

## CONSTITUTIONAL JUDGES AND OTHER MEANS FOR ENSURING COMPLIANCE WITH THE CONSTITUTION

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### S u m m a r y

The Constitution is at the same time a legal and a political instrument. The paper insists on the necessary interaction between judicial and non-judicial means for ensuring compliance with the Constitution. In the long run, its strength as a political instrument will diminish if the action of constitutional judges is not supported by a constitutional culture in which constitutional arguments are taken seriously even in the absence of an immediate threat of court action. The importance of the cultural factor increases the more doubtful a constitutional norm appears to be.

In the last sections of the paper, these points are discussed in the light of a recent statement by Andrius Kubilius, former Prime minister of Lithuania. According to the wording of the statement, it may be read as saying that the existence of the Constitutional Court is the only reason why attention is paid to the Constitution in political decision-making. If this were the correct understanding, it would be a strong sign of success for the Constitutional Court but not for the Constitution of Lithuania.

### The constitution: law and political instrument

Lawyers tend to regard the constitution first and foremost as a collection of legal norms. „Legal norms“ are currently defined as norms in the last instance subject to being upheld by „courts“.

In such a perspective, the creation of the Constitutional Court of the republic of Lithuania is just one example among many that together have created the recent but indeed far-reaching introduction of constitutional courts and/or other institutional devices for upholding the authority of the constitution as superior law all over Europe. This development makes a legal perspective more legitimate and pertinent than ever before.

The choice of a legal (or better: court-centred) perspective make it too easy, however, to forget that within the European constitutional tradition – not to speak of the so-called socialist one – the constitution had little or no importance as a strictly legal instrument [1]<sup>1</sup>. As a matter of fact, the Norwegian systems of judicial review of the constitutionality of legislation that was gradually established throughout the first half of the 19<sup>th</sup> Century was the first and for many years the only exception to that tradition. For the rest, the historical point of

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<sup>1</sup> On the role of constitutional justice in the constitutional debates in Philadelphia and Paris by the end of the 19<sup>th</sup> Century.

departure clearly was written constitutions perceived as some sort of political declarations with little or no effect as positive law to be applied by courts [2, p. 289–305].

The absence of a clear-cut status as a legal instrument nevertheless did not stand in the way of more than one constitution gaining considerable importance as measures of the constitutionality of political action. The political branches of government tended to act in conformity with the constitution or at least to avoid openly violating it: More often than not – at least in Western Europe – elections were held according to the provisions laid down by the Constitution, and so on.

Whether they did so because they considered themselves bound, by interest – by fear of criticism, for example – or both is of little importance in the present context. The point is quite simply the one already stated: A constitution may be quite successful in practice even if judicial remedies are inaccessible or of quite marginal importance.

On this background, it is crucial to recall that no constitution may penetrate political life by means of judicial remedies alone. As a matter of fact, a constitution is above all a political instrument. It is a pleonasm to say that it is of political origin. In order to function well it has also to be globally observed in political decision-making. It would be a sign of failure rather than of success if courts were constantly called upon to state the meaning of the Constitution and (if needed) to censure conflicting enactments.

In this sense, constitutional norms share the fate of any legal norm: Sociology of law as well as common-sense observations give sufficient ground for calmly stating that legal norms – even when enacted in the formally most unquestionable manner – risk remaining dead letters unless factors like internalisation by relevant actors, different social mechanisms and self-interest concur in rendering them effective. In the long run, it seems clear (or at least we should hope so) that dictatorship based on fear of sanctions without a minimum of popular support, will quite simply not work.

### **Constitutional cultures: the interaction between politics and law**

Presented in this way, the fundamental, broadly worded question is about the state of constitutional culture in a given society: To what extent are the text of the constitution and the intentions in which it is based, taken seriously as imperative norms for subsequent decision-making by the political branches of government as well as in the judiciary?

The existence of judicial remedies is but one of a greater number of factors that may contribute to explaining why constitutional enactments are crowned with attributes of efficiency according to their text or intentions, or to explaining why they fail, globally or in part. On the other hand, absence of institutional devices for upholding norms laid down by the text of the constitution independently of the changing will of the political branches of government is likely, at least in the long run, to influence negatively the importance of constitutional arguments in political decision-making.

By reference to the basic values of popular sovereignty and representative government so often thought to conflict with constitutional fetters on political action, the relationship between constitutions and sub-constitutional enactments by directly elected assemblies is most directly at stake: If the political majority may always feel sure of having the final word *without* needing to succeed by amending the text of the constitution, political preferences are likely to prevail notwithstanding more or less qualified arguments about their constitutionality.

In a short-term perspective, this implies a scope of discretion – in other words: a freedom of action – for the political majority of the day that is wider than it would otherwise have been. This perspective is the one that often seems to take the lead in political as well as legal debates. Since the word „freedom“ normally has a strong positive connotation, at least in our parts of the world, it is reasonable to suppose that even the absence of constitutional bounds can be nothing but positive.

In a long-term perspective however, the argument may go differently. Here, there are good reasons for pointing out that weakening the weight of constitutional arguments may

equally mean corrupting the constitution's potential as instrument of political action, reducing it to a pure symbol (or inviting people just to forget it).

It is probably true that constitutions are most often perceived as instruments of stability or – to put it more negatively – of inflexibility or rigidity. But precisely in the property of a constitution to bind the legislature because more difficult to amend than ordinary legislation, lies the key to using it as instrument of political action and change: Emerging democracies more often than not have resorted to constitution-making as one of the most important means for establishing the new system of government and for (if possible) securing it long life; among the huge number of examples available, those of Norway (early in the 19<sup>th</sup> Century) or present-day Lithuania (by the end of the second Millennium) may serve for the present purpose.

Later on, refusal to follow invitations to amend the text of the constitution may equally be understood as a means of political action. And first of all: amendments once adopted may be more powerful vectors of change than sub-constitutional enactments – precisely because they are less easy to amend and therefore likely to influence subsequent politics more strongly than ordinary legislation.

However, these affirmations are true only to the extent that neither subsequent legislative majorities nor other authoritative interpreters (like courts) feel free to make constitutional norms say what the interpreters themselves would like them do. If this condition is *not* satisfied, the difference between constitutional and ordinary legislative amendment will invariably be reduced or disappear.

The conditions just mentioned may be more or less well satisfied due to a number of factors, some of a strictly legal (or judicial) character and others being political or cultural in a broader sense. We thus need to study the constitution simultaneously as a political instrument and as a legal norm.

### **The „meaning“ of the constitution**

What factors contribute in explaining the relative success or failure of constitutional norms (or of constitutions as such) as relevant and important in subsequent decision-making and debate? What factors are the most pertinent as means for explaining the strengthening or weakening of pre-enacted constitutional norms over time?

Some texts called „constitutional“ or similar could best be understood under a more or less rhetorical or symbolic angle. Perhaps (parts of) the „constitutions“ within the Soviet systems could serve as examples of purely rhetorical texts. As for mainly symbolical expressions in the form of constitutional enactments, art. 110 a of the Constitution of Norway on the position of the Sami minority may be invoked; when it was added to the Constitution in 1988, it was explicitly not intended to entail any important effect as a legal norm binding the majority's freedom of action, but to serve as „a solemn and lasting expression of a principle that in the course of time has gained considerable support“ (quotation from the report to Parliament from the standing committee on constitutional affairs).

From constitutional enactments meant primarily as expressions of some symbolic value, we could not expect significant legal effects as part of the law to be applied by judges. But nothing of course prevents enactments that it is reasonable to regard as „legal norms“ from also benefiting from some rhetoric and/or symbolic value; on the contrary, such combinations are probably one of the patterns of constitutional enactments that succeed.

Many examples of the use made by opponents of the „socialist“ regimes of beautiful declarations embedded in constitutional or other solemn texts formally accepted by the relevant regimes (like the Helsinki declaration) also show that texts primarily adopted for cosmetic purposes may create important effects clearly unintended by the framers. But insofar as the main purpose of a constitutional enactment consists in the enactment itself, it gives little meaning to discuss other criteria of success or failure of that text.

Turning to constitutional norms subject to be applied in the contexts of judicial and political decision-making, the formally enacted text will always have to serve as an important

point of departure for understanding the way constitutional norms and constitutional arguments function in the society. But in order to serve as argument in a legal or political context, constitutional provisions must be endowed with a meaning.

The path from text to meaning is usually referred to as „*interpretation*“. The outcome of such activities may lead to profound evolutions of the normative set-up attached to a constitutional text without that text being amended correspondingly. For evident practical reasons, the task of determining the meaning of a provision through some sort of interpretation is always shared between different state bodies in a more or less puzzling blend.

The institutional set-up of a constitution may certainly contribute to explaining the relative success not only of the political regime as such but even of the underlying constitutional framework as relevant and important in political decision-making and debate. This is true when it comes to variations within the political branches of government, like the strength or weakness of the executive, as well as the organisation and relative position of the judiciary in constitutional matters.

### **Factors influencing constitutional interpretation**

The process of interpretation may be more or less open according to the character of the text, its age and other factors.

It may first be recalled that the scope of interpretation becomes greater the more openly worded the provisions at stake. Quite simply, less precisely worded provisions are easier to amend by way of „interpretation“ than appears *prima facie* reasonably loyal and sensible. Many constitutional provisions on fundamental or human rights provide typical examples of this kind. Because such provisions are harder to endow with a „plain meaning“ the latitude of loyal interpretation is necessarily greater than when more precisely worded texts are at stake. But it also becomes harder to draw the borderline between loyal interpretation and „interpretation“ that is excessively creative.

The „creativity“ may go in the direction of limiting the day-to-day freedom of action of ordinary legislation beyond the limits clearly established by the constituent power itself. As a matter of fact, people having this form of creativity in mind most often use qualifications like „judicial activism“. But it should not be forgotten that even „activism“ the opposite way is perfectly imaginable, at fact that may well be illustrated by the tendency of the Norwegian Supreme Court to interpret constitutional provisions in a way that does not hamper the freedom of action of simple majorities in Parliament capable of enacting ordinary legislation. Whereas the first-mentioned form of „judicial politics“ may excessively hamper the most straightforward expressions of popular sovereignty that we find in day-to-day enactments by Parliament, the latter form may leave the political freedom of action excessively open to the detriment of the interests supposed to be protected by the constitution.

In any case a high degree of textual openness towards interpretation – be it „loyal“ or „excessive“ – means that the potentiality of the constitution as instrument in the hands of the constituent power becomes weaker. The necessary corollary of this observation is that greater openness makes it more reasonable to read the relevant provision as an authorisation to be used as an „instrument“ for those – parliaments, court and others – in charge of effectively determining its meaning.

Such „authorisations“ are probably of greater practical importance than one might immediately expect: The consensus needed for getting constitutional enactments adopted is frequently reached at the price of leaving important choices open to later „interpretation“ and application; in such cases, we could talk of strategic use of ambiguity as part of the constitution-making process. Under other circumstances, a provision is worded in a broad or ambiguous manner thought to facilitate the enactment becoming more long lasting and/or able to cope with changing needs and demands.

Even extra-textual factors may contribute to explaining how constitutional norms are handled. For instance, the flexibility or not of a constitution is likely to influence the attitude

towards the un-amended text. The level of rigidity is first and foremost a question of formality: Which requirements regarding forum and procedure must be satisfied for having the text of a constitution amended? Formally, every constitution provides means for changing its own text. Of course efforts to amend constitutional norms or add new ones will sometimes fail due to lack of the political support needed according to the established procedure. But preventing change that cannot take place by using the prescribed way of amendment is often regarded as the very purpose of a constitution as understood here.

At the same time, we know that the amendment procedure established by some constitutions is so demanding that it places them more or less beyond the reach of the (derived) constituent power even in cases where political will is not lacking but rather widespread in the relevant political community. Prominent albeit different contemporary examples are the Constitutions of Denmark and the United States of America, whereas the constitutions of countries like Lithuania and Norway (not to speak about Sweden) are considerably more flexible.

The degree of rigidity of constitutional texts is also a question of history and psychology: There is no reason to believe that the frequency of constitutional amendment is determined solely by the formal availability of such enactments (and – of course – by the age and quality of the constitutional text). Since ca. 1970 the great French Declaration of the rights of man and of the citizen (1789) has been constitutionalised through the jurisprudence of the *Conseil constitutionnel*. Under a formal perspective, even this part of the *bloc de constitutionnalité* must be presumed to be subject to amendment. But who would seriously consider changing the words of stone tablets? Instead, the accommodation to changing circumstances has passed by adding new „rights“ and principles when a new constitution is adopted see now the preamble to the 1958 Constitution. Thereafter, it is for those charged with the interpretation of the French Constitution to find their way between rights and principles from widely different horizons.

Constitutional texts that – for one reason or another – are hard to amend are likely to be more exposed to extra-textual changes by „creative“ interpretation than constitutional texts that may more easily be amended. This effect is likely to be further enhanced when the provisions supposed to prevent the „needs of our time“ from being satisfied are quite openly worded in a way that (legitimately) invites choices between more than one possible meaning. Among other factors to be mentioned in the same direction, the age of the relevant provision merits particular attention.

If the argument is turned the other way round, we arrive at the assumption that the likeliness of seeing the constitution interpreted and applied in a loyal manner is greater the easier it is to amend. The point would simply be: Why create the norm outside the „plain meaning“ of the text if the „needs of our time“ may be served without much more hardship through regular amendment?

### **Constitutional judges and other means**

More often than not, the signification of a constitutional text seems so easy to recognise that few would question the reasonableness of the process of determining it. In such cases it may even seem as if no proper „interpretation“ has taken place: the signification quite simply appears as evident.

Obvious examples are offered by constitutions invariably stating the exact or maximum duration of the office of head of state or of the legislature, the exact size of the Parliament, and so on. Rarely is recourse to constitutional judges required for transferring such provisions from text to life. For example, the extension of a presidential mandate from, say, four to six years with no clear textual basis would represent such an evident violation of the constitutional norm that the qualification „coup d'état“ would be more proper than that of „interpretation“.

Of course not every institutional provision appears as sufficiently precise over time. For instance, the Constitutional Court of Lithuania has had to decide whether constitutional

provisions on „the Deputy Chairperson“ or similar really meant that the Seimas could elect only one such person<sup>1</sup>. But this simply illustrates that even constitutional provisions on institutional matters may be worded in a more or less univocal manner.

In this way, it becomes clear that parts at least – and not necessarily the least important parts – of a constitutional text may well prevail without access to court having to be important for explaining why reference to the constitutional norms is accepted as decisive. If precisely worded texts about constitutional norms are questioned as binding instruments or simply disregarded without external threats being called upon, it should rather be understood as a sign of grave dysfunctions in that constitutional system.

This goes well with the fact that some constitutions are actually left with the legislature as the principal source of authoritative meaning (and with the fact that in European history until the 1980s, this was much more frequently so).

It seems nevertheless reasonable to assume that absence of institutional devices for upholding norms laid down by the text of the constitution independently of the political branches of government will influence negatively its potential as a political instrument, at least in the long run. This is even more so when more than one particular reading of a constitutional provision may be legitimate, thus creating a need for an authoritative (last) interpreter of the Constitution.

During a seminar in Oslo last winter, the former Prime Minister of Lithuania, Andrius Kubilius, stating that, expressed this point in a most clear-cut manner

„... the significance of constitutional arguments in political decision-making is not predetermined by mythological respect of politicians for the Constitution, it rests on the existence of the Constitutional Court, which is a powerful and influential player in political decision-making“<sup>2</sup>.

This statement is most likely to be understood as an expression of the success of the Constitutional Court in getting itself respected and – therefore – in establishing itself as an important actor in Lithuanian public life.

The statement *may* also be read, however, as an expression of the idea that „politicians“ would feel more or less free to make whatever they want out of the constitution, had it not been for the existence of the Constitutional Court.

This adheres to the idea that in systems where the political majority may feel sure of having the final say without having to pass by formal amendment to the text of the constitution, the preferences of the political majority of the day are more likely to prevail than in systems where sub-constitutional enactments can be brought before independent institutions empowered – under certain circumstances – to censure them and where it is not unlikely that this may happen. Political wishes are likely to prevail even if they are not clearly in conformity with the constitution as presently worded.

This is the argument about the need for relatively wide access to a judge for having the meaning of the constitution defined and conflicting sub-constitutional enactments dismantled. In the continuation of this argument are frequently found more sophisticated considerations about the choice of court models or judges, of different techniques for initiating judicial review, different doctrines of constitutional interpretation, and so on. Quite often the main thinking about judicial review – among those interested in the matter – seems to be found in the slogan „the more the better“.

It is probable that opportunistic use of constitutional arguments are less likely to dominate the more real the possibility of judicial review of the resulting sub-constitutional enactment appears to be: The constitution is invoked only to the extent it is supposed to serve those who argue. Under other circumstances, it is passed under silence.

At this point again, Norway may serve as an example of a country where the century-old system of judicial review appears to be so remote from everyday life that few MPs ever think of the Supreme Court as a competitor to their own role in determining constitutional

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<sup>1</sup> In the ruling of 24 February 1994, the Lithuanian Constitutional Court answered that the election of three „deputy chairpersons“ was not unconstitutional.

<sup>2</sup> See further in Andrius Kubilius' contribution to the book based on the Seminar (forthcoming).

limits to statutory enactments. According to Mr. Kubilius – who certainly does not stand-alone at this point – the preventive effect of the existence of constitutional judges is far greater in Lithuania.

On the other hand, it is important to recall that the freedom of arguing on constitutional matters felt by a participant in the political debate is influenced also by other factors. One is the existence or not of other *institutional* devices like instruments for upstream (*ex ante*) control of legislation: In some countries a specialised „constitutional committee“ within Parliament plays an important role in this respect; Finland and (to a lesser extent) Sweden offer interesting examples. Preview through independent external bodies like the consultative divisions of the French Conseil d'Etat or the Estonian Legal Chancellor may equally be important in avoiding that unconstitutional norms are enacted.

In the early days in the history of Western constitutionalism, even devices like bicameralism or executive veto were thought of as prominent instruments for ensuring a high degree of *status quo* in the accommodation of constitutional norms to the political „realities“<sup>1</sup>. For obvious reasons however, other types of political and personal agenda most often took over, the result being that similar devices the more and more proved insufficient to fulfil the task of safeguarding constitutional norms conceived as quite different from that (for example) of making the president's policy win over that of the majority in Congress, as can frequently be observed from the United States. But examples from the Baltics and other parts of the world show that presidential veto (or at least the possibility for the head of State to object, at least temporarily, or to refer the question to the Constitutional Court) nevertheless may provide a useful supplementary means for enhancing the Constitution as measure of political action.

*In addition* to formalised institutional measures, it should be mentioned that a public debate largely aware of constitutional questions might function as a bulwark against blatantly unconstitutional arguments or behaviour in the political life. But one of the prerequisites for an enlightened public debate on constitutional – or even better: on broadly political – matters is a certain level of public awareness: The level of public awareness of constitutional issues is likely to be higher the more the constitution enjoys a status as *symbol* of the Nation or – or even better: and – as bulwark against intrusions into the freedom of its citizens. In the next turn, a high level of public awareness is likely to reduce the profit that can be drawn from highly opportunistic use of constitutional arguments in the political life.

The last point may be summed up by returning to the words “constitutional culture” (see above): The more solid it is, the more likely it is that constitutional arguments will be influential even if the intervention of the constitutional judge has not been solicited (or is not likely to be).

### **Conclusion: courts and the constitutional culture**

Now, the time has come to return to Mr. Kubilius' statement on the important role of the Constitutional Court in Lithuanian politics (see above): Literally understood, it must be read as an expression of a feeble constitutional culture in Lithuania.

The inherent paradox is the following: If it is true that the threat of the Constitutional court is the *only* reason why “politicians” in this country are inclined to take constitutional arguments seriously, it must by necessity mean that the constitution itself – as well as serious debate about its meaning – is irrelevant as far as the political circles are left alone. It also means that these circles *are* likely to be left alone with little or no public control when it comes to the way the constitution is used in political decision-making and debate. In other words: The Constitution of the Republic of Lithuania has little or no importance outside the courtroom.

I believe that this was not what Mr. Kubilius actually intended to say. In any case, my firm impression is that those assumptions are not true (or at least not entirely so). But they

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<sup>1</sup> See for instance Jon Elster's article referred to in footnote 1 above.

may serve as a most useful point of departure for discussing the proper share of responsibilities – or, in other words: the proper balance – between constitutional judges and other means for ensuring compliance with the Constitution.

Without some right of access to a court for having constitutional disputes resolved, the importance of genuine constitutional arguments in political life is likely to diminish, at least in the long run. At the same time, frequent recourse to constitutional judges provides no evident sign of success of the constitution as guiding instrument for the political community it purported to establish and to regulate. Such a situation could equally well be understood as the reflex of a constitution that is forceless without the constant intervention of judges.

My impression is that Lithuania in ten years has reached comparatively far in establishing a reasonable balance, the Constitutional Court having become an important *support* for the normative strength of the Constitution but not the *only* support. But of course a Lithuanian audience is in a far better situation than me for appreciating the present situation at this point. I believe the 10th anniversary of the Constitution of the Republic of Lithuania provides an excellent opportunity for further consideration and debate on the proper balance between „law“ and „politics“ in an enduring constitutional culture.





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### *Konstituciniai teismai ir kiti būdai užtikrinti Konstitucijos viršenybę*

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### SANTRAUKA

*Straipsnyje „Konstituciniai teismai ir kiti būdai užtikrinti Konstitucijos viršenybę“ konstitucija nagrinėjama kaip teisinis ir politinis instrumentas. Diskutuojama dėl būtinumo derinti teisinius ir neteisinius būdus siekiant užtikrinti konstitucijos viršenybę. Ateities perspektyvoje konstitucijos, kaip politinio instrumento, galia sumažės, jeigu konstitucinių teismų sprendimai nebus paremti konstitucine kultūra, kurioje į konstitucinius argumentus žiūrima rimtai netgi ir tais atvejais, kai nėra „grėsmės“, kad Konstitucinis Teismas priims vienokį ar kitokį sprendimą. Konstitucinės kultūros reikšmė ypač akivaizdi, kai kyla abejonių dėl konstitucinės normos.*

*Straipsnio pabaigoje minėtieji aspektai aptarti atsižvelgiant į buvusio Lietuvos Respublikos ministro pirmininko Andriaus Kubiliaus išsakytus argumentus. Skaitant pažodžiui gali būti suprasta, kad Konstitucinio Teismo buvimas – vienintelė priežastis, kodėl yra paisoma Konstitucijos priimant politinius sprendimus. Jeigu taip iš tiesų buvo norėta pasakyti, tai galėtų būti suprasta kaip akivaizdi Konstitucinio Teismo, bet ne Lietuvos Konstitucijos sėkmė.*

