GENESIS, EVOLUTION AND FUNCTIONS OF CONSTITUTIONAL REVIEW
(ISSUES OF CONSTITUTIONAL CONTROL IN COMPARATIVE AND BULGARIAN PROSPECTIVE)

E. TANCHEV,
Vice President of the Venice Commission, New Bulgarian University Law School, Former President of the Constitutional Court of Republic of Bulgaria, Professor

The present article demonstrates the role and functions of the constitutional control in different countries, including Bulgaria. Control of constitutionality of laws exists in various forms in contemporary world. Constitutional courts act as harmonizers of national constitutional and supranational values, principles and norms and resolving conflicts between national and supranational legal orders and institutions. Moreover, constitutional courts act as ultimate judicial safeguard of fundamental human rights and as border guards containing the state institutions within the constitutional limits of their powers.

Keywords: constitutional control, judicial review, resolving of disputes, constitutional court, constitutional council, constitutionalism, Hans Kelsen, John Marshall, Marbury v. Madison, fundamental human rights.

1. ANTECEDENTS AND GENESIS OF JUDICIAL REVIEW[1]

To legal positivists and proponents of the analytical school of jurisprudence control of constitutionality of laws emerges from the acting constitution and all other speculation should be ignored.

Others attribute the birth of judicial review of constitutionality to the invention of judges and law professors and one could hardly challenge the facts that it was the contribution of John Marshall in the US and Hans Kelsen in Austria that gave brought to life judicial review of constitutionality and the constitutional courts.

No one has challenged the birth date of judicial review so far. It was 1803 famous decision of the Supreme Court decision Marbury v. Madison and the solid argument of Chief Justice J. Marshall. This decision might be considered as a historical act having tantamount significance only to the drafting of the 1787 US constitution. For if the Founding Fathers secured American independence and a successful development of the Union, the judicial review fostered constitutional supremacy and long levity of the Federal constitution.

And yet we might look for antecedents of judicial review in the previous stages of development for as history proves there are almost no ideas and phenomena emerging at once and out of nothing.

There is no doubt that the essential prerequisite to the birth of judicial review is the status of the constitution as the «law of the land» or as the «highest law».

[1]The present article was published at: http://www.venice.coe.int/WCCJ/Papers/BUL_Tanchev_ E.pdf.

If we extend the concept of higher law to other sources of law, before the appearance of written constitution we will find embryos of judicial review even in the antiquity.[2] Another source of shaping judicial review were the political ideas of thinkers devised to check arbitrary power since antiquity, middle ages and especially during the enlightment.

Aristotle, Polibius and Cicero, developed the first concepts of the mixed government and separation of powers. One, certainly, will never find a scheme that they might have contrived even of an analogous device to judicial review even if their lost writings will be found.

The seeds of the idea of checking an arbitrary power grew in various currents of jurisprudence, political thought and practice even before the rebellious barons imposed Magna Carta Libertatum on king John.

Since St. Thoma Aquinas vindicated that an unjust law is not a law at all and should not be obeyed, various mechanisms of limitation of power were proposed. The range of enquiry was extensive and the means include:

- Civil disobedience to a despotic rule even in the form of enacted law (No doubt the roots of the idea of civil disobedience have been traced so far to Sophocles),
- the separation of powers, developed further by Marsilio of Padua in the church and state conflict, and especially in the enlightment by J. Locke, Montesque, abbey Mably and others,
- resistance, dethroning and even murdering of a despot, if the king's commands are contrary to the law of God or violates the Gods rules or devastates the church,[3]
- Withdrawal of people's support to the power of a tyrant,[4]

[2]The classic example to look for is ancient Greece. In the Athenian Polity a nomoi were regarded as a higher law and a complex and time wasting procedure to their revision was devised. Heavy responsibility was placed on person having proposed an amendment that subsequently was not ratified or proved to be inadvisable.. In one of the periods of the Greek history in 5 c. b. c. the capital punishment was even introduced. A special committee named helea was formed to the popular assembly to filter the new laws and amendments proposed in order to safeguard the supremacy of the acting laws and to eliminate inadequate drafts. Although this was certainly not a judicial activity neither it was carried by the courts, still it can be regarded as the first example or an antecedent to the judicial review., B. Leoni, Freedom and the Law, 1962, 77-78; M.Cappelletti, W. Cohen, Comparative Constitutional Law , Charlottesville, 1977, 5-6.

[3]During the Restoration after the massacre on St.Bartolomew Day of the french hugennots See S.J. Brutus, Vindiciae Contra Tyrannos, 1579.

[4]E.La Buassie,Chains of the Voluntary Servitude, in 17 century France.

- Resistance to oppression in the form of insurrection and deposing arbitrary government.[5]

Various currents of political thought had different justifications to these checks upon despotic laws and governments:

- It was considered to be infringement of the law of nature by the exponents of the Natural law,
- It was considered contrary to the Divine law,
- It was declared to be an infringement of the social compact, by the representatives of social contract doctrine
- It was declared to be usurpation of popular sovereignty by the radical democratic theoreticians.

All of these checks were meant to be spontaneous, sporadic and ultimate remedies against injustice and oppression. They were not built as an institutionalized restraint of a governmental excessive power, a restraint accessible at relatively small social costs, which was available to each one and to all the citizens that could afford the expenses of litigation.

Judicial review is one of these regularized restraints that are indispensable to the liberal constitutionalism. It polices government, preventing authoritarianism and arbitrary rule, serves as an ultimate remedy when constitutional human rights have been violated. Another very important implication in the context of the political system is to act as a safety valve to reduce social conflicts, to prevent drastic change and to protect minorities against oppressive majorities. By resolving deep social and political conflicts as legal or constitutional cases judicial review reduces social tension and prevents it from exacerbating into civil disturbances, wars or insurrections. Political controversies are elevated and resolved as legal questions.

The first universally recognized precedents by the constitutional scholars and cited as genesis of the modern judicial review belongs to the British constitutional practice.

It was sir E. Coke stated and implemented judicial review, recognizing the supremacy of the common law in the beginning of the 17 century in Great Britain. In the famous Bonham's case of 1610 Coke stated «that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is again common right and reason, or repugnant or impossible to be performed, the common law will controul it and ajudge such act to be void».[6]

However this precedent does not lead to the development of a full fledged judicial review in Britain possibly because of two factors. In the years that followed kings power achieved its ascendancy and during the revolutionary turmoil nobody ascribed to affirm the judicial review.[7]

Why constitutional review came so late in the European constitutionalism? It was more than a century after Marbury v. Madison, it was after the W.W.I that first models were drafted in Europe and in most countries even after 1950ies.

Looking at the causes that make control of constitutionality of laws an indispensable attribute to the modern constitutional system one should mention:

The Abbe Sieyes

a. A written constitution

b. a willingness of the governing elites, parties, leaders and general public to observe the supremacy of the C. and the rule of law;(in other words a democratic political and legal culture);

c. balanced government, founded on separation of powers between the three branches, between the constituent and constituted power, and between the union and its members if the federalism prevails

d. lack of arbitrary government either by the Executive as one man rule or by the supremacy of the legislature or the legislative despotism

e. denial of uncontrolled popular sovereignty, exercised directly or by omnipotent legislature as a tyranny of the majority

f. respect of the individual liberties and minority rights.

Having in mind these reasons one can answer the questions about the late origin of the judicial review in Europe, impossibility of the establishment of judicial review in the antiquity in the middle ages, in the communist and fascist systems or in some of the third world countries.[8]

2. MODELS AND STRUCTURES OF CONTROL OF CONSTITUTIONALITY

Control of constitutionality of laws exists in various forms in contemporary world. The general rule is that control of constitutionality should be located outside the Legislative and the Executive branch.[9] There has not been made any serious attempts to entrust control of constitutionality to the Executive, although even at Philadelphia some of the framers

[5]See G.Buchanan, De Jure Regni Apud Scotos (The Powers of the Crown in Scotland), Austin, 1949, 89; In the U.S. it was T. Jefferson that intended to integrate the right to a revolution into the system of government. A small insurrection each 20 years should control the oppressive ambitions of the rulers.

[6]B. Coxe, An Essay on Judicial Power and Unconstituional Legislation, Philadelphia,1893, 24.

[7]Since the time when the Instrument of government, created by O. Cromwell was suspended, Great Britain did not even attempt to entrench governmental relationships and fundamental liberties in a written constitution.

[8]Some of these reasons explain why in France a very limited specific model of control of constitutionality was created only by 1958, why the President and Prime minister were the only initial parties that have been granted standing, knowing the fact that almost a decade before the Marbury v. Madison decision Abbey Sieyes proposed to create a system of J.R. To some extent this is an answer to the B.Constant's proposition that the Head of State should be the fourth branch of power, that was contrived to be povoir neutre i.e. neutral power.

[9]G.Haratyunyan, A.Mavcic, The Constitutional Review and Its Development in the Modern World,Yerevan-Lyblyana,1999, 12-35.

considered a Council of Revision to the Chief Executive and in Bulgaria during 1980ies there was a proposal to create analogous organ to the President.[10]

Efforts to include control of constitutionality among the powers of the Legislature were equally meaningless for the only result would have been an omnipotent despotic parliament or a convention like that of 1793 during the Jacobine regime in France. Instead of controlling the Legislature control of constitutionality would have been transformed into a formidable weapon of legislative control. Constitutional supremacy would have lost any meaning for it would have been dissolved in the Legislative supremacy.

The only possible solution then common to all the models of control of constituionalty of laws is vesting this function in the courts, or creating a special institution outside the traditional judicial power, but never attributing the function to the Legislative or the Executive branches. One can remember the justification by Al. Hamilton in the Federalist Papers and Alexander Bickel's book «The Least Dangerous Branch».

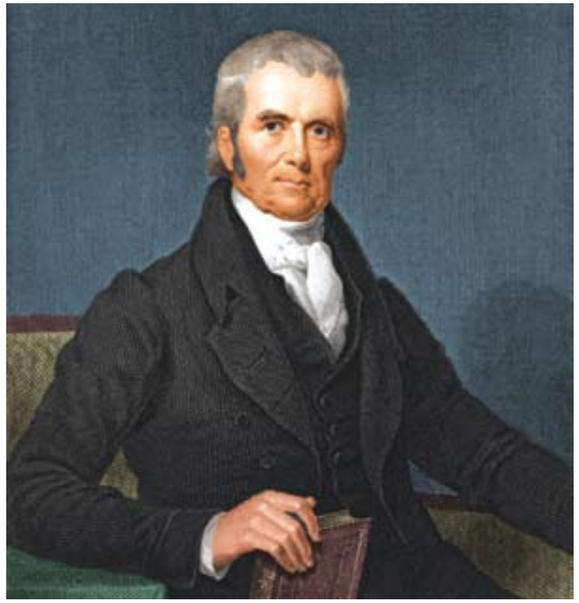
Since J.J. Rousseau and J. Bentham's proponents of the popular sovereignty and legislative supremacy doctrines still argue on the admissibility and rationality of entrusting CC to the courts. In the words of J.Bentham «Give to the Judges a power of annulling the acts(laws);and you transfer a portion of the supreme power from assembly, which the people have had some share, at least, in choosing, to a set of men in the choice of whom, they have not the least imaginable share.»[11]

To this argument has been added a very small portion by the followers which especially enjoy to label and accuse judges of legislative and even constituent power encroachment or usurpation when they declare a law, repugnant to the constitution to be void. By interpreting the constitution the courts develop the meaning of the constitutional provisions and in fact adapt the constitution to the new realities.

Sometimes the Courts are qualified as an independent policy makers, leaders of a public opinion, arbiter in the conflicts between the powers, catalyst of social change and the basic institutions which lead America to a «government by judiciary".[12]

The critics of judicial review of constitutionality of laws label the Supreme court as a supreme legislator,[13] super legislature,[14] last resort that discovers the framers intent[15] and a third chamber or permanent constitutional convention.[16]

According to the structures for its implementation control of constitutionality might be diffused (deconcentrated) or concentrated one. In a diffused system judicial review is carried by plural institutions, usually the courts and in the concentrated system constitutional control is vested in a single institution being a court or a special council for constitutional supervision.



The Chief Justice of the United States John Marshall

Prior Control of Constitutionality is the only available form in the Vth French Repubic, while in other countries like Austria, Hungary and others it is combined with posterior control of constitutionality.

Prior control of constitutionality can be only an abstract one while posterior control of constitutionality can be either abstract or a concrete one.

Various systems of control of constitutionality are exercised by four models in the cotemporary world.

a. The American model of JR has been implemented in Japan, Norway, Denmark, Brazil, Argentine, Chile, Honduras, Guatemala and other countries in Latin America during the periods when they have democratic constitutions. Judicial review is carried by all the courts in the Judicial system.

b. Judicial review might be vested in the Supreme Court. This model of is developed in the constitutional system of India, Australia, Swiss Confederation, Ireland, Canada, South Africa and others. No other courts can decide on constitutionality except the supreme court of the country. The common argument is that the control of constitutionality of laws is sophisticated activity and it should be available only to the justices that are trained best and have a long experience.

c. Control of constitutionality is concentrated in a special court – Constitutional Court This system prevails in Europe and the best examples are Austria, Germany, Italy, Spain, Portugal, Turkey, most of the constitutional democracies in Central and Eastern Europe, independent republics of the former Soviet Union and others. There is an interesting peculiarity, however in Germany. The concentrated control of constitutionality, performed by the Federal Constitutional court has not been devised to eliminate totally the diffused system of judicial review. While the Constitutional court has the exclusive jurisdiction to revise the Federal statutes, all the German courts can exercise judicial review revising other acts which might be contradictory to the constitution.

[10]Luckily these efforts did not prevail for attributing the control of constitutionality function to the head of state would no doubt lead to a one man rule. For it is a well known fact that this power was inherent prerogative of absolutist kings or dictators although resting on a very specific prerequisite. The king alone could control constitutionality for he was the only person to know what the constitutions is for it was time when raison d ' etat , monarchical sovereignty and the rule of man and not of laws were principles of state.

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

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

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

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

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

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

All of the constitutions of the emerging democracies have already introduced Constitutional courts. And even the constitutions in the breakaway former Soviet union republics have implemented this model to replace the committees for constitutional revision established during the Gorby's perestroika but proven to be an unsuccessful experiment.

The Constitutional court pattern was established first in the Austrian 1920 constitution. This was the original idea of a concentrated and firmly institutionalized judicial review initiated by the famous European scholar H. Kelsen. Almost simultaneously the idea was developed in the 1920 Constitution of Czechoslovakia. However, before the end of the World War II the control of constitutionality did not meet the expectations of the constitution makers. The Constitutional courts were most active in settling disputes between the federal and the member states governments. Since authoritarianism and totalitarianism were opposed to the rule of law Constitutional courts flourished in the post World War II constitutions in Europe.

The Constitutional court model of judicial review has certain of peculiarities that distinguish this system from the other patterns of control of constitutionality of laws.

The Constitutional court is located out of the system of the Courts, although it is a special jurisdiction within the judicial branch. In Europe the Constitutional courts have been regarded as special kind of political courts preordained to safeguard the supremacy of the constitution, the integrity of the Constitutional government and to act as the highest and ultimate guardian of the human rights.The Constitutional courts review all the acts of the Parliament, President and sometimes the normative acts of the Cabinet. Unconstitutionality and non compliance to the parliamentary legislation of the other acts of governmental administration and the infringements of the statutes by the other acts is controlled by specialized administrative courts within the judicial branch.

The Constitutional courts are granted the jurisdiction to resolve the conflicts between the branches of government arising from the horizontal and the vertical separation of powers.

In contrast to the U S Supreme court the constitutional courts have to resolve controversies arising in political life for example concerning the results of the general elections, checking the validity of parliamentary mandates, deciding on the constitutionality of a political party, the refusal of some elected representatives to take an oath to the Constitution on the grounds that they oppose some provisions of the constitutio.

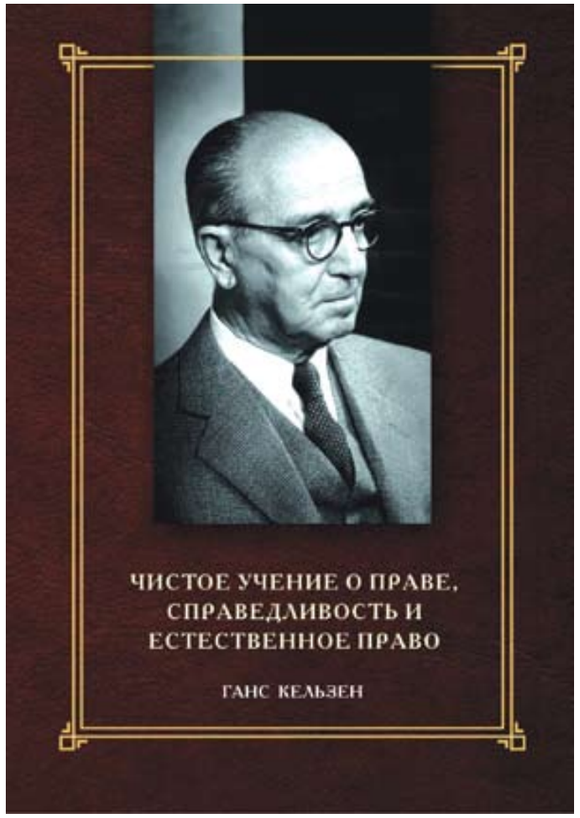
In contrast to the American judicial review the Constitutional courts annul the law or a part of it that is considered to be unconstitutional and their decision has an erga omnes effect.

Some of the constitutional courts have the power to provide interpretation of the provisions of the constitution.

Some of the constitutional courts are devised to compensate the lack of a second chamber of the parliament during a Presidential impeachment, since some of the European countries provide for unicameral representative assemblies.

Some of the constitutional courts combine prior control of constitutionality with posterior judicial review which is performed after the act has been enforced (Hungary)

d. Control of constitutionality is vested in a specially created political institution which is not a court. This institution is situated out of the traditional branches of power. This unique system of control of constitutionality was devised in the constitution of the Vth French republic and with some amendments is successfully functioning in France since 1958. However, analogous model has been a complete failure in the former Soviet Union.



One of the works of Hans Kelsen edition in Russian

Conseil Constitutionnel was the first and reluctant institutionalization of the control of constitutionality in France although the idea was launched during the French revolution by abbey Sieyes. Dictatorial regimes, notions of parliamentary supremacy and popular sovereignty leading to plebiscitary democracy were opposed to control of constitutionality for century and a half after the revolution.

Initially Conceil Constitutionnel was conceived as an autocratic instrument of the Executive power, for the president or the Prime minister alone had the standing to ask for revision of the parliamentary draft bills.

During 1970ies a very important constitutional amendment granted standing to a certain number of the members of each one of the both houses of Parliament.

Another important step was made by Conceil Constitutionnel itself. In one of its decisions Conseil broadened the scope of constitutional content, invoking the Preamble of the constitution, in which the two great declarations of rights are included. Since then Conseil Constitutionnel has assumed the status of a guardian of the fundamental rights and liberties.

e. Council of the Guardians of the C.(Iran,1979)

This institution has been established for the purpose of safeguarding the principles of Islam and the constitution and to avoid any conflict between these principles and the laws of parliament. (art.91).The Council

Karl Schmidt

family to which the particular institution that was assigned to review the parliamentary legislations compliance to the constitution belonged they have shared the same set of liberal democratic principles and values. Protection of the rule of law starting with the constitutional supremacy and fundamental human rights has been the common denominator while he difference concerned paths of development, growth, logistics of enforcement and quantity of the courts enforcing constitutional review.

Often the genesis and development of the institutionalized patterns of constitutional review has been interpreted to be a pure intellectual exercise of judges and professors rather than as being an outcome of the essential features of Anglo American (Anglo Saxon) and civil law systems. With no intention to diminish Chief justice John Marshall or Hans Kelsens' contributions in the area of founding constitutional review it seems that the legal family context is somewhat more influential and is crucial to the content and form of principles and agents of constitutional review introduced. Both legal families attributed different roles to the judges and legislators. Within the common law tradition the law was developed mostly by the judges finding the legal rule to reach judicial decision complying to justice in every concrete case. By the system of precedent the validity of the rule acquired normative meaning by applying it to the identical cases and situations.

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

Two premises were indispensable for the emerging of diffuse decentralized incidental judicial review of constitutionality of legislation – the system of precedent and courts of general jurisdiction. Lack of these premises doomed to failure all efforts to transplant the American system on the European soil[17] Within the civil law family especially after the French revolution the system of positive legislation and general validity rule making was affirmed on one side and different limitations on judge made law were devised and imposed, on the other.[18] The ultimate forms of these were the prohibition for the judges to enforce the laws but not to interpret them, known as "gramophone justice" meaning that the judge is under the obligation to play the record that has been produced by the legislator in concrete cases and "telephone justice" when the executive put a pressure on the court to achieve a beneficial decision by the court.[19] To contain the positive legislator within the limits of the constitution a negative one was needed and ordinary courts could not be entrusted with this function since the judges of general jurisdiction were themselves constrained by the parliamentary statues. Decentralized, diffuse review in the civil law system would be inoperative for the lack of doctrine and practice of stare decisis unifying the system by the rule of the precedent. Thus a specialized constitutional court had to be created and assigned abstract posterior review of parliamentary statute to ensure their compliance to the constitution as the supreme law of the land.[20]

of guardians consists of six members of the clergy «who are just, are knowledgeable in Islamic jurisprudence, and are aware of the needs of the times». They are selected by the Leader of the Country.(It is worth noting that the leader, according to the article 110 is to appoint the highest judicial authorities of the country) Another six lawyers from various branches of law, «from among the Moslem lawyers» are nominated by the Supreme council of the Judiciary and confirmed by the Assembly.

3. TYPES OF CONSTITUTIONAL REVIEW AND CONSTITUTIONAL REVIEW FUNCTIONS

Constitutional provisions and legislative norms attribute constitutional courts long lists of powers that are most often identified or regarded as functions. When constitutional court functions are identified with powers although, they vary considerably from country to country in addition to the constitutional review of laws, their jurisdiction might include controlling electoral processes and cancellation of the elections, guaranteeing the autonomy of municipalities, policing the constitutionality of political parties or resolving criminal proceedings against high government officials.

Deciding on conformity of the international treaties before ratification by the parliament to the nation state constitution or judging the compliance of laws to the international treaties already signed ratified and enforced and the international customary law principles consists another particular set of issues in the list of constitutional courts powers.

It should be emphasized that while the list of powers entrusted to the constitutional courts are mistakenly treated for functions they are only means or weapons instrumental to carry the functions of judicial review of constitutionality of laws.

Although the genesis and evolution of constitutional review followed different pattern depending on the constitutional design and the legal

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

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

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

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

Today the constitutional courts or other forms of constitutional review is universally accepted as a part of the European constitutional heritage.[21] Scholars still argue whether it was due to the popular sovereignty and democratic cravings rising from the grassroots or either it is introduced by the political elites.[22] The latter has been titled insurance model.By introducing judicial review it is a kind of a security investment protecting a former governing party when becoming an opposition one.[23]

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

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

1.Constitutional Courts have been recognized by the constitution drafters to be the Guardians of Constitutional Supremacy. Constitutional courts perform the function of supreme policeman of the Constitution. It seems that all of the Constitutional court powers are oriented in this direction. However, this is obviously the case with the most typical of the powers – abstract control of the constitutionality of laws having erga omnes effect. Where the Constitutional courts were established abstract posterior control has been monopoly of the Constitutional court though constitutionality and constitutional conformity might be recognized and more than this accepted by all other legal subjects until its unconstitutionality would not be declared by the court.

2.Constitutional review has been the voice and Guardian of the constitution's content as established by the constituent power. According to the classical democratic theory the nation state constituent power being an expression of popular sovereignty creates the constitution and has no place in legislation, practical executive government and adjudication of justice and deciding cases by the courts. The constituent power does not disappear but assumes a latent status or it " falls into sleep". It springs to life and becomes active when the terms of the constitutional contract need an amendment or the nation and its political elites have arrived to political decision to adopt new constitution.[24] While being in a latent position it is the constitutional court that voices the exact meaning of constitutional provisions, might interpret them but staying within the limits of the founding fathers will. Even the boldest judicial activist should accept that the constitutional court interpretation might update the constitutional provisions but it cannot amend or develop the constitutional content beyond the will of the founders. The process of growth of the constitution is not tantamount to constitutional amendment which is a legitimate monopoly of constituent power as emanation of popular sovereignty.

Evgeny Tanchev during his work in the Constitutional Court of Bulgaria

Within this function the constitutional courts primary role would be in voicing and keeping the content of the constitution as established through popular sovereignty by constituent power. Though it is generally accepted that division between constituent and constituted powers is a monopoly belonging to the civil law family firmly established since E.Sieyes it should be emphasized that in the American system it was stipulated as a premise to the birth and enforcement of judicial constitutional review by the court itself.[25]

3.Constitutional Courts act as ultimate judicial safeguard of fundamental human rights. No doubt this position of the courts is cornerstone in the

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

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

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

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

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

The photograph of the Constitutional Court of Bulgaria 2009-2012 From left to right judges: Stefka Stoeva,Vanya Angusheva , Georgi Petkanov, Plamen Kirov, Dimitar Tokushev, Emiliya Drumeva, Evgeni Tanchev, Vladislav Slavov, Blagovest Punev, Krassen Stoichev, Tzanka Tzankova, Roumen Nenkov

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

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

5.Constitutional courts act as legal arbiters or agents of constitutional and legal arbitrage resolving the conflicts. In this respect status of the constitutional courts might be compared to the neutral power or povoir neutre described by B.Constant[26] and attributed to the head of state conceived to be performing neutral arbitrage to resolve, diminish, accelerate, prevent, mediate institutional conflict or compromise an outcome beneficial to the particpants and tha whole nation. In contrast to this position of the head of state performing political arbitrage , the constitutional courts exercise constitutional arbitrage – i. e .the conflicts between the powers are resolved on the basis and within the constitution.

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

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

7.Constitutional Courts acting as a safety valve to decrease the level of the social pressure, unrest and prevent the constitution and governmental system from self destruction or destruction by the violent extraconstitutional, extraparliamentary or illegal action. One of the first explanations of the function of procedures, devices and institutions acting as a safety valve belongs to N. Machiavelli long before constitutional review of legislation emerged.[27] Another approach by converting a political or extraparliamentary violence into legal conflict one has been emphasized

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

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

by A. De Tocqueville.[28] Instead of being resolved by violence on the streets the conflicting issue is given in the hands of the court to decide within the constitution and with legal means. By this procedure the degree of social discontent is reduced from the melting pot of boiling emotions and hostilities to impartial and universally accepted procedures by people and institutions where the decision is worked out based on reason with rational arguments.

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

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

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

3 Constitutional review on parliamentary legislation performs the function of appeal and resort to the constitutional review to protect the constitutional rights and has been entrenched in some constitutions itself is a fundamental human right especially where individual complaint has been provided or through the indirect access to the constitutional courts.[29]

4.Constitutional courts exercise transforming function when updating the constitution and providing the growth of the constitution or in T. Jefferson’s words the constitution should belong to the living and not to the dead.[30] Providing new interpretation of the constitutional provisions in the context of new generations and might be instrumental to avoiding the textual constitutional amendment by the constituent power. This function of constitutional review might be indispensable to the avoiding of gridlocks especially in countries with rigid constitutions. It might be instrumental to reduce the cost of the formal constitutional amendment trough the cumbersome procedure of election and activity of constituent assembly.

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

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

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

D. Buquicchio - President of the European Commission for Democracy through Law of the Council of Europe (Venice Commission)

4.FORMS AND CONSEQUENCES OF JUDICIAL REVIEW BY THE CONSTITUTIONAL COURTS

According to the time for its implementation it might be prior (preliminary) – before the statute has been adopted and enacted or posterior – when the bill has been enacted and has become an acting law. (Prior supervision exists in Austria, France, Portugal, Hungary and Romania)

Posterior Constitutional control is of several different kinds:

The first of hem is the incidental supervision during the course of litigation pending before courts of general jurisdiction which takes place in USA, Switzerland, Greece and Portugal.

Concrete norm supervision compatibility to the constitution occurs when in the course of litigation pending before a court with General Jurisdiction upon application of that court, which must be either convinced in the unconstitutionality of the norm (German Constitution art 100) or at least have doubts, which are not evidently unfounded, as to its constitutionality (Italy). Concrete norm supervision is to be performed in Germany, Italy, Austria, Belgium, Greece, Bulgaria and others.

Abstract norm supervision is to be initiated independently of a legal dispute by specially qualified petitioners – high state officials, political institutions etc.(Switzerland, Austria, Germany, Spain, Belgium, Portugal, Bulgaria, Hungary, Romania, Slovakia and others.) According to the these countries constitutions the President, the Prime minister, a certain number of Parliamentary Deputies, the Supreme Courts and General

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

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

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

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Attorneys (Prosecutors) are granted standing and can initiate abstract form supervision).

Constitutional review based on and initiated by the individual complaints has been provided in some of the European countries constitutions. The general prerequisite of this form is that the citizen, filing the complaint should have direct stake in the litigation and his rights have to be violated by the unconstitutional statute, regulation or action. (In Austria this form of revision is provided by 140, 1 and 4, and 144 of the constitution, in Germany art 93(1,4a) of the Basic Law, in Spain recurso de amparo 161(1b) of the constitution, in Switzerland by a public law complaint art. 84 of the federal law on the Judiciary.)

The control of constitutionality might scrutinize laws challenged by the individual complaint on procedural and substantive basis.[31]

Especially valuable analysis has been provided in the recent extensive report of the Venice commission treating the direct complaint. " Study on Individual Access to Constitutional Justice".[32]

Consequences of Constitutional Review vary according to the different forms of the constitutional review.

Prior control of constitutionality is a declaration on the constitutionality of a law before it was enacted. The statement of unconstitutionality will cause a reconsideration of the parts of the law in conflict to the constitution and replace them with provisions in accordance with the constitution. In fact this form of constitutional review has a similar effect as a presidential veto power. They even might lead to identical outcome if the Legislature could amend the constitution with a two thirds majority, and thus avoid unconstitutionality preserving the law but changing the constitution (this is the effect of overriding a presidential veto) or changing the law in compliance with the constitutional review ruling and the constitution (the effect is nearly the same as of a successful presidential veto.

The outcome of Constitutional court's decision on unconstitutionality of a statute within the system of abstract constitutional review is invalidation of a statute in respect to all (erga omnes). It is apparent to all the European authors that the law declared to be unconstitutional ceases to exist. However, there are disputes on the moment when a statute ceases to exist. There can be no doubt as to the action of law in the future. Some scholars maintain that the law, declared to be unconstitutional from the moment when it was enacted. This assumption raises objections related to retroactivity and reasonable arguments with the complex issue how to deal with all consequences that followed from the moment when the law was enacted till the moment when the constitutional court's decision has been announced.

In the U.S. constitutional law the S.C. is to decide whether unconstitutionality invalidates the law ex tunc (retroactive) or ex nunc (pro futuro) only relating to the future. Doctrine of retroactivity was defined by the Supreme court in Vanhorne's Lessee v.Dorrance (1795) as a void act «never had constitutional existence it is a dead letter, and of no more virtue or avail, than if it never had been made „. In Linkletter v. Walker (1965) this doctrine however was reversed with the court stating that the constitution neither requires to apply, nor prohibits from applying a decision retrospectively.[33]

In Austria the constitutional court's decision has generally an ex nunc effect. It annuls a whole or a part of a statute or of a decree that are considered to be void from the moment when the court announces its decision. On the other hand, the constitutional court has the power to annul statutes that have been repealed by the Parliament and this proposition implies that the constitutional court's decision will have a retroactive or ex tunc effect. However, the general principle is ex nunc. There are two important details a statement of unconstitutionality might create an obligation to the Legislature to regulate and resolve the effects caused by the same statute since it has been enacted till the constitutional court's decision, or the constitutional court might even delay ex nunc effect of its decision. A complicated situation which might arise from a repealed statute might be that the other statutes that have been repealed might start their action again with no further action being necessary from a political institution.[34]

In Germany the acts found to be incompatible to the constitution are declared to be null. In the cases of abstract or concrete control of constitutionality the act is declared void ab initio or the courts decision has retroactive ex tunc effect. The only exception from retroactivity is the criminal proceedings that are being reviewed in the courts under the repealed law. All the other administrative and judicial decisions based on the repealed statute will be considered unchallengeable, but their enforceability, if not yet made, would be illicit. To avoid a declaration of unconstitutionality the constitutional court might use the formula of interpretation and to declare only a discrepancy of the statute to the constitution.[35]

[31]See on the forms of Judicial Review Alexander von Brunneck, Constitutional Review and Legislation in Western Democracies, in Constitutional Review and Legislation, ed. Cr. Landfried, Baden-Baden,1988, 219-263.

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

[33]This relates especially to criminal law when the decision benefited the prosecuted or was essential as a safeguard of innocent persons., see A. R. Brewer - Carias, Judicial Review in Comparative Law, Cambridge Univ. Press, Cambridge,1989, 151-155.

[34]ibid.201-202.

[35]Ibid., 214.

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In Italy and Spain decisions of the constitutional courts have the effect erga omnes and they do not have retroactive force. (The only exceptions where retroactivity takes place are criminal cases when a person was condemned under a statute declared to be unconstitutional, or the unconstitutional statute has already been repealed)

The constitution of Portugal provides for retroactivity of the decisions of the constitutional court. Powers of the Portugal's constitutional court are very broad and it can fix the effect of unconstitutionality in a more restrictive way, when required by legal security, equity or public interest. In these circumstances the constitutional court might soften some of the consequences resulting from the rigidity of the retroactive action.

5. SOME ISSUES SUBJECT TO DEBATE IN THE CONSTITUTIONAL JURISDICTION IN BULGARIA

The 1991 Constitution established for the first time in the national history a specialized institution for the review of the constitutionality of laws.

The Constitutional Court is a specialized judicial institution, which is not incorporated by the judicial branch. The institution has been built on the prototype of the German, Austrian, Italian and Spanish constitutional jurisdictions with the primary functions to protect and enforce supremacy of the constitution as the law of the land, to resolve the institutional conflicts over powers according to the constitution, to interpret the constitution, etc. By safeguarding the constitutional supremacy, the Court serves an important function in protecting human rights entrenched in the 1991 Constitution.

Another set of the Constitutional Court powers comprise verifying the constitutionality of international treaties before their ratification, judges in presidential, parliamentary elections, rules on the constitutionality of the parties and decides on charges brought in an impeachment of the President.

The Constitutional court excercises posterior, concentrated, abstract control for constitutionality of parliamentary legislation and the presidential legal acts as the European constitutional review model established in 1920 Constitution of Austria, created by the famous in Europe and later in the US lawyer H. Kelsen, who was among the first justices to serve on the court.[36]

[36]See V. Jackson, M. Tushnet, Comparative Constitutional Law, New York, 1999, 455-708; M. Cappeletti, The Judicial Process in Comparative Perspecive, Clarendon Press, Oxford, 1989; A. Brewer - Carrias, Judicial Review in Comparative Law, Cambridge, 1988; Constitutional Review and Legislation, ed. Ch.Landfried, Baden-Baden, 1988; Constitutional Review, ed. B. van Riermund, 1993; Control in Constitutional Law, ed C. M. Zoethout, G. Van Der Tang , M. Nijohof, 1993; For Bulgarian Constitutional Court see in Bulgarian J.Stalev, N.Nenovski, Konstitutzionniat sud, Sofia, 1996 and The Constitutional Court of the Republic of Bulgaria, Jurisprudence, ed. N. Nenovski, E. Tanchev, E. Drumeva, Sn. Natcheva and oth., COIPI, Sofia, 1997.

The Constitutional court comprises 12 justices, appointed for 9 year term with no renewal. To safeguard the independence of the institution a special appointment procedure has been devised. The National Assembly, the President of the Republic and the Supreme court each appoint one third of the justices, chosen among lawyers of high professional and moral integrity having 15 years of experience at least.

The access to the court according to the 1991 constitution is very restricted, compared to the practice established in the other emerging democracies and in the European model of constitutional review. The limited standing was considered by the founding fathers to be an important step in the safeguarding the effective functioning of this institution, since an common argument was brought that it might be overloaded with comlaints, especially since the collapse of the communist system, and consequently paralyzed.[37]

The cases can be reffered to the Constitutional court by one fifth of the mps by the President, by the Council of Ministers , by the Attorney General, and by the Chief Justices of the Supreme courts of cassation and arbitration. The ordinary citizens have not standing to bring a case questioning the constitutionality of parliamentary legislation affecting their rights.[38]

In text that follows I would like to mark some of the controversial issues experienced by the constitutional court of Bulgaria in the first decade after it had been established.

One of the first problems the Bulgarian constitutional court had to cope with was the scope of the acts that were to be referred for control of constitutionality. Initially it was declared that the court will not rule on the unconstitutional statutes in force before the adoption of the 1991 constitution of the Republic of Bulgaria. (Par. 3 of the interim and concluding provisions of the constitution.) The laws contrary to the constitution lose their validity with the new constitution entering in force. However in 1996 the constitutional court decided a case on the validity of such a statute declaring it to be unconstitutional and due to the ex nunc effect of the decision the court admitted that the law, though being unconstitutional from the day the 1991 constitution entered into force should not be enforced from the moment of the decision's publication i.e. after 1996.

According to the founding fathers intent constitution clearly states that the decisions of the constitutional court have ex nunc binding effect. (See art.151, par.2) By the time the constitution was drafted part of the constitution makers in the Grand National assembly shared the opinion that the retroactivity would undermine the rule of law principle which was considered cornerstone in the founding of the new democracy after the fall of the totalitarian system. In general liberal constitutionalism has condemned retroactivity as instrument which undermines social contract, justice, certainty of law and legitimacy of

[37]During the drafting of the 1991 Constitution another arguments for the existence of the Constitutional court have been raised . For example it was seen by some as a special kind of political justice and by a large portion of the members of the Grand National Assembly as a surrogate of the missing second chamber of the constitutional structure of the Republic.

[38]In one of his last decisions the court has de facto opened a very limited undirect access to the citizens on the model of art. 100 of 1949 Basic law of Germany. A citizen might bring a case by using the power of the Supreme court to refer the question of unconstitutionality to the Constitutional court.

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the legal order.[39] However the constituent assembly did not follow fully the idea to prohibit completely retroactive legal acts. Some of the argument against full prohibition of ex post facto law was that the total exclusion of retroactivity would help some of the ancien regime actions to be excluded from punishment and retribution. So the prohibition of retroactivity was proclaimed only in the sphere of criminal law and it stopped short concerning parliamentary legislation in other areas.

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

There was discussion in the academia about the temporal effect of the interpretative decisions of the constitutional court under art.149, par. 1, 1. H.Kelsen, Judicial Review of the Legislation, Journal of Politics, N 4, 1942, 183 ; of 1991 Constitution of Republic of Bulgaria. According to the classic theory of legal interpretation the act of interpretation does not have any legal validity if separated from the act hat it has to interpret. It seems that following this constellation the interpretative decisions of he constitutional court should have ex tunc effect.[40] After a robust debate in the academia the constitutional court has accepted the position that all of its decisions including those on constitutional interpretation have prospective effect.

Another problem which has received scholarly attention belongs to the nature of the interpretative decisions of the constitutional court. The court's binding interpretative decisions have provided prospective non adversarial constitutional interpretation which was successful to prevent unconstitutional legislation by resolving the constitutional ambiguity ex ante.[41]

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

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

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

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

[41]See H. Dimitrov, The Bulgarian Constitutional Court and Its Interpretative Jurisdiction, 37 Colum. J Transnat'l Law 459-505.

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

One of the most controversial issues concerns the consequences after a provision which was amendment to a parliamentary statute has been declared unconstitutional.[42] The court by interpretation has arrived at conclusion that in this case after its decision has entered in force an automatic revival (resurrection, restoration) of the acting before the amendment takes place. This interpretation was met with many counterarguments the most important of which is that there is no such explicit provision of the constitution and that the automatic revival in fact is a special case of retroactivity o the constitutional court decision. Moreover, the restoration should be considered contrary to the text of the art. 22, par. 4 of the Law on the Constitutional Court which states that all of the consequences of the law proclaimed to be unconstitutional have to be arranged by the institution which has adopted it. Another argument against the automatic revival of the acting provisions amended with norms proclaimed to be unconstitutional is that the old provisions contradict to the logic of the new provisions which were considered constitutional. The final result is the paralysis of the whole statute.

Some scholars have raised the debate if the stare decisis doctrine is valid for the constitutional courts decisions. However, it seems that the opposite position has prevailed for abstract constitutional review and because the court reversed its decision on the judicial council when considering the constitutionality of the law on the judiciary.

The method of reaching decisions is the last of the controversial issues deserving to be marked in this paper. The quorum for conducting meetings consists of two thirds of the justices at the constitutional court. The courts decisions on unconstitutionality are taken with overall majority which in a court of 12 amounts to the 7 justices votes. The constitutional justice has been conceived as counter majoritarian check. Decision taking through supermajorities makes protection of minority rights when constitutionality of law has been challenged more difficult.

So far by deciding more than a three hundred cases, the Constitutional court has been an effective safeguard to the constitutional supremacy and has vigorously reacted against the encroachments of parliamentary majorities.[43] The constitutional jurisdiction has dealt with statutes contradicting more than half of the provisions of the 1991 constitution.[44] Although sometimes the constitutional courts decisions were met with severe criticism and hostility from the governing majorities it has successfully performed the mission of the guardian of the constitution.

Е. Танчев: Конституциялық бақылаудың пайда болуы, эволюциясы және қызметі (конституциялық бақылау мәселелері, салыстырмалы және Болгар келешегінде).

Мақалада конституциялық бақылаудың әр түрлі елдердегі, соның ішінде Болгариядағы рөлі мен қызметі талданады. Заңдарды конституциялық бақылау қазіргі әлемде әр түрлі формада көрініс тапқан. Конституциялық соттар конституциялық және ұлтүсті құндылықтарды, қағидаттар мен нормаларды келісу институты ретінде, сондай-ақ ұлттық және ұлтүсті құқықтық тәртіптер мен институттар арасындағы дау-дамайларды шешу мақсатында әрекет етеді. Бұдан басқа, конституциялық соттар соңғы инстанцияда адамның негізгі құқықтарын сотта қорғаушы рөлін атқарады, сонымен қатар, мемлекеттік билік органдарының конституциялық өкілеттігін бөлу мәселелерінде төреші ретінде әрекет етеді.

Түйінді сөздер: конституциялық бақылау, сот бақылауы, дауларды шешу, конституциялық сот, конституциялық кеңес, конституционализм, Ганс Кельзен, Джон Маршалл, Марбери Мэдисонға қарсы, адамның негізгі құқықтары.

Е. Танчев: Генезис, эволюция и функции конституционного контроля (вопросы конституционного контроля в сравнительной и Болгарской перспективе).

В статье анализируется роль и функции конституционного контроля в различных странах, включая Болгарию. Конституционный контроль законодательства в современном мире представлен в разных формах. Конституционные суды действуют в качестве института согласования конституционных и наднациональных ценностей, принципов и норм, а также в целях разрешения конфликтов между национальным и наднациональным правовыми порядками и институтами. Кроме того, конституционные суды выполняют роль судебного защитника основных прав человека в последней инстанции, а также выступают в качестве арбитра в вопросах разграничения конституционных полномочий органов государственной власти.

Ключевые слова: конституционный контроль, судебный контроль, разрешение споров, конституционный суд, конституционный совет, конституционализм, Ганс Кельзен, Джон Маршалл, Марбери против Мэдисона, основные права человека.

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

[43]From 1991 till 2011 the Constitutional court was seized 419 times and has rendered 300 decisions.

[44]For analytic review by a keen observer on the constitutional court's jurisprudence see H. Schwartz, The Struggle for the Constitutional Justice in Post-Communist Europe, The Univ. of Chicago Press, 2000, 164-193.