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***Development of Constitutional Law  
through Constitutional Justice: Landmark Decisions  
and Their Impact on Constitutional Culture,  
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**Review**

In 2019, international legal culture in the area of constitutional law was enriched with a new and exceptional volume entitled *Development of Constitutional Law through Constitutional Justice: Landmark Decisions and Their Impact on Constitutional Culture*.

Published under the auspices of Gdańsk University Press and edited by Professor Rainer Arnold, Professor Anna Rytel-Warzocha, and Professor Andrzej Szmyt, the volume is dedicated to the memory of Paweł Bogdan Adamowicz, President of the Gdańsk Municipal Council, Vice-Rector of Gdańsk University and Mayor of the city, a protector of constitutional values, a humanist, and a true European, devoted to the cause of tolerance, whose death was so untimely.

The volume brings together papers presented during the *International Congress on European and Comparative Constitutional Law* held on 20–23 September 2018, celebrating the Congress's 20<sup>th</sup> anniversary in Gdańsk, a city of great importance for Europe, since it was the birthplace of the Solidarity movement, which is considered one of the causes of the fall of communism in Central and Eastern Europe.

The cooperation of the University of Gdańsk and the Faculty of Law made it possible to bring together at the same time and in the same place a range of university professors and prestigious scholars, as well as practitioners of constitutional law from different states.

We are honored that our country, Romania, was among the states contributing through their representatives to the conference's debates and, especially, we are honored by the opportunity to share with the readers of *Gdańsk Legal Studies* some thoughts on the post-congress volume. It is a valuable publication, useful for both theoreticians and practitioners of constitutional law, but also for PhD candidates, MA students, and undergraduates.

The volume has a total of 425 pages, gathering reflections from numerous constitutional law specialists from different states who have constructively approached the subject of constitutional justice through relevant commentary on the landmark decisions of the constitutional courts in their own states, and by emphasizing the essential and decisive role played by constitutional justice in the interpretation and development of constitutional law.

The interest generated by the conference was remarkable, because the theme, although a classic one, is of the utmost and enduring importance. It is clear that the supremacy of a state's constitution would remain a simple theoretical matter if there were no appropriate guarantees. The answer that Hans Kelsen gave in 1931 in the paper "Qui doit être le gardien de la Constitution?" (Who Should Be the Guardian of the Constitution? – Paris, Michel Houdiard Éditeur 2006, trans. Sandrine Baume), stating that the only guarantee for the supremacy of the Constitution is constitutional justice, remains a point of reference in relation to the birth of the concept of constitutional justice. Over time, constitutional justice has built up its legitimacy by asserting the importance of protecting human rights and limiting power. However, these are subsequent to the assertion of the supremacy of the constitution.

Constitutional justice is the crowning glory of the rule of law, the main objective of which is effectively to guarantee rights and fundamental freedoms.

These ideas are reflected in the Preface to the volume by Professor Rainer Arnold from the University of Regensburg. He emphasizes the fact that "constitutional justice has the competence and even the obligation to complement the written text of the Constitution, in particular in the field of values, in order to protect the individual against all threats to their freedom emerging in the course of time."

These initial reflections are developed by Professor Arnold in his article "The evolution of the German *Grundgesetz* through constitutional jurisprudence – some aspects," in which he convincingly illustrates the idea that "the FCC has confirmed the leading principles of the Constitution: the value orientation, stability of the political system, federalism and, with some reservations, an openness to the European and international community. It has especially emphasized dignity-oriented anthropocentrism with a vivid attention to an effective fundamental rights protection conceived as specifications of the central principle of freedom and moderated by the omnipresent instrument of proportionality. Rule of law has been associated with this value perspective and melted together into a functional unit."

An interesting and well-researched plea regarding the role of constitutional justice as a guarantor of the separation of state powers and protector of the rights and fundamental freedoms of citizens is made by Dragoljub Drašković, President of the Constitutional Court of Montenegro. He states that "Montenegro as a contemporary constitutional state has established a legal order based on the principle of the rule of law, and has placed within it the Constitutional Court whose core competence is the protection of constitutionality and legality, as well as of human rights and freedoms, or in other words the protection of the Constitution as a whole."

The role of constitutional justice as a neutral power and as a protector of rights is dealt with in "Protecting human rights and freedoms by constitutional control in Ukraine: constitutional complaint v official interpretation" by Professor Ihor Slidenko, Judge of the Constitutional Court of Ukraine, and Professor Dr. Sergiy Panasyuk of the Ukrainian-American Concordia University in Kyiv. They underline the fact that "the constitution complaint is a new instrument of human rights legal protection in Ukraine and in order to have real results or to understand a problem of implementation of such constitutional institute, Ukraine needs time and more real practice."

The article "Judicial (over)activism exemplified by the rulings of the Constitutional Tribunal concerning the democratic principle of the rule of law" by Professor Dr. Hab. Zbigniew Witkowski and Dr. Hab. Maciej Serowaniec from the Department of Constitutional Law, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń, highlights the important role played by the Polish Constitutional Court "in the initial implementation period of the democratic rule of law in the legal order. The advantage of the Tribunal's activism at that time was that the Constitution did not brake democratic changes, despite the fact that its core dates back to the times of real socialism."

Professor Leszek Garlicki, a former judge on the Constitutional Tribunal in Poland, a former judge at the European Court of Human Rights, and currently professor at Washington University in Saint Louis, and Dr. Marta Derlatka, a Warsaw lawyer, in their article that takes a historical perspective on the activity of the Polish Constitutional Court during the period 1996–2018, argue that its jurisprudence was "initially oriented on so-called procedural aspects of the rule of law. Also, the Court elaborated several *principles of decent legislation* like prohibition of retroactive laws, protection of vested rights and legitimate interests."

But, despite this experience, Poland has recently passed through a crisis of constitutional justice, showing evidence of a real "loss of the values of the rule of law," as Polish specialists in constitutional law claim. This crisis is also approached in the article by Professor Dr. Hab. Mirosław Wyrzykowski of the University of Warsaw. "The crisis was initiated in autumn 2015 by the combination of three elements: resolutions of the Parliament infringing the law, the President of the Republic and the President of the Council of Ministers. The constitutional crisis concerned the election by the Parliament of three judges of the Constitutional Tribunal to replace the judges already duly elected, the President's refusal to swear in the original three judges of the Constitutional Tribunal and the refusal of the Prime Minister to publish the judgments of the Constitutional Tribunal. The Acts passed in 2015 and 2016 regulate the Constitutional Tribunal in a way that is to be considered as violating the Constitution. The Constitutional Tribunal lost its role as guardian of the Constitution," notes Wyrzykowski. In a deeply critical spirit and with concern for the rule of law in Poland, the author concludes that "Poland has lost its constitutional identity, parliamentarianism emphasizing that there is an increasing risk of losing sustainable benchmarks for assessing the surrounding (non)constitutional reality."

"Constitutional Court within illiberal constitutionalism. Polish experience" by Professor Dr. Hab. Agnieszka Bień-Kacała of Nicolaus Copernicus University in Toruń

takes a similar critical line. She argues that “the application of illiberal judicialization of politics causes the defective functioning of constitutional courts. The adjudication is slowed down and the court is no longer an impartial and independent body. It becomes a servant of political will. As a consequence, the court starts to safeguard illiberal constitutionalism. Loyal constitutional judges deliver new readings of constitutional provisions to justify political actions of the day. The rights of an individual are no longer protected at the same level as in previous systemic solutions.”

After the presentation of theoretical arguments and following the same line of ideas, starting from the role held by the Constitutional Court as guarantor of compliance with the principle of the separation of state powers, Dr. Hab. Monika Florczak-Wator of the Department of Constitutional Law at the Jagiellonian University in Kraków, turns her attention to the constitutional crisis experienced by Poland. According to her, “the Constitutional Court has the authority to protect the principle of separation of powers,” but “when the Constitutional Court – as it currently stands in Poland – is subordinated to those who govern, and its judgments that do not meet their expectations are ignored, the Constitutional Court not only loses any real possibility of safeguarding the principle of separation of powers but also the legitimacy to take any measures in this field. A Constitutional Court subordinated to political powers ceases to be an objective and independent guarantor of the constitutional principle of separation of powers.”

As a comment on the above views, Andrzej Szmyt, Professor at the Faculty of Law and Administration, University of Gdańsk, brings to the attention of readers a dispute over the publication of judgments of the Constitutional Tribunal in Poland in 2015–2018, underlining that this kind of dispute has been simply an element in wider processes involving the conscious destruction of the fundamentals of the Polish constitutional system, starting in the fall of 2015.

An equally interesting approach is found in “European and Euro-Atlantic integration in Poland. Constitutional dimension,” in which Mirosław Granat, Professor of Constitutional Law at the Stefan Cardinal Wyszyński University in Warsaw, discusses the evolution of the concept of constitutional identity in Poland, mentioning that “since 1997, practical experience has shown that the Constitution can, to a large extent, evolve through the Constitutional Tribunal’s jurisprudence.” The professor does not agree with the claim that “the crucial role of the courts in interpreting the constitution has faced the criticism of politicians, and even legal scholars, as it was seen as *judicial activism*.” He continues his argument by ringing out an alarm regarding the situation after 2015: “The situation changed after 2015 when politicians used statutes to introduce changes concerning the judicial power. These changes were and still remain risky for the constitutional identity.”

Professor Dr. Hab. Piotr Tuleja of the Jagiellonian University in Kraków analyses the constitutional determinants of the de-legalization of Polish political parties by the Constitutional Tribunal and reaches the conclusion that “the Constitution does not give the Constitutional Tribunal proper grounds for adjudicating on the de-legalization of political parties.”

The issue of examining the conformity of the purposes and activities of the political parties with the Constitution of the Republic of Poland is developed in relation to the jurisprudence of the Polish Constitutional Tribunal by Professor Dr. Hab. Piotr Uziębło of the University of Gdańsk. He criticizes the defensive behavior of the Constitutional Tribunal and considers this approach dangerous for the democratic system.

Another key element of this volume is represented by articles dedicated to the role of a constitutional court in the formation and development of the constitutional culture of a state.

Thus, Professor Mathieu Disant of the University Lyon Saint-Etienne argues that Jean Monnet (France) at the beginning of his *Justice constitutionnelle et développement de la culture constitutionnelle. Observations à partir de la situation française* (Constitutional justice and the development of constitutional culture. Observations from the French situation) raises a pertinent question, namely: what is constitutional culture? From his point of view, it is a notion powerful, undecided, and hard to determine. Also, Disant wonders about the legal conditions for the development of a constitutional culture. With great refinement and deep analytical spirit, Disant shows that “one of the conditions is related to the existence of mechanisms adapted to the dissemination of constitutional norms,” while another one refers to the involvement of other factors, emphasizing the role of administrative and judicial courts, which must accept or withdraw the constitutional norms interpreted by constitutional jurisprudence. The author concludes by asking whether “the added value is due, in this, to an immersion of the branches of law and the interpretation of the judge in a broader legal-constitutional culture or is another way of saying that constitutional culture does not belong to constitutionalists.”

Sharing the point of view of Disant about the difficulty of defining constitutional culture, Professor Constance Grewe of the Robert Schuman University of Strasbourg and former Vice-President of the Constitutional Court, in her article “L’impact des grandes décisions des cours constitutionnelles sur la Culture Juridique. Une réflexion illustrée par la jurisprudence constitutionnelle allemande” (The impact of important decisions of constitutional courts upon legal culture: A reflection illustrated by German constitutional jurisprudence”) states that “the legal culture is not homogeneous but pluralist, it can be expressed and formed at all levels, from the individual through groups to the supranational level and therefore it can be challenged, modified, in short, that it is dynamic.”

Arta Vorpsi, expert in constitutional law, and Legal Adviser to the Judges at the Constitutional Court of Albania, in his discussion of the role of the Albanian Constitutional Court admits that it is difficult to describe the means by which the Court’s activity has affected the Albanian state and society in the past three decades. But one can notice the impressive growth of the Constitutional Court, despite its limited competence and despite a lack of understanding of its role among political actors or even among judges themselves. “Following the 2016 justice reform, which significantly affected the composition, jurisdiction and competences of the Albanian Constitutional

Court," the author stresses that the Court should focus on the consolidation of the rule of law, but also on the general preparation of Albania for its accession to the EU.

In turn, Professor Dr. Hab. Eugen Chelaru of the University of Pitesti, in his article "*Le rôle de la Cour constitutionnelle de la Roumanie dans la formation d'une culture constitutionnelle*" (The role of the constitutional court of Romania in the formation of constitutional culture), states that the formation of Romanian constitutional culture will be helped not only by the decisions of the Court solving constitutional legal issues between public authorities, but also by decisions exercising constitutional control of laws, *a priori* or *a posteriori*, the Constitutional Court having a privileged position in relation to other state institutions.

Despite the Polish constitutional crisis, to which many pages within this volume are devoted, Professor Dr. Hab. Ryszard Piotrowski of Warsaw University, in his article "The influence of the Constitutional Tribunal on the development of legal culture in Poland" emphasizes that the Constitutional Tribunal had and still has an important contribution to make in the development of Polish constitutional culture. He argues that "The Constitutional Tribunal plays a key role in the democratic state governed by the rule of law."

Further, the volume provides numerous areas for debate, the area of discussions being expanded to include the concept of European constitutional culture. Regarding this notion, discussion is opened by Jiří Zemánek, Jean Monnet Professor of European Law at the Charles University in Prague, who, in "The contribution of the Czech Constitutional Court to the European constitutional culture," raises a series of extremely topical questions: "What can be called *a European constitutional culture* in times of big challenges, such as the project of a Europe *united in diversity* is facing (Brexit; dispute on immigration policy; President Trump's "America first!")? Are we witnessing its sunset and fragmentation by a substitution of national constitutional identities? In which way is a constitutional court as the judicial body empowered to protect constitutionality contributing by references to the national constitutional culture to the process of constitutionalization of EU law?" Zemánek offers answers to these questions in his article.

Another remarkable article dedicated to European constitutional culture and the role played by the Court of Justice of the European Union in its formation is that written by Siniša Rodin, Judge of the Court of Justice of the EU. It states that "the constitutional culture of the European Union is constructed on liberal democratic assumptions that assume separation of powers, independence of the judicial branch, protection of individual rights and protection of minorities by counter-majoritarian safeguards."

In a further discussion of the role of the Court of Justice of the European Union, Viktor Muraviov, Professor at Kyiv Taras Shevchenko National University, and Dr. Natalia Mushak of the National Academy of Law Sciences of Ukraine conclude that "the EU Court of Justice practice resulting from its constitutional court functions consolidates the supranational elements of the European Union and to a large extent gives a powerful impetus to the transformation of the EU into a full-fledged state."

Another topic discussed refers to the impact of national constitutional jurisprudence in the acclimatization of European legal culture within national constitutional

cultures, by emphasizing the undeniable importance of constitutional judges. In this meaning, the article "*Conseil constitutionnel français et ordre juridique de l'Union européenne*" (The French constitutional council and the legal order of the European Union), Joël Rideau, Professor emeritus at the Sophia Antipolis University of Nice, argues that the interventions of constitutional judges may promote the adjustment of national legal norms to fit in with the requirements of the European Union's legal order. However, he also draws attention to the fact that such judges may represent obstacles to this adjustment through the adoption of decisions contrary to the fundamental principles of the European Union's legal order.

In this context, Professor Dr. Hab. Krzysztof Wójtowicz of the Faculty of Law of the University of Wrocław stresses in his article the importance of the independence of national courts. Judicial independence is part of the essence of the fundamental right to a fair trial, a right of significant importance, being a guarantee that all human rights resultant from EU laws will be protected, and therefore also protecting the rule of law.

The matter of the independence of national courts and of judges is developed by Dr. Hab. Anna Rytel-Warzocha of the Faculty of Law and Administration, University of Gdańsk. In her article, she carries out a detailed analysis of the jurisprudence of the Constitutional Tribunal in Poland.

Continuing this topic, Dr. Agnieszka Gajda of the Faculty of Law and Administration at the University of Gdańsk, in her article devoted to the right to a fair trial, argues that the jurisprudence of the Constitutional Tribunal significantly alters the understanding of the content of this right. After presenting a well-researched commentary on a Judgment of the Constitutional Tribunal of Poland of 20 April 2017, the author expresses the hope that the decision of the Constitutional Tribunal issued in 2017 will represent the next big step towards the total implementation of the constitutional right to a fair trial.

The issue of a constitutional referendum is taken up by Dr. Hab. Michał Jackowski of the University of Poznań. He discusses this at length in "Constitutional referendum in Poland and primary constituent power." He launches a debate regarding the admissibility, according to the Polish Constitution, of the referendum *ex-ante* on a revision of the constitution.

Another topic discussed in the volume is that of constitutional liability. This subject is developed by Professor Toma Birmontienė of Mykolas Romeris University in Vilnius. He asserts that "constitutional liability is a complex institution of constitutional law. Impeachment is one of the strictest forms, but not the sole form of constitutional liability. The legal and political aspects inherent in the nature of constitutional liability become closely intertwined in the application of this constitutional institution."

The success of this post-conference volume is completed by the article by Gabriella Mangione, Professor at the University of Insubria, who provides readers with an outstanding discussion of recent developments in Italian regionalism. The author argues that Italy is currently in the middle of a period of deep historical transformation, the end of which cannot be known yet, and that "the divide between the North and South,

the oldest and most persistent of Italian problems, has once again aggravated and severely conditioned public life.”

Also, another point of view worthy of mention is that of Professor Enver Hasani former President of the Constitutional Court of the Republic of Kosovo, who in his article discusses “the transfer of sovereignty in a comparative perspective, with a special reference to Kosovo and its transfer of judicial and other powers to an internationalized institution founded by the EU.”

Professor Aurel Băieșu from the Republic of Moldova proposes an analysis of the recent evolution of constitutional jurisprudence in his country, concluding that this evolution is part of a new model of constitutionalism based on judicial activism, which has gradually begun to appear in recent decades in European countries. This is followed by an article by Dr. Veaceslav Zaporojan, Judge at the Constitutional Court of the Republic of Moldova, who in a complex form develops the topic “*Le contrôle de la constitutionnalité des omissions législatives dans la jurisprudence constitutionnelle de la République de Moldova* (The control of the constitutionality of legislative omissions in the constitutional jurisprudence of the Republic of Moldova).

The issue of the economic neutrality of the Croatian Constitution is discussed by Professor Biliana Kostadinov of the Faculty of Law at the University of Zagreb, who indicates that “The economic neutrality of the constitution is the main theme of the relationship between the constitution and the economy under constitutional law compared to liberal democracies.”

Two more interesting studies strengthen the points of view expressed on the subject of constitutional justice and emphasize the fact that the reason for each legal institution should be sought, first of all, in history. Thus, Valentina Colcelli, Researcher on the National Research Council (Italy), in her article “From cosmopolitan individual status to European Union citizenship” goes beyond the pertinent issue of EU citizenship and stresses the importance of history in the development of a legal institution, by showing that “the diverse range of institutions across the EU is rooted in history.”

In addition, fully aware of the fact that one cannot truly know a legal institution without knowing its historical foundations, Professor Dr. Alexander Brösl, a former Judge on the Constitutional Court of the Slovak Republic, and Director of the Gustav Radbruch Institute of Legal Theory in the Faculty of Law, Šafárik University in Košice, and Ľudmila Gajdošíková, a former Judge on the Constitutional Court of the Slovak Republic, and Senior Researcher at the Institute of State and Law, the Slovak Academy of Sciences in Bratislava, present in their article “Landmark decisions on the history of the Constitutional Court of the Slovak Republic.”

We conclude this brief presentation of the articles gathered in the volume *Development of Constitutional Law through Constitutional Justice: Landmark Decisions and Their Impact on Constitutional Culture* with the hope that we have managed to interest potential readers. By harmoniously combining doctrine with jurisprudence, established opinions in judicial literature with their own opinions, analyzing constitutional regulations from several perspectives, and using accessible language and logically arguing



their ideas, the authors make a special contribution to deepening legal knowledge in the field of constitutional justice.

The value of the volume results from its particular way of presenting issues, from its critical attitude, and from the research methods used, but especially from the fact that the authors do not limit themselves to the simple statement of doctrinal opinions on the issues analyzed or to the simple presentation of data from practice, but aim to achieve a shared reflection on the significance of constitutional justice for their own countries and to contribute to the emergence of a transnational constitutional culture.