



NEW CHALLENGES AND OPPORTUNITIES IN CONSTITUTIONAL JUSTICE

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Dear Mr President,

Honourable Judges,

Ladies and gentlemen!

I would like to thank President Özkaya for inviting me to share some thoughts with you today at the symposium held to mark the 63rd anniversary of the establishment of the Constitutional Court.

I. INTRODUCTION: CONSTITUTIONAL DEMOCRACY: BALANCING DEMOCRACY AND THE RULE OF LAW

This is a very challenging topic because, historically, we find ourselves in a crisis of constitutional democracy and representation.

What challenges does constitutional justice face in this context?

In public, our form of government is usually referred to simply as 'democracy'.

However, when discussing the role of constitutional jurisdiction, it is more precise to use the term 'constitutional democracy'.

This term has both political and legal connotations.

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This reflects the fact that constitutional democracy, as a form of government, represents a unique combination of politics and law.

Constitutional democracy, often referred to as 'liberal democracy', differs from all other 20. and 21. century forms of government, such as authoritarianism, autocracy and totalitarianism.

This distinction is based on three main criteria: First, the extent of individual freedom; second, the extent of human rights; and third, the degree to which citizens can influence government policy and personnel.

In a constitutional democracy, citizens have the greatest individual freedom, the widest area protected by human rights and the greatest influence on government. In an authoritarian regime, these goods are considerably less present, and in an autocracy they are even less present. In a totalitarian state, citizens have practically none of these goods.

Individual freedom, human rights, and the opportunity to influence politics alongside others in a structured process are attractive features that people in a constitutional democracy often take for granted. They are often not even aware of them in their daily lives.

However, an increasing proportion of the population of a democratic country does not value these opportunities to participate in policymaking. This segment of society tends towards anti-democratic ideas and actions and is unwilling to defend this form of government when it is threatened.

Conversely, when these opportunities are restricted in an authoritarian system or largely eliminated in an autocracy, especially in a totalitarian state, people yearn for them.

The bravest people become prepared to fight for them, often at the risk of their freedom or even their lives. Therefore,

the idea of liberal democracy does not seem to be destructible in principle.

II. TWO ELEMENTS OF CONSTITUTIONAL DEMOCRACY: DEMOCRACY AND THE RULE OF LAW

Constitutional democracy consists of two elements, namely democracy and the rule of law. These elements are combined in a unique way.

Democracy is an institutional system that unites and consolidates the will of individual citizens, turning it into practical political decisions.

The actions of democracy thus reflect the collective will of citizens. However, this will is never uniform; rather, it reflects a variety of different ideas that compete with each other in a complex process. Decision-makers can then discuss them — ideally, using rational arguments. Ultimately, the decision is made by the majority.

The most important institution in a democracy is the election of political decision-makers. Ensuring that citizens are free to form their own opinions before voting is equally important.

Fundamental rights ensure that citizens can form their own opinions. The relevant fundamental rights include freedom of opinion, assembly, and association. Additionally, freedom of information and other fundamental rights must be considered.

These requirements must be met not only formally, but also factually. Only then can we speak of free elections that democratically legitimise parliament and other elected representatives.

If these conditions are not met, the elections cannot be recognised as free. Consequently, the results of the elections cannot be considered democratically legitimate.

Democracy is therefore the first and most important pillar of the modern constitutional state.

However, it cannot exist on its own in the long term. It is not sustainable in itself.

Democracy can only become sustainable if it is complemented by the second pillar of the modern constitutional state.

This second pillar is the rule of law.

The institutions of the rule of law — especially the constitutional judiciary — ensure the practical functioning of democracy.

This relates, in particular, to compliance with the government's, administration's and parliament's competences.

On the other hand, the courts, particularly the constitutional courts, must control the conditions that guarantee citizens' freedoms, in particular, the freedom of opinion.

Thus, the modern constitutional state is thus characterised by two structural principles: first, the democratic principle of majority rule, and second, the counter-majoritarian principle of the rule of law, based on the independence of the judiciary from the majority-based institutions of the executive and legislature.

III. CONSTITUTIONAL JURISDICTION AS AN INDISPENSABLE INSTRUMENT FOR SAFEGUARDING THE MODERN DEMOCRATIC CONSTITUTIONAL STATE

Constitutional jurisdiction plays a key role in maintaining and safeguarding this structure of the modern democratic constitutional state. The constitutional judiciary exercises independent control over the government, administration, and parliament.

In a democratic constitutional state based on the two pillars of democracy and the rule of law, this function is indispensable.

In the long term, a democratic constitutional state without constitutional jurisdiction is not possible. Without it, the state would become corrupt, erode and ultimately collapse, turning into an authoritarian regime.

The reverse is also true.

Only democratic constitutional states require independent constitutional courts. In an authoritarian regime, autocracy or totalitarian state, an independent constitutional court would be superfluous.

The fact that there are formally independent constitutional courts in some such states that are not really independent and therefore cannot fulfil their function properly has more to do with political propaganda.

Indeed, some of the courts that are members of the World Conference of Constitutional Justice do not fulfil the rigorous standards required for the effective oversight of the executive and legislative branches in modern constitutional states.

IV. THREATS TO THE DEMOCRATIC CONSTITUTIONAL STATE

Ladies and gentlemen!

For about a decade, we have been experiencing a global crisis of democracy and the modern constitutional state.

The historically unique system of the modern constitutional state is under pressure from both outside and within.

Right now, democratic Ukraine is fighting back against Russia's imperialist military attack.

At the same time, in many democratic states we are seeing the rise of parties that question the core values of constitutional democracy.

Some of these states are moving towards majoritarian authoritarianism or even autocracy.

There are many reasons for this negative development. Nevertheless, there are much stronger reasons to defend the democratic constitutional state.

When we consider the alternatives — an authoritarian regime, an autocracy or even a totalitarian state on the one hand, and anarchistic chaos on the other — we must admit that, in the long term, constitutional democracy is better for people and more successful than the previously mentioned alternatives.

V. CHALLENGES FACING CONSTITUTIONAL COURTS

Constitutional courts have a special responsibility for maintaining and defending the modern constitutional democratic state. This responsibility stems from their unique position within the state's structure.

They stand at the interface between politics and law. Their task is to scrutinise politics through the lens of the law. In this way, they ensure that politics remains bound by the constitution and democracy, and that political mistakes, whether intended or not, are corrected.

The constitutional courts thus fulfil the function of a self-correcting mechanism of the democratic constitutional state. They therefore make a significant contribution to the effectiveness and sustainability of the democratic constitutional state.

Through their watchdog function, the constitutional courts also play a preventive role in reducing the overstepping of competences by the political organs of the state to a minimum, at least where it is intended. This enables the state to function more smoothly and effectively.

Today, the old and new threats to the constitutional

democratic state pose particular challenges for the constitutional courts.

I would now like to highlight and explore *three* of these challenges in more detail.

A. AUTHORITARIAN-POPULIST CHALLENGES TO THE STRUCTURE OF THE DEMOCRATIC CONSTITUTIONAL STATE

Firstly, there is the authoritarian-populist challenge.

As I have already explained, the structure of the democratic constitutional state rests on two pillars: democracy and the rule of law. There is a balance between these two elements.

On the one hand, the content of the rule of law — the legal norms — is essentially created by the democratically legitimised legislature.

The purpose of democracy is to ensure that laws are made according to the will of the majority.

However, democracy must not degenerate into the tyranny of the majority.

This is why the rule of law imposes limits on democracy. These limits are set out in the constitution and in the general principles of law developed by constitutional courts and academia.

However, this system of checks and balances is increasingly being called into question by populist political forces.

They want to weaken the rule of law in the name of democracy. Populists are calling for checks and balances to be dismantled in favour of executive power being concentrated in the hands of a few.

Constitutional courts and other independent institutions are particularly targeted. Populist forces are trying to restrict

their powers and control the appointment of judges.

This balance is certainly not rigid or the same for all democratic states at all times. Nevertheless, a significant shift in this balance would jeopardise the democratic constitutional state. This would pave the way first to majoritarian authoritarianism and then to an authoritarian regime.

In this situation, the constitutional courts play a decisive role. They are the guardians of the constitution.

More precisely, they not only guard the formal constitution, but also the model of government of the democratic constitutional state as a whole.

It may therefore be possible to derive the power of the constitutional courts to reject constitutional amendments that have been adopted in a formally valid manner but which destabilise or even destroy the model of the democratic constitutional state.

To meet this challenge, the constitutional courts must have the confidence to protect not only the formal constitution, but also the democratic constitutional state as a whole.

B. PRESSURE ON JUDICIAL INDEPENDENCE

Linked to this is the second challenge: the increasing pressure on judicial independence. Connected to this is the risk of the judicial system being influenced by politics - the politization of judiciary.

This is particularly relevant in states in which populist parties have already come to power or exert considerable political influence, whether in government or in opposition.

These parties seek to strengthen the executive's direct control over the appointment of judges. More broadly, they want to bring independent state institutions under government control.

It is also worrying to observe the increasing number of

rhetorical attacks on judges by politicians. The European Court of Human Rights has long prohibited verbal attacks on the judiciary and set strict limits on politicians criticising court decisions.

This is only natural, given that courts are expected to have special authority outside of politics. However, since the election of the new US president, political rhetoric against judges has intensified there and spread to other parts of the world.

To meet this challenge, the constitutional courts must have the self-confidence to protect not only the formal constitution, but also the democratic rule of law as a whole.

As long as judges are not directly hindered in their freedom or the exercise of their office, it is their internal independence that matters.

Judges must be steadfast. Even if they are treated unfairly or rudely by politicians or the public, they must not be misled and must focus solely on defending the democratic constitutional state for the good of society in their decisions.

C. NEW CHALLENGE – THREATS TO THE INTEGRITY OF PUBLIC OPINION-BUILDING BY DIGITAL TECHNOLOGY AND FURTHER DEVELOPMENT OF THE PRINCIPLES OF SELF-DEFENDING DEMOCRACY

Now, let us turn to the third challenge for the democratic constitutional state (and thus also for its guardians - the constitutional courts).

This new challenge involves the covert manipulation of public opinion, which has been made possible by digital technology.

Those who wish to overthrow democracy have identified its most vulnerable point. This is the public forum, where public opinion is formed.

Democracy is a system in which the state reflects the opinions of its citizens to a greater or lesser extent.

Conversely, citizens contribute their opinions to politics and participate in the state's decision-making process. Democracy certainly does this better than other forms of government.

Citizens' many opinions are condensed by intermediary bodies — particularly political parties and the pluralistic, free press, which is bound by certain standards — and processed into operational policy.

It is also at this intermediary level that argumentative debate about the various alternatives takes place.

This system is not and never has been perfect. However, it has enabled citizens to form their own opinions and has promoted rational politics.

In the last decade social media has largely replaced this system with a new infrastructure that exposes autonomous opinion formation by citizens, and consequently the state's politics, to considerable risk of targeted manipulation.

At the heart of this infrastructure are algorithms that prioritise polarising and emotionally charged content to maximise user engagement. This design encourages the rapid spread of misinformation and creates 'filter bubbles' that undermine democratic discourse.

Additionally, platforms collect substantial user data for microtargeting purposes.

This allows for the creation of customised messages that exploit individual vulnerabilities. Automated bots and fake accounts can spread content en masse, simulate artificial trends, and create the illusion of broad support through practices such as 'astroturfing'.

Only a few large technology platforms have a global monopoly on operating this infrastructure. In doing so, they disseminate their own political preferences and control the

political views of citizens by using their algorithms to decide which views are seen and, more importantly, how widely they are seen.

This infrastructure is exploited also by authoritarian regimes to control their citizens, as well as by radical political forces, religious fundamentalists and supporters of terrorism, not to mention hostile states, who use it to manipulate public opinion in democracies in their favour in a non-transparent manner.

This undermines democratic values and consensus on the basic principles of coexistence in a democratic society.

This three-tier architecture — consisting of digital infrastructure, control by owners and targeted, covert manipulation — creates a synergistic ecosystem of influence that undermines democratic processes.

The emergence of AI-powered tools accelerates this dynamic and poses an existential threat to the integrity of democratic opinion formation by citizens.

Constitutional democracy is a complex system of principles and rules. It has also created political and legal mechanisms to protect this system of government.

One such mechanism is the basic principle of self-defending democracy.

Developed after the Second World War, this principle states that democratic freedoms must not be directed against democracy itself.

This fundamental principle has been recognised and consolidated by the European Court of Human Rights in three landmark judgements. These were the judgements in *Vogt v. Germany* (1995), *Refah Partisi v. Turkey* (2003), and *Zdanoka v. Latvia* (2004 and 2006).

The democratic constitutional state reacts to new developments, including new threats. According to

comparative government theory, this governmental model is the most adaptive and resilient. This is why its rules and principles are constantly evolving. Democracy was understood differently 100 or 50 years ago. It is understood differently today.

The same applies to the historically relatively new basic principle of 'self-defending democracy'. This principle is also constantly evolving.

In view of new dangers, especially the technological possibility of manipulating public political opinion, I believe it is time to expand this protective mechanism to guarantee the integrity of democratic opinion formation.

Constitutional courts have a special responsibility here. They must apply the principle of self-defending democracy to new situations.

On the one hand, this principle is intended to effectively defend the democratic constitutional state.

On the other hand, it must not restrict the democratic freedoms of citizens beyond what is absolutely necessary.

In other words, it should protect the democratic constitutional state effectively, without encouraging authoritarianism and paternalism.

Finding this balance is a particularly challenging task for the constitutional courts.

Ladies and gentlemen,

I have tried to highlight the special role of constitutional courts in democratic constitutional states, where law and politics meet.

I have also outlined three specific challenges that I believe are characteristic of our times and that many, though not all, constitutional courts are facing.

Thank you for your attention!