Конституционное
ПРАВОСУДИЕ

Вестник

Конференции

органов конституционного контроля

стран новой демократии

Выпуск 4(62)2013

ИЗДАЕТСЯ ЦЕНТРОМ КОНСТИТУЦИОННОГО ПРАВА РЕСПУБЛИКИ АРМЕНИЯ
ЕРЕВАН · 2013

ISSN 18290125

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Конституционные гарантии дееспособности и функциональной независимости конституционной юстиции*

Уважаемые участники Международной конференции!

Дамы и господа!

Позвольте, прежде всего, выразить глубокую признательность коллегам из Конституционного Суда Латвии за приглашение и предоставленную возможность выступить перед Вами.

Несомненно, что тематика Конференции не утратит свою актуальность, так как реальная жизнь и вызовы времени ставят перед конституционными судами все новые и новые требования по гарантированному обеспечению верховенства Конституции в наших странах.

На наш взгляд, для оценки дееспособности и эффективности деятельности конституционных судов необходимо в первую очередь **ответить на следующие вопросы**:

1. В чем состоит конституционная миссия Конституционного Суда и какова его функциональная роль?

* В настоящем выпуске публикуются некоторые материалы Международной конференции “Компетенция конституционного суда: границы и возможности расширения”, прошедшей в Риге 25–28 сентября 2013 года.

2. Насколько конституционно гарантирована эффективная и целостная реализация этой функции?
3. Какие правовые и институциональные гарантии созданы для независимого, беспристрастного и эффективного осуществления полномочий Конституционного Суда, следующих из его конституционной функции?
4. Свидетельствует ли международный опыт конституционного правосудия о наличии эффективных систем конституционного контроля или возникла необходимость коренных реформ в этой сфере?

Ответ на первый вопрос можно найти путем краткого сравнительно-исторического анализа. Идея контроля за законами, необходимость соответствия порядка и правил человеческого бытия божественным заповедям нашла отражение также в библейских интерпретациях. Тесть дает Моисею совет **придерживаться в первую очередь правдивого отражения воли Всевышнего в законах и жизненных правилах.** История свидетельствует также о том, что каждый шаг конституционного регламентирования общественных отношений объективно ставит вопрос - **как гарантировать соблюдение и осуществление конституционных правил в общественной жизни?** Рождение первой из современных конституций – принятие Конституции США сделало вопрос наиболее актуальным, и по велению жизни Верховный Суд США по делу “Мербери против Мэдисона” взял на себя миссию оценки конституционности законов. Подробности всем хорошо известны. Но неоспариваемый факт, что это всего **лишь первый качественный шаг на пути формирования современных систем судебного конституционного контроля.**

Второй решительный шаг, как известно, был обусловлен формированием Конституционного Суда Австрии на основании кельзенских концептуальных подходов. Однако в этом случае **правовая философия была совершенно иной.**

Формирование и развитие новых систем конституционного контроля в двадцатом веке **было обусловлено глобальными социальными катаклизмами – Первой и Второй мировыми войнами.**

В обоих случаях **в основе формирования европейских систем конституционного контроля лежала философия обеспечения общественной стабильности и предупреждения возможных социальных катаклизмов**. Этим также были обусловлены необходимость внедрения систем абстрактного и превентивного конституционного контроля.

Судебный конституционный контроль, будучи стержневым элементом системы конституционного контроля, стал качественно новым явлением, гарантирующим динамичную стабильность общественного развития посредством гарантирования верховенства Конституции. Не колеблясь, можно констатировать, что особенно **после Второй мировой войны европейские страны инициировали внедрение качественно новой системы укрепления иммунной системы общественного организма.** Развития в этом направлении продолжаются и в наши дни.

Ответ на второй вопрос не однозначен, так как ситуация в различных странах разная. **Концептуальный подход заключается в том, чтобы безупречно действовало то основное правило конституционной архитектуры, когда в составляющей стержень Основного Закона цепочке функция-институт-полномочие обеспечивается необходимая и достаточная гармония.** Графически это можно представить в следующем виде:

ПРОСТРАНСТВО КОНСТИТУЦИОННОГО КОНТРОЛЯ

В конкретном случае для полноценного осуществления функции гарантирования верховенства Конституции в предусмотренном Конституцией порядке должен быть сформирован такой институт судебного конституционного контроля, который, в первую очередь, имел бы все необходимые и достаточные полномочия для эффективного и динамичного обеспечения реализации своей функции.

О чем свидетельствует международный опыт?

С этой точки зрения все страны можно разделить на **три группы**, исходя из круга конституционных полномочий конституционных судов, состава субъектов обращения в суд и процессуальных особенностей конституционного судопроизводства.

К первой группе можно причислить те страны, в которых конституционные предпосылки гарантирования верховенства Конституции являются наиболее полными и действенными. В этих странах конституционные суды, в частности, уполномочены:

- оценивать конституционность правовых актов;
- разрешать споры по вопросу конституционных полномочий;
- гарантировать полноценную реализацию права человека на конституционное правосудие[1].

При наличии подобных полномочий крайне широк также круг субъектов обращения в Конституционный Суд и внедрена полноценная система индивидуальной конституционной жало-

[1] Общая классификация полномочий действующих в мире конституционных судов имеет следующую картину:

П О Л Н О М О Ч И Я	***кол-во КС, имеющих их***
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в т. ч.	
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бы. Классическим примером этой группы может служить, например, Федеральный Конституционный Суд Германии.

Ко второй группе можно отнести все те страны, где одна из трех указанных групп полномочий отсутствует или неполноценна.

К третьей группе относятся те страны, где при наличии института судебного конституционного контроля оба эти полномочия отсутствуют или неполноценны.

Общая философия сводится к тому, что **для осуществления независимого и эффективного конституционного правосудия на конституционном уровне должен быть решен вопрос гармонизации полномочий, функций и процессуальных начал беспрепятственной и эффективной деятельности суда.** На конституционном уровне решаются вопросы функциональной и институциональной независимости конституционного суда. **Все страны, которые можно включить в перечисленную вторую или третью группу с учетом принципиальных критериев правового государства с этой задачей должным образом не справились. Приведенные цифры свидетельствуют, что более 60% конституционных судов мира входят именно во вторую и третью группу.**

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Следующий круг вопросов касается решений на законодательном уровне, которые в дополнение к конституционным нормам устанавливают четкие процессуальные процедуры и гарантируют дееспособность конституционных судов. Опыт различных стран также свидетельствует, что здесь в ходе исторической эволюции есть положительная динамика. Примером может служить опыт многих стран, в том числе Армении. Я не буду вдаваться в детали, отмечу только, что тут **основной принцип, по нашему мнению, заключается в следующем: процессуальные основы деятельности конституционных судов не могут препятствовать эффективному и системному осуществлению их функциональных полномочий.** Законодательное развитие в нашей стране происходит именно по этой логике.

К этой теме более детально можно вернуться, если будут соответствующие вопросы.

С учетом требований регламента в рамках своего выступления хотелось бы обратить Ваше внимание еще на одну проблему, продиктованную вызовами нового тысячелетия. **По нашему глубокому убеждению, существующие системы судебного конституционного контроля почти во всех странах не находятся в необходимой и достаточной гармонии с другими системами конституционного контроля.** Это касается как органов законодательной, исполнительной, так и судебной власти. **Нет необходимой системности конституционного контроля в целом.** Естественно, что в разных странах ситуации отличаются, однако **ни в одной стране на конституционном уровне функциональными и институциональными решениями не обеспечено стабильное гарантирование верховенства Конституции посредством непрерывного конституционного мониторинга.** Не гарантировано также преодоление разобщенности между Конституцией и реальным конституционализмом.

Эта проблема требует в первую очередь конституционных решений. Поэтому необходимо, чтобы:

1. Рамки полномочий Конституционного Суда были конкретизированы на конституционном уровне, имея в виду три вышеупомянутые группы полномочий Суда.
2. На конституционном уровне был закреплен порядок формирования Конституционного Суда.

3. На конституционном уровне гарантировалось обеспечение исполнения постановлений Конституционного Суда.
4. Для Главы государства был конкретизирован порядок реализации полномочия по соблюдению Конституции, гармонизируя его с требованием гарантирования верховенства Конституции.
5. Была конкретизирована роль органов законодательной и исполнительной власти в вопросах конституционного контроля и надзора.
6. На уровне конституционных решений был предусмотрен такой круг субъектов, правомочных обращаться в Конституционный Суд, чтобы не препятствовать реализации конституционной функции Суда. Это, в частности, предполагает укоренение института полноценной конституционной жалобы.
7. Считаем, что положительным является опыт также тех стран, где по итогам каждого года Конституционный Суд оценивает состояние конституционной законности в стране и публикует полный отчет. Последний в силу конституционного положения должен стать предметом обсуждения различными органами власти и в рамках их полномочий должны быть предприняты шаги по укреплению конституционной законности в стране. Ответственным в данном вопросе должен быть Глава государства. Его важной конституционной обязанностью должен стать также мониторинг состояния конституционализма в стране посредством постоянной конституционной диагностики.

Наши исследования свидетельствуют, что **пока еще ни в одной стране не укоренилась подобная целостная и непрерывно действующая система.** В отдельных странах пробел в системных решениях восполняется посредством высокой правовой и политической культуры и сформировавшихся традиций, однако этого, несмотря на всю их важность, еще не достаточно для полного разрешения проблемы в соответствии с вызовами современности. **Конституционные решения последних десятилетий, происходящие изменения скорее всего создали так называемый "эффект заплаты", чем дали полное и системное решение проблемы.**

В новом тысячелетии внедрение всеобъемлющих и эффективно действующих систем конституционного контроля требует нового качества конституционных реформ и совершенно новых подходов. **Для каждой страны гарантирование верховенства конституции должно стать первоочередным приоритетом.** Только таким путем возможно преодолеть сращение политического, экономического и административного потенциалов, гарантировать четкое разделение властей и верховенство права, сделать желаемое становление правового государства возможным, **обеспечить динамичное и гармоничное развитие общественной жизни, установить приоритет конституционного права над текущей политической целесообразностью.**

К актуальности и всестороннему решению этой проблемы мы обратились в анализе, представленном в рамках недавно вышедшей в свет коллективной монографии "Конституционализм нового тысячелетия: парадигмы реальности и вызовы", поэтому ограничусь этим и еще раз подчеркну, что без осуществления непрерывного и постоянного мониторинга конституционализма в стране конституционный контроль в новом тысячелетии не может быть жизнеспособным.

Спасибо за внимание

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Constitutional guarantees of competence and functional independence of constitutional jurisdiction

Summary

The article discusses the issues of constitutional mission of the Constitutional Court and its functional role, effectiveness and integrity of guarantees of this function, legal and institutional guarantees of independent, impartial and effective implementation of the powers of the Constitutional Court and international practice of the constitutional justice concerning availability of effective systems of the constitutional review and necessity of radical reforms.

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Individual complaint as a domestic remedy to be exhausted or effective within the meaning of the ECHR. Comparative and Slovenian Aspect

ABSTRACT: In some systems the individual's access to constitutional courts has become so widespread that it may threaten the functional capacity of the constitutional court. With a growth in the number of constitutional complaints, efficiency may decrease. Therefore, the national legislature is trying to find some way for the constitutional court to eliminate less important or hopeless proceedings. Nevertheless, individuals should have opportunities to apply for the protection of their constitutional rights in the form of individual (constitutional) complaint which can be considered as an effective "interface" between the national and ECHR human rights protection. Additionally, a broader (national) individual access to the Constitutional Court stimulates the democratisation of the legal order which individuals have an opportunity to initiate a direct and immediate control over the legislative, executive and judicial state powers.

A) Comparative Aspect

1. The Individual as an Applicant before the Constitutional Court

Proceedings before the Constitutional Court have the nature of proposed proceedings (*juridiccion voluntaria*). In principle, the

Constitutional Court cannot itself initiate proceedings; as a rule, the proceedings before the Constitutional Court are based on (restricted to) the corresponding application lodged by a special, duly qualified (privileged) constitutional institution (the so-called legitimate petitioners).

The initiation of constitutional review proceedings on the initiative of the Constitutional Court (*ex officio*) is quite rare. It may most often be traced to some of the constitutional review systems of Eastern Europe; further, it is strictly preserved in Croatia and in Slovenia[1], elsewhere *ex officio* proceedings are not as frequent. The Austrian Constitutional Court, for example, may on its own initiative begin proceedings of the constitutional review of a statute or a regulation only if it refers to a pre-judicial question in some proceeding before the respective Constitutional Court. All the above cases may be referred to as objective forms of constitutional review.

On the other hand, some constitutional review systems also allow for a private individual's access to the Constitutional Court (concerning abstract as well as concrete review, based on a constitutional complaint, or on a popular complaint (*actio popularis*) or on other forms of constitutional rights' protection. This involves the so-called subjective constitutional review, the violation of individual rights and the protection of individual rights against the State (in particular against the legislature). In the countries with a diffuse constitutional review and in some countries with a concentrated constitutional review, the individual citizen is offered the possibility of requesting the constitutional review of statutes, administrative measures or judgments in special proceedings. Only after the complaint has been lodged with the Constitutional Court do proceedings begin. Even then, as a rule, the complainant may withdraw their complaint in order to thereby terminate the respective proceedings.

The individual's standing as complainant before the Constitutional Court has been influenced by extensive interpretation of provisions relating to the constitutional complaint, as well as by ever more extensive interpretation of provisions relating to

[1] Para. 2 of Article 15 of the Croatian *Constitutional Court Act* or in Article 39, Article 58 and Para. 4 of Article 61 of the Slovenian *Constitutional Court Act*.

concrete review[2]. In some systems the individual's access to constitutional courts has become so widespread that it already threatens the functional capacity of the Constitutional Court[3]. Therefore, the legislature is trying to find some way for constitutional courts to eliminate less important or hopeless proceedings (e.g. the restriction of abstract reviews by standing requirements). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With a growth in the number of complaints, efficiency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights[4].

2. Bodies Empowered for Human Rights Protection and the Forms of such Proceedings

The complaint of an affected individual whose constitutional rights are claimed to have been violated is generally the basis for appropriate proceedings of protection in which the protection of rights by the Constitutional Court is only one of a number of legal remedies for protection. Even the bodies intended to provide protection are different, depending on the particular system.

3. The Constitutional Complaint and its Extent in the World

A constitutional complaint is a specific subsidiary legal remedy against the violation of constitutional rights, primarily by individual acts of government bodies which enables a subject who believes that their rights have been affected to have their case heard and a decision issued by a Court authorised to provide a

[2] Greece, Italy, Switzerland, the USA.
[3] Germany, Slovenia.
[4] France is a specific exception among these systems, as private individuals have no full access to the Constitutional Council, except with reference to elections. In France, the protection of individual rights is, however, the responsibility of the National Council acting on the basis of a complaint against administrative acts.

constitutional review of disputed acts. Generally, the indictment refers to individual acts (all administrative and judicial acts), in contrast to the popular complaint (*actio popularis*), although it may also indirectly or even directly refer to a statute.

Is constitutional appeal a right? The Slovenian Constitutional Court has taken the view that it is an institute of judicial proceedings, or a special legal remedy[5].

The constitutional complaint is not an entirely new institute; its forerunner may be found in the Aragon law of the 13th to 16th Century[6]; and in Germany from the 15th Century onwards[7]; while Switzerland introduced a special constitutional complaint[8] in the *Constitution of 1874* and in the *Statutes* of 1874 and 1893. Austria introduced the constitutional complaint from 1868 (exercised by the *Reichsgericht* – Article 3 of the *Constitutional Law on the Reichsgericht* of 21 December 1867). Liechtenstein introduced the constitutional complaint by Para.1 of Article 104 of the *Constitution* of 1921 as well as by Article 23 of the *State Court Act* of 1925. Bavaria regulated the constitutional complaint by the *Constitutional Charter* of 26 May 1818, the *Constitutional Charter* of 14 August 1919 as well as by the *State Court Act* of 11 June 1920.

The constitutional complaint is very common in the systems of constitutional/judicial review. It is most widespread in Europe in a broader or in a limited form, regarding abstract and/or concrete constitutional review[9]. In Germany, the constitutional complaint appears on the federal and on provincial levels[10].

[5] Ruling No. U-I-71/94 of 6 October 1994, OdlUS III, 109.
[6] In the form of recurso de agravios, *firme de derecho, manifestacion de personas*.
[7] Incorporated in the institution *Reichskammergericht* of 1495, envisaged in the famous constitutional text, *Paulskirchenverfassung,* of 1849, and in Bavaria it was provided for in the Constitutions of 1808, 1818, 1919 and 1946.
[8] *Staatliche Verfassungsbeschwerde*.
[9] Albania, Andorra, Austria, Croatia, the Czech Republic, Cyprus, the FYROM, Germany, Hungary, Latvia, Liechtenstein (1992), Malta, Montenegro, Poland, Portugal, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland-Supreme Court, Ukraine, Georgia, Armenia.
[10] The federal constitutional complaint is the responsibility of the Federal Constitutional Court, the provincial constitutional complaint is the responsibility of certain Provincial Constitutional Courts: Bavaria, Berlin, Hessen and Saarland.

In addition to Europe, some Asian systems recognise a constitutional complaint in a broader or in a limited form[11]. It should also be noted that other Arabian countries, if they recognise judicial review at all, have in the main adopted the French system of the preventive review of rules following the model of the French Constitutional Council of 1958, which does not recognise the right of the individual to the full direct access to specific constitutional/judicial review bodies. In Africa some countries recognise the constitutional complaint[12]. The only example of constitutional complaint in Central and South America is the Brazilian *mandado de injuncao, i.e*. an individual complaint in case of negligence by the legislature (under the jurisdiction of the Brazilian Supreme Court) unless we also count the Colombian *accion de tutela* (the jurisdiction of the Constitutional Court), usually considered to be a subsidiary *amparo*.

The particularity of individual systems is that they recognise a cumulating of forms, the popular and the constitutional complaint[13]. The two forms may compete in their functions. The rationale for both forms is the protection of constitutional rights: the popular complaint (*actio popularis*) in public and the constitutional complaint in the private interest. In both cases the plaintiff is an individual. As a rule, the subject disputed is different: the popular complaint (*actio popularis*) refers to general acts and constitutional complaints refer to individual acts[14]. The standing of the plaintiff or that the remedy might have a personal effect upon the plaintiff is a precondition for a constitutional complaint. Although

[11] Azerbaijan, Georgia (under the jurisdiction of the Constitutional Court), Kyrghyzia (under the jurisdiction of the Constitutional Chamber of the Supreme Court), Mongolia (under the jurisdiction of the Constitutional Court since the *Constitution* of 1992), Papua-New Guinea (under the jurisdiction of the Supreme Court), South Korea (under the jurisdiction of the Constitutional Court since the Constitution of 1987), Taiwan (under the jurisdiction of the Supreme Court); the Constitutional Courts of Member states of the Russian Federation (Adigea, Baskiria, Buryatia, Dagestan, the Kabardino-Balkar Republic, Karelia, Koma).

[12] Benin (Constitutional Court), Cape Verde (the Supreme Court of Justice), Mauritius (the Supreme Court), Senegal (the Constitutional Council) and Sudan (the Supreme Court).

[13] Bavaria, Brazil, Colombia, Croatia, partially the Czech Republic, the FYROM, Hungary, Liechtenstein, Malta, Montenegro, Serbia, Slovenia.

[14] Except for the possibility of indirectly impugning a statute in Serbia, Montenegro, Slovenia and Spain, and the direct impugning of a statute in Germany.

it should be possible to exclude the standing of the appellant as a precondition for the popular complaint (*actio popularis*), individual systems do require it[15], such that for both the constitutional and the popular complaint (*actio popularis*), the standing or the personal effect on an individual works as a corrective with the aim to prevent the abuse and overburdening of the Constitutional Court or other constitutional/judicial review body. In both cases the same aim may be pursued through the introduction of a filing fee. It is, however, characteristic that in practice the number of constitutional complaints is increasing everywhere. Therefore, many constitutional courts have adapted the organization of their work following this trend either in the form of specialised individual chambers for constitutional complaints[16] or by narrower units of the Constitutional Court (chambers, sub-chambers)[17] issuing decisions on constitutional complaints.

4. The Fundamentals of the Constitutional Complaint

The following are the elements of the system of the constitutional complaint:

- the preliminary selection of complaints (the integration of filters into proceedings). This is most highly developed in the German system with the intent to sift out potentially unsuccessful complaints, and as such the space for maneuver of the Constitutional Court in rejecting a frivolous complaint is extended. This, in fact, involves the narrowing of the constitutional complaint as a legal remedy in principle open to everybody. One general problem of constitutional courts is how to separate the wheat from the chaff and at the same time secure the efficient protection of human rights in a democratic system. In addition, in certain systems the proposals for introducing the constitutional complaint are recent; some tend to introduce prior selection systems; on the other hand, certain systems tend towards the abolition of this legal institution;

[15] the FYROM, Slovenia.

[16] *e.g.* the German Federal Constitutional Court and the Spanish Constitutional Court.

[17] *e.g.* in the Czech Republic, Slovenia.

- protection through the constitutional complaint generally refers to constitutional rights and freedoms, and the circle of rights protected by the constitutional complaint is less specifically defined in individual systems (e.g. Slovenia, Croatia, Serbia and Montenegro, where "all" constitutionally guaranteed fundamental rights are supposed to be protected), while other systems mostly define the (narrow) the circle of protected constitutional rights[18]. Special forms of constitutional complaint may also protect special categories of rights[19];
- as a rule, acts disputed by the constitutional complaint refer to individual acts, with some exceptions[20];

[18] *See also* Klucka, J., Suitable Rights for *Constitutional Complaints*, Report on the Workshop on the "Functioning of the Constitutional Court of the Republic of Latvia", Riga, Latvia, 3-4 July 1997, Offprint.

[19] In Germany, Albania, Austria, Estonia, Liechtenstein, Slovakia, Switzerland, Hungary, Slovenia and in the Czech Republic municipalities are entitled, in order to protect self-government, to file a **"communal" constitutional complaint** (Germany recognises the "communal" constitutional complaint on a federal level and on a provincial level in the provinces of Wuerttemberg and North Westphalia). The German system also recognises a special constitutional complaint by an individual in relation to constitutional conditions for the nationalisation of land (*Sozialisierung*) in the province of Rheinland-Pfalz. A special form of constitutional complaint exists in Spain: there, the institute of the citizens' legislative initiative is also protected by constitutional complaint.

[20] In Switzerland, Cyprus and Austria a constitutional complaint can impugn only an administrative act, while in Germany, it can impugn acts of all levels (including a statute, also in case of omissions); in Spain, Slovenia, Serbia and Montenegro a statute may also be an indirect subject of a constitutional complaint; legislative negligence may be directly impugned by a constitutional complaint in Brazil, and also in the practice of the German Federal Constitutional Court and the Bavarian Constitutional Court. In Monaco the constitutional complaint is limited only to statutes. In addition, also newly introduced form of the constitutional complaint which were introduced in Hungary, Turkey, Latvia, Russia, Tadjikistan, Baskhiria, Buryatia, Dagestan, the Kabardino-Balkar Republic, Karelia, Komi and Poland are oriented to the general acts (so called unreal constitutional complaint). However, in case of violation of their human rights the Ukrainian petitioner may apply for the official interpretation by the Constitutional Court. In the last period there are some efforts relating to the introduction of the constitutional complaint (see: Lapinskas, Kęstutis. The perspectives of individual constitutional complaint in Lithuania. Strasbourg: European commission for democracy through law (Venice Commission), Batumi, Georgia, 2008. CDL-JU(2008)004. URL: http://www.venice.coe.int/docs/2008/CDL-JU(2008)004-e.asp.

- those entitled to lodge a constitutional complaint are generally individuals but in Austria, Germany, Spain, Switzerland, Serbia and Montenegro, legal entities explicitly may do so also, while in the Croatian system legal entities are explicitly excluded as a potential appellant; in some systems, the complaint may be lodged by the Ombudsman (Spain, Slovenia, Serbia) or by the public prosecutor (Spain, Portugal). In some systems the Constitutional Court is not bound by the petition and may exceptionally *ex officio* extend the proceedings to the general act if in a concrete case is concerned (Slovenia, Germany, Austria, Liechtenstein, similar in the Czech Republic, Spain, Croatia and Macedonia).
- the standing, or the personal effect the remedy might have upon the plaintiff is a mandatory element, although in most systems the concept of standing is fairly loosely defined;
- the prior exhaustion of legal remedies is an essential precondition, but with exceptions when the Constitutional Court may deal with a case irrespective of the fulfillment of this condition (Germany, Slovenia, Switzerland);
- the time limit for lodging an application ranges from 20 days to three months with an average of one month from the day of receipt or delivery of the final, legally binding (individual) judgment or decision or act of the State administration;
- the contents of applications are prescribed in detail in a majority of systems: in written form, sometimes with the language explicitly stated (Germany, Austria), along with the particular country, the disputed act, and a definition of the violation of the relevant constitutional right, etc.;
- a majority of systems (but not the systems of Middle and Eastern Europe) envisage the issuing of a temporary restraining order (injunction) or ruling (of the Constitutional Court) i.e. an order temporarily suspending the implementation of the disputed act until the adoption of a final decision;
- in some systems the payment of the costs of the proceedings is explicitly foreseen in cases of frivolous applications (Germany, Slovenia, Austria, Portugal, Spain, Switzerland);
- the effects of the decision: the Constitutional Court is limited to decide on constitutional matters, on the violation of constitutional rights. However, if a violation is found, a deci-

sion may have a cassatory effect which is, as a rule; *inter partes* (and *erga omnes* in a case in which the subject-matter of the decision is a legislative act). The Constitutional Court here retains the position of the highest judicial authority. These Courts can be referred to as the "high ranking courts of cassation", because Constitutional Courts reviewing the decisions of ordinary courts act in fact as the third and the fourth instance. Although the Constitutional Court is not a court of full jurisdiction, in specific cases it is the only competent court to judge whether a ordinary court has violated the constitutional rights of the plaintiff. It involves the review of micro-constitutionality, perhaps the review of the implementation of a law, which, however, is a deviation from the original function of the Constitutional Court. Constitutional complaint cases raise sensitive questions on defining constitutional limits. In any case, the Constitutional Court in its activities is limited strictly to questions of constitutional law. The Slovenian system is specific in that the Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Para. 1 of Article 60 of the *Slovenian Constitutional Court Act*, Official Gazette RS, No. 15/94).

The protection of fundamental rights and freedoms is an important function of a majority of constitutional courts, irrespective of whether they perform the function of constitutional judgment in the negative or positive sense. Whenever a Constitutional Court has the function of a "negative legislature", constitutional review is strongest precisely in the field of fundamental rights. Even in other fields (the concretisation of State-organisational and economic constitutional principles) in which the legislature has the primary role even in principle, constitutional courts insure that fundamental rights are protected. Precisely in the field of the protection of rights, the Constitutional Court also has the function of a substitute "Constitution-maker" (the "positive function"), which means that in specific cases constitutional courts even supplement constitutional provisions.

B) Slovenia - Applicants Before the Constitutional Court

1. Legal Interest Before the Constitutional Court

The following applicants may initiate constitutional review in the given cases:

Abstract review: anyone (Art. 162 (2), *Constitution;* Art. 24, *Constitutional Court Act*).

Abstract review: the National Assembly, one third of the deputies of the National Assembly, the National Council, the Government, (Art. 23.aë(1), *Constitutional Court Act*).

Concrete review (regarding its incidenter proceedings): the Courts (Art. 23, *Constitutional Court Act*), the ombudsman for human rights if he deems that a regulation or general act issued for the exercise of public authority inadmissibly interferes with human rights or fundamental freedoms; the information commissioner, provided that a question of constitutionality or legality arises in connection with a procedure he is conducting; the Bank of Slovenia or the Court of Audit, provided that a question of constitutionality or legality arises in connection with a procedure they are conducting; the State Attorney General, provided that a question of constitutionality arises in connection with a case the State Prosecutor's Office is conducting; representative bodies of local communities, provided that the constitutional position or constitutional rights of a local community are interfered with; representative associations of local communities, provided that the rights of local communities are threatened; national representative trade unions for an individual activity or profession, provided that the rights of workers are threatened;Art. 23.a(1), *Constitutional Court Act*).

Preventative review of treaties: the President of the Republic, the Government or one third of the deputies of the National Assembly (Art. 160 (2), *Constitution;* Art. 70, *Constitutional Court Act*).

Constitutional complaint: any natural person (as well as a legal entity), the Ombudsman (Arts. 160, 161, 162, *Constitution*, Art. 50, *Constitutional Court Act*).

Disputes on powers: the aggrieved authorities (Art. 61 (1)(2), *Constitutional Court Act*), anyone (Art. 61(3), *Constitutional Court Act*).

Impeachment: the National Assembly (Arts. 109 and 119, Constitution, Art. 63 (1), *Constitutional Court Act*).

Unconstitutional acts and activities of political parties: anyone by means of the popular complaint (*actio popularis*) or legitimate subjects by a request for an abstract review - legitimate subjects under Art. 23.a of the *Constitutional Court Act*, (Art. 68 (1) of the *Constitutional Court Act*).

Confirmation of deputies' terms of office: affected candidates or representatives of the lists of candidates (Art. 69 (1), *Constitutional Court Act*; Art. 8 (1) of the Deputies Act, Official Gazette RS, No. 48/92).

Confirmation of terms of office of the members of the National Council: affected candidates (Art. 50 (3), *National Council Act*, Official Gazette RS, No. 44/92).

Complaint of local self-government authorities concerning constitutional position and rights of local communities (Art. 91, *Local Self-Government Act*, Nos. 72/93 with amendments).

Conditions for the establishment of a municipality or a change in its territory: government, any deputy, at least 5000 voters, municipal council (Art. 14.a(3), Local Self-Government Act).

Dissolution a municipal council – dismission a mayor: municipal council, mayor (Art. 90.c(4), Local Self-Government Act).

Constitutionality and legality of a request to call a referendum: municipal council (Art. 47.a(2), Local Self-Government Act).

Review the constitutionality of consequences due to the suspension of the implementation or adoption of a law: National Assembly (Art. 21, Referendum and People's Initiative Act).

decision not to call a constitutional amendment referendum: at least thirty deputies (Art. 5.č, Referendum and People's Initiative Act).

Confirmation of elected Slovenian members of the European Parliament: affected candidates (Art. 23 (1), Election of Slovenian Members to the European Parliament Act).

Anyone (a natural person and/or a legal entity) who demonstrate legal interest may request the individual initiation of proceedings before the Constitutional Court (Art. 162(2), *Constitution;* Art. 24, *Constitutional Court Act*). Additionally, bodies, specified in Art. 23.a of the Constitutional Court Act, may request the abstract (National Assembly, one third of deputies, National Council, Government) or concrete constitutional review (Ombudsman, Information commissioner, Bank of Slovenia, Court of Audit, State attorney general, representative body of local community, representative association of local community, national representative trade union – in connection with the concrete case they are dealing with). These bodies do not need to demonstrate their legal interest for commencing constitutional review.

Concerning standing (legal interest) before the Constitutional Court, the Court issued many decisions, which the Court's general restrictive method of treatment and acknowledgment of the mentioned procedural condition. However, a detailed overview of the constitutional case-law shows that the Constitutional Court did not always hold on consistently its earlier decision concerning legal interest. Some of such oscillations can be defined a unconsistence of the constitutional case-law, but other deviations may be results of special circumstances which justify a different treating of apparently similar cases[21].

From the definition of the legal interest which derives from Art. 24(2) of the *Constitutional Court Act* and from its concretization in practice as well, the following elements can be stressed: the interest shall be legal (an encroachment upon someone's rights, legal interests and/or legal position must arise), so only in such case we can speak about the legal interest; moreover, the interest shall belong to the petitioner itself, accordingly, we speak about his/her own and personal legal interest – the petitioner shall demonstrate his/her legal interest, consequently that the expected decision taken by the Constitutional Court would have influence on his/her legal position; and what is of the highest importance, the enchroachment upon the petitioner's own and personal rights, legal interest and/or the legal position must be direct and concrete. If at least one of the mentioned elements is not present, then the procedural presumption of the legal interest is not

[21] Nerad, Sebastian. *Pravni interes za ustavnosodno presojo zakonov in drugih predpisov,* REVUS-revija za evropsko ustavnost, No. 4/2005, GV Založba Ljubljana, p. 42

present in whole and the Constitutional Court would in principle reject such petition.

Regarding individual petitioners, the Constitutional Court examines at first, if the eventual decision in merito would may have any effect on the petitioner at all (Art. 24(1)(2), *Constitutional Court Act*), *Constitutional Court Act*). On the contrary, in rule state and other bodies disputing regulations before the Constitutional Court do not have to demonstrate any legal interest (Art. 23.a, *Constitutional Court Act*). However, state bodies and other similar bodies as applicants may not submit a request to initiate the procedure for the review of the constitutionality or legality of regulations and general acts issued for the exercise of public authority which they themselves adopted (Art. 23.a(2), *Constitutional Court Act*)..

First of all, the state bodies don't have any legal interest to dispute legal provisions regulating their powers. Also any eventual unsuitable or even an illegal regulation of issue regarding activities or powers of the particular state body as a petitioner, doesn't indicate any encroachment upon its rights, legal interests or its legal position. State bodies don't have any legal interest to dispute the procedure for implementation of their powers. They are not entitled to dispute legal provisions which directly encroach on the legal position of individuals who's rights are an object of the decision-making of such body; only the affected individuals may demonstrate their legal interest for disputing of the mentioned provision from their own.

The state and other similar bodies can dispute only legal provisions which encroach on their own legal position when they exercise their role of the state body. The same principle shall be implemented for the subjects of public law.

In all cases concerning the state and other similar bodies or the individual members of the state bodies and/or the individuals - executors of the body''s role, a general principle shall be considered that the legal interest would be taken as been demonstrated if it is direct and concrete.

However, the Constitutional Court made an exception in case of petitions of trade unions. Under Art. 23.a (1)(11) the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority can be ini-

tiated also by a request submitted by national representative trade unions for an individual activity or profession, provided that the rights of workers are threatened (in contrast to the petion which shall be discussed and/or proved by the Constitutional Court). If the petitioner is not a such trade union, the Constitutional Court discusses and/or proves its request like a petition what means that such trade union shall demonstrate its legal interest.

The Constitutional Court made an exception also in some cases concerning associations and/or some other unions of citizens, however only then when such associations or other unions were established with the aim to assert interests and/or rights of their members.

The stability of the constitutional case-law has been consequently accentuating the necessity of the restrictive interpretation of the legal interest, because of the basic role of the legal interes: to restrict the access to the Constitutional Court. Such restrictive aim has been in the own nature of the legal interst. Therefore, the legal interest means a barrier due to which the petition can not be considered as a popular complaint (*actio popularis*). Bearing in mind the increasing overburdening of the Constitutional Court by (individual) petitions and paralelly by (individual) constitutional complaints, the restrictive interpretation of the legal interest can be well founded. However, on the other hand, it is no permissible to prevent individual petitions (popular complaints) by such interpretation of the legal interest, that in a concrete situation nobody would be able to demonstrate it. It is an essential question where is the extreme point of such restrictive interpretation of the legal interest. Furthermore, it is a question, where is the extreme point of the gradual limitation of the access to the Constitutional Court[22].

2. Ordinary Courts as Applicants

2.1 Preliminary Issues - Plea of Unconstitutionality

The Constitutional Court provides concrete review of provisions when requested by the ordinary Courts if a question relating to con-

[22] Nerad, Sebastian. *Pravni interes za ustavnosodno presojo zakonov in drugih predpisov, REVUS-revija za evropsko ustavnost,* No. 4/2005, GV Založba Ljubljana, p. 42

stitutionality or legality arises during the proceedings they are conducting (Art. 156, *Constitution*, Art. 23, *Constitutional Court Act*).

The courts are obliged to put the question. Art. 156 of the *Constitution* provides that if a court deciding some matter deems a law that it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision.

Additionally, the Constitution especially provides for the judicial review of the acts and decisions of all State administrative bodies (Art. 120 (3), Constitution). The Constitution determines as well that courts of competent jurisdiction are empowered to decide upon the legal validity of the decisions of State bodies, local government bodies and statutory authorities made in relation to administrative disputes and concerning the rights, obligations and legal entitlements of individuals or organizations (Art. 157, Constitution). This means that all final individual acts of administrative bodies (those which may not be charged by an appeal) are brought under judicial review. In cases where all legal remedies have been exhausted but the constitutional rights of an individual have allegedly been be violated, it is possible to lodge a constitutional complaint before the Constitutional Court (Art. 160 (1) (6), Constitution, Arts. 50 to 60, *Constitutional Court Act*). This means that the constitutional review of general administrative acts may not be exercised by ordinary courts, but by the Constitutional Court, which may abrogate or annul unconstitutional or illegal general administrative acts (Art. 59 (1), *Constitutional Court Act*).

Since the Slovenian system is a system of concentrated constitutional review, the ordinary Courts cannot exercise constitutional review while deciding concrete (*incidenter*) proceedings. The ordinary Court must interrupt the proceedings and propose the review of the constitutionality of the statute before the Constitutional Court (Art. 156, Constitution, Art. 23, *Constitutional Court Act*). The ordinary Court may continue the proceedings only after the Constitutional Court has reviewed the constitutionality of the respective statute (hence the Slovenian regulation, too, adopted the principle that a statute can only be eliminated from the legal system by the Constitutional Court).

If the Supreme Court deems a law or part thereof which it should apply to be unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for the review of its constitutionality (Art. 23(2), *Constitutional Court Act*).

If by a request the Supreme Court initiates proceedings for the review of the constitutionality of a law or part thereof, a court which should apply such law or part thereof in deciding may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such law or part thereof by a separate request (Art. 23(3), *Constitutional Court Act*).

The parties before any ordinary court cannot affect such proceedings since the ordinary courts are obliged, as an official duty according to the Constitution, when they raise a question of the constitutionality of the regulations they are applying to stay the proceedings and refer the case to review by the Constitutional Court.

It clearly follows from Art. 156 of the Constitution and Art. 23 of the *Constitutional Court Act* that the court (e.g. within civil proceedings) is not obliged to stay the proceedings and request the review of the constitutionality of statute when any of the parties to the proceedings requests so. Pursuant to the cited provisions of the Constitution and the *Constitutional Court Act*, it proceeds in such a manner only when it itself has doubts about the conformity with the Constitution of the statute it should apply[23].

If the court believes that the statute it should apply is unconstitutional it must, according to Art. 156 of the Constitution, stay its proceedings, commence proceedings before the Constitutional Court and continue the proceedings after the decision on the conformity of the statute with the Constitution. That was the situation in cases on which the Constitutional Court has decided so far upon the proposal of the (ordinary) court[24]. In all the cited cases, on which the Constitutional Court already decid-

[23] See ruling No. Up-70/96 of 22 May 1996, published on www.us-rs.si.

[24] See e.g. decisions No. U-I-48/94 of 9 November 1994 – Official Gazette RS, No. 73/94 and DecCC III, 123; No. U-I-48/94 of 25 May 1995 – Official Gazette RS, No. 37/95 and DecCC IV, 50; No. U-I-225/96 of 15 January 1998 – Official Gazette RS, No. 13/98 and DecCC VII, 7.

ed, the Supreme Court stayed the proceedings on a suit filed within the judicial review of administrative decisions, that is, in the phase in which there was no final decision reached yet. In the opinion of certain petitioners, in particular the finality of a decision in connection with which they commence proceedings prevents the effects of possible annulment of the challenged statutory provisions. The Constitutional Court, however, has not so far confirmed such a position. Regarding these questions and the function of the Supreme Court as the highest State court for providing uniform case-law (Art. 127(1), Constitution), the Constitutional Court held in case No. U-I-273/98 of 1 July 1999 (Official Gazette RS, No. 60/99, DecCC VIII, 169, see also www.us-rs.si) that the requirements for commencing proceedings determined in Art. 23 of the *Constitutional Court Act* were fulfilled although the proceedings in the concrete case were not stayed.

2.2 Exception of Unconstitutionality

An interesting aspect of relations between the Constitutional Court and ordinary courts is established through the mentioned provision of Art. 156 of the Constitution, which reads: "In the event that a court, in deciding upon any matter, concludes that a statute which it must apply is unconstitutional, it must stay the proceeding and refer the issue of the constitutional validity of the statute to the Constitutional Court. The original proceeding in the court may only be continued after the Constitutional Court has handed down its decision." We shall hereafter call this proceeding concrete control[25]. This provision establishes relations between ordinary courts and the Constitutional Court in two aspects. To refer an issue of the constitutionality of the statute to the Constitutional Court, the ordinary court (*judex a quo*) has, first, to establish the meaning of the challenged (*suspicious*) provision, and, second, to substantiate its unconstitutionality. In both regards the ordinary

[25] We find it necessary to mention that in Slovenian legal literature all procedures related to adjudication on the conformity of statutes (and regulations) are named *abstract control* (obviously because in these procedures *abstract acts* are checked) to be distinguished from constitutional complaint (which, on the other side, is never called *concrete control*, although the subject of scrutiny in these procedures are individual and, as a rule, concrete acts). A term *concrete control* is not used in Slovenian legal literature.

court's motion is subject to revision by the Constitutional Court. Dealing in details with this subject would call for more time - let us, at this occasion, only mention that in several cases interpretation of the challenged provision made by the Constitutional Court differed from the one made by the referring court - which could suffice to remove the doubt about constitutionality and contribute to the solution of an individual dispute as well. It need not be mentioned that decisions in these procedures have the same erga omnes effects as any decision brought in the field of abstract control. The decision is published in the Official Gazette and its effects spread beyond the case that triggered the constitutional dispute. It is interesting that ordinary courts relatively infrequently use this possibility[26].

3. Screening

There is no a screening procedure which allows the Constitutional Court to limit the number of cases or to speed up the hearing of those cases (nonsuit, quick reply, demurrer, evident answered.

The Slovenian Constitutional Court has no power to limit the number of cases it is about to adjudicate. Nowhere in the Constitution and the *Constitutional Court Act* have been such powers vested in the Constitutional Court. Thus, following the old tradition of continental courts, in abstract-review proceedings before the Constitutional Court what applies is the principle of legality, which means that the Constitutional Court must reach a decision on every case submitted to it provided that the procedural requirements are fulfilled.

[26] There is no clear answer as to what are the obligations of the ordinary court if a question of unconstitutionality is raised by a party in a judicial procedure. Does the court have to give some formal *interim* answer or can it deal with the problem in the final decision. Do ordinary courts *at all* even in a negative form have the power to deal with constitutional issues? The question is of a small *practical* relevance, because any party may always challenge any statutory provision directly before the Constitutional Court - if only he or she demonstrates the provision to be applied in his or her case interferes with his or her rights, legal interest or legal position. An ordinary court would in such case stop, if not formally stay, the procedure until the final decision of the Constitutional Court.

However, in a certain manner, it may speed up the hearing of certain cases. This is determined in Art. 46 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia (Official Gazette RS, No. 86/07). According to the Rules, the Order of Precedence for adjudicating cases is as follows: "The Constitutional Court shall adjudicate cases as a rule according to the order of precedence of receiving petitions, except:

- when simpler cases are at issue that can be considered and adjudicated already in the phase of examination or in the phase of preliminary proceedings;
- when consideration and adjudication according to the order of precedence are prevented by the length and complexity of preliminary proceedings or the proceedings for considering an individual case;
- when such cases are at issue for which the regulations that are applied on the basis of Art. 6 of the *Constitutional Court Act* determine that the Court must consider and adjudicate them rapidly;
- when the *Constitutional Court Act* or other regulations determine a time limit by which the Constitutional Court must consider a case and decide it;
- when the decision on a jurisdictional dispute is at issue;
- when the resolution of an important legal question is at issue, and in other cases
- when the Court decides so."

4. Scope of Referral of the Constitutional Court – "*ex officio*" Assessment

In principle, the Constitutional Court is limited by the application regarding its contents.

However, in deciding on the constitutionality and legality of a regulation or a general act issued for the exercise of public authority, the Constitutional Court is entitled to assess the constitutionality or legality of other provisions of the respective (or other) regulations or general acts issued for the exercise of public authority whose constitutionality or legality have not been submitted for assessment, if such proposals are mutually related, or

if this is absolutely necessary to resolve the case (Art. 30, *Constitutional Court Act*). If the Constitutional Court, while deciding on a constitutional complaint, establishes that a given abolished act was founded on an unconstitutional regulation or general act issued for the exercise of public authority, such act may be set aside (*ex tunc*) or abrogated (ex nunc) (Art. 161 (2), *Constitution*, Art. 59 (2), *Constitutional Court Act*).The Constitutional Court shall issue a decision stating which authority is competent and may also abrogate, retroactively or prospectively, the general act, or the general act for the exercise of public powers whose unconstitutionality or illegality has been established (Art. 61 (4), *Constitutional Court Act*).

5. The Slovenian Constitutional Complaint

5.1 History

With the introduction of the Constitutional Court by the Constitution of 1963, the then Slovenian Constitutional Court also acquired jurisdiction over the protection of basic rights and freedoms. It was empowered to decide on the protection of (at that time officially so called) self-government rights and other basic freedoms and rights determined by the then Federal and constituent republic Constitutions if these were violated by an individual act or deed by a State or municipal body or company if this were not guaranteed by other judicial protection by statute (Art. 228.3 of the Constitution of the SRS of 1963 and Arts. 36 to 40 of the then *Constitutional Court Act*). The decision of the Constitutional Court in such proceedings had a cassatory effect in the case of an established violation (an annulment or invalidation or amendment of an individual act, and the removal of possible consequences; or a prohibition on the continued performance of an activity). The jurisdiction of the Constitutional Court was, therefore, subsidiary. It was possible to initiate such proceedings only if, in a specific case, there was no judicial protection envisaged, or if all other legal remedies were exhausted.

However, in practice the former Constitutional Court rejected such individual suits on the basis of a lack of jurisdiction, and

directed the plaintiff to proceedings before the ordinary Courts. Such a state of affairs also created a certain negative attitude in the Constitutional Court itself, since it knew in advance that it would reject such suits and thus carry out a never-ending task. The then Constitutional Court itself warned that in relation to individual acts, the most sensible solution would be for decisions to be transferred, as a whole, to the ordinary Courts. To extend powers of constitutional courts – what was proposed by several – to the constitutional review of individual acts of the administration and judiciary would be no possible in the then period already for a reason, that the then constitutional courts are supposed to be substantially charged by the review of more and more broader autonomus regulations and due to the rapid changing and often disharmonious and uncertain legal system[27]. The negatively arranged jurisdiction of the Constitutional Court (whenever other legal protection was not provided) resulted in the fact that its activities in this field showed no results, although this activity was initiated precisely because of a complaint for the protection of rights. However, the then system of the constitutional review guaranteed throughout, the individual the right of popular complaint - petition (*actio popularis*) without the appellant – petitioner having to demonstrate his/her own standing.

In the initial period of the activity of the Constitutional Court, following the Constitution of 1963, the protection of human rights and freedoms by the Constitutional Court made no intensive progress. Perhaps this was due to an insufficiently specific constitutional and legal basis, one that would provide the Constitutional Court with enough practical standards for its decision-making. The reason perhaps lay in the whole system, which was not in favour of the Constitutional Court protection of basic rights.

The Constitution of 1974, however, removed the jurisdiction of the Constitutional Court over individual constitutional rights and freedoms, and attributed the protection of these rights to the ordinary Courts. Nevertheless, in the second period of the Constitutional Court's activity, from the Constitution of 1974 till the Constitution of 1991, the number of decisions explicitly relating to constitutionally protected human rights and freedoms,

[27] Deset let dela Ustavnega sodišča Slovenije, Dopisna delavska univerza Ljubljana 1974, p. 55.

slightly increased. In this respect the examples of the concretisation of the Principle of Equality before the Law, the Freedom of Work, the right to social security, and the right to legal remedies, are of special significance. Unfortunately, most of these decisions taken by the Constitutional Court included little reasoning. The reader may be prevented from comprehending all of the background reasons for the decision.

It was also characteristic of Slovenian Constitutional Case-Law prior to 1991 that, in comparison with Europe, it avoided the use of legal principles a great deal more, even those explicitly included in the text of the Constitution itself. In common with foreign practice, however, the Principle of Equality greatly predominated among otherwise rarely used principles. Decisions consistently remained within the framework of legal (formal) argument and no other value references were ever allowed: the Constitutional Court respected the Principle of Self-Restraint and stuck to the presumption of the constitutionality of statutes.

The new Constitution of the Republic of Slovenia of 1991, along with the catalogue of classical basic rights, in combination with the newly defined powers of the Constitutional Court, set the ground for the intensification of its role in this domain. It is considered that the Constitutional Court now has sufficient space for such activity. The Slovenian Constitution contains adequate definitions of rights which allow for professionally correct understanding and reasoning. Almost all basic rights have the nature of legal principles and are thus open to such an extent that they require significant further concretisation and implementation[28].

The question as to whether Slovenian Constitutional Case-Law from the period after the introduction of the 1991 Constitution, in its relations to basic rights and freedoms, has adapted to or is more in line with foreign constitutional case-law, can be answered in the sense that Slovenian Constitutional Case-Law comes close to foreign case-law in its approach to basic rights. The number of examples from this field has increased.

[28] Citation from Pavčnik, Marijan, Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung, WGO *Monatshefte fuer Osteuropaeisches Recht*, 35th yearbook 1993, Volume 6, 345-356. See also Pavčnik, Marijan, Understanding Basic (Human) Rights (On the Example of the Constitution of the Republic of Slovenia), *East European Human Rights Review*, Volume 2/1996, Number 1, 41-57.

From then on, the constitutional complaint no longer had any place in the system, until it was again reintroduced by the Constitution of 1991. This specific legal remedy thus remained combined with the previous system, i.e., with the possibility of lodging a popular complaint (*actio popularis*) (Art. 162(2) of the Constitution of 1991; Art. 24 of the Constitutional Court Act of 1994) with the Constitutional Court - despite the individual as petitioner having to demonstrate his/her legal interest (standing) - which in effect limits the procedural presumption. Accordingly, an individual may dispute all categories of (general) act by lodging a constitutional or popular complaint (actio popularis) if he/she is directly aggrieved.

5.2 Basic

Although the power of the Constitutional Court to adjudicate on individual cases involving the alleged breaches of constitutional human rights was envisaged already in the Constitution of 1991 (Art. 160(1)(6), Constitution), only the adoption of the Constitutional Court Act in 1994 made the procedure operational. The institute was adopted into the Slovenian legal system under the influence mainly of German jurisprudence - and in framing its practical application the Slovenian Constitutional Court systematically consulted comparative European jurisdictions. One of the most difficult tasks was to establish the proper scope and extent of this new legal remedy: to ensure effective protection of human rights to any person aggrieved on the one hand and to avoid the danger that the Constitutional Court becomes the last (in practice fourth) instance court within the range of ordinary courts, on the other hand.

It should be mentioned that in Slovenia the access to the Constitutional Court for the individual is in principle widely open: there are no limits as to which human rights may serve as a justification to lodge a constitutional complaint - in addition to all the rights established by the Constitution, also any human right laid down in any ratified and published international document may give rise to a constitutional complaint. There are no filing fees to be paid by the complainant. There are no requirements as to legal representation: applications *in forma pauperis* are widely accepted without reservations.

In the field of constitutional complaints the Constitutional Court adopts a two-step procedure. The first step is done by three judicial panels, each of them composed of three judges: a panel for civil cases, a panel for criminal cases and a panel for administrative cases. These judicial bodies are empowered only to decide on admissibility and (manifest) illfoundedness. If the complaint is found to be inadmissible it is dismissed, if it is found to be manifestly ill founded it is not accepted and only if it passes this scrutiny, the complaint is accepted (such decision can only be brought unanimously by the members of the panel, or, fifteen days following the dismissal or the decision of manifest illfoundedness, by any three members of the court) and submitted for decision making to the plenary session (second step of the procedure). Only after the complaint passes the first step examination successfully, the adversary procedure is established by giving the opposing party the possibility to take part in the procedure. At this stage of the procedure the body which issued the challenged decision (typically the Supreme Court) is always given the opportunity to submit its views and explications. The Supreme Court rarely avails itself of this possibility and normally does not take active part in the procedure. As a rule, the complaint is decided at an in camera session, and only exceptionally at a public hearing.

The constitutional complaint is not a legal remedy which would empower the Constitutional Court to consider merely the correctness and legality of legally valid court decisions. As mentioned before, this would turn the Constitutional Court into the court of last instance, which is not its constitutional role. The Constitutional Court is only authorized to assess whether the courts have, by their decisions, violated human rights and fundamental freedoms. The (panel of the) Constitutional Court dismisses a complaint if it is too late (60 days), if the complainant has not exhausted all ordinary and extraordinary legal remedies, if the complainant lacks standing (legal interest) or if the constitutional complaint is not complete (inadmissibility). The (panel of the) Constitutional Court does not deal with the constitutional complaint at all (according to the wording of Art. 55(2) of the *Constitutional Court Act* the Constitutional Court *shall not accept a constitutional complaint*) if there is obviously no violation of human rights and basic freedoms (manifest illfoundedness) or, if

the decision cannot be expected to provide a solution to an important legal question and if the violation of human rights or basic freedoms did not have any important consequences for the complainant (triviality). Concept of *triviality* is somehow strange to European legal culture. Some aspects of the concept of certiorari, applied by the US Supreme court may be found in it. The important characteristic of this institution in Slovenian legal system is that also the decision of non-acceptance on this ground has to give reasons. This is why the Slovenian Constitutional Court used this ground not to accept the constitutional complaint only in very few occasions. It is much easier and convincing to substantiate manifest illfoundedness than triviality of the alleged breaches of constitutionally guaranteed human rights. Though, one of the main problems the Constitutional Court is facing is how to cope with the permanently increasing caseload, both, in the field of constitutional complaints as well as in the field of review of statutes and regulations. Serious proposals have been made by legal experts and some former judges of the Court to examine the possibility of a new procedure, which would enable the Court to admit cases completely at its choice, bound only by internal criteria and without having to give reasons on admissibility or illfoundedness. My opinion is that to introduce such system would mean a *tectonic* change in public perception about the position and role of the Constitutional Court in a legal system. I am afraid that the society and the Court itself are not - and will not be in a near future - prepared for such turn.

When deciding about a constitutional complaint the Constitutional Court exclusively limits itself to examining whether the challenged decision is based on some legal standpoint that is unacceptable from the point of view of protection of human rights or whether it is arbitrary. In all three legal sections (civil, criminal, administrative) decisions, where breach of procedural guarantees were found, prevail. Among the constitutional rights of procedural nature the Constitutional Court has so far, by its decisions, protected equality in the protection of rights (Art. 22, Constitution), due process of the law (Art. 23, Constitution) the right to legal remedies (Art. 25, Constitution) and (special) legal guarantees in criminal proceedings (Art. 29, Constitution). Among violations in the field of substantive law the complainants

have so far successfully pleaded for the protection of personal liberty - related to the arrest and preventive detention (Art. 19), the right to property (Art. 33, Constitution), the right to privacy (Art. 35, Constitution), the inviolability of dwellings (Art. 36, Constitution) the freedom of expression (Art. 39, Constitution) and the right to social security (Art. 50, Constitution).

It must be mentioned that in examining constitutional complaints the Constitutional Court applies directly also provisions of the European Convention on Human Rights and interprets the extent of constitutional provisions in the light of jurisprudence of the European Court in Strasbourg.

If the (plenary session of) the Constitutional Court finds that the challenged individual act breached the complainant's constitutionally protected human right, it will normally reverse the challenged decision and remand it to the Supreme Court or, as the case may be, to some other court or administrative body, where the breach occurred. If the Constitutional Court establishes that the challenged act was based on an unconstitutional statute or regulation, it may in an incidental procedure quash such act - this part of its decision having an *erga omnes* effect.

A very strong power in relation to ordinary courts is vested in the Constitutional Court through the provision of Art. 60 of the *Constitutional Court Act*, which gives the Court the power to make a final decision by *changing* the challenged decision. This possibility is a very strong tool in the hands of the Constitutional Court, which enables it to impose its decision as final in cases when the body to which the decision was remanded would be reluctant to bring its decision in line with the Constitutional Court's views. Some constitutions, for example the Croatian Constitution enabled the Constitutional Court only to reverse and remand the decisions of the Supreme Court. In certain cases, (in Croatia dealing with the elections of judges) the Supreme Court would not follow the reasoning of the Constitutional Court, which caused an endless circle of appeals. The situation could only be resolved by giving the Constitutional Court the *reformatory* power to finally decide on the merits. The Constitutional Court of Bosnia and Herzegovina achieved this power through rules of procedure adopted by the Court itself.

Generally it can be said that, after some initial hesitation, the

courts in Slovenia have accepted the standpoints and standards expressed in the decisions of the Constitutional Court in constitutional complaints, and have brought their practice in agreement with them. There were no cases of overt opposition to any decision of the Court. Nevertheless in a very small number of cases the Court used its *reformatory* power and brought the final decision by amending the Supreme Court decision to enable the aggrieved party to be mended for the deprivation of a human right swiftly and efficiently. The Constitutional Court adopted this possibility five times (all of them in identical cases - related to military pensions) in 1998.

Art. 15(1) of the Constitution stipulates that human rights and fundamental freedoms are to be exercised directly on the basis of the Constitution, while paragraph 2 of the same Art. provides that the exercise of these rights and freedoms may be regulated by law. In conjunction with Art. 125 this means that these rights and freedoms are protected in all judicial proceedings before every court. After all other remedies have been exhausted, individuals also have the possibility of filing a constitutional complaint before the Constitutional Court, i.e. the instrument specially intended for the protection of human rights and fundamental freedoms.

The right to the judicial review of the acts and decisions of all administrative bodies and statutory authorities which affect the rights and legal entitlements of individuals or organizations is guaranteed (Art. 120(3), *Constitution;* Art. 157(1), Constitution).

As already mentioned, the individual's standing as complainant before the Constitutional Court has been influenced by extensive interpretation of provisions relating to the constitutional complaint, as well as by ever more extensive interpretation of provisions relating to concrete review. In some systems the individual's access to constitutional courts has become so widespread that it already threatens the functional capacity of the Constitutional Court. Therefore, the legislature is trying to find some way for constitutional courts to eliminate less important or hopeless proceedings (e.g. the restriction of abstract reviews by standing requirements by the amended *Constitutional Court Act*, Official Gazette RS, No. 64/07). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With a growth in the number of complaints, efficiency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights[29].

Prevailing petitioners before the Slovenian Constitutional Court have been and remain individuals. The current system of constitutional review under the Constitution of 1991 preserved the prior (under the Constitutions of 1963 and 1974) unlimited, individual popular complaint (*actio popularis*), but now restricted by the legal interest to be demonstrated by the petitioner (*actio quasi-popularis*) (Art. 162(2), *Constitution;* Art. 24, Constitutional Court Act)[30]. On the other hand, the newly introduced constitutional complaint increasingly intensified the role of the individual before the Constitutional Court (Arts. 160–162, *Constitution;* Art. 50, *Constitutional Court Act*). Since the Slovenian system is a system of concentrated constitutional review, the ordinary courts cannot exercise constitutional review while deciding in concrete (*incidenter*) proceedings. An ordinary court must interrupt the proceedings and refer the law to the Constitutional Court for a review of its constitutionality (Art. 156, *Constitution;* Art. 23, *Constitutional Court Act*). The ordinary court may continue the proceedings only after the Constitutional Court has reviewed the

[29] From Arne Mavcic, The International Encyclopedia of Laws, Constitutional Law, Slovenia, ed. Dr. R. Blanpain, Kluwer Law International, The Hague-London-Boston, 1998, pages 160-173.

[30] Concerning de lege lata: Accordingly, the legal interest is a procedural condition which means - in case of initiation of the constitutional court's proceedings upon the (individual) petition - a condition for the admissibility of in merito decision making on the constitutionality and legality of the disputed regulation.
Concerning de lege ferenda: It would be in contradiction with the Constitution if the Constitutional Court either totally "unfreezes" the legal interest in such a manner that the legal interest would not represent any limitation any more, or – what would be more believable –that the Court would "sharpen" the legal interest in such a manner that individual petitioners could not have any access to the Constitutional Court any more, what would be a sign of a virtual abolition of such form of constitutional review. The legal interest is a constitutional phenomenon and shall have a role of demarcation between the individual petition and the request (of a state body), however, on the other hand it should not be interpreted in such a manner that the presentation of individual petitions would be absolutely prevented.
See: Nerad, Sebastian. *Pravni interes za ustavnosodno presojo zakonov in drugih predpisov*, REVUS-revija za evropsko ustavnost, No. 4/2005, GV Založba Ljubljana, p. 42.

constitutionality of the respective law (so the Slovenian model, too, adopted the principle that a law can only be eliminated from the legal system by the Constitutional Court). If a court takes the view that an executive regulation does not comply with the Constitution or the law, it will not or must not apply it – the so-called *exceptio illegalis* (exception of illegality).

5.3 Procedure

The provisions of the Slovenian Constitution of 1991 that regulate the constitutional complaint in detail are relatively modest (Arts. 160 and 161, Constitution). However, the Constitution itself (Art. 160.3, Constitution) envisages special statutory regulations (Arts. 50 to 60, *Constitutional Court Act*).

The Constitutional Court accepts a constitutional complaint for consideration if the violation of human rights or fundamental freedoms had serious consequences for the complainant or if a decision concerns an important constitutional question which exceeds the importance of the concrete case (Art. 55.b(2), *Constitutional Court Act*). Constitutional complaints against individual acts issued in small-claims disputes, in trespass to property disputes, and in minor offence cases, or against a decision on the costs of proceedings, are as a general rule not admissible (Art. 55.a(2), *Constitutional Court Act*).

Lodged constitutional complaints are first examined by the Constitutional Court judge determined by the work schedule (Art. 54(3), Art. 55(1), *Constitutional Court Act*). However, as in the case of abstract review, in a screening procedure the Court has no discretionary powers in limiting cases it accepts. The (non-)acceptance of cases depends on the preliminary (i.e. prima facie) review of grounds of a case.

A panel of three Constitutional Court judges determined by the work schedule decides on the rejection, non-acceptance, or acceptance of a constitutional complaint for consideration (Art. 54(1), Art. 55.c(1), *Constitutional Court Act*). If the panel is not unanimous, Constitutional Court judges who are not members of the panel also decide on such (Art. 55.c(2), Art. 55.c(3), *Constitutional Court Act*).

The Constitutional Court rejects a constitutional complaint: if it does not refer to an individual act by which the rights, obligations, or legal entitlements of the complainant were decided on; if the complainant does not have legal interest for a decision on the constitutional complaint; if the constitutional complaint is not admissible, if it was not lodged in time, or if all legal remedies have not been exhausted; if it was lodged by a person not entitled to do so; if the constitutional complaint is incomplete because it does not contain all the required information or documents and the complainant does not supplement it in accordance with a call to do so by the Constitutional Court, or if it is so incomplete that the Constitutional Court cannot examine it (Art. 55.b(1), *Constitutional Court Act*).

If the panel does not decide otherwise, the statement of reasons of the order on the rejection or non-acceptance of the constitutional complaint includes only the reason for the decision and the composition of the Constitutional Court (Art. 55.c(4), *Constitutional Court Act*).

If a constitutional complaint is accepted for consideration, the Constitutional Court decides in full composition (Art. 57, *Constitutional Court Act*). If the Constitutional Court has already decided on the same constitutional matter and granted the complaint, the decision by which it grants the constitutional complaint is issued by a panel (Art. 59(3), *Constitutional Court Act*).

Generally, the Constitutional Court considers cases within its jurisdiction at a closed session or a public hearing (Art. 35(1), ConstitutionalCourt Act) which is called by the President of the Constitutional Court on his own initiative or upon the proposal of three Constitutional Court judges (Art. 35(2), Constitutional Court Act). After the consideration has been concluded, the Constitutional Court decides at a closed session by a majority vote of all Constitutional Court judges. A Constitutional Court judge who does not agree with a decision or with the reasoning of a decision may submit a dissenting or concurring opinion (Art. 40(3), *Constitutional Court Act*).

The Constitutional Court decides cases of constitutional complaints alleging violations of all human rights and basic freedoms guaranteed by the Constitution (Art. 160(1)(6), Constitution). The protection thus embraces all constitutionally

guaranteed basic human rights and freedoms, including those adopted through the international agreements that have become part of the national law through ratification.

Any legal entity or individual may file a constitutional complaint (Art. 50 (1), *Constitutional Court Act*), as may the Ombudsman if it is directly connected with individual matters with which he deals (Art. 50(2), *Constitutional Court Act*), although subject to the agreement of those whose human rights and basic freedoms he is protecting in an individual case (Art. 52(2), *Constitutional Court Act*). The subject-matter of a constitutional complaint may be an individual act of a government body, a body of local self-government, or public authority allegedly violating human rights or basic freedoms (Art. 50(1), Constitutional Court Act).

The precondition for lodging a constitutional complaint is the prior exhaustion of all possible legal remedies (Art. 160(3), *Constitution;* Art. 51(1), *Constitutional Court Act*). As an exception to this condition the Constitutional Court may hear a constitutional complaint even before all legal remedies have been exhausted in cases if the alleged violation is obvious and if the carrying out of the individual act would have irreparable consequences for the complainant (Art. 51(2), *Constitutional Court Act*).

A constitutional complaint may be lodged within sixty days of the adoption of the individual act (Art. 52(1), *Constitutional Court Act*), though in individual cases with good grounds, the Constitutional Court may decide on a constitutional complaint after the expiry of this time limit (Art. 52(3), *Constitutional Court Act*). Among others, the complaint must cite the disputed individual act, the facts on which the complaint is based, and the alleged violation of human rights and basic freedoms (Art. 53(1), *Constitutional Court Act*). It must be made in writing and a copy of the respective act and appropriate documentation must be attached to the complaint (Art. 53(2) and Art. 53(3), *Constitutional Court Act*).

In a senate of three judges (Art. 162(3), Constitution; Art. 54(1), *Constitutional Court Act*) the Constitutional Court decides whether it will accept or reject the constitutional complaint for hearing (on its allowability) at a non-public session. The Constitutional Court may establish a number of senates depending on the need (Art.162(3), Constitution, Art. 10(2),

Rules of Procedure). The constitutional complaint may be communicated to the opposing party for response either prior to or after acceptance (Art. 56, *Constitutional Court Act*). The Constitutional Court normally deals with a constitutional complaint in a closed session, but it may also call a public hearing (Art. 57, *Constitutional Court Act*). The Constitutional Court may suspend the implementation of an individual act, or statute, and other regulation or general act on the grounds of which the disputed individual act was adopted (Art. 58, *Constitutional Court Act*).

The decision *in merito* of the Constitutional Court may:

- deny the complaint as being unfounded (Art. 59(1), *Constitutional Court Act*);
- partially or entirely annul or invalidate the disputed (individual) act or return the case to the body having jurisdiction, for a new decision (Art. 59(1), *Constitutional Court Act*);
- annul or invalidate (*ex officio*) unconstitutional regulations or general acts issued for the exercise of public authority if the Constitutional Court finds that the annulled individual act is based on such a regulation or general act (Art. 161(2), *Constitution;* Art. 59(2), *Constitutional Court Act*);
- if the Constitutional Court has already decided on the same constitutional matter and granted the complaint, a decision by which it grants the constitutional complaint, in whole or in part abrogates or annuls the individual act, and remands the case to the authority competent to decide thereon, is issued by the panel, which may in such instances also decide in accordance with Article 60 of this Act (Art. 59(3), *Constitutional Court Act*);
- in case it annuls or invalidates a disputed individual act, the Constitutional Court may also decide on the disputed rights or freedoms if this is necessary to remove the consequences that have already been caused by the annulled or invalidated individual act, or if so required by the nature of the constitutional right or freedom, and if it is possible to so decide on the basis of data in the documentation (Art. 60(1), *Constitutional Court Act*); such an order is executed

by the body having jurisdiction for the implementation of the respective act which was retroactively abrogated by the Constitutional Court, and replaced by the Court's decision on the same matter; if there is no such body having jurisdiction according to currently valid regulations, the Constitutional Court appoints one (Art. 60(2), *Constitutional Court Act*).

5.4 The Particularities of the Slovenian Regulation

Accordingly, the particularities of the Slovenian regulation are as follows:

Exceptions to the precondition that all legal remedies must have been previously exhausted (Art. 51(2), *Constitutional Court Act*) and exceptions to the time limit (Art. 52(3), *Constitutional Court Act*), for filing a constitutional complaint;

Due to the great burden on Constitutional Court, a tendency to the restriction of procedural preconditions (Arts. 55.a, 55.b, 55.c, *Constitutional Court Act*);

A wide definition of constitutional rights as the subject of protection by the constitutional complaint in comparison with other systems which specifically define the circle of the rights so protected 8Art. 50(1), *Constitutional Court Act*);

Even a judgment (of the ordinary Courts) as the potential subject of a dispute in a constitutional complaint (Art. 50(1), *Constitutional Court Act*);

Ex officio proceedings inasmuch as the Constitutional Court is not limited by the complaint in the event that it finds that an individual act annulled is based on an unconstitutional regulation or general act - in such a case, the regulation or general act may be annulled or invalidated (Art. 59(2), *Constitutional Court Act*);

The coexistence of the constitutional (Arts. 50 to 60, *Constitutional Court Act*) and popular complaint (*actio popularis*) (Art. 24, *Constitutional Court Act*), the latter restricted only by the standing requirements for the appellant;

No particular court fee is required in the proceedings: each party pays its own costs in the proceedings before the

Constitutional Court unless otherwise determined by the *Constitutional Court Act* (e.g. Art. 34.a, *Constitutional Court Act*)[31];

The possibility of an ultimate decision on constitutional rights (Art. 60(1), *Constitutional Court Act*).

6. Some Legal Measures – as an Experiment Towards the Tendency of Limitation in Favour of Lower Number of Arrived Cases – A Stronger Selection in Favour of "more important" Cases[32]

After adoption of the 1991 Constitution and the *Constitutional Court Act* of 1994, the number of cases before the Constitutional Court was on the increase year by year. Additionally, during this period the grounds of the constitutional review and basic standards of the human rights protection were established by the constitutional case-law. In the first part of the mentioned period individual petitions (popular complaints) prevailed, however, in the next part of the same period (after the regulation of the constitutional complaint by the Constitutitutional Court Act of 1994) the constitutional complaints absolutely prevailed. Consequently, procedures before the Constitutional Court were extended over the reasonable time which has been requested by Art. 23(1) of the

[31] Article 34a
(1) The Constitutional Court may punish a participant in proceedings or his authorised representative by a fine amounting from 100 to 2,000 Euros if they abuse the rights enjoyed in accordance with this Act.
(2) The Constitutional Court may punish the authorised representative of a participant in proceedings who is a lawyer by a fine referred to in the preceding paragraph if an application does not contain the essential components determined by law.

[32] Zakon o spremembah in dopolnitvah zakona o Ustavnem sodišču, Predlog zakona, No. 700-03 / 93 - 0002 / 0033, EPA: 1323 – IV, Poročevalec Državnega zbora, No. 35/2007 of 14.05.2007 - Poročilo MDT
This law was adopted and it was published in the Official Gazette RS, No. 51/07, consolidated text in the Official Gazette RS, No. 64/07. Consequently, the new Rules of Procedure were adopted too and were published in the Official Gazette RS, No. 86/07

Constitution[33]. The respect of the mentioned human right and the assurance of the quality of the constitutional review were present-

[33] The number of unresolved cases and delays indicates that most Slovenian courts are overloaded. The Human Rights Ombudsman has been permanently calling the attention to the State's duty to provide for the enforcement of the right to the trial in reasonable time in the judicial proceedings before ordinary courts as well as before specialized courts. The Human Rights Ombudsman has been also calling the attention to the duty of judges to respect all competences of their judicial function. Only in this way it is possible to provide for the efficient, impartial and fair judicial proceedings. It is worth mentioning that the two thirds of appeals filed to the European Court for Human Rights refer to the violation of the right to the trial in the reasonable time. Such situation should not be overlooked by the judicial branch of power (Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 200)..
For example, the Constitutional Court decided on the constitutionality of the Administrative Dispute Act (CC (Constitutional Court), nr.U-I-65/05, 22 September 2005, *Official Gazette* 2005, nr. 92). The Constitutional Court discussed the issue if the affected persons have an efficient judicial protection of their right to the trial in the reasonable time (based on Article 23 (1) of the Constitution) in the situation of already terminated proceedings where this right was presumably violated. The Constitutional Court decided that the Administrative Dispute Act is not in conformity with the Constitution.
Under the so far existing Constitutional Court's statement, taking into account the legislation in force, the affected person may file an appeal for compensation (based on Article 26 of the Constitution) whenever the proceedings was finally terminated if the person's right to the trial in the reasonable time was presumably violated. It means that such appeal should be judged by the ordinary court in the civil proceedings applying general rules of the compensation law established by the Code of Obligation. On these grounds, the competent court may award to the affected person only a compensation for the pecuniary and non-pecuniary damage, provided that the conditions for the liability for damages are fulfilled. Irrespective of the above position, the Constitutional Court decided that - taking into account the case law of the European Court for Human Rights – it is necessary (in the spirit of the European Convention for Protection of Human Rights and Fundamental Freedoms) to interpret Article 15 (4) of the Constitution of the Republic of Slovenia, that guarantees the judicial protection of human rights and the right to eliminate consequences of their violation, in the way that this provision provides for the request to ensure (Within the scope of the judicial protection of the right to the trial in the reasonable time) the possibility of enforcement of equitable compensation even when the violation over. Accordingly, the criteria established by the European Court for Human Rights shall be applied for evaluation if the reasonable duration of the trial was exceeded.
Because the Administrative Dispute Act, referring to Article 157 (2) of the Constitution and providing for the judicial protection of the right to the trial in the reasonable time, does not contain any special provisions, adapted to the nature of the discussed right that would also provide for the claiming of a just compensation if the violation of the discussed right is over, the Constitutional Court decided that the Act is not in conformity with Article 15 (4) of the Constitution (in connection with Article 23 (1) of the Constitution).

ed by the authors of the amendments of the *Constitutional Court Act* of 2007 (Official Gazette RS, No. 64/07) as the principal reasons for draft law.

Following some theoretical standpoints, the Constitution of 1991 introduced the legal interest as a condition for the filing of the individual petition (a popular complaint) (Art. 162(2), Constitution). Later, the *Constitutional Court Act* of 1994 (Official Gazette, No. 15/94) continued by some more detailed starting point, that a direct encroachment upon the rights and/or the legal position of the petitioner mustl be demonstrated (Art. 24. *Constitutional Court Act*). However, the amendments of the *Constitutional Court Act* of 2007 determined more rigorous and precisely the elements of the expected demonstration of the legal interest especially in cases when the constitutional review of a by-law was requested. The previous decisions taken by the Constitutional Court in such cases concerned mainly individual examples (e.g. by-law relating to the urbanism) when the prior protection of the rights and legal interests could be asserted in the (earlier) individual procedures before ordinary courts[34]. Only

The Constitutional Court decided only on the issue if the legislation in force provides for the efficient judicial protection of the right to the trial in the reasonable time if the violation is over. However, the Court calls the attention that - in reference to the case-law of the European Court for Human Rights - the reasonable question is also raised about the efficiency of the judicial protection of the discussed right if the proceeding is still in course. As the Constitutional Court stated, in the process of adoption of future legal regulation that will eliminate the unconstitutional provisions declared by the Court's decision, there is also necessary to provide for the appropriate protection of the discussed right if the proceedings is still in course. Additionally, it is necessary to harmonize these issues with the standards adopted by the European Court for Human Rights. Moreover, the basic concern of the State and/or of the all three branches of power is to provide for the efficient enforcement of the judiciary function.

[34] Accordingly, in the sixtieth of the last century the same statements were affirmed: the protection of the constitutionality and legality should not be conferred only on the constitutional judiciary? Before 1991 in its practice, the Constitutional Court rejected especially individual suits and directed the applicants to proceedings before ordinary courts. The jurisdiction of the Constitutional Court relating to the protection of fundamental rights upon the individual applications as well as relating to the review of constitutionality and legality of by-laws (especially in the field of urbanism) was repeatedly presented as a redundant burdening of the Constitutional Court even in the past (see Deset let dela Ustavnega sodišča Slovenije, Dopisna delavska univerza Ljubljana 1974, p. 55).

if such protection could not be asserted, the procedure before the Constitutional Court might be relevant[35].

The amended *Constitutional Court Act* of 2007 (Official Gazette RS, No. 64/07) brought the changes[36] concern the constitutional complaint procedure:

A constitutional complaint is as a general rule not admissible in instances of small-claims disputes, in trespass to property disputes, minor offence cases, and in instances in which only a decision on the costs of proceedings is challenged (Art. 55.a(2), *constitutional Court Act*).

The Constitutional Court accepts a constitutional complaint for consideration only:

1) if there is a violation of human rights or fundamental freedoms which had serious consequences for the complainant; or 2) if it concerns an important constitutional question which exceeds the importance of the concrete case – thus, if, from the viewpoint of human rights, such concerns a precedential decision (Art. 55.b (2), *Constitutional Court Act*).

A panel of three Constitutional Court judges unanimously decides whether the statutory conditions for the consideration of a constitutional complaint are fulfilled. Furthermore, it decides on the acceptance of the constitutional complaint for consideration. Orders by which a constitutional complaint is rejected or is not accepted for consideration will as a general rule not include a statement of reasons (Art. 55.c, *Constitutional Court Act*).

In procedures for the review of the constitutionality or legality of regulations, the Act is amended in the part which refers to instances in which a regulation that has a direct effect (i.e. an additional procedure is not necessary for its implementation) is challenged by a petition – it may be challenged within one year after such regulation enters into force or within one year after the day the petitioner learns of the occurrence of harmful consequences. This amendment applies only to petitions which will be lodged after the implementation of the amendments of the Act (Art. 24(3), *Constitutional Court Act*).

If statutory provisions are challenged by the Supreme Court, a

[35] By such means, the constitutional review procedure has been acquiring a nature of a "real" subsidiary protection by the constitutional judiciary?

[36] www.us-rs.si

court which should apply such statutory provisions in individual proceedings may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such law or part thereof by a separate request. In order to enable quick access to data regarding which statutory provisions are challenged by the request of the Supreme Court, a list of such cases will be published on the Constitutional Court Web site. On the Constitutional Court Web site, court judges may enable an automatic alert regarding changes to the aforementioned list (Art. 23, *Constitutional Court Act*).

Henceforth, the Act determines the obligatory components of a request, petition (Art. 24.b, *Constitutional Court Act*), and constitutional complaint (Art. 53, *Constitutional Court Act*). These are published on the Constitutional Court Web site[37] and are included in the forms for lodging a petition or constitutional complaint. This amendment may be of particular interest for attorneys, as the Constitutional Court may punish an attorney by a fine if an application does not contain the essential components determined by law (Art. 34. a, *Constitutional Court Act*).

7. Some Comments

As already mentioned, the last change of the *Constitutional Court Act* in 2007 rigorously limited the access of individuals to the Constitutional Court[38]. The adopted changes introduced more strict criteria as though such additional limitations are a stringent necessity especially from the point of view of the right to a trial without undue delay (e.g. Art. 23(1), Constitution). Accordingly, the previous broad individual access to the Constitutional Court was deemed as a not very necessary; in any case, the human rights and fundamental freedoms protection has been provided by several (ordinar) court(s) during the earlier stages of procedure. Therefore, as the speakers in favour of the *Constitutional Court Act*

[37] www.us-rs.si

[38] Almost at the same time such measures were introduced in Spain; see GONZÁLEZ BEILFUSS, Markus. The access to the Spanish constitutional court: the administration of a limited good. Strasbourg: European commission for democracy through law (Venice Commission), Riga, Latvia, 2009. CDL-JU(2009)038.

changes of 2007 affirm, the limited access would be not to much disadvantageous. However, there are some other Slovenian theorists who affirm that the absence of observation of all welcome effects of the ("full") access to the Constitutional Court on the other hand obviously illustrates the interpretation that the state bodies alone are of the greatest significance. Additionally, the serviceability of the state bodies (which are actually paid to be in service of people) has been repeatedly ignored. Furthermore, it is namely lost in obscurity, that the state bodes are "only tools". The state governed by the rule of law shall trengthen also the harmony and greater exactness of legal rules which shall be in service of people, united in the society. Therefore such proposals and warnings[39] must not be overlooked that we shall move the focus of scare of the legal theory to the individual. Just a broad individual access to the constitutional review contributes to the protection of human rights and fundamental freedoms, accelerates the democratisation of any legal order and promotes the state governed by the rule of law at the same time. Furthermore, it is a matter of a democratic supervision over the commanding state bodies and the exclusion of contradictions from the legal order and by this means its gradual improvement (bringing in the accordance with the constitution) as well.

Accordingly, a broader individual access to the Constitutional Court stimulates the democratisation of the legal order which citizens have an opportunity to initiate a direct and immediate control over the legislative, executive and judicial state power. In some cases such controle would certainly contradict the major will, however just such kind of tension is surely a basic element of the constitutional democracy. Furthermore, anyone's right to initiate the supervision is undoubtedly one of the basic elements of authority. Therefore, it would be necessary to focus on the estimation how the limitation of the individual access to the Constitutional Court could reduce the democratic character of the legal order. The principle of the rule of law shall be not pro-

[39] Kristan, Andrej, Tri razsežnosti pravne države, Slabitev pravne države z omejevanjem dostopa do ustavnega sodišča, Revus (2009) 9, p. 65–89. See also Kristan, Andrej, Sodišču čast in vpliv, Pomembnost ustavnopravnega vprašanja in legitimnost odločanja v preizkusnih senatih po ZUstS in ZUstS-A, revus(2010) 12, p. 7-12

moted by the understanding of the individual access in a such way that could be easily sacrificed (or replaced)[40].

C) The Implementation of Strasbourg Standards

The concept of "constitutional complaint" is usually connected with the national constitutional protection of fundamental rights. However, certain international documents also envisage specific legal remedy of protection of fundamental rights and freedoms in the form of a complaint[41].

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 gives individuals the right to the so-called individual complaint[42] . An individual may lodge a complaint with the European Commission for Human Rights because of the alleged violation of rights guaranteed by the Convention. It is an explicit international legal remedy comparable to the national constitutional complaint. It fulfills its function

[40] Kristan, Andrej, Tri razsežnosti pravne države, Slabitev pravne države z omejevanjem dostopa do ustavnega sodišča, revus (2009) 9, p. 65–89. See also Mavčič, Arne, T*he constitutional review.* The Netherlands: BookWorld Publications, cop. 2001. p. 74-75. Mavčič, Arne. The Slovenian constitutional review. Preddvor: [samozal.] A. Mavčič, cop. 2009. 125 str. [COBISS.SI-ID 368383]; www.concourts.net

[41] e.g. Article 2 of the *Facultative Protocol of the General Assembly of the UN to the International Pact on Citizenship and Political Rights* of 19 December 1966 (Resolution No. 2000 A (XXI)) since that the Council for human rights must accept and debate reports from individual persons who claim that they are the victims of the violation of any right defined in this Pact. The right to individual complaint is contained in the following: Article 23 of the *Declaration on Fundamental Rights and Freedoms of the European Parliament* of 12 April 1989; section 18(2) of the *Document of the Moscow Meeting* of CSCE of 3 October 1991; Article 25 of the *American Convention on Human Rights* of 22 November 1969; Article 28 of the *Contract on the European Community* of 1 February 1992; Statute of 1979 of the *Comision y la Corte Interamericanas de los Derechos Humanos*; Statute of 1980 of the *Inter-American Court on Human Rights; American Convention on Human Rights* of July 18, 1978 (Article 44); Articles 55 through 59 of the *African (Banjul) Charter on Human and People's Rights* of June 27, 1981; indirectly by Para. 2 of Article 3 of the *Arab Charter on Human Rights* of 22 May 2004

[42] Article 34 of the *Convention*.

of the individual complaint where national law does not guarantee any appropriate protection of rights.

Individual complaint is a subsidiary legal remedy (preconditioned on the exhaustion of the national legal remedies), it is not a popular complaint (*actio popularis*) and it does not have retroactive or cassatory effect. It differs from the constitutional complaint in the way that, contrary to the latter, it leads merely to a finding (declaratory relief).

The position of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in national law specifies whether an individual may refer to the Convention or even base a national constitutional complaint thereon. It further narrows the maneuvering space of the Constitutional Court itself in the interpretation of the provisions of the *Convention*. It has actually become a connection of the national Constitutional Court to the European bodies in cases in which a judicial decision as a final national outcome of decision-making becomes the subject of an individual complaint to a European forum[43].

The institution of constitutional complaint and European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national

[43] *The European Convention for the Protection of Human Rights and Fundamental Freedoms:*
- is of constitutional impact in Austria;
- is the basis for an internal national constitutional complaint in Switzerland where it has a status comparable with the constitutional level;

In both cases it is permissible to found the national constitutional complaint on the provisions in the Convention.
- it is higher than ordinary law (Belgium, France, Luxembourg, Malta, The Netherlands, Portugal, Spain, Cyprus);
- it is ranked as Common Law: Germany, Denmark, which introduced the national use of the *Convention by special Statute* on 1 July 1992, Finland, Italy, Liectenstein, San Marino, Turkey;
- it does not have a direct internal state effect: Great Britain, Ireland, Sweden, Norway, Iceland.

Some countries of Anglophone Africa are an exception regarding the latter group of systems (Kenya, Tanzania, Uganda, Nigeria) which expressly adopted the system of protection of rights from the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (*e.g.* Nigeria in the Constitution of 1960) influenced by the extension clause to the European Convention in terms of Article 63, which Great Britain signed on 23 October 1953, whereby only the *Convention* itself and *Protocol 1* apply in these regions.

and supra-national (final) instance. The national (final) instance: the Constitutional Court as the highest body of judicial authority in a particular state for the protection of constitutionality and legality and human rights and fundamental freedoms 38 would be limited to investigation of constitutional-legal questions only. Review of the correct finding of the actual circumstances and the use of simple rules of evidence is a matter for the regular Courts. The subsidiary nature of a constitutional complaint also lies in the division of responsibility between the Constitutional and the regular Courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Commission or European Court. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, which means that the national constitutional complaint supplements national judicial protection while supra-national European complaint supplements national constitutional complaint.

The Statute of the Council of Europe came into force for Slovenia on 14 May 1993. The Convention was ratified on 31 May 1994. The Ratification of the Convention Act (in respect of ratification also of Article 25, Article 46, Protocol No. 1, and Protocols Nos. 4, 6, 7, 9, and 11) was published on 13 June 1994 (Official Gazette RS, No 33/94) and came into force on the fifteenth day following publication. On 28 June 1994 Slovenia formally ratified the Convention in Strasbourg by depositing the appropriate instruments with the Secretary General of the Council of Europe. When ratifying the Convention Slovenia made no reservations because new legislation had been prepared following international standards and the Convention. It is also interesting to note that Slovenia was the first member state to ratify Protocol No. 11. Slovenia recognized the competence of the European Commission and the jurisdiction of European Court of Human Rights under former Articles 25 and 46 of the Convention for an indeterminate period. In addition, the Slovenian declarations included a restriction *ratione temporis*, to the effect that the competence of the Commission and the jurisdiction of Court are recognized only for facts arising after the entry into force of the Convention and its Protocols with respect to Slovenia on 28 June 1994.

However, some decisions of the Slovenian Constitutional

Court referred to the Convention even before it became formally binding for Slovenia. In this connection, the Court observed that Slovenia had not yet signed and ratified the Convention, but considering its desire to join the Council of Europe it would necessarily have to do so, for which reason it was appropriate that Slovenian legislation be adjusted to meet the criteria of the Convention as soon as possible.

There is no doubt that Slovenia has been inspired by the same ideals and traditions of freedom and rule of law principles as the framers of the Convention. While Slovenia is today reintroducing and developing the legal culture of human rights after almost half a century of arrears, it cannot be said that it has no tradition concerning the protection of human rights and fundamental freedoms.

The Slovenian Constitutional Court and the whole system of ordinary courts must ensure the conformity of domestic legal provisions with the provisions of the Convention. In addition, the provisions of the Convention complement national constitutional provisions. Beyond that, the case-law of the European Court of Human Rights is also directly applicable in the decision making process of the Constitutional and other courts in Slovenia. Thus the jurisdiction of the European Court of Human Rights and Slovenian national courts overlap in several ways.

Additionally, consideration of Strasbourg case-law is explicitly determined by the Slovenian national law: The decisions of the European Court of Human Rights are to be directly executed by the competent courts of the Republic of Slovenia (Article 113 of the Constitutional Court Act).

It was characteristic of Slovenian practice prior to 1991 concerning human rights protection (especially before the Constitutional Court) that, in comparison with Europe, it largely avoided the use of legal principles, even those explicitly included in the text of the Constitution. In common with foreign practice, however, the principle of equality greatly predominated among otherwise rarely used principles. Decisions consistently remained within the framework of legalistic (formalistic) argument and no other value references were ever allowed: the Constitutional Court respected the principle of self-restraint and stuck to the presumption of the constitutionality of statutes. There were no references to the foreign law and case-law.

The new Constitution of the Republic of Slovenia of 1991, along with the catalogue of classical fundamental rights in combination with the newly defined powers of the Constitutional Court, paved the way for the intensification of its role in this domain. It is considered that the Constitutional Court now has sufficient space for such activity. The Slovenian Constitution contains adequate definitions of rights having the nature of legal principles and thus being sufficiently open to interpretation that they require significant further construction and implementation, also taking into account the provisions of the Convention and the practice of the European Court of Human Rights.

Slovenia has reached the standard of contemporary European legal culture in which it has become normal that domestic courts are influenced by the case-law of the European Court of Human Rights, thus raising the level of human rights protection. However, a legal rule and its implementation in everyday practice are two different things. Real, half-real, and often only apparent general interests of society may be extraordinarily strong, especially if they incite national socialist, ideological, or political emotions. At such a time people may forget principles which they had followed until recently, but they still demand and efficient functioning of ordinary courts. Judicial and political independence are almost the sole guarantees against the transformation of law into a tool of some or other ideological and political movement based on impatience.

Despite the internal contradictory properties of the individual access (especially in form of the constitutional complaint), the possibility shall remain open of access by the individual to justice or to judicial protection of his/her constitutional rights on the national level, in the role of subsidiary legal remedy as an “interface” between the national and the international (European) level of the human rights protection. In the Case of Lukenda v. Slovenia, 23032/02, of 06/10/2005[44] the European Court for human rights reiterated, firstly, that by virtue of Article 1 (which provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention”) the primary responsibility for implementing

[44] http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=67644828&skin=hudoc-en&action=request

and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the European Court for human rights is thus subsidiary to national systems safeguarding human rights. This subsidiary character is reflected in Article 13 and para. 2 of Article 35 of the Convention[45]".

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[45] "The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). Under Article 35, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001, and *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27). Additionally, the Court has previously held that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34)".

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Индивидуальная жалоба как внутригосударственное средство, которое должно быть исчерпано или эффективно в рамках ЕСПЧ. Сравнительный и словенский аспекты

Резюме

Индивидуальный доступ к конституционному правосудию в некоторых системах стал настолько распространенным, что функциональные возможности конституционного суда могут быть поставлены под угрозу. С ростом числа конституционных жалоб эффективность может снизиться. Следовательно, национальный законодательный орган должен пытаться найти способ устранения конституционным судом менее важных или безнадежных дел. Тем не менее, люди должны иметь много возможностей защиты своих конституционных прав посредством индивидуальной (конституционной) жалобы, которую можно рассматривать в качестве эффективного “интерфейса” между национальной системой защиты прав человека и защитой прав человека ЕСПЧ. Кроме того, более широкий индивидуальный доступ к конституционному правосудию стимулирует демократизацию правопорядка, в котором люди имеют возможность инициировать прямой и непосредственный контроль за законодательной, исполнительной и судебной властями.

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Полномочия Конституционного Совета Республики Казахстан и конституционно допустимые пределы их расширения

Уважаемые дамы и господа!

Позвольте поблагодарить за приглашение организаторов настоящей конференции от имени Председателя Конституционного Совета Республики Казахстан и от себя лично. Конституционный Совет Казахстана очень ценит сотрудничество с Конституционным Судом Латвии, а также тесную работу с Венецианской комиссией во имя динамичного развития и усиления конституционного контроля в нашей стране.

Казахстан является единственным постсоветским государством, где конституционный контроль осуществляется специально созданным независимым государственным органом, не входящим в традиционную систему судебной власти республики, что было закреплено Конституцией Республики Казахстан от 30 августа 1995 года[1].

Конституционный Совет Республики Казахстан действует с февраля 1996 года, является государственным органом, единственная задача которого – обеспечение верховенства Конституции на всей территории Республики.

Предметные полномочия Конституционного Совета Республики Казахстан определяются Основным законом страны и Конституционным законом «О Конституционном

[1] Конституция Республики Казахстан от 30 августа 1995 года, с изменениями и дополнениями от 25 января 2012 года, Астана, 2012.

Совете Республики Казахстан»[2]. В соответствии со статьей 72 Конституции Казахстана и статьей 17 Конституционного закона «О Конституционном Совете Республики Казахстан» Конституционный Совет:

- решает в случае спора вопрос о правильности проведения выборов Президента республики; выборов депутатов Парламента; республиканского референдума;
- рассматривает на соответствие Конституции до подписания Президентом принятые Парламентом законы; принятые Парламентом и его Палатами (Мажилиса и Сената) постановления; международные договоры Республики до их ратификации;
- дает официальное толкование норм Конституции;
- до принятия Парламентом соответственно решения о досрочном освобождении от должности Президента Республики, окончательного решения об отрешении от должности Президента Республики дает заключение о соблюдении установленных конституционных процедур.

Конституционное производство по приведенным вопросам может быть возбуждено только по обращениям Президента Республики Казахстан, Председателей Палат Парламента, не менее одной пятой части от общего числа депутатов Парламента, Премьер-министра.

Конституционный Совет рассматривает обращения судов в случаях, установленных статьей 78 Конституции Республики Казахстан.

Рассматривая до подписания Президентом принятые Парламентом законы и до ратификации международные договоры Республики на соответствие их Конституции, Конституционный Совет осуществляет предварительный контроль, а последующий контроль – при проверке конституционности законов и иных нормативных правовых актов по обращениям судов Республики.

Кроме того, по результатам обобщения практики конституционного производства Конституционный Совет ежегодно направляет Парламенту страны послание о состоянии кон-

[2] Конституционный закон Республики Казахстан от 29 декабря 1995 года №2737 «О Конституционном Совете Республики Казахстан» с изменениями и дополнениями от 17 июня 2008 года.

стиционной законности в Республике (подпункт 6) статьи 53 Конституции).

Вместе с тем, на наш взгляд, у Конституционного Совета имеется большой потенциал для дальнейшего законодательного расширения пределов осуществления конституционного контроля, которые следуют непосредственно из самой Конституции Республики.

Так, в статье 78 нашей Конституции установлено, что суды не вправе применять законы и иные нормативные правовые акты, ущемляющие закрепленные Конституцией права и свободы человека и гражданина. Если суд усмотрит, что закон или иной нормативный правовой акт, подлежащий применению, ущемляет закрепленные Конституцией права и свободы человека и гражданина, он обязан приостановить производство по делу и обратиться в Конституционный Совет с представлением о признании этого акта неконституционным.

В соответствии с данной конституционной нормой в Конституционный Совет обращаются суды Республики всех инстанций: районные и приравненные к ним суды, областные и приравненные к ним суды, рассматривающие дела и споры, как в качестве суда апелляционной и кассационной инстанций, а также Верховный Суд в качестве суда надзорной инстанции. В отличие от Конституционного Совета Франции, который может быть запрошен по этому вопросу лишь Государственным советом или Кассационным судом в соответствии со статьей 61-1 Конституции Французской Республики, если обратимся к практике европейских стран[3].

Таким образом, Государственный совет и Кассационный суд во Франции являются некими фильтрами, в которые первоначально поступают конституционные жалобы из судов. Эти фильтры означают, что нельзя непосредственно адресовать в Конституционный Совет, а также то, что эти два органа не обязаны в каждом случае направлять жалобу в этот Совет. Она должна быть ими рассмотрена. «Сам Конституционный Совет Франции в решении №2009-595 от 3 декабря 2009

[3] Конституция Французской Республики от 4 октября 1958 года с изменениями от 23 июля 2008 года.

года указал, что установление такого фильтра следует из статей 12, 15 и 16 Декларации прав и свобод человека и гражданина 1789 года, устанавливающих конституционной целью «надлежащее осуществление судебной власти»[4].

Указанная французская процедура рассмотрения конституционной жалобы также отличается от конституционного контроля в Германии. Так, если в Германии сам судья, рассматривающий дело по существу, играет основную роль в направлении дела в Конституционный Суд, то во Франции эта роль принадлежит сторонам в процессе и высшим судебным органам, а именно Государственному совету и Кассационному суду. «Немецкий судья суверенно и независимо от мнения сторон может произвести или не произвести такой запрос, тогда как во Франции судья, рассматривающий дело по существу, не может в силу своих должностных полномочий поступить таким же образом. Он связан инициативой сторон в процессе. Данное обстоятельство является также важной особенностью французской системы конституционного контроля, например, в отличие от процедур в конституционных судах Австрии или Бельгии. В этих странах запрос о контроле может быть поставлен любым лицом, чьи интересы затрагиваются при применении закона. Во Франции же такой контроль может быть осуществлен только по запросам стороны в процессе»[5].

И во Франции, и в Германии запрос должен быть письменным и мотивированным, но в Германии он направляется в Конституционный Суд[6], тогда как во Франции - лишь высшим судебным органам, принимающим решение о направлении дела в Конституционный Совет. Причем в Германии при рассмотрении дела Конституционный Суд не связан мотивами запроса, которые указал судья, рассматривающий дело по существу.

[4] *Массо Ж.* «Статьи 61 и 62 Конституции Французской Республики: приоритетный вопрос о конституционности»// Реферативный журнал «Государство и право». - Москва, 2013, №2.

[5] *Грев К.* «Контроль за конституционностью закона в Германии: некоторые сравнения с Французской системой»// Реферативный журнал «Государство и право». - Москва, 2013, №2.

[6] Основной Закон Федеративной Республики Германии от 23 мая 1949 года с изменениями от 28 августа 2006 года.

Такая конституционная жалоба может быть направлена на акты государственной власти, в частности на законы или в большинстве случаев на судебные решения, ставшие окончательными.

Закон может быть опротестован, если он посягает непосредственно на основные права или на право заявителя. Конституционная жалоба на судебное решение должна быть подана в месячный срок, а на закон – в течение года. Жалоба должна содержать указание на конкретные нарушения затрагиваемых личных и непосредственных прав заявителя. Если Конституционный Суд Германии принимает обоснованно мотивированную жалобу, то он обладает правом аннулировать закон или судебное решение, и в последнем случае направить дело на новое судебное рассмотрение в судебный орган обычной юстиции.

У нас же согласно пункту 3 статьи 22 Конституционного закона «О Конституционном Совете Республики Казахстан» обращение любого суда в Конституционный Совет подписывается председателем соответствующего суда. В случаях, когда обращение суда подписывается не председателем, а судьей, в производстве которого находится судебное дело, вышеуказанное положение закона является основанием для отказа в принятии к производству Конституционного Совета такого обращения.

В этой связи Конституционный Совет в ряде своих ежегодных посланий указал, что положение пункта 3 статьи 22 Конституционного закона «О Конституционном Совете Республики Казахстан» препятствует судьям непосредственно обращаться с представлением о признании закона или иного нормативного правового акта неконституционными[7]. Полагаем, что исключение из конституционного закона данного положения снимет эти вопросы и тем самым у судей появится возможность самостоятельно обращаться в Конституционный Совет.

Также хотелось бы акцентировать внимание на положение пункта 1 статьи 83 Конституции Республики Казахстан,

[7] Послания Конституционного Совета Республики Казахстан от 24 марта 2001 года и от 23 июня 2008 года №09-6/1 «О состоянии конституционной законности в Республике Казахстан».

где предусмотрено, что прокуратура опротестовывает законы и другие правовые акты, противоречащие Конституции. Вместе с тем изложенное конституционное положение до сих пор не нашло своего законодательного развития. На практике прокуратура не может воспользоваться этим правом, поскольку законодательство не предусматривает правового механизма реализации данного полномочия.

Хочу отметить, что озвученные предложения по уточнению и расширению полномочий судов общей юрисдикции позволят Конституционному Совету более эффективно осуществлять защиту конституционных прав и свобод человека и гражданина, обеспечивать верховенство и прямое действие Конституции на всей территории Республики Казахстан.

Конечно, послушав выступления своих коллег из других стран по вопросам границ и расширения компетенции органов конституционного контроля следует особо подчеркнуть, что каждое государство выбрало свой путь правового и конституционного развития в зависимости от устоявшихся традиций, мировоззрения и от уровня правосознания своих граждан, от их менталитета и т.д., в этом наше различие, но объединяет всех нас одно – это стремление к наилучшей защите прав и свобод наших граждан, к утверждению правового государства.

Спасибо за внимание.

A. Gzailganova

Member of the Constitutional Council of the Republic of Kazakhstan

Authorities of the Constitutional Court of the Republic of Kazakhstan and constitutionally admissible limits of their extension

Summary

The article discusses the role functions and examination of the applications of the Constitutional Court of the Republic of

Kazakhstan. According to Article 22, Part 3 of the Constitutional Law on Constitutional Council of the Republic of Kazakhstan applications of the courts to the Constitutional Court are signed by the chair of the relevant court. In case when the application is signed by a judge, the above - mentioned Article authorizes to decline the examination of the case. The Constitutional Council in a number of messages mentioned that provision of Article 22, Part 3 of the Constitutional Law on Constitutional Council of the Republic of Kazakhstan hinders the judges to apply directly to the Constitutional Court. Provisions Article 83, Point 1 of the Constitution of the Republic of Kazakhstan prescribes that the prosecutor's office is authorized to challenge the laws and other legal acts which are contradicting the Constitution. Although this constitutional provision has not been legislatively elaborated. In practice, the prosecutor's office is not authorized to enjoy this right, as the legislation does not provide legal mechanism for the implementation of this power.

T. Birmontienė

Justice of the Constitutional Court of the Republic of Lithuania

The Constitutional Concept of Impeachment: the Role of the Constitutional Court

I. Introduction

The constitutional institute of impeachment—as an instrument of constitutional liability—is important in deciding of the constitutional liability issues of highest state officials. The constitutional beginnings of this institute (provided we don't mention some ancient democratic institutes, as, for instance, ostracising) are the provisions of the US Constitution of 1787, according to which, the President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours. The House of Representatives, when voting for articles of accusation, presses charges, whereas all impeachments are tried by the Senate. The role of the judiciary is minimal in impeachment. However, during the impeachment trial of the US President, the Chief Justice presides over the sitting of the Senate. Thus, historically, the impeachment institute came into being as a political instrument—a political institution, the parliament, considers the issues of constitutional liability of highest state officials.

The constitutions of democratic states treat impeachment as a special procedure, where the issue of the constitutional liability of the official is being decided. The impeachment institute has undergone changes and, at present, when the impeachment proceedings are being consolidated in constitutions, the role of courts, including constitutional ones, is increasing. In some states, as for instance, in France, even in the presence of an insti-

tution of constitutional review, in the impeachment proceedings, along with the parliament, the High Court,[1] or the Court of Justice of the Republic,[2] formed specifically for deciding this issue, take part. Still, in most countries, whose constitutions consolidate powers of the Constitutional Court, in the impeachment procedure, along with the parliament, the institution of constitutional review takes part as well (e.g., Lithuania, Germany, Austria, Italy, the Czech Republic, South Korea, etc.) The role of constitutional courts in the impeachment proceedings is different whereas in some states it is the Constitutional Court that pronounces the final word (Germany, Austria, South Korea), though in Lithuania (and also in Italy) – after a corresponding conclusion of the Constitutional Court the final decision is taken by the parliament. In some countries not constitutional court but another higher court, as in the case of Romania, the High Court of Cassation and Justice, take part in the procedure of impeachment and the decision of this court is final. In Romania the constitutional court participates in a special procedure of the suspension of the President of Romania from office and serves as an advisory body, whereas the final question of the suspension of the President of Romania is decided by referendum.

Thus, in the constitutions of most states certain elements of the impeachment institute are established, however, the chosen impeachment models are different. The specific character of these models is determined by the role of courts in impeachment, and, in particular, by the role of constitutional courts.

[1] Article 68 of the Constitution of the French Republic *inter alia* provides that the President of the Republic shall not be removed from office during the term thereof on any grounds other than a breach of his duties patently incompatible with his continuing in office. Such removal from office shall be proclaimed by Parliament sitting as the High Court.

[2] Article 68-1 of the Constitution of the French Republic provides that members of the Government shall be criminally liable for acts performed in the holding of their office and classified as serious crimes or other major offences at the time they were committed; they shall be tried by the Court of Justice of the Republic. In Article 68-2 it is *inter alia* held the Court of Justice of the Republic shall consist of fifteen members: twelve Members of Parliament, elected in equal number from among their ranks by the National Assembly and the Senate after each general or partial renewal by election of these Houses, and three judges of the *Cour de cassation*, one of whom shall preside over the Court of Justice of the Republic.

The purpose of this report is to disclose the essence of impeachment as a constitutional institute, as consolidated in the Republic of Lithuania's Constitution of 1992, and the role assigned to the Constitutional Court of the Republic of Lithuania[3] (hereinafter—also the Constitutional Court) in the impeachment proceedings, as well as the changes in that role.

2. The concept of impeachment as a constitutional institute

The Constitutional Court began formulating the elements of the institute of impeachment as far back as in its ruling of 11 May 1999, in which this constitutional institute was construed as independent and related to the provisions of Item 5 of Article 63, Paragraph 2 of Article 86, Item 5 of Article 88, Paragraph 1 of Article 89, Article 105, Item 5 of Article 108 and Article 116 of the Constitution, which are to be assessed as constituting the constitutional basis for the institute of impeachment. The provisions of the Constitution consolidating the institute of impeachment may not be dissociated from the striving for an open, just and harmonious civil society and a state under the rule of law, which is enshrined in the Preamble to the Constitution, also from the provision of Article 1 of the Constitution that the State of Lithuania is a democratic republic, from the provision of Article 4 of the Constitution that the Nation executes its supreme sovereign

[3] Speaking of the impeachment proceedings that have taken place in Lithuania, one should note that, on 15 June 1999, the Seimas did not approve the revocation of the mandate of the Member of the Seimas Audrius Butkevičius and it continued to be a Member of the Seimas, even though he had been convicted for the commission of a crime (attempted serious fraud). On 31 March 2004, the Constitutional Court adopted the corresponding conclusion stating that the actions of President Rolandas Paksas of the Republic of Lithuania had been in conflict with the Constitution and that he had grossly violated the Constitution, whilst, on 6 April 2004, the Seimas removed Rolandas Paksas from office. On 27 October 2010, the Constitutional Court adopted the conclusion stating that the Members of the Seimas A. Sacharukas and L. Karalius had grossly violated the Constitution and had breached the oath, however, the Seimas revoked only the mandate of the Member of the Seimas L. Karalius, whilst A.Sacharukas continued as a Member of the Seimas.

power either directly or through its democratically elected representatives, as well as from the provisions of Article 5 of the Constitution that the scope of power is limited by the Constitution and state institutions serve the people. The constitutional principle of a state under the rule of law requires that all state institutions and officials act only on the basis of the Constitution and law and in compliance with the Constitution and law.

Various aspects of the constitutional concept of impeachment have been disclosed in the jurisprudence of the Constitutional Court, inter alia the Constitutional Court's ruling of 11 May 1999, the conclusions of 31 March 2004 and of 27 October 2010, the rulings of 15 April 2004, 25 May 2004 and 5 September 2012.

The Constitutional Court has construed the legal concept of impeachment while first of all interpreting the provisions of Article 74 of the Constitution.

Article 74 of the Constitution prescribes: "The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, as well as the Members of the Seimas, who have grossly violated the Constitution or breached their oath, or if it transpires that a crime has been committed, may, by a 3/5 majority vote of all the Members of the Seimas, be removed from office, or the mandate of a Member of the Seimas may be revoked. This shall be performed according to the procedure for impeachment proceedings, which shall be established by the Statute of the Seimas."

Thus, Article 74 of the Constitution consolidates the following elements of impeachment: 1) impeachment as a parliamentary procedure is applied only to the President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, and Members of the Seimas; 2) impeachment proceedings may be instituted only for a gross violation of the Constitution or a breach of the oath, or if it transpires that a crime has been committed; 3) the objective of impeachment proceedings is to decide the question of the constitutional liability of the aforesaid persons; 4) impeachment is conducted by the Seimas; 5) to remove a person from office or to revoke his mandate of a Member of the Seimas, a 3/5 majority vote of all the Members of the Seimas is necessary.

In its ruling of 11 May 1999, the Constitutional Court formulated for the first time the constitutional concept of impeachment and noted that impeachment is one of the measures of self-protection of the civil society. Providing for a special procedure for dismissal of the top officials from office or that for revocation of their mandate, one ensures the public and democratic control over the activities of those officials and at the same time grants them the additional guarantees so that they can fulfil their duties on the basis of law. Later the aforesaid provisions were developed in other Constitutional Court's rulings, inter alia of those 30 March 2000, 24 May 2004 and 5 September 2012, and the conclusions of 31 March 2004, 27 October 2010.

In its ruling of 5 September 2012, the Constitutional Court summed up the doctrine of the concept of impeachment and noted the following:

- the Constitution consolidates such an organisation of institutions executing state power and such a procedure for their formation where all the institutions executing state power—the Seimas, the President of the Republic, the Government, the Judiciary, as well as other state institutions—are formed only from the citizens who without reservations obey the Constitution adopted by the Nation and who, while in office, unconditionally follow the Constitution, law and the interests of the Nation and the State of Lithuania;
- state officials must enjoy the trust of citizens—the state community, however, in order that citizens—the state community—could reasonably trust state officials, also that it would be possible to ascertain that all the state institutions and all the state officials follow the Constitution as well as law and obey them, while those who do not obey the Constitution and law would not hold the office for which the trust of citizens—the state community—is required, the public democratic control over the activity of state officials and their accountability to society, which comprises inter alia a possibility of removing from office those state officials who violate the Constitution and law, who bring

their personal interests or the interests of a group above the interests of society, or who discredit state authority by their actions, is needed;

– one of the forms of the public democratic control over the activity of state officials is the constitutional institute of impeachment. The application of an institute of impeachment—a special parliamentary procedure and the constitutional sanction of removal from office, which are entrenched in the Constitution, in respect of the President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court and the President and judges of the Court of Appeal, is one of the measures of self-protection of the state community, the civil Nation, a way of its own defence from the aforesaid top officials of state power who ignore the Constitution and law, in a manner when they are prohibited from holding certain office, as they do not fulfil their obligation unconditionally to follow the Constitution and law, follow the interests of the Nation and the State of Lithuania, and who have disgraced state authority by their actions.

Not every violation of the Constitution is in itself a gross violation of the Constitution;[4] while deciding whether the actions of the President of the Republic grossly violated the Constitution, in each case one must assess the contents of concrete actions of the President of the Republic as well as the circumstances of their performance; a breach of the oath of the President of the Republic is, at the same time, a gross violation of the Constitution, while a gross violation of the Constitution is, at the same time, a breach of the oath; by the actions of the President of the Republic the Constitution would be grossly violated in cases when the President of the Republic held its office in bad faith, acted not in the interests of the Nation and the state but his personal interests, those of individual persons or their groups, acted with purposes and in the interests that are incompatible with the Constitution and laws and with public interests, or knowingly failed to discharge the duties established for the President of the Republic in the Constitution and laws. The said provisions of the constitutional doctrine are also applicable *mutatis mutandis* to the legal situations where it is being decided whether the actions of a Member of the Seimas, whereby the Constitution has been violated, constitute a gross violation of the Constitution.

[4] The Constitutional Court's conclusion of 31 March 2004.

Thus, in the doctrine of the Constitutional Court, impeachment is one of the forms of public democratic control over state officials. It is one of the measures of self-protection of the state community, the civil Nation, a way of its own defence from the aforesaid top officials of state power who ignore the Constitution and law, in a manner when they are prohibited from holding certain office, as they do not fulfil their obligation unconditionally to follow the Constitution and law, follow the interests of the Nation and the State of Lithuania.

The constitutional institute of impeachment is interrelated and integrated with other important constitutional institutes such as the oath and the electoral rights. The alteration of any of the elements of these institutes would result in the change of the content of other related institutes, i.e. the system of values entrenched in the aforementioned constitutional institutes would be changed.

2.1. Grounds for impeachment

In Article 74 of the Constitution three grounds for impeachment are distinguished: a gross violation of the Constitution, a breach of the oath, or when it transpires that a crime has been committed.

A breach of the oath in all cases is deemed to be a gross violation of the Constitution. In its ruling of 30 December 2003, the Constitutional Court held that the Constitution is grossly violated in all cases when the President of the Republic breaches his oath. Faithfulness to the State of Lithuania is also inseparable from faithfulness to the Constitution; upon the breach of the oath to be faithful to the Republic of Lithuania, one also grossly violates the Constitution.

However, another ground for impeachment—commission of a crime may not in every case be assessed as a gross violation of the Constitution, as, when deciding whether the actions of a corresponding official have grossly violated the Constitution, in each case it is necessary to assess the contents of concrete actions and the circumstances of their performance. In its ruling of 5

September 2012, the Constitutional Court summed up the doctrine formulated in its ruling of 25 May 2004 and noted that one of the grounds established in Article 74 of the Constitution, under which a certain official, specified in Article 74 of the Constitution, may be removed from office or his mandate of a Member of the Seimas may be revoked, is "if it transpires that a crime has been committed", and held the following:

– the commission of a crime in itself does not mean that the person has at the same time violated the Constitution or breached the oath, or that the person in his activity did not follow the Constitution, the interests of the Nation and the State of Lithuania, etc.; some crimes may even be of a type not directly related with a breach of the oath provided for in the Constitution or with a gross violation of the Constitution;
– it emerges from the provisions of Article 74 and Paragraph 2 of Article 56 of the Constitution that the crime by which the Constitution has not been grossly violated and the oath has not been breached does not cause the same constitutional legal effects as the crime by which the Constitution is grossly violated or the oath is breached;
– Paragraph 2 of Article 56 of the Constitution, under which a person who has fulfilled punishment imposed by a court judgement may stand in elections for a Member of the Seimas, means that the Constitution does not provide that a person who has been removed from office under the procedure for impeachment proceedings for the commission of a crime whereby the Constitution has not been grossly violated and the oath has not been breached may not stand in elections for a Member of the Seimas; moreover, while making the aforementioned exception, the Constitution expressis verbis allows to elect such a person Member of the Seimas.

Thus, the commission of a crime in itself does not mean that the person has at the same time violated the Constitution or breached the oath, or that the person in his activity did not follow the Constitution, the interests of the Nation and the State of Lithuania, etc. Some crimes may even be of a type not directly related with a breach of the oath provided for in the Constitution or with a gross violation of the Constitution.[5]

[5] The Constitutional Court's ruling of 15 April 2004.

2.2. The powers of the Seimas and those of the Constitutional Court in impeachment proceedings

Only two institutions—the Seimas and the Constitutional Court—enjoy powers in impeachment proceedings. The principle of separation of state powers, which is entrenched in the Constitution, *inter alia* means that once the powers of a concrete institution of state power have been directly established in the Constitution, one institution of state power may not take over the said powers from another state institution and it may not transfer or waive them; such powers may not be amended or limited by law.

Under Article 74 of the Constitution, the procedure for impeachment proceedings is established by the Statute of the Seimas. That provision of the Constitution implies the discretion of the Seimas to establish in the Statute of the Seimas as to who initiates impeachment, how this is done, the procedure for conducting impeachment, the procedure for adopting a decision concerning the removal of the person from office or revocation of the mandate of a Member of the Seimas, etc.

The role of the Constitutional Court in impeachment proceedings has undergone changes. Article 74 of the Constitution *expressis verbis* consolidates the grounds for impeachment, the persons who may be impeached, and the fact that it is only the Seimas that may, by a 3/5 majority vote of all the Members of the Seimas, remove from office or revoke the mandate of a Member of the Seimas. The same article also provides that the procedure for impeachment proceedings is established by the Statute of the Seimas.

While assessing the constitutional provisions designated for the role of the Constitutional Court in impeachment proceedings, one should note that Item 4 of Paragraph 2 of Article 105 of the Constitution only provides that the Constitutional Court presents a conclusion whether concrete actions of Members of the Seimas and state officials against whom an impeachment case has been instituted are in conflict with the Constitution.

Thus, when providing for the procedure for impeachment proceedings in the Statute of the Seimas, the legislator enjoys some freedom of discretion. In concrete constitutional justice

cases, the Constitutional Court has assessed this freedom of discretion in the aspect of its compliance with the Constitution and respectively corrected it. The ordinary legal regulation consolidated in the Statute of the Seimas was corrected in view of the doctrine of impeachment proceedings formulated by the Constitutional Court. Two important stages of the development of this legal regulation may be distinguished: the period between 1999 and 2004 and the period starting from 2004.

In its ruling of 11 May 1999, in which one assessed the articles of the Statute of the Seimas regulating the impeachment proceedings, the Constitutional Court, while interpreting Article 74 of the Constitution, noted that the Statute of the Seimas may establish such a procedure for impeachment that takes account of the differences of the constitutional grounds for impeachment. Thus, the Constitutional Court formulated a doctrinal provision to the effect that different constitutional grounds for impeachment determine different impeachment proceedings at the Seimas. Even though this ruling recognised that the provision of Article 259 of the Statute of the Seimas, insofar as it was limiting the right of a convicted person to participate in the impeachment proceedings (when they were conducted at the Seimas) and the constitutional right of that person to due process was not ensured, was in conflict with Article 74 of the Constitution, however, the Constitutional Court did not assess a circumstance that in the course of regulating the impeachment proceedings at the Seimas, when there is an effective judgement of conviction handed down by an ordinary court, the Seimas takes a final decision without a conclusion of Constitutional Court whether the actions of such a person are in conflict with the Constitution. Thus, according to the doctrine formulated by the Constitutional Court's ruling of 11 May 1999, impeachment proceedings were possible also without the Constitutional Court. In addition, in the same ruling the Constitutional Court did not assess the circumstance that, according to inter alia Article 230 of the Statute of the Seimas, the impeachment proceedings may be initiated not only by a group of 1/4 of the Members of the Seimas, but also by the President of the Republic, and, in certain cases, by the Judicial Court of Honour. Thus, the initiative for impeachment proceedings could also arise outside the Seimas.

Later, in its acts of 2004, the Constitutional Court gradually formulated the doctrinal provisions that exerted essential influence on the constitutional concept of impeachment proceedings and determined changes in the ordinary legal regulation laid down in the Statute of the Seimas.

In its conclusion of 31 March 2004, while interpreting different powers of the Seimas and the Constitutional Court in impeachment proceedings, the Constitutional Court formulated the essential provision of the constitutional doctrine to the effect that the Seimas enjoys the powers to decide whether the President of the Republic should be removed from office, but not whether concrete actions of the President of the Republic are not in conflict with the Constitution; during the impeachment proceedings at the Seimas only the issue of the constitutional liability of the President of the Republic is decided, i.e. only the issue of whether to remove the President of the Republic from office for a gross violation of the Constitution. The Seimas may not question a conclusion of the Constitutional Court stating that concrete actions of the President of the Republic are in conflict (or are not in conflict) with the Constitution. The Constitutional Court's conclusion is final on this issue. Under the Constitution, the Seimas does not enjoy any powers to decide whether the conclusion of the Constitutional Court is grounded and lawful—the legal fact that the actions of the President of the Republic are in conflict (or are not in conflict) with the Constitution is established only by the Constitutional Court.

The Constitutional Court emphasised that in cases when impeachment proceedings are instituted against the President of the Republic for a gross violation of the Constitution, the Seimas has a duty to apply to the Constitutional Court, requesting for a conclusion whether the actions of the President of the Republic are in conflict with the Constitution.

In its ruling of 15 April 2004, the Constitutional Court formulated a doctrinal provision on the powers of the Seimas in impeachment proceedings and emphasised that no state institutions are allowed to interfere with the constitutional powers of the Seimas to conduct impeachment, unless it is provided for in the Constitution; impeachment may be initiated only at the Seimas and only Members of the Seimas may launch an impeachment ini-

tiative. The Constitutional Court drew a conclusion that the Statute of the Seimas must not establish any such legal regulation to the effect that the subjects not provided for in the Constitution enjoy the powers enabling them to make the Seimas initiate the impeachment proceedings, and recognised the respective provisions of the Statute of the Seimas (Paragraph 1 of Article 230) that had established the right for the President of the Republic and the Judicial Court of Honour to initiate impeachment proceedings as being in conflict with the Constitution.

The Constitutional Court's ruling of 25 May 2004 further formulated inter alia the provisions of impeachment proceedings, which laid down a duty of Members of the Seimas, when they were facing a decision on impeachment against a person and voting on his removal from office, to invoke first of all the Constitution and to adopt decisions that are in line with it. A person who grossly violated the Constitution and breached the oath should not evade the constitutional liability—removal from office.[6]

[6] In its ruling of 25 May 2004, the Constitutional Court noted that, although Members of the Seimas, when deciding the issue of removal of the President of the Republic from office for a gross violation of the Constitution, or a breach of the oath, vote freely, still this does not mean that members of the Seimas, when deciding whether to remove the President of the Republic from office for a gross violation of the Constitution, or a breach of the oath according to the procedure for impeachment proceedings, are not bound by the oath of the Member of the Seimas taken by them, which obligates the Member of the Seimas in his activity to follow the Constitution, the interests of the state and his conscience, and not be bound by any mandates. The free mandate of a member of the Seimas, which is entrenched in the Constitution, may not be understood only as a permission to act at one's own discretion, following only one's conscience and to ignore the Constitution. The Constitution implies the notion of discretion and conscience of the Member of the Seimas, according to which no gap should exist between the discretion of the Member of the Seimas and the conscience of the Member of the Seimas on the one hand, and the requirements of the Constitution, as well as values entrenched in and protected by the Constitution on the other hand: according to the Constitution, the discretion of the Member of the Seimas and his conscience should be oriented towards the Constitution, and the interests of the Nation and the State of Lithuania. Therefore, an especially great responsibility is borne by the Seimas, which decides whether to remove, according to the procedure for impeachment proceedings, the President of the Republic from office for a gross violation of the Constitution and a breach of the oath: in a democratic state under the rule of law a person, who has grossly violated the Constitution, or breached the oath, should not evade the constitutional liability—the removal from office.

In this ruling, the Constitutional Court reinforced the significance of a conclusion of the Constitutional Court in impeachment proceedings and emphasised that such a conclusion cannot be changed or annulled either by referendum, or by way of elections or any other way.

In the same ruling, the Constitutional Court formulated a provision to the effect that a gross violation of the Constitution is alongside a breach of the oath and noted that the Seimas, which decides whether to remove, according to the procedure for impeachment proceedings, a person from office or to revoke his mandate of a Member of the Seimas for the commission of a crime, under the Constitution, bears the responsibility to elucidate whether the Constitution was grossly violated and the oath was breached by the commission of the crime. The Constitutional Court assessed the crimes provided for in the criminal law in a different fashion from the aspect that the commission of not every crime can mean a gross violation of the Constitution and, at the same time, serve the grounds for impeachment. Thus, the Constitutional Court indirectly formulated a doctrinal provision that in every situation it is the Constitutional Court, but not the Seimas, that must assess whether by committing a crime a person grossly violated the Constitution and breached the oath. Thus, the Seimas has a duty to apply to the Constitutional Court also as regards commission of a crime as a ground for impeachment. Even though in this ruling the Constitutional Court did not assess any corresponding provisions of the Statute of the Seimas, however, while taking account of the provisions of the constitutional doctrine, the legislator corrected the respective provisions of the Statute of the Seimas to the effect that they no longer contained the right of the Seimas not to apply to the Constitutional Court and conduct impeachment on its own in the situations where there was an effective court judgement of conviction.

Thus, after the aforesaid amendments to the Statute of the Seimas had been made in 2004, the same statute provided for the impeachment proceedings involving the participation of the Constitutional Court in all situations of conducting of such proceedings.

In impeachment proceedings, it is important not only to con-

solidate the powers of a constitutional court, but also to create conditions for constitutional courts for efficient implementation of such their powers. The Constitutional Court of Lithuania, having received an application from the Seimas, may properly prepare the proceedings and the time limit for drawing such a conclusion, differently from the situations when conclusions must be adopted regarding violations of the election laws during the elections of the Seimas or the President of the Republic, is not strictly limited.[7]

In its conclusion of 27 October 2010, the Constitutional Court summed up the doctrine formulated by it in relation to the powers of the Seimas and the Constitutional Court in impeachment proceedings and pointed out the following:

– under the Constitution, two institutions of state power enjoy powers in impeachment proceedings, i.e. the Seimas and the Constitutional Court. Each of these institutions of state power, under the Constitution, is assigned the powers that are in line with their functions during impeachment procedure: an impeachment case may be instituted only upon proposal (initiative) of Members of the Seimas; a conclusion as to whether concrete actions of the person against whom an impeachment case has been instituted are in conflict with the Constitution is presented by the Constitutional Court; in case the Constitutional Court concludes that the person against whom an impeachment case has been instituted has grossly violated the Constitution, the Seimas may remove such a person from office or may revoke his mandate of a Member of the Seimas by not less than a 3/5 majority vote of all the Members of the Seimas;
– under the Constitution, only the Constitutional Court has the powers to decide whether the persons indicated in Article 74 of the Constitution, against whom an impeachment case has been instituted, have grossly violated the Constitution (taking account of the fact that a gross violation of the Constitution is also a breach of the oath—to decide whether such persons have also breached the oath). The conclusion of the Constitutional Court that the person has grossly violated the Constitution (and thus has also breached the oath) is final. No state institution, no state official, no other subject may change or revoke such a conclusion of the Constitutional Court;
– if, while following the Constitution, the Seimas has, under the procedure for impeachment proceedings, removed a state official specified in Article 74 of the Constitution from office or revoked his mandate of a Member of the Seimas, then such a decision of the Seimas is final.

Thus, under the Constitution, only the Constitutional Court has the powers to decide whether concrete actions of a Member of the Seimas against whom an impeachment case has been instituted are in conflict with the Constitution, or whether a Member of the Seimas has grossly violated the Constitution. A constitutional duty is established for the Constitutional Court to investigate whether a Member of the Seimas has carried out the concrete actions specified in the inquiry to the Constitutional Court and assess whether those actions are in conflict with the Constitution, or whether the Constitution has been grossly violated. While investigating whether the concrete actions of a Member of the Seimas, which are specified in the inquiry of the Seimas, are in conflict with the Constitution, or whether the Constitution has been grossly violated, the Constitutional Court investigates and assesses both the evidence provided to the Constitutional Court along with the inquiry to the Constitutional Court as well as all the other evidence obtained in the course of the consideration of the case at the Constitutional Court, which confirms or denies that the Member of the Seimas has performed the concrete actions specified in the inquiry, or which confirms or denies that the said actions are in conflict with the Constitution and that the Constitution has been grossly violated.

Thus, the Constitution assigns different functions to the Seimas and the Constitutional Court in impeachment proceedings

[7] In this context, one should mention a situation of the Romania's Constitutional Court, when, on 5 July 2012, the Romanian Parliament was convened in an extraordinary session to deliberate on a proposal for the suspension from office of the President of Romania. The Constitutional Court was asked by Parliament to give a consultative opinion within 24 hours. It is noteworthy that, according to the Romanian legal regulation on suspension proceedings, the final decision on removal of the President from office is adopted by referendum (Opinion no. 685/2012, the European Commission for Democracy through Law (Venice Commission)).

and establishes the corresponding powers necessary for implementing those functions.

Different chosen constitutional impeachment models determine different proceedings of this constitutional sanction and different powers of the institutions—parliaments and (constitutional) courts. However, the important thing is finding a balance between impeachment as a process of political nature and its legal assessment[8].

3. Impeachment as an integrated institute of election law. Intersection of the jurisprudences.

In the doctrine formulated by the Constitutional Court the constitutional institutes of impeachment, the oath and the electoral right are assessed as closely interrelated and integrated, therefore, the change of any of the elements of these institutes would result in the change of the contents of other related institutes.

The Constitutional Court ruling of 25 May 2004[9] formulated the constitutional doctrine on the subjective right of a person to stand in elections, and the prohibition to stand in elections for a person who was removed from his office as a result of impeachment proceedings for the President of the Republic (or for a Member of the Seimas). This doctrine is especially important as regards the development of the constitutional doctrine on elections, as well as regards elucidation of the imperatives of guarantees of a person's electoral right arising from the provisions of the

[8] As mentioned before, in some states it is the Constitutional Court, but not the parliament, that makes a final decision on the impeachment issue. In this context, one is to mention a decision of the Constitutional Court of South Korea, when, in March 2004, the National Assembly of South Korea impeached President Roh Moo-hyun and brought about an immediate suspension of the presidency, but two months later the Constitutional Court of Korea restored the status quo by dismissing the impeachment and reinstating the President. (Lee, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective // *The American Journal of Comparative Law*, Vol. 53, No. 2 (Spring, 2005), pp. 403-432).

[9] The Constitutional Court's ruling of 25 May 2004.

Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter—the Convention). The doctrine formulated in this ruling was subsequently developed in the Constitutional Court ruling of 5 September 2012 which also formulated the constitutional doctrine on how the intersection of the jurisprudences that has occurred in this area must be solved.

While elucidating the Constitutional Court's jurisprudence on the rights protected by the Constitution and the Convention, the issue of compatibility of the jurisprudence of the Constitutional Court and that of the European Court of Human Rights comes into being.

It needs to be noted that the law of the Convention has great significance for the jurisprudence of the Constitutional Court. The Constitutional Court has formulated the doctrine of international treaties as a legal source, which has been gradually developed, with certain elements of this doctrine being specified in more accurate detail, it has held that the international treaties ratified by the Seimas acquire the power of the law[10] While construing this doctrinal provision, in its ruling of 14 March 2006, the Constitutional Court held that in cases when national legal acts (*inter alia* laws or constitutional laws) establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied.

The powers of the Constitutional Court and the European Court of Human Rights essentially differ, but the fact that the European Court of Human Rights treats the person's rights protected by the Convention as certain values, which are also pro-

[10] *Inter alia* the Constitutional Court's conclusion of 24 January 1995, the ruling of 17 October 1995, the decisions of 25 April 2002, 7 April 2004.
The Convention is applied directly in Lithuania's law, While construing the relationship between a ratified international treaty and a law, in its decision of 25 April 2002, the Constitutional Court held that, under the Constitution (Paragraph 1 of Article 105), the Constitutional Court considers and adopts rulings concerning the conformity of laws of the Republic of Lithuania and legal acts adopted by the Seimas with the Constitution of the Republic of Lithuania. Thus, under the Constitution, the Constitutional Court does not consider the conformity of a law with a legal act having the power of the law.
The Constitutional Court may not be viewed as an effective legal remedy in terms of Article 13 of the Convention.

tected by the Constitution, and that the Constitutional Court, while deciding on the compliance of the legal acts with the acts of higher power and, first of all, with the Constitution, inter alia construes the provisions of the Constitution designed for the protection of those values, makes the jurisprudences of these courts significant to both of these institutions in the course of dealing with the issues attributed to their competence.

When analysing the Constitutional Court's jurisprudence devoted to the rights protected by the Constitution and the Convention, inter alia the guarantees of the rights of a person to be elected to a legislative institution, one has to deal with an important question of compatibility of the jurisprudences of the Constitutional Court and the European Court of Human Rights. The intersection of the jurisprudences is possible where the same legal acts, the application of which has led to the violation of the person's rights that fall under the protection of the Convention, are assessed by the Constitutional Court and the European Court of Human Rights in a different way. After, on 6 January 2011, the European Court of Human Rights had handed down the judgment in the case of *Paksas v. Lithuania*[11], wherein Lithuania was recognised as having violated the human rights protected by the provisions of Article 3 of Protocol No. 1 of the Convention, the intersection of the jurisprudences of the European Court of Human Rights and the Constitutional Court has no longer been only an object of theoretical discussions.[12]

[11] In the judgment *Paksas v. Lithuania* of 6 January 2011(Application No.34932/04), the Grand Chamber of the European Court of Human Rights *inter alia* recognised that the applicant's disqualification from standing for election to the Seimas constituted a violation of Article 3 of Protocol No. 1.
It needs to be noted that in this judgment the judge J. P. Costa expressed a dissenting opinion, which was joined by the judges N. Tsotsoria and A. Baka.

[12] The intersection of the jurisprudences of the European Court of Human Rights and the Constitutional Court could also subsume such a situation that occurred after the European Court of Human Rights, on 27 July 2004, handed down the judgment Sidabras and *Džiautas v. Lithuania* (Application Nos. 55480/00, 59330/00) and, on 7 April 2005—the judgment Rainys and *Gasparavičius v. Lithuania* (Application Nos. 70665/0, 74345/01). In the Constitutional Court ruling of 8 May 2000 certain guarantees of the person's rights are treated in a different manner if compared to the aforesaid judgments of the European Court of Human Rights.

The different weighing of the values defended by the European Court of Human Rights and the Constitutional Court as well as the different treatment of the guarantees of the passive electoral right of the person to be elected as a member of the legislative institution (Seimas) became an object of the intersection of the jurisprudences.

While construing the provisions of *inter alia* Paragraph 2 of Article 34 and Paragraph 1 of Article 78 of the Constitution, in its ruling of 25 May 2004 the Constitutional Court inter alia held that, under the Constitution, a person who has been removed from office or whose mandate of a Member of the Seimas has been revoked according to the procedure for impeachment proceedings for a breach of the oath, a gross violation of the Constitution, or a crime that also grossly violates the Constitution and breaches the oath, may never be elected President of the Republic. In the said ruling the Constitutional Court also construed the essence of the constitutional institute of impeachment and its relation with the implementation of the person's passive electoral right inter alia to be elected as a member of the parliament.

Differently from what has been established by the Constitutional Court in its doctrine of limitation of the person's right to stand for elections in the judgment the of the Grand Chamber of the European Court of Human Rights *Paksas v. Lithuania*, the European Court of Human Rights held that with regard to the permanent and irreversible nature of the applicant's disqualification from holding parliamentary office, the Court found this restriction disproportionate, and thus concluded that there had been a violation of Article 3 of Protocol No. 1[13]. Before reaching such a conclusion, the European Court of Human Rights had assessed various circumstances relating to the case and *inter alia* observed that Article 3 of Protocol No. 1 applies only to the election of the "legislature"; taking into consideration the constitutional order of Lithuania, no doubts are raised as to the applicability of Article 3 of Protocol No. 1 to elections of Members of the Seimas.

[13] Article 3 of Protocol No. 1 provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

The European Court of Human Rights, when construing the formulation "the free expression of the opinion of the people in the choice of the legislature" of Article 3 of Protocol No. 1, drew a conclusion that "the decision to bar a senior official who has proved unfit for office from ever being a member of parliament in future is above all a matter for voters, who have the opportunity to choose at the polls whether to renew their trust in the person concerned".

Thus, in assessing the balance and intersection of values—a self-protection mechanism of democracy, by means of which one seeks to exclude from the legislature any senior officials who have committed gross violations of the Constitution or breached their constitutional oath (to restrict the right of such officials to participate in legislation for an indefinite period of time), on the one hand, and the freedom of expression of the opinion of the people in the choice of the legislature, on the other—the European Court of Human Rights gave priority to the freedom of expression of the opinion of the people in the choice of the legislature. The absolute restriction (the constitutionally grounded non-establishment of a certain time-limit as well as of any possibility of reviewing it) for the person (state official) who has grossly violated the Constitution or has breached his constitutional oath to stand for election as a member of the Seimas, even by taking into account the political context of the state (Lithuania), was assessed by the European Court of Human Rights as disproportionate and constituting a violation of the person's right to stand for election as a member of the legislative institution (Seimas), which is guaranteed in Article 3 of Protocol No. 1.

When assessing the aforementioned constitutional values, differently from the European Court of Human Rights, the Constitutional Court, in its ruling of 25 May 2004, gave priority not to the right of the person who has grossly violated the Constitution or has breached his constitutional oath to stand for election to the legislative institution, but to the self-protection mechanism of democracy, i.e. to the safeguarding of democratic order, as a legitimate and constitutionally defended objective.

Thus, one can draw a conclusion that the different weighing of the constitutional values by the European Court of Human Rights and the Constitutional Court (the values that are also

defended by the Convention), as well as the different prioritisation of one of these values has determined the intersection of the jurisprudences.

A considerable number of questions has been raised as a result of the intersection of the jurisprudences of the European Court of Human Rights and the Constitutional Court, a solution regarding which should be reached by searching for the means for harmonising, without denying the principle of the supremacy of the Constitution. The different assessment of the provisions of the legal acts of the European Court of Human Rights with regard to their compliance with the Convention should not be regarded as such an essential circumstance that could lead to possible repeated review of such legal act at the Constitutional Court.

In its ruling of 5 September 2012, the Constitutional Court construed the aforesaid intersection of the jurisprudences and formulated the respective doctrine[14].The Constitutional Court inter alia noted that the constitutional provision under which a person whose mandate of a Member of the Seimas has been revoked under procedure for impeachment proceedings for a gross violation of the Constitution and a breach of the oath, also a person who has been removed under procedure for impeachment proceedings *inter alia* from the office of the President of the Republic, for a gross violation of the Constitution and a breach of the oath, may never stand in elections for a Member of the Seimas is an implicit one and stems from the overall constitutional legal regulation, *inter alia* from the constitutional institute of the

[14] This doctrine was developed when the Constitutional Cour tin the ruling of 5 September 2012 considered whether the Law on Amending Article 2 of the Law on Elections to the Seimas, which allowed a person to stand in elections for a Member of the Seimas after four years have elapsed after he was impeached, was not in conflict with the Constitution. The said law was adopted while reacting to the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Paksas v. Lithuania* of 6 January 2011, wherein, as mentioned before, the permanent and irreversible prohibition for a person, who was removed from office in accordance with the procedure for impeachment proceedings for a gross violation of the Constitution and a breach of the oath, to stand in elections to the Seimas was recognised disproportionate and violating the right, entrenched in Article 3 of Protocol No. 1 of the Convention, to stand as a candidate for the legislature. In the judgment it was noted that the aforesaid prohibition is set in constitutional stone.

oath, entrenched in *inter alia* Article 59 of the Constitution, as well as from the institute of impeachment entrenched in Article 74 of the Constitution; such a person could not take the oath to be faithful to the Republic of Lithuania and acquire the rights of a representative of the Nation.

The Constitutional Court interpreted the said judgment of the European Court of Human Rights as meaning that the provisions of Article 3 of Protocol No. 1 of the Convention insofar as they imply the international obligation of the Republic of Lithuania to guarantee the right of a person, whose mandate of a Member of the Seimas has been revoked under procedure for impeachment proceedings for a gross violation of the Constitution and a breach of the oath, as well as a person who has been removed under procedure for impeachment proceedings for a gross violation of the Constitution and a breach of the oath *inter alia* from the office of the President of the Republic, to stand in elections for a Member of the Seimas, are incompatible with the provisions of the Constitution, *inter alia* the provisions of Paragraph 2 of Article 59 and Article 74 thereof.

The Constitutional Court emphasised that the system of the protection of human rights of the Convention is subsidiary with regard to the national legal systems and held that the main responsibility for effective implementation of the Convention and protocols thereto falls upon the states, the parties to the Convention and protocols thereto, therefore, they enjoy broad discretion to choose the ways and measures for the application and implementation of the Convention and protocols thereto, inter alia the execution of judgments of the European Court of Human Rights. However, such discretion is limited by the peculiarities (related to the established system of harmonisation of the national (domestic) and international law) of the legal systems of the states, *inter alia* their constitutions, as well as by the character of the human rights and freedoms guaranteed under the Convention and protocols thereto.

The Constitutional Court, while construing the power of an international treaty ratified by the Seimas in the system of legal sources, emphasised that in cases when the legal regulation entrenched in an international treaty ratified by the Seimas competes with the one established in the Constitution, the provisions

of such an international treaty do not have priority with regard to their application.

The Constitutional Court also was deciding the issue whether a judgment of the European Court of Human Rights in itself may serve as the constitutional grounds for reinterpretation (correction) of the official constitutional doctrine (provisions thereof). Having assessed the doctrine of reinterpretation of the Constitution that it itself has formulated, the Constitutional Court emphasised that it may be possible to deviate from the Constitutional Court precedents created while adopting decisions in cases of constitutional justice and new precedents may be created only in the cases when it is unavoidably and objectively necessary, constitutionally grounded and reasoned; it is impossible and constitutionally impermissible to reinterpret the official constitutional doctrine (provisions thereof) so that the official constitutional doctrine would be corrected, if by doing so the system of values entrenched in the Constitution is changed, the protection guarantees of the supremacy of the Constitution in the legal system are reduced and the concept of the Constitution as a single act and harmonious system is denied.

The Constitutional Court emphasised the integrity of the constitutional institutes of impeachment, the oath and electoral right as well as the fact that the change of any element of these institutes would result in the change of the content of other related institutes, i.e. the system of values entrenched in all aforementioned constitutional institutes would be changed. The Constitutional Court also drew a conclusion that, in itself, the judgment of the European Court of Human Rights may not serve as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine (provisions thereof) if such reinterpretation, in the absence of corresponding amendments to the Constitution, changed the overall constitutional regulation *(inter alia* the integrity of the constitutional institutes—impeachment, the oath and electoral right) in essence, also if it disturbed the system of the values entrenched in the Constitution and diminished the guarantees of protection of the superiority of the Constitution in the legal system.

In its ruling of 5 September 2012, the Constitutional Court also held that respect to international law, i.e. the observance of

international obligations undertaken of its own free will, respect to the universally recognised principles of international law (as well as the principle *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania. The Republic of Lithuania must follow the universally recognised principles and norms of international law *inter alia* under Paragraph 1 of Article 135 of the Constitution. From Paragraph 1 of Article 135 of the Constitution a duty arises for the Republic of Lithuania to remove the aforesaid incompatibility of the provisions of Article 3 of Protocol No. 1 of the Convention with the Constitution, inter alia the provisions of Paragraph 2 of Article 59 and Article 74 thereof. While taking account of the fact that, as mentioned before, the legal system of Lithuania is grounded upon the principle of superiority of the Constitution, the adoption of the corresponding amendment(s) to the Constitution in this situation is the only way to remove this incompatibility.

Thus, the Constitutional Court reached a conclusion that in this case the only way to reach the compatibility of the both jurisprudences is amending the Constitution, which would ensure a proper implementation of the undertaken international obligations.

Conclusion

The constitutions of democratic states treat impeachment as a special procedure, where the issue of the constitutional liability of the highest state official is being decided, however, the chosen impeachment models are different and the specific character of these models is determined by the role of the constitutional courts in impeachment.

Various aspects of the constitutional concept of impeachment have been disclosed in the jurisprudence of the Constitutional Court of the Republic of Lithuania. The Constitutional Court has construed the legal concept of impeachment while first of all interpreting the provisions of Article 74 of the Constitution. Three constitutional grounds for impeachment are distinguished: a gross violation of the Constitution, a breach of the oath, or when it transpires that a crime has been committed. The constitutional institute of impeachment is also interrelated and integrated with other important constitutional institutes such as the oath and the electoral rights.

Different chosen constitutional impeachment models determine different proceedings of the constitutional sanction and different powers of the institutions—parliaments and constitutional courts. In Lithuania only the Seimas and the Constitutional Court, enjoy powers in impeachment proceedings. While the Constitution assigns different functions to the parliament and the Constitutional Court in impeachment proceedings and establishes the corresponding powers necessary for implementing those functions, however, the important thing is finding a balance between impeachment as a process of political nature and its legal assessment.

While elucidating the Constitutional Court's jurisprudence on the protection of the rights protected by the Constitution and the Convention in the aspect of the grounds, process, and the aftermath of the impeachment, the issue of the compatibility of the jurisprudence of the Constitutional Court and that of the European Court of Human Rights has to be evaluated.

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Конституционная концепция импичмента: роль Конституционного Суда

Резюме

Конституции демократических государств относятся к процедуре импичмента как к особому процессу, когда решается вопрос конституционной ответственности высшего должностного лица государства. Выделяют три основные модели импичмента в зависимости от формы и степени участия в нем Конституционного Суда.

В судебной практике Конституционного Суда Литовской Республики раскрыты различные аспекты конституционной концепции процесса импичмента. Выделяются три консти-

туционных основания для импичмента: грубое нарушение Конституции или присяги, а также случай выявления факта совершения преступления. Конституционный институт импичмента тесно взаимосвязан с другими важными конституционными институтами, такими как присяга и избирательное право.

В Литве только Сейм и Конституционный Суд имеют полномочия в процессе импичмента. Однако важно найти баланс между политической природой данного процесса и его правовой оценкой.

Толкуя судебную практику Конституционного Суда в деле защиты прав, защищаемых Конституцией и Конвенцией в аспекте оснований, процесса и последствий процесса импичмента, вопрос совместимости судебной практики Конституционного Суда и Европейского суда по правам человека должен быть должным образом взвешен и оценен.

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Некоторые проблемы защиты интересов физического лица при проведении фото-, кино-, теле- видеосъемок в контексте требований международных нормативно-правовых актов, украинского и российского законодательства

В статье поднимаются вопросы защиты интересов физического лица с учетом стремительного развития технических средств сбора, обработки, хранения, распространения и иного использования информации о личности (фото-, кино-, теле-, видеосъемка, иные средства) независимо от его воли. Акцентируется внимание на необходимости создания правового механизма восстановления прав физического лица в случаях произвольного вмешательства в его личную или семейную жизнь.

Ключевые слова: *сбор, обработка, хранение, распространение и иное использование информации; вмешательство в личную или семейную жизнь; интересы физичес-кого лица.*

Генеральная Ассамблея ООН провозгласила положения Всеобщей декларации прав человека в качестве важнейших задач, к выполнению которых должны стремиться все народы и государства с тем, чтобы каждый человек и каждый орган общества, опираясь на данную Декларацию, стремились путем просвещения и образования способствовать уваже-

нию провозглашенных прав и свобод и обеспечению путем национальных и международных прогрессивных мероприятий их всеобщего и эффективного признания и осуществления среди народов государств – членов Организации и территорий, находящихся под их юрисдикцией.

Основополагающим принципом выполнения этих задач является принцип, согласно которому при осуществлении своих прав и свобод каждый человек должен подвергаться только тем ограничениям, которые установлены законом исключительно с целью обеспечения должного признания и уважения прав и свобод других людей и удовлетворения справедливых требований морали, общественного порядка и общего благосостояния в демократическом обществе [1, 97].

По сути, именно этот принцип лежит в основе как международного права, так и права любого современного демократического государства. В частности, это следует и из Конвенции о защите прав человека и основных свобод [2, 273].

В качестве гарантии практической реализации вышеуказанного принципа основополагающей ценности прав и свобод человека Конституция Украины [3] и Конституция Российской Федерации [4] устанавливают определяющее значение прав и свобод человека в деятельности государства. Важнейшим механизмом, гарантирующим это установление, является прямое действие Конституции, реализуемое, в частности, через деятельность Конституционного Суда Украины и Конституционного Суда Российской Федерации.

В случаях, когда нормативное регулирование в силу недостаточной ясности не позволяет в тех или иных обстоятельствах в процессе правоприменения по любым конкретным фактическим основаниям устанавливать однозначную и единообразную связь с основаниями правовыми, безусловно, необходимо компетентное участие конституционного суда, устанавливающего исчерпывающую ясность, в том числе и путем уточняющего толкования нуждающихся в этом правовых норм во взаимосвязи с фактологическими дефинициями, через практическую реализацию принципа непосредственного действия конституционных норм, гарантирующих права и свободы человека и определяющих деятельность государства.

В то же время, когда в основе проблемы лежит не недостаточная ясность нормы, объективно допускающая возможность неоднозначных толкований, а неверное понимание совершенно определенного смысла формирующих эту норму понятий, достаточно ограничиться соответствующим анализом понятийного аппарата.

Как показывает практика, проблема неверного понимания смысла используемого при конструировании правовой нормы понятия не всегда связана с недостаточной образованностью, низким уровнем эрудиции или банальной неразумностью ошибающегося. Зачастую источник проблемы все-таки более объективен. И обнаруживается он во всевозможных последствиях чрезвычайно высокой динамики развития современного мира, постоянно порождающего не только новые смыслы уже казалось бы устоявшихся понятий, но и новые понятия, формирующие эти смыслы, как это происходит, например, в сфере информационных технологий.

Еще совсем недавно информация как предмет правового регулирования вообще мало кого интересовала. И объяснялось это, конечно, вовсе не отсутствием объективно связанных именно с информацией отношений, имеющих высокую общественную актуальность.

Даже язык возник прежде всего именно как средство голосового сообщения информации.

История государственной либо иной чрезвычайно важной для человека тайны – личной или семейной - столь же древняя, сколь древними являются соответствующие отношения, связанные с существованием человеческого общества.

Тайна – это наиболее радикальная разновидность форм определенных систем ограничений по отношению к конкретной информации.

В течение довольно длительного времени ясность подобного радикализма воспринималась как достаточная, в том числе и для соответствующего нормативно-правового регулирования.

Столь же очевидной длительное время воспринималась и информация в ее подлежащих объективизации формах. Их особенности состоят в том, что существенных трудностей с

нормативно-правовым регулированием информации именно в этих формах с теоретической точки зрения, очевидно, не возникало, тем более – в контексте принципа безусловного приоритета прав и свобод человека, с учетом того обстоятельства, что, как было уже отмечено выше, установившая этот принцип в качестве важнейшего правового ориентира Всеобщая декларация прав человека была провозглашена и принята Генеральной Ассамблеей ООН лишь 10 декабря 1948 г.

В настоящее время в связи с активным развитием средств массовой информации, Интернета, иных процессов и технологий, связанных со сбором, хранением, обработкой, распространением и иным использованием информации, в Украине и в Российской Федерации уже предприняты многие конкретные меры по практической реализации вышеуказанного принципа основополагающей ценности прав и свобод человека, имеющих определяющее значение в деятельности государства, применительно к нормативно-правовому регулированию общественных отношений, связанных с информацией о человеке, определяемой в соответствующем расширенном контексте.

В частности, право на сбор, хранение, обработку, распространение и иное использование информации об особенностях человека регулируется статьей 307 «Защита интересов физического лица при проведении фото-, кино-, теле- и видеосъемок» и статьей 308 «Охрана интересов физического лица, изображенного на фотографиях и в других художественных произведениях» Гражданского кодекса Украины [5], а также статьей 152.1 «Охрана изображения гражданина» Гражданского кодекса Российской Федерации [6].

Принцип безусловного приоритета права каждого на уважение его личной и семейной жизни, жилища и корреспонденции, установленный статьей 8 Конвенции о защите прав человека и основных свобод [2, 272], реализуется в структурном построении вышеуказанных правовых норм достаточно ясно и определенно. Поэтому практические проблемы, очевидно, возникают в результате недостаточного понимания понятий, используемых в нормах.

В статье 12 Всеобщей декларация прав человека провозглашено, что никто не может подвергаться произвольному

вмешательству в его личную и семейную жизнь, произвольному посягательству на неприкосновенность жилища, тайну корреспонденции или на его честь и репутацию. Каждый человек имеет право на защиту закона от такого вмешательства или таких посягательств [1, 95].

Жизнь вообще, очевидно, в материально-правовом аспекте представляет собой определенное сочетание обстоятельств в некой последовательности.

Сочетание обстоятельств, имеющих отношение более к конкретному человеку, чем к кому-либо иному, считается жизнью конкретного человека.

Если данные обстоятельства имеют отношение более к лично самому человеку, чем к кому-либо иному, то они составляют личную жизнь этого человека.

Если эти обстоятельства имеют отношение более к семейным отношениям конкретного человека, чем кого-либо иного, то они составляют семейную жизнь этого человека.

Запрет на произвольное вмешательство в личную и семейную жизнь конкретного человека в контексте общеопределяющего принципа, состоящего в том, что при осуществлении своих прав и свобод каждый человек должен подвергаться только тем ограничениям, которые установлены законом исключительно с целью обеспечения должного признания и уважения прав и свобод других людей и удовлетворения справедливых требований морали, общественного порядка и общего благосостояния в демократическом обществе [1, 97], означает, что какое-либо деяние не самого человека в отношении обстоятельства личной или семейной жизни самого этого конкретного человека допустимо лишь при наличии по крайней мере одного из двух нижеприведенных условий, перечень которых является исчерпывающим:

1. Если в отношении рассматриваемого обстоятельства личной или семейной жизни конкретного человека существует ограничение запрета на произвольное вмешательство, установленное законом исключительно с целью обеспечения должного признания и уважения прав и свобод других и удовлетворения справедливых требований морали, общественного порядка и общего благосостояния в демократическом обществе [1, 97].

2. Если рассматриваемое обстоятельство не является обстоятельством личной или семейной жизни конкретного человека.

При этом из конструкции и контекста вышеуказанного запрета во взаимосвязи с общими принципами судебного разрешения споров следует, что при возникновении спора о нарушении права конкретного лица на то, что никто не может подвергаться произвольному вмешательству в его личную и семейную жизнь, лицо, которое полагает, что такое его право нарушено, должно доказать лишь сам факт постороннего, затрагивающего его личную или семейную жизнь деяния, которое указывается как нарушающее такое право. Обязанность доказать отсутствие этого факта либо наличие хотя бы одного из вышеуказанных необходимых условий, позволивших рассматривать это деяние как допустимое, лежит всецело на лице, которое указывается как совершившее это деяние.

В этом смысле в современном понимании художественное произведение (произведение изобразительного искусства), изображающее конкретного человека, результаты, видеозаписи, фото-, кино-, теле- и видеосъемки этого человека – все это различные формы сбора, хранения, обработки или иного использования информации о человеке в таком виде, который позволяет узнать в этой информации конкретного человека, а не кого-либо иного. Тем самым устанавливается факт постороннего деяния, затрагивающего личную жизнь этого человека.

Узнаваемость устанавливается выявлением сходства.

Сходство не следует путать с тождеством, то есть подменять такую категорию как реальное сходство объектов, подменяется сугубо теоретической и уже поэтому в реальности просто невозможной для различных предметов материального мира категорией тождества – идеального совпадения, которое действительно исследуется, но только тогда, когда необходимо установить факт событийного единства личности (как при исследовании трупа или при анализе деяний лица), а не факт изображения.

Сходством при изображении человека является очевидная близость особенностей этого человека и особенностей, изображенных в изображении.

В силу вышеуказанного принципа общеопределяющего значения прав и свобод человека и презумпции добросовестности определенно выраженное указание на очевидную близость особенностей изображаемого человека и особенностей, изображенных в изображении, должно восприниматься в гражданских отношениях как достаточное доказательство факта изображения этого человека, для опровержения которого необходимо доказать наличие хотя бы еще одного – другого – также изображаемого в рассматриваемом изображении человека, близость особенностей которого и особенностей, изображенных в изображении, более очевидна.

Особенности изображаемого человека изображаются в изображении, которое для целей нормативно-правового регулирования должно быть объективизировано.

Такая объективизация может быть любой.

Ни законодательством Украины, ни законодательством Российской Федерации допустимая объективизация изображения применительно к соответствующим нормам правового регулирования исчерпывающе не определена.

В заглавии статьи 308 Гражданского кодекса Украины указано: «Охрана интересов физического лица, изображенного на фотографиях и в других художественных произведениях», в части первой этой статьи отмечено: «Фотография, другие художественные произведения, на которых изображено физическое лицо», а далее упоминаются просто «фотография, другое художественное произведение» [5].

В заглавии статьи 152.1 Гражданского кодекса Российской Федерации указано: «Охрана изображения гражданина», в части первой этой статьи отмечено: «Изображение гражданина (в том числе его фотографии, а также видеозаписи или произведения изобразительного искусства, в которых он изображен)», а далее упоминается просто «изображение» [6].

В частности, воспроизводящие визуально внешний облик человека рисунок, грим, костюм или внешний облик, голос, движения, иные особенности конкретного человека, воспроизведенные аудиовизуально другим человеком, должны при необходимости, когда может усматриваться узнаваемость, оцениваться на предмет сходства, позволяю-

щего, например, устанавливать действие по изображению, наличие изображения и изображение как статичный материальный объект.

Всякое изображение конкретного человека, по сути, является безусловным следствием определенного взаимодействия, в котором с одной стороны неизбежно выступает сам человек в его особенностях, выраженных через информацию об индивидуальных признаках этого человека.

И поэтому само изображение любого реального человека – это всегда вмешательство по крайней мере в его личную жизнь.

До недавнего времени не придавалось особое значение этому со всех точек зрения очевидному обстоятельству лишь потому, что качественные и количественные характеристики технологий и устройств, производящих изображение человека, объективно были недостаточны для возникновения реальной общественной опасности их использования для произвольного вмешательства в личную и семейную жизнь человека.

С распространением цифровых технологий и использующих их всевозможных персональных устройств, оснащенных постоянно совершенствующимися средствами сбора, хранения, использования, распространения всевозможной информации, включая, конечно же, и информацию о личной и семейной жизни человека, возникла на практике и неуклонно нарастает реальная угроза общеопределяющему принципу, который заключается в том, что при осуществлении своих прав и свобод каждый человек должен подвергаться только тем ограничениям, которые установлены законом исключительно с целью обеспечения должного признания и уважения прав и свобод других людей и удовлетворения справедливых требований морали, общественного порядка и общего благосостояния в демократическом обществе [1, 97].

Угроза эта заключается в том, что по причинам, изложенным выше, в настоящее время любой человек в действительности может подвергаться произвольному вмешательству в его личную и семейную жизнь, произвольному посягательству на неприкосновенность жилища, тайну корреспонденции или на его честь и репутацию, вопреки статье 12 Всеобщей декларации прав человека [1, 95].

При этом провозглашенное в указанной статье право на защиту закона от такого вмешательства или таких посягательств, которое имеет каждый человек [1, 95], приобретает все более показательный характер, так как реализуемая, естественно, прежде всего через судебную практику защита закона явно не поспевает за развитием современной техники и технологий.

К сожалению, пока, как показывает практика, за развитием новейших техники и технологий не поспевает правосознание не только граждан, но и судей.

Однако не следует забывать, что именно правом человека на неприкосновенность его личной и семейной жизни, включающим и защиту от произвольного вмешательства изображением, в значительной мере определяется непосредственная эффективность демократии, реализуемой государством, стремящимся к совершенству общественных отношений именно через неукоснительное уважение прав и свобод человека.

А пока складывается парадоксальная ситуация.

Вне всяких сомнений действия многих телеканалов, газет, прочих СМИ, а также некоторых организаций, не принадлежащих к последним, и отдельных граждан в отношении изображения, иных сведений о личной или семейной жизни других людей явно нарушают фундаментальное право человека на защиту от произвольного вмешательства в личную и семейную жизнь.

Есть законодательство – не идеальное, но все-таки позволяющее привлекать к ответственности за такого рода нарушения.

Есть и судебные решения, вынесенные по делам относительно таких нарушений, и большинство этих решений, несмотря на весьма незначительную часть в той или иной мере ошибочных, все-таки восстанавливает нарушенные права.

Впрочем, в общем ситуацию тяжело назвать позитивной. Во-первых, далеко не всем известно об успехах отечественного судопроизводства в разрешении подобных споров.

А во-вторых, и это главное, складывается устойчивое впечатление, что до сих пор громадное количество граждан,

юристов и даже судей так и не может понять и осознать, что абсолютно недопустимо любое произвольное вмешательство в личную или семейную жизнь человека.

И, похоже, сомнений в успешности защиты жизни человека от вмешательства со временем становится не меньше, а даже больше.

Такая тенденция относительно морали и нравственности, которые формируются бытующим в обществе пониманием естественной меры допустимого, не может не вызывать самого серьезного беспокойства.

По нашему мнению, в корне изменить эту негативную ситуацию способно лишь кардинальное усиление общественной активности в вопросах защиты граждан при изображении и от любого другого произвольного вмешательства в личную или семейную жизнь человека.

Первым реальным шагом в этом направлении может стать, например, мера, в основе аналогичная той, эффективность которой довольно устойчиво проявляется в вопросах защиты прав потребителей.

Мера эта заключается в создании правового механизма, позволяющего третьим лицам по собственной инициативе заявлять требование о восстановлении нарушенного права гражданина на защиту при его изображении и в иных случаях произвольного вмешательства в его личную или семейную жизнь, а также о привлечении правонарушителей к имущественной ответственности, размер которой может быть определен указанием на денежную сумму в определенных границах, взыскиваемую в пользу лица, права которого нарушены.

При этом у гражданина, личное неимущественное право которого нарушено, должна оставаться возможность взыскания в упрощенном порядке соответствующей суммы возмещения морального ущерба, причиненного незаконными действиями при изображении и при любом другом произвольном вмешательстве в его личную или семейную жизнь, а также – соответствующих убытков, для чего на этом фоне довольно уместным может быть решение давно назревшего вопроса практического расширения форм и возможностей организации имущественных отношений, связанных, напри-

мер, с правами гражданина при изображении, которые в настоящее время в имущественном аспекте касаются лишь возможности позирования за плату либо взыскания в определенных случаях суммы морального ущерба. Конечно, этим не исчерпывается все реальное разнообразие возникающих в данной сфере имущественных вопросов и проблем.

Все приведенные примеры наглядно иллюстрируют не только то, насколько серьезны проблемы защиты права человека на сбор, хранение, обработку, распространение и иное использование информации о его индивидуальности, но и то, что современное общество вполне способно разбираться в этих проблемах и эффективно их решать.

Естественно, последнее возможно при условии формирования внятной и ответственной общественной позиции, которая в дальнейшем будет неуклонно оптимизироваться, не догоняя, а в определенном смысле предвосхищая и корректируя усиление и развитие имеющихся проблем.

Ведь нельзя забывать, что в основе любого права должна быть мораль как система ограничений, добровольно и осознанно принимаемых обществом вообще и конкретным человеком в частности.

Существенным является то, что мораль и нравственность могут и должны приниматься не формально и статично, а творчески и динамично, т. е. формироваться и осуществляться непрерывно и постоянно в живой и непосредственной связи с неуклонно развивающимися общественными процессами.

И одним из самых эффективных практических инструментов, всецело соответствующих самому духу и природе демократии, позволяющих не плестись в хвосте интенсивно прогрессирующих общественных процессов, а влиять на эти процессы, активно направляя их в нужное русло и не допуская при этом беззакония и произвола, является принцип прямого и непосредственного действия прав и свобод человека и гражданина, определяющих содержание и направление деятельности государства.

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Some issues of protection of the physical entity related to photo-, film-, television-, video-filming requirements in the context of the requirements of international legal normative acts and Ukrainian and Russian legislation

SUMMARY

The article deals with the issues of protection of interests of an individual which occurs due to rapid development of technical means of compiling, processing, preservation, distribution and other implementation of the information related to an individual (to photo-, film-, television-, video- filming) regardless of his/her will.

According to the author, a number of specific measures have been undertaken for implementing this principle in Ukraine and the Russian Federation. However, it seems that till nowadays many citizens, lawyers and even judges cannot understand that involuntary intrusion into private or family life of a person is absolutely inadmissible.

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Article 6 of the European Convention on Human Rights and the Right to a Fair Trial

1. General Remarks

Art. 6 para. 1 European Convention on Human Rights (ECHR) states that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Judgment must be “pronounced publicly”. The public may be excluded from the trial for certain reasons. For criminal trials, in particular, Art. 6 para. 2 ECHR stipulates the principle of presumption of innocence, and Art. 6 para. 3 ECHR specifies a minimum standard of procedural rights.

Thus, Article 6 of the European Convention on Human Rights provides for a number of organizational, jurisdictional and procedural guarantees going far beyond the right to a trial before a lawful judge (Art. 83 para. 2 Federal Constitutional Law). Its great significance for the Austrian system of law primarily derives from the evolutionary interpretation of the notion of civil and criminal law by the European Court of Human Rights (ECtHR), which differs substantially from the traditional terminology of continental Europe, as well as the influence of common law, which stresses the crucial function of a public hearing for a fair trial. Hence, the provision is given a wide scope, which includes substantial parts of classic administrative law. Currently, however, the long duration of hearings constitutes the main practical problem in Europe: In 2005, for example, 25% of the complaints lodged with the European Court of Human Rights concerned the right to a decision by the national courts within a “reasonable time”.

2. Civil rights and obligations

The European Court of Human Rights interprets the notion of "civil rights and obligations", as used in Art. 6 para. 1 ECHR, autonomously and very broadly – at least by the standards of continental European law. The assessment of the individual case is of particular importance. National law must at least allow a justifiable claim for recognition as a "right". This also covers entitlements or rights to the legitimate exercise of discretion. The point at issue is not whether a decision is taken on the right as such, but rather the "effects" of the decision on civil-law positions. As a result, Article 6 of the European Convention on Human Rights becomes applicable to administrative proceedings. In contrast, however, it is not applicable to enforcement proceedings, as such proceedings do not decide on the merits of the case.

Case law does not offer an abstract definition of what accounts for the civil-law nature of a right. While the national classification as a civil-law matter is irrelevant, the substantive content of the norm is to be assessed on the basis of national law. At any rate, the European Court of Human Rights has held that property-related rights are civil in nature. This applies, above all, to cases relating to property, as specified in Article 1 of Protocol No 1 to the ECHR, but also to cases relating to the use of property (e.g. building law, industrial plant and equipment law, water law), private income-generating activities or claims against social insurance institutions. This shows that the term "civil law", as used in Art. 6 ECHR, covers a large area of public law.

The Constitutional Court does not follow the case law of the ECtHR without reservation. Within the aforementioned group, it distinguishes between a "core area" of civil rights, i.e. cases relating to relations of citizens with one another and therefore traditionally governed by civil law, and cases that only touch upon civil rights "in their effects". In the opinion of the Constitutional Court, cases of the former type have to be decided on the merits of the case by a tribunal, as specified in Art. 6 ECHR, whereas a mere review by the Administrative Court and the Constitutional Court, which does not consider all substantive and legal issues, is sufficient in cases of the latter type. Nevertheless, a public oral hearing within a reasonable period of time is considered to be indispensable in such cases as well.

3. Criminal charges

The ECtHR also has its own, autonomous interpretation of the term "criminal charge" in Art. 1 para. 1 ECHR, taking into account the "intention and the purpose of the ECHR" and, consequently, going beyond classic criminal law. As can be derived from the Court's case law, the primary question to be considered is whether under national law the offence is classified as a criminal offence, but even if that is not the case, it may still be subject to criminal law on account of the nature of the infraction or the type and severity of the sanction to be imposed. Above all, if the sanction serves the purposes of prevention and repression ("deterrent" and "censuring"), the offence is subject to a norm of criminal law. Particularly severe sanctions, such as extended prison terms, always come under the heading of "criminal law" according to Art. 6 ECHR. This position is also held by the Constitutional Court.

4. Decision by an independent and impartial tribunal

The significance of Art. 6 para. 1 ECHR resides in the fact that it calls for decisions in the aforementioned matters to be taken by an "independent and impartial tribunal" and that the legal subject has a subjective right to a decision taken by such body based on the law (access to a court).

The term "court" ("tribunal") used in Art. 6 para. 1 ECHR is not equivalent to the (formal) notion of a court as used in the Federal Constitutional Act. According to the case law of the European Court of Human Rights, the elements that qualify a judicial body as a tribunal are its judicial function (decision in a case on the basis of legal rules and according to a formal procedure), its independence of the executive branch of government and vis-a-vis the parties, and its impartiality. Its independence and impartiality must also be guaranteed by the mode of appointment of its officers and their (long) terms of office. The Constitutional Court follows the case law of the ECHR in this respect as well.

The jurisdiction of such a court must cover the examination of all relevant substantive and legal issues. The Constitutional Court therefore concludes from Art. 6 ECHR that civil courts are bound by decisions of other authorities only to the extent to which the parties in the civil trial were parties to the proceedings before that

other authority (right of access); that other authority and its proceedings have to meet the requirements of Art. 6 ECHR. The right of access to a court is understood as the right to an effective guarantee of protection by the law, which may include the right to free legal assistance.

The right to a decision by a court/tribunal does not guarantee several stages of appeal. According to Art. 6 ECHR, a court decision at a single instance is sufficient. Contrary to that, Art. 2 of Protocol No 7 to the ECHR guarantees that everyone convicted of a criminal office by a tribunal has the right to have his/her conviction or sentence reviewed by a higher tribunal. Austria has entered a reservation, stating that both the Administrative Court and the Constitutional Court are to be regarded as "higher tribunals". This is sufficient even in cases in which collegiate bodies pursuant to Art. 133 para. 4 of the Federal Constitutional Act decide on criminal charges within the meaning of Art. 6 ECHR, which are not subject to review except by the Constitutional Court (e.g. the Supreme Disciplinary and Appeals Commission in disciplinary cases involving lawyers). Exceptions are possible in certain cases (e.g. minor punishable offences). Decisions pursuant to § 33a of the Administrative Court Act (Rejection) are deemed to be sufficient.

5. Fair trial

The obligation to hear the parties in a fair and equitable manner refers to the rules of a "fair trial", which are, however, not clearly defined. In the opinion of the Constitutional Court, it is essential for the party concerned to "effectively represent his/her interests". This includes, in particular, the right of parties to have access to the files and to be heard. This includes the right to be informed of all the evidence produced, the possibility to comment on questions of fact, and the obligation to thoroughly examine the assertions of the parties. The "principle of equality of arms" also derives from the obligation to ensure a fair trial. It requires adversarial proceedings and demands that a fair balance be maintained between the parties at the trial. Moreover, the essential issues must be referred to in the reasons given for the decision. To assess if a trial was fair or not, it has to be considered in its entirety. Legal remedy can be sought against irregularities or defects in the proceedings at lower courts.

While the general requirement of a fair trial applies to all civil and criminal cases, Art. 6 para. 3 ECHR guarantees everyone charged with a criminal offence the following minimum rights:

a) The right to information on the nature and cause of the accusation to be communicated as promptly as possible and in a language the accused understands; Art. 6 para. 3 (a) ECHR.
b) The right to have adequate time and facilities for the preparation of his/her defence; Art. 6 para. 3 (b) ECHR.
c) The right to defend himself/herself in person or through legal assistance of his/her own choosing or, in the absence of sufficient means, to be given it free when the interests of justice so require; Art. 6 para. 3 (c) ECHR.
d) The right to examine witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her; Art. 6 para. 3 (d) ECHR.
e) The right to have free assistance of an interpreter if he/she cannot understand or speak the language used in court; Art. 6 para. 3 (e) ECHR.

Another right deriving from the right to a fair trial is the right to avoid self-incrimination. An accused must not be forced to produce evidence against himself/herself (*nemo tenetur*-principle). This is also related to the presumption of innocence (Art. 6 para. 2 ECHR). However, it does not exclude the possibility of the court drawing unfavourable conclusions from the silence of the accused when evaluating the evidence presented, provided such conclusions are based on common sense and prima facie evidence is convincing.

6. Public oral hearing

Art. 6 para. 1 ECHR guarantees a public hearing (GE: *"öffentlich ..... gehört wird"*, FR: *"entendue ..... publiquement"*). Publicity of the hearing means that the hearing is open to the general public. The hearing must be held before the court called upon to decide on points of fact and points of law. According to Art. 6 para. 1 ECHR, excluding the public is only permitted in exceptional cases.

Art. 6 para. 1 ECHR also provides for the judgment to be pronounced publicly; this requirement is not always taken into consideration in the procedural rules. The question whether the possibility of public access to the judgment constitutes a sufficient substitute for public pronouncement is an open one, but has been answered affirmatively by the European Court of Human Rights. In the Court's opinion, the requirement of public pronouncement is met even if the full wording of the judgment is made accessible only to those individuals who can prove a sufficient interest in the case.

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Статья 6 Европейской конвенции по правам человека и право на справедливое судопроизводство

Резюме

Статья 6 Европейской Конвенции по правам человека предусматривает ряд организационных, законодательных и процессуальных гарантий права человека на судебную защиту.

Большое значение данной статьи для австрийской правовой системы прежде всего связано с толкованием понятий гражданского и уголовного права Европейским судом по правам человека (ЕСПЧ), которое существенно отличается от традиционной терминологии континентальной Европы, а также влияния общего права, подчеркивающего решающую функцию публичных слушаний в справедливом судебном разбирательстве.

Положения Статьи 6 толкуются достаточно широко, тем самым включая существенную часть классического административного права. Однако в настоящее время длительность слушаний является главной практической проблемой в Европе.

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The Constitutional Court in its Role as an Election Court

I. Introduction

The Constitutional Court is, ultimately, the only body to review the results of elections to general representative bodies (national parliaments: National Council, Federal Council; regional parliaments of the nine Laender, municipal council), the European Parliament and – as a specifically Austrian feature – to self-governing bodies (constituent bodies of statutory institutions representing organized interests, e.g. chambers). It also decides on challenges to elections to important executive positions (e.g. Federal President, members of provincial governments, mayors), regardless of whether the election is by popular vote or by representative bodies. Moreover, the jurisdiction of the Constitutional Court covers decisions on a loss of seat by an elected member of any representative body and proceedings relating to the instruments of direct democracy (popular initiative, plebiscite and referendum).

The Constitutional Court's election review function comprises the verification of the election result in terms of numbers as well as the election procedure as a whole. The election procedure is reviewed objectively for errors which – provided the unlawfulness identified is found to be of a "material" nature – may lead to the elections or parts thereof to be declared null and void (invalidated or partially invalidated). It is important to underline that (partial) invalidation of elections can only be pronounced by the Constitutional Court if the alleged unlawfulness of the electoral procedure has been established and has been found to have had an impact on the election result (principle of materiality). In this

context, it should also be noted that the Constitutional Court – as the body in charge of reviewing general legal norms – has the right to suspend electoral review proceedings in order to review the underlying legal provisions, provided the Court is concerned about prejudicial norms of electoral law. The Court may therefore examine legal norms governing the election procedure, the division into electoral districts or the processes applied in the determination of election results and, if need arises, repeal such norms as unconstitutional (e.g. provisions governing voting by postal ballot, division into electoral districts, etc.).

II. The right to challenge elections

The following parties have the right to challenge elections:

1. in the case of elections to general and special representative bodies, the group of voters who submitted a list of candidates to the competent electoral authority, through their representative authorized to accept service;
2. a candidate claiming to have been unlawfully deprived of his/her right to stand for election;
3. in the case of elections to certain executive bodies (e.g. provincial government, executive officers of local governments) elected by a body of qualified voters, a certain number of that body of voters (one tenth of its members, but at least two).

This means that the right of a voting-age citizen to participate in an election (active voting right) cannot be enforced by the voter himself/herself, but only indirectly by the voter groups (parties) who submitted a (valid) list of candidates. The only possibility open to citizens is to challenge the (non-) entry into the list of voters in separate administrative proceedings; they cannot fight against their exclusion from the act of voting as such (refusal to hand over the ballot paper, denial of access to the polling station) before the Constitutional Court.

III. Prerequisites for proceedings to be initiated

Proceedings to challenge an election are initiated upon application, which can only be submitted after the election, i.e. after the announcement of the result. Individual actions by an electoral

authority (e.g. refusal to admit a voter group to the election) cannot be challenged separately. This means that voter groups who were not admitted to the election have to wait until after the election to challenge the election for non-admission to that – and only that – particular election. An election can be challenged on the basis of any alleged unlawfulness in the electoral procedure; such unlawfulness may also reside in the unconstitutionality of prejudicial provisions of electoral law.

The application submitted has to contain the certain request namely to declare the election procedure in whole or part as null and void. The alleged unlawfulness of the procedure must be duly reasoned and substantiated in the application, i.e. specific reasons must be given for the challenge and presented in a credible manner and/or the grounds for an alleged unconstitutionality of the underlying provisions of electoral law have to be outlined. As a matter of principle, the Constitutional Court reviews an electoral procedure only within the limits of the unlawfulness alleged in the application. Beyond that limit, the Court is not entitled to conduct an ex-officio review of the lawfulness of the electoral procedure. If, however, the Constitutional Court has doubts about the constitutionality of the legal provisions to be applied in the review, the challenge proceedings are suspended and the legal provisions concerned are examined for their constitutionality. Upon completion of this review, the election review proceedings are resumed, considering any changes in the legal situation that may have resulted from the norm review. If the corrected legal situation no longer provides an adequate basis for the challenged election, it is deemed to have taken place without legal basis and therefore declared void as a whole.

When examining the lawfulness of election procedures, the Constitutional Court not only applies national law, but also has to consider the provisions of the European Union if the case is subject to EU law (e.g. in the case of elections to the statutory body representing labour – Chamber of Labour). Moreover, EU provisions (Art. 22 para. 1 TFEU – Treaty on the Functioning of the European Union, Art. 1 of the Municipal Elections Directive and Art. 40 GRC – European Union Charter of Fundamental Rights) explicitly state that citizens of the Union residing in a Member State of which they are not nationals may exercise the right to vote and to stand as candidates in municipal elections.

Like any other court faced with a question of interpretation of European Union law, the Constitutional Court, when applying Union law and having doubts about its interpretation, has to refer the question to the Court of Justice of the European Union. Pending an answer to its question, the Court has to suspend the election review proceedings. In proceedings concerning the election to a constituent body of the Chamber of Labour (General Assembly), the Constitutional Court applied to the Court of Justice of the European Union for a preliminary ruling (Constitutional Court 2 March 2001, W I-14/99) on the question of whether Union law (Decision 1/1980 of the Association Council) gives an employee of Turkish nationality the right to stand as a candidate in the election to that body. After the Court of Justice of the European Union had ruled in favour of the right to stand in elections (Case C-171/01), the Constitutional Court continued its election review proceedings and declared the election invalid on account of the fact that the national election authorities had denied the eligibility of the candidate in question.

IV. Scope of invalidation of elections

If the Constitutional Court establishes that the election procedure or parts thereof were against the law, the election has to be declared null and void in whole or part, if the unlawfulness had an impact on the outcome of the election. It is important to note that the election can be declared partly invalid: If, for instance, errors occurred in a single electoral district in the course of elections to the National Council, the Constitutional Court may declare the election in that district invalid "from the time of voting". Difficulties may arise in assessing the hypothetical relevance of an error. Answering this question may involve calculation processes: Given the system applied in Austria to calculate the seats due to the individual voter group (d'Hondt method), a single vote may be decisive for the allocation of seats. If a (decisive) vote was wrongly counted for a party standing for election, this results in the election being declared (partly) void, which means that the votes have to be re-counted, but the election does not have to be repeated. If electoral rules intended to exclude the possibility of manipulation and abuse in the electoral procedure have been violated, a (potential) impact on the result is deemed to exist and evidence of concrete manipulation is not required. The Constitutional Court declared a direct mayoral election void, because ballot cards for postal voting had unlawfully been issued on the basis of requests received by telephone, including for other family members who had never applied themselves. Hence, the possibility of manipulation could not be excluded.

V. Loss-of-seat proceedings

Proceedings relating to the loss of a seat won in an election are closely related to the electoral proceedings outlined above. Apart from the right to stand as a candidate in elections, eligibility also includes the right to keep a seat won in elections and to exercise the office thus obtained. The Constitutional Court consistently rules that the right to exercise an office only covers the protection of a seat won in an election to a general representative body, but not to an office received (derived) from such representative body. A loss of seat is only possible for the reasons specified by law. The reasons stated by the legislator must be of a serious nature, otherwise the Constitutional Court would initiate legal review proceedings and repeal the provision (e.g. change of domicile and resulting loss of eligibility, VfSlb: 14,804/1997). In loss-of-seat proceedings the Constitutional Court decides once and for all if the seat is lost for justified reasons. The Constitutional Court either pronounces the loss of seat upon application of the representative body (direct loss-of-seat proceedings), or it reviews the loss-of-seat decision pronounced by an administrative authority (indirect loss-of-seat proceedings).

VI. Review of the instruments of direct democracy

In conclusion, and without elaborating in detail, I should like to mention that the Constitutional Court also reviews the application of instruments of direct democracy, such as plebiscites, popular initiatives and referenda. The Court reviews the procedure and, if necessary, establishes its unlawfulness, which results in the plebiscite, referendum or popular initiative being declared invalid.

Х. Хертенхюбер

Судья Конституционного Суда
Австрийской Республики

Конституционный Суд в роли электорального суда

Резюме

Конституционный Суд является единственным органом, рассматривающим споры, касающиеся результатов выборов в представительные органы. Важно подчеркнуть, что только Конституционный Суд может признать результаты выборов недействительными, если предполагаемые нарушения повлияли на результаты выборов.

Суд может рассмотреть также вопрос конституционности правовых норм, регулирующих процедуру выборов. В докладе автор указывает также на условия инициирования процедуры, субъектов, имеющих право на оспаривание результатов выборов в Конституционный Суд.

При рассмотрении законности избирательных процедур, Конституционный Суд руководствуется не только национальным законодательством, но и должен учитывать положения Европейского союза, если дело подпадает под действие права ЕС.

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Organisation of Executive Power in a Democratic State

Abstract

The article analyses the organisation of executive power in a democratic state, marking out the development of understanding executive power in the 20th century.

Firstly, by use of legal theory cognitions and court practice, the author defines the executive power. According to the classic definition, the executive power comprises those state functions, which are not legislation and justice. In the system of separation of powers, the executive power is realised by the president and the government with the assistance of state administration carried out under the subordination of the latter.

In the article, the author points out that the principle of state administration unity has originated as a result of parliamentarism development to ensure parliamentary control over the executive branch.

In the concluding part of the article, the author analyses the trend typical of the 20th century, namely, establishing independent institutions for the performance of certain executive power functions. The author highlights both the causes for the origination of such a practice and the situation in the modern-day democratic state. Additionally, the author provides an insight into the practice of the Constitutional Court of the Republic of Latvia concerning the conditions for creating independent institutions.

Key words: *executive power, separation of powers, parliamentarism, independent institutions, state audit (the Court of Auditors), central bank, due administration*

I. Introduction

Organisation of power of a modern-day democratic state is based on the principle of separation of state powers. In Europe, already the French Declaration of Human and Civic Rights of 26 August 1789 in Article 16 sets forth that any society, in which no provision is made for guaranteeing the fundamental rights or for the separation of powers, has no Constitution.[1]

The formulation of this declaration statute providing that there is no constitution without the separation of power is not incidental. The ideas of constitutionalism provide for restricting the state power to protect the fundamental rights of a person and to prevent usurpation of the state power for the interests of an individual person or a group of persons.[2] With the constitution, restriction of the state power is realised by determining both a distribution of competencies among various state authorities and specific procedures for exercising particular state authorities.[3] Therefore, up until our day, implementation of the principle of separation of powers is the central problematic issue of the state power organisation law.[4]

Initially, restriction of the executive power and inclusion in the state power separation system was a challenge for putting constitutionalism to effect, in order to find a proper position for the parliament in the constitutional order in capacity of the people's representation. Meanwhile, consolidation of parliamentarism triggered a directly opposite trend, because the theoreticians and practicians of constitutional law addressed the issue of securing the role of executive power in state administration. After WWII, a new trend developed in Europe, namely, formation of separate state institutions as independent from the legislator's and government's political control.

In this article, the author will analyse the 20th century tendency to fragment the executive power by forming independent institutions, which are constantly monitoring certain fields of the executive branch. In order to achieve the objective of the article, the author will consider the concept of executive power within the context of the principle of separation of state powers, as well as will analyse the principle of unity of the executive branch and will highlight the trends of forming independent institutions and the necessity for such institutions in a democratic country.

II. The Concept of Executive Power

The classic theory of separation of state powers is based on the idea that all state functions can be divided into three groups – legislation, execution (state administration) and justice. For the performance of these activities, separate institutions are formed in a country, and they are mutually independent, they control and balance each other.[5] In the theory of law, also the objective of separation of state powers traditionally is also formulated – to prevent power usurpation tendencies and to foster moderation of power.[6]

[1] Déclaration des Droits de l'Homme et du Citoyen de 1789. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789.5076.html

[2] Sajó A., Limiting Government. An Introduction to Constitutionalism, Central European University Press, Budapest, 1999, pp. xiv–xv.

[3] Chalmers D., Asquith C., Outlines of Constitutional Law, Sweet & Maxwell, London, 1925, p. 3

[4] Judgment of 20 December 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-12-01, Paragraph 6. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/judg_2006-12-01.htm

[5] Judgment of 16 October 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-05-01, Paragraph 10. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf. See also: de Montesquieu C., The Spirit of Laws, Book XI. http://constitution.org/cm/sol_11.htm#001

[6] Judgment of 1 October 1999 by the Constitutional Court of the Republic of Latvia in the case No. 03-05(99), Paragraph 1 of the Concluding Part. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/03-05-99E.rtf. See also: Madison J. Federalist No. 51. http://constitution.org/fed/federa51.htm

Already since the times of Professor Georg Jellinek, a certain trend has taken shape, namely, to negatively define the executive power, which means that the executive power includes also those state functions, which are neither legislation nor justice.[7] By using this method, also the Constitutional Court of the Republic of Latvia has recognised that tthe executive power is the state function, which is neither legislation nor justice.[8]

Legislation in the practice of the Constitutional Court is defined as the adoption of statutes, namely, as exercising the rights to regulate a certain matter with the law.[9] Whereas, justice is dispute settlement in a contradictory process between two or more participants, based on legal norms.[10] It must be stressed that the Constitutional Court has given a narrow definition of the legislative and justice functions.

For instance, the Senate of the Supreme Court of the Republic of Latvia refers to proclamation of external statutory acts of any level as legislation.[11] Furthermore, Professor Fyodor Kokoshkin also included adoption of objective legal provisions in the legislation, dividing it into the ordinary and constitutional legislation.[12]

[7] Еллинекъ Г., Общее учение о государстве, Издание Юридическаго Книжнаго Магазина Н. К. Мартынова, Санкт-Петербург, 1908, с. 447 - 454; Кокошкин Ф. Ф., Лекции по общему государственному праву, Зерцало, Москва, 2004, с. 184 – 189. [Jellinek G., General doctrine about the government, Publisher: Law Bookstore of N.K. Martinov, St. Petersburg, 1908, pp. 447–454; Kokoshkin F. F., Lectures in general state law, Zertsalo, Moscow, 2004, pp. 184–189.]

[8] Judgment of 16 October 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-05-01, Paragraph 10.2. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf

[9] Judgment of 16 December 2005 by the Constitutional Court of the Republic of Latvia in the case No. 2005-12-0103 Paragraph 12. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2005-12-0103E.rtf

[10] Judgment of 14 March 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2005-18-01, Paragraph 16.1. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2005-18-01E.rtf

[11] Judgment of 9 March 2004 of the Supreme Court Senate of the Republic of Latvia in the case No. SKA-39, Paragraph 11. The judgment text is available at: http://www.at.gov.lv/files/archive/department3/2004/ska-39-2004.pdf

[12] Кокошкин Ф. Ф., Лекции по общему государственному праву, Зерцало, Москва, 2004, с. 186 – 189. [Kokoshkin F. F., Lectures in general government law, Zertsalo, Moscow, 2004, pp. 186–189]

On the other hand, the practice of the Constitutional Court refers only to the competence of adopting laws vested in the Saeima (the Parliament) and in the totality of Latvian citizens as legislation.[13] It derives from the practice of the Constitutional Court that both the adoption of regulations of the Cabinet of Ministers, as well as of other external statutory acts, which are adopted on the grounds of the legislator's delegation constitute the executive power.[14]

Likewise, the Senate of the Supreme Court has defined the function of justice broader than the Constitutional Court. The Senate of the Supreme Court has equated the function of justice with functions implemented by judicial authorities.[15] Nevertheless, it recognises that the function of justice should be referred only to hearing such cases in the court, in which the principle of adversiality is observed, namely, that at least two parties of contradicting interests must participate in a procedure, however, the final decision must be adopted by an independent arbitrator – the court. In other cases, the court authorities are exercising the functions of the executive branch, which have been delegated to their competence in compliance with the law.[16]

The definitions of legislation and justice affect the definition of the work of executive power. If legislation and justice is defined in an expanded way, the definition of the executive power work nar-

[13] Judgment of 16 December 2005 by the Constitutional Court of the Republic of Latvia in the case No. 2005-12-0103, Paragraph 12. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2005-12-0103E.rtf

[14] Judgment of 9 October 2007 by the Constitutional Court of the Republic of Latvia in the case No. 2007-04-03, Paragraph 14. The judgment text in English is available: http://www.satv.tiesa.gov.lv/upload/judg_2007-04-03.htm

[15] Decision of 9 March 2004 by the Department of Administrative Affairs of the Supreme Court of the Republic of Latvia in the case No. SKA-39, Paragraph 11. The decision text is available at: http://www.at.gov.lv/files/archive/department3/2004/ska-39-2004.pdf; Decision of 26 April 2005 by the Department of Administrative Affairs of the Senate of the Supreme Court of the Republic of Latvia in the case No. SKA-199, Paragraph 8. The decision text is available at: http://www.at.gov.lv/files/archive/department3/2005/ska-199-2005.pdf

[16] Judgment of 14 March 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2005-18-01, Paragraph 16. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2005-18-01E.rtf

rows. However, if legislation and justice is defined narrowly, the executive power functions automatically expand.

The broad and varying extent of functions of the executive power work already during the interwar period in the Latvian public law science served as grounds for doubting suitability of the Montesquieu scheme of classic separation of powers for the definition of functions of a modern state. The leading Latvian public law specialist Professor Kārlis Dišlers wrote: "But what should an administrative worker with the executive power function falling under his consideration in the Montesquieu scheme? This function does not correspond to any actual task, and it does not have any actual content. Therefore, it is the work with the administrative law theory that insistently encouraged the author to revise the Montesquieu theory of three state powers to change it into a state power function theory suitable for the modern developed state, achieving it mainly by dividing the Montesquieu executive power into several actual state power functions, which correspond to actual tasks of the state and therefore comprise definite real contents."[17]

In line with this approach, Kārlis Dišlers divided the executive power function in state-sustaining and state-developing functions. The state-maintaining functions were the administratively economic, administratively policing, and defensive function. The state-developing functions, for their part, comprised federative, administratively cultural, controlling, and regulatory functions.[18]

Even though this theory is not recognised in the Latvian public law today, it shows the expanse of the executive power function. It was precisely the various tasks of the executive power and the necessity to implement some of them as independently of the government's political influence as possible that served as the cause for establishing independent institutions in the executive branch.

[17] Dišlers K., Ievads Latvijas valststiesību zinātnē, [Introduction to public law science] A.Gulbis, Riga, 1930, pp. 37–38.
[18] Ibid, pp. 34–36.

III. Unity of Executive Power

Section 6 of the State Administration Structure Law of the Republic of Latvia provides for a principle of a single hierarchical system. No institution or administrative official may remain outside this system.[19]

The principle of a single state administration is necessary to ensure the control of the Cabinet of Ministers over implementation of all executive branch functions. Pursuant to the Constitution of the Republic of Latvia[20] the Cabinet of Ministers is the constitutional executive power holder in the Republic of Latvia.[21]

Thereby, the executive power function is delegated to the authority of the Cabinet of Ministers, even though certain executive power actions with the purpose to ensure separation of powers can be delegated also to other constitutional institutions. It can be concluded that those executive power activities, which are not delegated to other constitutional institutions, fall under the authority of the Cabinet of Ministers, which is responsible for their implementation.[22]

Implementation of executive power functions is a task so expansive that the Cabinet of Ministers cannot manage it by itself. Therefore, the Constitution prescribes that the Cabinet of Ministers may establish state administration institutions and may delegate a part of its authorities to these institutions, while maintaining control through the subordination mechanism and responsibility for the performance of delegated tasks.[23]

The state administration institutions are implementing the administrative (state administration) functions of the executive branch, which along with the political functions of the executive

[19] State Administrative Structure Law. http://www.mk.gov.lv/en/mk/darbibu-reglamentejosie-dokumenti/administration-structure-law/
[20] Constitution of the Republic of Latvia. http://saeima.lv/en/legislation/constitution
[21] Judgment of 16 October 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-05-01, Paragraph 15.3. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf
[22] Ibid, Paragraph 10.4.
[23] Levits E., Valsts un valsts pārvaldes juridiskā struktūra, [Legal structure of the state and state administration], "Jaunā pārvalde" 2002, No. 1(31), pp. 2–8.

branch implemented by the Cabinet of Ministers constitute the authority in the field of executive power devolved with the Constitution to the Cabinet of Ministers. In order for the Cabinet of Ministers to be able to assume political liability for implementation of all authority delegated to it in the executive branch, subordination of the state administration to the Cabinet of Ministers is necessary, namely, the Cabinet of Ministers must have such legal mechanisms at its disposal, which could ensure proper operations of the state administration institutions.[24]

In order to apply these core principles, Article 58 of the Constitution establishes that state administration institutions are subordinated to the Cabinet of Ministers. According to conclusions drawn by the Constitutional Court, the aim of this provision is to combine all the state institutions performing the functions of the executive branch in one single system under the subordination of the Cabinet of Ministers.[25]

The state administration unity and subordination to the Cabinet of Ministers to a great extent derives from the parliamentarism principle included in the Constitution. Formation of parliamentarism historically implied restriction of the monarch's power and the parliament's political control over the executive power. In order to enable effective implementation of this control, the government's political responsibility of the entire executive power was necessary. That, accordingly, automatically meant that the state administration institutions are subordinated to the government, so that the government would have access to legal mechanisms of implementing the politics of parliamentary majority.[26] Thereby "the cabinet of ministers accountable before the parliament is the sole active supreme body of executive power, through which the unity of executive power in the country is established."[27]

[24] Judgment of 16 October 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-05-01, Paragraph 11. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf

[25] Judgment of 9 July 1999 by the Constitutional Court of the Republic of Latvia in the case No. 04-03(99), Paragraph 2 of the Concluding Part. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/04-03-99E.rtf

[26] Mucenieks P., Ministru atbildības institūts vēsturiskās attīstības gaitā [Ministerial accountability institute during the historical development], "Tieslietu Ministrijas Vēstnesis" 1922, No. 5, pp. 216–228.

The Constitutional Court has very accurately highlighted the importance of Article 58 of the Constitution in putting the parliamentarism principles into effect: "Article 58 of the Constitution along with the second sentence of Article 53 of the Constitution [envisaging countersigning of the State President's decrees] prevent dualism of the executive power, namely, these Constitutional provisions prevent the politically unaccountable State President's possibilities to give decrees to state administration institutions and administer their work without the consent of the Cabinet of Ministers, which is responsible before the Saeima."[28]

In the modern public law, regardless of the risks included in this system, dualism of the executive power or the division of executive branch authority between the president and the government has turned into a rather popular mechanism.[29] Even though at the time of drafting the Constitution, Weimar Constitution had already been adopted and taken effect,[30] the Latvian public law experts took a negative stance toward dualism of executive power.[31]

Kārlis Dišlers clearly indicated that the parliamentary logic requires subjecting the executive power to the legislator: "It would be illogical, if two execute power bodies were to be maintained in a parliamentary structure, one of which (the cabinet of ministers) is

[27] Dišlers K., Dažas piezīmes pie Latvijas Republikas Satversmes projekta (tieša likumdošana un valsts prezidents) [A few remarks about the Draft Constitution of the Republic of Latvia (direct legislation and the state president)], "Tieslietu Ministrijas Vēstnesis" 1921, No. 4/6, p. 147.

[28] Judgment of 16 October 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-05-01, Paragraph 15.1. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf

[29] Sajó A., Limiting Government. An Introduction to Constitutionalism, Central European University Press, Budapest, 1999, pp. 199–202.

[30] Die Verfassung des Deutschen Reichs. [Constitution of the German Reich] http://www.lwl.org/westfaelische-geschichte/que/normal/que843.pdf

[31] Dišlers K. Izpildu varas evolūcija.[Evolution of the executive power] "Tieslietu Ministrijas Vēstnesis" 1921, No. 4–6, pp. 93–108.

subordinated to the legislator's power and accountable before it, while the other (the president of the state) is independent of the legislator and not accountable before it. [..] The former, regular formation of parliamentarism took the course by which the head of state gradually loss the role of an active executive power body and through it, even though as if remaining outside the parliamentary system, he became acceptable for this system as an element that does not interfere with its unity."[32]

Kārlis Dišlers used the constitutional practice of the French Third Republic to justify this conclusion. Regardless of the extensive authority of the republic's president vested in him by the constitution of the French Third Republic, in practice, "the fundamental principle of the constitution is, or it should be, that the president shoots rabbits but does not rule."[33] The president of the republic lost his *de facto* authorities in 1877 following the conflict of the French president Patrice de Mac-Mahon with the parliamentary majority, which ended in the president's resignation.[34] The following president Jules Grévy recognised that he conforms to the laws of parliamentarism and would never oppose the national will voiced by the constitutional bodies. This announcement or what is also known as Grévy Constitution ensured unity of the executive power and subordination to the government accountable before the parliament.[35]

Therefore, in parliamentarism, all state administration institutions should be subordinated to the government, which is held politically accountable to the parliament. This concept was realised in the Constitution, by introducing unity of the executive power and envisaging a state president having symbolic and representative functions.[36]

[32] Dišlers K. Francijas prezidenta Miljerana atkāpšanās valststiesiskā nozīme. [Impact of the French president's Millerand's resignation on the public law] "Tieslietu Ministrijas Vēstnesis" 1924, No. 6/7, p. 264.
[33] Ibid, p. 258.
[34] Chevallier J.-J., Histoire des institutions et des régimes politiques de la France de 1789 à 1958, [History of institutions and political regimes in France: 1789–1958] Dalloz, Paris, 2001, pp. 314–318.
[35] Ibid, pp. 328–329.
[36] Iljanova D., The Governmental System of the Republic of Latvia, [in:] Chronowski, N., Drinózi, T. And T. Takácz (eds.): Governmental Systems of Central and Eastern European States. Oficyna a Wolters Kluwer Business, Warsaw, 2011, pp. 419–421.

IV. Independent Institutions

Nevertheless, already during the parliamentarism formation and consolidation period it turned out that all state administration institutions cannot be fully subordinated to the government. In some cases, it was necessary to establish institutions, which are not subordinated to the government and implements its functions independently. Therefore, the statement voiced in jurisprudence, namely, that the functioning of a modern state requires establishing separate institutions, which do not fit in the classic system of separation of powers, is a well-grounded one.[37]

The state audit was among the first of such institutions in the practice of constitutionalism. According to Kārlis Dišlers: "The state audit is not an administrative institution; it is a peculiar independent institution, which has been entrusted with a peculiar function, and because of this function we can regard the institution at hand as a control institution. We must get used to the approach that alongside legislative, administrative, and judicial institutions, these peculiar control institutions also exist in the modern-day states."[38] Kārlis Dišlers also pointed out that initially the state audit was an institution of state administration comprised in the executive branch, however in a modern state subject to the court of law it has become an independent state authority body with its own peculiar function.[39]

In order to establish the special status of a state audit, already at the beginning of the 20th century, this institution oftentimes was enshrined in the constitution as an independent institution. For instance, Article 87 of the Constitution prescribes that the state audit office is an independent collegial institution. Article 92 of the 1922 Constitution of the Republic of Lithuania[40] stipulated the state

[37] Prokop K., Polish Constitutional Law, Temida 2, Białystok, 2011, p. 175.
[38] Dišlers K., Ievads Latvijas valststiesību zinātnē [Introduction to public law science], A.Gulbis, Riga, 1930, pp. 195–196.
[39] Ibid, p. 195.
[40] Lietuvos Valstybės Konstitucija [Constitution of the Republic of Lithuania]. http://lt.wikisource.org/wiki/Lietuvos_Valstybės_Konstitucija_(1922_m._rugpjūčio_1_d.)

auditor's duty to monitor the state revenues and expenditure, as well as state property and commitments.

After the Second World War, similar independence in Europe was envisaged for the central banks. In order to prevent the politicians' influence on monetary policy and to ensure price stability, the devastating consequences of which were clearly proven by the Great Depression experience in Europe, the central banks were granted an independent status. It means that the political state powers cannot affect the fields of issue of bank-notes, crediting, and bank sector control. The theory recognises that such a mechanism allows providing stability of national currencies and of prices, which ensure the prerequisites for economic growth of countries.[41]

Independence of central banks is so important factor of economic stability and development that it is specifically envisaged by the European Union founding treaties. Article 127 of the Treaty on the Functioning of the European Union envisages a European Central Bank system, the main objective whereof is to maintain price stability.[42] In legal sciences, it is recognised that establishment of a European Central Bank system implies an unprecedented delegation of monetary sovereignty from national to supranational level. That, for its part, imposes an obligation for the member states to maintain their national central banks, the independence of which is not questioned.[43]

For the most part, the independence of central banks is guaranteed by stipulating the status and functions in the national constitutions. Article 227 of the 1997 Constitution of Poland establishes that the National Bank of Poland is the central bank of the state having exclusive rights to issue bank-notes and to provide monetary

[41] Баренбойм П.Д., Гаджиев Г.А., Лафитский В.И., Мау В.А., Конституционная экономика, Юстицинформ, Москва,[Barenboim P.D., Gadzhiev G.A., Lafitskiy V.I., Mau V.A., Constitutional economics, Yustinform, Moscow] 2006, pp. 395–397.

[42] The Treaty on the Functioning of the European Union. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF

[43] Drēviņa K. Centrālo banku neatkarība: pašmērķis vai instruments. [Independence of central banks: an aim in itself or a tool] "Jurista Vārds" 2009, No. 47(590), pp. 14-15.

policy.[44] Article 111 of the 1992 Constitution of Estonia prescribes that the Bank of Estonia is entitled to issue the Estonian currency. The Bank of Estonia must regulate the currency circulation and must ensure national currency stability.[45]

Alongside the state audit and the central bank, also the ombudsman or the authorised agent for the protection of human rights is also established in the European countries as an independent institution. The task of this institution is to ensure the protection of human rights and to monitor that the executive power does not violate human rights of persons.[46] An interesting aspect to consider is the fact that in the Baltic States, the institution of an ombudsman was first introduced by Estonia during the authoritarian regime taking Scandinavia as an example. Article 47 of the 1938 Constitution of Estonia envisaged an institution of legal chancellor, whose duties included examination of lawfulness of statues issued by public institutions.[47]

Therefore, in a modern democratic state, it is impossible to delegate all executive power functions to the government and subordinated state administration institutions. A certain sphere of state administration can be removed from the government authority and delegated to an independent public institution, if it is found that a public institution subordinated to the government could not ensure sound administration in the respective sphere.[48] In such cases, the legislator normally subordinates the respective institution directly to its own control, excluding it from the executive power system, or

[44] Constitution of the Republic of Poland. http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

[45] Constitution of the Republic of Estonia. http://www.president.ee/en/republic-of-estonia/the-constitution/index.html

[46] Кутрис Г., Защита прав человека – существенная функция Конституционнго суда и Правозащитника Латвии, [in:] Constitutional Justice in the New Millenium. [Kutris G., Protection of human rights – an important function of the Constitutional Court and Ombudsman of Latvia] Almanac, Njhar, Erevan, 2007, pp. 74–77.

[47] Constitution of the Estonian Republic (1938). http://en.wikisource.org/wiki/Constitution_of_the_Estonian_Republic_(1938)

[48] Judgment of 16 October 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-05-01, Paragraph 16.3. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf

establishes it in a form of an independent institution. Thereby, it is possible to achieve that a certain sphere is regulated by a depoliticised and fully independent institution.[49]

Based on historic experience with strengthening the independence of a state audit and of the central bank, by creating them as public authority bodies and in the constitution text stipulating expressis verbis their independence and functions, many countries strive to determine all independent institutions in the constitution. Latvia has opted for a different approach – independence of the respective institutions is ensured through legislative procedure, taking into account that Article 57 of the Constitution entrusts the legislator to determine the mutual relations of public institutions in exercising the state authority.

The former chairperson of the Legal Committee of the Parliament of the Republic of Latvia Linards Muciņš during the parliamentary debates emphasised the legislator's role in establishing such independent institutions: "And life itself has proven it, and the European development has proven it that a whole range of institutions have formed after the Second World War, and they are in particular referred to as autonomous institutions, which are not under the government's subordination, but at the same time special laws have been adopted on these institutions, and they perform a relevant social task. At the same time, regardless of the fact that they do not depend from the government, they have been granted rather peculiar and vast authorisations."[50]

The Constitutional Court also emphasised that it is necessary to provide for the status of certain independent institutions by means of legislative procedure, as the Saeima decides on the need of such a regulation. The Constitutional Court indicated that the Constitution authorises the Saeima to establish independent institutions in cases, when it is otherwise infeasible to ensure sound gov-

[49] Sajó A., Limiting Government. An Introduction to Constitutionalism, Central European University Press, Budapest, 1999, pp. 202–203.

[50] Transcript of the third sitting of the autumn session of the 7th Convocation of the Saeima of the Republic of Latvia on 19 September 2002. http://saeima.lv/steno/2002/st_1909/st1909.htm

ernance. Likewise, the Constitutional Court indicated that in a democratic country, releasing certain state administration institutions from the subordination to the Cabinet of Ministers ensures sound governance in such spheres of administration, which are related to the control of operations of other public institutions, to ensuring price stability, as well as to levelling out the protection and interests of certain freedoms.[51]

At the same time, the Constitutional Court judgment also sets strict limits to the legislator's freedom of conduct.

Firstly, it is not permissible to forms such independent institutions, the functions of which can be just as effectively performed also by an institution under the subordination of the Cabinet of Ministers.

Secondly, there are field of executive branch, in which independent institutions cannot be established. In a democratic republic, parliamentary control is essential implemented through intermediation of a responsible government over armed forces and state security institutions.

Thirdly, as the Saeima forms an independent public institution, it must ensure proper democratic legitimation of that institution, as well as must introduce into the law effective mechanisms of monitoring the operations of that institution.[52]

Nevertheless, the doctrine of establishing independent institution as formulated by the Constitutional Court is accurately defined: establishment of such institutions is still an exception from the unity of state administration and should be permissible, when otherwise it is infeasible to ensure proper administration in the respective sphere of executive branch. Likewise, spheres are mentioned, in which formation of independent institutions is not permissible, and qualitative requirements in formation such institutions have been established.

[51] Judgment of 16 October 2006 by the Constitutional Court of the Republic of Latvia in the case No. 2006-05-01, Paragraph 16.3. The judgment text in English is available at: http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf

[52] Ibid.

The stance of the Constitutional Court has been accepted also by the legislator, envisaging its authority in Clause 2 of Section 2 of the Law on the Structure of the Cabinet of Ministers: "The Saeima can by law delegate the implementation of the executive power in certain spheres also to other institutions, which are not subordinated to the Cabinet of Ministers, but for the monitoring of operations whereof the law establishes effective mechanisms."[53]

However, a certain tendency is observed in practice: it could be referred to as fragmentation of the executive power. Increasingly, state administration institutions want to obtain a status of an independent institution also in fields, where formation of such institutions is not necessary, in order to get rid of the government's political control and to be able to operate independently.

In addition, in some European countries, previously unfamiliar institutions are being established, which assume new responsibilities. For instance, Article 44 of the Fundamental Law of Hungary provides for a special Budget Council with the responsibility of supporting the parliamentary legislative activities and examining balance of the state budget. Taking into account the fact that the 2011 Fundamental Law of Hungary[54] provides the Budget Council with rights to assess the conformity of the state budget project to the defined fiscal policy principles, this institution, in effect, is granted with veto rights, which restrict the freedom of government's and parliament's conduct in the process of planning public revenues and expenditures.

Having regard to the securing of fiscal discipline principles in the European Union member states and the provisions of the new Treaty on stability, coordination, and governance in the economic and monetary union,[55] formation of such institutions can be expected also in other European Union member states.

[53] Law on the Structure of the Cabinet of Ministers. http://www.likumi.lv/doc.php?id=175919&from=off

[54] The Fundamental Law of Hungary. http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf

[55] Treaty on stability, coordination and governance in the economic and monetary union.http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf

Nowadays, it is ever more difficult to define the executive power as a single and hierarchically organised system of state administration institutions, which is subordinated to the constitutional executive power carrier. Independent institutions, which are not directly subordinated to the parliamentary majority and government's political will, are being formed in ever more important spheres significant for the public interests. The relevant institutions oversee their spheres autonomously, based on professional knowledge and long-term perspective on the development of the respective field. Such a system affects also the implementation of the principle of democracy, because it is ever more difficult for the voters at elections, when choosing particular political proposals, to influence the governance of the relevant spheres. As these fields are governed independently of the political power, it is no longer possible to affect the decisions to be made in these fields by way of elections.

Therefore the executive power in a modern democratic state is fragmented, by excluding ever more important spheres from political control and transferring them to the competence of professional technocrats. That, consequently, could possible call for a revaluation of understanding of the classic principle of separation of powers, because the government or president being the carrier of the constitutional executive power, no longer portray the true decision-making mechanism.

V. Conclusions

1. According to the traditional understanding, the executive power includes those functions, which are not legislation or justice. The executive power is exercised by the constitutional executive power carrier – the government or the president – and the state administration institutions under its subordination.

2. The principle of unity of the executive power envisaging hierarchical subordination of all state administration institutions to the constitutional executive power carrier, formed as a result of parliamentarism to ensure the parliament's ability to affect and politically control all operations of the executive power through government accountable before the parliament.

3. In a democratic state, for the purpose of governing certain spheres, it is necessary to form institutions, which are not subordinated to the government and which implement its functions independently. It is permissible in such spheres of governance, which are not related to the control of operations of other public authorities, to ensuring price stability, as well as to the protection of certain freedoms and equalising interests.

4. Traditionally independent institutions have been enshrined in the constitution by envisaging their independence and functions in the constitution text. However, establishment of such institutions is permissible also by means of legislation as the legislator prescribes their independence guarantees.

5. A democratic state has also such spheres of the executive branch, in which independent institutions may not be created, such as the fields of state defence and security.

6. The parliament in establishing an independent institution must ensure proper democratic legitimation of that institution, as well as must effectively introduce the mechanisms of monitoring its operations into the law.

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Организация исполнительной власти в демократическом государстве

Резюме

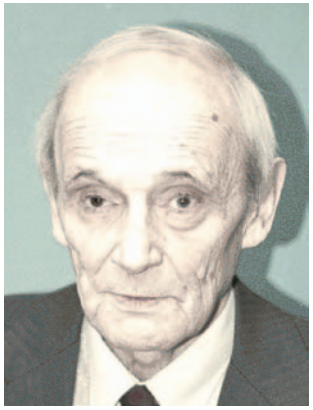
Статья посвящена организации исполнительной власти в демократическом государстве, развитию понимания исполнительной власти в XX веке.

Согласно классическому определению, исполнительная власть включает те государственные функции, которые не являются законотворческими или судебными. В системе разделения властей исполнительная власть осуществляется президентом и правительством при содействии государственной администрации.

В статье автор отмечает, что принцип единства системы государственной власти возник в результате развития парламентаризма для обеспечения парламентского контроля за исполнительной властью.

В заключительной части статьи автор анализирует тенденции XX века, в частности, создание независимых институтов для выполнения определенных функций исполнительной власти, подчеркивает причины возникновения такой практики и ситуации в современном демократическом государстве. Кроме того, автор дает представление о практике Конституционного Суда Латвийской Республики, описывая условия создания независимых институтов.

Профессору Геннадию Петровичу Жукову - 90 лет



30 апреля 2014 года заслуженному юристу Российской Федерации, доктору юридических наук, профессору, Почетному директору Международного института космического права (Париж), Академику международной академии астронавтики (Стокгольм) и Академии проблем дипломатических наук и международных отношений (Россия) Жукову Геннадию Петровичу исполняется 90 лет.

Геннадий Петрович Жуков родился в Москве. Он участвовал в Великой Отечественной войне. В августе 1941 г. на Западном фронте получил осколочное ранение, был на излечении в госпиталях по май 1942 г., затем с мая по декабрь 1942 г. воевал на Западном фронте. В дальнейшем служил в должности физрука в воинской части г. Киржач. Награжден орденом "Отечественной войны" I степени и медалями. Ветеран Великой Отечественной войны.

Г.П. Жуков окончил Всесоюзный юридический заочный институт (ныне - Московский государственный юридический университет имени О.Е. Кутафина - МГЮА) в 1947 г. и в том же году поступил в аспирантуру Института государства и права Академии наук СССР, где защитил кандидатскую диссертацию на тему "Борьба СССР за демократическое разрешение вопроса о польско-германской границе" (1951 г.).

С 1951 г. по 1955 г. Г.П. Жуков заведовал сектором права Академии наук Литовской ССР. Далее он занимался научно-исследовательской деятельностью в Институте государства и права АН СССР. Был ученым секретарем Комиссии АН по правовым вопросам межпланетного пространства.

В 1966 г. в Институте государства и права АН СССР Г.П. Жуков защитил докторскую диссертацию по теме "Международно-правовые проблемы освоения космоса". С 1970 г. по 1978 г. Жуков заведовал кафедрой международного права Дипломатической академии МИД СССР, а с 1981 г. по 1988 г. - сектором ООН отдела международных организаций Института мировой экономики и международных отношений (ИМЭМО) АН СССР.

Более 30 лет работы связывают Г.П. Жукова с Российским университетом дружбы народов. С 1965 г. по 1969 г. профессор Г.П. Жуков преподавал на кафедре международного права Университета дружбы народов им. П. Лумумбы, в 1988 г. он вернулся в Университет, в котором преподает по сей день. Профессор Г.П. Жуков инициировал в 2010 г. процесс подготовки студентов кафедры международного права к участию в международном конкурсе по международному космическому праву им. М. Ляхса. По его инициативе на кафедре создан Центр международного космического права, на базе которого проводятся конференции и круглые столы. В 2014 г. издан учебник "Международное космическое право" под редакцией Г.П. Жукова и А.Х. Абашидзе.

Геннадий Петрович Жуков 15 лет был вице-президентом Международного института космического права (Париж), а в настоящее время его почетный директор. За вклад в научную разработку проблем международного космического права в 1968 г. награжден золотой медалью и грамотой Международной астронавтической федерации и Международного института космического права.

Профессор Жуков принимал участие во многих международных дипломатических совещаниях и конференциях, в частности сессиях юридического подкомитета Комитета ООН по космосу (1963 и 1979 гг.), Рабочей группы по прямому вещанию с помощью спутников (1970 г.), Специального комитета по Уставу ООН и усилению роли Организации (1975 г.), Конференции ООН по космосу (Вена, 1968 г.). Дипломатической конференции по воздушному праву (1978 г.) и III Конференции по морскому праву (1979 г.).

В 1978-1979 г.г. Г.П. Жуков был избран по конкурсу заместителем Генерального секретаря Международной организа-

ции гражданской авиации (ИКАО) в г. Монреале и одновременно директором юридического управления этой организации.

Г.П. Жуков участвовал во многих международных научных конференциях, читал курсы лекций по международному праву в университетах Австрии, Болгарии, Венгрии, Чехословакии, Канады, Франции, Греции, Польши, Швейцарии, США и Финляндии. В 1978 г. Жуков выступил с курсом лекций в Гаагской академии международного права на тему: "Современные тенденции развития международного космического права", который был опубликован в Сборнике курсов этой академии.

Геннадий Петрович Жуков владеет английским, французским, польским и итальянским языками.

Он автор более 300 работ, опубликованных в нашей стране и за рубежом.

Его основные монографии: "В интересах Японии - нейтралитет" (М., 1961), "Варшавский Договор и вопросы международной безопасности" (М., 1961), "Критика естественно-правовых теорий международного права" (М., 1961), "Космическое право" (М., 1966), "International Space Law" (N.Y., 1984; совместно с Ю.М. Колосовым), "Космос и мир" (М., 1981), "Международно-правовые проблемы разоружения на современном этапе" (М., 1975); "Словарь международного космического права" (в соавторстве) (М., 1992); "L'adaptation du droit de l'espace ? ses nouveaux d?fis" (в соавторстве) (Paris, 2007); "Международное космическое право и вызовы XXI столетия. К 50-летию полета Юрия Гагарина в космос" (М: РУДН, 2011); глава "Evgeny Aleksandrovich Korovin (12.10.1892-3.11.1964)" (в соавт.) в книге "Pioneers of Space Law" (Leiden: Brill, 2013).

Основные учебники: две главы для "Курса международного права" (1963) - глава IV "Принцип уважения прав человека" (т. II) и глава VIII "Космическое право" (т. III); "Международное космическое право" (в соавторстве) (М., 1999 г.); главы "Международное космическое право" в учебнике "Международное право/ред. Е.Т. Усенко" (М., 2003), "Международное право: Особенная часть / Отв. Ред. А.Х. Абашидзе, Е.М. Абайдельдинов" (М. 2013) и др.

Г.П. Жуков - соавтор цикла коллективных исследований, посвященных ООН, в числе которых: "ООН и актуальные международные проблемы. К 20-летию ООН" (М., 1965), "ООН. Итоги, тенденции, и перспективы. К 25-летию ООН" (М., 1970), "ООН как инструмент по поддержанию и укреплению мира (Международно-правовые аспекты)" (М., 1985), "ООН и современные международные отношения" (М., 1986).

Профессор Геннадий Петрович Жуков - член московского союза журналистов, член Всемирной Ассоциации международного права (Лондон) и член комитета космического права Ассоциации, член Российской ассоциации международного права, почетный член Астронавтического общества Болгарии, бывший член редакционного совета голландского журнала "Air & Space Law", член диссертационных советов РУДН и ИГП РАН. Под руководством Г.П. Жукова защищено более 40 диссертаций по специальности "Международное право. Европейское право".

6 февраля 2010 г. Геннадию Петровичу присвоено звание Заслуженного юриста Российской Федерации.

Геннадий Петрович Жуков - крупный ученый современности, известный как в России, так и за рубежом. Он обладает острым аналитическим умом, огромными знаниями, живым интересом к проблемам международного права и международного космического права в особенности.

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Геннадия Петровича Жукова с Юбилеем, выражает
благодарность за огромный вклад в юридическую науку
и желает сохранить приподнятое состояние духа,
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Сдано в набор 18.12.2013 г.
Подписано к печати 25.12.2013 г.
Печ. л. 9
Бумага офсетная
Печать офсетная
Формат 60x84 1/16
Тираж 750 экз.

Выходит ежеквартально

Статьи вестника “Конституционное правосудие” публикуются в авторской редакции

Вестник включен в перечень ведущих рецензируемых научных журналов и изданий, в которых должны публиковаться основные научные результаты диссертаций на соискание ученых степеней доктора и кандидата наук

Зарегистрирован коллегией
N 8/22 Министерства юстиции РА
27 февраля 1998 г.