

# Part 1



# **Avoiding Political Influence on Constitutional Courts – Is This Mission Possible?**

## **I. Introduction**

Constitutional courts play a different role in the field of politics. The establishment of a constitutional court is a political decision and a political process. However once a political decision on establishing a constitutional court is adopted and the constitutional court is composed, it should be free of any political nature. Otherwise the constitutional court would merge with political power and lose its nature of the judiciary. Yet is it in all cases that constitutional courts are able to avoid entering a political process? Do other branches of power at no point ever make any attempt to use the constitutional court while acting in their own interests, at times even seeking to limit the powers of the constitutional court, thereby undermining or ultimately denying the nature of the constitutional court as the guardian of the constitution and constitutional values? These and related questions will be addressed in the article.

## **II. Constitutional courts and politics. Limits of influence**

The principles enshrined in national constitutions with regard to the establishment of constitutional review institutions, their competences and functioning have plenty in common. Constitutional courts have the mission to ensure the protection of the constitution, values consolidated therein

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\* Professor of Mykolas Romeris University, Lithuania, former judge of the Constitutional Court of Lithuania (2005–2014).

and human rights. While implementing this mission, constitutional courts deal not only with purely legal but also with legal-political issues. Since constitutional law provides the rules to formulate the key legal principles that are universally understood and recognised in democratic states, such as the rule of law, separation of state powers, independence of courts and other principles, and their interpretation in constitutional jurisprudences unavoidably touches the political institutions and as a general rule, part of this competence is inevitably related to the implementation of policies and political conflicts. Therefore, it is not a rare occurrence that avoiding becoming part of a political process becomes a mission impossible for a constitutional court. This is especially pertinent when constitutional courts deal with the so-called hard cases, such as impeachment, formation of the government, constitutionality of constitutional amendments, deciding on state budgetary issues etc. In the adjudication of these cases, it is important that constitutional courts remain within the limits drawn by the constitution, as well as by the constitutional court itself. Going beyond the established limits, a constitutional court not merely gets involved in solving political conflicts by means of law and interpretation of the relevant constitutional provisions, but notably it becomes a principal actor – a political institution – in the political process and faces a risk of losing the status of a constitutional court. However, some constitutional courts have not managed to escape this fate<sup>1</sup>.

The Venice Commission has prepared a considerable number of its opinions on different problems encountered by constitutional courts and has drawn attention to certain attempts by politicians to interfere with the independence of these courts<sup>2</sup>.

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<sup>1</sup> This also applies to the Constitutional Court of the Russian Federation after it handed down its judgment of 19 March 2014 whereby it, in principle, declared Crimea a constituent subject of the Russian Federation.

<sup>2</sup> *Inter alia*, Opinion No. 849/2016 on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, European Commission for Democracy through Law (the Venice Commission), Strasbourg, 14 June 2016; European Commission for Democracy through Law (the Venice Commission), Venice, 11 March 2016; Opinion 720/2013 on the Fourth Amendment to the Fundamental Law of Hungary, European Commission for Democracy through Law (the Venice Commission), Strasbourg, 17 June 2013, etc.

## **1. Constitutional interpretation of the form of government**

The competence of constitutional courts in the adjudication of constitutional justice cases, in particular their powers to solve conflicts between state authority institutions and to formulate the rules for participants of the political process, comes very close to political processes. It has been increasingly recognised that constitutional courts (constitutional councils or, in certain cases, courts of general jurisdiction), especially in cases where they adopt interpretative decisions, become competitors to the legislature. However, their power of judicial interpretation has also its limits, though constitutional courts interpret these limits in a different way. The criteria that must (can) be followed by constitutional courts in deciding on whether it is indeed their competence to answer particular questions and whether, by doing so, they avoid directly entering the political area are very important. As a general rule, such constitutional justice cases are a result of political disagreements. As part of the judicial branch of power, constitutional courts, unfortunately, are not dissociated from political processes; the issues concerning the competence of other branches of state power, as well as the related disputes in the form of legal acts, often become part of the cases adjudicated by constitutional courts.

Constitutional arrangements can cause the formation and co-existence of state authorities to be either less or more smooth-going and cohesive. Constitutional review institutions, interpreting the provisions of the respective constitutions, have to ensure that the arrangement of state powers is compliant with the principle of the separation of powers, as well as that the functioning and empowerment of state authority institutions is effective and well-balanced.

Constitutional courts, while carrying out their basic task to protect the constitutional order, interpret the constitution and make thoughtful use of a set of purely legal tools. The constitutional court may help the constitution function more effectively, better achieve the constitutional objective of creating workable democratic state government and prevent constitutional crises. If they fail to act according to their mandate, constitutional courts may turn into competitors to the constituent power and, thus, overstep their constitutional assignments.

Questions related to the form of state government usually arise upon the restoration of statehood, enactment of a new constitution, or adoption of substantial constitutional amendments, forcing to reconsider questions that seemed to have been answered. Thus, while interpreting the provisions of the constitution, constitutional courts draw the limits of powers conferred

on presidents and prime ministers, and they decide issues concerning the competence of the legislature.

The judgments of the Lithuanian and Moldovan constitutional courts in which these courts, while deciding a constitutional justice case, answered the question as to which form of state government is implied, respectively, by the provisions of the Lithuanian and Moldovan constitutions provide a reasonable cause to once again discuss the powers of constitutional courts to deal with rather exceptional questions, supposedly requiring an explicit constitutional regulation in order to be answered. The ruling of the Constitutional Court of Lithuania of 10 January 1998<sup>3</sup> and the judgment of the Constitutional Court of the Republic of Moldova of 29 December 2015<sup>4</sup>, which can be viewed as examples of political influence on the constitutional doctrine, were adopted with a difference in time of more than a decade; however, they share considerable proximity with regard to the questions they dealt with while answering which form of state government is underpinned by the constitutional provisions and what constitutional powers are conferred on the President of the state in forming the government and nominating a candidate for the office of Prime Minister. The proximity of constitutional doctrines in general could be determined by various factors, including the development of statehood, shared features of the constitutional setup, similarities in political processes, although distant in terms of time, which were taking place in the states, etc.

The powers of the President in forming the government and deciding on a candidate for the office of Prime Minister to be approved by the Parliament are very sensitive political issues and are generally regulated under specific constitutional provisions, and in some constitutional arrangements determined by certain constitutional conventions. Constitutional conventions are very important in establishing a balance between state powers and are critical factors in avoiding constitutional conflicts.

Conflicts between presidents and prime ministers over appointment-related issues are not rare in the countries that adopted new constitutions and constructed the principles of state government based on the separation

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<sup>3</sup> Ruling of the Constitutional Court of the Republic of Lithuania of 10 January 1998, available at: [www.lrkt.lt](http://www.lrkt.lt).

<sup>4</sup> Judgment of the Constitutional Court of Moldova No. 32 of 29 December 2015 on constitutional review of the Decree of the President of the Republic of Moldova No. 1877-VII of 21 December 2015 on appointing a candidate for the position of Prime Minister, available at: <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=553&cl=ro>.

of powers<sup>5</sup>. In Lithuania, following the election of the President, the conflict between the Prime Minister and the President concerning the powers of the President (and the Parliament) in the appointment and release of the Prime Minister (and the Government) from office resulted in constitutional dispute and, consequently, led to the adoption of the ruling of the Constitutional Court of 10 January 1998.

In this ruling, the Constitutional Court clarified that, based on the competence of state institutions as established by the Constitution, the model of government of the State of Lithuania should be categorised as the form of parliamentary republic. At the same time, the Constitutional Court noted that the form of government of the State of Lithuania also has certain characteristics of the so-called mixed (semi-presidential) form of government. This is reflected in the powers of the Parliament (*Seimas*), the powers of the Head of State – the President of the Republic, and the powers of the Government, as well as in the legal arrangement of their reciprocal interaction<sup>6</sup>.

In the above-mentioned ruling, the Constitutional Court interpreted the constitutional powers of the President in relation to the appointment of the Prime Minister (and the Government)<sup>7</sup> to the effect that the President of the Republic may not freely choose candidates for the office of Prime Minister or ministers, since the appointment of these officials is in all cases dependent on

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<sup>5</sup> G. A. Toth, *From Uneasy Compromises to Democratic Partnership. The Prospects of Central European Constitutionalism?*, *European Journal of Law Reform* 2011, No. (13)1, pp. 80–96 and 84–85.

<sup>6</sup> Under the constitutional arrangements (the Constitution of the Republic of Lithuania 1992), the President is elected in direct elections. The Lithuanian constitutional system consolidates the principle of the responsibility of the Government to the *Seimas*, which determines the manner of the formation of the Government; the constitutional framework of the branches of state power entails that only the Government that has the confidence of the *Seimas* may accomplish its powers based on the principles of parliamentary democracy, which are consolidated in the Constitution.

<sup>7</sup> In the ruling of 10 January 1998, the Constitutional Court of Lithuania analysed the relationships between the President of the Republic and the Government, and stressed that they are regulated by the norms of the Constitution. Under the Constitution, upon the approval of the *Seimas*, the President of the Republic appoints the Prime Minister, charges him/her with forming the Government, and approves the composition of the Government; upon the approval of the *Seimas*, the President removes the Prime Minister from office; accepts the powers returned by the Government upon the election of a new *Seimas* and charges the Government with exercising its functions until a new Government is formed; accepts the resignation of the Government and, when necessary, charges it with continuing to exercise its functions or charges one of the Ministers with exercising the functions of the Prime Minister until a new Government is formed; the President of the Republic, upon the resignation of the Government or after it returns its powers, within 15 days, proposes a candidate for the office of Prime Minister for consideration by the *Seimas*, etc.

whether the *Seimas* has confidence in or distrust of them. The Constitutional Court stressed that the fact that the President of the Republic, as part of executive power, has some political possibilities of influencing the formation of the structure of the Government should not be ignored, either. It should be mentioned that the argumentation set out in the ruling contains, among others, references to French constitutional case law<sup>8</sup>.

The Constitutional Court of the Republic of Moldova, in its judgment of 29 December 2015<sup>9</sup>, faced analogous issues concerning the form of state government implied by constitutional provisions and the constitutional powers granted by these provisions to the President of the state in forming the government and in choosing a candidate for the office of Prime Minister for a new government<sup>10</sup>. Regardless of a decade-long period separating these decisions, their lines of argumentation share a great deal of similarity. Although the judgment of the Moldovan Constitutional Court contains no direct reference to the ruling of the Lithuanian Constitutional Court of 10 January 1998, both decisions in question can be regarded as illustrating the influence of political issues on constitutional doctrines.

In its judgment at issue, the Constitutional Court of Moldova extensively analysed the constitutional grounds for the constitutional obligation of the President of the Republic of Moldova in designating a candidate for the office of Prime Minister. The Constitutional Court examined the constitutional arrangements of France, Germany, Italy, the Czech Republic, the USA and other countries. The Moldovan Constitutional Court emphasised that, in no

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<sup>8</sup> In the above-mentioned ruling, the Constitutional Court of Lithuania noted that the constitutional regulation of the returning of the powers of the Government after the election of the President of the Republic reminds, at least partly, of the constitutional tradition of the Third French Republic, when the Government there would resign after a parliamentary election and after a presidential election. The resignation after a presidential election was called the 'resignation of courtesy' (*démission de courtoise*). After the 'resignation of courtesy', the Government had to be approved anew. This procedure is said to be meaningful due to the relation of the Government with the Head of State, and that it reflects certain tendencies in the development of the model of government of the state.

<sup>9</sup> Judgment of the Constitutional Court of Moldova No. 32 of 29 December 2015 on constitutional review of the Decree of the President of the Republic of Moldova No. 1877-VII of 21 December 2015 on appointing a candidate for the position of Prime-minister, available at: <http://www.constcourt.md/ccdocview.php?tip=hotariri&dodid=553&l=ro>.

<sup>10</sup> The complaint addressed to the Constitutional Court of Moldova mainly concerned the conditions for performing the duties of the President of Moldova in designating a candidate for the office of Prime Minister and referred to a set of interlinked constitutional principles, such as democracy, representative mandate and relationships between the Parliament and the President of the Republic while appointing the Prime Minister.

parliamentary republic, the President elected by the parliamentary majority is entitled to dissolve the Parliament for the reason that the absolute majority of members of the Parliament did not accept his/her candidate for the office of Prime Minister.

The Constitutional Court of the Republic of Moldova held that the relevant constitutional provisions (Article 98.1 of the Constitution) should be interpreted taking into account the parliamentary form of government of the Republic of Moldova. The Court found that the constitutional provisions (Article 98.1 of the Constitution) provide for the exclusive prerogative of the President of the Republic to designate a candidate for the office of Prime Minister. At the same time, the Court noted that, although it is exclusive, the designation prerogative cannot be discretionary, since the President may designate a candidate for the office of Prime Minister only following consultations with parliamentary factions. The essential element of the procedure of forming the Government is the vote of the Parliament; the Government will only be politically responsible before the Parliament that can dismiss it.

Following this reasoning and taking into account the principles set out in its case law, the Moldovan Constitutional Court held that, in order to secure the constitutional powers to propose a candidate for the office of Prime Minister, the President of the Republic, elected by a parliamentary majority<sup>11</sup>, must ensure, through consultations with parliamentary factions, both the support of the parliamentary majority and the possible constructive cooperation with the minority, which is in the opposition<sup>12</sup>.

In the event of the formation of the Government as a result of parliamentary elections, the President cannot but recognise the outcome of the popular vote, and the President takes note of the official results of the elections and entrusts the mandate to form the Government to a person who has been proposed by an absolute majority in the Parliament. Therefore, either a majority is formed

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<sup>11</sup> In the period of the adoption of the judgment of 29 December 2015, following the constitutional reform of 2000 and until March 2016, under the provisions of the Article 78 of the Constitution of the Republic of Moldova of 1994, the President was to be elected by the parliamentary majority.

<sup>12</sup> The Constitutional Court of Moldova assessed the discretionary right of the President to designate a candidate for the office of Prime Minister as legally illogical. At the same time, the Court recognised that the President cannot be denied the right to assess the character, competence, experience and, ultimately, the ability of a person, either politically involved or not, to lead the Government and to attract the political support of the parliamentary majority, which will support him/her for the tenure of the legislature, but the President has no constitutional basis to impose his/her own candidate.

of political forces in the Parliament or the Parliament is dissolved and early elections are conducted<sup>13</sup>.

Considering that, after the Moldovan Constitutional Court had delivered the judgment of 4 March 2016<sup>14</sup>, in which particular amendments to the Constitution had been declared in conflict with the Constitution, only the modality of the election of the President was changed and not the powers of the President, it is possible to draw the assumption that the doctrine developed in the judgment of 29 December 2015 in relation to the powers of the President in nominating a candidate to be approved by the Parliament for the office of Prime Minister will continue to be relevant. Since, as indicated by the Constitutional Court of the Republic of Moldova in the judgment of 4 March 2016, the form of government of the Republic of Moldova remained unaffected by the changes in the modality of the election of the President, i.e. the Republic of Moldova has remained a parliamentary republic<sup>15</sup>.

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<sup>13</sup> In the judgment at issue, the Constitutional Court of Moldova came to the conclusion that, in the event of an absolute parliamentary majority, the President of the Republic must designate a candidate supported by this majority; and only when there is no absolute parliamentary majority, is the President of the Republic of Moldova under the duty, following consultation with parliamentary factions, to designate a candidate for the office of Prime Minister, even if parliamentary factions do not agree with the proposal of the President. The constitutional doctrine formulated in this judgment regarding the powers of the President of the Republic to designate a candidate for the office of Prime Minister to be approved by the Parliament in cases of forming a new Government can also be applied to the formation of the Government following parliamentary elections, as well as in cases where a new Government is formed following the resignation of the Government, or after a motion of no confidence is voted by the Parliament.

<sup>14</sup> Judgment of the Constitutional Court No. 7 of 4 March 2016 on constitutional review of certain provisions of Law No. 1115-XIV of 5 July 2000 amending the Constitution of the Republic of Moldova (modality of electing the President), available at: <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=558&l=en>.

<sup>15</sup> The forms of government of the Republic of Lithuania and the Republic of Moldova have acquired certain common additional qualities. Under the Lithuanian and Moldovan constitutional regulations, the Presidents in both states are elected by universal suffrage, and their powers are not broad. The constitutional doctrine formulated by the Lithuanian Constitutional Court in its ruling of 10 January 1998 can be considered relevant in assessing the constitutional framework of Moldova, its form of government and the powers conferred on the President of the Republic in forming the Government. In the light of the constitutional doctrine developed by the Lithuanian Constitutional Court in its ruling of 10 January 1998, another assumption can be made that, upon the delivery of the judgment of 4 March 2016 by the Moldovan Constitutional Court, which led to changes in the modality of the election of the President of the Republic, the form of government of the parliamentary Republic of Moldova has also gained certain elements of a semi-presidential republic, as well as that the constitutional doctrine formulated in the ruling of the Lithuanian Constitutional Court of 10 January 1998 can be regarded as pertinent in interpreting the current constitutional setup of the Republic of Moldova.

## **2. Deciding on constitutional amendments as a source of conflicts**

Each constitution needs to protect itself from narrow politically motivated amendments, leading to constitutional conflicts. Both substantive and procedural constitutional provisions may underlie certain instability. At times, procedural constitutional provisions regulating the amendment of the constitution may also determine particular conflicts between the state powers.

It is not a rare occurrence that the decisions of constitutional courts declaring amendments to the respective constitution (or provisions implementing the constitution) to be unconstitutional are followed by controversial evaluations and accusations that constitutional courts exceed their powers; in such cases, the constitutional courts are facing significant political criticism. In this regard, consideration should be given to the experience of the Constitutional Court of Hungary. On 11 March 2013, the Hungarian Parliament adopted the Fourth Amendment to the 2011 Fundamental Law<sup>16</sup>, re-enacting some controversial provisions, which were declared unconstitutional by the Constitutional Court. In 2012, the Constitutional Court, on the basis of the *ex post* constitutional review, held that some of the Transitional Provisions of the Fundamental Law were contrary to the Fundamental Law of Hungary and, therefore, annulled them with a retroactive force as of the date of their promulgation. The Constitutional Court criticised the legal form of these provisions<sup>17</sup> and came to the conclusion that they were not in nature

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<sup>16</sup> The 2011 Constitution of Hungary (the Fundamental Law), which took effect on 1 January 2012, succeeded the Constitution of 1949 in the version of 1989, which was widely interpreted by the Hungarian Constitutional Court. The new Constitution drew rather vast criticism from international community (Opinion No. 621/2011 of the Venice Commission on the New Constitution of Hungary, adopted at its 87th Plenary Session, 17–18 June 2011, available at: [www.venice.coe.int](http://www.venice.coe.int)). The Constitution provided that it can be amended in a relatively uncomplicated manner, requiring a single assent by two-thirds of the members of the Parliament. Thus, once a rather broad ruling coalition is created, the Constitution can be changed through a majoritarian procedure, irrespective of the opinion of the opposition and can become an instrument in the hands of one political party (or a coalition). The new Hungarian constitution has already been subject to five amendments, with its fourth amendment not only reaching an impressive scope but also reflecting particular points of the conflict between the Parliament and the Constitutional Court. The Parliament, disapproving of the decisions the Hungarian Constitutional Court (*inter alia*, the interpretation of the provisions of the new Constitution), attempted to limit the powers of the Constitutional Court through constitutional amendments.

<sup>17</sup> The decision of the Constitutional Court of Hungary No. 45/2012 (XII. 29) on the unconstitutionality and annulment of certain provisions of the Transitional Provisions of the Fundamental Law of Hungary. In this decision, the Constitutional Court of Hungary examined the Transitional Provisions of the Fundamental Law of Hungary (TPFL) and, *inter alia*, noted that ‘The Constitutional Court holds that on the basis of the above arguments, TPFL has no place

transitional and could not be deemed part of the Constitution and, thus, were invalid. In March 2013, the Parliament of Hungary amended the 2011 Constitution (Fundamental Law) for the fourth time. The fifteen-page amendment touched on several aspects. It restricted the powers of the Constitutional Court to use its previously developed constitutional doctrine, while allowing its legal effects to remain. The amendment provided that the decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law were repealed; this provision was left without prejudice to the legal effects produced by those decisions. While giving the Constitutional Court the power to review the constitutional amendments on procedural grounds, it stipulated that the court could not annul a law passed by a two-thirds parliamentary majority. In September 2013, a fifth amendment was passed in response to recommendations from the Constitutional Court, the European Commission, and the Venice Commission; the Government made an effort to address international criticism.

The power of constitutional courts to carry out the review of effective amendments to the respective constitutions from the formal point of view, i.e. in terms of their adoption, can determine essential changes in the respective constitutional system and significantly influence the political landscape if an amendment is found to be unconstitutional.

This type of decisions of constitutional courts, resulting in substantial changes in the constitutional setup of the state, includes the 30 September 2010 judgment of the Ukrainian Constitutional Court<sup>18</sup>. Article 159 of the 1996 Ukrainian Constitution provides that, in cases where the Parliament is adopting amendments to the Constitution, an opinion of the Constitutional Court of Ukraine is necessary to confirm that the drafting of the amendments is in compliance with the procedural requirements established in the Constitution<sup>19</sup>. In 2004, when adopting Law No. 222-IV on amending the

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in the system of the sources of law; it stands on the “nobody’s land of public law”. On the other hand, TPFL is contrary to the Fundamental Law in many aspects, primarily with regard to the preamble thereof that declares the principle of the unity of the Fundamental Law. In contrast with that, TPFL is a separate legal regulation, not incorporated into the Fundamental Law. The lack of incorporation breaks up the unity of the Fundamental Law. Available at: [http://www.mkab.hu/letoltetek/en\\_0045\\_2012.pdf](http://www.mkab.hu/letoltetek/en_0045_2012.pdf).

<sup>18</sup> The judgment of the Constitutional Court of Ukraine, case No. 1-45/2010 of 30 September 2010.

<sup>19</sup> As stipulated in Article 159 of the 1996 Constitution of Ukraine, a draft law on amendments to the Constitution of Ukraine must be considered by the *Verkhovna Rada* (Parliament) of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of such a draft law with the requirements of Articles 157 and 158 of the Constitution.

Constitution of Ukraine, the Ukrainian Parliament failed to observe the requirement that a final draft law must be submitted to the Constitutional Court in order to receive its conclusion. A draft law that reached the Constitutional Court was subsequently corrected by the Parliament.

On 30 September 2010, at the request of a group of parliamentarians, the Constitutional Court of Ukraine issued its judgment declaring the 2004 Law on amending the Constitution unconstitutional due to a violation of the constitutional procedure for its consideration and adoption<sup>20</sup>. In this judgment, the Constitutional Court pointed out that the 2004 law on amending the Constitution, declared to have been unconstitutional, was null and void as of the day of the adoption of the judgment of the Constitutional Court. The Constitutional Court also imposed the obligation on the state authorities to immediately bring the relevant legal acts into the respective compliance. The main consequence of the above-mentioned judgment of the Ukrainian Constitutional Court was the reinstatement of the legal content of the 1996 Constitution that had been in force before the 2004 amendments. The 2010 judgment of the Ukrainian Constitutional Court, which recognised the constitutional amendments of 2004 (leading to the parliamentary republic) to have been unconstitutional and returned the 1996 version of the Constitution, led to the retroactivity of the constitutional regulation, which gave more powers to the President. The judgment brought in the change in the political system and in the form of government of the state. However, the government system transposed from the past created additional preconditions for a serious constitutional crisis, which influenced the entire development of the Ukrainian statehood<sup>21</sup>.

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<sup>20</sup> The Constitutional Court did not follow its previous decision adopted in 2008 (the decision of the Constitutional Court of Ukraine in case No. 6-u/2008 of 5 February 2008) in which the Court had refused to decide on the 2004 constitutional amendments.

<sup>21</sup> The 1996 Constitution of Ukraine established a presidential-parliamentary type of institutional regime. The 1996 Constitution of Ukraine was amended in 2004, and these constitutional changes caused the transformation of the Ukrainian political system from a presidential-parliamentary system to a more parliamentary one. In February 2010, Mr. *Yanukovych* won the presidential elections; however, the formation of a new government faced some difficulties due to the fact that the majority coalition fell some votes short of the required majority (Opinion No. 599/2010 of the Venice Commission on Constitutional situation in Ukraine, adopted at its 85th Plenary Session on 17–18 December 2010).

On 30 September 2010 judgment of the Ukrainian Constitutional Court gave more constitutional powers to the President and made it possible to form a government favoured by the President, thus, in an outward and temporary manner, solving the conflict between the state powers – the Parliament and the President. The constitutional crisis, enabling the President (Mr. *Yanukovych*) to choose a Government favoured by the President, consequently created

In certain cases, a constitutional amendment initiated as a result of the political interests of a parliamentary majority may cause a future constitutional crisis. In the event of a constitutional crisis, in particular, where, because of the rigid requirements *expressis verbis* set by the constitutional provisions, the formation of a state authority institution is not possible due to the lack of agreement between the political powers in the parliament, and hampers the effective government of the state, the question arises as to whether the encountered problems can be solved by the constitutional review institution by means of interpreting the provisions of the Constitution. The amendments of 2000 to the Constitution of Moldova<sup>22</sup> ultimately resulted in a situation that had caused further constitutional crises, as well as serious difficulties in the following presidential elections in the Parliament. Several attempts to address the Constitutional Court to solve the problem through constitutional interpretation were not successful. The complaints were based on the fact that the Parliament had essentially altered the challenged provisions of the draft law amending the Constitution and these changes had not been presented to the Constitutional Court for a repeated advisory opinion as it was required under the provisions of the Constitution. Ultimately, as the attempts to amend the Constitution failed in the Parliament, the reassessment of the powers of the Constitutional Court to investigate and decide on the constitutionality of laws amending the Constitution was left as a critical issue, and, only in the judgment of 4 March 2016<sup>23</sup>, constitutional problems related to the election of the President of the Republic were resolved.

The judgment of 4 March 2016 of the Moldovan Constitutional Court, which originated subsequent to the request of a group of members of the Parliament to assess the constitutionality of the challenged amendment to

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certain preconditions for the crisis of state power in Ukraine (and, thus, possibly, the 2013–2014 revolutionary protests and the subsequent state crisis). Now the version of 2004 of Constitution of Ukraine is in power, with the amendments of *inter alia* 2016.

<sup>22</sup> In the case of Moldova, the constitutional amendments in 2000 (Law No. 1115-XIV of 5 July 2000 on amending the Constitution of Moldova) changed the system of the election of the President (from direct elections to elections in the Parliament by a 3/5 vote of its members). Consequently, the amendments to the Constitution, which anticipated a different and more complicated system of the election of the President, caused political instability to the effect that, from 2009 till 2012, the duties of the President of the Republic were exercised by acting Presidents, and early elections to the Parliament had to be held due to the fact that the Parliament failed to elect the President and was dissolved as a consequence.

<sup>23</sup> Judgment of the Constitutional Court No. 7 of 4 March 2016 on constitutional review of certain provisions of Law No. 1115-XIV of 5 July 2000 amending the Constitution of the Republic of Moldova (modality of electing the President), available at: <http://www.constcourt.md/ccdocview.php?tip=hotariri&dodid=558&l=en>.

the Constitution, *inter alia*, in terms of the process of its adoption<sup>24</sup>. In its judgment of 4 March 2016, the Moldovan Constitutional Court, after examining the procedural and substantial elements, not only found the failure to follow the procedure for the adoption of the amendment to the Constitution, but also emphasised, *inter alia*, that the challenged amendment of the Article 78 had generated a rupture of the constitutional unity, as it had failed to secure the normal functioning of the presidential institute, had created an imperfect system of government and, after examining different aspects of the constitutionality of the law amending the Constitution, declared it to have been inconsistent with the Constitution. In this decision, the Constitutional Court described the situation that would result after declaring the amendment to the Constitution as unconstitutional and stressed that the wording of Article 78 of the Constitution, applicable prior to the entry into force of the challenged law, would become applicable again, so the President of the Republic were to be elected by popular vote<sup>25</sup>.

### **3. Merging a constitutional court with a political process**

It is not usual for constitutional courts to receive favourable evaluation for their decisions from politicians. Constitutional courts seek to remain independent and resist political pressure faced when they adopt particular important decisions with a view to protecting the supremacy of the respective constitution and the democratic values enshrined therein.

A constitutional court that concedes to pressure from politicians and abandons its judicial independence does not fulfil its role of the guardian of the Constitution but becomes an instrument for adopting political decisions; unfortunately, this can apply to the Constitutional Court of the Russian Federation after it delivered its 19 March 2014 judgment No. 6-П/2014, giving appraisal of the constitutionality of the so-called international treaty between the Russian Federation and the so-called Republic of Crimea on Admission of the Republic of Crimea into the Russian Federation and

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<sup>24</sup> In this judgment, the Constitutional explained the legal effect of its previous judgment adopted in 2011 and the possibility of resuming the undecided question concerning the review over the constitutionality of the constitutional amendments of 2000. In the light of the newly invoked arguments, as well as the analysis of the relevant constitutional developments, the Constitutional Court of Moldova reinterpreted its position on the review of the constitutionality of laws amending the Constitution and declared that it is competent to examine the constitutionality of a law amending the Constitution.

<sup>25</sup> The elections of the President took place on 30 October 2016.

Creation of New Subjects in the Composition of the Russian Federation<sup>26</sup>. The undue haste under which the amendment to Article 65 of the 1993 Constitution of the Russian Federation was made only attests to the political nature of this unconstitutional decision<sup>27</sup>. Although, in its 19 March 2014 judgment, the Constitutional Court of the Russian Federation emphasised that it decides exclusively on issues of law, rather than the political necessity of such a treaty, the provided reasoning could hardly be considered to be based on law. The Constitutional Court, even without doubting the legal nature of the treaty in question, found compliant with the Constitution the fact that this treaty had been signed by the President of the Russian Federation and held that the treaty was consistent with the constitutional principle of the separation of powers, as well as that this treaty was applicable from the date of its signing and entered into force from the date of its ratification (thus, Crimea was announced to become a constituent part of the Russian Federation from the date of signing the treaty).

However, the powers of constitutional review institutions are not unlimited; they cannot compete with the universally recognised principles of international law or the values enshrined in the constitution itself. A decision of a constitutional court obviously contradicting the universally accepted

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<sup>26</sup> Judgment No. 6-II/2014 of 19 March 2014 on the Constitutionality of the International Treaty between the Russian Federation and the Republic of Crimea on Admission of the Republic of Crimea into the Russian Federation and Creation of New Subjects in the Composition of the Russian Federation pending its entry into force. Available at: <http://www.ksrf.ru/ru/>.

<sup>27</sup> The President of the Russian Federation, after signing the International Treaty between the Russian Federation and the Republic of Crimea on Admission of the Republic of Crimea into the Russian Federation and Creation of New Subjects in the Composition of the Russian Federation and before submitting this treaty for ratification, immediately, on 18 March 2014, applied to the Constitutional Court regarding the compliance of this so-called international treaty with the Constitution. As speedily as on the following day, i.e. on 19 March 2014, the Constitutional Court adopted the judgment declaring the said international treaty to be in compliance with the Constitution. On 21 March 2014, the Russian Parliament enacted the constitutional law respectively amending the provisions of Article 65 of the 1993 Constitution of the Russian Federation. Chapter 3 'The Federal Structure' of the 1993 Constitution of the Russian Federation not only enumerates the subjects of the Russian Federation but also consolidates the principle of the openness of the Russian Federation, by providing for the admission to the Russian Federation and the creation in it of a new subject (Paragraph 2 of Article 65); hence, it also provides for the possible alteration of the territory of the Russian Federation by expansion. It should be noted that these provisions do not provide for the reverse process; they only prescribe that the borders between the subjects of the Russian Federation may be changed upon their mutual consent (Article 67). It took less than a week to incorporate Crimea – part of the territory of the Republic of Ukraine, whose constitutional status is stipulated by the 1996 Constitution of Ukraine – into the Russian Federation as an integral part of the Russian Federation.

values of constitutional and international law becomes a purely political decision, and the constitutional court thus merges with politics and becomes a political institution.

### **III. Political attempts aimed at limiting the powers of constitutional courts**

Besides the development of constitutional review, which came to be in one or another form consolidated in constitutions or laws in most democratically governed states, the beginning of the 21st century has also been marked with attempts to limit the powers of constitutional justice institutions. Depending on the constitutional review model chosen by a particular state, the parliament, the government, or the president of the state may exercise influence on the constitutional justice institution in an attempt to make it more dependent on the will of politicians. Mainly this is achieved by seeking to limit the powers of this institution, its competence, rules (procedures) governing its operation, or its composition. These ends are likewise sought by modifying the legal acts regulating the formation and activity (competence) of the constitutional review institution or by complicating its operation through unfavourable decisions adopted by the executive branch of government.

It is often the case that political decisions aimed at limiting the powers of the constitutional court are wrapped in an impeccable legal form. The effects of such decisions can result not only in the modification of ordinary (organic) laws regulating the status of the constitutional court but also in the alteration of constitutional provisions. These processes are often triggered by the formation of a new ruling majority following parliamentary (or presidential) elections and its striving to be free of any control in adopting decisions that are likely to be at odds with constitutional provisions. Such political changes could coincide with the economic crises hitting the state and with their aftermath.

Enacting a new constitution can also serve the aims in question. Following the election of the Parliament of Hungary in 2010, the newly formed parliamentary majority, on the basis of the majoritarian principle, not only amended the then valid Constitution but also enacted a new Constitution (the Fundamental Law) in 2011. This new Constitution entrenched the provisions modified upon the amendment of 2010 on the number of judges of the Constitutional Court and the procedure for their appointment, as well as set out the powers of the Constitutional Court in a new way, *inter alia*,