Working paper

SUNICOP 2/2012

Presented in Osijek, Croatia

Contemporary legal challenges: EU – Hungary – Croatia

16-18 February 2012

This working paper is the draft version of the paper presented in the Conference.
Suggested reference of the working paper:
Tímea Drinóczi – Anita Blagojevic: Constitutional dialogue. Protection of constitutions - case studies: Hungary and Croatia. Working paper, SUNICOP 2/2012, http://sunicop.eunicop.eu/publications.html

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Constitutional dialogue.
Protection of constitutions - case studies: Hungary and Croatia

Constitutional dialogue theories have their roots in "common law systems" where they focus on the role of judiciary. These theories are about how to solve the counter-majoritarian difficulty and how to give a proper normative account of the role of judiciary in the constitutional democracy and how to find the proper constitutional meaning, especially in the interpretation of human rights.[1] After the emergence of these constitutional dialogue theories, scholarship, mainly still in common law states, started to expand its possible meanings to the interactions of organs beyond legislature and courts, as it "goes without saying that participants in the nation's constitutional dialogue include more than the major governmental actors and their activities".[2] In this paper we attempt to enumerate and systemize dialogic theories and draw the attention to the possible existence of other kinds of constitutional dialogue in civil law states. The reason of this study is that the major issues of common law constitutional dialogue (counter-majoritarian problem and the role of judiciary) are more or less solved in civil law system, where Kelsenian theory of judicial review is acknowledged. Still, a revised or modified idea of constitutional dialogue may be used to study the existing dialogic mechanisms in civil law states, as the finality of the democratic decision-making process, here there and everywhere, is to find the proper meaning of the constitution. From a civil law perspective, this work necessarily starts with revealing what "constitutional" and "dialogue" mean, and what functions may have the constitutional dialogue in this sense. Defining this expression in this way may lead us to a more complex understanding of constitutional dialogue in constitutional democracies of the (post)modern and globalized age.
In this paper we specify the constitutional dialogue theories, and other dialogic interactions emerged in the scholarship (point 1.1) and indicate how these ideas may be extended to other constitutional organs and other (constitutional) procedures in constitutional democracies (point 1.2). We provide examples of constitutional dialogue at regulatory level (point 1.3) from the recent Hungarian and Croatian constitutional development (points 2 and 3).

1. Understandings of constitutional dialogue

1.1. "Common law" constitutional dialogue is used to describe the relationship and interaction between at least two constitutional organs (judiciary and legislative power) keeping in mind the role of dialogue: giving a proper normative account of the role of judiciary and find the accurate constitutional meaning. There are different and congruent approaches developed by common law scholars. It is obviously impossible to summarize all of the theories, so here we provide just brief examples.
After the first experiences of the use of the Charter in Canada[3] *Peter W. Hogg and Allison A. Bushell* established their vision on the concept of constitutional dialogue. The dialogue

[1] Christine Bateup, 'The Dialogic Promise. Assessing the normative potential of theories of constitutional dialogue', 71 *Brooklyn Law Review* (2006) p. 1109.
[2] Michael Heise, 'Preliminary Thoughts on the Virtues of Passive Dialogue', available at: http://www.uakron.edu/law/lawreview/v34/docs/heise341.pdf p. 1, footnote nr. 1
[3] In Canada it is possible for the legislature to overcome a judicial decision striking down a law for breach of the Charter, due to the following four features of the Charter: "(1) section 33, which is the power of legislative

consists of those cases in which a judicial decision striking down a law on Charter grounds is followed by some action – reversal, modification, avoidance – by the competent authority. In these cases, there must have been consideration of the judicial decision by government, and a decision must have been made as to how to react to it.[4]

As *Christine Bateup* put it, constitutional dialogue metaphor "is most commonly used to describe the nature of interaction between courts and the political branches of government in the area of constitution decision-making, particularly in relation to the interpretation of constitutional rights".[5] Dialogue theories are to be understood as a tool for resolving the democratic legitimacy concerns associated with judicial review; thus this concept "has been popularized to the greatest extent in countries, such as Canada",[6] New Zealand, United Kingdom.[7] In her valuable and very much cited work, she gives a complex understanding of different dialogue theories[8] revealing their advantages and critics; she concludes that "the greatest potential for achieving a normatively satisfying understanding of constitutional dialogue emerges through the dynamic fusion of the equilibrium and partnership models of dialogue. […] [E]quilibrium theories focus on the role of the judiciary in facilitating and fostering society-wide constitutional discussion, […]; and partnership models draw attention to more distinct institutional functions that the judicial and legislative branches perform in dialogue with one another. The synthesis of these understandings highlights that dialogue should ideally incorporate both society-wide and institutional aspects; […] this provides the strongest normative vision of the role of judicial review in modern constitutionalism."[9] This

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override; (2) section 1, which allows for "reasonable limits" on guaranteed Charter rights; (3) the "qualified rights," in sections 7, 8, 9 and 12, which allow for action that satisfies standards of fairness and reasonableness; and (4) the guarantee of equality rights under section 15(1), which can be satisfied through a variety of remedial measures. Each of these features usually offers the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the Charter as articulated by the courts."

[4] Peter W. Hogg and Allison A. Bushell, 'The *Charter*Dialogue between courts and legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)', 35 *Osgoode Hall Law Journal* (1997) p. 79., 82.

[5] Bateup, loc. cit. n. 1, at p. 1109.

[6] Bateup, loc. cit. n. 1, at p. 1110.

[7] Bateup, loc. cit. n. 1, at pp. 1109-1110, pp. 1109-1110.

[8] "Judicial advice-giving involve judges counseling the political branches of government through the use of broad non-binding dicta." (loc. cit. n. 1, at p. 1123) Process-centered rules "seeks to ensure that the political actor who enact statutes and make public policy decisions take constitutional considerations into account." (p. 1128) Judges using judicial minimalism approach step back from "deciding cases in order to allow increased space for democratic consideration and choice". (loc. cit. n. 1, at p. 1131) Coordinate construction theories as the oldest conception of constitutional interpretation belong to the structural theories of dialogue and are based on the idea of "shared enterprise between the courts and the political branches of government" where judicial decision do not have a "unique status, as the Constitution did not provide for any specific authority to determine the limits of the division of powers between the different branches". (loc. cit. n. 1, at p. 1137) The other structural theories are the theories of judicial principle; these ideas "propose that judges perform a unique dialogic function based on their special institutional competence in relation to matters of principle". (loc. cit. n. 1, at p. 1143) Bateup analyses equilibrium as well as partnership theories and she finds the most promising vision of constitutional dialogue is when these two understandings are combined. loc. cit. n. 1, at (p. 1174). For additional approaches to the judicial dialogic participation (active and passive) see Michael Heise, , loc. cit. n. 2. Further critical analysis of these accounts can be found in the paper of Kent Roach. Kent Roach, 'Sharpening the Dialogue Debate: The Next Decade of Scholarship', 45 *Osgoode Hall Law Journal* (2007). Functioning of the Charter dialogue in Canada up to 2005 is analyzed by Rosalind Dixon who states that "new understanding [of dialogue] reveals that the history of dialogue under the *Charter* to date has tended to be more real than skeptics fear and more contingent than dialogue scholars assure". See Rosalind Dixon, 'The Supreme Court of Canada, *Charter* Dialogue, and Deference', 47 *Osgoode Hall Law Journal* (2009) p. 241. A firm objection is represented against the dialogue theories by Andrew Petter on the basis that there are many reasons to doubt the democratic character of Canadian political institutions. See Andrew Petter, 'Look Who's Talking Now: Dialogue Theory and the Return to Democracy', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) pp. 524-526.

[9] Bateup, loc. cit. n. 1, at p. 1180.

approach is then strengthened in another work expressing that "all systems of judicial review, bith strong- and weak-form, should be understood as generating a broader form of *society-wide* dialogue between the judiciary, the political branches and the people about the meaning and interpretation of fundamental rights".[10]

The "institutional dialogue" theory says that courts and legislatures participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as democratically illegitimate. For *Luc B. Tremblay* there are two conception of dialogue: dialogue as deliberation and dialogue as conversation.[11]

Joanne Scott and Susan Sturm consider the relationship between courts and governance as dynamic and reciprocal as well: courts draw upon the practice of governance in their construction of the criteria they apply to their judgments. They also provide an incentive structure for participation, transparency, principled decision-making, and accountability which in turn shapes, directly and indirectly, the political and deliberative process.[12]

For *Matthew S.R. Palmer's* the constitutional dialogue is an interaction between the different branches of government; interactive discussion where each party genuinely listens, seeks to understand the others' points, and is prepared to modify own views; it underlines the ubiquitous principle of western legal systems: the rule of law.[13]

As it can be seen, these dialogue accounts are about organs (court and legislatures) cooperating in decision making, more precisely: adjudication and legislation; the relationship between judiciary and legislature in common law systems has been examined and explained by different kinds of constitutional dialogue theories. The most successful seems to be the one that involves as many relevant actors into the dialogue as possible in order to reveal the constitutional meaning.[14] By doing so, it gives the opportunity for the legislative power to make as adequate laws as possible avoiding in this way the negative result of the judicial review. On the other hand, it draws the attention to an increased study of the legislative role in dialogue and the involvement of other actors in the dialogue. As Kent Roach put it: Constitutional dialogue theories "should not in the future focus solely on courts and legislatures, but should also examine the range of other bodies, including auditors general, human rights commissions, privacy and information commissions, complaints and audit bodies, and other review bodies, that can enter into a dialogue with the executive."[15] The quasi adjudicative bodies "mainly have powers of moral suasions and can call government to respond to their ruling without necessarily being able to force governments to comply with their rulings. Moreover, the dialogue concept may also be useful to understanding some forms of international law that rely more on persuasion then command".[16] He offers three projects for the future researchers of constitutional dialogue. The first and the second remain in the field of the "original constitutional dialogue": he suggests the idea of i) a comparative testing of the convergence thesis about the weak and strong forms of judicial review;[17] ii) study the

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[10] See Christine Bateup, 'Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights', (August 2008) Available at: http://works.bepress.com/christine_bateup/1 Abstract

[11] Luc B. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', 3. *International Journal of Constitutional Law* (2005) pp. 617-648.

[12] Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-thinking the judicial role in new governance', 13 *Columbia Journal of European Law* (2007)

[13] Matthew S.R. Palmer, 'The Language of Constitutional Dialogue: Bargaining in the Shadow of the People', Available at: http://works.bepress.com/matthew_palmer/9 p. 3., 4.

[14] See Roach, loc. cit. n. 8, at p. 181.

[15] The reason is the post-9/11 word, where the executive has increased power and the mechanisms of accountability have not caught up to the expanded state powers. Roach, loc. cit. n. 8, at p. 181.

[16] Roach, loc. cit. n. 8, at p. 182.

[17] Roach, loc. cit. n. 8, at pp. 185-186. See Bateup, loc. cit. n. 10.

dialogue in times of crises, involving the understanding of administrative responses to court decisions.[18] By suggesting the need of studying how the quasi-judicial bodies are involved in dialogue and expressing that "democratic dialogue is not simply the matter for courts and legislatures"[19] he extends the idea of constitutional dialogue to other actors beyond legislature and courts. His (iii) third proposed project is to examine the legislative reforms as "dialogue theory can be seen as part of the new process movement in legal scholarship that paid increased scholarly attention to the legislature."[20]

And indeed, the book,[21] which Roach refers to in connection with the third suggested project, contains some other kind of extended (constitutional) dialogue approaches: „Contributors consider […] how legislatures can engage in productive dialogue with citizens and courts at home and peer institutions in other countries." This approach is taken by, among others, *Jennifer Nedelsky*, who stresses that legislators should be in an ongoing interaction with all forums of public deliberation about the meaning of the core values".[22] Thus, besides the role of courts that of the legislature, as central constitutional organs representing popular sovereignty, is emphasized as they share a common responsibility for the continued existence of the constitutional order.[23] Similarly, in searching for the new American constitutionalism, *William N. Eskridge, Jr. and John Ferejohn* establishes that the process by which fundamental new or revised commitments (such as negative and positive liberties) are named and elaborated is a *dialogic one* in which democratically accountable legislatures and agencies play a larger role than courts.[24] In connection with the importance of legislatures in the field of interpretation of the constitution, *Andrée Lajoie, Cécile Bargada and Éric Gélineau* point out that all legislation that is not challenged in the courts is an interpretation and application of the constitution, "which has both the first and the only word in the matter, in a process that involves two dialogues: one with the courts, exceptional and institutional; and the other with the constituent public, constant and universal".[25] *Daphne Barak-Erez* suggests that institutional dialogue can be found in the international/transnational arena as well: i) judicial dialogue is the result of mutual influences between courts in different countries in the field of application of international and constitutional law; ii) dialogue of cooperation is brought about by human rights activists from different countries; iii) communication between legislatures – either at international or national level – is described as

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[18] Roach, loc. cit. n. 8, at pp. 186-189.

[19] Roach: pp. 188-189

[20] Roach: p. 189

[21] Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. ix.

[22] Jennifer Nedelsky, 'Legislative Judgments and the Enlarged Mentality: Taking Religious Perspective', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 95.

[23] Ruth Gavison, 'Legislatures and the Phases and Components of Constitutionalism' in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 213

[24] This larger role is realized by adopting super-statutes that "seeks to introduce or consolidate a norm or principle as fundamental in our polity"; […] [s]uch laws are a response to a normative social movement or a popular demand for change, and a legislatures enacting them understand that they are propounding a fundamental normative commitment". Super-statutes are: the Sherman Act of 1890, the Civil Rights act of 1964, and the Endangered Species Act of 1973. William N. Eskridge, Jr. and John Ferejohn, 'Super-statutes: A New American Constitutionalism', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 333., 337. The life circle of a super-statute can be understood as a society-wide dialogue; or as put by the authors: "an ongoing administrative – judicial – legislative trialogue" (p. 349.).

[25] Andrée Lajoie, Cécile Bargada and Éric Gélineau, 'Legislatures as Constitutional Interpretation: Another Dialogue', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 391.

a dialogue based on the community of professionals (legal advisors, experts) and community of activists and interest groups or the dialogue between individual legislators when dealing value issues.[26]

Catherine Powell speaks about *dialogic federalism* because a dialogue about rights can be detected between national and subnational governments, particularly when there are differences in the extent to which these governments incorporate human rights obligations. The adoption of "human rights treaties and standards at the states and local levels largely represents a form of communication through which people and communities, […] signify the need for the federal government to play a more active role in human rights lawmaking". Therefore there is an "assumption that dialogue among various levels of government is critical to meaningful implementation of international human rights law in the United States". This dialogic approach is both "descriptive in that it theorizes by looking at existing intergovernmental collaboration and dialogue" and prescriptive as it "encourages state and local participation even where none exists and posits a constitutional analysis about this participation".[27]

Bradley M. Bakker, taking an approach that constitutional dialogue is encompasses the idea that "different governmental branches and the people interact in ways that shape the dominant views of constitutional interpretation over time",[28] proves that *blogs* "can effectively advance constitutional dialogue in three ways: (1) engaging people directly in dialogue about constitutional issues, (2) by galvanizing people to participate in the political processes in a way that makes them better informed and better capable of applying pressure to the political branches in order to effectuate constitutional change, (3) by pressuring other institutional actors (namely, the conventional media) to focus more substantively on constitutional issues […]".[29]

Besides all the above mentioned types of (constitutional) dialogues, the *use of precedents* – as a means of courts' involvement and communication[30] – may be understood as a kind of dialogue between courts; this dialogue should be uphold by the discussion regarding the reasons for restricting or overruling a precedent.[31]

1.2. We may conclude here that the notion of "constitutional dialogue" is mainly used for describing the dialogic interaction between judiciary and legislature in common law states; for

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[26] Legislatures as a community do not engage in dialogue with one another: "The dynamics of legislation influencing foreign legislative initiatives should rather be described as based on inspiration without community". Daphne Barak-Erez, 'An International Community of Legislatures?', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 545., 533.

[27] Federalism (intergovernmental) dialogue proceeds along at least three tracks: i) there is "state and local adoption of international human rights standards where the federal government has failed to ratify a treaty" (see the case with CEDAW); ii) there are "state and local efforts to implement international obligations that the federal government has adopted through ratification or other acknowledgement that is bound […] but not fully implemented" (see "the case with the consular notification requirement for foreign national arrested and detained"); iii) there are "state and local efforts to apply human rights principles contained in treaty provisions for which the United States has entered a reservation". Catherine Powell, 'Dialogic federalism: constitutional possibilities for incorporation of human rights law in the United States', 150 *University of Pennsylvania Law Review* (2001) p. 249., 250., 252, and pp. 273-274.

[28] He cites Christine Bateup's work (loc. cit. n. 1). Michal J. Gerhardt, 'Blogs as constitutional dialogue: rekindling the dialogic promise?', 63 *NYU Annual Survey on American Law* (2007) p. 216

[29] Gerhardt, loc. cit. n. 28, at pp. 218-219.

[30] Jan Komárek, 'Judicial Precedent and European Constitutional Pluralism: How the Two Relate?' Available at: http://denning.law.ox.ac.uk/news/events_files/Komarek.pdf p. 2.

[31] See Michal J. Gerhardt, 'The Role of Precedents in Constitutional Decision-making and Theory', 980 *The George Washington Law Review, Faculty Publications Paper* (1991) p. 147.

some theorist this interaction necessarily includes other constitutional organs such as some agencies of executive power, people (blogs). For others, dialogic interaction arises between legislatures and between the judiciary, at subnational, national, inter- and transnational level. Consequently, is it is not exclusively the legislative procedure in which dialogic effect may be recognized.

Whatever the actors are for these theorists, the main scope is to find the proper constitutional meaning. For a civil law state, it is unfolded mainly by legislatures with the additional "assistance" of the constitutional courts. Due to the different nature in competence of constitutional courts and common law supreme courts, the dialogic relationship between these organs and their respective legislatures/constitution-making powers may be different as well. Due to the prominent role of legislature in the civil law Rechtstaat, one may reasonably suggest that a dialogue exists not only between the abovementioned organs but may occur between others that are involved in the democratic decision-making process as well because legislative impetus is generated not only by court decisions or even constitutional organs.[32]

That is why it may be interesting to examine the expression of "constitutional dialogue" and define what "constitutional" and *"dialogue"* may mean. An interaction is dialogic when at least two equal (that is not subordinated) actors are communicating or interacting[33] on the same subject matter. In law this concept of dialogue is realized in the field of normative decision-making, either be legislation or adjudication. A dialogue is *"constitutional"* when it occurs in a constitutional democracy among constitutional[34] or non-constitutional[35] actors in constitutional procedures.[36] Hence, we may mean under the notion of *constitutional dialogue* a flexible system that refers to interactions between constitutional organs and other constitutional and non-constitutional actors such as political parties, trade unions, social organizations, individuals etc. in the following constitutional procedures: legislation, constitutional review by the constitutional courts or supreme courts, and other procedures connected to these two. The *scope* of this account of constitutional dialogue is the realization of the constitution in the frame of the given constitutional establishment by involving as many actors as possible.

Constitutional dialogue *may occur* at regulatory or judicial level among the following actors. *At regulatory level* constitutional dialogue may be detected [37] between i) national judiciary and national legislature: just as in common law state, the judicial review accomplished by constitutional courts may have dialogic effects; ordinary courts may influence the legislature as well; ii) quasi adjudicative (such as ombudsman) and international bodies, NGOs and national legislature; iii) people, experts, interest groups etc. and national legislature: this refers to the consultation that is an element of quality legislation. At judicial level is can be found i) between international and supranational and national judiciary; among national judiciaries, including the role of precedents.

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[32] Binding effects of these inputs may be different depending on the authority issuing it; there is a clear difference between a binding court decision and a recommendation of the ombudsman or other monitoring agencies, and NGOs.

[33] The message of the sender is considered by the recipient and this consideration is materialized in a reply that influences the choices of the sender, and so forth. In this context, depending on the legal backgrounds a dialogic result may range from a mere acknowledgment to a real consideration.

[34] An actor is „constitutional" when its creation and competences are regulated by the constitution.

[35] "Non-constitutional" here means that an actor is not contained in the constitution; it does not refer to the status of being anyhow contrary to the constitution. Here belong for instance NGOs and other international or supranational organs.

[36] A procedure is constitutional when its elements are regulated at constitutional level.

[37] These interactions may be seen as regulatory conversation, that is a communicative interaction that occurs between all involved in the regulatory space. Julia Black, 'Regulatory Conversation', 29 *Journal of Law and Society* (March 2002) pp. 163-196.

The *overall scopes of constitutional dialogue may be* to i) find the proper constitutional meaning, including the creation of a proper balance between constitutional principles, rights and public policies, ii) maximize the effect of implementation of the functions of different state organs, be either legislative (parliament), (quasi) adjudicative (e.g. ombudsman, constitutional court), or independent (head of state) bodies, mainly in the field of decision-making.[38] At regulatory and judicial levels, there may be *different scopes* of the dialogue, such as i) solving counter-majoritarian difficulty in common law states; ii) fostering national quality legislation, mainly in human rights cases; iii) "changing ideas" among constitutional courts; iv) promoting common European human right practice;[39] v) assisting to build common democratic values into new pieces of legislation (e.g. Venice Commission).

1.3. Now we focus on the interaction at regulatory level and we intend to present the ways the decision-making process may have dialogic aspect beyond its interactions with judiciary (constitutional courts). In general, there are several *factors* that may start up the legislative decision-making process. These are the following: i) campaign promises;[40] ii) cases of "obligatory" legislation: when international, supranational legislation or a constitution so require,[41] iii) decisions of constitutional courts stating the unconstitutionality of a law,[42] iv) decisions of ordinary or inter-, supranational courts;[43] v) cases of "non-obligatory" legislation: impulses transmitted by national or international or supranational monitoring groups (e.g. ombudsman, Venice Commission), interest groups, media, public opinion, science etc.; vi) impulses realized by the legislature itself, such as a consequence of changes and developments in economic, social life, technology etc.[44] Impulses affecting the result of the legislative process can be encountered in pre-parliamentary, parliamentary and "post-parliamentary" stages. We examine this latter phase as here appears another constitutional actor, the *head of state*, who may have role in constitutional dialogue at regulatory level, provided that s/he has "political" and "constitutional veto". By these vetoes, depending on the concrete constitutional arrangement, the head of state has the possibility or may even have obligation to interact with the parliament and the constitutional court.[45] Dialogue between

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[38] In pluralist democracies, even if the concrete constitutional establishments differ, institutional involvement and dialogue allow combining each actors' competence so as a better and more legitimate decision can be taken. Komárek, loc. cit. n. 30, at pp. 10-11.

[39] See the interaction among Strasbourg, Luxemburg, and national (constitutional) courts.

[40] The constitutional dialogue occurs between the political party/politician and voters with a consequence of i) electing a candidate/voting for a list or not, ii) draft laws proposed by the elected representatives or the parliamentary group formed by them or the government based on their electoral promises and governmental programs. The reaction of voters can be tracked by checking on the electoral results of the following elections. This may be the widest understanding of a constitutional dialogue at regulatory level.

[41] Here the constitutional dialogue occurs between the international, supranational legislature and the pouvoir constituent, and national parliaments. The latter considers the possible ways of implementing what is required by the former organs provoking results in their or others monitoring and reviewing mechanism, including judicial and quasi-judicial actors as well.

[42] Some jurisdiction knows the declaration of omission through legislation when the legislature, having due authorization, have not adopted a statute and by doing so, it causes unconstitutionality. As there are different competences of constitutional courts, these diverse competences may mean other ways or modes of dialogue, but the idea is the same: protect constitutionality and reach as high consensus on constitutional meaning as possible.

[43] The constitutional meaning or their understanding of a piece of legislation (setting aside, annulment, stating an unconstitutional omission, making declaration about the infringement of certain other measures, determining constitutional requirements) is communicated to the legislature; it may result in a legislative decision (modification, annulment, to legislate, not to legislate) that is reviewed again by courts.

[44] These refer to the need of consultation in the legislative process.

[45] By political veto the head of state does not choose the promulgation and publication of a statute but send it back to the parliament for reconsideration; by constitutional veto s/he sends it to the constitutional court for constitutional review. Actors response accordingly by reconsideration, adoption again without changing the text,

other actors and procedures can also be considered as constitutional dialogue even when there are no constitutional actors, but it affect a constitutional procedure, such as legislation.[46]

2. Constitutional dialogue in Hungary, and the Venice Commission

In this part, we expound constitutional dialogic interaction between on the one hand the Hungarian Parliament and constitution-making power and, on the other hand, the Constitutional Court, the people and the Venice Commission. By doing so, we can explore a new phenomenon of constitutional dialogue: by studying its features we may make conclusions about the current status or degree of democracy and rule of law of a state.

2.1. Dialogue between the Constitutional Court and the Parliament on retroactive taxation

In one of the modification to the Constitution (Act XX of 1949) during the summer of 2010 an exemption from the principle of the prohibition of retroactive legislation (the possibility of retroactive taxation) was inserted into the Constitution (Art. 70/I(2)). This was intended to be the constitutional basis of the retroactive taxation Act that was adopted by the Parliament and then annulled by the Constitutional Court in autumn 2010. On the same day of the announcement of this unfavorable decision for the leading political parties, Art 70/I(2) (on the possibility of retroactive taxation) was changed[47] and a modified retroactive taxation Act was adopted. Modifying Art 70/I(2) was accompanied by the restriction of the competences of the Constitutional Court.[48]
With its decision 1747/B/2010 (adopted on 6 May 2011) the Constitutional Court annulled the Act based on Article 70/I(2), but in decision 61/2011 (adopted on 12 July 2011) it refused the constitutional review of constitutional amendments inserting the new Art. 70/I(2) and the limitation of the competences of the Constitutional Court.

2.2. Dialogue during constitution-making via consultation

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modifying it, annulment, or declaration of unconstitutionality. All of these measures are capable to generate new "dialogue".

[46] See the work of the Venice Commission, for instance.

[47] The new text: "For incomes paid from sources serving for public revenues as well as for incomes paid by organizations managing state assets or organizations owned or controlled by the state, starting from the fifth tax year preceding the given tax year, obligation may be compelled by statute to contribute to public revenues of a level less than the income."

[48] 32/A. § (2) The Constitutional Court shall review the constitutionality of statues on the State Budget and its implementation, on central taxes, stamp and customs duties, contributions, as well as on the content of the statues concerning uniform requirements on local taxes only if the petition refers exclusively to the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to the Hungarian citizenship under Article 69 of the Constitution. (3) The Constitutional Court shall annul the statutes and other legal norms that it finds to be unconstitutional. The Constitutional Court shall annul the statues on the State Budget and its implementation, on central taxes, stamp and customs duties, contributions, as well as on the content of the statues concerning uniform requirements on local taxes only if the content of these statutes violates the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to the Hungarian citizenship under Article 69 of the Constitution. The same restriction in subject matter remained untouched by the new constitution, called Fundamental Law of Hungary (Magyarország Alaptörvénye (2011. április 25) Magyar Közlöny 2011. évi 43. sz. 10656); see point 2.3.2.

The constituent power adopted a new Fundamental Law[49] in 18 April, 2011 that was published in 25 April 2011 in the Official Gazette. In the election of 2010, the governing parties gained 2/3 majority in the Parliament and they decided to make a new constitution. In summer 2011, a parliamentary committee was established to prepare the Concept of the New Constitution (based on which the new constitution can be drafted). On 14 March 2011, the draft constitution was submitted to the Parliament but until this date there was no information about its possible content and wording. It is indeed true that the Concept was adopted by the competent parliamentary commission in autumn 2010[50] but in February of 2011 it was suggested to be regarded only as a guideline.[51] Parliamentary parties were asked to submit their respective concepts to be negotiated in mid February 2011.[52] Still, the final deadline for the voting of the new Constitution was 18th of April. This situation is interesting because during the process of making the Concept, a so called consultation – that was quite formal – was announced where several (social) organizations were invited by the commission[53] to share their opinion about the new constitution.[54] During winter, a popular consultation was held as well: a questionnaire was sent to citizens who could express their view by answering a multiple choice "test". From a formal point of view there was popular as well as professional consultation; but several criteria of consultation[55] have not been met: e.g. there was not enough time provided for expression of opinion, there was no feedback; therefore we cannot consider this process as a substantive one. This is even truer when we take into consideration the fact that the drafters of the Concept were laconic and hardy wrote helpful reasoning and used legal arguments. The same lack of substantive reasoning was applicable to the draft Fundamental Law.[56]

2.3. Dialogue between the Venice Commission and the Hungarian constitution-making power about the Constitutional Court

2.3.1. On 21 February 2011, the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary, requested the Venice Commission to prepare a legal opinion on three particular issues arising in the framework of the drafting of a new Constitution of the Republic of Hungary. The Venice Commission did not receive a draft of the Constitution before 21 March 2011, but three specific questions[57] for consideration.[58]

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[49] Magyarország Alaptörvénye (2011. április 25) Magyar Közlöny 2011. évi 43. sz. 10656

[50] After 2.5 months of working in the merit.

[51] On 7 March 2011 the Parliament adopted its resolution 9/2011. (III. 9.) on the preparation of the new constitution.

[52] Until 14 March 2011 it was uncertain whether the draft is based on the Concept or the drafts submitted by the parliamentary parties; and it was not clear or guaranteed that a genuine debate could be held on the drafts as during the spring session there was not too much sitting scheduled until mid April when the voting was planned. In the meantime however it turned out that only one alternative draft was submitted (T/2628), which was not dealt with in merit by the plenary at all.

[53] Others could also share their views as well.

[54] There is no figure about the rate these expert opinions were used in drafting the Concept, but reading the very brief and modest, in terms of professionalism, Concept the rate can be estimated.

[55] Patricia Popelier, 'Consultation on Draft Regulation – Best Practices and Political Objections', in Marta Tavares Almeida and Luzius Mader, eds., *Quality of Legislation. Principles and Instruments. Proceedings of the Ninth Congress of the International Association of Legislation (IAL) in Lisbon, June 24th-25th 2010* (Nomos, Baden-Baden 2011) p 140.

[56] T/2627, that was then adopted as the new constitution.

[57] The relation between the EU's Charter of Fundamental Rights and the new Hungarian Constitution, the role and significance of the preliminary (ex ante) review and the actio popularis in ex post constitutional review.

[58] The Opinion is not a comment on draft new Constitution of Hungary. Opinion on three legal questions arising in the process of drafting the new Constitution (25-26 March 2011)

The Venice Commission, in its *Opinion on three legal questions arising in the process of drafting the new Constitution (25-26 March 2011)*, recognized and regretted that the abovementioned limitation of the competencies of the Constitutional Court as a result of the constitutional amendment adopted in November 2010 has not been repealed.[59] It concluded that the competence for *ex ante* review should be retained and specifically laid down, as well as all other prerogatives of the Constitutional Court, by the new Constitution. In order to avoid over-politicizing the mechanism of constitutional review, the right to initiate the *ex ante* review should be limited to the head of state. The review should take place only after the adoption of the law in parliament and before its enactment and, for international treaties, before their ratification. In addition, wider non-binding *ex ante* review could be conducted, if needed, by a parliamentary committee or by independent bodies or structures.
According to the Venice Commission, the removal of the *actio popularis*, to avoid the danger of overburdening the Constitutional Court and the misuse of the remedies before it, would not represent an infringement of the European constitutional standards. It nonetheless held advisable, in the light of the specific Hungarian constitutional heritage, to seek ways to couple this measure, if adopted, with alternative review mechanisms, e.g. to retain the indirect action via an intermediary actor, such as the ombudsman or other relevant bodies. The Venice Commission in addition recommended that the system of preliminary requests by ordinary courts be retained. The planned extension of the constitutional complaint to review also individual acts, in addition to normative Acts, is a necessary compensation for the removal of *actio popularis* and therefore a highly welcome development.

2.3.2. The *Fundamental Law* defines the Constitutional Court as the supreme body for the protection of the Fundamental Law and enumerates its competences as follows:[60]
- ex ante norm control that can be asked by the President of the Republic before promulgation, and by the Parliament upon the motion of the proponent of the bill, the Government or the Speaker of the Parliament after the final vote;
- review any piece of legislation applicable in a particular case for conformity with the Fundamental Law at the proposal of any judge,
- review any piece of legislation applied in a particular case for conformity with the Fundamental Law further to a constitutional complaint,
- review any court ruling for conformity with the Fundamental Law further to a constitutional complaint,
- examine any piece of legislation for conformity with the Fundamental Law at the request of the Government, one-fourth of the Members of Parliament or the Commissioner for Fundamental Rights,
- examine any piece of legislation for conflict with any international agreement, and
- exercise further responsibilities and competences determined in the Fundamental Law and a cardinal Act.
Pursuant to Article 37(4) "As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24(2)b-e),[61] only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship. The Constitutional Court

[59] See footnote nr 48.
[60] Art. 24 and 6 of the Fundamental Law
[61] The two cases of constitutional complaint and the two ex post reviews.

shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law's procedural requirements for the drafting and publication of such legislation."
The Fundamental Law contains some rules concerning the members and the President of the Constitutional Court. The Constitutional Court is a body of fifteen members, each elected for twelve years by a two-thirds vote of the Members of Parliament. Parliament elects with a two-thirds majority of the votes, a member of the Constitutional Court to serve as its President until the expiry of his or her mandate as a judge. No member of the Constitutional Court shall be affiliated to any political party or engage in any political activity.
Detailed rules for the competence, organization and operation of the Constitutional Court are regulated in an Act adopted by two-third majority.
It can be concluded that in the Fundamental Law
- not all competences are enumerated, initiation of ex ante review is not restricted to the President of the Republic, the restriction on subject matter of the review is not removed – even though these were suggested;
- actio popularis is changed by an ex post review on then proposal of Government, one-fourth of the MPs and the ombudsman;
- constitutional complaint is extended – as it was recommended.

2.3.3. In its *Opinion on the new Constitution of Hungary (17-18 June 2011)* the Venice Commission placed some important remarks in connection with the status of the Constitutional Court in the Fundamental Law. It made recommendations for some content elements of the new Act on the Constitutional Court.
The Venice Commission noted with satisfaction that the individual constitutional complaint has been introduced into the constitutional review system.
In the light of the 2010 curtailment of the Court's powers, confirmed by the new Constitution the Commission is concerned that a number of provisions of the new Constitution may undermine further the authority of the Constitutional Court as a guarantor of constitutionality of the Hungarian legal order. The Constitution, instead of giving the Constitutional Court full scope of control over the constitutionality of the budget and taxes legislation, it gives a special power of intervention in this domain to the new Budget Council. This limitation of the Court's competences also covers the State Budget "implementation", which may expand even further the number and scope of acts that will not be subject of constitutional review. It is strongly recommended that the cardinal law regulating the competences, organization and operation of the Constitutional Court provide all clarifications needed in this respect.
The Commission also laid down, that the constitutional court should be entitled to assess the compliance of all laws with the human rights guaranteed in the constitution, and especially with human rights of such a particular importance: the right not to be discriminated and the right not to be unduly deprived of its possessions.
The Venice Commission acknowledged that election of the Constitutional Court's president by a political actor, and not by the Court itself, is a widely accepted phenomenon. It however notes that, according to the Constitution of Hungary (Act XX of 1949), the judges have elected the president from their own ranks, a system which is seen, in general, as a stronger safeguard for the independence of the Constitutional Court. Regarding the duration of term of office of the Constitutional Court's judges, which is prolonged to twelve years, the Constitutional Court Act should preferably state that it is nonrenewable, to further increase their independence.
Article N(3) of the new Constitution, impose the Constitutional Court the obligation to respect the "principle of balanced, transparent and sustainable budget management" in the course of performing its duties. The Commission wished to understand this obligation as a requirement

applicable to the administrative management of the Constitutional Court as a public institution, and not as an interpretation principle to be enforced in the context of its constitutional review task. In addition, it considered that this principle should not be applied in a way that adversely affects the financial autonomy and the overall independence of the Court in its functioning.

2.3.4. The *Hungarian Government replied*[62] – not in each regard adequately – to this Opinion. According to the Government it should be pointed out that the competence of the previous Constitutional Court was by far the widest in Europe. The competences, procedures, organization and operation of the Constitutional Court will be regulated in detail by cardinal law, giving further clarification to the matters raised by the Venice Commission. But this does not appear in the new Act on the Constitutional Court.[63] The Act establishes such competences of the Constitutional Court that the Fundamental Law itself does not contain.[64] It contravenes to the Opinion of the Venice Commission and the Constitutional Court itself that has already expressed that all competences should be regulated at constitutional level. The Act,[65] on the other hand, declares that judges cannot be reelected. The insert of this rule into the constitution has been long recommended. The Venice Commission even in 1995 expressed that „[t]o ensure that judges are completely independent of the bodies which elect them, it would be preferable if their term of office – provided it is sufficiently long – were not renewable."[66]
According to the Government, the members of the Constitutional Court receive their mandate directly from the Parliament which elects the members on the basis of a broad consensus, i.e. by a two-third majority of the votes cast. The 12-year long mandate and the prohibition of any party affiliation or political activity constitute important constitutional guarantees for the independence of the members of the Constitutional Court. The election of the President of the Constitutional Court by the Parliament should strengthen the independence of the President from any eventual play of interests within the body itself. We have to remember, however, that this "broad consensus, i.e. by a two-third majority" may be abused, especially when the governing parties have 2/3 majority in the Parliament. The argument of the Government concerning the changed method of election of the President cannot be taken seriously.
To the concerns of the application of Article N (3) of the Fundamental Law, the Government is in a position that this rule is strictly applicable to the administrative management of the Constitutional Court as public institution and it cannot be understood as an interpretation principle to be applied in the context of carrying out their genuine tasks. Article N) is however difficult to be understood like this as it read as follows: (1) Hungary shall enforce the principle of balanced, transparent and sustainable budget management. (2) Parliament and the Government shall have primary responsibility for the enforcement of the principle set out in Paragraph (1). (3) In the course of performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle set out in Paragraph (1). It is up to the Constitutional Court to decide about the interpretation of this

[62] Position of the Government of Hungary on the Opinion on the new Constitution of Hungary (Transmitted by the Minister for Foreign Affairs of the Republic of Hungary on 6 July 2011)
[63] Act CLI of 2011 on the Constitutional Court
[64] It is true, that the Fundamental Law stipulates that "exercise further responsibilities and competences determined in the Fundamental Law and a cardinal Act" (Art 24. (2) point f)) but is should be interpreted as a provision referring to "special competences" of the Constitutional Court, being beyond the normal competences. For instance the interpretation of the Constitution or the declaration of unconstitutionality caused by omission in legislation is contained only by the Act and not the Fundamental Law.
[65] Art 6. (3)
[66] CDL(1995)073 Regulatory concept of the Constitution of the Republic of Hungary: Draft consolidated opinion http://www.venice.coe.int/docs/1995/CDL%281995%29073-e.asp

clause; but it does seem to be an interpretation rule, whatever position is taken by the Government.

3. Constitutional dialogue in Croatia, and the Venice Commission

In this part, we analyze constitutional dialog in the Republic of Croatia. In this sense, we study constitutional dialogic interaction between the relevant Croatian authorities (Croatian Parliament (*Hrvatski sabor*) and the Government) and the Croatian Constitutional Court, and between the Croatian Government and the Venice Commission**.** We can use this analysis to make similar conclusion as we made in the Hungarian part: the status or degree of democracy and rule of law of a state.

3.1. Dialogue between the Constitutional Court of the Republic of Croatia and the Croatian Parliament and Government

In the consideration of the dialogue between the Constitutional Court of the Republic of Croatia[67] and the Croatian Parliament and Government, and consequently the role played by the Constitutional Court in protecting the Constitution, i.e. protection and promotion of democracy and the rule of law, the basic quantitative indicators of the Court's work from 1990 until present have to be taken into account.
According to the statistics available at the Court's official website, in the period before 31 December 2010, the Constitutional Court received a total of 58,733 cases, of which 50,993 were decided. Even a fleeting observation of the received cases statistics shows two constants. The first constant is a continuous increase of the total number of received cases (e.g. in 1991, 180 cases were filed, 1992 – 374, 1993 – 507, 1998 – 1114, 2001 – 2567, 2008 – 5768, 2009 – 6041, 2010 – 7453; the only two exceptions were 2006 and 2007 when 4296 and 4846 cases were received, respectively, i.e. less than the 5232 received in 2005). The second constant is related to the pronouncedly high percentage of constitutional complaints filed compared to other cases, as well as a constant increase of that number each subsequent year. Within the relevant time period, in the process of concrete protection of human rights and basic freedoms as guaranteed by the Constitution, the Constitutional Court received no less than 44,887 constitutional complaints, 38,175 of which were decided. For comparison, there were 5,165 petitions and proposals for the review of the conformity of laws with the Constitution, there were 2,669 proposals to review the constitutionality and legality of other regulations, there were 159 supervisions of the constitutionality and legality of elections and referendums, etc.[68] Not entering into a more detailed analysis of the available statistics, even at this moment we

[67] The Constitutional Court of the Republic of Croatia was constituted pursuant to Articles 125, 126 and 127 of the Constitution of the Republic of Croatia from December 1990, supplemented by the Constitutional Act on the Constitutional Court of the Republic of Croatia and the Ruled of Procedure of the Constitutional Court of the Republic of Croatia. Besides controlling the constitutionality of laws and the legality of other regulations with regard to the Constitution and law, pursuant to Article 129 of the Constitution, the Constitutional Court also carries out other tasks: decides constitutional complaints, monitors the realisation of constitutionality and legality and reports any observed non-conformities with the Constitution and illegalities to the Croatian Parliament, decides on the responsibility of the President of the Republic, supervises the constitutionality of political parties' programmes and activities, supervises the constitutionality and legality of elections and national referendum, resolves electoral disputers and carries out other tasks as stipulated by the Constitution.

[68] Further, while only 125 constitutional complaints were received in 1991, that number rose to 550 in 1997, then to 1,579 in 2000, 3,148 in 2005, while in 2010 the Court received no less than 5,626 constitutional complaints. The table of received and decided cases during the period from 1990 until 31 December 2010 is available at the Constitutional Court's official website: http://www.usud.hr/uploads/Pregled%20primljenih%20i%20rije%20predmeta%20u%20razdoblju%20od%2019990%20do%2031%20prosinca%202010

can agree with the conclusion of *J. Crnić* (from 2001) that the statistics of the Constitutional Court work "show a continuous effort by the Constitutional Court to – from early 1991 until today – conscientiously and bravely use its constitutional powers to protect the constitutionality and legality and basic human rights and freedoms guaranteed by the Constitution. The totality of decisions in those cases constitutes a real contribution by the Constitutional Court in the protection, and even promotion of the rule of law in the Republic of Croatia."[69]
The above conclusion is supported by a substantial number of Constitutional Court decisions with actual contributions to preserving democracy and the rule of law. Just a few examples of those decisions are presented below.

3.1.1. ... concerning the constitutional right to the freedom of public assembly

Throughout its case law, the Constitutional Court on several occasions examined the conformity with the Constitution of the legal regulation of public assembly in Croatia.[70] The most recent significant decision concerning this matter was rendered by the Court this year in July. In its Decision no. U-I-295/2006 and U-I-4516/2007 of 6 July 2011,[71] rendered five years following the proposal to review the conformity with the Constitution of the amendments to the Public Assembly Act,[72] the Constitutional Court reviewed the conformity with the Constitution of Article 1 para. 3 of the Changes to the Public Assembly Act from 2005, in the part that prohibits the holding of public assemblies within the circle of 100 m from the premises where the highest bodies of state authority have their seat, namely, the Croatian Parliament, the President of the Republic of Croatia, the Government of the Republic of Croatia and the Constitutional Court of the Republic of Croatia.
Considering the relevant amendments, the Court has requested a draft law of the amendments to the Public Assembly Act from the Parliament. The Court also requested a statement of the Government. In its statement of 16 July 2009, the Government has assessed the intention of the legislature as legitimate, because "…proposed amendments…significantly contribute to more effective work of the police and security services, both from the standpoint of insurance plans, as well as from the standpoint of their implementation." This standpoint was supported with the appropriate solutions in the relevant laws of Austria, Germany and Slovenia.
Referring to the national law and the case law of the member states of the Council of Europe concerning the right to freedom of public assembly, and to the opinion of the Venice Commission and other international organisations on the right to freedom of assembly,[73] the

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[69] Jadranko Crnić, 'Ustavni sud Republike Hrvatske: iskustva i perspektive', *Politička misao*, Vol. XXXVII, no. 4. (2001.), p. 129.
[70] The first Public Assembly Act in the Republic of Croatia was adopted in 1992 (Official Gazette, no. 22/92). By the Constitutional Court Decision no. U-I-241/1998 of 31 March 1999 (Official Gazette, no. 38/99.) Article 3 para. 3 of the Act was cancelled (which read: "Bodies of local self-government may designate places where any public assembly may be held.") due to non-compliance with the Constitution. The Court found that the disputed provision restricted the right from Art. 42 of the Constitution, because the right to designate the place where public assembly may be held was given to local self-government bodies without any restrictions that would conform to the provision of Art. 16 of the Constitution. In it Decision no. U-I-3307/2005, U-I-3309/2005, U-I-3346/2005, U-I-3359/2005 of 23 November 2005 (Official Gazette no. 139/05.), the Constitutional Court cancelled the Changes to the Public Assembly Act (Official Gazette, no. 90/05.) due to formal non-conformity with the Constitution, i.e. because the amendments and revisions were not adopted by a required majority of vote by all the representatives in the Croatian Parliament.
[71] Official Gazette, no. 82/11.
[72] The proponents of the relevant proposal from 2005 were the Croatian Independent Trade Unions and the Civil Initiative Matija Gubec.
[73] The relevant document of the Venice Commission, Office for Democratic Institutions and Human Rights (ODIHR) and the Organization for Security and Co-operation in Europe (OSCE) in the field of the right to the

Constitutional Court concluded the followings. The legal ban on public assembly in the area of at least 100 m from the premises where the Croatian Parliament, the President of the Republic, the Government and the Constitutional Court *hold their sessions* is not in compliance with Article 42 of the Constitution because it, in relation to any *a priori* unknown concrete location and object, cancels the essence of the constitutional right to the freedom of public assembly with no reason (interests of state security and the protection of rights and freedoms of others) acceptable under constitutional law that could justify it. The legal ban on public assembly in the area of at least 100 m from the premises *accommodating the Croatian Parliament, the Government and the Constitutional Court* has a legitimate aim and is proportionate to that aim, but, notwithstanding, is "not necessary in a democratic society", because there is no "pressing social need" for its existence, which is supported by the fact that in this area (St. Mark's Square / Markov trg) it is not prohibited to organise public events that require special security measures, as well as other forms of gatherings (at realising economic, religious, cultural, humanitarian, sports, entertainment and other interests). The legal ban of public assembly in the area of 100 m from the building *accommodating the President of the Republic,* has no legitimate aim or reasonable and objective justification and thus it constitutes prima facie violation of the constitutional right to freedom of public assembly guaranteed in Article 42 of the Constitution.
Therefore, with this decision the Constitutional Court cancelled the ban on public assembly in the area within the circle of 100 m from the President's Office, while the ban on public assembly at St. Mark's Square (where the Croatian Parliament, the Government and the Constitutional Court are located) will remain in force until 15 July 2012, which means that the legislator was given the opportunity to amend the disputed statutory provisions and regulate them in compliance with the Constitution.

3.1.2. ...concerning dual voting rights for national minorities

In its Decision no. U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011 and U-I-994/2011 of 29 July 2011,[74] the Constitutional Court cancelled Article 1 of the Constitutional Act Amending the Constitutional National Minorities Rights Act (hereinafter Act), according to which national minority members which participate in the population of the Republic of Croatia with more than 1.5% (meaning only the Serb minority) were guaranteed at least three seats in the Croatian Parliament, elected on the basis of the general right to vote (Art. 1 para. 2 of the Act[75]). The Court found that the relevant amendment was in discord with Article 1 paras. 2 and 3 of the Constitution,[76] having considered it in the light of equal rights, national equality and a democratic multiparty system, the highest values of the constitutional order of the Republic of Croatia (Art. 3 of the Constitution[77]).
In the relevant case, the Constitutional Court accepted the standpoint that by Article 1 para 2 of the Act one minority group of citizens was singled out from the overall body of "the people" according to the criterion of nationality and "acknowledge and recognised" as a

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freedom of public assembly is OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly) of 9 July 2010.
[74] Official Gazette, no. 93/11
[75] Official Gazette, no. 80/10
[76] Art. 1. para. 2. of the Constitution reads: "Power in the Republic of Croatia derives from the people and belongs to the people as a community of free equal citizens." Art. 1. para. 3. of the Constitution reads: "The people shall exercise this power through the election of representatives and through direct decision making."
[77] Pursuant to Art 3. of the Constitution: "Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect of human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the grounds for interpretation of the Constitution."

separate "part of the people", which is in discord with the constitutional tenet of a "one and uniform" people which, as a community of citizens, exercises authority in the Republic of Croatia.[78]

Furthermore, the Constitutional Court found that the solution contained in Article 1, para. 2 of the relevant Act directly disrupts the basic constitutional demand for equal voting right of all voters-citizens within the framework of the general electoral system. Namely, according to the standpoint of the Constitutional Court, the system of a priori guaranteed and secured representative seats presupposes special measures which will ensure that national minority candidates-members are actually elected to the pre-guaranteed representative seats in the Croatian Parliament. This, however, "presupposes favouring 'minority' lists of candidates, and thus also the unequal weight of the votes of voters within the framework of the general electoral system, which the Constitution does not allow."

Finally, the Constitutional Court observed that the guarantee of "at least three seats" for members of a large-sized (i.e. Serb) minority within the frame of the general electoral system, in the manner as stipulated by the impugned provisions "leads to confusion from the aspect of constitutional law in the structure of representatives to the Croatian Parliament." Namely, if (at least) three representatives of the Serb minority are elected by all the voters-citizens of the Republic of Croatia (i.e. "the people"), then there are grounds to ask what is the difference between these (at least) three representatives of the Serb minority and the other representatives, especially those of Serb nationality who are also elected by the same circle of voters ("the people") within the framework of the general electoral system, but are not candidates from the lists of candidates put forward by the political parties that represent the Serb minority or the lists proposed by voters of Serb minority, but candidates from the lists of candidates put forward by other political parties, i.e. from independent (general) lists of candidates.

Regarding the matter of conformity with the Constitution of the solution contained in Article 1 para. 3 of the Act, that enables voters-members of national minorities to have a supplementary vote at the elections of representatives to the Croatian Parliament,[79] the Constitutional Court pronounced that the introduction of two votes for national minority members at the elections for the Croatian Parliament is allowed according to the constitutional law. However, to introduce two votes into the electoral system, certain prerequisites have to be met. The Constitution, namely, allows for members of national minorities to be, in addition to the general right to vote, provided with a special right to elect their own representatives in the Croatian Parliament (Article 15, para. 3 of the Constitution), but since there is no simultaneous definition of the scope and contents of those representatives' powers, the

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[78] In that sense, the Decision quotes an expert opinion from *S. Barić*, which reads: "Any singling out of any group of Croatian citizens from the total body of „the people under any criterion, so also under the criterion of national affiliation, and creating a mechanism by which such a group is specially represented through general and equal voting rights, I consider unacceptable in constitutional law, i.e. contrary to the basic letter and meaning of the Constitution of the Republic of Croatia, to the fundamental concept of "the people" "from which derives power and to which power belongs". This kind of mechanism presumes that there are different, constitutionally acknowledged and recognised parts of the people, which is to be reflected in the representation of certain parts of the general and common concept of the people. This is not the case with the Constitution of the Republic of Croatia. The people is one and in the meaning of constitution law it is formed of all the citizens of the Republic of Croatia, regardless of their personal characteristics, and thus also of national affiliation."

[79] Article 1 para. 3 of the Act reads: "National minorities which participate in the population of the Republic of Croatia with less than 1.5%, in addition to the general right to vote, have the right to elect five representatives who are national minority members in special constituencies on the grounds of special voting rights, in accordance with the law that regulates the election of representatives to the Croatian Parliament."

Constitutional Court holds that the matter has to be first regulated by a law with constitutional force, which, in other words, presupposes the adoption of a separate constitutional act.[80]
Further, with regard to the matter of the justification for applying Article 15 para 3 of the Constitution,[81] the Constitutional Court – accepting the legal principles of the Venice Commission,[82] contained in its 2008 Report on Dual Voting for Persons Belonging to National Minorities[83] – found that the right to supplementary vote can hardly secure a greater degree of integration of national minorities in political life than what had already been achieved before the impugned provision came into force, while at the same time this right infringes the equality of voting rights to a far greater measure than statutory measures that were in force until the entry into force of the impugned provision. In the light of specific facts and circumstances (related to the level of participation of national minorities in the Croatian Parliament in the last three parliamentary elections – 2000, 2003 and 2007), the relevant measure from Article 1 para 3 cannot be deemed proportionate. Therefore, the Constitutional Court cancelled the respective paragraph of the first article of the Constitutional Act Amending the Constitutional National Minorities Rights Act.
It should be noted that the Constitutional Court in its several decisions in 2011[84] also cancelled several articles (Articles 1, 5, 6, 7, 8, 9 and 10) of the Amendments to the Croatian Parliamentary Elections Act from 2010,[85] originally related to Article 1 of the Constitutional Act Amending the Constitutional National Minorities Rights Act. The Constitutional Court also decided for the current parliamentary elections (4 December 2011), unless the Croatian Parliament in the meantime passes new rules, rules that were in force until the enactment of the statutory amendments are to be applied.[86]

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[80] The Constitutional Court thereby cautions that the Constitutional Act on the Rights of National Minorities, despite its title, has no constitutional force, since it was not adopted in a procedure which is valid for passing and amending the Constitution. Thus, only when the Croatian Parliament passes such act could the issue of the method of election of minority representatives be regulated by an election act and then could the dual voting right be introduced.

[81] Namely, acknowledging a supplementary vote for national minority members must have its rational merit and reasonable justification based on factual substratum, and at the same time be legitimised from the aspect of proportionality. In other words, this means that "the special voting right in Article 15 para. 3 of the Constitution could only be justified if there were no other milder means for realising the desired objective, i.e. means that would encroach less on the equality of the voting rights of the other voters."

[82] Namely, the Venice Commission deems it necessary to test the justification of introducing a supplementary vote because this is because this is always an exceptional measure of an instrumental nature and is justified only when the given aim (i.e. the integration of the minority in the political system) cannot be achieved by the application of other measures, less restrictive with respect to the equality of the voting rights of other voters. Therefore, the test of justification always centres on the principle of proportionality. The Venice Commission also deems that the right to a supplementary vote has a limited scope. Its recognition can be justified only if it refers to a "small sized" minority and has a transitional, and therefore a temporary character.

[83] Report on Dual Voting for Persons Belonging to National Minorities, adopted by the Council for Democratic Elections at its 25th meeting/Venice, 12 June 2008/ and the Venice Commission at its 75th plenary session/Venice, 13-14 June 2008/, Study No. 387/2006, CDL-AD(2008)013, Strasbourg, 16 June 2008

[84] Decisions: U-I-120/2011, U-I-452/2011, U-I-693/2011, U-I-746/2011, U-I-993/2011 and U-I-3643/2011 of 29 July 2011. Official Gazette, no. 93/11

[85] Official Gazette, no. 145/10

[86] Of course, the issue of changing election rules within a year before the elections can be raised here. The President of the Constitutional Court of the Republic of Croatia, *Jasna Omejec*, commented on the issue and said that this legal principle "was self-imposed by the Parliament", specifically not to amend those parts of the election law related to the last amendments to the Constitution. Since no provisions related to the rights of minorities were amended at the time, then the Constitutional Court's decision is not subject to that principle and this only concerns the Croatian Parliament, and not the Constitutional Court as well. Quoted from:"Hrvatski ustavni sud ukinuo dvostruko pravo glasa", *Hrvatska riječ*, available at: http://www.hrvatska-riječ.com/2011/07/hrvatski-ustavni-sud-ukinuo-dvostruko-pravo-glasa-za-manjine

3.2. Dialogue between the Venice Commission and the Government of the Republic of Croatia concerning certain aspects of the 2002 Constitutional Act on the Rights of National Minorities

A brief history of the cooperation between the Republic of Croatia and the Venice Commission in relation to regulating the protection of the rights of national minorities (taking into account that the first act that regulated this topic was passed in 1991[87]) is as follows: to meet the requirements for accession into the Council of Europe, the Republic of Croatia in March 1996 agreed to apply the recommendations of the Venice Commission on the Constitutional Act on National Minorities, and one of the relevant recommendations was related to establishing the Council of National Minorities; in May 1997, the Government of the Republic of Croatia agreed with the Venice Commission concerning the foundation of the Council of National Minorities (the Council was founded in January 1998); in its report from March 1998, the Venice Commission reiterated the importance of passing the revised constitutional act and noted a negative (discouraging) influence that suspending a part of the Constitutional Act had on minorities and displaced persons.[88]

In April 1999, the Parliamentary Assembly of the Council of Europe adopted a resolution inviting the Government of the Republic of Croatia to pass a constitutional act which would revise the suspended provisions of the Constitutional Act from 1991, fully according to the recommendations by the Venice Commission and no later than the end of October 1999. However, the Croatian Government submitted the draft of the relevant act to the Venice Commission only in 2000, and the draft was positively reviewed by the Venice Commission in the sense of improvement in the protection of national minority rights.

Therefore, we can conclude that the Venice Commission was several times asked to concern itself with the revision of the constitutional act on the rights of national minorities, which ultimately resulted in the adoption of several relevant opinions.

The dialogue between the Venice Commission and the Government of the Republic of Croatia in 2002 was initiated by the request of the Deputy Prime Minister Goran Granić to the Venice Commission to issue an opinion concerning (new) draft of the Constitutional Act on the Rights of National Minorities.

In its Opinion no. 216/2002 of 12 September 2002,[89] based on the Draft of the Constitutional Act on the Rights of National Minorities of 22 July 2002, the Venice Commission recognised the positive aspects, within the meaning of a contribution to building a comprehensive framework for the protection of national minorities in Croatia. However, the Commission also pointed out that "not all concerns expressed and questions raised by its previous consultations and opinions had been adequately answered, especially not on the issue of voting rights and

[87] The issues of the protection of national minority rights in the Republic of Croatia was regulated by the Constitutional Act on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (Official Gazette, no. 65/91), passed in December 1991 and amended in February 1992. That Constitutional Act was amended in 1999 and 2000, and in 2002 it was substituted by the Constitutional Act on the Rights of National Minorities, which guarantees a high quality of the protection of the rights of national minorities in compliance with European standards.

[88] This concerns the suspension of the provisions of the Constitutional Act from 1991 that guaranteed special status to certain districts where members of ethnic minorities were majority in the population (Serb districts), on the basis of demographic changes due to war. By amending the Constitutional Act in 2000, the previously suspended provisions were cancelled. Due to these circumstances, the Venice Commission found that suspension and subsequent cancellation could have a discouraging effect on minorities and displaced persons who lived in or wanted to return to Croatia.

[89] Opinion no. 216/2002 of 12 September 2002, Draft Opinion on the Constitutional Law on the Rights of National Minorities in Croatia

voting procedure in relation to the representation of national minorities in Parliament." This is also the matter we will analyse for the purposes of this paper.[90]
Namely, with regard to the provision regulating the right of national minority members to be represented in the Croatian Parliament, the Venice Commission notes a "certain lack of specifity and elaboration" and therefore requested a clarification whether minorities were allowed dual voting rights,[91] i.e. "whether the needs of minority protection may justify a derogation from the principle 'one man, one vote'", adding that "any special voting system for members of minorities requires that the voters concerned and the candidates must reveal that they belong to a national minority (for instance at the moment of voting or in the frame of census)."
The response of the Government of the Republic of Croatia (i.e. its Work Group for the Preparation of the Draft of the Constitutional Act on the Rights of National Minorities) of 21 November 2002[92] in regard to the right of national minorities to representation in the Croatian Parliament was that "the manner of exercising this right, including the possibility of recognising the special right for persons belonging to national minorities to elect their representatives (dual vote right), will be regulated by the law which regulates the elections of representatives into the Croatian Parliament."[93] Invitation to resolve several important issues by electoral legislation, including the matter of supplementary voting right for national minority members, was repeated by the Venice Commission in its Opinion No. 216/2002 on the Constitutional Law on the Rights of National Minorities in Croatia of 25 March 2003.[94]

4. Summary

In this paper after attempting to give a manifold understanding of constitutional dialogue we focused on the dialogic interaction mainly between constitutional courts and the legislative powers both in Hungary and Croatia, and another dialogue that could be experienced between state power and the Venice Commission in both countries. Each dialogue was about to find a (proper) meaning of constitutions concerning constitution making or legislative processes which intended to unfold in details the constitutional provisions.
Through this very brief overview on the Croatian constitutional dialogue, we come to the conclusion on the positive contribution of this relevant factor in the protection of democracy and the rule of law. The above conclusion applies particularly to the Croatian Constitutional Court, whose substantial number of decisions has actual contribution to protecting the Constitution, preserving democracy and the rule of law in Croatia. In the case of Hungary, however, we may conclude that the dialogic interactions may have been more positive effects

[90] Some of the other questions of the Venice Commission are related to defining the expression "national minority", powers of the Council for National Minorities, representation of national minorities in bodies of local and regional self-government.
[91] Namely, both the Constitution (Art. 15 para 3: "Besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law."), and the Constitutional Act on the Rights of National Minorities (Article 3 para 1: "The rights and freedoms of persons who belong to national minorities, as basic human rights and freedoms, are an inseparable part of the democratic system of the Republic of Croatia and shall enjoy necessary support and protection, including statutory measures for the benefit of national minorities"), allow for the interpretation that minorities are permitted dual voting rights.
[92] Response of the Government of the Republic of Croatia to the Venice Commission's Opinion on the Draft Law on the Rights of National Minorities, Opinion no. 216/2002, Strasbourg, 3 December 2002
[93] Recalling the above analysed case of the Constitutional Court related to acknowledging the supplementary voting right to members of national minorities (point 3.2.), we can observe that the recent parliamentary elections were implemented without "consummating" the said right.
[94] Opinion No 216/2002 on the Constitutional Law on the Rights of National Minorities in Croatia, adopted by the Venice Commission at its 54th Plenary Session, Venice 14-15 March 2003

– at least in the case of the utilization of the opinions of the Venice Commission – if the Hungarian state power had been more attentive and sensible to rule of law and democracy matters and concerns. The same applies to the functioning of the constitution changing power setting aside the well-reasoned and rule of law based decision of the Constitutional Court and the constitution making power that was negligent in using substantial democratic decision-making standards in the course of preparing and adoption the new Fundamental Law of Hungary.