

**The concept of constitutional justice  
as seen from the Austrian perspective  
St. Petersburg 17.5.2016**

**I.**

I would like to thank you most cordially for the honourable invitation which has been extended to me to take part in this international conference on the occasion of the 25<sup>th</sup> anniversary of the Constitutional Court of the Russian Federation, which will be dedicated to questions of constitutional jurisdiction.

On behalf of the Austrian Constitutional Court let me address my sincere and heartfelt congratulations to all colleagues at the Constitutional Court of the Russian Federation on the occasion of this special anniversary. I wish you every success for the future in delivering your important tasks, serving the rule of law and democracy in your country.

Historically, the ties linking the constitutional courts of the Russian Federation and the Republic of Austria have always been close. They have provided many opportunities for sharing interesting opinions and experiences, as well as for personal encounters in a friendly and open atmosphere. It is with great pleasure that I look forward to cultivating these ties also in the future.

**II.**

The model of a democratic state which is governed by the rule of law is based on the concept of the primacy of the Constitution.

This concept of primacy means that every act of the state must be based on, and consistent with, the Constitution: legislation, the executive (government and administration), as well as the judiciary. No state institution is exempted, nobody may "stand above the Constitution".

In order to lend effectiveness to this binding character of the Constitution in the day-to-day implementation of acts of the state, it takes institutions which, in actual fact, ensure compliance with the Constitution.

In Austria, the most important of these institutions is the Constitutional Court.

The Austrian Constitutional Court was set up by Federal Constitutional Law on 1 October 1920. This Constitution was adopted at the end of World War I, following the downfall of the Austro-Hungarian monarchy, for the then newly founded Republic of Austria.

The idea of constitutional jurisdiction, i.e. the review of compliance with the Constitution by a separate, specialised court, is largely based on the following idea: Disputes on the interpretation and application of the Constitution are not only political but also legal conflicts. As such, they can only be decided by a court, i.e. using the tools of justice, not just those of politics.

The Austrian legal scholar and father of this idea, *Hans Kelsen*, once stated in his writings that constitutional jurisdiction is the true "guardian of the Constitution". Its eminent importance for the rule of law has once been aptly described in the following words: "A Constitution without a constitutional court which has the power to annul acts of the state that are unconstitutional would be tantamount to a light that does not shine!"

Constitutional jurisdiction is entrusted with ensuring that all state acts are in keeping with the Constitution, and in particular with the protection of the fundamental rights of the individual vis-à-vis the state and its machinery of power. In addition to its overriding importance for the rule of law, constitutional jurisdiction makes a significant contribution to strengthening democracy and hence the political stability of any state.

Of course, this important function entails a high degree of responsibility. This responsibility requires a particular judicial ethos, i.e. a mental attitude borne by the highest possible professional qualification, by a passionate commitment to the enforcement of the constitution, by an invariable distance from political, social or personal interests, and by the intransigent willingness to decide unbiasedly.

Only if all members of a constitutional court incessantly strive towards these goals, the court will be in a position to cope with the tasks assigned to them for the benefit of state and society, no matter how numerous or how difficult these tasks may be.

### III.

At the time of its onset, the Constitutional Court of Austria was more or less the first court worldwide especially set up to deal with constitutional issues. By now, however, constitutional justice has spread all over the world, in Europe, in Asia, in Latin America as well as in Africa.

It is by no means a coincidence that constitutional courts have been set up in many states since the end of World War II, especially during transitions from dictatorial regimes to democracies governed by the rule of law: Italy and Germany were the first, followed by Spain and Portugal, and ultimately many Central and Eastern European countries. Apparently, the establishment of these constitutional courts was meant to pave the way for these states towards the rule of law and democracy, and to safeguard these achievements also for the future.

At this point I must insist that it would be wrong to see constitutional jurisdiction as being in contradiction with democracy. Democracy, in fact, must not be misunderstood as the "unrestricted rule of the majority" (Kelsen); on the contrary, the nature of democracy implies that the political powers represented in Parliament constantly seek compromise between majority and minority. In such a system, the function of the constitutional court becomes one of effectively protecting the rights of the minority and, above all, the fundamental rights of the individual, against encroachments by the majority and the very state it represents. When a constitutional court thus reviews acts of law-making by Parliament as to their constitutionality, it ultimately exercises a function that safeguards democracy.

### IV.

When interpreting the constitution, the constitutional court cannot avoid limiting the scope of political decision-making, thereby replacing the choices of Parliament and Government with

judicial choices. Constitutional justice therefore is a highly political function called upon to operate on the border between legal review and politics.

This functional ambiguity also reflects the constitutional court itself. On the one hand, it is a genuine court within the constitutional meaning because the basis of its decisions are only legal norms, above all the constitution, the highest ranking norm in the legal order, and the members of the court are independent and cannot be removed from office but by the court itself.

On the other hand, the judgments of the constitutional court may have considerable political impact.

This applies especially to the constitutional review of parliamentary statutes. This power most clearly reflects that the „last word“ on interpretation and implementation of the constitution remains with the constitutional court. If a statute runs counter to the constitution, the constitutional court must, when requested to do so, repeal it, even if this judgment may appear to be inappropriate in political terms.

Of course, this may give rise to tensions with Parliament and Government. Court decisions, by their very nature, tend to be welcomed by one party and rejected by the other, depending on the different interests. This holds in particular for decisions rendered by a constitutional court, which is always called upon to rule on issues that arise from conflicting ideologies or political or social interests. However, such conflicts must not prevent a constitutional court from carrying out its duty to review compliance with the constitution and to protect human rights.

## V.

For the legitimacy and effectiveness of a constitutional court it is essential that it can decide in full independence and, above all, free of any political intervention. This independence is a prerequisite for a constitutional court to win the trust of the public at large. It is this trust of a country's citizens in the correct delivery of tasks, uninfluenced and not susceptible to being influenced, that is the most valuable asset of every constitutional court. In politically or

socially difficult times, the court can rely on it when making its contribution to guaranteeing the rule of law and democracy.

## VI.

However, it would be an illusion to believe that any constitutional court can maintain the rule of law by its own authority. This becomes manifest also if you take the Austrian Constitutional Court as an example, which meanwhile looks back on a long and eventful history. After a much-promising start in the early 1920s, it was eliminated as early as in 1933 by the fascist regime governing Austria at that time. It was only in 1946, after the end of World War II and after the national-socialist tyranny had been overcome in Austria, that the Austrian Constitutional Court was able to resume its work. This look back into Austria's history, but also recent developments in some European states make one thing clear:

Democracy and the rule of law is nothing we should take for granted. Their existence must be safeguarded and defended anew, day by day. Any such endeavour requires economic and social stability and, most importantly, that the rule of law, human rights and democracy become values which are embedded in the minds of a country's citizens.

## VII.

Thank you once again for this invitation. I am delighted that you have given me an opportunity to further strengthen the long-standing cooperation between the constitutional court of the Russian Federation and that of the Republic of Austria.

**Abstract**

Constitutional justice is a key element of a state committed to democracy and the rule of law, which implies that all state action, including parliamentary legislation, must be based on, and consistent with, the constitution.

When interpreting the constitution, a constitutional court cannot avoid narrowing the scope of political appreciation left to parliamentary legislation. Constitutional justice therefore is an eminently political function.

The legitimacy of constitutional justice and its effectiveness necessarily depend on its independence. Only if a constitutional is, and appears to be, independent of all other state organs as well as of political parties and other social pressure groups, it will gain such confidence which courts in general, and a constitutional court in particular, in a democratic society must inspire in the public.