Contents

It is hard to believe that twenty years have passed since the establishment of the Constitutional Court of the Republic of Latvia.

The path towards establishing the Constitutional Court and its further development was far from being a bed of roses. Paragraph 6 of the Declaration of 4 May 1990 "On the Restoration of Independence of the Republic of Latvia" provided that "in cases of disputes, the issues regarding the application of normative acts shall be resolved by the Constitutional Court of the Republic of Latvia", but nevertheless pursuant to the law "On Judicial Power", adopted in December 1992, initially the Supreme Court was entrusted with the functions of constitutional review. This situation changed in 1994, when a draft law on amendments to the Constitution of the Republic of Latvia was submitted to the Saeima. This draft law envisaged establishing the Constitutional Court of the Republic of Latvia, defined the status and jurisdiction of the Court, as well as the procedure for establishing the Constitutional Court. At the same time a draft law that defined the procedure of constitutional legal proceedings and draft amendments to the law "On Judicial Power" were submitted. During the term of the fifth Saeima all these draft laws were reviewed up to the third reading, however, because of an organised obstruction by some political forces the repeated attempts to adopt amendments to the Constitution of the Republic of Latvia and to enshrine the constitutional status of the Constitutional Court failed, as it turned out to be impossible to ensure the quorum at the parliamentary sittings – two thirds of the number of the members of the Parliament. The reason why it was impossible to adopt the draft laws required to establish the constitutional court was the fact that the election of the sixth Saeima was approaching and the politicians hoped that after the election the balance of power

in the Saeima would change. Thus, the sixth Saeima examined the respective draft laws from the start and only in June 1996 these laws were adopted and entered into force.

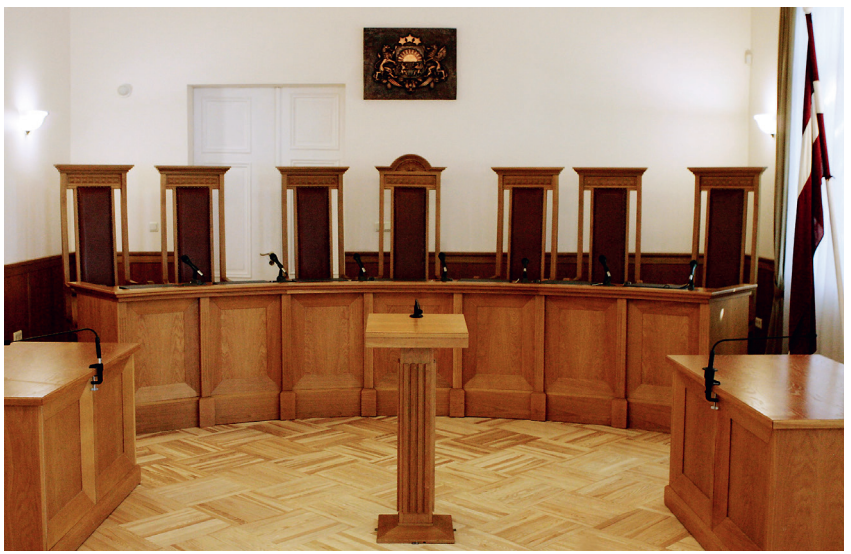
The Constitutional Court of the Republic of Latvia commenced its work on 9 December 1996 with an incomplete bench, consisting of six judges. It waited for almost three and a half years for the seventh judge. The provision of premises and the necessary equipment for the Constitutional Court also turned out to be a problem.

In creating the Constitutional Court lots of attention was paid to selection of the judges' assistants and advisors to the Court. The fact that more than six judges' assistants over these years have become doctors of legal science, but Ms. Daiga Rezevska has become not only a doctor of science and a professor, but also a judge of the Constitutional Court, proves that this was and continues to be the right approach.

Despite the government-initiated attempts to abolish the Constitutional Court in 1999, the Constitutional Court has been and still is held in a very high regard by the society. The Constitutional Court is a real and effective guarantor and guardian of human rights, democracy and the rule of law. It has achieved recognisability for itself among other constitutional courts not only in Europe, but also globally. The judges and specialists of the Constitutional Court are often invited to assist other countries as experts in solving acute problems and to share their experience. The practice of the Constitutional Court to organise an annual scientific practical conference dedicated to a particular problem of constitutional legal proceedings is commendable, as it promotes very useful and valuable sharing of experience and opinions.

The first President of the Constitutional Court of the Republic of Latvia
Prof. Dr.iur. Aivars Endziņš

I
Constitutional Court
1996-2016



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The Most Important Events in the History of the Constitutional Court of the Republic of Latvia

1996

5 June

Amendments to Article 85 of the Constitution of the Republic of Latvia adopted, providing that the Constitutional Court exists in the Republic of Latvia (entered into force on 26.06.1996).

The Constitutional Court Law adopted (entered into force on 28.06.1996.).

11 December

The Constitutional Court of the Republic of Latvia convenes for its first sitting, at which Aivars Endziņš is elected the acting President of the Constitutional Court of the Republic of Latvia (on 08.06.2000 elected the President, re-elected on 06.06.2003 and 06.06.2006, headed the Court until 31.01.2007).

9 December

Aivars Endziņš, Romāns Apsītis, Anita Ušacka and Ilma Čepāne give the Justice's oath and enter into office.

Justices Andrejs Lepse and Ilze Skultāne enter into office.

The day of establishing the Constitutional Court of the Republic of Latvia.

1997

21 April

The Rules of Procedure of the Constitutional Court of the Republic of Latvia are adopted and enter into force, defining the structure and organisation of work of the Constitutional Court of the Republic of Latvia.

7 May

The Constitutional Court of the Republic of Latvia pronounces its first judgement [Case No. 04-01 (97) regarding the purchase price of electricity]. The Court refers to general principles of law.

3 July

International seminar "On the Activities of the Constitutional Court of the Republic of Latvia", organised by the Constitutional Court of the Republic of Latvia and the Council of Europe Commission for Democracy through Law (the Venice Commission) in co-operation with the U.S. Agency for International Development.

28 April

The Constitutional Court of the Republic of Latvia hears its first case [No. 04-01 (97)].

13 June

The Constitutional Court of the Republic of Latvia for the first time terminates legal proceedings in a case [Case No. 04-03 (97)].

24 September

The first amendments to the Constitutional Court Law enter into force, expanding the circle of those subjects, who have the right to turn to the Constitutional Court of the Republic of Latvia.

1998

30 April

Judgement by the Constitutional Court of the Republic of Latvia in case No. 09-02 (98) on coercive expropriation of immoveable property. The Court for the first time refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6 November

Amendments to the Constitution of the Republic of Latvia enter into force, supplementing it with Chapter VIII "Fundamental Human Rights".

1999

5 March

The President of the State Guntis Ulmanis opens the new building of the Constitutional Court of the Republic of Latvia at 1 Jura Alunāna Street.

1 October

Latvia Judgement by the Constitutional Court of the Republic of Latvia in case No. 03-05 (99) on Telecommunications Tariffs Council. The Court for the first time refers to the principle of separation of powers.

17–20 May

The Constitutional Court of the Republic of Latvia participates at XI Congress of the Conference of European Constitutional Courts "The Constitutional Jurisprudence on Freedom of Conscience and Religion", during which the Constitutional Court of the Republic of Latvia was approved as the associate member of the Conference of European Constitutional Courts (Warsaw, Poland).

2000

25–26 February

International seminar on the draft law "Amendments to the Constitutional Court Law", elaborated by the Constitutional Court of the Republic of Latvia , organised by the Constitutional Court of the Republic of Latvia and the Council of Europe Commission for Democracy through Law (the Venice Commission).

8 June

Juris Jelāgins gives the Justice's oath and enters into office.

Romāns Apsītis elected as the Vice-president of the Constitutional Court of the Republic of Latvia (re-elected on 06.06.2003, served as the Vice-president until 06.06.2006).

22–23 September

I Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Constitutional Jurisdiction in Lithuania and Latvia" (in Cēsis, Latvia).

24 March

Judgement by the Constitutional Court of the Republic of in case No. 04-07 (99) on electricity purchase prices. The Court for the first time referred to the principle of proportionality.

30 August

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2000-03-01 on restrictions upon voting rights. The Court refers to the principle of self-defending democracy. The first judgement by the Constitutional Court of the Republic of Latvia, to which Justices' separate opinions were appended.

20–21 October

Preparatory meeting for XII Congress of the Conference of European Constitutional Courts, during which the Constitutional Court of the Republic of Latvia is approved as a member of the Conference of European Constitutional Courts (Brussels, Belgium).

2001

1 January

Amendments to the Constitutional Court Law enter into force, these specify and significantly expand the circle of subjects of constitutional review, as well as envisage the constitutional complaint and application by a court to the Constitutional Court of the Republic of Latvia. The written procedure is introduced.

12 June

The first sitting of the Constitutional Court of the Republic of Latvia, in which a case is examined in written procedure (case No. 2001-01-01).

4–6 October

II Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Topical Cases of the Constitutional Courts" (in Vilnius, Lithuania).

10 November

International conference dedicated to the 5th anniversary of the Constitutional Court of the Republic of Latvia "Protection of Fundamental Rights at the Constitutional Court".

30 January

New Rules of Procedure of the Constitutional Court of the Republic of Latvia are adopted and enter into force.

18 July

The first case on the basis of a constitutional complaint initiated (case No. 2001-04-0103 on the transcription of persons' names in personal documents).

30 October

The first collection of judgement by the Constitutional Court of the Republic of Latvia published.

21 December

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2001-04-0103 on the spelling of personal names. The Court highlights the constitutional status of the official language.

2002

13–17 May

The Constitutional Court of the Republic of Latvia participates in XII Congress of the Conference of European Constitutional Courts "The relations between Constitutional Courts and other national courts, including the interference in this area of the action of European Courts" (in Brussels, Belgium).

23 September

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2002-08-01 on the electoral threshold in the parliamentary election. The Court recognises that establishing of an electoral threshold in the parliamentary election does not jeopardize the expression of citizens' free will.

6–7 September

International seminar "An Application by the Court to the Constitutional Court of the Republic of Latvia", organised by the Constitutional Court of the Republic of Latvia, the German Foundation for International Legal Cooperation and the Latvian Judicial Training Centre.

10–12 October

III Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "The Principle of Equality of Persons in the Legal Proceedings of Constitutional Courts" (in Tukums, Latvia).

2003

25 March

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2002-12-01 on denationalisation of immoveable property. The Court recognises that Latvia does not have the possibility to eliminate all consequences of occupation and that these consequences equally affect the Latvian society as a whole.

2004

6 February

Gunārs Kūtris gives the Justice's oath and enters into office.

19 April

The President of the Constitutional Court of the Republic of Latvia Aivars Endziņš decorated with the 2nd class order of the Republic of Italy "*Grande Ufficiale*".

7 July

Judgement by Constitutional Court of the Republic of Latvia in case No. 2004-01-06 on travel documents. The Court recognises for the first time that the European Union law is part of the Latvian legal system.

25 March

Justice Aija Branta enters into office.

26–28 May

IV Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "The Role of the Constitutional Courts in the Context of Membership in the European Union" (in Palanga, Lithuania).

2005

13 May

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2004-18-0106 on minority schools. The Court recognises that the legislator may envisage an obligation for persons to acquire education in state and municipal institutions of education in the official language.

16 December

Judgement by the Constitutional Court of the Republic of Latvia in Case No. 2005-12-0103 on coercive expropriation of immoveable property. The Court recognises that in some cases political decisions have a legal dimension and that in such cases the legality of these decisions may be reviewed by the Constitutional Court.

13–19 May

The Constitutional Court of the Republic of Latvia participates in XIII Congress of the Conference of European Constitutional Courts "The criteria of the limitation of human rights in the practice of constitutional justice" (in Nicosia, Cyprus).

16–18 June

V Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "The Principle of a State Governed by the Rule of Law and the Right to a Fair Trial" (in Bīriņi, Latvia).

2 December

Conference of the Constitutional Court of the Republic of Latvia "Problems concerning the interpretation of the judgments of the Constitutional Court".

2006

6 June

Gunārs Kūtris elected the Vice-president of the Constitutional Court of the Republic of Latvia (served as the Vice-president until 31.01.2007, when he was elected President of the Constitutional Court of the Republic of Latvia).

16–18 October

The Constitutional Tribunal of the Republic of Poland visits the Constitutional Court of the Republic of Latvia, focusing upon the topic "Enforcement of Judgements by the Constitutional Court".

8 December

President of the Constitutional Court of the Republic of Latvia Aivars Endziņš is decorated with the Commander's Cross of the Republic of Lithuania "Order of Merits for Lithuania" for his personal contribution to promoting cooperation between the states of Lithuania and Latvia in legal matters.

27–29 September

VI Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Social Rights of a Person in the Jurisprudence of Constitutional Courts" (in Dubingiai, Lithuania).

7–10 December

International conference dedicated to the 10th anniversary of the Constitutional Court of the Republic of Latvia "The Role of the Constitutional Court of the Republic of Latvia in Safeguarding Values Enshrined in the Constitution of the Republic of Latvia: Experience of the Decade and Development Perspectives", organised by the Constitutional Court of the Republic of Latvia, the Council of Europe Commission for Democracy through Law (the Venice Commission) and the German Foundation for International Legal Cooperation.

2007

5 January

Justice Uldis Ķinis enters into office.

23 May

Kristīne Krūma gives the Justice's oath and enters into office.

7 September

VII Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Ultra vires Principle in the Case Law of a Constitutional Court" (in Ventspils, Latvia).

29 November

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2007-10-0102 on the border agreement between Latvia and Russia. The Court consolidates the doctrine of the state continuity of the Republic of Latvia.

31 January

Viktors Skudra and Kaspars Balodis give the Justice's oath and enter into office.

Gunārs Kūtris elected the President of the Constitutional Court of the Republic of Latvia (re-elected on 27.01.2010. and 23.01.2013, was head of the Court until 19.02.2014.).

Uldis Ķinis elected the Vice-president of the Constitutional Court of the Republic of Latvia (served as the Vice-president until 07.03.2008, when the Constitutional Court of the Republic of Latvia suspended his Justice's mandate due to participation in the International Tribunal on Former Yugoslavia in reviewing the case "Prosecutor v. Ante Gotovina *et al*" in the status of ad litem Judge).

7 December

Conference of the Constitutional Court of the Republic of Latvia "Initiation of a Case at the Constitutional Court of the Republic of Latvia".

2008

17 January

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2007-11-03 on the spatial planning of Riga. The Court notes that in interpretation of national legal acts the interpretation provided by, inter alia, the Court of Justice of the European Communities (currently – the Court of Justice of the European Union) should be taken into consideration.

14 March

Amendments to the Constitutional Court Law enter into force, establishing, inter alia, the binding nature of interpretation of a legal norm included in a decision by the Constitutional Court of the Republic of Latvia on terminating legal proceedings.

20 October

The first President of the Constitutional Court of the Republic of Latvia Aivars Endziņš and the President of the Constitutional Court of the Republic of Latvia Gunārs Kūtris decorated with the 1st degree badge of honour of the Judicial System for outstanding life-long contribution to the development of the Latvian legal system, reinforcing democracy and the rule of law in Latvia and in the world.

7 March

Juris Jelāgins elected Vice-president of the Constitutional Court of the Republic of Latvia (served as the Vice-president until 22.06.2010, when his term of office expired).

3–5 June

The Constitutional Court of the Republic of Latvia participates in XIV Congress of the Conference of the European Constitutional Courts "Deficiencies in Legal Regulation: Problems and Solutions in the Case Law of Constitutional Courts" (in Vilnius, Lithuania).

4–6 December

International conference "The tenth anniversary of Chapter 8 in the Constitution of the Republic of Latvia "Fundamental Human Rights", organised by the Constitutional Court of the Republic of Latvia.

2009

21–27 January

The Constitutional Court of the Republic of Latvia participates in I Congress of the World Conference of Constitutional Justice "Influential Constitutional Justice – its influence on society and on developing a global jurisprudence on human rights". (Cape Town, South Africa).

13–14 April

Visit of the President of the European Court of Human Rights Jean Paul Costa, Judge Ineta Ziemele and the Court's Deputy-registrar Michael O'Boyle to the Republic of Latvia (organised by the Constitutional Court of the Republic of Latvia).

26 August

The first case on the basis of an application by the President of the State Valdis Zatlers initiated (case No. 2009-77-01 on the regulation of the Public Procurement Law).

7 April

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2008-35-01 on the Lisbon Treaty. The Court recognises that Latvia has acceded to the European Union with the purpose of strengthening its democracy and that participation in the European Union does not violate the principle of the sovereignty of the people.

13 June

The Constitutional Court of the Republic of Armenia visits the Constitutional Court of the Republic of Latvia, focusing upon the topic "Topical Issues in Constitutional Legal Proceedings".

2–4 September

VIII Conference of Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Constitutional Aspects in Environment Protection in the Case Law of the Constitutional Court" (in Druskininkai, Lithuania).

21 December

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2009-43-01 on decreasing old-age pensions. The Court recognises that persons' fundamental rights, in particular – their social rights, are binding upon the legislator also in the circumstances of economic recession.

6 November

International Conference "Access to Court: Submitters of the Constitutional Complaint", organised by the Constitutional Court of the Republic of Latvia and the Council of Europe Commission for Democracy through Law (the Venice Commission).

The Constitutional Court of the Republic of Latvia examines 475 applications and initiates 117 cases within a year (the largest number of applications and cases in a year until then).

2010

1 January

Amendments to the Constitutional Court Law enter into force, establishing additional requirements to candidates for the office of a Justice of the Constitutional Court of the Republic of Latvia, inter alia, introducing the minimum age.

28 February

A survey conducted by the market research company "GFK" reveals that 70 % of Latvian citizens trust the Constitutional Court of the Republic of Latvia.
* Source: www.leta.lv

28 June

Vineta Muižniece gives the solemn promise and enters into office of a Justice.

Viktors Skudra elected the Vice-president of the Constitutional Court of the Republic of Latvia (served as the Vice-president until 22.05.2011.).

25 November

Judgement by the Constitutional Court of the Republic of Latvia in Case No. 2010-06-01 on the budget of constitutional institutions. The Court defines the doctrine of the budgetary independence.

18 January

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2009-11-01 on judges' remuneration. The Court recognises the obligation of the constitutional institutions to cooperate to ensure independence of courts and financial security of judges.

13 May

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2009-94-01 on dual citizenship. The Court recognised that state continuity applied also to the field of citizenship and that a person did not have subjective right to dual citizenship.

8–10 September

IX Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "The Principle of Legal Certainty in the Case Law of a Constitutional Court" (in Daugavpils, Latvia).

13 December

Conference of the Constitutional Court of the Republic of Latvia "Application by a Court to the Constitutional Court of the Republic of Latvia".

2011

14–20 January

The Constitutional Court of the Republic of Latvia participates at II Congress of the World Conference of Constitutional Justice "Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies" (Rio de Janeiro, Brazil).

3 June

Aija Branta elected the Vice-president of the Constitutional Court of the Republic of Latvia (served as the Vice-president until 28.02.2014, when was elected President of the Constitutional Court of the Republic of Latvia).

17 August

Sanita Osipova gives the Justice's oath and enters into office.

7–9 September

X Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of Lithuania "The Problems of Electoral Rights in the Constitutional Legal Proceedings" (Klaipeda, Lithuania).

22–26 May

The Constitutional Court of the Republic of Latvia participates at XV Congress of the Conference of the European Constitutional Courts "Constitutional justice: functions and relationship with the other public authorities" (Bucharest, Romania).

1 July

Amendments to the Constitutional Court Law enter into force, envisaging, inter alia, the right of the Council for the Judiciary to submit an application to the Constitutional Court of the Republic of Latvia, as well as to participate in the process of assessing and approving candidates for the office of a Constitutional Court Justice.

29–30 September

International conference dedicated to the 15th anniversary of the Constitutional Court of the Republic of Latvia "The Role of the Constitutional Court in the Protection of Constitutional Values", organised by the Constitutional Court of the Republic of Latvia and the Council of Europe Commission for Democracy through Law (the Venice Commission).

2012

3 February

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2011-11-01 on the State Road Fund. The Court recognises that also the institutions that form the state budget have the obligation to take into consideration the principles of a state governed by the rule of law.

5–7 September

XI Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Constitutional Review in the Field of Public Finance" (in Jūrmala, Latvia).

6 July

Gunārs Kūtris decorated with the Cross of Commander of the Order for Merits to Lithuania for merits to Lithuania and for promoting recognisability of the name of Lithuania in the world, as well as for being long-time supporter of cooperation between the Constitutional Courts of Lithuania and Latvia, for promoting constitutional values.

7 December

Conference of the Constitutional Court of the Republic of Latvia "Initiating a Case at the Constitutional Court of the Republic of Latvia: Topical Procedural Issues of the Constitutional Court of the Republic of Latvia".

2013

5–7 June

XII Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "The Constitutional Doctrine of Citizenship" (in Kaunas, Lithuania).

26 September

International conference "Jurisdiction of the Constitutional Court: Limits and Possibilities of Expansion", organised by the Constitutional Court of the Republic of Latvia and the Council of Europe Commission for Democracy through Law (the Venice Commission).

27 December

The Legal Department of the Constitutional Court of the Republic of Latvia established, its purpose is to facilitate the work of the Constitutional Court of the Republic of Latvia by providing legal support to the Justices of the Constitutional Court of the Republic of Latvia, as well as to promote continuity and development of the case law of the Constitutional Court of the Republic of Latvia.

2014

5 February

The new Rules of Procedure of the Constitutional Court of the Republic of Latvia are adopted and enter into force.

12 February

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2013-05-01 on the national referendum. The Court recognises that it is the obligation of the legislator to ensure that the people's right to legislate is exercised in accordance with the principle of democracy.

19 February

Gunārs Kusiņš gives the oath of a Justice and enters into office.

28 February

Aija Branta is elected the President of the Constitutional Court of the Republic of Latvia (was the head of the Court until 24.04.2014.).

5 March

Uldis Ķinis is elected the Vice-president of the Constitutional Court of the Republic of Latvia.

25 April

Justice Aldis Laviņš enters into office.

6 May

Aldis Laviņš is elected the President of the Constitutional Court of the Republic of Latvia.

10–15 May

The Constitutional Court of the Republic of Latvia participates at XVI Congress of the Conference of European Constitutional Courts "Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives" (in Vienna, Austria).

4–6 June

XIII Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Development of the Constitutional Doctrine at the Constitutional Court" (in Riga, Latvia).

22 July

Amendments to the Constitution of the Republic of Latvia enter into force, adding to the introductory part an extensive explanation of historical events, constitutional principles and values.

10 October

Former President of the Constitutional Court of the Republic of Latvia Aija Branta is decorated with the 2nd degree badge of honour of the Judicial System for significant contribution to the development of the legal system, reinforcing democracy and the rule of law, as well as for promoting the knowledge and professionalism of persons belonging to the court system.

28 September–1 October

The Constitutional Court of the Republic of Latvia participates at III Congress of the World Conference of Constitutional Justice "Constitutional Justice and Social Integration" (Seoul, South Korea).

5 December

Conference of the Constitutional Court of the Republic of Latvia "Judgement by the Constitutional Court of the Republic of Latvia as the Source of Law".

2015

8 January

Ineta Ziemele gives the solemn promise and enters the office of a Justice.

13–15 May

The Federal Constitutional Court of Germany visits the Constitutional Court of the Republic of Latvia, focusing upon the topic "National Constitutional Identity and the Common European Values. National Constitutional Court and Global Governance".

17–19 June

XIV Conference of the Justices of the Constitutional Court of the Republic of Latvia and the Constitutional Court of the Republic of Lithuania "Impact of the European Human Rights Convention upon the Jurisprudence of the Constitutional Court" (in Plateliai, Lithuania).

2 July

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2015-01-01 on the national flag. The Court for the first time refers to the Preamble of the Constitution of the Republic of Latvia. The Court recognises that the national flag has the status of the symbol of the State and that the constitutional regulation on it, inter alia, constituted the constitutional foundations of the State.

20 November

Justice of the Constitutional Court of the Republic of Latvia Kristīne Krūma is decorated with the 2nd degree badge of honour of the Judicial System for particularly significant contribution to the development of the judicial system and the judicature, reinforcing democracy and the rule of law, as well as for outstanding scientific achievements in the field of law and development of international relations.

9–10 December

Three-lateral meeting of the Constitutional Court of the Republic of Latvia, the Constitutional Court of the Republic of Lithuania and the Constitutional Court of Ukraine on topical issues of constitutional law (in Riga, Latvia).

11 December

Conference of the Constitutional Court of the Republic of Latvia "Restrictions upon Fundamental Rights in a Democratic State".

2016

24 February

The new home page of the Constitutional Court of the Republic of Latvia is launched, which provides the opportunity to study the rulings by the Constitutional Court of the Republic of Latvia, as well as a selection of the Panels' case law.

26 April

Daiga Rezevska gives the Justice's oath and enters the office.

26–27 May

International conference dedicated to the 20th anniversary of the Constitutional Court of the Republic of Latvia "Judicial Activism of Constitutional Court in a Democratic State", organised by the Constitutional Court of the Republic of Latvia and the Council of Europe Commission for Democracy through Law (the Venice Commission).

9 December

The 20th anniversary of the Constitutional Court of the Republic of Latvia.

8 March

An opening event of the Constitutional Court's of the Republic of Latvia anniversary year. Round-table discussion "The Constitutional Court of the Republic of Latvia in 20 Years" , with the participation of the President of the Constitutional Court of the Republic of Latvia Aldis Laviņš, as well as all former Presidents of the Constitutional Court of the Republic of Latvia – Aivars Endziņš, Gunārs Kūtris and Aija Branta.

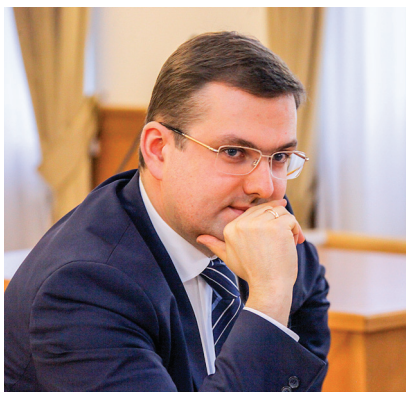
12 May

Judgement by the Constitutional Court of the Republic of Latvia in case No. 2015-14-0103 on using a person's DNA samples. The Court recognises that DNA are personal data requiring special protection.

8–10 September

The annual international conference of the European Society for International Law "How International Law Works in Times of Crisis", organised by the Constitutional Court of the Republic of Latvia and the Riga Graduate School of Law.

Discussion between the President of the Constitutional Court Mr Aldis Laviņš and the former Presidents of the Constitutional Court Mr Aivars Endziņš, Mr Gunārs Kūtris and Mrs Aija Branta about the Constitutional Court through the times 8 of March, 2016



J. Pleps:[1] Good morning, Presidents of the Constitutional Court! Good morning, ladies and gentlemen! This is a peculiar, I would say – a historic moment. All Presidents of the Constitutional Court are sitting at one table: Mr Aivars Endziņš,[2] Mr Gunārs Kūtris,[3] Ms Aija Branta[4] and Mr Aldis Laviņš.[5] And today, when the the anniversary year of the Constitutional Court begins, we have the possibility to take our breakfast coffee and a look back at the last 20 years. Not only to look back, but, I hope, also to look into the future and to reflect on the significance of the Constitutional Court in the Latvian legal system and also on what the Constitutional Court is like today and the way it will look like tomorrow. I would like this conversation to evolve in a way to cover several sets of issues. Most probably, we should begin

[1] J. Pleps – doctor of legal science, scholar and practitioner of constitutional law, Docent at the Faculty of Law, University of Latvia. From 08.08.2005 to 04.01.2008 worked as an assistant to a Justice at the Constitutional Court of the Republic of Latvia, later became the advisor to the Legal Bureau of the Saeima [Parliament].

[2] A. Endziņš served as the President of the Constitutional Court from 08.06.2000 to 31.01.2007 (from 11.12.1996 to 08.06.2000 was the Acting President of the Constitutional Court).

[3] G. Kūtris served as the President of the Constitutional Court from 31.01.2007 to 19.02.2014.

[4] A. Branta served as the President of the Constitutional Court from 28.02.2014 to 24.04.2014.

[5] A. Laviņš elected the President of the Constitutional Court on 6 May 2014.

with the matter that to me seems to be of the highest value. The inhabitant of Latvia is rather sceptical and incredulous. However, the Constitutional Court already since its origins has enjoyed a very high level of trust. If we were to ask, is there anything at all that Latvia's inhabitants believe in, then – and I have seen the results of surveys – the National Armed Forces, religious organisations and the Constitutional Court are mentioned most frequently. I cannot tell you the exact allocation of places among these three, but the competitors are very serious – the army and the Kingdom of Heaven. The first question, most probably, should be addressed to Mr Endziņš. How was it, was any intentional work done to win and increase the people's trust? Did you engage any public relations experts, outsiders, and did you think especially about the people's response to the decisions by the Constitutional Court, the assessment of the Court's work? Or did it just "happen" like that?

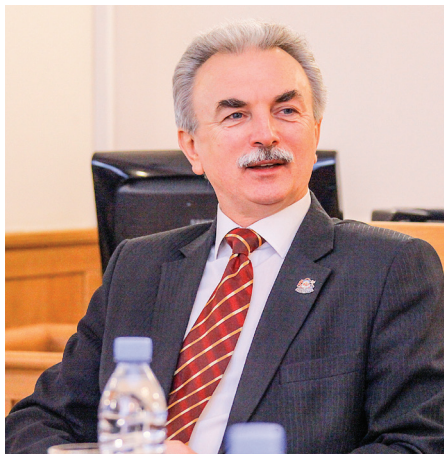
A. Endziņš: When the Constitutional Court was established, its jurisdiction was rather limited. There was no institution of constitutional complaint. Thus, also the number of cases was low. Sometimes it was said, even in the mass media, that there, i.e., at the Constitutional Court, are well remunerated, well, almost idlers with nothing to do. But, as soon as the Constitutional Court Law was amended and the constitutional complaint was introduced, the circle of those subjects who had the right to submit an application to the Constitutional Court expanded. In essence, even without feeling the need to develop public relations in a targeted way and involving respective specialists, the Constitutional Court by its work proved very obviously that it was safeguarding constitutional rights and freedoms. Already in the first cases, which became, we might say, a point of take-off. Moreover, the Constitutional Court, at least that is the impression that I have, from the very beginning proved that it could not be unduly influenced. That the words "litigation kitchen"[6] or anything of the like could not be attributed to the Constitutional Court. The position of the Constitutional Court has always been principally independent, irrespectively of who the applicants were – members of the Parliament or the Government. In fact, there has never been made any difference as to what has been contested – a provision of law adopted by the Parliament or Regulations of the Cabinet of Ministers.

J. Pleps: As they say, one law – one justice to all. I believe that Mr Kūtris together with Ms Branta steered the Constitutional Court through those difficult

[6] Reference to a book by Jānis Brūklenis "Litigation Kitchen", which contained transcripts of conversations among people, whose names had been changed, but it could be understood from the book that the conversations had taken place between layers, judges and other publicly known and influential persons. The conversations described in the book caused concern about the independence and the impartiality of the judicial system of Latvia.

times, the years of the economic crisis. And, it seems to me, that Viktors Skudra in his time said a fantastic phrase – at the time when people in Greece took to the streets, burnt cars and demolished, the inhabitants of Latvia were writing constitutional complaints to the Constitutional Court. How did you feel at the time?

G. Kūtris: Well, first of all we should mention a thing that we understood only later. Many people felt, and I also did, that the Constitutional Court was something like a vent for letting off steam, especially in extreme situations, when are many people who are dissatisfied with one of the laws. Perhaps this possibility to turn to the Constitutional Court was perceived as a possibility to find a solution that people were expecting, and to achieve it by a method that would be acceptable to Latvia's inhabitants, namely, in a peaceful spirit, through discussions, avoiding harshness. As regards the Court's public image or authority in society, I must say that when I together with colleagues reviewed the cases of the years of crisis, we did not think much about it. We rather thought about what the State could or could not do, about justice. The only thing that we tried to introduce at that time was press conferences. At least two or three times, when long and complicated judgments were passed, we tried to explain them in a simpler language, because often people – and not only ordinary people, but also all the high officials who must abide by these judgements read only the last, the executive part of the judgement, and do not understand why it is like this. And they start criticising. And then you have to explain. Therefore we started revising the level of judgements and looking for the optimum option. To avoid a situation where a person, having read a judgment until the end, no longer remembers what was there in the beginning. Judgements used to be shorter.



A. Endziņš: Yes, we also started working on this, in particular, after adopting the first judgements, when very few journalists were present. They listen a bit, and then leave. And then you just read and wonder what the Constitutional Court has ruled on, judged on. We introduced something like a press release, for the journalists, to understand what the matter was. That was one thing. The second – a short summary of the judgement, quintessence of the judgement, one

might say. It seems to me that thanks to this mass media began reflecting more accurately what the Constitutional Court had examined and ruled.

A. Branta: Yes, in connection with this I remember that right after the judgement was passed in the pensions' case, on a TV programme (I don't recall, which channel it was, the 1st or LNT), the journalists started talking among themselves, and one said – but, you know, the Constitutional Court has already ruled on it, only we have somehow missed it…

J. Pleps: Well, then I would like to refer to this morning. I hope that everybody was watching the First TV programme, where Mr Laviņš, so to say, announced the anniversary year of the Constitutional Court. Thus, a question regarding the President's interviews. How important are they? How important is it that the President of the Constitutional Court explains the work of the Court? Perhaps some other topical issues as well? Because I think that we all know that journalists usually ask questions which cannot really be asked, and even if they are told that something cannot be asked, they will ask it nevertheless.

A. Laviņš: Thus, the President's interviews and the initial question about the Court's authority. Well, in general I would say… As my colleagues already said, the Constitutional Court has gained its authority through its direct work – by adjudicating cases and confirming its position, proving that the Constitutional Court is on neither side, but is a neutral arbiter, which safeguards the constitutional values. Society, of course, has appreciated this. Therefore I thing that the ratings quite logically prove that the public trust is high. And yet we should look for ways of reinforcing what has been achieved. This sector that pertains to the administration of justice, is stable; the Constitutional Court continues to function according to the same principles. Thus, society has certain reasons to trust the Constitutional Court. However, there are some things that the management of the Constitutional Court should see. How to make the work of the Constitutional Court even better understandable to society? If we look at the statistical data for the whole period following introduction of the constitutional complaint, we see that on the basis of a constitutional complaint cases are initiated only very rarely. On the one hand, this instrument is intended for the entire society. You have the possibility to defend your rights! Come to the Constitutional Court! And, on the other hand, what do we see? I looked at the statistics. No more than 10 percent, a case is initiated only in 10 percent of instances. What has happened in the remaining 90 percent of cases? What happens to people who have turned to the Constitutional Court to resolve their problems and have received a ruling stating that certain deficiencies have been identified, but no case would be initiated? Does the disappointment linger – about the way the Constitutional Court works? Why does it happen? A large part of society turns to us. So, this is an aspect that we should explain to society,

and we have been doing this. I know that also previously colleagues have not refused interviews to the mass media, they have been active. We should continue in the same vein. The current and the future Presidents of the Constitutional Court must continue in the same vein. Thus, Presidents of the Constitutional Court are open, they communicate with mass media, they tell about the Court's work and the various aspects of it. We are trying to do that also now, and will try to make it a leitmotif for us in this anniversary year, that will run through all the events that we have planned.

A. Branta: I would like to add that the Constitutional Court's decisions on refusal are such a scrupulous work that, in my view, it is absolutely clear to people why their complaints were not accepted. Some of these decisions are several pages long. Everything is explained, in minute detail, based on the case-law. I do no think that these persons harbour any bitterness or lack of understanding, but, of course, it is the obligation of the Court to explain why the percentage of accepted constitutional complaints is so low and why the rest are not accepted.

G. Kūtris: I would like to mention one more example, responding to the question, whether during the economically harsh times for the country we were not trying to manoeuvre. Quite often even now when the Court passes a judgement and says that the law is fine, complies with the Constitution, comments like "a wolf does not bite a wolf", "the legislator pays their salary" or "everything has been pre-arranged" follow. I remember very well the pensions' case. I think I will not disclose any secret of the deliberations room here … But, of course, we, the judges, are normal people, like everyone else. So, when we examined that case, one of the questions was: if we rule like this, what is going to happen with the state budget, aren't we going to make it even worse for the state? However, finally we concluded that human rights would not be restricted like that, that this had to be given up.[7] And also, if the Ministry of Finance tells us – no, we have money in the budget for it and it is there, it does not matter that it has been transferred somewhere else, it is still there... We understood that in a situation where we have recognised a regulation as being incompatible with the Constitution, the final result should not necessarily be us saying, unconditionally, – the former rights should be reinstated immediately, to a full extent! Because human lives did not depend

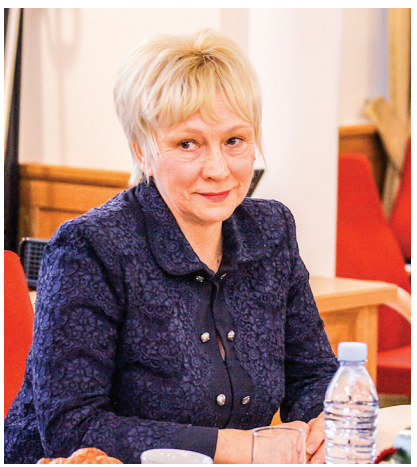
[7] Referring to the judgement of 21 December 2009 by the Constitutional Court in case No. 2009-43-01. In this case the Constitutional Court reviewed the compliance with the Constitution of a regulation that envisaged decreasing the old-age and service pensions by 10 per cent, and by 70 per cent – the old-age and service pensions of working pensioners. This is one of the cases in which the Constitutional Court examined restrictions upon fundamental rights in conditions of a dramatic economic recession and economic crisis.

upon it… Therefore we envisaged that short period of transition, by the end of which the Saeima and the Cabinet of Ministers had to enforce the judgement reasonably. We understood that it was impossible to enforce it immediately. So, there is a certain internal warning.

J. Pleps: So, it seems that everything is fine with the public trust; solid foundations have been laid. But, perhaps, it is worth turning to, as it is called in politicians' slang, "the players", which, probably, is also important. In this respect I would like to turn to Ms Branta. I believe that Latvia can be proud, having had a woman as the President of the Constitutional Court.

A. Branta: For a couple of months.

J. Pleps: Yes, and there have been and there are very many women among the judges of the Constitutional Court, which have left significant traces in the legal system of Latvia. You came from the Supreme Court and now you have returned to the Supreme Court. My question is about the dialogue with the Supreme Court. How do you see it – both from Alunāna Street and Brīvības Boulevard?[8] Because sometimes the legal proceedings in cases initiated on the basis of applications by courts are terminated because the respective norms have been incorrectly applied. Thus, the question is about the discussions, which in Europe are usually called a judicial dialogue.



A. Branta: I believe that as regards the dialogue, everything has been, is and will be fine because the decisions are reasoned. Each of us may have his or her own opinion, but if answers have been provided with respect to this opinion or it has been rejected in a reasoned way, there should be no negative responses. In the end, professionals are professionals, and the law is the law. Yes, that is the way it is.

J. Pleps: We have one more former judge who has come to the Constitutional Court. Mr Laviņš, what about the dialogue? Is the perspective from this place different from the one you used to have from Brīvības Boulevard?

[8] The current address of the Constitutional Court is 1 Alunāna Street. The Supreme Court is located at Brīvības Boulevard.

A. Laviņš: The experience that I have already gained at the Constitutional Court is very valuable. Because, if I were again a Supreme Court judge and it would be necessary to turn to the Constitutional Court, then, of course, it would be much clearer to me what the Constitutional Court expects from courts, the requirements that are set for the applications that courts submit to the Constitutional Courts. I remember, as I recall, at the time when Gunārs Kūtris was the President of the Constitutional Court, a conference dedicated to the application by courts to the Constitutional Court was held. In principle, this topic could be expanded and defined as follows: "Constitutional courts and judicial dialogue". And I remember that the questions put to the speakers implied – why are the applications submitted by the courts not accepted, where does the problem lie? It seems to me that at that time, indeed, there was lack of information about what should be paid greater attention to when turning to the Constitutional Court. Events as the conference mentioned before and the work done by the Judicial Training Centre are to be credited for the type of applications that currently come from courts. Those cases, when it is said – sorry, but there is no legal substantiation, are rare. And that sounds rather harsh if we refuse to accept an application from a court because it lacks legal substantiation. However, the Constitutional Court Law does not give us the opportunity to word it differently that the application has certain deficiencies. Perhaps the deficiency is not that big. However, the wording is that it lacks legal substantiation and therefore should be returned. What does the judge do? Either he says: "Oh, something was missing here", pulls himself together, revises the application and turns to the Constitutional Court again, or thinks: "Well, o.k., the Constitutional Court, possibly, does not see the problem, that major problem, and we can make do with an interpretation of legal norms." There have been also cases like that. However, I would say that since the time when the conference was held (I do not recall now the year – 2007, 2008?) until now the situation definitely has changed for the better.

A. Endziņš: I would also like to add something in this regard. It seems to me that the very same amendments that introduced the constitutional complaint also broadened the possibilities of courts to submit applications to the Constitutional Court. And, similarly to the first constitutional complaints, the first applications by courts also revealed that the applicants were not aware of the specifics of the Constitutional Court. That is the point. But now this is no longer the case. The constitutional complaints that came from prisons sometimes were prepared in a higher quality than some constitutional complaints submitted by a private person or a legal person, and these were drafted by lawyers. One has to take one's hat off to that!

J. Pleps: Prisons, of course, have given a significant contribution to reinforcing the rule of law. However, there is one more "player" – the legal science. Mr Kūtris, what was it like to work at the time when legal science was extremely complimentary? I almost cannot recall a single critical article about the decisions of the Constitutional Court during your term of office.

G. Kūtris: That is nice!

J. Pleps: Was the absence of criticism from the legal science not a nuisance?

G. Kūtris: In fact, there were very few scholars of law working in this field in Latvia. It seems to me that Mr Endziņš was the first one who properly assessed the work of the Court from the perspective of constitutional law. However, we tried to underscore in conferences, gradually, that the work of the Court could also be subject to criticism…

J. Pleps: That people should not be afraid.

G. Kūtris: ... that they should not be afraid of criticism, which is also to our own advantage. And, frankly speaking, we consider also the judges' separate opinions as a contribution, as a critical contribution, using softer words, but, in fact, revealing the object of discussion. Today the situation is much better, because Anita Rodiņa[9] follows vey closely each decision by the Court, not only its judgements, to state if…

J. Pleps: … probably more so with regard to decisions.

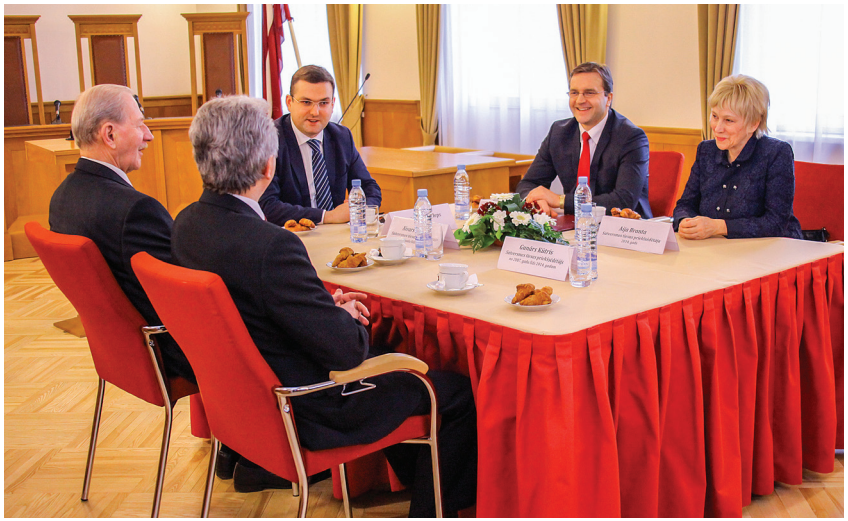
G. Kūtris: ... if some more peculiar decisions appear. Thus, a new generation has come, which is able to assess, analyse the Court's activities and to follow it in a cooler way.

J. Pleps: Most probably it is worth mentioning professor Zigurds Zīle,[10] who in the initial stage of Court's activities reviewed, if I am not mistaken, almost all of its judgements.

A. Endziņš: To my mind, the problem was in the fact that Mr Zīle, being an American lawyer, followed the practice of the American Supreme Court, which, if may say so, usurped the functions of a constitutional court's jurisdiction. Well, totally different, purely American approach. That is why he criticised, because he did not understand. What is that, how can that be? We, essentially, have a court of laws, and a concrete event, a civil case or a criminal case that

[9] A. Rodiņa – doctor of legal science, scholar of constitutional law, Associate Professor, Dean of the Faculty of Law, University of Latvia.

[10] Prof. Zigurds Zīle (Zigurds L. Zile, Emeritus Professor of Law, University of Wisconsin — Madison, USA). The subject of the discussion is his article "Visu varu Satversmes tiesai?" [Z. L. Zīle "All Power to Constitutional Court?"], newspaper "Diena", 27.03.2002., Nr. 73, p. 2. The author questioned the findings and interpretation of law expressed in the judgement by the Constitutional Court, as well as reprimanded the Constitutional Court for interfering into the legislator's jurisdiction.



would finally end up at the Constitutional Court is not required. It is a matter of understanding. However, talking about the present, we must note that we have not only researchers. I am happy to see that the journal "Jurista Vārds" publishes articles prepared by future bachelors and masters of law. Thus, young people already go deep into these matters, reflect. We may agree to their opinion or not, but it is inspiring… For example, the last article on the Rules of Procedure of the Constitutional Court, which are internal, but, in fact, have an impact outside. it is evident that this encourages reflection. Returning back to these Rules of Procedure, it is worth reminding that in 1999 very significant amendments to the Constitutional Court Law were prepared. At that time the Law on the Constitutional Court Procedure had been drafted. In the end, together with legislators and foreign experts we came to the conclusion that a special law on procedure was not necessary, that the most important things should be included in the law, but more technical issues could be regulated in greater detail by the Rules of Procedure, adopted by the Constitutional Court itself.

J. Pleps: Mr Endziņš, we can now easily move from the issue of the Rules of Procedure of the Constitutional Court to the next block of questions. Court and politics. How did you feel when you moved from a politician's job to a judge's office, namely, from being the Head of the Saeima Legal Affairs Committee to the administration of justice? Secondly, isn't there too great a similarity between the Rules of Procedure of the Saeima and the judicial procedures?

A. Endziņš: Well, before I became involved in the politics and served on the Supreme Council, I was a teacher, a docent at the University, and worked in the field of legal science. Also at the time when I was a deputy of the Supreme Council or a member of the Fifth or the Sixth Saeima, I held law as being supreme, not the political positions or something like that. I had no problems with that. Perhaps it is worth noting that in Belgium with respect to the Supreme Arbitration Court, the constitutional court, even the Constitution requires that at least half of the judges should have experience of political work, and it seems to me that exactly the fact that you have been in that…

J. Pleps: Kitchen.

A. Endziņš: ...kitchen where laws are made, that you have participated in the procedure of creating them, can help a judge. It can be of help, yes. It is another matter that at the time when the Constitutional Court was created this process entered, we might say, the finishing straight, and some politicians thought that the Constitutional Court would be something like the Politbureau of a party, solving issues in the way the politics need it. It was not a coincidence that an idea was heard – well, all that old guard that studied during the Soviet time, instead we should first of all select some 15 young people, send them to Western institutions of education and then select from among them. This means that the establishment of the Constitutional Court could have been postponed, and we could establish it only today. It was like that. And it is not for nothing that during the first election of the Constitutional Court, there were two candidates from the Plenary Session of the Supreme Court, from among the judges, two from the Government and three from the members of the Parliament. And there were six candidates for these three offices, that is, of the members of the Parliament. In fact, each political party proposed its own candidate, and only one of these six was elected. That was Romāns Apsītis. After the first judgement by the Constitutional Court...

J. Pleps: Hockey players! Were you called that? Hockey-players? Hockey-players, skating out without a puck.

A. Endziņš: Yes, approximately in this vein…

J. Peps: Were there such comments about the first judgement?[11]

A. Endziņš: Well, something like that. After this judgement, when I (I was a candidate proposed by the Cabinet of Ministers) met the Prime Minister

[11] The Constitutional Court made its first judgement on 7 May 1997 in Case No. 04-01(97). In this case the Constitutional Court reviewed the competence of the Cabinet of Ministers to issue legal acts. The judgement in Case No. 04-01(97) is substantiated by a reference to the general principles of law. The Constitutional Court found that the regulation issued by the Cabinet did not comply with the Constitution.

of the time Mr Šķēle, he said: "Well, Endziņš, beware!" Meaning – you were proposed by the Government, and now suddenly government regulation is recognised as being incompatible!

J. Pleps: I believe we have understood that. And Mr Kūtris, probably, is anticipating the next question. When I put this question to Mr Endziņš, Mr Kūtris smiled. How does it feel, similarly to Mr Pastars,[12] moving to the trenches of the opposite side of the front, – does the experience gained at the Constitutional Court help or hinder your work in politics?[13]

G. Kūtris: I believe that it definitely helps. The question, however, is how you enter the politics. Whether, when entering politics, you forget about the law and start to think only about the political aim. Whether you understand that you are a lawyer with a certain understanding of the legal system. It definitely helps a lot, as it is easier to evaluate what is being produced in that kitchen that you referred to. You can weed out those situations where you see that a norm is being made for a purely political aim… in the spirit of populism. Probably, I have not yet turned into a politician, because whenever I evaluate or propose anything, I refer to the Constitutional Court and say – at the Constitutional Court you will definitely be told off, because you cannot write like that, because this is that, that is this, this is that. Of course, I am exaggerating, because at the Constitutional Court it is not always the case that all the judges take a unanimous decision. It happens that they stick to their own opinion. However, at least the method for assessing whether the norm is good or bad, has been developed perfectly. In my time, I was not taught that at school. I learned it here, in practice, at the Constitutional Court. And, yes, the legal foundation that has been laid here helps to deal with and criticise provisions of a poor quality.

J. Pleps: One might say – an advocate or the authorised representative of the Constitutional Court at Jēkaba Street?[14] Are you following in the footsteps of Ms Čepāne?[15]

G. Kūtris: I would not quite agree to that. However, our colleagues at the Legal Bureau, that is, the Saeima Legal Bureau are getting anxious – do

[12] Edgars Pastars is a Latvian researcher and practitioner of constitutional law, the author of a number of publications and monographs. Currently a sworn attorney-at-law at the law office "Cobalt", previously worked both at the Constitutional Court and the Legal Bureau of the Saeima.

[13] Former President of the Constitutional Court Gunārs Kūtris currently is a member of the 12th Convocation of the Saeima, representing political party "For Latvia from the Heart".

[14] The building of the Saeima (the Parliament) is located in the Old Town of Riga, at Jēkaba Street.

[15] Ilma Čepāne is a Latvian lawyer and politician, a former judge of the Constitutional Court. Member of the Supreme Council of the Republic of Latvia and a number of Saeima convocations, represents the political party "Unity".

not defend the Constitutional Court! However, I am more worried about getting good laws. Working in the opposition one cannot achieve much but perhaps some matters can be settled in a softer way, so that you would have one case less, or try to solve an issue in a different way, so that it would not end up at the Constitutional Court. To a certain extent, I am not an advocate, rather an intermediary.

A. Branta: You do not always succeed, it was different at the Constitutional Court. If you have a different opinion, you can write a separate opinion, but at the Saeima…

G. Kūtris: ... you can keep your separate opinion.

J. Pleps: It is possible to discuss political motivation.

G. Kūtris: You can talk from the podium, but that does not change the outcome.

A. Endziņš: That is why the Constitutional Court, while preparing a case, is interested also in the origins of the case, not solely the pure text that the Saeima has adopted, it is interested also in the discussions that took place from on reading to the next. The Court tries to establish the legislator's will. Therefore, I believe, this experience is very important to both sides.

G. Kūtris: What Aivars is just saying is very important. Because now the commissions, quite often, when a provision is sort of …

J. Pleps: Tricky?

G. Kūtris: ...tricky, tries to have it recorded in the minutes that the provision should be enforced in this or that way, so that, if a case with regard to this norm were to end up at the Constitutional Court, it would understand how the legislator had intended it.

J. Pleps: We have a rather strange seating arrangement here, here we have judges-politicians and there – judges-judges. Ms Branta, how was it for you, coming to the Constitutional Court, where both academic and political circles were represented, did you have the feeling that the classical administration of justice remained here in a very distanced way, didn't it seem that the Constitutional Court is not a proper court at all?

A. Branta: Frankly speaking, it was very hard in the beginning. In general, that was great honour for me that I was chosen, that my colleagues had the trust in me and voted for me, so that I could be and work here. I have to say, I had immense respect, there were people with truly enormous luggage. Mr Endziņš tried to dispel my doubts by saying: "You are a lawyer, you should be able to do it." So then I have been trying to be able to do it for these whole ten years. The positive thing was that in the beginning there were not that many cases, there was the opportunity for learning. If I had come here when the cases of the crisis period started, it would have been much more complicated. Perhaps I could

add something from a judge's perspective to what was said by the esteemed politicians …

J. Pleps: This is how we classified you both (*pointing to A. Endziņš and G. Kūtris*).

A. Branta: In general it is very positive that an opinion is expressed about amendments or new laws. For us it is very important to clarify what the legislator really had wanted to achieve by it, since it can be turned in very different ways. It is very important to understand why it is the way it is, whether the intention had not been different, whether anything has changed. I must say, it was difficult to re-orient myself away from the regular administration of justice and, yes, it was also rather difficult to return to it.

J. Pleps: You have had many separate opinions. Do you want to write them also now?

A. Branta: I did not have that many separate opinions. At least I think so.

J. Pleps: But some of them have been very lasting.

A. Branta: Well, there have been a couple, yes.

J. Pleps: Do you have the wish to write them also now sometimes?

A. Branta: No, it has not happened. Although, no, I have written.

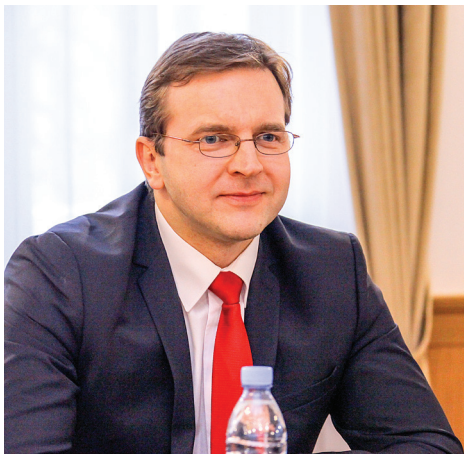
J.Pleps: Cannot shake off the habit?

A. Branta: No, of course, I cannot shake it off. However, here it is something entirely different compared to there. Yes, but now, when I am back in the office of a judge, those 10 years served at the Constitutional Court have also helped a lot, because I have those cases in my mind and can use them also in reviewing criminal cases.

J. Pleps: So, we have had an interesting conversation about judges-judges from among the Presidents. Ms Branta works more with criminal cases. Whereas Mr Laviņš has worked with administrative and civil cases. What about the administration of justice in this field? Are there any similarities, or not? I have noticed that in your time the management of the court hearings has become a little like the civil procedure – by giving the possibility to both parties to express their opinion and the classical questions that can immediately be identified by hardened chairmen of court hearings.

A. Laviņš: I would like to return to the conversation that the politicians started. If you have anything to say about a prepared draft law, then you should make use of the opportunities that you have, you should go to the podium and say that the regulation could be made differently. Because, when we here are establishing the scope of contested norms, then that is the minimum program, namely, let us take a look at the way this draft law was created, what was said during the discussions. If a good idea, based upon the case-law of the Constitutional Court in the respective matter, is not taken into consideration, then it is clear – there was

no intention to include these aspects in the legal provision, and then the scope of the contested norm is placed in an entirely different framework. Therefore this matter is important and we in constitutional cases focus a lot upon establishing the scope of the contested norms. Now, about chairing court hearing. Yes,



the experience is there, and one cannot escape from it. You cannot escape from yourself. Including the way of conducting a court hearing that you are accustomed to. Well, we have two parties here as well. At the beginning it was difficult for me to get rid of the term "parties". My colleagues have reprimanded me of this: "the Constitutional Court Law uses different terminology." Well, I did my best to adjust to the new terms. You have to be open in this respect. As regards the style, indeed, looking at it from the outside it might look rather civil procedural, perhaps more appropriate for hearing cases in civil procedure, but I hope that no harm is done. I want to feel sure that all the essential circumstances have been clarified in the procedure before the Constitutional Court, the opinion of the parties on all the issues, on all the submitted requests. Both parties are heard, and we get a complete picture, so that we can understand what is what and adjudicate the case in an unbiased way.

J. Pleps: It is very simple, those classical phrases that are typical of one type of procedure are used, and my colleagues, lawyers specialising in civil procedure, have told me – since Mr Laviņš is chairing the hearings, they feel safe. Because there are some codes – how to put questions, how to provide the right answers to them, and then you immediately start feeling…

G. Kūtris: Like being among our own people.

J. Pleps: ...yes, among our own people.

A. Endziņš: I would like to return back to establishing the legislator's will. The Saeima Rules of Procedure provide that until the third reading, in case if the opinion of the Saeima Legal Bureau, that is, the specialists' opinion, has not been taken into consideration, then it should be handed out to all members of the Saeima, in writing. However, the problem is that the Legal Bureau cannot go to the podium and provide additional explanations to the parliamentarians.

Unfortunately, we see on TV what the members of the Saeima do during sittings, they are not only reviewing draft laws. Therefore I really doubt whether the deputies really become aware of the critical opinion of the Legal Bureau by the third reading. Gunārs will correct me, if I am wrong, – quite frequently I had to go to the podium to defend and substantiate the Legal Bureau's opinion. Thus, in clarifying the legislator's will, one should also take into consideration how well-prepared politicians are, their knowledge. Definitely, the opinion of the Saeima Legal Bureau, its critical insights, are very important.

J. Pleps: Yes, and then the next question. We gathered already that initially the Constitutional Court, probably, was intended to be not quite like a council of a state enterprise, but as an ornamental toy that would not hinder political processes. Some people might have had such assumptions. At which moment did the Constitutional Court turn into a serious "player"? How does it seem now, in hindsight? Probably Mr Endziņš could share the initial feelings. When did politicians start fearing and respecting the Constitutional Court?

A. Endziņš: It seems to be that in 1997. When the first very well-reasoned judgements of the Constitutional Court appeared. In fact, at that time politicians and the executive power became aware that the Constitutional Court was far from being a body that can be manipulated, like some politicians might have wished. I believe that the process evolved. Not in vain the Constitutional Court turned, to a certain extent, into a bogeyman. We have heard from the podium – if we adopt a norm like this, it will be contested at the Constitutional Court. And it seems to me that the politicians understood better and better, sometimes even before our judgements were made, that they had made a mess of it and even did not wait until the case was reviewed, they amended or revoked the contested norms. There have been also cases, when the Saeima or the Cabinet tried to fight it till the end. Moreover, I have observed that if the Legal Bureau of the Saeima clearly understands that the contested norm is, indeed, incompatible with the Constitution, then members of the Bureau do not come to represent the Saeima. In such a case the Saeima is represented either

by one of the parliamentarians or a well-remunerated sworn attorney-at-law. To my mind, that was also rather symptomatic.

G. Kūtris: I can say only one thing – hats off to Aivars! I believe he laid the foundations. The first attack came from, if I am not mistaken, a Prime Minister, who said – we established it, we can also abolish it.

J. Pleps: Mr Šķēle, probably, would not propose Mr Endziņš for the office of a judge of the Constitutional Court again.

G. Kūtris: Another fact. A member of the Saeima took the liberty to say here, at the Court (although I was not there at the time), – do not forget who is paying your salary. And Mr Endziņš did not keep silent, he hit back immediately; not in the court room but publicly…

J. Pleps: No fist-fighting?

G. Kūtris: No, no fist-fighting, but we immediately responded and clarified it all publicly, and from then on nobody, at least in my time, did not dare to say anything like that… I know, for example, that at the time when the Border Treaty Case was reviewed, ministries were seething, the Ministry of Foreign Affairs was worried. However, no one dared to come here and ask anything, or even to test the waters, to find out what the possible solution could be. It is very important that the future judges also understand that. God forbid, if the Court loses its deterring function! If the Court starts manoeuvring to be to the legislator's liking, then not only will it lose its public authority, but also the foundations upon which the Court was built and stands on.

J. Pleps: Perhaps you have the feeling that at present the Court's attitude towards your current workplace is too friendly?

G. Kūtris: No, it is not! At present it is still feared in the Saeima. If I am not mistaken, with respect to one case, which will be reviewed soon, hints are given – do not rush with the judgement, we are going to amend the law soon. In one recent case such was the response given by the Saeima. We will amend it soon, everything will be fine!

A. Endziņš: I believe that it is not only the Latvian Constitutional Court, but in general a constitutional court in any other country quite often is very inconvenient for the politicians and the executive power. We could use the current events in Poland as an example, more specifically, the restrictions upon the functions of the Polish Constitutional Tribunal. The recent changes in Hungary, a new constitution was adopted. Such attempts occur now and again, because the constitutional court, if it has been established and performs its functions as a guardian of the democratic constitution, the law, it is a hindrance to some.

J. Pleps: I have to thank you for taking this up, because I have noted in my introductory words for the next part of our conversation – Hungary and Poland.

It might seem that democracy has been consolidated and that an institution like the constitutional court enjoys authority. However, I like the statement by Aharon Barack, I quote: "If Angela Merkel can do it in Germany, then it is possible everywhere." Mr Laviņš, is the Court ready for challenges, possible conflicts with the legislator? For example, you see the current situation of your colleagues in Poland and Hungary. God forbid, it is only a theoretical issue, we do not seem to have such threatening symptoms on the agenda. Mr Kūtris, is this issue on the agenda of the Legal Bureau of the Saeima?

A. Laviņš: What can I say? Are we ready ...

J. Pleps: To fight for the Constitution?

A. Laviņš: ... for such turn of events. I would say that at present we have a good team of judges at the Constitutional Court, the structure has also slightly changed and the legal support has significantly increased. Moreover, the judges' team comprises representatives of various fields. I think that we all together would be able to find the most appropriate solution. In Poland the Constitutional Court itself is divided. I even do not consider the possibility that the politicians might try to manipulate with the Constitutional Court by using phone calls or anything like that. However, one should always keep in mind also the bad options. In Poland's case the main factor is the legislator's actions, amending legal acts and influencing the constitutional court in this way. And I would say, – yes, it may happen like that, it is the reality in Poland. However, when the constitutional court has a high authority in society, then it would be a big risk for politicians – to propose an initiative to do anything with respect to the constitutional court. Whereas if the court's authority is low, then the society, possibly, will support some changes with respect to the constitutional court. I believe that the fact that Court has authority and the Court is internally united, is a major obstacle for the politicians to attempt anything. However, I am surprised by what is happening in Poland. I have spoken with the President of the Polish Constitutional Tribunal. He really seemed exhausted, no sparkle of enthusiasm in his eyes. I said that we could use various forums, including the conference dedicated to the anniversary of our Constitutional Court, to discuss, perhaps, among the presidents of courts adopting a kind of resolution, expressing support for the Polish Constitutional Tribunal. However, the President said that at the moment the Polish Constitutional Tribunal should not receive any international assistance, because by this it would only demonstrate its weakness. That is the President's position. Well, I respect it that they want to deal with it themselves. The court is internally divided, I see a problem in this. It is a major drawback, which hinders the opposition to the politicians' initiatives. So, my answer is that our situation is different, much better. Even if – although I hope that his not going to happen – if, like in another European country, society,

voters would demonstrate more sympathies towards things that the politicians serve them, using current events… I do not want to mention them here, but there a number of topics that can be very easily "foregrounded", offered to the voters and which the voters take up very greedily, and understand whom to vote for. And finally, if the majority were formed around the particular political force, then an opinion could be spread in society – why is that Constitutional Court interfering here?! What should be done in the name of our political aims? Something should be done with that Court! I am not saying that this was literary the scenario in Poland, but…

A. Endziņš: I also think that the situation here is quite different. Also in 1996, when such an idea actually emerged… Within a week… Neither the mass media, nor the political forces supported it, and thus immediately they started retreating – no, we did not want to abolish the Constitutional Court, quite to the contrary, we wanted to expand its jurisdiction, and so on and so forth. However, speaking of Poland, the Polish Constitutional Tribunal … It is not the Tribunal that is internally split. In fact, the politicians, by shaping it, by appointing new judges, are splitting the Constitutional Tribunal. Therefore the candidates that are proposed should be considered very carefully, in order not to allow a situation that attempts to blow the Court apart from within. By the way, I am flying to Venice tomorrow, for a meeting of the Council of Europe's Commission, where one sub-commission and the plenary session will examine the issue of Poland, in connection with the Constitutional Tribunal, because the situation is very critical. The Poles tried to make a scandal. Namely, the draft opinion of the Commission was leaked to the newspapers, and now there are almost demands that the Venice Commission conduct an investigation to find out who leaked it. However, that is a normal procedure or a situation, where the draft is available to all members of the Venice Commission in due time, and also to the respective public structures, which have proposed the particular issue for reviewing. In this case the members of the Bureau were surveyed by e-mail, attempts were made to stop reviewing the issue, to smooth things down. We, the independent members, were categorical – no way, we are going to examine the issue on its merits and the plenary session will have to adopt a decision. The position has to be very clear. The current President of the Tribunal has doubts, perhaps because of the situation that has developed in the Tribunal and in Poland in general. But there should definitely be an external reaction.

J. Pleps: Well, it seems to me that the Constitutional Court does not have any problems with unity, as I see – all the Presidents at the same table, the conversation still going on. There are no, so to say, the old and the new, the right or the left.

G. Kūtris: Perhaps that is because we did not work at the same time.

J. Pleps: Isn't that common knowledge that there is no such a thing as former judges? However, as we approach the conclusion of our conversation, I would like to ask the former Presidents of the Constitutional Court – what do you see as the greatest challenges that the Constitutional Court will have to face in the coming years? What new issues could appear in among the matters under review? What could that be? We know very well that during President Endziņš' time the prospects for a social democratic party were abolished, because the Constitutional Court assumed the role of social democrats in the Latvian legal system, and reinforced this role also during the period of crisis. It seems to me that Mr Kūtris together with Ms Branta took the first steps towards integration in Europe – through the major rulings, which, I must say, as regards constitutional courts, were almost the most optimistic in the European Union. What will be given to Mr Laviņš as a send-off? Perhaps Mr Kūtris knows better what kind of applications are being prepared.

A. Branta: I do not known anything about concrete applications. I believe that there are issues that are important to all. The fundamental rights.

A. Endziņš: I understand that the Constitutional Court at its conferences has already discussed the full constitutional complaint. One might say that a constitutional complaint by which only the compliance of a legal act may be contested is not genuine. However, as regards the genuine *actio popularis*, I, frankly speaking, am rather sceptical, because that would require increasing the number of judges of the Constitutional Court. The Court would also need more specialists, two panels should be set up. I believe that to be a very dangerous, risky matter. For example, Slovenia initially had this *actio popularis*, but then gave it up altogether, and now there is a constitutional court as such. Reviewing the applications submitted in the form of this constitutional complaint is not the idea of the constitutional court, that is my opinion.

G. Kūtris: It seems to me that there are two topics that could become relevant. One, perhaps, would not be so much of a challenge, but rather an additional workload. It could be the issue of impeachment procedures in the state. Because the society demands accountability of the officials. If an official violates the oath, how to make him liable? We have the example of Lithuania. As regards categories of cases, it seems to me that in the fields of social rights and property rights the methodology has been more or less developed. The number of applications pertaining to political rights could increase. It could happen. It seems to me so.

J. Pleps: Same-sex partnerships?

G. Kūtris: Yes, possibly, but…

J. Pleps: We see that in this respect European constitutional courts play an important role.

A. Endziņš: There might be the so-called disputes of competences. The law does not provide for them directly, but formally they, as it were, fall within the jurisdiction of the Constitutional Court. Not as a separate category, but they might appear in some way. However then respective amendments to the law would be necessary. The other matter is linked to the fact that sometimes the Constitutional Court refuses to initiate a case because the contested legal provision has not been indicated in the application. This seems to be a gap. European courts have initiated cases also with respect to matters that are even not regulated by a legal act but that is an additional path linked to human rights. For example, violence, torture in all its manifestations.

J. Pleps: Well, yes, usually the forms are not described.

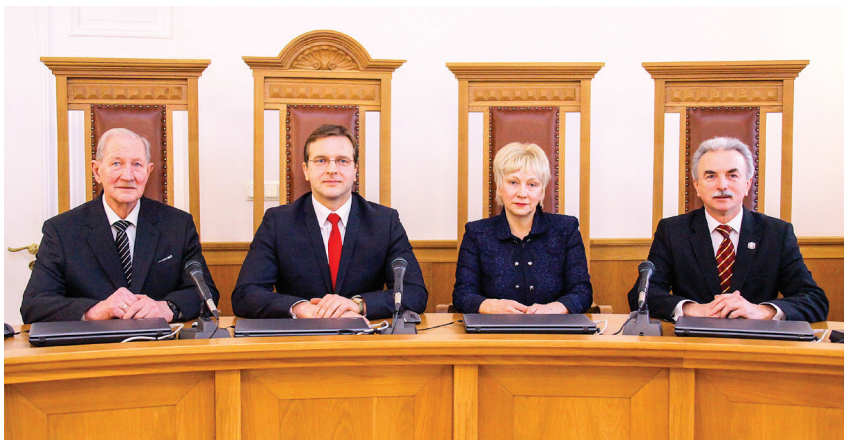
A. Endziņš: Yes, yes.

J. Pleps: Probably I should put the last question to the current President. A colleague of mine, who is practicing the EU law, asked me to do this. When is the Constitutional Court going to request a preliminary ruling from the Court of Justice of the European Union for the first time?

A. Laviņš: A very good question.

J. Pleps: He is interested in it, in particular, since the Germans have done it.

A. Laviņš: I will not give a direct answer. It is true that the Constitutional Court until now has not turned to the Court of Justice of the European Union. Why? Probably a number of answers could be given to this question, thinking also about our contacts with foreign colleagues, the way in which the Constitutional Court develops its international cooperation. We have agreed to hold a tri-lateral meeting with the judges of the Constitutional Courts of Belgium and the Czech Republic, and the main topic for discussion will be judicial dialogue,



namely, the dialogue between constitutional courts and the Court of Justice of the European Union. We shall discuss the position of courts – whether to refer or not to refer to the Court of Justice of the European Union for a preliminary ruling. We known that the Constitutional Court of Belgium is the leader in this respect, the Belgians are the most active. We know that no reference has been made by the Latvian Constitutional Court. If I am not mistaken, neither has the Czech Court done it. During the conversation I had with the presidents of these other courts, they were very interested in our attitude. Even if we have no examples, they wanted to hear our position. Why do we have this rather reserved attitude towards turning to the Court of Justice of the European Union? Perhaps there have been no issues worth referring. However, I think this probably is not the right argument. Probably a concept has evolved and prevails that we can resolve a situation without turning to the Court of Justice of the European Union. Thus, this autumn we are going to have the meeting, organised at the Constitutional Court of the Czech Republic, and we shall discuss this topic, examine the arguments of both sides, in order to reach the right balance. It is typical for constitutional courts – to strive for balance in all matters or to be moderate. Dear colleagues, I like this Latvian term.

J. Pleps: Ladies and gentlemen, we have to thank the Constitutional Court for this event, for organising it and for having this idea. The Presidents of the Constitutional Court – for coming. I would say that this possibility to ask questions to the Presidents of the Constitutional Court is unique. I assume that this conversation revealed why society trusts the Constitutional Court so much, why the legislator fears and respects the Constitutional Court and why the Constitutional Court is a major, significant success story in the transformation of the Latvian legal system. It seems to me that we are not discussing it enough on the European scale. If we look at the rulings made by the Constitutional Court, at its findings, we see that it is, indeed, a successful export commodity, that we have grounds to be proud of it. At least because, I will dare to say, that the Constitutional Court, since the day it was established, has worked as a constitutional court of the old Europe and has belonged to the old Europe for long. The borderline is rather clear – the rule of law, a state governed by the rule of law and human dignity. Thank you.

II
Judicial Activism of a Constitutional Court in a Democratic State

Papers of the international conference organized by the Constitutional Court of the Republic of Latvia in cooperation with Europen Comission for Democracy through Law (Venice Commision) (26-27 May 2016, Riga)

Raimonds Vējonis
The President of the Republic of Latvia

Highly esteemed President of the Constitutional Court,
Honourable justices of the Constitutional Court,
Excellencies,
Ladies and gentlemen,

I am genuinely pleased to be together with you today to celebrate the 20th anniversary of the Constitutional Court. And we have reasons to celebrate. Latvia is proud of the Constitutional Court and its achievements in the course of these 20 years.

The Constitutional Court, thanks to its honest work and carefully considered decisions, is highly esteemed by the society and is seen as an authority. The Constitutional Court is one of the institutions that enjoy the greatest trust of our people. The trust in the Constitutional Court also reinforces the belief in the state of Latvia and its constitutional order.

Every day the work of the Constitutional Court proves that justice, fundamental human rights and the rule of law are not just empty slogans or a privilege intended for a narrow circle of people. The door of the Court is open to everyone, whose violated rights require protection.

Ladies and gentlemen,

At the Conference dedicated to its anniversary the Constitutional Court has chosen to discuss the activism of constitutional courts in a democratic state. Perhaps this is the right moment to evaluate the work of the Court over the last 20 years. Without the active and principled position of the Constitutional Court our constitutional order today would not be what it is now.

The Constitutional Court has recognised that Latvia is a socially responsible state and that the economic and social rights guaranteed in the Constitution are actual obligations of the state, and that a person may request in court that these obligations are met.

We may be proud that in Latvia, as a green country, we have a green constitutional court, which cares for a sustainable development and everyone's right to a high-quality living environment.

The Constitutional Court has ensured that the Latvian legal system is open to international law and the idea of united Europe.

Justices of the Constitutional Court,

I hope that the choice of the topic for this conference proves the readiness of the Court to actively participate in reinforcing and safeguarding our constitutional order also in the future.

We need judges who, on a daily basis, would express their belief in a democratic Latvia governed by the rule of law in their words and deeds. The authority of the Constitutional Court is needed to safeguard democracy, fundamental human rights and the rule of law in the circumstances of current challenges.

I feel sure that the Constitutional Court will deal with these challenges. I hope that the discussions of today will bring ideas and inspiration for future work.

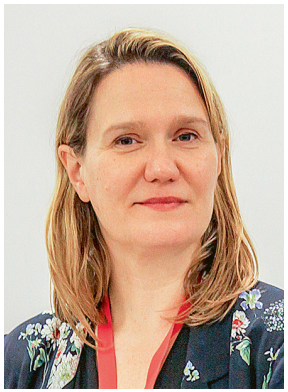
Ladies and gentlemen,

Anniversaries are occasions for saying thank you. Today I thank all the justices and employees of the Constitutional Court, who have worked together since the establishment of the Court to develop Latvia as a democratic state governed by the rule of law.

I would like to thank, in particular, Aivars Endziņš, the first President of the Constitutional Court.

We should not forget to thank our outstanding people, who selflessly work for the good of Latvia. This year I have already personally said thank you to our excellent composers Raimonds Pauls and Pēteris Vasks. Today I would like to laud our maestro of constitutional law – Aivars Endziņš.

Thank you for establishing the Constitutional Court, for reinforcing Latvia as a democratic state governed by the rule of law.



Tanja Gerwien
Representative of the Venice Commission

Chairman and Judges,
Ladies and Gentlemen,

I am very pleased to be in Riga today to take part in this International Conference on *Judicial Activism of Constitutional Courts in a Democratic State* organised by the Constitutional Court of Latvia in celebration of its 20th birthday.

This event is also co-organised – among others – by the Venice Commission under the Programmatic Co-operation Framework in the Eastern Partnership countries, funded by the European Union.

Venice Commission

I work for the Venice Commission *(a.k.a. the European Commission for Democracy through Law)* more specifically for the Constitutional Justice Division and for those of you unfamiliar with the Venice Commission, let me just briefly say that it is a consultative body of the Council of Europe, which specialises in constitutional law.

Our work consists of assisting member and co-operating states to improve their constitutions, legislation and the functioning of their democratic institutions.

The independence of the members of the Venice Commission is essential to the work that we carry out, notably when providing tailored advice to states that request it, in the form of opinions on draft laws.

The members of the Venice Commission provide advice on the basis of what we call *"our Common Constitutional Heritage"* and – to the extent possible – take into account legal traditions and the history of the state concerned.

The Venice Commission has – from the outset – underlined the importance of exchanging information and ideas between Constitutional Courts and Courts with equivalent jurisdiction.

In order to foster this, we have started co-operating with a number of regional or language-based groups of constitutional courts:

– in Europe,
– in Asia,
– in Africa,
– in Ibero-America,
– in French and Portuguese speaking countries, and the Association of Asian Constitutional Courts and Equivalent Institutions.

In pursuing our goal of uniting these groups and their members, the Venice Commission has organised a Congress of the World Conference on Constitutional Justice for the first time, in Cape Town, South Africa in 2009.

This first congress was followed by another in Rio de Janeiro, Brazil in 2011 and a third one in Seoul, Republic of Korea in 2014.

The next Congress will take place in September 2017 in Vilnius, Lithuania.

The World Conference unites regional or language-based groups of Constitutional Courts and already has 98 member Courts.

And its main objective is to facilitate judicial dialogue between constitutional judges on a global scale.

The Venice Commission believes that the exchange of information and ideas that takes place between judges from various parts of the world in the World Conference furthers reflection on discussions and arguments, which promote the basic goals that are inherent to national constitutions.

Another important task of the World Conference is to support the independence of its member Courts. This is why, since 2011, each congress deals with the topic of independence. The World Conference is ready to stand up for its members when they come under undue pressure from other State powers.

Judicial Activism of Constitutional Courts in a Democratic State

Today's topic of *Judicial Activism of Constitutional Courts in a Democratic State,* is therefore one of great interest to the Venice Commission.

Constitutional Courts are often unfairly accused of judicial activism, which is – as we all know – a catch-all term used in a negative sense to describe the tendency of judges to follow a particular, sometimes political or personal, agenda.

But, it's difficult to draw a line between the interpretation of the constitution and judicial activism. While such techniques as the *interpretation of laws in conformity with the constitution,* are useful in some cases for conflict avoidance,

there are other cases in which constitutional courts or equivalent bodies cannot avoid having to fill legal gaps through interpretation.

The interpretation of the constitution, a role attributed to the constitutional court, gets its legitimacy directly from the constitution.

The constitutional court's active role in fulfilling its mandate is crucial. This should not be confused with judicial activism, which would involve the court making its own legislative judgments. Such action by the constitutional court would be a radical departure from its role as the guarantor of the constitution.

By taking into account the historical context and by basing itself on the wording of the constitution, the constitutional court develops the inherent values contained in the constitution through the systematic or teleological approach.

In this way, the constitutional court ensures that the constitution remains a living, dynamic instrument that shapes the life of society, and vice versa, and not a static text that would quickly be out-dated.[1]

But, the unfair accusation of the constitutional court's judicial activism is often used to justify interference and undue pressure being placed on them by other branches of government – notably for having rendered "unpopular" judgments.

This is done either by questioning their jurisdiction or by drafting new laws that limit their powers or aim to control their composition. This tests the limits of the constitution and sometimes even breaches them.

The Venice Commission strongly condemns this type of practice. It runs counter to the model of a democratic state based on the rule of law and governed by the principle of the separation of powers.

The Venice Commission has adopted a declaration in March of this year as a result of several cases of undue interference in the work of Constitutional Courts in its member States, including situations in Croatia, Georgia, Poland, Slovakia and in Turkey. In this declaration, the Venice Commission expressed its serious concern over this state of affairs.

When state bodies publicly attack a constitutional court, this institution's independence and neutrality is put at risk. The court's position as the guardian of the supremacy of the constitution is undermined and this will affect the implementation of its judgments which, in turn, will be detrimental to

[1] Of interest = the doctrine of the ECtHR = the Strasbourg Court is guided by the teleological method of interpretation, based on Article 31.1 of the Vienna Convention on the Law of Treaties of 1969, and the interpretation logic whereby the Convention is treated as a "living instrument" where the object and the purpose of the legal provisions have priority, were of particular importance and interest.

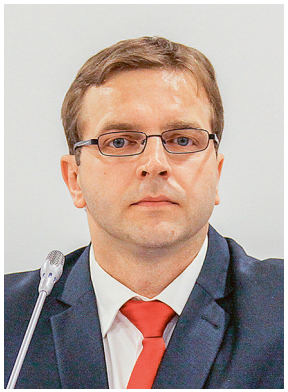
the rule of law and to the Common Constitutional Heritage that both require the respect and the effective implementation of the decisions of these courts.

The Venice Commission and the World Conference on Constitutional Justice remain vigilant and we are ready to support Constitutional Courts when they are unduly attacked by other State powers.

President,

Ladies and Gentlemen,

I would like to thank the Constitutional Court of Latvia for organising this event and I'm looking forward to interesting and inspiring presentations and discussions!



Aldis Laviņš
President of the Constitutional Court
of the Republic of Latvia

Highly Esteemed President of the State,
Honourable Chairman of the Council for the Judiciary,
Honourable Presidents of courts and judges,
Ladies and gentlemen,

1. I have the great honour and genuine pleasure to address you at the conference dedicated to the twenty years of work by the Constitutional Court of the Republic of Latvia.

Establishment of the Constitutional Court was not an easy process. Following lengthy discussions and serious work in 1996 amendments were introduced to the Satversme [Constitution] – one of the oldest constitutions in Europe, which has been in force since 1992. From the vantage point of the Satversme, the changes to Article 85 of the Satversme should be recognised as the most significant institutional innovation in the constitutional system.

Likewise, in 1996 the Constitutional Court Law was adopted and the Constitutional Court set to work.

2. Today we can speak about several periods in the work of the Constitutional Court. I shall try to outline them briefly.

2.1. The first period – from 1996 to 2001. This was the time, when the Constitutional Court:

1) formed as an independent institution;
2) established contacts with other European constitutional courts and began studying and adopting their practices;
3) embodied in the Rules of Procedure of the Constitutional Court and tested in practice the legal proceedings before the Constitutional Court as a separate type of legal proceedings;

4) pronounced a number of judgements that proved the ability of the Constitutional Court both to resolve disputes of principal constitutional importance and to adjudicate politically sensitive cases.

However, the most important thing was the fact that the Constitutional Court by its first rulings inspired Latvian lawyers to change their legal thinking and to adopt an understanding of law and methods of application complying with standards of the Western legal systems.

2.2. The second period – from 2001, when amendments to the Constitutional Court Law with respect to the individual constitutional complaint entered into force, until 2009. This is the period when the Constitutional Court shaped and developed the methodology for interpreting the Satversme and interpreted the content of Chapter VIII of the Satversme (Fundamental Human Rights). The cases reviewed by the Constitutional Court during this period laid the foundation for the understanding of these legal issues that is still used today and will remain useful also in the future.

2.2.1. For example, the Constitutional Court already in 2001 pointed out the link between the Latvian language and the existence and development of the Latvian nation, noting that restricting the use of the Latvian language as the official language within the territory of the state should be regarded as a threat to the democratic state order.

2.2.2. The so-called Border Treaty Case should be mentioned as the second example. This is a case of 2007 with respect to the state border between Latvia and Russia, in which the Constitutional Court elaborated the principle of the continuity of the State of Latvia enshrined in the Declaration on Restoration of the Independence of the Republic of Latvia and defined its significant place in the Latvian constitutional law.

2.2.3. Another example pertains to a case examined in 2009 in which the Constitutional Court analysed the compliance of the Lisbon Treaty with the Satversme and noted that Latvia's integration into the European Union did not violate the principle of the sovereignty of people. Transferring of some competencies to the EU should not be perceived as a weakening of the sovereignty, but rather as using it to reach the aims defined in the EU treaties that are not incompatible with the values and interests enshrined in the Satversme.

2.2.4. This is also the period that outlined the dialogue between the Constitutional Court and the European Court of Human Rights and the importance thereof in the case-law of both Courts.

2.3. The third period – from 2009 to 2013. This period is most of all associated with the so-called "crisis cases". In the period that was difficult for the state when the Parliament had to adopt complicated "laws of the times of crisis" which were unfavourable to people, the Constitutional Court turned into

something similar to a lightning rod, which had to absorb both unfounded and, regretfully, well-founded negative emotions coming from most diverse layers and groups of society.

This was the time when the Constitutional Court dealt with the problems of decreased pensions, issues related to decrease in judges' salaries, and with other crisis cases.

During this period, notwithstanding the situation of crisis, the Constitutional Court was able to engage in a preparatory work of a long-term importance, which today allows us to ensure the work of the court in a better quality, by making an efficient use of the Court's well-educated and capable human resources.

2.4. The time of festivities is the right moment for thanking everybody who has contributed to the Constitutional Court's becoming an institution which enjoys public trust and respect. My thanks go the former justices, employees and presidents of the Constitutional Court. We thank you for the generous contribution of your energy and knowledge.

3. At the same time I would like to say that we cannot stop at these achievements. Therefore I shall now speak about a provisional fourth period in the work of the Constitutional Court – from 2014 until the present.

We evaluate the possibilities for development and work on them in a targeted way, a proof to which is the intensive work to develop our international relations, as well as to improve the work and governance of the Constitutional Court.

3.1. The first President of the Constitutional Court, Mr Endziņš, in his speech at the conference dedicated to the 10th anniversary of the Constitutional Court pointed to a number of problems that still had to be solved. It is a pleasure to find that some of them have been eliminated. However, some issues remain that need to be solved in the nearest future.

3.1.1. Regretfully, the issue of state-provided legal assistance in cases where a person wants to submit an application to the Constitutional Court for the protection of his or her fundamental rights remains unsolved, as it was 10 years ago.

3.1.2. Although a person's right to a fair trial is ensured at the Constitutional Court, the legal proceedings at the Constitutional Court might benefit from some improvements. The Court's own resources should be used effectively to resolve this issue, and successful cooperation with the legislator should be facilitated.

3.1.3. The issue of the status of the judges of the Constitutional Court remains topical, i.e., the issue of their social guarantees and the expedient use of the capacities of the former judges for the benefit of the state. It is important to identify, support and use this resource, rich in knowledge and experience, in the national interests.

Honourable colleagues, the issues that I have listed are our national problems that we must resolve ourselves.

3.2. However, the greatest challenge is linked to the fact that the Constitutional Court, similarly to constitutional courts of other European states, works in the circumstances of further European integration, globalisation and diverse crises. These challenges cannot be solved locally.

3.2.1. On the one hand, we are open to the European law and a close cooperation between the member states. On the other hand, it is clear that the Satversme sets limits to this integration to safeguard the national constitutional identity. I can say with great satisfaction that until now there have been no major differences in opinions of the European courts and constitutional courts; moreover, the procedure that requires that legal issues are first of all scrutinised at the national level creates trust among the inhabitants of the member states that both the national constitutional identity will be safeguarded and common European values will be protected.

Now, perhaps more than ever before, we talk about the importance of retaining a united Europe. United, because we are united by our shared values, shared aims, similar challenges and shared search for solutions.

3.2.2. In view of the conditions of migration and security crisis, solutions must be sought also with respect to such important issue as balancing the national security and fundamental human rights. What are the restrictions upon human rights that we today consider as being proportional and reasonable, if the security of the state is put on the other end of the scale? Has the red line which cannot be stepped over in a state governed by the rule of law been moved? We still continue looking not only for balance, but also for an answer to the question of how far can we speak and act, referring to the national security as a legitimate aim for restricting human rights.

3.3. Honourable colleagues, an international cooperation of constitutional courts is a way for solving relevant issues on a wider scale, exceeding the borders of one state. This period will be characterised by the importance of judicial dialogue in Latvia and in Europe.

4. Our meeting of today also is an example of the way we are creating a common dialogue and solving relevant issues. At this point I would like to thank all those who facilitated our meeting at this conference.

1) Our thanks go to the representatives of the Venice Commission for their support in organising this conference,
2) We thank our colleagues at the Ministry of Foreign Affairs of the Republic of Latvia. Thanks to your support we were able to invite to the conference and engage in discussions with colleagues from the constitutional courts

of the Eastern Partnership countries, as well as from the states of Central Asia.

3) We thank our foreign colleagues who have prepared presentations for the conference.
4) We thank the journal "Jurista Vārds".
5) We thank the Faculty of Law of the University of Latvia for the possibility to stream our conference to a broader audience.
6) And, of course, enormous thanks to employees and judges of the Constitutional Court for their work in organising the conference. We are small in numbers, but as a united team we are able to achieve a lot. I thank you.

5. I would like to thank our colleagues for their involvement in selecting the topic of this conference. This year we shall focus upon issues related to the limits of the competence of constitutional courts.

In order for a constitutional court to successfully perform its basic task – to ensure the supremacy of the constitution – it is important to demonstrate a reasonable, balanced and sustainable stance with regard to legal issues and, in adopting decisions, to respect the discretion of the executive power and the legislator. Currently the situation in some countries indicates that the independence of constitutional courts may be jeopardised if the legislator and the executive power perceive in the activities of the judicial power an excessive activism and exceeding the limits of its competence.

To avoid such situations, to the extent possible, we shall discuss, today and tomorrow, the theoretical and practical aspects in connection with activism of constitutional courts in a democratic state. The topic is an interesting one, and we hope to engage in a valuable exchange of opinions.

Let our ideas and experience make this Conference proceed successfully.

Prof. **Evgeni Tanchev,**
Member of the Venice Commission
to the Council of Europe,
Former President of the Constitutional
Court of Bulgaria

Activism in Constitutional Review Revisited

Introductory Remarks

My contribution concentrates on the classic and new dimensions of judicial activism issue including negative versus positive legislator dilemma in the context of constitutional justice.

Strained relationship between judicial activism and judicial restraint phenomena has been at the center of the classic discourse in the nation state constitutional review. Modern multilevel governance and constitutional pluralism in Europe brought multiple new implications.

According to the conference program I will indulge mostly in the national and comparative dimensions of control of constitutionality. However, they are only part of contemporary constitutional review variety exemplified in the interaction of international and supranational courts performing constitutional review functions and their coexistence and interaction with the nation state full-fledged classic constitutional review.

The themes of judicial activism versus judicial restraint and the judiciary as negative versus positive legislator have been largely overwritten.[1] Liters of

[1] During the 1990s, the terms "judicial activism" and "judicial activist" appeared in an astounding 3,815 journal and law review articles. In the first four years of the twenty-first century, these terms have surfaced in another 1,817 articles--an average of more than 450 per year. Judges today are far more likely to accuse their colleagues of judicial activism than they were in prior decades. And the term has assumed a prominent role in public debates, appearing regularly in editorial pages. Web blogs, political discussion, and confirmation battles. However, as it has been correctly noted nearly everyone scorns judicial activism, that notoriously slippery term., See K. D. Kmiec, California Law Review, October, 2004 THE ORIGIN AND CURRENT

ink, tons of paper and quickly rising number megabytes have not reduced but contributed to the ambiguity and ambivalence of the term. The more has been written the more demand to be written further remains. Instead of achieving clarity as it has been already noticed that "ironically, as the term has become more commonplace, its meaning has become increasingly unclear".[2]

So there is a great risk to find oneself entrapped in either one of two dangers.

From one side I would not volunteer to follow the famous saying originating from the mother of legislatures – the British Parliament that everything has been said already but not by everybody.

From the other, side to run the risk and attempt to embrace and treat even the most important issues with all the care each one of them deserves in a short report is not serious. Hence, I have opted to select some modalities and features and not the whole range of implications or the whole matrix and to build a judicial activism versus judicial restraint phenomenon full-fledged template.

In the analysis of negative and positive legislator and judicial activism versus judicial restraint issues in constitutional justice I have left out genesis and evolution of constitutional control institutions and forms in historical and comparative legal context for the lack of space and time but not because of ignoring their impact. Besides I will not attempt to defend one of the issues and address with clear cut positive/ negative appraisal these phenomena, although judicial activism and courts positive legislator implications have received predominant negative connotation.

I will try to speed through some of judicial activism v. judicial restraint in constitutional Justice implications through positive versus negative legislator dilemma in the national and comparative context and in conclusion to wrap up this report with a snapshot of multiple constitutional review systems coexistence including comparative, national, international and supranational systems forming the order of constitutional orders in contemporary multilevel constitutionalism in Europe.

II. Judicial Activism v. Judicial Restraint in Constitutional Justice

The common solution to all models of constitutional justice has been vesting control of constitutionality of laws in the courts, or creating a special institution outside the traditional judicial power, but never attributing the function to

MEANINGS OF "JUDICIAL ACTIVISM", http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1324&context=californialawreview 1441 at 1443

[2] Ibid.,1443

the Legislative or the Executive branches themselves. Alexander Hamilton strong justification[3] in the Federalist Papers and Alexander Bickel's book "The Least Dangerous Branch" are worth remembering.

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

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

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

The Courts have been qualified as independent policy makers, leaders of public opinion, arbiters in the conflicts between the powers, catalysts of

[3] "Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community.
The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary" Al. Hamilton, J. Madison, J. Jay, Federalist Paper #78 – The Judiciary will always be least dangerous to the political rights of the Constitution, http://files.libertyfund.org/files/788/0084_LFeBk.pdf, at p. 402

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

social change and the basic institutions which lead America to a "government by judiciary".[5] The critics of judicial review of constitutionality of laws label the Supreme Court as a supreme legislator,[6] super legislature,[7] last resort that discovers the framers intent[8] and a third chamber or permanent constitutional convention.[9]

The very birth of judicial review of constitutionality has been one of the best proofs against critique of judicial activism and the notion of the courts positive role in the legislation. In the US judicial review of constitutionality has been established by John Marshall's famous Marbury v Madison Decision. It is, however, paradoxical that this activity was developed and practiced for more than a century when after the WW II Arthur Schlesinger invented the term judicial activism. Not only the birth of judicial review was established by judicial activism but both of them coexisted and went hand in hand long before the phenomenon received the name judicial activism.

Another notion should be emphasized. The way judicial review was born in the U S is indicative that a negative connotation of judicial activism and positive appraisal of judicial restraint in black or white paint is applied would be wrong. In other words if judicial activism is considered to be a priory a negative phenomenon the judicial review itself has been born in sin.

Though affecting the same areas judicial activism and/or judicial restraint have developed on different paths and acquired different degrees of intensity in the common law and civil law legal families. Two premises were indispensable for the emerging of the US diffuse decentralized incidental judicial review of constitutionality of legislation – the system of precedent and courts of general jurisdiction. Lack of these premises doomed to failure all efforts to transplant the American system of constitutional review on the European soil.[10]

Within the US and the common law legal system judicial activism has been described to take place in the following occasions:

1. Striking down arguably constitutional actions of other branches of power;
2. Ignoring precedent;

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

[6] A. Berle, The Three Faces of Power, 1967, 49

[7] A S. Miller, Judicial Activism and American Constitutionalism, in Constitutionalism, ed. J R Pennock, N.Y., 1979, 357

[8] E. Corwin, The Constitution and What it Means Today, Washington, 1957, 252

[9] L. Hand, The Bill of Rights, Harvard, 1957,73

[10] See Louis Favoreu, Le Cours constitutionnelles 1996 (Луи Фаворьо, Конституционните съдилища, София 2002, 10-15)

3. Judicial Legislation;
4. Departures from the accepted interpretative methodology;
5. Result oriented judging or resort to the famous Machiavellian maxim that the goal justifies the means.

Within the civil law family especially after the French revolution the system of positive legislation and general validity rule making was affirmed on one side and different limitations on judge made law were devised and imposed, on the other.[11] Within the separation of powers Judges were assigned to be only the mouth of the law.[12] The ultimate forms of these were the prohibition for the judges to enforce the laws but not to interpret them, known as "gramophone justice" meaning that the judge is under the obligation to play the record that has been produced by the legislator in concrete cases and "telephone justice" when the executive put a pressure on the court to achieve a beneficial decision by the court.[13]

The European body of constitutional review appeared after the end of the First World War when on the ashes of the Austro Hungarian Empire in the constitutions of the new democratic nation states the constitutional courts were established. It would be worth mentioning that some predecessors were experimented of Abbey Sieyes constitutional construct during the Great French revolution and in the constitutions of Austro Hungarian and German empires.[14]

The Constitutional court pattern was established first in the 1920 Austrian and 1920 Constitution of Czechoslovakia. (In Kelsen's famous wording – a constitution without a constitutional court is like a sunlight that does not shine.) This was the original idea of a concentrated specialized judicial review

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

[12] "Of the three powers above mentioned, the judiciary is in some measure next to nothing: there remain, therefore, only two; and as these have need of a regulating power to moderate them, the part of the legislative body composed of the nobility is extremely proper for this purpose. It is possible that the law, which is clear sighted in one sense, and blind in another, might, in some cases, be too severe. But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor". Montesquieu, Spirit of Laws, bk. 6, CH. 2; BK. 11, CHS. 1--7, 206., www. press-pubs.uchicago.edu/founders/.../v1ch17s9.ht.

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

[14] See E. Lambert, Le Gouvernement des juges et la lute contre la legislation sociale aux etats-unis, Marcel Giard & cie eds, 1921

initiated by the famous European scholar H. Kelsen nurtured and defended from the proponents of the American review by the courts of general jurisdiction, on one side, and from the C. Schmit's idea, that the President should be the Guarantor of the Constitution, on the other.[15]

Since authoritarianism and totalitarianism were opposed to the rule of law Constitutional courts could flourish in the post-World War II constitutions in Europe.

Within the constitutional justice in the civil law tradition countries separation of powers principle has been an object of judicial activism in the area of division between the constituent and constituted authorities, on the one side, and between legislation and constitutional review, on the other.

Activism of the constitutional courts has been identified mostly within the separation of powers principle particularly when the constitutional courts strike unconstitutional statutes and act themselves as negative or positive legislators the civil law legal family constitutional justice. Some of them have been accused of going beyond the judicial activity area and of judicial activism when engaging in the interpretation of the constituent authority and founding fathers /mothers will expressed in the constitutional provisions. Departures from the accepted interpretative methodology, result oriented judging have been rare in the constitutional justice in Europe and although the *res judicata* principle has been respected it is not plausible to stick to the precedent especially in the context of abstract constitutional review or interpretation of an ambivalent constitutional provision takes place.

There might be another area of judicial activism of constitutional justice within the continental legal tradition. In some of the most respected and successful constitutional courts like German, Austrian the constitutional courts have been vested with the powers to control conformity of governmental or executive legislation creating bylaws, to the Constitution, parliamentary codes and statutes. In abstracto, this kind of constitutional courts activism would take place towards the executive branch although it would be checking validity of norms established in the hierarchy of the nation state legal system.

In other countries where decisions of the last instance courts of general jurisdiction might be attacked at the Constitutional courts. This used to be the practice in Azerbaijan for the first 15 years after declaring independence after the Soviet Union fall. It is quite possible to arrive to this situation in the constitutional court of the Republic of Tajikistan where among the organs that can seize the court a commission of 3 constitutional judges might initiate

[15] К. Шмитт. Государство; Право и политика. Гарант конституции, Москва, 2013, 42-86; П. Киров, Президентът в българския конституционен модел, София, 2004, 226-248;

a constitutional complaint demanding a constitutional review of a legal act. In these occasions judicial branch might be an area of judicial activism constitutional courts. However due to their rarity, these examples are not the rule. It would be fair to conclude that the exceptions confirm the rule that activism of constitutional justice takes place within the area of the constituent authority and the legislative branch.

What actions of constitutional courts constitute judicial activism? The conclusion that judicial activism is the polar opposite of judicial restraint is not enough to define all forms of this phenomenon. It would simply transfer and subrogate the absent definition by a definition of the opposite phenomenon.

Without any claim of perfect last instance infallible absolute knowledge of truth, a conclusion that judicial activism would take place when in the courts decision there is trespassing of the constitutional limitation of constitutional courts powers which might be or not accompanied or constitute itself an encroachment on the constitutional powers of other branches. Without any doubt judicial activism goes beyond constitutional empowerment and breaks the limits of constitutional conferral of powers. If and when activism of constitutional courts takes place simultaneously with the encroachment of another branch powers it would be a sporadic and temporal but not a constant act of usurpation of power leading the other branch to abdicate from powers.

Often judicial activism has been treated as a static polar opposite of judicial restraint within which a judge should be perceived as a prisoner caged by the framers will. This conclusion is adequate to draw the difference of a kind but not of degree which is more common in practice. If we situate both on a straight line we would be able to observe that on the one end where the line starts absolute judicial activism would be located while at the other we find absolute judicial restraint. Further differentiation of activism from restraint in constitutional justice would require fixing where full-fledged forms would go beyond impropriety and become fully illegitimate. Judicial activism in constitutional justice will become fully illegitimate and would completely undermine the rule of law or review of constitutionality will become itself contra constitutional if and when it would be instrumental to the power usurpation of other branch and would lead to abdication from power of the other branch since the court would have already assumed his competence.

Going to the scale opposite end where absolute judicial restraint is located the full constitutional review illegitimacy will be reached when the constitutional court or a court of equivalent jurisdiction would tend to refrain from the action to protect the constitution or human rights by avoiding to strike down incompatible to the constitution legislation. No matter what shape this action would take place whether by declaring inadmissibility of the claim brought to the court or by

avoiding to produce substantive ruling on constitutionality when a flagrantly non constitutional legislation has been attacked. Here we find diametrically opposite form of illegitimacy. The courts might voluntary abdicate from the function to protect the constitution by refraining to rule on unconstitutionality. The other most often judicial activism takes shape when the court trespasses its powers and steps in the domain of powers of organs of other branches. So judicial activism is about trespassing or refraining from functions and it is completed when the courts action brings to abdication of other branches from powers or the court itself abdicates from its power. Legitimate constitutional justice activism and restraint lie between bringing other branches to abdication from their powers assigned by the constitution, on the one side. The usurpation by the courts action in case of restraint or abdication by the court itself from its constitutional powers by abandoning the functions of constitutional review provided in the constitution is the other end of judicial activism. So judicial activism takes place with one of the opposite abdications and is coupled with usurpation of powers of other organs.

Clear constitutional ground when declaring a provision to be unconstitutional and void is primordial to the proper judicial activism. Proper judicial activism stresses restraint, even when striking down duly enacted legislation. In this understanding of judicial review, the power to initiate policy remains with the legislature or the executive. The court merely exercises a judicial veto in the event that an act of one of the other branches of government goes beyond the power granted to that branch by the Constitution, or is in conflict with some provision of the Constitution.[16] Hence, absolute judicial activism is improper judicial action since it breaks constitutional hierarchy of norms and trespasses constitutional limitations for all the branches of power mandatory in a limited government and constitutional democracy. The improper activism might have many modalities but it stems from the prevalence of judicial preferences or political decisions to the constitutional grounds and legal hierarchy within the nation state legal system. Another label for the improper activism might be whimsical (sham) activism since the enforcement of the relevant law is a political preference or a whim of a certain judge contrary to the established hierarchy and validity of the legal acts. An obviously intolerable form of judicial activism is overbreadth when the courts' decision declares unconstitutional provision that was not demanded by the plaintiff and performs *ex officio* action which is ruled out to the judiciary.

Leaving aside the illegitimate and improper modalities of judicial activism in constitutional justice various degrees of judicial activism versus judicial

[16] Greg Jones. PROPER JUDICIAL ACTIVISM, [Vol. 14:141. HeinOnline – 14 Regent U. L. Rev. 142 2001– 2002, www.regentuniversity.org/.../Vol.%2014,%20No.%201...

restraint would emerge. They might be identified within the range between moderate, tempered activism and liberated restraint seeking to uphold the constitutional construction and founding framers will brought in consonance with contemporary circumstances or updating without changing the normative content of the constitution, while staying within the framers intent bringing through strict interpretation the content up to contemporary circumstances.

It is also more natural for a constitutional court to assume an activist position in certain areas especially in protecting certain right and combine it with more restrained position in the other fields. It is almost certain that the critique bringing the argument of government by the judiciary or judicial despotism would not claim that a court should be activist or restrained in every sphere of its decisions.

It is also a tough choice to make a priori which position is to prefer and which side of dilemma to adhere and activity versus restraint to prevail and receive in a courts just decision. Constitutional review should protect constitutional supremacy and the rule of law by balancing conflicts and compromising contradictions in values, principles and parties rights. At first glance judicial restraint looks safer and more adequate for a court than to perceive activism . Sometimes constitutional justice activism might leave no alternative before the court to save the constitution and avoid collapse of society when the only choice left is between the famous Roman maxim *Fiat justicia, et pereat mundus* and the justice Jackson claim that the constitution is not a suicidal pact.

Considering the "virtues" of judicial restraint in constitutional justice besides all other implications which are present in the particular case it is worth noting that judicial restraint might be dangerous to the constitutional democracy for it might leave unconstitutional authoritarianism unchecked facilitating despotic aspirations of the executive and parliamentary assembly. Constitutional justice overplaying judicial restraint leads to weakening, diminishing the maintenance of the restraint on other branches of power or decreases the effect of the regular constitutional checks, constitutional safeguards and limitations on power. From the other side judicial activism overplaying the restraint on other branches of power might pave the road of the government by judges or despotism by twisting constitutional powers on the side of the court. However, it is more than obvious that government of judges or government by judiciary bears all the signs of a metaphor. It is clear that the term is a misnomer for even referred to the best equipped judiciary supplied with finances and having lots of personnel cannot be in a position to carry the functions of a government or executive or legislative branches of power in the modern nation state. Another dangerous impact judicial activism has on the constitutional justice is to undermine legitimacy and impair impartiality and independence due to the belief that constitutionality test of

parliamentary legislation has been replaced by political grounds and reasoning in the courts decision.

At first glance delayed justice might be considered to be but another weapon of judicial restraint but in practice timing in rendering constitutional court decisions might be an instrument of judicial activism since of the Courts decision temporal effect might influence rights or social processes might take a different path of development.

Judicial activism versus judicial restraint might be evaluated from other perspectives besides the separation of power principle. One possible area of analysis might be the impact of the constitutional courts functions. Functions of constitutional court form other context of judicial activism versus judicial restraint so a brief review of the Constitutional justice functions has been attached in Appendix I to this report.

III. Negative versus Positive Legislator Dichotomy in Constitutional Justice

The European model of concentrated, abstract, posterior, specialized control, performed by a Constitutional Court, devised to protect constitutional supremacy, human rights, international and supranational law primacy being a counter majoritarian check and policing the constituted powers trespass of constitutional limitations was considered to be a part of the European Constitutional Heritage.[17]

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

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

The classic separation of powers principle might be further treated in the context of functional division of political decision making – policy determination, policy execution and control over the political decisions.[18] Legislative assemblies, executive organs and judicial bodies might perform separately or blend the functions in the political process within one of the powers. The division of political functions does not coincide with the tripartite separation of between the legislative, executive and judicial branches of government as a sole repository of one of the powers. The negative/positive legislator dilemma will be further obscured in the context of functional division of political decision making.

Being an institution for posterior, abstract, concentrated and specialized judicial review of the compliance of parliamentary statutes to the Constitution, the Constitutional Court is not assigned any of primary separation of powers of the three constituted branches of government, neither it is situated within the structure of the Judiciary. The Constitutional Court is the main institutional safeguard to the supremacy of the Constitution and to the separation of powers principle. No doubt, the Constitutional Court is a constituted institution with limited powers, but has been attributed a role to keep the other branches of constituted power within the limits of the Constitution, or within the framework of the will of the constituent power. The Constitutional Court acts as intermediary between the constituent power and the legislative, executive and judicial branches of government by policing their functions within the constitutional limitations. The Constitutional jurisdiction occupies the status of juridical arbiter by deciding on the conflicts of competence between the institutions. Despite the constitutional supremacy in the countries with a written constitution it was the parliament and it legislation considered to be embodiment of popular sovereignty delegated in free, pluralist and competitive elections with legislative power unlimited and beyond the reach of any review for conformity with the constitution by any other institution. To contain the positive legislator within the limits of the constitution a negative one was needed and ordinary courts could not be entrusted with this function since the judges of general jurisdiction were themselves constrained by the parliamentary statues. Decentralized, diffuse review in the civil law system would be inoperative for the lack of doctrine and practice of stare decisis unifying the system by the rule of the precedent. Thus a specialized constitutional court had to be created and assigned abstract posterior review of parliamentary statute to ensure their compliance to the constitution as the supreme law of the land.[19]

[18] K. Loewenstein, Political Power and the Governmental Process, Chicago Univ. Press, 1966

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

The constitutional justice has been universally accepted as an element of the European constitutional heritage today.[20] Scholars still argue whether it was due to the popular sovereignty and democratic cravings rising from the grassroots or either it is introduced by the political elites.[21] The latter has been called an insurance model for judicial review has been treated as a kind of security investment to protect former governing party when becoming opposition which is of crucial importance to safeguard that democratic alternation in constitutional government.[22] In a short restatement of negative versus positive legislative roles in constitutional justice several important conclusions should be emphasized.

1. The Constitutional Courts positive / negative or v.v. legislative position should not be treated as a second hand or the younger brother in the legislators family within the nation state. Indeed in other separation of powers areas they might play much more decisive role. Only a part of the constitutional court powers are related to the parliamentary legislation while others are pure special, last instance court jurisdictional matters pronouncing final and irreversible judgements that cannot be appealed. Besides all court powers including legislative one cannot be performed *ex officio* but only if initiated in the form of legal complaint on a juridical conflict by someone of the authorized subjects to seize the court.
   Constitutional courts decisions adjudicating constitutionality of political parties, legality of election results, cancellation of elections or mandates, resoling conflict of competences and ruling on impeachment or criminal trial for highest state officials have nothing to do with the legislative function. In these jurisdictional matters the court enjoys monopoly status adjudication and no part of these powers are shared with any other agents of legislative or executive power.
2. A legislative position of the constitutional court is implied in the following powers of the constitutional jurisdiction.
   a) The role of Constitutional Courts interacting with the Constituent power bodies during the process of enacting new constitutional rules, amending or mutating the Constitution.
      The Constitutional court should ensure that the fundamental law formal changes should be adopted within and by observing the procedure for

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

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

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

constitutional amendment.[23] In some of the constitutions constitutional review has been provided. However revue of the adoption procedure of constitutional amendments has been more widely embraced than reviewing the substance of the new provisions proposed. Control on compliance of the substance of the amendments to the constitution is relatively rare.[24] Indispensable conditions for a substantial constitutional review performance has been an accepted immanent hierarchy in the constitution starting with eternity clauses, constitutional principles ruling the other constitutional norms content and constitutional norms which have been developed to be directly enforceable.

   b) The role of Constitutional Courts interfering with parliamentary legislation and playing the role of assistants to the Legislator, complementing statutes, adding to them new provisions and determining the temporal effects of legislation;
   c) The role of Constitutional Courts interfering with absence of legislation due to lacunae or legislative omissions acting through interpretation sometimes as provisional temporary legislators or by addressing the legislator to step in and regulate to eliminate the vacuum;[25]
   d) The Constitutional courts role as Legislators on Matters of Judicial Review;
   e) The Constitutional courts role in providing interpretative decisions on the Constitutional text in case if different understanding of constitutional provisions exist contradictions and obscurities exist in the text. The Constitutional Court chooses one of the alternative meanings, clarifying the content by removing ambivalence and ambiguities, completing the legislators will without rewriting the provisions;[26]

[23] Study no. 469 / 2008 CDL-AD(2010)001, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) REPORT ON CONSTITUTIONAL AMENDMENT Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009) on the basis of comments by Ms Gret HALLER (Member, Switzerland) Mr Fredrik SEJERSTED (Substitute member, Norway) Mr Kaarlo TUORI (Member, Finland) Mr Jan VELAERS (Member, Belgium), http://www.venice.coe.int/WebForms/pages/?p=02_Reforms&lang=EN

[24] K. Gözler, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS, A Comparative Study, EKIN PRESS, Bursa – 2008, http://www.anayasa.gen.tr/jrca-intro.htm

[25] M. Safian, The Constitutional Court as Positive Legislator, in New Millenium Constitutionalism: Paradigms of Reality and Challenges, G. G. Haratyunyan ed., Yerevan 2013, 409-428 http://www.concourt.am/armenian/library/cclibrary/2013/newmillenium.pdf

[26] E. Kuris, On Perception of Constitutional Law in New Millenium Constitutionalism: Paradigms of Reality and Challenges, G. G. Haratyunyan ed., Yerevan 2013, 81-120 http://www.concourt.am/armenian/library/cclibrary/2013/newmillenium.pdf

f) The Constitutional courts role in resurrecting producing reincarnation of the older regulation which preceded the provisions annulled by the court as unconstitutional;[27]
g) The Constitutional courts role in determining temporal action and consequences of statutory provisions declared to be unconstitutional;
h) When the Constitutional courts deliver an interpretative decision performing abstract constitutional review with *erga omnes ex nunc* effected facto the new content of the norm has been created following interpretation of the court from the moment not the original norm was adopted but starting with courts decision.

3. Some important differences between the legislative roles of Parliaments and Constitutional Courts should be emphasized
The negative legislators position is clearly different from the parliamentary legislative role. When the Constitutional court plays the role of positive legislator it is also different from the positive legislation which is the main competence of the parliaments. While positive law making is always on the parliament initiative, the positive legislator function of the court has consequent effect on the legal borders of parliamentary political will which forms the statutory content.
The parliamentarians are free autonomously to initiate new draft laws at the moment there the society needs statutory regulation.They pick and determine the subject matter of the statutory provisions observing the constitutional limitations. The Constitutional courts cannot exercise their positive/negative legislators role *ex officio* at a moment when they decide. It is normal for a parliamentary legislation to be influenced by politics, partisan purposes appealing to the bulk of the population and in regard to the coming electoral campaign issues. The constitutional court intervention in deciding cases should result only on the interest of supremacy of constitution, the constitutional principles including rule of law and protection of fundamental human rights. Independence and impartiality of the courts decisions and protection of human rights and the constitution are the true and only pillars of legitimacy the judiciary should enjoy to perform effectively its functions.

[27] In Austria and in the Constitution of Portugal there are explicit provisions on the revival (reincarnation) of the legal norms which have been amended by provisions proclaimed o be unconstitutional. In 1940 H. Kelsen has explained this solution of the constitution with one of the basic arguments being that it helps to avoid the situation where proclamation of unconstitutionality would lead to lacunae or vacuum in the legislation, H. Kelsen, Judicial Review of the Legislation, Journal of Politics, N 4, 1942, 183; Stable URL: http://www.jstor.org/stable/2125770 Accessed: 23-04-2016 09:03 UTC

4. When the Constitutional court is not seized it also exerts an impact on the legislator. The very existence of a posteriori abstract constitutional review is a potential threat to the legislator to observe the constitutional limitations in order to avoid nullification of statutory provisions. Hence the option of seizing constitutional court has preventive indirect effect on the legislators will content.
5. Sometimes looking for a clear cut alternative of positive or negative legislator turns to be a false dilemma. In fact many combinations and degrees might be present in every single case decision in the negative positive dualism of the constitutional courts role in legislation . This is true if H. Kelsen legislation currencies conversion is further developed and taken to its logical consequences. Most often the hypothesis of direct negative legislator goes hand in hand simultaneous and not as an alternative to the indirect positive legislator in the courts decisions. Negative legislative activity by a court striking down a non-constitutional provision triggers positive legislation by the parliament to fill in the vacuum after unconstitutionality has been proclaimed the parliament might confirm the regulation that has been enforced by the courts decision or apply its normative power to rule out unconstitutionality. When a court acts like a positive legislator then the parliament might either support the new rule that has been established or to reject it by enacting new provision which corresponds to the compliance to the constitution.
This leads to direct positive legislation function of parliament which has the implicit indirect negative legislation impact on the court's decision.
If the two pairs of legislative roles of courts and parliaments are compared we can conclude that it would be fair to speak about reverse relationship of parliaments and constitutional courts positive versus negative legislation and not about false dilemma of contraposition of negative to positive legislator or v.v.

IV. Constitutional Review Beyond Constitutional Orthodoxy or How Constitutional Reviews have been Shaped and Shape the Multilevel Constitutionalism in Constitutional Pluralism in Europe

Without contesting all of the constitutional orthodoxy virtues we have to admit that it certainly requires adherence to the wisdom of our ancestors

famous fallacy and old maxim that there is nothing new under the sun.[28] In this context there are only national constitutions and national constitutional courts or bodies of equivalent jurisdiction performing constitutional review. International Supranational courts and legal orders belong to completely other legal realm where words constitution or constitutional neither govern and nor are even part of the legal to international and supranational worlds of law.

Revisiting judicial constitutional review activism provides an opportunity to diagnose and acknowledge the changes resulting from the evolution of judicial review in Europe. There are many new modalties in the constitutional review template today. From all the innovations I would concentrate on one to conclude this report.

How constitutional review has been shaped by contemporary constitutional pluralism and how the constitutional review itself took and takes part in the process of shaping multilevel constitutionalism in Europe?

One of the most fascinating developments in the area of constitutional law has been the process of new constitutional orders[29] emerging through gradual low intensity constitutionalization of international and supranational law primacy principle in Europe during the last decades. The constitutional review in multilevel constitutionalism context has been that the constitutional review has combined the classic safeguarding of constitutional supremacy function with the courts assumption of guarantors role of international and supranational law primacy and consistency to the hierarchy within the legal order. Constitutional pluralism has opened the necessity of ordering the mutual co-existence of various constitutional orders through courts resolving collisions within and between orders.

One way of approaching these new phenomena would be through the magnifying glass of constitutional orthodoxy. Leaving constitutional orthodoxy aside, the other way would be to observe the transformation of the nation unitary state monolevel or multilevel federal constitutionalism through new lenses and refrain from automatic transplants by simple analogies the statal features to the multilevel constitutionalism. Another very successful approach is to treat contemporary constitutional pluralism in the area of the EU integration in the context of integrative and evolutionary federalism concerning allocation distribution and performance of constitutional powers.[30]

[28] See J. Bentham,The Handbook of Political Fallacies, New York, 1962, 43-54.

[29] R. Arnold, National and Supranational Constitutionalism in Europe, New Millenium Constitutionalism: Paradigms of Reality and Challenges, G. G. Hatyunyan ed., Yerevan 2013, 121-138 http://www.concourt.am/armenian/library/cclibrary/2013/newmillenium.pdf;

[30] K. Lenaerts, Constitutionalism and Many Faces of Federalism, American Journal of Comparative Law, vol 38, N.2, Spring, 1990, 205-263, http://www.jstor.org/stable/840100

Accepting the premise that European legal space consists of state and non state constitutional orders For the last quarter of a century starting with the 90 ies of the 20th century Europe has entered a new stage in constitutional development marked by coexistence and mutual relationship between multiple constitutional orders – national, international and supranational layers of legal regulation. Only national constitutions form the full-fledged constitutional order so far while the international and supranational represent constitutional orders are in the making. They are neither replica to the national level in means of their structure and function, nor have they have reached the stage of finality common to the national constitutionalism level. Consequently various bodies of constitutional review emerge to protect the constitutional orders and act in general in autonomous way but exerting jurisprudential and logistic influence on each other. However, the international and supranational legal orders do not have a statal character. Within every legal order a hierarchic built system of legal sources exists and is maintained by a special body of constitutional review whether a special constitutional court or an institution with equivalent jurisdiction. Simultaneously though the legal orders are hierarchically built themselves they do not hermetically exist and function fully independent similar to autarchy of Greek polities in the antiquity. Within the whole European legal space consisting of hierarchically organized national, international and supranational legal orders, no clear cut Kelsenian nation state normative hierarchy exists. The conflicts which stand on the way of legal enforcement are to be avoided through different legal techniques by the legislators drafting provisions on different levels.[31] In this line of legal conflict resolution the courts stand as final and ultimate umpire to enforce the rule of law and finding the norms to prevail and to decide the residual juridical collisions.The process might be compared to the multilevel statal governance and multiple legal orders in federations and confederations. But in fact even in federations federal courts do not replace and neither stand in a tier relationship with the states judiciary, but both of them function within their own jurisdictions unless preemption prevails.

Democratic constitutional principles and especially rule of law forming the European constitutional heritage, constitute the foundation of multilevel constitutionalism and exclude chaos between heterarchical but not autarchical legal orders. This complicated system of constitutional orders is not a chaos but is built on functional interrelationship where the constituting legal orders are not in straightforward neither in a reverse mutual dependence in general.

[31] K. Lenaerts. Interlocking Legal Orders in the European Union and Comparative Law, International and Comparative Law Quarterly, Vol. 52, No. 4 (Oct., 2003), pp. 873-906

Contemporary constitutional pluralism in Europe approaches contradictions with a whole range of logistical techniques brought by the instruments of national, federal, comparative, international and supranational methods. Comparativism brings harmonization, unification, reception, legal transplant devices. Internationalism – implementation of international instruments by dualism through adoption of the special provision in the national law or monistic ratification of hard law and influence by soft law standards. In supranationalism the EU "member states", according to H. McMillan's wording, pool their sovereignties in order to gain strength in managing globalism challenges that a single country cannot successfully resolve.[32] Within supranational legal method adapting constitutions to the primary treaty law, completing and maintaining *acquis communautaire* and uniformity of EU law are the basics to the integration through law. Institutional interaction is facilitated by the principles of conferral of powers, subsidiarity, flexibility and proportionality too. ECJ performing constitutional review ensures that the law should be enforced and through its jurisprudence, including especially preliminary rulings procedure,[33] protects the EU unwritten constitution.[34]

Another original method proposes by M. Maduro, N. Walker and others is known as contrapunctualism in the area of law.[35] Coming from the art of

[32] Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level. Countries that make up the EU (its "member states") pool their sovereignty in order to gain strength and world influence none of them could have on its own. *Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level."* www.europa.eu.int/institutions/index_en.htm

[33] K. Lenaerts, The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited, www.ecln.net/elements/berlin2005/lenaerts.pdf
The Preliminary Reference to the Court of Justice of the European Constitutional Courts, German Law Journal Vol. 16 No. 06 P. 1317-1796 01 December 2015 www.germanlawjournal.com
А. Корнезов, Преюдициалното запитване до съда на Европейския съюз, София, 2. изд., 2012

[34] These undoubted characteristics of the European law are formulated by the Court as early as the beginning of the 60s, N. V. Algemene Transport – en Expeditie Onderneming van Gend & Loos, v. Netherlands Fiscal Administration; Case 26/62; Costa v. ENEL; Case 6/ 64. See in a detail E. Stein, Lawyers, Judges and the Making of a Transnational Constitution, American Journal of International Law, vol. 75, January 1975, N 1, 1-27;
P. Pescatore, The Doctrine of Direct Effect, European Law Review, 8, 1983, 155-157 ; J. Weiler, The Community System: the Dual Character of Supranationalism, Yearbook of European Law 1, 1981; A. Easson, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI, Florence, 1994-1995

[35] M. Maduro offered three pillar constructs of constitutions in a national and global context.

musical composition it is the technique of making a harmony between different tunes sounding simultaneously. It is important to emphasize that in order not to reach disharmony they should be composed in a common key. Democratic constitutional and legal principles of European constitutional heritage perform the role of the common musical key to protect the balance and harmonious performance in multilevel constitutionalism.

How are the different courts – national, international and supranational courts performing constitutional review or similar function related to each other? They are not in a hierarchical or tier relationship out of their legal or constitutional order. At present the European legal space consists as it has already been mentioned of different although separate homogenic, hierarchical within each one legal levels without a hierarchy between themselves. On the whole however it is not hierarchical on one side and autarchical on the other as mechanic unity structured of fully independent legal levels. Hierarchy within constitutional orders but not between and exclusion of full independence and autarchy between them. An interesting metaphor was applied by A. Voskuhle and R. Jaeger. Instead of the Egyptian pyramid which mirrors Kelsenian or Hartian positivistic hierarchy of law an image of mobile has been brought to describe the relationship between national and supranational courts performing constitutional review.[36]

Another original metaphor explaining the role of the courts belonging to different European legal orders so far has been brought by A. Voskuhle. He labeled the functioning and interrelationship between the courts belonging to different legal orders in Europe Bermuda triangle of human rights. Of course this Bermuda triangle abrogation of human rights and not human rights themselves should disappear.[37] Prime function of the national constitutional courts or bodies of equivalent jurisdiction has been to protect the supremacy of the constitution and to enforce international and supranational law primacy. European Court of Human Rights prime function like constitutional review was to monitor

M. Maduro, From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance, Lead Paper to the Workshop Changing Patterns of Rights Politics: A Challenge to a Stateness?, Hamnse Institute for Advanced Studies, Delmenhorst, Germany, June, 2003, 9-12; Miguel Poiares Maduro Three Claims of Constitutional Pluralism, https://www.wzb.eu/.../miguelmadurothreeclaimsofconstitution.

[36] "Mobile stands for kinetic sculpture which consists of ensemble of balanced parts that can move but are connected by strings or wire" see Prof. Dr. A. Voskuhle, Pyramid or Mobile ? – Human Rights Protection by the European Constitutional Courts, 36-40, http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf

[37] A. Voskuhle, Protection of Human Rights in the European Union. Multilevel Cooperation on Human Rights between the European Constitutional Courts, Our Common Future Hnnover/ Essen,2-6 November 2010, www.ourcommonfuture.de

uphold compliance to the European convention of Human rights. In this area the court performs a review of contradictions and breaches of human rights on the side of governments of the member states without breaking national sovereignty. Hence the European Court on Human rights performs the function of a constitutional court in regard to the Council of Europe member states compliance to the ECHR.

Once created and reaffirmed mostly like economic court protecting the 4 freedoms as the pillars of integration ECJ gradually has acquired functions common to the constitutional courts in transnational context. ECJ has assumed the role of constitutional court of the European legal order in the annulment proceedings under art. 263 TFEU performing review of legality of the EU legislative acts and their compliance to the founding treaties as primary EU law. ECJ is assuming the role of a constitutional court in the procedure of preliminary rulings on the validity of EU law under art. 267 b TFEU raised by the national courts. The constitutionalization of the founding treaties goes beyond securing the supremacy of the international law in the municipal legal order. Most of the constitutions provide that international norms under certain conditions become part of the national legal order and acquire legal force of a parliamentary legislation, or by superseding the statute law stand second to the constitution only.[38] Constitutional courts of the nation memberstates, E. Court HR and ECJ are the elements of the multilevel national, international and supranational constitutional review in Europe where the union of courts performing constitutional review has embraced horizontal with vertical constitutional review.[39]

On a supranational level the constitutionalization has been the process of gradual transformation of the founding treaties into a supreme fundamental law penetrating the national legal order, having a supremacy to the legal systems including constitutions of the EU Member States. By this process the Treaties legally bind the sovereign EU Member States by a vertical legal regime with enforceable rights and obligations to all the institutions of government and national legal persons. ECJ has been an indispensable vehicle in the process

[38] On the hierarchy of legal acts see. Е. Танчев, Източниците на правото в Сравнителното конституционно право, в Съвременно право 1995, кн.1 и 3; Р. Ташев, Източниците на правото, София, 1997; Law in the Making, ed. Al. Pizzorusso, Springer, 1988; Sources and Categories of European Union Law, ed. G. Winter, Baden-Baden, Nomos, 1996; L. M. Diez-Picazo, Sources of Law in Spain: An Outline, EUI, Working Paper, N 94/10, Florence

[39] Multilevel Cooperation of the European Constitutional Courts Der Europäische Verfassungsgerichtsverbund* Voßkuhle, European Constitutional Law Review 6, 2010, 175 -198, http:// journals.cambridge.org

of constitutionalization, affirming EU law as autonomous supranational legal order.[40]

The role of the Court can be compared to the judicial review in the United States in securing the growth of the U S constitution, making the formal constitutional amendment unnecessary while adapting the content of the constitutional provisions to the new realities. With constitutionalization the unwritten constitution has taken shape through the Court's jurisprudence. In the words of judge Mancini "If one were asked to synthetize the direction in which the case – law produced in Luxembourg has moved since 1957, one would have to say that it coincides with the making of a constitution for Europe".[41]

The jurisprudence of the Court has affirmed the autonomy of EC legal order, its supremacy, direct, immediate and universal effect,[42] doctrine of implied powers of the communities institutions and preemption in the areas defined by the founding treaties, protection of human rights by the EU Charter on Human Rights within art. 51 and art. 52.[43] Besides that the European Court of Justice has affirmed that the national institutions and judges should abide the interpretations of EU law, provided by its preliminary opinions and jurisprudence.[44]

Gradually the founding treaties have acquired a status of higher law or supremacy, which was an indisputable feature of constitutions for ages.[45]

[40] According to Sweet there are two stages from 1962 till 1979 and from 1979 till present., A. S. Sweet, Constitutional Dialogues in the European Community, EUI, Florence, R SC ¹ 95/38 1995; Though on different ground P. Ludlow and J. Weiler speak for 3 stages, P. Ludlow, History of the European Union, East-West Forum, 1995 ; According to Schuppert there are six phases ., G. Schuppert, Op. cit., 334 – 341; see also R. Dehousse, From Community to Union, Europe after Maastricht- An Ever Closer Union, ed. R. Dehousse, Munchen, 1994

[41] G. F. Mancini, The Making of a Constitution for Europe, 26 C.M.L.R.,1989, 595; See also Caporaso "Constitutionalization is a process of transiton from a state where where the countries are governed by contracts to a state where they are bound by constitutional principles which are closer to the municipal law than to the international law" , J. Caporaso, Op. cit., 37

[42] Once indesputable features of EC law were formulated by the Court during the 60ies, N.V. Algemeine Transport – en Expedite Ondernereming van Gend & Loos, v. Netherlands Fiscal Administration; Case 26/62; Costa v. ENEL; Case 6/ 64

[43] See E. Stein, Lawyers, Judges and the Making of a Transnational Constitution, American Journal of International Law, vol. 75, January 1975, N 1, 1-27; P. Pescatore, The Doctrine of Direct Effect, European Law Review, 8, 1983, 155-157 ; J. Weiler, The Community System: the Dual Character of Supranationalism, Yearbook of European Law 1, 1981; A. Easson, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI, Florence, 1994-1995

[44] See A. S. Sweet, Constitutional Dialogues in the European Community, EUI, Florence, R SC ¹ 95/38 1995 ; J. Weiler, The Constitution of Europe: Do the New Clothes Have an Emperor?, Forthcoming in Cambridge University Press

[45] For the meaning of higher law during centuries see M. Cappelletti in Judicial Review in the Contemporary World, 1971, 25-32, and his Comparative Constitutional Law, Charlottesville,

Constitualization of the founding treaties in the Court's jurisprudence brought to qualification of the EC primary law as a constitutional charter of the European communities.[46] The ECJ Opinion on the Draft agreement on an European Economic Area, delivered in December 1991 brought a description of the founding treaties as a constitution "the EEC treaty, albeit concluded in the form of international agreement, none the less constitutes the constitutional charter of a Community, based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals...The essential characteristics of the Community legal order which has been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".[47]

The most effective means in the development of ECJ constitutional court functions has been the preliminary ruling procedure for interpretation of EU law raised by the member state national courts. Here ECJ affirmed the constructive intercourse with the national judiciary concerning the enforcement of the EU law. The application of the EU law and its interaction with the national law has become two way street and not hierarchical relationship where the ECJ could simply discard and rule instead of national courts on the domestic law including the constitutional provision of a member state.[48]

Under these premises how would judicial activism versus judicial restraint dilemma take shape within the interrelationship between the courts belonging to the different constitutional orders in Europe?

Due to the current shape of political Union in the EU ECJ activism might be seen as vehicle to speed up European integration. The Court did not hesitate to act in the areas where necessary majorities or consensus were missing to find legal solution to the crisis on the basis of enforcement and prevalence of EU law.

The complicated discursive nature of interaction between ECJ and National constitutional courts of the EU member states does not bring to the establishment of a clearcut straight or reverse dependence within the multilevel system of constitutional review. In other words ECJ activism does not result in activism

1979, 5-11

46 Case 294/83 1986 ECR 1339,

47 S. Weatherill, Law and Integration in the European Union, Oxford, 1995, 184 – 185; See also Opinion 1/91, December 14, 1991.; see for more details D. Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces, C.M.L.R., 30, 1993, 17-69

48 See G. Itzcovich, The European Court of Justice as a Constitutional Court. Legal Reasoning in Comparative Perspective, Stals Research Paper, 2014, 4, p.6-9 http://stals.sssup.it

of the national constitutional courts and v.v. activism of the some national courts does not bring to the activism of ECJ. The activism versus restraint dichotomy are performed against other branches of power within the relevant constitutional orders . Hence there should not be straight forward direct or reverse impact on the judicial systems of constitutional review between different orders which has been caused by a constitutional review jurisprudence from another layer in the multilevel governance. Activism of the national constitutional courts should be mirrored, measured and magnified in their relationship with the respective branches of power in the same legal order to which the courts belong. Neither activism of supranational court nor activism of national courts should trigger a competition to conquer new areas of jurisdiction at the expense or in parallel with the all participant bodies in the multilevel constitutional review in Europe. Diplomacy in multilevel system of constitutional review in Europe as non hierarchical and non belligerent relationship attempts to work out compromises and in dialogue to avoid the clashes in the jurisprudence between the various constitutional orders.

It seems not correct to treat the activism in constitutional review whether within each of the constitutional orders or in between the in the whole European legal space as a homogenous phenomenon. Every court might be activist in one sphere and restrained in the other areas. If this is true for constitutional monism it would be even easier more likely to happen within the constitutional review in multilevel constitutional orders context due to the non-hierarchical interdependence.

In conclusion

Constitutional review performance takes place within the range from full size judicial activism at the point of trespassing of constitutional court powers and ends with full size judicial restraint where a constitutional court refrains from fulfilling its functions and *de facto* abdicates from its powers. Extreme judicial activism might couple trespassing to power usurpation of other branches to bring abdication from their constitutional powers. Extreme restraint paves the road to the constitutional courts abdication from its powers, surrender and betray their status of constitutional government, human rights and rule of law guardian.

Highest duty of a constitutional justice is to be on guard and check all other branches attempts to abrogate the powers of the court to protect the constitution. Self-defense of the courts should not be treated as par excellence judicial activism.

Vigorous or temperate due performance of control of constitutionality judicial court powers within the margin provided by the constitution,

supranational EU law and the ECHR should not be treated as a constitutional review activism or restraint.

This might be the point where I have to stop and gladly surrender the floor to other colleagues from whose wisdom I have learned a lot. They should take further the discourse on multiple dimensions constitutional courts in the national, comparative, international and supranational multilevel constitutional review in Europe.

Appendix I.
Constitutional Review Functions

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

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

1. Constitutional Courts have been recognized by the constitution drafters to be the Guardians of Constitutional Supremacy. Constitutional courts perform the function of supreme policeman of the Constitution. It seems that all of the Constitutional court powers are oriented in this direction. However, this is obviously the case with the most typical of the powers – abstract control of the constitutionality of laws having erga omnes effect. Where the Constitutional courts were established abstract posterior control has been monopoly of the Constitutional court though constitutionality and constitutional

conformity might be recognized and more than this accepted by all other legal subjects until its unconstitutionality would not be declared by the court.

2. Constitutional review has been the voice and Guardian of the constitution's content as established by the constituent power. According to the classical democratic theory the nation state constituent power being an expression of popular sovereignty creates the constitution and has no place in legislation, practical executive government and adjudication of justice and deciding cases by the courts. The constituent power does not disappear but assumes a latent status or it "falls into sleep". It springs to life and becomes active when the terms of the constitutional contract need an amendment or the nation and its political elites have arrived to political decision to adopt new constitution.[49] While being in a latent position it is the constitutional court that voices the exact meaning of constitutional provisions, might interpret them but staying within the limits of the founding fathers will. Even the boldest judicial activist should accept that the constitutional court interpretation might update the constitutional provisions but it cannot amend or develop the constitutional content beyond the will of the founders. The process of growth of the constitution is not tantamount to constitutional amendment which is a legitimate monopoly of constituent power as emanation of popular sovereignty.

Within this function the constitutional courts primary role would be in voicing and keeping the content of the constitution as established through popular sovereignty by constituent power. Though it is generally accepted that division between constituent and constituted powers is a monopoly belonging to the civil law family firmly established since E. Sieyes it should be emphasized that in the American system it was stipulated as a premise to the birth and enforcement of judicial constitutional review by the court itself.[50] As stated by justice Ch. E. Hughes to reiterate judicial activism "We are under the Constitution but the Constitution is what the judges say it is".[51]

3. Constitutional Courts act as ultimate judicial safeguard of fundamental human rights. No doubt this position of the courts is cornerstone in the legitimation of judicial review of constitutionality of laws. It was the status

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

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

[51] www.wikiquote.org/wiki/Charles_Evans_Hughes

of the courts as guardians of fundamental constitutional rights and liberties that defeated the radical democratic opposition to review of constitutionality of laws by judiciary. Parliaments are product of direct ascending procedural democratic legitimation through election and are entrusted with the democratic will of the nation or majority of the electorate. To this source of legitimation courts consisting of judges that are never directly elected by the people bring their constitutional legitimacy defending fundamental human right as a last and supreme national institution to protect human rights and ultimate resort to defend constitutional freedom against an encroachment on human rights by parliamentary legislation.

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

5. Constitutional courts act as legal arbiters (legal povoir neutre contrasted to political povoir neutre performed by the head of state) or agents of constitutional and legal arbitrage resolving the conflicts. In this respect status of the constitutional courts might be compared to the neutral power or *povoir neutre* described by B. Constant[52] and attributed to the head of state conceived to be performing neutral arbitrage to resolve, diminish, accelerate, prevent, mediate institutional conflict or compromise an outcome beneficial to the particpants and tha whole nation. In contrast to this position of the head of state performing political arbitrage, the constitutional courts exercise constitutional arbitrage – i. e .the conflicts between the powers are resolved on the basis and within the constitution.

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

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

7. Constitutional Courts acting as a safety valve to decrease the level of the social pressure, unrest and prevent the constitution and governmental

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

system from self destruction or destruction by the violent extraconstitutional, extraparliamentary or illegal action. One of the first explanations of the function of procedures, devices and institutions acting as a safety valve belongs to N. Machiavelli long before constitutional review of legislation emerged.[53] Another approach by converting a political or extraparliamentary violence into legal conflict one has been emphasized by A. De Tocqueville.[54] Instead of being resolved by violence on the streets the conflicting issue is given in the hands of the court to decide within the constitution and with legal means. By this procedure the degree of social discontent is reduced from the melting pot of boiling emotions and hostilities to impartial and universally accepted procedures by people and institutions where the decision is worked out based on reason with rational arguments.

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

[53] "To those set forward in a commonwealth as guardians of public freedom, no more useful or necessary authority can be given than the power to accuse, either before the people, or before some council or tribunal, those citizens who in any way have offended against the liberty of their country. A law of t his kind has two effects most beneficial to a State: *first,* that the citizens from fear of being accused, do not engage in attempts hurtful to the State, or doing so, are put down at once and without respect of persons: and *next,* that a vent is given for the escape of all those evil humors which, from whatever cause, gather in cities against particular citizens; for unless an outlet be duly provided for these by the laws, they flow into irregular channels and overwhelm the State. There is nothing, therefore, which contributes so much to the stability and permanence of a State, as to take care that the fermentation of these disturbing humors be supplied by operation of law with a recognized outlet" In respect of this incident I repeat what I have just now said, how useful and necessary it is for republics to provide by their laws a channel by which the displeasure of the multitude against a single citizen may find a vent. For when none such is regularly provided, recourse will be had to irregular channels, and these will assuredly lead to much worse results. For when a citizen is borne down by the operation or the ordinary laws, even though he be wronged, little or no disturbance is occasioned to the state: the injury he suffers not being wrought by private violence, nor by foreign force, which are the causes of the overthrow of free institutions, but by public authority and in accordance with public ordinances, which, having definite limits set them, are not likely to pass beyond these so as to endanger the commonwealth". 40 DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS BY NICCOLO MACHIAVELLI CITIZEN AND SECRETARY OF FLORENCE TRANSLATED FROM THE ITALIAN BYNINIAN HILL THOMSON, M.A.A PENN STATE ELECTRONIC CLASSICS CHAPTER VII www2.hn.psu.edu/.../machiavelli/Machiavelli-Discourses- Titus-Livius.pdf

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

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

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

Constitutional review on parliamentary legislation performs the function of appeal and resort to the constitutional review to protect the constitutional rights and has been entrenched in some constitutions itself is a fundamental human right especially where individual complaint has been provided or through the indirect access to the constitutional courts.[55]

Constitutional courts exercise transforming function when updating the constitution and providing the growth of the constitution or in T. Jefferson's words the constitution should belong to the living and not to the dead.[56] Providing new interpretation of the constitutional provisions in the context of new generations and might be instrumental to avoiding the textual constitutional amendment by the constituent power. This function of constitutional review might be indispensable to the avoiding of gridlocks especially in countries with rigid constitutions. It might be instrumental to reduce the cost of the formal constitutional amendment trough the cumbersome procedure of election and activity of constituent assembly.

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

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

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

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

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

Appendix II.
Historical and Doctrinal Implications of Invention and Usage of Negative Legislator Label

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

The first of them based on popular sovereignty doctrine elevated legislative power as being true expression, a mirror and dependent on peoples will alone. Theoretically it was mutatis mutandis the Jacobin credo based on Rosseau contract social ideas and practically developed by supremacy of the British parliament whose souvereign power did not know the borders posed by a written constitution

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

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

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

Within the context of separation of powers any notion on judiciary possessing or exercising legislative function or even interfering with legislation has been more often humbly whispered in the doctrine or carried in practice with extreme care or in such a hesitation shielded against accusations with the break away from democratic constitutionalism. Judicial role in legislation or legislative function was seen as a heresy to the constitutional orthodoxy

endangering separation of powers and undermining judicial independence. Indeed constitutional review of parliamentary statutes whether institutionalized by a special constitutional court or a body of equivalent jurisdiction has been a special case for the necessity to pronounce on conformity of laws to the constitution and if found to be in contradiction to declare the statute void ab initio or to annul it *ex nunc*. Even in that situation however the coexistence of possible forms and combinations of coexistence between the nouns judiciary and legislation or adjectives of judicial and legislative has been uneasy rather to qualify it to be a logical controversy was much easier in theory and practice. The concept of constitutionalism as a safeguard of fundamental human rights and limited governance with enumerated powers under the rule of law the constitutional review was meant to protect the constitutional supremacy and not to provide the governmental system with another extra parliamentary channel of legislation.

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

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

H. Kelsen tempered the radical consequences and repercussions of the constitutional courts on constitutional theory by coining the term of negative legislator.

This might have been the start of the long journey of the authentic identity of constitutional jurisprudence exercised by a constitutional court. Since then

may qualifications have been brought in the political debate. A short but not exhaustive list of positions between the full fledged positive legislators functions and the limited role of constitutional courts in the area of legislation would certainly include: reluctant legislator, substitute or surrogate legislator, indirect legislator, quasi legislator, demi semi, co-legislator,[57] legislator in hiding, legislating by prompting to the parliament, facilitating future legislation by parliament, expedient legislator (not to be mixed with legislator in during the emergencies) finding temporary solution until the parliament steps in and adopts the necessary statute or provisions etc. Negative legislator status marks the other end of possible interference of constitutional courts with the legislation seems to conclude the whole issue of the constitutional review quasi legislative powers. But are negative and positive legislators roles antonyms or real diametrical opposites where courts and parliaments are the opposite ends of legislation drafting within the constitution the constitutional framework and complying to the constitution, i.e. of constitutional friendly legislation. Certainly no and not because of many intermediary positions already mentioned.

Indeed in 1928 H. Kelsen first contrasted parliamentary to judicial activity in the area of legislation. While parliament as a positive legislator is creative and acts on his own initiative deciding when, how and to what extent to regulate, the constitutional court cannot act *ex officio* but has to be seized in order to control the statutory content compliance to the constitution. So if the parlamentarians can have the autonomy to enact general norms influenced by political and partisan factors striking out legislation should be made only on the grounds of non compliance he constitution and the courts judgement should reflect from judicial independence in applying the constitution. However he went on to say that these two statuses were not antipodes and de facto can be seen to convert in the process of enacting legislation complying to the constitution. "To annul a law is to assert a general (legislative) norm, because the annulment of a law has the same character as its elaboration – only with a negative sign attached... A tribunal which has the power to annul a law is, as a result, an organ of legislative power."[58]

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

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

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

It would be unserious to attempt to all inclusive analysis of the all of the doctrines in the present report. By picking 3 examples cannot aspire for the indepth thorough analysis this topic truly deserves.

In a very original and rational manner L. Favoreu tackled the issue from the context of constituonal jurisdicions.

A. S. Sweet analysed the legislative role of the constitutional courts from the perspective of consequences for the parliament of decisions declaring statutory provisions to be unconstitutional.

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

L. Favoreu Contribution

Favoreu offered alternative to the government-of-judges analysis of and negative versus positive legislator dilemma. He was successful in bypassing exclusiveness or simultaneous coexistence of negative and positive legislator issue in constitutional court powers and proposed more detailed and refined analysis of roles and functions within the constitutional review and parliamentary legislation. In a word he attempted to reaffirm the constitutional orthodoxy of the separation of powers principle in a very original and creative manner different from the traditional argumentation mainstream.

In the context of the liberal concept of politics juridification or as one of the Favoreu titles "politics captured by law" he built a bridge between the modern and classical rule of law principles in contemporary constitutional democracy.

A. S. Sweet analysis brilliantly sumarizes Favoreu concept that the constitutional jurisdictions perform four basic regulatory functions.[59] "First, constitutional courts act as either "a counterweight" against a parliamentary majority that is "too powerful" (in France and Spain, for example), or as a "substitute" legislator, where a parliamentary majority "does not exist" (as in Italy).

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

Third, L. Favoreu denied that constitutional courts ever "block", "veto", "censor", or "prevent" decisions taken by parliament; instead, they "guide", "direct", "authenticate", and "correct" the legislator, "putting reforms on

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

the right normative track... the constitutional one". Thus, far from obstructing the general will, constitutional judges actually legitimize it! Last in the absence of constitutional review... human rights would enjoy no protection."[60]

L. Favoreu developed ideas of direct and indirect effect of constitutional review on parliamentary legislative power. He distinguished between down-stream impact when statutory provisions are found to be in contradiction to the constitution and upstream impact leading to self-restraint (autolimitation) chilling the legislators ambition in the direct effect of constitutional review on the parliamentary legislation.[61]

A. S. Sweet

When the constitutional review has proclaimed a parliamentary statute unconstitutional without a doubt the Constitutional jurisdiction has acted as negative legislator.[62] This was the direct effect of the constitutional court decision in the area of legislation. Simultaneously the constitutional courts have exercised indirect effect on the parliamentary legislation – not by exerting political pressure which is a part of the interrelationship game between the executive and the legislative branches of power but through anticipatory reaction of the legislature.

Annuling a statute found to contradict the constitution triggers anticipatory reaction in the form of corrective revision. The parliament starts a procedure of adoption of legislative provisions in conformity in order to fill the statute with conforming provisions to the constitution. Although here the parliament and not the court is the positive legislator the parliamentary new legislation has been influenced by the courts decision. So there is no doubt that according to the substance of the new regulation it was influenced by the courts decision so the court indirectly takes part in the positive legislation. The ratio decidendi of the constitutional court judgement striking the law as unconstitutional usually prompts of explicitly mentions which path the legislation would have followed in order to be within the constitutional frame instead of the regulation that was found in contradiction to the constitution. A. S. Sweet draws four possible scenarios of legislators reaction. The prevailing one is when the parliamentary legislation might follow the court's reasoning when adopting the new provisions in line with the constitution. Rarely the legislature might decide to forego the regulation

[60] Ibid, 86

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

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

entirely i.e. to return to the position before the passage of the law found not to comply to the constitution. Another option the obstinate parliamentary majority perceive is to attempt to reformulate the provisions striken by the court and to replace them with slightly changed wording that repeats the previous attempt found to be unconstitutional. The new unconstitutionality ruling follows if the court will be seized.

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

Brewer-Carrias Comparative Study

During the XVIII International Congress in Comparative Law in at George Washington University Law School on July 27, 2010 professor Alan R. Brewer-Carias presented the general report on a big comparative study "Constitutional Courts as Positive Legislators in Comparative Law".[63] It is so far the most extensive and thorough comparative work where title boldly addresses straightforward the issue of the judicial role in the area of legislation and the courts as positive legislators. In the very beginning of the study the author poses the limits within which the constitutional review might be considered as positive legislator without reaching a status of irresponsible judicial totalitarianism. "The Constitutional court can assist the legislators in the accomplishment of their functions, but they cannot substitute Legislators and enact legislation, nor hey have any discretionary political basis in order to create legal norms or provisions that could not be deducted from the Constitution itself." Analyzing the constitutional courts and institutions of equivalent jurisdiction powers to perform constitutional review of legislation Brewer-Carias distinguished four areas where constitutional jurisdictions resemble positive legislators:

1. The role of Constitutional Courts interfering with the Constituent power, enacting constitutional rules and mutating the Constitution;
2. The role of Constitutional Courts interfering with parliamentary legislation and playing the role of assistants to the Legislator, complementing statutes, adding to them new provisions and determining the temporal effects of legislation;
3. The role of Constitutional Courts interfering with absence of legislation due to legislative omissions acting sometimes as provisional legislators;
4. The Constitutional courts role as Legislators on Matters of Judicial Review.

[63] Alan R. Brewer-Carias, "Constitutional Courts as Positive Legislators in Comparative Law", XVIII International Congress in Comparative Law in at George Washington University Law School on July 27, 2010, www.allanbrewercarias.com/, Later the general report and the national reports were printed in a separate volume of more than thousand pages, Allan R. Brewer-Carías, Constitutional Courts as Positive Legislators A Comparative Law Study, http://www.cambridge.org/us/academic/subjects/law/comparative-law/constitutional- courts-positive-legislators-comparative-law-study

The European model was transplanted to constitutionalism of the emerging democracies and now EU members states after the fall of the Berlin wall in 1989 including the implications of negative positive legislators dilemma.[64] On their part they have made some contribution to theory and practice of constitutional review some of which are related to the position of the constitutional courts as negative and positive legislators issue.

A problem which has received scholarly attention belongs to the nature of the interpretative decisions of the constitutional court. The court's binding interpretative decisions have provided prospective non adversarial constitutional interpretation which was successful to prevent unconstitutional legislation by resolving the constitutional ambiguity *ex ante*.[65]

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

[64] See M. Карагьозова-Финкова, Конституционните юрисдикции в новите демокрации от Европейския съюз, София, 2009; H. Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe, University of Chicago Press, 2000; W. Sadurski, Twenty Years After the Transition: Constitutional Review in Central and Eastern Europe, The University of Sidney Law Review, July 2009, http://ssrn.com.abstract =1437843

[65] See H. Dimitrov, The Bulgarian Constitutional Court and Its Interpretative Jurisdiction, 37 Colum. J Transnational Law 459-505

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

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

One of the most controversial issues concerns the consequences after a provision which was amendment to a parliamentary statute has been declared unconstitutional.[66] The court by interpretation has arrived at conclusion that in this case after its decision has entered in force an automatic revival (resurrection, restoration) of the acting before the amendment takes place. This interpretation was met with many counterarguments the most important of which is that there is no such explicit provision of the constitution and that the automatic revival in fact is a special case of retroactivity o the constitutional court decision. Moreover, the restoration should be considered contrary to the text of the art. 22, par. 4 of the Law on the Constitutional Court which states that all of the consequences of the law proclaimed to be unconstitutional have to be arranged by the institution which has adopted it. Another argument against the automatic revival of the acting provisions amended with norms proclaimed to be unconstitutional is that the old provisions contradict to the logic of the new provisions which were considered constitutional. The final result is the paralysis of the whole statute. Often the decisions of the constitutional court have *ex nunc* binding effect. Retroactivity (*ex tunc* effect) was thought to undermine the rule of law principle which was considered cornerstone in the founding of the new democracy after the fall of the totalitarian system. In general liberal constitutionalism has condemned retroactivity as instrument which undermines social contract, justice, certainty of law and legitimacy of the legal order.[67]

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

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

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

There was discussion in the academia about the temporal effect of the interpretative decisions of the constitutional court under art. 149, par. 1, 1. H. Kelsen, Judicial Review of the Legislation, Journal of Politics, N 4, 1942, 183; of 1991 Constitution of Republic of Bulgaria. According to the classic theory of legal interpretation the act of interpretation does not have any legal validity if separated from the act that it has to interpret. It seems that following this constellation the interpretative decisions of the constitutional court should have *ex tunc* effect.[68] After a robust debate in the academia the constitutional court has accepted the position that all of its decisions including those on constitutional interpretation have prospective effect.

[68] The opposite conclusion should mean that before the court pronounced its decision the provision of the constitution had one meaning and from the moment of the constitutional court's decision it has acquired another one. If this is the case it would lead to no other explanation than that – the Constitutional court has overstepped its powers and has amended the Constitution by acting like an agent of constituent power.

Prof. Dr. iur. **Sanita Osipova,**
Judge of the Constitutional Court of
the Republic of Latvia

A State Governed by the Rule of Law or "a Judges' State"?

Currently a number of criteria have been set that a country must meet in order for it to be respected by other states and become integrated as an equal in international relations. It must be a democratic state governed by the rule of law. If it is also a social state, then its prestige becomes even higher (at least in the eyes of human rights activists, its own citizens and not only its own citizens). Within the framework of the theme set for today we shall consider the second criterion: a state governed by the rule of law.

In discussions about a state governed by the rule of law mainly this one concept is used. However, the understanding of its content significantly differs in various cultures, for example, in Western and Eastern civilisations. Even among the states of the European Union nuances in the understanding of the concept of a state governed by the rule of law differ. In Europe at least three concepts of a state governed by the rule of law could be discussed. The oldest *Rule of Law* model evolved in England, based upon the principle that "rights of the members of society are strengthened by a publicly guaranteed justice". Historically, the next to evolve was the French *État de Droit*, pursuant to which first of all broad fundamental rights of citizens are established, and a system for guaranteeing and defending these is created only afterwards. And finally, the German *Rechtsstaat* model, where first of all a legal, independent and highly professional court is created and only then increasingly broader fundamental rights of the members of society are defined, to be defended in this court.[1] These three models share a common

[1] Zolo D. The Rule of Law: A Critical Reappraisal. In: Costa P., Zolo D. (Eds.) *The Rule of Law. History, Theory and Criticism*. Dordrecht: Springer, 2007, pp. 7–15.

aim – to guarantee the rights and freedoms of members of the society; however, the nuances in understanding how this aim should be achieved differ. None of these models, however, can be implemented in the absence of an appropriately created, independent and highly professional court system.

At the time when the independence of the state of the Republic of Latvia was regained at the end of the 20th century, also the concept of a state governed by the rule of law was reinstated in the Latvian legal terminology. This concept corresponds to the understanding of supremacy of law within continental Europe.[2] Building of a state governed by the rule of law by transforming the socialist legal system, alongside integration into the European Union and accession to NATO, was set as the shared aim of all the Latvian political forces of the time. The Latvian national programme "Integration into the European Union", adopted at the end of the 20th century, specified as one of the criteria for development of democracy Latvia's "efforts to create a state that would be based upon the rule of law, protection of main liberal rights and good governance".[3] Thus, in the mid-1990s Latvian politicians very concisely defined that a state governed by the rule of law was being built in Latvia, envisaging serious reforms in the courts, the prosecutor's offices, the bar association and institutions of public administration, because "[t]hese institutions have a serious role in ensuring the power of democratically adopted laws".[4] The Republic of Latvia, in building its state governed by the rule of law, followed the German *Rechtsstaat* model. The concept of *Rechtsstaat* acquired its contemporary content in the second half of the 20th century.[5] *Rechtsstaat* is a democratic state governed by the rule of law, where "all relationships between the state and the citizens comply with law and legal acts. It is definitely a "state of constitution" (German *Verfassungsstaat*), which has the basic law, the constitution, which regulates and legitimizes the state power and defines a number of branches of power (separation of powers), it imposes an obligation upon the state to respect the rights of the people, but the most important fundamental rights are written into the constitution itself. In a democratic state governed by the rule of law the state power in its entirety comes from the people, and the government is approved in democratic election".[6] By adopting the German concept of a state

[2] *Juridisko terminu vārdnīca: latviešu–krievu, krievu–latviešu*. Vēbers J. (zin. red.) Rīga: Rasma, 1994, 230. lpp.

[3] Latvijas nacionālā programma "Integrācija Eiropas Savienībā". Rīga: [b.i.], 21. lpp.

[4] *Ibidem*.

[5] Kunz K. L., Mona M. *Rechtsphilosophie, Rechtstheorie, Rechtssoziologie: Eine Einführung in die theoretischen Grundlagen der Rechtswissenschaft*. Bern: Haupt, 2006, S. 207.

[6] The author quotes N. Horn because he is among the authors, whose ideas were and still are

governed by the rule of law, Latvia obtained both the advantages of it and the risks related to it, which will be outlined further on.

Pursuant to the doctrine prevailing in Europe, a state governed by the rule of law is a value, i.e., a benefit that society is entitled to. However, more and more often the negative concept "a judges' state" (German *Richterstaat*) appears in publications related to a modern state governed by the rule of law. What is "a judges' state"? Is it "the evil twin" of a state governed by the rule of law?

My first encounter with the concept of "a judges' state" occurred when reading the work "Law, Legislation and Liberty" written by Friedrich August von Hayek (1899–1992) in 1973, where the author used this concept to characterize a threat to the people's power and liberty that is caused by an overly independent and highly professional court, where the judges apply law not in accordance with legal acts, but *contra legem*. Von Hayek characterised the threats to citizens' freedoms, the sovereign power of people and the principle of separation of powers, pursuant to which a legislator delegated to do so adopted laws. These threats are embodied by judges who are engaged in "activism of courts"; i.e., act outside the courts' competence established by the legislator, reaching into politics or the sphere that is within the legislator's competence.[7] Von Hayek is not the first author who, in analysing a state governed by the rule of law, has encountered its opposite or the possible outcome of its development – "the judges' state".[8] However, to my mind, von Hayek, due to his interdisciplinary vantage point and scholarly authority, was the one who brought these discussions outside "the cells" of legal scientists and made it public and global. Recently the discussion on whether judges' activities, *inter alia*, "overstepping the limits of a court's competence as defined by the legislator", jeopardize democracy and the separation of powers, is becoming more intense. This discussion is particularly active in Germany, since it was Germany, where the state governed by the rule of law was built, primarily on the basis of reinforcing the independence and professionalism of the judicial power. The results of this approach are independent, knowledgeable and charismatic judges who in the name of justice are ready to take all necessary measures... Including measures, the outcomes of which legal science already describes with the very

extensively used in the jurisprudence and case-law of Latvia. Horn N. *Einführung in die Rechtswissenschaft und Rechtsphilosophie*. 4., neu bearbeitete Auflage. Heidelberg: Müller, 2007, S. 3.

7 See: Фон Хайек Ф. А. *Право, законодательство и свобода. Современное понимание либеральных принципов справедливости и политики*. Перевод Б. Пинскера, А. Кустарева. Москва: ИРИСЭН, 2006

8 See, for example: Henning R. Rechtsstaat und Richterstaat. *Jahrbuch für Christliche Sozialwissenschaften*, 1962, Bd. 3, S. 181–189.

vivid epithet "oligarchic judges' state".[9] Other vivid epithets from texts written in English: both "judges' tyranny" and "lawyers' anarchy" could form in a state governed by the rule of law.[10]

As regards the discussion concerning the courts' activism ongoing in the German public space, two brilliant personalities must be mentioned: the former President of the German Federal Supreme Court Günter Hirsch and the outstanding theorist of law Bernd Rüthers. G. Hirsch in his publications supports the role and responsibility of judges in a state governed by the rule of law, because: "Who else but the judge has been called to find an answer that follows from the law in a specific case, if values clash, if the law is silent or if the law is not in step with the times?"[11] He underscores that "each legal norm must be considered in the context of social processes and public political notions, which this norm impacts. The content of a norm may change, and it must change. The faster and the more complex changes in the circumstances occur, the greater is the need for adjustments of norms implemented by judges. The contemporary legislator allocates an ever greater role in implementing, adopting and evolving the laws to judges, whose professionalism, personal independence and convictions compatible with a state governed by the rule of law are not doubted. Thus, the judges-made law is the outcome of changes occurring in the culture of legislation".[12] Whereas B. Rüthers notes that "as the result of these processes the Federal Republic of Germany has turned from a state governed by the rule of law into "a judges' state". Numerous areas in all fields of law are no longer regulated by law, but instead by "judge-made law". The saying that law is what the higher court instances have recognised as being law – until next changes in the case-law – applies to these areas. This pertains also to the constitutional law. The Constitutional Court of Germany has turned into the supreme source of national law".[13] Namely, the legislator legitimised by the people – the parliament – is losing its role, but the judge, who has not been

9 Hirsch G. "Rechtsstaat oder Richterstaat"? Der Richter im Spannungsfeld von erster und dritter Gewalt. Deutsch-Niederländische Juristenkonferenz, Dresden, 4. Oktober 2009. Available: http://www.deutsch-niederlaendische-juristenkonferenz.de/Rechtsstaat_oder_Richterstaat.pdf [accessed on 26.04.2016.]

10 Portinaro P. P. Beyond the Role of Law: Judges' Tyranny or Lawyers' Anarchy. In: Costa P., Zolo D. (Eds.) *The Rule of Law. History, Theory and Criticism*. Dordrecht: Springer, 2007, pp. 7–15.

11 Hirsch G. "Rechtsstaat oder Richterstaat"? Der Richter im Spannungsfeld von erster und dritter Gewalt. Deutsch-Niederländische Juristenkonferenz, Dresden, 4. Oktober 2009. Available: http://www.deutsch-niederlaendische-juristenkonferenz.de/Rechtsstaat_oder_Richterstaat.pdf [accessed on 26.04.2016.]

12 *Ibidem*.

13 Rüthers B. *Die heimliche Revolution vom Rechtsstaat zum Richterstaat. Verfassung und Methoden. Ein Essay*. Tübingen: Mohr Siebeck, 2014, S. V.

legitimised for this obligation, has apparently turned into the real legislator, which is said to jeopardize the sovereign power of the people to make decisions concerning a legislator that is politically protecting certain values.

The arguments of both parties – for and against the courts' activism – are equally heavy. On the one hand, there is the court's obligation and the competence to guarantee justice to every person, in each specific case. It is common knowledge in the theory of law that even if the law is deficient, the legal system is perfect and the necessary legal norms that are to be applied for solving the particular case can be found in it. On the other hand, there is the sovereign will of the people in legitimising the legislator and the principle of separation of powers as the principle of a state governed by the rule of law.

These processes – the creation of new legal norms by someone else besides the legislator who has been legitimised for this purpose – today is no longer the problem of only national states, but also of the supranational organisations that have courts of their own.

As an answer to the question whether "a judges' state" is a threat to democracy, one could say that democracy and fundamental rights cannot exist without a strong, professional and independent judicial power. Only such a judicial power is able to adopt objective and neutral rulings. Whereas "a judges' state" is not an actually existing model of state where anonymous judges who have not been directly legitimised by the people "produce" new legal norms, instead of applying the norms adopted by the legitimate legislator. "A judges' state" is one of the risks related to a state governed by the rule of law that should be taken into consideration both by the legislator and the court itself. It is "the dark side" or "the other face" of a state governed by the rule of law, which in certain conditions, in the presence of certain catalysts, could appear in a state governed by the rule of law (quite like in the mystery tale of Doctor Jekyll and Mister Hyde).

However, the risks or possible threats to democracy are not too big, since the legislator has all the leverage for governing the state, at least in a parliamentary state like Latvia, where judges are appointed by and their further careers are decided upon by the legislator, but the Minister of Justice may initiate a disciplinary case against a judge, also for exceeding his authority in applying legal norms. A judge may not be made disciplinary liable for an incorrect application of the law; however, in Latvia a judge can be punished for deliberate violation of law in applying legal norms. The creation of law *contra legem* or the application of a legal norm contrary to the case-law could also be perceived as a direct violation of law. "Due to the specificity of a judge's professional activities the borderline between an intentional violation of law and a courageous interpretation of law, which might have

a strong impact upon the development of legal system, may be rather diffuse," Aigars Strupišs, the Chairman of the Disciplinary Board, stated at the plenary session of the Supreme Court.[14] Thus, judgements by general courts, which have been adopted *contra legem*, are assessed not only by judges, because the Minister of Justice also has the right to initiate a disciplinary case against a judge (the majority of disciplinary cases against judges are, indeed, initiated by the Minister of Justice).

"A judges' state" is the risk, without which no democratic state governed by the rule of law could exist, since the court is the one that ensures its existence. Moreover, the court is able to ensure this in full only if it is strong – independent and competent. Activism of courts jeopardises a state governed by the rule of law in the same way that the law jeopardizes and restricts a person's freedom. The law restricts a person's freedom, but at the same time also guarantees it.[15] Likewise, the activism of courts is "a necessary evil", without which a democratic state governed by the rule of law could not exist in the modern changing world.

Now I would like to discuss a couple of examples that characterize the attitude of the Constitutional Court of the Republic of Latvia towards the activism of courts.

First example.[16] On 28 February 2007 the Constitutional Court terminated the legal proceedings in case No. 2006-41-01.[17] In this case the application to the Constitutional Court had been submitted by the Department of Administrative Cases of the Senate of the Supreme Court (hereinafter – the Senate), requesting an examination of the constitutionality of certain norms of the law "On the Entry and Residence of Foreign Citizens and Stateless Persons in the Republic of Latvia"[18] (hereinafter – Law on Foreign Citizens) and of the Immigration Law.[19]

In the case examined by the Senate the applicant turned to a state institution requesting a residence permit in the Republic of Latvia. However, the institution

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14 Disciplinārtiesas priekšsēdētājs: nedrīkst tiesnesim iedzīt bailes drosmīgi interpretēt likumu. Available: http://www.juristavards.lv/zinas/268196-disciplinartiesas-priekssedetajs-nedrikst-tiesnesim-iedzit-bailes-drosmigi-interpretet-likumu/ [accessed on 18.05.2016.]

15 This issue was extensively discussed by liberally thinking philosophers already in the 17th and 18th centuries. See, for example: Bentham J. An Introduction to the Principles of Morals and Legislation. London: Payne, 1780.

16 Illustrative example from: Bārdiņš G. Dialoga loma tiesas spriešanā. Rīga: Tiesu namu aģentūra, 2016, 169.–171. lpp.

17 Decision of 28 February 2007 by the Constitutional Court on the termination of legal proceedings in case No. 2006-41-01.

18 Likums "Par ārvalstnieku un bezvalstnieku ieceļošanu un uzturēšanos Latvijas Republikā". *Ziņotājs*, 1992. 9. jūlijs, Nr. 27/28.

19 Imigrācijas likums. *Latvijas Vēstnesis*, 2002. 20. novembris, Nr. 169.

informed the applicant that she had provided false information about her place of residence and means of subsistence; therefore the residence permit could not be issued. The institution referred to norms of Law on Foreign Citizens providing that a residence permit was not issued if a person was unable to provide for herself, as well as in the case where a person had knowingly provided false information in order to receive the residence permit. The applicant appealed against the decision by the institution in court. The Senate, after reviewing the case in cassation procedure, established that the norms of Law on Foreign Citizens and the identical norms of Immigration Law envisaged the mandatory issuing of an administrative act – a refusal to issue a residence permit. This administrative act had to be issued also if the person requesting the residence permit was married to a citizen of the Republic of Latvia. The Senate held that, thus, the institution and the court were not given the possibility to analyse the proportionality of the restriction of a person's family and private life. Therefore the Senate suspended the legal proceedings in the case and sent an application to the Constitutional Court.[20]

The Constitutional Court found that the principle of proportionality was one of the most important fundamental principles of a democratic state governed by the rule of law. The obligation to comply with the principle of proportionality is binding not only upon the legislator, but also upon the public administration and the judicial power. Not only the legislator, in creating legal norms, must assess the compatibility of these norms with the principle of proportionality, but also the public administration, in exercising the state power, must in each particular case take into consideration the principle of proportionality – especially in those cases, where the actions taken by public administration restrict a person's fundamental rights. The judicial power, in turn, has a dual role in complying with the principle of proportionality. On the one hand, its actions and the rulings that it adopts must comply with the principle of proportionality, but, on the other hand, the task of the judicial power is to verify whether the legislator and the public administration have not violated this principle. Therefore the opinion that the obligation of an institution to issue administrative acts prohibits it from considering proportionality is unfounded. The aim of a mandatory administrative act is to precisely define the way in which an institution must act in all typical cases envisaged in the norms, thus decreasing the institution's discretion to the minimum. However, in a democratic state governed by the rule of law the public administration should strive to ensure justice. A formal application of the contested norms, ignoring the actual

[20] Decision of 27 October 2006 by the Department of Administrative Cases of the Supreme Court Senate in Case No. SKA-362.

circumstances that make the particular case significantly different from other cases, where the legislator has defined the way of exercising the state power, is impermissible. In atypical cases an institution has the right to deviate from implementing the legal consequences. Such a deviation should be substantiated by special, presentable and convincing arguments.

In this case the Constitutional Court encouraged courts to be active, deviating in atypical cases from the legal consequences envisaged in a legal norm, in order to achieve a fair resolution of the case that complies with the principle of proportionality. Thus, the Constitutional Court affirmed that the legislator cannot predict all the possible situations in life and that ensuring fairness in each particular situation was the task of the parties applying the law, *inter alia*, that of the court.

Second example. In 2000 the Constitutional Court Law was significantly reformed. The right to submit an application to the Constitutional Court was also granted to courts of general jurisdiction and to administrative courts examining a case, as well as to any person whose fundamental rights were infringed by the contested norm. In other words, the circle of persons who had the right to turn to the Constitutional Court was expanded, *inter alia*, by introducing the constitutional complaint. The Law clearly states that a person whose "fundamental rights, as defined in the Constitution, are being infringed upon" has the right to submit a constitutional complaint (section 17(11)). The legislator did not intend to introduce the constitutional complaint as an instrument that a person could use to fight for public interests. The fact that the constitutional complaint does not comprise *actio popularis* is even more clearly defined by section 19²(1) of the Constitutional Court Law: "A constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution infringe upon legal norms that do not comply with the norms of a higher legal force."[21] The Constitutional Court in its case-law mainly strictly adheres to the limits outlined by the legislator and initiates cases on the basis of a constitutional complaint only in those instances where the contested norm has been applied or will mandatorily be applied to the applicant himself or herself, causing irreversible "harm" to his or her rights and interests.

Does the Constitutional Court, nevertheless, deviate from this strict position not to allow *actio popularis*, for example, in the context of Article 115 of the Constitution of the Republic of Latvia (hereinafter – the Constitution) or the right to a benevolent environment?

[21] Grozījumi Satversmes tiesas likumā. *Latvijas Vēstnesis*, 2000. gada 20. decembris, Nr. 460/464.

Article 115 of the Constitution provides: "The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment." The content of Article 115 of the Constitution, as well as the right to a benevolent environment and the respective obligations of the State have been specified in international agreements binding upon the Republic of Latvia, *inter alia*, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, as well as in the national legal acts.

The Constitutional Court has recognised that not only natural persons, but also associations and groups of persons have the right to turn to the Constitutional Court to contest the compliance of environment-related normative acts with Article 115 of the Constitution.[22] The Constitutional Court expressed the aforementioned findings in its judgement of 17 January 2008 in Case No. 2007-11-03 regarding the compliance of a spatial plan with the Constitution. There was no consensus among the members of the Court on whether the legislator, by granting to persons the right to submit a constitutional complaint to the Court, had included in it also the right of associations to contest compatibility of a spatial plan with Article 115 of the Constitution. A separate opinions of judges Kaspars Balodis and Viktors Skudra followed the judgement, stating that the Constitutional Court "had exceeded the limits of its jurisdiction by examining a case, which it should not have examined on the basis of a concrete constitutional complaint; moreover, it had done so by deciding in its judgement issues that did not fell within the jurisdiction of the Constitutional Court at all".[23] There was no consensus within the Constitutional Court on where the line of demarcation should be drawn between an infringement upon a person's own fundamental rights and a complaint for the benefit of public interests.

It is important to understand that almost in every case where the judgement by majority is followed by a separate opinion someone of the Court has doubts whether the Court has acted within the limits of law. If justice is administered by a collegial court, then the limits of the law are where the majority of judges see them. Is the previous example activism of a court at all or is it an interpretation of legal norms within the scope of values defined in the Constitution? Does the Court, while working within the framework of the legal system and

[22] Judgement of 17 January 2008 by the Constitutional Court in Case No. 2007-11-03 12. Para 13.1 and 13.2.

[23] Separate opinion by judges of the Constitutional Court Kaspars Balodis and Viktors Skudra in case No. 2007-11-03 "On Compliance of the Part of Riga Spatial Plan 2006 – 2018 Related to the Territory of the Freeport of Riga with Article 115 of the Constitution of the Republic of Latvia".

applying appropriate methods, exceed its competence? Does the activism of the Constitutional Court undermine or strengthen Latvia as a state governed by the rule of law?

The values and aims defined in a constitution carry not only a legal, but also a political dimension. Thus, judges of a constitutional court, by ensuring the protection of these values, deal with the constitutional framework of the life of the state. This framework established by the court is not only of a legal character; the court examines the compliance of the policy implemented by other bodies of state power with the constitutional norms and adjusts this policy in accordance with the constitution. Quite often a ruling by the constitutional court is the one that puts a legal end to a political dispute about the scope of constitutional norms and forms a clear basis for further actions by politicians. Therefore the issue of the limits of a constitutional court's jurisdiction is a theoretically ambiguous and a politically sensitive one.[24]

One of the theses that substantiate the legitimacy of law-creation by a court points to the legislator's implicit agreement to the rules created by the court. A legislator through its silence and inaction indirectly agrees that the judges' law has the force of law.[25] In other words, if the legislator were dissatisfied with the legal norms created as a result of "the activism of the courts", it would have plenty of possibilities to supplement the law, by pronouncing its will with a greater clarity.

Moreover, it should be taken into consideration that courts operate in a specific cultural environment. The legitimacy of the right of any court to engage in the creation of law is based upon the consensus of opinion prevailing in legal community. The consensus is established by recognising the binding force of the judges' law by the legal community and the society in general, and even by the fact that nobody protests against the rules of the judges' law. In such a case it is presumed that the rule complies with the consensus of the common interests.[26]

A judge is a servant of the people on behalf of whom he administers justice to achieve fairness.[27] As long as judges make judgements in the interests of

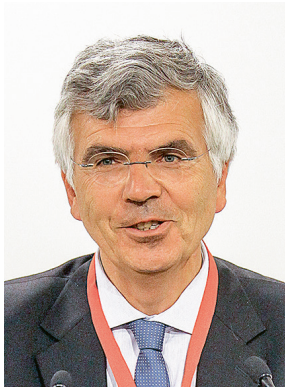
[24] Pleps J. *Satversmes iztulkošana*. Rīga: Latvijas Vēstnesis, 2012, 129. lpp.

[25] Sniedzīte G. *Tiesnešu tiesības. Jēdziens un nozīme Latvijas tiesību avotu doktrīnā.* Rīga: Latvijas Vēstnesis, 2013, 57. lpp.

[26] Sniedzīte G. *Tiesnešu tiesības. Jēdziens un nozīme Latvijas tiesību avotu doktrīnā.* Rīga: Latvijas Vēstnesis, 2013, 59.–60. lpp.

[27] Hirsch G. "Rechtsstaat oder Richterstaat"? Der Richter im Spannungsfeld von erster und dritter Gewalt. Deutsch-Niederländische Juristenkonferenz, Dresden, 4. Oktober 2009. Available: http://www.deutsch-niederlaendische-juristenkonferenz.de/Rechtsstaat_oder_Richterstaat.pdf [accessed on 26.04.2016.]

the society and the rights of a particular person, by using in their judgements the values and principles existing in the legal system, and do not engage in scientific experiments or prove that they are right by their judgements, we are speaking about a state governed by the rule of law, where constitutionality and fundamental rights are ensured. Yes, a judge holds a great power in society, but the control over the limits for exercising this power lies in the hands of the legislator and the executive power, while the control over the way this power is exercised lies in the hands of the whole corps of judges as the matter of applying judicial ethics.



Prof. Dr. **Pierre Nihoul**
Judge of the Constitutional Court of Belgium,
Honorary Member of the Council of State

The Activism of the Constitutional Court of Belgium

Introduction

The Belgian Constitutional Court has had to show a certain degree of activism to establish its position in the Belgian judicial landscape[1].

Firstly, with regard to the political authority. Belgium has long resisted constitutionalism in an ideological context of "legicentrism". The establishment of the Constitutional Court is fairly recent (1985) and is rooted in federalism, since its sole competence is the settlement of conflicts of legislative authority between the federated entities of the Belgian state.

Secondly, with regard to the judicial authority. The judicial authority dates from the independence of Belgium (1831), the Council of State from 1946. Those two jurisdictional orders have developed a case law since 1971 that enables them to review the conventionality of legislative and regulatory acts. The Court therefore had to find its place as it was gradually entrusted with constitutional litigation in the area of fundamental freedoms on account of its closeness to conventionality review.

Finally, with regard to its litigants and their counsels. The Court extended access to its jurisdiction and opened up new opportunities in terms of procedural guarantees.

[1] All judgments of the Belgian Constitutional Court can be found on the website: http://www.const-court.be.

We will develop those thoughts in three themes: the jurisdictional rules of the Court (I), the procedural rules and guarantees (II), and certain areas of substantive litigation (III).

I. The jurisdictional rules of the Court

The Court has jurisdiction to hear two kinds of litigation: the division of powers between the federal state and the federated entities (in Belgium the communities and regions) (A); public freedoms and fundamental rights (B).

A. Litigation in matters of the division of powers

Belgian federalism is based on the principle of exclusivity of powers, which means that any judicial issue is in principle settled by one single legislator. The Belgian system is characterized by the absence of a hierarchy between the acts of the different legislators and by the absence of the subsidiarity principle. Where a regulation has links with several regulatory authorities, the Court tries to identify the primordial element of the regulated legal relationship.

Nevertheless, the Court has made some qualifications to this principle in order to make the system more flexible:

– The principle of federal loyalty, which prohibits the entities from using their powers in a way that prevents the other entities from using theirs or makes that use exceedingly difficult. With effect from 1 January 2014, the legislator expressly gave the Court jurisdiction to oversee compliance with the principle of federal loyalty as currently enshrined in Article 143(1) of the Constitution;
– The broad scope which the Court has from the outset given to the principle of economic and monetary union which initially regulated the exercise of economic competences by the regions and which was subsequently extended to all regional, community and even federal competences;
– The principle of collaboration or cooperation: the absence of a cooperation agreement in a matter where the special legislator does not require such an agreement does not, in principle, constitute an infringement of the rules governing the division of powers. Nevertheless, where the powers overlap to such an extent that they can only be exercised after some form of collaboration or cooperation between the relevant legislators has been put in place, the Court considers any unilateral action by the legislator in question as an infringement of the proportionality principle inherent in any exercise of powers.

B. Litigation in matters of public freedoms and fundamental rights

In 1988, the Court was given certain competences in this kind of litigation, albeit restricted to freedom of education (Article 24 of the Constitution) and the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Nevertheless, the Court soon used litigation in matters of equality to expand its jurisdiction in three directions.

1. First, in judgment no. 21/89 it adopted the extended criteria accepted by the European Court of Human Rights in the review of the principle of equality and non-discrimination. The formulation has remained the same since judgment no. 21/89, except for some minor modifications:

"The principle of equality and non-discrimination does not rule out that a difference in treatment may be established between categories of persons, provided that such a difference is based on objective criteria and that it is reasonably justified. Moreover, this principle precludes the equal treatment, without reasonable justification, of categories of persons in situations which, having regard to the measure under consideration, are essentially different.

The existence of such justification must be assessed having regard to the aim and effects of the measure under consideration and the nature of the principles in question; the principle of equality and non-discrimination is infringed where it is found that there is no reasonable proportionality between the means employed and the aim sought to be realized."

2. It also finds that the principle of equality and non-discrimination is infringed whenever the legislator violates the fundamental rights or guarantees enshrined in other constitutional provisions or in an international treaty, whether or not it has a direct effect. The deprivation of a fundamental right constitutes *ipso facto* an infringement of the equality principle. The "prism" technique of Articles 10 and 11 of the Constitution permitted the Court to indirectly incorporate litigation in matters of public freedoms within its competence.

3. While not competent to hear direct infringements of international laws, the Court acknowledges that the constitutional provisions which it is empowered to enforce, both directly and indirectly, can be read in conjunction with the comparable international laws. This is the technique of the combination of rules on the protection of fundamental rights. It allows the Court to incorporate in its review standards international guarantees that offer greater protection and are more extensive.

In 2003, the special legislator extended the Court's jurisdiction in matters of public freedoms to all the rights and freedoms enshrined in Title II of

the Constitution. The Court therefore no longer has to use the indirect route of Articles 10 and 11 of the Constitution to hear violations of the freedoms enshrined in the Constitution. It can now try them directly. This new competence is expanded by the combination technique explained above of constitutional rights and international guarantees. The Court's review takes in similar provisions set out in international instruments and "takes into account" the guarantees provided by those instruments, which are considered inseparable from those enshrined in the Constitution[2]. Furthermore, it continues, through the prism of Articles 10 and 11 of the Constitution, to take cognizance of infringements of other constitutional provisions than those contained in Title II of the Constitution[3] or infringements of international guarantees that have no counterpart in the Constitution[4].

To sum up, the Court's jurisdiction is in principle confined to the rights and freedoms enshrined in Title II of the Constitution. By a method of combination, the Court's competence extends to similar international guarantees. This observance of international treaty law is reflected in references made in the Court's judgments to the case law of the European Court of Human Rights and to European Union law, such as the Charter of Fundamental Rights of the European Union and the case law of the Court of Justice of the European Union, as well as the referral of questions for a preliminary ruling to the Court of Justice of the European Union (26 judgments as at 31 March 2016). Furthermore, by the indirect route of Articles 10 and 11 of the Constitution, the Court reviews the constitutional guarantees that fall outside its jurisdiction and the international guarantees that have no counterpart in the Constitution.

[2] Thus the Court reads Articles 12, paragraph 2, and 14 of the Constitution (*nullum crimen, nulla poena sine lege*), which require that the essential elements of a charge or penalty must be prescribed by the law, taking into account the economy of those provisions, as well as in combination with the material requirements set out in Article 7 of the European Convention on Human Rights and in Article 15 of the International Covenant on Civil and Political Rights, such as the principle of *lex certa*.

[3] Thus the Court oversees the observance of local autonomy for the municipalities and provinces as enshrined in Articles 41 and 160 of the Constitution, read in conjunction with Articles 10 and 11 of the Constitution.

[4] Thus the Court examines infringements of the prohibition of inhuman and degrading treatment, not provided for by the Belgian Constitution, through Articles 10 and 11 of the Constitution, read in conjunction with Article 3 of the European Convention on Human Rights. It adopts the same approach to the right to an effective remedy, which is not enshrined as such in the Constitution, through the infringement of Articles 10 and 11 of the Constitution, read in conjunction with Articles 6 and 13 of the Convention.

II. Procedural rules and guarantees

Cases are brought before the Court in two ways: actions for annulment brought by a natural or legal person demonstrating an interest, or referrals for a preliminary ruling in connection with a case pending before an ordinary court.

A. Actions for annulment

1. The condition of an interest in taking action

The criteria that constitute the concept of interest are not set out in the law, leaving it up to the Court to determine those criteria; the Court requires petitioners to demonstrate in their petition that they are "liable to be directly and adversely affected by the challenged act". Those two concepts are broadly interpreted by the Court.

The Court thus broadly acknowledges the interest that natural and legal persons have in taking action in order to defend their own interests, particularly in the area of electoral, tax and criminal law. It also favourably receives petitions from organizations and associations acting in defence of a collective interest, subject to a review of the permanent nature of their activities, the specific nature of their statutory objective, and the observance of their bylaws. With regard to the latter point, the Court recently (2014) agreed to consider that it could be assumed from the lawyer's mandate *ad litem* that the action was validly instituted, unless proven otherwise. It also declared actions admissible that are brought by unincorporated associations, such as trade unions and political parties, while restricting their access where they are acting in matters for which they are legally acknowledged as constituting distinct legal entities and, although they are legally associated as such with the functioning of the public services, the actual conditions of that association are at issue.

It also considers that, if an action brought by several petitioners is admissible in respect of one of them, the interest of the other parties does not need to be investigated.

Finally, the Court examines the interest in the action rather than the interest in the ground, so that when the action is admissible, it does not need to examine each ground.

2. The act under review

The Court can only review legislative acts. Here, too, the term is broadly interpreted: it covers substantive laws as well as formal laws, such as budgetary laws, naturalization laws and laws approving Belgian cooperation agreements and international treaties.

B. Preliminary rulings

The same accessibility is to be found in referrals for preliminary rulings.

Firstly, with respect to the court that refers a question to the Constitutional Court for a preliminary ruling: in the absence of a filter between the ordinary court and the Constitutional Court, the latter will not hesitate to reformulate a poorly drafted question or to broadly interpret the admissibility conditions of the question. Moreover, if the Court considers from the outset that the assessment of the applicability of a legislative act to the lawsuit pending before the referring court is the exclusive competence of that court, it verifies, ever since judgment no. 111/2000, whether the provision referred to in the question may reasonably be held to apply to the lawsuit pending before the court; the Court will only decline to review the constitutionality of a legislative provision being referred to it if that provision manifestly does not concern the lawsuit in question.

Secondly, its case law has evolved as regards the assessment of the interest of parties in a preliminary ruling procedure. Certain persons who are not present in the case before the referring court argue that they are parties to a similar procedure pending before another court. Where originally such an interest was not admitted, the Constitutional Court, ever since judgment no. 44/2008, allows such an intervention because of the indirect effect that the preliminary ruling has on comparable lawsuits.

Finally, since judgment no. 125/2011, the Court has extended to preliminary rulings the possibility to maintain the effects of an annulment judgment for the time period it sets in the past or the future. Where the special Act on the Constitutional Court contained such a possibility for annulment judgments (Article 8, paragraph 2), it contains no such rule for preliminary rulings. The Court nevertheless considered that a preliminary ruling, while not removing the unconstitutional provision from the legal system, has an effect that reaches beyond the action pending before the court that referred the preliminary question, so that in this case the Court must also examine whether the impact of the judgment should not be tempered over time. This is necessary to ensure respect for the principles of legal certainty and legitimate expectations.

III. Substantive litigation

The purpose of this paper is not to reflect the entire case law of the Constitutional Court and the areas in which it has demonstrated constitutional activism. Certain matters get more focus.

1. The higher interest of the child

Belgian parentage law does not preclude disputes of paternity in or out of wedlock. Nevertheless, it prioritizes, to a certain extent, a stable family environment and socio-emotional reality over biological truth. To this end, it

sets grounds of inadmissibility for such actions in the form of short time limits and the concept of recognized enjoyment of status.

Since 2011, the Court has called into question most of those obstacles to the search for biological truth on account of them being too absolute. For this purpose, the Court refers to the right of the individual to search for his identity, which is part of the right to respect for private and family life, and the paramount value assigned to the interest of the child by Article 22b of the Constitution. When elaborating a regime that allows the public authorities to interfere in family life, the legislator has a certain margin of appreciation to get the right balance between the competing interests of the individual and society as a whole, as well as between the conflicting interests of the persons concerned. When balancing the different interests at stake, the interest of the child occupies a special place as it represents the weaker party in the family relationship. It is up to the court to find the right balance. The Constitutional Court has therefore found the obstacle of recognized enjoyment of status to be unconstitutional, as is the one-year time limit which the child was allowed after the age of 22 from the moment it had knowledge of the existence of its biological father to challenge its legal paternity.

The Court also challenged the absolute impossibility decreed by the Civil Code to establish an incestuous parentage, leaving it up to the court to assess the interests at issue.

2. Right of access to the courts

Associations have a right of access to the ordinary courts which is interpreted restrictively by the Court of Cassation and by the legislator when they are acting to defend a collective interest. The Constitutional Court does not hesitate to call such restrictions into question:

– Before the ordinary courts, an action is declared inadmissible in respect of a legal entity if it does not concern the existence of the legal entity, its assets or its moral rights, which means that actions that are brought for the purpose of a collective interest are not allowed. Firstly, the Court finds that the Belgian legislator has passed several laws granting a right of action to certain associations that claim a collective interest. However, Articles 10 and 11 of the Constitution, which enshrine the equality principle, do not compel the legislator to extend that right to all associations. Secondly, the Court notes that certain laws have allowed actions to be brought before the courts by associations claiming a collective interest relating to the protection of fundamental freedoms as enshrined in the Constitution and in international treaties to which Belgium is a signatory party. It follows that legal entities bringing an action in the name of a collective interest

relating to the protection of fundamental freedoms but not recognized by those laws are discriminated against. Nevertheless, it is up to the legislator to specify on what conditions those legal entities may be granted a right of action (judgment no. 133/2013);

– Article 1382 of the Civil Code is the legal foundation for civil liability in Belgium. It assumes a fault, damage and causation. As a rule, the victim is entitled to full compensation for the prejudice he has suffered, but the court may decide to carry out a fair valuation of the damage if it is impossible to determine otherwise, as is the case with environmental damage. This provision is considered discriminatory in the interpretation where a legal entity that has been set up and is acting in defence of a collective interest, such as the protection of the environment or certain elements thereof, is unable to receive more than a symbolic euro in compensation to repair the damage caused by the infringement of the collective interest for which it has been set up. Such a restriction also disproportionately affects the interests of the environmental organizations in question, which play an important part in defending the right to the protection of a healthy environment as enshrined in the Constitution (judgment no. 7/2016);
– Belgian law has instituted the class action for damages to allow wider access to justice for victims of collective damage in the area of consumer affairs. This right of action is subject to certain conditions, such as designating a public service or certain approved associations to represent the group. The Court found that the requirement of approval discriminated against similar foreign associations of the European Union that do not have such approval (judgment no. 41/2016).

3. Right to property

Article 16 of the Constitution provides "No one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by the law and in return for fair compensation paid beforehand". The Belgian Constitution only mentions the right to property and the deprivation of that right, which limits the constitutional protection to expropriation in the strict sense of immovable property.

Article 1 of the First Protocol to the European Convention on Human Rights is broader in scope. The First Protocol concerns the protection of property in general, both movable and immovable property, tangible and intangible property, real and personal rights. It deals not only with the limitation of ownership, but also with the control of the use of property, which encompasses restrictions of ownership. Using the combination technique explained earlier, the Constitutional Court incorporated the First Protocol and the case law of

the European Court of Human Rights in its own case law on the grounds that the rights being protected were similar and that the two provisions constituted an inseparable whole. Consequently, the protection of the right to property has been considerably broadened.

The Court took a further step by deducing from those two "inseparable" provisions a principle of equality in relation to the discharge of public burdens, from which it infers a right to compensation that covers situations other than expropriation. The principle of equality of citizens in relation to the discharge of public burdens precludes the public authority from imposing, without compensation, burdens exceeding those that must be borne by an individual in the general interest. It follows from this principle that the disproportionate prejudicial effects – i.e. the extraordinary social or occupational risk imposed on a small group of citizens or institutions – of a coercive measure which is lawful in itself must not be imposed on the injured parties, but must be shared out equally across the community. This right to compensation has been recognized in the following situations:

– the holder of a validly issued planning permission who has no real right over a building lot that is subject to a construction ban under a particular legal provision cannot get compensation for the expenses he has incurred to use the building lot for its intended purpose (55/2012);
– the absence of a compensation scheme for a construction ban resulting from a protection order (12/2014);
– the holders of real rights over an archaeological site, a historic building or an urban or rural site in respect of which a heritage protection order has been issued, are not entitled to compensation if the decrease in value of the immovable property is the direct result of the provisions of the final protection order of a site (132/2015).

Dean Spielmann
Former President of the European Court of Human Rights

Unravelling the Myth of Judicial Activism through Dialogue with National Courts: The Strasbourg Experience

Ladies and Gentlemen,

It is a great pleasure for me to be in Riga and to participate in the conference on Judicial Activism of Constitutional Courts in a Democratic State. And I would like to congratulate the organizers of this event, the Constitutional Court of Latvia and the Venice Commission for this initiative and especially the topic which will be explored over these next two days. I am deeply honoured to have been invited to give the keynote speech today, together with my colleague and friend, President Koenraad Lenaerts of the Court of Justice of the European Union. I am particularly pleased to be here in his company, because, as some of you may know, I recently left the European Court of Human Rights to join the EU General Court in Luxembourg.

The theme of the conference raises fundamental questions of power and authority, of accountability and legitimacy.

That the exercise of public power necessarily implies a degree of discretion for the authority concerned – and notably the executive – must be accepted as true in principle. However, the concept of the separation of powers, to which all European States subscribe in their way, goes hand in hand with respect by all authorities of the State for the rule of law. Discretionary powers, whether they arise out of tradition and practice, or out of positive law, must remain within the boundaries set by the relevant legal norms – domestic and international. As the organisers of the conference have pointed out, "it is …

important … to respect the competencies vested in the European Courts and in national (constitutional) courts and to promote a constructive dialogue between the national and the supra-national as well as the national and the European judicial actors."

In my contribution, I would like to share with you my Strasbourg experience. During my term of office as President of the European Court of Human Rights, I had the great honour to meet many eminent judges of constitutional courts. Some of them are present here in Riga. I always promoted true judicial, institutional and informal dialogue and tried to convince my counterparts:

– that the case-law of the European Court of Human Rights is not the jurisprudence of an activist Court trespassing over the boundaries of its jurisdiction;
– that in reality the "activism versus self-restraint" discourse might be misconceived and that we all promote, through our decisions, the same values.

But the promotion of our values goes hand in hand with mutual respect. Mutual respect is achieved by allowing, if appropriate, a margin of appreciation sometimes based on a careful scrutiny of any consensus as to a given problem. Any potential application of the margin is of course subject to the proportionality principle. But dialogue is essential. The jurisprudential dialogue has recently been completed by the sharing of relevant information, anticipating, at least to a certain extent the entry into force of Protocol No. 16 to the Convention. A new form of judicial dialogue could also be prompted by a more active role on the part of the Committee of Ministers of the Council of Europe.

I Margin of appreciation

Speaking from the perspective of the European Convention on Human Rights, it will not surprise you if I refer here to the margin of appreciation. It is, in a nutshell, the recognition by the European Court of an area of discretion that should be allowed to national authorities in the observance and implementation of human rights. A great deal has been said and written about the margin of appreciation – it may well be the most commented-upon feature of European human rights law. While it is a judge-made doctrine, it will soon make its way into the text of the Convention itself, with the addition of a new sentence to its Preamble, reading as follows:

"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy

a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,"

The States have themselves indicated, in the explanatory report, that their intention with this amendment is to be consistent with the case-law of the Court. The Protocol does not, therefore, set out to modify this key concept of European human rights law. Protocol No. 15 pairs the principle of subsidiarity with the margin of appreciation. This is the core of judicial dialogue under the Convention. In my own speeches and writings, I have described the margin of appreciation not as a concession, as it may sometimes be regarded, but as an incentive that is granted to the national courts to enter fully into their Convention role. That means to appropriate the principles and methodology of the European case-law, notably proportionality, in the determination of the cases that come before them. This is a form of dialogue that is at the heart of vindicating Convention rights. Speaking first, the national judges set out their analysis of the human rights issues at stake in the case, and their application of the corresponding jurisprudential principles. In sequence, the European Court assesses, and, as the case may be, rectifies or validates the analysis. This decentralised aspect of its enforcement, which hinges on the review performed by domestic courts, can be seen as a growing strength of the Convention system.

I referred a moment ago to the limits that must apply to discretionary power in a State that is governed by the rule of law, a concept that also appears in the Preamble to the Convention and underpins all of its provisions. In the phrase "margin of appreciation", one must emphasise the word "margin". It denotes a relatively limited area where the national authorities have a certain freedom of action or choice. The margin, as is well known, may be narrow or broad depending on a series of factors, but even when it is wide it remains a margin – it does not extend right the way across the page. As the Court has so often observed, the margin in a given case always goes hand in hand with European supervision. In short, there is no reserved domain for State authorities under the Convention.

Where a margin is allowed, the Court will refrain from a "total" review of the substance of the case and accept the decision or assessment made by the domestic authorities, as long as (*solange dass*) it remains within proper limits. It is the Court that ascertains where exactly these limits lie in a given case – it is the Court that draws the margin.

The legal literature has propounded various explanations for the doctrine:

– that it is the natural product of the Court's subsidiary jurisdiction;
– that it signifies respect for pluralism and State sovereignty (Waldock explained it as the means by which Strasbourg reconciles the international protection of human rights with the sovereign powers and responsibilities of democratic government);
– that it signals recognition by the Court of the inevitable limits to its institutional capacity, i.e. acceptance that it cannot consider every case in every detail;
– that a court, and *a fortiori* an international court, is not the ideal forum for arbitrating difficult choices of socio-economic policy;
– that the European Court is too distant to rule on cases of great sensitivity.

There is truth in each of these.

What is important is that the Court attributes a share of ultimate responsibility for safeguarding Convention rights to the domestic courts, and this in the interest of a healthy subsidiarity and the improved effectiveness of the Convention regime.

But, "subsidiary to what?" In the Court's view, to "the national systems safeguarding human rights".

The initial assessment is for the competent national authority, and in making it a margin of appreciation is allowed. But that goes hand in hand with European supervision – the final assessment is for the Court.

The governing principles are clear:

– where a particularly important facet of an individual's existence or identity is at stake, the margin will be restricted;
– where there is no consensus among European States either as to the relative importance of the interest at stake, or the best means of protecting it, and particularly where it concerns sensitive moral or ethical issues, the margin will be wider;
– the margin will usually be wide if the State is required to strike a balance between competing private and public interests.

There is a more general point to be emphasised here, that one might call the procedural aspect of the margin of appreciation. It is implicit in the very term used, "appreciation". The competent domestic authority, which may be a court, or parliament, or the administration, must engage in a process of appreciation – or assessment – of the rights and interests at stake.

For courts, no less should be expected. I would recall that the Convention is part of the domestic law of all of the Contracting States – it is no longer an external or foreign body of law. The role of the domestic judge in the Convention system is essential, having the potential to act within a shorter timeframe and with the full panoply of judicial tools to safeguard human rights. By adopting the methodology that has been developed by the European Court in its case-law, the domestic court can lead Strasbourg to accept that the situation remains within the relevant margin of appreciation. Let me give as an example of this

the judgment in *Von Hannover v. Germany (No. 2)*. The applicant, who needs no introduction, returned to Strasbourg with further complaints arising out of the publication of photographs in celebrity magazines in Germany. This gave the Court the occasion to consider the manner in which the domestic courts had examined her complaints. The conclusion is worth quoting in full:

124. The Court observes that, in accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.

125. The Court also observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the Von Hannover judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.

126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision."

The point is not limited to national courts. It is clear from the case-law that the legislative process can be very relevant to the margin of appreciation.

In the *Hirst (No. 2)* case, about prisoner voting, the Court considered that there was no evidence that the UK Parliament had ever sought to weigh up the competing interests, or to assess the proportionality of the blanket ban on voting by convicted prisoners. At most, there had been implicit consideration, but no substantive debate on the continued justification of the ban in light of modern-day penal policy and current human rights standards. This shortcoming counted against the respondent State. Despite allowing a wide margin in the case, the ban was found to fall outside it.

In contrast, when examining the situation in Italy, the Court saw evidence of the legislature's concern to adjust the voting ban to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender. This is the case of *Scoppola (No. 3)*, where the Court clarified that States may leave the issue of disenfranchisement to the judicial process, which is the system in some countries.

Or the legislature may take it on itself to determine the appropriate balance via legislation. One sees the same approach in relation to parliaments. Where legislators carefully weigh up the relevant human rights aspects of a piece of legislation, and seek to achieve a reasonable accommodation between individual rights and other aspects of public interest, the Court has shown itself inclined to accept the balance that has been struck (e.g. *Animal Defenders v. the United Kingdom*).

The Court also carefully examined the legislative process in the recent cases of *S.A.S v. France* concerning the prohibition of the full-face veil and in *Lambert and Others v. France* concerning the withdrawal of life-sustaining treatment. In both cases, the Court was satisfied by the quality of the legislative process, thus granting a margin of appreciation to the domestic authorities.

But balancing there must be. One might say that just as the Convention embraces the notion of "quality of law", it also expects a certain "quality of legislative process", one that is properly informed and duly deliberate.

I return to the considerations that determine the breadth of the margin.

Briefly, the aim of the interference in question is relevant to the analysis. The Court has acknowledged that where it is a matter of reconciling competing Convention rights, the margin will usually be wide, as for example in the *Odièvre* case (right of the birth mother to conserve her anonymity versus the right of the applicant to know her origins).

But it is not always so. In the recent case of *X v. Austria*, where the applicants complained that second-parent adoption was not permitted for same-sex couples, one of the Government's arguments was that the margin should be wide because adoption meant striking a careful balance between the interests of all the persons involved in the procedure. The Court did not accept this, holding that where persons are treated differently on grounds of sexual orientation, the margin is narrow, and the State must put forward particularly serious reasons (*probatio diabolica?*).

In contrast, the case-law allows a wide margin when it comes to social and economic policy, for example in the area of social security (*Stec v. UK*, *Carson v. UK*), or in relation to property rights for example (*Jahn v. Germany* – in the exceptional circumstances of German reunification).

The Court's review will then be of lesser intensity, but a margin remains a margin – it does not extend across the page.

II Consensus

I come now to the role of consensus. It is here that the concept of the margin of appreciation links to another fundamental principle of interpretation –

the Convention as a living instrument. In a nutshell, there is a relationship of inverse proportionality between a State's margin of appreciation in a particular area and the degree of consensus that can be discerned through comparative and/or international law. The matter is not free of controversy, but I maintain that reference to consensus serves to legitimise the Court's new reading of the Convention, and facilitates the reception of this into the domestic system.

Examples abound of judgments in both senses, i.e. of judgments where the Court has developed its reading of the Convention in line with the standards already applied by many States and reflected in international instruments; and cases where the absence of such a consensus has dissuaded the Court from doing so.

But there is no hard and fast rule. The lack of a strong consensus in Europe regarding the recognition of gender reassignment did not ultimately restrain the Court from ruling in favour of Christine Goodwin in 2002. The Court attached less importance to the lack of evidence of a common European approach, and referred instead to the clear and uncontested evidence of a continuing international trend towards increased social acceptance and legal recognition of transsexualism.

Likewise in the *Hirst (No. 2)* judgment, the Court remarked that even if no common European approach could be discerned to the issue of voting by prisoners, that could not in itself be determinative of the issue.

Conversely, even with an ostensibly very strong consensus in Europe regarding the availability of abortion, the Court determined in *A.B.C. v. Ireland* that this did not decisively narrow the margin of appreciation enjoyed by the domestic authorities. Instead, it reasoned that since the Court had already (in the case *Vo v. France*) taken the view that there was no consensus in Europe regarding the nature and status of the embryo, indicating that States retained a margin of appreciation in this regard, that same margin arose when it came to striking a balance between the rights of the unborn and those of the mother.

This reasoning was rejected by a minority of six judges. They considered that it departed from the Court's established methodology. In their eyes, there was a strong consensus in Europe in favour of a more permissive regime than the one allowed under the Irish constitution. They stated: "We believe that this will be one of the rare times in the Court's case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned".

III Proportionality

Having surveyed the contours of the margin of appreciation, my next point concerns the impact of the proportionality principle. This can prove to be

the most important – perhaps even the decisive – factor in a case that features the margin of appreciation. Being closely linked to the principle of effective protection, the proportionality principle constitutes the strongest bulwark against over-use of the margin of appreciation doctrine. By failing to respect proportionality, a State can effectively forfeit the "benefit" of the margin. To put it another way, the margin is sometimes referred to as the margin of error. Viewed in this way, failure to respect proportionality is too serious an error to be allowed to pass. See, as an example, the *Axel Springer* case, decided on the same date as the *Von Hannover (No. 2)* case, but finding a violation of the applicant company's freedom of expression. The majority found that, despite the margin of appreciation, there was no reasonable relationship of proportionality between the restrictions imposed by the national courts and the applicant's rights under Article 10. That lack of proportionality was the "strong reason" for the European Court to substitute its view for that of the domestic courts.

IV Dialogue

a) Judicial dialogue

For me, judicial dialogue is intrinsic to the very nature of the Convention system. It is intrinsic also to the over-riding concern that the protection of fundamental human rights be effective – a concern that I attribute to the authors of the Convention, no less than to the successive generations of jurists who, down to the present day, have applied themselves to concretely vindicating the rights of those under the protection of the European Court.

Looking at the recent case-law of the European Court of Human Rights involving the margin of appreciation, one can see a trend towards judicial self-restraint when it is clear that the superior national courts have, at the domestic level, examined the case in light of the relevant Convention provision and case-law principles. For example, in the already mentioned case of *Von Hannover (no. 2)*, which involved a balancing exercise between competing Convention rights – press freedom and the right to respect for private life –, the Court observed that it "would require strong reasons to substitute its view for that of the domestic courts" (*Von Hannover (no. 2)*).

There is a second example of judicial dialogue that I will mention, and it involves Germany's Constitutional Court. I am mindful, in giving this example, that the President of that Court, Andreas Voßkuhle, was, a few years ago, the guest speaker at the solemn opening of the judicial year of the European Court of Human Rights. On that occasion he conveyed to us a very telling image to depict the relationship between national courts and the European courts –

the image of a mobile, its different elements held in a dynamic balance, linked together by wires or strings that one should not get tangled.

The subject-matter at issue in this second example is the provisions of Germany's criminal law on the preventive detention of very dangerous persons. This was the subject of a Strasbourg judgment in 2009 – *M v. Germany*. The applicant complained that, having served his five-year sentence, followed by an additional ten years of preventive detention (the maximum allowed under Germany law at the relevant time), he continued to be detained under provisions that had been enacted some years after his trial and conviction. At domestic level, his constitutional complaint had been rejected, the Karlsruhe Court ruling that the retrospective effect of the legislative amendment was not contrary to the Constitution, nor was it disproportionate in the applicant's case.

The European Court found that the situation was in violation of both the right to liberty under Article 5, and of Article 7, which prohibits the application of more severe penalties retrospectively. Following this, the Constitutional Court reversed its position. In a decision given in 2011, and drawing explicitly on the *M* judgment, that Court ruled that the legislative provisions in question were unconstitutional. What this case shows for the German system – and I refer here to the comment of President Voßkuhle about it – is how the Convention is treated as an important guide to the interpretation of the corresponding provisions of the Constitution.

In 2012, it was the turn of Strasbourg to speak again on the matter. In the *Kronfeldner* case, a Chamber of the Court:

"welcome[d] the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level. … [B]y its judgment, the Federal Constitutional Court implemented this Court's findings in its … judgments on German preventive detention in the domestic legal order. It gave clear guidelines both to the domestic criminal courts and to the legislator on the consequences to be drawn in the future from the fact that numerous provisions of the Criminal Code on preventive detention were incompatible with the Basic Law, interpreted, inter alia, in the light of the Convention. Its judgment thus reflects and assumes the joint responsibility of the State Parties and this Court in securing the rights set forth in the Convention."

The European judge embodies the principle of *external review*. In recalling this basic *raison d'être*, I am mindful of the criticism often directed against the Convention, that it stands for "foreign meddling" in national affairs. What purpose does it serve to question the choices or disturb the settled order of

this or that democratic state? But I must stress the validity of the external viewpoint. It must, of course, be an informed one, but it will also be a detached one. Furthermore, the external perspective is a collective one, and from it come the common principles and standards that make up what has been called the *ius commune* of human rights in Europe.

I have described for you the existing practice of direct dialogue between European judges and their counterparts at the national level. What of the future?

b) Information sharing

The first concerns the new initiative launched recently at Strasbourg – the Network of Superior Courts. The idea had been launched at the Brussels intergovernmental conference. This represents a concrete follow-up to a point that was often put to us by national judges in the course of our dialogue with them, and that is: how can the national judge remain fully informed and continuously abreast of the Court's case-law? As you will know, the body of Convention case-law is considerable, and ever-expanding. National courts called on to decide issues governed by, or in some way linked to, the Convention have a very practical need for aid in identifying the relevant Strasbourg precedents.

So the first purpose of the Network is to allow the participating courts to consult directly, and with minimum formality, the Court's Registry.

The second purpose is to aid the Strasbourg Court in its work. Comparative law is an established part of the Court's methodology, used to gauge the degree of consensus that exists in Europe as regards a particular issue. That is no easy exercise, and the expectation from the Network is that via the partner courts, Strasbourg will have access to relevant and reliable information.

Following its launch on 5 October 2015, the European Court of Human Rights has completed a very positive test period with the *Cour de Cassation* and the *Conseil d'Etat*.

Drawing on lessons learned from that work, the Court is developing an IT platform with adapted parameters to allow it to manage the Network.

Other preparatory steps (drafting a Charter, Operational Rules, appointment of Registry Focal Points etc) are in hand.

In the meantime, and notably since the Opening of the Judicial Year in January 2016, expressions of intent to join the Network from 21 courts representing 16 States have been received.

Once this developmental phase is completed, these will be the first courts (after the French courts) to join the Network and this will be in the coming months.

Finally, a definition of "superior" has not yet been adopted, not least as legal systems vary so much. Expressions of interest in joining have also come from certain constitutional courts (Hungary, Spain and Turkey).

The European Court of Human Rights also maintains contact with the Forum of the Venice Commission, so Constitutional Courts can, through that channel, have contact with the European Court.

c) Institutionalised dialogue

Another point, looking to the future, is Protocol No. 16. This is an additional Protocol to the Convention whose potential should not be underestimated. In brief, it creates an advisory procedure allowing the highest national courts to seek guidance from the European Court on questions of principle regarding the interpretation or application of the Convention. The idea of an advisory jurisdiction is no novelty in international law. It is an important dimension of the International Court of Justice. It is also part of the machinery operated by the Inter-American Court of Human Rights. In future – and I hope in the near future – it will be part of the Convention system too. I see great potential in the Protocol to contribute towards the improved implementation of the Convention nationally. In very practical terms, it can cut out a waiting time that is usually measured in years while cases are brought to Strasbourg and wait for decision. More substantively, I see it as an instrument for furthering subsidiarity, in the sense of the sound vindication of Convention rights directly within the domestic legal order. I see the procedure as an instance of dialogue between courts that represent different limbs of the Convention system. For me, it fills a discernible gap in the Convention machinery, permitting direct interaction between the national and the international judge. I do not regard it as a mere adjunct, but as a new dimension for the Court to perform the task that the Convention entrusts to it. Six States have ratified this Protocol so far. Ten ratifications are needed for the Protocol to enter into force. So I am confident that this new device will become reality in the very near future.

V Implementing judgments

I have one more point about the means by which judicial dialogue is conducted, or, more exactly, might be conducted. Again, it arises out of the discussions that the Strasbourg Court has with national courts. It concerns the situation in which the task of executing a Strasbourg judgment falls to a domestic court, where it should modify case-law or judicial practice so as to comply with the Convention. In case of ambiguity or lack of clarity in the ECHR judgment, how can this be addressed? The Convention may offer a procedural

solution here, albeit untested thus far. What I am referring to is the procedure set out in Article 46 § 3. This permits the Council of Europe's Committee of Ministers to ask the Court about the correct interpretation of a judgment. The reason for this provision, which was part of Protocol No. 14, is plain. On occasion, the Committee of Ministers' supervisory role – which is a vital one – has been complicated by competing interpretations of a judgment of the Court. Of course, if the Court already has another such case on its docket, it will have the opportunity to rule on the efficacy of the steps taken to implement the previous judgment. This is not unusual – many examples can be given. But might one not regard the Article 46 § 3 procedure as existing not only for the purpose of proving guidance to the Committee of Ministers, but also to the national judge? Could it not, via the Committee of Ministers, serve as a channel of communication in the interests of effective compliance with a judgment of the Court? The idea may be innovative, but it is by no means far-fetched. I think that it merits consideration in the ongoing inter-governmental discussions on the future of the Convention system.

Conclusion

The image is sometimes conveyed of the European Court of Human Rights as an activist, over-reaching court, constantly pushing out the boundaries set in the text of the Convention. This is a caricature. Certainly, the Convention has been interpreted dynamically, for the sake of better protection of the individual. But this is done via settled methodology, which must itself be known to those who are familiar with Convention case-law. Jean-Marc Sauvé, the Vice-President of the French *Conseil d'Etat* rightly observed that as part of the Convention system, national courts need to internalise a two-fold perspective as they act within their margin of appreciation – along with their national perspective there should be a European perspective, informed by European standards and consensus. This is where the Convention system as a whole can still develop further. This is where its effectiveness in guaranteeing the protection and enjoyment of human rights can be improved. And judicial dialogue, in the sense I have just described, is no doubt an integral part of this.

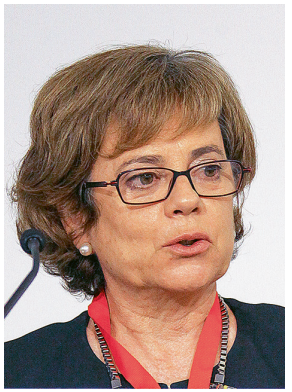
The Convention is a living instrument, yes, but also a maturing one. The ideal future that I envisage for it is one in which, State by State, the national authorities grow fully into the role that is naturally and rightfully theirs. In which the dialogue between the national authorities and the Strasbourg Court deepens, and with it the quality of protection of human rights. While I have concentrated on judicial dialogue today, that is not to disregard the importance of dialogue with the other domestic powers, the legislature in particular. I have

no time to do justice to this emergent phenomenon, which can only further embed the principles of European human rights law into the legal order of the Contracting States.

This brings me to my concluding remarks. In my decade or more at Strasbourg, I witnessed a significant change in many quarters around Europe regarding the way in which the Convention is observed and applied at domestic level. Viewed from Strasbourg, the change has been palpable. Notwithstanding episodes of controversy, I believe that the underlying tendency is one of increased subsidiarity – in the sense in which I have used it in this speech. As a European judge, I am naturally inclined to look primarily towards my opposite numbers at national level, to study their engagement with European Law. The protection of human rights is our common cause in Europe, the Europe of the Council of Europe and the European Union. And, for judges particularly, our common task. In performing it, the dialogue between us is a necessity, a corrective and an incentive. With the existing means for that dialogue, along with those anticipated though yet to materialize, the conditions are surely right to improve further the observance of the Convention.

For me, judicial dialogue is the key – indeed, the golden key – to that desirable future for the protection of human rights in Europe. To be sure, dialogue creates a climate of mutual trust. It helps us to unravel the myth of judicial activism. If the network of European Courts and courts in Europe is a success, the traditional "activism versus self-restraint" divide will at last become obsolete.

Thank you.



Prof. Dr. **Maria Lúcia Amaral**
Vice President of the Constitutional Court of the
Portuguese Republic

Judicial activism of European Constitutional Courts: does it really exist?

1. As far as I know, the expression "judicial activism" was for the first time used by Arthur Schlesinger Jr, in an article of the American magazine "Fortune" in 1947. The article had 14 pages and appeared in the middle of advertisements of Whisky and Agua Velva. Its title was: *The Supreme Court: 1947.*

Apparently, in this article, Arthur Schlesinger (its author) did not want to create or define a conceptual tool that would be used later by scholars in order to measure the certainty, the quality or the fairness of judicial decisions. The Fortune magazine was meant to be read by the public at large, and not by a community of academics. So, when *The Supreme Court: 1947* was written, the intention of its author was just to describe a moment of history of the United States Supreme Court – the year of 1947 – by describing the behavior of each one of its nine justices. And in order to describe this precise moment of the American judicial history, Schlesinger classified the nine judges of the Supreme Court, according to their judicial behavior, into two categories: the *champions of judicial self-restraint* on one side, and the *judicial activists,* on the other.

It is obvious that the expression *"judicial activists",* or *"judicial activism",* in spite of its particular origin, was meant to have an enormous success. Not only it has installed itself in the specific domain of the academic debate – requiring therefore a more accurate definition of what, in reality, it means – but also it has travelled from America to Europe, being nowadays a term used commonly by legal scholars of this side of the Atlantic . The proof of the success of the expression, if we needed any, is here, in this Colloquium. Here we are

in Riga talking about *judicial activism,* six decades after the publishing of Schlesinger's article.

2. The reasons for this success are, I believe, very clear.

Although the expressions had made its appearance only in the midst of the twentieth century, it is obvious that the *problem* that it identifies existed long before that time, a*t least in the context of the legal cultures of common law.*

To formulate the problem in its simplest way, I could say that it lies in the following question: how to define the precise boundaries of the proper domain of the judiciary vis-à-vis the other branches of government?

In the specific context of the European legal culture (that is to say, in the context of the *civil law* tradition) the existence of this problem became particularly evident after the second half of the twentieth century, at different levels of "governance". The European Court of Justice, for example, took several decisions – during the sixties – that implied a certain interpretation of the European treaties, favoring, in a decisive way, the communitarian integration of Europe. If we consider that the members that composed at that time this community (six Sovereign and national States) were not then able or disposed to strengthen at the political level their supranational cooperation, we can say that, in a certain way, the European Court of Justice has acted in a spirit of "judicial activism", for it has used legal arguments, legal processes and legal decisions to make what the political power – with its specific political procedures – was, in a certain period of history, unable to do.

At a very different level, we can say that the administrative courts – wherever they exist– can be considered "activists" whenever their interpretation of legal statutes is such that narrows the discretionary power given by theses statutes to the public administration. In this case, the judiciary branch also deliberates in a domain that should belong to another branch of government.

Finally, Constitutional Courts can also be considered "activists" whenever they adopt a certain interpretation of the Constitution that narrows the political decision of the democratic legislator. In this case, the *phenomena* is the same, since the judiciary surpasses its" natural" field, deciding about issues that, *in principle,* should be decided by others than the courts.

All this is commonly known.

My intention, by remembering these generally known ideas, is the following.

I will focus on the problem of" judicial activism" (as I have in general defined it) when exercised by constitutional courts.

I will raise, in this specific field, three main questions:

1) Is judicial activism, in this specific domain, a good thing?
2) If it is not, what remedies do we have to avoid it?

3) Finally: can these remedies be the same in Europe and elsewhere, or (saying it in another way): is there a specific problem with the European Constitutional Courts, whenever we consider them to be, in a negative sense, "activists"?

3. Is judicial activism, when exercised by Constitutional Justice, a good or a bad thing?

I think that when we are talking about "judicial activism" when exercised by Constitutional Courts we have to be quite clear. What exactly are we talking about? The interpretation of the Constitution (of a certain constitution) is the specific task of any Constitutional Justice. And we know for sure that this task cannot be properly fulfilled if we do not use, to accomplish it, specific hermeneutic tools. As the Chief - Justice Marshall put it, more than two hundred years ago: *we must never forget that is a Constitution that we are expounding.*

This reason a Constitutional Court cannot be a Court that decides shallow and narrow. (The expression belongs to Cass Sunstein). Judging in Constitutional matters requires, not only a certain vision about the length and strength of the Constitution that provides the basis for the decision, but also a strong conviction about its legitimacy. These are the two grounds upon which a coherent constitutional case-law can be built. Therefore, any Constitutional Court that uses these two grounds as the proper basis of its decisions cannot be considered, by this motive, an "activist", in the pejorative sense of the expression. Refusing to decide in a "shallow and narrow way" in Constitutional issues is the sound road that any Constitutional Court has to take, if it wants to deliver constitutional justice. An example of this affirmation can be found in a very well known decision of the German Constitutional Court, taken in the very early years of tis existence. In 1957, when the German Court decided, in the famous Luth case, that the fundamental rights enshrined in the Bonner Grundgesetz had an objective value, and, therefore, they should be legally binding also in private domains (relations/affairs), it did not act outside its legitimate domain of competence. It simply expounded the constitution it had to apply, bearing in mind the core-value of its legitimacy as a fundamental constitutional order. So, although the Luth doctrine did not follow directly from the constitutional text, the court that defined it did not behaved itself as an "activist". It simply acted as a constitutional court, refusing to decide "shallow and narrow".

4. Judicial activism, when exercised by Constitutional Courts, is something different. It occurs whenever the Court, in its process of interpreting the Constitution, finds for its norms a meaning that, instead of corresponding to the fundamental "values" of the constitutional order as such*, corresponds*

only to the will of a certain "faction " (or a certain "group") of the society. Whenever that happens, there is judiciary activism.

It supposes that he Court has acted in such a way that: first: its interpretation of the Constitution is an interpretation that can only be followed by a certain "faction" or "group" of the political community, and not by this community as a whole. Therefore, this interpretation generates division amongst the plural forces of the polity. Instead of promoting the union of the plural Constitutional State (Verfassungsstaat), it promotes division, by enforcing, through the means of a judicial decision, a certain policy, that can only be decided by majoritarian procedures, following the basic procedural rule of democracy.

When understood within this specific dimension, the term "activism" cannot but have the most pejorative meaning. It implies the corruption of the Constitutional State (Verfassungsstaat), because it implies that the constitutional judges, occupying the place of the majority elected in Parliament, want to impose their own majoritarian view through the ways of legal decisions. This means the annihilation of the democratic equality of the citizens. This means also that instead of a Constitutional State (Verfassungsstaat), we have simply a sort of legal order (which is not a polity) administrated or ruled by judicial decisions.

5. How to avoid this corruption?

Normally, the risk of corruption occurs when a court as to decide the most difficult or controversial questions. These are normally political questions, in the broad sense of the word "political"; and there is always the risk that, when deciding those questions, the Court misleads the interpretation of the Constitution, finding for its norms a meaning that is nothing but the will of a certain faction of society.

However, the European Constitutional Courts cannot use the *political question doctrine* as a proper tool to prevent their own activism.

The legitimacy of the European Constitutional Courts lies in the texts of the Constitutions. It is the legitimacy of a *system* that was designed, in a rationally planned way, by the "pouvoir Constituant". Outside the system the Court cannot act; and it is not planned that the Court can decline its competence by its power to qualify a certain issue, or question, as "political", or as a question that is to be decided by the political power alone.

All the questions that are put before the Constitutional Courts of the civil law tradition must be decided, provided that the procedure followed by the claimant has been the right one.

The only solution that there is, to avoid the corruption of the Constitutional State, lies in the *method* that has to be followed to rule the case.

Constitutional justice needs its own Savigny.

The European science of public law has played this role for the last fifty years. There would be many things that I could say about this topic, but let me finish, stressing just one basic idea: whenever the problem that has to be solved by the court does not imply the violation of a fundamental or basic right, and, therefore, has to be solved by the application of the general principles of equality, proportionality or legal certainty, the intensity of the scrutiny of the Court must always remain at a minimal level.