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CHURCH AND STATE AT THE CROSSROADS: CHRISTIAN LEGAL SOCIETY V. MARTINEZ

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INTRODUCTION

One of the recurrent battlegrounds in American constitutional law concerns the vexed relationship between church and state. At an abstract level, the discussion is often cast as a disagreement between those who wish to retain a strong wall of separation between the two and those who think that some accommodation between them better fits the national landscape. To be sure, this account is somewhat overdrawn. The strictest separationist recognizes that some public services must be supplied to private churches, and the most ardent accommodationist recognizes the need to place some limits on the level of interaction between church and state. The disagreements often come over just how all that is to be achieved. These crosscurrents recently came to a head in the bitterly contested decision of *Christian Legal Society v. Martinez*, issued on the last day of the October 2009 term. The decision illustrates both the built-in tension between the Free Exercise and Establishment clauses and the important role that the doctrine of unconstitutional conditions may play in setting the ground rules for state interaction with religious organizations.

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As with many great cases, the facts of CLS were stark in their simplicity. The Christian Legal Society applied for the privileges that Hastings Law School, a public institution, normally affords to all “Registered Student Organizations,” and was turned down because of its unwillingness to admit into its ranks those students who did not share its fundamental commitments, which included a rejection of homosexuality and a strong commitment to sex only within marriage.

CLS held that the Hastings Law School was within its rights to exclude CLS from most of the privileges that it routinely extended to RSOs. Justice Ruth Bader Ginsburg, writing for an uneasy five-member coalition, vindicated Hastings’s position, at least for the moment, on the ground that its exclusion of CLS rested on a permissible “all-comers” policy that required all Hastings RSOs to admit all interested students to their ranks, regardless of any clash in belief or worldview. She insisted that its policy could be rationally defended on the ground that it “encourages tolerance, cooperation, and learning among students.”

She also remanded the case to see if CLS could still pursue its claim that Hastings had used its all-comers policy as a pretext for impermissible viewpoint discrimination. The preservation point will prove knotty on remand, but it will not be examined in any detail here, except to say that no one knows whether an exception to a theory is preserved when the theory itself was never argued.

Justice Ginsburg’s majority decision was accompanied by two uneasy concurrences by Justices John Paul Stevens and Anthony Kennedy, who fretted about the possible implications of this decision. Ginsburg’s decision also provoked a strong dissent from Justice Samuel Alito, who insisted that the record had already shown that the all-comers policy was, in fact, a sham used to conceal Hastings’s animus toward CLS. As so often happens in constitutional law, the level of scrutiny applied to government policies often determines the outcome of the case. Justice Ginsburg ended up where she did because she took a deferential view toward how Hastings ran its law school, on the ground that the case “merely” involved a benefit that the school could, but need not, confer on CLS. Justice Alito ended up on the opposite side because he exercised far higher scrutiny of Hastings’s policy. There is no ironclad resolution to the deference/oversight controversy that works in all cases. But in the instant context, judicial deference had the unfortunate consequence of letting Hastings run roughshod over a weak and defenseless religious organization under its banner of toleration, cooperation, and learning. It was not the Court’s finest hour.

To put the case in context, the Hastings chapter of CLS contains fewer than a dozen students whose distinctive religious views were, and are, out of step with the majority.

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2 CLS, 130 S. Ct. at 2990.
3 “Neither the district court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance. On remand, the Ninth Circuit may consider CLS’s pretext argument if, and to the extent, it is preserved.” Id. at 2995.
4 CLS, 130 S. Ct. at 3001.
of the administration, faculty, and students at Hastings Law School. In early September 2004, CLS applied to become an RSO at Hastings, a California public institution of higher learning that has about 426 students per class. Hastings had long followed a policy that offered recognition and tangible support to all student organizations on a nondiscriminatory basis. These benefits included the use of the Hastings name and logo, the use of its bulletin boards and email systems, funding for activities and travel, and office space on the campus. After a prolonged internal review, however, Hastings refused to certify CLS as an RSO, thereby cutting it off from these benefits, which were routinely afforded to about 60 other RSOs with widely disparate views on legal, political, social, and moral issues. At the time, Hastings based its refusal to register CLS on the ground that key provisions of CLS’s charter conflicted with the school’s nondiscrimination policy, which bars discrimination on grounds of sexual orientation. CLS requires its members and officers to abide by key tenets of the Christian faith and comport themselves to serve CLS’s fundamental mission as followers of Jesus Christ in the law. That commitment, in turn, requires its members and officers to abstain from extramarital sexual relations and bars from membership any person who engages in “unrepentant homosexual conduct.” CLS imposes these restrictions only on membership and governance; its meetings have always been open to all members of the Hastings community. By way of offsetting the effects of its decision to exclude CLS from RSO membership, Hastings was prepared to allow CLS to use its facilities for certain meetings, but refused to go any further. In essence, Hastings preferred a policy of discrimination to one of total exclusion. On September 23, 2004, CLS lawyers sent Hastings a letter demanding full recognition. After a tense exchange of letters between the two sides, this lawsuit followed.

At first look, it appears as though the issue raised in CLS was whether Hastings’s nondiscrimination policy could trump CLS’s claim of associational autonomy. It turns out, however, that the exact articulation of the Hastings policy as it applied to CLS was itself a major source of disagreement. Justice Ginsburg, speaking for the majority, held that the case was, by stipulation, to be examined on the assumption that the all-comers policy held sway. Justice Alito’s dissent insisted that the nondiscrimination policy, as it related to sexual orientation, governed.

In order to analyze CLS, it is necessary to proceed as follows. I first examine which of these two policies controlled Hastings’s rejection of CLS. After these procedural wrangles are sorted out, I next analyze the First Amendment claims for freedom of speech and the

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5 Here was a brief rundown from Justice Alito: During the 2004–2005 school year, Hastings had more than 60 registered groups, including political groups (e.g., the Hastings Democratic Caucus and the Hastings Republicans), religious groups (e.g., the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students), groups that promote social causes (e.g., both pro-choice and pro-life groups), groups organized around racial or ethnic identity (e.g., the Black Law Students Association, the Korean American Law Society, La Raza Law Students Association, and the Middle Eastern Law Students Association), and groups that focus on gender or sexuality (e.g., the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings). Id. at 3001–02.

6 Id. at 2974.
free exercise of religion under both the more focused anti-discrimination policy and the broader all-comers policy. That inquiry proceeds in two stages. Its first part asks how these policies would fare under the First Amendment if the government had by direct regulation imposed them on all groups in society. That novel approach, of course, did not happen here, as all the disputed regulations and policies applied only to students who were selected for admission into Hastings Law School. Accordingly, the second portion of that analysis invokes the doctrine of unconstitutional conditions to see how that fact changes the overall analysis.\(^7\) Under that doctrine, the government does not have a free hand when it decides to confer licenses, benefits, or privileges on various groups. To be sure, it must be allowed to attach some conditions on its various dispensations of power, given the budget constraints under which all such organizations necessarily labor. But while some conditions are acceptable, others are not. No state, for example, can allow a foreign corporation to do business within its boundaries on condition that it abandons all access to federal courts.\(^8\) A state also may not condition private entry to a public highway on its willingness to waive its First Amendment right to freedom of speech or its Fourth Amendment right to be free from unreasonable searches and seizures.\(^9\) Yet, by the same token, the state can condition private entry on the willingness of drivers to abide by the appropriate traffic rules and to litigate accidents on the highways in state court.\(^10\)

The situation at Hastings is, of course, not exactly on all fours with the highway cases, given that the state must use the school for its own educational purposes. To capture the differences between the highway and the campus, the analysis must further consider the way in which the doctrine of unconstitutional conditions applies to what is commonly termed a “limited public forum,” a category into which the Court explicitly placed Hastings.\(^11\) These locations, as their name suggests, lie somewhere between the private and public poles. Finally, I explore some of the ramifications of CLS for other recent and ongoing controversies relating to religion, speech, and sex discrimination.

My conclusions are as follows: First, Justice Ginsburg was wrong to assume that the all-comers policy governed this case by stipulation. Second, she understated the level of protection that intimate private associations, of which CLS is one, receive from direct government regulation. Third, by ignoring the unconstitutional conditions doctrine, she allowed Hastings far too much discretion in how it treated its student organizations. More specific-

\(^7\) For my systematic analysis of the doctrine, see Richard A. Epstein, Bargaining with the State 5 (1993) (“Stated in its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly coerce, pressure, or induce the waiver of that person’s constitutional rights.”).
\(^8\) Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922) (noting that a state cannot require a foreign corporation to waive its access to federal courts in diversity cases as a condition for doing business within the state).
\(^9\) See, e.g., Frost & Frost Trucking Co. v. R.R. Comm’n, 271 U.S. 583 (1926). This point is discussed at length in Epstein, supra note 7, at 162–70.
\(^10\) Opinion of the Justices, 147 N.E. 681 (Mass. 1925).
\(^11\) See, for the definition, Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 44–45 (1983) (stating that a limited public forum lies somewhere between a government building dedicated to private purposes only and the public roads).
cally, she drew all the wrong implications from her correct classification of Hastings as a limited public forum. That classification allows the state to make policy choices, governed by a rational basis standard of review, in running its organizations. But to the extent that its nonessential facilities – such as after-hours use of classrooms – are used by students, its power to exclude or discriminate remains as restricted as it is in any open public forum. Justice Ginsburg wrongly concluded that Hastings should, by its all-comers policy, treat all student groups as de facto common carriers. The correct analysis runs in precisely the opposite direction: Hastings itself functions as a limited common carrier that must admit into its ranks all groups regardless of their substantive positions. The net effect of these mistakes is to legitimate intolerance against small and isolated religious groups – an error that has had, and will continue to have, negative consequences on key issues dealing with the treatment of speech and religion under a wide range of anti-discrimination norms.

I. FINDING THE RELEVANT HASTINGS POLICY

Many First Amendment challenges to government policies or rules often turn on a distinction between those policies that single out or target certain religious or speech practices for special sanction, and those that apply a general and neutral condition to those same practices. The rationale behind that distinction is clear enough. Those policies that single out certain parties for their speech or religious activities carry within them greater peril to their interests in individual and institutional autonomy. The application of general policies poses less of a threat in that regard, at least in theory, because the only way that the state can attack the religious or speech activities of one group is to impose similar limitations on all others. The group whose freedom of speech or religion may well be impaired thus has natural allies whose influence on the political process can easily counteract the political or legal isolation of the religious group in question. No one, in principle, could ever deny that a general nondiscrimination norm is an important form of protection for what are commonly called “discrete and insular minorities.”

It is, therefore, of some importance that the initial dispute in CLS depended on the articulation of the policy that applied to the case. The district court affirmed Hastings’s decision to limit CLS’s access to the law school’s facilities under the nondiscrimination policy, which reads in full as follows:

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[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings’s] policy on nondiscrimination is to comply fully with applicable law.

[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.  

In the view of the district court, this policy counted as both “neutral” and “reasonable” because it “requires that student groups be open to all interested students, without discrimination on the basis of any protected status.” That argument did not deny that the policy applied to religious organizations. Rather, it held that this generalized prohibition was insulated from a First Amendment challenge that treated the policy as a burden on an “expressive association,” that is, one devoted to the advance of certain personal and moral beliefs, in contradistinction to business or commercial ends. In effect, its position was that the general nondiscrimination policy should be regarded as neutral and reasonable because it was not directed solely toward religious groups. Every student organization at Hastings had to meet these conditions in order to gain access to the listed facilities and treatment. At this point, it looks as if the question is whether, under the First Amendment, disparate treatment of religious groups is required or whether it suffices that the disparate impact of the rule hits religious groups far harder than anyone else.

On the record, moreover, there is little doubt that this nondiscrimination policy governed the negotiations between Hastings and CLS from September 2004 to May 2005, when all its applications to stage events and use facilities were either ignored or rejected by the Hastings administration. The definition of neutrality during these tense discussions was that the anti-discrimination norm that applied to CLS was that which applied to all other organizations. Under that policy, Hastings admitted that its nondiscrimination policy “permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.”

Up to this point, there is no mention of a different general policy, the more inclusive all-comers rule. The first mention of this policy was in the deposition of Mary Kay Kane, then the Hastings dean, who stated: “It is my view that in order to be a registered student organization you have to allow all of our students to be members and full participants if

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14 CLS, 130 S. Ct. at 2979.
16 See CLS, 130 S. Ct. at 3002 (noting that Hastings’s director of student services, Judy Hansen Chapman, relied on that policy in correspondence with CLS).
17 Id. at 3003.
they want to.” There was, of course, no all-comers policy on the books comparable to that of the nondiscrimination policy. None had been debated, discussed, or approved by the faculty.

The new all-comers policy was first advanced as an extemporized gloss on the official nondiscrimination policy, from which, as Justice Alito points out, it plainly differed. The nondiscrimination policy identifies, in the fashion of the Civil Rights Acts, an explicit set of grounds on which it is forbidden to discriminate. The all-comers policy requires all individuals to be admitted into all groups. Any grounds for discrimination, not just those listed in the nondiscrimination policy, are off-limits. The effect of this policy is to treat all voluntary organizations under the Hastings umbrella as common carriers, required to take all traffic on equal terms. Indeed, as drafted, the duty to serve is still broader than that because it does not make way even for the traditional “for cause” reasons that allow common carriers to refuse service: the unwillingness of customers to follow the rules of the organization, to pay dues, or to behave in an orderly manner. In addition, the nondiscrimination policy is capable of universal application within Hastings, which is why it covers both admissions and hiring, for all its actions can refuse to take into account certain student traits. But the all-comers policy plainly cannot be universal: even if it is possible (although unwise) to admit all registered students into all Hastings RSOs, it is just not possible to hire all applicants to the faculty or to admit all applicants into the student body under that kind of rule. The only context in which that rule can work at all is after the hiring or admissions process is over, so that the privileges are extended only to the limited group of individuals that have been chosen under an overtly exclusionary regime.

The all-comers policy is not mentioned once in the long district court opinion, which stressed only the generality of the nondiscrimination policy that it upheld. The all-comers policy makes its official debut in a cryptic Ninth Circuit decision affirming the result below, which in its entirety reads:

The parties stipulate that Hastings imposes an open membership rule on all student groups – all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable.

The key stipulation that was mentioned in the Ninth Circuit opinion reads as follows:

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18 Id.
19 For an early discussion of common carrier obligations, see H. W. Chaplin, Limitations upon the Right of Withdrawal from Public Employment, 16 Harv. L. Rev. 555, 556–57 (1903).
20 319 Fed. Appx. 645, 646 (9th Cir. 2009). The opinion cited Truth v. Kent Sch. Dist., 542 F.3d 634, 649–50 (9th Cir. 2008), which dealt only with the refusal to certify a high school Christian organization under the school’s nondiscrimination policy. No all-comers policy was mentioned in that case.
Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.\(^{21}\)

Justice Ginsburg held that that stipulation necessarily insulated the underlying factual record from playing any role in the case.\(^{22}\) Consistent with her aggressive policy of procedural preclusions, she did not discuss these principles, even though the Hastings officials that handled the matter acted under the written nondiscrimination policy. In her view, the word “any” (which she duly italicized) limited the scope of the litigation so that the written nondiscrimination policy no longer mattered. The greater scope of the reformulated rule could only strengthen the generality and neutrality of the rule, which in turn increases its ability to survive a constitutional attack relating either to speech or to free exercise.

The impressive weight that Justice Ginsburg attaches to the stipulation is questionable in light of the surrounding circumstances. The stipulation is written in the timeless present tense; the key verb is “requires.” That stipulation did not, in so many words, say that Hastings “required” – past tense – all organizations to follow the all-comers policy at the time the critical decisions were made about CLS, before the all-comers policy had been formulated. Nor does the stipulation say that the actual decision in this case had been made pursuant to this all-comers policy, when clearly that was not possible. In addition, the statement does not take into account the wrinkle that this policy did not quite mean what it said. At the Supreme Court level, the implicit for-cause limitations available to common carriers to refuse service were built back into the record (saying that the policy “does not foreclose neutral and generally applicable membership requirements unrelated to “status or beliefs”),\(^{23}\) presumably to take into account the usual grounds that allow common carriers to refuse service. Finally, the stipulation clashes with the position that Hastings took in the answer to the complaint, by insisting that Hastings had no all-comers policy in place, but rather permitted “political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.”\(^{24}\) On issues of this importance, it seems most unwise to truncate the substantive examination by a stipulation that could be read more narrowly in ways that are more consistent with the record. Both versions of the policy raise real questions of principle, and it is to those issues that I now turn.

\(^{21}\) CLS, 130 S. Ct. at 2982 (emphasis in original).
\(^{22}\) Id. at 2982–84.
\(^{23}\) Id. at 2980 n.2.
\(^{24}\) Id. at 3003.
II. GOVERNMENT REGULATION OF ASSOCIATIONAL FREEDOM

One fundamental distinction that runs through all areas of constitutional law concerns the government’s role as regulator on the one hand and manager on the other. Traditionally, most constitutional doctrine asks what restrictions the government-as-regulator can impose on the private conduct of individuals undertaken on their own property and with their own resources when engaged in certain forms of protected conduct – in this instance, involving a cross between speech and religion. The level of protection that these activities receive against government intrusion is normally quite high in these two contexts because the Supreme Court prizes the interests in question.

That basic attitude does not, of course, translate into an absolutist position, even in pure regulation cases. The laws against incitement to riot, fraud, defamation, industrial espionage, and conspiracy to kill people or fix prices remain in place, as does the law that prohibits human sacrifice and pollution in the name of religious liberty. This article is no place to examine each of these areas in detail, but it is important to note one key thread in the analysis. This emphasis on force, fraud, and monopoly lines up well with the standard classical liberal justifications for overriding private choice. As such, the model of limited government prevails, which puts the jurisprudence on the First Amendment in obvious tension with the judicial attitudes that are taken toward the protections of property and contract, for which the Supreme Court offers far more limited protection from direct government regulation.

The point where the small-government approach to freedom of speech and religion receives perhaps its greatest pressure is with freedom of association. As an initial matter, associational freedom has received strong protection in a wide variety of contexts. The famous decision in *NAACP v. Alabama* allowed the NAACP to keep its membership records from the prying eyes of Alabama’s attorney general.25 In a similar fashion, it is clearly beyond argument that the free exercise of religion allows people not only to think and pray as they choose but also to associate through churches and other organizations in pursuit of their common ends. In recent times, one great counterweight to these associational freedoms has been the ever more popular anti-discrimination laws dealing with race, sex, age, disability, and, of course, sexual orientation. There is no question that common carriers were long subject to take-all-comers rules that prohibited them from engaging in certain forms of invidious discrimination in dealing with their customers. Yet, by the same token, the common-law rule always allowed those firms that did not have common carrier status, and the monopoly power that went along with it, to choose their trading partners free from these restraints.26 The same is

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true of antitrust law, a central tenet of which is that one competitor ordinarily may refuse to deal with another for any reason at all. The only exceptions are the few cases of “essential facilities” that give one competitor a monopoly position vis-à-vis the other. The scope of the all-comers doctrine is, therefore, limited. Freedom of association and contract are the norm for market firms as well as private clubs and churches.

The modern anti-discrimination laws are in many ways patterned on the earlier rules applicable to common carriers. However, their application is not limited to common carriers, but extends to cover all sorts of public accommodations that exercise no hint or whisper of monopoly power. These rules necessarily interfere with the rights of freedom of association because they truncate the right not to associate, which Justice Ginsburg, in line with conventional theory, recognizes as part of the basic right. In dealing with the clash between these associational rights and the general anti-discrimination law, Justice Ginsburg notes the level of “close scrutiny” that is applied to these regulations. In dealing with these points, she cites two cases to which she gives but passing attention: Roberts v. United States Jaycees and Boy Scouts of America v. Dale. She then quickly sidesteps their implications by noting that both are cases where the states applied an anti-discrimination law “that compelled a group to include unwanted members, with no choice to opt out.”

For the moment, it is best to treat Roberts and Dale on their own terms to see how anti-discrimination laws in general fare against challenges based on freedom of association. Once that is done, we can turn to the distinction between compulsion and benefits that drives her opinion. In dealing with the regulation of private organizations, the Court has stuck with the three-part classification that it announced in Roberts: economic associations, expressive associations, and intimate associations. For economic activities, the modern synthesis recognizes, without question, the dominance of the antidiscrimination laws over any claim of freedom of association. That position is inconsistent with the classical liberal view, which treats the principle of freedom of association (subject to the limitations already noted) as paramount in all areas of life. Put otherwise, any anti-discrimination law that undermines the preservation of a competitive economic system falls outside the scope of the state’s traditional police powers.

For these purposes, however, this claim has been put to rest, but in ways that leave untouched the analysis of the two forms of associational freedoms outside the economic

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30 CLS, 130 S. Ct. at 2984–85.
31 Id. at 2985.
34 CLS, 130 S. Ct. at 2975.
arena – globally expressive, and deeply intimate. Roberts gives the highest value to the intensely personal arrangements involved with CLS, matters that go to the core of individual identity. Justice Brennan’s decision intimates quite clearly that the anti-discrimination law could not apply to those situations because “the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”

The question that matters is where to draw the line. Justice Brennan had no hesitation about putting family relationships on the intimate side of the line and those of large commercial enterprises on the other. But he also had little hesitation in allowing Minnesota’s public accommodation law37 to apply to the Jaycees, a broad-based service organization that does not exhibit the social cohesion and moral commitment to its mission that define groups like CLS.38 Yet he said nothing about the large terrain that exists between the Jaycees and the family unit, leaving that issue for another day.

A classical liberal theory of freedom of association does not have to decide which type of associations matter or why. It is enough that all of these associations generate gains from cooperation for their members – gains that, outside the common carrier setting, are likely to be systematically larger than losses to excluded parties who are able to form or join other organizations on grounds of mutual consent. But the modern tripartite synthesis requires some theory to delineate between noncommercial operations like the Jaycees and intimate operations by the family, and to make that line clear enough to sort out the interim cases. Justice Brennan sought to supply this theory by noting that subjective values count for much more in intimate settings than in larger, all-purpose organizations lacking such focused beliefs.

The question of whether to draw the line was still unanswered. When it came up to the Supreme Court in Dale, the side of protected, “intimate” organizations was drawn more broadly than Justice Brennan was likely to accept. The precise question in the case was this: do the Boy Scouts, who have certain definite moral principles that they impose on their broad membership, merit protection as an intimate, expressive organization that falls on the other side of the line from Roberts?39 The line-drawing problem does not have an easy solution. The New Jersey Supreme Court had rejected the Boy Scouts’ claim of intimate association because its “large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not “sufficiently personal or private to warrant constitutional protection” under the freedom of intimate association.”40 The New Jersey Supreme Court

36 Roberts, 468 U.S. at 617–18.
38 Roberts, 468 U.S. at 621–23.
also held that “the reinstatement of Dale does not compel the Boy Scouts to express any message.”\(^{41}\)

The first claim is plausible; the second is wishful thinking. In the Establishment Clause area, the Supreme Court – especially its liberal members – has been quick to find that any involvement of the state in the activities of religious organizations counts as an endorsement of their views.\(^{42}\) In this context, it is not just a matter of false appearances. It is an explicit requirement of forced membership by openly gay individuals in key positions within the Boy Scouts. Of course, that appearance conveys the message that the Boy Scouts approve of homosexual conduct, when they do not. What an organization says depends on the people to whom it chooses to say it. So a deeply divided Supreme Court, through Chief Justice William Rehnquist, took the Boy Scouts at their word and allowed them to resist the application of New Jersey’s Law Against Discrimination, a result with which I agree.\(^{43}\) The Court emphatically and repeatedly stated that the evaluation of the group’s goals and purposes necessarily resided with the group itself, and it refused to reject that position, pointing to the internal divisions within the group’s ranks that led, from time to time, to deviations in practice from its core principles.\(^{44}\) More concretely, the Court treated the Boy Scouts’ mission statement as unassailable proof of its core beliefs.\(^{45}\) Nor was the Boy Scouts’ right of intimate association lost because the Boy Scouts had declined to include any explicit references to its opposition to homosexual activity in its handbook.

Judged by this metric, CLS is a far easier case for freedom of association than was Dale. The CLS chapter at Hastings is small and cohesive. It has no ambiguity about its meaning or purposes. It is a charter member of the class of intimate associations that every justice who participated in the Roberts decision placed beyond the pale of the anti-discrimination laws. In the context of direct regulation, at least, CLS enjoys strong protection of its associational, speech, and religious interests as intimate expression associations.

The next question, then, is what kinds of restrictions might pass muster? The obvious case is any effort to single out religious beliefs for extra scrutiny. But I have no doubt that if the government imposed an all-comers statute on all organizations, it would be struck down. The only question is how. The enormity of the rule would leave every organization in the United States in an untenable position because it could not take refuge behind an admission-and-hiring system that independently limits the scope of that all-comers obliga-

\(^{41}\) Dale, 734 A.2d at 1229 (quoted in Dale, 530 U.S. at 647).


\(^{44}\) Dale, 530 U.S. at 648–49.

\(^{45}\) Id. at 649.
tion. Businesses would have to hire without limit, or take people on a first-come, first-served basis. All sorts of voluntary associations would find themselves stuffed to the gills. The rate-making implementation of this mad proposal alone would be sufficient to doom it to perdition. Does any court want to decide the rates at which unwelcome applicants can join the organizations whose members don’t want them? This system works with common carriers because of their monopoly position, their clear capacity restraints, their ability to set rates, and the simple fact that passengers are, generally, pretty fungible. Queuing is tolerable for all sorts of common carriers, at least when price can shorten the queue to match capacity. No one hires employees or forms partnerships this way. Quite literally, this unheard-of rule could never pass in a legislature because it would produce no net winners.

But do this mental experiment: suppose that some adventurous legislature passed a universal all-comers statute for all firms. Manifestly, the courts would strike it down in toto, which in turn would allow all religious organizations to tuck themselves into the lee of all the business organizations that would lead the general charge against this rule. But what happens next with a rule that knocks out some selective grounds for refusing to associate, as is done with the civil rights laws? There is no question that this type of regime is far more sustainable because it negates only a few possible reasons for not hiring without creating a free-for-all. But the question of which grounds are appropriate for which organizations is troublesome. That said, no court in the land would say to a church or other religious organization, “You may keep out rich people or poor, but you cannot keep out those people who detest your faith and are determined to overthrow it.” The organization is allowed to have its viewpoint determine its membership under the Roberts formulation. An organization can discriminate on the basis of status, on the basis of belief, on the basis of neither, or on the basis of both. But this is a case where the anti-discrimination norm comes out second best.

III. FROM COERCION IMPOSED TO BENEFIT DENIED

A. The Right/Privilege Distinction

We thus come up with the situation where a religious organization is protected against compelled membership that might be ordered under either the all-comers policy or the selective admission standard. The critical transitional question is what happens when we move from the government-as-regulator to the government-as-owner of certain forms of property? It is a fair reading of Justice Ginsburg’s opinion in CLS that the sole ground that distinguishes Dale turns on the mode of state involvement. In a critical passage, she notes that Hastings does not impose any positive restrictions on what CLS can do off campus with
its own resources, but only indicates that it has to accept reasonable conditions in order to be eligible for the benefits that Hastings metes out to the various registered student organizations. In essence, the denial of the privilege should not be regarded as compulsion, so that the special protection for intimate associations recognized in Roberts and Dale is simply beside the point under this mocked up version of the long-discredited right/privilege distinction. In Commonwealth v. Davis, then-Massachusetts Supreme Court Justice Oliver Wendell Holmes put the issue as follows:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses.\(^{46}\)

When the case got to the U.S. Supreme Court, Justice Edward White gave it a slightly different version that put the distinction in terms of the greater/lesser power: “The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”\(^{47}\) This version of the doctrine did not survive. Indeed, in 1939, that view was decisively repudiated in Hague v. CIO, which held that the government ownership of the streets did not preclude their use as a public forum.\(^{48}\) That theme was endorsed in the academic literature as well. For example, whatever was left of the older right/privilege distinction was the object of a well-known 1968 attack by William Van Alstyne, who observed that “[i]f this view were uniformly applied, the devastating effect it would have on any constitutional claims within the public sector can be readily perceived.”\(^{49}\)

Ironically, in CLS, Justice Ginsburg writes as if none of these developments had taken place when she holds that CLS has no constitutional claims against Hastings, a public institution, when it merely refuses to supply this packet of benefits to CLS. Thus, suppose in this case that Hastings Law School did not admit any students into its entering class who refused to accept all the tenets of the school’s nondiscrimination policy, or to sign on to an oath to that effect. Does anyone think that this refusal to admit members of CLS into the law school would be acceptable?

\(^{46}\) Commonwealth v. Davis, 39 N.E. 113, 113 (1895).

\(^{47}\) Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

\(^{48}\) Hague v. CIO, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

B. Open Public Forums

So the next question asks how the unmentioned doctrine of unconstitutional conditions ties into the decision of Hastings to deny CLS most of the benefits routinely conferred on other RSOs. In order to answer that question, Justice Ginsburg quickly motored past Roberts to evaluate the CLS claim in connection with the doctrine of a limited public forum that lies, as noted earlier, midway between the public square and the use of Hastings facilities for its core missions of teaching and research. It is here that Justice Ginsburg’s argument falls apart, whether we consider the case under the rubric of either the nondiscrimination policy or the all-comers approach.

To see why, start with actions on the public square. The state must be able to stop some speech in some cases, but it could not restrict access to public forums on either of the two policies in play in CLS. To do so on the strength of the nondiscrimination policy would count as a form of viewpoint discrimination that prefers groups with some positions over groups that hold other positions. Instead, these highway cases adopt an all-comers policy, which, in this instance, imposes a duty to take all comers subject to time, place, and manner that are neutral in both form and effect. One position that is manifestly precluded by this approach is the insistence that the users of the public forum adopt take-all-comers policies similar to those that Hastings imposed. Just imagine a similar requirement that all vehicles that use the public highways take all comers, even if they do not choose to act as a common carrier.

This issue made it to the Supreme Court in Hurley v. Irish-American Gay, Lesbian and Bisexual Group, which held that the South Boston Allied War Veterans Council did not have to admit into its St. Patrick’s Day parade a gay, lesbian, and bisexual (GLIB) group that sought to march as a separate contingent under its own banner as part of the council’s larger St. Patrick’s Day celebration.\(^{50}\) The Supreme Court held that the private organization’s First Amendment associational and expressive rights trumped a Massachusetts statute that banned discrimination on account of sexual orientation.\(^{51}\) This issue was somewhat clouded because the Court also held that the anti-discrimination law applied to the extent that it permitted individual members of GLIB to join the float so long as they did not march under their GLIB banner or profess their own views. Still, that concession to the anti-discrimination laws is of no relevance here because it applies only to nonexpressive activities. Indeed, CLS was prepared to go further than this exception required, by its willingness to let any nonmember attend its meetings and say whatever he or she liked. But the essential point remains: state ownership over the roads does not add to the power of Massachusetts to tell the Veterans Council how to select its members and project its own message. Needless to say, the usual time, place, and manner restrictions


allow the state to control for nuisance-like behavior, just as it can with activities on private property.\textsuperscript{52}

In an open public forum, therefore, the state cannot impose either a nondiscrimination policy or an all-comers policy on private associations for matters that pertain to speech and religion. The state has to act as the common carrier. It cannot force the veterans to project messages with which they disagree. Whatever the rule in pure economic relationships, the principle of freedom of association keeps the state from using its monopoly power over the highway to run roughshod over the Veterans Council. Indeed, it is possible that it could not impose its all-comers policy even in economic affairs. Thus, it is doubtful that even standards of minimal constitutional rationality are met by a rule that requires IBM or any other corporation to hire all job applicants because the company makes use of public roads from which it could, in principle, be excluded. In some instances, the generality of a rule protects it from constitutional invalidation, simply because everyone is made worse off. But in this case, its perverse consequences are manifest whether it applies to one company or a hundred.

It takes little ingenuity to see that these general considerations carry over to religion and speech. No one could be told that he is only allowed to enter the public highways if he will provide transportation to members of rival religious groups on the same terms and conditions that he supplies it to members of his own group. And it would not reduce the sting in the slightest if this requirement were at the same time imposed on bridge club members to the benefit of chess club members. The all-comers policy and the nondiscrimination policy, which do not work as forms of direct regulation, do not work when transformed into conditions for entry onto public roads.

C. Limited Public Forums

The next step in the argument is to determine whether the rules that apply to a open public forum like the roads could carry over to a limited public forum like Hastings Law School. Justice Ginsburg takes the position that it cannot, saying that “this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition.”\textsuperscript{53} Clearly, there are obvious distinctions between open and limited public forums.

Unfortunately, Justice Ginsburg turns the analysis upside down when she seeks to account for that difference. Her key mistake is to argue that the limited nature of the public

\hspace{1em}\textsuperscript{52} See, e.g. Ward v. Rock Against Racism, 491 U.S. 781 (1989) (allowing “narrowly tailored” regulations to deal with noise and other time, place, and manner issues).

\hspace{1em}\textsuperscript{53} CLS, 130 S. Ct. at 2986.
forum necessarily alters the calculus under both the nondiscrimination policy and the all-comers policy from how it comes out on the public highway. She is right that the change of place matters, but it still must be understood what those differences are. Initially, no one would care to deny that Hastings University need not follow the all-comers policy that it wishes to impose on CLS in deciding which applicants to admit. Nor does it have to take people in on a first-come, first-served basis until its class is filled. Nor is it required to sell places in its class to the highest bidder. The ability for Hastings to function as a law school depends, of course, on its power to exclude – and on its power to admit. Even though it is a government agency, it has to receive a fair measure of management discretion to run its essential programs. Justice Stevens sounds the same theme when he writes, “It is critical, in evaluating CLS’s challenge to the nondiscrimination policy, to keep in mind that an RSO program is a limited forum – the boundaries of which may be delimited by the proprietor.”

Once Justices Ginsburg and Stevens treat Hastings as a limited public forum, they have two tasks: First, they must identify situations in which Hastings can exercise its ordinary right to exclude like a private owner. Second, they must also identify the public forum aspects of its operations in which it functions like the proprietor of a public forum lacking that right to exclude, because otherwise a limited public forum just becomes a form of government-run private property. On the former point, Hastings clearly does not have complete power to hire faculty and admit students for whatever reason it sees fit. The Equal Protection Clause, for example, prevents the school from refusing to admit students into the law school on the grounds of race or sex. I have no doubt that it would also prevent Hastings from adopting a policy that excluded members of CLS because of their religious beliefs. The clear implication is that some neutral criteria of academic excellence, fitness to study law, and ability to pay tuition are part of that mix.

Justice Ginsburg makes a modest concession to Justice Alito when she concedes that Hastings would be on thin constitutional ice if the State of California tried to “demand that all Christian groups admit members who believe that Jesus was merely human.” But the CLS chapter that brought this lawsuit does not want to be just a Christian group; it aspires to be a recognized student organization. The Hastings College of Law is not a legislature. And no state actor has demanded that anyone do anything outside the confines of a discrete, voluntary academic program.

There is a certain irony in drawing a distinction between a legislature and a school, for that distinction could have been used in *United States v. Virginia* to spare the Virginia Military Institute from an order to admit women, which Justice Ginsburg imposed. The point, of course, is that institutions that manage complex programs need more discretion than legislatures, and that it is somewhat odd to require a school to admit women under the

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54 Id. at 2997 (emphasis in original).
55 Id. (internal citation omitted).
Equal Protection Clause, only to recognize that, once admitted, they must receive, in practice, separate treatment on a wide number of issues. Make no mistake about it, compared to CLS, the level of intrusion was far greater in Virginia, where Justice Ginsburg required (but did not find) an “exceedingly persuasive justification” for the exclusion of women from VMI.\(^\text{57}\) CLS makes, at most, modest demands on Hastings for routine services. At VMI, an educational program had to be revamped from top to bottom. At Hastings, there is merely a need to create a new email portal.

The importance of getting the boundaries right is clear. Initially, CLS cannot demand that Hastings construct its academic program in line with its own beliefs. But in this case, none of its demands concern anything other than how the various facilities of Hastings should be allocated when they are not dedicated to the school’s educational mission. This problem comes all the time in connection with high schools and universities where the rule is that religious groups cannot be excluded from the use of facilities outside the regular academic program so long as other groups within the institution are allowed to use the facilities.\(^\text{58}\)

Here are some of the relevant precedents:

In *Rosenberger v. Rector and Visitors of the University of Virginia*, the University of Virginia was not obligated to fund any student publications.\(^\text{59}\) But it could not refuse to cover the printing costs of an explicitly Christian publication if it were prepared to fund printing costs for other campus publications dealing with similar religious and social issues. To the extent that the university was not engaged in its distinctive academic mission, it had to treat all groups in the same fashion, without discrimination.

Similarly, in *Widmar v. Vincent*, the Court overturned a decision of the University of Missouri at Kansas City to deny religious groups access to its facilities after hours when it held those same facilities open to nonreligious groups.\(^\text{60}\) There seems to be no meaningful distinction between the cases. Interestingly enough, the Court rejected the view that this restriction was needed to promote a greater separation of church and state. As a common carrier, it had to be impartial with respect to the ends of its constituent organizations, and thus was under a duty not to “inhibit” the advancement of religion.\(^\text{61}\) There is no reason to think that the adoption of any self-serving nondiscrimination policy would have altered the outcome.

Finally, in *Lamb’s Chapel v. Center Moriches Union Free School District*, the same basic principles prevented the Central Moriches school district from refusing to let Lamb’s Chapel

\(^{57}\) Id. at 524.

\(^{58}\) DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999) (“The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker’s viewpoint.”).

\(^{59}\) Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).


use its facilities after hours to run a religiously oriented film series that stressed the importance of family values.\textsuperscript{62} As a limited public forum, the district did not need to allow any group to use its facilities after hours. But once the district opened its doors to some outside organizations, it could not discriminate against others. Thus, the Court held, first, that the equal access policy to this limited public forum did not create an establishment of religion and, second, that the district’s rules impermissibly authorized viewpoint discrimination that cut against Lamb’s Chapel. The articulation of formal regulations here did not save the policy.

As these cases indicate, Hastings is properly treated as a limited public forum to which common carrier obligations \textit{do} attach so long as it is \textit{not} engaged in its essential academic mission. Put otherwise, the classrooms and the bulletin boards, when used after hours, function as a public square limited to all Hastings students. These internal public features of Hastings Law School are like the public roads in \textit{Hurley} or the public classrooms in \textit{Lamb’s Chapel}. Thus, if other student groups could use, for a fixed fee, the Hastings auditorium to run a meeting on a Sunday afternoon, so too could CLS, even though outsiders to the Hastings community could be excluded. Hastings is the common carrier that has to take all comers, not CLS.

It is not availing in this context, moreover, to change the example by stating that parity is restored if the auditorium is open only to those student groups that satisfy an all-comers policy, which CLS does not. At this point, the question should be whether there is any reasonable basis to exclude those groups that fail to sign the all-comers policy, which has only been used against common carriers and never against ordinary associational groups. Hastings bears at least some burden to explain why it adopts, in such a haphazard manner, a policy that is never used anywhere else. If it states that the reason is to prevent organizations like CLS from using facilities because they discriminate on grounds of sexual orientation, the all-comers policy becomes a pretext for a much more focused discriminatory activity that runs headlong into the conventional First Amendment prohibition against viewpoint discrimination in the distribution of university funds.\textsuperscript{63} But if it denies that explanation, what other reason does it have for imposing this restriction, knowing that it has a disparate impact on isolated groups like CLS?

There is, of course, a tradition that indicates that neutral rules that limit speech are valid so long as they do so without regard to the beliefs of that organization. “Incidental” – I hate that word – burdens get little traction in First Amendment cases. In the best-known case of this sort, \textit{United States v. O’Brien}, the Supreme Court held that the United States could punish people for burning draft cards to protest the Vietnam War. Its need to preserve the integrity of the Selective Service System was said to be “unrelated to the suppression of free expression.”\textsuperscript{64}

\textsuperscript{63} See, e.g., Rosenberger, 515 U.S. at 819.
\textsuperscript{64} United States v. O’Brien, 391 U.S. 367, 377 (1968).
O’Brien is an unpersuasive decision for two reasons. First, the burning of the draft card was known by everyone to be symbolic speech of the sort that is strongly protected. Second, the purported state interest in administrative order can be easily satisfied in so many other ways. Burning the card does not remove the registrant from the system. The simple requirement that the protestor keep a copy of the original card should allow for ready identification of the individual if necessary. The powerful expressive element is overwhelmed by the obvious fixes to the administrative problems. The case rationale is flimsy and utterly unworthy of extension. When the decision came down it was subject to widespread criticism that remains valid today.65

Yet, let it be supposed that O’Brien is correct. The United States at least offered what the Court regarded as sufficient reasons for imposing criminal sanctions on draft card burners. By parity of reasoning, the United States should have to offer similar justifications to criminalize private religious organizations that meet and pray on private property, or even to impose on them duties not to discriminate, subject to civil sanctions. But it can do neither so long as Roberts and Dale remain the law. It is, therefore, one thing for the state to refuse to supply benefits to people who burn draft cards, given that their actions are criminal. It is quite another to refuse to supply benefits to CLS, given that its underlying actions receive the highest level of constitutional protection. There is quite simply no parallel between criminal and fully protected conduct. In other words, if the twin rationales of toleration and cooperation cannot justify imposing the nondiscrimination norm on private parties on their own premises, it does not justify imposing that norm when they enter a limited public forum. To do otherwise is to revive the discredited privilege/right distinction.

There is a second confusion with Justice Ginsburg’s argument, when taken on its own terms. Her stated justification for the all-comers policy and the nondiscrimination policy is the desire to advance toleration and cooperation that students will need in some larger environment.66 But she fundamentally misconstrues the social meaning of both terms. The term “toleration” in religious affairs has a precise meaning: individuals “tolerate” the right of other people to practice a religion with which they profoundly disagree. The historical account here always stressed the position that mutual noninterference is the only way in which people of different faiths can get along. My dictionary puts the point as follows: “Toleration: The recognition of the rights of the individual to his own opinions and customs, as in matters pertaining to religious worship, when they do not interfere with the rights of others or with decency and order.”67

That definition, stressing negative liberties, is consistent with the historical record. In speaking about toleration, John Locke wrote: “It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which

66 See CLS, 130 S. Ct. at 2990.
might have been granted), that has produced all the bustles and wars that have been in the Christian world upon account of religion.”

Locke’s letter was written in 1689, the same year as the passage of the Act of Toleration, whose title was “An Act for Exempting their Majesties Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes.”

In this instance, toleration was needed to allow Protestants (but not others) to deviate from the Book of Common Prayer, whose dangers of excessive orthodoxy and centralization were neatly summed up by Justice Hugo Black as follows:

Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book [of Common Prayer] more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs.

The doctrine of unconstitutional conditions is one safeguard against that risk.

Read in context, therefore, the lesson of toleration at Hastings Law School is best achieved by letting CLS go about its own business. The opponents of CLS need to learn, if they do not already know, that they will not wilt by being present in the same building in which CLS conducts its meetings. Toleration requires adopting a live-and-let-live attitude about those with whom you disagree. It does not require any religious group to suffer a forced surrender of essential group characteristics, by admitting non-believers into its ranks. This purported justification for the rule gets matters exactly backward.

Justice Ginsburg does no better when she defends the Hastings policy for fostering cooperation. Cooperation, for its part, requires only that a group be prepared to work with other groups on common issues. It does not require that any group sacrifice its core identity or admit members of other groups, whose principles it does not accept, into its own ranks. That is, these twin virtues presuppose that organizations are allowed to maintain their separate identities, and then explains how different groups and individuals should think about and interact with others. Forced association in important extracurricular activities done in a limited public forum turns toleration into feigned agreement, and turns cooperation into forced association. Toleration outside the confines of Hastings has never had the connotation that Justice Ginsburg gives it in CLS. Her Orwellian abuse of language does not supply the needed justification for Hastings’s all-comers policy.

Justice Ginsburg and Justice Stevens also relied on Employment Division v. Smith to support the proposition that a neutral rule of general application could not be resisted on free exercise grounds. In their view, Smith explained why Hastings could not be required to

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69 1 Will. & Mar. c. 18 (1689).
grant the exemption from the all-comers policy to CLS even if it were allowed to do so. But Smith does not so hold. The key holding from Justice Antonin Scalia reads: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” That last clause is critical because the state is not free to regulate the activities of religious groups on private property insofar as they relate to religious beliefs and practices. That observation is consistent with Smith’s holding, which allowed for the direct enforcement of a criminal law that forbade all individuals to smoke peyote, against a member of the Native American Church who smoked peyote for ritual purposes. The disparate impact of the law on religious activities was an “incidental” burden that could not defeat the general rule. It therefore followed that if the criminal law were valid, Oregon could deny Smith unemployment benefits for engaging in what was criminal action.

The narrow objection to the use of Smith is the same as the objection to the application of O’Brien. The doctrine of unconstitutional conditions may not protect people who engage in criminal activity in seeking government benefits. But it does protect those, like CLS, whose conduct has constitutional immunity from suit. If the state cannot punish private meetings of CLS, it cannot withhold benefits from them. The cases are distinguishable.

The second argument goes to the weakness of Smith on its own terms. Smith has been widely attacked for its rigid approach. Justice Scalia’s insistence on neutrality made little sense when a modest accommodation, limited to allowing the use of peyote in these sacramental activities, posed no threat of systematic drug abuse, which is why the statute was never, in practice, criminally enforced. Smith also raised enormous hackles from liberals and conservatives alike who could not understand why the Free Exercise and Establishment Clauses should be reduced to a weak form of equal protection pabulum. That sorry episode provoked congressional efforts to undo the statute, first in the form of the Religious Freedom Restoration Act — which was promptly struck down — and then in the Religious Land Use and Institutionalized Persons Act, which has thus far escaped constitutional challenge.

Smith is no decision worthy of emulation and expansion. The brutal truth is that this neutrality rule does a very bad job of reconciling the relevant interests in free exercise cases. The disparate treatment test is manifestly underinclusive of First Amendment concerns in areas that call not for judicial deference, but for strict scrutiny of state actors. There are no intolerable demands on judicial competence, for the application of a disparate impact case in these settings yields a simple and straightforward result. There is no excuse for us-

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72 CLS, 130 S. Ct. at 2993, 2997 n.2.
73 Smith, 494 U.S. at 878–79.
ing the disparate impact test to prop up an all-comers policy that has nothing to condemn outside the area of common carriers.

The case for the all-comers rule is, moreover, not salvaged by the observation from both Justice Ginsburg and Justice Stevens that Hastings is not required to offer a subsidy to groups like CLS. No subsidy is said to be a far cry from the use of coercion. But to call the payments and benefits supplied to CLS a “subsidy” ignores the larger context in which Hastings makes these payments. Justice Ginsburg puts the situation this way: “RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students.”77

This simple sentence explains what is wrong with her argument. This supposed subsidy is not manna from heaven, courtesy of an anonymous Hastings alumnus who is antagonistic to CLS. It is collected by taxes on all students, including members of CLS. To make this an economic subsidy requires proof that it is paid by others to CLS. But viewed in context, the subsidies run the other way. CLS members must put money into a pot from which they are not allowed to withdraw cash. They are systematic net losers from a policy that requires them to subsidize all other groups. Only if we turn a blind eye to the source of the money does the subsidy argument make sense. That is not what First Amendment law is about. In the end, the usual rules for a limited public forum apply: if the state cannot sanction the activity when done privately, it cannot refuse to extend benefits to persons who engage in those activities in a limited public forum.

CONCLUSION: WHERE DO WE GO FROM HERE?

The CLS case is a peculiar amalgam that in some instances follows old precedent, in other instances repudiates precedent, and in other instances goes beyond precedent. The question is, what lies in the future?

At this juncture, the case has two separate strands. The first is case-specific: on remand, can CLS make out that the all-comers policy was an effort to target CLS? The record on this point seems to be clear: There has at no time been a formal all-comers policy. The Hastings administration routinely gave CLS the runaround on dates and places. The policy was adopted by the dean during litigation, but never systematically implemented. The clear inference was that it was an effort to throw a viewpoint-neutral façade on a viewpoint-biased policy. Unless the notion of pretext is given a narrowness that it has nowhere else

77 CLS, 130 S. Ct. at 2979.
in the law, the case should come out in favor of CLS. But, of course, anything is possible, including a hostile decision coupled with a new application in which the policies will be monitored for consistency across other organizations. Whatever the outcome in the case, the causes of toleration and cooperation will not be served.

Second, CLS also has real implications for larger social issues, including the constitutional status of gay marriage in connection with Equal Protection Clause challenges. As matters now stand, the Supreme Court in Lawrence v. Texas held that the state could not criminalize homosexual sodomy as a form of “deviate sexual intercourse.” The majority of the Court did not decide Lawrence on equal protection grounds, however; that is, on the ground that the Texas law covered not only homosexual sodomy but also heterosexual sodomy. Instead, it found in an application of substantive due process that all persons had a constitutional liberty interest in sexual relations free from state interference to engage in a “transcendent” personal experience. The opinion thus has serious libertarian overtones because it defines a broad sphere of sexual autonomy into which the state cannot enter. But the next question on the agenda is that if homosexual sodomy cannot be criminalized, why do the liberty interests of gay couples not allow them to marry on the same terms and conditions of heterosexual couples? The Supreme Court has thus far ducked this question – in part because of the furor that it would create however the Court rules – but it will not be able to do so for long.

So let us assume that Lawrence states the law of the land. If so, it is hard to think of a solid doctrinal justification that explains why these arrangements cannot be blessed by the state. Once the first step is taken in Lawrence on criminalization, it is difficult not to take the second step on same-sex marriage. After all, the state has a monopoly on the ability to issue licenses and should not be able to use that to benefit one group of persons at the expense of others. Churches and other organizations should not, on this view, be forced to accept gay couples in their ranks, or for that matter straight couples, if they so choose. The doctrine of unconstitutional conditions rightly applies, carrying Lawrence to the next step.

Or does it, after CLS? At this point, the grand question is whether the right/privilege distinction in CLS will have some renaissance. That rebirth is surely not evidenced in the two recent decisions in Massachusetts, Gill v. Office of Personnel Management and Massachusetts v. HHS, in which Judge Joseph Tauro struck down key provisions of the Defense of Marriage Act, which had, for the purposes of federal benefit programs, defined marriage as a union between one man and one woman. His two decisions blew by, at breakneck speed,
the right/privilege distinction with the categorical judgment that all rationales in favor of
the traditional definition of marriage lacked even the most minimal level of rationality to fend
off any sort of an equal protection challenge under either the Fourteenth Amendment or the
Fifth Amendment, which has long read equal protection into due process. Not to be outdone,
Judge Vaughn Walker, in Perry v. Schwarzenegger, recently struck down California’s gay-marriage ban (Proposition 8) on the grounds that its definition of marriage as between one man and one woman could not be defended on any rational grounds. It is worth noting that neither the U.S. government nor Governor Schwarzenegger chose to defend their respective laws on the merits.

The question is whether that juggernaut will be stopped in the Supreme Court, given
that it appears that there are at least five firm votes in favor of the legalization of gay mar-
riage: four liberal justices – Ginsburg, Breyer, Sotomayor, and Kagan – plus Kennedy. Doc-
trine is, of course, a transient thing at the Supreme Court level, but it appears that the only
line that could possibly hold back that outcome is CLS. Under CLS, the state does not have
to “subsidize” gay marriage through its recognition, even though it need not criminalize it.
Of course, no one knows how this will play out as the attacks on DOMA and Proposition 8
march onward through the legal system. But the betting here is that CLS will provide little
resistance against an attack on traditional morals legislation that, when read against the
early background of the Fourteenth Amendment, was squarely within the state power.

Still, doctrine is, as previously mentioned, a malleable thing, even a bird of passage. No
one doubts that the move toward the constitutionalization of gay marriage is hopeless
under any originalist reading of the Fourteenth Amendment. But in the end my prediction
is that constitutional politics will conquer what is left of constitutional law. The doctrine of
unconstitutional conditions that lay in ruins after CLS will rise again.

82 “This court need not address these arguments [for heightened scrutiny based on abridgment of fundamental rights and suspect classes], however, because DOMA fails to pass constitutional muster even under the highly deferential rational basis test. As set forth in detail below, this court is convinced that “there exists no fairly conceivable set of facts that could ground a rational relationship” be-
tween DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection.” Gill, 699 F. Supp. 2d 374 at 387 (internal citation omitted). The categories, at this point, are completely malleable.


INTRODUCTION

A comparative anthropologist could not have asked for a better script: two high profile cases, one before the European Court of Human Rights, the other before the U.S. Supreme court, each involving challenges to traditional displays of crosses on government property. The European high court struck down the cross. The American high court upheld the cross. Both cases are procedurally complicated and are factually distinguishable. But the juxtaposition of these decisions illustrates the growing contrast in European and American attitudes toward traditional religious symbols on government land and toward religious freedom more generally. Europe, as the heartland of Christianity for nearly two millennia, seems to be moving towards ever-stronger policies of secularization and laicite. America, once the champion of strict separation of church and state, seems to be moving toward an ever more generous accommodation of its religious traditions and symbols.

Lift High The Cross?

In *Lautsi v. Italy*, a mother of two children who attended an Italian public school challenged an Italian tradition going back to 1924 that called for the display of a crucifix in each public school classroom. The perennial and prominent presence of these overtly Christian symbols, Lautsi argued, was contrary to the atheistic beliefs with which she wanted to raise and educate her children. She thus sought to have the crucifixes removed. She won her case in the Italian trial court. She lost before the Italian domestic courts, which declared that the cross was an integral part of Italy’s history, culture, and identity, and that the cross was itself a symbol of the nation’s distinct commitment to liberty, pluralism, and toleration of all peaceable faiths. Lautsi then appealed to the European Court of Human Rights, arguing that Italy’s actions violated her and her children’s rights to education and to religious freedom guaranteed by the European Convention on Human Rights in Article 2 (of Protocol Number 1) and Article 9.

On November 3, 2009, a unanimous seven-judge chamber of the European Court of Human Rights held for Lautsi. The Court found that the public display of crucifixes in public school classrooms constituted a violation both of the right of parents to educate their children in conformity with their own convictions and of the right of children to freedom of thought, conscience, and religion, which included the right to be free from coerced religious participation or observance. The Court ordered damages to Lautsi of €5000.

On June 30, 2010, the Grand Chamber of the European Court of Human Rights heard further arguments in the case. At least twenty European nations publicly stated their support for Italy and joined its criticism of the European Court’s first chamber decision. The *Lautsi* case was taken under advisement by the Grand Chamber, which was subject to intense lobbying pressure on both sides.

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3 See *Lautsi I*, supra note 1, paras. 1, 3, 20.

4 See *Id.* paras. 1, 7.

5 See *Id.* paras. 13-15.


7 See *Id.* paras. 55-57.

8 See *Id.* para. 70.

9 For a full list of these twenty states, see *Id.*
On March 18, 2011, just as this Article was going to final press, the Grand Chamber of the European Court of Human Rights reversed the Chamber below, and held fifteen to two in favor of Italy, halting at least for now the steady march toward increasing secularization and *laicité*. While this Article retains our analysis of the original Chamber judgment against the backdrop of earlier European Court cases, we reflect on the significance of the Grand Chamber’s judgment in the Conclusion and show the growing convergence with recent U.S. Supreme Court case law.

In *Salazar v. Buono*, a retired national park worker challenged the display of a cross in a national park in the State of California. The Veterans of Foreign Wars ("VFW"), a private group, had donated and erected the cross in 1934 as a memorial to fallen American soldiers. The cross stood alone, visible on the horizon. A small sign at the base of the cross indicated that the VFW had donated it. Buono brought suit claiming that the presence of the cross on government land constituted an establishment of religion in violation of the First Amendment to the U.S. Constitution. A federal district court found the cross display to be unconstitutional. Congress responded by conveying a small parcel of the federal land with and around the cross to the VFW, in exchange for a nearby private tract of land that was added to the national park. The district court declared this purported Constitutional cure a "sham," and repeated its injunction that the cross be removed. The national park service appealed, ultimately to the Supreme Court.

A plurality of the Supreme Court ordered that the cross be retained. The decision to enjoin Congress’s land sale, Justice Kennedy wrote for the plurality, required the district court to undertake a separate Constitutional inquiry of whether Congress had violated the First Amendment Establishment Clause; it could not simply assume that this land sale was a "sham" designed to "evade" the first injunction. Congress had tried to resolve a "dilemma" created by the district court: "It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those [dead

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17 *Id.* at 1812.
18 *Id.* at 1811.
19 *Id.* at 1812.
20 *Id.*. The signs have since been removed and the cross currently stands unmarked.
21 *Id.*; U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion...").
22 *Salazar*, 130 S. Ct. at 1812.
23 *Id.* at 1813.
25 *Salazar*, 130 S. Ct. at 1814.
26 *Id.* at 1821.
27 *Id.* at 1814-21.
soldiers] the cross was seen as honoring. Deeming neither alternative to be satisfactory,” Congress had instead sold the land and cross to a private party.\textsuperscript{28} The district court now would have to judge the Constitutionality of Congress's actions on the merits.\textsuperscript{29} In Justice Kennedy's view, the district court would have to take into account the reality that, while the cross was “certainly a Christian symbol,” it had been erected in the park not “to promote a Christian message” or to “set the imprimatur of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.”\textsuperscript{30} The district court would further have to recognize that “[t]ime also has played its role” and that “the cross and the cause it commemorated had become entwined in the public consciousness” and part of “our national heritage.”\textsuperscript{31}

The contrasts in these cases are as ironic as they are striking. It is no small irony that Italy, a land saturated with Christian religious symbols, was ordered to remove its crosses, while California, famous for its Hollywood-style secularism and avant-garde culture, may keep a cross in place. It is no small irony that, after so many centuries of cultural adaptation and application, a cross in Italy was still judged to be an offensive religious symbol, while in America, after a few short decades, a memorial cross was judged to be so deeply woven into American “public consciousness” and “national heritage” that it could no longer be removed.\textsuperscript{32} And it is no small irony that the European Court, operating without an explicit prohibition on religious establishments, struck down the cross, while the U.S. Supreme Court, armed with an explicit Constitutional command that “Congress shall make no law respecting an establishment of religion,”\textsuperscript{33} let the cross stand on land that Congress controlled.

What is not so ironic or surprising is that the \textit{Lautsi} court took this firm stand against the public display of a cross in a public school setting. Young and impressionable students, often compelled to be in school, are generally more vulnerable to religious pressure and coercion, and western courts have thus long been zealous in protecting them in the name of religious freedom. Indeed, in six decades of cases before \textit{Salazar}, the U.S. Supreme Court had struck down the use of religious symbols in public schools, along with prayers, Bible reading, and religious instruction.\textsuperscript{34} A number of European nations besides Italy have done the same.\textsuperscript{35} This might suggest that, with \textit{Lautsi}, European and American laws of religious

\textsuperscript{28} Id. at 1809.
\textsuperscript{29} Id. at 1820-21.
\textsuperscript{30} Id. at 1816-17 (emphasis omitted).
\textsuperscript{31} Id. at 1817.
\textsuperscript{32} Id.
\textsuperscript{33} U.S. Const. amend. I.
\textsuperscript{34} See John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 223-40 (30 Ed. 2011).
freedom are actually moving closer together rather than further apart. And it might further suggest that the Lautsi case, despite its strong language of secularity and laicite, may be restricted in its application to public schools, rather than becoming a step on the slippery slope toward the greater secularization of Europe that some critics fear. After all, despite the sweeping Constitutional logic of strict separation of church and state at work in many of its religion and public school cases, the U.S. Supreme Court has rarely used these cases as precedents to strike down overt religious expression, free exercise accommodations, and church-state cooperation in other areas of public life. Particularly in recent years, the Supreme Court, flush with neo-federalist energy, has shown ample deference to the actions of state and local officials concerning religion when those actions are challenged under the First Amendment Establishment Clause. The European Court of Human Rights might proceed similarly in limiting the reach of Lautsi to public schools – particularly given its parallel doctrine to federalism of granting a “margin of appreciation” to national traditions and practices that are challenged as violations of the religious freedom guarantees of the European Convention on Human Rights.

The aim of this mini-symposium on “Religious Symbols on Government Property” is to probe these questions at greater depth. In the balance of this Article, the authors situate the Lautsi and Salazar cases in the existing case law of the European Court of Human Rights and the U.S. Supreme Court, respectively. The Lautsi case, it turns out, is largely one of first impression: most European Court cases on religious freedom and educational rights to date have dealt with private expressions of religious dress and ornamentation in public schools and other public settings. The Salazar case, by contrast, is the last in a three-decade series of convoluted Supreme Court cases. It seems to signal a retreat by the Court to its original position of allowing old religious symbols to stand on public lands, even while still preventing religious symbols in public schools.

In the two Articles that follow, two experts provide an in-depth analysis of the Lautsi and Salazar cases and the jurisprudential stakes at work in each case. Adam Linkner, a bright new Constitutional scholar now clerking with a distinguished federal judge, has followed the Salazar case from the beginning. He takes note of the conflicting lower federal court treatment of the very issue on which the Salazar plurality divided – whether a sale of government property that contains offending religious symbols is permissible under the First

Muniz et al. eds., 2006) (discussing European education and religious liberty issues).

37 Id.
38 See Witte & Nichols, supra note 33, at 186.
40 See infra text accompanying notes 128-56.
41 See infra text accompanying notes 387-89.
42 See infra text accompanying notes 411-23.
Amendment Establishment Clause. The real difficulty with Salazar, he argues, is that the Supreme Court gave too little guidance to the district court on remand to determine the Constitutionality of Congress's land sale. Linkner thus cleverly distills the convoluted six decades of Supreme Court approaches to the Establishment Clause into a more workable and predictable “insider/outsider” test that he astutely discerns at work even in the multiple opinions in Salazar First, this test requires a court to judge whether the “predominant purpose” or intent of the government was to favor, endorse, or privilege religion. This is an “insider” inquiry that considers all the evidence of what went into the government's decision and action respecting religion. Second, the test requires a court to judge whether an external reasonable observer would see the primary effect of the government's action as one that endorsed religion. This is an “outsider” inquiry, one that views the result of the government's action in context and determines whether it mostly supports, favors, or privileges religion over non-religion. These are separate inquiries, Linkner insists; a government action respecting religion should be struck down if either its predominant purpose or its principal effect is to favor religion. In Linkner's view, Congress's land sale was so transparently favorable to religion that it fails the insider/outsider inquiry. In the end, Linkner thinks Salazar is wrong and the cross should come down. He would likely applaud the recent case of Trunk v. City of San Diego, where the Ninth Circuit Court of Appeals, distinguishing Salazar, ordered the removal of a large cross which was privately donated to the United States nearly a century ago but now owned by the federal government – the Ninth Circuit's concern being that, from an outsider's perspective, the primary effect of the cross was to endorse religion.

Andrea Pin, a distinguished Constitutional law professor at the University of Padua, has watched the Lautsi case emerge from the very region of Italy where Pin had been schooled as a child and where he now teaches as a law professor. Pin provides a close and revealing analysis of the Constitutional history and cultural battles of Italy concerning religious freedom, the shifting relationship between the Catholic Church and the Italian state, and the unique understanding of Italian-style laicita (rather than French-style laicite). Pin then contrasts the Italian Constitutional law of religious symbolism with the emerging jurispru-
dence of religious freedom of the European Court of Human Rights.\textsuperscript{54} Pin regards \textit{Lautsi} as a serious test case that marks the growing tension between Italy and Europe, between religious traditions and secular modernity, between a commodious Constitutional concordance of religion and state and the emerging right of a secularist to veto these carefully calibrated national arrangements in the name of European religious freedom.\textsuperscript{55} In the end, Pin thinks the original Chamber decision of \textit{Lautsi} is wrong, and the crosses should remain. He thus applauds the recent Grand Chamber judgment.\textsuperscript{56}

Together, these two Articles illustrate some of the complexity of the legal issues surrounding the place of religious symbols on government land, and how serious scholars and judges can take opposing views and marshal reasoned arguments for each of them. It is easy to be cynical about these cases – treating them as much ado about nothing, or expensive hobbyhorses for cultural killjoys and public interest litigants to ride. But that view underestimates the extraordinary luxury we now enjoy in the West to be able to fight our cultural contests over religious symbols in courts and academies, rather than on the streets and battlefields. In centuries past in the West, and in many regions of the world still today, disputes over religious symbols often lead to violence, sometimes to all-out warfare.\textsuperscript{57} For religious and cultural symbols often embrace and evoke deep personal and communal emotions. Think of what happens when someone attacks or defaces an icon, a flag, the grave of a loved one, or the memorial of a fallen hero. Far more is thus at stake in these cross cases than the fate of a couple of pieces of wood nailed together. These cases are essential forums in which to work through our deep cultural differences and to sort out peaceably which traditions and practices should continue and which should change.

\section{I. RELIGIOUS FREEDOM AND RELIGIOUS SYMBOLS IN THE EUROPEAN CONVENTION AND THE EUROPEAN COURT OF HUMAN RIGHTS}

\textit{Lautsi} is largely a case of first impression, though it draws on several lines of cases. In this Part, we review the basic provisions on point in the European Convention on Human Rights and the procedures used by the European Court of Human Rights in adjudicating claims arising under the Convention. We review the relevant cases on freedom of thought, conscience, and religion and on the rights to education and free expression. At the end of

\textsuperscript{54} Id. at 117-20.
\textsuperscript{55} See Id. at 141-49.
\textsuperscript{56} See Id. passim.
each Subpart below, we briefly sort through how these precedents can be marshaled to support both sides of the *Lautsi* case now before the Grand Chamber.

**A. Provisions and Procedures**

A major instrument of the Council of Europe, the 1950 European Convention on Human Rights ("ECHR" or "Convention") is binding upon all forty-seven of the current member states.\(^{58}\) The European Court of Human Rights ("Court" or "European Court"), reformed in 1998,\(^{59}\) is the principal interpreter of the Convention.\(^{60}\) It is a daily operating and fully functioning supervisory body, staffed with forty-seven judges, representing each member state, along with some 640 clerks.\(^ {61}\) The Court's principal task is to hear cases that determine whether the member states are violating the rights guaranteed in the Convention.\(^ {62}\) Since 1998, any party under the jurisdiction of a European member state has standing to claim a violation of rights under the Convention and file a claim directly with the Court.\(^ {63}\) However, the Court has frequently stated that it is not a court of last appeal that can supplant national judicial remedies.\(^ {64}\)

Article 9 of the European Convention on Human Rights is the major provision on religious freedom.\(^ {65}\) It guarantees that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.\(^ {66}\)

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\(^{60}\) *Id.* art. 19.


\(^{63}\) *Id.*

\(^{64}\) See NINA-LOUISA AROLD, THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS 31 (2007) (analyzing the Court’s general workings and relationships with member states).


\(^{66}\) *Id.* art. 9.
The European Court has made clear that religious freedom “entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.”\(^{67}\) It has also made clear that Article 9(2) of the ECHR is an exhaustive list of the grounds on which any government official may impose limitations on religious freedom.\(^{68}\)

Article 2 of Protocol 1 to the European Convention supplements the religious freedom guarantee of Article 9 in cases of education.\(^{69}\) Article 2 provides: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”\(^{70}\) Article 14 of the Convention further prohibits discrimination on grounds of religion.\(^{71}\) And Article 10 protects freedom of expression, which can include religious and anti-religious expression.\(^{72}\)

Religious freedom cases arising under Article 9 are relatively few compared to other areas of human rights.\(^{73}\) From 1959 to 2009, the European Court of Human Rights (and its predecessors) found a total of thirty violations of this Article,\(^{74}\) five of them occurring in 2009 alone.\(^{75}\) By comparison, during that same forty-year period, the Court found some 4008 violations of Article 6 concerning the fairness and length of proceedings,\(^ {76}\) and the Court has close to 140,000 pending applications.\(^ {77}\) While religious freedom cases are small in number, violations of Article 9 are still burning issues,\(^{78}\) keeping Europe’s judges busy and probably giving them headaches.


\(^{70}\) Id.

\(^{71}\) European Convention on Human Rights, supra note 57, art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

\(^{72}\) Id. art. 10(1) (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”).

\(^{73}\) See Nina-Louisa Arold, Promoting Normative Cracks in the Surface: Strasbourg Changing Swedish Legal Culture, in LAW AND RELIGION IN THE 21ST CENTURY: NORDIC PERSPECTIVES 275, 278 (Lisbet Christoffersen et al. eds., 2010).


\(^{76}\) 50 YEARS OF ACTIVITY, supra note 73, at 15 (noting 4008 cases that concerned length of proceedings and an additional 3207 cases that concerned the right to a fair and timely trial under Article 6 of the ECHR between 1959 and 2009).

\(^{77}\) See Pub. Relations Unit, European Court of Human Rights, Pending Applications Allocated to a Judicial formation (2010), available at http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8E74A7401/0/Pending_applications_chart.pdf (in December 2010, there were 139,650 pending applications).

By repeatedly finding violations by individual member states, the European Court has induced changes in many domestic legal systems of member states. Those changes have prompted a growing awareness of other possible human rights claims; that fact, together with an increase in the number of member states, has resulted in a flood of applications to the Court.\textsuperscript{79} To manage this swollen docket, Protocol 14 now gives judges the discretion to restrict themselves to cases alleging “significant” violations.\textsuperscript{80} Chambers of seven judges, selected from among the forty-seven sitting judges, decide most cases.\textsuperscript{81} These seven judges often are a balanced representation of the legal cultures represented among the forty-seven member states.\textsuperscript{82}

Within three months of a chamber judgment any of the parties can request a referral to a Grand Chamber.\textsuperscript{83} This constitutes an internal appellate review, and involves seventeen judges of the European Court.\textsuperscript{84} The Italian government in \textit{Lautsi} invoked this mechanism.\textsuperscript{85} While, politically, the banning of Christian crucifixes in Italian schools might come as a surprise, both the hybrid legal culture of the European Court of Human Rights\textsuperscript{86} and the Court’s prior cases can readily support this decision, even if not ineluctably; hence, the Grand Chamber review in this case. To protect national traditions, or issues of special sensitivity in national societies, the Court frequently invokes the doctrine of a margin of appreciation.\textsuperscript{87} That doctrine recognizes that national judges are often better placed than international judges to assess these culturally sensitive questions.\textsuperscript{88} Only if there is a manifest breach of the European Convention on Human Rights will the Court find a violation.\textsuperscript{89}

When a party claims a violation of Article 9 rights to religious freedom, the Court will assess: (1) whether there is interference with that right; (2) whether this interference was

\textsuperscript{79} But see PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, STATISTICS 2010 (2010), \url{available at http://www.echr.coe.int/NR/rdonlyres/8699082A-A789-47E2-893F-5685A72B78FB/0/Statistics_2010.pdf} (discussing that between 1959 and 2009, the Court delivered a total of 12,198 judgments, while between January and September 2010, it produced 1442 judgments and 24,321 admissibility decisions).

\textsuperscript{80} European Convention on Human Rights, \textit{ supra} note 57, art. 35 (“The Court shall declare inadmissible any individual application... if it considers that... (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”).

\textsuperscript{81} PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 6 (2010) [hereinafter THE ECHR IN 50 QUESTIONS], \url{available at http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42C8-B88D-2B8781F42C8/0/FAQ_C0UL_ENG_AS_OCT2010.pdf}

\textsuperscript{82} See AROLD, \textit{ supra} note 63, at 55 (discussing the influence of different legal traditions that the judges share on the Court).

\textsuperscript{83} See European Convention on Human Rights, \textit{ supra} note 57, art. 43(1) (“Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.”).

\textsuperscript{84} THE ECHR IN 50 QUESTIONS, \textit{ supra} note 80, at 6.

\textsuperscript{85} See \textit{ supra} note 80, at 6.

\textsuperscript{86} See AROLD, \textit{ supra} note 63, at 55.

\textsuperscript{87} The margin of appreciation is frequently used by the Court. See \textit{YOUROW}, \textit{ supra} note 38, at 24 (providing an extensive study of the doctrine and describing its development in two time periods: before and after 1979). The doctrine’s scope was expanded during the later years. See, e.g., Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R. 189 (concerning flight noise interruptions of sleep); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976) (concerning obscene publications).

\textsuperscript{88} See \textit{YOUROW}, \textit{ supra} note 38, at 13.

\textsuperscript{89} See \textit{Id}.
based on law; and (3) whether this interference was necessary in a democratic society. It is usually the third step, the balancing test by the Court, which is the focus of most cases. There the judges analyze whether the interference corresponds to a pressing social need, is proportionate to the aim pursued, and is justified by relevant and sufficient reasons.

Religious beliefs and traditions can be relevant in making these decisions, even if they are not directly raised in an Article 9 case. A good example is the European Court case of Otto-Preminger-Institut v. Austria regarding an act of state censorship that was challenged as a violation of Article 10 rights to free expression. The case concerned the seizure and ban of a movie ridiculing the Holy Family that was slated to be shown at an art institute in Tyrol, Austria. Using the margin of appreciation doctrine, the European Court judges found these state restrictions on the film to be justified. The Court determined that the national authorities of Austria were better able to discern the cultural trends and moral sensitivities of the Tyrol region of Austria. While the Court recognized that Article 10 rights to freedom of expression encouraged a pluralism of religious and non-religious beliefs, these values had to yield in this case to the state’s concern about ideas that would strongly offend and attack the religious beliefs of a traditionally Catholic region that cherished the Holy Family. Here, the margin of appreciation doctrine was used to defer to a national court’s protection of local Christian sensibilities and traditions. This is an important precedent for Italy in the Lautsi case – though Otto-Preminger-Institut is an Article 10 case dealing with freedom of expression, not an Article 9 case dealing with freedom of thought, conscience, and religion.

B. Manifestations of Belief: What Gets Article 9 Protection?

The display of a belief through symbols combines concerns both about “religion” and “manifestation” of religion under Article 9. The European Court interprets “religion” broadly, but when it comes to “manifestation” not every action driven by religious belief is recognized and/or protected under Article 9. Three cases illustrate the range of treatment by the Court. In Pretty v. United Kingdom the European Court held that a husband’s act of...
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assisting the suicide of his terminally-ill wife was not a religious manifestation or act protected under Article 9, even if done on grounds of humanity and dignity. The husband could not accordingly claim a religious freedom exemption from English criminal prohibitions on assisting suicide. In *Cha’are Shalom Ve Tzedek v. France*, the Court found that while Jewish ritual slaughtering in general was a religious manifestation or practice deserving presumptive protection under Article 9, a state prohibition on a certain form of ritual slaughtering, deemed cruel to animals, was justified under Article 9, especially since an alternative supply of kosher meat was available from a neighbouring state. In *Kokkinakis v. Greece*, the Court found that proselytism or evangelization was a religious manifestation protected by Article 9, and that the state was not justified in imposing criminal sanctions on a peaceable proselytizer.

In a subsequent case of proselytism, *Jehovah’s Witnesses of Moscow v. Russia*, the Court restated how vital freedom of thought, conscience, and religion is for the democratic society:

> [A]s enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to “manifest [one’s] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares. Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified state interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to

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100 See Id. at 281-82.
101 See Id.
103 Id. at 259.
104 Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) 6 (1993). The Kokkinakis Court made clear that, while unjustified in this case, general restrictions on religious manifestations can be necessary to protect the pluralism of a society:
The fundamental nature of the rights guaranteed in Article 9 para. 1 (art. 9-1) is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11 (art. 8-2, art. 10-2, art. 11-2) which cover all the rights mentioned in the first paragraphs of those Articles (art. 8-1, art. 10-1, art. 11-1), that of Article 9 (art. 9-1) refers only to “freedom to manifest one’s religion or belief[,]” In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.
Id. at 18.
105 Id.
106 Jehovah’s Witnesses of Moscow v. Russia, Eur. Ct. H.R. (2010), http://www.echr.coe.int/echr/ Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Jehovah’s Witnesses of Moscow” in the “Case Title” box and “Russia” in the “Respondent state” box) (currently pending for referral to the Grand Chamber).
manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The State’s duty of neutrality and impartiality, as defined in the Court’s case-law, is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.\textsuperscript{107}

None of these cases dealt directly with whether a professed secularist has the right to be free from observing a government’s display of religious symbols in a public school. But these cases do make clear that religious freedom for all – even for atheists and agnostics – is a cherished right in a democratic society, and states must have strong and stated reasons and proportionate methods to regulate or limit this right.

C. Religious and Non-Religious School Curricula

Two recent school cases come closer to the issues of Lautsi. In Folgern v. Norway\textsuperscript{108} and Grzelak v. Poland,\textsuperscript{109} the Court dealt with forms of religious instruction in public schools that were challenged by professed atheists and agnostics.\textsuperscript{110} Folgero concerned Norway’s new law that required all public grade school and middle school students to take a course in “Christianity, Religion and Philosophy” (“KRL”).\textsuperscript{111} The law provided no full exemption for non-Christian students.\textsuperscript{112} A student, whose parents were professed atheists, objected that this curricular requirement violated the rights to education guaranteed by Article 2.\textsuperscript{113} The European Court agreed.\textsuperscript{114} It found that the state had not tailored its new law carefully enough to deal with students with different religious and non-religious sensibilities.\textsuperscript{115}

\textit{N}otwithstanding the many laudable legislative purposes stated in connection with the introduction of the KRL subject in the ordinary primary and lower secondary schools, it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner

\textsuperscript{107} Id. para. 99 (citations omitted).
\textsuperscript{109} Grzelak v. Poland, Eur. Ct. H.R. (2010) [hereinafter Grzelak], http://www.echr.coe.int/echr/ Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Grzelak” in the “Case Title” box and “Poland” in the “Respondent State” box).
\textsuperscript{110} Id. paras. 6-25; Folger0, supra note 107, para. 3.
\textsuperscript{111} Folger0, supra note 107, para. 3.
\textsuperscript{112} Id. note 107, para. 3.
\textsuperscript{113} Id. note 107, para. 3.
\textsuperscript{114} Id. note 107, para. 3.
\textsuperscript{115} Id.
for the purposes of Article 2 of Protocol No. 1. Accordingly, the Court finds that the refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation of Article 2.\textsuperscript{116}

Three years later, in \textit{Grzelak}, a public grade school student in Poland, with agnostic parents, was properly exempted from mandatory religion classes in accordance with \textit{Folgerō}.\textsuperscript{117} But the student’s only alternative to attending the religion classes was to spend unsupervised time in the school hallway, library, or club.\textsuperscript{118} His parents wanted him enrolled in an alternative course in secular ethics.\textsuperscript{119} The school refused to offer such a special course, on grounds of having insufficient teachers, students, and funds.\textsuperscript{120} The school further marked the student’s report card with a blank for “religion/ethics,” and calculated his cumulative grade point average based on fewer credit hours.\textsuperscript{121} The Court found both these state actions to be in violation of both Article 9 and Article 14 of the Convention, for “[i]t brings about a situation in which individuals are obliged – directly or indirectly – to reveal that they are non-believers. This is all the more important when such obligation occurs in the context of the provision of an important public service such as education.”\textsuperscript{122}

The Court considers that the absence of a mark for “religion/ethics” would be understood by any reasonable person as an indication that [this student] did not follow religious education classes, which were widely available, and that he was thus likely to be regarded as a person without religious beliefs... and distinguishes the persons concerned from those who have a mark for the subject. This finding takes on particular significance in respect of a country like Poland where the great majority of the population owe allegiance to one particular religion.

... [T]he Court finds that the absence of a mark for “religion/ethics” on the [student's] school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation...\textsuperscript{123}

These cases come closer to \textit{Lautsi} in that they deal with state impositions of religion on public school students – directly in the case of \textit{Folgerō}, indirectly in the case of \textit{Grzelak}. Neither is a straightforward Article 9 case. \textit{Folgerō} is about Article 2 rights to education free from religious influence;\textsuperscript{124} \textit{Grzelak} combines Article 9 with Article 14 restrictions on

\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Grzelak, supra note 108, para. 7.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} paras. 7, 12.
\textsuperscript{120} \textit{Id.} paras. 12, 19.
\textsuperscript{121} \textit{Id.} paras. 21-25.
\textsuperscript{122} \textit{Id.} para. 87.
\textsuperscript{123} \textit{Id.} paras. 95, 99 (citation omitted).
\textsuperscript{124} \textit{Folgerō, supra note 107, paras. 53-102.}
religious discrimination. Nonetheless, the Court stretched far in both these cases to protect the religious freedom rights of atheistic and agnostic public school students and their parents. And it included within the right of religious freedom (and related rights of education and non-discrimination) the right of a person to be free from state impositions of religion and even from indirect costs that come from avoiding the state’s religious offerings. Lautsi is still distinguishable: it is not about active curricular instruction in religion, but the passive display of a crucifix that the student will encounter in many other walks of Italian public and private life as well. But these cases are important precedents for Lautsi and her children.

D. School Dress Codes and Headscarves

In three other cases, the Court dealt with direct Article 9 religious freedom claims by Muslim women to wear headscarves in manifestation of their religion but contrary to public school dress codes. In each case, the Court held for the state, holding that the state’s interest in protecting the “secularity” of the school in a democratic society was a sufficient ground to justify its prohibitions on headscarves. In each case, the Court granted a margin of appreciation to the state to decide this culturally sensitive issue of headscarf regulations in accordance with its own traditions of secularism.

In Dahlab v. Switzerland, a state elementary school teacher, newly converted to the Islamic faith from Catholicism, was banned from wearing a headscarf when she taught her classes. The government highlighted the value of maintaining secularism in a public school that was open to young students from various traditions. Invoking the margin of appreciation doctrine, the Court found this school dress code and its application to Dahlab to be necessary and proportionate, and dismissed her claim that the state had violated her freedom of thought, conscience, and religion under Article 9. The Court stressed that it is very difficult to assess the impact that a powerful external symbol such as the wearing

126 See Id. paras. 84-101; Folger0, supra note 107, paras. 85-105.
127 See Folger0, supra note 107, paras. 66-67; Grzelak, supra note 108, paras. 85-99.
128 Lautsi I, supra note 1, para. 7.
133 Id. at 451-52.
134 Id. at 458.
135 Id. at 463.
of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.136

In Dogru v. France,137 a Muslim girl refused to follow her public school's dress code that required her to take off her headscarf during physical education classes and sports events.138 Dismayed by the breach of its rules and the tensions it caused among the other students, the school initiated disciplinary actions against her.139 When she persisted in her claim to wear her headscarf in all public settings, the school offered to teach her through a correspondence program, an option that her parents rejected.140 She was then expelled from the school.141 After losing in the French courts, she claimed violations of her Article 2 and Article 9 rights under the Convention.142 The European Court again held for the state, and again accorded France an ample margin of appreciation for its policy of maintaining a secular ethic in its public schools.143

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, in respect of which the approaches taken in Europe are diverse. Rules in this sphere

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136 Id.
137 Dogru, supra note 128.
138 Id. para. 7.
139 Id. para. 8.
140 See Id. paras. 11-12.
141 Id. para. 8.
142 Id. paras. 1, 2, 12-46.
143 Id. para. 75.
will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.\textsuperscript{144}

In the most famous headscarf case, Şahin v. Turkey,\textsuperscript{145} an Islamic medical student at Istanbul University was forbidden to take certain courses and exams because she was wearing a headscarf contrary to state rules governing dress.\textsuperscript{146} The University brought disciplinary actions against her.\textsuperscript{147} After losing in the Turkish courts, she filed a claim before the European Court of Human Rights alleging a violation of her Article 9 rights.\textsuperscript{148} The Court held for Turkey, and again granted a margin of appreciation to the Turkish constitutional and cultural ideals of gender equality and state secularism.\textsuperscript{149}

The principle of secularism was inspired by developments in Ottoman society in the period between the nineteenth century and the proclamation of the Republic. The idea of creating a modern public society in which equality was guaranteed to all citizens without distinction on grounds of religion, denomination or sex had already been mooted in the Ottoman debates of the nineteenth century. Significant advances in women’s rights were made during this period (equality of treatment in education, the introduction of a ban on polygamy in 1914, the transfer of jurisdiction in matrimonial cases to the secular courts that had been established in the nineteenth century).

The defining feature of the Republican ideal was the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious constraints and that society should be modernised had a common origin.\textsuperscript{150}

The Court further noted that Turkish national law clearly bans veils and headscarves from schools and public workplaces, and these bans had been upheld many times by the Turkish Constitutional Court.\textsuperscript{151} The European Court then discussed the different practices of European states concerning religious symbols and headscarves in order to assess whether there was a common European standard on the issue that could be enforced uniformly.\textsuperscript{152} There was none.\textsuperscript{153} Only Turkey, Azerbaijan, and Armenia at the time had explicit regulations con-
cerning Islamic headscarves in a university.\textsuperscript{154} France, “where secularism is regarded as one of the cornerstones of republican values,” prohibits persons from wearing headscarves, yarmulkes, and oversized crosses in its state schools.\textsuperscript{155} In seven other countries, including Germany and the United Kingdom, Muslim public school and university students were allowed to wear headscarves.\textsuperscript{156}

In the absence of a clear European consensus on the regulation of headscarves, the European Court was left to build on its own case law about how much religious freedom to protect and how much national regulation of religion to respect. Those precedents, the Şahin court concluded, called for an ample margin of appreciation to local practices, which the Court granted to Turkey:

In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.

Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society.” Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society[.]”

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially... in view of the diversity of the approaches taken by national authorities on the issue. \textit{It is not possible to discern throughout Europe a uniform conception of the significance of religion in society... and the meaning or impact of the public expression of a religious belief will differ according to time and context}. Rules in this sphere will conse-

\textsuperscript{154} Id. at 192.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 192-94.
quently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context.¹⁵⁷

In the “specific domestic context” of Turkey, “secularism” is “one of the fundamental principles of the Turkish state.”¹⁵⁸ This principle is “in harmony with the rule of law and respect for human rights [and] may be considered necessary to protect the democratic system in Turkey.”¹⁵⁹ Religious “attitudes” and actions to the contrary “will not enjoy the protection of Article 9 of the Convention.”¹⁶⁰ Hence by a sixteen to one vote, the Grand Chamber found in favor of Turkey.¹⁶¹

Only Judge Tulkens dissented, arguing that the majority was using the margin of appreciation doctrine to abdicate its responsibility to protect fundamental rights.¹⁶² The vital issues of religious freedom at stake in this case are not merely “a 'local' issue,” she argued, “but one of importance to all the member States. European [Court] supervision cannot, therefore, be escaped simply by invoking the margin of appreciation.”¹⁶³

On what grounds was the interference with the applicant’s right to freedom of religion through the ban on wearing the headscarf based? In the present case, relying exclusively on the reasons cited by the national authorities and courts, the majority put forward, in general and abstract terms, two main arguments: secularism and equality. While I fully and totally subscribe to each of these principles, I disagree with the manner in which they were applied here and to the way they were interpreted in relation to the practice of wearing the headscarf. In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.¹⁶⁴

While these three cases do not treat the government’s own use of religious symbols, they are nonetheless important precedents for both sides of the Lautsi case. These cases can be used to support Lautsi’s claim to religious freedom and non-discrimination for herself and her children. The only way they can enjoy true “equality” and “liberty” in Italy as a religious minority, the argument goes, is for the state to embrace the principle of “secularism” and to remove those symbols and end those practices that privilege and reflect the dominant Catholic faith. Particularly in the context of a state school, where children are

¹⁵⁷ Id. at 203-04 (emphases added) (citations omitted).
¹⁵⁸ Id. at 204-06.
¹⁵⁹ Id. at 205-06.
¹⁶⁰ Id.
¹⁶¹ Id. at 217.
¹⁶² See Id. at 221-22 (Tulkens, J., dissenting).
¹⁶³ Id. at 222.
¹⁶⁴ Id. at 221-22.
learning the fundamentals of democracy and freedom for all, even the passive display of a symbol that is overtly Christian and perennially present in the classroom violates the mandates of secularism.

Secularism, the argument continues, is the only common feature that binds together the potpourri of European traditions – Catholic Italy, Ireland, and Poland, Protestant Sweden and Norway, Anglican England, Muslim Turkey, Orthodox Greece and Romania, and the large number of atheists in former Socialist countries. In accepting the European Convention on Human Rights, these countries are also accepting the principle of secularism embedded within it. The only way to ensure that each member state abides by its commitment to human rights, and to the principles of secularity and neutrality that human rights demand, is to ban religious symbols on government land, particularly in public schools – whether those symbols are put there by the state or brought there by a private party. Especially a “powerful external symbol” like the headscarf, as the Dahlab Court noted, can be understood as a threat to “the message of tolerance, respect for others, and above all, equality and non-discrimination.” It is best to ban all these religious symbols in public life. Combine the solicitude for the religious freedom claims of atheists and agnostics in Folgerø and Grzelak against state imposition of religion with the clarion call for state secularism in Dahlab, Dogru, and Şahin, the argument concludes, and Lautsi and her children should win.

The real issue, Italy might counter, is whether the European Court is sincere about granting a margin of appreciation to national tribunals on culturally “sensitive” issues in which no “European consensus” exists. Or is the Court simply using the margin of appreciation doctrine as a pretext to establishing secularism throughout Europe, even in countries like Italy that reject it. Europe, after all, has no consensus about the mandates of secularism, and nothing in the European Convention commands secularism as a condition for respecting the human rights of all, whatever the Court’s imaginings to the contrary. Moreover, Europe has no consensus about the propriety of religious symbols on government land or in government buildings. These are highly sensitive local issues in ancient religious cultures like Italy that are gradually moving on their own terms and their own timetable toward ever greater pluralism.

Moreover, why would the European Court reject strong Article 9 claims by sincere good faith Muslims, engaged in mainstream religious practices that run contrary to new national

165 See Id. at 192-94 (majority opinion).
166 Id. at 205-06.
168 See generally Folgerø, supra note 107, paras. 51-57, 86; Grzelak, supra note 108.
170 See Lautsi I, supra note 1, paras. 38-41.
171 See Id. para. 41.
policies of secularism, yet grant Article 9 claims of a secularist who has only recently emigrated to Italy with her children but now objects to the vestiges of ancient traditions of Christianity? Why should young students – controlled by secularist parents – get full religious freedom protection against even indirect forms of majoritarian religion, while sincere, good faith Muslim adults cannot get the religious freedom to wear unobtrusive headscarves while enjoying their rights to education? The European Court has painted itself into a secularist corner, the argument for Italy would conclude, forgetting the true meaning of religious freedom.

E. Freedom of Expression

In *Otto-Preminger-institut v. Austria*, the European Court used the margin of appreciation doctrine to defer to Austria's traditions of Christianity, even in the face of a strong Article 10 claim to freedom of expression to show an offensive anti-religious film.\(^{172}\) That case used the margin of appreciation doctrine in a way favorable to Italy's argument in *Lautsi*.

Another Article 10 case, *Vajnai v. Hungary*,\(^ {173}\) can also be seen as helpful to Italy. A politician of a left wing party, during a public demonstration in Hungary, wore a five-pointed red star, the infamous symbol of the Communist era.\(^ {174}\) He was convicted for wearing a totalitarian symbol in public.\(^ {175}\) He filed a claim in the European Court, claiming a violation of his Article 10 rights to freedom of expression.\(^ {176}\) The Court held in the politician's favor.\(^ {177}\) The Court took special note of Hungary's history after its political transformation:

[A]lmost two decades have elapsed from Hungary's transition to pluralism and the country has proved to be a stable democracy... It has become a Member State of the European Union, after its full integration into the value system of the Council of Europe and the Convention. Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship. The Government has not shown the existence of such a threat prior to the enactment of the ban in question.\(^ {178}\)

Not only was the blanket ban unjustified, it was also too broad, because it required no proof that the defendant identified with the ideas that the star represented:

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\(^{172}\) See supra notes 91-97 and accompanying text.


\(^{174}\) *Id.* para. 6.

\(^{175}\) *Id.* paras. 7-8.

\(^{176}\) *Id.* para. 3.

\(^{177}\) *Id.* para. 58.

\(^{178}\) *Id.* para. 49 (citation omitted). *Id.* para. 49 (citation omitted).
The ban can encompass activities and ideas which clearly belong to those protected by Article 10, and there is no satisfactory way to sever the different meanings of the incriminated symbol. Indeed, the relevant Hungarian law does not attempt to do so. Moreover, even if such distinctions had existed, uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship.\footnote{Id. para. 54.}

While the Court recognized the deep scar that Communism had left on Hungary, the judges held that there was no longer a sufficient social need to criminalize the star that symbolized the former Communist regime.\footnote{Id. para. 57.}

[T]he applicant’s conviction for the mere fact that he had worn a red star cannot be considered to have responded to a “pressing social need.” Furthermore, the measure with which his conduct was sanctioned, although relatively light, belongs to the criminal law sphere, entailing the most serious consequences. The Court does not consider that the sanction was proportionate to the legitimate aim pursued. It follows that the interference with the applicant's freedom of expression cannot be justified under Article 10 § 2 of the Convention.\footnote{Id. para. 58.}

While the scope and standard of Article 9 and Article 10 of the Convention are certainly different, the Vajnai case has some modest bearing on the Lautsi case. In favor of Italy, the case recognizes that once offensive symbols in public life can lose their sting over time, and become accepted parts of a pluralistic culture that is teeming with countervailing symbols of all sorts.\footnote{See Id. paras. 48-58.} Only two decades after the fall of Communism, the signature red star of the Communist regime was now deemed an acceptable part of public life, even if the star reminded many observers of prior oppression and political abuse, and even if the star was worn by a political official.\footnote{Id. para. 49.} Wearing the star may be in bad taste, but the issue for the Vajnai court was whether wearing the star represented “a real and present danger” of a return to Communism, which it clearly did not.\footnote{See Pin, supra note 6, at 102-04.} Italy can make a comparable argument respecting its crucifixes, and how passage of time has rendered them acceptable parts of a pluralistic culture. These crucifixes are not harbingers of a return to Catholic establishments, nor do they signal a “real and present danger” that the democracy of Italy is about to fall to Catholic rule. Moreover, the offenses with which the crucifixes may have been associated in prior centuries of crusades, pogroms, and inquisitions have long since ended\footnote{Id. para. 49.} – much longer than the offenses associated with the Communist red star, which many Hungarian citizens today can still remember. While the crucifixes may offend a few members of soci-
ety, like Lautsi and her children, they represent cherished cultural values to many millions of others. Lautsi’s views, in fact, cause offense to millions of members of Italian society, but those views cannot be censored for that reason alone. Freedom of expression requires that all views be heard in public life, and no one should enjoy a heckler’s veto.

The counterargument for Lautsi might be that “freedom of expression” is a right that the individual can claim against the state, not that the state can claim against the individual. The further counterargument might be that these crucifixes are not one of sundry symbols in public life, but are a distinctive part of the public school classroom which the state compels children to attend. And this case is about freedom of expression, not freedom of thought, conscience, and religion.

As the foregoing survey of cases illustrates, the Grand Chamber in the Lautsi case has a wide range of arguments at its disposal. Interestingly, as we will note in the Conclusion, the Grand Chamber did rather little to distinguish these precedents or even to deal with them in a serious way. That will leave plenty of room for argument in subsequent European Court cases on religious symbols in public life, which will doubtlessly arise in different quarters of Europe.

II. RELIGIOUS FREEDOM AND RELIGIOUS SYMBOLS IN THE U.S. SUPREME COURT

While the U.S. Supreme Court has operated continuously since 1790, its cases on religious symbols in public life and on government land have come only in the last thirty years. All these cases have arisen under the First Amendment Establishment Clause which, as noted in the Introduction, provides that “Congress shall make no law respecting an establishment of religion.” That Constitutional provision, ratified in 1791, was largely a dead letter for the first 150 years of American history. Before 1947, the Supreme Court heard only two cases directly under the Establishment Clause, holding for the government each time. This changed dramatically in 1947, when the Court decided

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186 See Witte & Nichols, supra note 33, at 287-94.
188 See Witte & Nichols, supra note 33, at 227-36.
189 U.S. Const. amend. I.
190 Witte & Nichols, supra note 33, at 89.
191 See Id. at 109-10.
the famous case of *Everson v. Board of Education*\textsuperscript{193} for the first time applied the Establishment Clause to state and local governments, by incorporating it into the Due Process Clause of the Fourteenth Amendment.\textsuperscript{194} *Everson* also declared that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state.”\textsuperscript{195} This opened the floodgates of litigation; since 1947, the Supreme Court has heard nearly seventy cases arising in whole or in part under the Establishment Clause.\textsuperscript{196}

Some two-thirds of these Establishment Clause cases have concerned education – more particularly, the place of religion in public schools and the place of government in religious schools.\textsuperscript{197} Particularly in its religion and public school cases, the Court issued its strongest statements that the Establishment Clause called for a “high and impregnable” wall between church and state.\textsuperscript{198} “That wall must be kept high and impregnable. We could not approve the slightest breach.”\textsuperscript{199} The Court used this strict separationist logic to ban the use of religious teachers, religious officials, Bible readings, student-led prayers, moments of silence, and creationist science from the public school classroom, and to ban prayers and religious ceremonies even from occasional public school events like graduation ceremonies and football games.\textsuperscript{200} In these cases, the Court also developed a three-part test to apply the First Amendment Establishment Clause.\textsuperscript{201} In *Lemon v. Kurtzman*,\textsuperscript{202} the Court declared that any government action challenged under the Establishment Clause would meet Constitutional muster only if it: (1) had a secular purpose; (2) had a primary effect that neither advanced nor inhibited religion; and (3) fostered no excessive entanglement between church and state officials.\textsuperscript{203} This *Lemon* test, as it came to be called, was to be used not only in religion and education cases, but in all cases arising under the Establishment Clause.\textsuperscript{204}

Among the remaining Supreme Court Establishment Clause cases outside of education was a set of convoluted cases from 1980 to 2010 that raised two loaded questions: (1) what role may religious officials, ceremonies, and symbols play in public life; and (2) to what

\textsuperscript{194} Id. at 13-15.
\textsuperscript{195} Id. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).
\textsuperscript{196} For a list of cases, see WITTE & NICHOLS, supra note 33, at 305-38.
\textsuperscript{197} Id. at 223.
\textsuperscript{198} Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
\textsuperscript{199} Id.
\textsuperscript{201} Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} WITTE & NICHOLS, supra note 33, at 177-81.
extent may government recognize, support, fund, house, or participate in these forms and forums of religious expression?

Cases raising these questions had poured into the lower federal courts shortly after the Supreme Court issued its *Everson* case. Litigation groups like the American Civil Liberties Union, Americans United for Separation of Church and State, and the Anti-Defamation League filed many of the lawsuits. Their efforts were complemented, if not catalyzed, by the nation's growing countercultural movements in the 1960s (think of the hippie movement, Woodstock, and the Vietnam War protests), by a growing anti-religious sentiment in the American academy in the 1970s (think of the "God is dead" movement and the Marxist critiques of religion), and by the rise of religious and cultural minorities whose views found too little place in majoritarian policies and practices. Cultural critics and Constitutional litigants challenged a number of admixtures of religion and government — including the presence of religious language, art, and symbols on government stationery and seals and in public parks and government buildings; the purchase and display of religious art, music, literature, and statuary in state museums; governmental recognition of Christian Sundays and holidays; and others.

Before 1980, few of these cases made much headway in the lower federal courts. The Supreme Court repeatedly refused to hear these cases on appeal, save a small cluster of cases in 1961 challenging traditional Sabbath day laws, which got nowhere. After 1980, however, the Court took on several cases on state-supported displays of religious symbols. These cases divided (and continue to divide) the Court deeply, yielding wildly discordant approaches to the Establishment Clause and bitter dissenting opinions from several of the Justices, notably Justices Scalia, Souter, and Stevens.

205 Id. at 223.
206 Id.
207 Id.
208 Id.
209 Id.
210 Id. at 224.
213 See Van Orden, 545 U.S. 677; McCreary County, 545 U.S. 844.
A. Religious Symbols in Public Schools

*Stone v. Graham* was the Supreme Court’s first case to deal directly with the constitutionality of religious symbols on government property. This was, in fact, another religion and public school case. The *Stone* Court struck down a state statute that authorized posting a plaque bearing the Ten Commandments (or Decalogue) on the wall of each public school classroom. Private groups in the community donated and hung the plaques. The Commandments were not read publicly, nor did teachers or school officials mention or endorse them. Each plaque also bore a small inscription that sought to immunize it from charges of religious establishment: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”

Using the *Lemon* test, the Court struck down these displays as violations of the Establishment Clause. Its per curiam opinion held that the statute mandating the Decalogue display had no “secular legislative purpose” but was instead “plainly religious.” The Ten Commandments are sacred in Jewish and Christian circles, the Court reasoned, and they command “the religious duties of believers.” It made no Constitutional difference that the Ten Commandments were passively displayed rather than formally read aloud or that they were privately donated rather than purchased with state money. The very display of the Decalogue in the public school classroom served only a religious purpose and was thus per se unconstitutional.

B. Religious Creches and Government Support

The next main case dealt with the place of a government-sponsored religious symbol on private land, and here the Court upheld the display. In *Lynch v. Donnelly*, the Court
addressed the Constitutionality of a government display of a creche, or manger scene. \(^{227}\)

For forty years, officials in the town of Pawtucket, Rhode Island coordinated with local merchants to put up a large Christmas display in a private park in the heart of the downtown shopping area. \(^{228}\) The display had many typical holiday decorations: stuffed animals, toys, striped poles, a Santa Claus house, a sleigh and reindeer, cardboard carolers, colored lights, a “Season's Greetings” sign, and more. \(^{229}\) Embedded in this large display was a manger scene that depicted the Bible's account of Christ's birth. \(^{230}\) It included figurines of Mary, Joseph, and baby Jesus in a manger, surrounded by animals, shepherds, wise men, and angels. \(^{231}\) The creche occupied about ten percent of the total holiday display space, and constituted fifteen percent of all the figurines. \(^{232}\) The city purchased the creche forty years before and had since stored and maintained it at little cost. \(^{233}\) Local taxpayers challenged the display as violating the Establishment Clause. \(^{234}\)

The *Lynch* Court upheld the display. \(^{235}\) “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life,” Chief Justice Burger wrote for the majority, giving an ample list of illustrations to show how creches and other religious symbols had long been embedded in American culture and experience. \(^ {236}\) But there is another reason to uphold this display, Burger continued, now working through the three-part *Lemon* test. \(^ {237}\) Creches, while of undoubted religious significance to Christians, are merely “passive” parts of “purely secular displays extant at Christmas,” and they have taken on secular civic purposes and become embedded in the fabric of society. \(^ {238}\) Government acknowledgments of religion – like these creches, legislative prayers, and the “In God We Trust” statements on our coins – are not per se unconstitutional, Justice O'Connor added in concurrence. \(^ {239}\) Instead, they serve “the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” \(^ {240}\)

The primary effect of displaying the creche as part of the broader holiday display is not to advance the Christian religion, Chief Justice Burger continued, but to “engender[] a friendly community spirit of good will” that “brings people into the central city, and

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\(^{227}\) Id. at 671-72.

\(^{228}\) Id. at 671.

\(^{229}\) Id.

\(^{230}\) Id.

\(^{231}\) Id.

\(^{232}\) Id.

\(^{233}\) Id.

\(^{234}\) Id.

\(^{235}\) Id. at 672.

\(^{236}\) Id. at 674.

\(^{237}\) Id.

\(^{238}\) Id. at 685.

\(^{239}\) Id. at 692-93 (O'Connor, J., concurring).

\(^{240}\) Id.
serves commercial interests and benefits merchants.”

Governmental participation in and support of such “ceremonial deism” is not a form of excessive entanglement with religion and cannot be assessed “mechanically” or by using “absolutist” tests of establishment. “It is far too late in the day to impose a crabbed reading of the Establishment Clause on the country.”

Five years later, in County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, the Court offered a much closer, if not “crabbed,” reading of the Establishment Clause to outlaw another public holiday display that ran for six weeks, from Thanksgiving Day, late in November, into the new year. This display was in the county courthouse near the “Grand Staircase,” a heavily trafficked area for the many people who used the county’s offices for licensing, registration, litigation, and the like. Almost the entire display was a creche, featuring the same biblical figurines displayed in Lynch. The tallest figurine was an angel holding a trumpet that bore a clearly visible sign: “Gloria in Excelsis Deo” (“Give Glory to God in the Highest”), the Latin words of a familiar Christmas carol. A lay Catholic group donated the creche and put up a small sign indicating the same. The county had put around the display a small white fence, flanked by two small pine trees with red bows, and lined with red and white poinsettias. For the three weeks before Christmas, the county had invited local high school choirs to sing carols at the creche during lunch, dedicating the musical offerings to world peace and missing soldiers.

Local taxpayers sued.

The County of Allegheny Court struck down this creche display as violating the Establishment Clause. Justice Blackmun wrote for the plurality, noting that this display was on a prominent piece of government land, not in a private park like the Lynch display. This display was almost exclusively religious in content and not buffered by ample secular accoutrements of comparable size and genre. And this display carried a single, undiluted

241 Id. at 685 (majority opinion).
242 Id. at 669, 716 (quoting Arthur E. Sutherland, Book Review, 40 Ind. L.J. 83, 86 (1964)).
243 Id. at 687.
245 Id. at 580.
246 Id.
247 Id.
248 Id. at 573.
249 Id.
250 Id. at 580.
251 Id. at 581.
252 Id. at 587-88.
253 Id. at 579.
254 Id. at 598.
255 Id. at 598-99.
verbal message – enjoining viewers to give glory to God in the highest.256 Taken together, Justice Blackmun concluded, these factors had the fatal effect of primarily advancing or endorsing the Christian religion to the exclusion of all other faiths.257

The same County of Allegheny Court, however, upheld the public display of a menorah, the eight-armed candleholder symbolizing the Jewish holiday of Hanukkah.258 The menorah in question was an abstract eighteen-foot design, privately owned but erected and maintained by the county.259 It was displayed at a lesser-used entrance to the same courthouse, alongside the city’s forty-five-foot decorated Christmas tree, which was labeled “A Salute to Liberty.”260 Given its less prominent placement on government land, its abstract design, its proximity to the larger “Salute to Liberty” tree, its lack of verbal religious messages, and its use of a symbol (a menorah) that has both religious and cultural connotations, this display was constitutionally acceptable, Justice Blackmun concluded.261 The Court did not address the dissonance between upholding a menorah while simultaneously outlawing a creche at the same courthouse, but seemed to suggest that each case turned on the context and the characterization of the religious symbol.262

C. Private Displays of Religious Symbols in Public Forums

How to characterize a religious symbol arose again six years later, in Capitol Square Review and Advisory Board v. Pinette 263 For more than a century, Ohio kept open a ten-acre square around the state capitol building for public gatherings and displays of various sorts.264 Parties who wished to use the square had to apply and receive a free license from the state.265 In December, the state invited the community to erect various unattended displays in this square.266 The state put up its own Christmas tree, and granted a local rabbi’s application to put up a menorah.267 But the state denied the Ku Klux Klan’s (“KKK”) application to put up its signature Latin cross.268 The KKK appealed, charging the state with view-
point discrimination in violation of its free speech rights. The state countered that allowing the KKK to display its cross next to the state capitol would be establishing religion.

The Pinette Court upheld the free speech rights of the KKK and found no Establishment Clause violation. “[A] free-speech clause without religion would be Hamlet without the prince,” Justice Scalia wrote for the plurality. The state created an open public forum in its Capitol Square, and it cannot discriminatorily exclude religious speech from this forum unless it has a compelling reason. The Court concluded that a general aspiration to avoid an establishment of religion was not a sufficiently compelling reason to justify religious discrimination. Moreover, the Latin cross was only a private expression of religion, and no reasonable person would assume that the state had erected or condoned it – especially since the KKK would prominently label the cross as its own. And, unlike the single creche display at the grand staircase in County of Allegheny, this display would be one of several in a public forum open to anyone who applies.

Justice Thomas concurred, arguing not only that the Latin cross was a form of private expression, but also that it was not religious expression. For the KKK, “[t]he erection of such a cross is a political act, not a Christian one.” Its depiction is deeply offensive given the nation’s history of slavery and the KKK's history of racism. But even offensive speech deserves free speech protection.

D. Decalogue Displays on Government Land

The Court's conflicting messages and methods of dealing with public displays of religion became even more confusing after its two cases on the Constitutionality of Ten Commandments displays on government land. In McCreary County v. American Civil Liberties Union of Kentucky and Van Orden v. Perry, announced back-to-back on the same day, two
 sharply divided courts struck down one Decalogue display\textsuperscript{283} but left another standing.\textsuperscript{284} In \textit{McCreary County}, Justice Souter, writing for the majority, used a strict \textit{Lemon} analysis to strike down the display, with \textit{Stone v. Graham} as the strongest precedent.\textsuperscript{285} In \textit{Van Orden}, Chief Justice Rehnquist, writing for the plurality, ignored \textit{Lemon} and instead used a soft-history argument to uphold the display, with \textit{Lynch v. Donnelly} as the strongest precedent.\textsuperscript{286} Both cases featured long and bitter dissenters by Justice Stevens and Justice Scalia, respectively,\textsuperscript{287} and cacophonies of concurring and dissenting opinions by other Justices.\textsuperscript{288} The practical difference in outcome on the Court was attributable to Justice Breyer, who joined the majority in \textit{McCreary County}\textsuperscript{289} and joined in the decision (but not the plurality opinion) in \textit{Van Orden}.\textsuperscript{290} In his concurrence in \textit{Van Orden}, Justice Breyer described it as a “difficult borderline case” that called for “the exercise of legal judgment.”\textsuperscript{291}

\textit{McCreary County} concerned a Kentucky county’s new display of the Ten Commandments on a prominent courthouse wall.\textsuperscript{292} Initially the county ordered the Decalogue to be hung by itself.\textsuperscript{293} When the ACLU sued, the county ordered that the Decalogue be retained but that other governmental documents be put around the display.\textsuperscript{294} The county’s new order stated that “the Ten Commandments are codified in Kentucky’s civil and criminal laws”; that they were put up “in remembrance and honor of Jesus Christ, the Prince of Ethics”; and that the “Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America’s strength and direction.”\textsuperscript{295} Almost all the surrounding governmental documents chosen for the display had the religious language in them highlighted.\textsuperscript{296}

As the case proceeded through the courts, the county ordered a third display, without repealing its prior two orders.\textsuperscript{297} Now the Decalogue on display was expanded to include

\begin{itemize}
  \item \textit{McCreary County}, 545 U.S. at 858.
  \item \textit{Van Orden}, 545 U.S. at 677.
  \item \textit{McCreary County}, 545 U.S. at 850-81.
  \item \textit{Van Orden}, 545 U.S. at 681-92.
  \item \textit{Id.} at 692 (Scalia, J., concurring); \textit{Id.} at 737 (Stevens, Souter & Ginsburg, JJ., dissenting); \textit{McCreary County}, 545 U.S. at 885 (Rehnquist, C.J., Scalia, Kennedy & Thomas, JJ., dissenting).
  \item \textit{Van Orden}, 545 U.S. at 692 (Scalia, J., concurring); \textit{Id.} at 698 (Breyer, J., concurring in the judgment); \textit{Id.} at 737 (Stevens, Souter & Ginsburg, JJ., dissenting); \textit{McCreary County}, 545 U.S. at 881 (O’Connor, J., concurring); \textit{Id.} at 885 (Rehnquist, C.J., Scalia, Kennedy & Thomas, JJ., dissenting).
  \item \textit{McCreary County}, 545 U.S. at 849.
  \item \textit{Van Orden}, 545 U.S. at 698-706. (Breyer, J., concurring in the judgment).
  \item \textit{Id.} at 678 (Breyer, J., concurring in the judgment).
  \item \textit{McCreary County}, 545 U.S. at 850-81.
  \item \textit{Id.} at 851-52.
  \item \textit{Id.} at 853-54.
  \item \textit{Id.} at 853 (quoting Defendants’ Exhibit 9 in Memorandum in Support of Defendants’ Motion to Dismiss at 1-3, 6, Am. Civil Liberties Union of Ky. v. McCreary County, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (No. Civ. A. 99-507)).
  \item \textit{Id.} at 853-54.
  \item \textit{Id.} at 855-56.
\end{itemize}
Lift High The Cross?

the full verses from Exodus 20, and not just a summary as in the prior exhibits.\textsuperscript{298} Nine other documents of comparable size flanked it, including the Magna Carta, the Declaration of Independence, the Bill of Rights, and the Mayflower Compact, and in these documents, more neutral language was highlighted.\textsuperscript{299} The collection as a whole was entitled “The Foundations of American Law and Government Display.”\textsuperscript{300} Each document had a comparably-sized description of its historical and legal significance.\textsuperscript{301} The Ten Commandments bore this description:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.’ The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.\textsuperscript{302}

The entire display was on the wall of a heavily trafficked hallway in the county courthouse.\textsuperscript{303} The county had initiated and paid for the displays.\textsuperscript{304}

The McCreary County Court struck down this display as a violation of the Establishment Clause.\textsuperscript{305} Its fatal feature, in the Court’s judgment, was the lack of a genuine secular purpose, which both Lemon and Stone required.\textsuperscript{306} The Decalogue is a “pervasively religious text” with a clear religious message, Justice Souter wrote for the majority, even if this text may have had legal or political uses in the past.\textsuperscript{307} The county’s stated legislative purpose in putting up the display was to honor “Christ, the Prince of Ethics.” \textsuperscript{308} The original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. “When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.”\textsuperscript{309} That was fatal in Stone, and it must be fatal here.\textsuperscript{310}

\textsuperscript{298} Id.
\textsuperscript{299} Id. at 857.
\textsuperscript{300} Id. at 856.
\textsuperscript{301} Id.
\textsuperscript{302} Id. at 856 (quoting Application to Petition for Certiorari at 180a, McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005)).
\textsuperscript{303} Id. at 864-65.
\textsuperscript{304} Id. at 874-75.
\textsuperscript{305} Id. at 864-65.
\textsuperscript{306} Id. at 869.
\textsuperscript{307} Id. at 870 (quoting Defendants’ Exhibit 9 in Memorandum in Support of Defendants’ Motion to Dismiss at 1-3, 6, Am. Civil Liberties Union of Ky. v. McCreary County, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (No. Civ. A. 99-507)).
\textsuperscript{308} Id. at 869.
\textsuperscript{309} Id. at 871.
The county's clumsy attempts to dilute this religious message by relabeling the Decalogue as a moral code, and displaying other political documents with their religious passages prominently highlighted, only compounded its Constitutional error in the eyes of any "reasonable observer," Justice Souter continued.\textsuperscript{311} The purported secular purposes of the county's final display "were presented only as a litigating position"\textsuperscript{312} and did little to offset the offending religious purpose that had informed the first two displays and the county's actions throughout the lawsuit.\textsuperscript{313} A genuine attempt by government to cure an inadvertent unconstitutional condition could certainly pass muster under the Establishment Clause, the \textit{McCreary County} Court concluded, but no such genuine attempt existed here.\textsuperscript{314} Viewed as a whole, and over time, the county's actions formed an establishment of religion.\textsuperscript{315}

In \textit{Van Orden v. Perry}, issued two hours after \textit{McCreary County}, the Court took a very different approach.\textsuperscript{316} This case concerned a six-foot stone monument of the Decalogue on the state capitol grounds in Austin, Texas.\textsuperscript{317} A voluntary civic group, the Fraternal Order of Eagles, had privately donated the Decalogue forty years earlier.\textsuperscript{318} It was one of thirty-eight historical markers and monuments on a twenty-two-acre state capitol campus.\textsuperscript{319} It was located near a lesser sidewalk that connected the state capitol with the state Supreme Court building.\textsuperscript{320} Van Orden, a state taxpayer who had regularly used the law library the prior six years, challenged the Decalogue display as a form of religious establishment.\textsuperscript{321}

The \textit{Van Orden} Court upheld the display.\textsuperscript{322} "Our cases, Januslike, point in two directions," Chief Justice Rehnquist wrote candidly for the plurality.\textsuperscript{323} One set of cases "looks toward the strong role played by religion and religious traditions throughout our Nation's history."\textsuperscript{324} "The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom."\textsuperscript{325} The \textit{Van Orden} Court followed the first line of cases, and declared the \textit{Lemon} test "not useful"\textsuperscript{326} in this case. The Deca-
logue is clearly a religious text with a religious message, the Court made clear. But “[s] imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” The Decalogue, like many other religious texts and symbols on federal, state, and local government lands, is also part of “America’s heritage,” part of the fabric of American society. Its public display on government land democratically recognizes and represents that “religion has been closely identified with our history and government” and that Americans are “a religious people, whose institutions presuppose a Supreme Being.” Moreover, this Decalogue display was privately donated. It stood unchallenged for forty years. It is a merely “passive” display that anyone can easily avoid while walking the state capitol grounds. And its message is buffered by the thirty-seven other monuments and markers on the same government land, most of which are decidedly secular. If this display is unconstitutional, Chief Justice Rehnquist wrote, then hundreds of others religious displays and maybe even the religious statues of Moses and Mohammed on a frieze in the Supreme Court building, must come down. That surely is neither the intent nor the import of the First Amendment Establishment Clause.

After such a remarkably discordant pair of cases, it was surprising to most observers that, four years later, the Supreme Court, in Pleasant Grove City v. Summum, was unanimous in upholding the Constitutionality of a Ten Commandments monument on government land. The same Fraternal Order of Eagles in Van Orden had privately donated the monument forty years earlier. It was one of a dozen old signs and markers in a city park in Utah. A new religious group, called Summum, sought permission to erect in the park a monument with their Seven Aphorisms of faith. The city refused, so Summum sued under the First Amendment. It charged the city with violating the Free Speech clause by discriminating against its Seven Aphorisms. It also threatened to charge the city with

327 Id. at 690.
328 Id.
329 Id. at 689.
330 Id. at 683 (quoting Sch. Dist. Of Abington Twp. v. Schempp, 374 U.S. 203, 212-13 (1963); Zorach v. Clauson, 343 U.S. 306, 313 (1952)).
331 Id. at 701.
332 Id. at 682.
333 Id.
334 Id. at 681.
335 Id. at 689.
336 Id. at 691-92.
338 Id.
339 Id. at 1129.
340 Id.
341 Id.
342 Id.
343 Id.
violating the Establishment Clause by displaying the Ten Commandments alone. This left
the city with a hard choice: take down the Ten Commandments or put up the Seven Aphorisms.

The *Pleasant Grove City* Court accepted neither approach, and held for the govern-
ment. The Court treated the Ten Commandments monument as a form of permissible
government speech. A government “is entitled to say what it wishes,” Justice Alito wrote
for the Court, and it may select and reflect certain views in favor of others. In this case, city officials had earlier accepted a Ten Commandments monument on grounds that it reflected the “[a]esthetics, history, and local culture” of the city. The Free Speech Clause does not give a private citizen a “heckler’s veto” over that old decision by the city. Nor does it compel the city to accept every privately donated monument once it has accepted the first. Government speech is simply “not subject to scrutiny under the Free Speech Clause,” the Court concluded, nor to judicial second-guessing under the First Amendment. Government officials are “accountable to the electorate” for their speech, and they will be voted out of office if their views cause offense.

It helped the *Pleasant Grove City* Court that there were a dozen monuments in the city
park, only one of which was religious in content. It also helped that the Decalogue in question was a forty-year-old monument that had never been challenged before. Such facts allowed some of the Justices to agree that the display did not constitute an establish-
ment of religion. But the case turned on a characterization of the Ten Commandments monument as a form of government speech – not as a secularized icon of ceremonial deism or as a religious symbol sufficiently buffered by secular equivalents. The *Pleasant Grove City* Court did not deny or dilute the religious qualities of the Ten Commandments.

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344 Id.
345 Id. at 1139.
346 Id. at 1125.
347 Id.
348 Id. at 1127 (quoting *Rosenberger v. Rector*, 515 U.S. 819, 833 (1995)).
349 Id. at 1136.
350 Id. at 1128.
351 Id. at 1131 (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)).
352 Id. at 1138.
353 Id. at 1125.
354 Id. at 1127 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).
355 Id. at 1125.
356 Id. at 1140.
357 Id.
358 Id. at 1125.
359 Id. at 1140.
instead, it left it to elected government officials to decide how to reflect and represent the 
views of the people, including their religious views.\textsuperscript{360} The Court also left it to the people to 
debate and decide whether the government’s representation of their views was adequate 
or outmoded.\textsuperscript{361} Courts could certainly step in if the government coerced citizens to ac-
cept the religious views on these symbols, or if the government’s speech violated privacy, 
endangered society, or violated the Constitution.\textsuperscript{362} However, a merely passive display of 
a generic religious symbol or text was not nearly enough to trigger federal judicial inter-
vention.\textsuperscript{363}

\section*{E. The Cross in the National Park}

The Supreme Court did not use this government-speech logic in \textit{Salazar v. Buono}.\textsuperscript{364} The case, as discussed in the Introduction, concerned a challenge to a seven-foot cross 
on prominent display in the Mojave National Preserve in California.\textsuperscript{365} The cross had been 
donated and erected in 1934 by a private group, the Veterans of Foreign Wars, as a memo-
rial to fallen American soldiers.\textsuperscript{366} The cross stood alone.\textsuperscript{367} A few years earlier, a Buddhist 
group had sought to place one of its shrines near the cross, but the government had denied 
their application.\textsuperscript{368} A former park worker now challenged its Constitutionality.\textsuperscript{369}

Observers had expected the \textit{Salazar} Court to return to \textit{Pleasant Grove City}, and decide 
whether this privately-donated cross in a federal park, like the privately donated Deca-
logue in a city park, would be viewed as a constitutionally permissible form of government 
speech.\textsuperscript{370} Unlike \textit{Pleasant Grove City}, there were no nearby secular buffers to offset the 
religious message, but here the cross was a non-verbal symbol, its location was much more 
remote, and it had stood almost twice as long without challenge.\textsuperscript{371} The six fractured opin-
ions in \textit{Salazar}, however, focused largely on Buono’s standing rights, the Constitutionality 
of Congress’s private land sale, and the district court’s authority to enjoin it.\textsuperscript{372}

\begin{footnotes}
\footnotetext[360]{Id. at 1132.}
\footnotetext[361]{Id.}
\footnotetext[362]{Id. at 1125.}
\footnotetext[363]{See Id.}
\footnotetext[364]{Salazar v. Buono, 130 S. Ct. 1803 (2010).}
\footnotetext[365]{Id. at 1826.}
\footnotetext[366]{Id. at 1807.}
\footnotetext[367]{Id. at 1834.}
\footnotetext[368]{Buono v. Norton (BuonoI), 371 F.3d 543, 550 (9th Cir. 2004).}
\footnotetext[369]{Salazar, 130 S. Ct. at 1803.}
\footnotetext[370]{See generally Nelson Tebbe, Privatizing and Publicizing Speech, 104 NW. U. L. REV. COLLOquy 70 (2009).}
\footnotetext[371]{Salazar, 130 S. Ct. at 1803.}
\footnotetext[372]{Id.}
\end{footnotes}
Writing for himself and two other Justices, Justice Kennedy concluded that Buono had standing both to press his original case that challenged the Constitutionality of the cross display on federal land and to press his subsequent case that challenged the federal land sale. But Kennedy was not convinced that the district court had jurisdiction to extend its original injunction against the cross to enjoin the congressional act authorizing the land sale. The decision to enjoin the land sale required a separate Constitutional inquiry whether Congress had truly violated the Establishment Clause, not just a simple judgment that its act was a “sham” designed to “evade” the first injunction. The district court would now have to judge Congress’s actions on the merits. In making this judgment, Kennedy continued, the district court would have to take into account the reality that while the cross was “certainly a Christian symbol,” it had not been erected in the park “to promote a Christian message” or to “set the imprimatur of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.” The district court would further have to recognize that “[t]ime also has played its role” and “the cross and the cause it commemorated had become entwined in the public consciousness” and part of “our national heritage.” Justice Kennedy thus reversed the order enjoining the land transfer and remanded the case to the district court to judge the Constitutionality of Congress’s act on the merits and in light of these factors.

Joining the plurality opinion, Justice Alito thought the case was sufficiently developed for the Supreme Court itself to make that Constitutional judgment – and in favor of the government. The cross had been privately donated to honor the nation’s war dead (just like crosses in government cemeteries everywhere), it had stood without challenge for seventy years, and it was an utterly remote corner of a desert park “seen by more rattlesnakes than humans.” Also joining the plurality opinion, Justices Scalia and Thomas thought that Buono lacked standing to seek an injunction of the land sale and the district court lacked power to issue the injunction. Buono is asking a federal court to prevent the display of a small cross on private land, they concluded; this leaves no Constitutional question to resolve.

That characterization missed the Constitutional point, Justice Stevens wrote in dissent, joined by three other Justices. The issue is whether the original display of the cross vio-
lates the Establishment Clause, and whether Congress's actions in response to the district court order can be seen as an evasion – much like the government's actions in the McCreary County case, which had been judged unconstitutional.\textsuperscript{385} Justice Stevens concluded that both the purpose and effect of the land transfer statute was to endorse religion in violation of the establishment clause.\textsuperscript{386} In a separate dissent, Justice Breyer concluded that the district court did have power to enjoin the land transfer, making unnecessary any further inquiry into Establishment Clause issues.\textsuperscript{387}

F. Rules of Thumb in Future Religious Symbolism Cases

This thirty-year line of religious symbolism cases – from Stone v. Graham to Salazar v. Buono\textsuperscript{388} – has easily been the least steady of the Court's Establishment Clause cases. Many of these cases turn heavily on the facts, and how these facts are characterized. Many feature widely discordant opinions, sometimes cast in rhetorically bombastic terms. The Court still seems a long way from creating a new concordance of its discordant precedents – though Linkner's article hereafter makes a valiant effort to find coherence among the jumbled opinions.\textsuperscript{389} So far, there are only a few rules of thumb to guide litigants and lower courts in these matters. Four are worth mentioning here – with the caveat that while each might be useful, none is dispositive.

First, older religious displays and practices tend to fare better than newer displays, particularly if they have not faced much prior Constitutional challenge. Even if the original inspiration for the old display or practice was religious, its longstanding presence in public life seems to imbue it with a kind of cultural and Constitutional imprimatur. In the Court's view, it has become a part of American culture, society, and democracy – and is thus unlikely to be a fateful first step toward an establishment of religion.\textsuperscript{390} Sometimes the Court has implied that even if the display or practice once had specific religious meaning, that meaning has now been lost; and the display is now either merely a civic symbol devoid of religious content or a more generic symbol that evinces “ceremonial deism.”\textsuperscript{391} Other times, the Court has worked harder to acknowledge the ongoing religious nature and content of the symbol for many citizens.\textsuperscript{392}

\textsuperscript{385} Id. at 1841.
\textsuperscript{386} Id. at 1837.
\textsuperscript{387} Id. at 1843 (Breyer, J., dissenting).
\textsuperscript{389} See generally Linkner, supra note 23.
\textsuperscript{392} See McCreary County v. Am. Civil Liberties Union of Ky., 544 U.S. 844 (2005); Stone, 449 U.S. at 39.
Moreover, if Establishment Clause litigants sit on their rights too long, those rights tend to receive less deference when they are finally exercised. Older religious displays and practices were at issue in *Lynch*, *Van Orden*, *Pleasant Grove City*, and *Buono*, and the government won each time. Older religious displays and practices were at issue in *Lynch*, *Van Orden*, *Pleasant Grove City*, and *Buono*, and the government won each time.393 Newer displays were at issue in *Stone*, *County of Allegheny*, and *McCreary County*, and the government lost each time.394

The law recognizes both the power and the pressure of time in other areas. For example, the power of time can be seen in historical preservation and zoning rules that “grandfather” various older (religious) uses of property that do not comport with current preferred uses.395 It can also be seen in private property laws of “adverse possession”: an open, continuous, and notorious use of a property eventually will vest in the user.396 Those legal ideas have some bearing on these religious symbolism cases, leaving older displays more secure but new displays more vulnerable. The law further recognizes the pressure of time in its rules of pleading and procedure. In order to promote finality and to prevent stale claims, legislatures set statutes of limitations on many claims.397 The law has also long done the same through the equitable doctrine of laches, which similarly penalizes parties for sitting too long on their rights.398 While the law does not set statutes of limitations on Constitutional cases, and the Court has never explicitly invoked laches, the idea itself seems to influence the Court. “If a thing has been practiced for two hundred years by common consent” — especially at the local level, Justice Holmes once wrote — “it will need a strong case for the Fourteenth Amendment to affect it.”399

Second, it can be critical to a case how the symbol or practice is labeled or characterized. *Stone* and *McCreary County* characterized the Decalogue as a religious symbol and struck it down;400 *Van Orden* and *Pleasant Grove City* characterized it as an historical marker and let it stand;401 *Lynch* labeled the creche a mere holiday display with commercial value, and let it stand;402 *County of Allegheny* labeled the creche a depiction of the Christmas story, and struck it down;402 *County of Allegheny* labeled the creche a depiction of the Christmas story, and struck it down;403 *Pinette* called the Latin cross a form of private expression protected by the free speech clause;404 *Pleasant Grove City* called the Decalogue a form of government

393 *Pleasant Grove City*, 129 S. Ct. at 1125; *Van Orden*, 545 U.S. at 677; *Lynch*, 465 U.S. at 668; *Buono II*, 371 F.3d 543, 543 (9th Cir. 2004).
396 Id. at 344.
397 See, e.g., *GA. CODE ANN. § 9-3-24 (West 2011); MASS. GEN. LAWS. ANN. ch. 260, § 2A (West 2011); N.Y. CIVIL PRACTICE LAW § 213 (McKinney 2011).
speech immune from the Free Speech Clause. Lynch labeled the secular decorations around the creche an effective buffer; McCreary County regarded the secular documents around the Decalogue as fraudulent camouflage. For Stone, labeling the Decalogue as a moral code was viewed as a subterfuge belied by the very imperative tone of the Commandments. For County of Allegheny, labeling a forty-five-foot county Christmas tree as “A Salute to Liberty” was sufficient Constitutional cover for placement of a menorah. County of Allegheny treated as constitutionally fatal two signs at the creche bearing the imperative “Gloria in Excelsis Deo” and “Donated by the Holy Name Society.” Van Orden thought a small sign reading, “Presented... by the Fraternal Order of Eagles” offset any Constitutional offense to a six-foot Decalogue with imperatives like, “Thou shalt have no other gods before me,” “Thou shalt not take the Name of the Lord thy God in vain,” and “Remember the Sabbath day, to keep it holy.” Characterization of the symbol or practice can be key to its Constitutional fate.

Third, geographical location can also be important. Government-sponsored displays on private property, as in Lynch, get more deference than private displays on government property, as in Stone and County of Allegheny. Displays in prominent places on government properties, like the grand staircase in County of Allegheny or the main hallway in the McCreary County courthouse, are more suspect than those in less conspicuous places, like the secondary entrance in County of Allegheny the secondary sidewalk in Van Orden the small city park in Pleasant Grove City or the remote desert corner of a national park in Buono. Location is not dispositive of the Establishment Clause question, as litigants in Pinette found out; in that case, religious activities and displays on the plaza of the state capitol were upheld. But location is a factor in some cases. And location can play a key role if it strongly influences whether citizens are actually or effectively forced to observe or participate in the religious exercise. That smacks of coercion and leads the Court

405 Pleasant Grove City, 129 S. Ct. at 1126.
410 Id. at 573.
413 County of Allegheny, 492 U.S. at 573; Stone, 449 U.S. at 39.
414 County of Allegheny, 492 U.S. at 675.
416 County of Allegheny, 492 U.S. at 573.
419 Buono II, 371 F.3d 543, 549 (9th Cir. 2004).
to find a violation of the establishment clause, as in *Stone*\(^{421}\) and various cases on prayer in public schools.\(^{422}\)

A fourth factor is whether the religious symbol or practice is offset by other secular symbols or practices. Particularly when the government sponsors or houses religious symbols on its property, it is best to offset these religious symbols by non-religious symbols of comparable size, weight, and genre. *McCreary County* makes clear that a court can (and sometimes will) second guess the government when the court suspects subterfuge.\(^{423}\) But lower courts have generally been sympathetic with government officials who try to balance religious and non-religious messages in their public display.\(^{424}\) In assessing the balance, they will make rough judgments whether the offsetting symbols' messages are of comparable genre; whether its religious qualities are obvious or more abstract; and whether the religious symbol is suitable or unsuitable for the government forum.\(^{425}\) For example, a Renaissance “Madonna With Child” may be fine in the foyer of the state museum but not in the entrance to the state capitol. This, like all these rules of thumb, merely reiterates that context matters.

**CONCLUSION AND POSTSCRIPT**\(^{426}\)

The *Salazar* case and the *Lautsi* case were not inevitable in result given the shifting precedents available to the high courts of the United States and Europe, respectively. And neither case is likely to end the perennially contested questions of the Constitutional place of religious symbols on government land.

At the time of this writing, *Salazar* is back before the federal district court that now must judge the Constitutionality of Congress’s decision to sell the land.\(^{427}\) Since the *Salazar* case was remanded, the Ninth Circuit Court of Appeals has just issued another opinion, striking down another old memorial cross that the city of San Diego sold to Congress in an effort to

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\(^{425}\) See *County of Allegheny*, 492 U.S. at 635.


preserve it against an Establishment Clause challenge.\textsuperscript{428} However the \textit{Salazar} district court comes out on remand, the case will almost certainly be appealed again to the same Ninth Circuit court and likely to the Supreme Court as well.

Just as this Article was going to final press, the Grand Chamber of the European Court of Human Rights issued an important opinion that upheld Italy’s policy of displaying crucifixes in its public school classrooms, reversing the Chamber below in a fifteen to two decision.\textsuperscript{429} The Grand Chamber stated clearly that the crucifix is a religious symbol, that atheism is a protected religious belief, and that public schools must be religiously neutral.\textsuperscript{430} But the Court held that Italy’s longstanding policy of “passive displays” of a crucifix in each public school classroom was no violation of religious freedom – particularly when students of all faiths were welcome in public schools and were free to wear their own religious symbols.\textsuperscript{431} The Court held further that Italy’s policy of displaying only the crucifix was no violation of religious neutrality, but an acceptable democratic reflection of its majoritarian Catholic culture.\textsuperscript{432} With European nations widely divided on whether and where to display various religious symbols, the Court concluded, Italy must be granted a margin of appreciation to decide for itself how and where to maintain its Christian traditions in school.\textsuperscript{433}

There is much more to be said about the Grand Chamber’s judgment in \textit{Lautsi}. But what is notable here is how closely the Grand Chamber’s logic tracks that of the U.S. Supreme Court in its last three religious symbolism cases – \textit{Van Ordern}, \textit{Pleasant Grove City}, and \textit{Salazar}.\textsuperscript{434} While not entirely convergent in their religious symbolism cases, the American and European high courts now seem to hold six teachings in common.

First, tradition counts in these cases. In American courts, as we saw, older religious displays tend to fare better than newer displays.\textsuperscript{435} The longstanding customary presence of a religious symbol in public life eventually renders it not only acceptable but also indispensable to defining who we are as a people. In \textit{Lautsi}, Judge Bonello put this argument strongly in his concurrence: “A court of human rights cannot allow itself to suffer from historical Alzheimer’s. It has no right to disregard the cultural continuum of a nation’s flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people.”\textsuperscript{436}

\begin{footnotesize}
\begin{itemize}
  \item Trunk v. San Diego, 629 F.3d 1099, 1125 (9th Cir. 2011).
  \item Lautsi II, supra note 14, passim.
  \item See \textit{Id.} paras. 63-66.
  \item See \textit{Id.} paras. 73-74.
  \item See \textit{Id.} paras. 67, 71.
  \item \textit{Id.} para. 68.
  \item See supra Part II.D-E.
  \item See supra Part II.
  \item Lautsi II, supra note 14, para. 1.1 (Bonello, J., concurring).
\end{itemize}
\end{footnotesize}
Second, religious symbols often have redeeming cultural value. American courts have long recognized that a Decalogue is not only a religious commandment but also a common moral code; that a cross is not only a Christian symbol, but also a poignant memorial to military sacrifice. When passively and properly displayed, the meaning of a symbol can be left in the eye of the beholder – a sort of free market hermeneutic. The Lautsi court echoed this logic. While recognizing the crucifix as religious in origin, the Court accepted Italy’s argument that “the crucifix [also] symbolised the principles and values” of liberty, equality, and fraternity, which “formed the foundation of democracy” and human rights in Italy and beyond.

Third, local values deserve some deference. In the United States, the doctrine of federalism requires federal courts to defer to the practices and policies of individual states, unless there are clear violations of federal constitutional rights to free exercise and no establishment of religion. The Supreme Court has used this doctrine to uphold the passive display of crosses and Decalogues on state capitol grounds. The Lautsi Court uses the European margin of appreciation doctrine in much the same way. Lacking European consensus on public displays of religion and finding no coerced religious practice or indoctrination in this case, the Court left Italy to decide for itself how to balance the religious symbolism of its Catholic majority and the religious freedom and education rights of its atheistic minorities.

Fourth, religious freedom does not require the secularization of society. The U.S. Supreme Court became famous for its image of a “high and impregnable” wall of separation between church and state that left religion hermetically sealed from political life and public institutions, and hermeneutically sealed from political and legal arguments. But the reality today is that the Supreme Court has abandoned much of its strict separatism and now allows religious and non-religious parties alike to engage in peacable public activities, even in public schools. The European Court of Human Rights likewise became famous for promoting French-style laïcité in public schools and public life, striking down Muslim headscarves and other religious symbols as contrary to the democratic “message of tolerance, respect for others and... equality and non-discrimination.” Lautsi suggests a new policy that respects the rights of private religious and secular groups alike to express their views, but allows government to reflect democratically the traditional religious views of its majority.

437 See supra Part II.
438 Lautsi II, supra note 14, para. 67.
440 See supra Part II.
441 See Lautsi II, supra note 14, para. 68.
443 See supra Part II.
445 See Lautsi II, supra note 14, paras. 63-77.
Fifth, religious freedom does not give a minority a heckler's veto over majoritarian policies. Until recently, U.S. courts allowed taxpayers to challenge any law touching religion even if it caused them no real personal injury. This effectively gave secularists a “veto” over sundry laws and policies on religion – however old, common, or popular those laws might be. The Supreme Court has now tightened its standing rules considerably, forcing parties to make many of their cases for legal reform in the legislatures and to seek individual exemptions from policies that violate their beliefs. Lautsi holds similarly. It recognizes that while the crucifix may cause offense to Lautsi, it represents the cherished cultural values of millions of others, who, in turn, are offended by her views. But personal offense cannot be a ground for censorship. Freedom of religion and expression requires that all views be heard in public life.

Finally, religious symbolism cases are serious business. As we said in the Introduction, it is easy to be cynical about these cases. But the high temperature of the litigation and the close focus of the international media on these cases suggest that religious symbolism cases are themselves symbolically important for a democratic culture. These cases are essential forums to work out peaceably deep cultural differences and to find ways of accommodating both traditions and the shifting needs of modern cultures.

447 Cf. Id. at 1131 (quoting Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)).
448 See Id.
449 See Lautsi II, supra note 14, paras. 63-77.
450 Id.
451 Id.
Reid B. Locklin

THE MANY WINDOWS OF THE WALL

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Was I scared floating in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them – and God and faith and the separation of Church and State – George H.W. Bush.¹

Fundamental to Christianity is the distinction between what belongs to Caesar and what belongs to God (cf. Mt 22:21), in other words, the distinction between Church and State... [T]he State may not impose religion, yet it must guarantee religious freedom and harmony between the followers of different religions. For her part, the Church, as the social expression of Christian faith, has a proper independence and is structured on the basis of her faith as a community which the State must recognize. The two spheres are distinct, yet always interrelated – Pope Benedict XVI.²

These two affirmations of an appropriate “separation” or “distinction” between church and state come from what may, at first glance, seem unexpected sources: a U.S. politician closely associated with the Religious Right, during his 1988 presidential campaign, and the highest religious authority of the Roman Catholic Church, in a 2005 papal encyclical on faith, politics and social service. Particularly in the American imagination, both would likely evoke the Jeffersonian image of a “Wall” between these two spheres of political and social life, an image that is explored, defended and problematized by a number of the authors

¹ Cullen Murphey, War is Heck, Wash. Post, Apr. 8, 1988, at A21 (quoted in Kumar 47).
discussed in this review essay. Most importantly for our present purpose, both pope and politician speak in the language of singulars: a singular, secular state with its singular, secular law, and a singular “Church” with its own distinctive practices, law and moral order. The works under review here attempt, in a variety of different ways, to transpose this singular into a plural, to explore the relationship of secular and religious in a world of many different religious traditions and many different legal and social regimes.

Only one of these, The Challenge of Pluralism, by Pepperdine University political scientists Stephen W. Monsma and J. Christopher Soper, stands as a scholarly monograph, drawing on new research and fieldwork in five democracies to update and refine their original 1997 challenge to the U.S. ideal of strict separation between church and state. In some contrast to Monsma and Soper’s very clear focus, the edited collections of Stephen Prothero and D. Naresh Kumar offer loosely ordered compilations of very diverse essays solicited from prominent scholars of religion (Prothero) or reprinted from other venues (Kumar) to advance our understanding of pluralism in religious ethnography, sociology and law. The remaining two volumes stand somewhere in-between, gathering together papers presented at the University of Windsor Faculty of Law in 2006 (Moon) and as part of a lecture series hosted by the “Religion in the 21st Century” Priority Area of the University of Copenhagen, also in 2006 (Mehdi et al.). Together, these five books represent the cumulative effort of nearly fifty scholars of law, religion and the social sciences, drawn primarily from North America and Europe, to explore the consequences of globalization, immigration and religious pluralism for secular democracies in the contemporary world.

In this essay, I draw out three major areas effectively brought out by these various studies, including a number of issues on which they can be substantively engaged and brought into dialogue with one another. These are 1) diverse understandings of secularism and the secular state; 2) the significance of particular, controversial cases of adjudicating the proper relation between church and state; and 3) the broader challenges raised by religious diversity in redefining good citizenship, consensus values and civic belonging.

I. DIVERSE FACES OF THE SECULAR

In April 2009, I had the great privilege of traveling in Bangalore, India on the first day of polling for national elections in the world’s largest democracy and one of the world’s most pluralistic religious milieus. Just down the street from where I was staying, a large

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3 This is especially true of Richard W. Garnett, who explicitly situates Bush and Benedict in his insightful historical enquiry into this powerful metaphor and possible alternatives to it. (Kumar ch. 3)
billboard had been erected by the Christian Institute for the Study of Religion and Society (CISRS) to encourage participation in the elections and to stipulate broad values for Indians to consider when casting their votes: resistance to communalism, upholding the rights of women and children, just economic policy, and the “defence of secularism.” Such a public endorsement of secularism from a Christian lobby – which one would not expect in most parts of North America – reminded me of many conversations with Christian theologians and activists during a research trip in the Indian state of Tamil Nadu some years ago. “Secularism,” they contended, has a very different meaning in India than it has in the West. In the Indian context, this term refers not primarily to a social or political sphere separate from or opposed to religion, but to the important role of the government to encourage religion and to foster a harmonious pluralism of religious practice and belief in the society.

To some extent, the CISRS billboard can be attributed to the minority status of Indian Christians. Secularism, perhaps, always represents a more positive value for those who have the most to lose from an established majority; and the rise of Hindu nationalism in the last two decades has emerged as a real threat to both Muslim and Christian minorities in India. But it also offers a point of entry into an issue nicely illustrated in the volumes under review in this essay: namely, the diverse, historically situated meanings of secular government, and “the secular” itself, in the diverse social and political contexts in which it functions, from Europe to its former colonies to the wider, emerging realm of international law.

In their study of five modern Western democracies, Monsma and Soper suggest that there are “three basic models of church-state relations”: the “strict church-state separation model,” an “established church model,” and a “pluralist or structured pluralist model.” (Monsma & Soper 10-12) Arguably, both the first and the third of these models emerged in reaction against the second, particularly in Europe. Nevertheless, part of the purpose of Monsma and Soper’s study is to bring out the more positive elements of the models used in European countries that retain elements of religious establishment. In the case of Britain, for example, they argue that the unapologetic establishment of the Church of England as the state church uniquely combined with the comparative weakness of Anglicanism in modern British society, and thus encouraged this church to become an advocate for religious freedom and for a fuller participation of Catholics, Muslims and other religious groups alongside Anglicans in public life. This resulted in a situation of “partial establishment.”

On the one hand, this partial establishment “lent itself most easily to a state promotion of “consensual” religious values” (Monsma & Soper 139), which Monsma and Soper regard with some ambivalence. On the other, it also fostered a lively British sense “that religious groups have an important cultural and social function to play, which the state should both recognize and support” (Monsma & Soper 143), of which they wholeheartedly approve. Along similar lines, in Germany, the post-Reformation principle of cuius regio, eius religio (“the religion of the ruler is the religion of the state”) led to a distinctive sense that the “well-being of society rested on the two pillars of church and state, or throne and altar, as it is often put. They were seen as united in a common cause.” (Monsma & Soper 173) Though
Monsma and Soper conclude that Germany surpasses Britain in its far clearer constitutional protections for religious freedom, they insist that both countries have succeeded in creating ample space for authentic pluralism to flourish in their societies without disallowing support and even establishment of particular religious associations by the state.

Two essays in the Law and Pluralism volume, by Werner Menski and Prakash Shah, also address the ever-increasing pluralism of British social life. (Mehdi et al. chs. 2-3) Both focus less on questions of religious establishment than on the complex interplay of diverse cultural norms and moral systems with state law to generate what Shah terms a “paradigm shift” in the British legal system. (Mehdi et al. 76) In such a situation, neither religion nor the “official sphere” of law and government is sufficient to account for the “legally complex super-diverse environment” created by immigration and globalization. (Mehdi et al. 79) Instead, in Britain and throughout Europe, the law must “recognise its own limits,” generate “increasing space for religion” in the legal sphere, and enter into more constructive relations with a wide range of social actors, including religious ones. (Mehdi et al. 79)

Monsma and Soper, for their part, locate a good example of such a strategy at work in the Netherlands and in its distinctive model of “principled pluralism.” In this case, the commitment to pluralism did not emerge from an extension of establishment privileges to a wider constituency, but from the opposition of a so-called “monstrous alliance” of Catholic and Reformed parties to an aggressive 1878 school law that cut state subsidies to religious schools. (Monsma & Soper 56-58) The law was overturned; and the intellectual leaders of the movement articulated a philosophy of “parallelism” or “pillarization” that recognized the importance of different religious and philosophical traditions to society; constituted networks of schools, unions, political parties and other institutions for these different groups; and envisioned the working of the state in close cooperation with them. (Monsma & Soper 59-60) The Dutch model originally included four major groups – Reformed, Catholic, socialist and neutral – but Monsma and Soper adduce evidence that Jews, Muslims and even Hindus have been integrated in additional such “pillars,” with comparable structures and support. On the whole, they conclude, “the Netherlands has created an approach to church-state issues that appears to have achieved the traditional liberal goal of governmental neutrality on matters of religion.” (Monsma & Soper 84) They go on to generalize:

Once one accepts the fact that consensual moral-religious beliefs that are accepted by most but not all of the population and that public institutions and programs purged of all religious elements are not truly neutral, but reflect certain philosophical or moral perspectives, it is hard to disagree with the basic Dutch contention that true government neutrality can only be attained by treating people and organizations of all religious and nonreligious perspectives and beliefs equally – not by favoring one over the other (Monsma & Soper 84).

Monsma and Soper explicitly acknowledge that this more thoroughly pluralistic understanding of the secular order is the product of “certain unique Dutch conditions” that favor integration and close cooperation between different groups. Yet, they also insist that
those concerned about religious freedom and pluralism in the U.S. and elsewhere may
have “much to learn from the Dutch experience.” (Monsma & Soper 85)

While Monsma and Soper identify the Netherlands as their primary example of a genu-
inely pluralistic model of church and state, the organizers of the 2006 Copenhagen lecture
series set their gaze further afield, suggesting that such models should also be sought in
“comparative examples from a few post-colonial, non-Western societies with long experi-
ence in dealing with problems relating to multiculturalism and religious pluralism.” (Mehdi
et al. 15) Morocco and Pakistan provide valuable, if ambiguous, cases in point. In his es-
say, Lawrence Rosen focuses on the 2003 revision of the Moroccan Mudawwana, or Code
of Personal Status, as an illustrative counter-example to “liberal Western assumptions”
that progressive change generally proceeds from the top down. (Mehdi et al. ch. 7, 143)
Prior to this initiative, both under the French colonial regime and through successive royal
amendments in 1957 and 1993, family law courts applied well-established traditions of
Islamic law, which were “highly creative in their legal decision-making.” (Mehdi et al. 135)
With the implementation of the new, ostensibly more progressive Code, Rosen argues,
the scope of legal discretion may actually widen further, albeit in a way that functions “to
lessen one’s expectations of what the state can do for its citizen and encourage greater
reliance on one’s own networks of indebtedness.” (Mehdi et al. 144) Along similar lines,
M. Azam Chaudhary attempts to demonstrate how the customary law of local assemblies
(panchayat) and kinship groups (badary) comes to influence, to circumvent and ultimately
to prevail over successive layers of Islamic law and secular courts of justice in colonial and
post-colonial Punjab. (Mehdi et al. ch. 9) In both of these examples, the policies of colonial
and post-colonial regimes come into complex relationship with local practices and diverse
religious cultures, albeit in ways that threaten to weaken rather than to strengthen the
central authority and social cohesion of the state.

For a more positive example of authentic pluralism in state policy, Werner Menski sug-
gests that Britain and other European states look to India. “Faced with a constitutional
directive to develop a uniform civil code, found in Article 44 of the Indian Constitution,” he
writes, “postmodern India has not abandoned the personal law system, but has devised a
complex strategy of harmonizing the various personal laws, thus giving another new mean-
ing to “unity in diversity.” (Mehdi et al. ch. 2, 61) In his introduction to the Legal Plural-
ism compilation, D. Naresh Kumar attributes this flexibility to historical precedent. Since
India has always recognized multiple sources of Hindu and Buddhist law, it makes sense
that India eventually came to define secularism as neither “absence of religion” nor “non-
recognition of existence of religions,” but as “equality of treatment of different religions.”
(Kumar iii) This outcome is precisely what Monsma and Soper identify as the “liberal goal”
so successfully articulated and instantiated in the Dutch policy of pillarization, as discussed
above.

In the case of India, however, Erik Reenberg Sand strikes a note of caution. (Mehdi et al.
ch. 5) While recognizing that “India has at least three thousand years of experience in deal-
ing with problems of religious and cultural pluralism” (Mehdi et al. 95-96), he attributes this less to a distinctively Indian appreciation for such pluralism itself than to the more mundane fact that, at least until the establishment of the Delhi Sultanate in 1206, the “ancient Indian state was not centralized” and “what we call statutory, or positive, law was almost non-existent.” (Mehdi et al. 97) Under the Sultanate and then the British colonial authority, alongside a “continuing process of codification,” (Mehdi et al. 98) there was also a robust recognition of local religious and customary personal laws in caste groups and minority communities. These two trends came to a head in the drafting of the Indian Constitution in 1948-49, especially its provisions on freedom of religion and the promulgation of a uniform civil code – the latter of which was passed but implemented only in fits and starts up to the present day. What Menski and Kumar celebrate as a distinctively Indian approach to secularism and pluralism, however, Sand analyzes as a compromise or “clash between different sets of views regarding the borderline between the religious and the secular as well as different identity constructions and loyalties, whether by reference to a religious group or to the larger Indian nation.” (Mehdi et al. 105) Examining the arguments on behalf of the uniform civil code by drafting committee members K.M Munshi, Alladi Krishnaswami Ayyar and Dr. B.R. Ambedkar, he reflects that:

However tempting it is to reach out to ethnic minorities and to meet their demands for the right to practice their own personal laws, we should take a deep breath and reflect upon what we may risk losing. We should ask whether we want to risk giving up our time-honoured individual rights, based on our common allegiance to the state, in return for a multicultural society where allegiance to groups, be they majority or minority, becomes stronger. (Mehdi et al. 109)

Here the secular emerges less as a neutral ground opposed to or in alliance with a diversity of religious and non-religious constituencies than as a contested space where the rights of the individual and those of the social group or association may, and perhaps often do, conflict.

For a set of rather different colonial and post-colonial experiences with religious freedom and cultural diversity, we turn back to the West – to Australia, Canada and the United States. Monsma and Soper enlist Australia as a second robust example of a “pluralist model of church-state religions,” albeit one that lacks either the secure constitutional framework or the clearly articulated principles that make the Dutch example so attractive. (Monsma & Soper ch. 4) If one follows the analysis of Bruce Ryder (Moon ch. 4), Canada also fits the pluralist mold. Ryder draws a basic contrast between the “secular vision of public citizenship” typical of France, Turkey and the U.S. Supreme Court, and “the Canadian commitment to equal religious citizenship in both public and private spheres.” (Moon 88) Ryder, like many of the other contributors to Law and Religious Pluralism in Canada, traces this
distinctively Canadian commitment to the 1982 Canadian Charter of Rights and Freedoms,\(^4\) which includes “both strong protection of religious rights in s. 2(a) and s. 15 and limitations on those rights pursuant to s. 1 when they harm or pose a significant risk of harm to the rights of others.” (Moon 94)

Equally important for Ryder, a series of court cases in the mid-1980s extended these protections not merely to personal religious conviction, but also to the right to religious practices in the public sphere. The result is certainly a kind of secularism, albeit one unique to the Canadian context. “The entrenchment of freedom of religion in the Canadian Constitution,” Ryder writes, “has had the effect of promoting the secularization of the state in the sense that the state must refrain from adopting laws or policies that have the objective or effect of favoring one religion over another.” (Moon 94) Yet, he also clarifies that “secular” in this case does not require neutrality towards religion as such, as opposed to non-religious beliefs and practices, but only toward the beliefs and practices of particular traditions in their relations with one another and with the state. As in the Netherlands, it merely requires that state support be extended “in an even-handed manner to all adherents of religious or conscientious belief systems.” (Moon 95)

In his article, Ryder concedes that this ideal of “equal religious citizenship” represents a relatively recent development in Canadian jurisprudence. At present, it remains fragile and subject to challenge – which he documents with recent controversies over the rights of marriage commissioners to refuse to perform same-sex civil marriages, the rights of Sikh students to wear a kirpan or ceremonial dagger in public schools, and the rights of Muslims to faith-based marriage arbitration, to which we shall return below.

Ryder’s fellow contributor and volume editor Richard Moon largely concurs, though he traces such fragility not merely to external challenges but also to a tension internal to the Charter itself: namely, its “partial or ambiguous shift from autonomy to identity as the basis for freedom of conscience and religion.” (Moon ch. 9, 218) Focusing particularly on those cases where agnostics or atheists have raised successful challenges against state support for any religious belief and practice whatsoever, he notes that “[s]ecularism, in this context, looks less and less like a neutral or common ground that stands outside religious controversy and more like a particular worldview that dominates the public sphere because of the political power of its adherents.” (Moon 231) If religion is indeed an aspect of cultural identity, then it cannot be excluded from the public sphere without effectively marginalizing religious citizens, denying them equal treatment under Canadian law and “seriously impoverishing community life” for the nation as a whole. (Moon 234)

Ryder, as already noted, contrasts this Canadian approach against that of several other secular democracies, including France, Turkey and, of course, the United States. The U.S. approach also constitutes the sole example of a “strict church-state separation model” in

Monsma and Soper’s study. (Monsma & Soper ch. 2) Like Moon, both of these authors contend that the exclusion of religious expression and practice from the public sphere does not reflect a situation of genuine neutrality for religious persons and associations before the law. In the words of the Supreme Court Justice Potter Stewart, whom they quote at length, a refusal to permit religious exercises... is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private. (Monsma & Soper 27) In their analysis, the attempt to establish a strict “wall of separation” between church and state, rooted in liberal Enlightenment values of personal autonomy, reason and the relegation of religion to the private sphere, paradoxically undercuts a broader and more substantive liberal commitment to genuine religious neutrality.

Monsma and Soper substantiate this claim, which is central to the argument of their book, in several ways. For the present, it is simply worth noting that, even in their analysis, the U.S. ideal of secularism and the secular state is not so easily reduced to the Jeffersonian image of the wall. This ideal of separation is, first of all, something that emerged only in stages throughout U.S. history, including a “first disestablishment” orchestrated by a “strange coalition” of evangelical Protestants and liberal rationalists in the mid-eighteenth century and a “second disestablishment” by the Supreme Court in the post-World War II era. This development was, moreover, interspersed with alternative models such as the “informal reestablishment of Protestant Christianity” in the common school movement and the emergence of a “principle of neutrality or equal treatment” in the Supreme Court beginning in the early 1980s. (Monsma & Soper 18-23)

Second, as Ryder also acknowledges (Moon 95-98), the strict separation model typical of recent First Amendment jurisprudence stands in some tension with a more robust ideal of religious accommodation and equal treatment embodied in the 1993 Religious Freedom Restoration Act, a Congressional initiative struck down by the Supreme Court in 1997 but re-initiated through the more limited 2000 Religious Land Use and Institutionalized Persons Act and through a number of state legislatures. (Monsma & Soper 25-26; also see Bender & Snow, in Prothero ch. 9, 184)

Third, as Richard W. Garnett argues in an insightful essay on the work of Robert Rodes, the U.S. model may be traced to two different principles, each of which reinforces the legitimate autonomy of church and state, though each rests on altogether different bases: namely, a relatively overdeveloped “Erastian principle” that “views the institutional church as one of many institutional forms through which a society conforms itself to the will of God” and a relatively underdeveloped “High Church principle” that the “state must keep its hands off the church because the church is sacred” and possessed of its own integrity and independence. (Kumar ch. 3, 54-55) Were these two principles to be brought into a more appropriate balance, Garnett argues, the U.S. secular ideal might shift from strict separation toward what Rodes termed “pluralist Christendom” (Kumar 57-58), an ideal comparable to what Monsma refers to as “positive neutrality.” (Monsma & Soper 7)
Stephen Prothero’s edited collection A Nation of Religions also fixes its attention on the United States – it is, in fact, the only one of these five volumes to focus exclusively on U.S. examples. However, its contributors build their cases from the ground up, rather than from the top down. Questions of Supreme Court jurisprudence and First Amendment protections do arise in two chapters toward the back of the book (Prothero chs. 9-10), but the primary focus is fixed resolutely on the actual political contributions of Muslims, Buddhists, Hindus, Sikhs and Christians to American public life. Prothero introduces the collection by first tracing the empirical and mythic transformations of the U.S. from a Protestant nation to a “Judeo-Christian society” constituted by Protestants together with Catholics and Jews, and then to a genuinely pluralist society through the influx of Asian immigrants beginning in 1965. (Prothero 1-4) In the light of this new social context, he suggests that scholars must begin to ask “not whether the United States is a Christian or a multireligious nation – it is clearly both – but how religious diversity is changing the values, rites and institutions of the nation and how those values, rites, and institutions are changing American religions” (Prothero 6) – the central question that motivates the individual studies in his volume. The volume as a whole thus offers a salutary reminder that questions of religious diversity and secularism are not merely questions of “ought” but also of “is,” of the actual realities on the ground that may or may not reflect lofty ideals of governance, law and public policy.

At a minimum, the chapters and articles assembled in these five volumes significantly and fruitfully complicate any absolutist notions of secularism and the secular state. Such complications would become even more pronounced if we extended our view to include the policies and practices of the European Union, following critical assessments by Matej Avbelj (Kumar ch. 8) and Lisbet Christoffersen (Mehdi et al. ch. 6), or the more fluid, contested and – as Paul Schiff Berman would have it – “jurisgenerative” realm of international law. (Kumar ch. 5) Despite this enormous complexity, the reader is often left with the impression that so much more could have been said and more examples adduced to support individual claims. Given Sand’s cautions about India, for example, one wonders about other pluralist models in Asia, perhaps including Indonesia. It also seems odd that Turkey and France appear only in very brief, usually critical comments. This is, at one level, understandable: most of the authors treated here favor more pluralist models of secularism and the secular state at the expense of more separatist models, and they do so persuasively. Yet, the omission of France in particular is especially noticeable in a work such as Monsma and Soper’s Challenge of Pluralism. This is not only because of the complexity of the case itself – comprising both radical policies of laïcité and a significant role of the state in supporting and facilitating public worship – but also because its absence risks creating the distorted impression that that the U.S. stands isolated and alone in its insistence on strict separation.

Notwithstanding such omissions, the cumulative effect of these works is to support the contention of my Indian colleagues so many years ago: “secularism” is indeed an ideal that acquires its meaning only in and through the historical and cultural contexts in which it happens to take root. Certainly, it seems always to imply a distinction between the state and particular religious groups, state neutrality towards these groups, and legal protec-
tions for the free exercise of religion, as this is variously understood. Though such neutrality usually precludes establishment of a particular religion by the state, even here there are exceptions, as the examples of Britain and Germany amply reveal. Indeed, Jennifer Nedelsky and Roger Hutchinson suggest that it may be “more useful to understand that secular means “no longer dominated by a single religious tradition” rather than the illegitimacy of religious discourse in the public realm.” (Moon ch. 2, 42) Most of all, perhaps, secularism is as secularism does – that is, its meaning emerges only in and through its concrete application in those particular cases where the interests of the state and the interests of religious groups overlap or come into conflict.

II. CHURCH AND STATE, AND UMMAH

The years 2006 and 2007 were extremely busy in the politics of my current home, the Canadian province of Ontario. In February 2006, the provincial legislature passed the Family Statute Law Amendment Act, which formally excluded the enforcement of faith-based arbitration of family disputes according to Islamic Shari’a law in the Ontario courts. In October 2007, voters re-elected the Liberal government after an election campaign dominated by lively debate about the public funding of faith-based education. The Progressive Conservative leader John Tory advanced a proposal, supported by many Ontarians and the Catholic bishops of the province, to extend the support currently reserved for Catholic schools – a legacy of the Confederation of French and English Canada in 1867 – to include a far more diverse range of religious schools. In the mean time, beginning in February of the same year, prominent scholars Gérard Bouchard and Charles Taylor were holding town meetings and public enquiries on the controversial issue of “reasonable accommodation” for ethnic and religious minorities in the neighboring province of Québec. This initiative was motivated by a number of high-profile cases of such accommodation between 2002 and 2008, involving religious adornment such as kirpans, the provision of halal and kosher food in public establishments, and special treatment of Muslim women and Hasidic Jews in the province’s public services and in the health care sector.5

Reflecting on these political events, it would be hard not to conclude that, at least in Canada, the fact of religious pluralism has risen in the public consciousness in recent years, albeit in ways that highlight its tendency to bump up against the prevailing social order. For

some observers, this new pluralism may appear primarily as a disruption, upsetting – for better or worse – the stable moral and legal framework that preceded it. For many of the authors treated here, on the other hand, it is this imagined status quo itself that represents the exception rather than the rule, and their arguments reveal the complex, inherently plural dynamics that generally characterize relations between state authority and religious norms.

The free exercise of religion is a fundamental human right enshrined in the First Amendment of the U.S. Constitution, as well as the constitutions and other charters adopted by most of the democratic regimes discussed above. Nevertheless, free exercise can imply a range of different policies and legal postures, depending upon how this right is articulated and applied. In the U.S., for example, as argued by Courtney Bender and Jennifer Snow, free exercise was initially extended primarily to belief rather than to action. With its landmark ruling Sherbert v. Verner ⁶ in 1963, however, the Supreme Court extended this protection to religious practices themselves, except in cases where the state could demonstrate a “compelling interest” to curtail them. The Court would eventually reverse this precedent in Employment Division v. Smith,⁷ for fear that “each conscience” may become a “law unto itself,” while also shifting the emphasis from state neutrality to “equal opportunity” in adjudicating issues of church and state. (Prothero ch. 9, 181-86) Bender and Snow summarize this development as follows:

The Warren Court, cognizant of the variety of religions present in American life, expanded the list of constitutionally protected religious actions. It also insisted on greater separation between government and religion, effectively excluding many public displays of religious symbols and government funding of religious activities. In short, it acted on a vision that religion was a private matter of individual conscience. In contrast, the Rehnquist Court curtailed federal judicial protection of religious exercise and re-interpreted the Establishment Clause to allow for equal opportunity for religious groups in public life. The Rehnquist Court rejected the view that religion should be relegated to individual expression alone and was more willing than the prior Court to sacrifice the activities of religious minorities to the greater good of a well-functioning society. (Prothero 186)

Reflecting on the same legal developments, Monsma and Soper also discern a shift in recent years, but judge it to fall short of recognizing religious freedom as a positive right and religious groups as entitled to receive the same support afforded to non-religious groups and ideals – as more clearly affirmed in other liberal democracies. (Monsma & Soper 26-28)

Bruce Ryder and several of the other contributors to Law and Religious Pluralism in Canada attempt to make the case that the Canadian Charter, no less than the constitutions of the Netherlands or Germany, affirms such positive rights not only for religious belief but also for practice – including, where appropriate, the special accommodation and support

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of the state. Yet, these same essays also reveal how difficult it can be to translate this ideal into actual policy. David Schneiderman, for one, suggests that the issue is best approached by means of a “rubric of associational rights” that recognizes the state as “merely one among a number of associations to which an individual belonged.” (Moon ch. 3, 66, 68)

In the case of Canada, such an approach suggests that the state must recognize the equal legitimacy and varied purposes of religious and other associations, even as it exercises its obligation to “make difficult choices between associational purposes” for its own purpose in facilitating the common life of its citizens. (Moon 80) In his essay, “Living by a Different Law,” Alvin Esau presses this question with reference to groups such as Anabaptists, who live by moral norms that may in many cases violate the liberal values of autonomy and equality that underpin secular law. (Moon ch. 5) He argues that such “illiberal” persons and groups should be granted the greatest freedom possible to live by their own laws, so long as members possess genuine freedom to leave the group and – critically – the group itself is prepared to recognize the right of persons in the broader society to live by their own predominantly liberal values, in a move he labels “reciprocal pluralism.” (Moon 129-30, 131-34)

Schneiderman and Esau depend upon the theory of legal pluralism to make their individual cases, and this theory represents the central object of enquiry in Kumar’s edited volume of the same name. Such legal pluralism is defined by Kumar as “the presence of more than one legal order allowing its minor orders to build up” (Kumar ii) and by one of the essay authors more simply as “legal systems coexisting in the same geographical space.” (Matej Avbelj, in Kumar ch. 8, 205) All of the collected essays in Kumar’s volume deal, to one extent or another, with such situations on the ground, but the first two chapters, by Miranda Forsyth and Baudouin Dupret, explicitly address “legal pluralism” itself as both theory and ideal. Each offers a brief review of the literature, focusing especially on John Griffiths’ critique of “state centralism” and Sally Falk Moore’s account of the “semi-autonomous social fields” that constitute societies in actual practice.

For Forsyth, such theoretical accounts are helpful in creating a more “complete picture of the various systems that manage conflict in a society and the ways in which those systems interact with one another,” but they lack adequate mechanisms to address and to regulate such pluralism effectively. (Kumar ch. 1, 5) Thus, she provides a seven-model typology of the relations that can obtain between state and customary justice systems and a five-step process for formalizing these relations. (Kumar 6-13) 

Dupret by contrast suggests that, precisely by distinguishing between state law and other analogous systems of law or social custom, the theory of legal pluralism tends to obscure the very object it purports to reveal: “the phenomenon of practicing a law identified as plural.” (Kumar ch. 2, 38) The point, he contends, is not to redress power differentials created by state law nor In so doing, Forsyth self-consciously echoes and extends the work of Gordon R. Woodman, who also provides his own typology of possible relations in Law and Religion in Multicultural Societies (Mehdi et al. ch. 1).
to reform this same law. It is to observe social practices, to discover the diverse ways that persons and societies recognize various norms as "law," and thereby to offer a "realist" and "praxiological" description of social actors "as they orient themselves to these activity structures, which they read in a largely unproblematic way." (Kumar 39) Despite their quite different conclusions, both Forsyth and Dupret wish to advance the theory of legal pluralism by focusing on the ways that such pluralism manifests in the concrete activities of social life and the active, purposeful negotiation of diverse rules and norms.

A particularly fascinating and provocative example of such negotiation at work can be found in Stephen Dawson’s analysis of the 2000 controversy provoked by Alabama Chief Justice Roy S. Moore’s installation of a 2.5 ton stone monument of the Ten Commandments in the Alabama Judicial Building. (Prothero ch. 10) The controversy eventually led to the removal of the monument from the rotunda and Moore from the bench, in 2003. Based the Supreme Court decision in Lemon v. Kurtzman,9 the federal courts determined that the installation of the monument provoked an unwelcome perception of the state endorsement of religion on the part of some persons and thus violated the First Amendment. (Prothero 219-21) Highlighting the difficulty of using subjective, individual perceptions in determining such cases, Dawson suggests an alternative “Smith test,” based on Employment Division v. Smith.10 Such a test would allow for the public recognition of shared religious values if such recognition originates in the democratic process, is “nonobligatory” and “non-sectarian,” and can be shown to be “in accordance with some constitutional standard,” usually the relevant state constitution. (Prothero 214-15)

Based in large part upon the fact that Moore promised a Ten Commandments monument when he ran for office, and drawing on specific provisions of the Alabama State Constitution, Dawson argues that the Ten Commandments monument can be shown to satisfy this hypothetical Smith test. More importantly, reasoning in terms of such a test might help correct for the “universalizing tendencies of traditional liberalism.” (Prothero 224) He explains:

[P]luralism is often cited as a warrant for traditional liberal institutions and practices. Yet pluralism does not stop at the courtroom door; pluralism deprives traditional liberalism of any special authority it might presume for itself. There is no compelling necessity, in other words, to argue in terms of a universal principle of religious freedom and an impregnable wall of separation... Rather, [traditional liberals] should aim more modestly for modus vivendi among people holding different beliefs and values. Such a provisional settlement would be dynamic and open to future revision. (Prothero 224)

Similar to an argument on behalf of “legal formalism” by Lawrence B. Solum (Kumar ch. 4), Dawson seeks to address conflicts of religious and moral values by recourse not to

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9 403 U.S. 602 (1971).
10 496 U.S. 913 (1990)
particular ideological commitments, but to the working of democratic processes and public legal reason. Unlike Solum, he is perfectly willing to admit a robust if constitutionally limited role for the religious and moral values themselves in this ongoing process.

One possible response to Dawson’s argument – hinted at by Sand in his treatment of the Indian Constitution, above – is to concede the universalizing tendencies of traditional liberalism while continuing to celebrate its core values and to insist upon such values’ enduring, irreplaceable role in ensuring social equity. And this is precisely what we witness in Lorraine E. Weinrub’s very sharp analysis of the 2003-06 Ontario Shari’a law debate. (Moon ch. 10) Situating the argument over Muslim faith-based family arbitration within a broad context of judicial and political history before, during and in the wake of the 1982 adoption of the Charter of Rights and Freedoms, Weinrub contends that the fulcrum of the debate rested not on the particulars of Shari’a law, but upon the difficult transition of the Canadian political system from a “hierarchical social structure” to a “rights-based democracy” (Moon 259), in which every individual citizen’s relationship to the state is both “primary” and “direct” – superseding all other family, customary or religious mediating structures. “The direct and primary relationship of the individual to the state is of paramount importance,” she insists. (Moon 261) “It means that the majority no longer determines the entitlements of the minority to suit its preferences and traditions, styled as the common good. In addition, it means that no faith community determines the status, entitlements, and duties of individuals as they arise in the public sphere.” (Moon 261) Weinrub readily concedes that individual situations of family arbitration will certainly remain complex, and individual women and men will freely choose to accept mediation through the informal structures of Shari’a law and a wide range of other religious or customary norms. But, in a rights-based democracy, the state will continue to relate to such women and men as autonomous individuals, without reference to those norms. For a genuine, equitable pluralism to obtain in the public sphere, in other words, there can be no pluralism in the law.

Weinrub’s claim is very clear and, in its clarity, convincing. A normative commitment to liberal values of freedom and equity stands in permanent, fruitful tension with any public recognition of alternative norms. Yet, several other contributors add further layers to the Shari’a law debate, and thus suggest that the apparent simplicity of the liberal argument may more accurately mask the difficulty of pursuing genuine equality in a world of many competing norms, rather than resolving it. In her study of mahr, the nuptial gift or endowment owed by the husband to the wife according to Shari’a law, for example, Pascale Fournier illustrates the bargaining power that such mahr can provide to both partners in marriage, a power that may be overlooked or even impaired when Shari’a is reduced to the Western liberal categories of “law.” (Moon ch. 6) This point is also developed, in a quite different context and with rather different consequences, in an article by Marie-Claire Foblets on the implications of the 2004 Family Code for Moroccans living abroad. (Mehdi et al. ch. 8) For his part, Bruce Ryder suggests that the decision of the Ontario government to deny faith-based arbitration is “a matter of legal form rather than normative substance,” due to a number of other options open to those who wish “to settle their family rights and obliga-
tions on the basis of religious principles in a legally binding manner.” More troubling for Ryder is the public controversy surrounding the decision, which, in his view, was “driven by the public’s antipathy to political Islam.” (Moon ch. 4, 105-06)

Arguing along similar lines, Sherene Razack offers a participant-observer study of a select group of Muslim feminists, who tended as a group to object both to the oppression of women under contemporary applications of Shari’a law and to the racist values they perceived on the part of those who opposed faith-based arbitration most strongly (Mehdi et al. ch. 4):

Negotiating between the rock and the hard place, participants of this round table discussion were passionate about what could not be said in such a polarized climate. Islam’s highly sophisticated legal traditions were never discussed, one participant commented, and Islam was only ever equated with ultra conservative, misogynist interpretations of Sharia. Alongside this omission, the racism of the Canadian legal system also did not get discussed as feminists (both Muslim and non-Muslim) appeared to blithely put their trust in the state... As well, more practically, this participant noted, there were religious women who wanted to have their rights protected within Islam and thus within community, and were not satisfied to resolve their issues only in secular fora. (Mehdi et al. 90)

Read as a response to Weinrub, Razack’s study problematizes the value of a “primary” and “direct” relation of each individual with the state, at least as a sole or overriding ideal of social life. Such an ideal would seem to ring true only if one has good reason to trust the neutrality and equity of this state. Absent such trust, one invariably returns to the roles played by other mediating associations, such as family, ethnic communities and religion.

This observation, in turn, returns us to the thesis of Monsma and Soper’s Challenge of Pluralism, and particularly the ideal of “substantive neutrality” or “positive neutrality” they maintain as the most appropriate government posture toward particular religions and religious pluralism itself. (Monsma & Soper 6-7) Their primary focus is not faith-based family arbitration, but the public support of faith-based schools, public provision for religious education and public funding of faith-based social services. They are, overall, critical of U.S. policy in these areas – particularly in its refusal to fund faith-based education and to provide for voluntary release time programs for religious education in the public schools – and prefer the more expansive, accommodating and genuinely pluralist arrangements typical in the other democracies they study, especially Australia and the Netherlands. “The problem with some of the states considered here,” they write,

is not so much that their public policies accommodate group differences, but that they fail to do so equitably. This is true in Germany, which has not met the religious instruction needs of Muslim students to the same degree as it has for Protestant and Catholic students; and in the United States, which restricts tax-supported educational options to the state sector. (Monsma & Soper 220)
Here neutrality is conceived not primarily in terms of the immediacy between the state and individual, and the removal of the mediating structures of other associations, but in the even-handedness of the state in its relations with those same associations.

Monsma and Soper’s conclusions have much to recommend them. In terms of the situations described at the beginning of this section, they would seem to lend their measured, sensible support to equitable forms of religious accommodation, possibly to faith-based arbitration, and – explicitly – to any proposal to diversify the Ontario system of separate, faith-based schools. Perhaps more significantly, in making such recommendations, they construe neutrality less in terms of a quality possessed by the secular state by its very nature than as a goal to be pursued by this state in its complex, sometimes agonistic negotiation with other social actors. In this sense at least, they reveal some willingness, in Razack’s terms, to subject “the state to as much scrutiny as we do conservative religious groups.” (Mehdi et al. 93) The state and its law, at least in a secular democracy, must pursue equity for its citizens and the variety of associations to which these citizens belong – including, of course, particular religions and particular religious groups. In so doing, it shapes these citizens and these groups, even as it is in turn re-shaped by them. The central questions, therefore, are not merely those of particular issues of church and state. They also include questions of definition, imagination and the creation of a shared sense of belonging in the increasingly diverse societies inhabited by so many persons in the contemporary era.

III. RELIGIOUS PLURALISM AND CIVIC BELONGING

In May of 2004, at a dinner party in Connecticut, I unexpectedly found myself in the middle of a spirited dispute. Making small talk with the spouse of a colleague, I mentioned my upcoming move to Canada and began to effuse about the Canadian “mosaic,” Canada’s official policy of multiculturalism, and the significant public role played by so many diverse religious communities in the city of Toronto. Without missing a beat, my conversation partner began to shout at me... about the dangers of unassimilated minorities, about communal strife and about the abduction of one of his family members in Western Asia. There is one basis for genuine multiculturalism, he insisted, and only one: the American “melting pot,” founded on a shared commitment to the Constitution and the values of liberal democracy, and cemented through integrated education, social assimilation and, if at all possible, frequent intermarriage between members of different ethnic and religious groups. I said very little; once my interlocutor got started, I was more of a witness to the debate than a participant in it.
Later in the party, my conversation partner would apologize for his outburst. Considerably later still, I would probably be ready to concede that my unbounded enthusiasm for the “mosaic” was premature, and more than a little bit naïve. As I write this review essay, for example, police are investigating the attempted firebombing of a prominent mosque in the city of Toronto, and the 2004 murder of Theo van Gogh by a Muslim extremist continues to cast a long shadow across the Dutch experiment with pillarization. (Monsma & Soper 71-72) Nevertheless, that evening’s conversation did bring to light what would turn out to be a genuine, fundamental disagreement about the nature of civic belonging in a pluralistic world.

My experience was by no means unique. In their introduction to Law and Religion in Multicultural Societies, the editors note that the twin forces of migration and globalization have led many Western societies not only to a proliferation of legal and customary systems, but also to a situation of “value pluralism,” in which the very nature of the social order becomes the subject of dispute. This situation is made still more difficult as the state tends to insert its regulation into new areas of social life, and many persons, in turn, identify more strongly with the values of traditional religious communities: “Thus the two spheres of social regulation, state law and religion, each tend to expand their claims.” (Mehdi et al. 19)

The first and most fundamental claim to regulate any aspect of social life, perhaps, is the claim to define it. It makes sense, therefore, that a number of these collected essays address questions of definition. Several, notably those by Lori G. Beaman (Moon ch. 8) and Prakash Shah (Mehdi et al. ch. 3), draw our attention to what has become a truism in the field of religious studies: namely, that the concept of “religion” itself is socially constructed, and often functions to project a distinctively Western and Christian frame upon traditions that may or may not actually fit the frame. In an insightful essay aptly titled “Law’s Religion,” Benjamin J. Berger presses the question of definition, setting out to explore “the way religion is conceived of in modern public debate and... the ways in which the phenomenon of religion is tailored to fit within – and be digested by – the legal and political imagination.” (Moon ch. 11, 265) Surveying a wide range of Canadian cases, Berger demonstrates that the court rulings consistently represent religion in terms congenial to liberal Protestantism, essentially reducing it to the private convictions of autonomous, free individuals, rather than recognizing it as an aspect of culture. He writes:

Law begins with the premise that it is... merely concerned with that slice of religion necessary to decide the case before it and is quite happy to allow other understandings of religion to flourish. But law’s modesty is always false. Because law defines rights and uses power and violence to enforce its vision, its claim rapidly assumes the greater form, the comprehensive claim about religion. Because it both commands the coercive power of the state and always implicitly assumes the ultimacy of its authority, law’s rendering of religion assumes the force and significance of a total claim about what matters about religion, what religion relevantly is. (Moon 286)
Though they stop short of offering such a global judgment, Courtney Bender and Jennifer Snow offer a parallel survey of U.S. jurisprudence. (Prothero ch. 9) No less than Berger, they acknowledge that U.S. law has “often interpreted “religion” in Protestant ways” (Prothero 194), but they also recognize a shift in focus from the content of belief to more functional or analogical modes of reasoning, sometimes including appeal to the perception of a hypothetical “reasonable observer.” None of these approaches are perfect, Bender and Snow suggest, but they are flexible enough to accommodate Asian religious traditions – particularly as the hidden assumptions of the law become ever more clearly exposed through the growing number of cases involving those traditions. (Prothero 203-04)

As Bender and Snow’s argument well reveals, questions of definition, imagination and even consumption do not push in merely one direction: even as the law is defining religion, religious actors are continually re-negotiating their myriad relationships with the law and with the broader civic society it represents. In the chapter that concludes Prothero’s Nation of Religions (Prothero ch. 12), James Davison Hunter and David Franz suggest that, for many new religious groups in the United States, one can discern a relatively consistent “life-cycle” that includes four distinct stages: (1) “introduction,” in which members occupy an inwardly focused “niche” on the margins of the dominant culture; (2) a period of identity-assertion and the seeking of public “recognition” in that culture; (3) a more complex process of “negotiation” and interchange between the religious group and its social environment; and finally, (4) one or another form of “establishment” in the public imagination. (Prothero 259-68) Establishment, when achieved, does not consist of mere acknowledgement by the state or by other public authorities. It occurs as a result of a longer process of struggle and strategy, in which both the religious tradition and the broader society undergo significant transformations.

Not all of the essayists in Prothero’s collection accept this four-stage developmental model in toto. Nevertheless, almost all of them end up illustrating one or another of the dynamics it describes. A number describe specific processes by which particular religious groups have sought recognition and engaged in complex negotiations with the dominant U.S. culture. Examples include a quite literal petition for recognition addressed to President Bush by the Hindu International Council against Defamation (Prema A. Kurien, in Prothero ch. 6); the transformation of a Vietnamese Buddhist Temple into a center of education and acculturation for new immigrants (Hien Duc Do, in Prothero ch. 4); the changing architecture and ritual life of indigenized Sikh gurdwaras (Gurinder Singh Mann, in Prothero ch. 8); and a call to Japanese Buddhists, harassed and eventually interned by the U.S. government during World War II, to prove their patriotism by enlisting: “Buddhists! With true faith in the Buddha, let us serve our country, the United States of America, in silence.” (Duncan Ryuken Williams, in Prothero ch. 3, 66) In a few cases, the essays themselves can be interpreted as self-conscious efforts to advocate for particular positions in this process, such as an impassioned apologia for “progressive Islam” by Omid Safi (Prothero ch. 2) and Robert A.F. Thurman’s plea for a more profound recognition of Tibetan Buddhism and its
unique potential to provoke a “full encounter between Buddhism and the West.” (Prothero ch. 5, 111)

Finally, perhaps no better example of negotiation between a religious group and the dominant culture could be found than Vasudha Narayanan’s typically skilful account of Hindu enculturation. Many American Hindus, she suggests, tend to absorb the physical contours of the U.S. into a Hindu frame by building powerful, symbolic associations with the sacred geography of India while at the same moment wholeheartedly re-shaping their religious institutions to fit American patterns of volunteerism and social service. (Prothero ch. 7) The American social landscape is – in the terms proposed by Berger above – fit within and digested by a distinctively Hindu imagination while this imagination is also fit within and digested by a distinctively American mode of civic belonging.

Such negotiation does not merely occur between particular religious traditions and the secular state. On the contrary, it takes place as much or more within those traditions themselves. This occurs, first of all, because immigration tends to intensify the diversity within particular traditions as well as in society as a whole. In his essay entitled “The De-Europeanization of American Christianity” (Prothero ch. 11), R. Stephen Warner draws on new immigrant survey data to reveal how at least the first two panes of Will Herberg’s classic 1955 triptych of “Protestant, Catholic and Jew” have become slowly but surely de-coupled from any clear association with particular racial or ethnic groups in the wake of the steady influx of Christians from Asia and Latin America. Such an internal diversification of particular Christian traditions may be especially significant, at least so long as Christians remain in the majority in many Western states, but the phenomenon is by no means unique to Christianity. As Momsa and Soper point out with particular clarity in the case of Germany, the diversity and decentralized character of the German Muslim community – comprising Turkish, Kurdish, Arab and other ethnic communities following a range of different traditions of Islamic law – has made it difficult for the state to accord Islam the same support offered to such highly coherent and structured organizations as the Evangelical and Catholic Churches. (Monsma & Soper 187-88)

It is tempting to imagine that the answer to such a dilemma is the creation of new umbrella Muslim organizations and greater centralization of the Muslim community in the midst of its diversity, and this is indeed one possibility. One implication of Warner’s argument, however, is that the process of negotiation and establishment could also work in precisely the opposite way, as these Christian communities themselves become more internally diverse. Even in the Dutch case, where Muslims and others have to some extent established themselves as “pillars,” the meaning of such pillars has begun to change and become more fluid as people move more freely across the societal boundaries that once defined them. (Monsma & Soper 60-63) The system of pillarization is still significant in Dutch society, albeit in a way that is almost certainly far more pluralistic than its founders ever intended or imagined. Indeed, one of the most valuable conclusions that emerges from the essays and arguments in these five volumes may also be one of the most para-
doxic: namely, that the internal diversity of particular religious traditions, fraught as it is with struggle, may ultimately offer a model of civic belonging in pluralistic societies at least as adequate as that of a detached, purportedly neutral secular state.

Such a conclusion emerges most clearly, perhaps, in Jennifer Nedelesky and Roger Hutchinson’s essay, “Clashes of Principle and the Possibility of Dialogue.” (Moon ch. 2) They offer the national policy of the United Church of Canada (UCC) on same-sex marriage legislation, which combines strong principled support of such legislation with candid recognition of principled dissent and a possibility for local congregations to opt out of same-sex marriage celebrations, as an important model of what theorist Mikhail Bakhtin called “a genuine polyphony of fully valid voices.” (Moon 43) Social transformation, they suggest, does not require forced consensus. It can also occur through “a certain kind of dialogue: one that encourages change in the name of traditional values without using coercion, including the coercive authority of rights talk.” (Moon 61)

Though Ihsan Bagby is more restrained than Nedelesky and Hutchinson in his endorsement of polyphony, his excellent analysis of the 2000 Mosque in America survey and other fieldwork data may be read to lend indirect, empirical support to their claims. (Prothero ch. 1) Noting the incredible diversity of attitudes toward American society as a whole— a diversity that reflects divisions of race and ethnicity, styles of Qur’anic exegesis and legal interpretation, and such institutional divisions as the split between the American Society of Muslims, or Nation of Islam, and the Historically Sunni African American Mosques—Bagby nevertheless reveals the no less incredible consensus of mosque leaders on the importance of Muslim participation in the U.S. political process.

This is a genuinely polyphonic consensus, insofar as the motives behind it are as diverse as those who articulate them. Many simply wish to protect the rights and values of their particular communities. A growing minority, however, offer a range of reasons that more fully legitimize the state, from a desire for Muslims to assume their rightful place in the U.S. “mosaic” to an embrace of the “civic ideal of pluralism” as thoroughly Islamic. (Prothero 37-39) Perhaps most intriguingly, Muslim leaders like Imam W. Deen Mohammed, Imam Fahim Shuaib, and Robert Crane contend that the U.S. Constitution and the vision of the Founding Fathers cohere better with the values of Islam than with any other religious or philosophical tradition.

To be the best Muslim is to be a good American,” argues Crane, “and to be the best American is to be Islamic... The destiny of Muslims in America is to work with like-minded traditionalists of America’s other religions in a common strategy to bring peace through justice both at home and abroad, because this is the will of God. (Prothero 39)

Though latecomers to the American experiment, in other words, Muslims are in effect more authentically American than Protestants, Catholics or Jews, and they are therefore uniquely positioned to take leadership in a renewal of American civic society.
Crane’s distinctive interpretation is not innocent, of course, but neither are those other perspectives – Protestant, Catholic, Jewish, secular, agnostic – one might enlist to make a public argument for the cause of civic belonging. Contrary to the view of my interlocutor that May evening in Connecticut, there is no single foundation for multiculturalism or civil society, in the U.S. or anywhere else. Foundations of such a society are invariably plural, just its members are. As argued in a number of places throughout these volumes, therefore, the central questions of civic belonging may pertain less to constructing an impermeable “wall of separation” between church and state and reinforcing a broad consensus of secular values than to attending carefully to the many windows in this wall and the many, diverse paths and rationally for shared participation in the social order. “Involvement...,” as Bagby puts the matter, “leads to accommodation, and isolation leads to resistance and fanaticism.” (Prothero 23) The authors and essays in these works amply reveal that there is no single recipe for fostering such involvement. Such recipes vary widely, according to the history, culture and changing demographics of each particular society and its law. What does not vary is the importance of the task itself, however achieved, for the democratic project.
Press Release of the European Court of Human Rights

CRUCIFIXES IN ITALIAN STATE-SCHOOL CLASSROOMS: THE COURT FINDS NO VIOLATION

This press release is issued by the Registrar of the Court. no. 234. 18.03. 2011 and is available from the following web-site: http://www.echr.coe.int/echr/resources/hudoc/Lautsi_pr_eng.pdf

In today’s Grand Chamber judgment in the case of Lautsi and Others v. Italy (application no. 30814/06), which is final1, the European Court of Human Rights held, by a majority (15 votes to two), that there had been:

No violation of Article 2 of Protocol No. 1 (right to education) to the European Convention on Human Rights.

The case concerned the presence of crucifixes in State-school classrooms in Italy, which, according to the applicants, was incompatible with the obligation on the State, in the exercise of the functions which it assumed in relation to education and to teaching, to respect the right of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions.

This press release is also available in French, Italian and German.

PRINCIPAL FACTS

The applicants are Italian nationals who were born in 1957, 1988 and 1990 respectively. The first applicant, Soile Lautsi, and her two sons, Dataico and Sami Albertin2, live in Italy. In the school year 2001-2002 Dataico and Sami Albertin attended the Istituto comprensivo

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1 Grand Chamber judgments are final (Article 44 of the Convention). All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

2 “the second and third applicants”: in her application the first applicant stated that she was acting in her own name and on behalf of her children Dataico and Sami Albertin, then minors. The latter, who have subsequently come of age, confirmed that they wished to remain applicants.
statale Vittorino da Feltre, a State school in Abano Terme. A crucifix was fixed to the wall in each of the school’s classrooms.

On 22 April 2002, during a meeting of the school’s governors, Ms Lautsi’s husband raised the question of the presence of religious symbols in the classrooms, particularly mentioning crucifixes, and asked whether they ought to be removed. Following a decision of the school’s governors to keep religious symbols in classrooms, Ms Lautsi brought proceedings in the Veneto Administrative Court on 23 July 2002, complaining of, among other things, an infringement of the principle of secularism.

On 30 October 2003 the Minister of Education, Universities and Research – who in October 2002 had adopted a directive instructing school governors to ensure the presence of crucifixes in classrooms – joined the proceedings brought by Ms Lautsi. He argued that her application was ill-founded because the presence of crucifixes in State-school classrooms was based on two royal decrees of 1924 and 1928.3

In 2004 the Constitutional Court declared the question as to constitutionality, which had been referred to it by the Administrative Court, manifestly inadmissible on the ground that it was directed towards texts – the relevant provisions of the two royal decrees – which, not having the status of law, but only that of regulations, could not form the subject of a review of constitutionality.

On 17 March 2005 the Administrative Court dismissed the application lodged by Ms Lautsi. It held that the provisions of the royal decrees in question were still in force and that the presence of crucifixes in State-school classrooms did not breach the principle of the secular nature of the State, which was “part of the legal heritage of Europe and the western democracies”. The court took the view, in particular, that the crucifix was a symbol of Christianity in general rather than of Catholicism alone, so that it served as a point of reference for other creeds. It went on to say that the crucifix was a historical and cultural symbol, possessing an “identity-linked value” for the Italian people, and that it should also be considered a symbol of a value system underpinning the Italian Constitution.

Ms Lautsi appealed to the Consiglio di Stato, which gave judgment on 13 April 2006 confirming that the presence of crucifixes in State-school classrooms had its legal basis in the royal decrees of 1924 and 1928 and, regard being had to the meaning that should be attached to the crucifix, was compatible with the principle of secularism. In so far as it symbolised civil values which characterised Italian civilisation – tolerance, affirmation of one’s rights, the autonomy of one’s moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination – the crucifix in classrooms could fulfil, in a “secular” perspective, a highly educational function.

3 Article 118 of royal decree no. 965 of 30 April 1924 (internal regulations of middle schools) and Article 119 of royal decree no. 1297 of 26 April 1928 (approval of the general regulations governing primary education).
COMPLAINTS, PROCEDURE AND COMPOSITION OF THE COURT

Relying on Article 2 of Protocol No. 1 (right to education) and Article 9 (freedom of thought, conscience and religion), the applicants complained of the presence of crucifixes in the classrooms of the State school formerly attended by Dataico and Sami Albertin.

Relying on Article 14 (prohibition of discrimination), they submitted that all three of them, not being Catholics, had suffered a discriminatory difference in treatment in relation to Catholic parents and their children.

The application was lodged with the European Court of Human Rights on 27 July 2006. In its Chamber judgment of 3 November 2009 the Court held that there had been a violation of Article 2 of Protocol No. 1 (right to education) taken together with Article 9 (freedom of thought, conscience and religion). On 28 January 2010 the Italian Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referal to the Grand Chamber) and on 1 March 2010 a panel of the Grand Chamber accepted that request. A Grand Chamber hearing took place on 30 June 2010 in Strasbourg.

In accordance with Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 2 of the Rules of the European Court of Human Rights, leave to intervene in the written procedure was given to

i) 33 members of the European Parliament acting collectively;
ii) the following non-governmental organisations: Greek Helsinki Monitor, Associazione nazionale del libero Pensiero, European Centre for Law and Justice, Eurojuris, acting collectively; International Committee of Jurists, Interights and Human Rights Watch, acting collectively; Zentralkomitee der deutschen Katholiken: Semaines sociales de France and Associazioni cristiane lavoratori italiani.
iii) the Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania and the Republic of San Marino.

The Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta and the Republic of San Marino were also given leave to intervene collectively in the oral procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:
Jean-Paul Costa (France), President,
Christos Rozakis (Greece),
Nicolas Bratza (the United Kingdom),
Peer Lorenzen (Denmark),

4 Observations of third-party interveners: see §§ 47 to 56 of the judgment
5 Previously intervened before the Chamber
It could be seen from the Court’s case-law⁶ that the obligation on the Member States of the Council of Europe to respect the religious and philosophical convictions of parents did not apply only to the content of teaching and the way it was provided; it bound them “in the exercise” of all the “functions” which they assumed in relation to education and teaching. That included the organisation of the school environment where domestic law attributed that function to the public authorities. The decision whether crucifixes should be present in State-school classrooms formed part of the functions assumed by the Italian State and, accordingly, fell within the scope of Article 2 of Protocol No. 1. That provision conferred on the State the obligation, in the exercise of the functions they assumed in relation to education and teaching, to respect the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions.

The Court found that, while the crucifix was above all a religious symbol, there was no evidence before the Court that the display of such a symbol on classroom walls might have an influence on pupils. Furthermore, whilst it was nonetheless understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State’s part for her right to ensure their education and teaching in conformity with her own philosophical convictions, her subjective perception was not sufficient to establish a breach of Article 2 of Protocol No. 1.

The Italian Government submitted that the presence of crucifixes in State-school classrooms now corresponded to a tradition which they considered it important to perpetuate.

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⁶ Judgments of Kjeldsen, Busk Madsen and Pedersen v. Denmark of 7 December 1976 (§ 50); Valsamis v. Greece of 18 December 1996 (§ 27); Hasan and Eylem Zengin v. Turkey of 9 October 2007 (§ 49); and Folgerø and Others v. Norway, Grand Chamber judgment of 29 June 2007 (§ 84)
They added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account. With regard to the first point, the Court took the view that, while the decision whether or not to perpetuate a tradition fell in principle within the margin of appreciation of the member States of the Council of Europe, the reference to a tradition could not relieve them of their obligation to respect the rights and freedoms enshrined in the Convention and its Protocols. Regarding the second point, noting that the Italian Consiglio di Stato and the Court of Cassation had diverging views on the meaning of the crucifix and that the Constitutional Court had not given a ruling, the Court considered that it was not for it to take a position regarding a domestic debate among domestic courts.

The fact remained that the States enjoyed a margin of appreciation in their efforts to reconcile the exercise of the functions they assumed in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. The Court therefore had a duty in principle to respect the States’ decisions in those matters, including the place they accorded to religion, provided that those decisions did not lead to a form of indoctrination. Accordingly, the decision whether crucifixes should be present in classrooms was, in principle, a matter falling within the margin of appreciation of the State, particularly where there was no European consensus. That margin of appreciation, however, went hand in hand with supervision by the Court, whose task was to satisfy itself that the choice did not amount to a form of indoctrination.

In that connection it observed that by prescribing the presence of crucifixes in State-school classrooms the Italian regulations conferred on the country’s majority religion preponderant visibility in the school environment. In its view, that was not in itself sufficient, however, to denote a process of indoctrination on Italy’s part and establish a breach of the requirements of Article 2 of Protocol No. 1. It referred on that point to its earlier case-law in which it had held that having regard to the preponderance of one religion throughout the history of a country the fact that the school curriculum gave it greater prominence than other religions could not in itself be viewed as a process of indoctrination. It observed that a crucifix on a wall was an essentially passive symbol whose influence on pupils was not comparable to that of didactic speech or participation in religious activities.

The Court also considered that the effects of the greater visibility which the presence of the crucifix gave to Christianity in schools needed to be further placed in perspective by consideration of the following points: the presence of crucifixes was not associated with compulsory teaching about Christianity; according to the Government, Italy opened up the school environment to other religions (pupils were authorised to wear symbols or 7 §§ 26 to 28 of the judgment.
apparel having a religious connotation; non-majority religious practices were taken into account; optional religious education could be organised in schools for all recognised religious creeds; the end of Ramadan was often celebrated in schools, and so on). There was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions. In addition, the applicants had not asserted that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claimed that Dataico and Sami Albertin had ever experienced a tendentious reference to the crucifix by a teacher. Lastly, the Court noted that Ms Lautsi had retained in full her right as a parent to enlighten and advise her children and to guide them on a path in line with her own philosophical convictions.

The Court concluded that, in deciding to keep crucifixes in the classrooms of the State school attended by Ms Lautsi’s children, the authorities had acted within the limits of the margin of appreciation left to Italy in the context of its obligation to respect, in the exercise of the functions it assumed in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. Accordingly, there had been no violation of Article 2 of Protocol No. 1 in respect of the first applicant. The Court further considered that no separate issue arose under Article 9.

THE COURT CAME TO THE SAME CONCLUSION REGARDING THE CASE OF THE SECOND AND THIRD APPLICANTS.

Article 14

In its Chamber judgment the Court had held that, regard being had to its conclusion that there had been a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention, there was no cause to examine the case under Article 14.

After reiterating that Article 14 of the Convention had no independent existence, since it had effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols, the Grand Chamber held that, proceeding on the assumption that the applicants wished to complain of discrimination regarding their enjoyment of the rights guaranteed by Article 9 of the Convention and Article 2 of Protocol No. 1, it did not see in those complaints any issue distinct from those it had already determined under Article 2 of Protocol No. 1. There was accordingly no cause to examine that part of the application.


SEPARATE OPINIONS

Judges Bonello, Power and Rozakis each expressed a concurring opinion. Judge Malinverni expressed a dissenting opinion, joined by Judge Kalaydjieva. These opinions are annexed to the judgment.

_The judgment is available in English and French._

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_The European Court of Human Rights_ was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.
1. INTRODUCTION

1.1. The Formulation of the problem

Good legislative practice excludes the need for protecting any particular right by two articles. Despite the number of reproaches leveled against them, the authors of the second chapter of the Constitution of Georgia must take the responsibility to ensure that they do not deviate from the principle mentioned in the previous sentence. Doing so would be similar to turning a blind eye to a problem instead of resolving it. The lawmakers should explore all possible means to ensure that the scope of all articles is clearly distinguished in their interpretation.

Articles 19 and 24 of the Constitution of Georgia have similar protected spheres. Both the provisions are concerned with freedom of expression. In the case law of the Constitutional Court the question of demarcation of the scope of these articles has been an unresolved issue for over ten years. During this period, the Constitutional Court either ignored the problem or suggested inconsistent approaches to address this issue. Recently, the Ombudsman has applied to the Constitutional Court for a verdict on this subject and now

\[1\] For more details about the argument see chapter 3.4 “The Ombudsman v. the Parliament”

\[2\] For more details about the argument see chapter 3.4 “The Ombudsman v. the Parliament”
the Court is at the stage of delivering its final judgment. In the abovementioned case, the Court must explain which aspects of the freedom of religion are protected by article 19 of the Constitution of Georgia, *Forum Internum* (inner sphere) and *Forum Externum* (external sphere) of the freedom of religion\(^3\), and the manner in which they are protected.

The aim of this article is to analyze the existing case-law of the Constitutional Court, suggest an approach to the demarcation between article 19 and 24 of the Constitution, and analyze the appeal of the Ombudsman and the possible outcomes of the judgment of the Court.

2. THE CONSTITUTIONAL PROVISIONS AND THEIR ANALYSIS

As it was mentioned earlier, this article will discuss the problematic issue that exists in the second chapter of the Constitution of Georgia, namely distinguishing the scopes of article 19 and 24 of the Constitution of Georgia.

The wording of article 19 as follows:

1. *All people have the right to freedom of speech, thought, conscience, religion and belief*
2. *A person must not be persecuted because of his/her speech, thought, religion or belief; a person must not be forced to express his/her opinion about them either*
3. *The rights listed in this article must not be restricted, if its manifestation does not violate others’ rights;*

The wording of article 24:

1. *All people have the right to freely receive or impart information, to express or impart his/her opinion orally, in writing or by any other means.*
2. *Mass media shall be free. Censorship shall be impermissible.*
3. *Neither the state nor particular individuals have the right to monopolize the mass media or the means of dissemination of information*
4. *The exercise of the rights listed in the first and second paragraphs of this article can be allowed by law only under such conditions which are necessary in a democratic society in the interest of ensuring state security, territorial integrity and public safety, prevention of crime, protection of others’ rights and dignity, prevention of disclosure*

\(^3\) For more about the demarcation of the inner and outer scope of the freedom of religion see Vakhushi Menabde, “*Forum Internum* and the right of conscientious objection”, Jr. “Solidaroba”, 2009, #6(33)
of information recognized as confidential, and ensuring the independence and impartiality of judiciary.

The problem stems from the two words- Thought and Speech- which are common to the first paragraphs of both of these articles. If these words are identical, then what was the need of protecting a single right by two articles, especially when the grounds for their limitation are quite different? The answer to this question is, as has already been said above, that these articles defend different rights, or different aspects of the same right. The task of this essay is to answer the question: what is the difference between articles 19 and 24? As the literal understanding of these words is identical, it is necessary to clear up the teleology of each of these words, or the idea that forms “the soul of the Law” and in the light of which, explain each of the standards.

3. THE EARLIER CASES OF THE CONSTITUTIONAL COURT

3.1 Articles 19 and 24 of the Constitution in the admissibility decisions of the Constitutional Court

There have been a number of claims at the Constitutional Court regarding infringement of article 19 and 24 of the Constitution of Georgia, though only some of those claims passed the stage of admissibility. The proceedings of the rest of the cases have been suspended because of various reasons. Although the Court has not discussed the contents of these constitutional articles substantively, the views expressed by the plaintiffs(which are given in the descriptive part of the admissibility decision) are interesting.

One such case is Citizen Giorgi Korganashvili v. the Parliament of Georgia, wherein the plaintiff argued that certain provision of Article 19 of the Constitution was unconstitutional.

The plaintiff defended the interests of the Constitutional Democratic Party. Before the adoption of the impugned norm, the party had 180 members. The subject of the argument was the rule according to which the registration of the party was done after the Ministry of Justice was presented with the list of not less than 1000 members of the party (with identification and contact data).\(^4\) It was pointed out in the claim that the impugned norm had restricted the freedom of speech, thought, conscience, religion and belief\(^5\) which are rec-

\(^4\) The Second Board of the Constitutional Court of Georgia, the judgment N2/94/1, September 27, 2000 in the case of the citizen Giorgi Korganashvili v. the Parliament of Georgia.

\(^5\) Ibid;
Freedom of Religion – Where should we look for it?

Recognized in Article 9 of the Constitution of Georgia. Apart from this, any more information was not given about the justification of the claim in the admissibility decision of the Court.\(^6\)

Another case which was also not admitted by the Court for examination on merits is the case of\textit{Citizens Vakhtang Menabde and Irakli Butbaia v. the Parliament of Georgia}.\(^7\)

In this case, the plaintiffs argued against the law, according to which all the students, despite their religious belief, were obliged to do their military reserve service, and the conscientious objectors to military service were not given the right to substitute this obligation with a non-military alternative employment service.

The claimants believed that the impugned provision contradicted the freedom of the conscience and belief which are guaranteed by the first and third paragraphs of Article 19 of the Constitution of Georgia.\(^8\) From the plaintiffs’ point of view, the freedom of conscience means the individual’s opinions about the concepts of “good” and “bad” with reference to the actions of a person. Also, for them, the freedom of belief includes the right of a person to be free to choose and have a religious or non-religious belief and act in accordance with it. The freedom of belief includes the right of a person not to be subordinated to a treatment that is clearly contrary to his/her thinking. In the plaintiffs’ opinion, any action by which the state tries to force the individual to act contrary to his/her point of view should be considered to be an infringement of the freedom of conscience and belief of a person. The plaintiffs think that the rights protected by Article 19 of the Constitution of Georgia also include pacifism.\(^9\)

The next was the case of \textit{Citizen Avtandil Kakhniashvili v. the Parliament of Georgia and Georgian Central Election Commission}.\(^10\)

The subject of the argument in this case was the provision, according to which only political parties or blocs had the right to nominate the candidates to contest in elections for the membership of the Parliament. The plaintiff believed that this rule violated his right to take part in the elections independently. He asserted that the noted provision compelled him to collaborate with a particular political party/bloc and conduct the pre-election campaign as a member of such a party/bloc, which violated his rights and freedom under the 1st paragraph of Article 19, and the 1st paragraph of the Article 24 [...] of the Constitution.\(^10\)

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\(^6\) Exactly because of the fact that the claimant couldn’t present the evidence that the claim was not groundless, the Court recognized the claim to be inadmissible.

\(^7\) According to the Law, the age of doing the military reserve service for a student of a high educational institution was 23. The claimants were not of this age, and when they reached this age they would have graduated the bachelor stage, that’s why having existing data they weren’t and wouldn’t be treated under the validity of the norm. The Court recognized the claim inadmissible.

\(^8\) The Second Board of the Constitutional Court of Georgia, the Ruling N1/5/424, October 9, 2007 in the case of the citizens of Georgia-Vakhtang Menabde and Irakli Butbaia v. the Parliament of Georgia. para.1.3; \textit{Ibid}. para.1.3;

\(^9\) The Plenum of the Constitutional Court of Georgia, the Ruling N16/455, June 27, 2008, in the case of the citizen of Georgia Avtandil Kakhniashvili v. the Parliament of Georgia and Georgian Central Election Commission; para.1.4;
The aim of the constitutional claim was [...] to have the Court recognize the parliamentary election of May 21, 2008 as unconstitutional by recognizing the impugned provisions to be unconstitutional.\textsuperscript{11} However, the Court recognized the claim to be inadmissible.\textsuperscript{12}

However, the noted admissibility decision is interesting because it is the first occasion\textsuperscript{13} where the issue of constitutionality of the provision with respect to Article 19 and 24 arose at the same time.

The last case in which the Court passed a judgment involving Article 19 of the Constitution of Georgia is the case of The Conservative Party of Georgia v. the Parliament of Georgia.\textsuperscript{14} The plaintiff demanded to recognize a law which prohibited recording and broadcasting a trial as unconstitutional. “According to the 1\textsuperscript{st} and 3\textsuperscript{rd} paragraphs of Article 19 of the Constitution of Georgia, any individual can publicly express his/her opinion related to any issue if its manifestation does not violate others’ rights. [...] It is not compulsory whether his/her opinions were derived from the correct assessment of facts or if they were shared by the largest part of the society”.\textsuperscript{15} From the point of view of the plaintiff, the restriction of the rights was against Article 19 of the Constitution. However, it should be noted that the Court considered that the plaintiff was essentially arguing over the issue regulated in the Article 85 of the Constitution.\textsuperscript{16}

It appears that in the case law of the Constitutional Court, there are a total of four cases where the plaintiffs referred to Article 19 and 24 of the Constitution and the Court did not admit those cases on merits, without analyzing these articles in depth. The case law can be divided into three parts based on the content of the cases filed: (1) freedom of religion (2) right to election (3) the right to express opinion publicly. Among these, there is only one case where constitutionality of a provision is analyzed with respect to both Article 19 and 24. However, the Court did not state which aspect of the impugned provision is in conflict with a particular constitutional provision.

\textsuperscript{11} par. II.1.
\textsuperscript{12} According to the Law, the President of Georgia and not less than one fifth of the members of the Parliament of Georgia have the right to apply to the Court in connection with the constitutionality of conducting the elections (The Law on the Constitutional Court of Georgia”, the subparagraph “d” of the 1st paragraph of the 37th article of the Organic Law of Georgia) The motive of the Court while recognizing the claim as inadmissible was exactly that the plaintiff was not a proper subject for the noted argument.
\textsuperscript{13} This is the first judgment. The first actual claim on the noted article was launched with the parallel appeal on the case of “citizen of Georgia Akaki Gogichaishvili v. the Parliament of Georgia, though this judgment will be discussed below.
\textsuperscript{14} Ibid, l,para.7.;
\textsuperscript{15} The Second Board of the Constitutional Court of Georgia, the judgment N2/5/492, December 28, 2010 in the case of “the Political union of citizens The Conservative Party of Georgia v. the Parliament of Georgia”, l,para.6.;
\textsuperscript{16} The Constitution of Georgia, the 1st paragraph of the Article 85: The case is discussed in open session of the Court. The discussion of cases in closed session is permissible only in the cases provided by Law. The judgment is declared publicly; The claim was considered inadmissible because the 85th article is given not in the 2nd but in the 5th chapter, and the plaintiff is authorized to argue over the issues of compliance of the normative acts only with the rights guaranteed by the 2nd chapter of the Constitution of Georgia (”About the Constitutional Court”, subparagraph “a” of the 1st paragraph of the 39th article of the Organic Law of Georgia);
3.2. Article 24 in the judgments of the Constitutional Court

All the cases that the Court discussed Article 24 independently were concerned with freedom of information. In this process some interesting standards were established. For example, in the case of Georgian Young Lawyers’ Association and citizen Rusudan Tabatadze v. the Parliament of Georgia, the plaintiffs declared that Article 24 protects the freedom of expression and it was the same as Article 10 of the European Convention of Human Rights. The Court declared that “the noted article includes three rights- the right to information, thought and the means of the mass media” In another case, the Court noted that “the right to expression without the interference of the state, the right to receive and impart information is recognized in Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms. […] The noted regulations were expressed in Article 24 of the Constitution of Georgia. […]” In the same case, the Court mentions the noted article as “the right to thought”.

Accordingly, it can be said that from the point of view of the Court the provision under discussion is the same as Article 10 of the European Convention which is a classical document guaranteeing the right to expression.

3.3. The 19th and 24th articles in the judgments of the Constitutional Court

The first case where the Constitutional Court discussed Article 19 of the Constitution was the case of Georgian Young Lawyers’ Association and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maia Sharikadze, Nino Basilashvili, Vera Basilashvili and Lela Gurashvili v. the Parliament of Georgia. The case was about several articles of the law on Assembly and Manifestations. At one of the hearings, the plaintiff expressed his opinion that the impugned provision was in conflict not only with the right to manifestations but also with the right to expression. The case discussed the obligation of stating the nature or purpose of a meeting or manifestation in the notice which should be submitted by the organizers of a meeting.

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17 Article 24, only from freedom of information perspective is discussed in the following cases: The judgment N1/3/209,276, June 28,2004 of the 1st board of the Constitutional Court of Georgia on the case: The ombudsman of Georgia and the citizen of Georgia Ketevan Bakhadze v. the Parliament of Georgia; Also: The judgment N2/3/406,408, October 30,2008 of the 2nd board of the Constitutional Court of Georgia on case of The ombudsman of Georgia and Georgian Young Lawyers’ Association v. the Parliament of Georgia; The judgment N2/3/364, July, 2006 of the 2nd board of the Constitutional Court of Georgia on the case: Georgian Young Lawyers’ Association and the citizen Rusudan Tabatadze v. the Parliament of Georgia.
18 Id.
19 Id, para.2.
20 The judgment No2/2/359, June 6, 2006, of the 2nd board of the Constitutional Court of Georgia on the case: Georgian Young Lawyers’ Association v. the Parliament of Georgia. para.1
21 Ibid, para.2.
22 According to the legislation of Georgia, if the meeting or demonstration is held at a thoroughfare of public transport, the organizer is obliged to present the notice to the local self governmental organization about it, where at that time he must have indicated the following information: the form, aim, the place or the direction, the time of beginning and finishing, date, the approximate number of
to the local self-governmental organization. The author of the constitutional claim considered that [...] “the obligation concerning the submission of information about the nature and the objective of the meeting or manifestation was against the rights guaranteed by the Constitution, which include the right to meetings and the right to speech. In particular, it is in conflict with the first paragraphs of Articles 19 and 24 of the Constitution.” In this case, the Constitutional Court was given the chance for the first time to demarcate the above mentioned two norms from each other. However, the Court did not focus its attention on this issue during its deliberations. While reviewing the plaintiff’s corresponding request, the Court declared, “The right to freedom of speech has always belonged to the integral and fundamental functional elements of the democratic society for a long time. If we understand the freedom of meetings as the right to free expression of thought, the same can be said about it.” Though as the Court did not make the differentiation between the two articles clear, it can be assumed that the Court’s words intended to be applied to both the articles.

In the case of Citizen Akaki Gogichaishvili v. the Parliament of Georgia, the court analyzed the issue in a relatively broad manner. Under the Civil Code of Georgia and the Law on the Press and other Means of Mass Media, an individual has an obligation to retract his/her statement if he/she could not substantiate that his/her statement is true. The plaintiff thought that this law violates the 2nd paragraph of Article 19 of the Constitution of Georgia, which states that “it is inadmissible to persecute the person because of speech, thought, religion and belief, and to compel him/her to express his/her opinion about them”. The plaintiff considered that to oblige a person to deny his/her statements for the want of supporting evidence as defined by the impugned norm meant exactly amounts to compelling a person to express his/her opinions. “The freedom of expression means not only the free expression of one’s thoughts, but also the right to decline to express any opinion which you do not agree with. The information which a person is obliged to deny may still be the only truth for him/her. And the impugned norm, contrary to Article 19 of the Constitution, obliges him to disseminate the information and/or express his/her opinion against his will.”

It is true that in this case the complainant does not mention forum internum explicitly. But in fact he talks about it when he points out in his claim that the provision in paragraph 3 of article 19 of the Constitution of Georgia (“It is inadmissible to restrict the rights and freedoms listed in this article, if their manifestation does not violate rights of others”) exactly means that only that part of freedom of thought can be restricted which is related to the participants and others.

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23 Judgment N2/2/180-183, November 5,2002 of the 2nd board of the Constitutional Court of Georgia on the case of “Georgian Young Lawyers’ Association and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maia Sharikadze, Nino Basishvili, Vera Basishvili and Lela Gurashvili v. the parliament of Georgia”
24 The named judgment of the Constitutional Court of Georgia, Ibid, para.6;
25 The Second Board of the Constitutional Court of Georgia, the judgment N2/1/241. March 11, 2004 in the case of the citizen Akaki Gogichaishvili v. the Parliament of Georgia.
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its expression. The cases, when we are not dealing with the expression, are protected by the absolute privilege.\textsuperscript{26} In the complainant’s opinion, under the Constitution of Georgia, even in the time of a state of emergency or war it is not allowed to restrict this right.” \textsuperscript{27}

In the same case, the respondent also expressed his opinion with respect to article 19 and article 24 and their interrelationship, though he was seeking similarities between the two, instead of demarcation. He did not challenge the scope of these norms.\textsuperscript{28}

None of the lawyers\textsuperscript{29} summoned as specialists in the Court have touched upon the issue of demarcating the scope of these Constitutional norms. They also declared unanimously that the impugned norms did not violate the Constitutional demands.\textsuperscript{30}

In its decision, the Court paid attention to the fact that “under the 19\textsuperscript{th} article of the Constitution of Georgia, there are certain recognized human rights which include the right to freedom of speech, thought, conscience, religion and belief”. \textsuperscript{31} However, in accordance with the claimant’s request, the constitutionality of the impugned norms was reviewed with respect to the freedom of speech and thought.\textsuperscript{32}

According to the opinion of the Court, under the Constitution “ there are positive and negative guarantees provided for the protection of the freedoms enshrined in the Constitution, and article 19 includes the right to free expression and the right to abstain from expressing opinions which are contrary and unacceptable to one’s own ideas.”\textsuperscript{33} It is true that the Court declared that “the freedom of speech and thought does not belong to the category of absolute, unrestricted rights.”\textsuperscript{34} However, the Court also noted that “this kind of provision [Article 19, paragraph 3] additionally guarantees the protection of the freedom of speech and thought. It prohibits the restriction of these freedoms in any ways, if their manifestation does not violate the rights of others”\textsuperscript{35}

In this case, the Court established an unparalleled high standard for the freedom of expression: “[…] The restriction of the freedom of speech is admissible if its exercise violates the rights of others’ and this is the only condition that can be made the basis for the restriction of the freedom of speech and thought. […] Therefore, the right of each person ends where

\textsuperscript{26} Ibid;
\textsuperscript{27} Ibid;
\textsuperscript{28} Ibid;
\textsuperscript{29} The invited specialists in this case were: Professor of the Law Faculty of Iv. Javakhishvili Tbilisi State University, Doctor of Juridical Science Shalva Chikvashvili; Scientific-Advisory Board Member of the Constitutional Court of Georgia, the Lawyer Roin Migriauli; candidate of the Juridical Science Polikarpe Moniava; The Deputy Director of the State and Law Institute of Academy of Sciences of Georgia, Candidate of Juridical Science Konstantine Korkelia;
\textsuperscript{30} The citizen Akaki Gogichaishvili v. the Parliament of Georgia, supra note 25;
\textsuperscript{31} Ibid, para.1
\textsuperscript{32} Ibid, para.1
\textsuperscript{33} Ibid, para.1
\textsuperscript{34} Ibid, para.1
\textsuperscript{35} Ibid, para.1
The freedom of expression is indeed not an absolute right. The list of legitimate grounds for its restriction, *inter alia*, is far wider in the international legal instruments and the condition of rights of others’ is by far not the only reason. Here it should be clarified that in this case the Court speculated on the freedom of thought in general instead of considering one of its specific aspects, which was later done by the plenum of the Constitutional Court. The Court was allowed to establish such a standard due to the structuring of article 19 of the Constitution of Georgia, though this approach was changed later.

The Court separated ideas and the facts from each other. It declared that “idea is the individual’s personal, subjective assessment made with respect to a given event, idea, fact or a person,[…] Factual information denotes the events or circumstances that actually happen and exist in reality which may be wrong or right. Hence, facts should always be based on evidence. Accordingly, disseminating facts is subject to the obligation of proving their correctness and truthfulness. As it is impossible to verify truthfulness of ideas, correspondingly, a person expressing opinions should not be obliged to do so.[…]”

The Respondent won this case. The Court has not articulated any other concepts worth mentioning here in this case. It decided that the freedom of expression completely falls within the scope of article 19, without making any further explanations in this respect.

The next case examined on merits in which the Court considered article 19 is the case of Citizen Maia Natadze and Others v. the Parliament of Georgia and the President. In this case the complainant referred to article 19 (together with article 24) in the context of participation in elections. The plaintiffs argued that the right to freedom of expression is related to the right of voting which amounts to expressing one’s will through elections, and to the right of occupying an electoral position through popular elections. Restriction of this right is the same as restricting the expression of opinion. The complainants were not allowed to participate in governance themselves or through their representatives, take part in the process of decision-making and administration, and express their own views. So, the first paragraph of article 19 is violated.

It appears that the complainants did not distinguish between article 24 from article 19. Again, the respondent did not declare anything noteworthy from this perspective.

The court had to consider very interesting issue of whether “the values protected in these articles covered participation in elections and decision-making process of the repre-
sentative bodies of high educational institutions and also occupation of certain positions in these institutions”.

In this case the Court tried to separate article 19 and article 24 from each other for the first time. The Court observed that “article 19 and article 24 somehow complement each other from the point of view of constitutional protection of the freedom of expression”. According to this phrase, both these articles protect different aspects of freedom of expression.

After this, the Court pointed out the importance of receiving and disseminating information in a democratic society, and the absolute nature of the freedom of expression. “A free society consists of free individuals who live in the free informational space, think freely, have independent points of view, and take part in the democratic processes, which means the exchange of opinions and debate. Everyone has the right to express one’s own ideas, or to decline to express one’s ideas. The Constitution is categorical in this respect. It bans the persecution of a person for expressing his/her thoughts, and also bans compelling anyone to express his/her opinion. This is the strict rule that binds the State and its bodies without exception. So, the Court unanimously declared that people shall not be subjected to persecution because of having certain opinions, neither can they be subjected to coercion to express their opinions, and these rights are absolute without any exceptions.

Then the Court talked about the aspect of expression of the freedom of thought, “[...] The Constitution protects the process of expressing and disseminating one’s opinion, its contents and forms, though at the same time it establishes the formal and material conditions of restriction of these rights”. It appears that the Court actually discussed forum internum and forum externum, with the only deficiency being that the Court did not declare explicitly which articles protected the different aspects of the rights. We can speculate based on the phraseology it uses, which makes it is clear that its statements on the absolute nature of freedom of expression is based on paragraph 2 of article 19.

There is one more interesting hint in the following paragraph of the judgment: “The freedom of information, right to disseminate and receive it freely from the publicly available sources, from the sources of information which are useful for receiving and disseminating of information, is protected by paragraph 1 of article 24. It is impossible to form free opinions without free information. This is the norm that bans applying the “information filter” to the society, to the human mind, which is characteristic to undemocratic regimes. However, like the freedom of thought, this right is also subject to the Constitutional re-

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41 Ibid, para:II.12; As in the previous case, while reviewing the issue of compatibility of the impugned norm with article 19 of the Constitution, the Court did not discuss the freedom of conscience, religion and belief, and it limited itself only to the examination of the freedom of expression.
42 Ibid, para:II.13:
43 Ibid, para:II.13;
44 Ibid, para: II. 13;
strictions according to paragraph 4 of article 24. In this part of the judgment, the Court interpreted article 24 and declared that right to receive and disseminate information to be the substance of it. The Court does not consider that this article encompasses freedom of expression completely, but only one of its aspects, the freedom of information. As freedom of expression consists of forum internum and forum externum, the Court clearly implies expression when it comes to the part of restrictions. The Court also compares the right protected by article 24 to “freedom of thought”, where it states that both these rights can be restricted. As the Court divided the freedom of expression into two parts, it turns out that the Court perceived paragraph 1 of article 24 to be dealing with the freedom of information, and article 19 as forum internum together with the freedom of thought. The Constitutional Court made this approach more clear when it said: “[...] the aim of articles 19 and 24 is to guarantee the process of free exchange of thought and information in the democratic society [...]”. Here it can be seen once more that the Court separated thought and information from each other, perceiving thought as self generating and information as a medium. Thus, to put it in order, article 19 corresponds to freedom of “thought”, and article 24 to “information”.

The last and the most important case which the plenum of the Constitutional Court adjudicated is the case of the so called meetings and manifestations. Though the Court discussed many important issues in this case, in this article we will only refer to those parts which are related to article 19 and 24 of the Constitution. Georgian Young Lawyers’ Association challenged the constitutionality of article of the law which banned the meetings that call for the violent overthrow or violent change of the constitutional system of Georgia. The complainant asserted that the impugned law lacked the criteria of clear and present danger which in their view violated articles 19, 24 and 25. In this case, the Court for the first time tried to separate the scope of these articles from each other explicitly, and not through hints. At the beginning of the discussion of the issue, the Court remarked that “there is no need of interpreting the abovementioned articles of the Constitution exhaustively; the contents of each of them will be analyzed only to the extent that is necessary for the review of constitutionality of the challenged laws”.

At first the Court talked about article 24: “Article 24 of the Constitution of Georgia includes different aspects of the right to the freedom of expression. Paragraph 1 of this article protects the right to dissemination of thought and information “orally, in writing or by other means’. It includes the guarantees for the freedom of expression, which ensure the

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45 Ibid, para. II.14;  
46 Ibid, para.: II.16;  
48 Ibid, para; II.2
possibility of dissemination of opinion. This article protects the point of view of a person, his/her beliefs, information, also the means which a person chooses to express and disseminate them such as press, television, and other mediums of disseminating the information and thought [...]”. In contrast to the previous decision, the Court did not state that article 24 substantially enshrines freedom of receiving and disseminating information; it declared that in addition to this right the article included the right to freedom of disseminating thoughts. Furthermore, while considering article 24, the Court mentioned the word “belief” which inter alia includes religion. Such reading means that article 24 protects the forum externum of freedom of expression and religion, and article 19 protects forum internum of the same rights. Against the background of this judgment, article 24, together with “the right to dissemination of information”, also includes right to dissemination of thought.

In this case the Court broadly discussed article 19. The fundamental human right to the freedom of thought, speech, belief and conscience is protected by article 19 of the Constitution of Georgia. In spite of a certain similarity between articles 19 and 24 of the Constitution, that both of them mention the right to the freedom of thought, there is a substantial difference between these two articles. To identify the scope of the right the Court employed two techniques: reading the article 19 of the Constitution together with other articles, and analyzing the forms and extent of restricting this right.

While analyzing the basis of restrictions, the Court paid particular attention to the issue that in times of war and emergency, the possibility of the derogation of the right protected by article 19 is not provided in article 46 of the Constitution. So the Court concluded that “[...] in the system of rights, special importance is given to the right protected by article 19. The Constitution provides for that category of rights, the derogation of which is inadmissible to pursue the state security, safety or other important public goals. At the same time, the only basis for the restriction of article 19 is the necessity of protecting others’ rights.

In line with the above logic, the Court concluded that article 19 protects the personal sphere of an individual, his/her freedom of having, sharing or/and denying an opinion, religion, and belief. The aim of the Constitution is to establish the guarantee of freedom of thought, speech, conscience and belief, as forum internum, for the inviolability of the inner world of an individual, one’s personal sphere. This is the right (the aspect of right) which cannot be derogated or banned in the interests of the society, including in times of war and emergency. Nobody has the right to compel an individual to change his/her opinion or belief. The individual is also protected from being forced to say or not to say or express his/

49 Ibid, para.II.3
50 Ibid, para.:II.9
51 Ibid, para.: II.9
52 Ibid. Para.: II. 9
53 Ibid. Para.: II.9
her own idea. This right is not amenable to regulation because it forms the basis for the freedom of the individual, his/her identity and autonomy.

It is generally known that *forum internum* is an absolute right. If article 19 only protects this right, then the question arises with respect to the necessity of paragraph 3 of the same article, because it establishes the basis for the restriction (for protection of rights of others) of this right. The Constitutional Court tried to answer this question, though with its reply it denied the absolute character of *forum internum*, and declared that “the inner world of a person (*forum internum*), his personal sphere is protected from the interference of the State, but acts which cause violation of rights of other people within this personal sphere are subject to restriction.”

The Court tried to set the clear line after which *internum* will turn into *externum*. It observed that “The interest of the State or society towards the belief of an individual and his/her opinion can be established when beliefs or opinions are expressed through certain actions (or inactions) in social activities. The thought or speech will go beyond the personal scope and it may be subjected to restrictions, when it comes to the outer world and clashes with the rights of people not within the personal sphere, and the interests of the society. This kind of “expression” goes beyond the scope of the inner world and does not fall within article 19. This type of expression can be restricted on the basis provided in article 24 or/and other articles of the Constitution.”

The court rejected the constitutional claim in this part.

As it appears, together with the development of the practice of the Constitutional Court, there are Court opinions being developed on the interrelation of articles 19 and 24 of the Constitution. These approaches are important as in the process of forming its judgments the Court will take these opinions into account to develop its practice. It may share or change the existing jurisprudence, though these cases will undoubtedly play their role in separating the scope of article 19 and article 24.

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54 The same discussion is present in the case of Maia Natadze and others;
55 *The Political Union of Citizens – Movement for the United Georgia, the Political Union of Citizens- The Conservative Party of Georgia”, the Citizens- Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers’ Association, the Citizens- Dachi Tsaguria and Jaba Jishkariani, The Ombudsman of Georgia v. the Parliament of Georgia, supra note 47, para.: II.10;* 
58 *Ibid*, para.: II.12;
3.4. The Ombudsman against the parliament

The most important case which should answer the questions mentioned above in the context of this debate is the case of The Ombudsman v. the Parliament. As in the case of Menabde and Butbaia, the law on military reserve service is challenged as it does not provide the right to conscientious objection. It is interesting how the Ombudsman sees the contents of article 19. In the complainant’s opinion, the right to religion and belief (as absolute rights) and the right to their expression are guaranteed by article 19 of the Constitution of Georgia. Under the Constitution of Georgia both inner belief and the external freedom of expression of this belief are protected. In the Constitutional claim it was stated that under paragraph 3 of article 19, the restriction of the external freedom of belief is considered to be allowed if its expression violates others’ rights. Freedom of belief and conscience together with other rights implies the right of a person’s free choice of adopting a particular religious or unreligious belief. Hence follows the right of a person to act according to his/her own belief, or not to participate in activities which are contrary to his/her views. Accordingly, the right to not to join the obligatory military service and replace it with a non-military alternative service is the fundamental aspect of the right to the freedom of belief and conscience which is protected by article 19 of the Constitution of Georgia, and by the international instrument of human rights.¹⁰⁹

Unlike the previous case, the Court admitted this case for examination on merits, which means that it found the substantive link between article 19 of the Constitution and the challenged law. Otherwise, the case would not pass the examination of admissibility, and the Court would adopt an inadmissibility ruling.¹¹⁰ The recording notice that the Court adopted is binding for the First Board of the Constitutional Court. The Court decides the interrelation between a challenged law and a constitutional right at the admissibility stage of a claim.¹¹¹ If the Court opines that the abovementioned aspect of the freedom of religion is not protected by article 19, this kind of approach will create inconvenience (The Court recognized the relation in the preliminary hearing and then did not recognize it in examination of merits), especially in light of the fact that the plenum of the Constitutional Court changed the approach to article 19 given in the recording notice.¹¹²

¹⁰⁹ The First Board of the Constitutional Court of Georgia, the Recording Notice #1/4/477, December 2,2009 of in the case of the Ombudsman of Georgia v. the Parliament of Georgia, paragraphs. I, 4 and 5;
¹¹⁰ Cf., Ibid. Para.II.2
¹¹¹ Law of Georgia On the Proceedings in the Constitutional Court of Georgia, article 18.
¹¹² The Plenum of the Constitutional Court passed the judgment on April 18, 2011 (the case of meetings and manifestations), but the First Board adopted its recording notice far earlier on December 2, 2009.
4. THE SCOPE OF ARTICLE 19 AND ARTICLE 24 AND THEIR SEPARATION

Interestingly, according to the Organic Law of the Constitutional Court of Georgia, only the Plenum of the Court is authorized to overrule a precedent. The Board is bound by the case law of the Court. The above discussed judgment of the Plenum of the Constitutional Court excludes the possibility of finding the violation of article 19 in the case of military reserve service. If the Constitutional Court follows the precedent, it would mean that the relation between the impugned law and article 19 of the Constitution is absent. However this type of relation, as it has been already noted, is determined not in the final judgment made after examination of merits, but in the ruling made after the preliminary hearing at the admissibility stage. And the Court has already recognized the claim as admissible. There may be only one argument to justify the aforementioned; when the First Board admitted case of military reserve service for examination of merits, the Plenum’s judgment on the case of public meetings was not made yet.

However, there is an alternative solution which suggests that different aspects of the right to the freedom of expression should be distributed between two articles: article 24 shall protect *Forum Externum* of the freedom of expression, and article 19 shall protect *Forum Internum* of the freedom of expression. This will explain the recurrence of the word “thought” in article 19 and article 24 of the 2nd chapter of the Constitution. As for the freedom of religion, it can be declared that it is completely enshrined in article 19, because the words “religion” and “belief”, as well as the word “conscience”, are not mentioned anywhere else in the 2nd chapter of the Constitution. There arises the question: Why is the freedom of religion so important (there is only one ground for its restriction- rights of others)? There is hardly a comparable right to the freedom of religion that is guaranteed by the Constitution of Georgia. International instruments allow for the restriction of the freedom of religion on numerous grounds while the authors of the Constitution of Georgia included only one such ground for restriction- rights of others. It is hard to find an answer to this question as it could have been dictated by the reality of Georgian multi – religious society; it may be explained by the particularly delicate attitudes toward religious issues; or it may be simply a legislative flaw. According to this approach, article 19 of the Constitution of Georgia protects the freedom of religion, its inner sphere and its expression, out of which the former is absolute and the latter can be restricted according to the test of proportionality, where only protection of others’ rights can serve as the legitimate public aim for restriction.
5. CONCLUSION

The Court has many choices regarding the issue of separation of article 19 and article 24. After summing up the above mentioned discussion, the following probable solutions are identified:

I. Article 19 and article 24 protect the right to freedom of expression (article 19 also protects freedom of religion), though they do not contain different aspects of this right.

II. Article 19 of the Constitution includes the right to form and disseminate opinions; and article 24 includes the right to receive and disseminate information (the original source of which is not the person who disseminates).

III. Article 24 protects the rights to freedom of expression and religion, and article 19 protects the inner sphere of the same rights (which is not absolute in contrast to the wide-spread approach to this issue, and can be restricted for the protection of rights of others).

IV. And finally, article 24 protects Forum Externum of the freedom of expression, and article 19 protects Forum Externum of the freedom of expression. As for the freedom of religion, it can be said that the scope of this right is completely enshrined in article 19.

In spite of the fact that the first approach has been the dominating doctrine for years, it has already been rejected for a long time. Due to this and partially by the decision of the Plenum, the possibility of article 19 and article 24 having the same scope of protections was excluded. It is less likely that the first board will choose this solution.

The second approach is also unlikely to be incorporated in the future judgments. The reason is that the Constitutional Court, adopting the third approach, rejected this approach in the case related to meetings and demonstrations.

The Court has already partially considered the fourth approach at the Admissibility stage and shared it (in the part of article 19).

Perhaps the second part of this approach is also logical, though it was noted that the Plenum of the Court has declared something different, from which the board cannot deviate.

Thus, according to the last precedent, the result is likely to be the following: according to the court’s previous approach forum internum will be defined to fall within the scope of article 19, and conscientious objection will be placed within this inner sphere by the Court. Though this is not an acknowledged approach, this kind of view exists. This kind of position is expected from the Court in the context of the case of meetings and demonstrations. Here the Court decided that belief of an individual belongs to Forum Externum, and also to personal and family relationships. Therefore it will not come as a surprise if the Court will assess coercion to act contrary to one’s beliefs falls within the inner sphere of the right.
I. REGARDING THE INTERRELATION BETWEEN THE ESSENCE OF FUNDAMENTAL RIGHTS AND ESSENCE OF RIGHT-HOLDERS

Right-holders can have as many rights as their essence allows to. In other words, the essence of the right depends onto the essence of the right-holder. Accordingly, there are right-holders and their rights, scope of which is not circumscribed by national legal orders. Fundamental rights of the individual are so-called as rights of the “citizen of the world”. They do not owe their existence to legal orders. Fundamental rights are related to the existence of a human being. If they had their origin in national legal orders, their claim to universality would be unfounded. None of the rights linked to any particular legal order may be perfect and exhaustive, as no legal order can claim perfection. The fundamental rights accompany individuals, notwithstanding the jurisdiction which they enter. Even in the most backward and totalitarian country, a person is a holder of these rights. Ignoring these rights by a legal order does not mean that they can be denied. If the same person happens to be in a democratic country for a short period of time, that person will freely enjoy the fundamental rights, not because the legal order of that country grants him/her these rights, but because the person had such rights since the very moment of his/her birth. Thus, we should distinguish between the form of fundamental rights and the state of their implementation (guaranty). Fundamental rights are characteristic of human beings who are subjects of law. The Constitutional Court of Georgia has expressed the idea as follows: “state cannot grant or deprive a person of the basic rights, as it is not authorised to change the essence of a person.”\(^1\) This means that the essence of a right is defined with the essence of a person. In other words, rights are derived from the essence of a human being, thus a human being embodies rights. According to the interpretation of the Court, “Article 7

\(^1\) Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.
of the Constitution\(^2\) establishes two obligations of the State: 1) to acknowledge and 2) to protect the human rights. Due to the essence of the rights, their acknowledgement by the State means the obligation to recognise such rights as omnipresent entitlements of any individual. Whereas, protection of the stated rights means guaranteeing all the necessary mechanisms in order to ensure full exercise of such rights, including acknowledgement of the possibility to protect those rights at the court.\(^3\)

This position of the Court does not mean that the source of the rights exists outside an individual. Any legal order is obliged to acknowledge that human beings, as subjects of law, are entitled to fundamental rights – the entitlements that are not separable from personality. Otherwise, the very humanity of a human being and his/her status as a subject of law become questionable. Individuals are subjects of law by birth. A human being has dignity and thus fundamental rights are related to dignity. Here we have such a chain of human characteristics that cannot be denied. Fundamental rights are recognized per se as human rights existing within human beings. What already exists, it can be only protected by legal order. Therefore, when we refer to acknowledgement of human rights by the State, we mean binding of the State with the existing reality. The purpose of reflecting on positive law is to develop the order of values for their effective protection. The Court’s following judgment alludes to the same idea, expressed while interpreting Article 7 of the Constitution: “... non-performance or improper performance of the obligation to acknowledge and ensure the right may not question the existence of the right, as of the superior good of an individual. Acknowledgment of such obligation in the Constitution means that the State shall establish all the conditions for existence of such rights, otherwise, the fundamental rights of individuals will be violated, whereas all democratic and rule-of law states agree on the necessity of protection and guaranteeing of these rights and counter-activities would challenge the aspiration of the country towards the ideal of a state based on rule of law.”\(^4\)

Thus, no one can question the rights of an individual. A human being is an individual because he/she is a rational, and social creature with a personality. No one can deprive a human being of these characteristics. Article 7 of the Constitution sets forth the scope of the State’s constitutional obligation in relation to human rights. This means that “... the State, in the process of governing, is restricted with human rights, whereas subjects of rights are individuals, irrespective of their citizenship, place of residence or factual location.”\(^5\)

This judgment of the Court makes us think that human rights are entitlements over and above the constitution. Constitutions are based upon human rights and not vice versa. A

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\(^2\) The State acknowledges and protects the generally acknowledged rights and liberties of an individual as the indispensable and superior human values. During the implementation by the government, people and the State are bound with these rights and liberties as well as with the directly applicable law.

\(^3\) Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

\(^4\) Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.

\(^5\) Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.
constitution alienated from human rights may not be considered as a guide to define the scope of such rights. This idea was explicitly stated in a decision of the Constitutional Court: “... human rights, with all their contents and scope are directly applicable, and, first of all, restrain the State not only from setting forth inappropriate limits to a particular right with a particular normative act, but also prohibit overcoming the essence of fundamental rights through the constitution itself by establishing the normative basis for their violation and/or abolition.” Therefore, even the constitution is powerless to distort the essence of fundamental rights as it cannot establish the essence either.

Imagine that the constitution attempts to distort the essence of fundamental rights. This is actually impossible, but theoretically the constitution might contain such a provision. How shall the Constitutional Court act in this situation? It is not authorised to review whether the constitution itself is “constitutional”. Here, we can analogically use the formula of Gustav Radbruch. According to Radbruch, when law is not only unfair, but by its nature cannot even be qualified as legal, one shall act according to the law which is superior to statutory law. Distortion of the essence of human rights is an action directed against the human being itself. Shall we always rely on the constitution in such a situation? In such an event, we shall construe the constitution in the light of the essence of human rights, which it contains due to their universal character. Universal scope of a right necessarily supersedes the narrowed scope set forth in the constitution. One shall not forget that the constitution cannot supersede the content of fundamental rights, as it does not define their essence. In such a case, the court will by all means find the legal basis for review of the normative act.

Constitutional Court in its jurisprudence, on one hand, acknowledges that human rights are inseparable from a human being, and that those are the rights defining the essence inherent to him/her; on the other hand, the Court develops an idea that Article 42 of the constitution defines human rights, and in particular, the right to access to the court. Legally human rights may not be defined by the Constitution. The constitution merely reflects such rights. The Constitution expounds the guaranty for these rights. Simply put, the court defines a right and defines its guaranties. Therefore, we find the reasoning stipulated in the court decision doubtful, which states that, “the issue of existence of particular rights, naturally, shall be decided on the basis of the provisions determining the fundamental rights.” Article 42 is not the provision that creates fundamental human rights, but it is a provision that sets forth the guaranty for those rights. The expression, “every man has the right to apply to the court” shall not be understood as if the constitution has established this rule. The constitution has merely reflected the right, which belongs to an individual based on the rule which is superior to the constitution.

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6 Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.
8 Decision #1/466 of the Constitutional Court of Georgia, dated as of June 28, 2010.
II. PRINCIPLE OF PRESERVING ESSENCE IN GERMAN LAW

In German Federal Constitution, the principle of preserving essence is stated as a general rule in paragraph 2 of Article 19. It defines that, “in no case is it allowed to violate the essence of a fundamental right”. This principle represents the guaranteed safety for the content of fundamental rights.\(^9\)

The necessity to preserve the essence of human rights results from the fact that human rights have a universal character. They do not exist separately from other rights. Any right exists in a realm that is replete with social and private interests, and its content depends on the type of influence these interests have on it.\(^10\)

In order to explain the principle of preservation of the essence of human rights, it is necessary to define what is implied by its content and to which rights it is applicable.

The question arises whether the essence preserving principle represents an independent principle, or it is implied in any other principle. One may not explicitly say that it is fully separated, for example, from the principle of proportionality. One of the requirements of proportionality is preservation of the essence of a right.\(^11\)

While studying the above issue, it has to be taken into account that the Georgian Constitution does not contain general rules on restriction of fundamental rights. The separate rules of constitution deal with the necessity of limiting various rights. German Federal Constitution develops the general rule on restricting fundamental rights, as well as the general principle aimed to preserve the essence of them.

The principle of preserving the essence of fundamental rights addresses all the three branches of government i.e. legislative, executive and judicial, each one with the ability to affect human rights positively and negatively.

The principle of preserving the essence of fundamental rights provides the measure of constitutional changes. This principle obliges the legislature, in the event of any amendments to the Constitution, to protect the essence of fundamental rights in order to maintain and not to deteriorate the minimal standard of human rights. Preservation of essence and preservation of human rights shall be understood as synonymous phenomena with the same content.

In this context, the universal standards of human rights shall be taken into account, which restrict the authorities of member states of the European Union. When we refer

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\(^10\) Claudia Drews, 16.

\(^11\) Claudia Drews, 20.
to the essence of rights, we mean the universally accepted essence of such rights. German Federal Constitution does not state anything regarding the universality of the essence, but it is presumed that the essence of rights, which is acknowledged and accepted among the member states of the European Union, is implied. The implicitness of preserving the essence of human rights is well expressed in the decisions made by the Federal Constitutional. This is how one shall understand the nature of the essence of fundamental rights in the event of its definition by the Constitution of Georgia.

Federal constitution in general speaks about preserving the essence of fundamental rights. Therefore, it can be concluded that this principle deals with all fundamental rights. In accordance with the German Doctrine, such conclusion is quite disputable.

According to a widely spread opinion, principle of preserving the essence applies to those rights, restriction of which is allowed on the basis of law. The essence is protected from constitutionally unacceptable interference with a right. German Federal Constitutional Court considers the principle preserving the essence in the context of restriction of rights. In particular, while defining paragraph 2 of Article 19, it relies on the content of paragraph 1 of the same Article. Towards those rights, to which paragraph 1 of Article 19 does not apply, paragraph 2 of the same Article is not applied either. As an example, the Federal Constitutional Court refers to paragraph 1 of Article 12 of the Constitution, which deals with regulations of rights rather than restrictions.

Judicial practice in Germany as well as the widely spread scientific doctrine consider that the principle of preserving the essence covers all fundamental rights. It is also applied to the rights similar to fundamental rights.

One shall review the principle of preserving the essence of rights both in its positive and negative aspects. One shall not consider preserving the essence only as the fact that an individual is entitled to protect himself/herself from the state, and to remind the state, by way of the constitution, that it may not restrict a right in a manner jeopardises the essence of that right. Notwithstanding the fact that the right to protect oneself from the state represents a necessary condition for guarantying fundamental rights, this is not a sufficient explanation of the principle. First of all, it is necessary that the object to be protected be itself capable of being protected and able to exist. The rights determined by the constitution together with their essence and content shall be qualified as fundamental rights of universal character. In short, the constitution shall define a right in such a manner that the essence of a right is well defined and worthy of being protected. The type and degree of protection to a right shall depend onto the character of legal order existing in a country, as any right indirectly represents the value premised on the existence of a particular legal order and depending on its scope. The legal order is not just one part.

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12 Claudia Drews, 48.
13 Claudia Drews, 53.
of the legal realm; the legal order is the whole legal realm, the entire body of it. In order to create a healthy organism, the state is required to carry out its positive obligations in a manner the universal character of human rights requires. The legal order shall represent the order appropriate to the value of fundamental rights. Only in such an environment, rights may viably exist.

German scholarship offers absolute and relative theories regarding the content of the essence preserving principle. According to the absolute theory, the essence is the characteristic of a right, without which the existence of that fundamental right is impossible. The essence is the root of a right, its substance, the core, the indispensable framework, and the last bastion for its protection.\(^\text{14}\)

The essence preserving principle and the principle of proportionality are not the same. The peculiarity of the principle of preserving the essence lays in the fact that the essence is not the subject of weighing, whereas the values considered under the concept of proportionality are weighable.\(^\text{15}\)

The above mentioned does not mean that the essence of fundamental rights is frozen in time and not subject to changes. The content of a right is changeable in time. But, when we discuss protection of essence, we consider the essence of a right, which that right contains at that particular time and place. Any legal phenomenon may be considered from this point of view. The mentioned approach is known as the absolute-dynamic.\(^\text{16}\)

Theory of relativity gives a different account of the essence preserving principle. According to this theory, preservation of the substance is not an absolute limit of a fundamental right. Essence of a right shall be defined in every particular case in relation to other interests being in collision with the essence. According to the more rigid theory there is no such a thing as the essence of a fundamental right. Its content may be revealed only in its relation with other interests. The essence of a right is revealed not as a material substance but as a relationship between parties in a particular situation.\(^\text{17}\)

We consider that one may not have a strictly one-side approach to the principle of preserving the essence, as it is shown from the subjective theory. The essence of a fundamental right shall be considered as the value of having substantially peculiar features, revealing themselves in every particular case. By way of such an existential approach, the in-depth cognition of the essence of a right is possible. However, if we only consider the theory of relativity, it will become clear that legal certainty will be jeopardised, and the behavioral rules will become questionable. The essence of any event shall merely be what may be expected in every particular case. These cases will be the confirmation of what was prelimi-

\(^\text{14}\) Claudia Drews, 61-63.
\(^\text{15}\) Claudia Drews, 65.
\(^\text{16}\) Claudia Drews, 65.
\(^\text{17}\) Claudia Drews, 69.
narily given as the essence, but if we do not recognise and consider the absolute nature of
essence as a scope for our understanding of rights, then the essence of fundamental rights
will merely be what takes place in practice. However, we cannot formulate rules as every
particular case differs with the rest. Though, practical existence of a right is crucial for the
development of the notion of its essence.

In the practice of German Federal Constitutional Court, preserving the essence is related
to the personality, and, in particular, to the dignity of a human being. In this context,
preservation of the essence represents the guaranty to the free development of an individual.
We consider this view as well-founded. When one refers to an individual, the idea of a human
being endowed with rights as a result of his/her humanity is implied. A human being gains personality due to these rights. What would happen if the essence of the above
rights is jeopardised? In such a case, the personality of the human and his/her dignity will
be questioned. That is why preserving the essence in case-law is related to dignity. Without
the substantial guaranties of the fundamental rights, a human being would be deprived
of the possibility to arrange his/her life according to his/her will, becomes the object of
external influence, and the essence of a human being as the subject of law would also be
questioned. To sum up, preservation of the essence serves the objective of guarantee an
individual his/her dignity and personality as a human being.

Essence preservation is not the only constitutional problem that affects fundamental
rights. Property rights have also to be subjected to the requirement of preserving the es-
sence. The participant of either public or private legal relations does not have the right to
restrict his/her own rights in contractual relationships in a manner that jeopardizes the
essence of these rights. Should a participant of a civil transaction restrict his/her own rights,
it not only violates the interests of that particular individual, but also questions the private
legal values along with the rights of the other participants, and results in inadequate and
unfair relations. Such a situation also places an additional burden on the State to resolve
the disputes that may emanate from such scenarios. All these indicate to the fact that from
the perspective of essence, a right is capable of protecting itself not because it is related
to the personality of any particular human being, but because it objectively represents the
entitlement and the protection that the subjects of law do not change its content. Any right
is a human right in general rather than a right of a particular human being.

May the expropriation of property be considered as the exception to the essence pre-
serving principle? In case of expropriation of the property, the right to such property is
deprived rather than the essence of the right is infringed. Something that no more exists
can have no essence. Peculiarity of preserving the essence is that violation of a right results
in damage to the substance of a right. Even though a right has lost its form appearance, it
still exists deprived of content and diminished, and yet can be subjected to legal review.
Therefore, it still has the rudimentary traits. However, as these characteristics lack legal
capacity, it cannot claim to be called a right. Therefore, violation of the essence of a right
does not leave the space to make it eligible for legal review, and that right is said to have
Principle of Preserving the Essence of Fundamental Rights

lost its essence. Remains of rights after the violation of the essence are legally meaningless, and have no practical value. It is true, that violating the essence might be considered as the phenomenon equal to expropriated property, but due to the above mentioned circumstances, it shall not be fully identical thereto. Violation of the essence takes place when a right is subjected to restrictions that distort its appearance. The appearance of a right is the aggregate of characteristics establishing “ego” of that right.

III. ESSENCE PRESERVING PRINCIPLE IN ACCORDANCE WITH THE CONSTITUTION OF GEORGIA

In Georgian Constitution, we have no general rules on restricting fundamental rights based on essence preserving principle. After the introduction of the amendments adopted in 2010, the Constitution has underlined the aforementioned principle in Article 21. In general, when Constitution provides for restricting the fundamental rights, we can see the reflection of this principle in different forms. Most frequently, the Constitution provides for the guaranty for protection of fundamental rights, and at the same time defines the framework of its restriction in the context of particular societal interests. For example, Article 22 of the Constitution affirms the right of all the citizens, staying legally in Georgia, to freely move and choose the place of residence within the whole territory of the country. At the same time, the Constitution sets forth the basis for its restrictions, such as national security, social safety, etc. The provisions pertaining to this subject in the Constitution, exhaustively list all those social interests which may justify restriction of the fundamental rights. Therefore, it might be presumed that the limit of restriction of the right to pursue relevant interest is set so as to preserve its essence. The Constitution does not explicitly reflect the above stated; it is, however, elicited out of the nature of the limitation placed on a right. There are rules in the Constitution, which do not specify the basis for the restriction of a right, and are generally defined by referring to the social interests. In the event where the social interests need to be specified, the door of the Constitution is open for a legislator. For any legitimate interest, the essence of a right is the border that it may not overcome. On another occasion, the Constitution pays attention to the guaranties of a right without making a reference to the restrictions. This does not mean that the restriction of a right is not allowed. For example, Article 16 of the Constitution merely states that everyone is entitled to freely develop his/her personality. If we assume that the stated also applies to contractual freedom, then it will certainly be subject to restrictions.

Georgian Constitution has for the first time incorporated the form of the restriction of a right in which the essence preserving formulation is reflected. The aforementioned is
incorporated in paragraph 2 of Article 21 of the Constitution. For the sake of comparison, the old wording of this paragraph stated: “Restriction of rights defined in the paragraph 1 is allowed to protect social interests in the events and in the manner specified by law.” The new content of this paragraph is as follows: “To protect social interests, it is allowed to restrict the rights defined in paragraph 1 in the events established by the law, and in accordance with the mandated rules, so that the essence of the property is not violated.” As one may observe, difference between the two wordings is merely that in the current provision, the framework of the restriction of the property rights is indicated directly, and is reflected in the requirement of preserving the essence. As the amended constitutional text deals with the provisions protecting the property right only, logically the following question arises: does preservation of the essence deal with other fundamental rights? The answer is obvious: Essence preservation is the measurement of all fundamental rights. Then why did the legislator underline the above statement in such an extraordinary manner in relation to property right only? It seems, this is the result of the fact that property right is the most substantially restricted right. In comparison with other rights, property right may be the object of frequent restrictions in the name of social interests. Often, legal relationships between individuals are that of relations between property owners, and hence disputes occurring between individuals often involve the right to property (a classic example of this is the neighborhood law). The question arises, what would have happened if the said amendments were not made to Article 21? The answer is that the principle of restriction of the right to property would not have changed its character, such as preserving the essence of the right. The Constitutional Court has not underlined the importance of the protection of this principle in the process of restriction, and we shall refer to it later on. Preserving the essence of a fundamental right is derived from the nature of that right itself, and it is an elementary requirement towards the restriction of a right, which itself is a significant legal principle even without explicit statements made in the Constitution. Restriction of a right always implies the preservation of that right rather than its destruction. Though, it would be preferable if the legislature incorporates a general rule into the Constitution, in a manner it is effected in paragraph 2 of Article 19 of the German Federal Constitution. The essence of a right is revealed in the demand to preserve its content. Fundamental rights are tightly interconnected, thus violation of the essence of one right will negatively affect other rights. Human dignity is based on the body of substantially guarantied rights. Nonetheless, we consider highlighting the essence preserving principle in Article 21 as a step forward.
IV. ESSENCE PRESERVING PRINCIPLE IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

In judicial practice, the essence preserving principle is widely expressed in the process of restricting the right to property. The court has not once stated that the right to property has to be restricted in a way that its essence shall not be deteriorated, and the content shall be preserved. According to a widely spread held judicial practice, property shall remain the property. This practice has been introduced by the Constitutional Court of Georgia by way of the influence of a European precedent. In decision #1/1/103,117,137,147-48,152-53, dated as of June 7, 2001, the Constitutional Court stated: “In case of any kind of legal or contractual restriction of the right to property, the essence of the right to property shall be preserved, and its inner content shall not be deteriorated.”

Under this approach of the court, the most important aspect is that the preservation of the essence represents a general requirement that it is not addressed solely at the legislature, but towards all participants in the market. What is not allowed to the legislature shall not be allowed to any other party. The indicated provision shows that the essence is expressed in the content of the right to property. Similar approaches have been stipulated in other decisions. In accordance with decision #1/2/411, dated December 19, 2008, the issue of preserving the essence of the right to property has been raised in relation to its functional capability. It was noted in the decision that: “the fact that as the result of the restriction, formally, the elements peculiar to the content remain with the proprietor does not mean that interference into the property rights is justified. Preservation of the essence of the right depends on the scope of restrictions on the contents of such right, as exactly such content is the factor defining the essence. In any case of restriction of the content of the property, the property shall remain as it is and shall be capable of carrying the burden incurred as the result of such restriction.”

The court considered the restriction on the exercise of the right to property according to its intended purpose as a breach of the essence preserving principle “Ownership of of property will lose its sense if the property rights of the party are deprived of their content. The content of the right to property is guaranteed merely in the event of the property owner being able to execute in full the rights attached to a property, according to his/her will, and based on the nature of that property. Therefore, the legislature is obliged to allow a property holder to utilise the owned property according to the intended purpose, which implies establishing personal relations by the proprietor with the object of the property. This exactly is the expression of the positive content of the property as of the property right.”

As one might notice, the guaranty of essence is violated, when proprietor property owner is deprived of his/her due right to utilize his/her property functionally.

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19 Decisions by the Constitutional Court of Georgia, 2008, Batumi, 2009, pg.112.
most important issue is that utilization of a property according to its intended purpose by its owner is related to the preservation of the essence. In such an event, the court considers the scenario when a property holder is legally capable to carry out the realisation of the functions related to that property on his/her own. When the above is not possible, the issue will never arise from the stated point of view.

In decision #1/3/393,397, dated December 15, 2006, dealing with the protection of constitutional rights based on the practice of the European Court, the Constitutional Court stated: “The restrictions shall not diminish the availability of rights allowed to a person to the point when the essence of those rights itself is violated.” In accordance with the decisions of the Court, while restricting a right, the scope of such restrictions shall be defined so that the substance of the right is preserved to the required level. This is possible when the right is not overloaded. Justified demands placed on the exercise of a right do not render its implementation difficult and does not harm its existence. One of the examples of the aforementioned is a property right such as servitude. This right is exists to the extent it is not jeopardised. The existing formal order is arranged in the same way. In the doctrine the following statement is used quite often: servitude shall not turn the property void. Therefore, when any right is burdened with other right this shall be weighed in the manner that the burdened right be capable to bear it. Thus, restriction of a right, in its classic sense, means preserving the restricted object in a way that it might preserve its own appearance. Hence, it can be said that preserving the essence of a right means preserving its form. While reviewing the issue from the point of private law, it shall not be difficult to notice that in the interrelation of right to property and contractual rights such a problem arises quite often. For example, preserving the essence of the right to property depends on the scope of the definition of the rights and obligations. No matter to what extent the content of contractual rights is broadened, before it turns into the property right, it might not cause the termination of the essence of the property right. The fact is that the rights of the lessee and the lessor both have a wide scope according to the present Civil Code. But, this might not be considered as a danger to the essence of the right to property. The fact that the lessee and the lessor have the right to prolong the agreement derives from the social function of the right to property, which represents the characteristic of the right, but not the essential characteristic of the contractual rights.

Obviously, the legislature is in all cases obliged to define the scope of a right in a way that it fits into the essence (content) of such right. Thus, a right may not bear the essence of another right.

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A. THE ROLE OF THE COURT OF HUMAN RIGHTS IN STRASBOURG

I. Legal protection of individuals

The role of the Strasbourg Court is defined in Art. 19 ECHR: it has to ensure the observance of the engagements undertaken by the member states in the European Convention on Human Rights and the Protocols thereto. In doing so the Court may receive in particular individual petitions under Art. 34 ECHR and has to decide upon them whether there was a violation of the Convention. The Court confines itself as far as possible to examining the issues raised by the particular case before it, it does not see its task to review the relevant legislation in the abstract.\(^1\) State applications are extremely rare and can be neglected in this context – they will never be considered as minima. The Court decides on an application by a judgment which is binding under public international law for the state which was a party in that case (Art. 46 I ECHR) and the execution of which is supervised by the Committee of Ministers of the Council of Europe (Art. 46 II ECHR).

The Court by its judgment protects individuals whose Convention rights were violated. The right to individual applications and to have a decision of the Court on it is the core of

\(^1\) So the constant case-law, s. for instance judgment Taxquet v. Belgium, 16.11.2010, 926/05 § 83
the Convention system. It is true that the principle of subsidiarity underlying the Convention means that in the first line it is the duty of the authorities and in particular the courts of the member states to secure the rights guaranteed by the Convention (Art. 1 ECHR). But it is also true that they often fail to do so. It follows that in many cases the Strasbourg Court is the only institution which assures protection of individual rights. That may be so in cases of gross violations of human rights by member states for instance in applications concerning the right to life or the prohibition of torture. And that is often so in less grave cases, in particular in cases where the right of access to a national court was violated or where the courts do not decide within reasonable time so that Art. 6 I ECHR was violated.

II. Interpretation and development of the Convention

The Court has besides the role of individual protection and supervision as described above a constitutional mission\(^2\), that is to say a more general role. Art. 32 ECHR gives it jurisdiction “to all matters concerning the interpretation and application of the Convention and the protocols thereto”. The Court has repeatedly stated, “that its judgments in fact serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance of the States of the engagements undertaken by them as Contracting Parties”\(^3\). In this function as an European Constitutional Court the Court gives common principles and standards and determines the minimum level of protection which have to be observed.\(^4\) In pilot judgments\(^5\) it goes beyond that and gives guidelines to help states which have to decide on measures of more general kind, in particular legislative measures, to solve the problems of other persons in the same situation as the applicant and thus to avoid further applications.

The double role of the Court is the same as we see in the functioning of national Constitutional Courts. They decide individual cases and develop the Constitution at the same time by creating judge made law. Law making by case law is a common phenomenon in all member states independant of whether they are common law states or states with a continental law tradition. It is particularly important with Constitutional Courts because constitutions as the Convention very often are worded in short terms which need clarification, but it is true also for other national courts.

The more general role has practical consequences in the case law. For instance is with regard to Art. 34 ECHR the existence of a victim of a violation normally indispensible. But

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\(^4\) Report of Wise Persons Footnote 1

\(^5\) See under B II below
when the applicant as a victim has ceased to exist during the proceedings the Court takes a more flexible view and does not strike the case out of its list, when the case raises issues of general importance “which transcend the person and the interests of the applicant” or when doing so would “undermine the very essence of the right of individual applications”. 6 Similar considerations can be found in decisions on the question of whether to strike out an application under Art. 37 ECHR for instance after a declaration of the Government with an acknowledgment of a violation and the undertaking to remedy it. 7 In such cases the Court considers if respect for human rights requires to continue the examination of a case (Art. 37 I last sentence ECHR).

The Strasbourg Court has accepted its constitutional mission early by following from the beginning the concept of the Convention as “living instrument which must be interpreted in the light of present-day conditions” 8 and taking into account the “increasingly high standard being requested in the area of protection of human rights”. 9 Exactly that is the reason why the Srasbourg case-law has such an outstanding importance for the understanding of the Convention and the obligations flowing from it. The same is true for the case-law of the national constitutional courts and its importance for the understanding of the national constitution.

III. Binding force of judge-made law

Art. 46 ECHR concerns the binding force of judgments in cases to which the states are parties. The problem we are dealing with is the impact of judgments for a state which was not the respondent state. As mentioned above clarify judgments of the Strasbourg Court the Convention and develop it. That can only work when judgments against other member states have legal importance for them. The Convention has no provision like § 31 I of the German Federal Constitutional Court Act which stipulates that all German courts and authorities are bound by a final judgment of he constitutional court as far as it decides a specific matter in dispute (res iudicata). 10 But the Strasbourg case-law “reflects the the current state of development of the Convention and its protocols” 11 And since the Convention – “as interpreted by the ECHR – has the status of a formal... statute, it shares the primacy of statute law and must therefore be complied with by the judiciary” 12 which must “take

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7 See inter alia ECHR, decision of 1.4.2008, 35000/05, Orlowski v. Germany; ECHR, decision of 15.5.2008, 58364/00 No. 32, Lück v. Germany; ECHR of 7.1.2010, 25965/04 § 197 – Rantzev v. Cyprus
8 ECHR of 25.4.1978, Series A, No. 26, pp 15-16 § 31 – Tyrer v. United Kingdom
10 Order of the German Constitutional Court of 14.10.2004, 2 BvR 1481/04 § 39
11 German Constitutional Court, footnote 10, § 38
12 German Constitutional Court, footnote 10, § 53
into account the guarantees of the Convention and the decisions of the ECHR as part of a methodologically justifiable interpretation of the law”. That follows not from Art. 46 but from Art. 1 ECHR which obliges Member States “to secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention.”

B. EXCEPTIONS FROM THE AIM OF LEGAL PROTECTION OF INDIVIDUALS

I. Workload of the Court

The high and increasing workload of the Court in Strasbourg has since many years given rise to concern. The danger that the Court suffocates in too many petty cases so that it has not sufficient time to deal with cases which merit it and are important under the general and constitutional aspect has been discussed since long. The Court in its case-law has made efforts to contribute to a solution. It stresses the importance of Art. 13 and the principle of subsidiarity flowing from that provision and from Art. 6 I ECHR. With regard to Art. 46 I ECHR the Court states in its constant case-law that “the finding of a violation imposes on the respondent State a legal obligation not just to pay ... the sums awarded ... under Art. 41 ECHR but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects”. And the state is also obliged to take measures which ensure that there will be no similar violations of the Convention in the future. Since some years the Court applies pilot proceedings as a way to avoid as far as possible the need to decide numerous similar applications in the future.

II. Pilot Judgments

In its case law the Court has repeatedly stressed, that the obligation under Art. 46 ECHR to take general measures aims at securing the right of the applicant which the Court found to be violated. But it goes beyond that: “Such measures must also be taken in respect of other persons in the applicant’s position, notably by solving the problems that have led

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13 Order of the German Constitutional Court, footnote 10, § 47
15 Judgment of 8.6.2006, 75529/01 § 137, ECHR 2006-VII – Sürmeli v, Germany
to the Court's finding."\(^{16}\) The Court adopts a pilot judgment procedure to clearly identify structural problems underlying the violation and to give specific indications for measures or actions to be taken including legislative measures. The aim of the procedure is to induce the respondent State to solve many similar cases concerning the same problem at the domestic level so that the Court has not to repeat the same finding again and again.\(^ {17}\) A procedure of that kind has many advantages. But it can only work when the respondent States are ready to cooperate and to enact the indicated measures. One cannot imagine how the Committee of Ministers can come to a solution in the supervisory procedure under Art. 46 II ECHR when difficulties come up, when for instance a national parliament is not ready to adopt indicated legislative measures.

When the Court choses to apply a pilot judgment procedure the result may be that the legal protection of individuals is reduced. The Court sometimes – not in all pilot cases – decides to adjourn the examination of a great number of similar cases to give the respondent State the opportunity to settle them on the domestic level.\(^ {18}\) That may in particular be a reasonable solution when the Court has fixed a time limit within which the State has to solve the structural problem by general measures, for instance to enact new legislation. The consequence for numerous individuals which have complained about similar violations of their Convention rights is that their applications are not examined during a certain time. It may take long until the structural problem is solved and it is even possible that the respondent State does not redress the situation at all and continues to violate the Convention. In that case the Court will resume the examination of similar pending aplications and take them to judgment,\(^ {19}\) but it will take long time until the other applicants get their legal protection by the Court.

### III. Treatment of petty cases before entry into force of Prot. No. 14

The Convention gives procedural means quickly to do away with applications with no prospect of success and no importance. It is Art. 35 ECHR with its admissibility criteria which gives the main instrument namely in para 3 which states that “manifestly illfounded” applications shall be declared inadmissible by the Court. And under the Convention the Court does so by a committee of three judges when the decision can be taken unanimously and without further examination (Art. 28 ECHR). The decision can be taken by tacit agreement (Rule 23A of the Court), it is final, very often the respondent State is not even given notice of the application. There is no need to produce a written decision; the applicant can be informed of it by a letter (Rule 53 V of the Court).

\(^{16}\) Judgment of 25.7.2009, 476/07 § 49 – Olaru and others v. Moldova
\(^{17}\) Olaru judgment. footnote 16, §§ 50, 51
\(^{18}\) Olaru judgment, footnote 16, § 51
\(^{19}\) Olaru judgment, footnote 16, § 52
This filtering instrument is of great importance. More than 90 % of the applications are declared inadmissible. In 2009 the Court decided 35460 cases, by judgment 2395 and by decision 33065. The instrument has been reenforced by Prot. No. 14 which has entered into force on 1.6.2010 (see IV 4 below).

IV. Cases of minor importance (minima)

1. The maxim of “de minimis non curat praetor” part of the Convention system?

The above mentioned filtering mechanism covers minima cases, but only such with no prospect of success. But there was a discussion also about the question how to deal with cases of minimal importance for the applicant and of no general significance, even if they are manifestly well founded.

The maxim “de minimis non curat praetor” is seldom expressly mentioned in reports of the former European Commission of Human Rights or in judgments and decisions of the Court.

The first example is that of the report of the Commission of 19.12.1979 in the case of X v. United Kingdom. The applicant underwent an operation to straighten the toes of one foot while serving a prison sentence in the United Kingdom. One small toe had to be amputated later. The applicant petitioned for compensation and for permission to seek legal advice. Both requests were rejected. The Commission considered whether his complaint raised an issue under Art. 6 § 1 ECHR (fair trial, right to a court). It reasoned that even supposing that the refusal was not in conformity with Art. 6 ECHR the application was manifestly ill-founded. The commission noted first that such a situation would not occur again because the British practice had been liberalised and secondly, that the applicant had not consulted a solicitor when he was later able to do so. It continues: “In this respect the Commision refers to the legal principle of “de minimis non curat lex”. That was surprising in this context but it indicates that the Commission was convinced that such a principle existed.

Interesting in this connection is further the case of K.-H. v. Germany. It concerned a complaint raised by a German citizen under Art. 5 § 1 ECHR. He had been arrested by the police and detained for checking his identity. Such a detention shall under German legislation not exceed a total of twelve hours. The detention of the applicant had exceeded that statutory maximum by 45 minutes.

20 Decisions and Reports 47, 24
21 ECHR, judgment of 27.11.1997, 144/1996/763/964, Reports 1997-VII
The Commission in its report\textsuperscript{22} found that practical reasons may justify a modest delay of the release. The rather short delay of 45 minutes had not deprived the applicant his liberty in an arbitrary manner contrary to object and purpose of Art. 5 ECHR. For these reasons the Commission came to the result that there was no violation of Art. 5 § 1 ECHR. It is in the dissenting opinion of six members of the Commission that the maxim “de minimis” is mentioned. They argued that Art. 5 was violated. Even in a case of only short delay of release the importance of the right to liberty called for a scrupulous supervision by the Convention organs. Even such a short violation of domestic laws, so the dissenting members, could not be disregarded “by the application of some “de minimis principle”. The maxim of de minimis non curat praetor, so they continued, “is not part of the legal framework of the Convention and certainly has no place in the context of unlawful deprivation of liberty.” The Court in its judgment did not mention this question. It found that the maximum period of detention laid down by law was absolute and that Art. 5 § 1 (c) ECHR was violated\textsuperscript{23}.

This case makes clear that Commission and Court at that time and in this context did not want to expressly mention the principle “de minimis…”. They found other ways to deal with it, when interpreting the Articles of the Convention (see 3 below) and in a recent decision by applying Art. 35 § 3 ECHR and declaring minima applications under certain conditions inadmissible for abuse of the right to individual application.

2. Abuse of the right of applications

Shortly before entry into force of Prot. No. 14 with its specific regulation in Art. 35 § 3 (b) ECHR the Court has applied former Art. 35 § 3 ECHR. In the case of Stephan Bock v. Germany\textsuperscript{24} the applicant was a civil servant with a monthly salary of 4500 Euro. His physician had prescribed him magnesium tablets and he requested aid from the State which was his employer; he asked to be reimbursed the costs of these tablets, namely 7,99 Euro. When this request was refused the applicant lodged an objection against the negative decision, which was rejected, after that he lodged appeals with the Administrative Court, the Administrative Court of Appeal and the Federal Constitutional Court. In his application to the Strasbourg Court he claimed that his rights under Art. 6 § 1 ECHR were violated because the proceedings had taken too long. The Court rejected the application as an abuse of the right of application (Art. 35 § 3 ECHR) as inadmissible. In its reasons it did not mention the principle of de minimis non curat praetor, but the decision is clearly based on it. The Court noted the disproportion between the triviality of the facts, the pettiness of the amount involved and the extensive use of court proceedings including the application to an international

\textsuperscript{22} Of 10.9.1996, 25629/94, §§ 59, 65
\textsuperscript{23} § 72 of the judgment footnote 21
\textsuperscript{24} Decision of 19.1.2010, 22051/07
Court. It mentioned the overload of the Court and the fact that many applications pending are raising serious issues. The Court further noted that the application raised no questions of principle and that the issue of excessive length of court proceedings have been dealt with in numerous judgments. It came to the following result: “Under these exceptional circumstances the Court considers that the application must be regarded as an abuse of the right to petition”. Such a decision came late but it came at least. In the future the Court will apply Art. 35 § 3 (b) ECHR as amended by Prot. No. 14.

3. Filtering out minima by interpretation of material provisions of the ECHR

Without relying on the maxim of de minimis non curat praetor the Court has found many ways to reject applications which do not raise serious issues.

a) Margin of appreciation

One of the principles in the case-law is that national authorities have a margin of appreciation. This principle is of importance for the interpretation of paras 2 in Art. 8-11 ECHR, which inter alia provide that an interference must be necessary in a democratic society. The Court has often stressed that it is in the first place for the national authorities to assess whether there is a pressing social need and that they enjoy a certain margin of appreciation when doing so.\(^{25}\) In such cases the supervisory role of the Court is restricted, it does not substitute itself for the competent national authority so that it can easily find a way to accept a decision taken by national authorities when it does not violate the Convention in a significant way. The same is true for the criterion that there must be a reasonable relationship of proportionality between the legitimate aims pursued and the means employed.

b) Balance of interests

In many cases different interests have to be taken into account and the Court requires that a just balance between them must be achieved. That is for instance the case in applications concerning Art. 1 Prot. No 1 where the interference must strike a fair balance between the demands of public interest and the requirement of the protection of individual rights.\(^{26}\) A further example is the positive obligation to protect the rights guaranteed in the Convention. It requires that a fair balance is struck between the competing interests of the individual and the community.\(^{27}\) Such a balance is in particular necessary in the many cases where an individual right of one person has to be balanced against that of another, for example the right to respect for private life under Art. 8 ECHR against the freedom of

\(^{25}\) For instance regarding Art. 10 ECHR judgment in the case of Fressoz and Roire v. France, 22.1.1999, §§ 45,56, ECHR 2002-I

\(^{26}\) Judgment Beyerler v. Italy, 5.1.2000, 33202/96 §§ 107, 114, ECHR 2000-I

\(^{27}\) Case of von Hannover v. Germany, 24.6.2004, 59320/00 § 57, ECHR 2004-VI
expression under Art. 10 ECHR. In such cases the Court makes an overall examination of all circumstances of the case and of the various interests at issue and it is clear that in doing so it can filter out unimportant cases where there is no significant disadvantage for the applicant.

c) Application of procedural provisions to do away with minima cases

It is certainly true that there are some procedural possibilities to apply the maxim de minimis non curat praetor and the Interlaken-Conference of the Member States has invited the Court to use them. The criterion “manifestly ill-founded” enables the Court to react in a flexible way, but only with regard to applications without prospect of success. The criterion “abuse” may be used also for well-founded petitions and indeed it was — but in minima cases only late and rarely. The interpretation of the notion of “victim” in Art. 34 ECHR can take into account whether there is a disadvantage for the applicant (see 4 (a) below). The possibility under Art. 37 § 1 (b) and (c) ECHR to strike applications out of its list of cases when the matter has been resolved or when it is no longer justified to continue the examination could also be useful in this context.

d) Interpretation of material provisions

The Court requires for the applicability of many articles of the Convention a certain degree of severity so that cases with little or no significance are not covered by them. Here some examples:

Art. 3 ECHR: Following the case-law of the Court the ill-treatment must attain a minimum level of severity if it is to fall within the scope of this article. The assessment of that is relative and depends on all circumstances of the case. When for example prison conditions are at stake certain shortcomings must not necessarily amount to inhuman or degrading treatment.

Art. 6 § 1 ECHR: The Court has developed following criteria: The reasonability of the length of proceedings must be assessed in the light of the particular circumstances of the case in particular the complexity of the case, its importance for the applicant and the conduct of the applicant and the authorities before which the case was brought. Whether a proceeding was fair is assessed taking into account all circumstances of the case. These criteria give the Court the necessary flexibility.

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28 Judgment von Hannover, footnote 27, § 58
29 Action Plan adopted on 19.2.2010
30 Case of Ivan Kuzmin v. Russia, 25.11.2010, 30271/03 § 71
31 Judgment Farhad Aliyev v. Azerbaijan, 9.11.2010, 37138/06 §§ 114, 119
Art. 6 § 3 ECHR: When an application concerns an alleged violation of the rights of the defence in Art. 6 § 3 d ECHR the Court examines whether these rights have been restricted to an extend incompatible with the guarantees in Art. 6 ECHR.\(^{33}\)

Art. 8 ECHR: An interference with the right to respect of home and private life must reach a minimum level of severity.\(^{34}\) In cases of environmental pollution the Court has to decide whether the State’s positive obligations to protect persons come into play which may be the case when the pollution affects adversely and to a sufficient extent the enjoyment of his rights guaranteed in Art. 8 ECHR, it must be a “severe environmental pollution”\(^{35}\).

Art. 14 ECHR: It has to be assessed whether 1. the applicant is in an analogous or relevantly similar position as other persons, 2. they are treated differently, 3. there are objective and reasonable reasons which justify the difference in treatment, that is whether it pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to realize. And the States enjoy a margin of appreciation.\(^{36}\)

Art. 1 Prot. No. 1: From the case-law of the Court follows that the concept of possessions has an autonomous meaning and is not limited to the ownership of physical goods but includes certain rights constituting assets protected by this provision. The Court examines whether the circumstances of the case conferred on the applicant title to an substantive interest protected by Art. 1.\(^{37}\)

4. Prot. No. 14

a) History
The extreme and still growing workload of the Court triggered considerations how to effectively change the situation. The excessive workload is in particular caused by the high number of inadmissible applications (more than 90\%) and by repetitive cases, that is cases which derive from the same cause, often a structural cause, as earlier applications which have lead to a judgment finding a violation of the Convention (about 60\% of the judgments).\(^{38}\)

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\(^{33}\) For instance decision in the case of Dzelili v. Germany, 29.9.2009, 15065/05

\(^{34}\) Mileva a.o. v. Bulgaria, 25.11.2010, 43449/02 § 90

\(^{35}\) Inter alia case of Ivan Atanasov v. Bulgaria, 2.12.2010, 12853/03 §§ 66, 67

\(^{36}\) Pretty v. United Kingdom, 29.4.2002, 2346/02 § 87, ECHR 2002-III

\(^{37}\) Beyeler v. Italien, 5.1.2000, 33202/200 § 100, ECHR 2000-I

\(^{38}\) Prot. No. 14, Explanatory report § 7
There were proposals to relieve the Court of such applications,\(^ {39} \) in particular of applications with minor merit. The Working Party on Working Methods of the Court\(^ {40} \) recalled “that the admissibility criteria of Art. 35 ECHR did not include rejection of an application on the ground of its being of minor merit”. It noted that the abuse criterion in Art. 35 § 3 ECHR had in so far been applied in a restrictive manner and felt that the notion of “victim” (Art. 34 ECHR) might be interpreted in a more restrictive way. The Court did not pick up that proposal.

Again and again the idea came up to strengthen the “constitutional mission” of the Court and that the only effective remedy for the situation would be to give the Court discretionary power whether or not to accept a case for examination and decision, a system like that in the United States for the Supreme Court (certiari procedure). That would certainly give the Court the means not to decide on minimis. But the idea never found much sympathy up to now. The right to individual petition is rightly regarded as a key component of the control mechanism of the Convention and should not be undermined.\(^ {41} \) So up to now all reform ideas took as basis the existence of this right to petition and to a judicial examination and decision by the Court. Prot. No. 14 makes no radical changes to the control system but gives the Court procedural means to process applications quicker.

b) Procedural provisions

The main new procedural provisions are Art. 27 and 28 §1 (b) ECHR. They do not aim specifically at minima cases (as the new Art. 35 § 3 (b) ECHR does) but they improve the Court's filtering capacity in respect of the many pending unmeritious applications and give the Court better means to process repetitive cases.\(^ {42} \) It is clear that they give the Court tools also to do away speedily with minima cases.

The new Art. 27 ECHR creates the competence of a single judge to declare applications inadmissible in clear-cut, evident cases “where the inadmissibility of the application is manifest from the outset”.\(^ {43} \) § 28 § 1 (b) ECHR concerns committees of three judges which up to now could only give negative decisions, that is to say declare applications inadmissible. The new provision gives them the power to render positive decisions and judgments, that is to say to declare applications admissible und to decide on the merits in a judgment and that in a simplified and accelerated procedure.\(^ {44} \) They can do so when the question to consider in an application is covered by well established case-law which will be in particular so in repetitive cases. It is evident that this procedure can also be useful in minima cases, when they are not inadmissible under the new Art. 35 § 3 (b) ECHR.

\(^{39}\) Report of the Group of Wise Persons to the Committee of Ministers, 10.11.2006 (Sages (2006) 06 EN, § 35

\(^{40}\) Report January 2002 § 66

\(^{41}\) Prot. 14, Explanatory report § 34; Report of Wise Persons, footnote 39, § 42

\(^{42}\) Explanatory report § 36

\(^{43}\) Explanantory report § 67

\(^{44}\) Explanantory report §§ 68, 69
c) Indmissibility of minima cases (Art. 35 § 3 (b) ECHR)

The new Art. 35 § 3 (b) is the only provision of the Convention which expressly regulates the principle of de minimis non curat praetor and is insofar a corner stone of the reform. Here indeed the Convention gives the possibility to declare applications inadmissible which have prospect of success\(^4\) or are even manifestly well founded. That is a clear exception of he principle that the control mechanism aims at legally protecting individuals against violations of their rights and freedoms. The intention is to give the Court some flexibility in addition to that already provided by the existing admissibility criteria.\(^5\) The Interlaken-Conference invited the Court to “give full effect to the new admissibility criterion”\(^6\) and the Court seems to be determined to do that.\(^7\) It is clear that the terms used in the new provision leave room for interpretation. The Explanatory report points out that the new provision requires the development of criteria in the case-law of the Court\(^8\) and the Court has started to do so.\(^9\)

The new provision can only be applied when three conditions are met: aa) the applicant has not suffered a significant disadvantage, bb) the respect for human rights do not require the examination of the case and cc) the case has been duly considered by a domestic court.

aa) No serious disadvantage

The case-law gives some examples for applications in which that was the case. In the case of Korolev v Russia\(^10\) the applicant complained violation of Art. 6 ECHR and Art. 1 Prot. No. 1 because of the Russian authorities’ failure to pay him 22,50 Russian Roubles, an amount which Russian courts had awarded him. The Court noted

- The terms “significant disadvantage” are not susceptible to exhaustive definition.
- The general principle of de minimis non curat praetor means that a violation of rights must attain a minimum level of severity.
- When assessing the severity all circumstances of the case must be taken into account, including both the applicant’s subjective perception and what is objectively at stake.
- Even modest pecuniary damages may be significant. But there is no doubt that an amount of 22,50 Russian Roubles is of minimal significance.

The result is that there will normally be no serious disadvantage in cases with minimal pecuniary damages. The economic situation of the applicant must be taken into account,

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\(^4\) Explanatory report § 79  
\(^5\) Explanatory report § 78  
\(^6\) Action Plan of 19.2.2010  
\(^7\) s. ECHR, decision of 1.7.2010, 25551/05 – Korolev v. Russia  
\(^8\) § 80  
\(^9\) s. the decision footnote 48  
\(^10\) Footnote 48
but even then amounts of a few Euros will not be significant (less than 1 Euro in the Korolev case, 7.99 Euro in the above mentioned case Stephan Bock v. Germany,\textsuperscript{52} 90 Euro in the case of Mihal Ionescu v Romania\textsuperscript{53}).

On the other hand the Court has noted\textsuperscript{54} that the pecuniary interest cannot be the only element to assess whether there was a significant disadvantage. Applications with minor pecuniary damages may attain the required level of severity when they concern important questions of principle. In such cases respect for human rights will often require further examination (see bb) below). That will often be the case with petitions concerning Art. 2 and 3, perhaps also Art. 5.\textsuperscript{55} But that has to be considered in each particular matter. The case K.-H.v. Germany mentioned above\textsuperscript{56} seems to be a violation which did not attain a minimum level of severity.

**bb) Respect for human rights require examination**

These terms are taken from Art. 37 § 1, Art. 38 § 1 (b) ECHR, now Art. 39. The case-law concerning these Articles and the Korolev decision of the Court concerning the new Art. 35 § 3 (b) ECHR\textsuperscript{57} clarify under which conditions a further examination is necessary:

- When the application raises questions of general character affecting the observance of the Convention and the interpretation of its Articles.
- When there is a need to clarify State obligations under the Convention.
- When a State should be induced to resolve a structural problem.

Similar requirements can be found in Art. 30 ECHR and Art. 43 ECHR (the case “raises a serious question affecting the interpretation of the Convention”, “a serious issue of general importance”).

**cc) Due consideration of the case by a domestic court**

This requirement seems to be the most difficult. The Explanatory report\textsuperscript{58} is not very helpful, it refers to the principle of subsidiarity and states that each case must have a judicial examination either by domestic courts or by the Strasbourg Court.

As a rule it will be necessary that a domestic court has examined the circumstances on which the application is grounded and has given a decision on them either on appeal of
the applicant or without. It is not necessary that the domestic court has examined whether
Convention rights were violated, it is sufficient when it has examined whether correspon-
dend national guarantees were respected.

In the Korolev decision\textsuperscript{59} the Court has found that the main question is of whether there
was a denial of justice at home. So its result was that the new provision can be applied
when the domestic court refused to examine the case for non-compliance with domestic
procedural requirements. The result was the same when the applicant claimed a violation
of Convention rights by an instance court and there was no possibility to appeal under do-
mestic law because the Convention does not grant a right to challenge domestic judgments
in further domestic proceedings once a final decision has bee rendered.

The result can nevertheless not be the same for all cases where national law excludes an
examination. In cases where there is contrary to Art. 6 and 13 ECHR no right to a court and
no effective remedy or when the applicant was violated in his right under Art. 6 ECHR of
access to a court the application of Art. 35 § 3 ECHR is excluded because the case was not
duly examined by a national court.

Due examination: The Court will not understand its responsibility to examine whether
the domestic courts's decision is correct or not, it has very often stressed that it is not a
Court of 4\textsuperscript{th} instance and that it is not its function to deal with errors of fact or law allegedly
committed ba a national court\textsuperscript{60} the only exception being that of an arbitrary decision. The
decide question is whether there was an examination of the subject of the petition. When
a domestic court has examined the case in a fair proceeding will that normally be a due
examination for the purposes of Art. 35 § 3 (b) ECHR.

d) Minima in the case-law of the German Federal Constitutional Court

The German constitutional court is in a similar situation as the Court in Strasbourg as it
rules inter alia “on constitutional complaints which may be filed by any person alleging that
one of his basic rights ... has been infringed by public authority.” (Art. 93 § 1 (4a) Basic Law).
As under Art. 35 ECHR a constitutional complaint to the constitutional court may not be
lodged until all available remedies are exhausted (Art. 90 § 2 Federal Constitutional Court
Act). The court decides by panels of eight judges or chambers of three judges. A constitu-
tional complaint has to be accepted which requires that it has fundamental constitutional
significance or that it is indicated to accept it in order to enforce the fundamental rights;
this can also be the case when the complainant suffers “especially grave disadvantage as a
result of the refusal to decide on the complaint.” (Art. 93a of the Act). This article shows the
same underlying philosophy as mentioned above for the Court in Strasbourg: both courts
have a mission to legally protect individuals and a general constitutional mission. And the

\textsuperscript{59} Footnote 48 under C

\textsuperscript{60} Case of Garcia Ruiz v. Spain, 21.1.1999, 30544/96 § 28, ECHR 1999-I
wording is similar in Art. 93a of the German Act (grave disadvantage) and in Art. 35 § 3 (b) ECHR (significant disadvantage). A comparison shows nevertheless that the German Constitutional Court has wider possibilities not to accept a constitutional complaint.

It is normally the chamber of three judges which decides on the acceptance of the complaint. It can refuse acceptance unanimously, without oral hearing, without giving reasons and the decision is final (Art. 93b and d of the Act).

When a complaint is upheld the German constitutional court states which provision of the Basic Law was infringed as does the Strasbourg Court with the Convention guarantees. But contrary to the limited possibilities of that Court the German constitutional court may quash a decision or a judgment of a German Court and refer the matter back to it (Art. 93c). Such a decision is rendered by a panel, in clear cases also by a chamber “if the constitutional issue determining the judgment of the complaint has already been decided upon by the Federal Constitutional Court” and if the complaint “is clearly justified” (Art. 93c). Here again we can see the similarity with Art. 28 § 2 (b) ECHR on the competence of Committees („if the underlying question in the case ... is already the subject of well-established case-law of the Court“). When a constitutional complaint against a law has success, the constitutional court declares the law null and void (Art. 95 § 3 of the Act), a decision which can only be rendered by a panel (Art. 93c § 1). The Strasbourg Court has not such possibilities. But there are cases where it gives in pilot judgments time limits to amend or to enact legislation.

There is another difference between the control system of the two courts which should be mentioned in this context. As already mentioned above (under A III) Art. 31 of the Federal Constitutional Court Act stipulates that decisions of the constitutional court are binding on Federal and Land constitutional authorities and all courts and other authorities. The decision has the force of law and is published in the Federal Law Gazette when the court on a constitutional complaint declares a law to be compatible or incompatible with the Basic Law or to be null and void. There is no provision of that kind in the Convention; Art. 46 § 1 limits the binding force of judgments to cases to which the States were parties. So the effectiveness of the control of the Strasbourg Court as an international Court is weaker. It has nevertheless to be taken into account that judgments of the Strasbourg have effect also for the Member States that were not partie to the case (see A III above). So the difference is in theory greater than in praxis.

The maxime of de minimis non curat praetor is nowhere mentioned in German legislation. But it is evident that minima cases will not be accepted by the German Constitutional Court under Art. 93a of the Act. A three judges chamber will refuse to accept it and that decision must not be reasoned and is final.
CONCLUSION

The new admissibility criterion in Art. 35 § 3 (b) ECHR is an interesting approach and may open the door for a more general application of the principle de minimis non curat praetor in the Court’s case-law. But there remain some doubts whether it can contribute to considerably improve the filtering activity of the Court and to allow it to devote more time to applications which merit examination. It will be more realistic to expect that the new provision will be applied only in a limited number of petitions. The safeguards in its wording are strong and that is in particular true for the requirement of due consideration by a domestic court. So the new provision might be a first step hopefully followed by further in the case-law or in an amending Protocol. The discussion on the reform goes on and will certainly try in particular to find possibilities to improve the filtering mechanism.

61 Explanatory report § 77
INTRODUCTION

Protection of private property is one of key cornerstone issues in development of liberal economy and building stable democratic political and legal system, which would be serving interests of modern civil society and interests of individual members of that society. In such a system state would be acting as a guarantor of effective enjoyment of property
rights and would not be interfering in free circulation of property between private individuals. In other words the modern state’s function is to safeguard property. Such a modern state should not impose unnecessary restrictions on the right to peacefully enjoy property, unless they are absolutely necessary, proportionate and based on the principles of rule of law, which are the crucial foundations for ensuring effective exercise of the right to peaceful enjoyment of possessions.

The notion of private property was never recognised in the Soviet legal system, which for political reasons focused on protection of State property and socialist property. Private land ownership and ownership of real estate property, contrary to a possibility to have transactions in land and immovable property in liberal economy societies, was not recognised and was not allowed. It was limited to the right to use, to own and to dispose of property. But these rights, especially the rights to own and dispose of property were limited in law and in practice, circumventing the very essence of the right to peaceful enjoyment of possessions.

Thus, for instance, the Foundations of the USSR civil legislation declared that an individual owner had a right to own, use and dispose of property, however, they further established a discriminatory subdivision of property into its several types – the socialist property, which comprised of State property (so-called “peoples’ property”) and property of collective farms, professional trade unions and other collective organisations that were managing state-owned property. The Foundations of civil legislation that were used as sources of legislative drafting for Civil Codes of the Soviet Socialist Republics, also established a right to have individual or personal property, which was limited in scope of ownership. For instance, every citizen had a right to have personal property based on his/her “labour-related incomes”, which could only be used for aims that were not contrary to “the interest of society”. A person had a right to own only one house (or a part of it) of a particular size determined by law. Villagers, who were all members of the collective farms, could only own a limited number of domestic animals. Personal property could be “requisitioned” or “confiscated”, in the interests of the State or society, with payment of compensation and without it, respectively. Regime of protection of personal property was also much weaker than the State property that was better protected by criminal and administrative legislation and relevant law enforcement machinery. This was also underlined in the provisions of 1977 Brezhnev’s era Constitution of the USSR, whereas Article 61 of that Constitution established a duty on the citizen to protect socialist property as a highest valued property in existence. Such a legal approach fully reflected the Marxist approach to socialist property as a mean of production in socialist society, which in turn reflected the approach to the law of property.

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2 This idea is not new, for instance, one of the greatest legal philosophers of the past John Locke has already expressed it in the Second Treatise on Civil Government – “The Government has no other end but preservation of property”.

3 Foundations of the Civil Legislation of the USSR (Articles 19 – 32), adopted by the Verkhovny Sovet of the USSR on 8 December 1961, with changes and amendments as in force in 1981.

4 This attitude has changed and now under the provisions of the new Georgian Civil Code, the state’s property rights are protected in an equal manner as the rights of private persons.
as a group of legal norms regulating the conditions of attribution of means of economic production and results of labour by the state (representing the interests of working class) who owned, used and disposed of the aforementioned items. This political economy approach made an emphasis on prevalence of collective and state property over private property of an individual, which meant that the property rights of every private person were generally diminished notwithstanding declaration of joint people’s ownership of land, natural and other resources that were declared state-owned, i.e. owned by all people.

Both the provisions of the USSR Constitution and the Foundations of Civil Legislature did not really reflect the provisions of international law, related to protection of property rights, which were adopted much earlier, as they greatly emphasised on dominance of socialist property over personal property. In particular, in comparison with the mentioned legal acts, Article 17 of the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the UN on 10 December 1948, with participation of the three original Soviet members of the UN, established that “everyone has the right to own property alone as well as in association with others” and that “no one shall be arbitrarily deprived of his property”. The approach taken in Soviet jurisprudence and reflected in Constitution and Foundations was also quite different from the spirit, formulations and notions used in the text of Article 1 of Protocol No. 1 to the Convention, adopted in 1952, which established that “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” It also established that the establishment of the right to property “shall not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The changes brought to the Constitutions of the former Soviet States, after dissolution of the Soviet Union and relevant declarations of independence of these states, reflected on the approaches taken to protection of property, declaring that a right to peaceful enjoyment of possessions is a fundamental right, protected by law and its enforcement machinery, contrary to the Soviet times when this right was neglected. These constitutional novelties also prohibited any arbitrary interference into the right to peaceful enjoyment of possessions or any interference not based on law. For instance, Article 21 of the Constitu-

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5 To rephrase John F. Kennedy: “The rights of every man are diminished when the rights of one man are threatened.” Address to the nation, 11 June 1963.

6 The right to property was not recognised in the International Covenant on Civil and Political Rights. The same right was also presented quite in a different manner in Article 14 of the African Charter on Human and Peoples’ Rights as a right guaranteed, but confined to some limitations and contained “human and peoples’ duties arising from the Charter. A similar right to property with analogous limitations is also established by Article 21 of the American Convention on Human Rights (treaty adopted on 22 November 1969). Also, Convention of the Community of Independent States on Human Rights and Fundamental Freedoms (former Soviet Union states), Article 26, largely repeated the first sentence of Article 1 of Protocol No. 1, even though its wording is quite different.

tion of Georgia\textsuperscript{8}, with changes and amendments effectuated in 2006, developed the principles established by Article 1 of Protocol No. 1, and specified that:

“1. The property and the right to inherit shall be recognised and guaranteed. The abrogation of the universal right to property, of the right to acquire, alienate and inherit property shall be impermissible.
2. The restriction of the rights referred to in the first paragraph shall be permissible for the purpose of the pressing social need in the cases determined by law and in accordance with a procedure established by law.
3. Deprivation of property for the purpose of the pressing social need shall be permissible in the circumstances as expressly determined by law, under a court decision or in the case of the urgent necessity determined by the Organic Law and only with appropriate compensation.”

Thus, the new Constitution of Georgia incorporated the approaches taken in the case-law of the European Court of Human Rights to protection of property and established a higher degree of protection to property rights than it was initially provided by Article 1 of Protocol No. 1 to the Convention.\textsuperscript{9} In particular, Article 21 of the Constitution established that interference with property rights to acquire, alienate and inherit shall be effectuated only in the event of existing “pressing social need” and “in accordance with the procedure established by law”. It also prohibited any deprivation of property without a judicial decision and without compensation, which is not exactly always similar in the practice of the European Court of Human Rights.\textsuperscript{10} The domestic legislation seems to firmly prohibit any deprivation of property without compliance with the substantive and procedural requirements of law and relevant compensation to be paid.\textsuperscript{11,12} A similar approach was adopted to certain sensitive areas of property protection in Georgia, such as for instance restitution

\textsuperscript{8} Similarly, Article 41 of the Constitution of Ukraine, 28 June 1996, established that: “(1) Everyone has the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity. (2) The right of private property is acquired by the procedure determined by law. … (4) No one shall be unlawfully deprived of the right of property. The right of private property is inviolable. (5) The expropriation of objects of the right of private property may be applied only as an exception for reasons of social necessity, on the grounds of and by the procedure established by law, and on the condition of advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency. (6) Confiscation of property may be applied only pursuant to a court decision, in the cases, in the extent and by the procedure established by law.”

\textsuperscript{9} Adopted on 24 August 1995, with changes and amendments of 27 December 2006, interestingly, the 1921 Constitution of Georgia, a legal document establishing a number of fundamental rights for citizens, established equality in exercises of commercial and economic freedoms by the individuals.


\textsuperscript{11} At the same time, the European Bank for Reconstruction and Development in 2007 found that some Georgian legislation did not fully meet international standards or was not fully effective with regard to corporate governance, insolvency, and secured transactions. (Georgia, Nations in Transit, by Elizabeth Fuller). http://www.freedomhouse.org/uploads/nit/2009/Georgia-final.pdf.

\textsuperscript{12} Several cases concerning Georgia concerned expropriation of property from the foreign investors without proper compensation paid to them. These cases were examined by the International Centre for Settlement of Investment Disputes (The Republic of Georgia v. Ioannis Kardassopoulos AS, ICSID 12 November 2010; Ioannis Kardassopoulos & others v. The Republic of Georgia, ICSID 3 March 2010; Itera International Energy LLC & Itera Group NV v. Georgia, ICSID 4 December 2009).
of housing and property to the victims of Georgian-Ossetian Conflict, in a way it has been analysed by the opinion of the experts of the Venice Commission\textsuperscript{13}, one of whom was the member of the European Commission of Human Rights, which have stated that:

“...with regard to property, and in any particular case, the requisite fair balance had to be struck. ... The striking of a fair balance depends on many factors, and it is of vital importance that the applicable procedures are such to enable that all relevant factors are taken into due consideration... Although Article 1 of Protocol No. 1 does not expressly require the payment of compensation for a taking of, or other interference with property, in the case of a taking (or deprivation) of property, compensation is generally implicitly required. ... taking of property without an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of “public interest”, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. ... Finally, an interference with the right to property must also satisfy the requirement of legal certainty, or legality... a deprivation of property a taking must be “subject to the conditions provided for by law”... the State (or public authority) must comply with adequately accessible and sufficiently precise domestic legal provisions, which satisfy the essential requirements of the concept of “law”. This means not only that the interference in question must be based on some provision of domestic law, but that there must be a fair and proper procedure, and that the relevant measure must issue from and be executed by an appropriate authority, and should not be arbitrary.”\textsuperscript{14}

The aforementioned approach is clear and logical, is following the general approach taken in public and private international law to such matters as property taking, it is an easy to follow approach to be taken by the state and judicial authorities in practice in cases relating to interferences with property rights. However, plainly speaking, it does not take into account particular circumstances of interference with property rights. Let’s assess how it is being applied in the practice by the European Court of Human Rights in cases concerning Georgia\textsuperscript{15} and by the Georgian Constitutional Court\textsuperscript{16} and which criteria are being applied to decide on whether property rights were unlawfully interfered with.

\textsuperscript{13} Nevertheless, in certain areas, like town planning taking of property by means of expropriation without relevant compensation was being discussed as a problematic issue. \textit{Human Rights in Georgia: Report of the Public Defender in Georgia: Second Half of 2006}, Tbilisi 2007, pp. 97 – 117.


\textsuperscript{15} It is worth noting that Article 1 of Protocol No. 1 entered into force with respect to Georgia on 7 June 2002 (see \textit{Nikolaishvili v. Georgia} (dec.), no. 30272/04, 7 June 2009), thus the Court’s competence \textit{ratione temporis} extends to the allegations of property violations only after that date.

\textsuperscript{16} From a practical point of view judgments of the Constitutional Court are clear indicators of the domestic constitutional practice, even though under the case-law of the European Court recourse to the Constitutional Court of Georgia cannot be required to exhaust domestic remedies (see \textit{Apostol v. Georgia}, no. 40765/02, § 46, ECHR 2006-XIV).
The right to property (right to peaceful enjoyment of possessions) established by Article 1 of Protocol No. 1 covers a wide range of economic interests, which include not only classical property objects, but it also covers such objects as movable and immovable property, tangible and intangible interests, including shares, patents, copyright, intellectual property rights, permits and licenses to run business, arbitration and judicial awards, landlord entitlements to rent, economic interests connected with the running of a business (clientele, goodwill and business reputation), the right to exercise profession, a legitimate expectation to obtain something into ownership that is sufficiently established, property and social privileges that are sufficiently established in law, etc.\(^\text{17}\) In short Convention and the Court’s case-law protect a “bundle” of economic rights\(^\text{18}\) and not only the classical “triad” of rights that were traditionally protected in the Soviet civil law (right of use, right to own and right to dispose of). Furthermore, the Court, in examining complaints under Article 1 of Protocol No. 1, created a system of assessing the complaints from the point of view of compliance with three distinct rules, which are said to include the principle that everyone has the right to peaceful enjoyment of possessions, that deprivation of possessions shall be subjected to certain conditions (interference with property must be done in the public interest and be subject to the conditions provided for by law and/or according to the general principles of international law) and that the states have the power to enforce such laws as they deem necessary for specific purposes (in the general interest and to secure payment of taxes or other contributions or penalties).\(^\text{19}\) It goes without saying that the principles of rule of law and legal certainty enshrined in the Convention provide that laws that were used as a condition for interference are sufficiently accessible and foreseeable.\(^\text{20}\)

It is also to be mentioned that interference with the right to property shall serve legitimate aim and shall be proportionate to that aim, meaning that there should be a reasonable relationship of proportionality between the means used to enforce the prohibition and the aim sought to be realised (so-called “fair balance test”).\(^\text{21}\) In any case any interference with property rights, either control of use of property, its expropriation or depriva-


\(^{18}\) One of the examples of seeing property as a bundle of economic rights and interests is the approach taken in the Bilateral Investment Treaty between Ukraine and Georgia of 9 January 1995 that recognises two types of protected property rights – investments (movable and immovable property, shares and shareholdings, credits, intellectual property rights, goodwill and commercial secrets, licences and permits, concessions for natural resources) and revenues (financial income, gains, interests, shareholding, royalty and various other payments), which have a varying definition.

\(^{19}\) Sporrong and Lönnroth v. Sweden, 23 September 1982, § 82, Series A no. 52.

\(^{20}\) Brumărescu v. Romania [GC], no. 28342/95, § 61, ECHR 1999-VII.

\(^{21}\) AGOSI v. the United Kingdom, 24 October 1986, § 54, Series A no. 108.
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... judgment ... provided the applicant company with an established, enforceable claim which constituted a “possession” within the meaning of Article 1 of Protocol No. 1 ... The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions “subject to the conditions provided for by law” ... It follows that the issue of whether a fair balance has

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23 James and Others v. the United Kingdom, 21 February 1986, § 54, Series A no. 98.

24 Gasus Dosier- und Fördertechnik GmbH v. the Netherlands, 23 February 1995, § 74, Series A no. 306-B.

25 Amat-G Ltd and Mebaghishvili v. Georgia, no. 2507/03, ECHR 2005-VIII.
been struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary…”

The same principles of respect to the property rights were underlined in a judgment adopted in a different case against Georgia brought by the applicants (“Iza” Ltd. and Makrakhidze v. Georgia) and adopted on 27 September 2005\textsuperscript{26}, where the Court found that a fact that the applicant companies were unable to have final judgments in their favour enforced against the State and entities that acted on its behalf constituted an interference with their right to the peaceful enjoyment of their possessions.

In another judgment in application brought against Georgia (Klaus and Iouri Kiladze v. Georgia), on 2 February 2010\textsuperscript{27}, the European Court had to rule whether the applicants’ right to peaceful enjoyment of possessions was breached by the domestic authorities which allegedly arbitrarily denied two brothers, who were the victims of political repression during the Soviet era, compensation for damages based on the Law on victim status for persons subjected to political repression. In particular, the Court had to establish whether the applicants had legitimate expectation to receive such pecuniary and non-pecuniary compensation under the provisions of the relevant domestic law, but were arbitrarily denied it. The Court stated that:

“…It should be noted here that the jurisprudence of the Court in the matter, the notion of “property” can refer to either “existing possessions” or assets, a person is ought to receive, under which an applicant may claim to have at least a “legitimate expectation” of obtaining effective enjoyment of a property right …

... Given the foregoing, the Court finds that at the time of referral to the domestic courts, the applicants had, under Article 9 of the Act of December 11, 1997, a claim sufficiently established to be enforceable and they could legitimately claim recovery of damages against the State. This leads to the conclusion that this part of their action, Article 1 of Protocol No. 1 was applicable…”

Thus, it declared part of the applicant’s complaints inadmissible, being incompatible \textit{ratione materiae}, as there was no legitimate expectation to receive property the applicant’s claimed in restitution and thus no right of property established for the applicants.\textsuperscript{28} Nevertheless, the Court found that the applicant’s had a sufficiently established claim to

\textsuperscript{26} IZA Ltd and Makrakhidze v. Georgia, no. 28537/02, 27 September 2005.

\textsuperscript{27} Klaus and Iouri Kiladze v. Georgia, no. 7975/06, 2 February 2010.

\textsuperscript{28} Furthermore, in a different admissibility decision against Georgia, Andronikashvili v. Georgia ([dec.], no. 9297/08, 22 June 2010), the Court held that as the right to claim the restitution of property expropriated from Georgian nationals or their ancestors by the Soviet State during the 1920s and 1930s, had no basis in the domestic legal system. It followed from that the applicant’s complaint about the unreasonable length of the domestic proceedings were incompatible \textit{ratione materiae} with Article 6 § 1 of the Convention.
receive compensation for moral damages and their inability to receive such damages for lengthy inactivity by the state cannot be seen as being compatible with the applicants’ right to peaceful enjoyment of their possessions. The Court awarded the applicants just satisfaction in form of application of the provisions of Article 9 of the law of 11 December 1997 concerning compensation, which established that right to receive compensation or compensation in the amount of 4,000 Euros, each, in damages.

In a different case concerning a breach of the applicants’ property rights over a house (cottage) they possessed, Saghinadze and 2 Others v. Georgia, 27 May 2010, and in which they had been living for more than ten years on the basis of an administrative decision allocating that cottage to the internally displaced persons from Abkhazia. The Court found that the first applicant had continuously been in the exclusive, uninterrupted and open possession of the cottage and used it for over ten years, and that had been tolerated by the authorities. Also, the applicants’ right to use that house and prohibition to evict him from that house, which was established by legal acts confirming internally displaced persons’ rights to use these kind of premises were ignored by the domestic authorities, including courts. The Court also noted that the domestic procedure established in law for eviction of the applicants from their cottage was not complied with as they were evicted not on the basis of the court order, but solely as a consequence of an oral order by the Minister of the Interior, by force through actions of the special police forces. Furthermore, the domestic courts failed to acknowledge the fact of continuous use of that cottage and the constant practice of the Supreme Court in respect of that type of cases. Thus, the Court ruled that such a deprivation constituted arbitrary practice and ordered Georgia to return the right to use the cottage or to give him another appropriate lodging, or to pay him a reasonable monetary compensation. In this case, the Court ruled that:

“... 103. The Court reiterates that the concept of “possessions” ... has an autonomous meaning which is not limited to ownership of physical goods and is independent of the formal classifications in domestic law: the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision ... Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as “possessions” for the purposes of this provision ... The concept of “possessions” is not limited to “existing possessions” but may also cover assets, including claims, in respect of which the applicant can argue that he or she has at least a reasonable and “legitimate expectation” of obtaining effective enjoyment of a property right ... An “expectation” is “legitimate” if it is based on either a legislative provision or a legal act bearing on the property interest in question ...
... 108. In the light of the above-mentioned factual and legal considerations and having due regard to the circumstances of the present case assessed as a whole, the Court concludes that the first applicant had a right to use the cottage as his accommodation and that this right had a clear pecuniary dimension. It should therefore be regarded as “a possession” for the purposes of Article 1 of Protocol No. 1...

... 160. Consequently, having due regard to its findings in the instant case, and without prejudice to other possible measures remedying the violations of the first applicant’s rights under Article 8 of the Convention and Article 1 of Protocol No. 1, the Court considers that the most appropriate form of redress would be *restitutio in integrum* under the IDPs Act, that is, to have the cottage restored to the first applicant’s possession pending the establishment of conditions which would allow his return, in safety and with dignity, to his place of habitual residence in Abkhazia, Georgia. Alternatively, should the return of the cottage prove impossible, the Court is of the view that the first applicant’s claim could also be satisfied by providing him, as an internally displaced person, with other proper accommodation or paying him reasonable compensation for the loss of the right to use the cottage, the amount of which should be agreed on by the parties within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention. However, should the parties fail to reach agreement within that period, the Court reserves the right to fix the further procedure under Article 41 of the Convention, in order to determine itself the amount of such compensation (Rule 75 §§ 1 and 4 of the Rules of Court).

161. In addition, the Court has no doubt that the first applicant suffered distress and frustration on account of the violations of his various rights under the Convention and Article 1 of Protocol No. 1. The resulting non-pecuniary damage would not be adequately compensated for by the mere finding of these breaches. Making its assessment on an equitable basis, the Court awards the first applicant EUR 15,000 under this head.”

In another case against Georgia *Tchitchenadze v. Georgia*30, the Court found a breach of Article 1 of Protocol No. 1 for the following reasons:

“59. ... the quashing of the final decision of 18 November 2004, which infringed the principle of legal certainty and interfered with the applicant’s right to the peaceful enjoyment of the Mazniashvili estate, was a misuse of the reopening procedure under Article 422 § 1 of the CCP, not being justified by circumstances of a substantial and compelling character, and that it imposed an excessive and disproportionate burden on the applicant ...”

The constant case-law of the Court also requires that the states allow measures of judicial protection for persons claiming that their property rights were breached.31 Thus, in a


31 The situation might differ concerning protection of property rights of minority shareholders, whereas they cannot claim breach of their property rights if the actual victim was the legal entity, where they have a shareholding interest (see *Sultanishvili v. Georgia* (dec.), no. 40091/04, 4 May 2010.
judgment related to protection of property rights, adopted by the European Court in the case of *FC Mretebi v. Georgia* on 31 July 2007\(^\text{32}\), the Court ruled that the applicant was denied in its right of access to a court to protect its property rights ensuing from obligations of a private party to pay the applicant compensation for transfer of a footballer. While not recognising a breach of a right to property, the Court found a breach of a right to judicial protection of property rights. In particular, it found that the domestic authorities unfairly denied the applicant right of vindicating its claim through the courts, which amounted to a breach of Article 6 of the Convention.

### APPROACHES TO DEFINING PROPERTY IN THE CASE-LAW OF THE GEORGIAN CONSTITUTIONAL COURT

Similarly to approaches taken in the practice of the European Court of Human Rights, the Georgian Constitutional Court have ruled in a number of cases touching upon various economic interests arising from property. For instance, in a case of *LTD “Russenergoservice”, LTD “Patara Kakhi” and JSC “Gorgota”, individual company “Farmer” of Givi Abalaki and LTD “Energia” v. the Parliament of Georgia and the Ministry of Energy of Georgia*\(^\text{33}\), the Constitutional Court underlined that the right to property and the right to inherit property were inalienable rights recognised by the Constitution. In particular, it mentioned that the property rights may only be overridden by pressing social needs determined by law. Limitation of constitutional rights could be justified only when the legitimate aim had been attained so that the valuables and the owner of that property were not separated. It ruled in this case that imposing the limitations implied fair balancing of interests, rather than replacing one interest with another.

In a different case, *Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. The Parliament of Georgia*\(^\text{34}\), the Constitutional Court ruled that the right to property was not absolute and that the state could impose certain restrictions on the property rights. The Court noted that the Constitution achieved a balance between private and public interests so that in cases of conflict of interests the public interest will prevail, and owners must tolerate certain interference with their property. The Constitution provided


\(^{34}\) *Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. The Parliament of Georgia*, decision of 2 July 2007, case no. 1/2/384, published in *Sakartvelos Respublika* and a summary in CODICES database.
this balance in Article 21.2 and 21.3, under which interference with property by the state in
the form of restricting or expropriating property is permissible only when there appears to
be pressing social need and that it was unacceptable to introduce stricter limitations than
those that are required by “pressing social need” and through the proportionality of in-
terference principle. The Constitutional Court further mentioned that owners do have the
opportunity of redressing their rights through civil law procedures, but they must be able
to examine whether a decision to confiscate their property is well-founded and complies
with legislative and constitutional requirements, including a requirement of pressing social
need and relevant compensation for interferences with property.

In a case of Citizens of Georgia – Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Oth-
ers and Public Defender of Georgia v. The Parliament of Georgia\textsuperscript{35}, the Constitutional Court
was requested to decide whether the rule of the Law on Entrepreneurs (Article 533) au-
thorising a majority stockholder owning 95% of stocks in a joint stock company to acquire
5% of the voting stock for an equitable price (compulsory sale of stocks of minority stock-
holder), represented restriction or deprivation of property for the purposes of Article 21
of the Constitution and whether it met the constitutional criteria for either restriction or
deprivation of property. The Court noted that expropriation of property could be charac-
terised by direct or indirect participation of the state in a particular process of deprivation
of property. However, the interference with minority shareholders’ rights did not amount
to property expropriation, within the meaning of Article 533 of the Law on Entrepreneurs.
It ruled, however, that it amounted to “restriction” on the use of property mentioned in
Article 21.2 of the Constitution, merely describing negative interference by the state. The
Constitutional Court in this case came to the conclusion that this provision was unconsti-
tutional as no fair balance was struck between the interests of private persons and the
general public. In particular, it found that the rule under dispute was the determination of
an equitable price for the stocks of minority stockholders. Where an equitable price was
determined by the charter of the joint stock Company, and not by independent experts or
brokerage companies, minority stockholders were deprived of the chance to challenge the
price before the Court.

In a case of “Avtandil Lomtadze and Merab Kheladze v. President of Georgia”,\textsuperscript{36} the Con-
stitutional Court examined a case brought by a claimant that in 1997 the privatisation of
state-owned enterprises had taken place, as a result of which the claimant had been cre-
ated. In that way, “Sakmilsadenmsheni” Ltd. had acquired the ownership rights to a state
enterprise and became, in its opinion, the legal successor and not the assignee of the pur-
chased property. The claimant considered that its ownership rights, safeguarded by Article

\textsuperscript{35} Citizens of Georgia – Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Others and Public Defender of Georgia v. The Parliament of
Georgia, decision of 18 May 2007, cases nos. 2/1/370, 382, 390, 402, 405, published in Sakartvelos Respublika and a summary in CODICES
database.

\textsuperscript{36} “Avtandil Lomtadze and Merab Kheladze v. President of Georgia”, decision of 5 May 2003, case no. 2/5/172-198, published in Adamiani
da Konstitutsia and a summary published in CODICES.
Protection of property under the European Convention on Human Rights and the Georgian Constitution: analysis of the judicial practice of balancing proportionality of interference with the individual property rights

21 of the Constitution, were directly violated, as it, as the newly created enterprise, had to compensate damage caused to an employee by the previously existing state enterprise. The Court, however, ruled that the claimant’s assertion that after privatisation of the enterprise, compensation for damage caused to the health of an employee of a state enterprise should be carried out by the State. The Constitutional Court held that privatisation was the acquisition of the rights to state property by natural and legal persons or their associations; that, implied the acquisition of not only property rights (assets) but also obligations (liabilities). It accordingly did not find a breach of the right to property in the fact that the applicant succeeded to an obligation to pay compensation caused to health of a former employee of a privatised enterprise.

In a different case ruled upon by a Constitutional Court, Citizens Vano Sisauri, Tariman Magradze and Zurab Mchedlishvili v. the President of Georgia, it underline that according to Article 21 of the Constitution property may be deprived on the ground of social necessity in circumstances directly determined by law, by a court decision or in case of urgent necessity determined by organic law and if appropriate compensation is made. Thus alienation of property of a public association by a governmental decree without any relevant grounds infringes the universal right to property entrenched in the Constitution since the members of the association are deprived of the possibility to benefit from the facilities established by them over the years. The disputed act, on which the interference with property was based, was not registered in the State Registry of Normative Acts at the Ministry of Justice, which would allow the Constitutional Court to examine the constitutionality of normative acts on an exceptional basis, but the Constitutional Court held that considering the contents of the act and its scope of regulation the constitutionality of the disputed act could be examined. In that case, the Constitutional Court held that the Prime Minister was not empowered to invalidate a legal act of the then supreme body by an individual, personal decree and thus interference with the applicant’s property rights was not based on law.

CONCLUSIONS

Both the case-law of the European Court and the practice of the Constitutional Court of Georgia protect a variety of property rights, which include a variety of economic interests arising from the right to peaceful enjoyment of possessions. The tests established by the Convention, Court’s case-law and the Georgian Constitution and the practice of the Con-

37 Citizens Vano Sisauri, Tariman Magradze and Zurab Mchedlishvili v. the President of Georgia, decision of 23 February 1999, case no. 2/70-10, published in Adamiani da Konstitutsia and a summary published in CODICES.
stitutional Court of Georgia differ. In particular, the Convention uses the notion of “fair balance” between the means employed and the aim to be pursued. The practice of the Constitutional Court of Georgia looks into criteria of the pressing social need in interfering with property rights. Moreover, the practice of the European Court and Georgian Constitutional Court establishes clear criteria of the need to comply with the requirements of lawfulness in interfering with property and the need to avoid arbitrary interference. Both the procedural and substantive laws have to be complied with. Moreover, in cases relating to taking of property, the courts would tend to look at whether such a taking of property was followed by relevant compensation paid to those deprived of property. Both courts look into whether compensation had been paid to the persons whose property was taken. Thus, one can conclude that similar approaches are being taken by both the European Court and the Constitutional Court of Georgia in cases related to protection of property rights, notwithstanding the fact that Article 1 of Protocol No. 1 to the Convention and Article 21 of the Georgian Constitution provide for differing criteria for establishing whether a property right was breached by the State authorities and whether it was arbitrarily interfered with.

Generally, both the European Court of Human Rights and the Constitutional Court of Georgia are approaching the matters relating to protection of property rights with caution, analysing whether interference was based on law in first place and if so establishing whether a fair balance was struck between the interference with property rights and the public interest in the interference involved. Notwithstanding the difference in approaches practice of both courts is similar in its outcomes. The resulting judicial activity of both courts ensures stronger protection of property rights, coexistence of similar practices is important an important element of proof that both courts operate in a single European legal space with unique legal standards. The role of both courts in protection of property rights at the national level and at the European level cannot be underestimated and serves a good example of uniformity in protection of right to the peaceful enjoyment of possessions at European and domestic levels.
1. INTRODUCTION

On October 15, 2010, the Parliament of Georgia adopted amendments to the Constitution of Georgia, which marked completion of the Constitutional Reform initiated in 2009. With these amendments the Basic Law of the country, which since its initial adoption has often undergone broad and significant changes, has now developed almost into a new Constitution. The ground for stating this is that the amendments change the Constitution towards...
the parliamentary model of government, or to say more precisely, into the mixed model which is abundantly filled with the elements characteristic to a parliamentary republic.¹

The new provisions of the Constitution, establishing different rules for regulating relations among the government branches, will enter into force in October, 2013 from the moment of inauguration of the President elected through regular presidential elections. Therefore, there is plenty of time to analyze and consider the views and opinions submitted by the representatives of academic, political and other fields regarding the above mentioned amendments into the Constitution.

In the present article we will not analyze the existing provisions regarding the powers of the President and Government of Georgia, rather the field of our interest lies with the constitutional amendments regarding the constitutional institutions of the Head of the State, and the Executive. Additionally, while reviewing the constitutional amendments related to the above mentioned institutions, we will emphasize interrelations of these two bodies, rather than relations of each of them with the legislative branch, as the peculiarities of interrelationship between the President and the Government define by large the constitutional model.

It should also be noted, that the article presents the results of the Constitutional Reform in the following manner:

a) By analyzing the government model developed as a result of the Constitutional Reform and discussing relevant paragraphs of the Venice Commission’s Opinion of October 15-16, 2010;²
b) Through taking into account the main goals of the Constitutional Reform, one of them being distancing the President from the Executive powers, as the result of which the Government would become the supreme executive body and would develop into an independent branch with effective constitutional guarantees.

2. INSTITUTE OF THE PRESIDENT OF GEORGIA AND THE CONSTITUTIONAL REFORM AS OF 2010

Most of the problems of the Georgian Constitutionalism arise because of the institution of the Head of the State and constitutional regulation of its powers. The Constitutional Law of Georgia of April 14, 1991, for the first time in the history of Georgia, established the

¹ G. Kakhiani, views on particular issues related to the draft Constitutional Law, http://www.parliament.ge/publicdebates/article_7.pdf
Institution of the President, who is to be elected through general and direct election. The precedent of granting the President a high level of legitimacy within the parliamentary government model, in particular the method of election through general and direct election, is rare even today. In the parliamentary models, the rule of general and direct election of the President has been introduced in Bulgaria (since July, 1991), Slovenia (since December, 1991), and Austria (since 1957). The Georgian Constitution of 1995 effectively equipped the Head of the State of the presidential government with the leverages to manage the legislative or budgetary processes. Constitutional growth of the powers of the President has been reflected in the amendments of February 6, 2004. As a result of these amendments, powers of the Head of the State has increased, especially regarding the executive powers, along with the changes in the form of the government. This is indicated in the fact that Article 73 of Georgian Constitution, which deals with the powers of the President, starting from 1995 up to date, has undergone most of the changes.

Let us consider the most important part of the constitutional changes which dealt with the Chapter 4 of the Constitution, President of Georgia. In addition, while considering these changes, the most noteworthy is the model of the government that was developed as a result of the Constitutional Amendments.

2.1. Constitutional Status of the President and the Rule of Election

The Constitutional Reform, first of all, dealt with the constitutional status of the President. If today the President, along with the other functions, guides and executes domestic and foreign policies of the state, after the changes, he will be endued with the powers to be the arbiter during the conflicts between the governmental bodies, the Supreme Commander in Chief of the military forces, and the Representative of the State in foreign relations, as the Head of the State (Article 69). Therefore, within the government model defined by the reform, one of the most important goals reflected into the changes made to the Basic Law was distancing the Institution of the President from the Executive powers. This is also required by the principle of separation of powers, which is necessary for successful functioning of the state, and of the constitutional order. This principle has repeatedly been proven by the constitutional legal doctrine as well as in practice. The principle of separation of powers has two aspects viz. functional and organizational. The functional aspect reflects the idea of strict regulation of the powers of each governmental body so that neither of the branches encroaches upon the powers of another. As for the organizational aspect of separation of powers, it covers the rules of relations among various governmental branches,
which is the precondition for the existence of checks and balances mechanisms necessary for the rule of law. This idea was highlighted in the Article 16 of the French Declaration of the Rights of Man and of the Citizen which stated in 1789 that, “A Society, which... has no separation of powers, has no Constitution”.\(^6\)

The Constitution stipulates that presidential candidates must satisfy the so called “residential qualification” which requires a 5 year residency in the country, including a continued 3 year residency at the time of announcement of elections. The said change is not new to electoral law, and, guided by the Opinion of Venice Commission, serves to establish “the sufficient bonds of a presidential candidate to the country”. This, in our opinion, should be an absolutely obligatory requirement for the future President, and according to the Opinion of the Venice Commission, it helps “to exclude those persons who have no genuine ties with the country”.\(^7\) It should be emphasized that the Parliament, at the third hearing of the amendments, changed the requirement that a presidential candidate must be a citizen of Georgia by birth. In addition, the Parliament defined the terms of appointment or holding of new and regular elections of the President.\(^8\)

The Constitutional Amendments filled the vacuum related to the termination of the powers of the President, and defined it from the moment the newly elected president swears in. Also the President is banned from holding a party position. This step was taken to establish the institution of the President as a neutral arbiter. This point is also reflected in the Venice Commission’s Opinion.\(^9\)

### 2.2. Constitutional Powers of the President

As a result of the constitutional amendments, Article 73 of the Constitution, which defines the scope of powers of the President, was substantially reconsidered.

Due to the goals of the Constitutional Reform and the government model set forth as a result of the stated reform, the President will not have the power to assign the Prime Minister, to give consent to the latter in appointing the Ministers, to dismiss the government, and to dissolve the Ministers of Justice, Internal Affairs and Defense. Such restrictions on the powers of the President undisputedly secure development of the executive branch as an independent and supreme body, a change which is also approved by the Venice Commission.\(^9\)


\(^{8}\) Ibid, paragraph 41.

\(^{9}\) Ibid, paragraph 42.
The authorities of the President of Georgia will be restricted in the subjects of foreign relations. In particular, appointment or accreditation of ambassadors, holding negotiations with other states, signing international treaties etc., might be carried out only subject to approval by the Government. It should be emphasized that according to the recommendation of the Venice Commission, the last two powers from the above mentioned “will increase the risk of confrontation between the Government and the President”, and it is proposed that the President be deprived of the authorities in the field of foreign relations. However, we think that it would be quite difficult to delimit, strictly on the constitutional basis, the authorities of the President, as he is the representative of the State in its foreign relations, and represents the Government which is the body that executes foreign policy. We think that this issue will be regulated by secondary legislation, and, consequently, developed by practice.

A welcomed change is distancing the President from the budgetary process. As a result of the changes, the Government does not need the President’s consent to submit the state budget to the Parliament for approval. Also, the subparagraphs “e” and “f” of Article 73 of the Constitution specified and defined an exhaustive list of appointees to be made by the President. It should be emphasized that the President still holds the authority to propose, with the preliminary consent of the Government, the candidacy of the Chairman of the Government of the Autonomous Republic of Adjara to the Supreme Board. This authority is a subject of constant criticism by the Venice Commission, which is reflected in its Opinion about the Status of the Autonomous Republic of Ajara of June 18-19, 2004 regarding the draft Constitutional Law of Georgia, as well as in the Opinion regarding the Constitutional Reform carried out in 2010.

The President has the discretionary power to declare the state of emergency, and the power to terminate activities of the self-governments and the representative bodies of the territorial units on the basis of recommendations by the Government. We consider that these powers are justified due to the necessity of swift reaction by the state in case of emergencies. The emergency powers of the Head of the State are balanced by the requirement of the Parliament’s approval.

Under the unamended constitution, the President had the authority to exercise the constitutional and administrative review of legal acts, and, in accordance with the Paragraph 3 of Article 73, to suspend or cancel the acts of the Government and the Executive bodies, if they conflicted with the Constitution of Georgia, international treaties and conventions, laws, and normative acts of the President. These powers are removed as a part of the

10 Ibid, paragraph 43.
amendments, and this was a particularly welcomed change. When there is a specialized body of constitutional review, such as the Constitutional Court of Georgia, constitutional review should be exercised only by it while the President has the authority to file a claim at the Constitutional as well as General Courts. This change has also been positively assessed in the relevant Opinion by the Venice Commission.\textsuperscript{13}

2.3. Countersigning Mechanism – A novel feature in Georgian Constitutional practice

The newly added Article 73, for the first time in Georgian constitutional history, establishes the practice of the Prime Minister countersigning all the legal acts of the President. In the doctrine of constitutionalism, countersigning (in Latin: \textit{contra}-against, \textit{signare}-signing) means co-signing of the legal acts of the Head of the State by the Prime Minister (and by the minister of a corresponding department on rare occasions -). As a result of countersigning, the act gains legal power and the Prime Minister bears the legal and political authority for its implementation.

Institution of countersigning was established in European law in the beginning of 19\textsuperscript{th} century, and to date it is effective among the majority of the countries of old members of the European Union (France, Germany, Italy, Portugal, Spain, Greece, Finland...). The mechanism of countersigning has been adopted in Eastern Europe as a result of the Constitutional Reforms implemented, notably in Poland, Czech Republic, Bulgaria, Hungary, Romania, Croatia, Lithuania, Latvia, and Ukraine. Historically, the practice of countersigning has been created as a result of confrontation of two legal principles – Sovereignty of Monarchy and Parliamentary Supremacy. This practice has its origin in the “Act of the Arrangement”, 1701, which finally restricted the absolute authority of the Monarch and established diarchy. According to the famous constitutionalist Andras Sajo, “the constitutional problem was how the King had to be controlled – whose responsibility could be qualified neither on personal level nor in the rank of the Head of Executive”.\textsuperscript{14}

The countersigning should be viewed as the legal symbol which confirms transfer of the responsibility to execute the acts of the Head of the State to the members of the Government. However, it should be emphasized that the constitutions of the modern European states, which envisage the mechanism of countersigning, do not establish the particular procedures of the special responsibility for the countersigned act. Therefore, the real legal content of countersigning implies delimiting the functions and the competences of the Executive and the Head of the State, rather than the transfer of the responsibility to the countersigning person.

\textsuperscript{13} Ibid, paragraph 49.
\textsuperscript{14} A. Shajo, Self-restriction of the Government, Tbilisi, 2003, pg. 102-103
In the constitutional legal systems of the modern states, countersigning, as a rule, is established under the conditions of functional dualism of the executive branch in the models of parliamentary and mixed governments. Countersigning represents the procedural form of restricting the authorities of the Head of the State, without which the act of the Head of the State has no legal power and can not be executed (for example: Italian Constitution – Article 89; Fundamental Law of Germany – Article 58; Constitution of Greece – Article 35; Constitution of Portugal – Article 140). Legal analysis of the practice of countersigning reveals that countersigning is not required for the legal acts issued by the Head of the State, which are related to the functions of the Head of the State as the arbiter to settle conflicts or political crisis among various the government branches, and the so-called “formal technical powers”, which belong exclusively to the competence of the Head of the State (for example: authorities in the process of Government formation or dismissal of the Parliament [German, France]). Therefore, it may be concluded that in constitutional legal practice, countersigning is required for the realization of those powers of the Head of the State, which are related to executive function. Furthermore, the mechanism of countersigning is established only in those states where there is the mechanism of political responsibility of the government before the Parliament. This is also confirmed by the practice of constitutions of the European states. The practice of countersigning in relation to the Head of the State represents the constitutional guarantee of independence and autonomy of the Government, which, in the end, is the precondition for ensuring the principle of separation of powers.

Introduction of the principle of countersigning into Georgian constitutional practice serves the realization of the goals mentioned in the preceding paragraph. At the same time, there are exceptions to the rule. – Acts issued by the President during state of war are exempted from countersigning. This is understandable as the President, due to his/her constitutional status, is the Supreme Commander in Chief of the Military Forces and in the event of war, the President should have the possibility to react quickly and effectively. In addition to that, article 73\(^1\) of the Constitution foresees the scope of the issues, regarding which the legal acts issued by the President are not subject to countersigning. These, generally, are those issues which in the constitutional legal practice are known as “Direct Powers of the Head of the State”. These include, for example, – calling for elections and dismissal of the Parliament; summoning the extraordinary sitting and session of the Parliament; implementation of the legal initiative; promulgation of laws; personnel related authorities; acts of grace; awarding and termination of citizenship; conferment of state awards and special titles.

Quite interesting conclusions are expressed in the Opinion of the Venice Commission related to the Georgian version of the countersigning practice. In particular, the complete analysis of the paragraphs 53-56 of the Opinion clarifies that Venice Commission considers it appropriate to specify or broaden the scope of Article 73\(^1\) of the Constitution. We hope that the recommendations of Venice Commission, from the point of view of developing the practice of countersigning, will become subject of further discussions.
Thus, taking into consideration the government model established by the constitutional amendments, it can be said that the introduction of appropriate standards of practice of countersigning into the Georgian constitutional practice facilitates an increased role for the President as the neutral arbiter among the governmental institutes, and predefines the process of developing a free and responsible government.

3. Institute of the Government of Georgia and Constitutional Reform as of 2010

One of the principal problems of the Georgian constitutionalism has always been the status of the Government of Georgia in the state governmental system. During the legal history of independent Georgia, the government did not have the strictly defined status of a supreme and independent Executive branch. During different times, different generations of law-makers, in the process of searching for various governmental models, have more than once changed the status of the Government of Georgia within the system of separation of powers. We consider that settling of this problem became possible only as a result of the Constitutional Reform implemented in 2010, when the following provision emerged – “The Government of Georgia is the supreme executive body.” (Article 78, Paragraph 1).

In 2010, during the process of implementation of the Constitutional Reform in Georgia, defining the constitutional status of the Government, and its place within the system of the executive branch was of utmost importance on the agenda. This approach became a significant precondition for the regulation of other issues related to the constitutional construction of the Government. Due to the requirements of realization of the principle of separation of powers as set forth by the paragraph 4, Article 5 of the Constitution of Georgia, it became necessary to develop the executive branch into an independent governmental branch, and define the status of the government. Such necessity was also preconditioned by similar practices of the European states regarding the form of the mixed government, and the recommendation expressed by paragraph 7 of the Opinion by the Venice Commission regarding the constitutional amendments of February 6, 2004. According to Venice Commission’s recommendations, the Georgian Constitution “should confer to the Government and not to the President the authorities to carry out the policies of the Executive”. Taking into account these circumstances, the constitutional amendments im-

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15 E.g.: In France “the Government defines and manages the national politics” (Constitution, Article 20); in Romania “the Government... provides introduction and implementation of domestic and foreign politics of the country and carries out the general management of the State Government” (Constitution, Article 101); in Poland “the Board of the Ministers implements domestic and foreign politics of the Republic of Poland” (Constitution, Article 146); in Croatia “the Government carries out the Executive Authorities/Powers...” (Constitution, Article 113); in Portugal “the Government manages the general politics of the country and is the Supreme Body of the State Government” (Constitution, Article 182).

implemented in 2010 established the status of the government in the system where the strict separation of the powers of the governmental branches is provided, and effective checks and balances mechanisms exist among them. Therefore, achievement of the previously mentioned goal became possible by developing the government into the supreme executive branch, and distancing it from the head of the state.


An active executive branch, which provides for the effective management of the affairs of the state affairs, is necessary for any state. In a democracy, except for the classical presidential republic, in the management of the governmental system the most important role is conferred to the governmental institute. According to the notion recognized in constitutionalism, the government represents the supreme collegial executive body, which is responsible for executing and implementing the domestic and foreign policies of the country.\textsuperscript{17}

Another major subject of our overview is the part of the constitutional amendments, which dealt with the Chapter 4\textsuperscript{1} of the Constitution – “Georgian Government”. The provisions in the unamended Constitution, which read that “the Government provides for the implementation of the executive powers”, did not reflect the legal status of the independent branch of the Executive to the fullest extent. After the constitutional amendments, the Government represents the supreme executive body, which “implements the domestic and foreign policies of the country” (Constitution, Article 78, Paragraph 1). This change should be considered in the context of the constitutional status of the President who does not direct and implement domestic and foreign policies any more. The Government has been released from the responsibility to report to the President, and reports solely to the Parliament, in accordance with the goals of the Constitutional Reform. Also, presentation of the draft law, defining the structure and authorities of the Government, has been turned into the exclusive competence of the Government, for which the latter does not need the consent of the President anymore. The Government has been released from the responsibility to report to the President, and reports solely to the Parliament, in accordance with the goals of the Constitutional Reform. Also, presentation of the draft law, defining the structure and authorities of the Government, has been turned into the exclusive competence of the Government, for which the latter does not need the consent of the President anymore. By the amendments to the Article 79 of the Constitution, the constitutional status of the Prime Minister as the Head of the Government (and not of the Chairman) has been defined clearly, and the Prime Minister has been released from his responsibilities to the President, but not to the Parliament. The most important thing is that the Prime Minister became an independent figure in the process of appointing the members of the government, and does not need the consent of the President. According to the Opinion of the Venice Commission, this “corresponds to the new mixed system to balance the powers.”\textsuperscript{18} Accordingly, the analysis of the new amendments confirms that

\textsuperscript{17} I. Kobakhidze, Constitutional Law of Georgia, II Part, Tbilisi, 2007, pg. 90.
on the constitutional level both the goals of the Constitutional Reforms to ensure effective separation of powers, and establishing an independent and supreme executive body have been attained.

Fundamental constitutional changes related to the constitutional status of the Government can be briefly presented in the following way:

- Government became the supreme executive body which implements the domestic and foreign policies of the country, and reports to the Parliament;

- Head of the Government is the Prime Minister, who appoints and dismisses various members of the Government, including the ministers of security, defense and law enforcement agencies, the appointment of whom, according to the unamended Constitution, is the exclusive authority of the President. Resignation or termination of the power of the Prime Minister automatically results in the termination of powers of other members of the Government.

### 3.2. Process of Government Formation

In accordance with the government model established as a result of the Constitutional Reform, new edition of Article 80 that deals with the procedure of Government formation has been incorporated. It should be emphasized that the Fundamental Law has introduced a so-called “Parliamentary method” of forming the government in which the process of giving the government a vote of confidence has become prerogative of the Parliament, and the participation of the President in this process became formal. While this restructuring of the Government is considered by the Venice Commission as “a step taken forward”\(^{19}\), the Commission also offers some comments that deal with the procedure of forming the Government by the newly-elected Parliament, and the length of terms for giving the Government a vote of confidence in the event of termination of powers to the Government. For the Venice Commission the opportunity to call for another voting to give the same Government a vote of confidence in the Parliament is also unacceptable., The Commission opines that removing this procedure would decrease the time needed for the formation of the government, and renders this process more transparent \(^{20}\)

General constitutional amendments related to the government formation process are as follows:

\(^{19}\) Ibid, paragraph 69.

\(^{20}\) Ibid, paragraphs 69-70.
Changes in Georgian Constitutionalism: Constitutional Construction of the President and the Government and Specificities of their Interrelationship from the Perspective of the Constitutional Reform

- The Government’s powers are terminated at the moment of recognition of the powers of the newly-elected Parliament (and not at the election of a new President, as the unamended Constitution stipulated);
- In the newly-elected Parliament the party having won the electoral majority presents the nominee of the Prime Minister who will be formally nominated by the President. The nominated Prime Minister will select the ministers and submits to the Parliament for a vote of confidence;
- If the Parliament could not elect a government in two attempts, then the President submits the nominee proposed by two fifths of the deputies for the vote of confidence. The President may dismiss the Parliament and call for extraordinary elections, if the confidence vote could not be given to a government in the third attempt;
- If the Government has its powers terminated for other reason, and not due to election of new Parliament, the President nominates a candidate proposed by the parliamentary majority for the position of Prime Minister or, in case of absence of clear cut majority, a candidate from the largest party according to the number of its members in the Parliament.

3.3. Expression of no-confidence vote to the Government

Amendment to Article 81 of the Constitution established the procedure of expressing no-confidence vote to the government in a new form. The mechanism of constructive vote of no-confidence has been introduced; an absolutely unfamiliar notion for the Georgian constitutional practice.

Constructive vote of no-confidence is the special form of vote of no-confidence expressed to the Head of the Government. By expressing constructive vote of no-confidence, a successor is elected by the majority of votes by the Parliament, or by the Chamber of the Parliament to which the Government is responsible. Constructive vote of no-confidence is enshrined in the Constitutions of Germany, Slovenia, and many other states. Constructive vote of no-confidence, together with expressing no-confidence to the Government, requires the nomination of a new Head of the Government from the Parliament. The mechanism of constructive vote of no-confidence, in contrast to the traditional vote of no-confidence, ensures the stability of the Government. The major distinction of this procedure is that the resolution expressing no-confidence in the Prime Minister should be passed along with the election of a new Prime Minister. The principle of constructive vote of no-confidence constitutionally strengthens political stability of the government by preventing the opposition parties that are united with the only wish to replace the Prime Minister, and not to change the government policy. Constructive vote of no-confidence allows avoiding frequent governmental crises in the country, and that is the precondition of political stability of the state.
General constitutional procedures related to the motion of no-confidence vote may be presented in the following way:

- For the procedure of no confidence motion to commence, the motion should have the support of at least two fifths of the total membership of the house. Once the permission for the notion is given, the motion should be put to vote within 20-25 days of its introduction, and to pass it should have the support of more than half the total membership of the house. If the motion does not pass the vote, another no confidence motion cannot be initiated in the following six months;
- From the moment of filing the motion of no-confidence, within the following 20–25 days, the Parliament votes for nominating a new Prime Minister proposed by two fifths of the listed members for approval by the President; the President has the right to nominate the proposed candidate or deny within 5 days;
- The President’s “suspension veto” can be overcome by the Parliament with three fifths of the listed members of the Parliament passing the motion within 15 to 20 days of the President’s veto;
- In the event of overcoming the presidential “veto”, within the next 14 days the new Prime Minister is nominated and his/her Government is confirmed in accordance with the rule of constructive vote of no-confidence. This automatically means that, together with appointing the new Government, expression of no-confidence in the old government is passed; in the event of the no-confidence vote failing to result in the formation of a new government by the Parliament, the President bears the right within 3 days to dismiss the Parliament and call for extraordinary elections.

The Opinion of the Venice Commission regarding the implemented constitutional changes provides for several critical comments related to the procedure of expressing the no-confidence in the government. The comments deal with the following issues: necessity of voting to put the issue of expression of no-confidence for voting; existence of some kind of “veto” powers with regard to the candidacy of the Prime Minister nominated by the Parliament, and the quorum determined in order to overcome this “veto”, which is 3/5 of the members of the Parliament; and the length of the duration set forth for the procedure of no-confidence motion. Introduction of the concept of constructive vote of no-confidence, which is an effective means to achieve stability and avert political and governmental crisis, to the Georgian constitutional practice is undoubtedly a step taken forward. Nonetheless, we consider that the abovementioned comments by the Venice Commission should become subject of discussion for law-makers, form the basis for further development of the procedure of constructive vote of no-confidence, and help simplify its mechanism and shorten the duration.

21 Ibid, paragraphs 79-80.
3.4. Constitutional Status of the Governor – the State Agent

As a result of the Constitutional Reform, article 81 of the Constitution has been modified, which deals with the appointment and the general authorities of the state agent, the Governor. After the amendment comes into force, the Governor will be appointed by the Government, rather than by the President as it is provided in the present Constitution, and the Governor shall represent the Executive branch only in the administrative-territorial units of Georgia. We think that linking the office of the Governor to the government is absolutely logical to the government model set forth by the constitutional changes, and the same is considered by the Venice Commission as a “positive change”.  

4. Conclusion

The Constitution of Georgia of 1995 established a presidential, “American” model of government. The drawbacks of this model in our environment were several; rigidity of the Government, inability of the Parliament to dismiss the government in the event of a political crisis, and the inability of the President to dismiss the Parliament in similar circumstances. These drawbacks and the almost absent parliamentary control over the Government’s activities caused significant imbalance between the broad powers and responsibilities of the Executive and the Legislature in Georgia.  

Due to the aforementioned factors, the agenda of the constitutional reform of 2004 was to ensure that the Government achieves its effectiveness. As a result, on the basis of the Constitutional Reform of February 6, 2004, Georgia has been transformed from the American type of Presidential Republic into the model of mixed government. One of the important characteristics of the mixed republic is the dual executive branch. Taking into account this and other criteria, in accordance with the present Constitution, Georgia is recognized as a semi-presidential republic, though in the dual executive model balance of constitutional power is skewed towards the President, who is the Head of the State. In order to overcome such inconsistency, taking into account the societal demand and recommendations by foreign experts, the Government of Georgia, in the end of 2008, initiated to carry out the Constitutional Reform, the result of which would have been increased parliamentary powers and adoption of the new European type of constitution.

We consider that the new constitutional reality related to the offices of the President and the Government provides for an increased role of the President as the neutral arbiter among the state offices, and facilitates the process of independent and responsible gov-
ernment. Our position is further strengthened by the analysis of the Opinion by the Venice Commission, in the conclusive part of which it is emphasized that “the constitutional amendments provide several important improvements and significant steps towards the right direction”.\(^{24}\) We consider the development of the executive branch as an independent supreme body as the most important positive characteristic of the Constitutional Reform. Existence of an independent and responsible government and the constitutional amendments to the government model will aid in establishing the principle of separation of powers in practice. Professor Philip Lovo’s words, “Main body of the Parliamentarianism is the responsible Government”\(^{25}\), aptly describe the pertinence of this line of thought.

We have so far reviewed the most significant and principal aspects of the Constitutional Reform carried out on October 15, 2010, which are related to the constitutional nature of the President and the Government, and the innovative regulations of their relations. We consider it absolutely necessary to proceed with further examination of each constitutional amendment, the mechanisms of the formation of the government, and political responsibilities related to the constitutional regulations, while taking into consideration the opinions expressed by the Venice Commission. Further analysis of the constitutional changes should be directed at the purposes of the Constitutional Reform, and the nature of the government model developed as a result of it.


\(^{25}\) F. Lovo, Parliamentarianism, Tbilisi, 2005, pg. 87.
PRESENTATIONS DELIVERED AT THE INTERNATIONAL CONFERENCE "THE PAST AND THE FUTURE OF THE CONSTITUTIONAL REVIEW IN NEW DEMOCRACIES" ORGANIZED BY THE CONSTITUTIONAL COURT OF GEORGIA, BATUMI, 25-26.06.2011
The most important challenge facing the present times is the threat to global stability, peace and harmony. The factors that contribute to it can be attributed to the problems of constitutionalisation of social relations.

In a democratic society, based on rule of law, constitutional development assumes adequate level of constitutionalism. The essence of the latter is not only the constitutional order set forth by the Constitution, but also the principles that underlie the relationship between law and government. It is significant how constitutional order manifests itself in public life, how much the fundamental principles of the Constitution are clothed in flesh and blood, who is the real source and the carrier of power, to what extent human dignity is guaranteed and protected, and to what extent institutions of the state power are practically separated, independent, and balanced. Ensuring these principles is the main criterion of constitutionalism and constitutional democracy in a country. Society, and people do not need a set of good intentions, but a Constitution that is functional.

Constitutionalism is, ultimately, the existence of a conscious system of constitutional values in public life, in all forms of social behavior of the state and individual. Depending on its stage of evolution, constitutionalism in each sovereign nation, considering its socio-cultural characteristics, determines the level of social maturity of that society, the degree of development of civil harmony and stability, and maturity of the political system.

If the development of political and legal thought before the XVIII century had led to the adoption of constitutions, and the idea of establishing social cohesion through the Basic Law of the civil society, we are convinced that the main challenge of the XXI century is to guarantee constitutionalism in a country, which is the basis for the sustainable development of that society.

This objective raises qualitatively new requirements for the development and implementation of an integrated system of continuous constitutional diagnostics and constitutional monitoring, with which it is possible to identify, assess and restore the disturbed constitutional balance, and ensure the dynamism of development, stability, and effectiveness of public administration in a multidimensional society.

Our analysis has led to the conclusion that the absence of an effective mechanism for the timely identification and remediation of disturbed constitutional balance becomes the main reason for the accumulation of corresponding negative social energy, which, gaining the critical mass, leads to socio-systemic explosions. Empirical evidence shows that, especially in case of societies in transition, corresponding mechanisms of continuous constitutional diagnostics and monitoring are not effectively operational, and the existing systems of constitutional control and justice are not able to adequately respond to modern challenges. Constitutional review and justice operate discretely, and problems, in general, are solved at the level of constitutional-textual interpretation, and in real life their impact is of no importance in terms of establishing the principles of constitutionalism. Research carried out in Armenia and number of other countries indicated that more than half of functioning regulations contain the norms that are not relevant to their respective constitutions, and constitutional courts receive no more than three to four appeals per year as an abstract normative control. If we add to this the fact that the fundamental constitutional values and principles are clearly deformed not only at the level of legal regulation, but also in social practice, it becomes apparent that there is an urgent need to establish continuously active monitoring of constitutionalism in the society through the introduction of an effective mechanism of constitutional diagnostics.

The concept of a constitutional diagnostics encompasses the entire evaluation mechanism of constitutionalism in the society; identification of compliance of actual social relations with constitutionally established norms and principles.

\(^1\) In this context, and further, the term “social” means the public manifestation of a rational being.
Constitutional Diagnostics is the method of determining the degree of functional capacity of the social organism as a whole. First of all it is necessary to identify the true status and trends of constitutionalism in a society.

The objects of constitutional diagnostics are social life in general, and the functioning of power institutions (Scheme 1), in particular.

The subjects of constitutional diagnostics are: the people as the source power; bodies of the state power and local self-government; all the institutions of civil society; and individuals (Scheme 1).

The basis of the constitutional diagnostics is continuously functioning system of constitutional monitoring.

The main objectives of the constitutional diagnostics in terms of social transformation, in particular, are (Scheme 1):
- Identification of deficits of constitutionality in global outlook and ideological sphere in the legislative process, and other forms of law-making activity;
- Assessment of intra constitutional deformities, identification of the causes of these deformities, and development of mechanisms to overcome them;
- Identification of deformities of the constitutional values and principles in law enforcement practice.

The main objectives of constitutional monitoring are (Scheme 2):
- Ensuring the necessary and sufficient level of constitutionalism in the country;
- Overcoming a deformed perception of fundamental constitutional values and principles in the society, and increasing the level of constitutional legal awareness;
- Ensuring the necessary level of constitutionalisation of political behavior of institutions of power, and social behavior of the individual;
- Systemic support to the constitutionality of governance;
- Identification and registration of transnational criteria of social and legal behavior of individual and power.
Scheme 2
**MAJOR OBJECTIVES AND PRINCIPLES OF FUNCTIONING OF THE SYSTEM OF CONSTITUTIONAL MONITORING**

**Major objectives of constitutional monitoring**

- Ensuring necessary and sufficient level of constitutionalism in the country;
- Overcoming deformed perceptions of fundamental constitutional values and principles in the society, increasing the level of constitutional legal awareness;
- Ensuring the necessary level of constitutionalization of political behavior of institutions of power, and social behavior of the individual;
- Systemic support of the constitutionality of governance;
- Identification and registration of transnational criteria of social and legal behavior of individuals and power.

**Basic principles of functioning of the system of constitutional monitoring**

- Identification of any violation of the constitutional balance in the mode of continuous operation;
- Determination of the nature of violation;
- Offer tools and ways to restore constitutionality;
- Ensuring the exclusion of new violation while restoring functional balance.

Long-term and multifaceted analysis of this problem led us to conclude that providing a consistent and adequate system of constitutional monitoring is only possible with a deep understanding of the following circumstances:

1. The functioning of the social system has a multi-hierarchical nature, the basis of which is safeguarding and ensuring of the supremacy of law.
2. Each subsystem of a social community has certain defense resources, upon the exhaustion of which, the protective system of the whole organism is enacted.
3. The main mission of the public body’s immune system is conservation of the functional constitutional balance and stability, as non restoration of impaired balance, as noted above, becomes the cause of accumulation of negative social energy, which can lead to social disruptions when gaining the critical mass.
4. System of constitutional monitoring as a controlling system should operate in its characteristic manner of continuity, and relatively independently.
5. Any social pathology must activate and enact the entire system of constitutional self-defense.

System of constitutional monitoring should be based on the following basic principles (Scheme 2):

- Identification of any violation of the constitutional balance in the mode of continuous operation;
- Determination of the nature of violation;
- Offer tools and ways to restore constitutionality;
- Ensuring the exclusion of a new violation while restoring functional balance.

In order to implement these principles consistent with constitutional diagnostics, it is necessary to select a group of indicators that can comprehensively and holistically describe the constitutionality of social relations under the study. System of such indicators is often used by many international organisations. A good example is the annual studies by the
Foundation of Freedom House with respect to trends in development of constitutional democracy in the World. We have also attempted to provide a scientific methodology of such analysis, which can be found in the Bulletin <Constitutional Justice> (No. 4, 2010).

The important task of successful social transformation is a sequence in the constitutionalisation of social relations by overcoming the conflict between the Constitution, legal system, and legal practice in general. Only under these conditions can the necessary capacity of the system of separation and balance of powers be also provided, and the necessary stability and dynamism of social development can be guaranteed. This, in turn, requires new functional and institutional solutions for the implementation of an effective system of internal constitutional monitoring.

We believe that realities and challenges of present times have clearly demonstrated the relevance of operation of an integrated system of continuous constitutional monitoring in the society through the appropriate mechanisms of constitutional diagnostics. This is a practical way to strengthen the immune system of the social organism, and ensure the stability of development. Institutional solution to this problem is also related to the definition of prospects for the development of constitutional review, and determination of the place and role of constitutional courts in the system of state power.

We are convinced that the continuous systemic monitoring of constitutionalism in the society becomes the primary function of the state power, and requires the appropriate functional and institutional solutions. In this context, it is also necessary to seek opportunities for further development of the entire system of the constitutional control.

Functional solutions to this problem can be achieved at three levels. Firstly, it is necessary to ensure the constitutionality of the Constitution itself. The Constitution can realise its mission and be self-sufficient, if the fundamental constitutional values and principles are the actual basis of that particular society. However, it is necessary to eliminate inconsistency in the implementation of the basic principles of the Constitution, incompatibility between constitutional functions and authorities of the institutions of power, conflicts in realisation of the principles of direct and representative democracy, and conflict between the government and freedoms of the citizens. Of paramount importance in this context is ensuring intra constitutional functional balance in the general chain <constitutional value – constitutional principle – constitutional normative regulation – ensuring of dynamics of the functional constitutional balance – mechanisms of recovery in case of violation of such balance>. The problem of overcoming the distortion of intra constitutional functional balance continues to be relevant, especially in case of societies in transition.

The second level of ensuring continuous systemic monitoring of constitutionalism in the society rests on guaranteeing a balance of functions, and counterbalancing and constraining authorities of the institutions of power. This primarily relates to the functions and powers of the Head of State. It is necessary to provide practical constitutional and legal content to the constitutional provisions such as: The President shall observe the Constitution [see the Constitutions of: France (Article 5), Poland (Article 126, paragraph 2), the Republic of Armenia (Article 49)]; The President is the guarantor of the Constitution [see the Constitution of: the Russian Federation, Art. 80, paragraph 2]; The President shall ensure the normal functioning of constitutional bodies and democratic institutions[see the Constitutions of: Portugal (Art. 120), Slovakia (Art. 101, paragraph 1), and so on]. The same applies to the provisions of Article 69 of the Constitution of Georgia, in which it is established that the President of Georgia regulates the activities of state bodies in accordance with the Constitution. This means that detection and prevention of any violation of the constitutional balance due to functional exercise of powers by public authorities (without any limitation) is the constitutional duty of the President.

In a constitutional state, the main function of the President is to guarantee the sustained development of constitutionalism in the country. Given the fact that the solution to this problem also assumes a systemic identification, assessment, and restoration of the violated constitutional balance through legal mechanisms, the President becomes the main link of the immune system of the social organism. We believe that with this in mind, it is necessary to constitutionally provide for the powers and duties of the President to ensure the ongoing constitutional diagnostics, taking into account the functional authority of other institutions. Current conventional major powers of Head of State, including the relations between the Parliament and the President in the field of legislative policy, as the initiator of the constitutional amendments, or the power to refer a subject to the Constitutional Court, are not sufficient for full participation of the

President in the process of constitutional monitoring. Especially in new democracies, informal, shadow mechanisms of the constitutional diagnostics are enacted, which is very dangerous and incompatible with the principle of constitutional state. The constitution should not abstractly declare, but specifically authorise and compel the President to ensure the ongoing constitutional diagnostics, taking into consideration the functional role of all the constitutional subjects. This will also ensure that the Head of State will take an active role in the implementation of abstract judicial constitutional review. In many countries in recent years, presidents almost do not appeal to the Constitutional Court on the constitutionality of the form of a statute or other regulations.

In our view, the overall institutional design of implementation of constitutional monitoring can be summarised as follows (Scheme 3).

**Scheme 3**

**SYSTEM OF CONSTITUTIONAL MONITORING**

In this scheme functional role of each institution of power within the system of ongoing constitutional monitoring is not highlighted, except for the role of the President. The latter, as emphasised above, is given a key role in bringing this system into operation with a view to ensure coherent action by all institutions of power.

This scheme assumes that civil society plays a fundamental role in the development of constitutionalism in the country. This, first and foremost, means that people, as the main source of power, are also the guarantors of observance of constitutional values and principles. Any response coming from civil society in relation with any deformity of these values and principles should be the subject of constitutional monitoring.

In turn, the Parliament and the Government, along with their traditional functions, shall always consider the results of constitutional diagnostics not only in law-making process, but also, on the basis of their authority, to provide the necessary control over the processes of constitutionalisation of social relations. The institutions of constitutional review have to become more active in constitutional monitoring in the light of the fact that fundamental human rights and freedoms determine the meaning, content, and implementation of laws and other legal acts, which are the functions of legislative and executive branches of power. Other constitutional institutions also exercise their respective roles within the framework of their constitutional authority.
A special role in this scheme is given to general courts and the Constitutional Court.

The courts of general jurisdiction and specialised courts are designed to ensure these rights by guaranteeing access to courts, judicial efficacy, and uniform application of laws. Judiciary should identify existing gaps between the Constitution and existing legal system in general. This means that, first, the courts should play a more active role in the overall system of constitutional review, and secondly, the judiciary has to become an important subject of constitutional diagnostics.

The Constitutional Court, in turn, can fully carry out its core mission to ensure constitutionalism in the country under the following circumstances:

1. At the stage of the Constitution, it is necessary to ensure systemic compliance of the functions and powers of the Constitutional Court. The main function of the Constitutional Court is to guarantee the supremacy and direct effect of the Constitution. And this is possible, if conditions such as self-sufficiency of the Constitution, protection of fundamental human rights and freedoms, the constitutionality of legal acts, and resolution of disputes over constitutional powers within the legal framework etc, are ensured.

In today’s world, there are individual constitutional courts (as in Germany, Austria and some other countries), where the balance of their functions and powers complies with today’s challenges of constitutional monitoring.

2. The capability of judicial constitutional review is largely dependent on the adequacy and efficiency of the entire system of constitutional review. In the present scheme, it is of fundamental importance to guarantee the system of the continuous constitutional monitoring.

3. The head of state as the guarantor of the effective functioning of the whole system of constitutional monitoring, shall also become a guarantor of the implementation of decisions of the Constitutional Court. A classic example is the Article 146 of the Constitution of Austria (where the first Constitutional Court was established in 1920), which establishes that the enforcement of the Constitutional Court’s decisions, with respect to the requirements of the Article 137, is performed by the ordinary courts. Execution of other decisions of the Constitutional Court is assigned to the Federal President. Execution is performed by authorised officials and bodies of Federation or lands, including the Federal Army, on his order and in accordance with his directions. The Constitutional Court delegates the responsibility for the execution of its decisions to the Federal President.

4. The procedural mechanisms of judicial constitutional control shall fully comply with the authority and the functional role of the Constitutional Court in ensuring the supremacy and direct effect of the Constitution. This problem is especially urgent in new democracies.

More than 110 specialised bodies of judicial constitutional review, operating in today’s world, exercise a total of 37 different powers. No Constitutional Court has all of these powers. It is also impossible to determine at least two courts, the constitutional powers of which would be completely similar. This is natural as they are carriers of certain social relations with their specific features. However, all the existing constitutional courts can be divided into three groups:

1) having more than 15-16 authorities for the implementation of the regulatory constitutional review, interpretation of the Constitution and laws, resolving disputes over authority, protection of constitutional human rights, and an extended range of subjects entitled for appeal to the Constitutional Court.

2) The second group may include those courts which have 10 – 15 major constitutional powers of implementation of constitutional justice, and a relatively narrow range of subjects of appeal.

3) The third group includes those constitutional courts facing serious problems of formation, have very limited powers, and a limited range of appeal subjects. Usually there is no facility for individual constitutional complaint in these courts.

It is not accidental that some of the courts deliver hundreds and sometimes thousands of decisions, and there are constitutional courts whose final decisions do not exceed a dozen in a year.

We are convinced that constitutional justice shall not be functionally independent and capable enough, until acts, actions and omissions of all the constitutional institutions become subjects to judicial constitutional review, and all the constitutional institutions become subject to the right to appeal to the Constitutional Court. Only then the constitutional courts can become effective elements of the integral system of constitutional monitoring in the society.

The 20th century has proven that beliefs, traditions, morality, the whole system of values of social behavior etc, have adversely affected the dynamic balance and stability of development of society in terms of new realities. Key challenge
Modern Challenges to Systemic Development of Constitutional Control

of our time is to establish a functioning system of internal self-protection of the social organism. This will be possible by ensuring the supremacy of the Constitution through the adoption of the coordinated system of constitutional monitoring, and monitoring of the processes of constitutionalisation of social relations.

Summing up, it is necessary to state that we have presented just a few ideas in a succinct form about the need to implement a coherent and operable system of constitutional monitoring, without which it is impossible to guarantee the supremacy of the living Constitution, stability, and dynamism of social development. At the same time, in our view, the conceptual formulation of the problem opens up real opportunities for development and implementation of such a system that is relevant to the challenges of the time, within which the trends of further development of the institution of judicial constitutional review as a whole are designated as well.
“PRACTICAL ASPECTS OF PROTECTING HUMAN RIGHTS AND FREEDOMS THROUGH CONSTITUTIONAL JUSTICE IN THE REPUBLIC OF AZERBAIJAN”

Farhad Abdullaev – Chairman of Constitutional Court of Republic of Azerbaijan

After the collapse of the Soviet Union and the communist system of government, constitutional justice has been widely recognised as one of the most important indications of the commitment to build a democratic state by the countries that have regained independence. Recognising democratic values as the pillars that underpin the society, our country’s fundamental law set human rights and freedoms at its heart, and endowed the courts of general jurisdiction and general bodies of constitutional review with the responsibility to protect those values. It should be kept in mind that the essential elements of the legal culture of a society, Constitution and constitutional justice, affect the qualitative state of that society, and play an important, if not crucial, role in building civil society, and strengthen the welfare of that state. It is clear that the purpose of constitutional justice is to ensure and protect the rule of law as well as direct effect of a constitution in the social relations of all stake holders throughout a state. Implementation of all elements of constitutional justice in a state based on rule of law is possible through the realisation of constitutional powers of review established by a constitution and laws.

Our country was among the states which regained independence, and replaced the old system of government with a new democratic order. In the course adopting the reforms, the 1995 referendum of the Constitution of the Republic of Azerbaijan was an important event, which proclaimed human rights and individual freedoms as the supreme goal of the state. The fact that 56 of the 158 articles of the Basic Law were specifically devoted to human rights and freedoms is an important testimony to the revaluation of social values and political orientations of the state.

New trends of social development in the twenty-first century made it necessary to improve the legal system, assign additional responsibilities to government agencies, create a conducive environment for the full realisation of the rights and freedoms of all individuals and citizens, and for the fulfilment of their duties, thus increasing the role of constitutional supervision in the society. As you know, one of the important legal guarantees of human rights and freedoms is the constitutional court, which is an independent agency of the state, to ensure the functioning of society within the realm of constitutional legality. The Constitutional Court was formed in 1998 with the Constitution of Azerbaijan as its source. Under the Constitution, the Constitutional Court has fairly broad powers, which aim to ensure the supremacy of the Constitution, and the protection of the rights and freedoms of citizens.

As a body of constitutional justice on issues within the jurisdiction of the Basic Law, the Constitutional Court of Azerbaijan affects the formation of the new legal system, and also directly affects the legislative process, filling it with constitutional perspective. This is accomplished through the development of regulations and definitions of the legal positions by the Constitutional Court, which reflect the new understanding of the laws, define the targets of legal policy, the contours of the constitutional and legal reforms in all spheres of government- economic, social, and political- and social aspect of the state life. The Constitutional Court, in its rulings, repeatedly presented its recommendations to relevant authorities that include the Milli Majlis (Parliament), and Cabinet of Ministers of Azerbaijan, concerning the improvement of certain provisions of the legislation.

The implementation of constitutional review also suggests the evolutionary development of the Constitutional Court. Thus, the amendments made to the Constitution of Azerbaijan in 2002 by the popular vote (referendum) allowed the Court to enter into a new phase of its activities. According to the changes, citizens, courts of general jurisdiction, and the Ombudsman were added to the range of bodies endowed with the right to appeal to the Constitutional Court.

Due to the amendments to the Constitution, on 23 December 2003, a new Law “On Constitutional Court” was adopted. This new law established the superior position of the Constitution, and designated protection of the rights and freedoms of citizens as the main purpose of the Constitutional Court of Azerbaijan. The new law defines the procedure for submission and consideration of complaints, involving violation of the rights of citizens, against private legal acts of the...
legislative and executive authorities, municipalities, and courts. One of the most important criterion of admissibility of a
individual complaint before the Constitutional Court is the exhaustion of appeals at all relevant courts.

Undoubtedly, the institution of constitutional complaint is often an indispensable tool for protecting human rights
and freedoms, the rule of the Constitution, and it may play a significant role in the new democracies with respect to the
transformation of the Constitution from a set of declarative provisions into a set of rules for direct action.

In this regard, it should be noted that the implementation of the principle of supremacy of the Constitution, and en-
suring individual rights and freedoms in Azerbaijan, as in other new democracies, is often accompanied by certain practi-
cal problems. Thus, those entrusted with function of implementing the law often consider the Constitution as something
unrelated to their daily activities, and as a political declaration that is useless in practice. For practitioners, an act directly
coming from the superior administration has a primary normative value; the same is true about the acts of their own
agencies as opposed to other acts of general application. At best, they adjust their actions to the current law, and to the
specifics of rules. Transition to the modern legal mechanism requires a radical change in the psychology of such a legal
executive

The practice of the past years has shown that citizens are fairly active in filing individual complaints as effective means
to protect their rights. That vast majority of decisions of the Constitutional Court were pronounced on individual com-
plaints bears a testimony to the previous statement. Thus, over the course of its operation, the Constitutional Court of
Azerbaijan adopted 201 resolutions, 77 of which pertained to individual complaints.

The Constitutional Court has the power to interpret the law, which, in our opinion, is of vital importance. I must say
this procedure is frequently demanded by the law enforcement agencies.

It is important that the legal positions, as reflected in the rulings of the Constitutional Court, are formulated by taking
into account the fundamentals of the Constitution, its supremacy and direct effect, international acts to which our state
is signatory, and the principle of priority of human rights and freedoms. In its decisions, the Constitutional Court refers to
the Convention for the Protection of Human Rights and Fundamental Freedoms and its interpretation by the European
Court of Human Rights, thus introducing an additional element of objectivity in the formation of the Court’s final find-
ing. It is important that the Constitutional Court attaches great importance to the application of principles such as legal
certainty and proportionality, which are the starting points to the approaches to the resolution of certain legal disputes.

Today, the constitutional justice is more organically included into the legal system of new democracies. The legal
guidelines established by constitutional courts are related to an entire group of people, and thus have relevance for so-
ciety as a whole. This is especially important for the development of legislation in states undergoing legal and economic
transformation. Constitutional review can eliminate shortcomings of legislative and legal activities, resolve disputes aris-
ing between the government and citizens by legal means, ensure rule of law, and redress infringed rights and freedoms.

In summary, we can say with confidence that stability of the modern state is impossible without an effective system
of constitutional review that ensures the rule of the Basic Law. Being an essential element of rule of law, the system of
constitutional review becomes the indispensable component of the mechanism protecting the fundamental rights and
freedoms.
THE ICELANDIC CONSTITUTIONAL EXPERIMENT

Prof. Dr. Juríðis Thorgeirsdóttir – Member of the Venice Commission

Iceland is known to men as a land of volcanoes, geysers and glaciers. But it ought to be no less interesting to the student of history as the birthplace of a brilliant literature in poetry and prose, and as the home of a people who have maintained for many centuries a high level of intellectual cultivation. It is an almost unique instance of a community whose culture and creative power flourished independently of any favouring material conditions and indeed under conditions in the highest degree unfavourable. Nor ought it to be less interesting to the student of politics and laws as having produced a Constitution unlike any other whereof records remain and a body of law so elaborate and complex, that it is hard to believe that it existed among men whose chief occupation was to kill one another.

James Bryce, Studies in History and Jurisprudence (1901)

I. HISTORICAL BACKGROUND: THE SOCIAL CONTRACT OF THE OLD ICELANDIC COMMONWEALTH

1. Iceland became a member of the Council of Europe in 1950 and can consequently not be classified as one of the world’s new and emerging democracies. Iceland has arguably the world’s oldest national assembly (Althingi) dating back to the Old Icelandic Commonwealth (930-1262). It was established in 930 when the ruling chiefs (goðar) together with their advisers constituted the legislature (Lögregta) of the new Althingi. The chiefs administered justice in their own districts, and matters not settled there were referred to the Althingi. In this way they held both the legislative and judicial power. There was no executive power, but to chiefs fell the duty of seeing that such men as accepted their leadership received their rights, and to this extent they held the executive power. The system as a whole had no coercive power or law-enforcement agency and rested on a social contract. The laws of the commonwealth that remain and are known collectively as the Grágás (Grey Goose Code) show the Icelanders’ organizing ability, farsightedness and accuracy as well as skill in resolving legal difficulties.

2. The principal weakness of the form of government during the Old Icelandic Commonwealth was analogous to present day market syndromes of monopolies and concentration of power where private enterprise lay at the root of the social structure. Chiefdoms (goðorð), the clans of the chiefs, were not fixed by territorial boundaries and those dissatisfied with their chief could attach themselves to another chief. The position of the chief could be bought and sold as well as inherited. The seats in the legislature (Lögregta) were hence a marketable commodity, somewhat analogous to the harsh criticism of present day financing of political campaigns. The society was weaker than the weakest night watchman state as there was no executive branch of government. Killing was a civil offence resulting in a fine paid to the survivors of the victim. Enforcement of law was entirely a private affair.

2 See: Andrew Dennis, Peter Foote and Richard Perkins (translators): Laws of Early Iceland I, University of Manitoba Press (2007). There was for instance legal protection regarding equality in the case of dissolution of marriage. Upon getting married, a man had to pay a “bride-price” to his bride, and if they divorced, she was entitled to keep this money. This was her money and not part of the community property.
3 The period is remembered as the Golden Age in Iceland. http://www.newworldencyclopedia.org/entry/Icelandic_Commonwealth
4 http://www.daviddfriedman.com/Academic/Iceland/Iceland.html
3. Consequently with the passing of time the chiefdoms for large areas of the country became concentrated in the hands of fewer and wealthier chiefs. The rich and powerful could commit crimes with impunity as nobody was able to enforce judgment against them, which may provide another hypothetical analogy with the situation leading to the financial collapse in Iceland in 2008 – (Cf., infra paras. 9 and 10). The concentration of power and subsequent struggle was the main reason for ending of the commonwealth and for the country’s submission to the king of Norway (1262), when it entered into a treaty establishing a union with the Norwegian monarchy. Iceland was then passed to Denmark in the late 14th century when Norway and Denmark were united under the Danish crown. In the early 19th century, national consciousness was revived in Iceland.

4. The Althingi had been abolished in 1800 but was established in 1845 as a consultative assembly. In 1875 the Althingi received legislative powers again after Icelanders were given their first Constitution in 1874 when still part of the Danish kingdom. In 1903 the first important changes to the Constitution were made when Iceland was granted Home Rule, which went into effect in 1904. Considerable changes were made in 1915 when women got voting rights. A new Constitution went into effect in 1920 following the recognition of Iceland as independent of Denmark, though still in a personal union with the Danish king. The 1874 version of the Constitution remained in force virtually unchanged until 1944 when the Republic of Iceland was founded.

II. THE CONSTITUTION OF THE REPUBLIC OF ICELAND (1944)

5. The present Constitution of the Republic of Iceland dates from 17 June 1944 and has been amended six times since. These amendments have especially concerned setting constituency boundaries and guaranteeing equal voting rights but the most important change was made in 1995 when the human rights section was reviewed to comply with the requirements of the European Convention on Human Rights, which had been incorporated into Icelandic law in 1994 and other treaty obligations under international law.

6. The main clauses in the Constitution deal with organization of the state and the position of its citizens. The principal clauses provide that Iceland is a republic; that state power is divided into three parts, with legislative authority grounded in the people as expressed in democratic elections, that executive authority is dependent on legislative authority through the organization of representative government, that judicial power is independent; that the municipalities shall enjoy independence and that basic human rights shall be guaranteed.

7. Despite what may appear long standing democratic traditions in Iceland the banking system collapsed in October 2008 as a consequence of ongoing corruptive political and economic practices. Relative to the size of its economy, Iceland’s banking collapse is the largest suffered by any country in economic history. The collapse in everyday parlance does not only refer to the financial meltdown but also to the breakdown of trust towards authorities due to the lack of democratic accountability.

8. A report of the Special Investigation Commission (SIC) appointed by the parliament in December 2008 to investigate and analyze the processes leading to the collapse of the three main banks concluded in the spring of 2010 that ex prime minister was guilty of negligence alongside the former ministers of finance, commerce and foreign affairs for the 2008 collapse of the country’s banking system. Furthermore, the SIC stated that the Director General of the Financial Supervisory Authority (FME) and the Governors of the Central Bank had shown negligence.

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http://sic.althingi.is/


The Althing decided on September 28, 2010 with 33 votes against 30 to indict the former Prime Minister only. The Althingi prosecutor pressed charges against the former Prime Minister who is now standing trial for serious misconduct before the High Court (Landsdomur), a special court which was established in 1905 with the mandate to handle cases where members of the cabinet are suspected of criminal behavior. This is the first time that the Court is assembled. The Landsdomur has 15 members, five Supreme Court Justices, a district court president, a constitutional law professor and eight people chosen by Parliament every six years.
The 2000-page report also cited evidence of possible insider trading by key Icelandic investors. It found that money had been withdrawn by “insiders” only days before the banks went bust. The matter had been referred to a special prosecutor.

9. A phrase from Thomas Jefferson’s writings on an analogous situation may be used to describe the situation leading to the collapse: “The power had been in the hands of a few corrupt men who sacrificed the public interest to their own.”

The privatization process was started in the last decades of the 20th century with the stated aim of increasing economic efficiency by eliminating the distortions inherent in state-ownership. The hands-off approach to the economy; the increased power of financial actors through political campaign financing and control of the media led to an ever more authoritarian system, with a blurred distinction between elected authorities and the financial power holders. The authors of the SIC-report stated that the Icelandic authorities lacked both the power and the courage to set reasonable limits to the financial system.

10. There was very little public criticism of the ever growing banking system; the lack of transparency and the blurred line between elected authorities and the financial power holders. It has long been acknowledged that concentrating all the powers in the same hands, the legislative, executive and judiciary, is the definition of despotic government. There were no strict rules on campaign financing and the close ties that had developed between the political sphere and the financial community set the stage for systemic corruption. After the collapse there was growing criticism of the administration for its ineffectiveness due to longstanding nepotism at the cost of meritocracy, the progeny of democracy.

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12. The protestors demanded that the government of the Independence party and the Social Democrats would resign. A new government was formed in February 2009, although half of it, the social democrats were the other half of the previous government but with a new chairman and the left green party which had been in opposition since its founding.

III. AMENDING THE CONSTITUTION

13. The Venice Commission is of the opinion that having stronger procedures for constitutional amendment than for ordinary legislation is an important principle of democratic constitutionalism, fostering political stability, legitimacy, efficiency and quality of decision-making and the protection of non-majority rights and interests.


Thomas Jefferson Writings, The Library of America (1984), p. 245

It is now proposed by the Constitutional Council that [positive] discrimination on the basis of political affiliation will be prohibited; i.e. that individuals are rewarded with posts and promotions within the administration due to their political affiliations.

14. In the wake of the collapse the idea of reviewing the Constitution – to provide the basis for a more healthy political system to limit corruption – gained life. Demands had risen about the need to review various ground rules of the Icelandic administrative infrastructure such as the organization of the legislative, executive and judicial powers and the separation between those three branches of government. Furthermore there was a call for direct democracy through referendums.

15. There had been previous attempts since 1945 to revise parts of the Constitution. The Prime Minister in 2005 appointed a committee of nine representatives of the political parties represented in Parliament along with an expert committee of four scholars to submit a draft to amend the Constitution no later than by the end of 2006. The political committee was to decide which parts of the Constitution needed revision.

16. In February 2007 the above political committee handed in an interim report summing up its work since its appointment in 2005, stating that it needed longer time to finish the complete revision. It submitted however a draft amendment regarding the amendment clause of the Constitution in Article 79 recommending that a referendum should take place about the draft amendments which in their view was a more democratic method than stipulated in the current provision.

17. The current amendment provision of the Constitution stipulates in Article 79 that if the Parliament (Althingi) adopts proposals to amend or supplement the Constitution, the parliament must be immediately dissolved and a general election held. If the parliament then passes the resolution unchanged, it shall be confirmed by the President of the Republic and come into force as constitutional law.

IV. THE ADVISORY CONSTITUTIONAL ASSEMBLY AND THE CONSTITUTIONAL COMMITTEE

18. Prime Minister Johanna Sigurdardottir submitted a bill to the Parliament about an advisory Constitutional Assembly to review the Constitution in November 2009, which became an Act in June 2010. The explanatory report to this Act refers to the objective of such a constitutional assembly to be in line with democratic governance where the constitutional power is with the people. An actual democratic discourse had never taken place in Iceland about how these topics should be handled by the Icelandic Parliament. Furthermore the bill showed that due to the fact that political parties had not succeeded in reaching an agreement about necessary amendments to the current Constitution, there was a proposal that a special Constitutional Assembly be formed with 25 – 31 elected representatives who would take on this important task.

19. The Act No. 90/2010 on stated that when the Constitutional Assembly had agreed on a bill about a Constitutional Law, it was to be submitted to the Parliament for processing.

20. The Act on the Constitutional Assembly furthermore provided for the appointment by Parliament of a Constitutional Committee. This Committee’s role was to present ideas on constitutional amendments to the members of the Assembly. The Constitutional Committee subsequently elected the chairman from its rows; an expert in cell biology at the department of nursing in the University of Iceland. Other members include a professor at the faculty of law at the University of Iceland; a registrar of the EFTA Court, a professor emeritus in Icelandic literature; a law student; a member of the administrative staff of the Akureyri University/ researcher in constitutional matters and a civil servant with a law degree. The Constitutional Committee was to process the viewpoints on the core values of the Constitution which were to be found out by assembling one thousand Icelanders randomly to express these values and hand over a report to the advisory Constitutional Assembly.

21. In an election on November 27, 2010, 25 delegates were elected out of more than 500 candidates to the advisory Constitutional Assembly. The deadline for announcing candidacy was 18 October 2010 and the elections took place on 27 November 2010. A brochure published by the Ministry of the Interior, introducing the candidates and their agenda, was distributed into every household before the elections. A last minute attempt to meet criticism of the public’s lack of time to get acquainted with the candidates’ agenda – individuals from all spectrums of society – was
to have marathon interviews on the public service radio where each candidate got 5 minutes to make known his/her intentions with regard to constitutional amendments.

22. The Venice Commission has not set forth any formula for a new European “best model” or standards for constitutional change. The main difference with the attempt with the Constitutional Assembly as an advisory body from previous bodies appointed to come up with drafts or recommendations to amend the Constitution is that the Council is elected by the general electorate and is given wider scope than previously appointed political and expert committees. Its recommendations, however, have no binding force and hence its election cannot be regarded as anything but an experiment as the final word lies with parliament itself according to the Constitution.

V. SUPREME COURT INVALIDATION OF ELECTIONS TO CONSTITUTIONAL ASSEMBLY

23. The Supreme Court of Iceland invalidated the elections to the Constitutional Assembly in January 2011 after receiving complaints about alleged faults on the conduction of the elections (potentially traceable ballot papers; construction of ballot boxes etc).

24. The representatives of all parties but the Independence Party (dominant political party until through the time of the republic dating back to 1944 to the financial collapse in 2008) in the committee which was appointed to decide how to react to the Supreme Court’s invalidation of the elections decided to appoint the delegates that had been elected in the invalid elections to become members of a Constitutional Council or else the person next in line. On the basis of a parliamentary resolution the Constitutional Council was officially formed in April 2010 with only one of the elected members to the Assembly refusing to take a seat in the Council.

25. The appointment of the Constitutional Council was criticized for infringing the division of three branches of government with parliament invading the sphere of the judiciary. By appointing the invalidly elected delegates to a Constitutional Council the Parliament was in fact seen as undoing the decision of the Supreme Court to invalidate the elections. At the same time Parliament was also criticized for quashing its own legislation providing the Supreme Court with the final say in these matters. Such circumvention of constitutional principles was harshly criticized for not being appropriate given the aim to revise the constitution due to previous corrupt practices.

26. The Venice Commission has not addressed the question of legitimacy of constitutional change, as long as it is done by constitutional (as opposed to irregular and “unconstitutional”) means. The Constitutional Council is merely an advisory body and as such it can hardly be deemed as going against the prescribed formal amendment procedures, which is meant to guarantee the constitutional legitimacy of constitutional change. The attempt might however be criticized as providing authorities with an alibi for responding to the public anger and demand for change – if there is not a serious intention to adopt its proposals. The current Constitution requires intervening elections with the consent from two different parliaments – the one before and the one after the following election for the proposed amendments to go through. In light of the financial crisis and shaky political environment it seems doubtful that the current meager majority in parliament will adopt the proposals to amend the Constitution as that requires that the parliament must be immediately dissolved and general elections held.

27. If the above would prove to be the case the Venice Commission has pointed to pitfalls linked to rules to constitutional change that are too rigid, i.e. if the procedural and/or substantial rules are too strict they may create a lock-in, cementing unsuitable procedures of governance, blocking necessary change.

VI. THE CONSTITUTIONAL COUNCIL AND ITS TASK

27. The role of the Constitutional Council is to discuss the Constitutional Committee Report and prepare a bill about a revised constitution, taking into consideration the results of the National Forum 2010 (a randomly chosen 1000 representatives from the national register). The Constitutional Council decides which parts shall be revised and/or suggests new provisions or chapters be added to the current Constitution. The Constitutional Council was given four months to complete its role and it is comprised of the 25 delegates originally elected to the Constitutional Assembly which the Supreme Court invalidated. 17

28. When the Council has come to an agreement about a bill about a revised constitution the bill will be sent to national parliament (Althingi) for processing. The revised constitution does not come into force unless the requirements of the current Constitution are fulfilled and these requirements state that the national parliament (Althingi) has the final word with voting between two discussions.

29. General meetings of the whole Constitutional Council are called Council Meetings. All members of the Council participate in those meetings. Council Meetings are open to the public and anyone can attend while there is enough room.

30. According to a parliamentary resolution about the Constitutional Council the Council shall discuss the following matters in particular:

- The foundation of the Icelandic Constitution and its basic concepts.
- The organization of the legislative- and executive powers and their limits.
- The role and position of the President of the Republic.
- The independence of the courts and their supervision of other holders of state authority.
- Provisions about elections and the constituency system.
- Democratic public participation e.g. in the timing and arrangement of referendum, including a bill about constitutional laws.
- Transfer of state authority to international organizations and handling of foreign affairs.
- Environmental affairs, such as regarding ownership and utilization of

VII. INVOLVEMENT OF THE PUBLIC – THE CONSTITUTION IS BEING DRAFTED ON THE INTERNET

31. The Venice Commission has emphasized that constitutional reform is a process which requires free and open public debate, and sufficient time for public opinion to consider the issues and influence the outcome.

32. The Icelandic public has access to the work of the Constitutional Council on its webpage. Messages from the public are published on the website and there is a forum for discussion regarding the comments. The Council’s work can also be seen on the major social media sites such as Facebook and Youtub. On Thursdays at 13.00 there is live broadcast from the meetings of the Council on the webpage. The webpage also has regular news from the Council’s work as well as a weekly newsletter. Advertisements are published in the media encouraging the public to keep track of what is going on and to make comments.

33. The transparency of this process is to provide the opportunity for a genuine democratic discourse. The time is however limited as the Council when appointed was given four months to come up with a draft.

17 Apart from the one candidate who refused to take a seat in the Constitutional Council and the next in line was hence appointed.
VIII. SHORTCOMINGS WITH REGARD TO VC PRINCIPLES ON CONSTITUTIONAL AMENDMENTS

34. The Venice Commission has emphasized that amending the constitution requires a certain time delay, which ensures a period of debate and reflection.18

35. The four months that the Council has to draft the proposals is not much time for reflection. It will however be the national parliament and not this Council that will finally debate and consider the issues proposed by the Council.

36. The Venice Commission has furthermore emphasized that when drafting provisions on constitutional amendment, there is need for awareness of the potential effects of such rules; this requires both general and comparative analysis as well as a good knowledge of the national constitutional and political context.

37. The purposes for comparative analysis are to look for possible solutions to the constitutional problems with which the polity is confronted. Knowing constitutional issues provides new frames at looking at constitutional law. Knowing the political and economic and legal context is furthermore crucial to be able to clarify the nature of guaranteed rights from various angles and on various levels.

38. The members of the Council are not experts in constitutional comparativism or human rights jurisprudence – the framework to construct new constitutional arrangements. The composition of the Constitutional Council is a break from the domination of the legal elite, which is part of the prevailing legal tradition. The Council members come from various disciplines and backgrounds. Among them are two professors, one in economy, the other in theology, the chairman of the institute of ethics at the University of Iceland, an associate professor in political science, two young lawyers, a psychiatrist, two general practitioners, a farmer, a pastor, a nurse, undergraduates, an individual active in lobbying for the disabled, a labour unionist, a spokesman for consumers and a theatrical director – to give an example of the professional variety of the members.19

39. When members of the Constitutional Council have considered it important they have invited experts on various issues to come and address the Council on specific topics.20 From discussions in Council meetings it is evident that members furthermore seek advice from members of the Constitutional Committee.

40. It is not within the scope of this presentation to assess quality of the Council’s proposals (that has not finished its work at this stage) but according to discussions in the final stages there are no fundamental changes of the constitutional order.

41. Leaving aside any discussion on the competence of the Council in the area of constitutional science, the Icelandic experiment has evoked international attention. It is unlikely, however, that the Council’s revision will put its mark on history like the American Constitution drafted in a closed and cramped room in Philadelphia by 39 brilliant minds in 1787 – described 50 years later by Alexis de Tocqueville as a tour de force that “ought to be familiar to the statesmen of all countries”.21 It was a bold experiment in political ideals that has influenced constitutional making to this day. Among the founders were highly educated men that understood the basic axioms of Newtonian physics as well as the world of human affairs – the Federalist papers provide an insight into the cognition, erudition and foresight of these relentless thinkers.22 These intellectual qualities provided the grounds for a breakthrough in the science of government.

19 http://stjornlagarad.is/fulltruar/ accessed on 11 Juy 2011.
20 Not apparent on website who these experts are.
21 http://www.time.com/time/magazine/article/0,9171,964918-3,00.html
22 http://www.indiacause.com/blog/2011/03/05/america-creation-super-nation-superpower-economy/
The Icelandic Constitutional Experiment

IX. CONCLUSION

42. This is the first time Icelanders are forming their own constitution. The members of the Constitutional Council are new and inexperienced in the science of government – however the discussion is open and hence may work to the benefit of the drafting process as well as preventing errors. Time is though limited (4 months) and there has not been much feedback to the work of the Council or public debates on constitutional matters and required amendments in light of this experiment. The Council’s 4 month time is coming to an end by mid July.

42. The initiative of revising the Constitution comes from the authorities as a response to growing public frustration in the wake of the financial collapse. The invalidation of the election of the Constitutional Assembly by the Supreme Court and the subsequent appointment by Parliament of the invalidly elected members to the Constitutional Council may have diminished its authority in the eyes of the public as a credible body to propose constitutional amendments.

43. The forthcoming proposals from the Constitutional Council do not carry any legal weight. They might prompt political pressure but in light of the aforementioned facts (cf., 41 and 42 supra) it is unlikely that there will be uproar if there is no reaction. Unlike what took place in France with the Declaration of the Rights of Man in 1789 and much more recently during the South African Bill of Rights debate – there was in both cases agreement on the need for a Bill of Rights. At present in Iceland there is not an agreement for the need for a new constitution or furthermore whether the political and social ills leading to the crash can be blamed on constitutional deficiencies.

44. The current Constitution requires intervening elections with the consent from two different parliaments – the one before and the one after the following election for the proposed amendments to go through. In light of the financial crisis and shaky political environment it seems doubtful that the current meager majority in parliament will adopt the proposals to amend the Constitution since it requires that the parliament must be immediately dissolved and general elections held.

45. The historical opportunity to rewrite the Constitution may be lost due to the inherent rigid amendment requirements of the current Constitution and possibly lack of real political will to change it. How are the elected authorities expected to follow through at their own initiative with a procedure that may curtail their own power or eliminate their political life? Even if there was scope to amend the Constitution without dissolving Parliament – like in Finland where a constitutional amendment may be adopted within the same legislative period provided that certain conditions are fulfilled, notably in urgent cases – such definition, i.e. of the urgent amendment is lacking in the Icelandic experiment if the Parliamentary Resolution list of matters is taken as a starting point (Cf., Para 30 supra).

46. Although it may be well justified that it is urgent to amend the Constitution – the clear and reasoned facts are not stated as to why changes are necessary and which amendments are absolutely crucial. If the members of the Constitutional Council are to come up with successful proposals – a tour de force – ensuring the effective realization of fundamental rights in the constitutional order – it seems they are faced with almost a heroic task like when Galileo pointed out that the earth was not flat.

23 Jefferson, p. 243

THE MODERN MODEL OF CONSTITUTIONAL REVIEW IN THE REPUBLIC OF KAZAKHSTAN

Rogov I.I. – Chairman of Constitutional Council of Republic of Kazakhstan

The Constitution of the Republic of Kazakhstan, adopted on 30 August 1995 through the republican referendum, was the basis for reforming the government of independent Kazakhstan, including constitutional justice.

Today, constitutional review in Kazakhstan is assigned to the quasi-governmental agency called the Constitutional Council, which replaced the Constitutional Court while adopting the current Constitution of the country. The legal basis for the organisation and activities of the Council are the Constitution and the Constitutional Act of 29 December 1995 “On the Constitutional Council of the Republic of Kazakhstan”. Section six of the Constitution contains the fundamental rules establishing constitutional review in the Republic, whose implementation is assigned to the Constitutional Council. The Constitutional Council is not included in the judicial system, and is a public body, which ensures the supremacy and the legal protection of the Constitution as the Basic Law of the State throughout the territory of Kazakhstan.

The Constitutional Council, in the exercise of its powers, is self-sufficient and independent from government agencies, organisations, officials and citizens; it is subject only to the Constitution and cannot make its decisions based on political or other motives. The French system served as a model for the development of the institution of constitutional review in Kazakhstan. However, there are some differences, including the principal character, from the French model.

Kazakhstan’s Constitutional Council consists of seven members. The Chairman and two members of the Constitutional Council are appointed by the President of the Republic, and two members are appointed respectively by the Council of Senate and the Majilis of the Parliament. Before the constitutional reform was carried out in the country in May 2007, Council members, the same way as in France, were appointed by the Presidents of the Chambers of Parliament alone. Presently, it is the Chambers of the Parliament that ensures broad participation of the deputies, and, indirectly, the interests of the population in the formation of the Constitutional Council.

The term of office of a member of the Constitutional Council is six years. Half of the members of the Constitutional Council shall be renewed every three years. Ex-presidents of the Republic have the right to remain the life-long members of the Council.

The Chairman and members of the Constitutional Council are not accountable to anyone with regard to the activities pertaining to the issues of constitutional proceedings. Any interference in their activities is impermissible. Nobody has the right to require the Chairman and members of the Constitutional Council to report on the exercise of their powers. For a free and independent review of the cases under consideration by the Council, nobody has the right to require the Chairman and members of the Constitutional Council to express an opinion or to seek advice on matters that are the subject of consideration by the Constitutional Council, until a final decision is made by the Council.

Constitutional Councils of France and Kazakhstan have many features in common. They both are independent governmental agencies with non-judicial functions. Constitutional proceedings can be initiated only by a limited number of governmental entities: the President, the Prime Minister, the Presidents of the Chambers of Parliament, or not less than one fifth of the total number of deputies of the Parliament.

Constitutional Council of Kazakhstan mainly carries out the so-called preliminary constitutional control. The Constitution establishes the mandate of the Constitutional Council, which includes: decisions in case of dispute on the correctness of the election of the President, Members of Parliament and holding of the referendum; consideration of the laws adopted by Parliament on their compliance with the Constitution of the Republic before the President signs them; consideration of the ratification of international treaties of the Republic with reference to the Constitutionality; the official interpretation of the Constitution; giving conclusions on cases under consideration by the Parliament on the issues of early dismissal of the President of the Republic from the office on the grounds of illness and removal from the office in case of high treason.
The Constitutional Council carries out the so-called follow-up of the constitutionality of laws and other normative legal acts presented by courts. In accordance with Article 78 of the Constitution, the courts have no right to apply laws and other regulatory legal acts that infringe upon the rights and freedoms of citizens. If a court deems that a law or other regulatory legal act subject to application infringes on the rights and freedoms of citizens, that court is obliged to suspend legal proceedings and apply to the Constitutional Council with a proposal to declare the act unconstitutional. Considering the appeal of that court on declaring a legal act unconstitutional, the Constitutional Council protects the constitutional rights and freedoms of individuals indirectly through recognition of an act or part thereof to be unconstitutional. This mechanism works very efficiently. There is no conflict of interests between the courts and the body of constitutional review in the country. In addition, it provides citizens with the right to appeal indirectly to the Constitutional Council, which is an important argument against the reproach on the absence of citizens’ rights to appeal to the Constitutional Council, as opposed to the constitutional courts.

It is also the competence of the Constitutional Council of the Republic of Kazakhstan to give an official interpretation of the provisions of the constitution. To ensure the legality of the constitution, it is important to establish a uniform meaning and content of constitutional norms. Making official interpretation of the constitution the prerogative of the Constitutional Council ensures the correct understanding and application of the constitution for all citizens and authorities, and excludes any erroneous or confusing interpretation of the Constitution. The Constitutional Council of France does not have such an authority.

During the period of its functioning, the Constitutional Council received over 180 applications: 28 – on the constitutionality of laws adopted by the Parliament before they are signed by the President, 77 – on the official interpretation of provisions of the Constitution, 57- on recognising normative legal acts unconstitutional, according to representations of courts. In accordance with Article 72 of the Constitution to the Constitutional Council of the Republic, various officials applied to the Council in the following manner: President – 19 times, Chairman of the Senate – 8 times, the Chairman of the Majilis – 16 times, MPs – 39 times, Prime Minister – 20 times, the courts of the Republic – 57 times.

The Constitutional Council of Kazakhstan gives effect to its power, in accordance with the principles of independence, autonomy, fairness, security of tenure, collegiality, and its subordination only to the Constitution.

Decisions of the Constitutional Council come into force from the date of their adoption; they are binding throughout the Republic, final, and are not subject to appeal. Decisions of the Constitutional Council entail specific legal consequences. The law and international treaties of the Republic that are declared unconstitutional cannot be signed or ratified and put into effect. Laws and other normative legal acts that are recognised to be infringing upon the constitutional rights and freedoms of citizens lose legal power and cannot be implemented. Elections of the President and Members of Parliament, or a national referendum, recognised by the Constitutional Council as not consistent with the Constitution are declared invalid.

In accordance with the Constitution and the Constitutional Law “On the Constitutional Council of the Republic of Kazakhstan”, regulatory decisions of the Constitutional Council are part of the existing law of the country and their validity is equal to the norms of the Constitution itself. They can cancel a law (including constitutional) and other regulatory legal acts completely or in part in case they conflict with the Constitution.

The right to make objections to the decisions of the Constitutional Council is endowed with only the President of the Republic. This right of the Head of State stems from its legal status as the symbol and guarantor of the inviolability of the Constitution, the rights and freedoms of human beings and citizens.

I would like to emphasise that an objection by the President does not mean the abolition of the relevant decision of the Constitutional Council, and the objection is merely a pretext for re-consideration. The decision of the Council remains valid, if the President’s objections are overcome by two-thirds of votes of all members of the Constitutional Council. When objections of the President remain unresolved, the decision of the Constitutional Council is not adopted. The practice of constitutional proceedings demonstrates the viability of this practice. Over the years, the President thrice brought his objections to the Constitutional Council, and only once his objections were partly not overcome.

One of the objectives of the Constitutional Council is to prepare the annual messages on constitutional legality in the Republic. In this document, the Constitutional Council analyses the current legislations, and practice of their application in terms of their compliance with the Constitution, and draws the attention of relevant government agencies to any shortcomings that are found. Under the Constitution, such messages are heard at a joint session of the two Chambers
of the Parliament, thus they are “targeted”, in the first place, to the Parliament, the supreme representative body of the Republic. The text of the message is submitted to the President of the Republic. In addition to it, the Constitutional Law “On the Constitutional Council of the Republic of Kazakhstan” determines that the Chairman of the Constitutional Council informs the President of the Republic about the constitutional legality in the country at his request.

The Constitution does not define the order of execution of decisions of the Constitutional Council. Under Article 40 of the Constitutional Law “On the Constitutional Council of Kazakhstan”, the Constitutional Council may determine the order of enforcement of its decisions. The Constitutional Council is informed on the measures taken to implement its decisions by the state bodies and officials within the period prescribed by the Constitutional Council.

The positive impact on implementing the decisions of the Constitutional Council is regularly discussed at the meetings of the consultative body – the Council of Legal Policy under the President of the Republic of Kazakhstan.

Summing up, we can say that Kazakhstan’s model of constitutional review is justified. If there are any problems, they are not conceptual and are systematically solved. 29 December 2010 marked the 15th anniversary of the formation of the Constitutional Council of the Republic of Kazakhstan. Fifteen years of activity of the Constitutional Council of Kazakhstan has shown that the body has become an important tool for ensuring the constitutional legality in the Republic, and took a worthy place in the state mechanism of Kazakhstan.
ROLE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA AGAINST THE BACKDROP OF ECONOMIC RECESSION

Dr. iur. Uldis Kinis – Justice of the Constitutional court of The Republic of Latvia

EVOLUTION OF THE CONSTITUTIONAL COURT – THREE PERIODS

1. The first important period in the history of Constitutional Court of Republic of Latvia was from the foundation of the Court in 1996 until year 2000, when cases were reviewed only in the procedure of abstract constitutional control. At this time only a few governmental institutions or officials, like President, 1/3 of the members of Parliament, Government, municipalities, Plenary of the Supreme Court and Prosecutor general, had the right to submit a claim to the Constitutional court.

Taking in to account the limited number of possible claimants, the number of submissions received by Constitutional court was quite low, only 6 – 9 submissions per year. However all of these submissions were accepted and reviewed by the Court, and most of the cases ended with a judgment of the Constitutional Court.

2. At the ending of year 2000, Parliament passed amendments to the Law on the Constitutional Court, by that beginning the second most noticeable period in the history of Constitutional Court. Most important change in the Law on the Constitutional Court was inclusion of constitutional complaints in the jurisdiction of Constitutional Court, where any individual could submit a claim in cases when legal norm was violating his basic rights. From that time on, Constitutional court reviewed most of its cases in the order of concrete constitutional control.

Introduction of constitutional complaints in the jurisdiction of Constitutional Court considerably broadened the range of possible claimants in the Constitutional proceedings. Not only a limited number of State institutions could submit a claim to the Constitutional Court, but such possibility was offered to all citizens as a part of their rights protection mechanism.

The number of claims submitted to the Constitutional Court increased just as the range of the possible claimants, and reached 126 – 475 unique submissions per year, while the number of rulings increased to 17 – 48. Although such number is several times larger than in the previous period, Constitutional court could manage such amount of work.

Taking in to account that protection of basic rights in constitutional proceedings was not previously practiced in Latvia, gaining and maintaining the trust of society was a new challenge to the Constitutional Court. The quality of legal argumentation in the rulings of Constitutional Court played the greatest role in this task, because it had to be sufficiently complicated for the lawyers to analyze and simple enough for any citizen to understand. Constitutional Court of the Republic of Latvia managed to fulfill this task, and in a short time could become one of the most popular right protection mechanisms in the State.

3. New challenges were brought before the Constitutional Court of Republic of Latvia in 2008, when the economic recession of the world reached Latvia, by that beginning the third period in the history of the Constitutional Court.

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1 In my short presentation I will briefly try to show you way of the development of the CC of the Republic of Latvia. I think that facts which I will include in my presentation, will give you more understanding, how difficult for Latvian people was to manage crisis. 9 December 1996 is considered to be the birthday of the (Satversmes tiesa) Constitutional Court of Republic of Latvia. It means that we will also celebrate our 15th anniversary in December of this year. On this occasion Court will also organize international conference, which will take place on December of this year. In these fifteen years Constitutional court has experienced three different periods of evolution, each of them representing different challenges and increasing the number of cases reviewed.
My distinguish colleague, Former Vice President of the Court, Justice V. Skudra who sadly passed away a month ago, described the role of CC during economic recession period - something like as “lightening conductor” between state powers and society.  

Not only the quantity of the submissions, but also the quality of the submitted claims had increased, and the matters of the cases concerned very specific and complicated matters of law, like cases about life conditions in prisons, data protection, banking, insolvency, social security and procedural matters, so it became difficult for the Constitutional Court to manage the increasing workload. Under such circumstances the Constitutional Court of Republic of Latvia had to find new possibilities to manage the work, and one of the most interesting methods found was the argumented refusals.

Many of the claims submitted to the Constitutional Court have fulfilled the technical requirements that are set by the Law of the Constitutional Court, however the argumentation has been obviously inadequate and the claims had no reasonable expectation to be satisfied, so the Constitutional Court begun to refuse such claims by giving a broader argumentation and maybe even advices, how an individual could defend his rights with other available procedures and guidelines to legislator how to proceed. According to the previous practice, such cases would be reviewed in a full decision, however preparation of a full decision takes a large amount of time and work. In such manner, Constitutional court could decrease its own workload, at the same time attempting to solve the problems of the individuals.

Indeed, instead of violent protest rallies, Latvian people chose legal way for defending their Constitutional rights. They made submissions to the Constitutional court and contested legal norms, which Legislator adopted during this period of time. The number of claims submitted to the Constitutional Court increased dramatically, reaching an astonishing number greater than four thousand in the year 2009. In spite of such workload, all cases Court reviewed in a due time, without any delays.

Fortunately the number of submissions and cases has decreased in 2010 and 2011, however the consequences of the economic recession can still be felt in the routine of the Constitutional court.

What characterizes economic crisis? It is the necessity to stabilize state budget expenditures. In order to achieve it, legislators and Cabinet must implement heavy social reforms, which significantly deteriorated life of many people, particularly those who are less socially protected, e.g. pensioners, handicap, poor people. However State powers during implementation of those tasks must act in accordance with Rule of law. It means maintenance of three fundamental pillars of law, namely, legal certainty- that law must provide those subjects to the law with the ability to regulate their conduct; justice and policy. Even in critical situation the State must act in accordance with principle of the socially responsible State.  

“The aim of a socially responsible state is to level the most vital social public difference and to ensure for every group of residents adequate living standard”. (see Judgment 2006-07-01, para 18).

Justice V. Skudra has offered the classification of the economic recession cases in three groups.

First of all, the Actual recession cases, that concerned the decreases in social security payments and other decreases in state budget expenditures. Such cases concerned some of the most painful topics to the citizens, for example, decrease of the pensions.

For example, in several of the pension cases Constitutional court has hound that such decreases are unconstitutional because they do not meet the requirements of the principle of socially responsible state. Accomplishment measures charged for State budget more than 180 Million Lats. Constitutional court has also reviewed several cases concerning decreases in the remuneration of judges. These cases involved not only the questions of social rights, but also quite interesting questions on independence of the judiciary branch of state power and individual judges.

Secondly, the Background of recession cases, that concerned legal matters, which have been regulated for some time, however nobody was actually interested in such matters before the beginning of recession.

3 Term socially responsible state was elaborated by jurisprudence of the CC, se judgment (Nr. 2006-07-01 un Nr. 2008-08-0109)
Role of The Constitutional Court of The Republic of Latvia Against The Backdrop of Economic Recession

For example, cases concerning procedural norms in civil debt collection. Such regulations were considered adequate during economic development period, however economic recession dramatically increased the numbers of debt collection proceedings and individuals tried to challenge both, the norms that permit faster and simpler debt collection, just as the norms that slowed down such proceedings. Both the creditors and debtors took active part in such proceedings. Constitutional court has also reviewed a case that concerned remuneration guarantee fund for the employees of insolvent companies. Payments that employers had to make to the fund were decreased during the good times, however after the recession savings in the fund became insufficient because of the increasing number of insolvent companies.

And thirdly, the Prevention of further recession cases, that concerned legal norms, that the Parliament had passed to prevent similar situations in the future.

The best examples of such cases would be the ones about changes in banking regulations, that allowed the government to take control of credit institutions that have financial difficulties in order to prevent the insolvency. Taking in to account that an insolvency of banks can significantly damage financial situation in all state, such regulations were found necessary, however such regulations may be unfavorable to the owners of the banks, so they attempted to challenge the constitutionality of such regulations.

STRUCTURE OF CASES

This time has also shown that some types of cases appear before the court more often than others. Some of such cases are about territorial planning’s of municipalities, where the court has to evaluate collision between persons rights to property and societies right to live in a good environment. Prisoners often complain about regulations that restrict their rights while living in prisons. After the cuts in the budget, people often complain about their social rights to receive some benefits from the State. Such cases also involve other legal matters like equality, proportionality and legal certainty, and altogether these cases manifest the greatest majority of all questions reviewed in the constitutional court.

ENFORCEMENT OF THE JUDGMENTS OF THE CONSTITUTIONAL COURT

Section 31 of Constitutional court law states that:

(1) A Constitutional Court judgment shall be final. It shall enter into effect at the moment of its pronouncement.

(2) The Constitutional Court judgement and the interpretation of the relevant legal norm provided therein shall be obligatory for all State and local government institutions (also courts) and officials, as well as natural and legal persons. [...] .

This is not just text of the law, but it creates real strong legal guaranties that every person, body shall act in accordance with rulings of the court and we are proud to say that during 15 years of court practice there was not a single situation when legislative or executive power refused to comply with the Judgments. Although the primary effect of the rulings of Constitutional court is to evaluate whether a legal norm is in compliance with constitution, the argumentation included in these rulings has turned out to be quite significant in other matters, for example, giving guidelines for the legislator on necessary amendments to the law, providing interpretation of the norm that it would be correctly applied in practice, and also by causing discussions between academics.
Although Constitutional Court of the Republic of Latvia passed multiple judgments unfavorable to the Parliament and Government, State institutions have always complied with the rulings of the Constitutional Court, even if that has taken large sums from State budget.

Finally I would like to say few words about building confidence of society.

As it was mentioned before, Constitutional court enjoys great level of public confidence. For example, in 2010 in a social pooling among other public institutions, Constitutional court got uppermost rate of public confidence 70%. It is great achievement. Three key elements in this regard should be mentioned:

1. **Strict procedural rules and time-limits.** During 15 year practice, court in spite of increasing workload never allowed violation of time limits. As it is explained before, such result was possible thanks to excellent court management and new elaborated methods, e.g. argumented refusals, leveling of workload between judges, etc.

2. **Independent decision making process.** From the beginning CC demonstrated that all court rulings were based on objective and well reasoned conclusions. Conclusions were made without any political, administrative etc. influence. We are strictly following the rule of law.

3. **Enforcement of judgments.** Law says – The Constitutional Court judgement and the interpretation of the relevant legal norm provided therein shall be obligatory for all State and local government institutions (also courts) and officials, as well as natural and legal persons. […] During 15 years of practice, not a single case can been found when Parliament or Government or other public institution declined to implement the rulings of the court.

In conclusion, it is worth to say that Satversmes tiesa nowadays not only finds the credence of society, but also plays a role of important juridical authority for strengthening democracy and building Rule of law society in Latvia.

This shows that the Constitutional court has met the expectations of the People by securing the protection of their constitutional rights and we will improve those tasks also in Future.
In the contemporary world the Constitutional Court is an important factor of stability and guarantee for the ongoing progress of society and state. Due to this institution, acute political problems are solved in the framework of the law and on the basis of law.

A particularly important role plays the Constitutional Court under conditions of modern Republic of Moldova, evolving towards the formation of a legal state and civil society. As the sole body of constitutional review in the Republic of Moldova it acts since February 23rd, 1995.

The Republic of Moldova did not have any experience or tradition of constitutionalism. After an undertaken analysis of the world’s constitutional practices, the country has chosen the European model of constitutional justice.

For the first time in the history of our country there was set up a political and legal institution, whose main purpose – ensuring the supremacy of the Constitution, ensuring the implementation of the principle of separation of powers into legislative, executive and judiciary ones, building of a democratic state of law, safeguarding state’s responsibility towards the citizen.

According to Article 1 of the Constitution, adopted on 29 July 1994, the Republic of Moldova is proclaimed as a democratic legal state, in which human dignity, rights and freedoms, free development of human personality, justice and political pluralism are supreme values and are guaranteed.

In order to build a legal state, the Republic of Moldova has made every effort to ensure the rule of law, firm respect for fundamental individual rights and freedoms by state institutions.

In the first stage of its activity the Constitutional Court was faced with certain difficulties. Initially, on the grounds of the old legal thinking, the activities of the Constitutional Court was met with disbelief as there was for the first time established an institution empowered to declare unconstitutional any act of the President, Parliament or the Government, in this way ensuring the supremacy of the Constitution.

Being in the process of formation, democratic institutions and state organs were not always strictly observing their competences.

Opinions were also expressed with regard to the possibility of the Parliament of the Republic of Moldova to reconsider or bypass the decisions of the Constitutional Court due to the fact that, in contrast to the Constitutional Court, the Parliament has the authority to carry out its activities on behalf of the people without taking into account the fact that in its work it is obliged to comply with the provisions of the Constitution.

During sixteen years since its existence the Constitutional Court of the Republic of Moldova has established itself as an institution with a great potential, capable to defend the Constitution. Designed to avoid interference of one power into the authority of another power, to maintain balance and facilitate their interaction, in this period there were declared unconstitutional 178 normative acts.

The main task of the Constitutional Court – implementation of constitutional review of normative acts which it is obliged to assess from the legal and constitutional points of view and not from the standpoint of expediency. In its decisions the Court releases purely legal positions, regardless of practical feasibility or political views.

The Constitutional Court has an impact on the legislator, the political concept of the need to be guided by constitutional principles upon adoption of laws and solving matters of authority.
All the branches of power should be interested in the fact that the normative and legal system be based on two principles: legality and constitutionality.

In accordance with the requirements of constitutional review, the principle of legality means the law in ordering a single, coherent system, in strict conformity with the hierarchy of legal norms.

The principle of constitutionality includes legal means and methods of ensuring compliance of legal norms with the Constitution.

Human rights are enshrined and guaranteed by the Constitution and extended by laws. Compliance of laws with the Constitution are obligatory condition for the legal state, whose purpose is to strengthen respect for human rights and observance of human values.

Constitutional control is meant to ensure supremacy of the Constitution and the law.

Supremacy of law means the rule of law in all spheres of public life and the contents of laws must be permeated with ideas of social justice, freedom, equality, etc.

The principle of supremacy of law has become one of the attributes of the rule of law and within the state constitutional justice must comply with it.

In its Decision of 21st of December 1995, the Constitutional Court noted that the state’s Constitution governs the basic social relations that are essential for the establishment, maintenance and performance of power.

In the legal state the principle of legal certainty is essential, in particular, it must be respected in the field of application of penal, civil and administrative law. In its decisions the Constitutional Court noted that lawmaking should be based on the principle of legal certainty which requires clarity, accuracy, non-discrepancy, logical consistency of legal norms.

The Constitutional Court has repeatedly spoken out on the need to safeguard and protect the right to an effective remedy by the competent courts for violations of rights, freedoms and lawful interests of persons (Article 26 of the Constitution) and the right to protection (Article 26 of the Constitution) in a series of rulings.

The Constitutional Court interprets the right to judicial protection as an inalienable, absolute, not subject to restrictions on human rights taking into account the principle of rule of law.

The decisions of the Constitutional Court formulated the basic principles of rule of law, the priority of generally recognized norms of international law, direct action of constitutional norms, respect for the hierarchy of normative acts, access to justice, inadmissibility of giving non-retroactivity to normative acts leading to worsening the position of participants in legal relationships, social justice, equality, solidarity, humanity, state’s responsibility towards the citizen.

While exercising constitutional review, the Court noted the need to respect the proportionality between the restrictions laid down by law regarding rights and freedoms of citizens and other values and objectives protected by the Constitution.

Given such a criterion as the proportionality limit of rights and freedoms of citizens, the Constitutional Court verifies to what extent the principle of proportionality is being implemented, arising from the constitutional principles and foreseeing observance of proportionality between the state and public interests and the need to protect the rights and freedoms of citizens.

By its decisions and views addressed to the legislator, the Constitutional Court acts indirectly as a “lawmaker”, setting forth clear legal positions and creating a constitutional doctrine, asserting constitutional values which contribute to conferring constitutional nature to state and public life.

The jurisprudence of the European Court of Human Rights plays an important role in the activity of the Constitutional Court. The Court motivates its position in the light of the constitutional principles of the Constitution and, respectively, the jurisprudence practice of the European Court of Human Rights. In this regard, the Constitutional Court by its Decision № 10 dated 16 April 2010 on reviewing the ruling of the Constitutional Court № 16 of 28 May 1998 “On the interpretation of Article 20 of the Constitution of the Republic of Moldova” has reconsidered its practice in the implementation of the constitutional review of administrative acts of individual character issued by the Parliament, the President of the Republic of Moldova and the Government in the exercise of its powers relating to the selection,
appointment and removal from public office of state officials who represent particular public interest, designated or elected for a certain period.

The Constitutional Court justified the revision of the Decision № 16 of 28 May 1998 by the fact that both in law and in the jurisprudence of the Constitutional Court of the Republic of Moldova there are many uncertainties with regard to access to justice of state officials who are representing a particular political and public interest, as well as possible contradictions between the jurisprudence of the Constitutional Court of the Republic of Moldova and the jurisprudence of the ECHR as a result of changes introduced in its practice in the recent years.

Under the new interpretation of Article 20 of the Constitution of the Republic of Moldova, the Constitutional Court pointed out that the acts of individual nature of the Parliament, the President and Government referring to selection, appointment and removal from public office of public officials who are representing a particular political interest cannot be subject to constitutionality review upon the request of the subjects enjoying this right.

As concerning state officials who are representing a particular public interest appointed for a fixed term, the Court decided that in order to ensure a certain level of independence, good faith in exercising their duties and complete fulfillment of the terms of office for which they were elected or appointed, they should be entitled to guarantees of a fair trial in case of labour disputes. So, the judges of the Constitutional Court, the judges of the Supreme Court, the Prosecutor General and other persons the attitude must be different than to politicians.

The Court emphasized that the acts of individual character concerning the above-mentioned officials may be subject to control of constitutionality with a view to the form and adoption procedure.

Subsequently, the Constitutional Court in its Decision № 95 dated 21 May 2010 on the control of the constitutionality of the Law “On making amendments and addenda to some legislative acts,” admitted partially unconstitutional the Law on supplementing the list of state officials representing special political and public interests, not subject to appeal to the administrative court.

Subjecting the constitutionality review of the Parliament Ordinance № 30-VIII dated 4 March 2010 “On the dismissal of the President of the Supreme Court”, the Constitutional Court has applied a new legal position and found it unconstitutional, pointing out that there was a violation of a procedural nature since there was no relevant proposal of the Supreme Council of Magistracy. The Constitutional Court underlined that the Parliament had violated the principle of separation and interaction of state powers in the state (Article 6 of the Constitution), the provisions on the status of the President of the Supreme Court (Article 116 part (4) of the Constitution) and the Law on the Status of Judges (Article 21 part 2).

The Constitutional Court of the Republic of Moldova considers that the constitutional review of normative acts would be more effective if citizens had the opportunity to apply to the Constitutional Court directly or through the courts of any level.

While exercising constitutional review in the light of its decisions, the Constitutional Court should raise confidence and faith in the future of civil society in building a legal state. This can be done through objective application of constitutional principles and progressive international practices and through giving correct direction to the legislator and enforcement agency for the unquestioning execution of constitutional principles.

The experience of the Constitutional Court of the Republic of Moldova on implementation of constitutional review suggests that under the separation of powers, strengthening of statehood and development of democracy, the Constitutional Court proves to be a necessary and effective institution in a legal state.
1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?

The status of the constitutional judges, starting with the legislative provisions, the powers of the public authorities related to their appointment, the possibility for the same authorities to dismiss them, as well as the grounds for dismissal, duration of the term of office, as well as the possibility of a new term of office as judges are the factors based on which their independence and even the limitations in the fulfilment of their term are measured.

1.1. Parliament’s role in the procedure for appointing the judges to the Constitutional Court.

Varying from case to case, Parliaments play an important role, sometimes even exclusive, in the appointment of constitutional judges.

a – Parliament has exclusive power to appoint judges to the Constitutional Court.

Consequently, in Germany, all constitutional judges are appointed by the Parliament. Half of the judges of a chamber are elected by the Bundestag, whereas the other half – by the Bundesrat – which means the directly elected representation of the people and by the Land representatives, based on the proportional representation rules. In Switzerland, the federal Parliament elects the judges of the Federal Tribunal, based on proposal by the Judicial Committee. In Poland, the 15 constitutional judges are individually appointed for a 9-year term of office, by the first Chamber of the Parliament. In Hungary, the eleven constitutional judges are elected by the Parliament. In Croatia, all thirteen judges are elected by the Croat Parliament. In Montenegro, the Constitutional Court judges are appointed by the Parliament.

b – Parliament appoints part of the judges to the Constitutional Court.

In France, the nine members of the Constitutional Council are appointed for a nine – year term, and, more specifically, three of them every other three years. With every renewal, one member is appointed by the president of the National Assembly and a second by the President of the Senate. In Latvia, of the seven judges of the Constitutional Court validated by the Parliament, three are proposed by at least ten members of the Parliament. In Lithuania, of the nine constitutional judges, one third is appointed based on proposal by the president of the Parliament. In the Republic of Moldova, the procedure to appoint judges to the Constitutional Court is a result of the principle of separation of powers in the State, enshrined in Article 6 of the Constitution, but also of the exclusive substantive jurisdiction of the Court to enforce this principle. Thus, two judges are appointed by the Parliament, two by the Government and two by the Superior Council of Magistracy (Article 136 par. (2) of the Constitution). In Portugal, the Parliament shall appoint ten out of the 13 judges. In Romania, the appointment of the constitutional judges is based on the provisions of Article 142 par. (3) of the Constitution, as follows: three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania. It is worth pointing out that the legislator appoints two thirds of the constitutional judges, whereas the executive, through the President of Romania, appoints one third of their total number. In Spain, of the twelve constitutional judges, four are appointed by the Congress of Deputies and four by the Senate. In Armenia, the National Assembly appoints five of the nine members of the Constitutional Court. In Belarus, of a number of 12 judges, six are elected by one of the Chambers of Parliament, whereas other six are appointed by the President of the Republic. In Turkey, two of the
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17 judges of the Constitutional Court are elected by the Large National Assembly. The rest of 15 members of the Constitutional Court are selected by the President of the Republic.

c – Parliament appoints constitutional judges based on proposal by the Head of State.

In Russia, the judges of the Constitutional Court are appointed by the Federation Council, in a secret ballot, based on proposal by the President of the Russian Federation.

In Slovenia, judges at the Constitutional Court are elected by the National Assembly, through a secret ballot, based on the majority vote of the total number of Deputies, and based on proposal by the President of the Republic. In Azerbaijan, the appointment of Constitutional Court judges are made by the Parliament, based on recommendation by the President of the Republic. In Slovenia, the Constitutional Court judges are elected by the National Assembly, based on proposal by the President of the Republic of Slovenia.

d – Parliament makes proposals to the Head of the State with respect to the appointment of judges to the Constitutional Court.

Thus, in Austria, the constitutional judges are appointed by the Federal President, who, is, however, bound by the recommendations made by the other constitutional bodies. Consequently, of the 12 constitutional judges, three are appointed based on the recommendation by the National Council (the Parliamentary Chamber elected through a direct vote based on a proportional system), whereas other three members are appointed based on a proposal by the Federal Council (the Parliamentary Chamber appointed indirectly and which represents the länder of Austria). In Belgium, the 12 judges of the Constitutional Court are appointed by the King based on a list that is alternatively presented to him by the House of Representatives and the Senate. Usually, the King shall appoint the person who ranks first on the list of that House. Consequently, in reality, the judge is not appointed by the King, but by either the Deputies or the Senators. In practice, when they appoint the judges, the parliamentarian assemblies exercise the principle of proportionality, therefore the composition of the Court shall reflect the composition of the assemblies. Consequently, no candidate will have the opportunity of being recommended, unless they have the support of the political group which holds the respective position.

e – Parliament expresses its consent in connection with the proposals of the Head of State concerning the appointment of judges to the Constitutional Court.

Thus, in Albania, the members of the Constitutional Court shall be appointed by the President of the Republic, with the consent of the Assembly. In the Czech Republic, the Constitutional Court judges are appointed by the President of the Republic, based on the consent of the Senate.

f – Parliament does not participate in the appointment of judges to the Constitutional Court.

In Luxembourg, the Parliament is not involved in the procedure of appointment of judges, whereas in Ireland, the Parliament does not have a direct role in the appointment of judges at the Supreme Court. In Cyprus, the Parliament does not take part in the appointment of judges at the Supreme Court which is the authority empowered to carry out constitutionality reviews. The members of the Supreme Court are appointed by the President of the Republic. However, the President asks the Court to express its opinion, which is usually observed.

1. 2. The Government’s role in the procedure for appointing the judges to the Constitutional Court.

In some States, the Government plays an important role, sometimes an exclusive one in the appointment of constitutional judges.

a – Government has exclusive power to appoint judges to the Constitutional Court.

Thus, in Ireland, the Government has the exclusive jurisdiction to appoint constitutional judges. The Government, after having selected a candidate for appointment, informs the President of Ireland on their appointment, whereas the President officially appoints the candidate. In Norway, the ordinary courts, in whose hierarchy, the Supreme Court rules
as a last instance court, are competent to conduct the constitutionality review in terms of laws adopted by the Norwegian Parliament. The Norwegian Parliament does not take part in the appointment of judges. Judges are appointed by the State Council.

**b – Government appoints part of the judges to the Constitutional Court.**

In *Spain*, of the twelve constitutional judges, two are appointed by the Government.

**c – Government makes proposals for the appointment of judges to the Constitutional Court.**

Thus, in *Austria*, constitutional judges are appointed by the Federal President, who, however, is bound by the recommendations made by the other constitutional bodies. Therefore, of the 12 constitutional judges, six are appointment based on proposal by the Federal Government. In *Latvia*, of the seven judges of the Constitutional Court, who are validated by the Parliament, two are proposed by the Cabinet of Ministers.

### 1.3. Following their appointment, may the same authority revoke the judges of the constitutional court?

In most States, following their appointment, the constitutional judges cannot be dismissed by the authority that vested them with this high office.

By exception, the dismissals may be likely to occur, as follows:

In *Albania*, subsequent to their appointment, Constitutional Court judges may only be dismissed by the Assembly, based on a majority vote of two thirds of the number of members in the Assembly. In *Armenia*, the National Assembly is authorized in the cases and procedures prescribed by Law, on the basis of the conclusion of the Constitutional Court and by a majority vote of the total number of Deputies terminate the powers of any of its appointees to the Constitutional Court. In *Azerbaijan*, the provisions under Article 128 of the Constitution define the grounds and the dismissal procedure applicable to Constitutional Court judges. So, should a judge commit an offence, the President of the Republic of Azerbaijan, based on conclusions of Supreme Court of the Republic of Azerbaijan, may make statement in Milli Mejlis (Parliament) of the Republic of Azerbaijan with the initiative to dismiss judges from their office. Such conclusions of Supreme Court of the Republic of Azerbaijan must be presented to the President of the Republic of Azerbaijan within 30 days after his request. Decision on dismissal of judges of Constitutional Court of the Republic of Azerbaijan is taken by Milli Mejlis of the Republic of Azerbaijan by majority vote.

In *Belarus*, according to the Constitution, the President is empowered to dismiss the president and judges of the Constitutional Court on the grounds provided by law with notification of the Council of the Republic. In accordance with Article 124 of the Code on Judicial System and Status of Judges, the said powers can also be terminated by the President if a judge voluntarily applies for resignation or dismissal, or the Constitutional Court asks for the termination of the powers on the grounds provided in the abovementioned Code (for example, appointment to another office or transfer to a different position) with notification of the Council of the Republic. Thereat the Constitutional Court submission shall be adopted by a majority vote of the full composition of the judges thereof. If the Constitutional Court submits for the termination of the judge powers due to gross violations of his duties, commission of an act incompatible with public service, such submission shall be adopted by no less than a two thirds majority vote of the full composition of judges. In *Russia*, the termination of powers of a judge of the Constitutional Court of the Russian Federation shall be effected by the Federation Council, upon submission of the Constitutional Court.

### 1.4. Which are the reasons/grounds for such dismissals?

In *Albania*, after being appointed, the judge of the Constitutional Court can be removed by the Assembly by two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behaviour that seriously discredit judicial integrity and reputation. The decision of the Assembly is reviewed by the Constitutional Court, which, when it determines the existence of one of these grounds, declares the removal from office of the member of the Constitutional Court. The examination procedure of the Assembly for the removal from office of the member of the Constitutional Court, for one of the aforementioned grounds, is initiated on the basis of a reasoned
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petition submitted by not less than half of all members of the Assembly. In Armenia, the grounds for termination of the powers of the member of the Constitutional Court are envisaged in Part 3, Article 14 of the Law on “the Constitutional Court.” In accordance to the latter, membership in the Constitutional Court shall be terminated on the basis of a conclusion of the Constitutional Court by the appointing body when the Member:

1) has been absent for three times within one year from the sessions of the Court without an excuse;
2) has been unable to exercise his/her powers as Constitutional Court Member for six months because of some temporary disability or other lawful reason;
3) violates the rules of incompatibility related to the Constitutional Court Member prescribed by this Law.
4) expressed an opinion in advance on the case being reviewed by the Constitutional Court or otherwise raised suspicion in his/her impartiality or passed information on the process of the closed door consultation or broke the oath of the Constitutional Court Member in any other way.
5) is affected by a physical disease or illness, which affects the fulfilment of the duties of a Constitutional Court Member.

In Russia, termination is possible if the procedure to appoint the Constitutional Court judge was violated, as provided in the Constitution of the Russian Federation and the Federal Constitutional Law mentioned above.

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

2.1 General issues

In most States Members to the Conference, the Constitutions and the infraconstitutional legislation, respectively the laws concerning the organisation and functioning of Constitutional Courts, as well as, in some cases, budget laws or public finance laws, contain various rules that lay out a specific legal regime of financial autonomy of the Constitutional Courts, which is guaranteed by the mechanism of funding, elaboration of the own budget established by law and management of that budget. In a reduced number of cases, either there is no such autonomy (for example, the Constitutional Court of Luxembourg), or, even if such is guaranteed, the financial autonomy does not exist from the practical point of view (an aspect which was highlighted by the Constitutional Court of the Republic of Croatia).

The provisions related to the financial autonomy of the Constitutional Courts and its scope has some particularities, especially in connection with the following: funding, determination of the budget for expenses, its endorsement (including from the point of view of the margin of appreciation and the discretion of the executive and legislative authorities involved in this process), management of the endorsed budget.

2.2 Funding of Constitutional Courts

Constitutional jurisdiction authorities – Constitutional Courts or Supreme Courts (Tribunals), respectively Federal Tribunals, have their own budget, which is integral part of the State budget approved by the law-making authority, as the financial resources of the Courts are represented by the appropriations transferred on a yearly basis by the State. A special case is Portugal, where, besides the financial resources allocated by the State, the Constitutional Tribunal also has its own resources. According to Article 47-B of the Organic Law on its own organization, functioning and procedure, “in

Even if the Constitutions do not have specific provisions with respect to the financial resources of the Constitutional Courts (a generic name for courts, tribunals or constitutional councils), the financial autonomy of these public authorities derives from the principle of independence of the judiciary, which is enshrined in the fundamental laws. Thus, for instance, the Constitution of the Russian Federation provides in Article 124 of the Constitution of the Russian Federation a general guarantee of financial independence of courts, stating that they shall be financed only from the federal budget, and that the funding should ensure the possibility of the complete and independent administration of justice in accordance with federal law. To that effect, in its report, the Constitutional Court of Lithuania held in its Ruling of 22 October 2007 that the independence of judges and courts is “inter alia ensured by consolidating self-governance of the judiciary, meaning that the judiciary is all-sufficient, and its financial and technical provision.”
addition to the State budget appropriations, own funds of the Constitutional Tribunal are deemed to comprise the balance managed and carried over from the previous year, the proceeds of expenses and fines, the profit derived of the sale of publications, issued by the Tribunal, or of the services supplied by the documentation department, as well as all the other earnings, which are allocated to it by laws, contracts or in any other way.”

1.3 Drafting the expenditure budget

• In most cases, the draft budget of Constitutional Courts (Tribunals) is determined by them and submitted to the executive authority to include it in the general budget draft law and then submitted to the endorsement of the law-making authority.

However, there are also exceptions from the above-mentioned rule.

Thus, the budget of all Courts in Ireland, including the Supreme Court, is determined by the Government and submitted to Parliament for approval. The budget is negotiated by a consultative process whereby the Courts Service, an independent statutory body which manages the courts and provides administrative support to the judiciary, makes a submission to the Department of Justice and Law Reform. The Department of Justice then negotiates with the Department of Finance on behalf of the Courts Service, but with the participation of the Courts Service, regarding the level of funding. Arising from this process the level of funding made available to the Courts Service is decided by the Government and submitted to the Oireachtas (the National Parliament).

In Monaco, the budget of the Supreme Tribunal is integrated in the general budget of courts and tribunals, set and managed by the Director of the Judicial Services (compared to a Minister of Justice).

The Supreme Court of Norway does not set up its own budget. However the court presents a budget proposal to the National Courts Administration, which is an independent administrative body. The NCA then presents a draft budget for the courts to the Ministry of Justice. The Ministry then presents its framework budget for the Parliament for approval as part of the Government’s overall draft annual State Budget. The budget of the Supreme Court is independent of the budget of the lower courts and will thus be dealt with separately.

A similar situation existed in Germany where in the first years of activity (1951-1953), the budgetary funds for the Federal Constitutional Court formed an element of the individual budget of the Federal Ministry of Justice. The Federal Constitutional Court was therefore able to register and reason its funding requirements only to the Ministry of Justice, and not directly to the Federal Ministry of Finance and to Parliament’s budget committee. A consequence of attribution to the individual budget of the Federal Ministry of Justice was also that the Federal Constitutional Court was not able to independently manage the funds provided for it, and therefore that it was not for instance able to decide for itself on filling posts within the administration of the Court. This state of affairs was however soon regarded as not being compatible with the principle of the separation of powers, or with the legal status of the Court as a constitutional organ. The Federal Constitutional Court has had its own individual budget within the federal budget since 1953. This means that it is able to register its needs independently with the Federal Ministry of Finance.

• There are also cases when the draft budget prepared by the Court is sent or presented directly to the law-maker. In Belgium, for instance, according to a customary rule, provided in an agreement concluded between the Chamber of Representatives and the Constitutional Court, it shall determine its budget and, based on that, it shall submit its appropriations application directly to the Chamber of Representatives, whereas it shall also notify it to the minister for budgetary affairs.

2 Actually in Belgium, there is a strong guarantee related to the budgetary autonomy of the Constitutional Court. To that effect, Article 123, § 1 of the special law provides that “the funding required for the functioning of the Constitutional Court shall be recorded under the budget allocated for dowries”. When the Court had been established, such appropriations were only provided for the Chamber, the Senate and the royal family. Any appropriation titled dowry means that the Court is the one to determine the way in which such allocated funding will be used, as it is not broken down through the budget law: this autonomy related to the financial management of the institution has always been regarded as mandatory guarantee for the independence of the institution.
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In Switzerland as well, the Swiss Federal Tribunal determines its own budget, it presents it to the competent parlia-
mentarian committees and in the plenary of the Parliament. The Federal Department of Justice and Police (the Ministry
of Justice) does not have a say within the budget adoption procedure.

- A matter that calls into debate the real nature of the financial autonomy of the Constitutional Courts has to do
with the possibility of the executive authority to have a say on the draft budget submitted by the Constitutional
Courts. There are differences among the participating States in connection with this point.

Thus, for instance, in Poland, neither the Ministry of Finance, nor the Government has the possibility to interfere with
the content of the draft budget sent by the Constitutional Tribunal.

In Estonia, the reasonableness and advisability of the budget expenditure is negotiated between representatives of
the Ministry of Finance and the Supreme Court (which comprises the Constitutional Review Chamber). Following the
negotiations and resolution of disagreements at the governmental level the Ministry of Finance draws up the draft state
budget and submits it to the Parliament via the Government. In the budget negotiations with the officials of the Ministry
of Finance the Supreme Court is represented by the Director of the Supreme Court and in negotiations with the members
of the Government and the Parliament by the Chief Justice. Upon amendment or omission of amounts allocated to the
Supreme Court in the draft State budget, the Government of the Republic shall present the amendments with justification
therefore in the explanatory memorandum to the draft State budget aimed at the Parliament.

In Germany, according to the provisions of the Federal Budget Code, the Ministry of Finance is not required to accept
all registered estimates according to the regulations of the Federal Budget Code described above. In the event that the
estimates of the Federal Constitutional Court are derogated from, it is nonetheless safeguarded that its registrations are
forwarded to the further deciding agencies. The Federal Budget Code provides that derogations in the draft of the Min-
istry of Finance from the preliminary estimates of the President of the Federal Constitutional Court, just as derogations
from preliminary estimates of the Federal President and of the Presidents of the Bundestag, of the Bundesrat and of the
Federal Audit Office, are to be notified to the Federal Government if they have not been carried out in agreement (§ 28.3
of the Federal Budget Code). A corresponding arrangement is provided for in case the draft adopted by the Federal Gov-
ernment on the basis of the draft of the Ministry of Finance which forms the basis of Parliament’s deliberations derogates
in a not consented manner from the preliminary estimates of the organs in question (§ 29.3 of the Federal Budget Code).
It is ensured by these means that the Federal Constitutional Court is able to submit its budget proposals in unabridged
form to the agency which ultimately decides, namely Parliament.

In Latvia, the Law on Budget and Financial Management provides that the budgetary request of the Constitutional
Court shall not be amended, up to the submission of the draft budget law to the Cabinet, without the consent of the sub-
mitter of the request. Consequent, the Minister of Finance does not have the right to introduce amendments into
the budgetary request of the Constitutional Court. The Cabinet of Minister, however, does have the right to introduce
such amendments without co-coordinating them with the Court. At present, the Constitutional Court examines a case on
compliance of this provision with the Constitution.

In Portugal, the possibility of the Government to amend the draft budget developed by the administrative depart-
ments of the Court is not completely excluded either. However – it is emphasized – that attention needs to be paid to “the
political-constitutional requirement to inform the Parliament as regards the content of this draft, even if the Government
has not endorsed it (more specifically when the two bodies did not have a concerted attitude)”.

A special case is highlighted by the Constitutional Court of the Republic of Macedonia. According to the national
report, at the end of every financial year, the Constitutional Court drafts a Proposed-Budget for the next year in which
it projects its needs for funds for an unobstructed functioning and execution of its competences. This proposal is sub-
mited to the Ministry of Finance, which prepares the Draft-Budget of the Republic of Macedonia and submits it to the
Government of the Republic of Macedonia, which defines the text and submits it to the Assembly of the Republic of
Macedonia for adoption. In this long way the needs are not taken into consideration, and the Court never receives
the funds it requests, that is, besides its modesty, in an average it receives 20% less than the funds needed. As the
Government is not obliged to take over the projected Budget of the Constitutional Court and include it in the State
Budget, the Court is forced to react almost always, even to plead to have an intervention, with an amendment, into
the text of the State Budget, in order to have the funds for the Court provided with a view to its normal functioning.
This is certainly due, inter alia, to the constitutional position of the Government as the only proposer of the Budget
before the Assembly and to the fact that the Constitutional Court does not have any instrument whatsoever to fight
such setup. Even when using the funds approved in the Budget, the Court has a problem in the enforcement of the payment orders for certain needs.

Also, in Bosnia and Herzegovina, even if the relevant rules provide that the Constitutional Court is financially autonomous, it is emphasized that this presents a problem which the Constitutional Court is continuously faced with in its practice.

- As to the principles which the law-making authority needs to observe upon approval of the budget of the Court, within the general budget, it is worth pointing out that according to various legislations, there is a rule according to which the yearly allocated resources for the activities of the Constitutional Court must not be reduced as compared to the budgetary appropriations for the previous fiscal year (Azerbaijan, Georgia, the Russian Federation).

Starting from the reality according to which, in some States, the Constitutional Court, through its representatives, does not have the opportunity to assist or actively participate in the parliamentarian debates in connection with the draft budget law, and consequently, it is unable to influence the decision concerning the amount of the funds allocated for the activity of the Court, an opinion was expressed according to which the Constitutional Court should be provided a more active role in this respect, reflecting its role and importance and that the budgetary autonomy of the Constitutional Court should be governed by law. To that effect, some national laws set forth the participation of the Constitutional Courts (Supreme Courts) representatives in the parliamentarian debates concerning the budget (for instance: Cyprus, Montenegro, Poland, Turkey).

2.4 Management of the expenditure budget

Another component of the financial autonomy of the Constitutional Courts is given by the independence in terms of managing the funds allocated through the own budget, within the limit of the endorsed budgetary loans, and, usually, the purpose of the appropriations needs to be preserved.

Most Constitutional Courts show that until now, they have not had any problems with the determination of their own budget or with its management.

There are still exceptions, one of them highlighted by the Constitutional Court of the Republic of Croatia, which shows that, even if its rule of operation contains the guarantee with constitutional force that “the CCRC may independently distribute the assets approved in the State Budget for the functioning of the activities of the CCRC, in accordance with its annual budget and the law”, this formal guarantee has not however been realized in practice yet. In everyday legal life the CCRC is considered an “ordinary” budget user to which not only all the relevant regulations related to budgetary issues apply, but also secondary regulations passed by the Government of the Republic of Croatia and the Ministry of Finance, including internal instructions of the Ministry of Finance, especially the State Treasury Department. To conclude, in practice the CCRC enjoys no autonomy in distributing the assets within its annual budget, although this autonomy is expressly guaranteed in the CACCRC.

Just the same, the Constitutional Court of the Republic of Macedonia, even when using the funds approved in the Budget, has a problem in the enforcement of the payment orders for certain needs.

- As to changing the amount of endorsed funds, such may take place during the year within the budgetary correction procedure. In Armenia, for instance, in order to ensure the regular activity of the Constitutional Court and to fund the unexpected expenses, a deposit fund is prescribed, which is presented by a separate line of the budget.

In principle, following the endorsement of the budget by law, the appropriations of the Court cannot be decreased any longer. However, such a possibility is provided, for instance, in the case of the Republic of Lithuania, where the appropriations may be reviewed if the State goes through a severe economic and financial situation. Also, in Croatia, even if endorsed and established in the State budget, the appropriations for the yearly budget of the Constitutional Court are not sheltered against the interventions of the executive branch of power during the execution of the budget.

- Constitutional Courts draft reports concerning the execution of their budgets, which are submitted to the Minister of Finance, respectively, to the Parliament and subject to the inspection of the Courts of Accounts.
A special case is highlighted in the report of the Constitutional Court of Italy, which shows that, within the endorsed budget, expenses are set by the Court and its internal bodies, in full autonomy, without any type of external interferences, including for purposes of audit or control. In connection to the latter point, it is possible to state that the Constitutional Court does not fall within the scope of application of Article 103, Paragraph 2 of the Constitution, which affirms that “The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law.”

The Court itself – in Case No. 129 of 1981 – decided a dispute stemming from the claim, of the Court of Accounts, to audit the Treasurers of the Presidency of the Republic and of the two Houses of Parliament. Although the Constitutional Court was not directly involved in the dispute, the ratio decidendi of the decision, which rejected the claim advanced by the Court of Accounts, can also be extended to include the Constitutional Court. From that ratio it is possible to discern, indeed, that the legal foundation of the Court of Account’s jurisdiction to review is not of immediate operation in every case, as it must necessarily face the limits posed by the objective amenability of subjects to review and by the respect for constitutional norms and principles. In particular, the autonomy and independence enjoyed by the highest constitutional organs must be acknowledged not only as consisting in powers of self-organization, but also in the application of constitutional measures, which does not envisage any possibility for invoking administrative or jurisdictional remedies. With regard to the apparatuses at the service of constitutional powers, the exemption from accounts-related judgments (giudizi di conto) is the direct reflection of the autonomy enjoyed by the highest constitutional organs, a fortiori in light of the absence of detailed and specific constitutional regulation, integrated by unwritten principles consolidated through the constant repetition of uniform courses of conduct. Holding the power to submit the Treasurers of the Presidency of the Republic, and of the lower and upper Houses of Parliament, to auditing review is not, therefore, within the jurisdiction of the Court of Accounts.

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

3.1 Regulating the organization and functioning of the constitutional court

Essentially, constitutional justice is institutionalized in the Constitution itself, which means that the fundamental rules for the organisation and functioning of the Constitutional Courts must be stipulated in provisions of a constitutional order.

As at the basis of the constitutional jurisdiction lie statutory provisions with the highest rank in the regulatory hierarchy, change in the provisions regulating the organisation and functioning of the Constitutional Court does not generally constitute a very simple matter, whereas the law-maker cannot significantly change the nature of constitutional justice (see to that respect the report by the Constitutional Courts of Austria, Belgium, the Republic of Croatia, the Republic of Poland or Romania). This is deemed to be one of the strongest guarantees to preserve the independent position of the Constitutional Court within the system of political power, as it prevents the law-maker to influence its status through frequent changes of the law (see the report of the Constitutional Court of Croatia).

The provisions of the Constitution are further developed by special laws, based on which the Constitutional Courts adopt own Rules of organisation and functioning.

Particular cases are highlighted in the report of the Constitutional Court of Bosnia and Herzegovina wherein it is emphasized that the Constitution of Bosnia and Herzegovina does not provide that a Law on the Constitutional Court shall be enacted but it provides that the Constitutional Court shall adopt its own Rules of the Court. Thus, the only act, in addition to the Constitution of Bosnia and Herzegovina, which regulates the activity of the Constitutional Court are the Rules of the Court of BiH which have force of an organic law. According to the Rules of the Constitutional Court, the Constitutional Court is the only competent authority to amend the Rules of the Constitutional Court. Also, in the Republic of Macedonia the organisation and functioning of the Constitutional Court is not the subject of legal regulation, but they are regulated by the Constitutional Court itself with a Book of Procedures; it has been found that the possibility for the Constitutional Court to regulate, autonomously, by its own enactment, its work, that is manner of handling and internal organization, has demonstrated its positive side so far in the practice.
3.2 Relationships between the legislative – constitutional court in the framework of the procedure to amend its act of operation and functioning

The general rule that may be emphasized is that the organisation and functioning of the Constitutional Courts (Tribunals) or Supreme Courts is governed by a law, adopted by the legislator, which may be amended without the consultation of the Constitutional Court, in the sense that there is no regulation that might oblige the legislator to undertake such an action, a rule resulting from of the general principle of separation of powers.

In very few cases, it was highlighted that there were either specific regulations, or there was an obligation to send the amending draft law to the Constitutional Court (Czech Republic), or the chief justice of the Constitutional Court had the possibility to take part and take the floor during a parliamentarian meeting (Rules of Parliament of Hungary). Thus, in the Czech Republic, Article 5 par. 1 let. c) of the Rules provides that a draft statute or substantive outline thereof shall be given to the Constitutional Court, the Supreme Court, and the Supreme Administrative Court, if it concerns them as organisational components of the State, or their competence, or the procedural rules that govern them. Thus, the Constitutional Court is always a commenting party for a potential amendment to the Act on the Constitutional Court. However, its comments are of the nature of recommendations and consultations, and the Constitutional Court does not have a veto in the process. In the event of a draft statute (or amendment) submitted by a subject other than the government, the Constitutional Court is not legally entitled to make comments, though the proponent of the statute may ask for its opinion, as may the Parliament during debates.

In some States, the amendment of the such law was conducted at the very proposal of the Constitutional Court [for instance, the special law concerning the Constitutional Tribunal of Andorra (LQTC) or the Law concerning the organisation and operation of the Supreme Court of Norway].

Even if there is no statutory obligation for the legislative to consult the Constitutional Court upon any amendment to the law regarding its organisation and functioning, in practice, such a consultation actually takes place (Albania, Austria, Belarus, Belgium, Cyprus, Republic of Croatia, Estonia, Germany, Ireland, Republic of Latvia, Lithuania, Luxembourg, Portugal, Norway, Republic of Moldova, the Russian Federation, the Republic of Serbia), because, as highlighted in various reports (Azerbaijan, Cyprus, Slovenia), there is a practice or a custom in this respect.

Consultation may be more or less formal, it may be under the form of invitations addressed to the Constitutional Court to express an opinion at the beginning of the legislative procedure, requests for an opinion or a recommendation, it may take the form of a debate throughout the time when the draft law is developed or of participations in the committee of experts that contribute to the drafting of a new law or to a major review of the law in force.

In this context was invoked (Germany) a constitutional principle of faithful co-operation between organs (Organtreue) which was first mentioned in a set of constitutional complaint proceedings. The Federal Constitutional Court initially left it open at that time as to whether such a constitutional principle exists and whether, if so, such could be invoked by a complainant in constitutional complaint proceedings¹, but the principle was, however, explicitly recognized in its decisions rendered later on⁴. This principle does not imply that, prior to any exercise of its competence which is related in any way with the tasks of another constitutional organ, a constitutional organ would have to consult this other organ. One could however consider whether or not the principle of faithful co-operation between organs could be considered to have been violated if the organisational and procedural basis of the activity of a constitutional organ was to be changed without the organ in question previously having been enabled to make a statement on the intended change. For instance, the principle of federal comity (conduct which is well-disposed towards the Federation), on which the principle of faithful co-operation between organs is modelled, has been interpreted by the Federal Constitutional Court in such a way that the duty to give consideration to one another postulated by this principle obliges the Federation to hear the Land in question – apart from in cases of particular urgency – prior to making use of the right to issue instructions to which it is entitled with regard to certain administrative matters of the Länder⁵.

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¹ See Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts – BVerfGE 29, 221 <233>.
⁴ See BVerfGE 89, 155 <191>; 97, 350 <374-375>; 119, 96 <122>.
⁵ see BVerfGE 81, 310 <337>; see also BVerfGE 104, 249 <270>
By exception from the above-mentioned rule, such consultations are not allowed, and the following reasons are invoked in this respect: either the separation between the activity of the Court and Parliament, two bodies which operate in distinct spheres and which do not intersect, even if the laws that are to be endorsed aim the Court directly (for instance, Italy) or that the operated changes may be subsequently subject to the examination by the Constitutional Court within its constitutionality review in the case of laws (for instance, the Republic of Armenia). The Turkish Constitutional Court points out in this respect in its national report that, in practice, at least verbal consent of the Constitutional Court is taken into account in the amendment of its law of organisation. Since the Constitutional Court reviews constitutionality of laws, it is regarded as a delicate issue. It is likely that the law amending the Law on the Organization and Functioning of the Constitutional Court may be brought before the Constitutional Court. For that reason, the Constitutional Court avoids expressing its views on a draft law. For this reason, also in Ukraine such consultations are limited in practice.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/Standing Orders of Parliament and, respectively, Government?

4.1 Constitutionality review of Regulations/ Standing Orders of Parliament

Constitutional Courts, in most of the cases, have jurisdiction to verify the constitutionality of the Regulations (or equivalent acts) of Parliament (generic name for the legislative authority). This is also in consideration of the fact that the acts that regulate the organisation and operation of Parliament, do occupy, in many countries, a special position in the hierarchy of regulatory acts, and (where they are not expressly listed in the category of laws) they do have the value and force of a law, and thus, as a rule, these acts cannot be challenged before ordinary courts but only before Constitutional Courts.

There are also situations where such prerogative is not stipulated. Thus the Constitution of Bosnia and Herzegovina does not explicitly provide that the constitutionality review body has jurisdiction to examine the constitutionality of the Rules on Procedure of the Parliamentary Assembly, and the Constitutional Court so far has not had an opportunity to interpret its jurisdiction in a case on this matter.

The Belgian Constitutional Court does not have jurisdiction to look into the rules that govern the operation of the Federal Parliament and Government.

Luxemburg’s Constitutional Court reviews only the constitutionality of laws, and can be referred only through a judicial or administrative court that will address a matter concerning the constitutionality of a law, which needs to be clarified in view of the settlement of the case on its docket. This Court does not have a special jurisdiction to review the Standing Orders of Parliament, respectively Government.

Italy’s Constitutional Court has obviously ruled out any possibility of review of the Standing Orders of Parliament. In their report they quote a well-established case-law in this respect, and mention is made to the reference case no. 154 of 1985, where a statement of case inadmissibility (and hence the Court’s impossibility to examine the merits) relied on two reasons: firstly the rules of Parliament are not included in the steps stipulated at Article 134, sub-section 1 of the Constitution (according to which “The Constitutional Court shall rule on [...] controversies arising from the constitutional legitimacy of laws and regulations that have the power of a law, issued by the State and Regions”); and secondly there is the institutional position of the Chambers of Parliament (“the immediate expression of the people’s sovereignty”). Looking at the first reason, the Court – in consideration of the fact that Article 134 of the Constitution has “rigorously set the precise and insurmountable limits of a judge’s authority concerning the laws in our legal system” inferred that “since the text [of the Article] ignores the Parliamentary rules, it is only by way of interpretation that such might be included.”

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6 Concerning the legal nature of the Standing Orders of the Chambers of Parliament, the report of the Romanian Constitutional Court shows that such acts do not come in the category of laws, because unlike the latter, they can only regulate the internal organisation and operation of the Chambers and are not subject to promulgation by the President of the country. However, in accordance with Article 76 par. (1) of the Constitution, resolutions concerning the Standing Orders of each Chamber shall be passed just like organic laws, by a majority vote of the members in each Chamber, so as to ensure the widest expression of the will of Deputies and, respectively Senators concerning the regulatory stipulations.
impossibility of extended interpretation of Article 134 was thus justified in the light of its declared incompatibility with the system, which characterises Parliament as a central body whose independence must be secured in relation to all the other powers. By transposing this argument from the body (Parliament) to the source (the regulations), the impossibility of reviewing the rules of Parliament derives from the latter’s special role as “direct executor of the Constitution,” which in itself gives rise to a “particularity,” an expression of the fact that “the constitutional preserve of regulatory power comes under the guarantees stipulated by the Constitution in order to ensure the independence of that sovereign body from any other power.”

Also the Constitutional Court of Moldova lacks that prerogative.

There are also situations where this prerogative is conditional. Thus, for example, in Albania the Standing Orders of Parliament can be the subject to constitutionality review only in cases affecting its provisions of constitutional nature (Judgments no. 29/2009 and no. 33/2010 by the Constitutional Court of Albania).

In Ireland, the Supreme Court of Justice established, in its case-law, that courts of law cannot intervene upon the right of the Oireachtas (National Parliament) to establish its own rules and standing orders. Nevertheless, we note that certain judges of the Supreme Court felt there could be exceptions from this principle in case the rights of a citizen are in question.

- In the cases where the Constitutional Courts do have such power, it is specifically provided by those States’ Constitutions and by the laws for the organisation and operation of the Constitutional Court, or, in certain situations, will be inferred by way of interpretation, in considering such type of regulations as coming under a certain category (laws) or in considering the position they occupy in the hierarchy of regulatory acts.

Thus, for instance, the Standing Orders of the Grand National Assembly of the Republic of Armenia have the status of a law. Since the Constitutional Court has jurisdiction to exercise constitutionally review over laws, the Standing Orders of the Grand National can also be subject to constitutionality review.

Similarly, the Constitutional Court of the Republic of Croatia stated, in principle, by its Judgment no. U-II-1744/2001 of 11 February 2004, with respect to the nature of the Standing Orders of the Croatian Parliament and established that they have the force of a law. With a number of specific distinctions (determined, in the case of Austria, by the meaning of the notion “Standing Orders” in the laws in this State), the same reasoning applies in relation to the jurisdiction of the Constitutional Court of Austria, Estonia, Republic of Macedonia, Republic of Poland, Ukraine.

Along the same line, the Lithuanian Constitutional Court Report stipulates that neither the Constitution nor the Law on the Constitutional Court, which defines the powers of the Constitutional Court, textually establish that review exercised by the Court applies also to the the constitutionality of the Standing Orders of the Seimas or the lawfulness of the provisions of the Rules of operation of the Government. Such power of the Constitutional Court stems from the principles of supremacy of the Constitution, rule of law, hierarchy of legal acts and other constitutional mandatory requirements. The Constitutional Court held, in its case-law that, under the Constitution, there may not be any such laws adopted by the Seimas the compliance of which with the Constitution and constitutional laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such other legal acts adopted by the Seimas the compliance of which with the Constitution, constitutional laws and laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such acts of the President of the Republic the compliance of which with the Constitution, constitutional laws and laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such acts of the Government the compliance of which with the Constitution, constitutional laws, laws and Seimas resolutions on implementation of laws would not be subject to investigation by the Constitutional Court (Constitutional Court ruling of 30 December 2003). Therefore, when the Constitutional Court was investigating the constitutionality of the Statute of the Seimas for the first time, substantiated it by the fact that the statute is a legal act adopted by the Seimas which, under the Constitution, has the force of a law.

\[\text{De Blacam, \textit{Judicial Review} (second edition Tottel, 2009) p.74, about Maguire versus Ardagh [2002] 1 IR 385; quoted here is Article 15.10 in the Constitution of Ireland, which reads: “Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.”}\]
have so far never yet been reviewed before the Constitutional Court. In practice, however, the Rules of Procedure of the German Bundestag include legal provisions of all levels, including the rules of procedure of the constitutional organs (see Wieland, in Dreier, GG, Vol. III, 2nd ed. 2008, Article 93, marginal no. 58; Hopfauf, in: Schmidt-Bleibtreu/Klein, GG, 11th ed. 2008, Article 93, marginal no. 101). In practice, however, the Rules of Procedure of the German Bundestag and of the Federal Government have so far never yet been reviewed in this procedure. However, provisions contained in the Rules of Procedure of the Bundestag have been the subject-matter of a review in disputes between organs (Organstreitverfahren) several times.

• Some Constitutional Courts used their case-law to substantiate the subject matter of constitutionality review in this case.

Thus, for instance, the Romanian Constitutional Court established that the subject of the review are the Standing Orders of Parliament, namely the own regulations of the two Chambers as well as the joint regulations, including decisions to amend or supplement the Standing Orders of Parliament, respectively the decisions by the Chambers of Parliament that have a regulatory character and contain stipulations on the organisation and operation of Parliament as a whole, or of each separate Chamber. To that effect, the Romanian Constitutional Court stated that it is not competent to exercise a constitutionality review on the interpretation or application of the Standing Orders of Parliament. By virtue of the principle or regulatory autonomy, as established in Article 64 par. (1) first sentence of the Constitution, the Chambers of Parliament have exclusive jurisdiction to interpret the regulatory contents of their own regulations and decide upon the way such shall be applied, and failure to comply with certain regulatory provisions can be established and settled using exclusively parliamentary procedures (Constitutional Court Decisions nos. 44/19939, 98/199510, 17/200011, 47/200012). Likewise, the Constitutional Court noting that in certain cases the challenges concerned the incomplete character of certain provisions in the Standing Orders, or a defective formulation thereof, for the purpose of supplementation or amendment thereof; the Court found that such challenges were exceeding its jurisdiction.13

Also in the national report of the Spanish Constitutional Tribunal there is a clear distinction between the Standing Orders of Parliament, which come within the scope of constitutionality review, and other acts issued by the same authority which fall under the jurisdiction of ordinary courts. It is thus pointed out that judicial bodies have jurisdiction to rule with respect to Parliament’s disputes related to personnel, management and administration of assets, as well as in the

8 Decision by the Constitutional Court U-I-40/96, dated 3 April 1997 (Official Journal of the Republic of Slovenia, No. 24/97, and OdlUS VI, 46), par. 3.
case of litigations in matters concerning property or material liability. The acts that can become subject to challenge are those that are issued by the management and administration bodies of the two Chambers in applying parliamentary laws and rules, but never those laws and rules in themselves, without thereby affecting the ability of courts of law to remove the unconstitutional aspect of the challenged parliamentary rule. Parliamentary rules that can come under scrutiny by courts of law are those that cause effects that involve third parties other than Members of Parliament: the institution’s staff, suppliers, etc.; rules cannot come under scrutiny that have to do with internal regulations for the organization and operation of a Chamber (interna corporis).

• The constitutional review can be carried out a priori – i.e. before the entry into force of the Standing Orders (example: Monaco) or their application (example: France), or a posteriori, i.e. after their entry into force (example: Romania); some Constitutional Courts can exercise the review both a priori and a posteriori (example: Constitutional Court of Hungary).

In Monaco, for instance, the National Council’s Rules of internal organisation cannot enter into force before their constitutionality is reviewed by the Supreme Tribunal, and if such provisions are found unconstitutional they cannot be applied. The current Rules of the National Council were the subject of two decisions by the Supreme Tribunal. Following a finding of unconstitutionality concerning some of its stipulations, the National Council reviewed those stipulations immediately, under a Decision of 28 October 1964; under ruling of 25 May 1965, the Supreme Tribunal found the Rules in their entirety in compliance with the Constitution and applicable law.

In France, under Article 61 par. 1 of the Constitution, the regulations of the parliamentary chambers and amendments thereof are subject to a systematic review exercised by the Constitutional Council.

The Constitutional Court of Hungary, as part of its ex ante oversight responsibilities, performs the constitutionality review of Parliament’s Rules [§1 item a) in the CC Law]. Thus before adopting its rules of procedure, Parliament can ask the Constitutional Court to look into their compliance with the Constitution, with an indication of the stipulations they feel are more likely to require verification. In case the Constitutional Court finds that one of the stipulations in the Rules is unconstitutional, Parliament will strike it out. [§34 sub-sections (1), (2)]. The oversight function can also be exercised ex post facto [§1 item b) in the CC Law], and any individual can file a motion for the Constitutional Court to start an oversight procedure [§21 subsection (2) in the CC Law].

• The constitutionality review can be direct, on referral by certain entities specifically and distinctly stipulated by law (e.g. – in Andorra – one-fifth of the parliamentarians; in Romania – one of the presidents of the two Chambers, a parliamentary group, or a number of at least 50 Deputies or at least 25 Senators); or it can be indirect, as part of exercising a different power stipulated by law.

Some examples of indirect oversight come from the German Federal Constitutional Court: as part of the procedure to settle institutional disputes, on request from a body or a competent division of said body, which exercises its own rights as established by the Constitution or by the internal rules of one of the Federation’s supreme bodies, and under which allegations are raised that rights and obligations granted under the Constitution are directly violated or threatened, either through the agency of an act or through an omission by another body or competent division thereof, the German Federal Constitutional Court shall clarify whether the challenged act violated the Constitution. As part of the procedure to settle institutional disputes it is also possible to look at the internal regulations, as well as their rules for implementation.14

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14 e.g. provisions in the Rules of the Bundestag, to the effect that draft laws that engaged a financing from public funds could only be debated if accompanied by a balancing law – intended to cover the incurred expenditure or deficit – were found unconstitutional as of the very first year of operation of the Federal Constitutional Court, as part of an institutional litigation procedure. The Court found they restricted the constitutional right to legal initiative in a manner that was not specified by the Constitution (BVerfGE 1, 144 <158 and following>; on the contrary, the Court ruled the Rule was constitutional that such a draft law should be submitted directly to the budget committee, even if that eliminated one of the otherwise customary three readings of the draft in Parliament. Also unconstitutional were those stipulations in the Bundestag Rules based on which an independent deputy – specifically, a member of the Bundestag who had been excluded from his parliamentary group – is precluded from taking part in the proceedings of any parliamentary committee in the Bundestag. The Federal Constitutional Court found that in this case, while an obligation did not exist to grant such a person a right to vote on the committee – as such vote would have carried a disproportionate weight – the deputy nevertheless had to be given the opportunity to become a member on at least one of the committees, with a right to speak and bring motions (BVerfGE 80, 188 <221 and next>). In another line, while ruling in an institutional dispute on request from a number of Bundestag members, decisions by the Bundestag were found constitutional that had limited continuation of a parliamentary debate on a controversial issue.
Similarly, stipulations in the Rules of Parliament and Government that refer to the procedure to adopt regulatory acts can also be the object of an indirect review by the Court, as part of any procedure that regards the validity of that piece of regulation.

- As regards the case-law of Constitutional Courts, as established following the exercise of that power, after reading the reports, we note that they approach a range of legal topics that are in many cases similar, e.g. the ones concerning the majority required to adopt pieces of regulation or other decisions by Parliament, or the matter of the rights of parliamentary groups.

Thus the Constitutional Court of Croatia, for instance, in its Judgment no. UI-4480/2004 of 5 June 2007 (Official Journal issue no. 69/07), repealed those elements of regulation that established the majority needed to adopt laws and other acts of Parliament. The Constitutional Court found that those stipulations were in conflict with Article 81 par. (1) in the Constitution, which reads: “Unless otherwise specified by the Constitution, the Croatian Parliament shall make decisions by a majority vote, provided that a majority of representatives are present at the session.”

The Constitutional Court of Romania accepted the referral concerning the unconstitutionality of in the provisions under Article 40 par. (1)15 of the Regulations of the Joint Sittings of the Chamber of Deputies and the Senate16, and found them unconstitutional, because they granted to the president of the Chamber of Deputies a decisive role in case of equal number of votes and that comes against the constitutional provisions concerning the necessary majority in adopting parliamentary acts, also provisions that do not contain such mentioning17. In a different decision, the same Court found18 that Article 155 par. (3) of the Standing Orders of the Chamber of Deputies, according to which an application for criminal investigation of Member of the Government “ [...] is to be adopted with the vote of at least two-thirds of the Deputies” contravenes Article 76 par. (2) in the Constitution which reads that “(2) Ordinary laws and resolutions shall be passed by a majority vote of the members present in each Chamber” and, consequently, it is unconstitutional. For the same reasons the Court ascertained the unconstitutionality of similar provisions of the Senate Standing Orders19.

The Constitutional Court of the Republic of Macedonia, under Judgment U. no. 28/2006 of 12 July 2006, repealed the phrase in Article 231 par. 2: “by a majority of votes of the total number of members” in the Standing Orders of the Assembly of the Republic of Macedonia (“Official Journal of the Republic of Macedonia,” no. 60/2002). Article 231 par. 1 of the Standing Orders of the Assembly of the Republic of Macedonia stipulates that the Assembly can hold closed sessions (in camera proceedings) on proposal by the President of Parliament, the Government or at least 20 members. Par. 2 al Article 231, in the part that was challenged, stipulated that the Assembly shall decide on the proposal without debating it, with a majority of the votes of all members. Starting from the stipulations of Article 70 par. 1 in the Constitution of the Republic of Macedonia, under which the Assembly sessions are public, as well as par. 2 in the same Article that stipulates the Assembly can decide to work in camera, with a majority of two-thirds of the votes of the total number of members, the Constitutional Court found that the challenged text in the Standing Orders of the Assembly of the Republic of Macedonia to a specific number of hours, and the duration allotted each parliamentary group was proportional to their size. The possibility to limit, in advance, the duration of debates had not been expressly stipulated in the Rules of the Bundestag; nevertheless, the Federal Constitutional Court did refer to a specific provision in the Rules – which in fact had already been found constitutional – to the effect that the Bundestag could decide to end debates; that provision also included a right to set a given duration for debates from the very beginning, or to limit such duration starting at a certain point in time (BVerfGE 10, 4 <13>). Allocation of speaking time for depending on the size of the parliamentary group was also regarded as being constitutional (BVerfGE, Federal Constitutional Court, loc. cit. pp. 14 and next; the Rules do not contain any specific stipulations here either, except for one provision that allows inference that such allocation is self-understood). Also, having been referred by a number of Deputies concerning the rules adopted in 2005 concerning publication of income derived outside the mandate, the Court found – after a very close vote – that the legal stipulation (§ 44a of the Law of the Status of Members of the German Bundestag – Abgeordnetengesetz), as well as the detailed rules on the obligation of publication thereof (contained in the “Code of Conduct of the Members in the German Bundestag” adopted by the Bundestag and which, under §18 in the Rules of the German Bundestag) constitute an integral part thereof, are constitutional (BVerfGE 118, 277 <323 and next, 352 and next>.

15 “In case of an even vote, the vote of the chairperson in the session is decisive.”
17 Article 76 of the Constitution concerning Passing of bills and resolutions.
is in violation of the Constitution because the decision to exclude the public from the Assembly’s proceedings required the vote of a majority inferior to that of two-thirds that was required by Constitution.

Concerning the relationship within Parliament in terms of organisation within parliamentary groups, and respectively the rights of independent parliamentarians, we should mention the constant case-law of the Romanian Constitutional Court when ruling in the matter of unrestricted ability of parliamentarians to move from one group to another, to join a parliamentary group or to establish a group of independent parliamentarians. Every time such a matter was brought before it the Court ruled that the Rules restricting this right were essentially in violation of Article 69 par. (2) of the Constitution, which rejects any form of imperative mandate.

In the same context but from a different perspective we should note Judgment U. no. 259/2008 of 27 January 2010 by the Constitutional Court of the Republic of Macedonia, which repealed Article 157 in the Standing Orders of the Assembly of the Republic of Macedonia (“Official Journal of the Republic of Macedonia,” no. 91/2008). In its par. 1 the text read that: “in case a general debate on the draft laws does not take place, the representatives of parliamentary groups can endorse the position of the Government they represent concerning the draft law in a session of the Assembly, in the beginning of debates,” while par. 2 states that such person’s addresses cannot exceed ten minutes. Under that Judgment, the Constitutional Court ensured equal rights for parliamentarians who are not members of a group as regards participation in debates on a draft law submitted to the Assembly. In justifying its judgment the Court held that in its view the different position of a parliamentary group vs. that of one member of Parliament should not constitute a problem, e.g. in terms of duration of an address, since the parliamentary group speaks in the name of several representatives while the single parliamentarian speaks individually. Nevertheless, the question remains whether the difference between parliamentarians can go so far as to exclude a representative from debates on a draft law simply because he/she is not a member of a parliamentary group, and whether such limitation is in observance of a parliamentarian’s position and status under the Constitution. Consequently, if the Rules state that debates can open in one session of the Assembly then every representative should have a right to take part in the debates and independent members cannot be excluded from that right. The duration of an address, depending on whether a representative speaks on behalf of a group or oneself, is a different matter. From the aforementioned data and considering the concept underlying the Rules of the Assembly regarding the establishment of parliamentary groups and their position, the Macedonian Constitutional Court found that the parliamentarian, who was elected by a direct vote and whom citizens entrusted their sovereignty, cannot be excluded from the right to voice his/her opinion on a draft law for which a general debate has not been organized, simply on grounds that he/she is no part of a parliamentary group.

4.2 Constitutionality review as regards the Standing Orders / Regulations of the Government

Following the examination of the country reports, we note that those Constitutional Courts which do not have jurisdiction to perform the constitutionality review of the Standing Orders of Parliament are also lacking jurisdiction to perform the constitutionality review in case of Standing Orders of Government. Reasons are similar, as shown in the report of the Constitutional Court of Italy, wherein it is stated that the impossibility for the Court to operate a scrutiny for constitutionality is confirmed also in regard to Standing Orders of Government; on one hand, it could be considered possible to simply extend part of the considerations in support of the unreviewability of Parliamentary Standing Orders, and especially in light of the constitutional nature of the organ from which the regulation originates, or on the secondary nature of the rules for the operation and functioning of the Government. Such a placement within the system of legal sources means that the Court cannot, in any case, scrutinize them (unless in exceptional cases), since its jurisdiction is limited to laws and enactments having force of law.

There are also Constitutional Courts which have the power to perform the constitutionality review with respect to the Standing Orders of Parliament, and, however, unable to perform the constitutionality review of the Standing Orders of Government, as in the case of Andorra, where the special Law concerning the Constitutional Tribunal only provides the
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constitutioality review of the Regulations of the General Council, and fails to say anything about the Regulations for the organisation and functioning of the Government.

There are also cases when the Constitutional Court has exclusive jurisdiction to perform the constitutionality review of legal acts, but does not have any powers of review over the acts of the executive power (for instance, Belgium).

There are also cases when the particular elements pertaining to constitutionality review of the Standing Orders of Parliament apply also in case of constitutionality review of the Standing Orders of the Government (for instance, Belarus, Switzerland, Germany, Macedonia), as well as cases when this latter prerogative of the Court has its own features or it is likely to be governed by additional distinctions.

Thus, there are distinction in relation to:

- the nature and the issuer of the statutory act that governs the organisation and functioning of the Government;
- the nature of the acts issued by the Government, whereas the individual acts are excluded from the scope of the constitutionality review.

Consequently, in some cases, the power to perform the constitutionality review of the Standing Orders of the Government results from the general power of the Constitutional Court to conduct the constitutionality review in case of all acts issued by the Government, without making any distinction pertaining to their subject matter. As a result, to the extent in which the rules of organisation and functioning of the Government are set in an act issued by this authority, the respective act belongs by default to the scope of acts subject to the constitutionality review performed by the Constitutional Court. For instance, the Cabinet of Ministers of Ukraine, within its power, shall issue resolutions and bylaws whose enforcement is binding. As one of the prerogatives of the Constitutional Court of Ukraine is to rule on the constitutionality of the acts of the Cabinet of Ministers, whereas the Rules of procedure of the Cabinet of Ministers of Ukraine were approved in a Resolution of this Cabinet, then, consequently, the mentioned act shall fall under the constitutionality review exercised by the Constitutional Court of Ukraine. A similar reasoning shall be applied to the power of the Constitutional Court of the Russian Federation and Lithuania.

In some States, the rules on the organisation and functioning of the Government are established by means of acts issued by other authorities, whose constitutionality review shall fall under the scope of the Constitutional Court. For instance, thus, in Armenia the procedure of functioning of the Government of the Republic of Armenia is defined by a decree of the RA President. Taking into consideration, that the RA President’s decrees are subject to constitutional review, the legal act, which defines the procedure of functioning of the Government, is also subject to review by the Constitutional Court.

The report by the Constitutional Court of Romania points out that the statutory acts regulating the organisation and functioning of the Government shall be subject to the constitutionality review performed by the Constitutional Court to the extent in which they are primary statutory acts – laws (which are issued by the Parliament) or orders which shall be issued by the Government). The Decisions by the Government shall be issued for the organisation of the enforcement of laws [Article 108 par.(2) of the Constitution], and shall constitute secondary statutory acts, and, consequently, they are not subject to the constitutionality review performed by the Constitutional Court, however they may be subject to the legality review carried out by the administrative courts.

In connection to the distinction based on the nature of acts issued by the Government, we note that, in general, the Constitutional Court has the power to review only the statutory or general Government acts. As concerns the administrative acts of individual type, which represent norms of a personal nature, with unique legal effects applicable just to a single case, and, consequently, not-binding to the general public, such cannot be subject to constitutionality review, as pointed out specifically in the report of the Constitutional Court of the Republic of Moldova. Similar features in terms of distinction between individual and regulatory acts are highlighted in the reports of the Constitutional Court of the Czech Republic, the Constitutional Tribunal of Poland or the Constitutional Court of Georgia. At the same time, the Constitutional Review Chamber of the Supreme Court of Estonia exercises its control over the legislation with general applicability: laws adopted by Parliament, respectively regulations adopted by the Government, ministries and

21 Decree of the RA President of 18 July, 2007, on Defining the order of organization of the activity of the RA government and other state governing bodies subject to the latter).
local authorities. The Chamber shall not be competent to review the individual acts issued by the Government or the ministries.

At the same time, we can notice that if the Government acts (including those which regulate its organisation and functioning) fall under the category of administrative acts, they automatically fall under the jurisdiction of courts or other administrative authorities. For instance, the report by the Constitutional Court of Turkey points out that there is a separate system of administrative justice, whereas the Government acts fall under the scope of the control exercised by the State Council. The Constitutional Court does not have any power with respect to this category of acts. The report by the Constitutional Court of Latvia also reveals a similar distinction, showing that, according to Article 16 par. (4) of the Law on the Constitutional Court, the Constitutional Court shall rule on other acts by the Parliament, the Cabinet of Ministers, the President, the Speaker of Parliament and the Prime-Minister, except for the administrative acts.

A special situation is highlighted in the report by the Constitutional Court of Austria, where, after showing that “real” regulations (regulations specifying a law) adopted by the Federal Government are subject to constitutional review just as any other regulation, as well as that the Constitutional Court is not entitled to review internal acts of the Federal Government, it is pointed out that, as regards the Rules of Procedure of the Federal Government, there is a particular situation: they do not exist, a fact quite unusual measured by international standards. The internal rules for Government’s operating activities are based on individual decisions and “customs” developed in the legal practice of Federal Governments since 1945. The most important such rule is that decisions of the Federal Government must be adopted unanimously. Since this rule undisputedly applies there is no need for further discussion on the interpretation of rules of procedure because in case of a dispute an agreement in the decision-making process will not be reached anyway.

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

A. General and individual acts/ Statutory and non-statutory acts.

After reading the reports of the Constitutional Courts, we find that, in practice, it is difficult to attain an uniform approach with respect to the complex category of acts subject to constitutional review, taking into account the particular elements related to the regulation of powers pertaining to the Constitutional Courts, as well as the existing dissimilarities in connection with the legal systems of the participating countries, determined, inter alia, by the structure of these States – unitary or federative, as well as by the difference in conception as regards the constitutionality review.

Moreover, the national reports discuss this issue in a complex manner, and as a result a simple listing of the category of acts subject to review by the Constitutional Courts barely covers a small portion of the rich information conveyed.

Taking into account this complex character and to treat it uniformly, out of practical reasons, namely to supply a basis for the discussion on this subject, we shall proceed to listing out the category of acts on which the Constitutional Courts exercise review, by pointing out the main distinctions and nuances portrayed in the reports under this chapter.

Consequently, some reports make a distinction between general acts and individual acts, respectively, in the case of the latter, based on the entity that issues them.

In some cases, the scope of the acts subject to review is established as such, in the meaning that various regulatory or general acts fall under this category.

For example, the Constitutional Court of the Republic of Belarus shows that in performing the a priori constitutionality review, the Constitutional Court delivers judgments on the constitutionality of all normative legal acts provided that one of the qualified subjects provided by the law submits the relevant proposal.

The Constitutional Court of the Czech Republic performs the review of laws, as well as of “other legal regulations”. These are legal documents that were adopted and exist in the required form. The basic requirements for these legal regulations fall into two groups: general requirements (the regulation must be of regulatory nature and is binding on a wide – indefinite – group of subjects) and specific requirements (the regulation must be duly adopted and published, valid and in effect).
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Just the same, in proceedings for the review of constitutionality, the Constitutional Court of Slovenia decides upon the constitutionality (and legality) of laws, regulations, local community regulations, and general acts issued for the exercise of public authority.

The Constitutional Court of Serbia is competent to perform the review of a large set of acts, issued by various authorities and legal entities, the common feature of such acts being, as it results from the report developed, their general nature, more specifically: laws and other general acts of the National Assembly, President or Government, general acts of the other authorities and State bodies, statutes and other general acts of the authorities from the autonomous provinces, the statutes and other general acts of the local self-governing entities, general acts of the political parties, trade unions, and citizens’ associations, general acts of the organisations that exercise public functions, statutes and other general acts of companies and institutions, general acts of chambers and other associations, general acts of funds and other associations, collective agreements.

Actually, the rule is that it falls under the jurisdiction of the Constitutional Courts to perform the review of general acts. However, there are also cases when the Constitutional Courts are competent to perform the constitutionality review in the case of various individual acts.

Thus, the Constitutional Court of Austria shows that, according to the concept of the Austrian Federal Constitution, every legal act directly interfering with the legal sphere of the addressee is subject to review when it constitutes, abolishes or amends rights and duties. Any such legal act having general effect (i.e. addressing a target group marked by general criteria) is subject to review, as are all individual legal acts provided they are issued by an administrative authority (laws, regulations, agreements concluded between the Federation and the lands, respectively, between the lands in their specific area of jurisdiction). By contrast, individual legal acts by ordinary courts (judgments and decisions) may not be reviewed by the Constitutional Court at all. An exception exists however in the field of asylum law: judgments and decisions of the Asylum Court may be challenged before the Constitutional Court.

The Constitutional Court of the Republic of Croatia performs the constitutionality review in case of individual decisions by all State bodies/ governmental bodies (including final judgments and decisions of the Supreme Court of the Republic of Croatia, as well as of the other courts), bodies of local and regional self-government and legal entities with public authority, with regard to the violation of human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia.

The Constitutional Court of Lithuania is competent to review the legal acts and decides on their compatibility with the Constitution and the laws, irrespective whether they are statutory or individual, whether they have one time applicability (ad-hoc) or permanent validity.

In Germany, both provisions adopted by the Government, and any other acts or omissions on the part of the Government, may become subject-matter of a constitutional review where the possibility exists that they violate constitutional rights of those who may initiate proceedings of the respective type to protect their rights. Thus, in response to constitutional complaints of parties affected, the Federal Constitutional Court has in several sets of proceedings reviewed information measures of the Federal Government or of individual ministries. Constitutional complaints are normally only admissible once all remedies have been exhausted; the Federal Constitutional Court quashes only the impugned court decisions, but does not rescind the underlying administrative measure, and refers the case to a court with jurisdiction. The court decisions which have approved the acts of the Federal Government are therefore normally the primary subject-matter of the constitutional court’s review in such cases. Indirectly, however, – unless the impugned court decisions do not already need to be rescinded because of procedural errors – there may also be findings on the constitutionality of the underlying governmental acts.

The Constitutional Court of the Republic of Macedonia, within the frameworks of the competence for the protection of the freedoms and rights of the individual and citizen, may appraise individual acts or actions which have violated certain rights or freedoms of the citizens, which are safeguarded by the Constitutional Court and it may annul the same. Within the frameworks of this competence the Constitutional Court may appraise also the acts of the courts, that is, court judgments and the individual acts of the bodies of administration and other organizations carrying out public mandates. However, within the frameworks of the constitutional-court control, the Constitutional Court is not competent to appraise the individual acts of the Assembly and the Government.
In Norway, courts have the right to review constitutionality of the legislation and to censor administrative documents; however, we need to specify that they do not conduct constitutionality review in abstracito. The right to censor administrative decisions includes also the review of the facts in the relevant cases.

Also the Portuguese Constitutional Tribunal sets forth a distinction in this respect, establishing that, in principle, only the administrative documents issued by public entities are subject to its constitutionality review. However, the Tribunal has abandoned the concept of law in a purely formal sense and has developed a broader and, at the same time, formal and functional concept of the legal norm. Under this new concept, the review of a legal document depends on a cumulative verification of specific requirements. First of all, its prescriptive nature, particularly the prescription of a conduct or behaviour rule; secondly, it’s heteronymous nature; thirdly, its mandatory nature (its binding content). Therefore, various types of legal norms may be subject to constitutionality review. In addition to the legal norms in a traditional sense (namely general, abstract and mandatory rules issued by public entities), there are also other legal documents, namely the public norms having a mandatory external effect, of an individual and definite nature, as they are set forth in a legislative document, as well as the norms issued by private entities, if the latter have normative powers delegated to them by public entities. Thus, a Portuguese constitutional judge may verify the following legal norms in respect of their constitutionality: laws adopted by the Republic’s Assembly, including measure-laws (pieces of legislation having the form of a law and the content of an administrative document), and any other laws having an individual and definite content; law-decrees (legislative documents of the Government); legislative documents of the Madeira and Azores autonomous regions; international treaties and conventions in their simplified form, including international agreement-treaties; documents of statutory nature issued by the Government, the governments of the Madeira and Azores autonomous regions, local community bodies, specific administrative authorities (as is the case of civil governors of the regions located in the continental part of Portugal), specific public law legal entities, in certain situations, specific non-public entities, which have normative powers delegated to them by public entities; regulatory decisions (assentos) rendered by the Supreme Tribunal of Justice; decisions issued by the Supreme Tribunal of Justice for the jurisprudence unification; norms drafted by judges (in their capacity as interpreters) “in the spirit of the system” for the purpose of filling legislative gaps; regulations established by jurisdictions of voluntary arbitration; specific or sui generis documents, such as those establishing the rules necessary for the operation and organization of the Republic’s Assembly, based on its internal normative autonomy (despite of their nature of interna corporis documents); norms included in the by-laws of public utility associations; regulations of public utility associations or of other private entities, in the situations where these benefit from a delegation of authority from public entities; traditional (customary) norms, to the extent that and in the areas in which they are accepted as an internal law source; norms issued by the bodies of competent jurisdiction of international organizations to which Portugal is a party and that are in force in the Portuguese rule of law system.

Similarly, in respect to its competence to review constitutionality of other documents of the government administration bodies, the Hungarian Constitutional Court represents that it has had a consistent practice that depended on whether the documents in question had a normative content or not. At the initial stage of its jurisprudence, the Constitutional Court has decided that other documents issued by the government administration bodies were to be determined based on their content, not on their name (Decision no. 60/1992). In most of the cases, the Constitutional Court – in relation to the Parliament’s documents that had been subject to its review – established that those had an individual and definite character or, on the contrary, a normative content, by verifying their purpose, specifications, as well as the period for which the conduct rules included in the relevant documents had been established (e.g., Decision no. 50/2003). Regarding the norms belonging to the range of other documents of the government administration based on their name, not on their content (first of all: Resolution no. 52/1993), the Constitutional Court decided that it had not the competence of jurisdiction, since the document subject to review did not have a normative character and, as a result, rejected the intimation. In the same report, it is stated that there are also different kinds of norms that may not be deemed government administration documents based on their issuer or name and, in such cases, the Constitutional Court rejects petitions, by making reference in the title to the annulment of the reviewed norm and by underlining the fact that such norm can neither generate further rights or obligations nor produce legal effects. It is also stated that there has been a diverging practice related to the possibility of reviewing laws without a normative content. The common element of all these decisions consists of the fact that the starting point was precisely the Law on the Constitutional Court. Such practice was changed when Decision no. 42/2005 was adopted, under which the Court established the following: “The Constitutional Court deemed its competence of jurisdiction to conduct a subsequent abstract review as a competence covering all norms (provisions of a normative nature) deriving from (and protected by) the Constitution”. Therefore, the Constitutional Court examined the constitutionality of a decision on consistent interpretation (mandatory for lower courts) rendered by the
Supreme Court. The concept of law was addressed in a different manner through Decision no. 24/2008. Under this decision, the Court specified as follows: “The Constitution itself establishes the State’s authority, which may adopt laws, and the form under which such laws may be adopted.” For the purposes of this decision, a law is a document adopted based on the Constitution.

B. Primary legislation and secondary legislation

In respect to the documents subject to constitutionality review, some reports make a distinction between primary legislation and secondary legislation.

Primary legislation, which has specific particularities, may be subject to review by Constitutional Courts. However, secondary legislation does not fall, in all cases, under the jurisdiction of Constitutional Courts.

Thus, the Constitutional Court of Belgium has exclusive competence in respect of the constitutionality review of legislative documents, but it has no prerogatives of review over documents of the executive power.

In the report of the Constitutional Court of the Czech Republic, it is stated that the Constitutional Court is not authorized to review the consistency of sub-statutory legal norms, even if they are of varying legal force and conflict with each other. The Constitutional Court has noted in this regard: “The Constitution does not give the Constitutional Court the power to annul sub-statutory legal regulations of lesser legal force due to inconsistency with sub-statutory regulations of higher legal force, or even due to inconsistency with a sub-statutory regulation of the same legal force. Thus, at the level of abstract review of norms, the Constitutional Court is not a universal guardian for the consistency of a hierarchically structure legal order at all its levels. In our constitutional system, conflict between sub-statutory regulations of varying or the same legal force can be addressed at the level of specific review of norms and their application under Article 95 par. 1 of the Constitution.”

Similarly, the Constitutional Court of Italy lacks jurisdiction to review sub-statutory regulations, such as rules that are issued by the Government. Such documents are subject to a review of legality or of compliance with the primary legislation – conducted by judges of ordinary or administrative courts. Therefore, given the fact that secondary rules need to comply with laws, and laws need to comply with the Constitution, these secondary norms have also to inherently comply with the Constitution, while a separate review based on the provisions of the Constitution is not necessary.

Referring to the documents issued by the Government, the Constitutional Court of Romania points out that, according to Article 108, paragraph (1) of the Constitution, the Government issues decisions and ordinances. However, only Government Ordinances (Article 146, item d) of the Constitution and Article 29, paragraph (1) of Law no. 47/1992) which are, such as the laws and the parliamentary regulations, primary legislation, may constitute subject to constitutionality review by the Constitutional Court. Government Decisions are issued for organising the enforcement of laws (Article 108, paragraph (2) of the Constitution), which represent secondary legislation, and, as a result, are not subject to constitutionality review by the Constitutional Court, but, possibly, to a legality review conducted by administrative courts.

C. Categories of documents over which Constitutional Courts conduct reviews

In a synthetic presentation, such documents are as follows:

a) Laws

After reading the submitted reports, we find first a complex approach of the concept of law, in some cases both the formal and the substantive criterion being used for defining it.

Consequently, some reports state that there are subject to constitutionality review laws and legal norms having the force of law, under which are listed for example, in Italy, numerous legal norms: laws adopted by the State, legislative decrees adopted based on a delegation (legal norms issued by the executive under an authorisation given by the Parliament) law-decrees, legal norms issued by the Executive as a reaction to specific emergency situations and which, after sixty days, have to be turned into laws adopted by the Parliament. The Court may decide also upon the constitutionality of the legislation adopted by the Regions and the two Autonomous Provinces to which the Constitution conferred legislative prerogatives (Bolzano and Trento, which comprise the Trentino-Alto Adige Region). Constitutionality review is also conducted over presidential decrees through which a law or a different legal norm is declared repealed follow-
ing a referendum, according to Article 75 of the Constitution. The Regulations adopted by the European Union are not categorized as laws or legal norms having the force of a law for the purpose of constitutionality review, even though the Constitutional Court stated that the European legislation may run counter to “the fundamental principles of the constitutional system or to inalienable human rights” (case no. 98 of 1965, subsequently confirmed repeatedly); in the event that such incompatibility is found, in observance of the dualist concept regarding the relation between the national and the EU legislation, the Court’s review would limit exclusively to the Italian legislation for their implementation, to the extent that it transposes EU norms.

In a similar manner, in Spain, in abstract constitutionality review procedures, both in an appeal and in a matter of unconstitutionality, the Tribunal verifies compliance with the Constitution of “the laws, provisions of regulations or documents having the force of law” or, in a synthetic wording, of any “norms having a status of law”, namely: autonomy statutes and other organic laws; other laws, provisions of regulations and of State documents having the force of law (it is specified that, in case of legislative decrees, which are provisions with a force of law adopted by the Government based on a delegation granted by the Parliament, the Tribunal exercises its competence without prejudice to the control prerogatives granted to common law courts); international treaties; regulations of the Chambers and of the Cortes Generales (the Parliament); regulatory laws, norms and provisions with a force of law adopted by the Autonomous Communities, with the same exception mentioned in relation to the situations of legislative delegation; regulations of the Legislative Assemblies and of Autonomous Communities.

The reference to the two criteria – the substantive and the formal one – is made also in the report of the Constitutional Court of Hungary, as mentioned above.22

However, in most of the cases, the law in a formal sense is considered, as an act of a general nature issued by the legislative power, and which was adopted under a pre-established procedure.

As a rule, all categories of laws, in a formal sense, are subject to review by the Constitutional Court. A particularity in this area, determined by the State structure, is relevant in some of the reports of the Constitutional Courts of the federal States, and refers to the competence of such Courts to review the Constitutions of the States that are included in the federation structure, as well as other rules adopted by such States.

Thus, the Constitutional Court of the Russian Federation has the competence to review the constitutions of its republics. Likewise, charters, laws and other legal norms of the Russian Federation’s entities, adopted in areas that fall under the competence of the Russian Federation’s State bodies or under the joint competence of the Russian Federation’s State bodies and of the Russian Federation’s entities are subject to review.

However, there are also cases where specific categories of laws are excluded from the reviews conducted by the Constitutional Courts, by considering either their typology or their scope of regulation.

Consequently, in Switzerland, for example, federal laws are excluded from constitutionality review, because the Swiss Federal Tribunal has the obligation to apply them (Article 190 of the Constitution). Abstract review is excluded in all these cases (Article 189, paragraph 4 of the Constitution). Instead, within a definite review, the Tribunal may find that a federal law violates the Constitution or the international law. In the first situation, it can neither annul the law nor refuse to apply it. It has the possibility to flag unconstitutionality through a decision first and also in its annual management report, submitted to the Parliament, under the section titled “Indications to the attention of the legislator”. Also, federal ordinances may not be brought before the Swiss Federal Tribunal (Article 189, paragraph 4 of the Constitution). It results that also abstract review is excluded for this category of legal norms. Instead, a definite review conducted by the Federal Tribunal is possible. Its extension varies depending on whether an ordinance is based directly on the federal Constitution or on a delegation contained by a federal law. Cantonal laws and ordinances (including communal laws and ordinances) may be subject to abstract and definite review without restrictions.

In Luxembourg, the Constitutional Court decides upon compliance of the laws with the Constitution, except for the legislation under which treaties are approved.

In France, starting from March 1, 2010, the Constitutional Council conducts a posteriori reviews, through preliminary...
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decisions on the issue of constitutionality, over any legal provisions in force, upon notification by the State Council or the Court of Cassation, in relation to an objection raised during a trial pending in court referring to the compliance of these provisions with “the rights and freedoms guaranteed by the Constitution”. However, the Constitutional Council may not review the laws adopted through referendums and the constitutional laws.

In Hungary, the Constitutional Court annuls laws and other legal norms which it finds to be unconstitutional. The Constitutional Court may annul laws on the State budget and its execution, on general taxes, on stamp and custom fees, on contributions, as well as those referring to the content of laws under which unitary terms in the area of local taxes are established, but only in the situation where, given their content, they violate the right to life and human dignity, the right to personal data protection, the right to freedom of thinking, conscience, and religion or the right relating to the Hungarian citizenship.

As a rule, constitutionality review is conducted upon notification of aspects set forth by the Constitution, or by the laws on the organisation and operation of Constitutional Courts; however, there are Constitutional Courts under which competence falls the systematic review of laws.

Consequently, for example, the Constitutional Court of Belarus, starting from July 2008, conducts mandatory a priori reviews over all laws adopted by the Parliament, prior to their promulgation by the President. The Constitutional Council of France conducts a systematic review (Article 61, paragraph 1 of the Constitution) of the organic laws, prior to their promulgation, and of law proposals that are approved through a referendum procedure, prior to their being subject to a referendum.

b) International treaties

As a rule, international treaties are subject to review by Constitutional Courts.

Review is conducted prior to ratification/promulgation, as a preventive measure or, possibly, as a sanctioning measure for the fact that a treaty was concluded beyond the limits permitted by the Constitution (for example, Albania, Andorra, the Czech Republic, the Russian Federation, France, Lithuania, Latvia, the Republic of Poland, Romania) and, in some cases, following ratification (for example, Serbia).

In most of the cases, the prepared reports refer to the category of international treaties in general, while other times distinctions are made within this category.

Thus, the Constitutional Court of Azerbaijan, for example, decides upon the inter-State agreements of the Republic of Azerbaijan prior to their coming into force and upon inter-government agreements of the Republic of Azerbaijan.

The Constitutional Tribunal of Portugal states that international treaties and conventions in their simplified form, including international agreement-treaties, are subject to its review.

The Constitutional Court of the Russian Federation specifies that treaties concluded between State bodies of the Russian Federation and State bodies of entities of the Russian Federation, treaties concluded between State bodies of entities of the Russian Federation and international treaties of the Russian Federation that have not come into force are subject to its review.

Both related to the category of laws and to that of international treaties, a special situation is found in Austria, where the Constitutional Court has the competence to review the republication of a law or of a State treaty. Therefore, according to the Austrian Constitution, the supreme constitutional bodies of the Federation and of the Austrian provinces may review republication of laws and treaties. This means that the text of the legal norm in force on the relevant date is authenticated in a wording binding for law subjects. The purpose of this provision is that of transposing in a continuous form, easily accessible, laws or State treaties which wording has become complicated and difficult to understand because of numerous amendments made. The Constitutional Court verifies whether the republication conditions have been observed, namely whether the text has been republished with all amendments adopted by the competent legislator in their exact wording.
c) Regulations of the Parliament\textsuperscript{23}, other documents of the Parliament

As a rule, documents of general nature of the Parliament (the legislative authority), other than laws, are subject to review by Constitutional Courts (for example, the Republic of Armenia, Azerbaijan, the Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Spain, Ukraine).

In Estonia, also the resolutions adopted by the Standing Committee of the Riigikogu are subject to review by the Constitutional Court.

In Romania, regulations of the Parliament, resolutions of the Plenary of the Chamber of Deputies, resolutions of the Plenary of the Senate and resolutions of the Plenary of the two reunited Chambers of the Parliament are subject to constitutionality review.

In Ukraine, legal documents of the Supreme Rada of Ukraine (resolutions, statements etc.), among which “normative acts of the Presidium of the Verkhovna Rada of Ukraine, which follows from the special status of the Presidium of the Verkhovna Rada of Ukraine in the system of State power of Ukraine before February 14, 1992”, as well as legal documents of the Supreme Rada of the Autonomous Republic of Crimea are subject to review by the Constitutional Court.

d) Decrees/Resolutions/Orders/General Acts of the President of the Republic

Some Constitutional Courts have the competence to review general acts issued by the President of the Republic (the Republic of Armenia, Azerbaijan, the Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia and Ukraine).


Legal norms of the Government are subject to review by Constitutional Courts in States such as Andorra (decrees issued based a legislative delegation), the Republic of Armenia, Azerbaijan (resolutions and orders of the Cabinet of Ministers), the Republic of Belarus (resolutions of the Council of Ministers), the Russian Federation, the Republic of Moldova, Montenegro (general acts adopted by the Government: regulations, ordinances, decrees etc), Georgia, Portugal (legislative documents of the Government, namely decree-laws), Romania (ordinances and emergency ordinances), Serbia (decrees, resolutions and other general acts adopted by the Government), Spain, Ukraine (documents of the Council of Ministers), Turkey (where the Parliament may approve, through a law, authorization of the Council of Ministers to issue “decrees having force of law”).

f) Resolutions of the Prime Minister (e.g., the Republic of Armenia)

\textit{g) Legal norms of the central executive administration bodies (e.g., Azerbaijan)}

\textit{h) Documents/Resolutions of the local public administration/local autonomous bodies}

- resolutions of local autonomous bodies (the Republic of Armenia)
- legal norms of the central public administration bodies (Albania)
- acts issued by the municipality (Azerbaijan)
- documents of public authority legal entities, including local autonomous and regional bodies (the Republic of Croatia).

\textit{i) Other documents}

Acts of courts (other than those of an individual nature mentioned under point 1 above)/acts of the General Prosecutor

- decisions of the Supreme Court of the Republic of Azerbaijan (Azerbaijan);
- documents of the Supreme Court, the Supreme Economic Court and the General Prosecutor (the Republic of Belarus);

\textsuperscript{23} See answer to question no. 4
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- regulatory decisions (assentos) rendered by the Supreme Tribunal of Justice; decisions issued for jurisprudence unification purposes by the Supreme Tribunal of Justice; norms drafted by judges (in their capacity as interpreters) “in the spirit of the system,” in order to fill legislative gaps; regulations established by jurisdictions of voluntary arbitration (Portugal).

Traditional (customary) norms, to the extent and in the areas where these are accepted as an internal law source (Portugal).

Decisions of election commissions (through appeal or final appeal (recourse) – Estonia; in Lithuania, the Court examines the decisions issued by the Central Election Commission or its refusal to review complaints related to the infringement of the election legislation, when such decisions have been issued or other acts have been drafted by the commission after the end of the voting operations in the elections for the Seimas or for the office of President of the Republic (the decision of the Constitutional Court on November 5, 2004), in which case the Constitutional Court practically investigates the legality of the document of the Central Election Commission (whether this Central Election Commission has observed the election law);

Programs of the political parties, in respect of their constitutionality (the Constitutional Court of the Republic of Croatia, the Constitutional Court of the Republic of Macedonia);

Statutes of political parties and civic associations, in respect of their constitutionality (the Republic of Croatia, the Republic of Macedonia);

Norms contained in statutes of public utility associations and regulations of public utility associations or of other private entities, in the situation where they benefit from a delegation of authority from public entities (Portugal);

Norms issued by competent bodies of the international organisations to which Portugal is a party and which are in force in the Portuguese legal order (Portugal).

6. a) The Parliament and the Government, as applicable, proceeds without delay to the amendment of laws (namely of the act declared unconstitutional) in the sense of reconciling it with the fundamental law, according to the decision of the court of constitutional disputes. What is the term established for this purpose? Is there a special procedure in place? Otherwise, specify the alternatives. Give examples.

6.a) 1. If the Parliament and the Government, as applicable, proceeds without delay to the amendment of laws (namely of the act declared unconstitutional) in the sense of reconciling it with the fundamental law, according to the decision of the court of constitutional disputes.

The issue concerning the measures through which a document declared unconstitutional is reconciled with the Basic Law by the Parliament or the Government is very complex, because it gets specific particularities depending on the subject and type of constitutionality review or the effects of the decisions of the Constitutional Court rendered in conducting such review.

Some of the Constitutional Courts make a clear distinction between the preventive conduct of the law maker, a concerted action or inaction, as general ways of compliance with the decision of the Constitutional Court, namely depending on the typology of decisions (through which unconstitutionality of a norm or legal norm is confirmed, the effect consisting of its invalidation or repealing, decisions confirming legislative gaps or decisions confirming unconstitutionality of a specific interpretation of the law), and the prerogatives under which these are rendered or between the type of constitutionality review—*a priori/a posteriori*, respectively *abstract/definite*.

Generally speaking, without making any distinctions based on the above mentioned criteria, in most of the countries, the aforementioned authorities comply with decisions of the Constitutional Court. There have been even situations where aspects of unconstitutionality have been eliminated before a decision was rendered by the Constitutional Court, namely, at the moment when the Court was notified in a specific case, the law maker, finding that there were flaws in the rule on which ground the Constitutional Court was notified, eliminated them by means of amending the criticized norm (e.g., the Republic of Latvia).

24 A category that has disappeared.
However, the nature and promptness of compliance measures is quite different; under this aspect, a series of factors, related in principal to the existence of specific terms and procedures regulated under the law and to the complexity of the issues raised by the reconciliation of the document declared unconstitutional with the provisions of the Constitution having to be discussed, as in some situations, this process requires a longer period of time for finding a solution.

There have been also cases of non-compliance with the decisions of the Constitutional Court (for example: Croatia, Luxemburg, Poland, Romania), including under the aspect of incorporating a legislative solution declared unconstitutional by the Court in the text of a new legal norm, as well as cases where such compliance is questionable25 (for example, Estonia).

Thus, the Constitutional Court of Croatia, referring to the non-enforcement of a decision, states that, even though this is an extremely rare situation in the past 20 years, it proves that there are no legal mechanisms in the rule of law system of the Republic of Croatia through which the Croatian Parliament or Government can be forced to enforce the Court’s decisions. However, it specifies at the same time that the situation differs significantly when other authorities have the obligation to enforce a decision of the Constitutional Court. In such cases, Article 31, paragraph (3) of the Constitutional Law on the Constitutional Court of the Republic of Croatia applies, which sets forts that “The Government of the Republic of Croatia ensures, through its central administration bodies, enforcement of the decisions and judgments of the Constitutional Court”.

Also, other Constitutional Courts (for example, those of the Czech Republic, Italy, the Republic of Poland) represent that they do not have the legal means to oblige the legislator to adopt a new regulation.

However, the Constitutional Court may sanction a statutory act or a norm that took over a legislative solution declared as being unconstitutional. The Constitutional Court of Romania evinces for this purpose a situation where, noticing that an unconstitutionality flaw found previously had been perpetuated in a new legal norm adopted by the Parliament, it confirmed the unconstitutionality of the new act. Thus, through Decision no. 1018/201026, considering a previous decision (no. 415/2010) and the obligation of the Parliament to reconcile the unconstitutional provisions with the provisions of the Basic Law, the Court decided that “adoption by the legislator of norms contrary to what was decided upon by a decision of the Constitutional Court, through which it tends to maintain the legislative solutions affected by unconstitutionality flaws, is contrary to the Basic Law”. Similarly, the Constitutional Court of Romania sanctioned through its decisions the lawmaking procedure used by the Government, which effect was, in one situation, that the provisions of a legal norm that was repealed and declared unconstitutional – Government Emergency Ordinance no.37/2009 – continued to produce legal effects in the form of a new legal norm – Government Emergency Ordinance no.105/2009 – which took over entirely, with insignificant amendments, the initial provisions in the respective area. On that occasion27, the Court decided that such situation “calls into question the constitutional behaviour of a legislative nature of the Executive in its relation to the Parliament and, last but not least, to the Constitutional Court.”

In the report of the Constitutional Tribunal of Poland it is stated that the introduction of legislative amendments necessary to re-establish the integrity of the legal system, after the Tribunal repeals non-complying provisions, has represented a serious issue for years. The incompetence of the legislator in this respect impedes the efficiency of the Tribunal decisions and impacts adversely the authority of laws. However, it is mentioned that, recently, the situation has been improved. The introduction of a special procedure in the Senate – which seeks to monitor the Tribunal jurisprudence and to prepare specific legislative initiatives based on such monitoring – should be assessed as very beneficial.

6. a) 2. Regulation of terms and procedures. An alternative

In most of the States there is no special procedure or terms under which the Parliament or the Government, as applicable, should amend an act that was declared unconstitutional, in the sense of bringing it in compliance with the Basic

25 It is stated that it is questionable whether we can speak about compliance with the decision rendered under the constitutionality review in the following situations: where the legislative did not amend the provisions declared unconstitutional through a decision of the Supreme Court, but the legislation was harmonized in practice with the Constitution, or where the legislation was amended formally but unconstitutinality was preserved in its substance.


Law[^28], according to the decision of the constitutional court, and the conclusion is that, in practice, the actual manner and time interval in which compliance with those provided for by Constitutional Courts is reached tend to remain at the discretion of the legislative.

There are also cases where such terms, respectively procedures, are regulated either through the Constitution or through legal norms regulating the organisation and operation of the aforementioned authorities, or through laws on the organisation and operation of Constitutional Courts. Many of the reports reveal in this context the possibility of the constitutional courts to postpone the entry into force of their decisions concerning unconstitutionality, which amounts to the provision of a deadline for the lawmaker in order to bring into line the respective act with the ruling of the Constitutional. As for the terms set through the documents of Constitutional Courts, we note that, most of the times, their purpose is to grant the legislator the time necessary to take the measures required for eliminating a legislative gap or to regulate a specific issue in accordance with the Constitution. This happens because, as stated in some of the reports, the Constitutional Court can neither oblige the legislative power to adopt a law nor can it set time limits for this purpose, considering the principle of separation of powers.

(a) Terms and procedures regulated by the Constitution

According to Article 147 paragraph (1) of the Constitution of Romania, any provisions of the laws and ordinances in force, as well as any of the regulations which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right.

According to Article 125 sec. 3 of the Constitution of the Slovak Republic, if the Constitutional Court holds by its decision that there is inconformity between legal regulations, the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued these legal regulations shall be obliged to harmonize with the Constitution, with constitutional laws and with international treaties promulgated in the manner laid down by a law, and in cases stipulated by the Constitution also with other laws, governmental regulations and with generally binding legal regulations of Ministries and other central state administration bodies within six month from the promulgation of the decision of the Constitutional Court. If they fail to do so, these regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

(b) Terms and procedures regulated by the Standing Orders/Statute of the Legislative Power

In the Republic of Lithuania, as from 2002, the Seimas’ Statute includes a special chapter devoted to the implementation of the Constitutional Court’s decisions and rulings, which sets forth the procedure for enforcing the decisions of the Constitutional Court under which a specific document is confirmed as being contrary to the Constitution, as well as the actual deadlines for doing so. In order to ensure proper implementation of the Constitutional Court’s decision and the amendment of the unconstitutional legal document, one of the Seimas Vice-Presidents is appointed as being in charge of such procedure in the Seimas. Article 181[^2] of the Seimas Statute establishes that, within one month after receiving a decision of the Constitutional Court, the Legislative Department has the obligation to provide the Seimas’ Legal Commission with proposals for the decision implementation, which the Commission has to examine within maximum two months after the decision was received by the Seimas. The specialized commission or the working group created for this purpose within the Seimas has the obligation, within maximum four months, to draft and submit to the Seimas for review a draft amending the relevant law (or specific provisions of it) or any other document adopted by the Seimas (or a part of it) that was declared unconstitutional. In case of a complex draft, the Seimas’ Standing Committee may extend the deadline for submission, which shall not exceed 12 months. Also, there may be a proposal for the Government to prepare a draft amending the law (or provisions of it). The drafts amending unconstitutional laws, prepared for the purpose of implementing decisions of the Constitutional Court, are subject to debates and adoption under the general law making procedure established by the Seimas’ Statute. In adopting the new law or the amendment or supplementing of a law in force, the legislator may not disregard the concept given to the constitutional provisions and the legal rationale contained in the decisions of the Constitutional Court.

[^28] For example: the Republic of Armenia, the Republic of Belarus, Cyprus, the Republic of Croatia, Estonia, Latvia, Luxembourg, Macedonia, Ireland, the Czech Republic, Monaco, Poland, Georgia.
In the same report it is also stated that, in practice, there are also situations where a term longer than the one set by the Seimas’ Statute is granted to the legislator in order to make amendments to a document (or a part of it) declared unconstitutional. This is possible where the Constitutional Court, rendering in favour of unconstitutionality, orders also the postponement of the official publication of the relevant decision, which means that such rule continues to remain in force until the official publication of the Constitutional Court’s decision, even though it was confirmed as being in conflict with the Constitution. The legislator, aware of the fact that the rule will become null by right as from a specific date, has the possibility to debate and draft in advance all such amendments. The Constitutional Court may postpone the official publication of its decision when this is necessary in order to grant a respite to the legislator in order to eliminate the gaps found. The official publication of the Constitutional Court’s decision is postponed for the purpose of avoiding specific effects, unfavorable both for the society and for the State, as well as in relation to human rights and freedoms, effects that may occur if the Constitutional Court’s decision were published officially immediately after its rendering and if it came into effect on the same day when it was published officially (decisions of the Constitutional Court on January 19, 2005, August, 23, 2005 and June 29, 2010).

In Romania, the Chamber of Deputies amended its Regulations\(^2^9\) in 2010, by introducing a series of rules and deadlines related to the procedure to be followed in the event that the Court confirms unconstitutionality of specific legal provisions, following an a priori or an a posteriori review. Thus, according to Article 134 of the Chamber of Deputies’ Regulations, in cases of unconstitutionality of laws prior to their promulgation, and in the situation where the Chamber of Deputies was the first Chamber notified, the Standing Committee, in its first meeting held after the publication of the Constitutional Court’s decision in the Official Gazette of Romania, shall notify the Committee for Legal Matters, Discipline, and Immunities and the Standing Committee notified in the first instance on the draft law or the legislative proposal, in order to re-examine the provisions declared unconstitutional. The same procedure applies also in the situation where the relevant provisions are sent to the Senate, in its capacity as first Chamber notified. The deadline set by the Standing Committee for the report drafting by the mentioned committees may not be longer than 15 days, such report is included on the agenda on a priority basis, and is adopted with the majority required by the ordinary or organic nature of the legislative initiative subject to re-examination. Upon re-examination, the necessary technical and legislative correlation will be done and, following adoption, provisions are sent to the Senate, if the latter is the decision-making Chamber.

According to Article 134\(^2\) of the Chamber of Deputies’ Regulation, in case of unconstitutionality of provisions of the laws and ordinances in force, as well as of those of Regulations, and which, according to Article 147, paragraph (1) of the Constitution, cease their legal effects within 45 days from the publication of the Constitutional Court’s decision, a term during which these are suspended de jure, and, in the event that the Chamber of Deputies was the first Chamber notified, the Chamber’s Standing Committee shall notify the Committee for Legal Matters, Discipline, and Immunities and the Standing Committee under which scope of activity the relevant legal norm falls, for the purpose of revising the provisions and reconciling them with the provisions of the Constitution. The revised provisions are included in a legislative initiative, which is distributed to the Deputies and, after the expiry of the 7-day time limit, within which amendments may be submitted, the two committees, within 5 days, shall draft a report on that legislative initiative, which is subject to debates and adoption by the Plenary of the Chamber of Deputies. Such legislative initiative is adopted with the majority required by the nature of the legal norm in question and is sent to the Senate.

(c) Terms and procedures regulated by the Law on the Organisation and Operation of the Constitutional Court

For instance, in the Russian Federation, Article 80 of the Federal Constitutional Law “on the Constitutional Court of the Russian Federation” regulates this issue as follows. In the event that a provision of a federal constitutional law or a federal law (or provisions of it) is declared entirely or partially unconstitutional by a decision of the Constitutional Court, or if, following a decision of the Constitutional Court, a need to eliminate a gap existing in the relevant rule results, the Government of the Russian Federation shall submit to the State Duma, within maximum three months from the publication of the Constitutional Court’s decision, a new federal constitutional draft law or a new federal draft law or several connected draft laws or, as applicable, a draft law for the amendment of the law declared initially as being partially unconstitutional. Draft laws shall be discussed by the State Duma under an extraordinary procedure. In the event that a provision of a legal norm of the Government of the Russian Federation is declared entirely or partially unconstitutional by a decision of the Constitutional Court, or if, following a decision of the Constitutional Court, a need to eliminate a gap existing in

the relevant rule results, the Government of the Russian Federation, within maximum two months from the publication of the Constitutional Court’s decision, shall repeal that legal norm, and either shall adopt a new legal norm or will make amendments and/or additions to the legal norm confirmed as being partially unconstitutional.

In the Republic of Moldova, the obligation of public authorities to reach compliance of the laws and other legal norms or of parts of them that have been declared unconstitutional with the Constitution is expressly regulated by the Law on the Constitutional Court. According to Article 28\(^1\) paragraph (1) of the law, the Government, within maximum 3 months from the day of publication of the Constitutional Court’s decision, submits to the Parliament the draft law amending and supplementing or repealing a legal norm or parts of it that were declared unconstitutional. The relevant draft law shall be examined by the Parliament on a priority basis. Paragraph (2) of the same Article sets forth that the President of the Republic of Moldova or the Government, within maximum 2 months from the publication date of the Constitutional Court’s decision, shall amend and supplement or repeal a legal norm or parts of it that were declared unconstitutional and, as applicable, shall issue or adopt a new act. In the event that, in examining a case, the Constitutional Court confirms the existence of gaps in legislation, due to failure to observe specific provisions of the Constitution, it shall first draw the attention of the relevant bodies on them, through a letter. The Constitutional Court’s observations regarding the gaps (omissions) existing in the relevant legal norms due to the non-observance of specific constitutional provisions mentioned in the letter are to be examined by the authority concerned, which, within maximum 3 months, shall inform the Constitutional Court on the examination results.

(d) Terms and procedures regulated by other special laws

In Romania, Law no. 590/2003 on Treaties\(^2\) specifies, in Article 40, paragraph (4), second sentence, that, in the event that, in fulfilling its powers and prerogatives related to constitutionality review, the Constitutional Court decides that the provisions of a treaty which is in force for Romania are unconstitutional, the Ministry of Foreign Affairs, together with the ministry or institution under which jurisdiction falls the main area regulated by that treaty, shall take steps, within 30 days, to initiate procedures necessary for its renegotiation or validity termination for the Romanian party or, as applicable, for the Constitution revision.

(e) Terms set by decisions of the Constitutional Court

The Constitutional Court of the Republic of Slovenia, when it finds that a law, a different rule or general act issued for the purpose of exercising public authority is unconstitutional or illegal, as it does not regulate a specific issue it should have to regulate, or regulates it in such a manner that does not allow for cancellation or repealing, adopts a declaratory ruling, according to Article 48 of the LCC. The legislator (or the authority issuing such illegal or unconstitutional rule or general act for the purpose of exercising public authority) has to eliminate the unconstitutionality or illegality aspects within the time interval set by the Constitutional Court. The time interval set by the Constitutional Court depends on the circumstances of the case in question, the term within which the legislator has to remedy the unconstitutionality or illegality aspects being of six months or one year.

For example, in Decision no. U-I-207/08, Up-2168/08 on March 18, 2010 (Official Gazette of the Republic of Slovenia No. 30/10), the Constitutional Court, establishing that Article 25 of the Law regulating protection of the right to a trial without unjustified delays is unconstitutional, as it does not regulate the status of the injured parties in whose cases violation of the right to a trial without unjustified delays ceased prior to the date of January 1, 2007, but who did not claim any fair compensation before the international courts until that date, the Constitutional Court required the legislator to remedy the unconstitutionality issues within six months from the publication of its decision in the Official Gazette of the Republic of Slovenia. In Decision no. U-I-411/06 on June 19, 2008 (Official Gazette of the Republic of Slovenia no. 68/08 and OdlUS XVII, 43), the Constitutional Court decided that the 7th paragraph of Article 128 of the Aviation Law was unconstitutional to the extent that it established that, in addition to the data mentioned in the Aviation Law, also other personal data may be processed. The Constitutional Court required the legislator to remedy this unconstitutionality issue within one year from the publication of its decision in the Official Gazette of the Republic of Slovenia. Article 142 of the Procedure Regulation of the National Assembly sets that the National Assembly, in its capacity as legislator, may adopt amendments to the laws referring to the procedure before the Constitutional Court or to the decisions of the Constitutional Court (for example, even when the Constitutional Court confirms unconstitutionality of the reviewed laws) under

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\(^{20}\) Published in Part I of the Official Journal of Romania no. 23 din January 12, 2004
a simplified procedure. As a rule, the legislative procedure implies three readings, while under a simplified procedure the second and the third reading take place during the same session. A special particularity of the simplified procedure is that there is no general debate over the draft law. Amendments may be submitted directly in the session until the commencement of the third reading of the draft law.

In the Republic of Belarus, the Constitutional Court, in some of its decisions, sets a date for their enforcement. Thus, in 1998, an inter-ministerial document of the Ministry of Social Security and the Ministry of Labour was submitted for review before the Constitutional Court. The Court had to decide on the types of payments that had not been paid as contributions to the social insurance budget. In its decision of September 24, 1998, the Court set a date (January 1, 1999) as from which the standards deemed unconstitutional shall no longer be applied. As a result, the Parliament had to reconcile the legislation on State social security with the decision of the Constitutional Court, around the date of December 31, 1998.

In Hungary, within the ex post facto review, when the Constitutional Court establishes, ex officio or based on a notification, that the legislative body did not fulfill its duties and prerogatives according to the authority resting upon it, which resulted in the occurrence of an unconstitutionality situation, the Court orders that the relevant body fulfill its duty, by setting also a deadline for this purpose. The Law on the Constitutional Court does not set forth sanctions, specifying under §49, sub-section (2) only the fact that the body in relation to which an omission was found shall fulfill its duties and prerogatives within the set deadline. Also, the Law on the Constitutional Court permits the Court to set a term for a law that has been declared unconstitutional to cease its effects or applicability in a particular case, justified by interests related to the legal security or where there is an extremely important interest from the part of the notifying party [§43 sub-section (4)].

Similarly, in the Czech Republic, the Law on the Constitutional Court sets forth, under Article 58 paragraph 1, that the decisions (that annul a legal provision or a part of it) become applicable as from the date when they are published in the Official Law Collection, except for the situation where the Constitutional Court decides otherwise. Therefore, the Constitutional Court often postpones enforcement of its decisions, in order to provide the legislator with sufficient time to adopt a new legal norm, which would reflect the Constitutional Court’s decision, and would eliminate the unconstitutional issues. In the situation where the Constitutional Court decides to postpone enforcement of a decision that annuls a legal norm or a part of it, its decision on the postponement duration is influenced first of all by reasons related to the complexity of the legal framework to be replaced and to the complexity of the legislative process. In general, enforcement may be postponed for a period of up to 18 months.

In Austria, there is a possibility for the constitutional court to set a term for the lapse of the relevant legal norm, but no longer than 18 months. Such legal norm will continue to apply to the situations created prior to its annulment (except for the case on which it was grounded), except for the situation where the Constitutional Court decides otherwise through a decision.

Also, in the Republic of Poland, for the same reasons mentioned above, the Tribunal may postpone the date on which an unconstitutional (illegal) provision loses its legal power (the first sentence in fine of Article 190, paragraph (3) of the Constitution). In the case of laws, such postponement periods may not exceed 18 months, calculated from the publication date of the relevant decision, while in respect of other types of legal norms subject to review, such period may not exceed 12 months. In the same report, it is also stated that there is a special procedure established only in the rules and norms of the Senate (Article 85a – 85f of the Resolution of the Republic of Poland’s Senate on 23 November, 1990 – The Senate Regulation[31]). According to this procedure, decisions of the Tribunal are brought to the knowledge of the Senate’s Legislative Committee by the Senate’s Marshall. Subsequently, the Committee examines whether it is necessary to take legislative steps in the relevant area (for example, for the purpose of eliminating gaps and inconsistencies from the legal system). Following analysis of the issue, the Committee submits to the Senate’s Marshall a proposal to adopt a legislative initiative or informs the Senate’s Marshall that legislative measures do not have to be adopted. Depending on the Legislative Committee’s opinion, the Senate may submit an appropriate legislative initiative to the Seim. However, the Seim may reject the Senate’s initiative.

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[31] To these provisions, stipulated in Section IX titled “Enforcement of decisions of the Constitutional Tribunal”, the Senate’s rules and norms have been added, in compliance with Article 1, paragraph (3) of the Senate’s Resolution on 9 November, 2007.
In order to draw the legislator’s attention with respect to the need to amend non-complying normative solutions, the Tribunal has also the right to: express, in its decision reasoning, the need to adopt some amendments that would re-establish the integrity of the legal system; to issue signalling decisions (mandatory for the recipient) and to include the relevant observations in the annual publication titled *Information on Substantive Issues Arising from the Activities and Jurisprudence of the Constitutional Tribunal*.

In the same way, in *Bosnia and Herzegovina*, according to the Regulation of the Constitutional Court, a deadline may be set for the reconciliation of the legislation declared unconstitutional by the Constitutional Court, such deadline being of maximum 6 months.

In *the Republic of Latvia*, when the Court decides upon the nullification of a contested norm or document as from a specific future date, according to Article 32 (3) of the Law on the Constitutional Court, it may set a subsequent date as from which the appealed norms that were found as being unconstitutional lose their legal power, in the event that the immediate repealing of the norm would result in a more aggravated or inadmissible situation. Usually, the legislator is provided with a period of 6 months in order to remedy all the deficiencies found.

In *Turkey*, the provisions of the laws that have been annulled by the Constitutional Court cease producing effects as from the publication date of the annulment decision in the Official Gazette. If the Court deems necessary, it may also decide the date on which the annulment decision comes into force, a date that may not be later than one year from the publication date of the decision in the Official Gazette.

In *Ukraine*, where necessary, the Constitutional Court may determine in its decision or opinion the procedure and terms of enforcement and oblige appropriate State bodies to ensure enforcement of the decision or adherence to the opinion (Article 70.2 of the Law). Also, in accordance with Article 70.3 of the Law of Ukraine “on the Constitutional Court of Ukraine” the Constitutional Court of Ukraine has the right to demand from bodies stated in this Article a written confirmation of execution of the decision or adherence to the opinion of the Constitutional Court of Ukraine.

**6. b) The Parliament may invalidate a decision of the Constitutional Court: please specify under what terms.**

Neither the Constitutions of States nor their infra-constitutional legislation confer to the Parliament or to any other public authority the competence to invalidate decisions of the Constitutional Courts.

There are cases where such possibility existed for the Parliament, but such was eliminated, Constitutions of States being amended for this purpose.

Therefore, in *the Republic of Poland*, for example, between 1985 (the year when the Constitutional Tribunal was created) and 1997 (the year when the current Constitution was adopted) rejection of the Senate’s decisions by the Seim was possible. This was a consequence of the presumption, adopted in the communist doctrine of the constitutional law, that the Seim was the supreme body in matter of State authority, superior to all other State bodies (including to courts and tribunals). According to Article 7 of the Law on April 29, 1985 on the Constitutional Tribunal (which is no longer applicable), the Seim had the power to reject a decision rendered by the Tribunal on the unconstitutionality of a law, if, in the Seim’s opinion – the relevant law did not violate the Constitution. The Seim’s resolution on rejecting a decision of the Tribunal required a majority of at least two thirds, in the presence of at least half of the statutory number of Deputies. The Seim did not have the power to reject a decision of the Tribunal through which it declared the unconstitutionality of a legal document inferior to a law (such decisions were final). The situation changed when the Constitution of 1997 came into force. As from that moment, the Seim had no longer the right to reject decisions of the Tribunal. According to Article 190, paragraph (1) of the 1997 Constitution, all decisions of the Tribunal are final in the sense that they may not be appealed or rejected by any other public authority body. They have binding character, which means that they are binding for all public authority bodies – including for the Seim.

Similarly, in Romania, such possibility was set forth by the Constitution of 1991, which, prior to its revision in 2003, established, in Article 145, paragraph (1), that “*in unconstitutionality situations confirmed in compliance with Article 144, items a) and b), the relevant law or regulation is sent for re-examination. If the law is adopted in the same form by a majority of at least two thirds of the number of members of each Chamber, the unconstitutionality objection is eliminated, and promulgation becomes mandatory*”. This provision of the 1991 Constitution, justifiably criticized in the specialized doctrine, allowed for the Parliament to become a Court of Cassation in a dispute in which it was a party. Therefore, it was possible for an unconstitutional law to become constitutional through the will of an eligible majority of Deputies and Senators, without a revision of the Constitution, by completing all stages and fulfilling all procedures specified for this.
Following the Constitution revision of 2003, this possibility of the Parliament to invalidate a decision of the Constitutional Court was removed, and all decisions of the Constitutional Court are, according to Article 147, paragraph (4) of the Constitution, generally binding.

As stated in some of the reports, even though the competence to invalidate a decision of the Constitutional Court is not conferred to the Parliament, in exercising its constituent powers, it may revise the Basic Law in a manner that would allow for the overcoming of the effects of a decision of a court of constitutional jurisdiction.

For example, in Slovenia, the Constitutional Court decided in its Decision no. U-I-12/97 on October 8, 1998, that the legislator has to adopt a voting system based on the majority principle for electing Deputies in the National Assembly, according to the results of a referendum, and the National Assembly amended subsequently Article 80 of the Constitution and established that Deputies are elected based on the proportional representation principle (for example, by means of a proportional voting system).

The Spanish Constitutional Tribunal stated in 1992 that the right granted to European citizens under the Treaty of the European Union – signed in Maastricht, to be elected in the leadership bodies of the local communities was contrary to the Spanish Constitution (Article 13 of the Constitution of Spain: Declaration 1/July 1, 1992). In order to be able to ratify the Treaty of Maastricht, the Parliament had to revise the constitutional provisions. The reform of August 1, 1992, the first – and for now the only amendment of the constitutional text – was the only way to overcome the objection raised by the Constitutional Tribunal.

The Constitutional Court of Austria mentions in this sense that, in principle, the Parliament may not invalidate a decision of the Constitutional Court, but it may adopt a new law, also unconstitutional. In such case, the Constitutional Court will review it again. Since compared to the Constitutions of other States the Austrian one may be easily amended (the only requirement being the presence of at least half of the members of the National Council and a majority of two thirds of the votes expressed), in the past, there has been a situation where the Parliament (re)adopted an annulled law, this time as a law amending the Constitution. This practice has been often criticized in the doctrine, so that (until now) it has not been repeated. But also in such case, the Constitutional Court verifies whether such constitutional law could be an equivalent to a document revising the Constitution completely. In a concrete case, the Constitutional Court invalidated a constitutional law suppressing rights guaranteed constitutionally in a specific area (public procurement), by limiting their duration, of nature to undermine the control authority of the Constitutional Court.

Particular aspects are underlined in the report of the Constitutional Tribunal of Spain, which, as far as the possibility of the Parliament to invalidate its decisions is concerned, makes a distinction based on the scope of the constitutionality review or on the ground for unconstitutionality. For this purpose, it is stated that, when the Constitutional Tribunal does not declare a law as being contrary to the Constitution, but its interpretation and application by the courts, it is always possible to revise the laws that generated a jurisprudential divergence, while the new law may establish expressly the norm which had been deducted by the judicial bodies from the preceding legislative provisions. Also, if the Constitutional Tribunal declares nullity on grounds related to formal flaws (competence of jurisdiction or procedure) or if it interprets a law in its sense according to the Constitution, its decision does not prevent the competent legislator to amend the law, based on the procedure prescribed by the Constitution. Therefore, in such cases, it is possible that the legislator establish a norm different from the one deducted by the Constitutional Tribunal in a previous reading of the law, in light of the Constitution.

7. Are there institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of such contacts/what functions and prerogatives are exercised by both parties?

7.1 General aspects

After examining the institutionalized cooperation mechanisms existing between the Constitutional Court and other bodies, which are relevant in the contents of the reports asserting the existence of such mechanisms, it is found that, as a rule, these refer to either the application of conjunct competences, established by the Constitution and by laws, or individual duties and prerogatives of each body or authority, or a broader approach, addressing the area of research or of international collaboration.
The following have been presented as representing institutionalized cooperation mechanisms related to: creation of the Constitutional Court; procedure before the Constitutional Court; other cooperation forms with various bodies in fulfilling their duties and prerogatives; optimization of the legal order; participation of the Court, its judges or its President as members in various bodies, respectively organisations.

1.2 Creation of the Constitutional Court

Judges of the Constitutional Courts are appointed or elected by State authorities, according to a specific procedure,\textsuperscript{32} regulated by the Constitution or by the Law on the Organisation and Operation of the Constitutional Court.

7.3 Involvement in the procedure before the Constitutional Court within the exercise of its duties and prerogatives

Such involvement materializes in:

a) referral of the Constitutional Court by the bodies established by the Constitution respectively by the law, in order to review constitutionality of specific legal norms (for example, Belarus, Belgium, the Czech Republic, Italy, Romania, the Republic of Poland, the Republic of Serbia, the Republic of Slovakia, Ukraine; we need to underline in this context the specific form of collaboration existing between the Constitutional Court and the courts of law within the procedure regarding exceptions of unconstitutionality, emphasized, for example, in the reports of the Constitutional Court of Italy, respectively Romania);\textsuperscript{33}

b) referral of the Constitutional Court for exercising other of its duties and prerogatives (for example, in Belarus, upon referral by the President of the Republic, the Constitutional Court presents its conclusions in relation to the existence of acts of blatant or systematic violation of the Constitution by the Chambers of the National Assembly. When referred by the President of the Republic, the Constitutional Court shall also decide upon the existence of acts of blatant systematic violation of the provisions of laws by the local councils; in the Republic of Slovakia, the Constitutional Court conducts the disciplinary procedure against the President of the Supreme Court of the Republic of Slovakia, the Vice-president of the Supreme Court and the General Prosecutor; also, it gives a consultative approval for the initiation of criminal proceedings against or preventative arrest of a judge or of the General Prosecutor; in Ukraine, the bodies of the State power set by law and the bodies of local autonomy may refer the Constitutional Court in respect of issues of official interpretation of the Constitution and laws of Ukraine; also, the Supreme Rada of Ukraine may refer the Court in relation to the observance of the constitutional procedure for investigating and reviewing a case regarding the dismissal of the President of Ukraine in relation to an impeachment order (Articles 111 and 151 of the Ukrainian Constitution, and Articles 13 and 41 of the Ukrainian Law on the Constitutional Court of Ukraine). Presentation and submission of its conclusions to the Supreme Rada of Ukraine represents a mandatory element in the impeachment procedure. For the purpose of creating the conditions necessary for the adoption of such conclusions by the Constitutional Court, judges of the Constitutional Court of Ukraine (no more than three individuals) are invited to the hearings that take place before the special investigation commission in relation to the investigation conducted (Article 175 of the Regulation). Upon request, they will be given the floor during the session of the special investigation commission, for possible observations regarding the violation of the constitutional investigation procedure etc.\textsuperscript{34}

c) filing of memoranda or opinions in cases pending before the Constitutional Court, upon request/notification by the Court (for example, Belgium, the Republic of Macedonia, Romania, the Republic of Serbia);

d) participation, in established cases, in the procedure conducted before the Court (for example, in Macedonia, within the procedure initiated based on a petition for the protection of rights and freedoms, the Constitutional Court summons compulsorily the Ombudsman, in order to attend the public debates session and, if necessary, may summon also other persons, bodies or organisations; in Portugal, the General Prosecutor participates in the procedures conducted before

\textsuperscript{32} See the answer to question 1 of the Questionnaire.
\textsuperscript{33} See the answer to question 3 of the Questionnaire.
\textsuperscript{34} See also the answer to question no. 5 of the Questionnaire.
the Tribunal, irrespective of the manner it deems adequate for reviewing a case. Therefore, the General Prosecutor may make submissions during the written stage of the procedure, after which he/she may take part to the public session, and the viewpoints presented are usually deemed significantly important; in the Russian Federation, there are plenipotentiary representatives of the President of the Russian Federation, the Federation’s Council, the State Duma, the Government of the Russian Federation, the Ministry of Justice of the Russian Federation and of the General Prosecutor’s Office of the Russian Federation who participate in the proceedings conducted before the Constitutional Court; e) the obligation of public authorities and of any other persons to provide, upon request by the Constitutional Court, information, documents or deeds held by them, requested by the Constitutional Court for the fulfilment of its duties and prerogatives (for example, the Republic of Macedonia, the Republic of Moldova, Portugal, Romania, the Russian Federation, the Republic of Slovakia, Ukraine).

In some cases, the requested information may concern precisely the manner of interpretation of a legal norm, in jurisprudence or in the legal doctrine – consequently, in countries such as Portugal, the Constitutional Tribunal may request information regarding the manner of interpretation of the legal provisions subject to review in the legal practice from the Supreme Court and the Superior Administrative Court.

In Romania, the Regulations on the Organisation and Operation of the Constitutional Court establish that judges-rapporteur may request specialized consultancy from individuals or institutions, based on prior approval from the President of the Court.

Such cooperation of the State authorities and organisations exercising a public function with the Constitutional Court is not optional but mandatory, being related to the exercise of the function of constitutional jurisdiction. In this sense, the Law on the Constitutional Court of the Republic of Serbia sets forth that any failure of a public authority or of a person in charge of providing the Court, within the set term, with the appealed document, the requested documents, the relevant data or information necessary during the proceedings and for rendering the Court decision, as well as an omission of other State and public authorities, of organisations exercising public functions, of natural persons or legal entities to provide, within the set deadline, the data and information relevant for conducting the Court proceedings and for rendering the decision represents a misdemeanour and is sanctioned by a fine payment.

7.4 Other forms of cooperation with various bodies, in fulfilling their duties and prerogatives

We can enumerate the following:

a) cooperation with the Governmental Agent representing the State in the proceedings conducted in compliance with the Convention on the Protection of Human Rights and Fundamental Freedoms before the European Court of Human Rights, where this is a party in a case (providing of information, documents or copies of the requested documents, drafting of conclusions and reports in order to answer de facto and de jure matters related to the alleged violation of the Convention, organisation of direct consultations – see for this purpose the report of the Constitutional Court of the Czech Republic);

b) relation with the administration in charge of publication of the Official Journal of the State, for the purpose of fulfilling its duty of officially publishing the decisions (thus, in Spain, the Constitutional Tribunal cooperates with the Presidency Ministry [the Government], on which the Official Journal State Agency depends, and also with the Journal directly. Ever since 1982, the Tribunal has concluded a series of collaboration conventions with the body publishing the State’s Official Journal, in order to ensure dissemination of the constitutional doctrine;

c) obligation of the Constitutional Court to inform/communicate to the authorities established by law the rendered decisions (for example, Belgium, Switzerland, Romania);

d) obligation of State authorities to enforce decisions of the Constitutional Court (for example, Article 31, paragraph 3 of CACC, which specifies that “The Government of the Republic of Croatia ensures, through its central administration bodies, enforcement of the decisions and rulings of the Constitutional Court”.)
The Constitutional Court’s Relationship to Parliament and Government

1.5 Cooperation mechanisms that aim at optimizing the legal order

For example, in Belarus, one of the forms of cooperation of the Constitutional Court with the President and the Legislative consists of the annual messages regarding the constitutional legality in the State, which are adopted based on specific verified documents. Such annual messages contribute to an optimization of the legal order; similarly, in order to remedy specific gaps, to eliminate conflicts of laws and to ensure an optimum legal regulation or a consistent practice in applying the laws, the Constitutional Court has the right to submit proposals to the President, the Parliament Chambers, the Government and to other State authorities, depending on their competences, related to the need of introducing amendments and/or additions to specific legislative documents or to adopt new legal norms.

The Swiss Federal Tribunal drafts every year a management report intended to the Parliament, which contains also a section titled “indications to the attention of the legislator.” In this section, the Tribunal may flag the inconsistencies existing in the legislation or its findings regarding the unconstitutionality of federal norms. The report is discussed by the specialized Committees of the Parliament, which may initiate subsequently the necessary legislative amendments, in order to reconcile the provisions of these federal norms with the Constitution.

In Germany, according to a long lasting tradition, the Federal Constitutional Court organizes a meeting with the Federal Government once in approximately two years, and meets once during each legislature with the Bundestag Presidium and with leaders of the Bundestag parliamentary groups, for a general exchange of information, without addressing however subjects related to the cases pending in Court or in respect of which the Court may be called upon to adjudicate, or legal matters referring to any of these.

In the Republic of Serbia, according to Article 105 of the Law on Constitutional Court, “The Constitutional Court shall bring to the knowledge of the National Assembly the situations and issues occurred in ensuring constitutionality and legality in the Republic of Serbia, shall issue opinions and shall indicate those cases where adoption and amendment of legislation is necessary or any other steps required for defending constitutionality and legality”.

1.6 Participation of the Court, its judges or its President as members in various bodies or organisations, as applicable

For example, in Estonia, the President of the Supreme Court is a member of the Council for the Administration of Courts of Law. The Council is in charge of general matters related to the administration of justice and of the 1st and 2nd rank courts of law, but does not decide upon or debate matters regarding the Supreme Court or the Constitutional Control Section).

In Romania, according to the provisions of Article 48 of the same Regulations on the Organisation and Operation of the Constitutional Court, the Court establishes cooperation relations with similar authorities from abroad and may become a member of international organisations in the area of constitutional justice.

7.7 Other forms of cooperation

We need to specify that, in their answers, some Constitutional Courts36 (Albania, the Republic of Armenia, Andorra, Cyprus, the Republic of Croatia, Luxembourg, France, Ireland, the Republic of Lithuania, Latvia and Turkey) state that the legal norms do not establish institutionalized cooperation mechanisms between the Constitutional Court and other bodies.

However, they mention certain forms of cooperation with other institutions or unofficial relations among institutions under certain circumstances, such as, for example, those established under point 5 of Article 46 of the Law on the Constitutional Court of the Republic of Armenia, according to which, “Representatives of the President of the Republic, of the National Assembly, of the Government, and of the Court of Cassation, of the Ombudsman, or of the Chief Prosecu-

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35 See the answer to Question no. 2 of the Questionnaire
36 Supreme Courts or Constitutional Council, as applicable.
tor interested in participating in sessions of the Constitutional Court, may submit an application for this purpose to the Constitutional Court and may receive the documents and deeds of the case under review in advance. Also, they may bring clarifications related to the questions asked by the Constitutional Court, and have the status of invitees in the case hearing"; in Azerbaijan, the close relations of the Constitutional Court with the Ombudsman of the Republic of Azerbaijan; in France, the existence of memoranda of understanding with State authorities (the Presidency of the Republic, the Prime Minister, the Presidency of the National Assembly, and the Presidency of the Senate), which allow for an electronic exchange of documents within proceedings of referral and notification of the file items and of the decisions; and, finally, in Turkey, the occasional cooperation of the Constitutional Court with a series of national public bodies, including with the Judicial Academy, universities, specific international organisations and other supreme courts (the High Court of Appeals, the State Council), contacts that are limited, in general, to symposiums, specific projects etc.

Under this aspect, they also mention the spirit of cooperation characterizing the constitutional institutions, which determines the collaboration among bodies when this is necessary, by observing their scope of competence and their functions, as well as the contacts more or less formal in the area of representation and exchange of ideas, participation of the Court members in workshops and conferences (see the reports of the Constitutional Courts of Austria and Hungary).
II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT (ROMANIA)

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INTRODUCTION

Each Constitution, as basic law of a State, has the specific regulatory object of organising public powers and regulating the relationships between them by establishing the State’s bodies, by establishing both their composition and the appointment procedures and by establishing the jurisdiction of public authorities and the relationships between them. As Thomas Paine\(^{37}\) stated, “a constitution precedes a government; a government is only a brainchild of the constitution” and a constitution establishing a government also commands both substantial and procedural limits in the exercise of power by such government.

In exercising the duties and jurisdiction specific to the unitary or federal character of the State, such State bodies may, vertically or horizontally, generate legal disputes resulting from legal acts or from the deeds, actions or omissions thereof. As mentioned in Germany’s Report, institutional disputes (Organstreit) resolution is not intended to reconcile subjective rights but rather to clarify the jurisdiction system set up by the Constitution.

In most participating States, such legal disputes are settled by the constitutional courts except for the following States: Ireland\(^{38}\), Luxembourg, Monaco\(^{39}\), Norway and Turkey, where such a procedure does not exist.

The analysis of all the reports sent by participating States shows that the control exercised by the constitutional court as regards legal disputes between authorities is not intended to secure their rights but to settle such disputes primarily in order to ensure compliance of the State bodies’ conduct with their jurisdiction as stipulated in the Constitution, for a good functioning of the State based on the separation of its powers and, finally, for safeguarding the supremacy of the Constitution in a State governed by the rule of law.

1. What are the main characteristics of the constitutional legal dispute between public authorities?

In the States where the constitutional court settles legal disputes between institutions, the following main features can be identified depending upon the nature, object, parties and legal grounds of the dispute as well as upon the character of the constitutionality review:

a) As regards the nature of the dispute, it has to be a legal dispute not a political one. Therefore, in all States, the settlement of institutional disputes is not a political procedure but a jurisdictional one. For instance, in Germany\(^{40}\), the political minority uses the settlement procedure of the litigation between constitutional bodies in the attempt of asserting its rights against the majority, the institutional disputes being a crucial instrument of the opposition; in Lithuania, the submission of such applications to the Constitutional Court is sometimes used as a legal instrument in the political battle,

\(^{37}\) Writings of Thomas Paine, Vol.II (1779-1792): The Rights of Man, p.93

\(^{38}\) In its Report points out that, if the Government, a State body or a public body exceeds its constitutional or legal responsibilities, any person injured by the act issued by such body may turn to the courts of law.

\(^{39}\) Where the relationships between the Prince, the Government and the National Council are “government acts,” therefore they are exempted from any jurisdictional control.

\(^{40}\) According to the German Constitutional Court, the institutional dispute resolution procedure is intended to protect the rights of the State bodies within mutual relationships, not to exercise a general constitutional “guardianship” (BVerfGE 100, 266 <268>).
for instance whenever the opposition tries to prove that the governing forces adopt acts contrary to constitutional norms or whenever it tries to prevent the adoption of certain decisions.

b) As regards the object of the dispute, as from the analysis of the reports sent it appears the need for a classification according to the structure of the public authority in that State and by the specific ties between the “whole” and its “parts,” as follows:

- in case of a unitary State, there may be:
  - disputes of jurisdiction – horizontally – between the State bodies. They can be positive (when one or several authorities assume powers, duties or jurisdiction incumbent on other bodies) or negative (when public authorities decline their jurisdiction or refuse to carry out actions that are among their duties) and they are the most common, occurring in all States, for instance in Portugal, Serbia, Slovenia, Slovakia and Ukraine;
  - disputes of jurisdiction – vertically – between central State bodies and regions, or disputes between regions in Italy, or disputes of jurisdiction between central bodies and local autonomous entities, in the Czech Republic, Republic of Macedonia, Montenegro, Serbia, Ukraine;
  - disputes related to the defence of local autonomy; it is the case of Croatia, where each local or regional autonomous entity may turn to the Court whenever the State, by its decision, infringes the right to local or regional autonomy secured by the Constitution41; furthermore, Article 161 of Spain’s Constitution regulates the disputes for the defence of local autonomy or statutory autonomy, which allows the Town Halls, General Councils or other local bodies to defend their autonomy against the laws of the State or of own Autonomous Communities42.

- in the case of a federative State, there may be federal disputes (between the State and the bodies of the entities – communities/regions/ cantons/lands) or between the bodies of the entities themselves, as well as legal disputes/institutional disputes at the State level – between the federative State’s institutions. This is the case of Austria, Belgium, Bosnia-Herzegovina, Germany, Russia and Switzerland.

Another feature regarding the object of legal disputes between State bodies is that – in the States where the constitutional court has this express prerogative – they cannot refer to the infringement of fundamental rights and, such cannot be used in order to perform a constitutionality review of regulatory acts. This is the case with Germany43, Ukraine, Romania, Italy and the Czech Republic. Exempted from this rule are the cases of Bosnia-Herzegovina, Albania and Ukraine.

In the other States, where the constitutional court indirectly watches over the observance of the rules of separation of powers, by means of the constitutionality review, noteworthy is in Portugal the tendency of avoiding the transformation of the constitutional court into a super-court authorised to regulate State institutions or into an arbitrator.

Also a feature related to the object of the dispute is that, in most States, such procedures cannot be disputes of jurisdiction. For instance, in Spain the disputes opposing executive power authorities to ordinary courts of laws have a specific settlement means, i.e. the jurisdiction disputes which are settled by the Tribunal for Jurisdiction Disputes44. In the Czech Republic, such jurisdiction disputes related to the authority to decide/issue the resolution, when the involved parties are courts of law and autonomous, executive, territorial, occupational or professional bodies, or civil courts of law and administrative courts, shall be examined and settled by a special panel made up of three Supreme Court judges and three Supreme Administrative Court judges. Exemption from this rule can be found in Slovenia, where the Constitutional Court decides upon the disputes of jurisdiction between courts of law and other State authorities, as well as in the Republic of Macedonia.

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41 In addition, if the representative body of a local or regional autonomous entity considers that a law regulating the organisation, responsibilities or financing of local and regional autonomous entities does not comply with the Constitution, it can appeal to the Constitutional Court to examine the constitutionality of the law or of several provisions of the law;
42 The recent Institutional Law 1/2010 dated February 1 also stipulated the possibility of settling a dispute for the defence of the statutory autonomy of the historical territories of the Basque Autonomous Community;
43 For this there is an abstract control of laws, initiated as per Article 93.1 no. 2 of the Fundamental Law corroborated with §§ 13 no. 6 and 76 and the following of the Law of the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz – BVerfGG), upon the request of the Federal Government, of a Land government or of one-third of the Bundestag members.
44 Presided over by the Chief Justice of the Supreme Court and consisting of an equal number of Supreme Court magistrates and permanent councillors of the State Council (Resolution TC 56/1990 dated March 29, F J 37).
c) As regards the parties in the dispute, they must always be State bodies. However, depending upon the structure of the public power in a State and upon the type of dispute, they can be central State bodies (in Italy, Germany, Montenegro, Poland, Serbia, Slovakia), local bodies (Romania and Slovakia), autonomous territorial bodies (Spain, Croatia, Italy, Serbia, the Czech Republic, Ukraine, the Republic of Macedonia) or bodies of the entities in federative States (in Russia, Germany, Switzerland and Bosnia-Herzegovina).

Furthermore, while in some countries such as Andorra and Albania any constitutional bodies can be parties in a dispute, in other countries such as Poland only central State bodies can.

d) As regards the legal grounds of the dispute, we can note that in all States this involves the existence of a constitutional relationship between the parties. Therefore, the dispute has to derive from the duties stipulated in the Constitution or from the interpretation of constitutional provisions. For instance in Germany, Lithuania, Slovenia and Romania.

e) As regards the character of the control exercised by the constitutional court, the analysis of all reports sent shows that it is a concrete and not an abstract one, the authors of the complaint must have a current and concrete interest in its resolution (Italy, Latvia, Slovenia and Germany). Poland’s Report points out that this dispute has to be a genuine not a hypothetical dispute.

2. If the constitutional court has jurisdiction to settle such disputes.

In most States the constitutional court has, pursuant to the Constitution, the jurisdiction to settle constitutional legal disputes. In case of Albania, Andorra, Azerbaijan, Cyprus, Croatia, Spain, Georgia, Italy, Hungary, the Republic of Macedonia, Poland, Russia, Serbia, Slovakia, Slovenia, the Czech Republic and Ukraine the constitutional court is empowered to settle disputes of jurisdiction. They can be: positive or negative and can occur both horizontally (between central, legislative, executive and legal powers) and vertically (between central powers and local powers).

A special situation is in Belgium, where the Constitutional Court has the power to settle only disputes of jurisdiction between the legislative assemblies of the federal State, of communities and of regions.

Moreover, in other States such as Bosnia – Herzegovina, Italy, Germany, Montenegro, Romania, Slovakia, Switzerland and Ukraine, the national Constitution establishes the constitutional courts’ power to examine not only disputes

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45 In case of an institutional dispute, the Federal Constitutional Court decides upon the interpretation of the Constitution. Even when the decision is essentially rendered to settle the institutional disputes, the Federal Constitutional Court by means of the same decision may decide upon a legal matter relevant for the interpretation of the provision in the fundamental Law to which reference was made (cf. § 67 sentence 3 in BVerfGG).

46 Pursuant to Article 98 letter d) of the Constitution

47 Pursuant to Article 139 of the Constitution, the Supreme Court pronounces in last instance on the appeals submitted as regards a dispute of jurisdiction between the Chamber of Representatives and the Communal Chambers or between any of them and the bodies or authorities of the Republic

48 Pursuant to Article 134 of the Constitution, Italy’s Constitutional Court may examine and settle the disputes arisen between state powers (instance, between the legislative and the executive), between central state bodies and a certain region, or between regions

49 Pursuant to Article Article 167 par. 2, items 1-4 of the Constitution of the Republic of Serbia

50 Slovenia’s Constitutional Court decides upon the disputes of jurisdiction between State bodies and local community bodies, upon the disputes of jurisdiction between courts of law and other state authorities, as well as upon the disputes of jurisdiction between the National Assembly, the President of the Republic and the Government (Article 160 par. 1 of the Constitution, points 7, 8 and 9).

51 Pursuant to Article 93.1 no. 1 of the fundamental Law

52 Any infringement of the Constitution

53 Romania’s Constitutional Court decided that that the fundamental Law stipulates the jurisdiction of the Court to settle any constitutional legal dispute arisen between public authorities and not only the disputes of jurisdiction, positive or negative, arisen from them (Judgment no. 270/2008, published in the Official Gazette of Romania, Part I, no. 290 dated April 15, 2008) http://www.ccr.ro/decisions/pdf/en/2008/D0270_08.pdf. In addition, the Court decided that the notion of constitutional legal dispute refers to any disputed legal situations that arise directly from the text of the Constitution and are not limited only to positive or negative disputes of jurisdiction that might cause institutional blockages (to see Judgment no. 901/2009, published in the Official Gazette of Romania, Part I, no.503 dated July 21, 2009)
of jurisdiction between State bodies but also any other disputes arisen between them. Thus, in Bosnia – Herzegovina, the Constitutional Court has the jurisdiction to settle positive or negative disputes of jurisdiction or any other litigation arisen in the relationships between the State and the authority of an entity and/or State institutions. In Croatia and Spain, besides the disputes of jurisdiction, the Croatian Constitutional Court, respectively the Spanish Constitutional Tribunal, may also settle a dispute for the defence of local autonomy. In the Czech Republic, the Constitutional Court extended this concept beyond the positive or negative disputes of jurisdiction. In Slovakia, the Constitutional Court adjudicates on any disputes between State bodies as regards the interpretation of the Constitution or of the constitutional laws, as well as on the complaints submitted by the local public administration authorities against an unconstitutional or otherwise unjustified intervention, in matters related to local autonomy, except for the situation when another court has the jurisdiction to offer legal protection.

In Germany, the jurisdiction of settling litigations between the bodies of a Land lies in principle with the constitutional court of that land.

On the other hand, Armenia, Belarus, Estonia, France, Ireland, Latvia, Lithuania, Luxembourg, the Republic of Moldova, Monaco, Norway, Portugal and Turkey do not have a special responsibility stipulated in the Constitution regarding the jurisdiction of the Constitutional Court to settle such disputes, but in some of these States, i.e. in Armenia, Belarus, France, Estonia, Lithuania, the Republic of Moldova and Portugal, the constitutional court has the possibility to settle such disputes, indirectly, whenever it exercises an a priori or a posteriori review of constitutionality of regulatory acts. Thus, in Portugal, the coexistence of several regulatory powers, mainly of several law-making powers deriving from the Portuguese Constitution, also assumes the possibility that a body or an entity violates other body’s or entity’s responsibilities. This is why, in a way, we can say that when, for instance, it verifies the constitutionality of a decree-law or of a regional legislative decree as against the specific jurisdiction, or of a regulatory act issued by a local authority, the Constitutional Tribunal also settles institutional disputes. In Armenia, the Constitutional Court is competent to settle only those disputes related to the decision made by electoral commissions on the results of the elections.

Special situations can be found in:

54 Amendment I to the Constitution of Bosnia-Herzegovina, adopted in March 2009, supplemented Article VI with a new paragraph, (4), stipulating that the Constitutional Court of Bosnia and Herzegovina is competent to decide upon any litigation related to the protection of the established status and jurisdiction of the Brčko autonomous district in Bosnia and Herzegovina, litigation that might arise between one or the two entities and the Brčko district or between Bosnia and Herzegovina and the Brčko district, pursuant to the provisions of the Constitution and the sentences given by the Arbitration Tribunal.

55 Particularly by its decisions no. PI ÚS 14/01, PI. ÚS 17/06 and PI. ÚS 87/06. In the case PI.ÚS 17/06 dated December 12, 2006, the Constitutional Court first verified whether there really is a dispute of jurisdiction. After confirming its existence, it then analysed the jurisdiction of the body having adopted the final decision and decided that that jurisdiction also lay with another body (joint jurisdiction). In this case, the action of another body was a prerequisite in the adoption of a final decision. The essence of that dispute was whether the minister of justice could decide the appointment of a Supreme Court Justice without the consent of the Chief Justice of the Supreme Court. The Constitutional Court admitted in that context that the Chief Justice of the Supreme Court is a state body, who has an exclusive right of consenting with regard to the appointment of a Supreme Court Justice. Furthermore, it stated that the application is admissible as no other body has the prerogative of deciding in that particular case; it stated that, in its capacity as a constitutionality-protecting legal body (Article 83 of the Constitution), it could not allow the continuation of a dispute between two important state bodies representing the legal power, on the one hand, and the executive power, on the other hand, merely because there was no provision regarding who was authorised to settle such dispute. In a democratic state governed by the rule of law it is not possible that an arbitrary act cannot be submitted to control and, thus, cannot be repealed, despite its obvious illegality or non-constitutionality.

56 Only under exceptional circumstances, when for instance there is no constitutional court in a land, litigation between the bodies of that Land can be brought to the Federal Constitutional Court, pursuant to Article 93.1 no. 4 of the fundamental Law.

57 Most disputes between authorities refer to the interpretation and implementation of the constitutional principle of the separation of powers in the state.

58 It is considered that “institutional disputes” may mean the constitutionality control of the general applicable laws (laws and other regulatory acts) as part of the constitutionality control procedure, which may be initiated by the President of the Republic, by the Chancellor of Justice, by local councils as well as, in certain cases, by the courts of law that may address the Supreme Court by means of a resolution. Under such a circumstance, the other party involved in the dispute is Riigikogu, the Government, the Ministry or the local public authority having adopted or omitted to adopt the regulatory act.

59 Autonomous regions Azores and Madeira have legislative and regulatory autonomy. Local bodies have only regulatory autonomy.

60 For instance, the distribution of the legislative power between Parliament, the Government and the Assemblies of autonomous regions set by the Constitution may indirectly generate a dispute of jurisdiction between constitutional bodies.
Resolution of Organic Litigations by The Constitutional Court

- Austria, where the Constitutional Court decides: upon the divergent opinions between the Court of Audit and the public administration as regards the interpretation of the legal provisions setting the jurisdiction of the Court of Audit; upon the divergent opinions between the Ombudsman and the federal government or a federal ministry as regards the interpretation of the legal provisions setting the Ombudsman’s jurisdiction; upon the disputes of jurisdiction between the Federation and a land, or between lands, in case both regional authorities claim the same jurisdiction (the so-called positive disputes of jurisdiction); it also decides upon the disputes of jurisdiction between courts of law and administrative authorities as well as between ordinary law courts and other jurisdictions, the Constitutional Court included; it is competent to decide whether a legislative or execution act is of the jurisdiction of the Federation or of the lands; it decides whether there are agreements concluded between the Federation and the lands, or between the lands, as well as in connection with the meeting of the requirements under such agreements by the Federation or by the lands; it pronounces on the impeachment procedure initiated against the supreme constitutional bodies of the Republic.

- Latvia, where although the Constitution does not include an express responsibility to this purpose the Constitutional Court settles institutional disputes as well. Taking into consideration the responsibilities of the Constitutional Court, such issues can be straightened out, however, by means of litigations only when the contesting norm or act refers to (or affects) the relationships between State institutions or bodies.

- Switzerland, where the Swiss Federal Tribunal adjudicates – by means of an action to a single instance – disputes of jurisdiction between federal authorities and canton authority and also adjudicates civil law or public law litigations between the Confederation and cantons or between cantons.

3. Which are the public authorities among which such disputes may arise?

Depending upon the structure of the public power in a State and upon the jurisdiction of the constitutional court in settling institutional disputes, such disputes may arise as follows:

A. In case of disputes of jurisdiction, horizontally:
- between the central State bodies: in Montenegro, Poland, Romania, Serbia, Slovakia, Spain, Italy, Ukraine
- only between legislative, executive and legal powers: in Azerbaijan and Croatia
- only between various law-making bodies: in Belgium
- only between supreme State bodies: in the Czech Republic (Chamber of Deputies, Senate, the President, the Government, the Constitutional Court, and the case-law shows the two supreme courts as well)

61 Such impeachment procedures are highly uncommon. There were only two instances during the first Republic (between 1918 – 1933) and another during the second Republic (since 1945).

62 The federal Chancellery, federal departments or, if stipulated by the federal law, their subordinating administrative units have the right to make an appeal, by means of a so-called public law appeal, if the attacked act is likely to violate the federal laws (Article 89 par. 2, letter a of LTF). Similarly, the communes and the other public law collectivities invoking the infringement of the guarantees recognised by the canton constitution or by the federal Constitution may, in their turn, address to the Swiss Federal Tribunal by means of a public law appeal (Article 89 par. 2, letter c of LTF). In most cases the communes invoke, in support to their request, infringements of the canton constitutional guarantee regarding communal autonomy (cf., for instance, Resolution TF 136 II 274: the appeal against the provisions of the Genovese law on zones and meeting zones).

63 The bodies of local autonomy units as well as the disputes of jurisdiction between their bodies and the central administration bodies are settled by administrative courts, except for the cases when the law stipulates differently (see Article 4 of the August 30, 2002 Law – Law on the procedures in administrative courts).

64 But not the King of Spain, who is inviolable (Article 56 of Spanish Constitution) and, therefore, it is impossible to initiate a dispute or any kind of legal action against him.

65 In the sense of the dispute settled by the Constitutional Court, State power can also be one of the independent public entities that do not classify in the traditional trichotomy of roles, but does exercise the functions stipulated by the Constitution, in full autonomy and independence. Examples can be given: the Constitutional Court itself, the President of the Republic and the Court of Audit in exercising its audit role.

66 The President of Ukraine; a number of at least 45 deputies; the Supreme Court of Ukraine; the Human Right Parliamentary Advocate; the Supreme Rada of Ukraine; the Supreme Rada of the Autonomous Republic of Crimea (Article 150 of Ukraine’s Constitution).

67 The dispute of jurisdiction between the Chief Justice of the Supreme Court and the Minister of Justice as regards authority to appoint a judge at the Supreme Court (case no. Pl. ÚS 87/06).
B. In case of the disputes of jurisdiction, vertically:
- between central bodies and local bodies: in Slovakia and Romania
- between State bodies and autonomous territorial bodies: in Italy\textsuperscript{68}, Serbia\textsuperscript{69}, the Czech Republic, Ukraine, Montenegro, the Republic of Macedonia.

C. In cases of disputes for the defence of local autonomy:
- between general institutions of the State and the Autonomous Communities: in Spain
- between the State and the representative body of a local or regional autonomous entity (when the constitutionality of a law regulating the organisation, jurisdiction or financing of local and regional autonomous units is challenged) or the representative body of a local or regional autonomous unit or the executive power representative in a county, town or municipality (prefect, mayor of the town or of the municipality) if the issue refers to an complaint regarding the infringement of the right to local or regional autonomy, by an individual act issued by the State bodies, in Croatia

D. In case of federative States:
- between the federative State institutions or between the State and the entity bodies or between the bodies of the entities: in Belgium, Bosnia-Herzegovina\textsuperscript{70}, Russia\textsuperscript{71}, Germany\textsuperscript{72}, where parties in litigation can be both supreme federal bodies and other participants\textsuperscript{73}, Switzerland, Austria (between the Federation and one land or between lands)

\textsuperscript{68} Where the main categories of disputes appear, on the one hand, between bodies or subjects of the state apparatus and, on the other hand, between the State and the autonomous territorial bodies (mainly, the Regions; in theory, the Provinces and Municipalities can be also included here). The last type of dispute has “standardised” subjects, which means that after the bodies representing the State and the regions are identified, disputes will arise only between these bodies. However, the last type of disputes cannot be identified \textit{a priori}, in the sense that the dispute may arise between different bodies. Still, it is possible to make a distinction between the disputes within a single power area and the disputes involving several power areas: as regards the first case, the internal organisation of the power will establish the body having the jurisdiction to settle the dispute; as regards the last case, however, there might arise the problem of establishing the proper entity that is equidistant to the two powers in dispute.

\textsuperscript{69} Parties in the dispute may be the following authorities: a) courts of law and other State authorities; b) authorities at the level of the republic and those in provinces or the local autonomy entities; c) authorities in provinces and the local autonomy entities as well as d) authorities of various autonomous provinces or of various local autonomy entities.

\textsuperscript{70} Disputes may arise between entities, or between Bosnia and Herzegovina and one or both entities, or between the institutions in Bosnia and Herzegovina. Pursuant to Article VI (4) of the Constitution, the Court is competent to decide upon any litigation related to the protection of the established status and jurisdiction of the Brčko autonomous district in Bosnia and Herzegovina, litigation that might arise between one or the two entities and the Brčko district or between Bosnia and Herzegovina and the Brčko district.

\textsuperscript{71} Pursuant to Article 125 of the Constitution of the Russian Federation, such disputes may arise: a) between the federal bodies of the state power; b) between the state power bodies of the Russian Federation and the state power bodies of the entities in the Russian Federation; c) between the higher entities of the state bodies in the entities of the Russian Federation.

\textsuperscript{72} Among the supreme federal bodies are Bundesrat, the Federal President, Bundestag, the Federal Government, the Joint Parliamentary Commission (\textit{Gemeinsamer Ausschuss}) and the Federal Assembly (\textit{Bundesversammlung}).

\textsuperscript{73} Other parties, in the meaning of § 93.1 no. 1 of the fundamental Law, invested with rights by the fundamental Law or by the regulation of a supreme federal body, are primarily the sections or subdivisions of the supreme federal bodies. Among them are the presidents of Bundestag and Bundesrat, the members of the Federal Government, political commissions, parliamentary groups, parliamentary groups in sub-commissions and the groups in the meaning of § 10.4 of the Bundestag Regulation (GO-BT) (groups of deputies who associate but do not reach the number required to set up a parliamentary group. On the contrary, it is considered that an occasional majority or minority, coagulated as a simple vote, cannot have the capacity of "party." In Bundesrat it is considered that parties in institutional disputes can be the president, presidium, commissions and members of Bundesrat, in general, as well as the total number of the members of a Land in Bundesrat.

The applications for the settlement of institutional disputes by the Federal Constitutional Court have been lately filed mainly by the Bundestag parliamentary groups. This is proven by the recent decisions made by the Court in the institutional disputes procedure: the judgment dated May 4, 2010 (2 BvE 5/07, EuGRZ 2010, 343), the judgment dated May 7, 2008 (BVerfGE 121, 135), the judgment dated July 3, 2007 (BVerfGE 118, 244).

Unlike § 63 of BVerfGG, which recognizes the possibility of being part of institutional disputes “only” to the component sections of some bodies – Bundestag, Bundesrat and the Federal Government – which were granted specific rights in the fundamental Law or in the Bundestag and Bundesrat Regulation, Article 93.1 no. 1 of the fundamental Law extends the area of participants, also including the ones that were granted specific rights in the in the fundamental Law or in the regulation of a supreme federal body. This differentiation has practical significance as regards the participation of political parties and of Bundestag members in institutional disputes.
In some countries institutional disputes may arise only between constitutional bodies, such as in Albania, Andorra, Spain, Romania, while in others they may arise between any state bodies: in Armenia, Cyprus, Georgia, Montenegro, Serbia.

In Germany there is a special situation related to the possibility of political parties to be parties in an institutional dispute. Thus, the Federal Constitutional Court has however afforded to the parties which are active at federal level in the exercise of their functions a quality as an organ and has upheld this case-law despite being the object of considerable criticism in the literature, insofar as the constitutional legal dispute relates to the status of a political party as a subject of political will-formation and the opposing party is another constitutional organ. In this field, the parties came so close to state organ will-formation that they were said to have disputes between organs available to defend their status. Outside of this core area, it is however incumbent on the parties to seek their legal protection, after having exhausted the legal remedies before the non-constitutional courts, by means of a constitutional complaint. This applies particularly when the party wishes to assert its constitutional status against a public-law broadcaster.

Other special situations are found in Serbia and Ukraine, where the Ombudsman can be a party in an institutional dispute, while in Austria the party in the opinion divergence procedure between the Ombudsman and the federal government or a federal ministry as regards the interpretation of legal provisions setting the Ombudsman's jurisdiction.

As to the constitutional court, it can be party in an institutional dispute in Italy and the Czech Republic, while in Romania and Germany the Constitutional Court cannot be a party in such a dispute.

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74 The Judgment no. 20/2007 issued by the Constitutional Court of the Republic of Albania decided that parties in a dispute of jurisdiction can be a constitutional body, on the one hand, and one of its components, on the other hand, as for instance at least 1/4 of the number of deputies and Parliament.

75 Co-Princes, the General Council, the Government, the Superior Council of Justice and the Communes (which are the representative and administrative bodies of “parishes” or parròquies, public collectivities with legal personality and the right to adopt local regulations, in keeping with the law, in the form of orders, regulations and decrees.

76 In its Judgment no. 988/2008, Romania’s Constitutional court expressly stated the meaning of the “public authorities” phrase, showing that it means: “Parliament, made up of the Chamber of Deputies and the Senate, the President of Romania, as an independent public authority, the Government, the central and local public administration bodies, as well as the legal authority bodies – the High Court of Justice, the Public Ministry and the Higher Council of Magistrates.”

77 The Supreme Court pronounces in last instance on the appeals submitted with regard to a dispute of jurisdiction between the Chamber of Representatives and Communal Chambers, or between any of them and the bodies or authorities of the Republic. Pursuant to the jurisprudence of the Supreme Court, bodies or authorities are specific legal persons, having the characteristics of actual governing institutions and functioning for and on behalf of a public right primary entity, such as the Republic of Cyprus (municipalities, semi-governmental organisations).

78 Parliament, the Government, common law courts, local public administration authorities and other state authorities

79 The common law courts, no matter their jurisdiction level, the state administration authorities (all ministries, the administrative bodies making them up or subordinated to them (divisions, inspectorates, departments), specialised bodies (secretariats, offices)), the authorities of the autonomous provinces as mentioned in the charters of those provinces, the local autonomy authorities (authorities of municipalities, towns and capital city Belgrade), the National Bank of Serbia, the State Audit Institution, the Ombudsman, the Commissar for Public Interest Information etc.

80 By the Principle Resolution, cf. BVerfGE 4, 27 <31>


82 Cf. BVerfGE 66, 107 <115>; 73, 40 <65>; 74, 44 <48 and following>; 79, 379 <383>.

83 The provisions of the Political Parties Law (Parteiengesetz) on the financing of parties equally refers to their constitutional status as factors of constitutional life in forming the political will, and the Federal Constitutional Court took them into consideration in the institutional disputes resolution procedure, less those related to the reimbursement and ordering/instruction of the payments made by the president of the Bundestag, also pursuant to the parties financing rules (cf. BVerfGE 27, 152 <157>; Pietzcker, in: Festschrift 50 Jahre Bundesverfassungsgericht Vol. I, 2001, 587 <594>). Likewise, a political party may stand on the institutional disputes procedure when challenging the publicity the Federal Government made during electoral campaign (cf. BVerfGE 44, 125 <136-137>).

84 As they do not meet the compulsory requirements of § 2.1 of the Political Parties Law – (cf. BVerfGE 1, 208 <227>; 13, 54 <81 and following>; 74, 96; 79, 379 <384-385>).

85 Pursuant to the Judgment no. 53/2005 issued by the Constitutional Court of Romania, published in Romania’s Official Gazette, Part I, no. 144 dated February 17, 2005, the parties in a constitutional legal dispute can be only the public authorities referred to in Title III of the Constitution, i.e. Romania’s Parliament, Romania’s Government, Public Authority and Legal Authority, while the Constitutional Court is regulated by Title V of Romania’s Constitution.

86 The Federal Constitutional Court does not have any position in the state’s management, therefore it cannot initiate litigations between bodies; Stern, in: Bonner Kommentar zum GG – Zweitbearbeitung –, Article 93, margin no. 92 and following.).
4. Legal acts, deeds or actions that can generate such disputes: are they connected only to the disputes of jurisdiction or do they also occur in cases when a public authority can challenge the constitutionality of an act issued by another public authority?

Has your constitutional court settled such disputes? Give examples.

The analysis of all submitted reports shows that the issues having generated constitutional legal disputes can be classified in: a) legal acts and b) actions, measures or omissions.

a) In all the States where the constitutional court settles institutional legal disputes, they can be generated by legal acts issued by the public authorities involved in the dispute. Thus, in Spain the disputes of jurisdiction can be caused by the provisions, decisions and any kind of acts adopted, issued or made by any authority, by the State or by one of the 17 Autonomous Communities.

In Bosnia-Herzegovina we note the following acts that can generate disputes of jurisdiction: the Agreement on the establishment of special parallel relationships between the Federal Republic of Yugoslavia and the Srpska Republic\(^{87}\), which caused a dispute of jurisdiction between the State of Bosnia and Herzegovina and one of the two component entities, the Srpska Republic\(^{88}\), the Insurance Agency Law in Bosnia and Herzegovina\(^{89}\), which generated litigation on the distribution of jurisdiction between the State and the entities.

In Romania, an example is the decisions made by the High Court of Review and Justice whereby it did not only clarify the meaning of legal regulations or of their scope but, invoking legislative technique mistakes or non-constitutionality mistakes, it re-enforced norms that had no longer been valid as they had been repealed by regulatory acts issued by the law-making authority. These decisions made by the Supreme Court generated a constitutional legal dispute between judiciary, on the one hand, and the Parliament of Romania and the Romanian Government, on the other hand\(^{90}\).

In Italy the disputes between the State and the region can also refer to acts that do not have the force of a law, such cases being specifically called “disputes of responsibilities.”

In Montenegro, the Constitutional Court decides upon any form of “infringement of the Constitution” occurred following the enactment of an unconstitutional law, regulation or any other general or individual act.

b) Moreover, in all the States where the constitutional court settles institutional legal disputes, they can be generated by actions or measures or omissions, materialized or not in legal acts, of the public authorities involved in the dispute. Thus, in Germany\(^{91}\) any conduct on the part of the opposing party can be regarded as legally material which is suited to harm the legal status of the applicant. An act within the meaning of § 64.1 of the Federal Constitutional Court Act is not restricted to only being one single act, but may also be the issuance of a law or cooperation in an act of creating provisions; the resolution

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\(^{87}\) See the decision made by the Constitutional Court of Bosnia-Herzegovina No. U 42/01 dated March 5, 2001

\(^{88}\) In particular, the issue was whether the consent of the Parliamentary Assembly of Bosnia and Herzegovina had to be asked for before ratifying the Agreement. In connection with this aspect, the Constitutional Court found that, pursuant to Article III (2) of the BIH Constitution, an agreement regarding the establishment of a special parallel relationship includes a constitutional restriction on the sovereignty and territorial integrity because the agreements with states and international organisations can be concluded (exclusively) with the consent of the Parliamentary Assembly of Bosnia and Herzegovina. Therefore, an agreement setting up special parallel relationships falls under the Constitutional Court’s control because the agreements with states and international organisations require the consent of the Parliamentary Assembly. In this case the Constitutional Court decides that the consent of the Parliamentary Assembly is not required to set up special parallel relationships with neighbouring countries and, therefore, the Agreement was concluded in compliance with the Constitution of Bosnia and Herzegovina.

\(^{89}\) In this case, the Constitutional Court ruled out that the Parliamentary Assembly of Bosnia and Herzegovina is competent to adopt the challenged legal provisions, pursuant to Article IV (4) letter (a) corroborated with Article III (1) letters (a) and (b) of the Constitution of Bosnia and Herzegovina, as they are meant to harmonize the laws on insurance companies as well as with the relevant laws in the European Union, and thus Bosnia and Herzegovina fulfils its obligations under the Stabilization and association Agreement (Constitutional Court’s Judgment no. U 17/09 dated March 27, 2010).


\(^{91}\) The object of institutional disputes is the actual litigation regarding the jurisdiction or statutes of constitutional bodies. §64.1 sentence 1 of the Law on the Federal Constitutional Court (BverfGG) defines it by using such terms as “measure or omission of the opposing party” whereby the applicant’s rights and responsibilities stipulated by the fundamental Law were injured or put under direct threat. The measure or omission has to be objectively present and legally relevant.
of parliament on the rejection of a legal initiative can also be qualified as an act in the dispute between organs. Also, the issuance of or change to a provision of the Rules of Procedure of the German Bundestag may constitute an act within the meaning of § 64.1 of the Federal Constitutional Court Act if it is able to mean that the applicant is currently legally. The application of the Rules of Procedure themselves, by contrast, is not a permissible object of attack in disputes between organs. The rejection of a motion for recognition as a parliamentary group or as a group in the German Bundestag according to § 10.4 of the Rules of Procedure of the Bundestag also does not constitute an act which is able to give rise to a dispute between organs. Omission, conversely, means to not carry out an act. A constitutionally relevant omission may for instance consist of the Federal President refusing to sign a federal statute, the Federal Government refusing to respond to a parliamentary question or the Federal Government refusing to permit the Bundestag or the committee of inquiry to inspect the files.

In Italy the disputes between central State bodies and regions or between regions can arise in connection with any type of measure or act, except for the primary ones, for which there is a special procedure: the one for the control of constitutionality of laws. The disputes between State powers (i.e. the executive, legislative and legal powers but also between the State and other bodies) can refer to adopted measures but also to a legally relevant conduct or action which allegedly violates the integrity of the autonomy and independence granted to a certain body by the Constitution. The aforementioned actions can consist of deeds, formalised or not in acts, positive or negative, which lead to a certain result. Inactions, in the mentioned meaning, are also to be included here.

In the Czech Republic the disputes of jurisdiction, pursuant to Article 120 par. 1 of the Constitutional Court Law, mean the disputes between State bodies related to the authority to issue decisions, to implement measures or perform other actions in the area specified in the complaint. In the Czech Republic’s legal system, the Constitutional Court cannot decide upon other disputes but upon those related to the actual application of regulations. In such procedures, the Constitutional Court cannot verify the constitutionality of regulatory acts issued by State bodies; therefore it cannot sort out the legislative authority disputes. The control of regulations is part of the second type of procedures.

As regards the second question, the following situations can be noticed:

a) In most States, the situations having generated disputes are linked only to the jurisdiction of the public authorities involved.

Thus, if the infringement of powers was caused by laws, the dispute should be settled in compliance with the procedure used for the constitutionality review of regulatory acts. It is the case of Andorra, where if the infringement of powers was caused by a law of the General Council or by a legislative decree of the Government, the dispute should be settled in compliance with the procedure used for the constitutionality review stipulated in Chapter II Title IV of the special Law on Constitutional Tribunal, in all its aspects, including the one related to the active procedural quality.

In Macedonia, the first case referred to a negative dispute of jurisdiction between the Central Registry Office of the Republic of Macedonia and the First-Instance Court in Shtip, when both authorities had declined their authority to record a mention for the registration of an administrator in the Trade Registry. By the decision made, the Constitutional Court decided that the Central Registry Office of the Republic of Macedonia was the competent authority to make that registration. By Judgment U. no. 143/2008 dated October 15, 2008 the positive dispute of interests between the First-instance Court in Skopje and the Securities Commission was settled. In that case, both authorities considered themselves competent to pronounce a temporary interdiction measure related to the securities of a trading company, company that filed the complaint with the Court for the settlement of the dispute of jurisdiction. The Constitutional Court found in favour of the First-Instance Court, ruling that the court not the Securities Commission was competent to pronounce that measure.

Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, §64, marginal no. 36. But more than with the positive action, the issue of legal relevance appears in the case of an omission. Omissions cause legal consequences when there is the legal obligation to take action (Klein, in: Bend/Klein, Verfassungsprozessrecht, 2nd ed. 2001, § 26, marginal no. 1025). If this is not the case, the application for the acknowledgement of an unconstitutional omission has to be denied as inadmissible because the admissible object does not exist (BVerfGE 104, 310).

Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, §64, marginal no. 36.

See Article 87 par. 1 letter a) and letter b) of the Constitution

This has never been registered with the Tribunal in Andorra

In Italy the Court pointed out that, thus, legislative measures are possible to be challenged but only when they could not be the subject of an incidental complaint, on the basis of an exemption of non-constitutionality.\(^{97}\)

b) The situations having generated legal disputes are also linked to the constitutionality of the act in question.

Such situations can be seen in Albania, Bosnia-Herzegovina, Estonia, Latvia, Lithuania, Moldova, Montenegro, Russia and Ukraine.

In Albania, when the settlement of the dispute of jurisdiction refers to acts issued by the bodies in dispute, the Constitutional Court also examines the constitutionality or legality of such acts in order to settle the dispute.\(^{98}\)

In Latvia the institutional disputes are settled only in jurisdictional framework, when the Court pronounces on the compliance of the challenged act or rule with the higher legal rule. Thus, if certain challenged rule is in any way connected to the jurisdiction of an institution, it will be examined in the concrete case.

In Lithuania, most disputes between authorities settled by the Constitutional Court refer to the interpretation and implementation of the constitutional principle of the separation of powers in the State. There are the applications requesting the examination of the constitutionality of those regulatory acts setting the responsibilities of State institutions and regulating their relationships, principle that can be indicated directly or implicitly.

In Moldova, the Constitutional Court declared as unconstitutional several Government resolutions whereby the principle of the separation of powers was violated. On October 5, 1995 the Constitutional Court submitted the Government Resolution no. 696 dated December 30, 1994 to the control of constitutionality.

In Ukraine, the main characteristic is that such disputes of jurisdiction vary depending upon the object of the application filed by the subject entitled to address to the Court, in connection with the constitutionality of the acts adopted by a State body or the official interpretation (usually in systemic relation with the provisions of Ukraine’s Constitution). Pursuant to Article 152 of Ukraine’s Constitution, by the decision of the Constitutional Court the laws and the other legal acts, in full or in part, will be declared unconstitutional if they do not comply with Ukraine’s Constitution or if their drafting, adoption or enforcement procedure set by Ukraine’s Constitution has been violated. Therefore, the Constitutional Court decides in the constitutional litigations between the public bodies of the State power referred to in Article 150 of Ukraine’s Constitution as regards the issues related to the constitutionality of the acts issued by such bodies, including on the disputes of jurisdiction as well as the constitutionality of that act.

Special situations can be found in:

\(^{97}\) The procedure that represents the “normal” way to challenge a law or a regulatory act but which may come upon certain “blockages” – as phrased by the former Chief Justice of the Constitutional Court, Gustavo Zagrebelsky – arisen because, in order to refer the Court, the law should be applicable in a specific case, but this cannot be relied on in the case of several categories of laws, such as electoral laws, fund-allotting laws, etc.

\(^{98}\) In its judgment no. 20 dated 04.05.2007, the Constitutional Court, taking into consideration the right of the parliamentary minority (1/4 of deputies) to set up an investigation committee in the capacity of a “constitutional authority,” acknowledged that Parliament’s decision refusing the setting-up of such a committee generated a dispute of jurisdiction. Therefore, it decided to settle the dispute of jurisdiction arisen between the 1/4 of the deputies, on the one hand, and Parliament, on the other hand, ruling to nullify, on grounds of non-constitutionality, the act having generated the dispute – **Parliament’s decision**.

In its decision no.22 dated 05.05.2010, the Constitutional Court acknowledged that a dispute of jurisdiction was generated by the way in which the Assembly’s decision on the setting-up of an investigation committee formulated the object of the parliamentary investigation, by the investigation carried out by that committee as well as by that committee’s establishing the unlawfulness of the KRRT decisions, thus creating a blockage in the exercise of the jurisdiction of plaintiff Tirana Municipality. Therefore, the Court decided to settle the dispute of jurisdiction between this authority and the Assembly of the Republic of Albania by nullifying the decisions made by the Assembly of the Republic of Albania “as regards the setting-up of the Investigation Committee” and “as regards the approval of the report and conclusions of the investigation commission.”

\(^{99}\) Chapter 10 of the Law on Ukraine’s Constitutional Court sets the characteristics of the procedures in the cases related to the constitutionality of the legal acts having generated litigations about the jurisdiction of the constitutional bodies of Ukraine’s state power, of the bodies of the Autonomous Republic of Crimea and of the local autonomy bodies. Pursuant to Article 75 in the aforementioned law, the grounds to refer the Court must be a dispute of jurisdiction between the state constitutional bodies, the bodies of the Autonomous Republic of Crimea and the local autonomy bodies, if one of the subjects entitled to refer the Court considers that the acts of Ukraine’s Supreme Rada, the acts of Ukraine’s President, the acts of Ukraine’s Council of Ministers, the legal acts of the Supreme Rada of the Autonomous Republic of Crimea setting the jurisdiction of the abovementioned bodies do not comply with Ukraine’s Constitution.
- Serbia, where institutional disputes brought to the Constitutional Court of Serbia refer to the disputes of jurisdiction between public authorities, but it is possible that one of the authorities in dispute starts the control procedure of the constitutionality and legality of a general act, as part of the settlement of the disputes of jurisdiction. Under such circumstances, the Constitutional Court shall treat the application for the control of constitutionality and legality as a previous matter upon which the result of the settlement procedure of the disputes of jurisdiction depends. Under such a circumstance, it will suspend the examination of the disputes of jurisdiction until the completion of the regulatory control. The Constitutional Court can decide the beginning *ex officio* of the control of the regulatory act, the judgment of the disputes of jurisdiction being suspended until the completion of the control.

- Slovenia, where in the settlement of a dispute of jurisdiction the Court can decide *ex officio* to exercise the constitutionality control of the regulation if it considers that this contributes to the settlement of the dispute and can repeal or annul the regulation or the general act issued in exercising public authority which is found unconstitutional or illegal in that procedure.

- in Switzerland, where the Swiss Federal Tribunal cannot be apprised in legislation matters except for deciding whether a canton rule usurps the legislative jurisdiction of the Confederation but not the other way round.

5. Who has the right to refer the constitutional court in order to settle such a dispute?

The analysis of the reports sent shows the need to classify the entities that have the right to refer the constitutional court – depending upon the express regulation of the constitutional litigation court’s responsibility to settle institutional disputes. The following differences can be noticed:

A. In the States where the constitutional litigation court has the express authority to settle constitutional legal disputes, we find the following situations:

a) In most countries, the entity that has the right to refer the constitutional court in order to settle an institutional dispute can be any party in that dispute. This is the case, for instance, of Albania, Bosnia and Herzegovina, Cyprus, Croatia, the Republic of Macedonia, Montenegro, Serbia, Slovenia, Italy, Germany and Russia.

b) In other States, such as Azerbaijan, Andorra, Georgia, Spain, Romania, Poland, Slovakia, Ukraine, the entities that have the right to refer the constitutional court in order to settle an institutional dispute are expressly and restrictively stipulated by the Constitution and/or by laws and they can be both the public authorities at the top of the State powers and the supreme bodies of autonomous entities. Therefore, the entities can be:

- the President of the country: in Azerbaijan, Georgia, Poland, Ukraine, Romania, Slovakia,
- the King: in Spain
- the Chambers of Parliament/the presidents of one Chamber of Parliament / a certain number of parliamentarians: in Georgia (one fifth of the Parliament members), Poland (the Marshals of Seim and of the Senate), Romania (one of the presidents of the two Chambers of the Parliament), Spain (Congress/Senate), Ukraine (a number of at least 45 Deputies, Ukraine’s Supreme Rada and the Supreme Rada of the Autonomous Republic of Crimea),
- the Government/the head of the Government: in Andorra, Georgia, Romania, Poland, Spain, Slovakia, Croatia
- one fifth of the total number of members of the National Council of the Republic: in Slovakia
- the supreme court: in Poland (the President of the Supreme Court/ the President of the High Administrative Court), Ukraine (the Supreme Court), Azerbaijan
- any court of law: in Slovakia
- the Attorney General/the Attorney General’s Office: in Slovakia and Azerbaijan
- the President of the Superior Council of Magistracy or of the General Council of the Legal Power: in Romania and in Spain, respectively

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100 Article 50 par. 2 and Article 53 in the Constitutional Court Law.
101 To date, the Constitutional Court has never had to settle disputes of jurisdiction which would require the constitutionality (and legality) control of an act.
102 Article 61 par. 4 of the Constitutional Court Law.
- one-fifth of the number of members of the General Council in Andorra
- autonomous entities/their supreme bodies: in Andorra (the 3 Communes), Georgia (supreme representative bodies in Abkhazia and Ajara)
- authorities of local public administration: in Slovakia
- the Ombudsman: in Ukraine (Human Right Parliamentary Advocate) and Serbia

B. In the States where the constitutional litigation court does not have the express authority to settle constitutional legal disputes but it has the possibility to settle such disputes indirectly when exercising an *a priori* or *a posteriori* control of the constitutionality of regulatory acts, one can notice that the entities that have the right to refer the constitutional court in order to solve an institutional dispute are the same public authorities that can make the complaint about the constitutionality control of regulatory acts. Such situations can be found in Armenia, Belarus, France, Estonia, Lithuania, the Republic of Moldova and Portugal.

6. What is the settling procedure of such a dispute?

In all the States where the constitutional litigation court settles institutional disputes the complaint is made by a written act (application/complaint/resolution) drafted in observance of certain requirements of form, and justified.

In some States there is a time frame within which such complaint can be filed: for instance, in Germany the application shall be filed within 6 months from the date when the measure or the omission was acknowledged; in Cyprus the application has to be filed within 30 days from the challenging date of such a responsibility or jurisdiction; in Slovenia the affected authority has to formulate an application for the settlement of the dispute within 90 days from the date when it discovered that another authority intervened or assumed the jurisdiction.

Moreover, in all States the first procedural step is in writing.

Special situations are noticed in Spain, where there is the obligation to fulfil a previous procedure\(^{103}\) and in Azerbaijan, where the examination of the admissibility of the application is compulsory\(^{104}\).

Another special situation appears in Andorra, where one party dropping their action results in the annulment of the action. In the Czech Republic, before the constitutional court pronounces, the author of the application – with the consent of the Constitutional Court – is allowed to withdraw it. The Constitutional Court may decide, however, that the interest in settling the disputes of jurisdiction in a particular case exceeds the plaintiff’s will, so it will continue the procedure. But when it accepts the withdrawal of the application, it stops the procedure. Furthermore, during the procedure, the Constitutional Court can decide to deny the application if: the settlement of the disputes of jurisdiction lies with another body, pursuant to a special law, or the settlement of the disputes of jurisdiction lies with a body higher than the two bodies between which the disputes of jurisdiction appeared.

In other cases, the Constitutional Court pronounces on the merits of the case, deciding which is the competent body to settle the problem having generated the dispute. When the disputes of jurisdiction appeared between a State body and an autonomous region, it decides whether the problem is of the jurisdiction of the State or of the autonomous region.

\(^{103}\) Before apprising the Constitutional Tribunal, the body considering that its responsibilities were injured has to address to the body having abusively exercised such responsibilities and to require the repeal of the decision having brought about the undue assumption of responsibilities. To this end it has a 1-month period from the date when the decision having caused the dispute was acknowledged. If the body to which the notification is addressed states that it acts within the limits of the constitutional and legal exercise of its responsibilities, the body considering that its responsibilities were unduly taken over will take the dispute to the Constitutional Tribunal within one month from that date. It can also do this if the notified body does not correct its decision within one month of receiving the notification. Procedure is simple. Having received the seizing application, the Tribunal sends it within ten days to the challenged body and grants it one month to formulate pertinent assertions.

\(^{104}\) The litigation-examining application related to the separation of powers between the legislative, the executive and the legal system is commonly submitted to the panel set up in the Constitutional Court, which within 15 days has to rule on the admissibility or inadmissibility of that application. The decision made by the panel of the Constitutional Court regarding the admissibility or inadmissibility of the application is sent, on the same day, to the body or the official person having requested the examination. The Constitutional Court has to start the examination of the main issue of the application within 30 days from the date when the application was admitted.
In Estonia, the Supreme Court can suspend, on substantially justified grounds, the implementation of the attacked regulatory act or of certain provisions thereof, until the date when the decision made by the Constitutional Court is to produce its effects, while in Croatia the Constitutional Court can order the interruption of procedures in front of the bodies in dispute until it pronounces its decision. Likewise, in Italy the plaintiff is ensured a preliminary protection in the form of an order whereby the attacked act is suspended.\textsuperscript{105}

According to sent reports there is also a verbal procedure in the following States: Belarus, Bosnia and Herzegovina, Romania, Poland\textsuperscript{106}, Italy\textsuperscript{107}. During such a procedure evidence is brought and any clarifications needed for the case are made.

In Italy the disputes between State powers show several significant characteristics. The body claiming that its legal authority were violated will apprise the Court, but its application will comprise only the description of facts and probably the responsible act. The Court decides whether the application is admissible; if it is, the Court will establish the body (or bodies) that are to be summoned as defendant. The plaintiff will have the obligation to notify the defendants and to file the application once more with the court registry, together with the proof of the delivery of notifications. From that moment on the dispute between the State powers begins the settlement procedure, which is similar to the one applicable in the constitutionality control and the disputes of responsibilities between the State and the regions. The most important difference is that, with the disputes between State powers, the issuance of a suspending order related to the challenged measure is not possible.

In all States the settlement of the institutional dispute by the constitutional litigation court is made in the Plenum, and in all cases the constitutional litigation court pronounces an act in writing, binding for the parties, whereby the dispute is settled (such as a resolution in Montenegro, Poland, Italy, Romania, Croatia), which is published in an official publication (only the final part is published in Poland).

7. What solutions are pronounced by the constitutional litigation court. Illustrate

Depending upon the express regulation of the constitutional litigation court’s responsibility to settle institutional disputes, the following solutions can be noticed:

A. In the States where the constitutional litigation court has the express jurisdiction to settle constitutional legal disputes, we notice the following:

a) In most States the adopted solution can be the annulment/ invalidation/repeal of the act having generated the dispute: Albania, Andorra, Azerbaijan\textsuperscript{108}, Cyprus, Montenegro\textsuperscript{109}, the Republic of Macedonia, Serbia, Slovenia, Ukraine.\textsuperscript{110}

\textsuperscript{105} The Court can run an investigation as well, which the Chief Justice of the Court assigns to a judge-rapporteur. Sometimes the investigation is also meant to offer the plaintiff a preliminary protection in the form of an order suspending the challenged act (in the disputes of jurisdiction, this authority has already been recognised by Law no. 87 / 1953; in cases filed directly, suspension of the implementation of a law was approved only by Law no. 131 / 2003).

\textsuperscript{106} Which mentions that there is no special procedure for the settlement of institutional disputes, but the same procedure for the law’s constitutionality control has to be followed.

\textsuperscript{107} After the investigation is completed, a hearing takes place during which the parties in the dispute can express their opinions, pointing out and integrating, as the case may be, the content of the application or of the initial action, or subsequent conclusions registered around the date of the hearing.

\textsuperscript{108} The Constitutional Court nullified two Orders issued by the head of the executive in Baku.

\textsuperscript{109} In this case the decision has the effect of invalidation. It ends a constitutional litigation and removes the unconstitutional norm, removes the infringement to the human rights and citizen liberties, settles the dispute of jurisdiction, establishes whether the President violated the Constitution, decides on the banning of a political party or of a non-governmental organisation, establishes whether any law was violated during the elections.

\textsuperscript{110} The Constitutional Court can acknowledge the interference of the state power body in the exclusive jurisdiction of another body, the lack of jurisdiction of the state power body in the matter being the object of litigation and can declare the non-constitutionality of the issued regulatory act. The Constitutional Court can confirm the jurisdiction of the state power body by acknowledging that the provisions of the regulatory act stipulating such jurisdiction or the act issued by that body in exercising its jurisdiction, which is the object of litigation, comply with Ukraine’s Constitution (constitutional).
b) In other States the constitutional court establishes the competent body to decide on the case. Thus, in Croatia, in the case of a positive/negative dispute of jurisdiction, the Constitutional Court pronounces a decision whereby it establishes the competent body to decide on the case. In Hungary, before 2005, the Constitutional Court – established the competent body and appointed the body bound to take action; or – rejected the application because there was no dispute. In the Republic of Macedonia the Constitutional Court establishes the competent body to decide on the case. In Poland the Constitutional Tribunal pronounces a decision appointing the competent State body to adopt certain measures or to perform an action (to settle a certain case). In Serbia the Court will pronounce a decision annulling any measures adopted by the authority challenged as lacking jurisdiction. In Romania the Constitutional Court can pronounce the acknowledgement of the existence of a dispute between 2 or several authorities and its settlement consisting in the conduct to be followed; the acknowledgement of the existence of a dispute and the acknowledgement of its extinction by adopting an attitude compliant with the Constitution; the acknowledgement of the non-existence of a constitutional legal dispute; the acknowledgement of the Court’s lack of jurisdiction in examining certain acts of public authorities; the acknowledgement of the non-admissibility of an application for the settlement of the dispute between State “powers.” In the Czech Republic the Constitutional Court pronounces on the merits of the case, establishing what body has authority to settle the problem having generated the dispute;

c) another solution can be denial, i.e. the acknowledgement of the lack of grounds of the application/complaint, as it is in Italy and Romania, where the Constitutional Court can find that a constitutional legal dispute does not exist;

B. In the States where the constitutional litigation court does not have the express jurisdiction to settle constitutional legal disputes but it has the possibility to settle such disputes, indirectly, when exercising an a priori or a posteriori control of the constitutionality of regulatory acts, the constitutional litigation court examines the application or the complaint related to the constitutionality of a piece of regulation and pronounces one of the following solutions:

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111 The Tribunal defines the area of that body’s jurisdiction and the way they “differ” from other state bodies’ jurisdiction (see below the comments on the decision in the case Kpt 2/08). To date, the Tribunal has pronounced only in two cases related to disputes of jurisdiction (cases Kpt 1/08 and Kpt 2/08). In the case Kpt 1/08, the First Chief Justice of the Supreme Court referred the Tribunal requesting to settle a dispute of jurisdiction which, in his opinion, had arisen between the President of the Republic of Poland and the National Council of Magistrates (KRS) in connection with the appointment of judges. The dispute appeared when the President of the Republic refused to appoint several judges (in January 2008), although their candidacies had been positively assessed and submitted by the National Council of Magistrates. In the opinion of the First Chief Justice of the Supreme Court, the refusal to appoint positively assessed candidates equals to their independent “assessment” by the President of the Republic, despite the fact that the Council had the responsibility to assess the candidacies. The Tribunal refused to examine the merits of the case, considering that there was not a genuine dispute of jurisdiction. Both state bodies exercised their constitutional and legal responsibilities in their own area of jurisdiction (Resolution dated June 23, 2008, no. Ref. Kpt 1/08). In the case Kpt 2/08, the Tribunal had to settle the dispute of jurisdiction between the President of the Republic of Poland and the Council of Ministers (the Government), in the context of differentiating the representation responsibilities of the Republic of Poland at a session of the European Council. The issue referred mainly to which of the state bodies was competent to determine and to present the position of the Republic of Poland and whether the President of the Republic could decide to attend such a session. By Resolution dated May 16, 2009 (no. Ref. Kpt 2/08), the Tribunal ruled that the President of the Republic – in his capacity as supreme representative of the Republic of Poland – can decide to attend a European Council session if he considers it useful for the fulfilment of his tasks as President of the Republic stipulated in Art. 126 par. (2) of the Constitution. But this does not mean that the President alone can decide and present the position of the Republic of Poland, because pursuant to Article 146 par. (1) of the Constitution the Council of Ministers is in charge of the internal and external policy issues of the Republic of Poland. The Council of Ministers exercises a general control in the area of the relationships with other states and international organisations (Article 146 par. (4) item (9) of the Constitution). Moreover, the Council deals with the state affairs that are not ascribed to other state bodies (Article 146 par. (2) of the Constitution). As neither the constitutional provisions nor the legal ones stipulate that the responsibility to decide and present the position of the Republic of Poland in European Union bodies and reunions is ascribed to any state body (for instance, to the President of the Republic), these responsibilities are expected to fall in the jurisdiction area of the Council of Ministers. In the name of the Council of Ministers, the position of the Republic of Poland is presented by the president of the Council of Ministers (prime minister), who secures the implementation of the policies adopted by the Council of Ministers (for instance, Article 148 par. (4) of the Constitution), or by a member of the Council with jurisdiction in the field (for instance, the minister of foreign affairs). However, the Tribunal pointed out that Article 133 par. (3) of the Constitution instates the obligation that the President of the Republic, the prime minister and the relevant minister cooperate in the foreign policy area. In the context of the European Council sessions, this cooperation has to involve, among others, informing the President about the syllabus of a certain reunion and the agreed position of the Council of Ministers in that issue, the information of the Council of Ministers by the President of the Republic about his intention to attend a certain session, the making of arrangements as regards the form and size of such participation (including the President’s possible participation in the presentation of the position of the Republic of Poland as set by the Council of Ministers) as well as the observance of agreed measures.

112 Romania’s Constitutional Court acknowledged the lack of jurisdiction in examining several acts by public authorities (Judgment no.872 dated October 9, 2007) as well as the inadmissibility of an application for the settlement of the dispute between state “powers.” (Judgment no.988 dated October 1, 2008).
a) it declares the piece of regulation as unconstitutional (entirely or in part);
b) it declares the piece of regulation as constitutional;

Such situations can be found in Albania, Belarus, Bosnia-Herzegovina, Russia\textsuperscript{113}, Armenia, Estonia, Ukraine.

8. Means to implement the constitutional court’s decision: conduct of the involved public authorities after the dispute is settled. Give examples.

In all States the judgment returned by the constitutional litigation courts related to the settlement of institutional disputes are mandatory.

The analysis of filed reports shows that in most cases the public bodies involved in the dispute did comply with the judgments returned by the constitutional litigation courts in considering this general binding character.

For instance, in Germany the provisions of Article 93.1 no. 1 of the Fundamental Law corroborated with the provisions of § 67.1 sentence 1 of BVerfGG introduce the assumption that, in mutual relationships, constitutional bodies will observe the judgment returned by the Federal Constitutional Court which ruled on the non-constitutionality of a measure, without the need to pronounce an express obligation and its fulfilment. This state of mutual respect (Interorganrespekt) between constitutional bodies, deriving from the principle of the State governed by the provision stipulated in Article 20.3 of the Fundamental Law as an obligation of both the executive and the legislative not to take any measures against the Fundamental Law, offers enough guarantees that all the parties in the litigation procedure comply with the legal findings of the Federal Constitutional Court.\textsuperscript{114}

In most cases\textsuperscript{115}, there is no special procedure for the enforcement of decisions/resolutions made by the constitutional litigation courts, e.g. in Latvia, Lithuania, Poland, Romania.

As an exception, in Albania the power to implement the Constitutional Court’s decisions is exercised by the Council of Ministers by means of the competent public administration bodies. The persons who do not implement the Constitutional Court’s decisions or who hinder their implementation, when such action is not a criminal violation, shall be liable to a fine of up to 100 thousand leke, enforced by the Chief Justice of the Constitutional Court through a final judgment that stands for a writ of execution. Likewise, in Montenegro, the Government of the Republic of Montenegro, upon the Constitutional Court’s request, ensures the enforcement of the Constitutional Court’s judgment, while the related expenses are to be covered from the budget.

A special situation can be found in Croatia, where the Constitutional Court sets the bodies entitled to enforce its decisions as well as the way in which they are to be enforced. By setting the means for the enforcement of its decisions, Croatia’s Constitutional Court actually orders the competent bodies to implement general and/or individual measures comparable to those enforced on the Member States by the European Court of Human Rights.

Likewise, in Germany the Federal Constitutional Court also has authority to pronounce a temporary ordinance.\textsuperscript{116} In such cases, besides the finding itself, the Court can enforce a specific, compulsory conduct\textsuperscript{117} on the opposing party; moreover, whenever necessary, the Court can secure the enforcement of its decision by an enforcement order.\textsuperscript{118}

\textsuperscript{113} Where the Constitutional Court can declare the norm as constitutional (in full or in part) in the constitutional legal meaning given by the Constitutional Court.


\textsuperscript{115} For instance, in Bosnia and Herzegovina there is no department in charge with their enforcement. However, if its decisions are not implemented or are enforced with delay or the Constitutional Court is notified with delay about the measures taken, the Constitutional Court shall pronounce a judgment stating that the decision was not enforced. Such judgment will be sent to the jurisdictional prosecutor or to another body that has jurisdiction to enforce the decision, appointed by the Constitutional Court.

\textsuperscript{116} Cf. BVerfGE 89, 38 <44>; 96, 223 <229>; 98, 139 <144>

\textsuperscript{117} Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, \textit{Bundesverfassungsgerichtsgesetz}, § 67, marginal no. 36

III. ENFORCEMENT OF THE CONSTITUTIONAL COURT DECISIONS
(Romania)

Puskás Valentin Zoltán, Judge
Benke Károly, Assistant-magistrate in chief

1. The Decisions by the Constitutional Court

a) are final;

In principle, in all the States the decisions rendered by the Constitutional Courts are final.

Portugal is a special case, as in certain conditions the decision of the Constitutional Court on matters of unconstitutionality may be defeated. Thus, the President of the Republic has the mandatory suspensive right to veto and must return the draft law found as unconstitutional to the Parliament. However, the draft law may be confirmed by Parliament if it adopts it again based on the votes of two-thirds of the attending Deputies, on condition that this number should be higher than the absolute majority of Deputies exercising their functions. In this case, the draft law will end up again at the President who may promulgate the law or ratify the international treaty — except for the case when the President of the Republic refuses to do so (Articles 279-2 and 4 of the Constitution of Portugal). In such a case, the law or the international treaty cannot be enacted and cannot be applied.

b) may be appealed, in which case the holders of such right, the terms and the procedure shall be pointed out;

The decisions rendered by the constitutional court cannot be appealed in any participating State.

c/d) cause erga omnes / inter partes litigantes effects.

Given the binding character of the decisions of the Constitutional Courts, more specifically, their erga omnes or inter partes litigantes effects, in most of the States, the decisions of unconstitutionality of a draft law cause erga omnes effects. Most certainly, the situation is different in those States that adopted the American model of constitutionality review, a case when the rule of judicial precedent is applied (Norway).

In order to provide examples for the statements made above, as well as to clarify the specific aspects encountered in the participating countries, we will list, below, the position adopted by various countries:

- besides the inter partes litigantes character, inherent to any court ruling observing the res judicata principle, the constitutional court decisions are binding for all courts and for all other public institutions or authorities. The same holds for the decisions of the plenum and for the decisions of the two senates. However, the decision to deny the unconstitutionality motion as inadmissible is not binding. The erga omnes effect of the constitutional court decisions is limited and does not extend to third-party private persons (Germany).

The full erga omnes effect applies to the abstract and concrete constitutionality review in case of laws and individual motions of unconstitutionality related to legislative acts. Consequently, only those decisions have the power to cancel one law or to find it compatible or incompatible with the Constitution.

- only the ruling returned following the amparo constitutionality review has inter partes character (Andorra);
- in Austria, the decisions returned following the constitutionality review exercised on the legal acts have erga omnes effects, such effects being applied only for the future, whereas those that are aimed at individual acts cause inter partes effects. Mention should be made that the constitutional court has the power to declare laws unconstitutional even retroactively; nevertheless, the rule is that the principle of non-retroactivity shall be applied (unlike Germany, where retroactivity rules);
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- the Constitutional Court has the power to suggest possible ways to overcome the unconstitutionality it identifies. The public authorities and institutions which are the addressees of its decisions must respond within the timeframe provided by the court on the enforcement and observance of its decisions (Belarus).
- in Estonia, the constitutional court has the power to delay the entry into force of its ruling, which is seen as a limitation of the erga omnes effect that the ruling produces. Such a stay of the entry into force of the ruling of the constitutional court is also to be found in Georgia or in Poland, but only in Estonia this is interpreted as a limitation of the erga omnes effect of the ruling.
- the ruling whereby the constitutional court finds that a legal provision is unconstitutional in a certain interpretation is not binding for all courts except for the a quo judge, consequently, one may infer from that that it only produces inter partes effects. However, if the courts try to enforce the interpretation dismissed by the Court, it may supplement its initial ruling by another one finding that the law is unconstitutional – the so-called system of “double ruling” (Italy);
- in Latvia, the binding character of the ruling by the constitutional court is translated both through the binding character of the ruling itself and by the binding character of the interpretation, given by the court, of the law that is challenged;
- the binding character of the decisions is doubled by the binding character of the contents of the acts by the Constitutional Court which interpret the provisions of the Constitution (Lithuania);
- in the Republic of Macedonia, the span of the binding effects of the decisions depends on the object that is referred to and the nature of the matter settled;
- in the Republic of Moldova, the ruling of the Constitutional Court must be enforced within the timeframes specified in the ruling, as it enters into force on the date when it is adopted;
- Norway implements the American model of legislative constitutionality review, consequently, the decisions by the Supreme Court in constitutional matters shall be only inter partes binding. However, this effect is doubled by the rule of the legal precedent, to the effect that the lower courts are bound to apply the judgments returned by the higher courts;
- in Poland, Romania or Serbia, the decisions of the constitutional courts are, in general, mandatory;
- in Russia, the erga omnes effect of the ruling is translated into the fact that it may constitute grounds for the jurisdictional authority to repeal legal provisions similar to the ones that have been found unconstitutional. Moreover, review of the court ruling may be an action applied for not only in a specific case, but also in other cases for which the ruling presents interest;
- in Serbia, decisions that settle constitutional challenges introduced by an individual and which find that an individual act or action breached or deprived the respective individual of their human or minority rights safeguarded in the Constitution may also be applied to those individuals who have not made such challenges if they are in the same situation. However, if such a connection cannot be proven, then such a ruling shall keep to its inter partes character.
- in Slovenia, even if the decisions returned in cases of motions of unconstitutionality have inter partes effects, they may acquire erga omnes effects only if the legal rule on which the challenged individual act was based is found unconstitutional. However, in principle, the procedure used for the settlement of the motions of unconstitutionality only acknowledges the inter partes effects of the decisions by the constitutional court;
- in Switzerland, during the abstract review, in case the disputed cantonal rule is cancelled, the ruling may produce erga omnes effects. However, during the concrete review, the ruling cannot produce such effects any longer; still, finding unconstitutionality during this review as well may bestow erga omnes tones to the ruling, to the effect that if the unconstitutional rule continues to be enforced, in a specific case, any individual may have it declared unconstitutional again. Consequently, the public authorities, taking into account this situation, choose to set aside the unconstitutional rule, even if the ruling of the Federal Tribunal a priori has inter partes effects;

Not in the least, it is worth mentioning that in certain countries the Constitution provides in terminis that the decisions of the Constitutional Courts are enforceable (i.e. Republic of Macedonia, Montenegro, and Serbia).

In terms of the decisions concerning the denial of motions of unconstitutionality during the a posteriori review, in principle, they bear inter partes effects, except for countries such as France, Turkey or Luxembourg, where a new challenge concerning the unconstitutionality of a law already challenged before cannot be grounded in the same reasons or cannot take into account the same grounds. It is worth mentioning that in Portugal or Romania, if the challenged law is found in line with the Constitution, it does not mean that it cannot be challenged again in terms of a new motion of unconstitutionality as the constitutionality of the law is not an absolute.
In exchange, the decisions concerning dismissals of motions of unconstitutionality during the a priori review bear limited *erga omnes* effects, most certainly limited to the scope of the subjects involved in the ratification procedure.

2. As of the day of the publication of the ruling in the Official Journal/ Gazette, the legal provision declared unconstitutional:

a) shall be repealed;
b) shall be set aside until the legal provision/ law declared unconstitutional is set in line with the provisions of the fundamental law;
c) shall be set aside until the law maker shall invalidate the ruling of the constitutional court;
d) other options;

2.1. The unconstitutionality ruling in the case of a law enters into force either as of the day when it is returned (by way of an example, this happens in Belarus, Estonia, Georgia, Ukraine, Republic of Moldova), or as of the day when it is published (by way of an example, this happens in Armenia, Austria, Belarus, Croatia, France, Italy, Latvia, Serbia, Turkey, Albania, Romania, the Czech Republic), or as of a date provided in the ruling (by way of an example, this happens in Azerbaijan related to the laws and other regulatory documents, or some of their provisions, the intergovernmental agreements of the Republic of Azerbaijan), or as of the date following the publication of the ruling (by way of an example, this happens in Bosnia and Herzegovina, Slovenia).

An interesting situation can be found in Azerbaijan, where the decisions of the Constitutional Court may enter into force at various moments, depending on the area of interest:

- on a date provided in the contents of the ruling in the case of the unconstitutionality of laws and other legislative acts or their provisions, the intergovernmental agreements of the Republic of Azerbaijan;
- on the date when the ruling concerning the separation of the powers between the legislative, the executive and the judiciary, as well as concerning the interpretation of the Constitution and the laws of the Republic of Azerbaijan is published;
- on the date when the ruling concerning other matters under the jurisdiction of the Constitutional Court is returned;

In the Republic of Moldova, the decisions of the Court may enter into force on the date when they are published or on the date provided in the ruling. In the Czech Republic, the Court may also decide that the ruling shall enter into force on the date when it is returned.

2.2. However, most of the countries under analysis provided in their domestic legislation the opportunity of the constitutional court to delay to a certain date the moment when the unconstitutionality ruling shall enter into force (up to one year since the publication of the ruling – Turkey, up to six months since the publication of the ruling – Bosnia and Herzegovina, up to six months since the return of the ruling – Estonia, around six months – Latvia, 12-18 months in Poland, up to 18 months in Austria, one year in Turkey and Slovenia; to that effect, see also the example of Germany, Croatia, the Czech Republic or Georgia). In other countries, the term of this timeframe is a matter of decision by the Constitutional Court (Armenia, Belarus, France, and Russia).

This timeframe shall bear no effects on the case that resulted in the cancellation of the legal act, but shall apply to all acts that would be adopted by the administrative authorities or courts until the date of its expiry (Austria). Consequently, the legal act cannot be challenged anymore until the expiry of this timeframe, after which its *ipso jure* effects shall cease (Austria).

Such delay may be enforced until to the occurrence of a certain event/ act (Belarus).

When ordering a delay, the situation that might arise as of the moment of the cancellation of the unconstitutional provisions shall be taken into account, namely, no prejudice should be brought to the fundamental rights of the plaintiffs and other persons and no significant damages should be caused to the interests of the State or of the society (Latvia).

The reasons for such a delay all gravitate around the principle of stability in connection with the legal relationships, but, besides this principle, other aspects also arise such as the need to provide sufficient time to the authority that adopt-
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ed the unconstitutional legal provision to repeal it, amend it, supplement it (Belarus), respectively, to harmonize the unconstitutional provision with the ruling of the Court (Bosnia and Herzegovina), to avoid regulatory omissions (Croatia).

In Russia, if the immediate cancellation of the regulatory provisions could have a negative effect on the balance of the constitutional values, the Constitutional Court may stay the enforcement of its ruling and may provide a subsequent date to repeal the legal provisions declared unconstitutional. In Armenia, if the Constitutional Court finds that, by declaring the act unconstitutional and, consequently, by invalidating it or any of its provisions as of the moment when the Court returns its ruling, severe consequences will be unavoidable for citizens and the authority of the State, so as to damage the legal certainty as a consequence of the nullification of the respective act, then the Constitutional Court has the right to declare the act as unconstitutional and, at the same time, to postpone the day when the act will be nullified.

If the incompatibility is not eliminated within the timeframe specified, the Constitutional Court will stipulate in a subsequent ruling that the provisions found unconstitutional are no longer in force (Bosnia and Herzegovina).

A special case is Germany, where the Federal Constitutional Tribunal finds that the challenged legal act is incompatible with the Constitution, but does not nullify it, to provide to the lawmaker a margin of appreciation and sufficient time to adopt a new regulation in the following cases: (1) when the lawmaker must have several options to eliminate the unconstitutionality (2) if it is a matter of general interest to have the transition from an unconstitutional to a constitutional stage of law implemented gradually, especially in those cases when the declaration of nullity would create a situation even less compatible with the Constitution as compared to the current one. Among the steps envisaged there may also be circulars concerning the continuous application of the unconstitutional law either as unchanged or amended. When the perpetuation of the unconstitutional provisions cannot be accepted even in an amended form, it is up to the Federal Constitutional Court to develop a provision that should either be transitory or taken as a benchmark. When it declares its incompatibility, the Federal Constitutional Court also has the possibility to refrain from ordering the continuous application of the unconstitutional law. But – unlike the nullification declaration – such a solution is justified only if it simultaneously imposes a timeframe by which the lawmaker should adopt new legislation, in line with the Constitution, when the Court deems that a transitory regulation is not mandatory. Consequently, the unconstitutional provision becomes inapplicable until the entry into force of the new law and, as such, any proceedings ongoing in courts must be suspended.

Unlike the situation of the countries already mentioned, there are also other countries where the constitutional court does not have the power to delay the effects of its ruling, namely, it cannot postpone the moment when the legal act found unconstitutional must cease its effects – for instance, in Portugal or Romania.

2.3. Depending on the constitutional system, the decisions of the constitutional courts are governed either by the principle of non-retroactivity, or the principle of retroactive application, or they accept both principles with certain nuances, as will be the case in what follows.

The following are included in the first category of countries: Romania (where, according to Article147 par.4 final phrase of the Constitution, the decisions “take effect only for the future”), Armenia, Belarus (where the phrase is used that the unconstitutional act “ceases its effects”), Republic of Moldova (where the unconstitutional provisions become null and shall no longer be applied as of the moment when the respective ruling by the Constitutional Court is returned) or Serbia.

Germany is included in the second category, where, according to the tradition of the German public law, any provision that is contrary to another one which is of a higher order shall be ipso jure and ex tunc null, resulting eo ipso into the nullification of a law contrary to the Constitution.

In Belgium, the nullified legal provision disappears from the legal order, as if it had never been adopted. The retroactivity inherent to the restoration of a status quo ante results in the ex tunc quashing of the provision. Retroactivity is seen as the logical consequence of the unconstitutionality, as it vitiated from the onset the nullified provision. To limit the effects of the nullification, which can severely harm legal certainty, if the Court deems it necessary, it shall indicate in a general provision the effects of the nullified provisions that shall be considered final or those that shall be temporarily maintained for a period that shall be specified. The Constitutional Court shall nullify the challenged provision as a whole or partially. Consequently, the annulment may aim all challenged provisions, but it may only confine to a single provision, phrase or even to a single word. Sometimes, the Court decides to modulate its annulment: in conclusion, it will nullify a legal provision or any part thereof but only “to the extent to which” they are unconstitutional.
In Ireland, where the constitutionality review is performed by the supreme court of justice, the unconstitutional law is nullified either as of the moment of its entry into force, if it is a law adopted subsequent to the entry into force of the 1937 Constitution, or as of the date of the entry into force of the Constitution, if it is a pre-constitutional law.

Austria is included in the third category, where, even if in principle, the ruling bears effects only for the future, the Court may choose to declare inapplicable the legal act with retroactive effects (such a vision gives rise to problems based on the principle of res judicata in the case of decisions that were adopted yet unchallenged), as well as Armenia (where the retroactivity of the Court’s ruling is imposed only when the provisions found unconstitutional are under the Criminal Code or the law concerning the administrative liability), Republic of Macedonia or Slovenia, which are countries where the Constitutional Court may not only repeal a law, but also repeal or nullify a regulation or general acts adopted to exercise the public authority, as well as adopt a declaratory ruling wherein it may state that the act it reviewed was unconstitutional or unlawful.

In Italy or Montenegro, the unconstitutionality ruling causes retroactive effects, except for the cases already finally concluded — facta praeterita; it is worth mentioning that the enforcement of the unconstitutionality ruling in pending cases is deemed retroactive as it is enforced to acts which had already occurred. Italy also acknowledges the concept of “acquired unconstitutionality,” more specifically the limitation of the retroactive effects of unconstitutionality decisions, namely that the constitutional court declares that a legal provision, which had been compatible with the Constitution when it had entered into force, has in time become unconstitutional because of various events, so that the effects of the ruling shall appear as a consequence of the former.

There are also cases when the Constitutional Court has the jurisdiction to provide that the unconstitutionality ruling shall produce effects as of the date of the entry into force of the respective legal act (Latvia). Moreover, if the Constitutional Court finds that the challenged norm is not line with a legal act of a higher order, and declares it null as of the date of the publication of the Constitutional Court ruling, with respect to the author of the motion or a certain circle of persons, the effects of the ruling by the Court shall begin to surface as of the date when the act came into force or was enforced. The procedure is applied by the Constitutional Court to prevent most efficiently the violation of individual rights.

To decide whether to nullify or repeal a law, a regulation or a general act, the Constitutional Court must take into account all circumstances which are relevant for the observance of the constitutionality and lawfulness, especially the severity of the breach, its nature and significance with respect to the exercise of the citizens’ rights and liberties or the relationships established based on those acts, the legal certainty, as well as any other aspects which are relevant for the settlement of the case (Republic of Macedonia – Article 73 of the Regulation concerning the Constitutional Court).

2.4. In terms of the substantive law effects caused by the decisions of the constitutional courts, more specifically, the courts tasked to perform the constitutionality review, it is worth mentioning that such decisions impose various effects, as the case may be:

1. Repealing effect or elimination of the unconstitutional law from the legal system (Albania, Armenia, Andorra, Estonia, Croatia, Hungary, Italy, France, Latvia, Lithuania, Republic of Macedonia, Republic of Moldova, Poland, Russia, Turkey, the Czech Republic, Ukraine, Slovenia, and Romania).

By way of an example, in Lithuania, even if the text of the Constitution uses the phrase according to which the provision found unconstitutional “shall not be applied,” both the Court doctrine and its jurisprudence interpret this phrase in the sense that the unconstitutional law shall be eliminated from the legal system. The Seimas, the President of the Republic, or the Government, as the case may be, are bound by the Constitution to acknowledge that such a legal act (part of it) shall no longer be valid or (if it is impossible for them to perform this without appropriately regulating the respective social relationships) they shall amend it so as the new regulation should not be in conflict with the legal acts of a higher order, among which (and in the first place) the Constitution. However, even until the date when this constitutional obligation is fulfilled, the legal act (part of it) shall not be applied in any case, and the legal power of the law shall be cancelled.

Besides the repealing effect of the ruling, in the Republic of Moldova, the Government, no later than 3 months of the date of the publication of the ruling of the Constitutional Court, shall submit in Parliament the draft law concerning the amendment and supplementation or the repealing of the legal act or of the various parts of it declared unconstitutional.

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The respective draft law shall be examined by the Parliament as a matter of priority. In Russia too, the repealing of the unconstitutional provisions shall not cancel the obligation of the lawmaker that adopted it to eliminate them from the legal system, according to the procedure and the deadlines set in the mentioned Federal Constitutional Law. At the same time, loss of constitutional legitimacy in the case of a legal act shall constitute a “different sanction which is much more severe than a simple repealing of a legal act”¹²⁰ (Romania).

2. Simple substantive setting aside, as the unconstitutional act is still in force and may be formally applied (Cyprus, Luxembourg, Norway or Belgium¹²¹ as regards the objection of unconstitutionality). Consequently, the Parliament may repeal the unconstitutional act, but even if it does not do so, the act continues to exist, but will not be applied any longer in the adoption of any decision or of any other act by the authorities (Cyprus). The situation in Norway amounts to the same effect, as should the Supreme Court declare one law unconstitutional, it cannot nullify it. In exchange, the jurisdictional bodies shall repeal it/ amend it according to the ruling by the Court.

3. Setting the act aside, accompanied – as the case may be – by the action of the authority that adopted the unconstitutional legal act (Belarus). Consequently, the unconstitutional legal acts shall not be applied by courts until the authority that adopted them bring the required amendments to them.

4. Setting the act aside, accompanied by nullification/ repealing based on the type of exercised review (Portugal). It is worth mentioning that based on the nature of the exercised review, the Court will either nullify the legal act, or, by finding it unconstitutional will merely setting it aside in the case pending before the judge, as it shall not be applicable any longer in that case. To fill out the legal void created through this decision, the Constitutional Tribunal may order the re-entry into force of the legal act(s) that had been repealed, as the case may be, through the provision declared unconstitutional (Portugal).

In Switzerland, if in terms of the constitutionality review of the federal laws, the lawmaker does not have any obligation, in terms of the cantonal laws, it is worth mentioning that the law found unconstitutional during the abstract review shall be repealed, whereas the law found unconstitutional during the concrete review shall be cancelled in the sense that neither the authorities can enforce it, nor the citizens should observe it anymore. However, the lawmaker authority shall conduct the amendment/ repealing.

5. Finally, in Germany, the ruling whereby the Federal Constitutional Court declares the unconstitutionality of the law does not have constitutional character; it shall not quash, invalidate nor reform the law, but it shall only present its findings, at most it shall set aside the lawfulness appearance in terms of the validity of the law.

Unconstitutionality may be expressed either by finding the legal act incompatible with the Constitution or by declaring null the legal act under analysis. However, the substantive benefit of finding the incompatibility resides most particularly in that, unlike the declaration of nullification, it does not immediately generate facts, but the incompatibility statement may be accompanied by transitional enforcement steps, ordered by the Federal Constitutional Court. That is why the legal consequences of an incompatibility statement shall be caused by the contents of the enforcement order returned by the Federal Constitutional Court together with its ruling.

2.5. Effects on individual acts

The ruling finding the unconstitutionality of a legal act, besides the direct effects on the unconstitutional legal act, may also be applicable to those administrative or judicial acts adopted following the enforcement of the unconstitutional legal act. Consequently, in Austria, finding unconstitutional a law on which an individual legal act of an administrative

¹²¹ The legal act found unconstitutional shall continue to exist in the legal order and must be enforced in any situation beyond the dispute that gave rise to the preliminary ruling, even if the respective legal act was declared unconstitutional. A preliminary ruling shall only be binding for the courts, and not for the administrative authorities or the private persons. The unconstitutionality as found and comprised in the preliminary ruling has no impact on the court decisions bearing res judicata authority, which were based on the unconstitutional legal act. During this procedure, unlike the appeal for nullification, the Court was not provided with a possibility to limit the effects of its ruling on a preliminary matter. True, even in such a case, identifying unconstitutionality is likely to bring prejudice to the legal certainty. Even the Court itself tries sometimes to modulate the temporal effects of its ruling.
authority of last resort or of the Court for asylum-seekers was based, as challenged before the constitutional court, may cause their nullification, whereas the administrative authority is bound to issue a decision in line with the legal position expressed by the Constitutional Court.

The same happens in Belgium – cancellation of a legal act means that the court decisions that were based on the cancelled act will lose its legal grounds, but this does not mean that the respective decisions will disappear all together ipso facto from the legal order. The date of the publication in the Official Gazette (le Moniteur belge) of the cancellation decision shall give rise to a deadline of six months during which an appeal may be filed for the retraction of these decisions. In terms of the administrative acts issued based on a cancelled act, according to the organic law, special remedies may be used to cancel such decisions no later than six months since the publication of the Court ruling in the Official Gazette. However, when the Court decides to maintain the effects of the cancelled provision, then it is no longer possible to launch any legal proceedings to nullify the acts based on the cancelled provision.

There are States, like Lithuania, where the decisions based on the legal acts declared against the Constitution or the law shall not be executed any longer if they had not been already executed prior to the ruling of the Constitutional Court to have produced its effects. At the same time, each State institution shall be bound to revoke its acts of a lower order (their provisions) that were based on the act declared unconstitutional. In the same way, in Montenegro, the ruling finding unconstitutionality shall suspend the irrevocability clause in the case of individual acts, whereas the individual acts based on the unconstitutional law shall be amended by the jurisdictional authority based on request by the interested person, this procedure being subject to various terms and conditions.

In Serbia, any person whose rights were violated through an individual act adopted based on the unconstitutional act shall be entitled to apply to the jurisdictional authority with a view to putting the respective act in line with the ruling of the Constitutional Court in no more than 6 months. If the amendment of the individual act cannot correct the consequences related to the enforcement of the unconstitutional act, the Constitutional Court may rule that such consequences should be removed through a restitutio in integrum, the award of damages or through any other way. Such a vision is grounded on the fact that a final individual act adopted based on an unconstitutional legal act cannot be applied or enforced. Any enforcement of such an act that has begun shall cease.

Also in the Republic of Moldova the acts issued to enforce legal provisions or parts of them declared unconstitutional shall become null and shall be repealed. In Republic of Macedonia as well, the unconstitutional act cannot operate any longer as grounds for the adoption of other acts in the future or for the enforcement of individual acts adopted based on it.

In Germany, when it is referred with an unconstitutionality complaint, the Constitutional Tribunal – while it finds that it is not the law that is unconstitutional but the steps ordered by the authorities or certain court decisions – shall establish which provisions of the Fundamental Law were violated through the concrete measure or omission. Such a finding of unconstitutionality already involves binding effects. Moreover, the Federal Constitutional Court shall quash the challenged decision, which it shall sent to the jurisdictional court, according to the judicial procedure, the measure thus being quashed, whereas the court that has to rule shall be bound by this finding of unconstitutionality.

2.6. Suspension by the constitutional court of the challenged legal act

This institution appears in such States as Germany, Belgium or Lithuania. In Belgium or Germany, suspension lies with the discretion of the Court, whereas in Lithuania, it is ex officio in the case of a certain type of complaint.

Thus, in Belgium, the Constitutional Court may suspend the legal act that is the subject of an appeal for nullification. The Court assimilates the suspension to a temporary annulment. However, unlike the annulment, the suspension does not have a retroactive effect. In Lithuania, according to the Constitution, a legal act shall be suspended when the President of the Republic or the Seimas in corpore shall refer the Constitutional Court with an application to rule on its constitutionality. Once, following the examination of the case, it is found that the challenged act is in line with the Constitution, its legal effects are reinstated.
2.7. Specific matters related to the unconstitutionality ruling returned following the procedure of unconstitutional exception

- Austria: in the specific case at the constitutional court (the situation of unconstitutionality complaints) that gave rise to the regulatory review procedure, the ruling of the Constitutional Court involves a so-called “adjusted legal situation” (“bereinigte Rechtslage”). This means that, while ruling in this case, the Court must ignore the nullified legal act (the so-called “prize for the winner of the case”). Consequently, in most cases, the Constitutional Court shall also nullify – continuing with its procedure – the measure taken by the administrative authority, as the legal situation must be assessed as if the invalidated legal act had never existed.

- during the constitutionality review in the case of legal acts which are no longer in force, the ruling of the Estonian Supreme Court shall produce [inter partes] effects, whereas the challenged act shall be deemed unconstitutional starting the moment when the Supreme Court was referred with this matter. Unlike Estonia, in Romania, the decisions of unconstitutionality of the legal acts which are no longer in force have [erga omnes] effects limited to the pending cases of the administrative and judicial authorities; such a legal act is deemed unconstitutional from the date when the Constitutional Court decision is published122.

3. Once the Constitutional Court has already returned an unconstitutionality ruling, to what extent is it binding for the court that tries the case on the merits, as well as for the other judicial courts?

According to the American model of constitutionality review, the ruling by the Supreme Court is binding for all courts of a lower legal order, as well as for the Court itself (Cyprus, Estonia, Ireland123, Luxembourg, Monaco, and Norway). At the same time, the courts of a lower legal order generally pursue the alignment of their own jurisprudence to that of the Supreme Court, to the effect of avoiding sustaining appeals filed against their own decisions (Switzerland).

According to the European model of constitutionality review, the unconstitutionality ruling in connection with the concrete constitutionality review shall be binding not only for the seizing court but also for all other national courts (Germany, Lithuania, France, Hungary, Latvia, Moldova, Poland, Romania or Turkey). However, in some cases, the act which was found to be unconstitutional shall continue to exist in the legal order and must be enforced in any situation beyond the dispute that gave rise to the preliminary ruling, even if the respective act was declared unconstitutional. A court that were to see a matter brought before it – in a different dispute – in connection with an identical subject would not bound to refer the Court any longer; in this case, when returning judgment the court shall enforce the solution provided by the Court, which takes precedence (Belgium124). A court decision or decisionsthat were based on the unconstitutional act and that have already been returned shall not lose their [res judicata] authority because of the unconstitutionality ruling returned in an unconstitutionality exception motion (Belgium, Spain). A binding judgment means both its orders and its reasoning are binding125 (Germany, Romania). Moreover, the courts are bound by the provisional enforcement decisions delivered by the Federal Constitutional Court (Germany), but the purely procedural decisions are not binding (Germany, Romania).

The consequences of the ruling by the Constitutional Court are essentially quasi-normative (Lithuania, Romania). Also, it is worth to be mentioned that the judgment determining the competence of the Federation or the Länder for the enforcement of The Constitutional Court Decisions

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123 The constitutionality of the law may be challenged before the High Court as a court of first instance, whereas the latter’s ruling can only be challenged at the Supreme Court

124 As a preliminary ruling shall only be imposed to courts and not to administrative authorities or private individuals, the unconstitutionality ruling within the preliminary procedure gives rise to a new deadline for the submission of an appeal for nullification, which is part of the abstract review proceedings (Belgium). The ruling of the Constitutional Court has [res judicata] authority as of the date the ruling is received by the a quo judge (Belgium);

125 In the Czech Republic there is a dispute concerning the doctrine which has not been settled convincingly by the Constitutional Court yet, namely to what extent the grounds of the ruling are mandatory; the jurisprudence of the Court tends to consider these grounds not as binding [de jure] precedents for the public authorities and institutions, however, they are binding for the Court, which cannot deviate from them unless it reconsiders its jurisprudence. Still, these grounds are [de facto] observed by the public authorities and institutions.
adoption of an act of legislation or executive has the rank of a constitutional law and may therefore only be amended by constitutional law (Austria).

If the Constitutional Court decides that the legal act under criticism is unconstitutional and nullifies it “in terms of the aspects mentioned in the ruling” or “in connection with certain provisions,” the fact that this ruling is binding means that the common courts should enforce the respective provision in line with the Constitution and the elements highlighted by the Constitutional Court (Romania, Armenia, Italy126, Belgium, Spain127). So, as a matter of principle, when the Constitutional Court nullifies a court ruling, the case shall be sent back to the ordinary court, which must reopen the procedure and return a different ruling (the Czech Republic128). In connection with the complaints formulated against court decisions or decisions by other public authorities concerning violations of the rights and liberties provided in the Constitution and in the ECHR, the Court, allowing this appeal, shall nullify the respective ruling, send the case back to the respective court in view to reinitiate the proceedings, whereas this latter court shall be bound by the ruling of the Constitutional Court (Bosnia and Herzegovina). Likewise, the Constitutional Court may provide the manner in which its decisions shall be implemented, and such shall be binding for the ordinary courts (Slovenia, Serbia) and if the court decisions, irrespective of the level of jurisdiction, are nullified by the Constitutional Court, such shall cease to produce legal effects as of the date they were returned (Albania)129.

The Constitutional Court ruling shall constitute grounds for the review of the court ruling that was returned, if the latter ruling has not been enforced yet (Russia, Ukraine). As a consequence of the ascertained unconstitutionality, the respective ruling shall constitute a new circumstance that was not taken into account during the initial trial of the case, therefore the legal remedy for the review of the ruling returned by the ordinary court may be exercised against the person who submitted the individual application based on which the Constitutional Court declared the unconstitutionality and consequently nullified the respective legal act (Armenia, Azerbaijan). Also subject to review, based on the unconstitutionality ruling returned by the Constitutional Court are: the decisions of ordinary courts against those persons who, on the date when the ruling was returned by the Constitutional Court concerning the constitutionality of the legal provision, had a possibility to exercise their right to refer the Constitutional Court (Armenia, Azerbaijan).

A final criminal sentence, which was based on a legal provision that was subsequently declared unconstitutional and repealed, shall cease to produce effects as of the date of the entry into force of the ruling (Croatia). Also, if by the ruling of unconstitutionality in criminal or administrative jurisdiction cases concerning a procedure of punishment in which, as the legal act applied was nullified, results a reduction of the punishment or the sanction, or an exclusion, exoneration or limitation of liability, the latter shall be subject to review (Spain). Decisions of the Supreme Court returned during the constitutionality review shall cause procedural consequences at the level of the civil, criminal and administrative jurisdiction trials and shall serve as cause for review for all three categories of procedures (Estonia); the Constitutional Court shall also order the review in a criminal trial completed through a decision that cannot be appealed any longer (Hungary). At the same time, if there is no possibility to suspend the trial of the case in court a quo when it refers the Constitutional Court with an unconstitutionality exception, the unconstitutionality ruling returned following this complaint shall cause the review of the court ruling returned in the meantime in that case, both in civil and in criminal matters, based on application (Romania). Even if the procedural rules do not comprise any specific provision that should stipulate the possibility to apply for the retrial of a case and taking into account that the law based on which the court returned a final ruling was

126 If a legal text that established an exception from the common law was repealed, then the judge must apply the general rule, whereas if a repealing law was declared unconstitutional, it is possible to “revitalize” the repealed law. Decisions may be ablative (the unconstitutionality of a legal act is declared “to the extent to which” it establishes certain facts), additive (they declare the unconstitutionality of a legal act “to the extent to which it does not” cause a specific outcome), substitutive (they declare the unconstitutionality of a provision “to the extent to which” it provides for more than one result “to the detriment” of another), additive by principle (through such an unconstitutionality ruling, the Court does not specify the new regulatory content that the regulation should cover, but confines itself to suggesting what the judge should pursue in order to implement the principle) and the interpretative decisions that maintain the constitutionality of the law in a certain sense (Italy);
127 All judges and all courts shall interpret and apply the laws and the regulations according to “the constitutional provisions and principles, in line with the interpretation arising from the decisions returned by the Constitutional Tribunal, in any of the proceedings” (Spain);
128 When the Constitutional Court rules to postpone the enforcing date of its judgment on the unconstitutionality of an act, the regular courts must interpret such questioned acts in a constitutional manner, namely in line with the opinions expressed by the Constitutional Court, even if the respective act remains formally in force;
129 The cases shall be sent for review to the court whose ruling was quashed
nullified through a ruling by the Constitutional Court, such a legal remedy should be required because of the *erga omnes* effect of unconstitutionality decisions (Republic of Macedonia).

The victim may apply to the jurisdictional authority to cancel the individual act adopted based on the unconstitutional law (Republic of Macedonia, Montenegro, Croatia). In issuing a new individual act, the issuing authority act is bound to observe the legal position expressed by the constitutional court in the ruling that repeals the act which violated the constitutional right of the plaintiff (Croatia). However, if the consequences as a result of the interpretation of the legal act or regulation cancelled through the ruling of the Constitutional Court cannot be removed through the amendment of the individual act, the Court may order the removal of such consequences through reinstating the status quo, with the award of damages or in any other way (Republic of Macedonia); in Croatia, any natural or legal person, whose complaint seizing the Constitutional Court was sustained and resulted in the repealing of the legal provision or regulation that was challenged, may apply to the jurisdictional body to amend the individual act that violated their rights and that was issued based on the provisions of the law or regulation that was repealed. If the losses sustained as a consequence of the violation of the rights of the party cannot be redressed, the victim may apply to the jurisdictional court, within six months since the date of the publication of the ruling of the Court in the Official Gazette, to ask for compensation for the damage sustained.

Some specific aspects resulting from the submitted national reports:

- in Portugal there is no true exception of unconstitutionality to the extent to which the common courts may settle the unconstitutionality matter by themselves – they have authority to review the constitutionality of the legal acts and to rule that these should not be applied (diffuse review). This is rather an avenue of reviewing court decisions, but is exclusively applied to issues of constitutionality. For this reason, the Constitutional Tribunal shall only be referred to rule on issues of constitutionality as an appellate court;
- the dismissal decisions returned during an unconstitutionality appeal or a dispute in defence of local autonomy prevent the further raising of this matter by using any of the two available avenues [appeal on law or unconstitutionality matter], as long as it is grounded in the violation of the same constitutional provision (Spain);
- within the procedure applicable to the unconstitutionality complaint, the ruling of the Constitutional Court shall be binding for the court whose individual act or measure was found by the Court in violation or in dismissal of various human or minority rights or fundamental liberties in the case of a given person and the ruling shall be enforced according to the manner provided by the Constitutional Court (Serbia).

4. Does the lawmaker, during both the *a posteriori* and the *a priori* review, meets its constitutional obligation every time to eliminate all unconstitutionality aspects within the set deadlines?

4.1. The replies to the questionnaires envisaged especially the case where the constitutional courts postpone the entry into force of their decisions concerning unconstitutionality, which amounts to the provision of a deadline for the lawmaker to observe in order to align the respective act with the ruling of the Constitutional Court (Austria, Slovenia). Setting a deadline wherein the lawmaker should act, preserving the effects of an unconstitutional act until a given future date, finding unconstitutional a legislative loophole are but forms of self-limitation for the constitutional judge who, far from suppressing the attributes of the lawmaker, reinstates the latter precisely to its lawmaking power (Belgium).

Aligning the unconstitutional text may take the specific form of amending the challenged legal act or its repealing followed by the adoption of a new legal act that could regulate the social relations taken into account in the unconstitutional act (the Czech Republic, Norway). Usually, the lawmaker fulfils this mandate by the deadline, even when the subject of the future regulation gives rise to big political controversies (Germany, Austria). When the lawmaker does not succeed in taking action by the deadline, the ruling of the Constitutional Court shall enter into force (Germany, Austria).

Quite on the contrary, in other constitutional systems, the lawmaker is not bound by the obligation to repeal a law that was declared unconstitutional, but in practice this shall be aligned to the unconstitutionality ruling (Cyprus, Luxembourg). At the same time, in Switzerland, at the federal level, the lawmaker does not have any obligation arising from the case when the Federal Tribunal finds one federal law unconstitutional, during the specific constitutionality review.
4.2. In connection with the deadlines within which the lawmaker must take action, the law of the Republic of Moldova provides that the Government must take action within two months of the date of the publication of the Constitutional Court ruling, whereas according to Article 147 par. (1) in the Constitution of Romania, Parliament or the Government, as the case may be, are bound to bring the unconstitutional law in agreement with the ruling of the Constitutional Court within 45 days of the return of the ruling during the *a posteriori* constitutionality review.

In other States, even if the national law does not provide a deadline or the way in which the lawmaker should take action (Serbia, Russia, Portugal, Norway, Republic of Macedonia, Georgia, Armenia, Azerbaijan, Romania\textsuperscript{130}, Belarus, Belgium, Lithuania\textsuperscript{131}), it must still take action with celerity (Andorra), the unconstitutionality decisions being enforced accordingly (Montenegro, Croatia, Azerbaijan); in the Republic of Moldova in the year 2009, 2 decisions had remained unenforced; in Lithuania, out of 140 decisions finding unconstitutional acts, 101 were enforced; in Hungary, the lawmaker failed to fulfill its obligation to eliminate the unconstitutional omissions in a number of 18 cases out of 103; in Belarus, a total of 215 decisions were enforced out of the 292 returned by the Constitutional Court, the rest being partially enforced or in the process of being enforced; in Bosnia and Herzegovina all decisions returned during the abstract constitutionality review between August 2009 – March 2010 have been enforced, since the lawmaker is bound to enforce the decisions of the constitutional court (Belgium, Lithuania). In exchange, in Albania, if a legal act is nullified and if the new relations urge for a legal regulation, the jurisdictional bodies shall be notified concerning the ruling of the Constitutional Court, so as to be able to take the steps provided in the ruling of the Court, without any time limitation in this respect.

Due to its importance, the decisions of the Constitutional Tribunal are fully observed, either by the other judicial bodies, or by the political and administrative bodies (Portugal). There are even cases when the lawmaker eliminates the status of unconstitutionality even before the return of the ruling by the constitutional court (Latvia), more specifically, once the Court was refered in a certain case, the lawmaker, seeing that there are deficiencies in the regulation that serves as grounds for the complaint submitted to the Constitutional Court, will remove them by amending the act under criticism.

At the same time, with a view to increasing the number of enforced decisions of the Constitutional Courts, the following were taken into account:

- some Constitutional Courts develop a pack of proposals to amend and supplement the Law concerning their organization and operation, so as to improve the future way in which the decisions of the Constitutional Court will be enforced (Azerbaijan);
- some Constitutional Courts also have the authority to issue recommendations to the legislative and executive authorities, so as to amend the act based on the legal arguments brought by the Constitutional Court or to adopt an adequate regulation regarding the subject that was examined by the Constitutional Court (Azerbaijan);
- according to the Law of 25 April 2007, a parliament committee is tasked to monitor the legislation and may, as the case may be, draft legislative initiatives to enforce the decisions of the Constitutional Court (Belgium);
- exchange of letters between the Constitutional Court and Parliament (Republic of Moldova).

In certain various exceptional cases, when the lawmaker was reluctant to eliminate various provisions, the Constitutional Tribunal was forced to declare null the legislation adopted contrary to the constitutional doctrine (Spain, Republic of Macedonia);

To conclude, it is worth highlighting the classification made in its report by Estonia concerning the behaviour of the lawmaker faced with various unconstitutionality decisions, as follows:

- extraordinary cases when the lawmaker aligned very quickly and precisely to the decisions of the court tasked with constitutional review;
- ordinary situations when the timeframe allocated by the lawmaker is in line with the complexity of the issue;
- procrastination when there are obvious and excessive delays in implementation, when the Parliament is manifestly lacking the political will to solve the problem raised by the Court.

Similar classifications are applicable to both Turkey or Romania.

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\textsuperscript{130} In the case of the *a priori* constitutionality review.

\textsuperscript{131} The Lithuania Report even uses the phrase that the response of the lawmaker should take place “accordingly and promptly.”
4.3. In other States, the actual unconstitutionality ruling returned by the Constitutional Court does not generally mandate that the lawmaker take the required action to remove the status of unconstitutionality, as it is removed by the very ruling of the Court (Poland, Armenia). However, the need for such intervention by the lawmaker within a preset deadline arises most particularly when the Constitutional Court finds the unconstitutionality of the legal act under criticism “from the point of view of the aspects mentioned in the ruling” or “with respect to certain provisions” (Armenia), in which case the Constitutional Court – by its ruling – creates a legislative void (Armenia, Belgium, Poland, Hungary), when a preliminary ruling is returned (Belgium, Switzerland – in the case of cantonal acts), when it returns decisions adding to principles (Italy), when the Court finds unconstitutionality and does not declare it (Italy, a case when the law is not nullified, but the Court expresses its doubt concerning the constitutionality of the law, and consequently, the lawmaker must take action as soon as possible to avoid a case of unconstitutionality) or when the Court draws the attention of Parliament to an issue of constitutional order (Republic of Moldova).

In some cases, an obligation appears to arise on the part of the lawmaker to the effect of amending the Constitution so that the regulation under criticism could be part of the positive law (see, for instance, the case of Ukraine, where the Constitutional Court found the Rome Statute of the International Criminal Court unconstitutional, and this treaty never entered into force owing to the fact that there was no political will to review the Constitution).

4.4. In the case of the a priori review, the legislative process concerning the law declared unconstitutional shall stop, but this does not mean that a new legal draft cannot be initiated observing the unconstitutionality ruling (Ireland). As a matter of fact, if a provision which was declared unconstitutional, would still be promulgated and published, the administrative acts adopted based on this law would inevitably be subject of nullification by the administrative judge (France).

5. What happens when the lawmaker fails to remove the unconstitutionality character within the timeframe provided in the Constitution and/or legislation? Give examples.

5.1. There are cases when the unconstitutional ruling is unclear with respect to the changes that must be performed in order to put the respective provision in line with the Constitution, therefore time and reflection are sometimes required to decide on the new phrasing or on a new political solution (Norway). There are also cases when the lawmaker does not know how to enforce the ruling of the Constitutional Court that declared a legal act unconstitutional. In such a case, the President of the Seimas shall submit an application to the Constitutional Court to require the interpretation of the provisions of a ruling, and once they receive such interpretation, they will take the adequate steps (Lithuania).

5.2. Each State has built a system whereby it attempts to require the lawmaker to comply with the decisions of the constitutional courts and determine it to act within the meaning of those decisions. Such systems have an administrative or criminal constraint component, as the case may be, but also a constitutional one.

In the first category there is either the administrative (Republic of Moldova and Albania) or the criminal (Russia, Montenegro, Bosnia and Herzegovina) liability for failure to enforce the decisions of the Constitutional Court.

There is a more diversified array of instruments in the second category that put first the need to have the decisions of constitutional courts enforced by the lawmaker. To that effect, take for instance the following examples:

- if the lawmaker does not align to the ruling of the Federal Constitutional Court whereby it is required to adopt new legislation, the Court may impose various enforcement steps (Germany). Consequently, the Constitutional Tribunal, if the deadlines set for the lawmaker are not met, then may act as a positive quasi-lawmaker (for instance in the case when the employment benefits for public servants shall be set). It may also instruct the lawmaker to adopt a new regulation by a set deadline and may order that the previous law be applied “no later than that date.” Such a situation arose when various fiscal provisions had been declared unconstitutional and the lawmaker had failed to adopt a new regulation so that the respective legal text had not been applied subsequent to that date. At the same time, if deemed necessary, the Tribunal may retroactively order the limitation of the time interval within which the legal provisions shall be applicable, which means putting pressure on the lawmaker, at risk, for instance, of losing taxes to be collected for the State budget (Germany);
- the jurisdictional bodies (Parliament or Government) may apply for extension of the deadline set for the setting aside of the legal provisions declared unconstitutional, on which the Constitutional Court must return a ruling
(Croatia, Belarus). Such a practice unreasonably postponed the deadline set for the setting aside of the provisions declared unconstitutional, with the whole array of resulting negative consequences (Croatia);

- there are no legal mechanisms under the legal order that can force Parliament or the Government to enforce the decisions of the Court concerning the repealing of laws or (secondary) regulations, or part of their provisions that had been declared unconstitutional (Croatia). The Supreme Court of Justice does not have the means either to oversee the observance of its decisions (Estonia);

- failure of the lawmaker to act may instate a certain status of unconstitutionality (the Czech Republic). However, the lack of intervention by the lawmaker does not constitute too severe a problem in those cases which are not of impact for the public opinion (Turkey);

- in exceptional cases, when the Constitutional Tribunal considered it necessary to have a legislative intervention that should supplement the alignment of laws with the Constitution, it also suggested a “reasonable timeframe” wherein the lawmaker should take action, even if, in principle, according to Spanish law, there are no timeframes wherein the lawmaker should take action with a view to align to the constitutional decisions, as the ruling shall be applied as such (Spain);

- failure to observe a previous ruling by the Constitutional Court may cause the unconstitutionality of the law adopted as a consequence (Armenia);

- in certain circumstances, the lawmaker is likely to be held accountable and forced to pay compensation if it adopted a legal act that is found unconstitutional (Belgium);

- the law (respectively, the general act) shall cease to exist (Austria, Spain, Romania), which means that a certain field of the social relations could remain unregulated, consequently regulatory loopholes might occur. Such omissions may be eliminated within the process of interpretation and application of the law by the general jurisdiction courts and specialized tribunals (Lithuania). Unless supplemented by the lawmaker, such loopholes may be overcome in extremis through the precise application of the Constitution by the courts (Republic of Macedonia). Also, unless the lawmaker succeeds in concluding the political compromise acceptable to all parties, the constitutional court may solve the issue based on the constitutional values and the general legislation (Estonia). Moreover, if the lawmaker does not remove the unconstitutional faults, any person may exercise their rights, for instance, by directly applying the Constitution and the interpretation given in the ruling of the Constitutional Court (Latvia);

- if the lawmaker fails to take action, as the Court may repeal a law, it may also suspend it (temporarily setting it aside), which is to be viewed as a less severe intervention as compared to the repealing, but which is required when the constitutional values at risk cannot be defended through the usual means any longer (Slovenia);

- the constitutional responsibility involves such steps as the dissolution of the (representative) legislative body of the State power or the dismissal of the leadership of an entity (Russia);

- if one ruling is not enforced or if it is deemed that there appeared a delay in either its enforcement or in informing the Constitutional Court concerning the actions taken, the Constitutional Court shall return a ruling wherein it shall mention that its ruling was not enforced and, as the case may be, it shall also provide the manner of its enforcement. This ruling shall be forwarded to the jurisdictional prosecutor or to any other body that has jurisdiction to enforce the ruling, appointed by the Constitutional Court (Bosnia and Herzegovina).

6. By means of another act, can the lawmaker again put in place a legislative solution that was declared unconstitutional? Provide arguments.

6.1. First of all, a distinction should be made between the requirements of form and those of substance. In connection with finding a law unconstitutional on grounds of form, the fulfilment of that requirement (the adoption of that act by the jurisdictional body, comprising the legislative solution in a given type of legal act) results in the possibility of the substantive solution included in the respective regulation to be instated again (Estonia, Spain).

In terms of the substantive unconstitutionality, the answers may be classified taking into account the prior provision of such interdictions in the domestic legislation.

A category of States, such as Russia or Lithuania, provided such a prohibition in the Law concerning the organization and operation of the Constitutional Court. The specific regulation of the interdiction to instate the legislative solution declared unconstitutional is doubled by the jurisprudence of the Constitutional Court (Lithuania).
Most States have not provided in their legislations such a prohibition, which does not necessarily mean that the lawmaker has an automatic possibility to further again the legislative solution declared unconstitutional. Such a likelihood was limited either (1) through the interpretation of the constitutional and legal texts which regulate the effects of the decisions by the constitutional courts (Armenia, Cyprus, Georgia, Ireland, Latvia, Republic of Moldova, Montenegro, Turkey); or (2) through the jurisprudence of the constitutional courts (Germany, Croatia, Spain, France, Azerbaijan, Belarus, Republic of Macedonia, Poland, Romania, Serbia, Ukraine); or (3) through the opportunity that the constitutional courts have to again declare the respective legislative solution unconstitutional (Austria, Italy, Luxembourg, Norway, Slovakia, Slovenia, Switzerland, the Czech Republic).

(1) This situation is aimed at the meanings and effects that the binding character of the decisions by the constitutional courts may produce;

(2) Finding unconstitutional any legal provision makes it impossible not only for the lawmaker to adopt new acts with an identical content, but also the enforcement by the courts of law of similar provisions stipulated in other acts (Azerbaijan).

The interdiction of instating the unconstitutional legislative solution again is not absolute in Germany or Croatia, where, as a matter of principle, the lawmaker is deprived of the right to again instate the legislative solution declared unconstitutional if all relevant aspects and circumstances remained unchanged.

A special case may be found in Germany, where the first senate of the Constitutional Tribunal considers that the lawmaker has the responsibility to adjust the legal system to the evolution of social conditions and conceptions concerning the legal order and, consequently, in principle, the lawmaker may fulfil this responsibility including by adopting a new regulation with the same content. Moreover, failure to accept such a phrasing may result in the “freezing” of the Tribunal jurisprudence, so that the decisions, once returned, would be set in concrete forever, leaving the lawmaker bereft of any other possibility to adjust itself to the social and economic evolutions characteristic of a modern, free and dynamic society. However, if the legal act is reiterated, the first Senate will ask the lawmaker not to ignore the reasons why the previous law was declared unconstitutional by the Federal Constitutional Tribunal and to use such legal construct and provide reasons for it only when there are special grounds.

The second senate, even if it does not share the vision of the first, considers that the lawmaker may again instate the legislative solution found unconstitutional on condition that the factual circumstances, respectively the legal arguments set forth by the lawmaker, should have changed.

(3) If a change occurred with the factual and legal circumstances, a provision that was at some point in time declared unconstitutional may not be incompatible with the Constitution any longer, given the new factual and legal status (Italy).

6.2. Other States have never been confronted with such a situation, therefore, the doctrine considers that the lawmaker shall be prohibited from adopting a legal provision identical to the one declared unconstitutional (Belgium), or there is a conflict in the doctrine if unconstitutionality decisions shall be binding only for the executive and the judicial branches or for the legislative branch as well (Portugal). In agreement with the special law, there would be a possibility that the Court could suspend the new act, without it being mandatory any longer to bring solid evidence and a prejudice that can hardly be compensated (Belgium)

6.3. The impossibility to again instate the legislative solution declared unconstitutional may be overcome by amending the Constitution, especially in the case of the European accession process (Spain, France, Hungary), but also when the lawmaker refuses to further become subject to a certain jurisprudence of the Constitutional Court (Hungary).

7. The Constitutional Court has the possibility to task other bodies with the enforcement of its decisions and/or provide the manner in which they shall be executed in a certain case?

According to the reports presented, by way of a principle, it is worth mentioning that, based on whether the domestic legislation provides the power of the constitutional courts to task other bodies with the enforcement of their decisions and/or provide the manner in which they shall be executed, two categories of States may be highlighted, as follows:
A) States where such leverage is not provided, where there is no such possibility, namely Armenia, Azerbaijan, Cyprus, Hungary, Ireland, Latvia, Lithuania, Luxembourg, France, Republic of Moldova, Montenegro, Romania, Poland, Russia, Slovakia, the Czech Republic or Turkey. In these conditions, it is the task to the administrative and judiciary authorities to see to it that the Court ruling shall be observed, therefore, the enforcement of the Court decisions depends to a great extent on the cooperation of the other bodies within the legal system (Italy). At the same time, even if the constitutional court imposes guidelines in its ruling, their effectiveness depends on the authority of the Constitutional Tribunal, as well as on the extent to which the executive bodies are open to cooperating with the Tribunal (Poland).

B) States where, under one form or the other, the constitutional courts may play a role in appointing the body that has authority to enforce their decisions and/ or providing the manner in which they shall be enforced. It is worth mentioning, by way of an example, that:

- in Albania, the enforcement of the decisions of the Constitutional Court shall be ensured by the Council of Ministers through the intermediary of the jurisdictional bodies of the public administration, but the Constitutional Court as well may appoint another body to enforce its ruling, and, if the case may be, it may provide the means for the enforcement. Moreover, the president of the Constitutional Court, through a final ruling which is enforceable, may apply an administrative fine if the ruling of the Court is not observed;
- in Austria, enforcement of decisions by the Constitutional Court shall be performed by common courts or by the Federal President according to the distinctions operated in the Federal Constitution. If the Federal President has authority to enforce such decisions, then the President shall be the addressee of the enforcement application submitted by the Constitutional Court. At the same time, the ruling shall be enforced according to the instructions received through the intermediary of the federal or States’ authorities, the Federal Army included, consequently tasked by the President and at the latter’s discretion;
- in Croatia, the Government ensures the enforcement of Court decisions and decisions through the bodies of the central administration; however, the Court itself may provide the authority which shall be tasked with the enforcement of its ruling or decision, as well as the way in which the ruling or the decision must be enforced. Consequently, the Court shall in fact order the jurisdictional bodies to implement the steps of general and/ or individual character as a result of its decisions. At the same time, the Court shall be authorized to indicate the procedure, the deadlines and the specific means for the enforcement of its decisions (Russia), but it may also place an obligation on the shoulders of the jurisdictional State bodies to ensure the enforcement of its ruling or the observance of its opinion (Ukraine);
- in the Republic of Macedonia, the decisions by the Constitutional Court shall be enforced by the body that issued the law, the general regulation or the general act that was nullified or repealed through the ruling by the Constitutional Court. If necessary, the Court shall request the Government of the Republic of Macedonia to ensure the enforcement of its decisions;
- in general, in Germany, the Court itself may ensure the implementation of its decisions by means of independent transitional arrangements or orders on the further application of statutes which have been rejected. The Federal Constitutional Court was given jurisdiction for also executing its decisions; consequently, the Court itself may state in the respective decision by whom it is to be executed. Furthermore, the Court may also regulate the “method of execution” in individual cases in accordance with this provision. The Federal Constitutional Court is also entitled to task individuals, authorities or organs which are subject to German state power to carry out concrete execution measures. Against this background, it is explained why the Federal Constitutional Court knows two forms of tasking to execute decisions: The Court may either task an agency in general terms to execute decisions and leave it to implement the execution measures at its own discretion, or the Court may entrust an agency with a concrete execution measure which is precisely determined, and hence make the tasked party “the executing organ” of the Federal Constitutional Court. To the extent to which is necessary, the Tribunal may also use other bodies to enforce its transitional decisions.

If the Court finds any political parties unconstitutional, the Court shall mandate the Ministers of internal affairs of the States to dissolve the respective parties and to ensure that the ban is applied to those organizations that could replace the latter;

- in Serbia, the Constitution grants to the Constitutional Court the prerogative to issue a special order that shall provide the means for the enforcement of its ruling, the order being, in its turn, mandatory. The enforcement shall
either be done directly, or through the agency of a jurisdictional body of the central administration, according to the means of enforcement provided in the ruling by the Court;
- the Court may provide the authority that would execute the ruling, as well as the enforcement means, if need be. This is practically an authorization sanctioned to the Court to fill out the legislative loopholes that might arise from the ruling of unconstitutionality. In terms of their legal nature, such decisions shall be distinguished from the ruling returned following the constitutionality review. The provision concerning the enforcement means through the decisions that find unconstitutional any legislative omission shall also be likely to transitionally fill out that respective legislative omission. (Slovenia);
- in the case of the *amparo* constitutionality review, the organisational Law of the Constitutional Tribunal provides that the latter may decide “who is responsible to enforce such decisions and, as the case may be, solve the problems occurred during enforcement.” Enforcement provisions may also be included in the returned ruling or in any other subsequent acts. The Tribunal may also nullify any ruling that would go against the one returned in the exercise of its powers the moment it is enforced (Spain);
- in those cases that involve both constitutionality reviews and more specific subjects, the Supreme Court may set a very precise procedure with a view to enforcing its decisions (Estonia);
- in the Republic of Moldova, the Government drafted a decision concerning the legal mechanism applicable to its actions and the actions of the reporting public authorities in order to enforce the decisions of the Constitutional Court, whereas in the Republic of Macedonia, the direct monitoring concerning the enforcement of the decisions of the Court is a matter of the tasks and responsibilities performed by its Secretary General;
- in Norway, that applies the American system of legislative constitutionality review, the unconstitutionality decisions shall be imposed *inter partes*, which, in terms of their enforcement, means that if one of the parties fails to fulfil its obligation, then the other party may apply to the jurisdictional authorities for assistance.
1. The effectiveness of any justice is determined by the correlation between its goals and the degree of their implementation, i.e. the degree of the real protection of rights and interests of subjects of law that addressed the court. Justice may not exist without effective execution of the court decisions, otherwise it becomes pointless.

Despite the fact that the constitutional courts of various countries have different powers and thus have different influence on the state processes, ensuring proper execution of their decisions is equally required. The effectiveness of the constitutional justice and its authority in terms of the specific organisation of the state power is determined by the way in which their decisions are executed. The results of its activity are determined not only by valuable content, clarity and accuracy of its decisions but also by the extent to which these decisions produce real influence on the social processes.

Formally, the legislation of many countries provides the right of the constitutional courts to stipulate in their decisions the state bodies that are responsible for their execution and to vest them with relevant obligations. That is why at the first glance there should be no specific problems with the execution of the abovementioned decisions. Besides, some constitutional courts exercise monitoring over the execution of their decisions with further address of the court leadership to the relevant state bodies. In this respect of special attention is the practice of the constitutional courts of some countries, for example Georgia, which envisages regular reports to the Court Plenum on execution of the adopted decisions. On the base of these reports the President of the Constitutional Court from time to time informs the President, the Parliament and the Supreme Court on the state of the constitutional justice in the country.

However, the problem of timeliness and effectiveness of the execution of the decisions of the constitutional court remains to be actual. Accuracy and timeliness of the execution of the decisions of the constitutional court only insignificantly depends on the court itself. Much more it depends on the stability of socio-economic and political situation in the country, the level of its democratic development, the observance of the principles of the division of powers and the rule of law, the level of the legal conscience and legal culture in the society. Thus, the execution of the decisions of the constitutional court assumes not only the use of its authority and the possibilities of the constitutional and legal procedure, juridical characteristics of its acts, but also the involvement of other state institutions.

The statement of the issue in the abovementioned manner is actual for Ukraine as well.

2. According to the Constitution of Ukraine and the legal positions of the Constitutional Court of Ukraine its decisions are mandatory for execution throughout the entire territory of Ukraine, they are final and shall not be appealed, regardless of the fact whether the procedure and terms for their execution are determined or not. The Constitutional Court of Ukraine has more than once pointed out that the bodies of state power, bodies of the Autonomous Republic of Crimea, and bodies of local self-government, their officials and officers, individuals and legal entities should abstain from application of legal acts or their provisions that were recognised as unconstitutional.

According to Article 70.2 of the Law of Ukraine “On the Constitutional Court of Ukraine”, where necessary the Constitutional Court of Ukraine may determine in its decision (opinion) additional measures related to the procedure of their execution. But despite the fact whether the procedure and terms of the execution of the decision are determined or not in the decision (opinion), the appropriate state bodies, bodies of local self-government and officials should act only on grounds, within the limits of authority and in the manner stipulated by the Constitution and laws of Ukraine. This obligation is also actual when the decision on the unconstitutionality entails violation of logic and structure of the legal act and gaps in it, which make the efficient legal regulation impossible. Under these conditions relevant body within the reasonable time should adopt the new legal act or introduce amendments to the effective normative legal act. But so long as the law does not stipulate the abovementioned procedures directly it would be expedient to assign
relevant procedure and define terms for introducing amendments to the legal acts that are recognised completely or partially as unconstitutional.

3. The Constitution of Ukraine attributes to the authorities of the Verkhovna Rada of Ukraine the adoption of laws, including those that introduce amendments to the laws that are in force. The laws are adopted in the order stipulated by the Rules of the Procedure of the Verkhovna Rada of Ukraine in detail. This order puts the execution of the decisions of the Constitutional Court of Ukraine that assume introducing amendments to laws that are in force or adoption of a new law of Ukraine into the dependence upon the timeliness of drafting relevant draft laws, their submission for consideration of the Verkhovna Rada of Ukraine and passing through all necessary procedures envisaged by the Rules of the Procedure of the Verkhovna Rada of Ukraine. In its turn, resolution of these issues in certain manner depends on the political factor as well – on the desire of the political forces that are represented in the Verkhovna Rada of Ukraine to support a draft law and its quick passage through all stages of the legislative process.

Thus, the systemic resolution of the problem of introducing amendments to laws in order to execute the decisions of the Constitutional Court of Ukraine depends on the specific characteristics of the legislative process and the political culture of the Deputy Corps, aptitude of the People’s Deputies of Ukraine to achieve political compromise for the sake of the resolution of tasks which are of national significance. The practice demonstrates that the difference of the social and political interests represented by the People’s Deputies of Ukraine causes different reaction on the decisions of the Constitutional Court of Ukraine and quite often impedes the adoption of the necessary laws. Therefore it would be expedient to envisage in the Rules of the Procedure of the Verkhovna Rada of Ukraine the special procedure of adoption of laws with regard to the necessity to timely execute the decisions of the Constitutional Court of Ukraine.

4. In the aspect of the proper execution of the decisions of the Constitutional Court of Ukraine the issue of preventing adoption the legal acts that reproduce provisions that were recognised unconstitutional by the bodies of state power also seems to be crucial. Unfortunately, there have been repeated attempts recently to factually ignore the decisions of the Constitutional Court of Ukraine. For example, complicated history of the adoption of the Rules of the Procedure of the Verkhovna Rada of Ukraine might testify to this. In a number of its decisions the Constitutional Court of Ukraine stated that according to the Constitution of Ukraine the Rules of the Procedure, that regulate the organisation and activities of the Verkhovna Rada of Ukraine, should be adopted exclusively as a Law of Ukraine and in accordance with the procedure envisaged by the Constitution of Ukraine. However, the Parliament of Ukraine did not response immediately to this legal position of the Constitutional Court of Ukraine and adopted the abovementioned document in the form of the other act. Nowadays in Ukraine there is effective the Law of Ukraine “On the Rules of the Procedure of the Verkhovna Rada of Ukraine” adopted on February 10, 2010. In this case the decision of the Constitutional Court of Ukraine and the requirements of the Constitution of Ukraine were at least implemented, however, the probability of the attempts to ignore the decisions of the Constitutional Court of Ukraine in the future may not be absolutely denied, since each provision of the law including one that was recognised unconstitutional is not politically neutral and may find repeat approval among the Deputy Corps.

In this context quite useful is the experience of legislative regulation of several other countries, where the law directly envisages the impossibility to adopt (issue) a legal act which contains the provisions of the same content which were earlier declared unconstitutional. In this respect of interest are the provisions of the Organic Law “On the Constitutional Court of Georgia” that envisages the way to react to non-fulfilment of the mentioned stipulation: if the Constitutional Court of Georgia at the preliminary session finds that the disputed legal act contains provisions identical to those that already have been deemed to be unconstitutional, the Court may recognise the mentioned legal act unconstitutional without any consideration on the merits.

5. Misunderstanding or rejection of the legal nature of the decisions of the Constitutional Court of Ukraine by bodies of state power also complicates to a certain extent the process of the execution of the decisions of the Constitutional Court of Ukraine. According to the generally accepted practice not only the resolutive part of the decision of the constitutional court should be executed but its substantiation as well – so-called ratio decidendi. Therefore, filling in gaps that appear as a result of recognition of several provisions unconstitutional by the legislator should be realized with account of the legal positions of the Constitutional Court of Ukraine, including those stated in the motivation part of the decisions of the Constitutional Court of Ukraine.
The legal nature of the decisions of the Constitutional Court of Ukraine concerning official interpretation of the Constitution of Ukraine and laws of Ukraine should be also taken into consideration. We should examine the interpretation of a norm and the norm itself as a whole – the decision on the official interpretation becomes the part of the effective norm. Taking into consideration the mandatory character of the decisions of the Constitutional Court of Ukraine erga omnes, including the decisions on the official interpretation, they should be executed in the same way as the provisions of the Constitution of Ukraine and the laws of Ukraine. Therefore individuals who ignore the abovementioned decisions should bear legal responsibility for unlawful acts in the general order stipulated in legislation.

6. Insufficient awareness of the addressees of the content of the decisions of the Constitutional Court of Ukraine (despite various forms of promulgation of the decisions of the Constitutional Court of Ukraine) also does not promote consistent and quick execution of these decisions. Disagreements with the legal positions of the Constitutional Court of Ukraine that are sometimes expressed in public by the representatives of some state bodies and political forces also complicate their execution. It may be accounted for the overall level of the legal culture in the political sphere, state apparatus and the society in general; its elimination is connected with the rise of the level of legal awareness of the subjects of the constitutional and legal relations, and fostering respect to the Constitutional Court of Ukraine and its decisions.

7. Article 70.4 of the Law of Ukraine “On the Constitutional Court of Ukraine” stipulates that the failure to execute decisions or adhere to opinions of the Constitutional Court of Ukraine shall entail liability under the law. However, the current legislation of Ukraine does not indicate specific forms of such liability (administrative, criminal or other). The notion and content of the relevant offences (non-execution, non-observance, improper execution, refusal to execute the decisions of the Constitutional Court of Ukraine), sanctions for their commitment are not defined. The legislative regulation in this case will be complete, if the legal grounds for each type of liability are envisaged and the procedure of bringing to such liability is defined.

8. The existence of the factors that impede the execution of the decisions of the Constitutional Court of Ukraine does not mean that the Constitutional Court of Ukraine should adopt only those decisions that are easier to execute. The body of the constitutional jurisdiction is called to guarantee the supremacy of the Constitution of Ukraine as a Fundamental Law of the Ukrainian State, and in its activity it is, first of all, guided by the principle of the rule of law and that of the priority of the human rights and not by the reasons of expediency. On the other hand, execution of the decisions of the Constitutional Court of Ukraine, including those “politically uncomfortable”, should lean on the relevant legal guarantees, in particular, on the norms that would precisely describe the order of their execution and create the basis for application of relevant means of the legal liability where necessary.