

WHO PROTECTS THE  
CONSTITUTION AND HOW?

# NOTION

- What is the protection of the constitution?
- What methods to protect?

# APPROACHES – CONSTITUTIONAL PROTECTION / JUSTICE

- Against abuse of authority by parliament (positive lawmaker) – CC (negative lawmaker)
- Parliament can create organs to control Gov't in their executive function (against abuse of fundamental rights)
  - ombudsmen

## IN OTHER WORDS

- Parliament (or Convention) creates the Constitution
- Parliament (or Convention) creates the institutions to interpret and protect the Constitution (CC, OMB, SC) in the Constitution and through legislation

# MORE SPECIFICALLY

- CC protects and interprets (applies) the Constitution: interprets the meaning of the fundamental principles of constitutionalism + functions of state organs, exercise of public power, protection of fundamental rights (*acquis constitutionnel*)
- HU: “the invisible constitution” – principles derived from the Constitution, and developed by the CC to accommodate the changes in law and society, without changing the text of the Constitution

# THE GENERAL THEORY OF CONSTITUTIONAL PROTECTION

- *How to protect the primacy of the norms of the constitution over “regular” laws?*
- *How to protect individuals (covered by the constitution) based on the constitution against abuse of power?*
- **“Constitutional justice”** – administration of justice (applying and interpreting the constitution) – ordinary courts: application and interpretation of laws (in light of the constitution)

# MAIN TOOLS OF CONSTITUTIONAL JUSTICE

- Control of constitutionality of legal norms (ex ante, ex post / abstract, concrete)
- Protection of individual rights – through different institutions (CC, omb) and processes (complaint, application)

# CONSTITUTIONAL JUSTICE AND JUDICIARY - MODELS

- Decentralized
- Centralized
- Mixed
- Quasi
- No

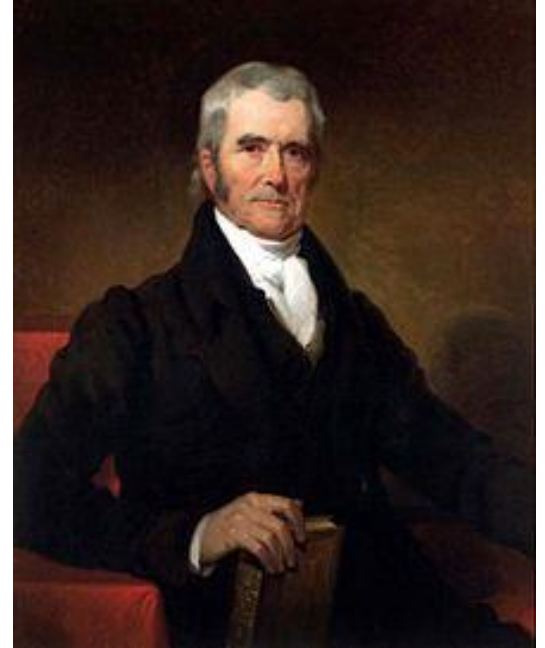


"Mr. Justice, must you keep repeating 'nobody can fire me, nobody can fire me, nobody can fire me'?"



# DECENTRALIZED MODEL

- US, some EU – 1803, 2010
- Parliamentary privilege (UK: no review)
- US - “limiting government” - 1803 – Marbury v. Madison – “first CC decision”
- Supreme judicial forum (no sui generis special organ)
- Individual rights protection
- No control of constitutionality

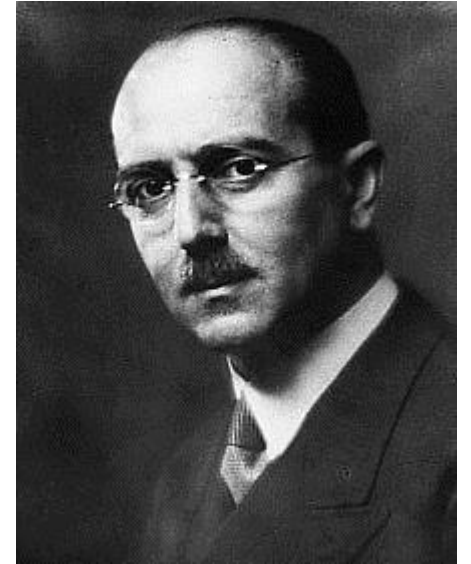


# DECENTRALIZED MODEL

- The role of the SC, lower courts – why decentralized?
- Inter partes decision – the role of precedents
- Judicial self-restraint
- Political question doctrine
- Writ of certiorari
- How does it work?

# CENTRALIZED MODEL

- Most of EU – 1920
- Kelsen – Austro-German tradition
- Sui generis organ to protect the constitution (historical reasons – “limiting government”)
- Control of constitutionality of norms
- Individual rights protection



# CENTRALIZED MODEL

- The role of the SC, lower courts??? If there is a sui generis CC
- Erga omnes decision (how different from inter partes)
- Annulment of the legal norms
- Does it decide political questions?
- Judicial self-restraint?

# MIXED MODEL (LATIN AMERICA)

- Builds on good practices from US and EU models
- One special court
- All courts can decide on constitutionality
- Typical: Latin-America



# QUASI CC

- Substitutes specific organs with specific rules
- Restricted functions
- Estonia, Finland

# NO CC

- Avoid the creation of judicial means for the protection of constitution
- Netherlands, UK (secondary ultra vires law)

# CONTROL OF CONSTITUTIONALITY OF NORMS

- EXEC, LEG, other public organs can initiate (or individuals)
- Ex ante (before adoption and publication) – as part of the political process issues of constitutionality arise – tools
- Ex post (after adoption) – two paths: actio popularis / “constitutional filters” / in concrete cases (judicial process)



# SUPREME COURT OF THE USA

- "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, §I,
- General terms of the Constitution – changing conditions, changing interpretations
- 9 justices from 1869
- President nominates, Senate votes
- „During good behavior”
- 7,000-8,000 civil and criminal cases every term



# SUPREME COURT OF THE UK

- 1399-2009 – House of Lords' Law Lords
- 12 justices
- Advertisement from 2009
- final court of appeal
- „concentrates on cases of the greatest public and constitutional importance”
- ECHR
- secondary ultra vires law



# FEDERAL CONSTITUTIONAL COURT OF GERMANY

- 2 senates (8-8 justices), 12 year-term
- 8 elected by the Bundesrat, 8 elected by the Bundestag
- Plenary („if one Senate intends to deviate from the other Senate’s interpretation of a specific legal matter”)
- „ (...) duty is to ensure that the Constitution of the Federal Republic of Germany (*Grundgesetz* – Basic Law) is obeyed”
- Great effect on other CC-s



# CONSEIL CONSTITUTIONNEL

- 9 members for 9 years (3 - President, 3 – President of the National Assembly, 3 – President of the Senate)
- + the former presidents
- Mostly ex ante constitutional control
- From 2010 ex post norm control



# OMBUDSMAN

- *„an Ombudsman is not a lawgiver or a social reformer, nor a knight in shining armor who challenges and defeats the administrative dragon at every turn.”*

(Robin K. Matsunaga)



# HISTORY

- Sweden, 1713
- Proto-ombudsmen - censors
- Scandinavian Countries
- After the Second World War
- 2004 – 120 Offices

# EUROPEAN MODEL

- After the Second World War
- 1989
- Related to the Parliament and the Government
- Appointed by authorities
- Protects the citizens from the state and the administration
- Protects the human rights
- Models:
  - Swedish
  - „English and French”



# THE SWEDISH MODEL

- Swedish Constitution in 1809
- Connected to investigation
- To inspect the administration
- Four now
- Nationwide competence





# THE ENGLISH-FRENCH MODEL

- More limited possibilities
- British:
  - Only initiated by the MP-s
  - Several different types
- Médiateur:
  - GOV appointment
  - Solve conflicts between the citizens and the administration

# EUROPEAN OMBUDSMAN

- Every EU country has some kind of OMB
- EU-Ombudsman – protects the citizens from the maladministration of the EU
- From 1995
- Connection with the MS OMB



# AMERICAN MODEL

- Alternative Dispute Resolution
- Related to the private sector
- Ombudsperson
- Generally not independent

# UNITED STATES

- Most OMB employed by companies
- Mediate between costumers and companies to avoid lawsuits
- Banks, insurence companies, universities
- State OMB: Alaska, Arizona, Hawaii, Iowa, Nebraska
- Model Acts to spread the model
- Standards:
  - Independence
  - Impartiality
  - Confidentiality
  - Credible view process



# CANADA

- First in 1967
- Types: classical legislative, broader public sector, private sector, universities
- Many legislative OMB
- Tax payer OMB, OMB for hospitals etc.
- Post OMB, Veterans OMB
- Getting more competence



# INTERNATIONAL LEVEL

- Most significant international organizations
- United Nations
- Organizations of the UN
- Beginnings
- Nowadays' level
- Monitoring

# NON-GOVERNMENTAL ORGANIZATIONS

- Their importance
- The history of the beginnings
- International level
- Regional level
- National level
- Possibilities of acting

# CIVIL SOCIETY ORGANIZATIONS

- The role of civil society in Human Rights Protection
- History
- Possible functions
- Typical roles
- Most important ones



# QUESTIONS FOR SELF-CHECK

- How can we protect the constitution in the national level?
- How can we protect the constitution in the international level?
- What are the models of Constitutional courts?
- What are the characteristics of the European Ombudsman?
- What are the differences between the European and American models of ombudsman?
- What are the purpose of NGOs?
- How can the civil society can help to protect the constitution?
- What is the meaning of the „negative lawmaker” concept?
- What is the concept of the „invisible constitution”?
- What is the meaning of the concept of „constitutional justice”?

# RESOURCES

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- Andrew Harding: The Fundamentals of Constitutional Courts  
Andrew Harding
- Sweet, A. S., 'Constitutional Courts', in M. Rosenfeld and A. Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford: Oxford University Press, 2012),
- Ian Darling: The Role of Ombudsman in Canada & the USA

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