Constitutional Court of the Republic of Slovenia

International Conference

Bled, Slovenia
June 2016

25 Years

CONFERENCE PROCEEDINGS

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Foreword by the Editor

The independence of the Republic of Slovenia, attained in June 1991, was inextricably linked with the decision to establish a democratic state governed by the rule of law and based on respect for human rights and fundamental freedoms. In the years following our independence, the Constitutional Court of the Republic of Slovenia played an important role in the protection of these values. The Court celebrated the 25th anniversary of its functioning within the independent state with a solemn ceremony and the organisation of an international conference, focused on the role and position of constitutional courts. These Conference Proceedings contain important insights from the ceremony and the international conference.

The first part of the Conference Proceedings contains a collection of the ceremonial speeches delivered at the ceremony on 22 June 2016 at Brdo Castle. The ceremony was attended by high-ranking representatives of the Slovene state and guests from the Court of Justice of the European Union as well as a number of foreign constitutional courts and supreme courts, which also perform constitutional review. The published speeches include addresses by Mag. Miroslav Mozetič, President of the Constitutional Court of the Republic of Slovenia, Prof. Dr Koen Lenaerts, President of the Court of Justice of the European Union, Mr George Papuashvili, President of the Constitutional Court of Georgia and Chairman of the Conference of European Constitutional Courts, and Mr Borut Pahor, President of the Republic of Slovenia.

The second part of the Conference Proceedings contains the contributions presented at the international conference that took place on 23 June 2016 in Bled. We are grateful to the President of the Court of Justice of the European Union, the Presidents, Vice Presidents, and former Presidents of constitutional courts who responded to the invitation of the Constitutional Court of the Republic of Slovenia and gave excellent presentations illustrating their views on constitutional review from constitutional and European law perspectives. This part of the Conference Proceedings is introduced by the special contribution of Assist. Prof. Dr Aleš No-

vak, Head of the Department for Legal Theory and Sociology of Law at the Faculty of Law in Ljubljana. He is in charge of several subjects from the field of the theory of the state and legal theory and has kindly accepted the invitation of the Constitutional Court of the Republic of Slovenia to contribute his account of the work of the international conference as well as his view on the role of constitutional review in general. We are grateful for his work as the academic view of a younger colleague who dedicated a part of his career to the study of constitutional review entails a valuable contribution to these Conference Proceedings.

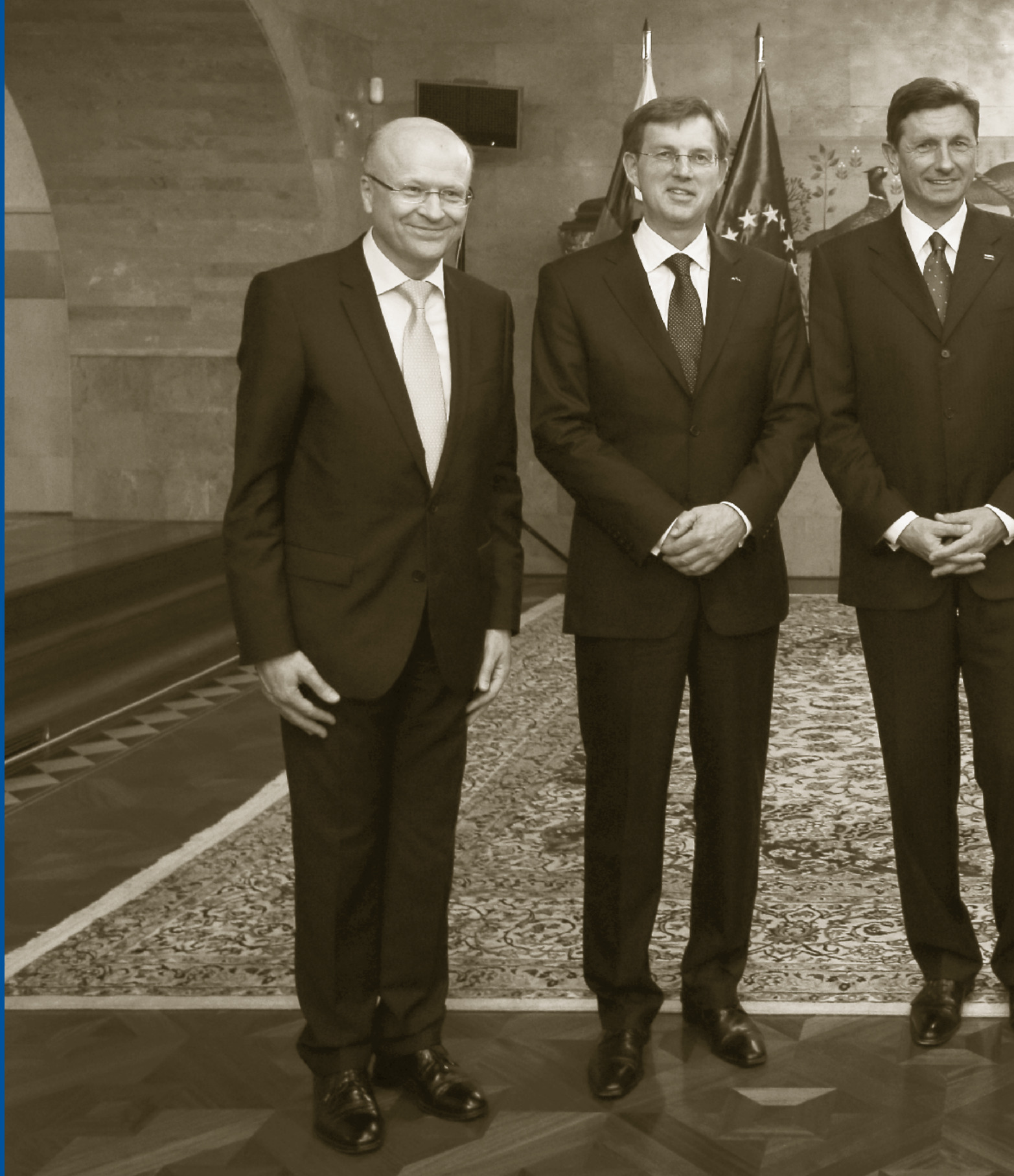
I would also like to seize this opportunity and, in the name of the judges of the Constitutional Court of the Republic of Slovenia and on my own behalf, once again thank our colleagues and friends from other constitutional and supreme courts who responded to our invitation and joined us in the celebration of this noteworthy anniversary of our Court's functioning. We were delighted that this solemn occasion, similarly as our past meetings, provided us with a new opportunity to exchange our views and ideas regarding the mission of ensuring the rule of law and respect for human rights and fundamental freedoms entrusted to each of us in our own court.

I Solemn Ceremony Commemorating the 25th Anniversary of the Constitutional Court of the Republic of Slovenia and the Independence of the Republic of Slovenia

II International Conference Commemorating the 25th Anniversary of the Constitutional Court of the Republic of Slovenia

Solemn Ceremony Commemorating the 25th Anniversary of the Constitutional Court of the Republic of Slovenia and the Independence of the Republic of Slovenia

BRDO, 22 JUNE 2016



Opening speech by

Mag.
Miroslav Mozetič

President of the Constitutional Court of the Republic of Slovenia

"New challenges and new trials undoubtedly lie before our society as well as before the Constitutional Court."

Dear President of the Republic, Mr Borut Pahor,
President of the Court of Justice of the European Union, Mr Koen Lenaerts,
Chairman of the Conference of European Constitutional Courts and President of the Constitutional Court of Georgia, Mr George Papuashvili,
Presidents and judges of the invited constitutional courts,
Former judges of the Constitutional Court of the Republic of Slovenia,
Representatives of the legislative, executive, and judicial branches of government,
Representatives of religious communities,
Advisors of the Constitutional Court of the Republic of Slovenia, and
Distinguished guests,

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The 25 years of the functioning of the Constitutional Court of the Republic of Slovenia are inextricably linked with the same anniversary of the independent state of Slovenia. On 25 June 1991, the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia and the Special Declaration of Independence were adopted and proclaimed. This date also marks the birth of our new state and the completion of the long process of its gradual establishment as well as the implementation of the will that the Slovene nation and the residents of the Republic of Slovenia expressed in the Plebiscite to establish for their future lives an independent and sovereign state that will no longer be part of the Socialist Federal Republic of Yugoslavia. In December of the same year a new Constitution was adopted.

As is evident from the Basic Constitutional Charter, the long-held wish, which the Plebiscite transformed into a clearly expressed demand of the people for an independent state, was first and foremost a call for a democratic state governed by the rule of law in which human rights and fundamental freedoms would be respected and protected and a call for the establishment of a democratic constitutional order that would put human dignity and the spiritual, political, and economic freedom of individuals into the foreground.

In Decision No. U-I-109/10 the Constitutional Court stressed that "[h]uman dignity is at the centre of the constitutional order of the Republic of Slovenia. Its ethical and constitutional significance already proceeds from the Basic Constitutional Charter, which is not only the constitutional foundation of Slovene statehood, as also certain principles that demonstrate the fundamental legal and constitutional quality of the new independent and sovereign state are outlined therein. By adopting the independence documents not only the fundamental relationship entailing state sovereignty between the Republic of Slovenia and the [Socialist Federal Republic of Yugoslavia] was severed, but there was also a fracture with the fundamental value concept of the constitutional order. Differently than the former [Socialist Federal

Republic of Yugoslavia], the Republic of Slovenia is a state governed by the rule of law whose constitutional order proceeds from the principle of respect for human rights and fundamental freedoms. Human dignity is the fundamental value which permeates the entire legal order and therefore it also has an objective significance in the functioning of authority not only in individual proceedings but also when adopting regulations."

These are the premises, i.e. "severing the legal link of the Republic of Slovenia as part of Yugoslavia" and especially the "value concept and foundation of the constitutional order of the new state", on which the Constitutional Court of the Republic of Slovenia began its work as the highest judicial body for the protection of constitutionality, legality, and protection of human rights and fundamental freedoms 25 years ago. This is what differentiates it from the Constitutional Court of the Socialist Republic of Slovenia, established by the Constitution of the Socialist Republic of Slovenia of 1963. The differentiating criterion is thus primarily a substantive or value-based criterion, whereby it should also be noted that we are now speaking of the constitutional court of an independent state. Taking into account these two historical periods in Slovenia together with the differences that characterised them, we can nevertheless state that a constitutional court exists in Slovenia since 1964.

25 years ago, Slovenia began its journey as an independent state and at the same time it embarked on its path of transformation from the former communist and totalitarian political regime, from a state that did not function as a state regulated by law, from a state in which human rights were grossly violated (as established by the Basic Constitutional Charter) into a modern democratic and social state governed by the rule of law and based on respect for human dignity and the human rights and fundamental freedoms derived therefrom. In other words, we embarked on the difficult path of implementing and exercising the Basic Constitutional Charter and the Constitution.

The new Constitution along with the new regulation of the state and especially the new system of values it introduced were not planted in virgin soil. We were, and in fact we still are, burdened by the "heritage of the former communist regime" that we dismantled (or should have dismantled) as this process was called by Council of Europe Resolution No. 1096. Alongside this "dismantling" we had to build a new social order and, above all, implement the newly established fundamental values, make them our own, exercise and respect them (or at least we should have done so). I am afraid that we have not yet completed this task. It seems that we have difficulties to accept the new fundamental values, which we have enshrined into the Constitution, and to live by them.

I have no intention of reducing the role of the other stakeholders in this process, in particular the role of the National Assembly as the legislature, political parties, and civil society, as well as the role of the ordinary judiciary. I merely wish to stress the extremely important and often crucial role of the Constitutional Court.

According to its constitutional role the Constitutional Court is the highest guardian and interpreter of the Constitution. Its primary task is to review the constitutionality of laws and the constitutionality and legality of regulations. In this role it has significantly impacted the process of transferring fundamental human and constitutional rights and fundamental constitutional values into the texts of laws and other regulations. In doing so, it set the limits for the constitutional admissibility of the regulation of human rights and fundamental freedoms. In constitutional complaint proceedings it frequently determined the minimum standards with regard to constitutional procedural safeguards in judicial proceedings and also ensured that human rights were respected in concrete cases.

Through the exercise of these powers, the Constitutional Court has largely ensured that the new constitutional order and the new system of values flew into legislation and in particular also into the social consciousness and the consciousness of individuals. It thus played an important role in the dismantling of the old social order and at the same time contributed to the construction of a new-one. The transition can only be successful, and we will be able to consider it a success, if we accept the fundamental values defined by the Constitution as our own, if we fully implement a functioning system of a constitutional democracy governed by the rule of law. Otherwise we will remain at a purely formal level and be left with only an empty shell.

The Constitutional Court consists of judges. Their work is reflected in the decisions of the Constitutional Court, in separate opinions, in thousands of meticulously studied case files, in hours upon hours of spirited debate. Part of it is also evident from the statistical data regarding the work of the Constitutional Court, from the published collections of its decisions, and, in recent years, also from its web site. To commemorate the present anniversary we further published a special selection of the most important decisions adopted by the Constitutional Court in the period since it began its work over 25 years ago up until the end of last year. Therefore, I will not burden you with statistical data. We must, however, not overlook the enormous work and effort of the advisors of the Constitutional Court. Without their valuable assistance we certainly could not have completed such an extensive amount of work.

At the occasion of our 25th anniversary it is also necessary to pay a special tribute to all former judges of the Constitutional Court, as well as former advisors, who participated in the interpretation of the Constitution, the development and consolidation of the rule of law, and the protection of human rights and fundamental freedoms. The first composition of the Constitutional Court, which has done pioneering work and adopted numerous positions that are still relevant today, deserves a special recognition. The first composition paved the way and, from the outset, set high standards of constitutional review. Throughout its functioning, i.e. the entire twenty-five years since the Republic of Slovenia became a sovereign and independent state, the Constitutional Court has been committed to protecting the Constitution. Through the introduction of modern standards of constitutional review, the judges of the Constitutional Court put the Republic of Slovenia on the map along with other modern constitutional democracies in Europe. The Constitutional Court of the Republic of

Slovenia is a member of the Conference of European Constitutional Courts and the World Conference on Constitutional Justice. It has developed excellent relations with almost all European constitutional courts, and in particular also a productive cooperation with the constitutional courts of our neighbour countries. Through such cooperation and through the exchange of experiences the role of constitutional courts in the implementation of the principles of constitutional democracy is additionally strengthened.

I am convinced that, throughout the 25 years of its functioning, the Constitutional Court performed its tasks appropriately and excelled at its work. It received both praise as well as criticism and complaints, sometimes claiming that it is too activist in its decision-making and at other occasions that it is too reserved. When I speak of criticism, I mean serious criticism which is always welcome, and not the lowly accusations or attacks that have become quite frequent in recent years. Such different attitudes towards the Constitutional Court are understandable and are mostly determined by its constitutional position that, in a particular manner, places it in a superior position in relation to all three branches of government. It has the power to supervise the legislative, executive and judicial branches of government. Therefore, with regard to the supervision of the legislative and executive branches, it is often pulled onto the political field or, differently put, in such instances it finds itself moving along the thin and unclear line separating politics and law. When dealing with fundamental premises and values, it is not always easy to remain within the purely legal sphere. In addition, there is the question as to who defines that line and determines its position. These are additional reasons (if not even the decisive-ones) underlying the complaints about activism and even accusations of interferences with the political field, i.e. with the field of the legislature. I am convinced that what is referred to as activism of the Constitutional Court is justifiable and even necessary if it serves the protection of constitutionality, in particular human rights and fundamental freedoms, and if it is indispensable for the protection of these rights and freedoms. However, activism must not be used in the service of one or another policy or different partial and personal interests. I hope that, as judges of the Constitutional Court, we have adhered to this principle to the greatest extent possible.

In addition to the legal expertise of the Constitutional Court, its independence is crucial for the fulfilment of its task. The starting point and principle directive of its work are the Constitution and human rights and fundamental freedoms. The Court, of course, does not exist outside of society, it is not isolated from social reality or immune to different influences. However, it must establish a system for the protection against external negative influences, regardless of where they come from or who exerted them.

New challenges and new trials undoubtedly lie before our society as well as before the Constitutional Court. There have been changes with regard to the economic conditions and our natural environment. We are faced with the great challenge of dealing with migrant and refugee flows, and new security challenges. In dealing with these challenges and new trials we are also faced with the issue of human rights and fundamental freedoms. These will undoubtedly

entail difficult tasks for all of us. We will have to find a balance between social and personal standards, economic development and security, on the one hand, and freedom, an intact nature, and social security, on the other. Sooner or later, the Constitutional Court will be pulled into the search for this balance or more precisely into the assessment of whether the legislature applied the right measure when weighing the various interests at issue and whether it excessively interfered with human rights and fundamental freedoms. This is an additional reason why the independence of the Constitutional Court is an indispensable value that must especially be taken into account by the political actors in power. In a number of states designated as young democracies, constitutional courts are becoming a thorn in the flesh of the political actors in power, an obstacle on the path to pursue their political objectives, which they often pursue by means that are constitutionally disputable. Therefore, these actors attempt to weaken the power of constitutional courts by cutting their competences or seeking different ways of submitting them, of rendering them more cooperative.

I am convinced that in the long run such attempts will negatively affect all of us. Strong and independent constitutional courts are not intended to serve the ambitions and arbitrariness of constitutional court judges. To the contrary, they serve the protection of constitutionality, democracy, the rule of law, and, last but not least, human rights and fundamental freedoms. Ceremonies such as today's and meetings such as tomorrow's undoubtedly contribute to the recognition of this role of constitutional courts and to strengthening the awareness of the importance of constitutional justice for well-functioning constitutional democracies governed by the rule of law.

Therefore, distinguished guests, Mr President, I would like to express my sincere gratitude to all of you for responding to our invitation and attending this ceremony to commemorate the 25th anniversary of the Constitutional Court of the Republic of Slovenia. I believe that all of us, as well as all Slovene citizens, share the hope that the Constitutional Court of the Republic of Slovenia will continue its work as a genuine and effective guardian of constitutionality and human rights and fundamental freedoms.

Thank you.

XI

Opening speech by

Dr Koen Lenaerts

President of the Court of Justice of the European Union

“The recipe for this success can be found in the Member States’ willingness to transcend their own interests and to pursue common ambitious objectives without compromising their own identity.”

I feel very privileged to be here at Brdo Castle this evening in such distinguished company.

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As we all know, these are not easy times for the European Union. The economic crisis that pushed European solidarity to its limits has been followed by an equally challenging refugee crisis. Those crises take place at a time when Europeans must also find solutions to combat international terrorism. And tomorrow a member of the European family will decide whether the time has come to say goodbye.

It is in my view important to reflect – in times of crises – on the success story that the European Union really is. No one can deny that the European construction has brought peace, stability and prosperity to a continent that had long been ravaged by the atrocities and privations of war. The recipe for this success can be found in the Member States' willingness to transcend their own interests and to pursue common ambitious objectives without compromising their own identity.

I am sure that the authors of the initial Coal and Steel Treaty could only have dreamt of the European Union as we know it today.

The Union is a "Union of values" where human dignity, freedom, democracy, equality, the rule of law and human rights are to be respected by all. An internal market has been created as an area without borders in which the free movement of persons, goods, services and capital is guaranteed; there are Treaty provisions on Union citizenship, a citizenship which is destined to be the fundamental status of nationals of the Member States; police and customs cooperation has become a reality, as well as judicial cooperation ensuring the mutual recognition and enforcement of national judgments in civil and criminal matters.

In this success story the national courts play a fundamental role. Within the European Union, judicial power is shared between the Court of Justice and national courts. Whilst it is for the Court of Justice to say what the law of the EU is, it is for the national courts to apply that law

faithfully in the cases brought before them. In particular, this applies to all national supreme and constitutional courts which, as the guardians of their domestic legal orders, are under an obligation to guarantee effective judicial protection of the rights enshrined in EU law and to ensure the consistency of their own domestic law with EU law.

The constitutional courts' input in upholding the common fundamental values on which the Union is founded is really crucial. It is indeed mainly up to the constitutional courts of the Member States to ensure – as the gatekeepers of the rule of law within their own legal order – that the level of fundamental rights protection within the domestic legal order is on a par with that guaranteed by the Charter of Fundamental Rights of the European Union, which, reaffirms those rights as they result from the constitutional traditions common to the Member States. In a situation where action of the Member States is not entirely determined by European Union law, national authorities and courts remain free to apply national standards of protection of fundamental rights. This means that the Charter allows for constitutional diversity.

However, in giving concrete expression to that diversity, the constitutional courts will have to see to it that the level of protection provided for by the Charter, as interpreted by the Court of Justice, and the primacy, unity and effectiveness of European Union law are not being compromised. Accordingly, constitutional courts play a fundamental role in ensuring that Europeans remain "united in diversity".

I am particularly glad to be able to celebrate with you all the 25th anniversary of the Constitutional Court of the Republic of Slovenia, which is one of the pillars of our European temple.

Thank you.

Opening speech by

George Papuashvili

President of the Constitutional Court of Georgia and Chairman of the Conference of the European Constitutional Courts

“I would like to kindly underscore the essential role of the Constitutional Courts of Slovenia and Georgia in ensuring constitutional supremacy, democratic stability, well-functioning governmental bodies, and protection of human rights and freedoms in their respective countries.”

Vaša Ekselenca, spoštovani Predsednik!
Člani in Predsednik slovenskega
ustavnega sodišča, dragi kolegi!

XVIII

Dovolite, da vam čestitam v imenu gruzijskega ustavnega sodišča in konference evropskih ustavnih sodišč ob 25-letnici slovenske samostojnosti in slovenskega ustavnega sodišča. Vesel sem, da imam priložnost obiskati gostoljubno Slovenijo. Želim vam uspešno delovanje v bodočih ustavnih pravosodnih procesih. Z veseljem pričakujem obisk slovenske delegacije ustavnega sodišča, v septembru, v Batumiju, na mednarodni konferenci, posvečeni 20. obletnici gruzinskega ustavnega sodišča.[1]

I am extremely honoured to address you in my capacity as the President of the Constitutional Court of Georgia as well as the Chairman of the Conference of the European Constitutional Courts. It is exciting to be here today on this solemn occasion and let me first thank the Constitutional Court of the Republic of Slovenia – and, in particular, its President Mr Miroslav Mozetič – for inviting me to participate in this event commemorating the 25th anniversary of the Constitutional Court of the Republic of Slovenia and the Independence of the Republic of Slovenia. My sincere congratulations on your anniversary and my best wishes for a peaceful, prosperous, and successful future.

I cannot emphasise enough the importance of this occasion. Slovenia and Georgia have very much in common in terms of legal and political development. The resemblance between Slovenia and Georgia goes back to the late 1980s and early 1990s, after the end of communist rule in the Caucasus and Eastern European states and the breakup of the Yugoslav Republic. Wide-

1 The opening part of the speech was delivered in Slovene and translates as follows:
"Your Excellency, esteemed President! Members and President of the Slovenian Constitutional Court, dear colleagues! Allow me to congratulate you on the 25th anniversary of Slovenian independence and the Slovenian Constitutional Court on behalf of the Georgian Constitutional Court and the Conference of European Constitutional Courts. I am pleased to have the opportunity to visit hospitable Slovenia. I wish you successful work in future constitutional judicial proceedings. I am looking forward to the visit of the delegation of the Slovenian Constitutional Court in September in Batumi, at the international conference dedicated to the 20th anniversary of the Georgian Constitutional Court."

spread national movements heightened the struggle for independence which eventually culminated in regaining the independence of Georgia, on 9 April 1991, and Slovenia, on 23 December 1991. Soon, our two countries adopted Constitutions that sought to instil the principles of an independent, sovereign, and democratic state, rule of law, and human rights. Since that time, the two countries have achieved great improvements in their development. Notably, the Republic of Slovenia made rapid political, social, and economic reforms and in 2004 became an EU member state. Whereas, in June 2014 Georgia signed the Association Agreement with the EU thereby significantly deepening political and economic ties, bringing Georgia closer to Europe. Therefore, we consider the Republic of Slovenia as our partner EU member state supporting Georgia's aspiration to join the democratic family of European nations.

It should be mentioned, that this year both of our countries are celebrating their 25th anniversaries since regaining their independence. The Constitutional Court of Georgia, however, was established on August 25, 1995 and will celebrate its 20th anniversary in the nearest months.

Apart from historical similarities between Slovenia and Georgia, I would like to kindly underscore the essential role of the Constitutional Courts of Slovenia and Georgia in ensuring constitutional supremacy, democratic stability, well-functioning governmental bodies, and protection of human rights and freedoms in their respective countries. 25 years are a good moment to lean back and take stock of achievements and consider avenues for further improvement.

I am pleased and grateful to the Constitutional Court of the Republic of Slovenia for its support during the candidacy of the Constitutional Court of Georgia to chair the Conference of European Constitutional Courts. Namely, in May 2014 the Constitutional Court of Georgia became the first non-EU state chairing the Conference and I'm proud that during my Presidency the Constitutional Court of Georgia turned into an equal member of the European society of constitutional justice. Georgia is set to organise the 17th Congress of the European Constitutional Courts, which is truly a testament to its effective and successful work on a consistent basis.

Finally, as a representative of Georgia, I am thrilled and proud to have the Slovenian nation as a good friend. I do hope that Slovenia will continually support my country on its way to Euro-Atlantic integration, for which I am deeply grateful. This is a firm historical choice of the Georgian people and aims to fulfil our long-lasting national dream – to return to the European family.

I sincerely congratulate the entire nation as well as the Constitutional Court of Slovenia on the anniversary. Again, thank you very much for your kind invitation to speak here today. And once again, my best congratulations on behalf of the Georgian Constitutional Court!

Thank you.

Keynote speech by

Borut Pahor

President of the Republic of Slovenia

“I would first like to thank [...] all the generations of Constitutional Court judges for their diligent, professional, and committed work in establishing the authority of the Constitutional Court, in building a state governed by the rule of law...”

Dear President of the Constitutional Court of the Republic of Slovenia, President of the European Court of Justice, President of the Constitutional Court of Georgia, Prime Minister, Your Excellencies, Ladies and Gentlemen,

XXII

On the eve of the celebration of our quarter-century anniversary, I would first like to thank, as the President of the Republic, all the generations of Constitutional Court judges for their diligent, professional, and committed work in establishing the authority of the Constitutional Court, in building a state governed by the rule of law, in particular its constitutional dimension, but also, and this must not be overlooked, as regards the very demanding work that was realised in bringing about the creation of a legal culture. Since my constitutional duties also require that in this very period I propose first two candidates for the Constitutional Court and then subsequently another four at the beginning of next year, thus in a short time two thirds of all constitutional judges, let me state that the process of recruiting candidates is carried out very carefully. I say this because I want to emphasise once again the degree of solemn respect that all the political institutions of the state responsible for the selection of constitutional judges have with regard to this major and important challenge. In its history over the last quarter of a century, the Court has gained all our respect with its work.

As is the fate of judicial decisions everywhere, Constitutional Court decisions are met with both approval and criticism. However, it seems to me that by its conduct, both when adopting decisions and subsequently advocating for such decisions, the Constitutional Court has successfully convinced the public that even though people can disagree with its decisions, they still must respect them. In this framework, credit must be given to all the generations of Constitutional Court judges; not only as regards the strengthening of the institution of the Constitutional Court, the awareness of the importance of human rights and the protection of constitutionality – thus for the strengthening of a state governed by the rule of law – but also, very importantly, for strengthening the legal culture. The President of the Court of Justice of the European Union mentioned at the beginning of his introduction that we live in quite a challenging period, a period in which the British people are deciding not only on their own future, but consequently also on the future of all of us. Just as the political authorities of your states, dear guests from abroad, do not comment on this very important and perhaps ground-

breaking event, Slovenian political authorities also do not comment on it, as the British people may decide on their status at their own discretion. We are, however, all very well aware that a decision going one way or the other will have important implications for the future of the continent that is our home.

Let me take this opportunity today to reiterate the wish of the Slovene nation, the citizens of the Republic of Slovenia, that the European Union stay together and find a way out of this crisis, as was also mentioned by the President of the European Court. My opinion is – and this is also symbolised by the referendum of the British people on the so-called Brexit, which is the first of its kind and as such is setting a precedent – that the European Union cannot remain in its current state for long and that it requires a fresh development impetus. We Slovenians, the citizens of the Republic of Slovenia, will celebrate the 25th anniversary of the proclamation of our statehood the day after tomorrow; we are committed to the idea of Europe and I wish to tell especially those of you from abroad that the foundation of our state, our national idea, is to the greatest possible extent in symbiosis with the European idea. The deepening of the European idea and its strength, the fortification also of its constitutional dimensions, entails, at least in our opinion, an important step also for us as one of the 28 members of the European family.

Pending the decision of the British people and in the expectation that we will find a way to consolidate the European Union together as a factor for peace, security, and prosperity in general and the legal security of human rights and the dignity of the individual, I wish to express, to you, President of the Constitutional Court, and to your colleagues, sincere congratulations on this 25th anniversary. To all of you who have so kindly responded to our invitation and honoured this anniversary with your presence, I sincerely thank you and would also like to express my best wishes regarding our successful common future.

Thank you very much for your attention.

International Conference Commemorating the 25th Anniversary of the Constitutional Court of the Republic of Slovenia

BLED, 23 JUNE 2016

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Assist. Prof. Dr Aleš Novak

Faculty od Law,
University of Ljubljana

The Many Precious Gifts of a "Secular Papacy"

An Overview of the International Conference Commemorating the 25th Anniversary of the Constitutional Court of the Republic of Slovenia

1.

As constitutional courts are becoming one of the crucial and defining traits of modern states, the discussion of their role and mission assumes special import. Even more so if we consider what a fundamental transformation of modern legal systems the introduction of constitutional review has prompted. On one occasion Donald Dworkin quipped that constitutional courts have become a sort of "secular papacy."[1] His witty remark can be understood on many different levels. We can understand it as underlying the fact that constitutional courts have become *supreme moral authorities*. The impact of their decisions has ceased to be purely legal (if that was ever the case) – the centrality of human rights protection in post-Second World War constitutional review, which defines the position of every individual within the political community, has endowed their decision-making with a distinct ethical dimension. Almost every significant public issue ends up being adjudicated by constitutional courts (or the equivalent). Dworkin's humorous insight can also be understood as hinting at a degree of *trust* accorded to the constitutional court's decisions. In the same way as the papacy was (in its golden age) an institution that inspired trust, so today constitutional courts inspire trust. In most modern states the supreme judicial authority enjoys public support envied by the legislative or executive branches of the government. Judicial decisions enjoy the appearance of expertise and correctness facilitating the "leap of faith"[2] that makes law possible. But Dworkin's clever observation can also refer to the "infallibility"[3] supreme judicial authorities

1 S. Breyer, Introduction: The "International" Constitutional Judge, in: Exploring Law's Empire – The Jurisprudence of Ronald Dworkin (ed. S. Hershovitz), Oxford University Press, Oxford, 2008, p. 1.

2 I have borrowed this phrase from the title of John Gardner's work Law as a Leap of Faith (Oxford University Press, Oxford, 2012). Gardner's point is of course slightly different.

3 I am referring to the infallibility invoked by the US Supreme Court Justice Jackson in his famous dictum in Brown v. Allen (344 U.S. 443 (1953)): "We are not final because we are infallible, but we are infallible only because we are final."

claim, when they reserve for themselves the exclusive prerogative to correct their possible mistakes and deny that option to every other agent in the system of government.

Dworkin's many penetrating observations on constitutional review – including his comment regarding the "secular papacy" – have come from outside the practice he described. They were made by someone who has keenly and inquisitively observed the practice without participating in it. The international conference organised by the Slovenian Constitutional Court on the occasion of its 25th anniversary presented a splendid opportunity to lend a keen ear to those who are immersed on a daily basis in the practice of constitutional review and to learn what they consider to be the true nature thereof and the challenges confronting this "secular papacy." The discussion that took place on 23 June at Bled amongst an illustrious gathering of former and current presidents, vice presidents, and influential members of constitutional courts and supranational courts unveiled the successes they celebrate and the challenges that still await them. In this short overview I will strive to highlight a few of the leitmotifs connecting various contributions of this outstanding selection of judges. The phrase "secular papacy" is by all means an evocative one, but it should not become merely a "catchphrase" and blind us to the many precious gifts this institution has bestowed upon modern legal systems, among them also upon that of Slovenia. The conference was a vivid reminder of what we owe to this "secular papacy."

2.

The spirit of the laws changes with epochs. In his renowned book *Judges, Legislators and Professors*, van Caenegem tried to shed some light on the changing nature of law by highlighting three possible agents exerting the decisive influence on law in a certain period.[4] In the 17th and 18th centuries most of Europe was dominated by law mainly created by professors setting a firm doctrinal basis for positive law. Their systematising efforts set the tone for positive law in an epoch when the legislature was pushed to the margins of the law-creating process. Legal doctrine became the source of law. In the 19th century the pendulum swung towards legislatures. Law came to be equated with the people's chosen representatives. The concept of the separation of powers emerged, providing a philosophical foundation for the idea that the source of law can only be the will of the people, expressed through their elected representatives. In a less developed formulation, this concept can be traced back to Locke's Two Treaties on Government,[5] while the fully evolved articulation, which is replicated in countless modern constitutions, emerges in Montesquieu's The Spirit of the Laws.[6] Its core precept – the existence of three sharply distinguished governmental powers – the creation of law, their execution, and

4 R. C. van Caenegen, Judges, Legislators and Professors – Chapters in European Legal History, Cambridge University Press, Cambridge, 2002, pp. 67–71.

5 J. Locke, Second Treatise of Government XII, §143–148.

6 C.-L. Montesquieu, The Spirit of the Laws II, 11, 6.

their application to individual disputes, which is somewhat misleadingly equated to the interpretation of laws[7] – has profoundly influenced our modern understanding of the state and law.

The emergence of judicial or constitutional review – which is commonly believed to have been ushered in by the famous Marbury v. Madison decision, where the US Supreme Court claimed the right to assess the constitutionality of legislation adopted by Congress and to annul it if a legislative act were to be found unconstitutional[8] – has profoundly changed the concept of the separation of powers. Dr Jadranka Sovdat, the Vice President of the Slovene Constitutional Court, pointed out that the emergence of constitutional courts has resulted "in important changes."[9] They occur both in the rearrangement of the legislature's position in the architecture of state power and in an important shift within the legal relationship between the legislature and the individual.[10] Each transformation is momentous. The power of the constitutional court to annul a decision adopted by the democratically elected legislature heralds the gradual decline of the doctrine of parliamentary sovereignty. The legally unlimited power of the parliament, which stops short only of being able "[to] make a woman a man, and a man a woman,"[11] has become a thing of the past. The emergence of constitutional review fundamentally rearranges the constitutional design of hitherto co-ordinate branches of government, who have been allotted separate and clearly defined sets of competences.

Now, the co-ordination is no longer there, since a more supreme power towers above all other branches of government.[12] Other branches of government, the legislature in particular, have viewed this development with distrust. This is perhaps most clearly displayed in *a string of restrictions on the powers of constitutional courts*. The contribution of the President of the Aus-

7 It is misleading because every execution of the law must be preceded by the interpretation of the law. Kelsen therefore proposed that the classic scheme be replaced by a dualist model with only two basic governmental powers: the creation and the application of law. *Cf.* H. Kelsen, The General Theory of Law and State, Harvard University Press, Cambridge, 1945, pp. 255–256 and 269 *et seq.*

8 Marbury v. Madison, 5 U.S. 137 (1803). It is worth mentioning that this myth is to be taken with a grain of salt. This power was not exercised again by the US Supreme Court until 1856 (in the infamous case of Dred Scott v. Sandford, 60 U.S. 393 (1856)), and was not invoked until 1887 as a precedent establishing judicial review. *Cf.* Robert L. Clinton: Precedent as Mythology: A Reinterpretation of Marbury v. Madison, in: American Journal of Jurisprudence 35 (1990), p. 84 and nn. 152 and 153, Benedetta Barbisan: *L'invenzione della* Marbury v. Madison, in: Giornale di Storia Costituzionale 11 (2006), p. 148. Van Alstyne – on the contrary – tried to prove in his A Critical Guide to Marbury v. Madison (Duke Law Journal (1969) 1) that American courts had such power long before that (pp. 16–29).

9 J. Sovdat, The Constitution between Politics and Law: Limits of Constitutional Review, p. 188. *Cf.* P. Rychetský, The Role of the Constitutional Court in Strengthening the Rule of Law in the Czech Republic, p. 156 and E. Petrič, The Role of Constitutional Courts in the Implementation of the Rule of Law in States in Transition, p. 173.

10 J. Sovdat, The Constitution between Politics and Law: Limits of Constitutional Review, p. 188.

11 Jean Louis De Lolme, The Constitution of England; Or, An Account of the English Government, Liberty Fund, Indianapolis 2007, p. 101, note a. A. V. Dicey quoted this thought in his work The Law of the Constitution and made it famous (the quote can be found in A. V. Dicey, Introduction to the Study of the Law of the Constitution (7th ed.), Macmillan and Co., London, 1908, p. 41).

12 *Cf.* D. Kyritsis, Shared Authority – Courts and Legislatures in Legal Theory, Hart Publishing, Oxford and Portland, 2015, p. 10.

trian Constitutional Court, Dr Gerhart Holzinger, offers a telling example of the legislature's endeavour to restrain judicial review. The first operating constitutional court in Europe had at first a very narrowly defined set of competences. In a federal state such as Austria, the founding fathers of the Austrian constitution envisioned the role of the constitutional court as the guardian of the balance between federal and state power. At first only the federal government and the provinces were entitled to initiate proceedings before the constitutional court. Less than a decade later, this right was granted to the Administrative and Supreme Courts, and only three decades after the Second World War the right to challenge laws before the Constitutional Court was extended to all appellate courts and individuals, but only in cases where the law had been applied directly to the individual without any implementing measures. It was only in 2015 that all courts were granted this right along with the parties in court proceedings were the court to fail to challenge an act that was to be relied on in court proceedings. A parallel development can be observed in the case of Belgium, succinctly described by the former President, now Judge, of the Belgian Constitutional Court, Professor Emeritus Dr André Alen, and Willem Verrijdt, law clerk at the same Constitutional Court.[13] Upon its founding, the Belgian Constitutional Court was entrusted the same responsibility as the Austrian Constitutional Court – that of overseeing the faithful execution of federal and state competences. Eight years later the Constitutional Court was granted the power – today universally understood to belong to the core of constitutional review – to enforce respect for human rights. In a telling move, the legislature however restricted this Constitutional Court's competence to a handful of constitutional provisions.[14] It was only in 2003 that the Constitutional Court's review jurisdiction was extended to the entire Title II of the Constitution dealing with human rights and some other key constitutional provisions (such as the principles of legality, equality in tax matters, and the protection of foreigners).[15]

A parallel comparison tells an interesting story. It alerts us to the fact that federal states with their bifurcation of sovereignty to the federal and state levels offer a much more fertile ground for development.[16] It is a perhaps this very distinctive constitutional design that alleviates the anxiety felt perhaps by the legislature when introducing this "foreign element" into Montesqieu's separation of power scheme. Some anxiety was undoubtedly present as the gradual extension of the constitutional court's competences in the cases of Austria and Belgium attests to. The constitutional history of both countries lays bare the hesitancy of the legislature to grant too much power to this newly formed judicial authority. A similar development can be observed in the design of the constitutional review in Portugal. Professor Dr Maria Lúcia Amaral, the Vice President of the Portuguese Constitutional Court, demonstrated how the Portuguese

13 A. Alen, W. Verrijdt, The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges, pp. 94–95.

14 *Ibidem*, p. 94.

15 *Ibidem,* p. 94.

16 Suffice it to recall the United States or Austria, which introduced a (European style) constitutional court to the Continent, or Germany, with its arguably most influential model of a constitutional court. *Cf.* M. de Visser, Constitutional Review in Europe – A Comparative Analysis, Hart Publishing, Oxford-Portland, Oregon, 2014, p. 56.

constitutional review can be placed somewhere between the model promoted by the Austrian theorist Hans Kelsen and the American Chief Justice John Marshall.[17] Each judge is empowered to refuse the application of a norm in a certain case if he or she considers this legislative provision to be unconstitutional. In an appeal to the Constitutional Court it is this court that decides as a court of appeal, or a court of last instance, on the matter of constitutionality. In the desire to "translate" the American model "into the peculiar language of a legal culture that is, as is the case of the Portuguese legal culture, part of the civil law tradition,"[18] a Constitutional Court decision only has *intra partes* and not *erga omnes* effect. The Portuguese model of constitutional review can therefore be classified as a model of "weak constitutionalism."[19] But at the same time, it should not go unnoticed that the original restraint of the legislature in granting powers to the Constitutional Court has subsided in much the same manner as in the Austrian and Belgian cases[20] and that the jurisdiction of the Constitutional Court has slowly been expanding. In some cases, an incentive was provided by the Constitutional Court's creative interpretation of its own powers, thus providing a modernising refreshment of constitutional guarantees enshrined in the given constitution adopted in the first half of the 19th century.[21] The underlying reason for this progressive legislative (and sometimes judicial) expansion of constitutional courts' powers must certainly be found in a growing awareness of the importance of human rights protection, which has become a focal point of modern constitutional review, but can also be attributed to a sincere desire of constitutional courts to provide protection in cases neglected by the legislature. The impetus for an expansion of a constitutional court's powers can also be motivated by purely pragmatic reasons. The President of the Lithuanian Constitutional Court, Professor Dr Dainius Žalimas, described the reluctant behaviour of state authorities regarding the abolition of the death penalty despite clear trends in international law and within the community of nations joined in the Council of Europe. It was only after a group of members of the Parliament submitted a petition to the Constitutional Court that the constitutionality of the death penalty could be assessed and the death penalty abolished.[22] It is not uncommon to find that politicians are relieved when the constitutional court tackles some contentious issue they have been doing their best to avoid. An almost identical reaction of politicians was described by Professor Dr Gerhart Holzinger, the President of the Austrian Constitutional Court, when he jovially observed how the national decision-makers breathed a sigh of relief when the Constitutional Court cut through some Gordian knot.[23]

17 M. L. Amaral, The Portuguese Constitutional Court: Thirty Years of Existence, p. 88.

18 *Ibidem*, p. 88. (emphasis omitted).

19 *Ibidem*, p. 88. For a more comprehensive account of the Portuguese model of judicial review, see, A. Cortes, T. Violante, Concrete Control of Constitutionality in Portugal: A Means towards Effective Protection of Fundamental Rights, Penn State International Law Review 29 (2010–2011), pp. 760–764.

20 G. Holzinger, The Origins and Development of Constitutional Jurisdiction in Austria, p. 67, and A. Alen, W. Verrijdt, The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges, pp. 94–95.

21 *Ibidem*, pp. 94–95.

22 D. Žalimas, The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law, pp. 143–144.

23 G. Holzinger, The Origins and Development of Constitutional Jurisdiction in Austria, p. 66.

The gradual expansion of constitutional courts' jurisdiction cannot be the only reason explaining the ascension of constitutionals courts to the position of supreme moral authorities in modern society. An important contribution can also be identified in an important shift in *constitutional (legal) reasoning*. The emergence of constitutional courts has had an important impact on the nature of legal reasoning. The commonly shared continental understanding of legal reasoning stems from Montesquieu's concept of the separation of powers and is famously captured in his comparison of a judge to the "mouthpiece of the law" (*la bouche de la loi*).[24] The idea of the separation of powers is grounded in the presumption of entirely separate governmental functions. The legislature is entrusted with the creation of the law, the executive with the execution of the law, adopted by the legislature, and the judge with faithful interpretation thereof, or, to use Beccaria's words, entrusted with the responsibility "to complete a perfect syllogism."[25] This understanding of legal decision-making is a reflection of a rigorous logical operation starting with the *praemissa maior* (or statutory provision), which is combined with the *praemissa minor* (stating the relevant facts), leading to a *conclusio*, a conclusion. The ideology of "bound decision-making"[26] proved to be a tempting and liberating self-portrait of the judge. On the one hand, it provided his or her decisions with the appearance of scientific (or logical) certainty, an ideal, which modernity has exalted above all else.[27] On the other hand, this very ideology has exonerated the judge from any responsibility for his or her decisions, as they were perceived only as the mechanical application of the lawmaker's abstract decisions to a concrete case.

This perception has been steadily undermined by a variety of different factors, principle among which have been the codification of human rights, coinciding with modern constitutionalism,[28] and the establishment of specialised constitutional courts entrusted with the interpretation of such bills of rights. The open-ended formulations characteristic of constitutional provisions on human rights which preclude the possibility of rigid and self-sufficient logical deduction provide a standing invitation for constitutional courts to employ value-oriented reasoning. This is the emphasis of some modern approaches to legal interpretation, from the German *Wertungsjurisprudenz*[29] to Dworkin's "moral reading" of the Constitution.[30] It is generally accepted from

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24 Montesquieu's remark was in all probability misunderstood.

25 C. Beccaria, On Crimes and Punishments and Other Writings IV (ed. A. Thomas, trans. A. Thomas and J. Parzen), University of Toronto Press, Toronto-Buffalo-London, 2008, p. 14). Beccaria speaks here about the use of criminal law provisions, but his statements can also be understood as a more general illustration of the Enlightenment attitude towards legal interpretation.

26 Wróblewski, The Judicial Application of Law (1992), pp. 273–283 and M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law] (3rd ed.), GV Založba, Ljubljana, 2013, pp. 27–33.

27 *Cf*. E. Vogelin, *Nova politična znanost – Uvod* [New Political Science – An Introduction], Inštitut Nove revije, zavod za humanistiko, Ljubljana, 2013, pp. 4–5.

28 *Cf*. A. Barbera, *Le basi filosofiche del costituzionalismo*, in: Le basi filosofiche del costituzionalismo (ed. A. Barbera), Editore Laterza, Roma-Bari, 2012, pp. 4–5.

29 K. Larenz, C.-W. Canaris, *Methodenlehre der Rechtswissenschaft* (3rd ed.), Springer, 1995, p. 36 *et seq.*

30 R. Dworkin, Freedom's Law – The Moral Reading of the American Constitution, Oxford University Press, Oxford, 1996,

Gadamer on that the path to the objective reconstruction of the legislature's intent is for the most part illusory. To understand a constitution (or its provisions) means to interpret according to "evolving standards of decency that mark the progress of a maturing society."[31]

This marked shift towards a value-oriented interpretation of constitutional provisions has brought the decision-making process of constitutional courts closer to the people, who intuitively assume that legal reasoning must coincide with moral reasoning. Even though this goal is not fully attainable, this gradual transformation towards a more value-oriented legal reasoning has contributed towards the high esteem in which the judiciary is traditionally held (at least in the "old democracies"). The comparison of the Austrian, Czech, and Italian experiences is instructive. The President of the Austrian Constitutional Court, Professor Dr Gerhart Holzinger, highlighted an interesting connection between the abandonment of a pronounced judicial self-restraint in favour of a more value-oriented constitutional review and the prestige the Austrian Constitutional Court has gained in comparison to other state authorities in that precise time period.[32] Dr Pavel Rychetský, President of the Constitutional Court of the Czech Republic, argued in a similar vein for a systematic deference to content over form. "Legal regulations must be scrutinized in terms of their content as under the material rule of law, based on the idea of justice, fundamental rights are a corrective not only of the content of laws but also of their interpretation and application."[33] The guiding principle of legal interpretation thus becomes "a general idea of justice" or "the general principle of natural law".[34] This is a clear shift from a traditional continental legal reasoning.

A similar transformation can be observed in the jurisprudence of the Italian Constitutional Court. The Vice President of the Italian Constitutional Court, Professor Dr Marta Cartabia, pointedly described the shift from a "rather mechanical" exercise of constitutional review at the Court's beginnings towards a "holistic, syncretic, inclusive, and integrated form of legal reasoning."[35] Her description of the sort of legal reasoning employed by the Italian Constitutional Court can be taken as a rather accurate characterisation of modern constitutional reasoning, which is above all *pragmatic* rather than dogmatic. The text of the constitution is important, yet not decisive; the constitutional court will take into consideration foreign law without necessarily adhering to it, it will be attentive to changes in public opinion and in the legal and social context, but will never cede its interpretative power to popular sentiment, it will acknowledge the importance of the original intent without granting it precedence over

pp. 1–5, 7–12.

31 This famous phrase was coined by Chief Justice Earl Warren in Trop v. Dulles (356 U.S. 86 (1958)).

32 G. Holzinger, The Origins and Development of Constitutional Jurisdiction in Austria, pp. 65–66.

33 P. Rychetský, The Role of the Constitutional Court in Strengthening the Rule of Law in the Czech Republic, pp. 158–159.

34 *Ibidem*, p. 159.

35 M. Cartabia, On Bridges and Walls: The "Italian Style" of Constitutional Adjudication, p. 82. Dr. P. Rychetský, President of the Constitutional Court of the Czech Republic, makes an important point that such an approach "to the rule of law fails to offer systemic solutions" and ultimately causes judicial systems to "collapse under their own weight"; P. Rychetský, The Role of the Constitutional Court in Strengthening the Rule of Law in the Czech Republic, p. 156.

its past decisions and the internal coherence of its jurisprudence.[36] As was shown by Professor Cartabia regarding the Italian example, constitutional courts try to tread a *via media* instead of committing themselves to a singular interpretative approach.

Professor Cartabia's contribution noted one further consideration that might contribute towards augmenting the moral authority of a given constitutional court, i.e. the degree to which constitutional adjudication is compatible with the wider cultural background or, to use an antiquated term, with the *Volksgeist*.[37] In her intriguing contribution, she outlined the particular "style" of Italian constitutional adjudication. She defined its key characteristic as "relationality," which is displayed in the position given to the Italian Constitutional Court in the wider architecture of governmental powers, its institutional design, the manner of discharging its responsibilities, and in the inherent traits of constitutional adjudication regarding national and supranational law.[38] Professor Cartabia's contribution highlights an interesting paradox. On the one hand, modern constitutional adjudication displays a certain unity as far as methods and results are concerned, at least with regard to human rights protection. This underlying unity facilitates the dialogue between different constitutional courts and foreshadows the emergence of common human rights law. On the other hand, it is easy to recognise – and Professor Cartabia's contribution is a vivid reminder of that fact – a very dissimilar institutional design of constitutional courts and disparate approaches towards decision-making. *E pluribus* (or, better still, *e diversibus*) *unum* is becoming a reality in the realm of constitutional adjudication as well.

3.

Ronald Dworkin's quip regarding the "secular papacy" personified in modern constitutional courts is also a very apt description of another phenomenon. I am referring to the *level of acceptance* the majority of constitutional court decisions receive from those who deem their legal system to be legitimate. A plethora of constitutional court judges taking part in the Bled conference pointed out the widespread deference to their decisions. It would appear that the moral authority claimed by constitutional courts is mirrored in the confidence their decisions inspire among citizens.

To a certain extent, this may be explained by *a rational decision-making process* that permeates constitutional adjudication and calls on constitutional courts to present convincing argu-

36 I am summarising M. Cartabia's description (*ibidem*, p. 82).

37 I have borrowed the concept (but not the exact term) from Savigny (*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), p. 8).

38 M. Cartabia argues that relationality can be discerned in the appointment of constitutional court judges, which calls for the cooperation of three constitutional organs: the President of the Republic, the parliament, and the judiciary, or in the collegial style of adopting every Constitutional Court decision, or in the fact that there are no separate opinions, or that the Constitutional Court relies on ordinary judges to initiate the proceedings before it (*cf.* M. Cartabia, On Bridges and Walls: The "Italian Style" of Constitutional Adjudication, pp. 75–78 *et passim*).

ments for their decision. Dr Jadranka Sovdat, the Vice President of the Slovenian Constitutional Court, pointed out that "[t]he criterion for assessing the persuasiveness and quality of constitutional adjudication is […] the argumentative strength of […] legal reasoning."[39] There can be no doubt that this observation is pertinent and very aptly summarises the core belief that animates modern constitutional adjudication. But this only captures the formal aspect of adjudication, which is necessary but not a sufficient reason for legitimacy in the eyes of the citizens. The other aspect is substantial.

Or is it? There are good reasons to think the distinction is not so clear-cut. In his meticulous analysis, Péter Paczolay, former President of the Hungarian Constitutional Court, shows how far-reaching the implications of the seemingly formal principle of legal certainty are. A plethora of important legal values derive from this simple precept: the accessibility of legislation and court decisions, the foreseeability of laws, the stability and consistency of laws, legitimate expectations, non-retroactivity, *nullum crimen* and *nulla poena* principles, and *res judicata*.[40] Long ago, Lon L. Fuller tried to show how important substantive effects arise from adherence to certain formal demands. In his Morality of Law he argued that the totality of such demands can be described as the internal morality of law and that disregard for such fundamental requirements as the clarity of law, the absence of internal contradictions, the promulgation thereof, and the prohibition of retroactivity may warrant the assessment that no law was created by the legislature.[41] His "internal morality of law" (as opposed to the substantive moral precepts dubbed external morality) is a dramatic reminder of how interwoven form and substance are in law. In much the same vein, Paczolay outlined how the Hungarian Constitutional Court has interpreted the principle of legal certainty "from its substantial and procedural aspect."[42] But even so, the "pure" substantive aspect cannot be disregarded.

There are good reasons to agree with the former President of the Italian Constitutional Court, Gustavo Zagrebelsky, who observed in his book *Il diritto mite* that we are witnessing the transformation of the state of law into the state of rights.[43] The modern state is characterised by a deep commitment to the *idea of human rights*. On a symbolic level, this is best displayed by the respectful recognition of the importance of human rights provisions, which are enshrined in the most important legal act and often given a prominent position therein. But this commitment is only realised when they are given appropriate judicial protection.[44] Such commitment is hollow if the protection of human rights is entrusted only to those state authorities where there exists a systemic temptation to subordinate the individual's rights to the interests of the

39 J. Sovdat, The Constitution between Politics and Law: Limits of Constitutional Review, p. 191.

40 P. Paczolay, The Hungarian Constitutional Court's Efforts for Legal Certainty, p. 164. *Cf.* P. Rychetský, The Role of the Constitutional Court in Strengthening the Rule of Law in the Czech Republic, p. 159.

41 Lon L. Fuller, The Morality of Law, Yale University Press, New Haven and London, 1969, p. 39.

42 P. Paczolay, The Hungarian Constitutional Court's Efforts for Legal Certainty, p. 168.

43 G. Zagrebelsky, *Il diritto mite*, Einaudi, Torino, 1992, p. 84.

44 *Cf.* M. Cappelletti, Repudiating Montesquieu? The Expansion of "Constitutional Justice", Catholic University Law Review 35 (1985–1986), pp. 6–7.

majority.[45] Dworkin's "rights thesis"[46] may be an extreme but nevertheless poignant example of the backlash against such a possibility. In his famous book *Taking Rights Seriously*, Dworkin draws a sharp contrast between policies that "[set] out a goal to be reached, generally an improvement in some economic, political or social feature of the community" and principles as "a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[47] The "rights thesis" sets forth a demand for courts to enforce existing rights and grant them unconditional precedence even if that would conflict with socially desirable policies.[48] And even though modern constitutional adjudication recognises that solutions may not always be so straightforward, it is rooted in the same idea that human rights are valuable in themselves and not as a means to achieving some goal. This commitment, shared by all the conference participants, is a crucial trait of modern-day constitutional adjudication and also a reason why constitutional courts enjoy a high degree of public trust. Constitutional courts tend to be recognised as guardians of human rights who "in the service of the individual, his or her dignity and freedom,"[49] ensure that the constitutional commitments regarding human rights protection are carried out.

Another equally significant factor contributing to the high level of trust is the somewhat arcane principle of proportionality. Although relatively unknown outside the legal community, this principle is steadily becoming a quintessential tool of constitutional adjudication. Its ascension from its humble beginnings in German administrative law is nothing short of magnificent.[50] An apt demonstration of its pivotal role is provided by the legendary South African Constitutional Court judge Albie Sachs. In response to the hypothetical question of which two constitutional elements he would take with him were he to be stranded on a desert island, he offers a rather surprising response (at least to a non-lawyer): human dignity and proportionality.[51] It is clear that today the principle of proportionality has become an indispensable element of the deep structure of modern (constitutional) law. In their contribution, Professor Dr Alen and Verrijdt therefore described a constitutional development common to many constitutional systems. Although the Belgian Constitution does not refer explicitly to the principle of the

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45 This was well illustrated by a short digression by Professor Cartabia that outlines "a conservative approach" to an understanding of the nature of human rights adopted by the Italian Constitutional Court shortly after its founding, which regards human rights provisions as merely "programmatic norms" calling for legislative concretisation to be fully applicable (*cf*. M. Cartabia, On Bridges and Walls: The "Italian Style" of Constitutional Adjudication, p. 73).

46 R. Dworkin, Taking Rights Seriously, Harvard University Press, Cambridge, Massachusetts, 2001, p. 87.

47 *Ibidem*, p. 22.

48 *Ibidem*, p. 87.

49 J. Sovdat, The Constitution between Politics and Law: Limits of Constitutional Review, p. 190.

50 On the development of this principle, see, e.g., A. Stone Sweet and J. Mathews, Proportionality Balancing and Global Constitutionalism, Columbia Journal of Transnational Law 47 (2008–2009), pp. 100 *et seq.,* and M. Cohen-Eliya and I. Porat, American Balancing and German Proportionality: The Historical Origins, International Journal of Constitutional Law 8 (2010), str. 271–284.

51 A. Sachs, The Alchemy of Law, Oxford University Press, Oxford – New York, 2009, p. 203.

rule of law, the case law has consistently held this principle to be "an unwritten constitutional principle and a foundational principle."[52] This principle in turn entails in a direct way the principles of legal certainty (together with the prohibition of retroactivity) and the principle of proportionality.[53] "[T]he principle of proportionality," the Belgian Constitutional Court held in one of its decisions, "is inherent in any exercise of powers."[54]

The concept of proportionality, the idea that in the case of a conflict no single interest may become – to borrow a felicitous phrase from Dr Cartabia – "a tyrant right," is intuitively appealing. It promises a gradual detachment from the categorical, black-and white reasoning so often found in law, and holds the promise of a less formal decision-making. This evolution draws constitutional adjudication closer to the common sense of justice and fosters trust in constitutional adjudication.

But even all that may not suffice to establish the legitimacy of a particular decision of a constitutional court in the eyes of the citizens. Constitutional courts resort to different techniques to bolster the legitimacy of their decisions. In states with a weaker rule of law tradition, one way to counter doubts as to the legitimacy of the decision rendered may be to support the reasoning by appealing to *foreign or international law*. The most striking example of this legitimacy-reinforcing method is provided by the South African Constitution. When interpreting the country's Bill of Rights, a court or tribunal "must consider international law" and "may consider foreign law."[55] In such cases, international or foreign law may supply the missing modicum of legitimacy the national law and national institutions lack in the eyes of its citizens. The invocation of a foreign or international court's legal decision or a foreign legal provision reassures the citizens that the decision rendered by their constitutional court is neither arbitrary nor capricious, but rather in conformity with foreign decisions. However, it would not be entirely fair to consider every reference to an outside legal authority as nothing more than a ploy to reinforce the decision's legitimacy. In an increasingly interrelated world community where most supreme judicial tribunals employ the same language of human rights, such cross-fertilisation seeking inspiration and enlightenment in foreign case law is the only sensible approach.

A string of telling examples of fruitful reliance on international law was put forward by the President of the Lithuanian Constitutional Court, Professor Dr Dainius Žalimas. In all three instances – the assessment of the constitutionality of the death penalty, the legal definition of a family, and the legal definition of genocide – the Court tread into contested waters, tackling emotionally charged topics. And although the Latvian Constitution is relatively silent on the legal import of international law, which is mentioned in only one provision, which calls for the state to "follow the universally recognised principles and norms of international law" in implementing its

52 A. Alen, W. Verrijdt, The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges, p. 97.

53 *Ibidem*, pp. 99–102.

54 CC No. 168/2004, 28 October 2004, B.5.3; No. 172/2006, 22 November 2006, B.8.

55 Article 39, para. 1 (b) and (c) of the South African Constitution.

foreign policy, the Court accorded it an important role in reaching its decision. In all three cases, international laws and even "the trends in the attitude of the international community"[56] played a pivotal role in the Constitutional Court's reasoning. The Vice President of the Italian Constitutional Court highlighted a comparable trend in Italian constitutional adjudication in recent years, as the Court does not hesitate to openly cite the opinions of other constitutional courts.[57]

4.

Finally, Dworkin's likening of modern constitutional courts to a "secular papacy" can also be understood as a thinly veiled hint toward the often-claimed infallibility or at least the finality of the decisions rendered by the supreme judicial authorities in different political communities. It suffices to examine the very beginnings of judicial review to find ample proof that such claims are real. The renowned US Supreme Court decision of Marbury v. Madison,[58] delivered by Chief Justice John Marshall, already contained all the elements legitimising the constitutional courts' claim regarding their infallibility and finality even today. The constitution is "a superior, paramount law" and every legislative act contrary to it is "not law."[59] And since there can be no doubt that "[i]t is emphatically the province and duty of the Judicial Department [i.e. the judicial branch] to say what the law is," and this includes the meaning of the Constitution as well, the decisions of the judicial branch as to the meaning of the Constitution have the same binding effect as the Constitution itself.[60] This presents a rather important modification of the classical separation of powers scheme, one that elicited some grave misgivings from the outset. Constitutional courts have ever since faced doubts as to their legitimacy and even suggestions that their powers should be curtailed. The mirror image of such qualms is constitutional courts' insistence on the finality and "infallibility" of their decisions. It should come as no surprise, therefore, that a number of former or current constitutional judges have in one way or another addressed this "existential question."

The key argument against judicial review is its seeming incongruence with the democratic foundation of the modern state. This objection to constitutional adjudication was best articulated by the American constitutional scholar A. M. Bickel in the catchphrase "countermajoritarian difficulty."[61] This calls attention to the fact that the annulment of a legislative act the court deems unconstitutional thwarts the will of the elected representatives of the people

56 D. Žalimas, The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law, p. 143. Professor Žalimas addresses the problem of the death penalty at this particular point.

57 M. Cartabia, On Bridges and Walls: The "Italian Style" of Constitutional Adjudication, p. 81.

58 Marbury v. Madison, 5 U.S. 137 (1803).

59 *Ibidem*.

60 For a critical evaluation of the commonly adopted understanding of this decision, see, M. S. Paulsen, The Irrepressible Myth of *Marbury*, Michigan Law Review 101 (2003), pp. 2707 *et seq.*

61 A. M. Bickel, The Least Dangerous Branch – The Supreme Court at the Bar of Politics, Bobbs-Merrill Company, Indianapolis-New York, 1962, pp. 16–23.

and indirectly undermines the very essence of democracy.[62] Democracy, Professor Dr Gerhart Holzinger, the President of the Austrian Constitutional Court, warns, cannot be understood as the "unrestricted rule of the majority." It is much more sensible to view it as a constant striving to reach a "compromise between majority and minority."[63] The role of the constitutional court – argues Professor Holzinger, seemingly echoing the views of Ely, another American scholar[64] – is to provide effective protection of minorities and, in particular, of the rights of the individual. The constitutional court is thus a guardian of democracy.[65]

The other *punctum dolens* is the recurring theme as to the nature of the relationship between the representative branch of the government and the constitutional court. The Vice President of the Slovenian Constitutional Court, Dr Jadranka Sovdat, drew attention to an important distinction between the parliament *qua* lawmaker and the parliament *qua* "constitution-maker," (*le pouvoir constituent*). The lawmaker's field of decision-making is considerably restricted by the substantive and formal restrictions imposed by various constitutional provisions.[66] The constitutional court as "the guardian of the Constitution" has to ensure that these limitations are adhered to in the law-making activity of the representative branch of the government. Theoretical disagreements abound as to the question of who has the final word in those cases where the legislature will not defer to the constitutional court's decision. Two extreme positions have emerged. One set of scholars argue that constitutional court decisions possess the same authority as the constitution itself,[67] or, at least, that the legislature is legally bound by the constitutional court's decisions.[68] On the opposite side of the spectrum, a more "protestant"[69] view of constitutional interpretation can be discerned, arguing for a pluralism of coordinate constitutional interpretations by all branches of government and denying a predominant position to either of them.[70] Notwithstanding the intriguing philosophical

62 *Ibidem*, p. 17.

63 G. Holzinger, The Origins and Development of Constitutional Jurisdiction in Austria, p. 65. *Cf.* with a similar point made by Professor Dr Petrič, former President, now Judge of the Slovenian Constitutional Court; E. Petrič, The Role of Constitutional Courts in the Implementation of the Rule of Law in States in Transition, p. 173.

64 J. H. Ely, Democracy and Distrust – A Theory of Judicial Review, Harvard University Press, Cambridge, Massachusetts-London, 1980, p. 103: it is the constitutional court's task to stop the majority from denying the minority "the protection afforded other groups by a representative system" (p. 103).

65 G. Holzinger, The Origins and Development of Constitutional Jurisdiction in Austria, p. 65.

66 J. Sovdat, The Constitution between Politics and Law: Limits of Constitutional Review, p. 189.

67 See, e.g., L. Alexander, F. Schauer, On Extrajudicial Constitutional Interpretation, Harvard Law Review 110 (1997) 7, pp. 1372–1383 and 1387; A. Ides, Judicial Supremacy and the Law of the Constitution, UCLA Law Review 47 (1999–2000), pp. 515–519; and L. Alexander, F. Schauer, Defending Judicial Supremacy: A Reply, Constitutional Commentary 17 (2000), p. 455.

68 See, e.g., J. Ipsen, *Rechtsfolgen der Verfassungswidrigkeit von Norm und Einzelakt*, Nomos, Baden-Baden, 1980, pp. 212–213 or Das Bonner Grundgesetz – Kommentar (ed. H. v. Mangoldt, F. Klein, C. Starck), Vol. III, Verlag Franz Vahlen, Munich, 1999, pp. 1130–1135.

69 I have borrowed the term from S. Levinson, Constitutional Faith (Princeton University Press, Princeton, 1988, p. 29).

70 E.g., M. C. Miller, When Congress Attacks the Supreme Court, Case Western Law Review 56 (2005–2006), pp. 2015–2016; M. Tushnet, Two Versions of Judicial Supremacy, William and Mary Law Review 39 (1997–1998), pp. 949–960; K. Vogel, *Das Bundesverfassungsgericht und die übrigen Verfassungsorgane*, Peter Lang, Frankfurt am Main-Bern-New York-Paris,

questions underlying this discussion, this view is often highly technical and relies on the institutional[71] and historical idiosyncrasies of the given constitutional system.

It might be more productive to refocus our attention on more practical aspects of these dilemmas, following the example of Dr Sovdat. Modern constitutional democracies are centred on the effective protection of human rights. The authority of the constitutional court can therefore be justified in the most persuasive terms by its commitment to human rights protection. The debate whether the legislature should defer to constitutional court decisions is thus not only an academic discussion on the order of precedence of state bodies, but also a very pragmatic discussion regarding how to protect the legitimate interests of individuals in the most effective manner.[72] Mutual respect for each other's prerogatives is mandated predominantly "in the interest of the addressees of legal norms," as pointed out by Dr Sovdat.

A different situation arises when the representative body acts *qua* "constitution-maker", (*le pouvoir constituent*). The legal act it thus creates is not a legislative act that has to conform to formal and substantive constitutional demands. The act it creates is the highest legal act, a "paramount law" unbound by any other legal provision. Should that make a difference? Various constitutional courts provide us with different answers. At the Bled conference, two opposite views were presented. The role of the constitutional court can be understood as being literally "the guardian of the constitution," i.e. the text that is given an almost iconic position and has to be guarded by the constitutional court even against its very maker. This approach is more persuasive when the constitution incorporates some provisions limiting the constitution-making power of the parliament. I am referring to so-called "eternity clauses" (*Ewigkeitsklausel* or *Ewigkeitsgarantie*).[73] In such cases, the constitutional court can present its possible annulment of subsequent constitutional amendments in terms of exercising constitutionally mandated control over the actions of the legislature. The constitutional court can claim such prerogative even with no textual basis in the constitutional provisions. In this case, the court casts itself as a guardian of "basic" or "eternal" values essential for the rule of law. Such an attitude has been adopted by the Lithuanian Constitutional Court and was precisely described by its President, Dr Dainius Žalimas.[74] In articulating a doctrine on unconstitutional constitutional amendments, the Lithuanian Constitutional Court relied on "the essence of the Constitution,"

1988, pp. 36–39 *et passim*, S. Korioth, *Die Bindungswirkung normverwerfender Entscheidungen des Bundesverfassungsgerichts für den Gesetzgeber*, Der Staat 30 (1991), p. 564 (the discussion is otherwise well balanced) and *Grundgesetz – Kommentar* (ed. H. Dreier), Vol. III, Mohr Siebeck, Tübingen, 2008, p. 525.

71 A crucial factor in the German debate is the wording of Article 96, para. 2, of the German Constitution, which grants a decision of the Federal Constitutional Court "*gesetzeskraft*" (the power of the law).

72 J. Sovdat, The Constitution between Politics and Law: Limits of Constitutional Review, pp. 188–189.

73 For a decent attempt at a theoretical definition, see: S. Weintal, The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty, Israel Law Review 44 (2011), pp. 456–459. *Cf.* also other contributions in Israel Law Review (44 (2011) 3), dedicated to the problem of unconstitutional constitutional amendments.

74 D. Žalimas, The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law, pp. 148–149.

in particular, on the key components of the rule of law, such as human rights and democracy, which are so important that they have to be guarded by the Constitutional Court even against the parliament *qua* constitution-maker.[75] These values enjoy absolute protection, which empowers the Constitutional Court to annul amendments that might otherwise erode them. A somewhat different situation arises if a constitutional amendment were to lead to an inconsistency between the existing provisions and the proposed ones. If the inner integrity of the Constitution could be compromised, "relative substantive limitations" apply that restrict the liberty of the constitution-maker.[76] The integrity of the constitution can either be preserved by the parliament refraining from adopting such amendment or by changing the existing provision so that the newly adopted amendment would not conflict therewith. Although the motives of the Lithuanian Constitutional Court are laudable, there is always the peril of the constitutional court being transformed from the guardian of the constitution into its overlord.

Dr Jadranka Sovdat, Vice President of the Slovenian Constitutional Court, outlined a much more restrained approach of the Slovenian Constitutional Court. In a number of its decisions, the Court has held that it lacks the competence to review constitutional amendments. It has thus drawn a clear boundary between law and politics: constitutional revisions remain "in the realm of politics," leaving the representative body at least one constitutionally permitted path to override a constitutional court decision that it disapproves of: it can change the Constitution.[77] Each player preserves a field of sovereignty: the constitutional court retains its power to control the constitutionality of legislation, but the legislature is supreme in those exceptional circumstances when the elected representatives conclude that the time for a change in society's fundamental rules has come.

Less conspicuous, yet no less important, is the tension between the constitutional court and the *ordinary courts*. This judicial dualism is peculiar to European legal systems where the constitutional court was set up as a specialised court. The Italian example is instructive, revealing a slowly maturing relationship, leading to "active cooperation" between the Constitutional Court and the regular courts.[78] The ordinary courts are indispensable since only ordinary court judges can request that the Constitutional Court adjudicate on a legislative act they have to apply. As highly qualified lawyers, they have a much better understanding than the parties in court proceeding whether some legal provision is constitutionally sound. Their contribution to maintaining the coherence of the legal system is therefore crucial. On the other hand, the Constitutional Court demonstrates respect for the ordinary courts by its tendency to review legislation as it is interpreted by the ordinary courts, without imposing on them its own interpretation of the law.[79] This "living law doctrine" preserves the separate realms of both the Constitutional Court and the ordinary courts.

75 *Ibidem*, p. 149.

76 *Ibidem*, p. 149.

77 J. Sovdat, The Constitution between Politics and Law: Limits of Constitutional Review, p. 194.

78 M. Cartabia, On Bridges and Walls: The "Italian Style" of Constitutional Adjudication, pp. 78–80.

79 *Ibidem*, pp. 78–80.

The formation of the Council of Europe and the continuous strengthening of the European Union have confronted constitutional courts with another set of challenges. The traditional self-understanding of constitutional courts entails the conviction that they are the supreme judicial authority. As the "guardians of the constitution" they believe that they are entrusted with safekeeping – to use a modern expression – the "constitutional identity" of the political community. The emergence of the European Court of Human Rights and the European Court of Justice at the very least foreshadows the possibility of supranational legal systems that bring into question the pre-eminence of national constitutions as the founding documents of nation states and, indirectly, the supremacy of constitutional courts as the highest judicial authorities. A new judicial authority claiming supremacy could compromise the traditional self-understanding of constitutional courts as to their "infallibility." The reluctance of constitutional courts to embrace these new judicial authorities is somewhat less obvious with the European Court of Human Rights. The main reason might be that its main mission is in harmony with what the constitutional courts perceive as their *raison d'*être, i.e. the protection of human rights.

A much deeper distrust is inspired by the Luxembourg court, which has embraced the formation of the common market and "creating an ever closer union among the peoples of Europe"[80] as its preeminent guiding principles. The discussions at the Bled conference have shown that the relationship between the European Court of Justice and European constitutional courts remains fraught with challenges.

The contribution of Professor Dr Koen Lenaerts, President of the European Court of Justice, elegantly linked together the topics of mutual trust between the Member States, mutual cooperation, and the protection of human rights. His starting point was sincere respect for the equality of the Member States before the EU Treaties, which recognise the same democratic legitimacy to every Member State.[81] If this commitment is taken seriously, it should follow that all Member State must be willing, at least in principle, to trust each other and display such trust through mutual recognition of their respective judicial decisions.[82] National judicial decisions adopted by the competent judicial tribunal and in accordance with the relevant EU legislation "must be recognised and enforced throughout the EU."[83] Mutual recognition of judicial decisions undoubtedly has a direct impact on human rights. Professor Lenaerts offered the enlightening example of the European arrest warrant. He pointed out that the case law imposes two negative obligations on the Member States.[84] The first prohibits Member States from imposing a higher level of national protection of fundamental rights than another Member

80 Preamble to the Treaty on European Union from 2007.

81 K. Lenaerts, Mutual Trust, Mutual Recognition and the Protection of Fundamental Rights in the Case Law of the Court of Justice of The European Union, p. 123.

82 *Ibidem*, pp. 123–124.

83 *Ibidem*, p. 124.

84 *Ibidem*, p. 124.

State. The other prohibits a Member State from ascertaining whether another Member State has "actually in a specific case, [observed] the fundamental rights guaranteed by the EU."[85]

This illustration makes it abundantly clear how EU law mandates that Member States ignore their own constitutional human rights guarantees in order to foster the "free movement of judicial decisions" if these guarantees offer a higher level of human rights protection than EU law.[86] Yet the second negative obligation, Professor Lenaerts argues, is not absolute. A Member State has to ensure whether the provisions of the Framework Decision on the European Arrest Warrant are, in fact, applicable to the case at hand. In exceptional cases, the Member State can ascertain if the requesting state has actually, in the specific case, observed the fundamental rights guaranteed by the EU.[87] If there is credible evidence that the execution of the European arrest warrant was liable to give rise to breaches of the prohibition on torture and inhuman or degrading treatment or punishment or if the conditions of detention are such as to violate Article 4 of the EU Charter of Fundamental Rights,[88] the executing party may withhold the execution of the European arrest warrant. In making this assessment, the executing state might find a powerful ally in the European Court of Human Rights, Professor Lenaerts observed, which has found that the requesting party may have violated some of these human rights. The successful operation of the principle of mutual trust requires national courts to engage in "constructive dialogue" with the European Court of Human Rights and the European Court of Justice.[89] "Mutual trust," as Professor Lenaerts pointedly concluded his contribution "must not be confused with blind trust."[90]

It is quite understandable that national courts and in particular constitutional courts view this mandated lowering of human rights standards to the lowest common denominator with some modicum of distrust. The relationship between the national legal systems and EU law was the focal point of the contribution of Professor Dr Ferdinand Kirchhof, Vice President of the German Constitutional Court. The adoption of the EU Charter of Fundamental Rights has decreased the number of potential points of friction between German law and EU law. Conflicts arise rarely and are often easy to resolve since both legal systems are grounded in the same commitment to human rights. Nevertheless, different scopes of protection of human rights and different prerequisites for their limitation may lead to "a dogmatic contradiction" between these systems.[91] In general, the German law recognises and respects the primacy of EU law. But there are some exceptions where giving precedence to EU law would be incompatible with the German Constitution. In these cases, the German Federal Constitutional Court has an obliga-

85 Opinion of the CJEU 2/13, paras. 191–192.

86 K. Lenaerts, Mutual Trust, Mutual Recognition and the Protection of Fundamental Rights in the Case Law of the Court of Justice of The European Union, p. 124.

87 *Ibidem*, p. 125.

88 *Ibidem*, p. 126.

89 *Ibidem*, p. 127.

90 *Ibidem*, p. 128.

91 F. Kirchhof, The Evolution of the Relationship between German Constitutional Law and European Union Law, p. 132.

tion to limit the applicability of EU law.[92] That would certainly be the case if the EU law were to interfere with the constitutional identity of the Federal Republic of Germany. Professor Kirchhof opined that interference with the principles of democracy, the rule of law, the principle of a social state, the republican form of government, and the federal state would give rise to such an infringement upon Germany's constitutional identity. The German Federal Constitutional Court would also be obliged to act if it were to come to the conclusion that the EU has not respected limitations on its conferred powers and acted *ultra vires*.[93] And it would also be compelled to act if an EU law were to violate the core content of the fundamental rights enshrined in the *Grundgesetz*.[94] In its deliberations on EU law, the Federal Constitutional Court acts "with extreme circumspection" and would "proceed with the greatest possible respect" even were it to discover some incompatibility with German constitutional law.[95] A sustained dialogue holds much more promise than an outright confrontation between the two legal orders. This "judicial conversation" is already unfolding, as was demonstrated by Professor Kirchhof with two examples from the Constitutional Court's recent case law. Professor Kirchhof concluded his contribution with an intriguing call to reconsider strict and unbending compliance with the principle of the primacy of EU law with regard to human rights issues. The primacy of EU law makes sense, Professor Kirchhof argued, in cases such as customs duties, taxes, and competition. A quite different situation arises when human rights are concerned. The nature and import of such provisions are quite different than the nature and import of tax regulation.[96] Human rights provisions are not aimed at ushering in complete uniformity within the European family of nations. The rigid insistence on the primacy of EU law therefore seems less persuasive.[97]

The views of the German Federal Constitutional Court on the limits of the application of EU law are in no way unique. They represent what is becoming a growing consensus among the highest judicial authorities of the Member States. They consider their respective constitutions to take precedence over EU law. The same sentiment is echoed in the contribution of Professor Dr Alen and Verrijdt, who listed a specific set of conditions under which the Belgian Constitutional Court would grant precedence to EU law.[98] They also insisted that the Constitutional Court's case law mandates that the "national and constitutional identity" must be protected.[99] In the unlikely event that EU law were to erode this constitutional identity, emphasis has to be laid upon "sincere cooperation" with the European authorities, which must include "all existing techniques of judicial dialogue."[100]

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92 *Ibidem*, pp. 133–134.

93 *Ibidem*, p. 133.

94 *Ibidem*, p. 133.

95 *Ibidem*, p. 134.

96 *Ibidem*, p. 137.

97 *Ibidem*, pp. 137–138.

98 A. Alen, W. Verrijdt, The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges, p. 103.

99 *Ibidem*, p. 107.

100 *Ibidem*, p. 111.

5.

In celebrating anniversaries, the past and the future meet. We celebrate the past and look to the future. The institution of the constitutional court in our legal culture has good reason to feel proud of its past. In the greater European context, it has significantly contributed to the strengthening of the rule of law and enhanced the protection of human rights. It would be no exaggeration to say that constitutional courts have dramatically changed the European legal landscape. In the Slovenian context, the Constitutional Court has done much more. With a meagre tradition of democracy and the rule of law, it fell to the Constitutional Court to create anew certain important elements that shaped our current legal culture. Some controversial decisions notwithstanding, it laid a solid groundwork for the rule of law.

The future holds even greater promise for constitutional adjudication. The growing recognition of the importance of human rights in our culture and the "constitutionalisation" of law[101] ensure the central place of constitutional courts in the future. This is the future that the Slovenian Constitutional Court will participate in, on the same footing as other European Constitutional Courts. If we were to judge from the contributions presented at the Bled conference and the ensuing discussions, we could anticipate that two themes may dominate the discourse of constitutional courts in the coming 25 years. The first – and rightly so – is human rights, and the second is judicial cooperation, i.e. cooperation between constitutional courts, between constitutional and supranational courts, and between constitutional and ordinary courts. And as Slovenian Constitutional Court celebrates its 25th anniversary,[102] there can be no doubt that the "secular papacy" certainly has a future to look forward to.

101 A. Stone Sweet, Governing with Judges – Constitutional Politics in Europe, Oxford University Press, Oxford, 2010, p. 1.

102 It is perhaps worth mentioning – at least in passing – that the Slovenian Constitutional Court was actually founded in 1963 (*Cf.* E. Petrič, The Role of Constitutional Courts in the Implementation of the Rule of Law in States in Transition, p. 171). In 1991, the new Slovenian Constitution granted the (already existing) Constitutional Court significant new powers and independence comparable to other European constitutional courts, so that the decision was taken to adopt this as the date of the founding of the Constitutional Court. It is nevertheless illuminating to read how the renowned Stanford Professor Mauro Cappelletti assessed the Yugoslav system of judicial review in 1985: "Significantly, Yugoslavia too, in its quest for political and ideological autonomy *vis-à-vis* the Soviet Union, enacted a constitution in 1963 that introduced a system of judicial review. Yugoslavia has been the first and, so far, the only country under a Communist regime to do so; but it is most meaningful that Czechoslovakia in 1968 – the year of the passions and hopes of the "Spring of Prague" – tried to follow suit, and that so did Poland in 1982 before 'Solidarnosh' [*sic!*] and all the rest were condemned to silence." (M. Cappelletti, Repudiating Montesquieu? The Expansion of "Constitutional Justice", Catholic University Law Review 35 (1985–1986), p. 8, footnotes omitted).

At the Conference, the speech was delivered by

Prof. Dr Robert Schick

Judge at the Administrative Court and
Substitute Member of the Constitutional
Court of Austria

Speech written by

Prof. Dr Gerhart Holzinger

President of the Constitutional
Court of Austria

The Origins and Development of Constitutional Jurisdiction in Austria

1.

I would like to thank you most cordially for the honourable invitation which has been extended to me to take part in this international conference on the occasion of the 25th anniversary of the Constitutional Court of the Republic of Slovenia, which will be dedicated to questions of constitutional jurisdiction.

On behalf of the Austrian Constitutional Court (VGH) let me address my sincere and heartfelt congratulations to all colleagues at the Constitutional Court of the Republic of Slovenia on the occasion of this special anniversary. I wish you every success for the future in delivering your important tasks, serving the rule of law and democracy in your country.

Historically, the ties linking the constitutional courts of the Republic of Slovenia and of Austria have always been close. They have provided many opportunities for sharing interesting opinions and experiences, as well as for personal encounters in a friendly and open atmosphere. It is with great pleasure that I look forward to cultivating these ties also in the future.

2.

The model of a democratic state which is governed by the rule of law is based on the notion of the primacy of the Constitution.

This notion of primacy means that every act of the state must be based on, and consistent with, the Constitution: the legislature, the executive (government and administration), as well as the judiciary. No state institution is exempted, nobody may "stand above the Constitution".

In order to lend effectiveness to this binding character of the Constitution in the day-to-day implementation of acts of the state, it takes institutions which, in actual fact, ensure compliance with the Constitution.

In Austria, the most important of these institutions is the Constitutional Court.

The Austrian Constitutional Court was set up by Federal Constitutional Law on 1 October 1920. This Constitution was adopted at the end of World War I, following the downfall of the Austro-Hungarian monarchy, for the then newly founded Republic of Austria.

The notion of constitutional jurisdiction, i.e. the review of compliance with the Constitution by a separate, specialised court, is largely based on the following idea: Disputes on the interpretation and application of the Constitution are not only political but also legal conflicts. As such, they can only be decided by a court, i.e. using the tools of justice, not just those of politics.

The Austrian legal scholar and father of this idea, *Hans Kelsen*, once stated in his writings that constitutional jurisdiction is the true "guardian of the Constitution". Its eminent importance for the rule of law has once been aptly described in the following words: "A Constitution with-

out a constitutional court which has the power to annul acts of the state that are unconstitutional would be tantamount to a light that does not shine!"

Constitutional jurisdiction is entrusted with ensuring that all state acts are in keeping with the Constitution, and in particular with the protection of the fundamental rights of the individual *vis-à-vis* the state and its machinery of power. In addition to its overriding importance for the rule of law, constitutional jurisdiction makes a significant contribution to strengthening democracy and hence the political stability of any state.

It is by no means a coincidence that constitutional courts have been set up in many states since the end of World War II, especially during transitions from dictatorial regimes to democracies governed by the rule of law: Italy and Germany were the first, followed by Spain and Portugal, and ultimately many Central and Eastern European countries. Apparently, the establishment of these constitutional courts was meant to pave the way for these states towards the rule of law and democracy, and to safeguard these achievements also for the future.

At this point I must insist that it would be wrong to see constitutional jurisdiction as being in contradiction with democracy. Democracy, in fact, must not be misunderstood as the "unrestricted rule of the majority" (Kelsen); on the contrary, the nature of democracy implies that the political powers represented in Parliament constantly seek compromise between majority and minority. In such a system, the function of the constitutional court becomes one of effectively protecting the rights of the minority and, above all, the fundamental rights of the individual, against encroachments by the majority and the very state it represents. When a constitutional court thus reviews acts of law-making by Parliament as to their constitutionality, it ultimately exercises a function that safeguards democracy.

3.

It is generally known that applying the law in any form also means making the law. This holds particularly for the jurisprudence of a constitutional court, whose basis for decision-making is largely derived from generally framed provisions, as is typical of a Constitution.

A constitutional court is therefore faced with the difficult question as to how it is to apply the Constitution as a legally binding standard of review to acts of the state without unduly competing with the parliamentary legislature.

Throughout decades, until the 1980s, the case law of the Austrian Constitutional Court was marked by pronounced judicial self-restraint. Apparently, this is largely due to the influence of the strictly positivist Vienna school of legal theory, according to which a Constitution is to be interpreted as strictly as possible based on its wording. Any such understanding eventually boils down to the constitutional court being able to take up only severe, "blatantly obvious"

cases of unconstitutionality. Following this logic, constitutional jurisdiction risks becoming futile in terms of an instrument of effective protection of minorities, but also of individuals.

In fact, the Austrian Constitutional Court gradually gave up its restraint in the 1980s. This change can be largely attributed to foreign role models, e.g. the case law of the European Court of Human Rights (ECHR) and of the German Federal Constitutional Court (BVerfG).

Specifically, the Austrian Constitutional Court espoused the notion that state interference with fundamental rights is constitutional only if and when it is proportionate. It does not suffice for such an intervention to be allowed by law; what counts is that it serves a purpose in the public interest, that it is suitable and necessary for attaining this objective, and that it is proportionate in view of the public interests pursued. This weighing of conflicting public and private interests, but also of different fundamental rights, is one of the most challenging tasks of constitutional jurisdiction.

4.

Court decisions, by their very nature, tend to be welcomed by one party and rejected by the other, depending on the different interests. This holds in particular for decisions rendered by a constitutional court, which is always called upon to rule on issues that arise from conflicting ideologies or political or social interests. In this respect, one thing should not be overlooked: regardless of whether the constitutional court declares a law unconstitutional (and repeals it), or finds a law not to be in contradiction with the Constitution, its decision always spells out the substance of the Constitution in more concrete terms and such determines the scope for political decisions.

As already mentioned, the case law of the Austrian Constitutional Court has long been considered by many as excessively "restrained"; legal scholars in particular reproached the court for giving constitutional legitimation, more or less mechanically, to whatever the parliamentary majority had adopted ("adaptive jurisprudence").

When, in the 1980s, the Austrian Constitutional Court began to develop a more value-oriented jurisprudence, it was again met with criticism. This time, it was mostly the representatives of the political majority who reproached the Austrian Constitutional Court for having crossed the borderline between jurisdiction and policy-making.

In recent years, this criticism from the political sphere has largely subsided. This might be attributable to the fact that the Austrian Constitutional Court is among those state institutions which enjoys a high degree of trust among the citizens, citizens who trust that the Court is delivering its tasks at a high level of quality, correctly, and - above all - without being influenced by politics! Besides, one cannot help gaining the impression that, now and then, policy-makers shun away from taking complex – because socially most controversial – decisions and are happy to let the Constitutional Court to be in the vanguard.

5.

In Austria, the core task of the Constitutional Court, i.e. reviewing laws as to their constitutionality, has seen a remarkable development these days.

For a long time, access to this type of judicial review used to be fairly restrictive. The original version of the Constitution of 1920 had essentially conceived judicial review as abstract proceedings that were to govern disputes between state bodies, which could exclusively be brought by the federal government (against province legislation) and/or by a province (against federal legislation). However, this system was reformed in that the Austrian Constitutional Court was given powers to initiate such proceedings on its own, if the underlying law was a key element for a ruling by the Constitutional Court (in other proceedings). Complaints against decisions of administrative authorities and/or (since 2014) decisions of first-instance administrative tribunals are "cases in point" which may prompt an *ex officio* review.

With the 1929 amendment of the Constitution, the Administrative Court and the Supreme Court, i.e. the two supreme courts in administrative matters and civil and criminal matters respectively, were granted the right to challenge laws before the Constitutional Court. In 1975, this right to challenge laws was extended to all appellate courts; concurrently, individuals were granted the right to challenge laws before the Constitutional Court, if the law had become operative directly for the person without official proceedings ("individual application").

Since 2015 all courts – in addition to the administrative tribunals that were set up in 2014, also first-instance civil and criminal courts – have the right to challenge laws with the Constitutional Court. If a civil or criminal court fails to challenge an act, the parties in these proceedings before such a court are entitled to file an application for review with the Constitutional Court themselves ("party application").

6.

For the legitimacy and effectiveness of a constitutional court it is essential that it can decide in full independence and, above all, free of any political intervention. This independence is a prerequisite for a constitutional court to win the trust of the public at large. It is this trust of a country's citizens in the correct delivery of tasks, uninfluenced and not susceptible to being influenced, that is the most valuable asset of every constitutional court.

However, it would be an illusion to believe that any constitutional court can maintain the rule of law by its own authority. This becomes manifest also if you take the Austrian Constitutional Court as an example, which meanwhile looks back on a long and eventful history. After a much-promising start in the early 1920s, it was eliminated as early as 1933 by the fascist regime governing Austria at that time. It was only in 1946, after the end of World War II and after

the national-socialist tyranny had been overcome in Austria, that the Austrian Constitutional Court was able to resume its work. This look back into Austria's history, but also recent developments in some European states make one thing clear:

Democracy and the rule of law is nothing we should take for granted. Their existence must be safeguarded and defended anew, day by day. Any such endeavour requires economic and social stability and, most importantly, that the rule of law, human rights and democracy become values which are embedded in the minds of a country's citizens.

7.

Distinguished President, ladies and gentlemen!

Thank you once again for this invitation. I am delighted that you have given me an opportunity to further strengthen the long-standing cooperation among colleagues between the constitutional court of the Republic of Slovenia and that of the Republic of Austria.

Prof. Dr Marta Cartabia

Vice President of the Constitutional Court of Italy

Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication

1. A Challenging and Successful Story

A fortunate coincidence brings us to Bled to celebrate the 25th anniversary of the Slovenian Constitutional Court, while the Constitutional Court of Italy – which I am honoured to represent – has just turned 60. Indeed, its first decision was issued in April 1956.

The Italian Court is one of the earliest examples of the "European model of constitutional review of legislation" to develop in the aftermath of World War II together with the German *Bundesverfassungsgericht*. Both of these courts followed the pioneer of all European constitutional courts – the Austrian one – as revisited under the influence of the United States' experience.[1]

Anniversaries are invitations to learn from history. The question thus arises: what we can learn – if anything – from the Italian history of constitutional adjudication? In other words, what does the balance of these 60 years of history look like?

I would say that – all things considered – the story of the Italian Court is one of success, although it has met its fair share of challenges.

When the Italian Court was established, the legal and political environment was not at all favourable to the judicial review of legislation. For different reasons, the major political parties in Parliament were hostile; the judiciary was suspicious; and the majority of legal scholars were wary. All things considered, the new institution was set up in an inhospitable environment.

1 On this point, M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* 1–25 (1968); M. Cappelletti & W. Cohen, *Comparative Constitutional Law: Cases and Materials* (1979).

Nothing in the legal and political culture was ready to welcome the new special constitutional body, and yet the Italian legal system very much needed it. As most European countries recovering from the totalitarian era, Italy was under pressure to introduce a judicial review of legislation. During the twenty years of the Fascist regime, a huge number of shameful and atrocious crimes were committed *through* the law, rather than *despite* the law. Generally, the rule of law was formally respected, at least from the procedural point of view; however, from a substantive point of view, the legal provisions issued by the national Parliaments in those years were at odds with the most basic sense of justice. Suffice it to recall one example: the racial legislation issued by the Italian Parliament in the late 1930s, which openly and severely discriminated against and persecuted Jews and other groups on the ground of race. Having this background in mind, the national constitutions approved after the end of the war, starting with the German and the Italian ones, unsurprisingly introduced the judicial review of legislation, together with special procedures for constitutional amendments; furthermore, they were enriched with a generous catalogue of fundamental rights, for the protection of which a new special judge was established. For similar reasons, other European countries followed the same route once they were released from the bondage of dictatorship: this was the case with Spain and Portugal in the 1970s and 1980s, and, some years later, with all Central and Eastern European countries after the fall of Communism.[2]

In Europe, all post-totalitarian constitutions gave space to constitutional adjudication and established special tribunals for the purpose. Constitutional courts were, and still are, regarded in Europe as watchdogs against all forms of "legal injustice", as Gustav Radbruch stated in a famous book of 1946. And rightly so.

Nonetheless, at the time, the Italian legal and political culture was still imbued with the key concepts and structures of nineteenth-century modern constitutionalism, which was based on the centrality of parliaments and of the principles of *légalité*, the *volonté générale,* the rule of law and the separation of powers. To reconstruct a democratic order after the shameful experience of the Fascist period, the founders of the new Republic naturally relied upon the existing traditional institutional architecture: however, the presence of a powerful judge vested with the competence of reviewing parliamentary legislation was somewhat inconsistent with that framework.

The Italian constitutional mindset of the post-World War II period was a strange mix of British and French nineteenth-century legal tradition. On the one hand, according to the British legal tradition, the principle of the "sovereignty of Parliament" was undisputable: the legislature was the sole institution vested not only with law-making power but also with a "permanent constitution-making" power. On the other, unlike the British, but very close to the French tradition,

2 An excellent overview of the diffusion of constitutional adjudication in Europe and around the world is provided by T. Groppi, *Introduzione: alla ricerca di un modello europeo di giustizia costituzionale*, in *La giustizia costituzionale in Europa* 1, 5 *et seq.* (Tania Groppi & Marco Olivetti eds., 2003).

the Italian judiciary was meant to be *la bouche de la loi*, and was composed of judges "subject to the law" (Article 101 of the Italian Constitution). The judiciary consisted of bureaucratic staff, and the judicial function was conceived as rather mechanical.

Consider that one of the most popular and influential books was *Le gouvernement des juges* ("The government of judges"), written by E. Lambert. The book was published in 1921 and based on an account of the power held by the judiciary in the United States during the Lochner Era. The description of such an activist Supreme Court became a veritable spectre for the European statesmen of the time.

In those years, the fundamental pillars of modern continental European constitutionalism were averse to the idea of judicial review of legislation. In Europe, distrust towards the judiciary, together with a great emphasis on "the law" and "parliaments", was part and parcel of the major legal myths of the time.[3]

The clearest sign of this distrust towards the new Constitutional Court was the delayed implementation of the institution. Indeed, it was envisaged in the Constitution of 1948, but implemented only in 1956 – eight years later.

Moreover, even after its implementation, the Supreme Court of Cassation, adopted a conservative approach in its case law[4] that was likely to tame the role of the new Constitutional Court. I refer, in particular, to the "programmatic vs. preceptive norms" doctrine.

The idea was that the Constitution consisted largely in principles and not in preceptive rules, and those principles – defined as *programmatic norms* – were not suitable to be applied by the courts, but rather required prior implementation by Parliament. As long as such parliamentary legislation was not adopted, the Constitution remained essentially ineffective. This doctrine would have placed the implementation of the Constitution by and large in the hands of the political bodies, removing it from those of the judiciary. Certainly, had this doctrine taken root, constitutional review would have been much less effective.

However, despite the early distrust, the Italian Constitutional Court soon became one of the most influential authorities in the Italian institutional architecture, quickly gaining the utmost respect from all other branches of government.

How did the new Constitutional Court respond to such an unfavourable context? How did the Constitutional Court interact with its opponents? What "strategy" did the Court adopt to overcome the pervasive resistance against it at the dawn of the Republic?

3 P. Grossi, *Mitologie giuridiche della modernità*, Giuffrè, Milan, 2007.

4 E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana,* Laterza, Bari, 2012.

Since its very origins, the Italian Court has adopted a twofold attitude. On the one hand, it has shown solid self-awareness and high consideration for its own mission; on the other, it has maintained a very open and relational approach to other actors, both political and judicial. Later, the Court began to interact with its European counterparts following a similar approach. In the search for its own role in the national and European institutional order, the Italian court has proved to be a resolute guardian of the national constitutional identity and yet open to and cooperative with other counterparts.

In the following pages, I would like to insist on this second feature: recalling John Merryman, it can be said that the "Italian style" of constitutional adjudication lies in its "relational character."[5] This "relational style" may become of some interest for all European courts in the current context, one in which they are called upon to operate in a space of constitutional interdependence and interaction.

2. Relational Capabilities as a Relevant Indicator for Comparative Studies

It is somewhat unconventional to describe an institution according to its approach to other actors and its counterparts. Generally, institutions are qualified by their composition, their organization, the procedures they follow, their competences and the effects of their actions. Their relational approach to other bodies tends to escape the interest of traditional scholarship.

As for constitutional courts, comparative legal scholars propose a classification[6] that contrasts, for example, centralized and diffuse systems of judicial review of legislation, referring to the judicial body that is given the power of judicial review; abstract or concrete procedures, as regards access to the court; *ad hoc* or *erga omnes* effects, in relation to the effects of their decisions; or fundamental rights adjudicators or institutional dispute resolvers, in terms of the court's "core business".

In accordance with these benchmarks, they have elaborated a "continental European model of constitutional adjudication,"[7] arising out of the convergence between the Kelsenian model and the concrete US system. The Italian court fits into this model perfectly.

As any other constitutional court of the European family, the Italian Court is a *special judge*: it performs its function following judicial procedures, but the procedure to appoint its members

5 This idea is developed in V. Barsotti, P.G. Carozza, M. Cartabia and A. Simoncini, *Italian Constitutional Justice in Global Context*, OUP, 2015.

6 M. De Visser, *Constitutional Review in Europe. A Comparative Analysis*, Bloomsbury Publishing, 2013.

7 V. Ferreres Comella, *Constitutional Courts and Democratic Values; A European Perspective*, 2009.

is different from that adopted for other judges, and involves other political bodies. Moreover, it is also a *specialized body*, which deals only with constitutional adjudication. Unlike supreme courts, European constitutional courts are not part of the ordinary judicial branch and their jurisdiction is one of pure constitutional adjudication. Finally, constitutional courts are *centralized bodies*: judicial review of legislation falls within the exclusive province of the Constitutional Court. Had a US-style judicial review of legislation been introduced in Europe, where the principle of *stare decisis* does not endow judgments with the same binding force as it does in common law countries, then values such as legal certainty, the uniform application of the law, and even the equality of citizens would be threatened. For these reasons, ordinary judges were prevented from scrutinizing legislation – especially, to preserve the uniform application of the law – whenever a legislative provision conflicted with the Constitution.

Although the traditional approach to comparative constitutional adjudication remains meaningful and undisputed, new indicators are becoming relevant and should be taken into consideration, to fully understand each individual constitutional experience.

The current European context has undergone an important transformation, and new features have become relevant in assessing the true identity of national constitutional courts. Today, European constitutional adjudication occurs in complex and composite legal systems populated by multiple systems of protection of fundamental rights, in which various courts – with overlapping jurisdictions – compete with each other; and in which an increasing number of charters, constitutions and conventions have entered into force, each of which envisages new bodies for the protection of rights, such that quasi-judicial bodies and independent agencies operate alongside traditional courts and tribunals. The European constitutional landscape is densely populated indeed.

Many cases and controversies are brought before different courts, and many of them require the concurrent implementation of national and transnational legal standards.

If we consider the complexity of this context, a new taxonomy of constitutional courts may be elaborated on the basis of their general attitude towards other actors. Today, the courts' relational qualities matter. Similar courts may behave in a solipsistic or a cooperative manner, or may take a confrontational or a dialogical stance.

In this respect, if there is a single phrase that can describe the Italian Constitutional Court, this is its "relational approach to constitutional adjudication". Italian constitutional law is intensely relational – it speaks of cooperation, connection, interdependence, interactions, links, networks, and the like.

Indeed, no single idea is capable of capturing the essence of an institution as rich in history, complexity, and even contradiction as the Italian Constitutional Court. However, many of the interesting aspects of the Court and its case law that stand out when viewed in com-

parison with other experiences may be summed up with the term "relationality." At its best, the Court operates with notable attentiveness to the relations between persons, institutions, powers, associations and nations.

This is not to imply that the Italian Court is always consistent and successful in maintaining this distinctive identity, nor that its relational approach is always an unambiguous asset. As has been remarked,[8] some aspects of the process and style of the Court's opinions are not an outstanding example of openness and transparency.

Nor it can be suggested that the Italian Court is absolutely singular in this effort at relationality: any successful constitutional tribunal must attend, to some degree, to the political realities of its position within the constitutional order, and the Italian court undoubtedly still has much to learn from other systems in this regard.

Nevertheless, when reviewing the history of the institution, it is helpful to adopt a hermeneutic of positivity – to tease out, from a complex jumble of data, that which is of particular value and to offer it as a narrative that calls forth the best version of the Court. Viewed in this perspective, the relational qualities of the Italian Court are valuable assets, worth articulating and sharing.

3. Institutional and Interpretative Relationality

What are the origins of the relational mindset of the Italian Constitutional Court?

To a significant degree, this pervasive feature of the Italian Constitutional Court emerges from the very particular intra-institutional relation-building capacity within the Court itself.

Indeed, relationality is imprinted into the very structure of the Court. Let us consider the composition and fabric of the Court. Of its 15 judges, five are elected by the Parliament, five are appointed by the President of the Republic and five are elected by the other branches of the judiciary: both ordinary and administrative bodies. Therefore, all the other branches of the State have a say in the appointment of the Constitutional Court's 15 members. Although the members of the Court are fully independent and do not answer to their "constituencies", they proceed from different bodies. This fact matters.

Moreover, although all judges are jurists, some of them come from the academy, as legal scholars; others from the bar; and yet others from the judiciary.

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8 T. Groppi, *Giustizia costituzionale "Italian Style"? Sì, grazie (ma con qualche correttivo),* in *Diritto pubblico comparato ed europeo*, No. 2 of 2016.

The constitutional judges are diverse due to their different sources of appointment – some selected by the highest courts of the ordinary judiciary, others by Parliament, and others by the President – and due to their different backgrounds, with career judges working alongside university professors and practicing lawyers. They are united by a common legal education, but differ in terms of their previous professional trajectories and personal cultural formation. This pluralism has always been a great asset of the Court.

This pluralistic composition matters if it is considered that the Court's rules of procedure are dominated by a paramount principle: that of *collegiality*. Justices are prompted towards dialogue and agreement because of the principle of collegiality that governs the Court's work. The Court's internal organization and working procedures are designed to encourage the judges to work intensely with one another; they are obliged to dialogue with one another. This fosters reciprocal cross-fertilization among the Court's members and their respective ideas, political and social backgrounds, cultures and mentalities; it also serves as the principal growth factor in the Court's capacity for building relations.

Every single step in the decision-making process requires the participation of all 15 members. Some features of the decisional process are worth noting, to fully appreciate the strict collegiality that governs the Italian Constitutional Court.

For example, unlike many other constitutional courts, the Italian Court never splits into chambers: every single case is discussed and decided by a plenary panel, even cases that may be minor or repetitive. No filter is applied to scrutinize the admissibility of an application, and every controversy enjoys the same procedural dignity.

Another expression of the principle of strict collegiality is that the individual voices of the judges cannot be recognized. The Court always speaks with one voice, and separate opinions are not allowed. Although the issue has been discussed from time to time, to date the Court has rejected all proposals aiming to introduce the plurality of opinions. Every decision is the result of the deliberation of all 15 members of the Court; even those who do not agree have a say and can contribute to the drafting of the Court's judgment. Without the possibility to publish a dissenting opinion, even those judges who were not part of the majority of the Court participate in writing the official judgment. The absence of separate opinions, and the requirement that the draft judgments be read together in chambers and collectively approved, fosters compromise and encourages the Justices to broadly incorporate the particular views of their individual colleagues into the final text. These methods favour efforts to reconcile and unify divergent views into a composite that cannot be reduced to the perspective of a single judge, politician or scholar.

A third characteristic of the Italian Court is that the President of the Court does not play a predominant role over the entire body; rather, his position is commonly defined as one of *primus inter pares* – first among peers. Indeed, an unwritten rule has been followed to date, with only a few exceptions: the President is chosen by seniority. Consequently, almost all of the constitu-

tional judges have had the chance to chair the Court, albeit for a very short term (even of a few weeks or a few months). Even the most significant powers of the President of the Court – that of nominating the *juge rapporteur* for each controversy and that of casting a double vote in case of parity – are subdued, in a sense, by the brevity of his mandate. The opinion expressed by the President of the Court does not control the opinion of the overall court at all: in this respect, his voice is no more relevant than that of the other members.

The Court's internal structural and procedural pluralism, and the principle of strict collegiality governing its operation, are reflected in its external activities. First, at least two dimensions of its relational approach to constitutional adjudication may be singled out: the institutional dimension and the interpretative dimension.

3. 1. Institutional Relationality

In the performance of its duties, the Italian Court – as any other constitutional court – must cooperate with other branches of government: the Parliament, the Government, the President of the Republic, the Regions, and other components of the Judiciary, at national and European levels. All the functions of the Italian Constitutional Court imply interaction with other bodies. These interactions may be adversarial or synergic. The distinctive trait of the Italian experience, however, is the latter. Occasional conflicts do not contradict the general trend, consisting of dialogue, collaboration, cooperation, accommodation, compromise, and the like.

As a paradigmatic example, the relations of the Constitutional Court with other branches of the national and European judiciary are worth examining in further detail. Such branches are, on the one hand, in "competition" with the Constitutional Court; on the other, however, they are necessary partners.

3.1.1. The Constitutional Court and Ordinary Courts

Cooperative relations with other national judicial bodies have been crucial for the proper operation of constitutional adjudication in Italy. The incidental method of review, which remains the main pathway of access to the Constitutional Court, entrusts ordinary judges with the role of gatekeepers of the Constitutional Court, as defined by Piero Calamandrei,[9] as it is precisely ordinary judges who decide which cases will be admitted for constitutional review and which will not. This mechanism is based on the cooperation of ordinary judges. If ordinary courts do not activate the procedure, the Constitutional Court cannot play its part.

9 P. Calamandrei, *Il procedimento per la dichiarazione di illegittimità costituzionale*, in *Opere giuridiche*, Vol. III, Naples, Morano, 1965, p. 372.

The incidental procedure is structured as follows:[10] when a judge, in the course of a judicial proceeding concerning any kind of case – criminal, property, tort, administrative – is called upon to apply a legal provision the constitutionality of which is questionable or suspect, he is required to suspend the procedure and refer the case to the Constitutional Court, so that the legislation may be reviewed. Once the Court has issued a binding decision on the point, the ordinary judge can resume the case and decide it in accordance with the Constitutional Court's judgment.

Ordinary judges cannot review legislation themselves; however, they are involved in the constitutional review of legislation because they are the gatekeepers to the Constitutional Court. It is up to them to send a question of constitutionality to the Court. Loyal and active cooperation is thus necessary between ordinary judges and the Constitutional Court in its position as special judge for the judicial review of legislation.

As seen above, when discussing the early history of the Constitutional Court, smooth relations with the ordinary judiciary were not to be taken for granted: the case of the "programmatic vs. preceptive norms" doctrine is self-explanatory.

An important contribution to fostering respectful and synergic relations with national ordinary courts was given by the *"living law doctrine"* and by the method of *interpretation "in conformity with the Constitution"*.

According to the former, the Constitutional Court tends to review the challenged legislation as it is interpreted by ordinary courts, without imposing its own interpretation. When the case law of ordinary courts, and especially that of the Supreme Court of Cassation, uniformly adopts a given interpretation of a legal provision, the Constitutional Court accepts that interpretation as "living law"(*diritto vivente*). Consequently, the Constitutional Court decides the issue upon the assumption that the interpretation at issue is the correct one. Thus, when the Court finds the provision unconstitutional, it declares it null and void on its face, rather than adjusting the problem at the interpretative level.

On the other hand, since the mid-1990s, the Constitutional Court has invited ordinary courts to read statutory texts in such a way that they concord with the principles enshrined in the Constitution. Ordinary judges, following the case law of the Constitutional Court, have adopted the so-called *interpretazione conforme a Costituzione* ("interpretation in accordance with the Constitution"): that is, they themselves construct meanings of statutes that are compatible with the Constitution and that do not violate it. Judges may sometimes even force the literal meaning of the text, to "save" the statute and therefore avoid referring the case to the Constitutional Court.

10 See Article 23 of Law No. 87 of 1953.

Through these doctrines, the Constitutional Court has displayed a great deal of trust in the ordinary judiciary, preserving the primary competence of the latter as the interpreter of legislation. As for the interpretative powers, these doctrines distinguish the domain of the ordinary judiciary – vested with the power to interpret parliamentary legislation – from the domain of the Constitutional Court – which is vested with the power of interpreting the Constitution and reviewing legislation according to it.

This distinction demonstrates respect for ordinary judges, and contributed a great deal to build good relations with them. Most of the Constitutional Court's decisions presuppose a healthy cooperation with the ordinary judiciary, including both lower courts and the highest courts (the Supreme Court of Cassation and the State Council). Without this inter-judicial relationality, the doors of the Constitutional Court would have remained closed, and the pronouncements of the Constitutional Court ineffective.

3.1.2. The Constitutional Court and European Courts

A similarly active and loyal cooperation is required for smooth relations with what shall hereinafter be referred to as the European Courts: the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

As a matter of principle, in a centralized system as is the Italian one, the Constitutional Court is endowed with the exclusive and final power to review legislation. As a matter of fact, however, the Italian Constitutional Court is networked with other judicial bodies: the ordinary judiciary – as seen above – and the two European Courts, the role of which is growing in significance.

Certainly, the missions of the national constitutional courts and those of the European Courts do not overlap, and neither of them has jurisdiction over constitutional judicial review of national legislation, which falls within the exclusive domain of the national constitutional courts. Nevertheless, the three legal orders – EU, ECHR, and national legal orders – have developed into a "composite" constitutional system and a number of interactions occur among their respective judicial bodies, especially when they act as human rights adjudicators. Each of them cannot do without the others.

Within the European context, the Italian Constitutional Court has dramatically changed its attitude over time, moving from a strict "constitutional patriotism" towards an incremental openness to the European environment. While, at the beginning of the European adventure, the Italian Court considered its supranational and foreign counterparts as aliens, a period of informal reciprocal influence then followed, during which the Italian Constitutional Court – while avoiding all formal reference to the case law of the two European Courts – was actually well aware of the case law developed in Luxembourg and in Strasbourg. Today, the European case law is an ordinary constituent of the legal authorities on the basis of which constitutional adjudication is conducted and justified.

The current framework of the relationship with the CJEU was established in 1984,[11] although direct dialogue by means of preliminary ruling was inaugurated only in 2008 and confirmed in 2013;[12] as for the relationship with the ECtHR, the turning point is represented by the "twin" judgments issued in 2007.[13] However, long before opening up to direct dialogue with the European Courts, the Italian Constitutional Court maintained an implicit and silent, although influential, attention to their decisions. A similarly implicit and silent, but influential, consideration is paid by the Constitutional Court to foreign law and comparative sources: whereas, in recent years, the Italian Constitutional Court has occasionally openly referred to the case law of other constitutional courts, the influence of the latter is actually much deeper than may be apparent on the surface.

In conclusion, Italian constitutional justice has incrementally entered into an active relationship with European, international, and comparative law, and especially with the judge-made law of the two European supranational Courts, in particular in human rights cases. While, in some areas, the impact of these external sources has induced the Constitutional Court to revise its previous case law and to develop new principles and standards, in other cases the Italian Constitutional Court intentionally takes a different position from European or foreign courts, especially when the core values of constitutional identity are at stake. In short, now the Court does engage in open and direct relations with external judicial bodies. However, those relations are not oriented towards an unreasoned importation of judicial solutions from the outside; rather, it is a two-way relation between peers, a dialogue that triggers constructive convergence but also leaves room for difference and distinctiveness.[14]

As a result, from the institutional point of view, the Italian Court is now a protagonist of a composite system of judicial review, which envisages the Constitutional Court at its centre, and includes other actors too – ordinary judges and European courts. The Italian Court is well aware of this fact and does its utmost to maintain good "neighbourly" relations with all of them.

3.2. Interpretative Relationality

The relational institutional context within which the Constitutional Court operates resonates in its doctrines. The ability of the Italian Constitutional Court to establish sound and vital two-way relations with other institutional actors – both political and judicial, national and supranational – is in significant ways mirrored in the methods of constitutional interpretation that distinguish the Italian Constitutional Court, which could be defined as methods of "interpretative relationality".

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11 Constitutional Court, Judgment No. 170 of 1984

12 Constitutional Court, Judgment No. 103 of 2008 and No. 207 of 2013. On this point, see the rich debate published by the Special Issue of the *German Law Journal*, No. 6 of 2015.

13 Constitutional Court, Judgments Nos. 348 and 349 of 2007

14 Constitutional Court, Judgments No. 264 of 2012 and No. 49 of 2015.

3.2.1. An Integrated Legal Reasoning

In its legal reasoning, the Constitutional Court follows a comprehensive methodology, one that does not shy away from complexity. Indeed, a simultaneous multiplicity of approaches to constitutional interpretation can often be found in the decisions of the Italian Constitutional Court. Moreover, and even more significantly, the Court interprets the Constitution as a whole, as a system, avoiding the fragmented interpretation of a single provision removed from its contextual relationship with the other principles, rules and rights enshrined in the Constitution. The Court's methods of interpretation and of legal reasoning are broadly inclusive, go beyond the single textual provision at stake, and draw inspiration from the spirit of the Constitution.

From the methodological point of view, the Italian Court uses a holistic, syncretic, inclusive and integrated form of legal reasoning, one based on a composite combination of different approaches to constitutional interpretation.

Textual, teleological, historical, and systemic constructions of the Constitution are often jointly used in the Court's reasoning. To be clearer:

- the text does matter, but the Court is not trapped in a narrow form of textualism; it does not stick strictly to the written word of the Constitution or to literal interpretation of its provisions;
- the original intent may also be important, but has never been used as a conclusive argument;
- foreign law is taken into account, but does not control the Court's decision;
- changes in public opinion and in the legal and social context are taken into account – as "the living constitution" – although the Court does not hand over its interpretative power to popular sentiment;
- the Court does not disdain teleological interpretation, but also attaches great importance to its own precedents and to the coherence of its case law.

In other words: the Constitution is considered as a whole, as an integrated system, avoiding fragmented interpretation or the isolation of a single provision from other parts of the text.

3.2.2 Balancing Human Rights

This final remark brings us to another distinctive feature of Italian constitutional doctrine in the field of human rights.

The Constitution and the Constitutional Court endorse a relational understanding of individual rights, one that corresponds to the peculiar understanding of fundamental rights endorsed by the Italian Constitutional itself. Indeed, Article 2 of the Constitution establishes that

rights belong to each person, considered as an individual and as a member of the social groups within which his or her life develops and flourishes:

"The Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social groups where his personality is expressed, and requires fulfilment of the inderogable duties of political, economic and social solidarity."

Moreover, the individual rights listed in the Constitution are divided into four groups, which are titled as follows:[15]

- civil *relations*
- ethical and social *relations*
- economic *relations*
- political *relations*

Although fundamental rights are recognised to each individual, they concern the relational aspects of social life.

When brought to the bar, indeed, most cases involve a number of competing fundamental rights; this requires the Court to properly balance them all.

The Court insists on the fact that no individual right is absolute; all rights protected by the Constitution are to be balanced with other rights and relevant public interests. Therefore, a holistic, rather than piecemeal, interpretation of the Constitution is most appropriate in the field of fundamental rights. That is, rather than regarding the Constitution as an assemblage of fragmented and unconnected propositions, all the rights and values proclaimed within it are considered to be components of a unified mosaic, such that each element reveals its full meaning only in the context of a broader design.

The three doctrines that provide structure to the Court's constitutional reasoning are balancing, reasonableness and proportionality.

A clear example of this approach to the protection of inviolable rights may be seen in Judgment No. 85 of 2013, which dealt with a complex case concerning the ILVA steel mills. The case involved the right to health and to a safe environment on the one hand, and the right to work (of a great number of people) and the right to free economic activity on the other. In its judgment, the Court clearly stated that:

"All fundamental rights protected by the Constitution are mutually related to one another and it is thus not possible to identify any one of them in isolation as prevailing absolutely over the others. Protection must at all times be "systematic and not fragmented into a series of rules

15 Emphasis added.

that are uncoordinated and potentially conflict with one another" (Judgment No. 264/2012). If this were not the case, the result would be an unlimited expansion of one of the rights, which would "tyrannise" other legal interests recognised and protected under constitutional law, which constitute as a whole an expression of human dignity."

A careful reading of this passage shows that the Italian Court considers balancing rights to mean that: (a) no constitutional right has an absolute value, nor does it enjoy absolute predominance over the others – if it were otherwise, it would become a "tyrant" right; (b) the Constitution does not establish an abstract ranking of rights; (c) the balancing exercise requires flexible and unfixed relations between different rights, depending on the concrete case at hand; (d) balancing rights requires engaging in reasonableness and proportionality tests, and never allows the complete sacrifice of one of the values at stake.

4. Conclusion

Institutional relationality, interpretative relationality: a 60-year history of the Italian Constitutional Court has shown how fruitful this approach to constitutional adjudication can be.

This is not a minor legacy to constitutional adjudication in the new millennium.

European integration and globalization have affected constitutional law and constitutional adjudication to such an extent that national constitutional courts are now inevitably linked in a "network". They interact with other bodies – whether they wish to do so or not – within the national legal system as well as outside of it, with their foreign or supranational counterparts.

In such a context, where the diversity of interrelated cultures can easily turn into conflict and distrust, good mutual relationships are vital for the flourishing of constitutional adjudication and to better serve the legal protection of human dignity.

It helps to build bridges, rather than walls.

Prof. Dr Maria Lúcia Amaral

Vice President of the Portuguese Constitutional Court

The Portuguese Constitutional Court: Thirty Years of Existence

1.

On behalf of the Portuguese Constitutional Court I would like to thank you vividly for this invitation. It is of course an honour and a pleasure to be hosted by the Republic of Slovenia in the commemoration of the 25th anniversary of its Constitutional Court. This Conference contributes to the shaping of a "European epistemic community" (a European community of knowledge) in the complex field of Constitutional Law. And I am particularly grateful to the Constitutional Court of Slovenia for the opportunity that I have been given to be, today, a part of this community.

2.

I was kindly asked to speak about the Portuguese experience in what concerns the most relevant case law of its Constitutional Court.

The Portuguese Constitutional Court was established in 1983, following the first amendment to the Portuguese Constitution of 1976. It means that although it has been established only one decade earlier than the Constitutional Court of Slovenia, the Portuguese Court is often mentioned as an example of the so called "second wave" of the expansion of the institutions of Constitutional Justice throughout the European continent.

The image of the successive "waves" of expansion of the institution of Constitutional Justice is broadly known. Normally, it is said that the "first wave" occurred in the fifties of the Twentieth Century, with the institution of the German and the Italian Constitutional Courts and the reaffirmation of the Austrian Constitutional Court. It is also said that the second "wave" occurred at the end of the seventies, when Portugal and Spain joined the group of the European Consti-

tutional Democracies. Being so, the Portuguese Constitutional Court belongs to this "second wave", and its establishment – as well as its jurisprudence – must be understood in this context.

If I recall now these affirmations, so widespread and known, it is because I feel the need to stress a previous point that is, I believe, not so well known.

3.

Although the Portuguese Constitutional Court is rightly placed among the other European Constitutional Courts as a historical expression of the movement of expansion of the Kelsenian idea of Constitutional Justice or jurisdiction, it is, at least in the European context, a somewhat different and peculiar Court: it is a Court which the "pouvoir constituant" (the constituent power) has placed somewhere between Kelsen and the American Chief Justice Marshall.

In fact, the institutional design – the *architecture* – of the Portuguese system is such that it combines elements of the Austrian model with elements of the American judicial review. The Austrian or the Kelsenian model is present in the procedures concerning the abstract control of norms. However, in what concerns the so-called concrete control of norms, the system that is in place corresponds entirely to the paradigm (model) of the American judicial review of laws, as it was "adopted" or "translated" into the peculiar language of a legal culture which is, as is characteristic of the Portuguese legal culture, part of the *civil law tradition*.

I am not going to bother you now with an accurate description of this system and of its *modus operandi*. I will just stress the main reason for its peculiarity, which lies in the way the Court relates itself to all other (ordinary) courts. Three main aspects must be stressed in this context.

Firstly, in opposition to what happens according to the European or Austrian model, in Portugal all the judges have (Article 204.º of the Portuguese Constitution) the power and the duty to refuse the application of a norm to a certain case, if they consider that this norm (contained in a legislative act) goes against the Constitution. Secondly, in contrast to what happens according to the European or Austrian model, following the decision of the common judge, there is an appeal to the Constitutional Court that decides as a *court of appeal*, or *court of last instance*, specifically on the matter of constitutionality. Thirdly, in these procedures, the decisions of the Constitutional Court, *concerning the unconstitutionality of a certain legal norm*, do not have an *erga omnes effect.* They just decide the case, having a strict *inter partes effect*.

If we consider that the large majority of the decisions that the Court has taken since its establishment are decisions of this kind – with a strict *inter partes effect* – I would say that the Portuguese system is, in the dialogue between the models of *strong* and *weak constitutionalism,* closer to the models of *weak constitutionalism* than the majority of the other European systems of constitutional justice.

4.

It is impossible to assess the role that has been played by the case law of the Portuguese Constitutional Court over its thirty years of existence without bearing in mind the specific constrictions that flow from this peculiar system.

However, in spite of these constrictions – that are embedded in deep historical and cultural roots – the case law of the Constitutional Court has had an important role in the shaping of the Portuguese legal order. Particularly, the existence of the Court, and its case law, has been the guaranty that this legal order is kept in accordance with the main requirements of a Constitutional Democracy.

I will demonstrate this statement with some examples.

The first example concerns the domains of criminal substantive law and criminal procedural law.

In these domains, the Court, by the means of a case law based on the principles of human dignity (Article 1 of the Constitution) and proportionality (Article 18), has determined the entire transformation of the pre-constitutional legal order, that is to say, the legal order that has been inherited from the dictatorial "regime".

The second example concerns administrative substantive law and administrative procedural law. By the means of a jurisprudence that has been especially based on the general principle of equality (Article 13 of the Constitution), and on the right to a fair trial (Article 20), the Court has also shaped the deep transformation of the authoritative administrative law and practices that were an essential element of the *ethos* of the authoritarian regime.

The third example can be found in the protection of property rights against takings. One can say that in this particular domain, the present legal order was born thanks to the case law of the Constitutional Court, especially thanks to its interpretation of the content of the principle of tax equality *(égalité devant les charges publiques)*.

The Court has also played a major role in raising awareness for the need to protect social rights. In this field, its case law has been constantly based on the principles of legal certainty, equality (the prohibition of arbitrary legal measures) and proportionality.

To conclude, I will say that being the principle of the constitutionality of laws a fundamental principle of Portuguese law already recognized as such in the original version of the Portuguese Constitution of 1976, it was with the creation of the Portuguese Constitutional Court in 1983 that the primacy (*supremacy)* of the constitution over ordinary law became fully institutionalized in the legal system.

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The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges

1. History

1. 1. From the "Inviolability of Legislation" to its Review Against the Constitution and Treaties

1. Apart from its interpretation in conformity with the Constitution,[1] legislation remained "inviolable" or sovereign until 1971, when the Court of Cassation ruled that a validly enacted self-executing *treaty*, "by the very nature of international law laid down by treaties", takes precedence over both earlier and later legislation. Every ordinary and administrative court must thus refuse to apply it in case of conflict.[2] This is called *diffuse review*.

2. Referring to "*The Federalist*", Robert BADINTER, former president of the French *Conseil constitutionnel* (1986-1995), rightly pointed out the two reasons for the constitutional review of legislation in the USA, i.e. guarding the delicate balance between the Federation and the States, and protecting fundamental rights.[3]

Constitutional review of legislation in Belgium was prompted by the same reasons, the difference being that this power of review is not given to every court, but exclusively to the Constitutional Court. This is Kelsen's model of *centralised constitutional review*, in which the principal mission is largely the protection of fundamental rights and freedoms.[4]

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1 Cass. 20 April 1950 (*Waleffe*), *Pas.*, 1950, I, 560, with conclusions by L. Cornil.

2 Cass. 27 May 1971 (*S.A. Fromagerie Franco-Suisse Le Ski*), *Pas.*, 1971, I, 886, with conclusions by W.J. Ganshof Van Der Meersch.

3 R. Badinter, Préface, S. Breyer, *La Cour suprême, l'Amérique et son histoire*, Paris, Odile Jacob, 2011, 10–11.

4 Between 1985 and 2015, the Court delivered 3900 judgments, 473 of which concern the division of powers between the federal State, the Communities and the Regions, while the others relate to rights and freedoms.

3. As soon as federated entities (in Belgium: Communities and Regions) with legislative powers came into being alongside the central (i.e. federal) State, the *division of powers* between those authorities necessitated a review of their legislation. In 1980, the Constitution[5] reserved the task of controlling that division of powers and reviewing the respective rules having force of statutory law for the Constitutional Court,[6] a court which does not form part of the judiciary and half of whose members are former Members of Parliament. The purpose was to safeguard the uniformity of constitutional interpretation in matters concerning the powers of the federal State and the federated entities.

4. Besides this first mission of the Constitutional Court, its jurisdiction was subsequently extended to cover the compliance of legislation with *rights and freedoms*. As of 1988, the Constitutional Court has jurisdiction to control the observance of Articles 10 and 11 (the principle of equality and non-discrimination) and 24 (the right to and freedom of education) of the Constitution[7] and, as of 2003, the Court's review jurisdiction has been extended to the entire Title II ("The Belgians and their rights") of the Constitution, as well as to Articles 170, 172 and 191 (the principles of legality and equality in tax matters, and the protection of foreigners).[8]

Additionally, the Constitutional Court substantially extended its review in matters of rights and freedoms following each of those two extensions of jurisdiction. First of all, it decided to read Articles 10 and 11 of the Constitution in combination with all rights and freedoms enshrined in the Constitution,[9] in treaty provisions binding Belgium[10] or in general principles of law,[11] since it cannot be accepted that a particular category of persons is wrongfully deprived from guarantees that are given to everyone. Next, the Court *ex officio* read the constitutional provisions relied upon by the parties in combination with treaty provisions binding Belgium and guaranteeing analogous rights and freedoms.[12]

5. This twofold technique of reading constitutional provisions in combination with international treaty provisions has many advantages, such as a modernisation of the fundamental rights provisions in the Belgian Constitution, many of which date back to 1831, and the incorporation of Luxembourg and Strasbourg case law in the Constitutional Court's judgments.[13] Although this

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5 Now Article 142 of the Constitution.

6 Then still called the "Court of Arbitration": constitutional provision of 29 July 1980 (*Moniteur belge*, 30 July 1980, 2nd edition); changed to "Constitutional Court" by the constitutional provision of 7 May 2007 (*Moniteur belge*, 8 May 2007, 3rd edition).

7 Constitutional provision of 15 July 1988 (*Moniteur belge,* 19 July 1988).

8 Special Majority Act of 9 March 2003 (*Moniteur belge,* 11 April 2003, 1st edition).

9 CC No. 23/89, 13 October 1989, B.1.2.

10 CC No. 18/90, 23 May 1990, B.11.3; even if an international treaty is not self-executing: CC No. 106/2003, 22 July 2003, B.4.2.

11 CC No. 72/92, 18 November 1992, B.2.1.

12 CC No. 136/2004, 22 July 2004, B.5.3–B.5.4.

13 For further details, see A. Alen, J. Spreutels, E. Peremans and W. Verrijdt, "Cour constitutionnelle de Belgique", in R. Huppmann and R. Schnabl (eds.), *La coopération entre les Cours constitutionnelles en Europe. Situation actuelle et*

Court is not competent to review directly the consistency with international treaties, its case law of reading constitutional provisions in combination with those treaties parallels the direct review by any ordinary and administrative court of legislation in the light of self-executing treaties.

For the compliance of legislation with treaties, two distinct review systems are thus in place: diffuse treaty review and centralised constitutional review. In order to solve the problem of a potential "competition of fundamental rights", the Special Majority Act on the Constitutional Court was amended: when before a court an infringement is invoked by a legislative act of a fundamental right guaranteed in an entirely or partially analogous manner by a provision of Title II of the Constitution and by a provision of European or international law, the court must in principle first refer the case to the Constitutional Court for a preliminary ruling on the compatibility with the provision of Title II of the Constitution.[14] Only after the Constitutional Court's negative answer on the question of constitutionality, the referring court may review the legislative act in the light of the provision of European or international law. This arrangement, which sets an order of review, was similarly adopted by the French legislature. This French regulation led to the famous *Melki and Abdeli* judgment of the Court of Justice, in which the latter accepted the conformity of the *question prioritaire de constitutionnalité* with the principle of full effect of EU law, provided that some conditions are met.[15]

1.2. Explicit Reference to the "Rule of Law" in the Case Law of the Constitutional Court is Fairly Limited

The Constitutional Court only rarely makes explicit reference to the "rule of law" in its case
6. law. Four types of references can be distinguished.

(i) First of all, the Court has referred to the actual meaning of *"l'Etat de droit"* when stressing that not only the governed, but also those who govern, are bound by the law. An oath is to be understood as a solemn declaration that a person exercising public authority will

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perspectives, Wien, Verlag Österreich, 2014, vol. 1, 293–347.

14 Article 26(4) of the Special Majority Act of 6 January 1989 on the Constitutional Court, inserted by the Special Majority Act of 12 July 2009 (*Moniteur belge,* 31 July 2009, 2nd edition) and complemented by the Special Majority Act of 4 April 2014 (*Moniteur belge,* 15 April 2014, 1st edition).

15 ECJ 22 June 2010, *Melki and Abdeli*, C188/10 and C189/10: the national courts or tribunals remain free (i) to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary, (ii) to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and (iii) to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law. If the national law transposes the mandatory provisions of an EU directive, a fourth condition applies, i.e. a mandatory referral to the Court of Justice of a question on the validity of that directive. See W. Verrijdt, "Should the EU Effectiveness Principle be Applied To Judge National Constitutional Review Procedures?", in X (ed.), *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme - Liber amicorum Michel Melchior*, Liège, Anthemis, 2010, 543–571.

abide by the law; the mere fact that the official constitutional oath refers to the King, cannot dismiss a republican from the obligation to take that oath, by which he merely acknowledges his allegiance to the existing state structure as set out by the Constitution.[16]

(ii) The Court's second use of the rule of law principle is an immediate consequence of the first one. This principle requires access to a judge[17] in order to have all irregularities committed by governmental bodies sanctioned, including a damages action against public authorities.[18]

(iii) The third meaning of the rule of law principle as understood by the Constitutional Court is a direct consequence of the second one. Access to justice in itself does not suffice: its effectiveness requires the organisation of the Judiciary to meet certain requirements. These characteristics linked to the rule of law concern the due process rights,[19] the principles of judicial independence and impartiality,[20] the professional secrecy of attorneys at law,[21] the courts' full jurisdiction (*"pleine juridiction"*),[22] the right to the effective enforcement of definitive judicial decisions,[23] and the right that definitive judicial decisions are not called into question.[24] More in general, *"it is fundamentally important in*

16 CC No. 151/2002, 15 October 2002, B.3.2: *"The Belgian State is governed by the rule of law. One of the characteristics of the rule of law is that the leaders are subject to the law"*.

17 CC No. 182/2008, 18 December 2008, B.5.3; No. 19/2011, 3 February 2011, B.4.2: *"The right of access to the courts, which is an essential aspect of the right to a fair trial, is a fundamental right in a State governed by the rule of law"*. See also CC No. 18/2012, 9 February 2012, B.9.2; No. 139/2012, 14 November 2012, B.13; No. 48/2015, 30 April 2015, B.18.1; No. 108/2015, 16 July 2015, B.11.3.

18 CC n° 99/2014, 30 June 2014, B.14. This case involved damages because of a tort committed by the highest courts. The Constitutional Court stated: *"In the absence of any opportunity to have an irregularity allegedly committed by the court of last instance censured by available legal remedies, the right of the person who believes he is injured by that irregularity to bring an action of tort is of crucial importance in a State governed by the rule of law."* Because of judicial hierarchy and legal certainty, however, the Constitutional Court specified that only a sufficiently serious violation suffices for a lower court to establish the tort committed by one of the highest courts.

19 CC No. 202/2004, 21 December 2004, B.27.6; No. 105/2007, 19 July 2007, B.11.1; No. 107/2007, 26 July 2007, B.7.1; No. 22/2008, 21 February 2008, B.7; No. 98/2008, 3 July 2008, B.7; No. 201/2011, 22 December 2011, B.12.1; No. 178/2015, 17 December 2015, B.77.2: *"The rights of defence and the right to a fair trial are fundamental rights in a State governed by the rule of law."* These judgments all involve the principle of equality of arms and the right to an adversarial trial.

20 CC No. 67/2013, 16 May 2013, B.7.2; No. 74/2014, 8 May 2014, B.7.2; No. 103/2015, 16 July 2015, B.11.2; No. 138/2015, 15 October 2015, B.26; No. 152/2015, 29 October 2015, B.12.2..

21 CC No. 126/2005, 13 July 2005, B.7.1-B.7.2.: *"In order to be found compatible with the fundamental principles of the Belgian legal system, the act of lifting the legal professional privilege must be justified by a compelling reason and must be strictly proportionate."*

22 CC No. 78/98, 7 July 1998, B.9-B.10; CC No. 25/2016, 18 February 2016, B.37.1.

23 CC No. 122/2012, 18 October 2012, B.6; No. 56/2014, 27 March 2014, B.5: *"The right to an effective enforcement of definitive judicial decisions is one of the fundamental attributes of the rule of law."*

24 CC No. 177/2005, 7 December 2005, B.23; No. 6/2009, 15 January 2009, B.3.10; No. 199/2009, 17 December 2009, B.8. See also CC No. 172/2008, 3 December 2008, B.20; No. 107/2011, 16 June 2011, B.7.1; No. 9/2012, 25 January 2012, B.13.2; No. 160/2013, 21 November 2013, B.10.1; No. 113/2015, 17 September 2015, B.8.2: *"Even when legislating with retroactive effect, the legislature cannot, [...], at the risk of infringing one of the essential principles of the rule of law, bring into discussion judicial decisions that have become final."*

a democratic State governed by the rule of law that the courts and tribunals inspire confidence in the public and in the parties to the proceedings."[25]

(iv) The fourth meaning of the rule of law in the Constitutional Court's case law relates to the *"fundamental principles of the Belgian legal order"*, such as the separation of powers,[26] the necessity to have official documents published before they bind the public,[27] and human rights such as the principle of equality and non-discrimination[28] and the right to vote and to be elected.[29]

1.3. Nevertheless, the "Rule of Law" is an Unwritten Constitutional Principle and a Foundational Principle

7. An honorary judge in the Constitutional Court has written that this Court has conceived the rule of law as an elementary unwritten constitutional principle as well as a foundational principle, which forms the basis for other principles, more particularly the principle of legal certainty and the principle of proportionality.[30] We will discuss very briefly both of these principles in the abundant case law of the Constitutional Court.

8.1. The principle of *legal certainty*, an inherent attribute of the rule of law,[31] requires that individuals can foresee the legal consequences of their actions.[32] The principle of legality *in criminal matters* proceeds from the idea that *"criminal law must be formulated in terms which ensure that everyone will know, when deciding to adopt a course of conduct, whether that conduct is punishable and, where appropriate, to know the punishment incurred. It requires the legislature to indicate, in terms which are sufficiently precise and clear and provide legal certainty, what acts are to be punished, so that, on the one hand, a person adopting a course of action may first make a due assessment of what the criminal consequences of that action will be, and, on the other hand, to ensure that not too*

25 CC No. 157/2009, 13 October 2009, B.3.1; No. 123/2011, 7 July 2011, B.8.1; No. 155/2011, 13 October 2011, B.3; No. 3/2016, 14 January 2016, B.10.1.

26 CC No. 67/2013, 16 May 2013, B.7.2; No. 74/2014, 8 May 2014, B.7.2; No. 103/2015, 16 July 2015, B.11.2; No. 138/2015, 15 October 2015, B.26; No. 152/2015, 29 October 2015, B.12.2: *"The principles of judicial independence and the separation of powers are basic attributes of the rule of law."*

27 CC No. 106/2004, 16 June 2004, B.3.2.: *"Bearing in mind that publication is an essential condition for the binding effect of official texts, the ability of each person to take cognizance of those texts at any time is a right that is inherent in the rule of law, since such cognizance permits each person to comply with them."*

28 CC No. 17/2009, 12 February 2009, B.10.3. This principle is part of the *ordre public*: e.g. CC No. 8/2012, 18 January 2012, B.15.5.: *"The principle of equality and non-discrimination is not, […], simply a principle of good legislation and good administration. It is one of the cornerstones of a democratic State governed by the rule of law."*

29 CC No. 187/2005, 14 December 2005, B.5.1; No. 130/2006, 28 July 2006, B.6; No. 87/2014, 6 June 2014, B.3.2; No. 136/2015, 1 October 2015, B.9; No. 80/2010, 1 July 2010, B.5.1; No. 169/2015, 26 November 2015, B.4: *"The right to vote and the right to be elected are fundamental political rights in a State governed by the rule of law."*

30 L.P. Suetens, "De invloed van het Arbitragehof op het grondwettelijk recht", *R.W.*, 1993–1994, 1317–1318.

31 CC No. 106/2004, 16 June 2004, B.3.2.

32 E.g. CC No. 49/1996, 12 July 1996, B.3.8.

much is left to the discretion of the judge." Influenced by the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), the Constitutional Court has since 2005-2006 added the following considerations: *"However, the* lex certa *principle does not prohibit the legislature to grant a certain margin of appreciation to the judge, because of the general character of legislation, its applicability to a wide variety of cases and the evolution of the acts they aim to sanction.*

The condition that an offence must be clearly defined by the law is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

It is only by examining a particular provision of criminal law that it is possible to determine, taking into account the elements proper to the offences it is intended to punish, whether the general terms used by the legislature are so vague as to infringe the principle of legality in criminal matters."[33]

8.2. The principle of the *non-retroactive effect of laws* is a general principle of law.[34] Leaving aside criminal law,[35] interpretative laws[36] and validation laws, the Constitutional Court states:

> *"The non-retroactive effect of laws is a safeguard meant to prevent legal uncertainty. This safeguard requires that the content of the law is foreseeable and accessible, so that the individual can reasonably foresee the consequences of a particular act when it is carried out. Retroactivity is only justified if it is essential to achieve an objective of general interest.*
>
> *If, moreover, it turns out that the purpose or consequence of the retroactivity consists of influencing the outcome of a judicial proceeding in a certain direction or to prevent the courts from deciding a specific point of law, the nature of the principle at issue requires that exceptional circumstances or compelling grounds of the general interest justify the intervention of the legislature, which infringes, at the expense of one category of citizens, the procedural safeguards that are offered to everyone."*[37]
>
> Finally, a legislative act must on no account infringe on final judgments. If that is its aim, it would violate Articles 10 and 11 of the Constitution by depriving a certain category of persons from the benefit of final judgments, which cannot be justified under any circumstance. *"This is one of the essential principles of the rule of law."*[38]

According to the recent case law of the Constitutional Court, mere budgetary considerations no longer seem able to justify retroactivity.[39]

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33 E.g. CC No. 1/2016, 14 January 2016, B.5.3.

34 CC No. 7/1997, 19 February 1997, B.4.6.

35 The Constitutional Court applies Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights.

36 The Constitutional Court verifies whether a so-called interpretative law is really *"a law that gives a legislative provision the meaning that the legislature meant to give it at the time of its adoption and that it can reasonably be given."* Indeed, *"the safeguard of the non-retroactive effect of laws cannot be evaded by the mere fact that a law with retroactive effect is presented as an interpretative law"*; CC No. 102/2006, 21 June 2006, B.5.2.

37 E.g. CC No. 77/2015, 28 May 2015, B.4.1.

38 E.g. CC No. 107/2011, 16 June 2011, B.7.1.

39 CC No. 54/2015, 7 May 2015, B.13. See also CC No. 1/2015, 22 January 2015, and European Court of Human Rights,

8.3. In principle, it is up to the legislature to consider, when introducing new regulations, whether it is necessary or appropriate to include *transitional provisions*. *"The principle of equality and non-discrimination is only violated if the transitional regime, or the absence thereof, results in a difference in treatment without reasonable justification, or if the principle of legitimate expectations is excessively impaired."*[40] Such is the case if *"the legitimate expectations of a specific category of persons are impaired without any compelling ground of the general interest justifying the absence of a transitional regime put in place for their benefit."*[41]

1.4. The Unstoppable Rise of the Principle of Proportionality

9. Under this title, P. MARTENS, honorary President of the Constitutional Court, described in 1992 the rise of the principle of proportionality in (public) law.[42] About a quarter of a century later, the principle of proportionality has become firmly entrenched in the case law of the Constitutional Court, particularly with respect to rights and freedoms, but also with respect to the division of powers.

10.1. According to the Constitutional Court, *"the principle of proportionality is inherent in any exercise of powers."*[43]

10.2. This principle prohibits any legislature from exercising its powers in such a way that it becomes impossible or excessively difficult for another legislature to efficiently exercise its powers.[44]

Since the *absence of cooperation* in a matter for which the Special Majority Act on Institutional Reform requires mandatory cooperation, is not compatible with the principle of proportionality inherent in any exercise of powers, the Court may verify compliance with the obligation to conclude cooperation agreements.[45] If the powers of the federal State and the federated entities have become interwoven to such an extent that they can no longer be exercised without mutual cooperation, for instance as a result of technological developments, a legislature violates the principle of proportionality if it legislates unilaterally on the matter, even if the Special Majority Act on Institutional Reform does not provide for an obligation to conclude a cooperation agreement.[46]

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3 September 2013, *M.C. and others v. Italy*, as well as CC No. 131/2015, 1 October 2015, B.13 (*"The budgetary objective invoked during the parliamentary* travaux *cannot release the legislature from its obligation to guarantee for every person the right to lead a life in keeping with human dignity when a foreign national needs urgent medical attention"*).

40 E.g. CC No. 41/2016, 17 March 2016, B.10.

41 E.g. CC No. 86/2015, 11 June 2015, B.4.6 (violation as in several judgments).

42 P. Martens, "L'irrésistible ascension du principe de proportionnalité", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu*, Brussels, Bruylant, 1992, I, 49–68.

43 E.g. CC No. 168/2004, 28 October 2004, B.5.3; No. 172/2006, 22 November 2006, B.8.

44 E.g. CC No. 116/2009, 16 July 2009, B.8.

45 E.g. CC No. 40/2012, 8 March 2012, B.5.

46 CC No. 132/2004, 14 July 2004, B.6.2; No. 128/2005, 13 July 2005, B.6; No. 163/2006, 8 November 2006, B.3–B.4. See also

Before the Special Majority Act on the Constitutional Court in 2014 conferred jurisdiction on the Constitutional Court to review the compatibility of legislation with the principle of *federal loyalty*[47] enshrined in Article 143(1) of the Constitution,[48] the Constitutional Court already ensured the respect for that principle, read in combination with the principle of reasonableness and proportionality, by granting this principle the same significance as the principle of proportionality.[49]

The Constitutional Court also applies the principle of proportionality when a legislature deprives the municipalities or the provinces of some of their powers[50] or when it examines whether implied powers may be accepted by verifying the condition whereby the provisions adopted by a legislature outside the scope of its powers only have a marginal impact on the powers conferred upon another legislature.

10.3. The principle of proportionality does not only limit the legislatures' powers *ratione materiae*, but also their powers *ratione loci*: because of the very nature of the promotion of culture, the powers relating to this matter may produce effects outside the territory for which a community legislature is responsible; nevertheless, those potential extraterritorial effects *"must not counteract the cultural policy of the other community."*[51]

11.1. Even more so than in the review of the division of powers, the principle of proportionality plays an important part in the review of the compliance of legislation with the *principle of equality and with the other fundamental rights*; the litigation in those matters accounts for around 90 percent of the case law of the Constitutional Court.

11.2. As in the case law of the European courts and the higher courts in the national order, review of consistency with the principle of proportionality is often the final stage in the examination of the observance of the *principle of equality and non-discrimination,*[52] in which the Constitutional Court examines whether a measure, in its consequences, and the means employed to achieve that measure, are in reasonable proportion to the aim pursued. The Court had already

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CC No. 158/2013, 21 November 2013, B.17.7.

47 See Articles 1(3°) and 26(1)(4°) of the Special Majority Act of 6 January 1989 on the Constitutional Court, inserted by Articles 47 and 48 of the Special Majority Act of 6 January 2014 (*Moniteur belge,* 31 January 2014, 1st edition).

48 This article provides: "*In the exercise of their respective responsibilities, the federal State [and the federated entities] act with respect for federal loyalty, in order to prevent conflicts of interest.*"

49 "*The principle of federal loyalty […] means that each legislature is obliged, in the exercise of its own powers, to ensure that its own actions do not render the exercise of the other legislatures' powers impossible or excessively difficult*"; CC No. 119/2004, 30 June 2004, B.3.3; No. 97/2014, 30 June 2014, B.4.5. See also CC No. 98/2015, 25 June 2015, B.30.3; No. 21/2016, 18 February 2016, B.12.

50 As of judgment No. 95/2005, 25 May 2005, B.26.

51 CC No. 54/96, 3 October 1996, B.7.2.

52 After – where appropriate – the comparability test, the review of the aim pursued, the objective and the relevant criterion of distinction.

established its case law on that matter in its first judgment on the principle of equality and non-discrimination.[53] In that judgment, the Court ruled as follows: *"It is not for the Court to assess whether a measure established by law is appropriate or desirable. It is up to the legislature to determine what measures have to be taken to achieve the aim it has set itself. […] It is not for the Court to examine […] whether or not the aim pursued by the legislature can be achieved by different legal measures."*[54] Fortunately, the Court has abandoned this view, as such examination does form part of the proportionality test.[55] The Court has also considered that *"it does not have the same scope of appraisal as does the legislature"*,[56] yet such considerations have become very rare. Likewise, the term *"manifest(ly)"* has largely disappeared from the Court's parlance. All the foregoing suggests a more complete review of the principle of proportionality, rather than a merely marginal review. The requirement of proportionality is in fact implicitly laid down in Articles 10 and 11 of the Constitution.[57]

11.3. As was already mentioned (see No. 4), the Constitutional Court reads Articles 10 and 11 of the Constitution in conjunction with all *rights and freedoms* guaranteed by international treaties binding Belgium, and reads the fundamental rights enshrined in the Constitution in combination with the treaty provisions binding Belgium which are analogous in scope. The Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and the International Covenant on Civil and Political Rights are the most often applied international human rights conventions. Unlike the Belgian Constitution, which makes a formal distinction as regards restrictions between regulatory measures, repressive measures (both permitted in principle) and preventive measures (prohibited in principle), the aforementioned international conventions employ a system of substantive restrictions: *"the law"* (i.e. a provision of national law which is accessible and precise) may subject the exercise of most freedoms to certain restrictions, provided that they are strictly necessary in a democratic society, and that they pursue a legitimate aim. The measure must be both relevant (i.e. meet a pressing social need) and proportionate to the legitimate aim being pursued. When reading the Belgian Constitution in conjunction with a treaty provision, the Constitutional Court verifies whether the restriction is provided for by a "law" in the formal sense, if the Belgian Constitution so requires, but also whether it satisfies the substantive conditions stipulated in the treaty provision: the legislative provision must be sufficiently precise, meet a pressing social need, and be proportionate to the legitimate aim being pursued.[58]

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53 CC No. 23/89, 13 October 1989, B.1.3: *"[…]; the principle of equality is violated if it is found that there is no reasonable degree of proportionality between the means employed and the aim pursued."*

54 CC No. 23/89, 13 October 1989, B.2.7.

55 E.g. CC No. 16/2005, 19 January 2005, B.6.2 (regarding the restriction of the right to respect for private and family life enshrined in Article 22 of the Constitution): *"[…] since this aim may also be achieved in a manner that is less harmful to those concerned […]."*

56 E.g. CC No. 121/2009, 16 July 2009, B.14.6. See also CC No. 157/2005, 20 October 2005, B.7.2; No. 18/2015, 12 February 2015, B.5.

57 CC No. 40/2003, 9 April 2003, B.23.2; No. 88/2004, 19 May 2004, B.27.

58 Established case law since CC No. 202/2004, 21 December 2004, B.5.4.

11.4. As in the case law of the European Court of Human Rights, the principle of proportionality is a *general principle of law* in the Constitutional Court's case law, i.e. a criterion for finding the right balance between the protection of the general interest of the society and the respect for fundamental human rights.[59] For every court, the principle of proportionality is the ideal instrument to weigh interests and values.[60]

The case law of the Constitutional Court contains many other applications of the principle of proportionality, for example in the matter of administrative fines,[61] penalties[62] and the right to property.[63]

1.5. Conclusion

12. Belgium has come a long way, from the "inviolability of the law" to its review of consistency with the Constitution by the Constitutional Court, which also involves international treaties in its review (see Nos. 1–5). Despite the fact that explicit reference to the "rule of law" in the case law of the Constitutional Court is rare (see No. 6), it constitutes for this Court an unwritten constitutional principle underlying other principles (see No. 7), in particular the principle of legal certainty (see No. 8) and the principle of proportionality (see No. 9), the latter both in the review of the division of powers (see No. 10) and even more so in the review of consistency with the principle of equality and the other fundamental rights (see No. 11). In the case law of the Constitutional Court, the rule of law is indeed alive and kicking.

2. Challenges

13. As it is impossible to sum up all possible challenges, we will discuss two challenges of an entirely different nature: on the one hand, an institutional one, the relationship between EU law and the Constitution; on the other hand, a substantive challenge, the fight against terrorism.

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59 M.A. Eissen, "Le principe de proportionnalité dans la jurisprudence de la Cour européenne des droits de l'homme", *Etudes et Documents du Conseil d'Etat*, 1988, 275–284.

60 W. Van Gerven, "Het proportionaliteitsbeginsel", in *Hommage aan Marcel Storme. De norm achter de regel*, Deurne, Kluwer, 1995, 1–17.

61 E.g. CC No. 25/2016, 18 February 2016, B.40.2: the mere fact that the Council of State does not have the power to "quash" decisions is not sufficient to conclude that its review does not meet the requirements of full jurisdiction within the meaning of Article 6 of the European Convention on Human Rights, since it carries out an in-depth review, in law and in fact, of the decision and of its proportionality.

62 E.g. CC No. 13/2015, 5 February 2015, B.20: *"[…], the principle of legality demands that the penalty must be in proportion to the offence committed. The penalty inflicted must be in proportion to the seriousness of the reprehensible conduct."* See also CC No. 8/2010, 4 February 2010, B.12 (regarding disciplinary penalties).

63 Article 16 of the Constitution, which only relates to expropriation, and Article 1 of the First Protocol to the European Convention on Human Rights are considered by the Constitutional Court as "analogous provisions".

2.1. EU Law

14. Belgium's EU membership has been a challenge for the Constitution. Its accession to the Treaty establishing the European Coal and Steel Community (1951), the Treaty establishing the European Economic Community (1957) and the Treaty establishing the European Atomic Energy Community (1957) was said to violate the principle of national sovereignty enshrined in Article 33 of the Constitution, because the assignment of the exercise of legislative, executive, judicial and fiscal competences to supranational organisations ran counter to the requirement that all powers must be exercised in the manner laid down by the Constitution, which did not mention competences of international organisations.[64] This problem was only resolved in 1970, when a new Article 34 was inserted into the Constitution, stipulating that "*the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law*", thus providing a *post factum* constitutional basis for Belgium's membership of international organisations.[65]

Article 34 of the Constitution is regularly invoked by the Council of State's Legislation Division, which has developed five cumulative criteria for examining the constitutionality of further assignments of the exercise of powers to international organisations.[66] First, the assignment only concerns the *'exercising'* of powers, whereas the powers themselves remain with the competent Belgian institutions. The exercising of powers can be taken back at any time,[67] even though this will likely lead to Belgium leaving the international organisation. Second, the assignment should only concern *'specific'* powers, which must be limited in scope and clearly defined. Third, every assignment requires the *'legislature's consent'*, e.g. by approving the treaty establishing an international organisation. Fourth, the assignment must be to the benefit of an *'institution of public international law'*, i.e. not to the benefit of another State or to the benefit of a cross-border association of municipalities. And fifth, these assignments may only deviate from the constitutional provisions concerning the exercise of *'powers'*: if an assignment deviates from other constitutional provisions, such as human rights, the treaty may only be approved and ratified after amending the constitutional provisions concerned.[68]

64 Council of State, general assembly of the Legislation Division, opinion of 12 January 1953, *Parl. Doc.*, House of Representatives, 1952–1953, No. 163. *Adde* the legal opinions of G. Dor, W.J. Ganshof Van der Meersch, P. De Visscher and A. Mast of 17 April 1953, *Parl. Doc.*, House of Representatives, 1952–1953, No. 696.

65 See A. Alen, *Hoe 'Belgisch' is het 'Belgische staatsrecht' nog?*, Antwerp, Intersentia, 2015, 21–26; P. Vandernoot, "Regards du Conseil d'Etat sur une disposition orpheline: l'article 34 de la Constitution", in *En hommage à Francis Delpérée*, Brussels, Bruylant, 2007, 1599–1630; W. Verrijdt, "EU Integration and the Belgian Constitution", in S. Griller, M. Claes and L. Papadopoulou (eds.), *Member States' Constitutions and EU Integration*, Oxford, Hart Publishing, 2016 (to be published), No. 20.

66 E.g. Council of State, Legislation Division, opinion of 15 February 2005, *Parl. Doc.*, Senate, 2004–2005, No. 3-1091/1 (the European Constitution); opinion of 29 January 2008, *Parl. Doc.*, Senate, 2007–2008, No. 4-568/1 (the Lisbon Treaty); opinion of 18 September 2012, *Parl. Doc.*, Flemish Parliament, 2012–2013, No. 1815/1 (the Fiscal Compact); and opinion of 3 April 2012, *Parl. Doc.*, Senate, 2011–2012, No. 5-1598/1 (the ESM Treaty). See on these criteria P. Vandernoot, *o.c.*, 1599–1630.

67 *Parl. Doc.*, House of Representatives, Extraordinary Session 1968, No. 16/2, pp. 4–5; P. De Stexhe, *La revision de la Constitution belge 1968-1970*, Brussels, Larcier, 1972, No. 304.

68 The Council of State's Legislation Division has suggested that Article 195 of the Constitution, which stipulates the

Unfortunately, these criteria are often ignored by the legislature, who has approved some of these treaties without passing the necessary constitutional amendments.[69]

15. The significance of Article 34 of the Constitution stretches beyond the assignment of new competences to the European Union. According to the Council of State's Legislation Division, this constitutional provision also implies that, after the assignment of new competences, the empowered EU bodies may take autonomous decisions, without being bound by the Belgian Constitution. Therefore, the provisions of the Belgian Constitution cannot take precedence over secondary EU law that obliges the Belgian authorities to take actions violating the Constitution, even including constitutional rights.[70]

16. This possibility of having to adopt unconstitutional legislation increases with every extension of the EU's competences, taking into account that they are interpreted very extensively by the ECJ, which also has exclusive jurisdiction for examining the validity of norms of secondary EU law. In a multi-layered legal order, the question how constitutional courts should deal with this challenge, is a very important one.

The two most compelling problems in this regard involve, on the one hand, the position of the national constitutional provisions offering a more extensive human rights protection than the Charter of Fundamental Rights of the European Union (hereinafter: the Charter), and, on the other hand, the wider human rights protection offered by the European Convention on Human Rights (hereinafter: the Convention).

17. Before addressing these two problems, it should be stressed that, among European constitutional courts, the Belgian Constitutional Court has a very particular approach towards EU law, by examining, through the lens of its discrimination test, whether legislation respects

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procedure for amending the Constitution, would be amended in order to allow for such revisions of the Constitution following a swifter procedure than the current one, which involves the dissolution of the Parliament and legislative elections (Council of State, Legislation Division, opinion of 29 January 2008, *Parl. Doc.*, Senate, 2007–2008, No. 4-568/1, p. 343). This path has, however, not been followed yet.

69 Concerning the Lisbon Treaty, the *Conseil d'Etat*'s Legislation Division had suggested the prior amendment of the principle *nullum crimen sine lege* in Article 12 of the Constitution, in which '*lege*' refers to a Belgian legislature, in order to allow for the creation of a European Public Prosecutor's Office, but this constitutional amendment has never been adopted. Meanwhile, the Constitutional Court has accepted that an EU regulation suffices as a legal basis because of its direct applicability (CC No. 37/2010, 22 April 2010), but this argument cannot be used for secondary EU law lacking direct applicability.

70 Council of State, Legislation Division, opinion No. 39.192/3 of 4 November 2005, *Parl. Doc.*, House of Representatives, 2005–2006, No. 51-2189/1, pp. 113–116 (a directive concerning advertising for medication); opinion of 29 January 2008, *Parl. Doc.*, Senate, 2007–2008, No. 4-568/1, p. 341 (the Lisbon Treaty). The Council of State's Administrative Tribunal Division upholds the same principle: CE 5 November 1996, *Goosse*, No. 62.921 and *Orfinger*, No. 62.922; CE 31 March 2014, *J.V.H. e.a.*, No. 226.980 (in the latter judgment, the Council of State holds that rules of secondary EU law trump constitutional provisions, insofar as these rules do not leave any margin for a measure which respects the Constitution).

EU law (see No. 4), by respecting all procedural requirements derived from the principle of full effect of EU law by the ECJ,[71] and by having referred 91 preliminary questions to the ECJ in 26 judgments.[72]

2.1.1 EU Law and the Constitution

18. Nevertheless, the possibility of unconstitutional obligations of EU law remains, and hence, the hierarchical relation between the Constitution and EU law must be addressed.[73] A distinction should, in this regard, be made between primary EU law and secondary EU law.

As primary EU law is plain treaty law, it follows the logic of the relation between international law and the Constitution. According to the Court of Cassation, all self-executing treaties have precedence over the Constitution.[74] According to the Council of State and the Constitutional Court, however, the Constitution ranks higher than international treaties, because treaties can only enter the Belgian legal order after being approved by an Act which is fully subjected to the Constitutional Court's constitutional review. An additional argument is that the legislature may not do indirectly, by approving an unconstitutional treaty, what it may not do directly, i.e. violate the Constitution.[75] The Constitution does not resolve this discussion. The legislature has, however, implicitly subscribed to the latter view, as it has shortened the delay for challenging Acts approving treaties before the Constitutional Court from six months to sixty days, and as it has only precluded preliminary references concerning Acts approving the 'constituent EU Treaties' and the Convention and its additional protocols.[76]

71 E.g. the *Marleasing* requirement of interpretation in conformity with EU law (CC No. 55/2011, 6 April 2011; No. 161/2012, 20 December 2012); the *Factortame* requirement of interim measures (CC No. 96/2010, 29 July 2010); the *van Schijndel and van Veen* requirement of *ex officio* application of EU law (CC No. 97/2011, 31 May 2011; No. 74/2012, 12 June 2012; No. 15/2015, 5 February 2015); the *Winner-Wetten* prohibition on the temporal maintenance of legislation violating EU law (CC No. 144/2013, 7 November 2013); etc. See J. Theunis, "Het Grondwettelijk Hof en de procedurele verplichtingen uit het Europees Unierecht", in W. Pas, P. Peeters and W. Verrijdt (eds.), *Liber discipulorum André Alen*, Bruges, die Keure, 2015, 409–438.

72 See A. Alen and W. Verrijdt, "Le dialogue préjudiciel de la Cour constitutionelle belge avec la Cour de justice de l'Union européenne", in *Liber amicorum Yves Lejeune*, 2016 (to be published).

73 See A. Alen and W. Verrijdt, "La relation entre la Constitution belge et le droit international et européen", in *Liber amicorum Rusen Ergec*, 2016 (to be published).

74 Cass. 9 November 2004, *Rev. Dr. Pén.* 2005, 789; Cass. 16 November 2004 *RW* 2005–06, 387. Except if the Constitution offers a more extensive protection (Article 53 of the Convention). The Special Majority Act of 12 July 2009 has implicitly sanctioned this position (see No. 5, concerning Article 26 (4) of the Special Majority Act on the Constitutional Court).

75 CC No. 26/91, 16 October 1991; CC No. 12/94, 3 February 1994; CC No. 20/2004, 4 February 2004; CC No. 87/2010, 8 July 2010; CC No. 117/2011, 30 June 2011; CC No. 32/2013, 7 March 2013; CC. No. 62/2016, 28 April 2016; Council of State, Legislation Division, opinion No. 21.540, 6 May 1992, *Parl. Doc.*, House of Representatives, 1991–1992, No. 482/1, pp. 69–72; opinion No. 28.936/2, 21 April 1999, *Parl. Doc.*, Senate, 1999-2000, No. 2-329/1, pp. 94–101.

76 Articles 3 (2) and 26 (1*bis*) of the Special Majority Act on the Constitutional Court.

Concerning secondary EU law, all *'supreme courts'* reach the same outcome, albeit based on a different reasoning. Whereas the Court of Cassation bases the primacy of secondary EU law over the Constitution on the ECJ's *Internationale Handelsgesellschaft* judgment,[77] the Constitutional Court and the Council of State base that same primacy on Article 34 of the Constitution.[78] The latter reasoning implies that, in the end, the Constitution is the highest norm, and that the precedence of EU law over the Constitution is constrained by the conditions defined in the Constitution.

19. The Constitutional Court has long been silent about the role of Article 34 of the Constitution in this regard. In a 2010 judgment, it has, for the first time, used this provision to justify the legislature's implementation of a directive which was alleged to violate the Constitution. That EU directive required the legislature to confer vast regulatory powers upon the independent federal energy regulatory office (CREG). The legal provisions concerned were challenged because of a lack of accountability towards the competent Minister and towards the Parliament, principles anchored in Articles 33, 37 and 101 of the Constitution. The Constitutional Court, however, ruled that, insofar as necessary, the deviation from these constitutional rules was justified because of Article 34 of the Constitution.[79] It must be noted, however, that Article 34 of the Constitution was not used as the sole justification in the Court's reasoning: it was mentioned as a final argument and it was thus used to grant the legislature a very broad margin of appreciation when transposing the obligations following from secondary EU law.

20. In a recent judgment, the Constitutional Court was more explicit about the meaning of Article 34 of the Constitution and the relation between the Belgian Constitution and EU law. Rejecting actions for annulment of the Act approving the ESM Treaty, because the petitioners lacked standing, the Court added the following *obiter dictum* argument: *"When approving a treaty which [attributes new competences to EU institutions], the legislature must respect Article 34 of the Constitution. By virtue of that provision, the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law. While these institutions may subsequently decide autonomously about how they exercise these competences, Article 34 of the Constitution cannot be interpreted as granting an unlimited licence to the legislature, when approving that treaty, or to the said institutions, when exercising their attributed powers. Article 34 of the Constitution does not allow a discriminating derogation to the national identity inherent in the fundamental structures, political and constitutional,*[80] *or to the basic values of the protection offered by the Constitution to all legal subjects."*[81]

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77 Cass. 2 June 2003, *RCJB* 2007, 24. It has also referred to the precedence of EU law over all other norms of law as a general principle of law (Cass. 4 April 2008, *Arr.Cass.* 2008, No. 205).

78 CC No. 130/2010, 18 November 2010; Council of State, Administrative Tribunal Division, 5 November 1996, *Goosse*, n° 62.921; *id.*, 5 November 1996, *Orfinger*, No. 62.922.

79 CC No. 130/2010, 18 November 2010, B.8.1.

80 This formulation reflects Article 4.2 TEU.

81 CC No. 62/2016, 28 April 2016, B.8.7.

The Constitutional Court has thus explicitly acknowledged that neither primary nor secondary EU law may violate the Belgian national and constitutional identity or the basic values of human rights protection. Implicitly, it has also acknowledged that the European institutions may not act *ultra vires*. These lines can be read as a subscription to the German *Bundesverfassungsgericht*'s *Honeywell* jurisprudence, which protects the same aspects of the German Constitution against infringements by EU law.

Whereas the *Bundesverfassungsgericht* developed this jurisprudence in several subsequent judgments, in which it added several material and procedural specifications and conditions, the Belgian Constitutional Court did not go further than mentioning the principle of national identity and the basic values of constitutional protection. It did not specify whether these principles imply a review competence for the Constitutional Court, nor what the consequences of such a review would be for the applicability of the examined rule of secondary EU law in Belgium.

Nor did the Constitutional Court explain whether it would enter into a preliminary dialogue with the ECJ before conducting its possible review and whether it would grant a *Fehlertoleranz* to the ECJ. If the *Bundesverfassungsgericht*'s practice is followed, a preliminary dialogue with the ECJ is necessary both in the *ultra vires* review[82] and in the identity review,[83] because this is a crucial element in balancing respect for the full effect of EU law and the protection of the essence of the Constitution.

21. The Constitutional Court also avoided the most delicate discussion in this regard, i.e. which constitutional provisions and principles are part of Belgium's national identity and which ones are not. This question has not yet been the subject of much doctrinal debate, but it is clear that the ambit of the constitutional provisions which could be used as "a shield" against EU law, may not be too broad, so that only some key aspects of the Constitution, relating to Belgium's specific constitutional history and culture, can come into play.[84] These constitutional aspects could relate to, on the one hand, the very reasons why Belgium became an independent State, and, on the other hand, the reasons why it still exists, after surviving several linguistic and ideological tensions.[85]

The first set of aspects may be less significant than the second one, because of the long time passed since 1831 and the evolutionary interpretations of many of the constitutional provisions which were framed as a reaction against the Dutch King Willem I's reign. Nevertheless, this historical

82 E.g. BVerfG 14 January 2014, 2 BvR 2728/13 (*Gauweiler*). This referring judgment was followed by ECJ 16 June 2015, *Gauweiler*, C-62/14, and BVerfG 21 June 2016, 2 BvR 2728/13. In the *Bundesverfassungsgericht*'s final judgment, the OMT mechanism was only held to be consistent with the German Constitution provided some restrictive interpretations.

83 E.g. BVerfG15 December 2015, 2 BvR 2735/14.

84 H. Dumont, "L'intégration européenne et le respect de l'identité nationale des états (notamment fédéraux)", in E. Vandenbossche and S. Van Drooghenbroeck (eds.), *Europese voorschriften en Staatshervorming / Contraintes européennes et réforme de l'Etat*, Bruges, die Keure, 2013, 55, who limits this ambit to *"ce qui fait qu'un État est lui-même et non un autre, ce qui permet de le reconnaître et de le distinguer des autres"*.

85 W. Verrijdt, *o.c.*, No. 43.

background still explains why the Belgian Constitution puts so much emphasis on the legality principle, requiring the intervention of a democratically elected legislature in several matters, such as limitations to human rights. It also explains why several human rights which were systematically ignored by the Dutch King Willem I between 1815 and 1830, benefit from a more extensive protection by the Belgian Constitution than analogous human rights in the Convention and the Charter (e.g. the freedom of education, the freedom of religion and the freedom of the press).[86]

The second set of aspects reveals another particularity of the Belgian polity, i.e. its talent for reaching compromises.[87] The Belgian history shows several examples of bipolar oppositions, such as the ideological opposition between Catholics, on the one hand, and Socialists and Liberals, on the other hand, culminating in the *'School Issues'*, which were resolved by the *School Pact* in 1958,[88] and the linguistic opposition between Flemish and Walloons, starting as soon as the 1840's, cumulating in violent student protests in 1968 and eventually leading to Belgium's transformation into a federal state *sui generis*. Arguably, these fundamental compromises, which were reached after difficult negotiations, and every single aspect of equal importance to the pacifying compromise, are part of Belgium's *"fundamental structures, political and constitutional,"* because they have resolved deeply rooted crises. If some elements of a delicate compromise would perish, the whole equilibrium could be lost.

Therefore, the basic choices made during Belgium's federalisation process can be considered to be part of its national identity.[89] In that respect, the fundamental choices for territorial federalism, the rule of linguistic parity, and the specific linguistic regulations[90] are relevant. The specific choices, typical for Belgian federalism, regarding the operation of participative and cooperative federalism can also be mentioned in this context.[91]

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86 See, on the historical links between the Dutch Constitution of 1815 and the Belgian Constitution of 1831, A. Alen, D. Heirbaut, A.W. Heringa and C. Rotteveel Mansveld (eds.), *De Grondwet van het Verenigd Koninkrijk der Nederlanden van 1815. Staatkundige en historische beschouwingen uit België en Nederland*, The Hague / Bruges, Boom / die Keure, 2016 (to be published).

87 For more details, see A. Alen, D. Haljan, P. Peeters and S. Feyen (eds.), *International Encyclopaedia of Constitutional Law – Belgium*, Alphen aan den Rijn, Kluwer Law International, 2013, Nos. 425, 456-458 and 484.

88 The essential aspects of this School Pact, regarding the active and passive freedom of education and its financing, were anchored in Article 24 of the Constitution in 1988 and the Constitutional Court was empowered to review the compliance of legislation with this new Article 24.

89 E. Cloots, "Europese integratie en de eerbiediging van de nationale identiteit van de lidstaten", in E. Vandenbossche and S. Van Drooghenbroeck (eds.), *o.c.*, 25–26. This author includes the choice whether or not to grant regional authorities a degree of political autonomy, the choice to become a federal State, the circumscription of the federated entities, the definition of their legislative powers, as well as their applicability *ratione personae* and *ratione materiae*, and the organs competent for exercising these powers and for safeguarding the division of competences.

90 In its *Las* judgment, the ECJ has acknowledged that the protection of the official language of a federated entity is part of Belgium's national identity, but it has nevertheless stated that a Flemish Community Act requiring the contracts between employers and employees to be in Dutch, regardless their own language, went too far (ECJ 16 April 2013, *Las*, C-202/11, par. 26).

91 H. Dumont, *o.c.*, 66.

22. Another interesting question is whether the constitutional catalogues of human rights are part of the national identity, or at least if they remain valid as "a shield" against secondary EU law insofar as they offer a more extensive human rights protection than the Charter. In Belgium, several constitutional rights which still offer a more extensive protection than the Charter and the Convention, are indeed the result of Belgium's specific historical context (see No. 21).

According to the ECJ's interpretation of Article 53 of the Charter, the national constitutions may, however, not offer such a protection against acts of secondary EU law and their national implementation, because that would jeopardize the "primacy, unity and effectiveness" of EU law.[92] This interpretation by the ECJ is criticized because it seems to contradict the very wording of that provision, to jeopardize the level of human rights protection offered by the national constitutions and to lead to the emergence of two different levels of human rights protection, depending on the applicability of EU law. This danger, and the legal uncertainty it would bring along, can only be contained by a strong dialogue between the ECJ and the national constitutional courts, and by a stronger reasoning of the ECJ's judgments, which also takes into account national constitutional interests.[93]

A judgment of the German *Bundesverfassungsgericht* dated 15 December 2015 shows the potential of linking the principle of national identity with the constitutional human rights catalogue. In that judgment, the *Bundesverfassungsgericht* explained that it will protect fundamental rights as part of identity review in *Verfassungsbeschwerde* proceedings.[94] Such a reasoning seems to imply that, if the *Grundgesetz* offers a wider protection than the Charter, the *Melloni* judgment is *de facto* set aside. It should, however, be noted that the *Bundesverfassungsgericht* will exercise this competence with restraint, with an open mind to European integration, and after a preliminary dialogue with the ECJ.

As the Belgian Constitutional Court has not yet defined the scope of the Belgian national identity (see No. 21), it is unclear whether it would circumvent the *Melloni* judgment using this technique.

23. In the ECJ's view, the monopoly for the review of secondary EU law resides in the Luxembourg Court,[95] and includes the national identity review in light of Article 4.2 TEU.[96] In this view,

92 ECJ 26 February 2013, *Melloni*, C-399/11, par. 60. See par. 58: *"That interpretation of Article 53 of the Charter [giving to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter] would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution"*.

93 A. Alen, *o.c.*, 36–38; J. Komarek, "The place of national constitutional courts in the EU", *ECLR* 2013, 433.

94 BVerfG 15 December 2015, 2 BvR 2735/14 (see No. 20).

95 ECJ 22 October 1987, *Foto-Frost*, C-314/85; ECJ 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10.

96 ECJ 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs- GmbH t. Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02; ECJ 22 December 2010, *Ilonka Sayn-Wittgenstein*, C-208/09.

there is no room for national identity review by constitutional courts. Nevertheless, several constitutional courts have already acknowledged that they would declare obligations of secondary EU law inapplicable if they would run counter to elements of national identity.[97]

The case law of these constitutional courts shows that the EU's perspective of national identity does not stand alone, but should be balanced with the national perspective on the same principle.[98] According to some authors, the ECJ is not very well placed to determine, for each Member State, which aspects of its national constitution relate to its national identity.[99] A genuine dialogue between the national constitutional courts and the ECJ is therefore called for whenever an element of national identity is in play.

24. The Belgian Constitutional Court's practice shows that it does not avoid dialogue with the ECJ (see No. 17). In principle, the Belgian Constitutional Court will respect the precedence of EU law, and it will only examine the constitutionality of Acts transposing norms of secondary EU law insofar as they leave the legislature a free choice of means.[100] If the validity of a norm of secondary EU law is challenged before the Constitutional Court, it will refer the case to the ECJ for a preliminary ruling.[101]

An interesting example of this practice concerns the *Test-Achats* case. The Belgian consumer protection organisation, which did not have standing before the ECJ in order to challenge a directive provision allowing the national legislatures to distinguish between men and women with regard to the amount of life insurance premiums, challenged the Act transposing that possibility before the Constitutional Court. The petition for annulment was based on the principle of equality and non-discrimination laid down in the Belgian Constitution, but the Constitutional Court referred the case to the ECJ for a preliminary ruling on the directive's

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97 E.g. BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell* (Germany); CC n° 2006-540, 27 July 2006, *Droit d'auteur*; CC n° 2010-79 QPC, 17 December 2010, *Kamel Daoudi* (France); comp. with a direct constitutionality review of secondary EU law by the Polish Constitutional Court (SK 45/09, 16 November 2011). The Czech Constitutional Court has already declared a norm of secondary EU law inapplicable after an ultra vires review (Pl. ÚS 5/12, 14 February 2012). See also the recent decision of the *Bundesverfassungsgericht* in the *Gauweiler* case, in which the OMT mechanism was only held to be consistent with the German Constitution provided some restrictive interpretations (BVerfG 21 June 2016, 2 BvR 2728/13; see No. 20).

98 R. Arnold, "The Federal Constitutional Court of Germany in the context of European integration", in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.), *Human Rights Protection in the European legal order: the interaction between the European and the national courts*, Antwerp, Intersentia, 2011, 252–253.

99 L. Besselink, "National and constitutional identity before and after Lisbon", *Utrecht Law Review* 2010, 45.

100 CC No. 59/2014, 3 April 2014; No. 144/2014, 9 October 2014.

101 Validity questions to the ECJ have been referred in the following eight cases: CC No. 124/2005, 13 July 2005 (*European Arrest Warrant*); No. 126/2005, 13 July 2005 (*Money Laundering*); No. 103/2009, 18 June 2009 (*Services Directive*); No. 128/2009, 24 July 2009 (*European Arrest Warrant*); No. 116/2012, 10 October 2012 (*Directive 95/46*); No. 172/2013, 19 December 2013 (*Universal Services Directive*); No. 165/2014, 13 November 2014 (*VAT Directive*); No. 15/2015, 5 February 2015 (*Commission decisions*).

respect for the principle of equality laid down in EU law.[102] The ECJ found a violation of this principle and ruled the directive's provision was invalid.[103] Subsequently, the Constitutional Court annulled the Belgian transposition, by merely copying the reasoning on the merits from the ECJ's judgment.[104]

25. The Belgian Constitutional Court thus subscribes to the principle of sincere cooperation with the European Union. Ensuring the full effect of EU law accords with upholding the rule of law. Nevertheless, ensuring human rights is an even more compelling feature of the rule of law. If both principles run counter to each other, the Constitutional Court is likely to use all existing techniques of judicial dialogue in order to avoid problems, but it has suggested that it will take the rule of law into account.

2.1.2. EU Law and the European Convention on Human Rights

26. European constitutional pluralism is not limited to national constitutions and EU law, but also comprises the Convention, which must also be interpreted and applied according to a principle of full effect.[105] Problems may arise when EU law's principle of full effect conflicts with the Convention's principle of full effect.[106]

From the ECtHR's perspective, the Convention sets minimum standards of protection, which must be met by all Member States, even if their constitutions or other treaty obligations grant a lower threshold of protection. A Member State cannot set aside these obligations simply by referring to its other international and supranational obligations,[107] including its obligations imposed by EU law. In the absence of the EU's formal accession to the Convention, the ECtHR lacks competence to directly review acts of secondary EU law in the light of the Convention.[108] By contrast, the ECtHR indirectly reviews secondary EU law in the light of the Convention by reviewing the Acts and decisions with which the Member States transpose and implement secondary EU law.[109] In its famous *Bosphorus* case, the ECtHR balanced the interests of human rights protection with the interests of European integration by accepting that, in principle, a lower standard of review applies if obligations of EU law are at stake. In such cases, it will presume that a Member State which implements an obligation of EU law, has respected its obligations under the Convention, but only insofar as the protection, "*as*

102 CC No. 103/2009, 18 June 2009.

103 ECJ 1 March 2011, *Test-Achats*, C-236/09.

104 CC No. 116/2011, 30 June 2011.

105 ECtHR (GC) 7 February 2013, *Fabris v. France*, § 75.

106 E.g. M. Bossuyt and W. Verrijdt, "The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment", *EuConst* 2011, 383-387.

107 E.g. ECtHR (GC) 12 September 2012, *Nada v. Switzerland*, §§ 196-198.

108 ECtHR (GC) 18 February 1999, *Matthews v. United Kingdom*, §§ 32-35.

109 ECtHR (GC) 15 November 1996, *Cantoni v. France*, § 30.

regards both the substantive guarantees offered and the mechanisms controlling their observance", offered by EU law is "equivalent" to the protection under the Convention. This presumption can, however, be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.[110] A manifestly deficient protection exists, and the ECtHR's ordinary review applies, if the national judge has failed to refer the case to the ECJ for a preliminary validity question.[111] Also, if the State's action is not fully dictated by EU law, because the State organs had some discretionary power, the *Bosphorus* presumption does not apply where a State exercised State discretion.[112]

From the ECJ's perspective, the Convention is not part of primary EU law and therefore not a formal review norm for secondary EU law. It only operates as a tool to interpret the human rights which are part of primary EU law because they are laid down in the Charter or because they are general principles of EU law. The normative value of the Convention is nevertheless strengthened by Article 52.3 of the Charter, which requires that the meaning and scope of Charter rights which correspond to Convention rights, shall be the same as those laid down by the Convention,[113] provided the EU's possibility to grant a more extensive protection. This provision articulates the EU's dimension of the faith put in the EU's human rights protection by the ECtHR in the *Bosphorus* judgment. The ECJ's jurisprudence, by contrast, does not articulate a principle of equivalent protection towards the Convention system.[114] Given the ECJ's strong attachment to the principle of the unity of EU law, it reserves the monopoly for examining the validity of secondary EU law[115] and does not allow national judges to set aside secondary EU law or its national transposition for violating the Convention. The Opinion on the accession of the EU to the Convention additionally makes it clear that the ECJ does not accept an exterior control by the ECtHR either.[116]

27. In this context, the question arises what approach the national constitutional courts should follow when reviewing an Act transposing or implementing an obligation of secondary EU law which runs counter to the Convention, as interpreted by the ECtHR, whereas that norm of secondary EU law does not run counter to the Charter, as interpreted by the ECJ.[117]

28. The tension increases if the ECJ does not fully implement the interpretation given by the ECtHR to Convention rights which are analogous to Charter rights.[118] In its Åkerberg *Frans-*

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110 ECtHR (GC) 30 June 2005, *Bosphorus v. Ireland*, §§ 152–158.

111 ECtHR 6 December 2012, *Michaud v. France*, §§ 112–115.

112 ECtHR (GC) 21 January 2011, *M.S.S. v. Belgium and Greece*, §§ 338–340.

113 This includes the ECtHR's interpretation of these Convention rights (Explanations relating to the Charter of Fundamental Rights, 2007/C-303/02, *OJ* 14 December 2007, C-303/32-35).

114 G. Rosoux, *Vers une "dématérialisation" des droits fondamentaux?*, Brussels, Bruylant, 2015, 777.

115 ECJ 22 October 1987, *Foto-Frost*, C-314/85; ECJ 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10.

116 ECJ 18 December 2014, *Opinion No. 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.

117 The answer to this question would be a lot easier if the EU would accede to the Convention itself.

118 See the examples mentioned by J. Callewaert, "Leur sens et leur portée sont les mêmes. Quelques réflexions sur l'article

son case, for example, the ECJ did not follow - and did not even mention - the ECtHR's case law concerning the *ne bis in idem* principle.[119] In this case, the ECJ noted *"that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance […], a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties […] These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. […]".* It then left it *"for the referring court to determine, […], whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards […], which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive"*.[120] The Strasbourg case law does not provide for an exception to the *ne bis in idem* rule.[121]

The Belgian Constitutional Court was confronted with this divergent case law when adjudicating an action for annulment of an Act allowing the Public Prosecutor's Office and the tax administration to decide whether a tax offence would be prosecuted criminally or administratively. A punitive prosecution remained possible after an administrative fine was imposed for the same facts, albeit the fact that the administrative fine could not be enforced as long as the criminal prosecution was pending and that it was lifted when the suspect was referred to the trial judge. The Constitutional Court annulled this possible double jeopardy, without referring to the ECJ's Åkerberg *Fransson* judgment,[122] which might allow such procedures, while only referring to the stricter ECtHR jurisprudence, which disallows any double jeopardy.[123]

52, § 3 de la Charte des droits fondamentaux de l'Union européenne", *Journal des Tribunaux* 2012, 596.

119 The Explanations relating to the Charter of Fundamental Rights nevertheless explicitly mention Article 50 of the Charter and Article 4 of the Seventh Protocol to the Convention to have the same meaning and scope. The protection in EU law should even be more extensive, as all jurisdictions in all Member States are concerned.

120 ECJ 26 February 2013, Åkerberg *Fransson*, C-617/10, par. 34 and par. 36. The Advocate General's conclusion (par. 71–74) indicates that the Court's not mentioning the ECtHR's case law might be explained by the fact that not all Member States have ratified the Seventh Protocol and other Member States have lodged reservations or declarations to Article 4 of Protocol No. 7, restricting its application to criminal offences. This lack of agreement between the Member States explains why Member States are – as opposed to the *Melloni* judgment pronounced the same day – free to apply higher standards of fundamental rights protection (K. Lenaerts, "Human rights protection through judicial dialogue between national constitutional courts and the European Court of Justice", in A. Alen, V. Joosten, R. Leysen and W. Verrijdt (eds.), *Liberae cogitationes. Liber amicorum Marc Bossuyt*, Antwerp, Intersentia, 2013, 376–377.

121 In fact, Sweden was condemned by the ECtHR in a very similar case posterior to the ECJ's Åkerberg *Fransson* judgment (ECtHR 27 November 2014, *Lucky Dev v. Sweden*, § 62).

122 It did, however, not disregard the possible applicability of EU law, and it did mention the existence of Article 50 of the Charter.

123 CC No. 61/2014, 3 April 2014, referring to Article 4 of the Seventh Protocol to the Convention, which came into force in Belgium on 1 July 2012, and to ECtHR (GC) 10 February 2009, *Zolotukhin v. Russia*, § 82; ECtHR 16 June 2009, *Ruotsalainen v. Finland*, § 56.

The Constitutional Court thus applied the principle of the most extensive protection. According to an author, the Constitutional Court has implicitly acknowledged that Article 4 of the Seventh Protocol and Article 50 of the Charter offer an equivalent protection, as referred to in Article 52.3 of the Charter, by mentioning both treaty provisions, while only referring to the ECtHR's case law.[124] It must be noted, however, that this case did not fall under the ambit of EU law.

29. When EU law is applicable, the Belgian Constitutional Court engages in a preliminary dialogue with the ECJ.[125] This dialogue causes the procedural limb of the *Bosphorus* presumption to apply, so that the ECtHR will subsequently apply its deferential approach (see No. 26). Therefore, even if the ECJ does not find a violation and the Constitutional Court would limit itself to implementing the ECJ's judgment, there is only little risk of the ECtHR finding a violation in a subsequent judgment. Nevertheless, at least one case indicates that the Belgian Constitutional Court does not limit its subsequent review to a mere implementation of the ECJ's judgment.

This case concerned the second Money Laundering Directive,[126] the transposing Act of which was challenged before the Constitutional Court, mainly because of a violation of Articles 6 and 8 of the Convention. The Court had sent this case to the ECJ for a preliminary ruling on whether the Money Laundering Directive violates Article 6 of the Convention (and thus Article 6 TEU) insofar as it extends the duty to report suspect transactions to lawyers.[127] The ECJ found no violation of the right to a fair trial,[128] but subsequently, the Constitutional Court did require the legal provisions transposing the Money Laundering Directive to be interpreted in conformity with Article 8 of the Convention.[129] If the Constitutional Court would have simply applied the logic of the primacy of EU law, it should either have implemented the ECJ's judgment, finding no violation, or have referred the same case to the ECJ again for a preliminary ruling on the directive's compliance with Article 8 of the Convention.

The Constitutional Court thus offered a more extensive human rights protection than the ECJ,[130] which had not followed the conclusion of its Advocate-General, who had also men-

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124 G. Rosoux, *o.c.*, 792.

125 CC No. 126/2005, 13 July 2005; CC No. 165/2014, 13 November 2014. Implicitly, by only referring to Article 6 TEU without specifying the relevant Convention rights: CC No. 124/2005, 13 July 2005.

126 Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

127 CC No. 126/2005, 13 July 2005.

128 ECJ 26 June 2007, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres (belge)*, C-305/05.

129 CC No. 10/2008, 23 January 2008. According to the Constitutional Court, the only interpretation which respects Article 8 of the Convention requires that the information the lawyer receives during a confident discussion with his client, whether or not in the course of legal representation, is protected by professional secrecy.

130 E. Cloots, "Het Grondwettelijk Hof en de toetsing van secundair Unierecht aan fundamentele rechten", in A. Alen and J. Van Nieuwenhove (eds.), *Leuvense Staatsrechtelijke Standpunten 1*, Bruges, die Keure, 2008, 28–33.

tioned potential problems under Article 8 of the Convention.[131] The Constitutional Court's approach was later upheld by the ECtHR in its famous *Michaud* judgment.[132]

30. The Constitutional Court attaches great importance to the full effect of EU law when conducting its review of legislative provisions in the light of the Convention. It refers both to ECJ and ECtHR case law when interpreting the human rights laid down in the Belgian Constitution, and engages in an active dialogue with the ECJ for further clarifications. Irrespective, its case law shows that it applies the principle of the most extensive human rights protection.

2.1.3. Conclusion

31. In any State governed by the rule of law, human rights are the highest norms and they must be respected by all State organs, including all judges. The existence of many overlapping human rights documents, both national and supranational, should only lead to a more extensive protection, but in reality, they often lead to confusion, as the human rights' interpretation and application might differ between national and supranational constitutional judges. The Constitutional Court systematically aims at providing legal certainty in this field, and at avoiding judgments by the ECtHR and the ECJ finding a violation, by interpreting the human rights laid down in the Belgian Constitution in light of the interpretation of the Convention and the Charter by the ECtHR and the ECJ. When the scope of analogous human rights differs, the Constitutional Court is likely to choose for the most extensive human rights protection.

2.2. The Fight Against Terrorism

32. Fundamental rule of law principles such as human rights can come under threat after shocking societal events, the most relevant contemporary example of which are terrorist attacks. Terrorism is directly and indirectly linked to human rights: directly, as terrorist attacks aim to cause death and severe bodily harm, and indirectly, when a State's response to terrorism leads to the adoption of policies and practices which limit human rights.[133] While under the legal obligation to combat terrorism, States also remain under the obligation to respect the boundaries set by human rights law.

Terrorist threats often spark new legislation, which is likely to be brought before the Constitutional Court. The Court's task is then to find a proper balance between combatting those who threaten the very foundations of the Western European society and preserving the rule

131 Concl. Adv.-Gen. Poiares Maduro, 14 December 2006, C-305/05, par. 41.

132 ECtHR 6 December 2012, *Michaud v. France*, §§ 126–131.

133 Special UN Rapporteur K. Koufa, "Terrorism and Human Rights", UN Doc. E/CN.4/Sub.2/1999/27; UN Doc. E/CN.4/Sub.2/2001/31; UN Doc. E/CN.4/Sub.2/2002/35.

of law, which is one of these foundations. The Convention plays an important role in this regard, because, on the one hand, the Constitutional Court's human rights jurisprudence is always guided by the existing ECtHR case law (see No. 4), but also because the ECtHR can be called upon to examine, in individual cases, the conformity of the Constitutional Court's judgments with the Convention. Before addressing these standards, two preliminary remarks must be made.

33. It should first be noted that, contrary to many national constitutions, the Belgian Constitution does not contain an emergency clause. Article 187 of the Constitution even provides for the opposite: *"The Constitution cannot be wholly or partially suspended"*. This shows that Belgium has a peacetime Constitution, drafted from the point of view of a country which was to remain neutral in any conflict.[134] Moreover, this provision's aim was avoiding *coups d'état*, and is historically linked to the turmoil in France in July 1830. This provision implies that the constitutional rights, as interpreted in the light of the Convention, fully apply in the review of counter-terrorism measures.

Given this constitutional provision, one might wonder whether the Belgian authorities are entitled to declare the state of emergency under Article 15 of the Convention. As the human rights laid down in the Belgian Constitution are inextricably linked to the human rights laid down in the Convention (see No. 4), every derogation to (some of) the rights laid down in the Convention implies a partial suspension of the Constitution. Article 187 of the Constitution can thus be seen as offering a more extensive human rights protection than Article 15 of the Convention.

34. Secondly, it has been contended in the European[135] literature that balancing models of human rights adjudication offer a better equilibrium between national security and human rights protection, compared to categorisation models.[136] Balancing offers the judge the possibility to outweigh all relevant stakes, both public and private, whereas categorisation uses clearly defined categories. The human rights review operated by the Constitutional Court mainly follows the balancing model, apart from its review of consistency with the absolute human rights, which do not allow for limitations.

35. The ECtHR has developed a massive jurisprudence regarding counter-terrorism measures.[137]

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134 W.J. Ganshof van der Meersch, "De schorsing van de vrijheidsrechten in uitzonderingstoestand", *Preadviezen voor de Vereniging voor vergelijkende studie van het recht in België en Nederland*, Zwolle, Tjeenk Willink, 1950, 13.

135 American scholars rather believe that balancing models put too much emphasis on individual concerns and therefore give leeway to terrorists (e.g. L. Tribe, *American Constitutional Law*, Westbury, Foundation Press, 1988, 794).

136 S. Sottiaux, *Terrorism and the Limitation of Rights*, Oxford, Hart Publishing, 2008, 406.

137 See F. Bernard, "La Cour européenne des droits de l'homme et la lutte contre le terrorisme", *RTDH* 2016, 43–59; S. Kowalska, "Human Rights Protection and Terrorism - Reflections in the Context of Strasbourg Jurisprudence", *Politické vedy* 2015, 25–42; J.P. Loof, *Mensenrechten en staatsveiligheid: verenigbare grootheden?*, Nijmegen, Wolf Legal Publishers, 2005; L.-A. Sicilianos, "The European Court of Human Rights at a Time of Crisis in Europe", *EHRLR* 2016, 121–135; S. Sottiaux, *o.c.*, 67–321; F. Vanneste, "Het Europese Hof voor de Rechten van de Mens en de overheden die terrorisme bestrijden: brothers

This case law expresses three leading principles. The first one is that the ECtHR maintains a clear distinction between measures limiting the absolute human rights, i.e. the ones protected from derogation under Article 15 of the Convention, and the measures limiting other human rights. This distinction is more important than a formal notification of a state of emergency under Article 15 of the Convention, which does not significantly alter the Court's review.

The second principle is that a state of emergency does not allow the States to lower the threshold of the non-derogable rights. Nevertheless, even concerning these rights, the Court shows some understanding for the difficult circumstances under which the State authorities have to operate, and it therefore shows some leniency in its adjudication of whether the threshold has been reached. It has, for example, accepted the extradition of a terrorism suspect to a non-Convention country, based on mere diplomatic assurances that he would not be subjected to torture.[138] It has also accepted the solitary confinement for eight years of an extremely dangerous terrorist.[139] In a case concerning the siege in a Moscow theatre by Chechen separatists, it did not find a violation of the right to life, although the Russian authorities ended the hostage crisis with several casualties.[140] Nevertheless, the Court has clearly reaffirmed that the scope of application of non-derogable rights does encompass measures of counter-terrorism and it does not hesitate to find a violation of these rights, even in a terrorist context.[141]

The third principle is that the Court shows a large degree of leniency towards limitations to the derogable rights in a terrorist context, granting the Member States a very broad margin of appreciation.

Such measures must still be directly relevant for the goal pursued.[142] But relevant measures are virtually always accepted,[143] without a thorough review on the merits, provided that all individual applications of such measures must be subjected to the control of an inde-

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in arms?", *RW* 2003–2004, 1665–1677. See also the Factsheet "Terrorism and the European Convention on Human Rights", established by the Press Unit of the European Court of Human Rights, *www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf*.

138 ECtHR 17 January 2012, *Othman (Abu Qatada) v. United Kingdom*, §§ 192–204.

139 ECtHR (GC) 4 July 2006, *Ramirez Sanchez v. France*, §§ 136–150.

140 ECtHR 20 December 2011, *Finogenov and others v. Russia,* §§ 217–262.

141 E.g. ECtHR (GC) 28 February 2008, *Saadi v. Italy*, § 138; ECtHR (GC) 19 February 2009, *A. and others v. United Kingdom*, § 126; ECtHR 31 January 2012, *M.S. v. Belgium*, § 126; ECtHR (GC) 13 December 2012, *El-Masri v. FYROM*, § 195; ECtHR 4 September 2014, *Trabelsi v. Belgium*, § 118: *"However, none of these factors have any effect on the absolute nature of Article 3. As the Court has affirmed on several occasions, this rule brooks no exception. […] that it is not possible to make the activities of the individual in question, however undesirable or dangerous, a material consideration or to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of the State is engaged under Article 3"*.

142 ECtHR 2 December 2014, *Güler and Ugur v. Turkey,* § 53: *"laws against terrorism should not be used as a pretext to limit legitimate religious activity"*.

143 E.g. an administrative fine for a cartoon which seemed to approve the 9/11 attacks (ECtHR 2 October 2008, *Leroy v. France*, §§ 43–46), the dissolution of a political party (ECtHR 30 June 2009, *Herri Batasuna and Batasuna v. Spain*, §§ 85–91).

pendent judge. This *'proceduralisation'* approach, which aims to prevent abuses of legislation which is in itself necessary for combatting terrorism, applies to techniques of infiltration, telephone tapping, access to classified files, etc.[144]

36. The Belgian Constitutional Court's case law concerning counter-terrorism measures is guided by the same principles. The case law about non-derogable rights is limited to cases involving Article 7 of the Convention. In a case in which a retrospective criminal indictment[145] was enacted in order to prosecute one suspected terrorist who had allegedly committed terrorist crimes in Turkey, but resided in Belgium, the Constitutional Court made clear that the non-derogable rights fully apply in terrorism cases. In a very short reasoning, it noted that Article 7 of the Convention prohibits retroactive criminal indictments to the detriment of suspected offenders, and therefore annulled this provision,[146] without examining whether the principle of non-retroactivity should be applied more leniently in terrorism-related cases.

Concerning the *lex certa* principle, which leaves a bit more manoeuvring room than the prohibition on retroactivity, the Constitutional Court did show some understanding for the difficult circumstances under which the State authorities have to operate when combatting terrorism. Its prior case law concerning the *lex certa* principle had been very strict, but the Constitutional Court changed its course when it had to apply this very same principle in a terrorism-related case. Referring to the ECtHR's case law,[147] it ruled that the *lex certa* principle does not prohibit the legislature to grant a certain margin of appreciation to the judge, because of the general character of legislation, its applicability to a wide variety of cases and the evolution of the acts they aim to sanction.[148] The Court therefore accepted the rather vague definition of a *"terrorist crime"*, considering that only a specific intention to commit an act of terrorism could be sanctioned under this heading. This lenient approach has continued to apply, both in terrorism-related cases[149] and in unrelated cases.[150]

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144 ECtHR 6 September 1978, *Klass and others v. Germany*, § 56 (in that case, the review was performed by the Bundestag, instead of by a judge); ECtHR 24 April 1990, *Kruslin v. France*, § 34; ECtHR 15 June 1992, *Lüdi v. Switzerland*, § 38; ECtHR 26 May 1993, *Brannigan and McBride v. United Kingdom*, § 61–65; ECtHR 18 May 2010, *Kennedy v. United Kingdom*, § 167; ECtHR (GC) 12 September 2012, *Nada v. Switzerland*, § 212.

145 A legal provision extended the Belgian criminal courts' jurisdiction to terrorist crimes committed by a foreigner outside Belgium, if that foreigner could be found in Belgium. At first, that provision was only applicable to acts committed after its entry into force, but in order to secure the prosecution of one alleged terrorist, the legislature subsequently granted it an immediate effect in ongoing procedures. The Constitutional Court qualified this extension of jurisdiction as a rule of material criminal law, because it allowed for the prosecution of persons who could not be prosecuted before this rule's enactment.

146 CC No. 73/2005, 20 April 2005, B.8.

147 ECtHR 25 May 1993, *Kokkinakis v. Greece*, §§ 40 and 52; ECtHR 22 November 1995, *S.W. v. United Kingdom*, § 36; ECtHR 15 November 1996, *Cantoni v. France*, §§ 29 and 31.

148 CC No. 125/2005, 13 July 2005, B.6.2.

149 CC No. 122/2014, 19 September 2014 (*"membership to a terrorist organisation"*); CC No. 9/2015, 28 January 2015 (*"incitement to terrorist activities"*, *"recruiting terrorists"*, *"training terrorists"*).

150 E.g. CC No. 110/2015, 17 September 2015 (*"plastic surgery"*); CC No. 72/2016, 25 May 2016 (*"sexism"*).

37. The Constitutional Court's case law concerning derogable rights reflects both the broad margin of appreciation offered by the ECtHR and the tendency towards proceduralisation.

The most notable example concerns the extension of the techniques allowed for the intelligence services to exercise their missions.[151] The Constitutional Court accepted these new techniques, because they aimed to cope with elevated security risks and new techniques used by those threatening the security of the State. The Court even accepted the keeping of secret surveillance records concerning all persons of interest. Nevertheless, it did require that once the Executive Commission had ruled that the secrecy of a given file was no longer necessary, the person concerned must automatically be notified of the surveillance record's existence, allowing him to exercise his procedural rights.

38. The greater latitude for the legislature in terrorism-related cases is also reflected in the Court's judgments concerning special techniques of investigation. In 2004, the Court ruled upon an action for annulment of legislation granting the criminal prosecutors a new set of techniques of investigation. As these techniques could be used in any criminal investigation, the judgment does not refer to terrorist threats. Applying the ECtHR's case law, the Court annulled some techniques which infringed upon the right to privacy, such as the observation, or which could violate due process rights or spark discriminations, such as infiltrations and incitement by police officers. In addition, it ruled that the judicial control of the exercise of these special techniques did not suffice.[152]

In 2007, the Court had to rule upon a further extension of the special techniques of investigation with the specific aim of combatting terrorism, and the Court refers to this aim 13 times in its reasoning. In this case, the Constitutional Court applied a much more deferential approach, accepting all techniques of investigation - some of which were modified because of the Court's prior judgment - and only sanctioning the lack of independent judicial control of the classified parts of the case file.[153]

39. In terrorism-related cases, as in other cases, the Constitutional Court implements the relevant case law of the ECtHR and the ECJ. The most notable example is the Court's annulment[154] of the Act transposing the Data Retention Directive, in which its reasoning mainly consisted of a copy-paste of the ECJ's judgment invalidating that directive.[155]

40. The aforementioned judgments prove that the Belgian Constitutional Court, as does the ECtHR, does not consider the human rights discourse a strong obstacle for combatting terror-

151 CC No. 145/2011, 22 September 2011.

152 CC No. 202/2004, 21 December 2004.

153 CC No. 105/2007, 19 July 2007.

154 CC No. 84/2015, 11 June 2015.

155 ECJ 8 April 2014, *Digital Rights Ireland Ltd.*, C-293/12 and C-594/12, *Kärntner Landesregierung and others.*

ism, but rather a supplementary source of upholding the democratic values, drawing the borders in which the fight against terrorism is to be fought.[156] It takes into account the seriousness of terrorist threats and the complexity of combatting them, therefore granting the State organs a sufficient leeway to take appropriate measures, but not a blanket permission: absolute human rights remain absolute, whereas derogable human rights can only be limited provided *ex post* control by an independent judge. In the same way as the ECtHR, the Constitutional Court therefore refuses to acknowledge the false dilemma between freedom and security, but rather requests the protection of both interests, which are both necessary aspects of the rule of law.[157] Indeed, one must bear in mind that the rule of law is not to be harmed, or even destroyed, for the sake of its protection.[158]

3. Conclusion

41. Although the Belgian Constitutional Court was originally only conceived as an arbiter of the legislative competences of the federal level and the federated entities, later extensions of its competences, as well as its own jurisprudence, have established it as an important player in the field of upholding the rule of law. It takes this task very seriously, by protecting the rule of law against the challenges of a sometimes very different nature.

156 F. Vanneste, "Het Europese Hof voor de Rechten van de Mens en de overheden die terrorisme bestrijden: brothers in arms?", *RW* 2003–2004, 1665.

157 L.-A. Sicilianos, *o.c.*, 135.

158 ECtHR 6 September 1978, *Klass and others v. Germany, § 49*.

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

The European Union is founded on the basic idea that its citizens are equal under the Treaties. This applies not only to EU citizens in their individual capacity, but also to the Member States, as the entities through which EU citizens collectively exercise their democratic rights. In the EU legal order, the principle of equality is thus both a fundamental right, when applied to individuals, and a principle of governance, when applied to the Member States.

As a principle of governance, Article 4(2) TEU provides that "[t]he EU shall respect the equality of Member States before the Treaties." Within the scope of application of EU law, the 28 Member States stand on an equal footing. Regardless of their date of accession, of their size, of their economic power, of their history, of their system of government, all Member States enjoy the same democratic legitimacy.

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

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

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

In order for EU citizens to move freely and securely in an area without internal frontiers, the authors of the Treaties took the view that national courts were best placed to protect the fundamental rights of individuals. That is why the establishment of an AFSJ is, first and foremost, to be achieved through the mutual recognition of national judicial decisions.

The principle of mutual recognition means that judicial decisions – issued by the competent court and that fall within the scope of the relevant EU legislation – must be recognised and enforced throughout the EU.

However, in enhancing the free movement of judicial decisions, the principle of mutual recognition inevitably has an impact on the exercise of fundamental rights. For example, a person who is the subject of a European arrest warrant may be surrendered to the Member State that issued such a warrant against his or her will, thus limiting that person's freedom. The successful operation of the principle of mutual recognition is thus based on the assumption that Member States can – and do – trust each other as regards respect for fundamental rights.

To sum up, it is because Member States, and particularly their national courts, are deemed equal before the Treaties that they are able to trust each other to protect fundamental rights adequately and it is because they trust each other that judicial cooperation is feasible, through the mutual recognition of judicial decisions.

In the light of the case law of the ECJ, it is safe to say that the principle of mutual trust imposes two negative obligations on the Member States. First, they may "not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law." Second, "save in exceptional cases", Member States are prevented from "check[ing] whether [another] Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU."

Whilst the first obligation allows no room for exceptions, the second does so. In that regard, allow me to examine more closely those two negative obligations by reference to recent case law of the ECJ, notably in the context of the Framework Decision on the European arrest warrant (the 'Framework Decision').[1]

Under the Framework Decision, primary responsibility for protecting the fundamental rights

1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [2009] OJ L 81/24.

of persons who are the subject of a European arrest warrant rests with the judicial authorities of the issuing Member State, i.e. the Member State where criminal proceedings are taking – or have taken – place.

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

If the executing Member State has doubts as to the adequacy of the level of fundamental rights protection provided for by the Framework Decision as a matter of EU law, it must engage in a dialogue with the ECJ. That is precisely what the Belgian Constitutional Court did in *Advocaten voor de Wereld* and *I.B.*,[2] and the Spanish Constitutional Court in *Melloni*.[3] In those three cases, those national constitutional courts each asked the ECJ to determine whether different aspects of the Framework Decision complied with the fundamental rights recognised by the EU legal order.

Moreover, the fact that the Framework Decision complies with the Charter does not mean that European arrest warrants must always be executed automatically. The executing judicial authorities are under an obligation to verify whether the provisions of the Framework Decision that limit the exercise of the fundamental rights of the persons who are the subject of a European arrest warrant are, in fact, applicable to the case at hand. If they fail to do so, they run the risk of misapplying the Framework Decision, thus violating both EU law and their own national constitutional law. For example, in a recent ruling, the German Constitutional Court found that the Düsseldorf Higher Regional Court had violated the '*Schuldprinzip*', a constitutional principle that forms part of Germany's constitutional identity, on the ground that it had misapplied the Framework Decision as implemented in Germany.[4]

If the validity of the Framework Decision is upheld in the light of the Charter, the next question that arises is whether the executing judicial authority may verify whether the issuing Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. In that regard, the ECJ held, in its Opinion 2/13,[5] that the executing Member State may do so, but only in exceptional cases.

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

3 Case C-399/11 *Melloni*, EU:C:2013:107.

4 Bundesverfassungsgericht, order of 15 December 2015, 2 BvR 2735/14.

5 Opinion 2/13, EU:C:2014:2454.

In Joined Cases *Aranyosi* and *Căldăraru*,[6] the ECJ recently ruled that such an exceptional case may arise where the execution of a European arrest warrant was liable to give rise to breaches of the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Article 4 of the Charter. That might be the case, for example, where conditions of detention in the issuing Member State do not comply with Article 4 of the Charter because the prison facilities where the person surrendered is likely to be incarcerated are overpopulated or prison cells are too small.

The rationale behind such findings is that, unlike the principle of mutual trust and the fundamental rights that are *not* enshrined in Title I of the Charter, the prohibition on torture and inhuman or degrading treatment may not be subject to any limitations. That prohibition, which seeks to protect the very essence of human dignity, is absolute. As a matter of fact, the ECtHR has held, in the context of Article 3 of the ECHR, the provision that corresponds to Article 4 of the Charter, that no derogation from that prohibition is allowed, not even in the fight against international terrorism and organised crime.

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

First, it must rely on objective, reliable, specific and properly up to date evidence showing failures in the prison system of the issuing Member State that may constitute a breach of Article 4 of the Charter.

Second, it must check whether there are substantial grounds to believe, in the light of the circumstances of the particular case at hand, that the individual concerned by the arrest warrant will be exposed to inhuman or degrading treatment if he were to be surrendered. This shows that mutual trust between Member State legal systems is not blind and the premise that all Member States comply with their fundamental rights obligations under the EU Charter must, in case of substantial doubts, be verified.

Where such doubts arise, the executing judicial authority should make enquiries of the issuing judicial authority as to the adequacy of conditions of detention in that Member State before executing a European arrest warrant. For as long as the issuing judicial authority remains unable to convince its counterpart in the executing Member State that the execution of the European arrest warrant can take place in conditions that comply with Article 4 of the Charter, the surrender of the person concerned should be postponed. Postponing a European arrest warrant's execution in such circumstances guarantees compliance with the Charter, whilst preserving the effectiveness of the system of mutual recognition set out in the Framework Decision, inasmuch as it places the onus firmly on the issuing Member State to ensure that

6 Joined Cases C-404/15 and C-659/15 PPU *Aranyosi et Căldăraru*, EU:C:2016:198.

the conditions are met for its decision to be worthy of recognition in the other Member States. In that way, a permanent state of mistrust between two Member States' courts, which might lead in time to the fragmentation of the AFSJ, is avoided. Needless to say, where the doubts of the executing judicial authority cannot be removed within a reasonable time, that court must decide whether to bring the surrender procedure to an end.

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

National courts, and in particular national supreme and constitutional courts, must ensure that the Framework Decision is properly applied. Indeed, an incorrect application of the Framework Decision may upset the delicate balance that the EU legislator has struck between ensuring the effectiveness of the principle of mutual recognition and respect for the fundamental rights of the person who is the subject of a European arrest warrant as recognised by the Charter.

For its part, the ECtHR is a valuable ally for the executing judicial authorities in identifying the existence of a real risk of violating the prohibition enshrined in Article 4 of the Charter, since that provision corresponds to Article 3 ECHR. The case law of that court not only provides useful guidance as to the content that should be given to Article 4 of the Charter, but is also a valuable source of information with regard to the actual existence of deficiencies in the level of fundamental rights protection ensured by the issuing Member State.

That said, as matters currently stand, the system of fundamental rights protection established by the ECHR does not expressly recognise the constitutional importance that the principle of mutual trust enjoys within the EU legal order. That is one of the considerations that led the ECJ to rule, in Opinion 2/13, that the draft agreement on the accession of the EU to the ECHR was incompatible with both the EU Treaties and the Charter. However, cases such as *Povse v. Austria* and *Avotiņš v. Latvia* appear to suggest that the ECtHR is willing to recognise the importance of that principle.[7] Notably, in the latter case, the Grand Chamber of the ECtHR held, after reaffirming that the *Bosphorus* presumption remains good law, that it "is mindful of the importance of the mutual recognition mechanisms for the construction of the [AFSJ]." Accordingly, the adoption of the means necessary to achieve such construction is, in principle, a wholly legitimate objective from the standpoint of the ECHR. As a matter of principle, the ECtHR held that the ECHR does not oppose the mutual recognition of judicial decisions between EU Member States, provided that such recognition does not take place automatically and mechanically. As regards Article 4 of the Charter, those findings are, in my view, fully consistent with the case law of the ECJ, notably with the *N.S.*,[8] *Aranyosi* and *Căldăraru* judgments.

7 ECtHR, *Povse v. Austria*, judgment of 18 June 2013, CE:ECHR:2013:0618DEC000389011, and *Avotiņš v. Latvia*, judgment of 23 May 2016, CE:ECHR:2016:0523JUD001750207.

8 Joined Cases C-411/10 and C-493/10 *NS*, EU:C:2011:865.

Last, but not least, the role of the ECJ is to make sure that the balance that the EU legislator has struck between the principle of mutual trust and the protection of fundamental rights complies with primary EU law, and in particular with the Charter.

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

Prof. Dr Ferdinand Kirchhof

Vice President of the Federal
Constitutional Court of Germany

The Evolution of the Relationship between German Constitutional Law and European Union Law

1.

The German Basic Law is binding upon German state authorities without exception. A key provision of the German Constitution, Art. 1 sec. 3 of the Basic Law (*Grundgesetz* – GG), binds the legislature, executive and judiciary by basic rights as directly applicable law, and Art. 20 sec. 3 GG stipulates that the legislature, executive and judiciary are bound by the constitutional order.

The law of the European Treaties – the so-called primary law of the EU – is adopted by consensus of the Member States. For Germany, as a Member State, Art. 23 GG prescribes: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law." For this purpose, the provision allows the transfer of sovereign powers to the EU. However, pursuant to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, known as the "Eternity Clause", such a transfer of sovereign powers is subject to the condition that it does not affect the principles laid down in Articles 1 and 20 of the Basic Law. Art. 20 GG determines that the Federal Republic of Germany is a democratic and social federal state, constituted under the rule of law and the governmental form of a republic. Art. 1 GG establishes the inviolability of human dignity as the paramount constitutional principle, and acknowledges the human rights and basic rights set forth in Arts. 2 to 19 GG.

Pursuant to the Basic Law's specifications applied to Germany as an EU member State, the primary law of the EU must hence stay within the limits of the admissible transfer of sovereign rights under Art. 23 sec. 1 GG. The same applies, of course, to EU secondary law, directives and regulations, because these cannot reach beyond the powers of the EU under primary law.

2.

In proceedings for preliminary rulings pursuant to Art. 267 TFEU, the Court of Justice of the European Union (CJEU) has jurisdiction to give rulings concerning the interpretation of the European Treaties and concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Most legal issues that arise when national and European law collide and that are taken to the Luxembourg Court are dealt with in this type of procedure. In its established case law since the 1960s, the CJEU has held the view that EU law has grown beyond the mere ties established between Member States under public international law in that it has become a legal order in its own right, which has created rights and obligations not only for the contracting Member States, but also immediately for their citizens. Invoking the development of an autonomous European legal order ranking between the levels of public international law and national law, the CJEU has also created the rule of precedence of application of European law (*Anwendungsvorrang)* over the national law of the Member States. This precedence of application is to be applied strictly and without exception.

3.

Insofar as the legal orders of the European Union and those of its Member States regulate distinct life circumstances, they do not clash. But as soon as a Member State must transpose or implement European law, especially EU directives, or if a national administration must apply European law directly, the two legal orders overlap and can lead to conflicts. These become especially critical when national constitutional law, with the special standing of a *pouvoir constituant*, conflicts with more technically focused EU directives or regulations, for example in the areas of food law or transport law.

Since the European Union's Charter of Fundamental Rights entered into force at the end of 2009, such conflicts arising from colliding laws of Member States and European law might also occur in the field of fundamental rights. With the aim of preserving equality and freedom for Union citizens and German nationals, both sets of norms, and both courts that are called upon to interpret the respective norms, are basically heading in the same direction. Consequently, conflicts rarely arise in practice, and are easy to resolve in harmony within what is, essentially, a common task. Nevertheless, the different scopes of protection and different prerequisites for limiting fundamental rights may lead to a dogmatic contradiction between the two sets of norms.

4.

While the CJEU holds that such conflicts between fundamental rights should also be resolved by a strict precedence of application of European Law, the legal requirements of Art. 51 *et seq*.

of the Charter of Fundamental Rights are phrased more subtly and sensitively. Under Art. 51 of the EU Charter of Fundamental Rights, its fundamental rights are addressed to Member States only when they are implementing Union law; they may not establish any new power or task for the Union. Under Art. 52 sec. 4 of the Charter, its fundamental rights must be interpreted in harmony with the constitutional traditions common to the Member States. Under Art. 52 sec. 6 of the Charter, full account must be taken of national laws and practices of the Member States. Under Art. 53 of the Charter, none of its fundamental rights is to be interpreted as restricting or adversely affecting rights recognised by the Member States' constitutions.

5.

German constitutional law, and the relevant case law, generally recognises the precedence of application of EU law. Differences exist only as to its dogmatic basis – and these are of a rather academic-dogmatic nature. However, exceptions from the strict precedence of application of EU law are made where European law is incompatible with German constitutional law.

These exceptions, however, remain within narrow bounds. In a body of case law that has evolved over many years since the 1980s, the Federal Constitutional Court has declared that, in the interest of a uniform European legal order, as a rule it no longer exercises its jurisdiction to interpret the Basic Law, and particularly the fundamental rights under that law, insofar and so long as European law and the case law of the CJEU afford a level of legal protection that is comparable to the German Basic Law and the German fundamental rights. This means that if a conflict arises between European and German law in the daily routine of judicial decisions, the protection of fundamental rights is largely placed in the hands of the European Court of Justice, trusting that the CJEU will ensure that these rights are upheld. But this delimitation of the Federal Constitutional Court's constitutional mandate of monitoring compliance with the Basic Law ends where the core content of the Basic Law would else be violated. Reiterating Art. 23 and Art. 79 sec. 3 GG, the Federal Constitutional Court intervenes and limits the precedence of application in three cases:

The European Union cannot interfere with the constitutional identity of the Federal Republic of Germany; this criterion essentially refers to a violation of the state principles of democracy, the rule of law, the social state, a republican form of government, and the federal state. In this respect, the Federal Constitutional Court does not only focus on laws conflicting in a specific case, but also on a gradual undermining of those laws, and, above all, assesses whether the powers of the German legislature are becoming meaningless.

Secondly, the Court examines whether the European Union has adhered to the limitations set by the particular conferred power, which was transferred by the German Member State to the European Union via Art. 23 GG. *Ultra vires* acts by the EU are not admissible, and the Federal Constitutional Court would object to them.

Thirdly, the Federal Constitutional Court considers whether legal acts of the EU violate the core content of German fundamental rights, particularly the principle of human dignity, and would intervene if necessary.

6.

However, in its review of legal acts where it is likely that an exception from the precedence of application of EU law will be made, the Federal Constitutional Court proceeds with extreme circumspection. It does not seek a confrontation between the two legal orders, but instead always endeavours to resolve conflicts arising between the two legal orders within the system of and in dialogue between the courts, in an iterative process of reciprocal reconciliation of legal opinions. After determining that such a conflict exists, the Federal Constitutional Court refers the question of law to the CJEU in a request for a preliminary ruling under Art. 267 TFEU, so as to obtain a confirmed legal opinion from the CJEU and a resolution of the conflict by mutual agreement. The Federal Constitutional Court would only take control and intervene if the opinion of the CJEU also proves to be incompatible with German constitutional law; yet even then it would always proceed with the greatest possible respect for the European legal order. In any case, however, it would consistently uphold the constitutional core of the German Basic Law.

7.

This dialogue between the courts has become evident in recently decided cases; it has shown that it is very well possible that a collaboration between Karlsruhe and Luxembourg will result in finding a solution that is beneficial to both legal orders.

8.

I would like to take up three cases in which the dialogue within the multi-level cooperation of the courts has evolved and proved its efficacy. The first proceeds in an entirely unspectacular way, but very efficiently. Based on the awareness that Germany is (also legally) not an island and must take due account of links with European law, we also interpret the German provisions of the Basic Law in light of European primary law provisions. In the Cassina case, the Federal Constitutional Court had to decide whether a foreign corporation from another EU Member State could be entitled to German fundamental rights. Art. 19 GG only states that German fundamental rights "shall also apply to domestic" corporations. Hitherto the interpretation of the law had understood this wording to mean that only domestic companies, along with natural persons, have legal personality with regard to fundamental rights. However, because economic subjects from all EU Member States are supposed to be able to operate under

the same conditions within the internal market, the Federal Constitutional Court interpreted this provision to mean that the Basic Law's provision was intended to include domestic corporations within the protection of fundamental rights, but was not meant to offer any interpretation as to whether foreign companies from an EU Member State have legal personality with regard to such rights. This therefore left the question of their entitlement to fundamental rights open, and the Federal Constitutional Court answered it, referring to the existence of a European internal market with its own legal system, by extending the protection of German fundamental rights to foreign corporations from EU Member States. Thus the German legal order and the European legal system were once again in harmony.

In the Melloni case, the European Court of Justice had still insisted that European provisions should strictly apply to the extradition to other Member States in criminal cases. However, in a case decided by the Second Senate of the Federal Constitutional Court, an Italian court had – 22 years ago – sentenced a person *in absentia* to 30 years of imprisonment, without that person's knowledge, and ruled that the person was therefore to be extradited from Germany to Italy. The Senate, however, decided that this extradition would be inadmissible because a criminal conviction without the knowledge of the accused was incompatible with the principle of human dignity, in spite of the conflicting European provision. Shortly thereafter, in similar cases, the European Court of Justice likewise objected to an extradition, referring to the requirement of due process under the rule of law contained in the European extradition provision. This example shows that on the basis of their legal orders, the two courts are quite capable of arriving at the same results with regard to the protection of legal interests – this means that the dialogue within the multilevel cooperation of courts can succeed in practice.

9.

The third case is the Federal Constitutional Court's OMT decision. Complaints against the purchase of government bonds by the European Central Bank prompted the Federal Constitutional Court to refer for the first time to the CJEU for a preliminary ruling under Art. 267 TFEU. The CJEU decided that, under certain conditions, the purchases were compatible with European law. The Federal Constitutional Court accepted this interpretation of the European provision empowering the European Central Bank as "still acceptable", noting, however, that its own interpretation would have concluded that the law had been violated. The underlying reason for this broad-minded approach was the application of the *ultra vires* doctrine to European law in a version that denies recognition of a judgment of the CJEU only if there are obvious errors in that court's interpretation, and furthermore concedes a "fault tolerance" to the CJEU. The dialogue between the two courts plays out procedurally in the sequence of a reference for a preliminary ruling, a decision by the CJEU, and a subsequent and final assessment by the Federal Constitutional Court. The Federal Constitutional Court's exercise of restraint towards a different interpretation of Union law by the CJEU

implies that the multi-level cooperation of courts entails listening to one another, giving thoughtful attention to the other court's arguments, and then reaching a cooperative result that is fruitful for both.

However, in the OMT judgment the Federal Constitutional Court also reaffirmed its position that the precedence of application of European Union law reaches its limits in three situations – situations in which the German Basic Law then prevails: If the EU exceeds its individual conferred powers and acts *ultra vires*; if Union law compromises the German constitutional identity – most notably democracy, the rule of law, and human dignity; and if it violates the core of German fundamental rights. Such legal acts by the European Union cannot be complied with or executed by German offices and agencies. At the same time, the Court found that because of its responsibility with respect to European integration, the Federal Republic of Germany has a protective duty towards business and society to preserve those limits, which may consolidate to the point of becoming a subjective right of protection for its citizens. To minimise conflicts concerning the precedence of application within the German system of national law, the Federal Constitutional Court now requires the regular courts to clarify such questions of application in advance through references to the CJEU for a preliminary ruling, and additionally through a referral to the Federal Constitutional Court itself, so that it alone can finally decide this question. This ultimate concentration on two courts in the event of a conflict, each of which belongs to the respective other level concerned, strengthens the dialogue between the CJEU and the Federal Constitutional Court.

10.

The coexistence of German and European fundamental rights still remains largely unclarified. Even the field of application of the Charter of Fundamental Rights under Art. 51 is still uncertain. The Federal Constitutional Court persists in the opinion that the Charter of Fundamental Rights applies only when the Member States are implementing European law and a matter has been settled conclusively under European law. The CJEU, by contrast, calls for the Charter of Fundamental Rights to apply if a case generally falls within the "field of application of Union law". In the ÅkerbergFransson case, it maintained this view in a Swedish value added tax matter, arguing that under Art. 325 TFEU the Member States are required to counter fraud affecting the financial interests of the Union. The Federal Constitutional Court rejected this interpretation of Art. 51 of the Charter of Fundamental Rights in its judgment on the counter-terrorism database, pointing out that the field of application of the Charter could not be expanded in contravention of its wording and purpose. So far, the European Court of Justice has not yet given adequate consideration and acknowledgment to the EU's obligation to respect national identity, the constitutional structures of the Member States, and their common constitutional traditions, as set forth in Arts. 52 and 53 of the Charter of Fundamental Rights and Art. 4 sec. 2 and Art. 6 sec. 3 TFEU. In this field, there is still significant potential for intensifying and coordinating the dialogue between the courts.

11.

The question of precedence of application of European fundamental rights over German fundamental rights is highly disputed in German legal literature. Opinions range from those holding that a strict precedence of application also applies here, to the view that there is no precedence of application of the European fundamental rights over German fundamental rights at all. I myself advocate the latter opinion, and would argue in favour of seeking a harmonious coexistence of both fundamental rights clusters. After all, the objective of guaranteeing equality and freedom that they both pursue can be optimised most effectively for the citizen through a strict preservation of both clusters of fundamental rights. In turn, giving precedence of application to European fundamental rights would, rigidly and insensitively, strictly negate and exclude *ab initio* all legal interests and values protected by the constitutions of the Member States.

This opinion of the parallel validity of both complexes of fundamental rights, on an equal footing, is based primarily on two reasons. First – more as a technical matter of law – Art. 51 of the EU Charter of Fundamental Rights defines only that the European Charter is "addressed to" the Member States, i.e. whether its fundamental rights are applicable at all. Yet it does not resolve a conflict between two binding provisions, which only arises after the determined field of application is met. Art. 51 of the Charter of Fundamental Rights says nothing at all about how a conflict arising between laws is to be resolved, but rather induces such a conflict by defining its field of application. The resolution of the conflict itself is still reserved to the jurisdiction of both courts.

The second, basically dogmatic argument in favour of an equal and parallel applicability of European and German fundamental rights is based on the internal legitimation of the rule of precedence of application of EU law. The CJEU arrives at its principle of precedence because it seeks to implement the integration objective of a European legal order. It sets out the dogmatic basis for its principle by arguing that precedence of application of EU law is necessary in order to form a uniform European legal order, because otherwise Europe would be fragmented into 28 national legal orders. This justification obviously holds true for provisions on customs duties, taxes and competition within the European internal market. Without a uniform application of the rules, from Finland to Portugal, no uniform internal market could be achieved in these fields, there would be no free movement of goods and services across national borders, and economic entities could not operate throughout Europe without national barriers. Fundamental rights, however, are of an entirely different nature and have an entirely different objective than rules on duties or competition. While the latter must by their very nature apply to everyone throughout Europe alike, fundamental rights are not intended to establish European unity at all, but rather aim to preserve individual freedom and equality for the citizens and for society. Most of the time they do not display any interest in European integration as such. In fact, often such an interest is not even desired, neither historically nor presently. For example, the development of religious freedom, the right to conscientious objection to military service,

collective labour law, freedom of the media and press, and freedom of expression have been shaped very differently in the Member States' procedures, based on historical experience and present needs. In these areas a uniform ruling by the EU throughout Europe is not required. Therefore, the rule of precedence of application of European law lacks internal legitimation in the area of fundamental rights.

It would therefore be preferable if both courts protected their own fundamental rights and cooperated in this way to reach the goal of guaranteeing equality and freedom, rather than interfering with the other legal order in a substantively unjustified manner by invoking a strict precedence of application, and thus structurally undermining the safeguards for fundamental rights of that legal order.

Prof. Dr Dainius Žalimas

President of the Constitutional Court of the Republic of Lithuania

The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law

On behalf of the Constitutional Court of the Republic of Lithuania, I have the great honour to congratulate you on the 25th anniversary of the activity of the Constitutional Court of the Republic of Slovenia. I am pleased to note that the foundations for close relations between Lithuania and Slovenia were laid as early as in 1991. In July 1991, the Supreme Council (*Reconstituent Seimas*) of the Republic of Lithuania firmly supported the aspiration of Slovenia for independence and protested against the acts of aggression taken by the Yugoslav communist regime in an attempt to suppress the aspirations for Slovenian statehood. On 30 July 1991, in response to the appeal made by President of the Republic of Slovenia Milan Kučan, the Lithuanian *Reconstituent Seimas* recognised the independence of the Republic of Slovenia and commissioned the then Lithuanian Government to immediately establish diplomatic contacts with the Republic of Slovenia. Lithuania became the second state that recognised the sovereignty of Slovenia. The bilateral ties between the two countries, established at the same time, also provided a solid foundation for cooperation between the Constitutional Courts of Lithuania and Slovenia.

I would like to express my gratitude for the opportunity to share with you some thoughts concerning the relationship between the rule of law, which is considered to be one of the most powerful expressions in the modern world, and the openness of a constitution to international law.

Respect for international law is usually not explicitly included in the list of elements making up the content of the rule of law. However, for example, in the Rule of Law Checklist, adopted by the Venice Commission, compliance with international law, in particular human rights law, is enlisted as one of the elements of the principle of legality.[1] In addition, according to the generally accepted substantive definition of the rule of law, the requirement of the compliance of laws with international human rights norms and standards constitutes an

1 Rule of Law Checklist, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e.

inseparable part of the concept. Taking into account the humanisation of international law and the evolutive development of both substantive and procedural human rights standards and human rights-related guarantees, international norms become relevant for the content of the rule of law as a whole. Once an international dimension is introduced into the principle of legality, the openness of a national legal system, including the constitution, to international law may be perceived as an element of the rule of law that reinforces other elements comprising the content of this principle.

Though the subject-matter of my presentation is formulated in general terms, taking into account the theme and purpose of this conference, I will concentrate on the landmark cases of the Constitutional Court of the Republic of Lithuania revealing the openness of the Lithuanian Constitution to international law.

According to the official constitutional doctrine developed by the Lithuanian Constitutional Court, respect for international law is an inseparable part of the constitutional principle of a state under the rule of law and is closely linked with the striving for an open, just, and harmonious civil society. However, the Lithuanian Constitution does not establish the precedence of international law over the Constitution. The constitution-centric concept of the Lithuanian legal system determines that no law or other legal act, including international treaties of the Republic of Lithuania, may be in conflict with the Constitution. Therefore, the relationship between international law and the Constitution is best described by an approach based on a realist (coordination) theory. This approach recognises certain autonomy of national constitutions and that of the legal system of international law, as well as the superiority of each of them within the area of their operation. In order to avoid the conflict of national constitutions with the obligations of the state assumed under international law, such an approach emphasises the necessity of the coordination and alignment of the Constitution (through the development of the official constitutional doctrine) with international law.

1. Landmark Cases Illustrating the Openness of the Lithuanian Constitution to International Law

Taking into account that adherence to international human rights standards is considered to constitute an inseparable part of the substantive concept of the rule of law, I would like to present three constitutional court cases demonstrating the relevance of international law in protecting human rights on a national level and, simultaneously, strengthening the rule of law.

1.1. The Case Concerning the Constitutionality of the Death Penalty

The first of these cases was decided in 1998 and concerned the constitutionality of the death penalty.

1.1.1. Context of the Case

Since Lithuania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms in 1995, the abolition of the death penalty was intensely debated. Since 1996, the *de facto* moratorium on the death penalty was in place, as the President of the Republic was not considering appeals for clemency of persons sentenced to death. Without this procedure, the death penalty could not be carried out. However, due to wide support for the death penalty within society, the political will to abolish this penalty was lacking. Thus, a group of Parliament (*Seimas*) members submitted a petition to the Constitutional Court requesting an investigation into the constitutionality of the related provisions of the Criminal Code.

1.1.2. Main Arguments of the Constitutional Court

The Constitutional Court held that this issue must be investigated from various aspects, including the need to consolidate a democratic and humanistic legal order, trends in the attitude of the international community regarding the death penalty, and the international obligations of the State of Lithuania.

Thus, the reasoning of the Court was based on two lines of arguments: firstly, the necessity to protect innate human rights, especially the right to life and the right not to be subjected to cruel or degrading treatment, and, secondly, clear trends towards the abolition of the death penalty in international law.

As regards innate human rights, the Constitutional Court held that these rights are values unquestionably recognised by the international community; they constitute the starting point from which all other rights are derived. From among those rights, human life and dignity were distinguished as exceptional values, whose protection and respect must be ensured by the Constitution. Actually, this distinction can be linked to the case law of the European Court of Human Rights, under which the provisions of the Convention consolidating the right to life and the right not to be subjected to torture and cruel or degrading treatment are regarded as the most fundamental provisions of the Convention enshrining core values of the democratic societies making up the Council of Europe.[2] Further, the Constitutional Court noted that the death penalty ends human life, and there is no possibility of rectifying a mistake if a person who does not deserve it is sentenced to death. What is more, the death penalty deprives the convict of human dignity, as the state in that case treats the person as a mere object to be eliminated from the human community. Taking into account these arguments, the Constitutional Court held that such a penalty is incompatible with the constitutional provisions establishing the innate nature of human rights (Article 18), the right to life (Article 19), and the prohibition of torture and cruel or degrading treatment (Article 21(3)).

2 *Soering v. the United Kingdom* [Plenary], application no. 14038/88, Judgment of 7 July 1989, § 88; *McCann and Others v. the United Kingdom* [GC], application no. 18984/91, Judgment of 27 September 1995, § 147.

Turning to the impact of international law, it should be noted that it was namely in this case that the Constitutional Court, relying on integral interpretation of the Constitution, recognised the importance of international law as the minimum constitutional standard for national law. Referring to Article 135(1) of the Constitution, providing that, in conducting foreign policy, the Republic of Lithuania shall pursue the universally recognised principles and norms of international law, the Constitutional Court held that, recognising the principles and norms of international law, the State of Lithuania may not apply to the people of this country any such standards that would substantially differ from international ones.[3]

At that time, Lithuania was not yet a party to Protocol No. 6 of the European Convention on Human Rights (which demands that the death penalty be abolished without reservations). Thus, the Constitutional Court adopted a broader approach and concentrated not on the formal obligations of the State of Lithuania, but placed an emphasis on the evolving international trend towards the abolition of the death penalty. In this regard, the Court invoked both universal and regional documents, including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, and multiple *soft-law* documents adopted by the UN General Assembly, the Council of Europe, and the European Parliament. The Constitutional Court came to the conclusion that the abolition of the death penalty was increasingly regarded as a universally recognised norm. In this context, it was noted that, at that time, Lithuania was one of only five states of the Council of Europe that had not yet signed Protocol No. 6. The Court also took into account the "evident trend" in criminal law of European states towards the humanisation of criminal punishment.

All these arguments related to increasing acceptance within the international community of the need to abolish the death penalty had a strong reinforcing, if not decisive, role in the process leading to the conclusion on the unconstitutionality of the penalty that, in the words of the Council of Europe, serves "no purpose in a civilised society governed by the rule of law and respect for human rights".[4]

1.2. The Case Concerning the Constitutionality of the State Family Policy Concept

Another perfect example of consistent interpretation of the Constitution with international law, in particular with the European Convention on Human Rights, is related to the case concerning the constitutionality of the State Family Policy Concept.

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3 Constitutional Court ruling of 9 December 1998. *Note: all the cited rulings of the Constitutional Court of the Republic of Lithuania are available in English on the Court's website: http://www.lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2016.*

4 http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Death_Penalty/default_en.asp.

1.2.1. Context of the Case

In 2008, the *Seimas* adopted a resolution approving the State Family Policy Concept. According to this Concept, family was defined as deriving exclusively from marriage. Thus, even natural families (a single parent who was not married and his or her child) were not considered a family. Also, a man and a woman who were not married to each other, but lived together and raised children, were not regarded as a family. This document, whose provisions had to serve as guidelines for future legislation, generated many discussions as to its discriminative character. For example, according to the Concept, only marriage-based families were to be entitled to receive more favourable conditions for gaining access to housing, social assistance, or other support. Finally, a group of members of the *Seimas* applied to the Constitutional Court requesting an assessment of the constitutionality of the provisions establishing the definition of family and related concepts (incomplete family, harmonious family, *etc*.).

1.2.2. Main Arguments of the Constitutional Court

The Constitutional Court, in its ruling of 28 September 2011,[5] held that the constitutionality of the notion of family, as consolidated in the State Family Policy Concept, is important in terms of the constitutionality of legal acts that will be adopted after adjusting them to the provisions of the Concept.

In assessing the compliance of the disputed provisions with the Constitution, the Constitutional Court had to interpret the constitutional meaning of "family". In this respect, the Court based its argumentation on three main aspects.

Firstly, it was emphasised that, although the institutes of marriage and family are entrenched in the same Article 38 of the Constitution and are closely interrelated, this does not mean that the Constitution does not protect and defend families other than those founded on the basis of marriage. That is, the Court made a distinction between two constitutional notions – that of marriage and that of family.

Secondly, the Constitutional Court emphasised the obligation of the state to regulate family relations in such a manner that there would be no preconditions created for discrimination against certain participants of family relations (as, for instance, a man and a woman who live together without having registered their union as a marriage, their children or adopted children, one of the parents who is raising a child, *etc*.). The Court also noted that, in order to comply with the constitutional principle of a state under the rule of law, the *Seimas*, when regulating family relations, must observe the requirements stemming from the equality of rights, human dignity, and respect for private life.

5 Constitutional Court ruling of 28 September 2011.

Thirdly, the Constitutional Court explicitly acknowledged that the constitutional concept of the family must be interpreted in view of the international obligations of the State of Lithuania under the European Convention on Human Rights. In particular, the Constitutional Court took into account that the concept of "family life" in the case law of the European Court of Human Rights is not confined to the notion of the traditional family founded on the basis of marriage; other types of the relationship of living together (e.g. characterised by the permanence of the relationship between persons, the character of assumed obligations, common children, *etc*.) are equally protected in the sense of Article 8 of the Convention (respect for private and family life).[6]

Based on these three aspects, the Constitutional Court found that "the constitutional concept of the family is based on mutual responsibility between family members, understanding, emotional affection, assistance, and similar relations, as well as on the voluntary determination to take on certain rights and responsibilities, i.e. the content of the relationship, whereas the form of the expression of the relationship has no essential significance for the constitutional concept of the family."[7]

Consequently, it was held that the *Seimas*, having narrowed the content of the notion of the family, did not observe the concept of the family as a constitutional value.

The case law of the European Court of Human Rights had a decisive impact on the interpretation of the constitutional notion of the family and inspired the Constitutional Court to give priority to the content of a family relationship rather than its form. Such an approach allowed the Constitutional Court to create preconditions for precluding discriminatory regulation in the future and guaranteeing the equal protection of persons living in different types of families.

1.3. The Case Concerning Criminal Responsibility for Genocide

The third case in which international law had a weighty significance for interpreting constitutional guarantees was the constitutional court case concerning responsibility for genocide.

1.3.1. The Context of the Case

This case originated in the context of criminal proceedings against persons who were accused of perpetrating genocide in 1951–1965 on the territory of the occupied Republic of Lithuania. Specifically, the defendants were accused of the actions committed with intent to physically destroy the part of Lithuania's residents who belonged to a separate political group – participants

6 *Ibidem.*

7 *Ibidem.*

of the armed resistance against the Soviet occupation. The petitioners – several Lithuanian courts – doubted the constitutionality of criminal responsibility for genocide directed against persons belonging to social or political groups, i.e. groups not included in the definition of genocide according to the universally recognised norms of international law.

1.3.2. Main Arguments of the Constitutional Court

In its ruling of 18 March 2014,[8] the Constitutional Court stated that the criminal laws of the Republic of Lithuania that are related to responsibility for international crimes, including genocide, may not establish any such standards that would be lower than those established under the universally recognised norms of international law. Disregard for the said requirement would be incompatible with the principle of *pacta sunt servanda* and the pursuit for an open, just, and harmonious civil society and a state under the rule of law. Based on this conception of international law as a standard for national law, the Constitutional Court developed two main lines of reasoning.

The first line of reasoning concerned the constitutionality of the definition of genocide broader than that established in international law. After analysing the relevant international treaty law and jurisprudence of international courts and tribunals, the Constitutional Court noted that states are under the international legal obligation to adopt the respective national legislation establishing criminal responsibility for genocide. The practice of more than 20 states, including several European states, reveals that this obligation is perceived as not precluding a certain discretion, based on the concrete historical, political, social, and cultural context, to establish, in national law, a broader definition of the crime of genocide compared to that established under the universally recognised norms of international law. Such a possibility is not prohibited under the Genocide Convention or the Rome Statute, either. Taking into account that the inclusion of social and political groups into the definition of genocide was determined by the Lithuanian historical, political, and legal context, i.e. the legacy of the occupying Soviet totalitarian regime, including massive repressions against Lithuanian residents, the Constitutional Court ruled that the impugned provision of the Criminal Code, defining genocide as directed against, among others, social or political groups, was not in conflict with the Constitution.

The second line of reasoning concerned the issue of the retroactive application of the wider definition of genocide. When interpreting the content of the constitutional principle of *nullum crimen, nulla poena sine lege,* the Constitutional Court took into account that the universally recognised norms of international law permit an exception to this principle, by providing for the retroactivity of national laws establishing criminal responsibility for international crimes, as defined by the universally recognised norms. However, this exception does not apply to crimes defined exclusively under national law. Therefore, persons may

8 Constitutional Court ruling of 18 March 2014.

not be brought to trial for actions committed prior to the entry into force of the broader concept of genocide in cases where such actions do not meet the definition of genocide under international law. At the same time, it is important to mention that this ruling should not be perceived as leading to impunity. The Constitutional Court emphasised that, in cases where the actions committed during the period of the Soviet occupation against particular political or social groups of the Lithuanian population do not meet the definition of genocide under international law, it should be assessed whether such actions can be qualified as crimes against humanity or war crimes.

Based on this reasoning, the provisions of the Criminal Code establishing that a person could be retroactively brought to trial for genocide directed against persons belonging to any social or political group (i.e. groups not covered by the definition of genocide under the universally recognised norms of international law) were ruled to have been in conflict with the Constitution, including the principle of a state under the rule of law.

Thus, this case demonstrates the fundamental impact of international law in reinforcing the requirement of non-retroactivity, which is an important law-making criterion and an element of the rule of law.

Of course, these three cases are not the only examples of consistent interpretation of the Constitution with international law. For example, the content of the constitutional right to a fair trial, which is regarded by the Venice Commission as a separate element of the rule of law, was also developed on the basis of the case law of the European Court on Human Rights.

2. Limits on Constitutional Amendments

The jurisprudence of the Lithuanian Constitutional Court reveals a dynamic approach towards the openness of the Constitution to international law. Thus, in addition to interpreting particular provisions of the Constitution in line with international law, consistent interpretation has one more major implication – it leads to limitations on constitutional amendments.

The Constitutional Court formulated the doctrine of unconstitutional constitutional amendments in its rulings of 24 January 2014 and 11 July 2014. The essence of this doctrine is the notion of substantive limitations on constitutional amendments. Such limitations stem from the overall constitutional regulation and may be either absolute ("eternal clauses") or relative.

As for absolutely unamendable ("eternal") constitutional provisions, the Constitutional Court held that no amendments to the Constitution may be adopted that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state.[9] Oth-

9 See Constitutional Court ruling of 11 July 2014.

erwise, the essence of the Constitution itself would be denied. Thus, the values inseparable from the concept of the rule of law – innate human rights and democracy – were recognised to enjoy absolute protection, as they form the core of the Lithuanian constitutional identity. Besides, the Court took into consideration the Guidelines for Constitutional Referendums at National Level, adopted by the Venice Commission in 2001. According to these guidelines, a text submitted to a constitutional referendum must not be contrary to international law or the Council of Europe's statutory principles (democracy, human rights, and the rule of law).

Relative substantive limitations are aimed at preserving the integrity (inner unity) of the Constitution. Thus, to the extent that eternal clauses are not affected, certain provisions can be changed only together with the intrinsically related provisions. It is especially at this point that openness to international law comes into play.

With respect to international legal obligations undertaken by the state of Lithuania, the Constitutional Court, in its ruling of 24 January 2014,[10] noted that the principle of *pacta sunt servanda* is a legal tradition and a constitutional principle of the restored independent State of Lithuania; in addition, respect for international law is an inseparable part of the constitutional principle of a state under the rule of law. The principle of *pacta sunt servanda* implies that it is not permissible to rely on national law, including the Constitution, in order to justify the failure to fulfil international obligations. Therefore, in view of the necessity to preserve the inner unity of the Constitution, the Court held that the Constitution does not permit any such amendments to the Constitution that would deny the international obligations of the Republic of Lithuania and, at the same time, the constitutional principle of *pacta sunt servanda,* as long as the said international obligations have not been renounced in accordance with the norms of international law.

Thus, the doctrine of unconstitutional constitutional amendments not only ensures the highest possible legal protection of democracy and innate human rights, but also provides special protection for international obligations of the State of Lithuania, thus, reinforcing the concept of international law as a standard of legality.

3. Limits on Openness to International Law

In this respect, it is important to emphasise that the openness of the Constitution to international law should not be understood as denying the supremacy of the Constitution in the Lithuanian legal system. Due to the fact that the Constitution and international law are inherently autonomous and have superiority in their respective spheres, certain incompatibilities between international legal norms and constitutional norms may arise.

10 Constitutional Court ruling of 24 January 2014.

So far, there has been only one instance of direct incompatibility between the Constitution and international law, i.e. the European Convention on Human Rights. This case concerned a former President of Lithuania, Rolandas Paksas, who was removed from office after impeachment proceedings in 2004. On 25 May 2004,[11] the Constitutional Court adopted the ruling in which it was held that a person who grossly violated the Constitution and breached his oath and, as a result of such, was removed from office could never again stand in elections for an office requiring a person to take an oath to the State of Lithuania. On 6 January 2011, in the case *Paksas v. Lithuania,* the Grand Chamber of the European Court of Human Rights held that such a permanent disqualification from standing in parliamentary elections was disproportionate and constituted a violation of Article 3 of Protocol No. 1 to the Convention.[12]

Thus, a divergence occurred between the positions of the Constitutional Court and the European Court of Human Rights, as these courts took different approaches towards the public interest. The Constitutional Court placed more weight on such constitutional values as the security of the state and the loyalty of high-ranking officials to the state, and emphasised the significance of the constitutional institute of an oath; whereas the European Court of Human Rights gave priority to the public interest in ensuring freedom of choice of the people in electing the legislature.

This divergence of jurisprudences led to another landmark case, in which certain limits to the openness of the Constitution to international law were defined.

3.1 Main Findings of the Constitutional Court

The Constitutional Court, in its ruling of 5 September 2012, held that, in itself, the judgment of the European Court of Human Rights may not serve as a constitutional basis for the reinterpretation (correction) of the official constitutional doctrine if, in the absence of corresponding amendments to the Constitution, such a reinterpretation would substantially change the overall constitutional regulation (in this particular case, the integrity of the constitutional institutes such as impeachment, the oath, and the electoral right) and would distort the system of the values entrenched in the Constitution or undermine the guarantees for the protection of the supremacy of the Constitution in the legal system.[13] It should be noted that the European Court of Human Rights examined the situation of Rolandas Paksas only in terms of parliamentary elections. Whereas the Constitutional Court had to take into account that the constitutional institute of an oath and the requirement of loyalty to the state are applicable to much broader circle of officials than members of the parliament and, therefore, have wider implications, including those related to the protection of statehood.

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11 Constitutional Court ruling of 25 May 2004.

12 *Paksas v. Lithuania* (GC), application no. 34932/04, Judgment of 6 January 2011, ECHR 2011.

13 Constitutional Court ruling of 5 September 2012.

On the other hand, the Constitutional Court emphasised that the constitutional principle of *pacta sunt servanda* implies the duty for the Republic of Lithuania to remove the incompatibility of the provisions of Article 3 of Protocol No. 1 of the Convention with the Constitution, i.e. to adopt appropriate amendment(s) to the Constitution.

In this context, it should be pointed out that the issue of incompatibility was also dealt with in the above mentioned constitutional court case concerning criminal responsibility for genocide. In this case, the Constitutional Court held that the incompatibility between an international treaty of the Republic of Lithuania and the provisions of the Constitution must be removed either by renouncing the international obligations established under the international treaty in the manner prescribed by the norms of international law or by making the appropriate amendments to the Constitution.

However, the discretion to choose among those options is limited. Taking into account the perception of human rights as fundamental constitutional values and considering the constitutional principle of an open, just, and harmonious civil society, as well as that of the geopolitical orientation of the state, renouncing international obligations in the sphere of human rights would not be a constitutionally justified option.

4. Conclusions

Ladies and gentlemen and dear guests, in summary, I would like to emphasise that the openness of the Constitution to international law leads to a constant dialogue between national and international legal systems. The jurisprudence of the Lithuanian Constitutional Court reveals certain constitutional principles that render it possible to minimise potential tensions between national and international law and lead to the openness of the Constitution towards the influence of the international legal system.

The main principle is that of *pacta sunt servanda.* This principle is supplemented by two other principles implying the integration of the State of Lithuania into the democratic community of states – the principle of an open, just, and harmonious civil society and the principle of the geopolitical orientation of the state. These three principles give rise to the requirement that international law should be perceived as the minimum necessary constitutional standard for national law. They also provide the basis for the constitutional presumption of the compatibility of international law with the Constitution and give rise to the duty of the Constitutional Court, when interpreting the provisions of the Constitution, to pay regard to the international legal context (the duty of consistent interpretation).

Actually, in cases where the official constitutional doctrine on a specific issue is not sufficiently developed, the Lithuanian Constitutional Court internalises the provisions of international law. This entails that the provisions of the Constitution are given the same meaning and con-

tent as under the corresponding norms of international law. In other words, international law serves as a direct source of inspiration for the Constitutional Court in forming and developing the official constitutional doctrine. At the same time, constitutional law is continuously supplemented with the elements derived from international law. This process helps to strengthen different elements of the rule of law both on the national and international scale.

Dr Pavel Rychetský

President of the Constitutional
Court of the Czech Republic

The Role of the Constitutional Court in Strengthening the Rule of Law in the Czech Republic

First of all, let me thank President Mozetič for the invitation to this international conference and let me wish the Constitutional Court of Slovenia the best of success for the next quarter of a century of its independent existence. I am one of those who remember democratic transformation of the 1990´s in Central and Eastern Europe. Slovenia was the top of the class in that regard. My sincere congratulations to the Republic of Slovenia and its constitutional court! At the same time, it appears most appropriate that the topic of our meeting is the relation between the rule of law and constitutional justice. This is not a merely theoretical issue that had been long resolved but a current, topical and dynamic one. Let me share with you some of the experiences gained by the Czech Constitutional Court in the course of developing and protecting the rule of law in our country.

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Powerful intellectual and social upheavals which gave birth to the ideals of the rule of law in the 18th and 19th century were inevitably followed by a secondary phase, one which was to protect the freshly established concept of the rule of law. Independent judiciary became the absolute and ultimate guarantor thereof. Further progress in jurisprudence on our continent after WWII led from the notion of the "rule of law" to the notion of the "rule of justice". As a result of that, the barraters of the 20th century, who endowed us with the atrocities of world wars, unprecedented genocides, coups, wrongs and lawlessness, could not but watch the disappearance from society of tradition, religion, unwritten but generally accepted rules of behaviour and informal moral authorities. The diminishment of such value systems which were not of normative nature shifted the burden of decision-making nearly exclusively upon courts.

The twentieth century established a firm bond between states and written law. Law was no longer just one of the instruments of power but a definition, a prerequisite and a mirror of each state, the blood of its organism. But the twentieth century was also the century of

unrest, of endings and new beginnings. And new beginnings demand new laws and such demands lead to legislative tempests. It may not be wrong to say that hypertrophy of legal system, including in the Czech Republic, was a common denominator of radical social changes in Europe. After 1989, we embarked on systemic changes, on rounds of new laws linked to the establishment of an independent state, new laws stemming from the harmonisation with the laws of the European Union. We were under the illusion – and I am stating that as a former member of the cabinet responsible for legislation – that every social problem can be resolved by a new piece of legislation. We soon came to realise that this is only the calling of the Sirens, that the swelling of written laws and their constant changes only lead to the loss of direction, to the loss of ability to understand the sense and purpose of law and to apply it in practice. The scope and dynamics of legal regulations pushed an individual out of its interpretation on one hand, demanding such interpretation from authorities, i.e. courts, on the other hand.

Thus, the idea of the rule of law is not connected with law *per se* but with the body of applicable legislation in force. The state´s boundedness by law, respect of and subordination to law are implied. Rule of law is not a formal construct which could be assessed according to a check list of prescribed elements,[1] but an indefinite notion providing a set of constitutive values for the society. The German Federal Court wrote most pertinently on the issue of the 1941 regulation on the aryanisation of Jewish property:

> "*Law and justice are not available to the legislator. The idea that the constituent body can arrange things according to their own will would mean returning to the ideological positions of value-free legal positivism which had been long overcome in both jurisprudence and practice. The era of National Socialism in Germany teaches us that the legislator may legislate non-rights*."[2]

In modern European states, the postulate of the rule of law about sharing and protecting constitutional values led to the strengthening of the judicial power *vis à vis* the legislative and executive powers and to the expansion of constitutional justice. Empowering constitutional justice is no panacea as overloaded courts lose efficacy and make mistakes. Formalistic approach to the rule of law fails to offer systemic solutions but introduces new, additional procedural tools to protect rights, broadens the scope of subjects and entities of *locus standi,* and increases the number of recourse instances. Judicial systems under the rule of law then collapse under their own weight. Similarly, we could argue that a forest fire is not to be extinguished but more trees to be planted around it.[3] Contemporary rule of law is at a crossroads and we have to decide

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1 This, however, is not to undermine rightful demands for cohesion and integrity in law; see Dworkin, R.: Law's Empire,1st Edition, Harvard University Press, 1986, chapter 2.4.2.

2 See the decision of the German Federal Constitutional Court in the matter of a decree no. 11 with respect to Act on German Reich´s Citizenship of 24. 11. 1941 (GBl. I., p. 772), on the basis of which citizenship of Jews who emigrated was nulled and their property confiscated (BVerfGE 23, 98).

3 "*No legal order may be developed* ad infinitum *both from the perspective of procedural tools available to protect rights and from the perspective of the appellate review system. Each legal system is bound to generate a certain number of mistakes. The purpose of appellate review or reviews is to minimize mistakes to the minimum but not to remove them. The system of appellate review*

whether to cut back on the broadness of its principles or turn a blind eye to the underlying tectonic tensions.

Like all other countries of Europe, the Czech Republic, too, demonstrates its will to be a state governed by the rule of law. It does so in Article 1, Paragraph 1 of the Constitution which defines the country as a democratic state. In this Article, the key ideals of the constitutive body are anchored setting forth values for the future. The principles of the rule of law which are embodied in the constitutional order are the general and introductory principle of the whole architecture of the legal order and a basic point of reference for the Constitutional Court. The same thesis is then developed in its case law while some additional sub-principles of the rule of law had to be inferred in it. Moreover, the above-quoted provision of the Constitution in fact joins two principles: the principle of a democratic state and the principle of the rule of law.

Both principles are fundamental for the very existence of the present modern state. However, they do not draw from same sources. While democracy is a political notion the purpose of which is the creation and organisation of the powers in the state, by contract, rule of law refers to the political system not according to its formation but on the basis of the fact that powers in such a state are subordinated to law. The point of intersection of the two principles is the fact that no establishment other than a democratic one can be legitimate under the rule of law.[4]

Let us go on asking: What is the relation between the citizen and the state under the rule of law? The answer is obvious – the citizen must enjoy priority. Citizens must stand above the state and their basic rights and freedoms stand above the interests of the state.

The principle of the rule of law, as both a normative and a value category, is split into two areas. The first area establishes the principle of state power being bound by the law[5], the second is expressed through the principle that "what is not forbidden, is permitted."[6] Precisely in this I see the border stone delineating the formal and substantive dimension of the rule of law. One of the earliest judgments of the Czech Constitutional Court,[7] handed down in December

instances is thus a balance between the effort to install the rule of law on one hand and the efficacy of decision making and legal certainty on the other." The judgment of the Czech Constitutional Court ref. no. Pl. ÚS 15/01, dated 31 October 2001.

4 See the judgment of the Czech Constitutional Court, ref. no. Pl. ÚS 19/93.

5 Provision of Article 2 Para 3 of the Constitution of the Czech Republic: "*The government´s power is to serve all citizens and may be exercised only in situations, within limits and in a manner prescribed by law.*"

6 Provision of Article 2 Para 4 of the Constitution of the Czech Republic: "*Every citizen has the right to do anything that is not forbidden by law and must not be forced to do anything that is not prescribed by law.*"

7 *"Czech laws are not based on the sovereignty of legislation. The fact that laws are superior over secondary legislation doesn´t mean that they are sovereign. One cannot assume sovereignty of law even within the scope of legislative competence in a constitutional state. The concept of constitutional rule of law, on which the Czech Constitution is based, is not subject to free disposition by the legislator, and the same holds true for the laws themselves since the legislator is bound by principal values which the Constitution deems inviolable. […] constitutive principles of a democratic society under this Constitution stand above the legislative competences, i.e. "ultra vires" of the Parliament. Constitutional rule of law rises and falls with these principles.*

of 1993, held clearly that the stability of law and legal certainty for citizens is rationally and formally legitimate but has no priority over inviolable values of a democratic society.

Later, the Constitutional Court reviewed a motion for the annulment of the Act on Illegality of the Communist Regime and Resistance Against It. The argument of the petitioners held that calling the state and political regime between 1948 and 1989 illegal means casting doubt on the continuity of law which stemmed from the fact that laws and regulations from that period were taken over. The Constitutional Court refuted this argument by stating that the Constitution of the Czech Republic is not value-neutral, i.e. is not a mere list of institutions and procedures but incorporates in its language certain ideas expressing inviolable values of a democratic society. The Constitution adopts and respects the principle of legality as an inherent component of the rule of law but it does not link positive law only with formal legality but subordinates the interpretation and application of laws to their substantive content and meaning. The Constitutional Court has made it ample clear that while there is continuity with the "old laws" - in other words, legal certainty of parties to legal rights and obligations - there´s discontinuity in terms of values with the "old regime".

Six months later the Constitutional Court abolished the crime of "defamation of constitutional institutions,"[8] when it stressed the above-mentioned superiority of the citizen over the state. It noted that laws under the rule of law are not mere circulars for the state apparatus and the criminal code is not a mere internal regulation for the criminal justice system. According to the view of the Constitutional Court, laws are public and published tools for the citizens to clearly understand what is still permitted and what is not. "*The principles of the rule of law are based on the priority of the citizen over the state, i.e. the priority of fundamental human rights and liberties,*" it held.

In 2009,[9] the Czech Constitutional Court went even farther in its arguments when it debated the formalistic attachment of general courts to – constitutionally insufficient – legal regulations. Under the rule of law, form must not prevail over content. Legal regulations must be scrutinized in terms of their content as under the material rule of law, based on the idea of justice, fundamental rights are a corrective not only of the content of laws but also of their

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Removing any of these principles in any manner, albeit by a majority or unanimous vote of the Parliament would mean doing away with the constitutional rule of law as such." The judgment of the Czech Constitutional Court, ref. no. Pl. ÚS 19/93, dated 21 December 1993.

8 *"One of the conditions for application of civil rights is drawing a clear borderline between that freedom, which is the constructive basis for a democratic and critical society, and the freedom which leads to destruction of general human and democratic values. Therefore, democratic states recognize the rightfulness of certain limitations on the exercise of civil and human rights and freedoms. The nature of the rule of law contains the recognition (confirmed by long experience of mankind), that limiting civil liberties is a neuralgic point of every society and thus such limitations have to be kept at the minimum while withstanding any attempts on the part of the government and the powerful to gain more power than absolutely necessary."* The judgment of the Czech Constitutional Court, ref. no. Pl. ÚS 43/93, dated 12 April 1994.

9 The judgment of the Czech Constitutional Court, ref. no. II. ÚS 2048/09, dated 2 November 2009.

interpretation and application. Under the rule of law, it is the responsibility of every judge to arrive at resolutions which protect fundamental rights of the parties to the maximum, and if that proves impossible, then rule in line with a general idea of justice, i.e. according to the general principle of natural law.

The material rule of law as developed through the jurisprudence of the Czech Constitutional Court in numerous areas goes beyond the original idea of the formal rule of law based on legal positivism.[10] However, it needs to be noted that accenting the substantive approach does not mean that formal qualities are not necessary. Also today, the principle of the rule of law is tied to formal characteristics which have to be embraced by legal rules so that individuals can take them into account when deciding about their behaviour in the future.[11]

The principle of legal certainty as one of the preconditions of the material rule of law is thus key for determining one´s future behaviour.[12] It goes hand in hand with predictability of the legal order and the recognisability of consequences of decisions handed down on its basis and in keeping – both substantive-wise and formally – with it.[13] Although the requirement of legal certainty is not expressly confirmed in the Constitution, the case law infers it from the very basis of the rule of law. Legal certainty touches upon the area of both creation and formation of laws (stability of regulations and legality of the legislative process), as well as its application. In the arena of application of laws, legal certainty means that the recipient of the regulation must recognise the legal status and consequently predict legal rulings. A country with unclear rules of behaviour and unpredictable court decisions is not a country under the rule of law.[14]

10 19th century science was enchanted with hierarchy, symmetry, logics and mechanics. Jurisprudence was no exception. Hierarchy of legal regulations, mechanical taxonomy of civil and criminal procedure, structural logics of legal regulations and a sharp distinction between law and other value systems… that all fell apart in the melting pot of the Second World War. Formalistic law led to substantive wrongs and the generally shared positivist perception that "all that is legal is by definition legitimate" perished. On its grave, Radbruch´s formula which became the mantra of judges in doing away with "lawless law" (*unrichtiges Recht*) blossomed. See Radbruch, G.: *Gesetzliches Unrecht und* übergestzliches *Recht*, 1946, Juristische Zeitgeschichte.

11 In its judgment ref. no. Pl. ÚS 77/06, the Constitutional Court noted the formal values of law which do not determine the content of legal regulations but serve to ensure the existence, acceptance and applicability: order, predictability, freedom from arbitrariness, equity and legal security. The rule of law involves the principle of predictability of law and no arbitrariness by public authorities.

12 In 1988, a renowned Austrian thinker Franz Bydlinski (1931–2011) formulated five postulates of legal certainty: clarity of law, stability of law, accessibility of law, peace protected by law and enforceability of law. Bydlinski, F.: *Fundamentale Rechtsgrundsätze*, Wien, 1988, p. 293.

13 *"Transparent and predictable accord between declared legal rules and procedures of public authorities (general courts) is an indispensable precondition of the rule of law. One of the key preconditions of the material rule of law is the principle of legal certainty linked with predictability and foreseeability of consequences of rulings handed down on the basis thereof, which are and have to be with respect to their requisites formally and materially in accordance with law"*. The judgment of the Czech Constitutional Court, ref. no. IV. ÚS 157/03, dated 24 September 2003.

14 *"Embedded in the principle of the rule of law is the principle of predictability and no arbitrariness on the part of public authorities. In this context, the theory of law speaks about formal values of law which do not determine the content of legal*

When Czechoslovakia split into two countries, the writers of the Czech Constitution inserted in it Article 9 (2) which reads: *"No fundamental requisites of the democratic rule of law shall change"*. For a long time thereafter, both academics and practitioners debated whether this is a mere proclamation or a directly applicable and effective legal provision. Our Constitutional Court resolved the dispute on 10 September 2009 by a judgment[15] which revoked an *ad hoc* constitutional act limiting the term of office of the lower chamber of the Parliament and holding early election on the same date as was the date when the term ended. The Constitution, however, provided for four different options of dissolving the Parliament and holding early election. In all four cases, it held true that the early election must be called within sixty day of the dissolution of the chamber. During that time, the Members of Parliament would not receive salaries and other social benefits, including health and social insurance. Hence, they adopted an *ad hoc* constitutional law which circumvented the prescribed procedure, ignored it and was of "one-use only." The Constitutional Court saw in this a violation of fundamental requisites of the rule of law and the act, albeit constitutional, was revoked.

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To conclude, let me mention one category which seemingly stands above the rule of law. The constitutional rule of law. Under the constitutional rule of law, there are institutional guarantees that law and regulations which are in conflict with the constitution will be revoked as will be any individual interventions of the public authorities into constitutional rights and liberties. Under the constitutional rule of law, constitutional principles have a direct and unmediated effect and the state is bound by them. Constitutional courts are the institutional guarantee of such a desired state bearing on their shoulders the entire architecture of constitutionality. We all know that such a burden is often hard to bear but one must not relinquish…

The rule of law may exist without constitutional courts. To meet its purpose, however, constitutional courts need the rule of law. Without it, constitutional courts are just an empty gloss of power.

This was expressed most pertinently by Gustav Radbruch[16] in 1946:

> *"Democracy is undoubtedly an important good, but the rule of law is like bread we eat every day, water we drink and air we breathe; the best thing about democracy is that it is capable of ensuring the rule of law."*

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regulations but serve to ensure the existence, acceptance and applicability, and include such values as order, predictability, freedom from arbitrariness, equity and legal security. According to the opinion of the Constitutional Court, the rule of law involves the principle of predictability of law, its comprehensibility, and no internal contradictions." The judgment of the Czech Constitutional Court, ref. no. I. ÚS 420/09, dated 3 June 2009.

15 The judgment of the Czech Constitutional Court, ref. no. Pl. ÚS 27/09, dated 10 September 2009.

16 Radbruch, G.: *Gesetzliches Unrecht und* übergestzliches *Recht*, 1946, Juristische Zeitgeschichte, p. 106.

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The Hungarian Constitutional Court's Efforts for Legal Certainty

1. Rule of Law and Legal Certainty

Legal certainty is a fundamental element of rule of law and a basic principle of law-making. Its conceptual foundation was laid already by John Locke who in chapter XI of The Second Treatise of Civil Government defined the extent of legislative power with four limitations:

> the legislative or supreme power over the lives and fortunes of the people cannot be absolutely arbitrary; secondly, it is bound to dispense justice by promulgated standing laws, and known authorised judges; thirdly, it cannot take from any man any part of his property without his own consent; fourthly, the legislative cannot transfer the power of making laws to any other hands.[1]

Along this lines defined as soon as in 1690, the concept of legal certainty was developed both in material and procedural sense. The material elements of rule of law as measures of constitutionality (ban of arbitrary power) primarily determine the constitutional requirements of legislation, but also may be interpreted as guarantees for the exercise of fundamental rights. The notion of legal certainty is used mostly in the formal or procedural aspect of the constitutional control over legislation.

From the large scale of international law instruments I refer only to the hard law of the European Convention of Human Rights (arts. 6-11), and two recent documents of the Venice Commission. In 2011 the Venice Commission adopted the Report on the Rule of Law.[2] This report

1 John Locke, Two Treatises of Government, ed. by Peter Laslett, Cambridge University Press, 1992. pp. 357–363.

2 CDL-AD(2011)003rev.

identified common features of the Rule of Law, *Rechtsstaat* and État *de droit*. A first version of a checklist to evaluate the State of the Rule of Law in single States was appended to this report. The final checklist was adopted by the Venice Commission in March 2016.[3]

In the Commission's approach, legal certainty is a benchmark of rule of law, and its components are accessibility of legislation and court decisions, foreseeability of laws, stability and consistency of laws, legitimate expectations, non-retroactivity, *nullum crimen* and *nulla poena* principles, and *res judicata*. This latest list shows that quite different principles and requirements might belong to the domain of legal security, and substantial-material elements merge with formal-procedural ones.

2. The Hungarian Constitutional Court's Concept of Legal Certainty

The Hungarian Constitutional Court considered legal certainty from the very beginning to be an "essential element" of the rule of law, and in its jurisprudence this is the most comprehensive and most frequently used test for the constitutionality of legislation. The Constitutional Court emphasized the content of legal certainty as follows:

> "*Legal certainty compels the state – and primarily the legislature – to ensure that the law on the whole, in its individual parts and in its specific provision, is clear and unambiguous and that the subjects of law find its operation ascertainable and predictable. Thus, legal certainty requires not merely unambiguous legal norms but also the predictable operation of the legal institutions. As a result, procedural guarantees are fundamental to ensuring legal certainty. Only by following the formal rules of procedure may a valid law be created, and only by complying with procedural norms do legal institutions operate in a constitutional manner*."[4]

The Constitutional Court also highlighted the material content of essential elements of the rule of law from the position of the protection of citizens' rights:

> "*The requirement of legal certainty – among others – means also that the rights and obligations of citizens shall be regulated by statute, in laws announced properly and accessible to all; the subjects of law shall have the opportunity to adjust their intentions to the prescriptions of law. No one shall suffer harm because she could not access a law because of the fault of the legislator, either if it was announced later or because its retroactive application was ordered*."[5]

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3 CDL-AD(2016)007.

4 Decision No. 9/1992. Its English translation in László Sólyom and George Brunner (eds.), Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court. Ann Arbor, The University of Michigan Press, 2000. p. 206.

5 Decision No. 14/1993.

The main elements of legal certainty in the jurisprudence of the Constitutional Court are the following:

3. Norm Clarity

The requirement of "norm clarity" as a separate measure of legal certainty refers to the wording of the law. An indispensable condition of lawfulness is clarity:

> "*Legal certainty – which is an important element of the rule of law declared in the Constitution – requires that the text of the law shall be clear and explicit, and shall carry a normative content recognizable during the application of law.*"[6]

The requirement of norm clarity takes on special significance in criminal law.[7] The violation of "norm clarity" may indirectly violate fundamental rights. It has been several times declared by the Constitutional Court that conceptually unclear, uncertain legal categories "make impossible"[8] the constitutional obligation of the state to guarantee the protection of fundamental rights.

The Constitutional Court has distinguished between the assessment of norm clarity and the assessment of legislative techniques, such as cogency and dispositivity. This latter task is not a substantial part of the constitutional requirement of norm clarity:

> "*It is not the duty of the Constitutional Court to qualify the content of norms where it is not related to legal certainty but from aspects of functionalism and legal techniques.*"[9]

4. Reasonable Time

The "reasonable time" requirement became a separate rule of law measure in 1992, when the Constitutional Court held it to be unconstitutional that a decree entered into force on the same day that it was promulgated.[10] The Constitutional Court raised the provision in the Act

6 Decision No. 11/1992; Decision No. 26/1992.

7 Decision No. 30/1992. The Constitutional Court held the "abuse of the right to assembly" criminal law provisions unconstitutional due to the uncertainty of the statutory provision: "as it does not determine which crime the punishable behaviours conceptually relate to, it implicates the possibility of arbitrary restriction of the right to assembly." (Decision No. 58/1997)

8 "The undefined quality of professional secrecy the complete absence of clarification of this notion is unconstitutional in itself, as it does not comply with the requirement of legal certainty, expressing the essence of the rule of law, and, at the same time, expressly violates, in the context of the fundamental rights protection obligation of the state." Decision No. 34/1994.

9 Decision No. 21/B/1994.

10 A ministerial decree on the modification of Trade Customs Tariffs made the modification of customs tariff and other fees enter into force of the day of promulgation. The client, who had paid the calculated tariff was obliged a month

of Legislation defining the requirement of "reasonable time" to a constitutional requirement: "*legislative authorities occasionally […] make the law enter into force on the day of announcement; this undoubtedly violates the constitutional rights of those concerned by the provisions of the law.*"[11]

The Constitutional Court has in several decisions established legislation to be unconstitutional for lack of "reasonable time".[12]

However, the Court added that there is no objective measure by which to define the amount of time needed for preparation; the legislator must determine the time required before a statute enters into force by considering the social subject of regulation and the characteristics of related regulation (e.g., whether the new regulation is favourable or disadvantageous as compared with previous regulation). However, the Constitutional Court did not exclude the immediate entry into force of legislation for a social interest which is "important and not otherwise enforceable", which will be examined by the Constitutional Court in each case.

5. Prohibition of Retroactive Effect

In addition to "reasonable time" and "norm clarity", as separate measures of constitutionality, the Constitutional Court included into the concept of legal certainty the prohibition of legislation with retroactive effect. The Constitutional Court interpreted this prohibition more broadly as a separate element of legal certainty. Consequently, legislation is unconstitutional even if the enactment was not retroactive, but if the provisions of the law "*shall be applicable for legal relationships already existing before the enactment of the law.*"[13]

Connecting principles of trust and predictability as materially relevant to the prohibition of retroactive effect, the Constitutional Court established what the constitutional barrier might be for modification of a legally ensured tax allowance: "*the limit of this is not only that the modification disadvantageous to those concerned shall not be of retroactive effect, but also that the effect of modification shall not cover those natural and legal persons who had commenced the activity before the entry into force of the modification, trusting in state guarantee.*"[14]

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later to pay an additional amount, as a result of the modification of the law, which was already in force at the time of the customs formalities. The judge suspended the ongoing procedure and turned to the Constitutional Court on grounds of violation of the Rule of Law clause of the Constitution.

11 Decision No. 28/1992.

12 See e.g. Decision No. 41/1997; Decision No. 723/B/1998; Decision No. 10/2001.

13 "In the absence of this minimum legal certainty – i.e. that during the budgetary year the state may intervene into the budget of the local governments without limits and even in a way affecting the structure of sources – the economic independence of local governments would practically fade away, in addition to which unrestricted state intervention would be incompatible with the constitutional law status of local governments determined in the Constitution." Decision No. 57/1994.

14 Decision No. 9/1994.

The Constitutional Court connected the violation of the prohibition on retroactive legislation also to the reasonable time requirement when the announcement of a law in force occurred on a date after its entering into force.[15]

6. Protection of Hierarchy of Norms

The Constitutional Court included into the scope of legal certainty the division of legislative powers, the protection of hierarchy of sources of law (e.g. the relationship between statute and decree), significant issues of constitutionality of legislative procedure, the matter of 'two-thirds majority' legislation, and the concept of so-called public law validity or invalidity.

The demarcation of the law-making competences of the Parliament and the Government and the position of statutes in the hierarchy of legislation emerged in the procedure of the Constitutional Court primarily in relation to the law-making competence of the Government. Hierarchy of norms is determined by the Constitution. Regarding the scope of Parliamentary legislative power, the Constitutional Court clarified that it is open 'downwards' in the hierarchy of norms, which is to say that the original law-making power of the Government, when it regulates for the first time a certain issue, does not 'reserve' that issue for Government. The Parliament may raise the decree level regulation to the level of acts. "The constitutional representation of exclusive legislative subjects is only an illustrative list, and shall not be considered under any circumstances to be exhaustive. It is the right of Parliament from time to time to decide which issues it wishes to regulate by statute, and for which issues regulation by decree is sufficient, and for this it provides authorization for legislation to those with legislative competence."[16]

The Constitutional Court confirmed this approach when it stressed that the legislative competence of the Parliament within the framework of the Constitution "is full and unlimited". The government, regardless of whether it exercises its so-called 'original' law-making competence set forth in its list of powers defined in the Constitution, or – upon statutory authorisation – its 'executive' law-making competence, "*shall not dispose of any exclusive law-making powers, not removable by the Parliament*".[17] The Constitutional Court e.g. declared that even if presently government decree stipulates the speed limits, this does not exclude the possibility that in the future the Parliament in its own competence might regulate the permitted speed limit.[18] This leads us to the correlated issue of proper authorisation of transferring legislative power. According to the Constitutional Court, the legislative competence of state organs is derived from the Constitution, the determination, modification or withdrawal of the limits of the legislative

15 Decision No. 797/B/2001.

16 Decision No. 53/2001.

17 Decision No. 46/2006.

18 Decision No. 90/2008.

competence (and in the enforcement of this competence also the substitution) is reserved for the subject of regulations of the Constitution: "*the possible transfer of exercising this competence shall be subject of the 'establishing norm', the Constitution, therefore 'substitution' shall also be based on the Constitution.*"[19]

The Constitutional Court interpreted the constitutional provision on the duty of the Government to protect constitutional order, and protect and guarantee the rights of natural and legal persons as a rule that determines the law-making competence of the Government: "*Constitutional order and the protection of citizens' rights both impose the obligation to the Government that in case of need it shall perform its law-making duties without separate authorisation.*"[20]

7. Conclusions

To sum up: the Hungarian Constitutional Court interpreted legal certainty both from its substantial and procedural aspect. However, the Court was criticised for giving priority to formal-procedural elements in case of conflict. This was put in the context of the conflicting values of substantial and formal understanding of justice, respectively. The Court was firm in underlying that the basic guarantees of rule of law cannot be set aside by reference to historical situations and to justice: "*A state under the rule of law cannot be created by undermining the rule of law. Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice.*"[21]

The interpretation of legal security and its implementation is sometimes criticised also as being soft, subjectivist and relativist. However, in my view, the emphasis on the formal and procedural requirements of law-making procedure was very important in changing the former socialist patterns of legislative activity, and later on, to face the challenges of an age of legal uncertainties where parliaments work as law-making factories.[22]

And a final remark: even if we sometimes forget about it, the requirements of legal certainty such as foreseeability do not apply only to the legislative power but also to judicial decisions. Thus, the predictability and coherency of Constitutional Court decisions is also an important standard of the Rule of Law.

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19 Decision No. 37/2006.

20 Decision No. 22/1990.

21 Decision No. 11/1992. Its English translation in László Sólyom and George Brunner (eds.), Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court. Ann Arbor, The University of Michigan Press, 2000. p. 221.

22 Anthony D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1 (1983); accessed at Anthony D'Amato, Legal Uncertainty (2010). Faculty Working Papers. Paper 108: http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/108.

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The Role of Constitutional Courts in the Implementation of the Rule of Law in States in Transition

The historic break with the previous social and political order in the first half of the 1990s that took place in the Central, Eastern, and Southeast Europe, going as far as the Caucasus and Central Asia entailed the establishment of constitutional courts in the existing and in the newly formed states that are more or less accurately described as "states in transition". It should certainly be added that the "transition" process was more or less deep in some of these states, which also holds true for the changes relating, in particular, to the rule of law and constitutional courts.

In this brief and limited address at today's solemn occasion it is naturally only possible to speak in general terms about how in a quarter of a century of its existence and functioning the constitutional judiciary has established its position in this part of the world, of its achievements, deficiencies, and issues it has faced on the way. Nevertheless, it is possible to single out certain observations when looking closely at the functioning of constitutional courts, which I had the opportunity to do in particular when I was the President of our Constitutional Court, when meeting and talking to my fellow judges and presidents of constitutional courts in this part of Europe, and also by reading about their work, positions, and difficulties they encounter.

Generally speaking, the majority of constitutional courts were created or reinstated (in Czechoslovakia, for instance, similarly to Austria, there had been a functioning constitutional court as early as between the two World Wars) after the fall of the Berlin Wall, i.e. approximately a quarter of a century ago. In Slovenia and in the other states in the territory of the former Socialist Federative Republic of Yugoslavia (hereinafter referred to as the SFRY), there were, in accordance with the constitutional system adopted in 1963, a federal Constitutional Court of the SFRY and constitutional courts of the socialist republics. However, apart from their name "constitutional court", these courts did not have much in common with constitutional courts based on Kelsen's ideas and – in particular as regards their position within the system of the separation of powers and their independent functioning – with modern constitutional courts. Let

me mention in passing that this is also the main reason why today we are celebrating the 25th anniversary of the Slovene Constitutional Court, i.e. without the official continuity with the constitutional court that had functioned, notwithstanding in what manner, before the groundbreaking year of 1991. Naturally, the establishment or restoration and functioning of the constitutional courts in the territories to the East of the former "Iron Curtain" dividing Europe prior to 1989, started out in environments that significantly differed from one another in terms of legal tradition, legal culture, the development of legal theory, as well as the understanding of questions as fundamental as what the role of law is and which ends the law shall serve.

Surely, from such perspective, which is undoubtedly significant for the functioning of the constitutional courts and for understanding their role in the context of the rule of law, the situation was not equal, for instance, in Poland or Hungary, on the one hand, and in Georgia or Armenia, on the other. Nevertheless, certain fundamental realities were similar. In all of the so-called states in transition, there namely existed – to a greater or lesser extent – social and political realities that were different than the one in which the first constitutional courts were established after 1920 and in which the constitutional judiciary spread throughout Western Europe following the Second World War. Let me mention at least two ideas that have been officially abandoned also in states in transition in the period after 1990, but have remained present to a greater or lesser degree in the minds of the people, including many lawyers, even those in the judiciary: the idea of the "unity of power" and of law as "a means of compulsion for maintaining the power of the working class", concretely the Communist Party or the current power-holders at the time. Several generations of lawyers, including many of those who are still active, among them also persons working in the judiciary and elsewhere, and who teach at law faculties in this part of the world, obtained their professional education when the mentioned two principles applied, when it was blasphemous to propagate the principle of the separation of powers, independence of the judiciary from the other branches of power, and the role of law as not serving the interest of the state, the "majority" of the people, the "working class", etc. The authorities expected the law to serve their interests, i.e. the "majority" of the people, going as far as abusing the law when necessary. The question of how many of such expectations are still present in the states in transition and to what degree the role of law (and, consequently, the role of constitutional courts) is still (mis)understood, is, in fact, an empirical question. My experience and observations, also in Slovenia, confirm that such expectations and misunderstandings are indeed still present in different places to a smaller or greater extent.

The new constitutional systems with more or less extensive catalogues of human rights, proclaiming the principles of a state governed by the rule of law, the separation of powers, the independence of the judiciary, and procedural safeguards in criminal proceedings, were set in the described social milieu and the corresponding legal cultures, which were more or less burdened by the past. These new constitutional systems of course include also the subject of our analysis, namely the constitutional courts. These are those constitutional courts that are based on ideas by Kelsen and others, the characteristics of which I am not going to enumerate

here as they are well-known, hence, the constitutional courts such as had been established in the West, the part of the world with a different legal culture. These are constitutional courts that supervise the legislative and executive branches of power from the viewpoint of the constitution, and that are the last (but not the only) guardians of fundamental human rights and freedoms, guardians and guarantors of the constitution and fundamental constitutional norms and principles, *inter alia* the principle of the separation of powers and independence of the judiciary. In other words, the constitutional courts as the guarantors of everything that the rule of law stands for.

It is not difficult to understand that the constitutional courts, often established virtually overnight in states in transition and transplanted in legal and also political (non-)culture of these states, represented a sort of an intruder that first had to strengthen its position of a true constitutional court, i.e. a truly independent constitutional court.

Having in mind the frequent problems and conflicts with the institutions of the new democratic power in which constitutional courts of several states in transition have found themselves, I take the liberty to conclude, *grosso modo*, that in states in transition it was precisely the constitutional courts that have played, the important role in ensuring respect for the rule of law, constitutionality and legality, human rights and fundamental freedoms, including the right to a fair trial.

Let me also add that in this context foreign assistance, cooperation, and exchange of experience between constitutional courts have played a significant role in this respect, just as the work and judgments of the European Court of Human Rights (hereinafter referred to as the ECtHR), the efforts of the Venice Commission, and the work of the Council of Europe have. However, the major part of the burden has been and still falls on the shoulders of the judges of these constitutional courts, who are often expected and are under the pressure to decide in a "politically correct" manner, i.e. in accordance with the expectations of the authorities and the "majority" of people.

The difficulties and the lack of understanding of the work and the role of constitutional courts in states in transition have been and remain significant. Allow me to state that also the recent complications that occurred at the constitutional courts, well-established and distinguished as the Polish and the Hungarian ones, demonstrate the extent of the lack of understanding and difficulties that constitutional courts and their judges may be faced with. They are the ones who are able to keep in check the majority, even the absolute majority in the legislative branch of power; they can quash a law or some other general legal act that has already been adopted, or a judgment of regular courts; they are the ones who are able to protect individuals, human dignity, and human rights and fundamental freedoms, from the otherwise almighty executive power; and they can allow or prohibit a referendum despite the opposition from the general public and the media, and despite the fact that "political correctness" demands otherwise. The fundamental characteristic of constitutional courts is precisely in supervising and limiting the

"majority", in a democracy in which, as a general rule, it is the majority that decides. But also the majority could abuse its constitutional powers and overstep its constitutional boundaries. In developed democratic societies that have a long-standing legal tradition and culture, it is easily understood that, the essential role and the position of the constitutional courts is *a priori* a position which may lead to or even necessarily leads to a conflict with the legislative and executive powers. In states in transition, on the contrary, this is often difficult to understand. Experiences – also in Slovenia – support such conclusion. Difficulties arise in particular where under the guise of "formal democracy," the authorities are in fact still undemocratic and more or less authoritarian.

The expectations of politicians and also of the public in states in transition that decisions of constitutional courts should follow the expectations of the majority are naturally a frequent reason for criticism directed at constitutional courts and their judges, namely that their decisions are "to the detriment of the state", "political", "out of touch with reality", etc. Elsewhere in Europe, such criticism towards constitutional courts is very rare, yet substantiated criticism based on professional, constitutional grounds is frequent. This latter type of criticism is of course always necessary and welcome. It is never easy to decide against the wishes of the authorities, the "majority", and against the public opinion, in particular where authorities are still too undemocratic and face few real limitations, if any at all – which is, unfortunately, still a reality in some states in transition.

Professional, substantiated criticism of decisions and work of constitutional courts is of particular importance for the development of law, judicial practice, and the rule of law in states in transition, as well as the very work and decision-making of the constitutional courts themselves. The cooperation between constitutional courts, in particular referencing the case law of other constitutional courts and decisions of the ECtHR, are of exceptional importance for the consolidation of the authority of constitutional courts in states in transition and, consequently, for fostering and strengthening the constitutional judiciary and the rule of law in these states. The quality of decisions and their reasoning, as well as independence and uprightness of constitutional courts and their judges – which is often not easy to achieve or sustain – are the best answers to criticism, especially political criticism, and to disqualifications of constitutional courts and judges. Such criticisms are frequent in states in transition and mostly reflect a lack of understanding of the role of constitutional courts. They also present a tendency to attribute a subordinated role to the constitutional courts in relation to the legislative and in particular the executive branch of power. I have already underlined the importance of international cooperation of constitutional courts, the exchange of experiences, and especially the role of the case law of the ECtHR for the work and the strengthening of the position of constitutional courts in states in transition. The ECtHR in particular can exert a profound influence on the work of constitutional courts and should offer them support with its well thought out judgments. In order for ECtHR judgments to be influential, it is, of course, necessary that this Court is composed of excellent judges. This, in turn, confers on the states a special responsibility to propose excellent candidates for the judges of the ECtHR, taking into account both their

professional qualities and their personal characteristics. Whether this is the reality in many states in transition is an open question which I am not going to answer at this point. Let me only add that certain decisions of the ECtHR were justly subject to serious and substantiated criticism, which indicates, *inter alia*, that states are often not very lucky in selecting their candidates for the ECtHR judges.

Let me also mention the recently adopted Protocol No. 16 to the ECHR, which offers an additional possibility for cooperation between the constitutional courts and the ECtHR – namely preliminary questions to the Court. What is interesting and somehow incomprehensible, at least *prima facie*, is the reluctance of, precisely, the states in transition to ratify this Protocol. This Protocol would enable constitutional courts to increasingly ground their decisions regarding human rights on the case law of the ECtHR, including also the preliminary opinions of the ECtHR. This would probably narrow the possible political criticism of those judgments of constitutional courts based on preliminary opinions of the ECtHR. Perhaps this is precisely the reason why states are hesitant to ratify this Protocol, which the Republic of Slovenia has nevertheless ratified and is among the first Member States of the Council of Europe which have already done so.

Protocol No. 16 is however less relevant with regard to reviews performed by constitutional courts concerning the constitutionality of laws and other general acts. In states in transition, this is precisely the area where disputes arise and, consequently, where criticism and exertion of pressure on constitutional courts occur. It is evident that all the authorities of a state, including the legislature, have the duty to ensure that the general acts they adopt are in conformity with the constitution; this is not only the duty of constitutional courts who as a general rule carry out their review of constitutionality *post factum*. A closer look at this issue indicates that, in states in transition, the legislature often opts for the "easier way out" and in adopting legislative acts fails to pay enough attention to the consistency of these acts and decisions with the constitution. Alsothe executive branch of power tends to act in the same manner. Consequently, such attitude necessarily leads to difficulties with constitutional courts, which are obliged to stop, i.e. to annul or abrogate such acts due to their inconsistency with the constitution. In other words, in states in transition, other branches of power and also the broader public often underestimate the constitutional aspects of regulations and are therefore annoyed and surprised when a constitutional court does what it must do and what the constitution which it safeguards requires.

It is also true, however, that, in particular in states in transition that are still in the process of implementing the rule of law, the absence of conflicts between the constitutional courts and the other two branches of power could give rise to serious grounds for concern. I remember the time when a colleague of mine, the President of the constitutional court of one of the states in transition, explained to me that there were no difficulties in their relation with the politicians in power, as within the framework of a permanent dialogue that went up to the head of state they were able to reach agreements on all issues. I have to admit that the mere

thought of a "permanent dialogue" with the "top political level in the state", seemed worrisome to me as the President of the Constitutional Court. I would be particularly worried if the matter at issue would in any manner concern specific cases dealt with by the court. The nature of the position of constitutional courts is such that it stirs conflict, rather than dialogue, with the other two branches of power and the political power in general. This, however, is often not understood in states in transition.

As already stated, a constitutional court may limit – naturally, from the viewpoint of the constitution – the "will of the people", i.e. the legislature, but also the people directly, when, for instance, it prohibits a referendum, which falls within the powers of several constitutional courts in states in transition.

Taking the above-stated into account, it is clear that quality, convincingness, comprehensibility, and clarity – as well as brevity – of their decisions are important for the work of constitutional courts everywhere, and in states in transition in particular. It must be clear that decisions are based on the constitution and that they are not *a priori* in the interest of politics, especially not in the interest of the ruling political power, since it is primarily the ruling majority that is able to abuse power, and not the minority or the political opposition. By their most important decisions – and constitutional courts often decide on key (and also complex) matters for the state and the people – they address a broad circle of addressees, not only lawyers and state authorities, and not only parties in specific cases either. It is the vocation of constitutional courts to decide on and to interpret the fundamental constitutional principles and norms on which the state and life therein are based. In societies where the implementation of the rule of law has merely begun, the role of constitutional courts is particularly exposed, as these courts address, in their decisions, societies at large. Therefore, in addition to decision-making *in camera,* constitutional courts have the possibility to publicly pronounce their decisions and the possibility to hold public hearings – which they use too seldom. In some states in transition hardly at all. Is this due to the fact they are overburdened with a multitude of cases, or due to the incomprehensible fear to face the public and the two other branches of power?

An important element in such context is also the fact that the majority of the constitutional courts in states in transition, in particular those which hold the power to decide on the so-called constitutional complaints, are overburdened with thousands of cases. This limits their capabilities to devote their attention to in-depth consideration of those cases that are in fact crucial for the implementation of the rule of law. The efforts of the Constitutional Court of the Republic of Slovenia, whose 25th anniversary of its functioning we are celebrating today, went precisely in this direction, namely towards acquiring the possibility to autonomously select cases that it would consider, yet these efforts have not been successful. This is unfortunate, but it would be inappropriate to speak today of the underlying reasons for such.

As a general rule, notably when the most important cases are at issue, the decision-making of constitutional courts involves weighing between constitutional principles and values that are

protected by constitutional principles as fundamental values of society. In states in transition in particular, the weighing of principles and the establishing of balance between various values is often burdened by ideology. The understanding of the human right to personal liberty, the right to privacy, the right to private property, a series of other rights and freedoms, and, above all, the understanding of the relations between independent branches of power and of their equality are burdened by ideological sediments of the past. The relation between freedom and security is becoming a kind of a touchstone for assessing the maturity of these societies – and, hence, of the role of their constitutional courts. This relation concerns various aspects of freedom (freedom of belief, freedom of expression, various life choices, etc.) and various aspects of security (protection from terrorism, protection of privacy, social security, etc.). In the coming years, the constitutional courts weighing these values, in particular those in states in transition, may well become the subject of criticism and disapproval, as it is difficult for their decisions to receive general approval.

This is where one stumbles upon the problem of respect for institutions, concretely for constitutional courts, which is apparently a burning issue in a number of states in transition. Respect for institutions is the reflection of their actual role and work, and at the same time also of the stage of development of the society and the current political and general culture. It is clear, however, that without the authority of institutions there can be no stability in the state, as disorder then emerges instead of order. The essence of respect for institutions, including courts and constitutional courts, is not respect in and of itself. The essence is that the disrespect for institutions eventually leads to disorder, and consequently to a diminished efficiency of the society, it provokes obstacles to development, and reduces legal certainty. Respect, however, does not exclude criticism. Respect must be earned and this applies to constitutional courts as well and the criticism of constitutional court is welcome as the path towards its development and improvement.

Leonid Pitamic, a prominent name of the Slovene constitutional and international law, stated as early as in 1920 that a "judge" must be the one who has the last say as the interpreter of the Constitution, as Marijan Pavčnik, member of the Slovenian Academy of Sciences and Arts, reminded us on Constitutionality Day last year. I agree with Pavčnik's thought that "a court and not the legislature should be the last interpreter of the Constitution". Such position appears to entail that the Constitutional Court decides what law is. Nevertheless, the Constitutional Court is of course not the authority creating law. In states in transition, at the current level of their legal and also political culture, it is often difficult for political authorities to accept such position. The challenge for the young constitutional courts operating in such environments is, therefore, significant. They can only tackle this challenge by ensuring quality of their decisions, their persuasiveness, and clarity of their reasoning. And, above all, by their own independence. Precisely those who decide what is in conformity with the constitution must be independent, both in fact and in their appearance. Both aspects of independence are crucial. The independence of constitutional (but also other) courts is at the centre of their power, and at the same time could also represents their weakest point.

Constitutional courts are supposed to be *a priori* independent. This is enshrined in constitutions and other documents. Numerous measures have been undertaken that should ensure the independence of constitutional courts and constitutional judges, going from the manner of their selection and election to the length or permanence of their offices, requirements regarding their recusal during decision-making, various limitations, etc. These are the efforts intended to ensure the independence as well as the appearance of independence, as both are important for the authority of constitutional courts. However, the most important element is, absolutely, the intimate perception of independence, by judges themselves, the awareness that constitutional court judges hold the duty and privilege to decide independently, in accordance with nothing but the constitution and the law. Yet, this intimate freedom is still often limited in states in transition.

Criticism, whether justified or not, and also rough attacks on constitutional courts occurring in some states in transition, all of which are directed either against these courts or individual judges, often consist of allegations lacking any real arguments, namely that their decision-making is biased, political, and ideological – does not contribute to the freedom of their decision-making, and consequently to the strengthening of the rule of law. Especially when in states in transition new constitutional judges are to be selected, the narrative on what they should be like and who they should be echoes from all sides. Therefore, this certainly is an important issue, however, at the same time those in power often hold the belief that a constitutional court judge must be one of "us" – as it used to be in these states prior to the transition.

I have explained that constitutional courts are *a priori* in the position where they are in opposition to the other two branches of power and are thus often criticised and disapproved of, in particular where political authorities yearn to be unlimited and also "unified". The constitutional court is the very institution that by the power of its decisions demonstrates to political authorities the inconsistency of their decisions with the constitution, thus limiting them. In states in transition, there can therefore be no magic cure for the criticism directed towards constitutional courts and pressures put on them. Independence of constitutional courts is however of utmost importance. Indeed, the selection process and the manner of election of constitutional court judges are crucial. As any other person, every constitutional court judge undoubtedly also holds his or her own conceptual, perhaps even ideological and political, beliefs and orientations. The considerations and suggestions that constitutional courts should be composed of an equal number of "these" and "those", "ours" and "theirs", "liberals" and "conservatives", "left-wingers" and "right-wingers", and so forth, do not hold much promise for the independence of constitutional courts. Such categorisations are unacceptable and even indecent; they can also present a danger for the selection process of constitutional court judges and the independence of constitutional courts. This is simply because they somehow oblige the constitutional court judges in advance to decide in a certain way: the "left-wingers" in a "left-wing" manner, and the "right-wingers" would feel obliged to act as the "right-wing" judges.

The only pertinent categorisation and the only path towards independence of constitutional courts is the appointment of highly competent experts and honest persons. That means lawyers who have proved their expertise and personal characteristics in either legal practice or theory, or in best case scenario both of these. Accomplished persons who are professionally and personally mature, honest beyond reproach, who when deciding on human rights and requests for review of constitutionality can make these decisions regardless of whether they are "liberal" or "conservative", "ours" or "theirs", by keeping an appropriate distance, maturely and, above all, with legal expertise as well as life experience, and exclusively on the basis of the constitution. Persons with an intimate sense of independence, who can and even feel an obligation to decide regardless of any criticism or applause from either "ours" or the "theirs".

To conclude, let me express that it is often not simple to be a constitutional court judge in states in transition. Still, such positions are of crucial importance. After all, the successful implementation of the rule of law in the states in transition, and consequently establishing the foundations for the welfare and security of its people, as well as social justice, depends to a large extend on the constitutional courts. Changes concerning the role and position of constitutional courts are taking place in states in transition, and are headed into the right direction. However, changing the mind-set of some lawyers, and even more so of politicians, is proving to be more challenging. These changes take time. Nevertheless, there should be no doubt that also such changes are occurring, in states in transition as well. To a large extent, they can be attributed to their constitutional courts.

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The Constitution Between Politics and Law: Limits of Constitutional Review

1. Introduction

The Constitution and the laws are the fundamental acts that regulate social relations. They have a political as well as a legal character. Their ambivalent nature is a fact that we have to accept. The regulation of social relations always entails an intertwining of policy and law.[1] Namely, the policy of the political actors whom the people have authorised to pursue their political objectives in elections. In pursuing their objectives, however, these actors have to observe the commonly accepted values and the foundations of their own functioning as defined by the Constitution. Before the establishment of constitutional review, whether the laws in fact observed such was ultimately decided on by the political actors represented in the legislative body and, indirectly, the people at regularly held elections. In most of Europe, this has by now become history. In the Slovene constitutional order, as in numerous other constitutional orders, in such situations it is the Constitutional Court that has the final word. The term constitutional democracy has come to designate such constitutional systems.[2]

If we proceed from the assumption that both the Constitution and the laws are ambivalent by their very nature, we are confronted with the following provocative question: are constitutional court judges thus in fact politicians who, through their decisions, enter into a political discussion with the parliament (and the government, which, in parliamentary systems, enjoys the support of the parliament) on whether the laws remained within the boundaries determined by the commonly accepted social values protected by the Constitution? Or do they play

1 Regarding such, see M. Cerar, *Podobnosti in razlike med pravom in politiko, X. dnevi javnega prava, zbornik posvetovanja* [Similarities between law and politics, X Days of Public Law], Inštitut za javno upravo, Ljubljana 2004, pp. 410–414.

2 "The term constitutional democracy expresses that the assessment whether the decisions of the majority are correct is subject to a fundamental reservation, namely the reservation whether these decisions are consistent with the constitution." W. Hassemer, *Ustavna demokracija* [Constitutional Democracy], Pravnik, 4–5 (2003), p. 214.

a different role, and, if so, wherein lies the difference? Legal scholars have already spilled much ink on this issue.[3] They offered different answers and in their quest applied different criteria and methodological approaches, which, together with the results, have revealed the diversity and complexity of the challenge that lies before us.[4] In fact, the search for answers to this question is likely to continue for as long as the search for answers to the question regarding the actual meaning of politics and law.[5] Both questions entail the exact same challenge. This contribution is thus only a piece in the mosaic of quests and attempts to approach the matter. I will analyse it primarily from the perspective of an individual – i.e. the addressee of the legal norm. The individual is the reason that both the legislature and the Constitutional Court have become part of the system of state power. I shall limit my contribution to only some of the issues that significantly co-determine the relationship between the Constitutional Court and the legislature. The latter may, under certain conditions, become the constitution framer and thus bring a third player into this relationship. In essence, I shall address the question of whether the relationship between politics and law imposes any limits on the Constitutional Court within the framework of this relationship and if such is the case, what these limits are. For answers I turn to the Slovene legal order, an integral part of which is *inter alia* the case law of the Constitutional Court of the Republic of Slovenia.[6] Due to the limited scope of this discussion, I will not attempt to comprehensively analyse the chosen point of view, but will instead limit myself to presenting a selection of some illustrative decisions. These shall support a possible answer to the question raised.

3 See e.g. A. Stone Sweet, The Politics of Constitutional Review in France and Europe, International Journal of Constitutional Law, 1 (2007), pp. 69–92, Mattias Klatt, Positive rights: Who decides? Judicial review in balance, International Journal of Constitutional Law, 2 (2015), pp. 354–382, S. Gardbaum, Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?), The American Journal of Comparative Law, 3 (2014), pp. 613–639, and R. Weill, The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making, The American Journal of Comparative Law, 1 (2014), pp. 127–169. A former president of the Constitutional Court of the Republic of Slovenia is of the opinion that, if we refer to politics in its broadest sense, the Constitutional Court is also a political institution, and as a result its decisions are political as well. What is crucial in this regard is that all decisions are based on constitutional legal arguments and that the judges are not lead by political motives. D. Wedam Lukić, *Ustavno sodstvo med pravom in politiko* [Constitutional Adjudication between Law and Politics], Javna uprava, 2 (2007), pp. 44–45.

4 In his opposition to Favoreu's position that constitutional law only became a branch of law with the establishment of the *Conseil constitutionnel* and taking into account the criticism that its regulation is not flawless and that therefore it cannot be designated as a constitutional court (it is generally known that certain changes regarding such have been introduced by the constitutional amendment in 2008), Rousseau highlighted that "the function of judging can be analyzed less as the work of hierarchical reasoning – assessing, clarifying, and organizing laws in order – and more as the implementation of procedural reasoning guaranteeing the free flow of arguments, assessing their rationality, and deriving the meaning of a law from the community formed from the stakeholders' subjective convictions." D. Rousseau, The Conseil Constitutionnel confronted with comparative law and the theory of constitutional justice (or Louis Favoreu's untenable paradoxes), International Journal of Constitutional Law, 1 (2007), pp. 42–43.

5 Regarding such see M. Cerar, *op. cit.*, pp. 405–410.

6 Hereinafter referred to as the Constitutional Court.

2. The Importance of the Constitution as a Political and Legal Act for the Individual

The free individual as a social being living in harmony with others lies at the heart of democratic society. This harmony is based on respect for human dignity and human rights and fundamental freedoms (hereinafter referred to as human rights) that belong to everyone simply as persons. To ensure our harmonious co-existence, each individual's rights, including human rights, must necessarily be limited by the equal rights of others or, in order to ensure life in a communal society, by values that serve the common good. Consequently, at the heart of every human right there also lies the duty to respect the equal rights of others and the values that serve the common good. Individuals are thus not completely free in the exercise of their human rights as such would result in the denial of the rights of others.[7] It is, however, precisely the rights of others that require all individuals to exercise their human rights responsibly. The mutual limitation of rights and the duty to exercise them responsibly require, on the one hand, that human co-existence be regulated by mandatory legal rules and, on the other, that a system for the protection of everyone's freedom and human rights is established. These rights namely continue to exist despite their limitations and, to the extent to which they co-exist, they have to be protected, both in relationships between individuals and the state as well as in relationships between individuals themselves.[8]

A democratic state respects the mentioned fundamental premises and builds its regulation, including the regulation of the functioning of state power, upon them. They are among the values included in its constitution, which is at once the fundamental political and the highest[9] legal act in the state. As a political act, it entails an expression of the broadest political consensus regarding the recognition of common social values and the establishment of the foundations of the organisation of the state. As a legal act, it establishes the constitutional and in fact the entire legal order as a harmonious legal system. In this regard the constitutional order is an intertwined collection of constitutional values that are expressed in numerous constitutional principles, constitutionally guaranteed rights, among which human rights are the most important, as well as constitutional duties, constitutional principles and legal rules that determine the foundations of the organisation of the state and its authorities. There can be no dispute that the principles of a democratic state and the rule of the people as well as the principles of a state governed by the rule of law and the separation of powers feature among the most important ones. They too have a distinct political meaning. In accordance with the principles

7 Human rights are usually not absolute; there are some exceptions, for instance the prohibition of torture.

8 Regarding conflicts between constitutional rights as principles and constitutional rights as rules, and regarding conflicts between constitutional rights as principles that do not affect the validity and purpose of the rights as such, but arise when they are exercised at a subconstitutional level and where the principle of proportionality enters the stage, see A. Barak, Proportionality, Constitutional Rights and their Limitations, Cambridge University Press, Cambridge 2012, pp. 39–41 and 83–106.

9 Due to its complexity, I leave aside the relationship between national constitutional law and the law of the European Union as regulated by Article 3a of the Constitution and the Treaty of Lisbon.

of a democratic state[10] and the rule of the people,[11] the people either exercise power directly or they entrust it to their elected representatives through the exercise of the right to vote as a fundamental political right within the framework of elections as the fundamental political mechanism.[12] In modern democracies, representative democracy is namely the predominant manner of adopting fundamental decisions in society. As it does not entail a permanent transfer of power to the elected representatives, but the transfer of its exercise for a limited period of time corresponding to their term of office, it is the principle of periodicity of elections as a fundamental electoral principle that, in the next elections, establishes the political accountability of the elected representatives to the people. As fundamental constitutional principles, the mentioned principles also function as legal principles, and elections are a mechanism that is especially meticulously regulated and that, provided that fundamental electoral principles are observed, implements the right to vote as a human right and through its periodical exercise shapes the composition of the representative body. Without a meticulous legal regulation, the right to vote cannot be exercised at all. Its naissance and existence, as well as its exercise are regulated and guaranteed by the law, which also ensures its protection, if necessary also through the judiciary. In this regard, its effectiveness is ensured with a view to enable individuals to trust in the fairness of elections and the reliability of the election result, which are the basis of the legitimacy of elections. This is another argument in favour of the mutually intertwined nature of politics and law.

The central task of the representative body, which is conferred on it at elections, is the regulation of social relations with legally binding force by general legal acts adopted in a special procedure – i.e. laws. Like the Constitution, these are, on the one hand, acts expressing the political will of the elected majority and, on the other, the central general legal acts of the legal system. Proceeding from the rather general provisions of the Constitution, they regulate in further detail the rules of human co-existence.[13] Due to the nature of the legislative branch of power, which obtains its legitimacy directly from the people, laws also entail the basis and framework of the functioning of the executive[14] as well as the judicial branches of power.[15]

As a general rule, the relations between the individual branches of power are also a constituent part of the constitutional order, as they entail the relations between the central authorities of state power that form the foundation of the constitutionally determined organisation of the state. These relations are built on the principle of the separation of power. Its implementation,

10 Article 1 of the Constitution.

11 The first sentence of the second paragraph of Article 3 of the Constitution.

12 The second sentence of the second paragraph of Article 3 of the Constitution.

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

14 The second paragraph of Article 120 of the Constitution.

15 In accordance with Article 125 of the Constitution judges (at ordinary courts) are bound by the Constitution and laws.

on the one hand, requires that each branch of power fulfils responsibly the tasks accorded to it by the constitutional order, and, on the other, it establishes a mechanism of checks and balances between the authorities of the individual branches of power. This mechanism is intended to ensure their mutual supervision, restraint, respect, and cooperation, thereby preventing abuses of power.[16] As long as the judicial branch of power is (only) established as the power whose task it is to interpret laws[17] in the process of authoritative dispute resolution between individuals (legal entities[18]) or between individuals and the state, such does not directly influence the fundamental relationship between the legislature and the people. Laws have a general binding force. It is not only all of the addressees of statutory norms, but it is firstly the state itself (i.e. all of its authorities) that has to adhere to them, at least until such time as they are amended by new laws. Unless a system of correction of legislative decision-making by referendum is established, there exists only political accountability of the legislature to the people exercised through elections. In such manner, political control is (indirectly) established over whether in regulating social relations the legislature respected the commonly accepted social values, enshrined in the Constitution. In relation to the legislature, individuals carry the same weight as their votes in the elections. Due to the nature of elections, any individual's voice may, even though every voice matters, drown in a multitude of different voices. This also applies if an individual's human rights are at stake.

16 According to the Constitutional Court the principle of the separation of powers requires that individual branches of power be separated one from another, as a general rule in both the subjective and organisational sense, as well as functionally, and that a constitutional checks and balances mechanism must be established between them in order to prevent abuses of power with a view to ensuring respect for people and their dignity (Constitutional Court Decision No. U-I-158/94, dated 9 March 1995); however, between individual branches of power there must also exist mutual respect and, to a certain degree, adequate cooperation in order for the functioning of state power as a whole to be ensured (Decision No. U-I-83/94, dated 14 July 1994). All quoted decisions are available on the website of the Constitutional Court (www.us-rs.si).

17 Whereby we have to acknowledge the creative power of such interpretation, which, as understood today, has evolved through the historical development of the perception of the judge that was vividly described by Novak who concluded: "The history of contemplating the role of the judge reveals itself as […] a succession of attributions. Montesquieu, discontent with the excessive power of judges in his homeland, looks to the English judge and attributes to him a rigid adherence to the law. His description of the English judge is – although distorting his actual role – consistent with the actual self-perception of the judge on the far side of the English Channel. 'The mouth that pronounces the words of the law' soon turns from a compliment which […] the writer devoted to the English judge into an insult for the Continental judges. Montesquieu's ideal soon becomes a nightmare: the judge's strict adherence to the law grows to resemble slave shackles, which the followers of the German Free Law School want to shake off as soon as possible. Their gaze once again turns to another, i.e. the English judge, in whom they now identify the exact opposite of what the French aristocrat saw in him. The judge who is free in his decision-making and who, together with the legislature, creates the law becomes the ideal […]." A. Novak, *Imago iudicis, štiri podobe iz idejne zgodovine sojenja*, [*Imago Iudicis,* Four Images from the History of Ideas on Judging], Zbornik znanstvenih razprav, Year LXXV/2015, p. 93.

18 The rights enjoyed by individuals as human rights can, provided their legal nature allows for such, also be enjoyed by legal entities as constitutional rights (Decision No. U-I-40/12, dated 11 April 2013). Therefore, when referring to individuals, legal entities must also be considered to a certain extent, even though hereinafter for reasons of greater clarity I do not refer to them separately.

If the judicial branch of power assumes a new role, i.e. if it is accorded the competence to invalidate a legal act adopted by the legislative branch of power outside of the scope of its established political accountability (whereby the latter does not even directly entail such power), this results in important changes in the constitutional order. Firstly, the constitutionally determined mutual relations of the fundamental stakeholders of state authority change. The establishment of constitutional review thus influences the position of the legislature. What is more, it does not merely establish a relationship between the legislature and the electorate (i.e. all voters taken together), but a direct relationship between the legislature and each individual who is in a dispute with the legislature regarding the constitutionality of the regulation of a completely concrete social relationship – namely with the individual who is the legal addressee of the statutory norm. The Constitutional Court is the one that is called upon to decide this dispute by determining the limits within which the legislature must operate in order to ensure respect for the Constitution. The determination of these limits necessarily requires that the decisions of the Constitutional Court have binding force also with regard to the democratically elected legislature. Such binding force is an intrinsic part of a legal system. The position of the individual in relation to the legislature is thereby strengthened.[19] His or her rights (may) become more important than the political will of the Parliament. The individuals may therefore freely set out upon the path they have envisaged for themselves, safe in the knowledge that the law will protect them, even in relation to the political majority. The law guarantees them that potential disputes will be resolved by an independent authority and in an impartial manner in accordance with the law. This authority is, of course, the judge, more precisely, in disputes with the legislature, the constitutional judge.[20] The establishment of legal peace and legal certainty that will enable the individual to freely continue on his or her path require the legislature to respect the decision by which the Constitutional Court resolves a dispute. If necessary, it must also respond to it, precisely in order to guarantee the effective protection of the individual's constitutional position. In principle, both the legislature as well as the Constitutional Court have to fulfil the respective tasks that the Constitution accords to them responsibly. The mutual respect between them has been established precisely in the interest of the addressees of legal norms. If the legislature and the Constitutional Court took turns in a back and forth of enactments and invalidations of the same legal norm, it would be precisely the addressees of this norm who would be at direct risk. If this were the case, very little would remain of legal certainty and trust in the law. It is therefore only logical that also

19 "[J]udicial review appears to offer the individual citizen the respite from the sense of powerlessness in the face of authority that democratic theory and political accountability seem to promise but too rarely provide." S. Gardbaum, *op. cit.*, p. 639.

20 In instances of diffuse judicial review the (ordinary court) judge is entrusted with both tasks. However, if there is a Constitutional Court set up as an independent state authority, certain competences are reserved exclusively to the constitutional court judge. As ordinary court judges are bound by the Constitution (Article 125 of the Constitution), they have to interpret laws in a constitutionally consistent manner, however, they lack the authority to invalidate them (as they are also bound by the laws). This authority is only accorded to the constitutional judge. Consequently, if doubts regarding the constitutionality of a law arise, an ordinary court judge must stay judicial proceedings and initiate proceedings for the review of its constitutionality before the Constitutional Court (Article 156 of the Constitution).

in the relationship between the legislature and the Constitutional Court the implementation of the principle of the separation of powers is intended to ensure the exercise of individual freedom and prevent abuses of power.

3. The Limits of Constitutional Review

In spite of the fact that the Constitution and the laws are an expression of political will, they are also legal acts. Due to their general nature, the review of the consistency of a law with the Constitution necessarily includes an interpretation of both acts[21] through the means of the rules established in the field of law. The fact that the two acts are legal acts does not entail that they may be conferred any kind of content as long as they observe certain formal rules characteristic of law. Such a view has already been surpassed. Their legal nature is to a large extent grounded in their content, and in the remaining part primarily in their procedural aspect, which has to enable the implementation of their content. It is precisely these aspects – i.e. the substantive and the procedural aspect of their legal nature – that determine the boundaries of the playing field of the Constitutional Court. However, they also limit the political stakeholders. The Members of the Parliament enjoy a certain margin of appreciation with regard to the manner in which they will regulate social relations. The Constitutional Court has to respect such margin of appreciation. Therefore, as long as, for example, the question of the appropriateness of a certain statutory regulation is at issue, the choice is reserved to the policy of the democratic legislature. The Constitutional Court may not intervene therewith.

Once a certain subject-matter has been determined by the Constitution, however, the legislature can no longer be completely free in pursuing its political objectives. At this point the Constitutional Court enters the stage and sets the constitutional limits of the legislature's freedom, which contain the field of its competences and thus the field of its duties as well. In exercising these, already from the outset the legislature must observe the fact that laws (due to their position in the legal order) are adopted in a special procedure which is itself legally regulated. By a law, the legislature must not only determine substantive ("material") rights, but also provide for a procedural mechanism that will ensure their effectiveness. Such entails the interpretation of the content of individual human rights as it is determined by the Constitution, including so-called constitutional procedural safeguards. It is precisely at this point that the role of the Constitutional Court as the guardian of the Constitution, and thus the guardian of the values enshrined therein, becomes most evident.[22] There can be no dispute that human rights occupy

21 Namely the interpretation of the Constitution as the major premise and the interpretation of the law as the minor premise of the constitutional review.

22 "[T]he most important reason constitutional adjudication is different from ordinary judging lies not in the fact that political factors are involved, but in the fact that it is the job of constitutional adjudication to choose and impose values. [...] [O]f course judges make choices all the time when interpreting statutes, but there is a huge difference between the narrow and specific sense of value choice in deciding what a phrase in a statute means, constrained as this

the central place among these values. When performing its role, the Constitutional Court is in the service of the individual, his or her dignity and freedom. Its position allows the Constitutional Court to interpret constitutional provisions in favour of human rights when setting the constitutional limits of the legislature, in particular with regard to relations between individuals and the state. In this field, the limits of constitutional review cannot remain within the same constraints as in cases that entail the interpretation of, for example, rules regulating state power or local self-government; it is crucial that they be broader.[23] Furthermore, through the interpretation of the Constitution and dependent on the constitutional values that require protection,[24] the Constitutional Court develops different doctrines and techniques of constitutional review which it applies in the determination of the legislature's substantive constitutional limits. A noteworthy example of such is the manner in which the Constitutional Court reviews the admissibility of interferences with human rights, i.e. by means of the so-called test of the legitimate aim and the strict test of the proportionality of the means applied to pursue such aim.[25] If a law does not interfere with the content of a right as such, but determines solely the manner of its exercise, the legislature enjoys a significantly broader margin of appreciation, as it may freely choose a regulation as long as it has reasonable grounds for its choice. We speak of a more lenient test, the so-called test of the reasonableness of a regulation of human rights,[26] which is similar to the test the Constitutional Court applies in reviewing the "ordinary" equality before the law that allows the legislature to regulate essentially equal positions differently, provided it has reasonable grounds for such that follow from the nature of the matter.[27]

All of these interpretations of the Constitution, from substantive as well as procedural perspectives, and the mechanisms that have to be applied or, differently put, the paths that have to be taken in order to uncover the substantive and procedural constitutional limits of the implementation of the political will are by their nature subject-matters that belong (at least in part)

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decision is by countless rules of statutory construction, and the much broader choice of major social value involved in constitutional interpretation." D. Robertson, The Judge as Political Theorist, Contemporary Constitutional Review, Princeton University Press, Woodstock 2010, p. 19.

23 One must, however, consider that these limits are different depending on the individual human right at issue. They are thus different when, for example, considering the right to personal freedom (the first paragraph of Article 19 of the Constitution) or the right to social security that *inter alia* includes the right to a pension (the first paragraph of Article 50 of the Constitution), which, according to a statutory reservation determined by the Constitution, is to be regulated by law.

24 Regarding arguments supporting the position that such does not lead to excessive flexibility, see M. Klatt, *op. cit.*, pp. 373–376.

25 The third paragraph of Article 15 of the Constitution, according to which human rights may only be limited by the rights of others and, in accordance with settled constitutional case law, by public interest (the test of legitimacy), and the principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). With regard to the principle of proportionality as a principle and methodological approach to the review of the admissibility of human rights restrictions with an analysis of Slovene constitutional case law, see A Novak, *Predpostavke načela sorazmernosti v ustavnosodnem odločanju* [Presuppositions of the Principle of Proportionality in Constitutional Decision-Making], in: M. Pavčnik and A. Novak (Eds.), *op. cit.*, pp. 103–181.

26 E.g. Decision No. U-I-189/10, dated 15 March 2012.

27 E.g. Decision No. U-I-300/97, dated 12 November 1998.

to the law. Despite the fact that we are dealing with a particular kind of intertwining of politics and law, the relative independence of the law in this context must be acknowledged.[28] Especially in this regard, one must insist that the Constitutional Court is not the authority monitoring the process of the implementation of the political will by means of political criteria. Its role is namely to monitor such from the perspective of (constitutional) law. It has to apply the methods of interpretations that are established within the legal field and that rely on exhaustive and persuasive arguments in order to arrive at the relevant constitutional issues and thus the limits of its review. Such is the heart of constitutional adjudication.[29] The criterion for assessing the persuasiveness and quality of constitutional adjudication is therefore the argumentative strength of the legal reasoning, and not whether individual Constitutional Court decisions are more or less politically acceptable. Their persuasiveness is not undermined, but in fact reinforced by the institution of the judges' separate opinions.[30] They reveal that we are concerned with a confrontation of arguments arising from value-based perceptions of the Constitution and laws that challenge constitutional law arguments by arguments of the same kind, rather than with references to the judges' alleged political preferences.[31] Therefore, the power of the Constitutional Court to abrogate a law is important in the short term, while in the long term the constitutional law reasons underlying such decision come to the forefront are more important.

4. The Relationship between the Constitution Framer and the Constitutional Court

As established, the Constitutional Court determines the limits of the legislature's playing field by interpreting the Constitution and in such sense limits (the Parliament's) political objectives with (constitutional) law. It respects the field of the Parliament's political discretion, while imposing constitutional law limits where such is required by the Constitution. Therewith, it does

28 M. Cerar, *op. cit.*, pp. 411–412. "[T]he court may be making the decision the government *ought to have made*, but this may also be to say no more than the government ought to obey the rule of law. That is why we have courts in general – to make sure that the rule of law does prevail." D. Robertson, *op. cit.*, p. 340.

29 As Robertson, who approaches these questions with a detailed and comprehensive analysis of the arguments presented in the decisions of some constitutional courts or highest ordinary courts entrusted with judicial review, concluded in his above-cited book: "Whatever legal theorist may argue, constitutional review by courts, or court-like bodies, is a major part of modern democracy, and probably an inescapable institution under any newly created or seriously modernized constitution. As is true throughout jurisprudence, there may be gaps between legal philosophy and what courts do. But this has never much affected judges. Much of more interesting modern democratic theory stresses the deliberative aspect, values the idea of politics as discussion and debate. There is an old saw to the effect that 'Politicians bargain, judges argue.' Unless legislative politics changes enormously in liberal democracy, the institution most capable of carrying on an argument about constitutional values is the constitutional court." D. Robertson, *op. cit.*, p. 383.

30 See D. Rousseau, *op. cit.*, pp. 34–35.

31 One has to be aware of the fact that the Constitutional Court itself unnecessarily encourages speculations regarding the political nature of its decision-making, unless it fulfils this part of its role of the guardian of the Constitution.

not engage only in the interpretation of the content of rights guaranteed to individuals by the Constitution, but also in the interpretation of constitutional provisions that dictate the approach (methodology) for the setting of these limits under constitutional law. Consequently, such does not entail a merely technical matter and we must proceed from the foundations of the limits of constitutional review that are curbed by the constitutionally determined competences of the Constitutional Court. These refer to the relationship between the constitution framer and the Constitutional Court. The most provocative question raised in this regard is whether the Constitutional Court may review the constitutionality of the Constitution itself. Our Constitutional Court answered this question in the negative in two cases. The decisions have some similarities and some differences.

By the first Decision, the Constitutional Court rejected the petition to initiate proceedings for a review of the constitutionality of certain provisions of the Constitutional Act amending the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia.[32] The Act regulated the transition to the new constitutional order of the independent state that was created following the dissolution of the former federation. The constitution framer *inter alia* determined that the business and assets of the bank Ljubljanska banka shall be transferred to the new bank, established under the provisions of this Act (Nova Ljubljanska banka), but the first bank shall retain its liabilities towards the National Bank of Yugoslavia and those liabilities towards foreign creditors that were guaranteed by the Socialist Federal Republic of Yugoslavia and that were eventually used by beneficiaries from other republics of former Yugoslavia. The Constitutional Court held that the case concerned provisions that regulated one of the issues related to the transition to the new constitutional order (foreign currency deposits that were guaranteed by the National Bank of Yugoslavia). These were also intended to be included in the agreement on legal succession[33] and the assumption of liabilities and assets of the former Socialist Federal Republic of Yugoslavia and legal persons in its territory. Provisions of this kind have the nature of constitutional legal norms which the Constitutional Court, as it stated, is not competent to review. The Constitutional Court thus indicated that constitutional amendments, which are adopted in accordance with the specific procedure for amending the Constitution and by a qualified majority of two thirds of the deputies in the form of a constitutional act, remain within the political realm. The Constitutional Court is barred from reviewing them precisely due to the constitutional provisions regarding the competences of the Constitutional Court. As a result, the accountability for the content of such decisions also remains entirely political. In light of the unanimously adopted decision, the question of whether the Constitutional Court could in exceptional instances nevertheless review the constitutionality of a constitutional act if it became evident that the legislature, in order to avoid constitutional review, abused the form

32 Order No. U-I-332/94, dated 11 April 1996. The Constitutional Court defined this fundamental constitutional act as a "permanent and inexhaustible source of statehood" (Opinion No. Rm-1/09, dated 18 March 2010).

33 As clearly follows from the Judgment of the Grand Chamber in the case *Ališić and others v. Slovenia*, dated 16 July 2014, the European Court of Human Rights evidently saw matters differently.

of such an act to regulate subject matter in fact belonging to an "ordinary" law, had not been raised in this particular case. The Slovene Constitution (in contrast to some other constitutions) does not contain (at least not explicitly) a so-called *eternity clause* that would prohibit the amendment of certain fundamental constitutional provisions.

This fundamental position regarding the lack of jurisdiction to review constitutional acts was confirmed by another Decision. Therein, the Constitutional Court also resolved another question regarding the relationship between the Constitutional Court and the legislature. Allow me to briefly summarise the case. Following a legislative referendum on which three proposed types of election systems for electing the representative body, which were mutually exclusive,[34] were decided on, the Constitutional Court reviewed the constitutionality of the act that regulated the manner of voting and determining the outcome of that referendum. The Constitutional Court held *inter alia* that the act was constitutional if interpreted as entailing that the winning proposal was the one supported by the majority of the voters who voted in the referendum.[35] On such basis, the Constitutional Court itself, by adopting an interpretative decision regarding the statutory provision, held that the proposal to introduce a two-round majority election system won the referendum.[36] Consequently, the legislature was required to enact this system. The Decision was adopted by five votes against three. The Constitutional Court judges who voted against the majority decision expressed their opposition precisely in the light of the fact that the Constitutional Court allegedly exceeded the limits of its competence. The dissenting opinions naturally did not affect the binding nature of the Decision. The Decision was met by a fierce reaction from legal scholars as well as the general public. In the part that established the victory of the majority election system, the decision was even challenged by a constitutional complaint; however, the Constitutional Court rejected the latter as inadmissible.[37] Subsequently, the constitution framer adopted a constitutional act by which it included the regulation of the basic type of election system into the Constitution.[38] The constitutional act was challenged by a petition to initiate proceedings to review its constitutionality before the Constitutional Court. In addition, the enacted election system was challenged by invoking the Constitutional Court Decision establishing the victory of the majority election system. Consequently, the Constitutional Court was once again confronted with the fundamental question of whether it is competent to review the constitutionality of a constitutional amendment. Furthermore, it was confronted with the question of whether it is constitutionally admissible for the legislature to override the Constitutional Court decision by assuming the role of the constitution framer and amending the Constitution.

34 At that time, the Constitution left the regulation of the election system to the law, which established a system of proportionate representation. Proposals for a two-round majority election system, a purely proportionate system with the entire state as a single constituency, and a combined election system were decided on in the referendum.

35 Point 1 of the Operative Provisions of Decision No. U-I-12/97, dated 8 October 1998.

36 Point 2 of the Operative Provisions of the cited Decision.

37 Order No. Up-331/98, dated 4 March 1999.

38 A system of proportionate elections with a four-percent election threshold and with due consideration that voters have a decisive influence on the allocation of seats to the candidates; the fifth paragraph of Article 80 of the Constitution.

In answering the first question,[39] the Constitutional Court confirmed its position from Order No. U-I-332/94, which established the formal criterion as decisive for the determination of the jurisdiction of the Constitutional Court. However, it developed this position further by clarifying that a constitutional act is used as an act by which the Constitution is amended, which entails that in this context its provisions are constitutional provisions regardless of their content and nature. In addition, it is used as an act determining the implementation of new constitutional provisions and the transition to their application. Such provisions also entail constitutional content. It is, however, possible that a constitutional act would also include different provisions that do not pursue any of these aims. In such instances the material criterion would be decisive – what is essential are the content and nature of the provisions at issue. The provision by which the constitution framer regulated the type of election system entails a constituent part of the Constitution. The provisions by which the constitution framer regulated the election system in more detail until the adoption of a new statutory regulation in order to ensure the transition to the new regulation also entail constitutional provisions. The Constitutional Court lacks jurisdiction to review the former as well as the latter. By deciding on the petition to initiate proceedings to review the constitutionality of the election act, however, the Constitutional Court defined the nature of its Decision establishing that the system of majority election was the winner of the referendum.[40] It emphasised that the Decision was binding upon the Parliament acting as the legislature, but not acting as the constitution framer when amending the Constitution. As soon as the constitution framer adopted the constitutional act by which it adopted a different regulation of the election system, the binding effect of the Constitutional Court Decision that required the legislature to adopt a different solution ceased. The Constitutional Court thus clearly indicated that the legislature has a constitutionally admissible tool against a Constitutional Court decision with which it does not agree: a constitutional amendment. It is a tool that remains in the realm of politics[41] and its result – the act that entails an amendment to the Constitution or the transition to a new constitutional order – is binding on the Constitutional Court as the major premise of constitutional review. The Constitutional Court lacks the jurisdiction to review its constitutionality. In this regard, the limits of constitutional review are thus determined. The relationship between the legislature and the Constitutional Court is namely transformed into the relationship between the constitution framer and the Constitutional Court – a relationship of a different legal quality.

39 Order No. U-I-214/00, dated 14 September 2000.

40 By Order No. U-I-204/00, dated 14 September 2000, it rejected the petition as manifestly ill-founded.

41 The question of whether the legislature may avail itself of this tool in all situations may arise. If, e.g., the interpretation of a provision regarding a human right and the admissibility of its limitation were at issue, a potential constitutional amendment would not necessarily change the situation. In all instances where that human right would be guaranteed by international instruments that would also provide a sufficient level of its protection, in accordance with the fifth paragraph of Article 15 of the Constitution, the amended constitutional provision would have to give precedence to a provision of a directly applicable treaty (Article 8 of the Constitution). The content of the constitutional review would thus remain the same also after the constitutional amendment.

5. The Relationship between the Legislature and the Constitutional Court

Far more frequently than the relationship between the Constitutional Court and the Parliament as the constitution framer, the relationship between the Constitutional Court and the Parliament as the legislature ("who remains the legislature") is the subject of debate. This relationship is in fact a constant feature in the review of the constitutionality of laws, which is one of the most important competences of the Constitutional Court. Such raises the question of what the decisions of the Constitutional Court entail for the legislature, for the future statutory regulation of either social relations regarding which the Constitutional Court already established that they are regulated in an unconstitutional manner or the future statutory regulation of social relations that are essentially the same. Let us have a closer look at this relationship in the context of the story of the "erased", a case that provides a graphic illustration of the power struggle between politics and the Constitutional Court. The story does not refer to citizenship but to the right to permanent residence of persons who as citizens of the other republics of the former common state enjoyed such right until Slovenia's independence. They lost the right because the legislature failed to regulate their position after they had become aliens in Slovenia, while persons who had already been aliens before Slovenia's independence retained their right to permanent residence. As a result of such unconstitutional legal gap in the statutory regulation, the competent state authorities transferred the register containing the affected persons to the register of persons without a permanent residence, without issuing appropriate decisions regarding such. This transfer was labelled as "erasure" from the register of permanent residents and thus the affected persons as the "erased".

In 1998, on the basis of applications made by laypersons that were barely comprehensible,[42] the Constitutional Court initiated proceedings to review the constitutionality of the provisions of the Aliens Act that were the alleged basis for the erasure. By Decision No. U-I-284/94, dated 4 February 1999, it held that the Act was unconstitutional because it failed to determine the conditions under which the affected persons could obtain permanent residence (i.e. an inconsistency with the principles of a state governed by the rule of law and the principle of equality). It required the legislature to remedy the established unconstitutionality in the short period of six months and prohibited the forceful removal of these persons from the state territory until the unconstitutionality is remedied. The legislature reacted to that Constitutional Court Decision by adopting a law within a year's time. However, it failed to regulate the position of the affected persons retroactively, as well as the position of those persons who had been forcefully removed from the state territory on the basis of the unconstitutional regulation. Moreover, it set an extremely short time limit, i.e. three months, for lodging the applications for obtaining permanent residence. Consequently, a new petition of the affected persons led to a second Constitutional Court Decision[43] which established an unconstitutionality in the

42 See Order No. U-I-284/94, dated 24 June 1998.

43 Decision No. U-I-246/02, dated 3 April 2003.

outlined regards – namely a new unconstitutional legal gap that required the legislature's response. In addition, the Constitutional Court determined a so-called manner of implementation of its decision.[44] It established a transitory regulation requiring the competent ministry to issue to persons who already obtained permanent residence (*ex nunc*) on the basis of the new Act decisions establishing their status also *ex tunc* for the entire period since their erasure.

Interestingly, it was only the second decision that sparked the beginning of a rather turbulent period of tensions between the Constitutional Court and the politicians in power who attacked, I dare say in an indecent manner, the Constitutional Court judges and their (unanimous) decision. In the political arena, on the one hand, the politicians were of the opinion that the legislature should not respond to this Decision, and, on the other, any possible, albeit constitutionally inadmissible steps to nullify the Decision of the Constitutional Court were undertaken. The Parliamentary opposition *inter alia* requested several times that the question be put to referendum (which was possible on the basis of the constitutional regulation of referenda in force at the time). In substance, such entailed an appeal that voters should be the final arbiter regarding the question whether the Constitutional Court Decision should be implemented or not.[45] The Constitutional Court emphasised that the legislature's failure to respond to the established unconstitutionality already entailed a violation of the principles of a state governed by the rule of law and the principle of the separation of powers. This was made worse by the fact that the status of those persons had not been regulated in over twelve years. At the same time, the Constitutional Court stressed that, in the same manner in which the legislature is bound by the Constitution, the Constitution is binding on voters when they exercise state power directly and the subject matter to be decided on is an act intended to remedy an unconstitutionality established by a Constitutional Court decision. Therefore it did not allow the referendum. The Constitutional Court also had to address the question whether the manner of implementation of the Decision as determined by the Constitutional Court (a transitional rule) can directly serve as the basis for the issuing of administrative decisions or whether such requires the adoption of a special law. The Constitutional Court expressly held that such a Constitutional Court decision entails the same legal basis for issuing administrative decisions as a law.[46] Such, however, does not prevent the legislature from adopting a different solution, namely to enact a law that regulates the same subject matter differently, provided, of course, that there exists another statutory regulation that is consistent with the Constitution.

After the adoption of the Decision in 2003, another six years in fact went by before the legis-

44 On the basis of the second paragraph of Article 40 of the Constitutional Court Act.

45 Decision No. U-II-3/04, dated 20 April 2004.

46 "The Constitutional Court itself 'prescribes', by the manner of implementation, the content of the norm (it fills-in the legal gap) in one possible manner (if there exist, of course, multiple possible manners) of the implementation of a decision. Authorities of the state competent for the implementation of a decision of the Constitutional Court (already on the basis of a law or determined by a decision, as is the case in the case at issue) must act in accordance with that part of the decision that determines the manner of implementation as long as the legislature (the National Assembly) does not prescribe it differently […]." Order No. U-II-3/03, dated 22 December 2003.

lature finally responded to it by adopting a law. And even then the parliamentary opposition requested a referendum regarding the law, in which the voters could reject it. The law that was intended to finally remedy the unconstitutional legal gap was only enacted after the Decision of the Constitutional Court that such referendum would be unconstitutional.[47] It is thus not surprising that the story's epilogue came in the form of a judgment of the European Court of Human Rights that established violations of the human rights of the erased persons.[48] If the legislature had responded to the Constitutional Court Decision in accordance with the requirements stemming from the principles of a state governed by the rule of law and the separation of powers, the status of those persons would have long been settled. There would have been no need for an intervention by the European Court of Human Rights. The latter simply confirmed that the Constitutional Court was in the right. In that case, the effectiveness of constitutional review was completely nullified by politics.

I only included the most important Constitutional Court Decisions regarding the erased in the outline of their story, but there were in fact more. The intention of this story is to illustrate the consequences resulting from the mutual disrespect between the individual branches of power (in that case the disrespect originated in the political arena) for the rights of the individual as the addressee of the statutory norm (or, in instances where such norm, although it is constitutionally required, does not exist and we could speak of a person "entitled" to a particular statutory norm that will regulate his or her position). It becomes clear that the Constitutional Court and the legislature cannot simply take turns at being right at the expense of vital human rights. The last time the Constitutional Court prohibited a referendum on a law regulating the status of the erased it namely added another argument to its reasoning on the unconstitutionality of the statutory regulation of their position. It emphasised that there had been an interference with the personal dignity of these persons (Article 34 of the Constitution). More specifically, there was an interference with the direct expression of their human dignity. In such instances, a tension between politics and the Constitutional Court is thus not merely a question of the prestige of their constitutional positions, but it is their constitutionally dictated duty to overcome such tension in order to ensure that human rights are respected. Such is not only the duty of the Constitutional Court, but (and first and foremost) the duty of the Parliament – and thus of politics (as well as a duty of all other state authorities).

The outlined example demonstrates what the relationship between the Constitutional Court and the legislature should not be like in a state governed by the rule of law. Even though the Constitutional Court, according to its case law, interprets the Constitution with binding legal effect and thus fulfils its role of guardian of the Constitution, the binding force of Con-

47 Decision No. U-II-1/10, dated 10 June 2010. By this Decision the Constitutional Court emphasised that the question of whether a Constitutional Court decision shall be observed or not cannot be decided on in a referendum as such would entail a referendum on the authority of the Constitutional Court and on whether certain questions shall be regulated in a constitutionally consistent manner or not.

48 Judgment in the case *Kurić and others v. Slovenia*, dated 26 June 2012 (Grand Chamber).

stitutional Court decisions is not absolute. This is already a consequence of the fact that it is completely clear that all cases include an interpretation of the Constitution that is captured in a singular social moment,[49] while the constitutional debate continues to proceed on the lifeline, as in fact it must. Just as the Constitutional Court may amend its prior interpretations of the Constitution, provided such is indicated by weighty constitutional law reasons, the same reasons may dictate an active exchange regarding constitutional law between the legislature and the Constitutional Court with regard to the future statutory regulation of social relations. However, in a state governed by the rule of law which upholds the principle of the separation of powers, such exchange must be grounded in appropriate respect towards the role of the Constitutional Court in general and its individual decisions. As the Constitutional Court is the actor resolving by means of the authority of its decision disputes between an individual and the legislature and as precisely this individual and his or her human rights constitute the core of the issue that reflects the relationship between the Constitutional Court and the political options in the Parliament, the political actors must treat departures from the binding force of Constitutional Court decisions as exceptions and not as the rule.[50]

6. Conclusion

Let us now, in light of all of the above, attempt to answer the question raised in the beginning of this contribution. In the broader meaning of politics, the Constitutional Court is a political institution to the extent that politics and law are intertwined. The decisions of the Constitutional Court also have political consequences just as the acts it reviews do. However, this does not entail that Constitutional Court judges enter the political debate on the regulation of social relations as politicians. If it did, practically all Constitutional Court decisions would be dictated by the political preferences of the majority of the Constitutional Court judges. However, such is not the case. The law, in this case constitutional law, is binding on all authorities of the state, thus also Constitutional Court judges. It requires them to remain on the substantive path of law and to avail themselves of established methods of interpretation of legal acts to arrive at their decision. They are integrated into the system of state power as guardians of the individual and his or her dignity, freedom, and the entirety of their human rights enshrined in the Constitution. The latter protects the individual as a legal act also in relation to the democratic legislature. In a dispute between the legislature and an individual, the final word on legal matters is reserved to the Constitutional Court who is called upon to set the limits to the political will of the parliamentary majority. These limits are a reflection of the constitutional content that the Constitutional Court must reach by methods of interpretations obtained through methods of interpretation, established by legal theory, and supported by exhaustive and waterproof reasoning.

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49 *Cf.* D. Rousseau, *op. cit.*, p. 43.

50 For more, see J. Sovdat, *Zavezujoča narava odločb Ustavnega sodišča* [The Binding Nature of Constitutional Court Decisions], Podjetje in delo, 6–7/2015, pp. 1374–1387.

In fulfilling its constitutional role, the Constitutional Court must respect the legislature's playing field within which the decision on the appropriateness of a statutory regulation is reserved to politics. However, politics is not completely free if constitutionally determined content is at issue. It must observe the commonly accepted values that are enshrined in the Constitution, and in this context especially human rights. As a general rule, the Constitutional Court is the state authority that has the final say on what the content of these rights is and on the admissibility of their restrictions.

To counter Constitutional Court decisions, the Parliament may avail itself of a special tool which allows it to become the constitution framer and amend the Constitution in response to a Constitutional Court decision. It may, of course, only do so if such does not go against international instruments regulating human rights. As the legislature, it must observe the binding force of Constitutional Court decisions. Such is the requirement stemming from the principle of a state governed by the rule of law and intended to ensure that individuals can trust in the law. The Constitution guarantees to those individuals that disputes between them and the legislature will be resolved in an authoritative manner precisely by a Constitutional Court decision. The more Constitutional Court decisions refer to basic human rights, the more the legislature must take them into consideration. An exception may apply to decisions by which the legislature, while showing due respect for the Constitutional Court as an institution and for its decisions, fuels the constitutional law debate between the Constitutional Court and Parliament. However, never at the expanse of fundamental human rights.

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