI, 63).

<sup>18</sup> Decision of the Constitutional Court No. U-I-67/09, Up-316/09, dated 24 March 2011 (Official Gazette RS, No. 28/11, and OdlUS XIX, 19).

<sup>19</sup> Decision of the Constitutional Court No. U-I-259/01, dated 20 November 2003 (Official Gazette RS, No. 118/03, and OdlUS XII, 90).

<sup>20</sup> Decision of the Constitutional Court No. U-I-110/03, Up-631/03, dated 14 April 2005 (Official Gazette RS, No. 46/05, and OdlUS XIV, 21).

serve as the reason for determining their identity.<sup>21</sup> The Constitutional Court also established the unconstitutionality of the Police Act due to the fact that the disclosure of certain confidential information necessary for the defence in criminal proceedings depended on a discretionary decision of the Minister of the Interior. At the same time, it granted judges authorisation to decide on the disclosure of confidential information in criminal proceedings despite the Minister's opposition and determined the procedure by which judges decide in such instances until a different statutory regulation is adopted.<sup>22</sup>

In two decisions the Constitutional Court established the unconstitutionality of the statutory regulation of same-sex partnerships. Firstly, an unconstitutionality was established because the challenged regulation did not prescribe the same rules of inheritance between the partners in a registered same-sex partnership as apply to spouses,<sup>23</sup> and, secondly, also due to inadmissible discrimination based on sexual orientation regarding inheritance between same-sex partners who live in a long-term partnership but have not registered a same-sex partnership, in comparison with the regulation of inheritance between common-law spouses.<sup>24</sup> In both cases the Constitutional Court decided that, until the established inconsistency is remedied, the same rules as apply to spouses also apply to same-sex partners who live in a registered same-sex partnership, and that the same rules as apply to common-law spouses apply to same-sex partners who live in a long-term partnership (but have not registered a same-sex partnership).

In a recent decision, the Constitutional Court held that the Attorneys Act and the Criminal Procedure Act are unconstitutional.<sup>25</sup> The statutory regulation of searches of attorneys' offices namely contained no special rules to protect an attorney's privacy, another aspect of which is an attorney's duty to protect professional secrecy – in other words, to protect the rights, including human rights, of clients who are in a confidential relationship with him or her. The Court found the regulation to be inconsistent with the right to privacy and the right to a court as the challenged statutory regulation allowed the police to make the final decision on which documents and electronic devices or

<sup>21</sup> Decision of the Constitutional Court No. U-I-152/03, dated 23 March 2006 (Official Gazette RS, No. 36/06, and OdlUS XV, 22).

<sup>22</sup> Decision of the Constitutional Court No. U-I-271/08, dated 24 March 2011 (Official Gazette RS, No. 26/11, and OdlUS XIX, 18).

<sup>23</sup> Decision of the Constitutional Court No. U-I-425/06, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 29).

<sup>24</sup> Decision of the Constitutional Court No. U-I-212/10, dated 14 March 2013 (Official Gazette RS, No. 31/13).

<sup>25</sup> Decision of the Constitutional Court No. U-I-115/14, Up-218/14, dated 12 January 2016 (Official Gazette RS, No. 8/16)

electronic data in the attorney's office that is being searched will be seized. Moreover, *no a posteriori* appeal was ensured against the court search warrant. The Constitutional Court found that there has been an unconstitutional gap in the challenged regulation that resulted in violations of extremely important human rights.

At the same time, the Court had to decide on a constitutional complaint against the search warrant lodged by the attorneys whose offices had been searched and whose documents and electronic devices had been seized by the police. In such cases it is most obvious that a decision establishing an unconstitutional gap raises the question of what is to happen until the legislature fulfils its duty to adopt a law that will meet all relevant constitutional safeguards. If in the mentioned case the Court had not adopted any further decisions, new violations of the human rights at issue would have occurred during searches of attorneys' offices, as the unconstitutional regulation would have remained in force. To ensure the protection of important human rights the Court thus decided to determine the manner of implementation of its decision. It established a transitional regulation of the entire procedure according to which the search of an attorney's office may be conducted upon an issued court search warrant. The most important part of the determined manner of implementation is that if, during the search of an attorney's office, the attorney or representative of the Bar Association objects the search and the seizure of documents or electronic data, the documents and the copies of electronic data must be sealed and handed to a judge to decide whether the interference with the right to privacy should be allowed. Furthermore, the Court established the right to lodge an appeal against such judicial decision as well as against the court search warrant.

As was emphasised before, in such instances the parliament is free to adopt a new regulation as a response to the established unconstitutionality. However, until it fulfils this task, and up to date it failed to do so in a number of the above presented cases, the important human rights that were at risk are protected by the Court's manner of implementation of its decisions.

#### **4. A Step Too Far into the Legislative Sphere?**

What the mentioned cases all have in common is that the Constitutional Court temporarily entered the legislative sphere in order to safeguard human rights. However, it is necessary to note that sometimes the Constitutional Court decided to use such a measure also when what was at issue was the regulation of questions that essentially belong within the sphere of political decision-making of the legislature. In my opinion, in those cases it is not possible to agree with the activism of the Constitutional Court. Frequently, a characteristic

of such cases is that judicial activism is in fact demonstrated already before the manner of implementation is determined, i.e. when the Constitutional Court excessively interferes with the legislature's discretion already when interpreting constitutional provisions. An interaction between the first and the second type of activism thus exists.

One such example is the case in which the Constitutional Court established the unconstitutionality of the Urban Municipality of Koper because it allegedly included both, the municipal areas and settlements of Koper, without existing any relevant connection between them. In addition, the Constitutional Court extended, until the established unconstitutionality was remedied and shortly before local elections were to be held, the term of office of the municipal council members in office at the time of the decision, until they were to assume office in the new municipalities that were to be established under the new statutory regulation.<sup>26</sup> The legislature opposed this decision and, instead of regulating the municipalities anew, in 1999 adopted a law by which it called elections in the Urban Municipality of Koper. The Constitutional Court subsequently confirmed that that law was not inconsistent with the Constitution.<sup>27</sup> However, this was not the end of the story, as it appeared for a second time on the docket of the judges of the Constitutional Court. That time, however, the outcome was exactly opposite.

The legislature initiated activities that would enable the secession of a part of the territory of the Urban Municipality of Koper and establish the new Municipality of Ankaran. In a consultative referendum, the majority of the inhabitants of the territory that would belong to the future new municipality voted in favour of an independent municipality.<sup>28</sup> Notwithstanding such will of the voters, the legislature failed to adopt the law establishing the new Municipality of Ankaran. The Constitutional Court thus established the unconstitutionality of the Establishment of Municipalities and Municipal Boundaries Act and imposed on the legislature the obligation to repeal it within two months. At the same time it invalidated the calling of regular municipal elections in the Urban Municipality of Koper, it imposed on the President of the National Assembly the obligation to call elections for the municipal council of the Urban Municipality of Koper

<sup>26</sup> Decision of the Constitutional Court No. U-I-301/98, dated 17 September 1998 (Official Gazette RS, No. 67/98, and OdlUS VII, 157).

<sup>27</sup> It decided on such by Decision No. U-I-163/99, *op. cit.*, in which it gave priority to the principle of the periodicity of elections over the established unconstitutionality regarding the territory of the municipality.

<sup>28</sup> The third paragraph of Article 139 of the Constitution determines: "A municipality is established by law following a referendum by which the will of the residents in a given territory is determined. The territory of the municipality is also defined by law."

and for the municipal council of the new Municipality of Ankaran after the implementation of the law establishing the Municipality of Ankaran, and extended the term of office of council members and the mayor of the Urban Municipality of Koper until the newly elected authorities are constituted.<sup>29</sup> The decision was met with strong reactions of a part of the professional public,<sup>30</sup> while the legislature failed to respect the Constitutional Court's decision once again by adopting the Calling of Regular Local Elections in the Municipality of Koper Act. This Act was also challenged before the Constitutional Court; however, this time the Constitutional Court did not stop where it had in 1999, but took its activism another step further. The Constitutional Court did in fact allow regular local elections in the Urban Municipality of Koper, but at the same time established, by itself, the Municipality of Ankaran and decided that the first elections in the municipality are to be carried out in the framework of the regular local elections in 2014.<sup>31</sup> As a consequence, the Municipality of Ankaran was in fact established by the decision of the Constitutional Court and the first local elections in the Municipality were held in 2014.

In my opinion, such decisions entail a step too far towards the legislative sphere.<sup>32</sup> This kind of activism is not in favour of the protection of human rights and fundamental freedoms. In contrast, "the Municipality of Ankaran – yes or no" case concerned a typical question that falls within the exclusive competence of the legislature's decision-making; in the mentioned case, in how many and in which municipalities local self-government is to be carried out. The Constitutional Court should not interfere with such subject matter through its decisions, but should respect the legislature's sphere of political discretion.

## 5. Conclusion

The Constitutional Court is the guardian of the Constitution, and as such also the guardian of the values enshrined therein, especially human rights and fundamental freedoms. The Constitutional Court can only fulfil this mission if the effectiveness of constitutional review is ensured. Therefore the Constitutional

<sup>29</sup> Decision of the Constitutional Court No. U-I-137/10, dated 26 November 2010 (Official Gazette RS, No. 72/10, and OdlUS XIX, 9).

<sup>30</sup> See, for instance, M. Krivic, *Hudo poenostavljanje ankaranskega zapleta* [A strong simplification of the conflict regarding Ankaran], *Pravna praksa*, No. 4 (2011), pp. 6–8.

<sup>31</sup> Decision of the Constitutional Court No. U-I-114/11, dated 9 June 2011 (Official Gazette RS, No. 47/11, and OdlUS XIX, 23).

<sup>32</sup> Consequently, I could not agree with them; I voted against Decisions No. U-I-137/10 and No. U-I-114/11 and explained in my dissenting opinions why the Constitutional Court excessively interfered with the sphere of the legislature.

Court may adopt an activist approach already when interpreting constitutional provisions on human rights if such is required to protect them.

In order for the role of the constitutional review to be effectively implemented in the wake of an established unconstitutionality, the Court may extend its activism even further. It can enter the field of the legislature by overtly temporarily regulating, with the legally binding force of law, the issues that were the subject of a constitutional review. This kind of activism is sometimes simply an objective necessity for ensuring the immediate protection of human rights while giving the legislature sufficient time to adopt a new law as a response to a Constitutional Court decision. The legislature is free to establish a new regulation in consistency with the Constitution. However, until it fulfils this task the important human rights that were at risk are protected by the Court's manner of implementation of its decision. This strong judicial activism of the Court has been an objective necessity for ensuring the effectiveness of the constitutional review and safeguarding the extremely important human rights that have been the main subject of review. There is an impression that this type of judicial activism is almost generally accepted in Slovenia – accepted by the legislature, the regular courts, and legal theorists.

Objections, especially from legal theorists, are voiced when, as was illustrated, the Court takes its activism too far. When what is at issue is decision-making on topics that by their very nature must fall within the sphere of the exclusive competences of the elected representatives of the people in the parliament, the Constitutional Court should consistently limit its activities to the sphere delimited by the principle of the separation of powers. This should be respected already in the interpretation of the provisions of the Constitution. Furthermore, in such cases there is also no place for determining the manner of implementation of a Constitutional Court decision. When, on the other hand, what is at stake is a human right guaranteed by the Constitution, even if it is “only” guaranteed by a so-called activist interpretation of a constitutional provision provided by the Constitutional Court, the strong type of activism, i.e. a temporary transformation of the Court into the “positive legislature”, should be allowed in order to protect such human right.



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## **Interpretative Activity and the Principle of Judicial Restraint in the Constitutional Justice**

Dear Chairman/Chairwoman,  
Dear participants of the Conference,  
Ladies and Gentlemen,

First of all, let me express my heartfelt gratitude for the opportunity to participate in such a high forum on the occasion of the 20th anniversary of the Constitutional Court of the Republic of Latvia.

I would like to emphasise, and I think all the participants will share this opinion, that we have already heard much interesting and useful information.

In my turn, I will be glad to present some considerations on the topic of this event.

A certain level of abstraction is a feature characteristic of every legal act. The task of a court is to provide the interpretation of its provisions with due judicial discretion and to decide the case on its merits on this basis. This involves the court's activity in determining whether such interpretation is necessary, in determining aspects in relation to which it should be made as well as in implementing the relevant legal position.

The limits of this interpretative activity represent a topical issue for the court, as their overstepping can be treated as judicial activism.

The court's restraint is also sometimes criticised. The court is reproached, for example, with insufficient protection of human rights, evasion of independent

oversight of government activities and other values of society. Finally, such actions are also considered as judicial activism.

Therefore, a prerequisite of effective justice, including the constitutional justice, shall be a balance between excessive restraint in the form of inertness, extreme conservatism and excessive activity bordering on a clear abuse of inherent right of judicial discretion.

The most common function of constitutional justice bodies is supervision over the compliance of laws and other normative legal acts with the Constitution. It involves their active influence on all spheres of public life. The most important direction of this influence is orientation of rule-making and law-enforcement subjects on the most complete and accurate implementation of the values, principles and rules of the Constitution.

In this sense, the activities of the Constitutional Court of the Republic of Belarus include a number of components. One of them is the Court's interpretation of the principles and rules of the Constitution.

There is no doubt that the most solid legal basis for interpretation of constitutional provisions by the constitutional justice body is the right to their official interpretation vested to this body as an element of its competence. In the absence of such a right a solid theoretical justification for overstepping a literal understanding (reading) of the constitutional provisions by the constitutional court when interpreting the Constitution is required. This also applies to a broad interpretation of the constitutional provisions affecting human rights. Otherwise, interpretative legal positions of the court may be considered as manifestation of judicial activism and may lead to conflicts with legislative bodies and other branches of government.

The legislation of the Republic of Belarus does not contain any direct reference to such specific means of implementing the constitutional function of the Constitutional Court as interpretative legal positions. However, the Court's interpretative activities comply with its status in the system of state power as a judicial body and its functions to review the constitutionality of normative legal acts in the state. In practice, when expressing interpretative legal positions the Constitutional Court grounds their necessity by features of the specific case.

Formation of the uniform external perception of the values, principles and rules of the Constitution by actors of legal communication is an important element of the interpretative activity of the Constitutional Court. The Court's interpretative activity also includes assessment of the degree of implementation of the constitutional values, principles and rules with regard to their interpretation by the Constitutional Court in the rule-making and law-enforcement. The Court takes measures in order to increase the degree of such implementation, including through interpretation of the rules of subordinate acts of constitutional legislation

in order to ensure their application in the constitutional and legal sense. This contributes to the proper implementation of the constitutional provisions, exclusion of violations of constitutional legality, ensuring the effectiveness of the constitutional legal regulation, the introduction of the constitutional values in social practice.

At the same time, the external interpretative activity of the court inevitably provides for dynamic actions by its subject. This requires the definition of a position on the issue of how far can the Court go in carrying out this interpretative role. It is a burning issue to set limits of the court's activity or, conversely, of its judicial restraint. Overstepping these limits can lead to passing beyond its competence, including interference in the competence of bodies that are legally authorised to interpret or amend the Constitution.

In particular, in spite of the priority objectives, achieved through interpretative activity, the Constitutional Court of the Republic of Belarus has always considered possible and appropriate degree of such activity outside of which this could be considered as judicial activism.

The analysis of the Constitutional Court practice shows that its interpretative activity is conditioned by a number of factors obliging it to carry out such activity as well as providing for the need to take into account the principle of judicial restraint.

Among these factors it is necessary to mention:

- features of the Constitution as a legal document;
- established and generally recognised approaches to the interpretation of provisions of the Constitution as a kind of judicial interpretation taking into account the general rules of interpretation of legal acts;
- place of the Constitutional Court in the system of separation of powers, including substantive and meaningful specific nature of its powers;
- place of the Constitutional Court in the system of judicial bodies acting on the territory of the State;
- methods and procedures used by the Constitutional Court in the exercise of its powers;
- public and historical practice of carrying out such relationship, level of its theoretical understanding;
- personal experience and world view of judges.

So, with regard to the specific features of the Constitution as a legal document, I would like to note the following. The ambiguity and a high level of abstraction of the constitutional text, the dynamic character of relations regulated by the Constitution determine the relative validity of a number of individual interpretations of the provisions of the Basic Law, their dependence on the subjective discretion of the law-enforcement body. Meanwhile, based on

the principle of legal certainty, the direct effect of the Constitution as an act of the highest legal force, strict and consistent regulatory system is possible only on the basis of a uniform understanding of its requirements, and developments in legislative acts and application in the law-enforcement based on this understanding.

These features of the Constitution determine the need for interpretation of its principles and rules by the Constitutional Court that ensures the identification of their content in relation to growing social relations, adaptation and transformation of the constitutional provisions without amending the text.

The Constitution does not provide a direct answer, what are the limits and rules of its interpretation. The Constitutional Court has applied established approaches to the interpretation of its provisions as a form of judicial interpretation taking into account the general rules of interpretation of legal acts. It follows from this that the Court's main task is to extract as much information as possible from the text of the Constitution in order to fully comprehend not only the content laid by the authors, but also the meaning that is potentially contained in the text of the Constitution in addition to the author's will.

Through the interpretation of the constitutional provisions, in addition to the above-mentioned instruments of the doctrine of interpretation, the Constitutional Court takes into account its previously stated legal positions. Legal positions of foreign and international courts as well as doctrinal positions formulated in the legal literature are also analysed.

Thus, the Court's interpretative activity is limited to some extent by its own previously stated legal positions. The Constitutional Court shows reasonable restraint in altering its legal positions in order to ensure the stability of the constitutional and legal regulation.

Legal positions and the case-law of general courts, foreign bodies of the constitutional review, international courts are used by the Constitutional Court as an additional argument in favour of its interpretative legal positions. Interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights is one of the benchmarks for the Constitutional Court when identifying the content of the rules of the Constitution on the rights and freedoms of the individual, making recommendations to the legislator in order to harmonise the European and national law.

Taking into account achievements of legal doctrine is a factor of the scientific validity of the interpretative legal positions of the Constitutional Court and, therefore, of increasing the level of their influence on real social relations.

The use of such an arsenal in order to develop legal positions excludes infringement of the limits of the court's discretion, when instead of supporting its position with arguments of the legal nature the court takes a willful decision.

The focus of the interpretative activity of the Constitutional Court on the realisation of the constitutional rules, their implementation in social practice, in specific legal relationship involving a wide range of subjects determines the need to establish its interpretative activity in the system of separation of powers taking into account the specific nature of the subject and content of its powers.

It should be noted that the trend when national constitutional courts reject judicial activism in order to avoid conflicts with the legislator in general and the political system is considered nowadays as one of the most common trends in the European system of judicial review. The Constitutional Court avoids politicisation of its decisions, including the use of politically-oriented arguments in grounding its legal positions and conclusions, of the political terminology of its judgements and decisions. However, it must be admitted that, since the Constitution is a political and legal document, the interpretation of its rules by the Court for the purpose of constitutionalisation of social relations has always had a certain political component and may also interfere in the functioning of other bodies and officials.

The analysis of the relevant practice of the Constitutional Court permits to define substantive limits of its interpretative activity. A significant degree of such activity is manifested by the Court in interpretation of the constitutional rules that enshrine the rights and freedoms of the individual bearing in mind the goals of their most complete realisation. These rights and freedoms are specified and developed in its acts in accordance with the development of social relations, requirements of international standards. In its turn, the Court shows judicial restraint in the substantive review of the constitutional rules that enshrine the legal status of state bodies by refraining from broad or, on the contrary, restrictive interpretation of these rules.

The interpretative activity of the Constitutional Court is the most positively perceived by other actors of legal space when it is a matter of gaps and collisions in normative legal acts that have constitutional significance. The presence of such gaps and collisions can lead to infringement, impossibility to exercise the constitutional rights of individuals, non-fulfillment of other constitutional requirements.

However, in its interpretation of the rules of subordinate acts of the constitutional legislation the Court manifests judicial restraint avoiding distortion of the clearly expressed will of the legislator. In identifying inaccuracy or insufficiency of legal regulation of the Court proceeds from the assumption that these defects can be remedied only by the rule-making body, they can not be filled by the Court or by the law-enforcement body by means of interpretation. In such cases the Court formulates the relevant legal positions containing

recommendations to the legislator or another rule-making body on the proper regulation of social relations.

Thus, the interpretative activity of the Constitutional Court, as a rule, creates legal structures that contain at the same time constitutional and legal guidelines of legal regulation and restrictive framework for the legislator (another rule-making body).

The interpretative activity of the Constitutional Court is also determined by its place in the judicial system of the Republic of Belarus.

Foreign experience shows that in some cases the practice of the courts, including international ones, characterised as activist due to its rule-making nature is the basis for raising the issue of its legitimacy. In connection with the entry of the Republic of Belarus in the Eurasian Economic Union (EAEU) the interpretative activity of the Constitutional Court is aimed at developing fundamental approaches to determine the correlation of acts of the EAEU bodies, the competence of which includes supranational powers, with acts of national bodies.

The practice of the Court of the Eurasian Economic Community, the actual predecessor of the EAEU Court, demonstrated the importance of dialogue between international and national courts, high quality of arguments of an international court, their credibility and authority. The Constitutional Court has carefully been studying the experience of the European Union, which also shows the need to develop and maintain a balance of competence, checks and balances in judicial activities of supranational and interstate bodies.

The formation of such a balance providing for a consistent co-existence of the international and national law, as well as of the institutional structure can be significantly promoted by the interpretative activity of the Constitutional Court as well as of the EAEU Court within the framework of their competence established by the relevant legal acts.

Thus, strengthening the role of acts of the constitutional justice bodies in the system of the Roman-German law requires common approaches to the establishment of the bases and limits of their interpretative activity. It will contribute to ordering legal relationship, to the stability of the legal basis of their functioning as an essential condition of the constitutional legality in our countries.

Ending my word, I would like to extend my thanks to the Constitutional Court of the Republic of Latvia and its esteemed President for your cordial welcome. I hope that relations between the Constitutional Court of the Republic of Belarus and the Constitutional Court of the Republic of Latvia will be developed in a spirit of fruitful cooperation, effective exchange of experience, ideas and practice. Especially as because this remarkable conference shows that we have common issues and common effective solutions.

Thank you very much for your attention!



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## **Judicial Activism of the Constitutional Court of the Republic of Armenia in the Context of Constitutional Reforms**

Honourable President of the Constitutional Court of Latvia,  
Dear Colleagues,  
Ladies and Gentlemen,

Please allow me, on behalf of the Constitutional Court of the Republic of Armenia, to congratulate you on the 20<sup>th</sup> anniversary of the Constitutional Court of Latvia. I wish the whole team of the Latvian Constitutional Court good health and further success in effectively carrying out the mission of constitutional justice. I am also grateful for the invitation to participate in the Conference, and for the high-class welcome I have received.

The theme chosen for discussion is of current interest. In my report, I would like to present some aspects of Armenia's realities as concerns the judicial activism of the Constitutional Court and the relevant constitutional developments.

I will start with some general observations.

Judicial activism of a constitutional court is an important and necessary element, aimed at ensuring that the main functions of constitutional justice are effectively implemented.

It goes without saying that the activism of a constitutional court must have certain limits, to avoid conflict of interests in the court's relations with both the judiciary bodies and other public authorities, as well as to secure a targeted and objective self-expression.

In our opinion, the limits of a constitutional court's activism are, in particular, determined by:

- the nature of the constitutional court's powers and the range of objects of constitutional review;
- the range of entities with the right to address the constitutional court;
- the specific features of the constitutional proceedings;
- the legal consequences of the constitutional court's judgements.

Judicial activism of a constitutional court is, to be sure, directly determined also by the judicial independence of the constitutional court.<sup>1</sup>

At the same time, we think that a primary role in the aspect of the judicial activism of a constitutional court is played by the high-level professional experience of judges of constitutional courts, as well as by their determination, their commitment to principles, and their integrity in effectively carrying out the mission of constitutional justice.

In the Republic of Armenia, the powers of the Constitutional Court are specified in the the Constitution (Article 100). As to the range of objects of constitutional review, we will specifically point out that in accordance with the Constitution it does not include acts of all the constitutional bodies, and the settlement of disputes between constitutional bodies relating to their constitutional powers. In this context, we would also like to note that the institution of individual constitutional complaint in the Republic of Armenia exists in a restricted form.

The Constitution also establishes an exhaustive list of entities that have the right to address the Constitutional Court (Article 101). In accordance with the constitutional regulations, the Constitutional Court does not have the right to examine cases on its own motion. It examines cases only when a relevant application has been filed by an entity that has the right to address the Constitutional Court, and adopts a judgement only on the matter specified in the application.

As concerns the constitutional proceedings and the specific features thereof, the Constitutional Court, in accordance with the procedure prescribed by the Law on the Constitutional Court, is in particular authorised:

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<sup>1</sup> Problems related to the above are being thoroughly discussed on an international scale from an academic and research perspective, including, *inter alia*, during the Yerevan conferences organised by the Constitutional Court of the Republic of Armenia, the Venice Commission of the Council of Europe, and the Conference of Constitutional Control Organs of the Countries of New Democracy, the materials of which are published in the International Almanac (see [www.concourt.am](http://www.concourt.am)).

- to clarify all the circumstances *ex officio*, without limiting itself to the motions, suggestions and evidence brought forward by the parties to the proceedings, and other materials of the case;
- to demand materials from state and municipal bodies, from officials of those bodies, as well as from individuals and legal entities;
- in determining the constitutionality of a legal act, to evaluate also the existing law enforcement practice;
- in determining the constitutionality of a normative act, to also determine the constitutionality of its other provisions which are systemically interrelated with the contested provision. Having found out that these other provisions of the act are not in conformity with the Constitution, to recognise those provisions as being incompatible with the Constitution and invalid;
- to extend the effect of a ruling by which the contested act is recognized as being in whole or in part incompatible with the Constitution and invalid to the relations that had started before that ruling came into force, if the opposite decision could cause grave consequences for the state or the public;
- if the Court finds that holding the contested legal act or any provision thereof unconstitutional and invalid from the moment of the announcement of the Court's judgement would inevitably cause grave consequences for the public and for the state, which would harm the legal certainty expected from the annulment of that legal act, the Constitutional Court has the right, while recognising the act as being incompatible with the Constitution, to stipulate in its judgement that the invalidation of the act is postponed for a certain period, during which it is possible and necessary to take measures for the prevention of the above-mentioned consequences.

It should be noted that the Constitutional Court is actively exercising its powers, which is reflected in extensive statistics. Moreover, the Constitutional Court has firmly established the practice of obtaining, particularly in cases regarding the constitutionality of legal acts, opinions of the judiciary and the Chamber of Advocates.

As it has been mentioned above, the limits of the judicial activism of the Constitutional Court are also determined by the legal consequences of the Constitutional Court's judgements. We fully share the doctrinal approach, according to which the enforcement of the Constitutional Court's judgement must have threefold legal consequences. First, it must serve as a guarantee of the protection of objective rights for everyone; second, it must protect the subjective right of a particular person; third, it must become a source of law for the legislator and the executive, playing a directing role in the development of law. Without the due perception and implementation of the Constitutional

Court's case-law, it is impossible to establish constitutionalism in a country and to speak of guaranteeing the supremacy of the Constitution.<sup>2</sup>

Over the 20 years of its activity, the Constitutional Court of the Republic of Armenia has adopted 1272 decisions,<sup>3</sup> 224 of which concern the issues of the constitutionality of legal acts. The Constitutional Court has reviewed the constitutionality of 85 legal acts (14 contested acts in their entirety and 528 contested provisions of legal acts), as a result of which:

- 137 provisions of contested acts were found to be compatible with the Constitution;
- 10 contested acts in full and 162 contested provisions of contested legal acts were found to be compatible with the Constitution in the specific constitutional legal meaning provided for in the judgement of the Constitutional Court;
- 2 contested acts in full and 168 contested provisions of contested legal acts were found to be incompatible with the Constitution and invalid.

The Constitutional Court has adjudicated upon 43 disputes related to elections. Decisions of the respective election committees or the results of elections were found to be invalid in eight electoral precincts, and the results of voting were recognised as invalid in 40 voting stations.

As a result of reviewing constitutionality of about 1000 obligations assumed by the Republic of Armenia under international agreements, various provisions of five international agreements were found to be incompatible with the Constitution.

Guided by the Constitution, by the European Convention on the Protection of Human Rights and Fundamental Freedoms, and by the basic provisions enshrined in other international legal documents, referring to the international experience in the development of democracy and to the case-law of the European Court of Human Rights, having emphasised the formation and development of the necessary regulatory and legal prerequisites, having also evaluated the law-enforcement practice, the Constitutional Court in its judgements has put forward doctrinal approaches, has expressed and consistently developed the key legal positions. Based on the legal positions of the Constitutional Court of the Republic of Armenia, numerous amendments of a systemic and institutional nature have been made to legal acts.<sup>4</sup> We will also note that the previously mentioned legal

<sup>2</sup> For more details, see *Harutyunyan G. G. Guarantees of Execution of the Decisions of the Constitutional Court* (2012 report) ([www.concourt.am](http://www.concourt.am)).

<sup>3</sup> Statistical data as of 25 May 2016.

<sup>4</sup> At the same time, it is necessary to note that our country still faces many problems with the full-scale implementation of the legal consequences entailed by the judgements of the Constitutional Court, those problems being determined by the legal and constitutional culture and related, in

positions of the Constitutional Court have served as a basis for the constitutional changes in the Republic of Armenia.

We consider it necessary within the present theme to point out that the Constitutional Court within one month following the end of every year actively follows its legal obligation to publish a report on the implementation status of its rulings. The analysis of those annual reports shows that they never, even initially, were just an informative, statistical summary. By means of those reports, the Constitutional Court also carries out analysis, in which it brings into focus the problems of securing constitutional legitimacy that have been encountered in the respective year, as well as puts forward proposals for the solution of those problems, such proposals primarily being addressed to the competent authorities and officials.

Summing up the above, one can conclude that in the framework of the existing constitutional legal possibilities the judicial activism of the Constitutional Court of the Republic of Armenia is a reality. It should simultaneously be pointed out that the high level of the judicial activism of a constitutional court is, as we view it, conditioned by the presence of some necessary prerequisites, such as, in particular:

- a clear and full-scale establishment on the constitutional legislative level of the main functions of the Constitutional Court and of the powers necessary for the implementation of those functions;
- a coherent and substantiated selection of the objects of constitutional review;
- an optimal range of the subjects of constitutional justice;
- a full-scale establishment on the constitutional legislative level of the necessary functional, institutional, material, and social guarantees of the independence of the Constitutional Court.

In terms of securing the above-mentioned prerequisites, our country still has problems, the solution of which was among the targets of the constitutional reforms that resulted in the adoption of amendments<sup>5</sup> to the Constitution in a referendum on 6 December 2015.

particular, to the implementation of the legal positions of the Constitutional Court as a source of case-law, and to the implementation of the Constitutional Court's judgements on the grounds of new circumstances. The Constitutional Court has repeatedly brought these problems to notice in its judgements and in the annual reports on the implementation thereof.

<sup>5</sup> It must be mentioned that the legal regulations concerning the Constitutional Court contained in the constitutional amendments of 2015 will come into effect on the day of accession to the office of a new President of the Republic of Armenia. Until that moment, the provisions complying with the 2005 amendments to the Constitution remain in force.

Thus, the main function of the Constitutional Court – to secure the supremacy of the Constitution – has been clearly established on a constitutional level. Before the adoption of the above-mentioned constitutional regulation, this function was enshrined only in the Law on the Constitutional Court.

The procedure of the formation of the Constitutional Court has changed. As a result of the constitutional changes, the Constitutional Court is no longer formed by the President of the Republic and by the National Assembly, and, instead, it is stipulated that the judges of the Constitutional Court shall be appointed by the National Assembly by no less than three fifths of the votes of all members, three of those judges being proposed by the President of the Republic, three – by the Government, and three – by a general meeting of judges. This amendment was introduced to ensure that in a state with a parliamentary system of government a decision by the only representative body vested with a primary mandate would impart high legitimacy to the election of the judges of the Constitutional Court. It is of high importance that the Constitutional Court is composed of experienced and reputable lawyers; therefore, the minimum age and professional experience requirements have been raised. There is no doubt that a balanced composition of the Constitutional Court, a higher level of the professional experience of its judges, as well as pluralism, create effective guarantees for active and efficient functioning of the Court.

The constitutional amendments limit the term of office of a Constitutional Court judge to 12 years, without the right to re-election. This amendment is presented as being a step aimed at strengthening the independence of the judges of the Constitutional Court, which also gives way to a generational change and a change of ideology. This also creates career prospects for the judges of general jurisdiction courts, thus contributing to the development of a healthy competition among judges.

Pursuant to the new constitutional provisions, the President and the Deputy President of the Constitutional Court shall be elected by the judges of the Constitutional Court for the period of six years without the right to re-election. This makes it possible for different judges to hold these offices and prevents the possibility of their superiority over other judges. Limiting the term of office creates the possibility of an additional stimulus for the judges, thus contributing to the activeness and efficiency of their work.

There is another fundamental change. As an important step in securing judicial independence, the procedure for termination of powers of a judge of the Constitutional Court has been revised, and, as a result, according to the Constitution the decision-making on this matter is left to the Constitutional Court. Before this constitutional regulation, this matter was within

the competence of the body that had appointed the respective member of the Constitutional Court.

Some key constitutional changes have taken place also with regard to the powers of the Constitutional Court, resulting in the expansion of the range of objects of constitutional review. In particular, the Constitutional Court has for the first time been given the authority to settle disputes between the constitutional bodies in relation to their constitutional powers. This allows settling, by legal means, the constitutional disputes that emerge between the National Assembly, the Government, the President of the Republic, the municipal bodies, and the Supreme Judicial Council (the latter is a new independent state body that guarantees the independence of courts and judges).

The Constitutional Court has been given the authority to determine, in accordance with the established procedure, whether draft constitutional amendments and draft legal acts to be adopted in a referendum comply with the Constitution – before the adoption of the respective amendments or acts. One more effective guarantee of preliminary constitutional review has been established: the Constitutional Court has been given a possibility to determine, in accordance with the established procedure, constitutionality of a law adopted by the National Assembly before the respective law is signed by the President of the Republic.

As concerns individual complaints, the constitutional amendments have eliminated the unnatural situation of the Constitutional Court being limited solely to the review of constitutionality of laws. In accordance with the new constitutional regulation, the Constitutional Court has been authorised, in accordance with the established procedure, to review the constitutionality of any normative act that infringes upon the fundamental human rights and freedoms. Moreover, the provision according to which the Constitutional Court, when determining constitutionality of such regulatory acts, shall also take into account the interpretations given to the respective provision in law-enforcement practice, has been raised up to the constitutional level. Needless to say that these changes have significantly expanded the framework of the institute of individual constitutional complaint.

We believe that the above-mentioned constitutional amendments create powerful prerequisites for the effective exercise of judicial activism of the Constitutional Court. Those amendments have been a top-priority and necessary step. However, a comprehensive legislative implementation of the new constitutional regulations and a full-scale implementation of the new constitutional legal solutions is not insignificant, either. Everything is still ahead. As a conclusion from all of the above, it is safe to say that the judicial activism of the Constitutional Court really serves its purposes, which are to effectively

secure the supremacy of the Constitution, to ensure the constitutional balance in the separation of powers, and to guarantee the protection of human rights and freedoms enshrined in the Constitution.

Best of luck in the Conference, and thank you for attention!



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## **The regulatory role of judicial activism. The experience of the Constitutional Court of Romania – an ongoing evolution**

### **Abstract**

The aim of this paper is to point out the experience of the Constitutional Court of Romania in terms of judicial activism and to support its factual necessity *vis-a-vis* the constitutional courts in order to enforce the principle of supremacy of the Constitution. The selected and analysed decisions focus on the relation of the Constitutional Court to the legislative and judiciary, on the way in which the Court regulates their activity through constitutional interpretation and on the necessity of extend and strengthen the normative content of the Constitution by incorporating certain international obligations that derives from international treaties – concluded especially in the field of human rights protection – without affecting the national constitutional identity. It is also emphasized that there is a thick borderline between judicial activism and infringement of other state authorities' competencies.

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At the beginning of a constitutional court's activity, there are inherent difficulties for its institutional legitimization; however, the confirmation of attainment thereof is a matter of time if the court has an active approach towards

its role to guarantee the supremacy of the Constitution. Of course, for this purpose the court has to be endowed with powers that ensure the undiluted fulfilment of its role (therefore, an exterior condition unrelated to the court's behaviour), while the Court has to exercise its powers under a strict scrutiny, aspect that is linked to the inner behaviour of the Court and its members. In this context, in order to label a constitutional court as promoting judicial activism or judicial self-restraint, we have to define the two concepts that are quite new in the Romanian legal philosophy. In a previous study we used and developed these concepts when analysing the relationship between the constitutional court and the judiciary<sup>1</sup>, emphasizing that they designate the degree of involvement of the Constitutional Court in providing guidance and ensure that courts conduct their activity in line with the requirements of the Constitution whereas the monopoly of judicial interpretation of the Constitution belongs to the Constitutional Court. In terms of the Constitutional Court's approach, it is obvious that the two concepts are equally applicable to Parliament or Government. But, the intensity of this dialogue depends, crucially, on the one hand, on the position, role, powers, effects of decisions and institutional legitimacy of the Constitutional Court, criteria which we described as objective, and, on the other hand, on its composition, as well as on the political, economic and social realities at a given time, criteria which we described as subjective. It may seem that there should be no room for judicial activism, but only for a normal exercise of the constitutional review, a task that is inherent to any constitutional court's activity; this would be a genuine assertion only if there is an abstract way of tackling this issue. But reality is not governed by abstract notions and this is a reason why a normal exercise of a given competence should be regarded in certain circumstances as a judicial activism. When there is (a) a change of constitutional case law in a certain respect, (b) a constitutional struggle with other branches of powers in order to change their long established administrative/ judicial practice or (c) an evolving interpretation of the Constitution, we can assert that there is a high degree of constitutional implication in shaping the future political and legal evolution of the society; and that is judicial activism.

In order to analyse the Romanian experience, it should be borne in mind that, in our institutional landscape, the Constitutional Court is a relatively new

<sup>1</sup> Puskás V. Z., Benke K. - *Implications of the decisions of the Constitutional Court on the activity of the High Court of Cassation and Justice and of the Superior Council of Magistracy in the Constitutional Court Bulletin no.2/2014*, p.7-32.

authority<sup>2</sup>, whereas it has been established under the 1991 Constitution<sup>3</sup>. Moreover, what is currently the most important and specific power of the constitutional court – the constitutional review of laws – used to be exercised by courts of law both during the period up to the beginning of the Communist regime [1911-1945], and in the aftermath of the 1989 Revolution, when the plenary of the Supreme Court of Justice, by four judgements delivered on 14 January 1991, therefore prior to the adoption of the Constitution, held that it alone was empowered to rule on the constitutionality of laws upon referral by the General Prosecutor of Romania<sup>4</sup>. After the 1991 Constitution, the plenary of the court lost the power – established by case-law – to verify the constitutionality of laws, and such has been transferred to the Constitutional Court.

In what follows, we will present a concise image: (1) on the manner in which the Constitutional Court of Romania preserved and consolidated its powers vis-à-vis the attempts of the Parliament and Government to limit them; (2) on the manner in which the Constitutional Court strengthened its position in relation to the judiciary; and (3) on the Court's approach as to the interpretation of the Constitution taking into account the requirements of the international treaties ratified by Romania and the mandatory acts of the European Union.

<sup>2</sup> In drafting the Constitution, there were also opinions that the American review of constitutionality of laws should have been adopted, as it was considered excessive to set up a body which could control all three powers. Furthermore, there was also the view that the verification of the constitutionality of laws should be a competence solely of the Supreme Court of Justice, in Joint Sections, and the a priori review be carried out by a Committee of the two Chambers of Parliament; for details, see, I. Vida – *Bătălia pentru Curtea Constituțională* (The battle for the Constitutional Court – t.n.) in *Despre Constituție și Constituționalism – Liber Amicorum Ioan Muraru* (About Constitution and Constitutionalism – Liber Amicorum Ioan Muraru – t.n.), Hamangiu Publishing House, Bucharest, 2006, p. 235-248, especially p. 244 and p. 246.

<sup>3</sup> See, also, Law no.47/1992 on the organization and functioning of the Constitutional Court, published in the Official Gazette of Romania, Part I, no.101 of 22 May 1992, successively republished in the Official Gazette of Romania, Part I, no.187 of 7 August 1997, the Official Gazette of Romania, Part I, no.643 of 16 July 2004, and the Official Gazette of Romania, Part I, no.807 of 3 December 2010.

<sup>4</sup> The Court held that the means made available to the judiciary for the control of the executive and the legislative are the administrative litigations procedure and the constitutional litigations procedure; in the case of the constitutional litigations procedure, the jurisdiction belongs to Plenum of the Court upon referral by the prosecutor-general; in this case, the Plenum of Court had been referred to by a court of law in October 1990 with reference to the unconstitutionality of the Grand National Assembly Decree no.92/1950 for the nationalisation of some buildings, published in Official Bulletin no.36 of 20 April 1950, which has also led to the dismissal of the application as inadmissible for the reason that the Plenum had not been properly notified; see, for details, M. Criste – *Controlul constituționalității legilor în România – aspecte istorice și instituționale* (The constitutional review of laws in Romania – historical and institutional aspects – t.n.), Lumina Lex Publishing House, Bucharest, 1992, p. 70-76

Therefore, there are three types of situations that need to be analysed in terms of the judicial activism promoted by the Court, as follows:

- 1) Judicial activism of the Constitutional Court leads to an *ex post* reaction of the legislative authority to limit its powers;
- 2) Judicial activism of the Constitutional Court broadens the sphere of constitutional review as to include legal norms in the interpretation given by means of decisions delivered for the uniform interpretation and application of the laws or by means of a consolidated case law;
- 3) Judicial activism of the Constitutional Court constitutionalizes, in certain circumstances, the obligations arising from the international treaties on human rights or from the EU law, all these becoming either standard of reference or standard on interpretation interposed to the Constitution.

### **1. Judicial activism and the reaction of the legislative authority**

We will take into account the broad sense of the term “legislative authority” as to designate in what follows both Parliament and the Government when the latter acts as a delegate legislator. It has to be pointed out that in the Romanian constitutional system the Government has the competence to adopt legislative acts that – after their enactment – are subject to a parliamentary procedure that may lead to their approval or rejection [Article 115 of the Constitution].

The powers of the Constitutional Court are enshrined in the Constitution [Article 146 a-k)], but a provision of the Constitution [Article 146 l)] stipulates that other powers may be provided in the Court’s organic law. On this constitutional basis, the Parliament adopted Law no.177/2010<sup>5</sup> according to which the Constitutional Court adjudicates on the constitutionality of the resolutions by the Plenary of the Chamber of Deputies, resolutions by the Plenary of the Senate and resolutions by the Plenary of the joint Chambers of Parliament<sup>6</sup>. After the enactment of the aforementioned law, 40 senators contested its constitutionality before the Constitutional Court in an *a priori* constitutional review, but the challenge was dismissed by the Court<sup>7</sup>. The activism promoted

<sup>5</sup> Law no.177/2010 amending and supplementing Law no.47/1992 on the Organisation and Operation of the Constitutional Court, the Civil Procedure Code and the Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no.672 of 4 October 2010.

<sup>6</sup> In the Romanian legal system, such resolutions may concern the vote of confidence/ no confidence adopted by the Parliament, the appointment/ removal of certain high ranking public officials etc.

<sup>7</sup> Decision no.1106 of 22 September 2010, published in the Official Gazette of Romania, Part I, no.672 of 4 October 2010.

by the Constitutional Court when exercising this power prompted the governing political parties’ representatives to fiercely challenge its normative existence<sup>8</sup>. As a result, initially the Parliament and then the Government tried to abolish it by adopting a law<sup>9</sup>/ an emergency ordinance<sup>10</sup> to that purpose and having failed in this endeavour, the Parliament tried to limit the Court’s discretion in exercising this power<sup>11</sup>.

By Decision no.727 of 9 July 2012<sup>12</sup>, the Constitutional Court stated that the legislative amendment, which abolishes the power of the Constitutional Court to rule on the constitutionality of the resolutions by the Plenary of the Chamber of Deputies, the resolutions by the Plenary of the Senate and the resolutions by the Plenary of the two Joint Chambers of Parliament, without any distinction, does nothing but to diminish the authority of the Constitutional Court – a fundamental institution of the State, and to infringe, thus, the principle of the rule of law, leading to unforeseeable difficulties in achieving an appropriate State policy aimed to consolidate and build a democratic State in which the Constitution, its supremacy and the laws are mandatory. In these circumstances, the Court noted that the democratic and social State based on the rule of law should not remain a fundamental principle, with purely theoretical nuances, without any practical results, but it must become a reality, properly perceived, both by public authorities and by citizens.

The Court also pointed out that exclusion from constitutional review of all the resolutions of the Parliament is not based on the rule of law but, possibly, on grounds of necessity, which, by nature, involves subjectivity, interpretation and arbitrary. However, constitutional justice is based on the rule of law, not on necessity. The Court emphasized that the exercise of this power cannot mean an “excessive” burden for the Constitutional Court, as stated in the explanatory memorandum to the law subject to review, a claim without legal significance, whereas it is inextricably integrated, once legitimately given, into a legal

<sup>8</sup> For an extensive study on this topic, see Puskás V. Z. – *Rolul Curții Constituționale în consolidarea statului de drept (The Role of the Constitutional Court in Enhancing the Rule of Law)* in the volume *Repere actuale din jurisprudența Curții Constituționale a României și perspective de justiție europeană (Current Benchmarks in the Constitutional Court of Romania Case-Law and Perspectives of European Justice)*, Sitech Publishing House, Craiova, 2012.

<sup>9</sup> The law was adopted on the 25th of June 2012 and immediately challenged before the Constitutional Court.

<sup>10</sup> Emergency Ordinance no.38/2012 amending Law no.47/1992 on the Organisation and Operation of the Constitutional Court, legislative act published in the Official Gazette of Romania, Part I, no.445 of 4 July 2012.

<sup>11</sup> Law for the approval of Emergency Ordinance no.38/2012, law adopted on the 18th of July 2012.

<sup>12</sup> Published in the Official Gazette of Romania, Part I, no.477 of 12 July 2012.

mechanism likely to contribute to the separation and balance of powers in a democratic and social State governed by the rule of law. To assess and decide on the activity of the Constitutional Court, especially in terms of quantitative standards, is to incorrectly perceive it and furthermore, to ignore the substance of its fundamental role.

The Court concluded that the purpose of the rule of reference comprised in Article 146 l) of the Constitution, as results from its wording – “it also fulfils other prerogatives as provided by the Court’s organic law”, was to allow the legislator to extend the powers of the Constitutional Court. Therefore, to interpret the mentioned fundamental rule in that the legislator would be able to limit, abolish or reduce these powers, at the expense of other fundamental provisions, amounts to emptying it of its contents, respectively to divert it from the purpose to improve constitutional democracy, pursued by the framers themselves during the revision, which is absolutely unacceptable. Therefore, the powers of the Constitutional Court provided under Article 146 l) of the Basic Law cannot be changed if such results in abolishing, under any conditions and in breach of certain fundamental rules, any of these powers. In this regard, even if the power to review the constitutionality of the resolutions issued by Parliament was granted to the Constitutional Court by means of its organic law, it acquired a constitutional nature under the provisions of Article 146 l) of the Constitution.

As a consequence, the Court held that the legislative solution which exempts from constitutional review Parliament Resolutions that infringe upon constitutional principles and values was unconstitutional<sup>13</sup>.

It has to be mentioned that the Court struck down the legislative solution – so, not only the law that was under *a priori* constitutional review and that was not in force at that moment, but also the emergency ordinance adopted by the Government whilst the case was pending before the Court, emergency ordinance which contained the same solution abolishing the aforementioned power of the constitutional court. As an effect of the Court’s decision, the said emergency ordinance should have been rejected by the Parliament.

<sup>13</sup> In Decision no.799 of 17 June 2011, published in the Official Gazette of Romania, Part I, no.440 of 23 June 2011, and Decision no.80 of 14 February 2014, published in the Official Gazette of Romania, Part I, no.246 of 7 April 2014, delivered on two legislative proposals concerning the revision of the Constitution of Romania [art.146 a) 2<sup>nd</sup> thesis of the Constitution], the Court stated that article 146 l) of the Constitution can be repealed by way of constitutional amendment only if the power of the Constitutional Court to review the constitutionality of the resolutions by the Plenary of the Chamber of Deputies, resolutions by the Plenary of the Senate and resolutions by the Plenary of the joint Chambers of Parliament is enshrined in the Constitution. Otherwise a simple repeal of Article 146 l) of the Constitution violates the provisions of Article 152 of the Constitution - *The limits on matters of revision*.

But, instead of rejecting the emergency ordinance, the Parliament approved it with amendments and it only limited the Court’s competence in respect of the aforementioned power<sup>14</sup>. However, in an *a priori* constitutional review the Court declared unconstitutional the enacted approval law, because it limited in an unconstitutional manner the plenary jurisdiction of the Court in exercising the constitutional review of the parliamentary resolutions<sup>15</sup>.

After this constitutional struggle, the Constitutional Court’s power conferred by Law no.177/2010 has still a normative existence, and there have been no other legislative attempts to abolish/ restrict it. We may assert the constitutional review of parliamentary resolutions has now become a standard democratic exercise. As a matter of fact, since September 2012, the Court has delivered 19 decisions on the constitutionality of parliamentary resolutions. In conclusion, it is obvious that the dynamic interpretation of the Constitution was the paramount ground that preserved unaltered the Constitutional Court’s competence.

Another decision that worth to be mentioned in this context is Decision no.766 of 15 June 2011<sup>16</sup>. Through that decision, the Court extended its jurisdiction, considering itself competent to exercise the constitutional review of normative acts that are no longer in force, but which continue to produce effects in concrete judicial cases. It has to be emphasized that the respective decision represented a turning point in the Court’s practice as until 2011 the Court itself had established that was not competent to verify the constitutionality of the normative acts that were no longer in force. This self-restraint approach was left behind and since 2011 the Court deemed itself competent to verify the constitutionality of all normative acts regardless whether they are in force or not.

## **2. Judicial activism in relation to the judiciary**

The legislature has regulated, in both civil and criminal matters, two legal concepts that can give expression to Article 126 (3) of the Constitution, under which “The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence”. These concepts regard the decisions delivered in an appeal in the interest of the law and the preliminary rulings on questions of law.

<sup>14</sup> According to the adopted law, the Court would not be any more competent to verify the constitutionality of the decisions that concerned the internal autonomy of the Parliament and the individual decisions adopted *intuitu personae* by the Parliament.

<sup>15</sup> Decision no.738 of 19 September 2012, published in the Official Gazette of Romania, Part I, no.690 of 8 October 2012.

<sup>16</sup> Published in the Official Gazette of Romania, Part I, no.549 of 3 August 2011.

In its case law, the Constitutional Court stated that “the mandatory nature of the solutions given on matters of law, by settling an appeal in the interest of the law, means that the judge must comply with the uniform legal interpretation given by the supreme court”<sup>17</sup>. Therefore, the Constitutional Court, by Decision no.854 of 23 June 2011<sup>18</sup>, deemed itself competent to verify the constitutionality of Article 394 of the Criminal Procedure Code of 1968, as interpreted by Decision no.LX/2007 pronounced by the Joint Sections of the High Court of Cassation and Justice following the settling of an appeal in the interest of the law lodged by the General Prosecutor of Romania<sup>19</sup>. Furthermore, in order to be able to rule on the constitutionality of the rule thus interpreted, it has already become an exercise in the case-law of the Constitutional Court to verify whether or not the High Court of Cassation and Justice, by the interpretation given, falls within the limits of Article 126 (3) of the Constitution<sup>20</sup>, in the sense that the Constitutional Court first establishes whether or not the interpretation of the High Court of Cassation and Justice constitutes an interference in the competence of the legislative power and, subsequently, the Court determines whether or not the text thus interpreted is constitutional in substance, respectively whether or not it complies with the provisions of the Constitution<sup>21</sup>.

By Decision no.854 of 23 June 2011, the Court held that “the fact that by a decision handed down in an appeal in the interest of the law a certain interpretation is given to a legal text is not likely to be converted into a bar to the proceedings forcing the Court, despite its role as guarantor of

<sup>17</sup> See, in this regard, Decision no.8 of 18 January 2011, published in the Official Gazette of Romania, Part I, no.186 of 17 March 2011.

<sup>18</sup> Published in the Official Gazette of Romania, Part I, no.672 of 21 September 2011.

<sup>19</sup> By Decision no.854 of 23 June 2011, the Court, stating that it has no jurisdiction to give a ruling on the decision of the High Court of Cassation and Justice as an act, but that it may rule on the primary regulatory act as interpreted by it, gave the signs of returning to its case-law established by Decision no.409 of 4 November 2003, published in the Official Gazette of Romania, Part I, no.848 of 27 November 2003. It thus continued what it had started with Decision no.8 of 18 January 2011, published in the Official Gazette of Romania, Part I, no.186 of 17 March 2011, by which it considered the constitutionality of Article 35 of Law no.33/1994 in the mandatory interpretation imposed by Decision no.53/2007 of the Joint Sections of the High Court of Cassation and Justice. It is worth noting that it did not retain this mentioning in the title and in the operative part of the decision, but it stated it in the recitals of the decision.

<sup>20</sup> See Decision no.349 of 17 June 2014, published in the Official Gazette of Romania Part I, no.582 of 4 August 2014.

<sup>21</sup> By Decision no.898 of 30 June 2011, published in the Official Gazette of Romania, Part I, no.706 of 6 October 2011, the Court held that the Decision of the High Court of Cassation and Justice no.3 of 4 April 2011 concerning the salaries of teaching staff, „is far from constituting an interference in the competences of the legislative power, as it constitutes a correct implementation of the Constitutional Court’s decisions handed down in matters related to the salaries of teaching staff”.

the supremacy of the Constitution, to stop examining the text in question in the interpretation given by the supreme court. The Constitution is the framework and the extent to which the legislature and the other authorities can act; therefore, all interpretations in relation to the legal rule should take account of this constitutional requirement contained in Article 1 (5) of the Basic Law, which provides that, in Romania, the observance of the Constitution and its supremacy is mandatory”. Therefore, the Constitutional Court “verifies the constitutionality of the applicable legal texts in the interpretation enshrined by the appeals in the interest of the law. To accept the contrary view is contrary to the very reason for existence of the Constitutional Court, which would thus deny its constitutional role by accepting that a legal text can apply within limits that could collide with the Basic Law”.

Accordingly, the High Court of Cassation and Justice has the jurisdiction to interpret and apply a legal provision within the limits set by the Constitution, and this competence cannot be exercised in breach of the constitutional framework and, as described above, by infringing the competence of the legislature or even the case-law of the Constitutional Court.

In this context, it is worth mentioning the Decision of the High Court of Cassation and Justice no.8 of 18 October 2010<sup>22</sup>, delivered in an appeal in the interest of the law, by which it was held that after the repeal of the provisions of Articles 205 to 207 of the Criminal Code, by Article I (56) of Law no.278/2006 amending and supplementing the Criminal Code and other laws, “insult and slander have not been re-incriminated”, although the Constitutional Court had previously assessed, by Decision no.62 of 18 January 2007<sup>23</sup>, that the repealing provisions found to be unconstitutional “cease their legal effects under the conditions laid down in Article 147 (1) of the Constitution and the legal provisions subject to repeal shall continue to produce their effects”. It was evident that the High Court of Cassation and Justice had exceeded its constitutional competence of uniform interpretation of the law, annulling the Constitutional Court Decision no.62 of 18 January 2007. Subsequently, the Constitutional Court, by Decision no.206 of 29 April 2013<sup>24</sup>, held that ‘the solution given on the matters of law examined’ by the Decision of the High Court of Cassation and Justice – Joint Sections no.8 of 18 October 2010, published in Official Gazette of Romania, Part I, no.416 of 14 June 2011 is unconstitutional, being contrary to the provisions of Article 1 (3), (4) and (5), Article 126 (3), Article 142 (1) and Article 147 (1) and (4) of the Constitution and to the Constitutional Court

<sup>22</sup> Published in the Official Gazette of Romania, Part I, no.416 of 16 June 2011.

<sup>23</sup> Published in the Official Gazette of Romania, Part I, no.104 of 12 February 2007.

<sup>24</sup> Published in the Official Gazette of Romania, Part I, no.350 of 13 June 2013.

Decision no.62 of 18 January 2007, published in Official Gazette of Romania, Part I, no.104 of 12 February 2007.

This latter decision shows that, indirectly, through the texts in the Code of Civil Procedure or the Code of Criminal Procedure, where appropriate, one can even challenge, in terms of their constitutionality, the decisions delivered by the High Court of Cassation and Justice in settling appeals in the interest of the law<sup>25</sup>. Moreover, we note that, by Decision no.799 of 17 June 2011<sup>26</sup>, the Court suggested the introduction of a new power, respectively, the power to rule on the constitutionality of the decisions handed down by the High Court of Cassation and Justice in the settlement of appeals in the interest of the law. The Court held that “the solutions rendered in the appeal in the interest of the law, binding on the courts, adopted in order to ensure the uniform interpretation and application of the law, should comply with the constitutional requirements, reason why the constitutional review thereof is necessary”.

The Court has also held that the normative content of a legal act as established in the interpretation given through a preliminary ruling on questions of law can be subject to constitutional review just as the interpretation given through an appeal in the interest of the law<sup>27</sup>.

According to the Court’s recent case law, the constitutional review may regard the normative content of a legal act as established by the systematic case law of the courts and confirmed/ accepted by the decisions of the courts of last instance<sup>28</sup>.

### **3. Judicial activism in assessing the normative content of the Constitution**

3.1. By Decision no.64 of 24 February 2015<sup>29</sup>, the Court noted that Article 41 (2) of the Constitution, enshrining the right of employees to social protection

measures, lists the components of this right, respectively the employees’ safety and health, the working conditions for women and young persons, the setting up of a minimum gross salary per economy, weekly rest periods, rest leave with pay, work performed under difficult and special conditions, training courses, as well as “other specific conditions determined by law”. The Court found that the intention of the legislature, by reference to “other specific conditions determined by law” in view of establishing the regulatory scope of the right, was to allow it to be shaped and structured in a dynamic way, in order to adapt it to the new economic or social realities occurred in the evolution of society.

The Court, in order to configure the fundamental right to social protection of labour, in addition to its components specifically listed by the constitutional text, held under Articles 11 and 20 of the Constitution that the citizens’ rights and freedoms shall be interpreted in conformity with the international treaties to which Romania is a party, and the legislature implicitly imposed as level of constitutional protection of fundamental rights and freedoms at least the one provided by the international documents. In this context, the regulation of a measure of social protection of labour in an international treaty, in conjunction with its social importance and magnitude, results in conferring a right or freedom provided by the Constitution of an interpretation consistent with the international treaty, in other words an interpretation that develops in an evolving manner the constitutional concept. Therefore, the Court, having regard to the provisions of Part I points 21 and 29 of the revised European Social Charter, held that the right to social protection of labour comprises as components the information and consultation of employees, being thus integrated to the normative content of the fundamental right mentioned above.

As a consequence, the Court assessed that Article 41 (2) of the Constitution, in addition to the essential components of the right to social protection of labour specifically mentioned in the Constitution, implicitly allows the possibility of constitutionalisation by way of the Constitutional Court’s case-law of the measures of social protection of labour covered by international treaties, and of the measures provided by law as a result of international obligations assumed by the Romanian State or of the need to regulate measures with a particular social and economic impact. It follows that the information and consultation of employees are components of the right to measures of social protection of labour with constitutional valences, joining, by way of interpretation, those specifically mentioned in Article 41 (2) second sentence of the Constitution.

The same way of interpretation of the Constitution can be found in Decision no.2 of 4 January 2011<sup>30</sup>. That decision concerns, mainly, aspects

<sup>25</sup> For further information, see, Puskás V. Z., Benke K. - *Implications of the decisions of the Constitutional Court on the activity of the High Court of Cassation and Justice and of the Superior Council of Magistracy* in The Constitutional Court Bulletin no.2/2014, p.24.

<sup>26</sup> Published in the Official Gazette of Romania, Part I, no.440 of 23 June 2011.

<sup>27</sup> See Decision no.265 of 6 May 2014, published in the Official Gazette of Romania, Part I, no.372 of 20 May 2014, Decision no.717 of 29 October 2015, published in the Official Gazette of Romania, Part I, no.216 of 23 March 2016, or Decision no.152 of 17 March 2016, published in the Official Gazette of Romania, Part I, no.419 of 3 June 2016.

<sup>28</sup> Decision no.956 of 13 November 2012, published in the Official Gazette of Romania, Part I, no.838 of 12 December 2012, Decision no.448 of 29 October 2013, published in the Official Gazette of Romania, Part I, no.5 of 7 January 2014, or Decision no.841 of 10 December 2015, published in the Official Gazette of Romania, Part I, no.110 of 12 February 2016.

<sup>29</sup> Published in the Official Gazette of Romania, Part I, no.286 of 28 April 2015.

<sup>30</sup> Published in the Official Gazette of Romania, Part I, no.136 of 23 February 2011.

regarding the education of persons belonging to national minorities, such as the organisation of education units where all school subjects are studied in the minority language or where the Romanian language and literature is studied according to curricula and textbooks developed specifically for the respective minority. The Court considered, in its analysis, the combined application and interpretation, on the grounds of Articles 11 and 20 of the Constitution, of the provisions under Article 6 and Article 32 paragraph (3) of the Constitution<sup>31</sup> with the relevant international instruments, making extensive references to the preamble to the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by Resolution No.47/135 of 18 December 1992 of the United Nations General Assembly, the Framework Convention for the Protection of National Minorities, ratified by Law no.33/1995<sup>32</sup>, the explanatory report of the Framework Convention, as well as to the European Charter for Regional or Minority Languages, ratified by Law no.282/2007<sup>33</sup>, the latter two instruments having been developed under the auspices of the Council of Europe<sup>34</sup>. All the aforementioned international instruments refer to the special situation of persons belonging to national minorities, which requires a special conduct from the State in their respect and thus, the Court concluded that infraconstitutional normative acts must respect and develop both the constitutional requirements and those contained in international instruments to which the Romanian State is a party. In this regard, the Court found that the National Education Law - regarding the organisation of education units where all school subjects are studied in the minority language or where the Romanian language and literature is studied according to curricula and textbooks developed specifically for the respective minority - implements and develops these requirements in a manner as to enable and ensure the continuous development of the cultural identity of persons belonging to national minorities.

<sup>31</sup> Article 6 provides: „(1) *The State recognizes and guarantees for persons belonging to national minorities the right to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity.* (2) *Measures of protection taken by the Romanian State with a view to the preservation, development and expression of identity of persons belonging to national minorities must be consistent with the principles of equality and non-discrimination as to the other Romanian citizens*”. Article 32 (3) provides: „*The right of persons belonging to national minorities to learn their mother tongue, and their right to be taught in this language are guaranteed; the manner in which these rights may be exercised shall be determined by law*”

<sup>32</sup> Published in the Official Gazette of Romania, Part I, no.82 of 4 May 1995.

<sup>33</sup> Published in the Official Gazette of Romania, Part I, no.752 of 6 November 2007.

<sup>34</sup> All these international acts emphasize that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, is an integral part of the development of society as a whole and within a democratic framework.

3.2. As regards EU law, the Court observed by Decision no.64 of 24 February 2015 that the Court of Justice of the European Union, by the Judgment of 3 March 2011, in the Case C-235/2010 *David Claes and others v Landsbanki Luxembourg SA*, having regard to Article 27 of the Charter of Fundamental Rights of the European Union and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, held that the obligations of information and consultation covered by the directive must be observed irrespective that the judicial reorganization or liquidation procedure was open to the undertaking.

Concerning the application of the European Union binding acts within the constitutional review, the Court held that the use of a rule of European law within the constitutional review as rule interposed to that of reference involves, pursuant to Article 148 (2) and (4) of the Constitution of Romania, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unambiguous by itself or its meaning should have been established in a clear, precise and unambiguous manner by the Court of Justice of the European Union and, on the other hand, the rule must apply to a certain level of constitutional relevance, so that its normative content supports the possible breach by national law of the Constitution – the sole direct reference rule within the constitutional review<sup>35</sup>. The normative inconsistency between national and European Union law, where the latter has constitutional relevance, cannot be resolved only through recourse to the constitutional principle of priority of application of the European Union acts, but by ascertaining the violation of Article 148 (2) of the Constitution, a text that implicitly contains a clause of compliance of national laws with the European Union acts, and the breach of which must be sanctioned as such by the Constitutional Court. Of course, for the European Union acts that have no constitutional relevance, the power to remedy the normative inconsistency belongs to the legislature or to the courts, as appropriate.

3.3. Through a dynamic interpretation of the Constitution, the Court, taking into account Article 20 (1) of the Constitution, according to which “*The constitutional provisions relative to the citizens’ rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party*”, has constitutionalized the provisions of international treaties. The aforementioned case-law highlights that the level of protection of the fundamental rights and freedoms guaranteed by the Constitution must be at least equal to that of the international instruments to which Romania is a party, whereas, pursuant

<sup>35</sup> See also Decision no.688 of 18 May 2011, published in the Official Gazette of Romania, Part I, no.487 of 8 July 2011.

to the text of Article 20 (1) of the Constitution, the international treaties shape the content of the Constitution. Therefore, under this text, the Court, in analysing and structuring a constitutional right or freedom, is obliged to take into account and observe the provisions of the treaties to which Romania is a party, and, therefore, it can constitutionalize specific aspects arising from the provisions of such instruments<sup>36</sup>.

We notice that, by Decision no.766 of 15 June 2011 and Decision no.64 of 24 February 2015, reference is made to the concept of living law, establishing that the fundamental rights do not have an abstract existence or a fixed, immutable content, since the constitutional concepts are themselves subject to an evolving interpretative vision. Therefore, the Court highlighted that a fundamental right or freedom has an evolving meaning, without being abstract and removed from legal reality. However, this evolving meaning may not diminish the legal protection granted to it, but, on the contrary, it requires an ascending legal protection, being thus maintained a fair balance between fundamental rights that become concurrent at a given time.

The European Union binding acts cannot be considered reference rules in the constitutional review; however, they contain very important guiding principles that may be taken into account upon conducting such review. The existence of a normative contradiction between European law and national law does not automatically indicate a problem of constitutionality; such a problem only arises if the European rule concerns an issue with obvious constitutional relevance, as in the present case (Decision no.64 of 24 February 2015), where the labelling of the issue raised by the European Union act as of legal or constitutional relevance depended on how the invoked constitutional right was shaped. Furthermore, we note that the Constitutional Court has underlined the implicit existence of a constitutional clause of compliance of the infra-constitutional legislation with the European Union law, of course, to the extent that the raised problems do not concern the national constitutional identity.

The concept of national constitutional identity has been constantly emphasized by the Court in its decisions and it is perceived as a possible barrier to the implementation at national level of the obligations deriving from EU law. The content of this concept cannot be strictly and exhaustively established; however, it can be shaped according to the constitutional values that define the State and its existence; in that respect, it is worth mentioning the Christian

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<sup>36</sup> For further developments, see M-M. Pivniceru, Benke K. - *Constitutionalisation of the obligations under international treaties and European Union binding acts – Constitutional Court of Romania* in Vienna Journal on International Constitutional Law, vol.9, no.3/2015, p.455-456.

values which structure and guide the system of rights and liberties that are set forth in the Constitution<sup>37</sup>, the special protection of national minorities and/ or the *jus cogens* principles. Therefore, the national constitutional identity regards a people's profound roots.

To conclude, the judicial activism of the Romanian Constitutional Court has consolidated its institutional position in relation to the other State authorities and has allowed, through the interpretation of the Constitution, the receipt of the obligations arising from the international treaties on human rights or from the EU law – in this latter case, the Constitutional Court decisions can be perceived as an invisible Constitution, which explains and increases the normative content of the Constitution. Of course, there are also limits to judicial activism, whereas constitutional courts are not entitled to take over the competencies and responsibilities of other State branches; therefore, constitutional adjudication cannot have an *ultra vires* approach to the constitutional courts competencies enshrined in the Constitution and law.

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<sup>37</sup> See Puskás V. Z. – *Christian values in the Romanian Constitution* in The Constitutional Court Bulletin, no.2/2011, p.7-10.



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## **Reflections on judicial activism: From ownership reform to penal policy**

### **Introduction**

Several speakers at this conference have questioned the usefulness of the notion of “judicial activism”. It has been asked whether this concept is worth being dealt with by judges, given its ambiguity and negative connotations. Yet, despite the lack of any precise definition of “judicial activism”, there seems to be some broad understanding as to what this notion refers to. Therefore, I take the liberty to use it, albeit with some restraint, in the following.

The Supreme Court of Estonia (the *Riigikohus*)<sup>2</sup> can be considered as activist when measured against conventional standards deeming activist every court that strikes down a law enacted by a democratically elected parliament, i.e., whenever it effectively performs its function of constitutional review. This kind of judicial behaviour is, of course, no novelty after *Marbury v. Madison*<sup>3</sup> and is, indeed, a common feature of all modern constitutional courts.

<sup>1</sup> \* I would like to thank Ms Berit Aaviksoo, adviser to the Constitutional Review Chamber of the Estonian Supreme Court, for the invaluable help she provided for the preparation of this paper.

<sup>2</sup> Under the constitutional system of Estonia, the Supreme Court has been vested with the powers of constitutional review. The Supreme Court adjudicates constitutional review cases either at the sessions of the Constitutional Review Chamber, consisting of the members of the Administrative Law, Criminal and Civil Chambers, or sitting in plenary.

<sup>3</sup> 5 U.S. 137 (1803).

Describing judicial activism as deciding on political issues does not make things much clearer. Politics can be defined as authoritative allocation of values for a given society. The *Riigikohus* – as any other court of last resort – issues judgments which are authoritative and normative in the sense that they represent a choice between different value judgements which cannot be resolved by applying universally accepted standards of measurement.<sup>4</sup>

Furthermore, one could also argue that the views on a particular court’s position on the activism/restraint scale can be seen as depending on the position of the observer. Thus, a court’s role can be seen differently by politicians, lawyers (judges, practitioners or legal scholars), political scientists, general public, etc. Measuring this kind of “perceived activism” is no easy task. In a small country where scholarly literature on the matter is not abundant and sociological surveys generally do not go much further than measuring the reliability of various institutions, including courts, the assessment of the “perceived activism” necessarily remains somewhat speculative.

In the following, the Estonian Supreme Court’s position on the activism/restraint scale will be examined from three aspects. Firstly, regard will be had to cases where the Supreme Court has postponed the entry into force of its judgment in order to allow the *Riigikogu* (the Estonian Parliament) to enact new legislation conforming the Constitution; secondly, link between the court’s activism/restraint and the doctrine of pertinence (relevance) in concrete norm control proceedings will be looked at; thirdly, the legislator’s margin of appreciation in the context of penal policy will be touched upon.

### **Postponement of entry into force of judgments: Ownership Reform and Pharmacies**

It could be asked whether a constitutional court is perceived – particularly by the legislator – as activist when it postpones the entry into force of its judgment and invites the legislator to regulate a specific matter. On the one hand, the legislator retains the possibility to make its choices, but on the other hand, in particular as regards difficult political questions, the legislator does not necessarily appreciate its agenda being determined by a court. This is in particular so where the constitutional court also outlines the principles of the legislation to be enacted. As concerns Estonia, there are several examples where the Parliament has failed to act within the time-limits or according

<sup>4</sup> Compare R. Hodder-Williams. Six Notions of „Political” and the United States Supreme Court. – *British Journal of Political Science*, Vol 22, Issue 1 (1992), pp 2-3.

to the “guidelines” indicated by the Supreme Court. The cases concerning the Ownership Reform Act and the Medicinal Products Act serve as two of them.

For years, the ownership reform legislation enacted in the beginning of the 1990s contained a provision according to which issues related to the restoration of the property rights of persons who had resettled from Estonia to Germany in the context of the Second World War were to be resolved pursuant to an international agreement. As no such agreement was concluded, the potential claimants as well as the current tenants remained in uncertainty for years: it remained unclear whether the property in question was to be returned to the pre-war owners or could it be sold (privatised) to current tenants. The Supreme Court was called to deal with this matter on a number of occasions. It firstly found that the pertinent provision of the Ownership Reform Act was unconstitutional because of its lacking clarity. However, it refrained from invalidating it finding that such a ruling would involve making a political decision (restoration of the property to some of the pre-war owners) that was reserved to the legislator and not to the court.<sup>5</sup> It might be worth noting that pursuant to the letter of the then applicable Constitutional Review Court Procedure Act the Supreme Court did not have an option of merely declaring a norm unconstitutional in a situation like the one at issue: it should have also invalidated the pertinent norm. Indeed, a dissenting minority called for the invalidation of the pertinent provision of the Ownership Reform Act but, at the same time, for the postponement of the effect of the judgment for a period of one year, something the Constitutional Review Court Procedure Act did not provide for either. Needless to say, the Supreme Court had to revisit the matter on several occasions, as the Parliament had not adopted pertinent legislative amendments within several years to follow. Thus, having been faced with the same issue more than three years later, the Supreme Court noted that the mere finding – once more – of the unconstitutionality of the same provision of the Ownership Reform Act would not be conducive to the resolution of the situation. The Supreme Court declared the provision invalid but postponed the entry into force of its judgment for six months (the latter option was now explicitly provided for by a new Constitutional Review Court Procedure Act that had been enacted in the meantime) in order to allow the legislator to make its choices.<sup>6</sup> When in six months’ time no legislative amendments had entered into force despite the Parliament’s effort to that effect (the adopted legislation

<sup>5</sup> Judgment of the Supreme Court, case no. 3-4-1-5-02, 28.10.2002. The majority of the Supreme Court’s rulings in constitutional review cases are available in English translation at <http://www.riigikohus.ee/?id=823>.

<sup>6</sup> Judgment of the Supreme Court, case no. 3-3-1-63-05, 12.04.2006.

had been vetoed by the President of the Republic), the Supreme Court finally resolved the underlying administrative case pending before it on the basis of the general provisions of the Ownership Reform Act, the exception concerning the resettlers having lost its effect.<sup>7</sup>

The Medicinal Products Act cases serve as another example of the interplay between the Supreme Court and the Parliament. In the first of the cases the Supreme Court quashed the prohibition to establish new pharmacies in densely populated areas.<sup>8</sup> The entry into force of the judgment was postponed for six months having regard to various considerations including the fact that the Parliament was already engaged in preparing new legislation on the issue as well as the possibly adverse effects of an abrupt change in the legislation on the availability of pharmacy service in rural areas and on the freedom of pharmacists to conduct a business. The Supreme Court’s judgment in this case prompted the Parliament to adopt amendments to the Medicinal Products Act. However, these amendments, as the Supreme Court established in its follow-up judgment a year later,<sup>9</sup> had substantially same effect as the provisions that had been invalidated by the court. Having regard to that fact and considering that the legislator had had sufficient time to elaborate new rules, the Supreme Court did not postpone the entry into force of its judgment this time.

The above examples demonstrate that the initial restraint of the Supreme Court – leaving it to the Parliament to make the political choices – may lead, at times, to the need to revisit politically sensitive issues, something that would not necessarily be appreciated by the legislator and something that may give rise to claims about the court’s activism.

In Estonia parliamentary minority cannot challenge the constitutionality of a piece of legislation before the Supreme Court. There have been some calls – notably by lawyers rather than politicians – to consider extension of the list of subjects entitled to bring a case to the Supreme Court and to allow the parliamentary minority to address the Supreme Court,<sup>10</sup> but no such amendments have been enacted and at the moment there seems to exist no broadly shared understanding that such a development would be required. Nevertheless, it might be of interest to contemplate whether the Supreme Court would have been given a more activist role in the above cases if the parliamentary

<sup>7</sup> Judgment of the Supreme Court, case no. 3-3-1-63-05, 6.12.2006.

<sup>8</sup> Judgment of the Supreme Court, case no. 3-4-1-2-13, 9.12.2013.

<sup>9</sup> Judgment of the Supreme Court, case no. 3-4-1-30-14, 22.12.2014.

<sup>10</sup> See, for example, R. Maruste. Ettekanne Põhiseaduse viienda aastapäeva konverentsil [Presentation at the conference on the occasion of the fifth anniversary of the Constitution]. – *Juridica*, 1997, no 9, pp 438-440.

minority would have had the opportunity to intervene in the interplay between the legislator and the constitutional court.

### **The doctrine of pertinence: Prisoners' voting rights**

According to the doctrine of pertinence (relevance),<sup>11</sup> established in its early practice and developed by the Supreme Court over subsequent years, the constitutional review court only reviews, within concrete norm control proceedings, the constitutionality of the applicable, i.e. pertinent (relevant) Act.<sup>12</sup> The relevance, in its turn, has been defined as follows:

“The disputed provision must be of decisive importance for the resolution of the case [...]. An Act is of a decisive importance if in the case of unconstitutionality of the Act a court should render a judgment different from what it should render in the case of constitutionality of the Act.”<sup>13</sup>

The essence of that restraint is to refrain the court from answering abstract questions not pertinent to the concrete court case. Thus, it constitutes a variation of the case and controversy doctrine.

However, the scope of what is deemed to be the relevant/pertinent Act – or provision – can be construed in different ways. A recent case concerning the blanket ban on prisoners' right to vote serves as an example. The case was brought before the Supreme Court by an appellate court who had declared the provision laying down an indiscriminate ban unconstitutional. The complainants in the underlying administrative cases were two prisoners serving, respectively, more than six years' prison sentence and life imprisonment, both for several intentional crimes. The parties to the constitutional review proceedings before the Supreme Court (including the legislator having enacted the contested prohibition) agreed that the ban as such was in conflict with the Constitution. The Supreme Court, for its part, referred to the case-law of the European Court of Human Rights and asserted that it interpreted Article 57

<sup>11</sup> Under Estonia's system of constitutional review, the courts can declare, in their judgments, an Act or other legislation of general application applicable in the case to be in conflict with the Constitution and decide the case without applying it. In that instance, the court is under an obligation to turn to the Supreme Court to have the unapplied Act declared invalid and/or unconstitutional. Abstract review of legislation is entrusted to the President of the Republic (*ex ante* review) and the Chancellor of Justice (*ex post* review).

<sup>12</sup> Section 14 (2) of Estonia's Constitutional Review Court Procedure Act stipulates: “*In the adjudication of the matter on the basis of a court judgment or court ruling the Supreme Court may repeal or declare to be in conflict with the Constitution legislation of general application, an international agreement or a provision thereof or the refusal to issue an instrument of legislation of general application which is relevant to the adjudication of the matter.*”

<sup>13</sup> Judgment of the Supreme Court, case no. 3-4-1-5-02, 28.10.2002.

of the Estonian Constitution (right to vote), in the same way as the Strasbourg Court interpreted Article 3 of Protocol No. 1 to the European Convention on Human Rights. It considered that a ban according to which no person serving a prison sentence could vote in parliamentary elections was not in accordance with Article 57 of the Constitution. Nevertheless, having regard to the specific circumstances of the underlying administrative cases, it did not consider the voting ban imposed on the two persons in question to be disproportionate, given the nature of the offences committed by them. The Supreme Court's reasoning read as follows:

“Making a decision as to which offences or assessments of offences suffice for restricting the right to vote is within the competence of, above all, the legislature. The present case arises from the constitutional review proceedings initiated by a court and, thus, the matter in hand involves concrete norm control proceedings. Under [...] the Constitutional Review Court Procedure Act, the Supreme Court declares a legislative instrument or provision relevant to the court case to be unconstitutional. The Supreme Court has noted in its case-law that the purpose of concrete norm control proceedings is to serve the interests of, above all, parties to the proceedings [...] and that, within concrete norm control proceedings, the [Supreme Court] assesses the constitutionality of a provision based on the facts of the specific case [...]. Thus, the present case involves concrete norm control proceedings and in the course thereof the [Supreme Court] can only assess whether in the case of either applicant the legislature has proportionately exercised its right contained in Article 58<sup>14</sup> of the Constitution.”<sup>15</sup>

Thus, essentially, the Supreme Court held that the interference with the right to vote of the complainants in the underlying administrative case was not disproportionate owing to the gravity of crimes committed by them, and it was not for the Supreme Court to rule on the constitutionality of the ban in abstract in concrete norm control proceedings. It is noteworthy that the Supreme Court in that case exercised considerably more restraint than the European Court of Human Rights in a similar case of *Hirst v. the United Kingdom (no. 2)*.<sup>16</sup> In the latter case the Strasbourg Court found a violation of the applicant's right to vote regardless of the fact that he was a life prisoner who had committed serious crimes. It considered that it was justified in examining the compatibility with the Convention of the measure in question, without regard to the question

<sup>14</sup> Article 58 of the Constitution authorises the Parliament to enact legislation restricting the right to vote of convicted prisoners.

<sup>15</sup> Judgment of the Supreme Court, case no. 3-4-1-2-15, 1.07.2015.

<sup>16</sup> *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005 IX.

whether, had the measure been drafted differently and in a way which was compatible with the Convention, the applicant might still have been deprived of the vote. Interestingly, the dissenting minority in *Hirst* criticized the Court's finding of the British legislation incompatible with the Convention *in abstracto* whereas the Estonian Supreme Court's judgment in the *Riigikogu* Election Act case gave rise to no separate opinions.<sup>17</sup>

Thus, it could be argued that the doctrine of pertinence, besides being a rather technical conception, also serves as a tool for the Supreme Court allowing it to exercise the degree of activism or restraint it deems appropriate in a particular case.

### **The legislator's margin of discretion: Penal policy**

In 2003, the Supreme Court laid down, in *obiter dictum*, its general attitude concerning policy-making in the delicate area of shaping criminal sanctions:

“The Constitutional Review Chamber points out that the legislator has wide discretion in determining a punishment corresponding to necessary elements of an offence. Terms and rates of punishments are based on value judgments accepted by society, which the legislator is competent to express. Also, this way the Parliament can form the penal policy of State and influence criminal behaviour”.<sup>18</sup>

In the case quoted above the Supreme Court examined, at the request of a first-instance court, the constitutionality of the minimum sanction of two years' imprisonment for repeated unauthorised use of other person's property. The first-instance court had found that there were no such particular circumstances related to the *offence* which would have allowed the court to impose a sanction below the minimum term foreseen for the offence in question. However, the two years' imprisonment amounted to a disproportionate restriction of the accused's right to liberty in the eyes of the trial court. The Supreme Court came to a different conclusion considering that the applicable general provisions of the Penal Code also allowed to take into account particular circumstances related to the accused's *person* in determining whether a sanction under the minimum term could be meted out. As the requesting court had not established the relevant facts or analysed that matter, and the Supreme Court was not authorised to establish facts, it dismissed the request by the first-instance court and declined to declare unconstitutional the minimum sanction in question.

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<sup>17</sup> The result of the vote is not indicated in the Supreme Court's rulings, therefore it cannot be concluded from the absence of separate opinions that the Supreme Court was unanimous.

<sup>18</sup> Judgment of the Supreme Court, case no. 3-4-1-9-03, 25.11.2003.

Twelve years later, the Supreme Court was again faced with issue of the constitutionality of a minimum sanction the Penal Code foresaw for an offence. The case concerned six years' minimum term of punishment for commission of an act of sexual nature with a child younger than ten years of age without the use of violence. The Supreme Court scrutinised whether the lower courts had thoroughly analysed if the general provisions of the Penal Code allowed to mete out a sanction below the minimum rate foreseen for that offence. This time it was satisfied that the courts had established that in the underlying criminal case no such circumstances – related either to the *offence* or the accused's *person* – existed. The Supreme Court found that an abstract possibility to go below the minimum sanction had no bearing on its constitutionality in such circumstances.

Referring to its earlier practice, the Supreme Court reiterated:

“The introduction of penal sanctions belongs to the exclusive competence of the legislator and in the determination of the punishment corresponding to the offence (the frames of a penalty), the legislator has a wide margin of appreciation. The penalty rates are based on values accepted in a given society, the expression of which belongs to the competence of the legislative power. Also, this way the parliament can shape penal policy and influence criminal behaviour [...]. The separation of powers principle implies that the courts must not replace the legislator in shaping the system of penalties proceeding from abstract aims of penal policy.”<sup>19</sup>

However, it went on saying that the legislator's wide margin of appreciation did not preclude the power of courts to assess the provision of criminal law, including the compatibility of the sanction with the Constitution, and – after having concurred with the opinion of the *Riigikogu* that sexual offences committed against children were grave in nature, and that offences of that kind were a societal problem in case of which severe penalties to protect the rights and freedoms of other people were justified – declared the minimum sanction of six years for the type of offence in question unconstitutional. The Supreme Court noted that the legislator had essentially equalized the offence in question with manslaughter by enacting penalties of the same minimum rate for both of them. It considered that in the case at hand the interference with the right to liberty of the offender was “manifestly disproportionate” since it did not correspond to the extent of the “non-justice” of the offence.

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<sup>19</sup> Judgment of the Supreme Court, case no. 4-1-13-15, 23.09.2015.

**Instead of a conclusion**

It is said that a picture is worth a thousand words. While the measurement of the activism/restraint of a constitutional court in general inevitably remains somewhat speculative, the above pictures depict some techniques used by the Estonian Supreme Court which I believe to be also relevant in the context of the activism/restraint discussion. However, be it the postponement of entry into force of the judgments, the doctrine of pertinence or the legislator's margin of appreciation – none of the elements touched upon above firmly points to a particular direction on the activism/restraint scale. Rather, it would seem that the same techniques can be used for achieving results deemed appropriate in the circumstances of particular cases before the court.