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"LEGAL CONSEQUENCES OF CONSTITUTIONAL COURT DECISIONS IN STRENGTHENING THE STATE'S CONSTITUTIONAL ORDER"

YEREVAN, ARMENIA, 6-8 October 2011

REPORT

"Constitutional Court Functions in Protecting the Democratic Constitutional Order"

by

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Types of Constitutional Review and its Relationship to 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 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[1] 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

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

different limitations on judge made law were devised and imposed, on the other.[2] 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.[3] 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. [4] Today the constitutional courts or other forms of constitutional review is universally accepted as a part of the European constitutional heritage[5]. 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. [6] 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.[7]

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.

Short List of Constitutional court Functions

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

[2] 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

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

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

[5] 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

[6] **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

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

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.[8] 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.

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.[9]

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

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[8] 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

[9] 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

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[10] 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.[11] Another approach by converting a political or extraparliamentary violence into legal conflict one has been emphasized by A. De Tocqueville.[12]. 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

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

[11]" 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

[12] *"**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***

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.[13]

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.[14] *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.

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[13] 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)

[14] 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

Modern (Contemporary) Context of constitutional courts functions performance national and international context

With constitutional democracy triumph during the last decades of the 20th century, rule of law has become a common denominator among the principles entrenched in the new constitutions.

Besides the traditional obstacles practical enforcement of the rule of law or rechtstaat has to cope with new challenges which affect the functions of the constitutional courts.

Three of them deserve special attention

In the emerging democracies constitutional design of the rechtsstaat confronts underdeveloped legal culture on the part of the rulers and ruled. Due to the lack of active civil society and perceptions like legal nihilism and fetishism the living rule of law is abunds with unenforcible provisions and ineffective law enforcement. These defects of the rule of law might be cured gradually and the treatment might take generations that have lived their life in a constitutional democracy.

One of the most fascinating events in contemporary global age is the emergence of multi level constitutionalism. Constitutional monism of the nation states is supplemented with supranational constitutional dimension by gradual constitutionalization through establishing international and European standards of constitutional democracy. Within European context two variously shaped and encompassing different sets of nation member states supranational constitutional streams evolve - Council of Europe, ECHR and jurisprudence of the Strasbourg court of Human Rights on the one side and the EU constitutional order for its member states on the other side.

In contrast to federations multilevel constitutionalism is not hierarchically structured like supremacy of the nation state constitutions within the national legal system. For the time being and in the foreseeable future integration through law and economic integration have not scheduled emergence of European super state neither EU would be transformed in omnipotent statal entity identical to that of the nation states. Primacy of the EU law and validity of EU standards will be guaranteed not by supremacy of a written formal supranational constitution but by contrapunctual constitutionalism where conflicts between the constitutional orders and harmony is achieved by the same democratic constitutional values and principles shaped by the common European constitutional heritage after the Westphalian peace treaty.

Like in contrapunctual music harmony is achieved only if different melodies are composed in one key so contrapunctual constitutionalism resolves and avoids conflicts by foundation of the national and supranational levels on the same set of democratic constitutional values and principles with the each one contents being modified and adapted to its respective constitutional orders.

In a constitutional pluralism rule of law transcends the rechtsstaat and the rule of law within the national legal system which is supplemented by the rule of law beyond the nation state on a supranational and international law level. The conflicts between different legal orders are unavoidable but the mechanisms for their resolution are built, negotiated and agreed upon in order to peacefully overcome them.

Perhaps it might be appropriate to draw a comparison with M. Maduro's concept of hierarchy within contrapunctual constitutionalism and legitimacy within the national, EU and global constitutionalism. In our contemporary globalized age constitutional pluralism is at a stage where separate constitutional locations have reached a different level of hierarchy within the legal order. The weakest of all has been the global constitutionalism where different

currents mark the emerging priorities of governance and the legal order. In contrapunctual constitutionalism harmonizing the different loci of constitutionalism should be done in a harmonious manner. Harmony, however, would require certain premises to be observed. For example, simultaneous melodies in music should be performed within one key and should not be sung in *a capella* or in a cannon fashion. Hierarchies and legitimacies in national, EU and global constitutionalism should be built on the consensus concerning some democratic values and should not be aimed at repetition, although with a different consequence. [15]

The heterogeneity of governance modes in the EU requires the use of all avenues of legitimacy available to the various modes of governance.[16] One should not fear that in this way complex and differentiated legitimacies will be the result. EU citizenship and, which is not intended to destroy national citizenship, has moreover been introduced and is based on national citizenship. The human rights belonging to the EU citizens are not meant to impair the citizens rights provided in the nation state constitutions but to guarantee more opportunities for the EU citizens.[17] However multilevel recognition and protection of human rights are probably the soundest legitimacy building factor for supranational governance facilitating the interaction of different entities of multilevel governance forming the contemporary constitutional pluralism.

Terrorism and transnational crime pose the most formidable threat to the rule of law in contemporary constitutional democracies. The constitutional democracies confront actual dilemma that they have to preserve and protect the principle of the rule of law and constitutional democracy with the established procedures and instruments of the rule of law from individuals or groups that do not recognize the very fabric of the principle but aim to destroy democratic societies built on the rule of law. Indeed there has not been agreement between scholars and politicians on the content of terrorism neither there has been a legal definition of this term in any international law instrument. However, considering some of their implications terrorism and the rule of law are diametrically opposites. While on the one side of the antinomy lie values like predictability, security and legitimate expectations of people on the other side the goals are to be achieved by intimidation, fear, insecurity and unexpected harms to physical persons in order to exert pressure on government. While the constitutions and the rule of law aim to limit coercion and resolve conflicts peacefully terrorism and transnational crime resort to unlimited coercion in order to achieve their goals.[18] Rule of law is an universal and integral principle and once it is suspended it or unrestricted violence to the criminals without observing fair trial, presumption of innocence etc. is imposed, then the guarantee that the government and law enforcement would not become criminals themselves, standing on one and the same path with

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[15] See for contrapunctual constitutionalism **M. Maduro**, 'Europe and the Constitution: What if this is as Good as it gets?', in **J.H.H. Weiler** and M. Wind, eds., *Rethinking European Constitutionalism* (Cambridge, Cambridge University Press 2000).
Also available at: <http://www.umich.edu/~iinet/euc/PDFs/2002%20Papers/Maduro.PDF>.

[16] See **R. de Jonghe** and **P. Bursens**, 'The Quest for more Legitimacy in the EU as a Multilevel Political System' (Paper for ECPR Congress in Edinburgh 28 March - April, 2003) available at: <http;// www.clingendael.nl/library/litlijst/ litlst2004.1/European.integration.pdf>

[17] Admitting that EU citizenship actually exists based on the prerequisite of citizenship of one of the member states of the Union automatically means the direct participation of EU citizens, thereby creating input legitimacy, but this should not be seen as more valuable or impairing the indirect or output legitimacy of intergovernmentalism, as within the nation-state this is built on the direct participation of the people in government elections. Therefore the conclusion that there should be a prevalence of one mode of legitimacy in the EU above all others seems to be somewhat misleading. Within different EU governance methods various types of legitimacy will undoubtedly prevail. For example, intergovernmental legitimacy will be based on indirect and output legitimacy, while direct and input legitimacy will normally develop more efficiently at the supranational level of community and federal methods of integration.

[18] One of the best liberal definitions of constitutionalism emphasizing the constitutions role as frame of government was offered in the second half of the 19 century in the US by John Potter Stockton " The constitutions are chains with which men bind themselves in heir sane moments that they may not die by a suicidal hand in the day of their frenzy.", **J.E.Finn**, Constitutions in Crisis, Oxford University Press, 1991, , 5

the criminals, will wither away. Leaving the rule of law ground to protect it though legitimated by the reason of state, constitutional dictatorship or limited emergency formulae transforms the law enforcement into criminal activity. Constitutional democracies and the principle of rule of law seem to be ill equipped to defend themselves against terrorist and international crime threats with the legal means of peaceful conflict resolution.

Models of Implementation of International Norms in the National Legal Order and 1991 Bulgarian Constitution

The classical principle of constitutional supremacy is assuming new dimensions with the development of the relations between the national legal systems and the supranational legal orders in contemporary globalized world.

Modern democratic constitutional states recognize the primacy of international law principle. The systems implementing treaty obligations however are different due to the choice of monism or dualism in the national constitutions.[19] In general incorporation of the treaties provisions follows two types of procedures.[20]

According to the dominant in Europe monistic system the international treaty becomes an integral part of the national law after having been ratified. Under dualism implementation of treaties can take place not by ratification but by drafting a special law or by amending the existing national legislation.

Comparative analysis of European systems demonstrates another type of difference due to the position of the international treaties in the national legal order

In some countries like Belgium, Luxembourg and Netherlands, the international treaties provisions have a supranational effect and stand above the legal system superseding the authority of constitutional norms.

According to the constitutional practice of other countries like Austria, Italy and Finland, the treaties, having been ratified with parliamentary supermajority vote, have the same legal binding effect as constitutional provisions.

The third type of implementation of treaties obligations under the monistic system in Europe places them above the ordinary parliamentary legislation but under the national constitutions according to their legally binding effect. This is the current practice in Bulgaria, Germany, France, Greece, Cypress, Portugal, Spain and others.

In the Czech Republic, Lichtenstein, Romania, Russia, and the Slovak republic only the treaties relating to human rights stand above the ordinary legislation.[21]

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[19] See for different legal orders in dualistic system and integrating the both legal orders in monism **M.Kumm ,** Towards a Constitutional Theory of the Relationship between National and International Law International Law Part I and II, National Courts and the Arguments from Democracy, p. 1-2, www.law.nyu.edu/clppt/program2003/readings/kumm1and2.pdf ; **L.Wildhaber**, Treaty-Making Power and the Constitution,Bazel,1971, 152-153

[20] **P. van Dijk, G. , J. H. van Hoof,** Theory and Practice of the European Convention on Human Rights, Boston,1990,11-12; **A.Drzemczewski**, European Human Rights Convention in Domestic Law, Oxford, 1985, 33-35;E Wagnerowa, Direct Applicability of the Human Rights Treaties in The Status of International Treaties on Human Rights,Collection Science and Technique of Democracy, N 42,Council of Europe Publishing, Strasbourg, 2006,111-127

[21] **C. Economides**, The Elaboration of Model Clauses on the Relationship between International and Domestic Law, The European Commission for Democracy Through Law, Council of Europe, 1994, 91-113, 101-102 ; **L.Erades**, Interactions between International and Municipal Law , T.M.C. Asser Institute – The Hague, 1993 ; The French Legal System: An Introduction, 1992,45; ., See **Й.Фровайн,** Европейската конвенция за правата на човека като обществен ред в Европа,София,1994, 32 ; Вж също така **Л.Кулишев**, Прилагането на Европейската конвенция за правата на човека в българския правен ред, сп.Закон, бр.2,1994, 3-25

The 1991 Bulgarian constitution proclaims primacy of international law treaties which have legally binding effect and supersede the contradicting provisions of the national legislation. Under the monistic approach, International treaties, constitutionally ratified, promulgated, and having come into force in the Republic of Bulgaria, shall be a part of the domestic law of the country. They shall take precedence over any conflicting legal rules under the domestic legislation. The Constitutional Court of the Republic of Bulgaria in an interpretative ruling has extended the validity of this constitutional provision i.e. art. 5, par.4 to include all the treaties which were signed before the entry in force of the Constitution if they fulfill the requirements of art. 5, par.4.[22]

Interpretation of art. 85, par. 3 and art.149, par.1, 4 in connection with art 5, par. 4 makes apparent that the 1991 Constitution of Bulgaria has situated treaties only second to the Constitution itself but above all the national legislation.[23] Thus, the primacy of international law has complied with the requirements of art. 2 of the UN Charter respecting the nation state sovereignty.[24]

The process of implementing a treaty is different from interaction between the EU legal order and EU member states' legal systems. Due to the transfer of sovereignty, provisions of EU law prevail over the national constitutional norms and have legal binding effect after the EU member states have been notified. That is why implementing of the international treaties bears no similarity to the obligation to comply with acquis communautaire in adapting the national constitutions and approximation of legislation in order to provide supranational, direct, immediate and horizontal effect of primary and institutional EU law.[25]

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[22]Article 5 of the Bulgarian 1991 constitution provides:
(1) The Constitution is the supreme law, and no other law may contradict it.
(2) The provisions of the Constitution shall have direct applicability.
(3) No one may be sentenced for any action or inaction that was not legally provided for a crime when it was committed.
(4) International treaties, constitutionally ratified , promulgated, and having come into force as for the Republic of Bulgaria, shall be a part of the domestic law of the country. They shall take precedence over any conflicting legal rules under the domestic legislation.
(5) All the normative acts shall be promulgated. They shall come into force three days after their promulgation, unless other period of time shall be stipulated therein. The Constitutonal court ruled that the legal effect of treaties signed and ratified before 1991 Constitution entered in force is determined by the regime that was in effect at that time and especially according to the requirement for their publication. The treaties are part of the Bulgarian legal system if they are published or if there was no requirement to be published. If they are not published they do not have primacy to the contravening provisions of the national legislation. They might acquire the superseding effect over the contravening norms of Bulgarian legislation from the moment of their official publication. See **Мотиви на Решение N 7 от 1992 г. по к.д. N 6 1992 ., ДВ, N 56, от 1992 г.**

[23]Article 85. (3) stipulates that the signing of international treaties that require constitutional amendments must be preceded by the passage of such amendments. Under Art.149.(1), 4 The Constitutional Court rules on the consistency between the international treaties signed by the Republic of Bulgaria and the Constitution, prior to their ratification, as well as on the consistency between the laws and the universally accepted standards of international law and the international treaties to which Bulgaria is a signatory; **The Constitution and the Participation of Bulgaria in international agreements,** edited by E. Konstantinov, Sofia, 1993; **G. Tisheva, I. Muleshkova,** Relations between the domestic legislation of the Republic of Bulgaria and the international human rights standards, the Human Rights magazine, Issue No. 1, 1997, 4-9.

[24] The supranational, direct, immediate and horizontal effect of EU law is provided by the proposed EU clause in the constitution providing for transfer of sovereign powers to the EU and its institutions.

[25] These undoubted characteristics of the European law are formulated by the Court as early as the beginning of the 60s, N.V. Algemeine Transport - en Expeditie Onderneming van Gend & Loos, v. Netherlands Fiscal Administration; Case 26/62; Costa v. ENEL; Case 6/ 64. See in a detail **E. Stein**, Lawyers, Judges and the Making of a Transnational Constitution, American Journal of International Law, vol.75, January 1975, N 1, 1-27; **P. Pescatore**, The Doctrine of Direct Effect, European Law Review, 8, 1983, 155-157 ; **J. Weiler**, The Community System: the Dual Character of Supranationalism, Yearbook of European Law 1, 1981; **A. Easson**, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI , Florence, 1994-1995

Bulgaria's Constitution of 1991 incorporates both functional and institutional guarantees for maintaining its supremacy. The democratic principles of popular sovereignty, separation of powers, political pluralism and the rule of law are designed to assure constitutional supremacy in the functioning of the constitutional government.

The specialized, concentrated, abstract and posterior review by the Constitutional Court is a constitutional guarantee for the supremacy of the Constitution.

The issue of the status of the international instruments on human rights has been extensively treated by the Venice commission of Democracy through law of the Council of Europe.[26]

Multilevel constitutionalism affects constitutional courts and he functions they perform in many ways. Here I will limit myself on the functional performance and interaction between the constitutional courts and their functions.

Supranational courts do not form another tier or instance in the system of courts neither they constitute another level of constitutional courts, though there are issues in their jurisdiction that are common to the national constitutional courts.

European Court of HR and ECJ have brought structural and functional changes in the performance of national courts and even more substantially to the constitutional courts[27]

No doubt the primary and most important effect of the supranational European courts were strengthening of community legal order and securing Europe as a legal space where human rights in the ECHR and political interaction in the Council of Europe form the current shape of regional cooperation between the nation states and their peoples in Europe.

However, the main effect on judicial protection of rights and on the functions of the constitutional courts should be traced in the direction that the supranational courts directly interact with national courts, on one side, and with the constitutional courts, on the other. Two trends might be observed in constitutional review in Europe within the relationship of European supranational and national courts, after the jurisprudence of ECJ and European Court HR has empowered the ordinary courts and judges in a way that they might undermine the role of the Constitutional courts to review national legislation. On one side jurisprudence of the supranational European courts has centralized the system of review of legislation within their own jurisdiction and interpretation of EU law and ECHR. On the other , especially after Simmental revolution the system of judicial review in the nation states in Europe that have opted for centralized concentrated posterior and abstract review by specialized constitutional courts has been to some extent decentralized by introducing judicial review of legislation by the national ordinary courts for compliance to EU law or ECHR in concrete incidental manner in concrete cases with the decisions validity inter partes.

[26] See The Status of International Treaties on Human Rights,Collection Science and Technique of Democracy, N 42,Council of Europe Publishing, Strasbourg, 2006

[27] For extensive treatment see **V.F.Comella**, Constitutional Courts and Democratic Values, Yale Univ. Press, London, 2006, 123-128