

Jurgita Paužaitė-Kulvinskienė

Professor Dr.
Faculty of Law, Vilnius University
(Vilnius, Lithuania)
ORCID ID: https://orcid.org/0000-0002-3643-6928
Jurgita.pauzaite@tf.vu.lt

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POSTMODERN CONSTITUTIONALISM AND THE JUDICIAL REVIEW OF STATE DISCRETION IN NATIONAL SECURITY AND FOREIGN POLICY

Abstract. Modern constitutional law increasingly operates in a complex legal environment shaped by globalization, supranational integration, technological development and geopolitical instability. In this context, the traditional understanding of constitutional law as a closed national legal system is being gradually replaced by a postmodern constitutional paradigm emphasizing legal pluralism, interpretative flexibility and the dynamic interaction between different legal orders.

The purpose of the article is to analyze how the postmodern understanding of the constitution influences the interpretation of state institutions' discretionary powers, particularly in the areas of national security and foreign policy, and to determine the limits of constitutional judicial review in these sensitive spheres of public governance. The research is based on doctrinal, systematic and comparative legal methods. Particular attention is paid to the jurisprudence of constitutional courts (US, Germany and Lithuania) and the interaction between constitutional principles such as the rule of law, proportionality, separation of powers and effective judicial protection. The article demonstrates that modern constitutional law increasingly functions as jurisprudential law, where constitutional norms acquire concrete meaning through judicial interpretation. Constitutional courts therefore play a crucial role in balancing competing constitutional values while ensuring that the discretionary powers of political institutions remain within constitutional limits. It is concluded that even in highly sensitive policy areas such as national security and foreign relations, discretionary powers of state institutions cannot be immune from constitutional scrutiny. However, judicial review in such cases must remain restrained and focused on verifying the legality, proportionality, procedural fairness and absence of manifest error rather than substituting political decision-making.

Keywords: postmodern; constitution; constitutional court; judicial review; discretion; national security; foreign policy; constitutional pluralism; rule of law.

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Introduction

Problem Statement and Its Connection to Significant Scientific and Practical Tasks

Contemporary constitutional law can increasingly no longer be interpreted solely on the basis of the classical paradigm of the state, sovereignty, and a closed national legal system. Globalization, European integration, the strengthening of international human rights standards, digitalization, the development of artificial intelligence, geopolitical crises, and national security challenges are transforming

not only the content of law, but also the very concept of the constitution. In this context, the postmodern approach to constitutional law is becoming increasingly relevant, according to which the constitution is understood not as a static and isolated text of national law, but as a dynamic system of values and principles functioning within a multilevel normative environment.

These transformations are particularly significant when assessing the limits of the discretion of the supreme state authorities – parliament, the president, and the government. In a democratic state governed by the rule of law, these institutions enjoy broad freedom of political decision-making, especially in such areas as national security, foreign policy, the protection of strategic economic sectors, or the safeguarding of state sovereignty. However, such discretion is not absolute. It must be exercised in compliance with the Constitution and with the principles of the rule of law, proportionality, good administration, protection of legitimate expectations, and effective judicial protection. Therefore, the essential question becomes the extent to which constitutional courts may and must review the constitutionality of discretionary decisions taken by other branches of government, without assuming their political responsibility and without undermining the principle of separation of powers.

The relevance of this research is determined by several interrelated factors. First, in contemporary states, the fields of national security and foreign policy are no longer perceived as "immune" from judicial review. On the contrary, it is precisely in these areas that the need to reconcile broad executive or legislative discretion with the requirements of the rule of law and human rights protection becomes especially apparent. Second, multilevel constitutionalism and legal pluralism mean that the decisions of national constitutional justice are shaped not only by domestic constitutional doctrine, but also in the context of European Union law, the case law of the European Court of Human Rights, comparative constitutional law, and general principles of public law. Third, in the Lithuanian legal system, questions of national security have exceptionally high practical and doctrinal significance due to objectively existing geopolitical circumstances; therefore, the analysis of the limits of constitutional review in this field is important not only theoretically but also practically.

The scientific novelty of this research lies in its attempt to combine three thematic dimensions that are most often examined separately: first, the postmodern conception of constitutional law; second, the nature of constitutional law as jurisprudential law; and third, the problem of the limits of constitutional review in the fields of national security and foreign policy. The article proceeds from the assumption that it is precisely the postmodern understanding of the constitution that makes it possible to explain more consistently why contemporary constitutional courts, on the one hand, cannot refuse to review the discretionary decisions of state authorities, but, on the other hand, cannot replace the political or economic expediency assessment of those authorities with their own.

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The research problem may be formulated as follows: how does the postmodern understanding of the constitution change the perception of the role of the constitutional court in assessing the limits of the discretion of parliament, the president, and the government, especially in the areas of national security and foreign policy?

The article employs several interrelated research methods. First, the doctrinal legal research method is applied through the analysis of constitutional theory, constitutional jurisprudence, and general principles of public law. Second, the systemic method is used, allowing national constitutional doctrine to be assessed within a broader European and transnational normative context. Third, the comparative method is applied on the basis of examples drawn from the jurisprudence of the United States Supreme Court and the Federal Constitutional Court of Germany. Fourth, the teleological and value-oriented method of legal interpretation is employed, making it possible to reveal the relationship between national security, democracy, the rule of law, and the protection of human rights in contemporary constitutional justice.

The article is based on the thesis that the postmodern understanding of the constitution determines the transformation of contemporary constitutional justice: the constitutional court can no longer be perceived merely as an institution of formal hierarchical review of norms. It becomes an active shaper of constitutional order and value balance within a multilevel legal environment. However, this leadership is not unlimited – it is exercised through the doctrine of judicial review of discretion, which distinguishes permissible constitutional control from impermissible reassessment of political or economic expediency.

Analysis of Recent Research and Publications

The concept of postmodern constitutional law is developed in the doctrine as a response to the transformation of contemporary constitutionalism. The problematic of the interaction of legal pluralism, multi-level constitutionalism and competitive normative regimes is analyzed by Neil Walker, Miguel Poiares Maduro, Gunther Teubner and other authors. The works of these authors rightly emphasize that the modern constitutional order is formed not only within the nation-state, but also through the dialogue and mutual interaction of different legal authorities. This literature allows us to understand postmodern constitutional law as a theoretical paradigm that explains the functioning of constitutional law in a fragmented and multi-layered environment.

Another important direction of literature is associated with the concept of constitutional law as jurisprudential law. Robert Alexy, Aharon Barak, Alec Stone Sweet, Dieter Grimm and other authors argue that constitutional norms, as principles and value guidelines, acquire concrete content primarily in jurisprudence. Constitutional courts in this perspective are perceived not only as implementers of norms, but also as active shapers of constitutional doctrine. Of

particular significance is Stone Sweet's "governing with judges" concept, which highlights the role of constitutional courts in structuring public authority relations.

The third group of literature is related to the issues of discretion, proportionality and judicial self-control. The approaches developed by A. Barak, R. Alexy, as well as in the European public law doctrine, allow us to justify that the discretion of state institutions is not absolute, but its judicial control cannot turn into a review of political or economic expediency. This doctrine is especially important in the areas of national security and foreign policy, where the recognition of broad discretion of institutions must be combined with the requirements of legality, proportionality, individual assessment and procedural justice.

However, although the aforementioned literature extensively analyses the issues of either postmodern constitutionalism, constitutional jurisprudence, or judicial control of discretion, the interaction of these three dimensions is still not sufficiently developed. In particular, there is a lack of research that: first, would systematically link the postmodernist concept of the constitution with the role of the constitutional court; second, would explain the limits of the powers of the constitutional court precisely through the doctrine of judicial review of discretion; third, would analyze this issue in the specific field of national security and foreign policy, where law and political expediency most clearly collide.

It is this unresolved part of the general problem that forms the focus of the study of this article.

Purpose of the Research

The aim of this article is to reveal how the postmodernist concept of the constitution changes the approach to the role of the constitutional court in assessing the limits of discretion of the highest state institutions – the parliament, the president and the government – especially in the areas of national security and foreign policy.

The article is based on the following main assumptions.

First, the postmodernist concept of constitutional law determines that the constitution can no longer be interpreted as an isolated national text, and constitutional meanings are formed in a multi-layered legal environment. Second, modern constitutional law is jurisprudential law, therefore the constitutional court acts not only as an institution of norm control, but also as an active shaper of the constitutional order. Third, the constitutional court, when checking the discretion of the highest state institutions, cannot take over their political prerogatives, but it can and must check the constitutional limits of their discretion. Fourth, in the areas of national security and foreign policy, constitutional scrutiny is characterized by a more restrained intensity, but cannot be eliminated, as this would contradict the principle of the rule of law. Thus, the purpose of this article is not only to describe the existing doctrine, but to supplement and deepen it, showing that the postmodern concept of the constitution allows for a more consistent justification

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of a differentiated, restrained, but effective model of constitutional control in sensitive areas of state decision-making.

I. Postmodern Constitutional Law and the Influence of This Approach on the Contemporary Understanding of Constitutional Justice: Theoretical Premises and the Transformation of Constitutionalism

Postmodern constitutional law is a theoretical approach to constitutional law that emphasizes the pluralism, fluidity, and contextual dependence of the legal system not only on legal, but also on social, political, and technological factors. Unlike the classical or modern conception of constitutional law, which is based on a stable structure of constitutional institutions, the doctrine of separation of powers, a clear hierarchy of national legal norms, and an unambiguous understanding of popular sovereignty, postmodern constitutional law stresses that constitutional norms and their interpretation are continuously shaped through the interaction of different centres of power, value conflicts, and international processes.

Within postmodern constitutional theory, the constitution is no longer perceived merely as a national written document whose meaning can be derived autonomously from its text. Instead, constitutional law operates within a broader multilevel legal space in which national constitutions interact with international law, regional legal systems, and supranational regulatory structures. Phenomena such as European Union law, the legal system of the Council of Europe, international human rights standards, and global regulatory practices transform the traditional nation-state model of constitutionalism and contribute to the emergence of what is commonly described as legal pluralism. Postmodern constitutional theory therefore seeks to explain how constitutional law functions within a fragmented and multilevel legal space in which normative authority is distributed among various national and transnational legal regimes.

The concept of postmodern constitutional law emerged as a response to the processes of constitutional transformation taking place at the end of the twentieth century and the beginning of the twenty-first century. Globalisation, the integration of states and legal systems, particularly within the European Union, the protection of human rights through supranational legal mechanisms, and technological progress have prompted a reconsideration of the traditional doctrine of constitutionalism. Consequently, one of the defining features of postmodern constitutionalism is multilevel constitutionalism, enabled by the very fact of legal pluralism. Constitutional law can no longer be understood solely as the apex of the national legal system because it is constantly influenced by transnational and supranational normative regimes. Contemporary constitutional scholarship therefore increasingly refers to multilevel constitutionalism, in which national constitutions interact with international human rights law, regional integration systems, and global regulatory structures.

Legal pluralism has been particularly emphasised by scholars such as Neil Walker[1] and Miguel Poiares Maduro[2], who argue that the contemporary constitutional order is shaped not within a single sovereign state alone, but through the dialogue and interaction of different legal authorities. At the same time, other constitutional theorists have pointed out that the emergence of multilevel constitutionalism transforms the traditional understanding of constitutional authority and requires new theoretical approaches capable of explaining the relationship between national, supranational and transnational legal orders.

Another important element of postmodern constitutional law is interpretive pluralism. Constitutional norms are increasingly understood not as strictly determined rules but as principles whose content is revealed through the practice of constitutional and ordinary courts, public debate, and political processes. Constitutional interpretation is therefore no longer merely a matter of formal legal application by a national constitutional court. Instead, the interpretation and application of constitutional norms becomes a discursive process involving courts, the legislature, the executive, civil society, and the academic community.

National constitutional courts nevertheless retain an essential role in this process as institutions that not only apply the constitution but also actively shape its meaning through constitutional jurisprudence and doctrine. In his discourse theory, Jürgen Habermas[3] emphasises that constitutional norms derive their legitimacy from public rational discourse, while Gunther Teubner[4] highlights the interaction between law and other autonomous social systems – such as the economy and technology – which transform the traditional boundaries of constitutional law.

At the same time, the jurisprudential character of constitutional law has been emphasised by several scholars who argue that constitutional adjudication inevitably involves balancing competing constitutional principles and values. Robert Alexy, for example, conceptualises constitutional principles as optimisation requirements that must be balanced through proportionality analysis[5]. Similarly, Alec Stone Sweet describes the expanding role of constitutional courts as a process of "governing with judges", where courts increasingly participate in shaping public policy through constitutional interpretation[6].

Within the context of postmodern constitutionalism, new constitutional challenges also emerge, particularly those related to technological development and global security crises. The regulation of artificial intelligence, the power

[1] Neil Walker, 'The Idea of Constitutional Pluralism' [2002] 65(3) *Modern Law Review* 317 https://doi.org/10.1111/1468-2230.00383.

[2] M Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' [2007] 1(2) European Journal of Legal Studies 137–152.

[3] J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

[4] G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

[5] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002).

[6] A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

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of digital platforms, the use of big data, or migration crises raise fundamental questions concerning the application of traditional constitutional principles such as democratic legitimacy, privacy protection, separation of powers, and the rule of law in new circumstances. Consequently, constitutional law increasingly relies on balancing competing principles and public interests, applying proportionality tests and flexible interpretive methods in order to maintain the effectiveness of the "living constitution" paradigm[7].

Against this theoretical background, the role of constitutional courts acquires a new dimension. If constitutional law operates within a pluralistic and multilevel normative environment, constitutional adjudication can no longer be understood merely as a formal exercise of hierarchical norm control. Instead, constitutional courts increasingly function as institutions that mediate between competing constitutional values, reconcile tensions between different legal orders, and ensure the coherence of constitutional principles within a complex legal environment. In this sense, constitutional adjudication becomes an integral element of the postmodern constitutional order, where courts are required not only to apply constitutional norms but also to structure the relationship between democratic decision-making, fundamental rights protection, and the rule of law[8].

This development explains why contemporary constitutional courts frequently engage in the review of politically sensitive decisions adopted by other branches of government, particularly in areas such as national security, economic regulation, and foreign policy. However, the legitimacy of such judicial review depends on the court's ability to distinguish between reviewing the constitutional limits of discretion and replacing political decision-making with its own assessment of policy or expediency[9].

Postmodern constitutional law does not constitute a new autonomous branch of law. Rather, it represents a theoretical paradigm explaining the transformation of constitutionalism in the face of contemporary challenges. According to this perspective, constitutional law – like other branches of law – operates today within a multilevel legal environment where national constitutions interact with supranational legal regimes and where constitutional meaning is shaped through the continuous dialogue of institutions, courts, and society. In this way, postmodern constitutionalism reflects the adaptation of constitutional law to a new social reality and seeks to explain how constitutional law functions within a complex, globalised, and technologically transformed society in which constitutional values are shaped not only at the national level but also at international and transnational levels.

[7] D A Strauss, *The Living Constitution* (Oxford University Press 2010).
[8] A Barak, *The Judge in a Democracy* (Princeton University Press 2006); A Stone Sweet, J Mathews, 'Proportionality Balancing and Global Constitutionalism' [2008] 47 Columbia Journal of Transnational Law 72.
[9] M Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' [2007] 1(2) European Journal of Legal Studies 153–183.

II. Postmodern Constitutional Law as Jurisprudential Law: A Comparison of the Doctrines of the United States Supreme Court and the German Federal Constitutional Court

In contemporary constitutional law scholarship, it is increasingly emphasized that constitutional law is not merely a system of normative texts but also a form of jurisprudential law whose content is shaped through judicial practice and the process of constitutional interpretation. Although the constitution is traditionally perceived as the supreme written legal act, the meaning and practical functioning of its provisions become apparent only through the jurisprudence of institutions of constitutional review – constitutional courts or supreme courts.

Constitutional courts are therefore increasingly described as institutions that play a significant role not only in shaping the content of law but also in influencing public policy. Alec Stone Sweet[10] famously described this phenomenon as "governing with judges", referring to a process in which constitutional courts, through their interpretation of the constitution, effectively participate in shaping the direction of public policy and resolving fundamental conflicts within the political community.

This function of constitutional jurisprudence is particularly visible in the constitutional system of the United States, where the Supreme Court has played a central role in the evolution of the constitutional order for more than two centuries[11]. Recent jurisprudence of the United States Supreme Court demonstrates a new stage in the development of constitutional law in which the Court not only interprets the Constitution but also fundamentally revises previous constitutional doctrines and redefines the limits of permissible legal regulation.

One of the most prominent examples is the case Dobbs v. Jackson Women's Health Organization (2022), in which the Court overturned nearly five decades of constitutional precedent established in *Roe v. Wade (1973)* and reaffirmed in *Planned Parenthood v. Casey (1992)*, concluding that the United States Constitution does not confer a federally protected right to abortion[12]. By this decision, the Supreme Court significantly altered the previous constitutional doctrine and returned regulatory authority in this area to the individual states. Many constitutional scholars consider this judgment one of the most consequential turning points in American constitutional jurisprudence in recent decades.

Another important example is West Virginia v. Environmental Protection Agency (2022), where the Supreme Court developed the so-called "major questions doctrine"[13]. According to this doctrine, federal administrative agencies may not adopt decisions of vast economic or political significance without clear congressional authorization. The decision is widely regarded as a significant

[10] Stone Sweet (n 6).
[11] Marbury v Madison 5 US (1 Cranch) 137 (1803).
[12] Dobbs v Jackson Women's Health Organization 597 US 215 (2022); Roe v Wade 410 US 113 (1973); Planned Parenthood v Casey 505 US 833 (1992).
[13] West Virginia v Environmental Protection Agency 597 US 697 (2022).

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precedent limiting the discretion of federal regulatory agencies in the fields of climate policy and economic regulation.

Similar developments can also be observed in Students for Fair Admissions v. Harvard College (2023), in which the Supreme Court held that race-based admissions policies used by universities violated the principle of equality under the Fourteenth Amendment of the United States Constitution[14]. This decision effectively terminated a longstanding jurisprudential doctrine that had permitted limited forms of affirmative action in American higher education.

An even more striking illustration of the influence of constitutional jurisprudence on state governance can be found in the field of administrative law. In Loper Bright Enterprises v. Raimondo (2024) the United States Supreme Court overturned the long-standing Chevron doctrine, which since 1984 had allowed federal courts to defer to administrative agencies[15] interpretations of ambiguous statutory provisions. The abandonment of this precedent has been described as one of the most significant developments in American administrative law over the past four decades, as it substantially strengthens the role of courts in interpreting federal statutes while reducing the discretion of administrative agencies.

These examples demonstrate that the United States Supreme Court today operates not only as a guardian of the Constitution but also as an influential actor in shaping public policy. By revisiting precedents and redefining the balance of powers among constitutional actors – Congress, the executive branch, and administrative agencies – the Court exerts a direct influence not only on legal doctrine but also on the regulatory policies of the state. Consequently, contemporary constitutional scholarship increasingly debates the limits of the role of constitutional courts and the balance between constitutional review and democratic political processes[16].

The conception of constitutional law as jurisprudential law is also developed in Europe. From the very beginning of its activity, the German Federal Constitutional Court has developed a doctrine according to which the constitution must be understood not only as a normative text but also as an objective system of values (objektive Wertordnung)[17]. This doctrine was formulated in the famous Lüth case (1958)[18], in which the Court recognised that fundamental rights not only protect individuals against unlawful actions by state authorities but also constitute the value-based foundation of the entire legal system. This judgment is widely regarded as one of the most important precedents of modern constitutional jurisprudence in Europe because it fundamentally transformed the role of constitutional rights within the legal order.

[14] Students for Fair Admissions v President and Fellows of Harvard College 600 US 181 (2023).
[15] Loper Bright Enterprises v Raimondo 603 US 369 (2024); Chevron USA Inc v Natural Resources Defense Council Inc 467 US 837 (1984).
[16] Alexy (n 5).
[17] J Ipsen, '"Lüth" und die Folgen' [2022] 77(3) Zeitschrift für öffentliches Recht 613–619; G Jochum, 'Die Grundrechte als Objektive Wertordnung und was daraus geworden ist' [2022] 77(3) Zeitschrift für öffentliches Recht 621–625.
[18] BVerfGE 7, 198 – Lüth (Federal Constitutional Court, 15 January 1958).

The German Federal Constitutional Court often develops constitutional doctrine through the systematic interpretation of constitutional principles. For instance, in its Lisbon Treaty judgment (2009)[19] the Court formulated the doctrine according to which European integration may not violate the constitutional identity (Verfassungsidentität) protected by the German Basic Law[20]. This doctrine implies that certain constitutional principles – democracy, federalism, and the protection of human dignity – remain inviolable even in the process of European integration.

Another important example of the jurisprudence of the German Federal Constitutional Court is the PSPP decision (2020), in which the Court held for the first time that acts of European Union institutions may exceed their conferred competences (*ultra vires*)[21]. In this case, the Court concluded that the judgment of the Court of Justice of the European Union in *Weiss (C-493/17)*[22] had been methodologically insufficient and that national constitutional courts may, in exceptional circumstances, exercise *ultra vires* review of EU institutional actions. This decision triggered extensive debate about the role of constitutional courts within the multilevel European legal order and demonstrated that national constitutional courts may actively defend the boundaries of their constitutional systems.

A brief comparison of the United States Supreme Court and the German Federal Constitutional Court demonstrates that, although these courts operate within different constitutional systems, their jurisprudence shares an important common feature: constitutional courts act as active shapers of the constitutional order. In the United States constitutional system this role more frequently manifests itself through the reinterpretation of precedents and doctrinal shifts, whereas in Germany it is expressed through the systematic development of constitutional principles and the protection of constitutional identity.

In summary, constitutional courts in contemporary democracies increasingly function as institutions that not only ensure the supremacy of the constitution but also actively shape the boundaries of the constitutional order. This tendency confirms the understanding of constitutional law as jurisprudential law, in which the constitutional text operates in conjunction with constitutional doctrine developed by courts.

The jurisprudential character of constitutional law is determined primarily by the very structure of constitutional norms. Constitutional provisions are frequently formulated as general principles or value-based guidelines – such as

[19] BVerfGE 123, 267 – Lisbon Treaty Judgment (Federal Constitutional Court, 30 June 2009); A von Bogdandy, S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' [2011] 48 Common Market Law Review 1417.

[20] Basic Law for the Federal Republic of Germany <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> (accessed 15.02.2026).

[21] BVerfGE 2 BvR 859/15 – PSPP (Public Sector Purchase Programme) (Federal Constitutional Court, 5 May 2020).

[22] Weiss and Others v Bundesrepublik Deutschland (Case C-493/17) EU:C:2018:1000.

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democracy, the rule of law, proportionality, effective judicial protection, or the protection of human rights. The content of constitutional norms cannot be fully defined *ex ante* by the text of the legal act alone. Moreover, many essential legal concepts – such as the notion of public interest, the concept of discretion, or the definition of its limits – cannot be exhaustively determined in positive law and therefore can only be clarified through judicial jurisprudence.

Constitutional norms acquire their concrete meaning and significance only through the interpretative process carried out by courts when resolving constitutional disputes *in concreto*. From a historical perspective, therefore, contemporary constitutional law can be understood primarily as jurisprudential law developed by national courts and shaped by multilevel constitutionalism and interpretive pluralism.

Constitutional jurisprudence is particularly important when courts are required to resolve complex constitutional conflicts involving competing principles or values. In such situations courts apply methods of proportionality, balancing, and practical concordance in order to maintain the coherence and stability of the constitutional order. Robert Alexy, in his theory of constitutional argumentation, explains that constitutional principles function as optimisation requirements whose application inevitably requires rational balancing between competing constitutional values[23].

The jurisprudential character of constitutional law also determines the dynamic nature of constitutional doctrine. Dynamic constitutional jurisprudence allows state institutions to adapt to new social, political, and technological challenges without formally amending the constitutional text. In this way, judicial practice becomes one of the most important drivers of constitutional development, ensuring both the stability of the constitutional system and its capacity to adapt to changing social realities.

In situations where legal norms are ambiguous or incomplete, leadership from constitutional judges becomes particularly important. Legislatures often fail to regulate certain situations comprehensively or leave normative gaps. In such circumstances the participants of pluralistic legal discourse – courts, legislatures, executive authorities, civil society, and the academic community – look to constitutional courts to provide the final legal determination. Constitutional courts thus bear responsibility not only for resolving individual disputes but also for guiding the broader evolution of the legal system.

Consequently, constitutional jurisprudence ensures that the content of law develops dynamically, while courts possess a unique capacity to shape legal precedents of national, European, and even global significance.

[23] D Grimm, *Constitutionalism: Past, Present and Future* (Oxford University Press 2016); Barak (n 8) 73–79.

III. The Powers of the Constitutional Court to Review the Discretionary Powers of Other State Authorities: The Delicate Boundary Between Law and Political or Economic Expediency

As a general rule, national constitutional courts are empowered to review only the constitutionality of legal acts of the highest legal force. Otherwise, the competence of the constitutional court would become excessively broad and the court would be overwhelmed with an unreasonable workload. Consequently, the object of constitutional review usually consists of acts adopted by the highest state authorities – parliament, the president, or the government.

When reviewing the legality of acts adopted by these institutions, the constitutional court inevitably encounters the division of competences between itself as a judicial authority and the institutions exercising state power. This division is based on the principle of the separation of powers, which *inter alia* implies that state institutions may not assume the constitutional powers assigned to other branches of government. Accordingly, the constitutional court, when seized by interested parties requesting the review of acts adopted by parliament, the president, or the government, may not assume the constitutional powers of those institutions. In other words, the court may not replace their discretionary decisions or compel them to adopt specific acts related to the exercise of state authority.

Nevertheless, it is important to distinguish between two legal propositions: the statement that "no institution may assume the constitutional powers of another institution" is not equivalent to the claim that courts "may not review the acts adopted by those institutions"[24]. Otherwise, one would have to conclude that whenever a constitutional court examines whether the acts of parliament, the president, or the government comply with the constitution or statutes, it thereby assumes their constitutional powers. The risk of such an assumption may arise only at the stage of delivering the final judicial decision, if the court were to replace the substantive content of the decision adopted by the state authority. It does not arise at the stage of reviewing the constitutionality of the contested act.

Thus, constitutional courts de facto review the scope and exercise of the constitutional discretion relied upon by the highest state authorities when adopting their decisions. Constitutional jurisprudence demonstrates that constitutional courts operate within a delicate balance between two principles: on the one hand, they must respect the discretion of political institutions within the democratic process; on the other hand, they must ensure the supremacy of the constitution and the protection of fundamental rights. Maintaining this balance requires a

[24] A Gedmintaitė, E Masnevaitė, J Paužaitė-Kulvinskienė, 'Valstybės valdžios aktų imunitetas Lietuvos administracinėje justicijoje' [2025] 135 Teisė 25 doi:10.15388/Teise.2025.135.1; J Paužaitė-Kulvinskienė, 'Ar valstybės valdžios aktai turi imunitetą nuo teisminės peržiūros: sankirta tarp konstitucinės ir administracinės justicijos' (23.10.2025) <https://www.teise.pro/index.php/2025/10/23/j-pauzaite-kulvinskiene-ar-valstybes-valdzios-aktai-turi-imuniteta-nuo-teismines-perziuros-sankirta-tarp-konstitucines-ir-administracines-justicijos> (accessed 15.02.2026).

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complex legal calibration of competing constitutional values. Only through such calibration can constitutional courts exercise effective constitutional review while preserving the stability of the principle of separation of powers.

The competence of constitutional courts to review the acts of state authorities derives from the principle of the supremacy of the constitution, but it must be balanced with the doctrine of separation of powers, according to which no state institution may assume the powers of another[25]. For this reason, constitutional courts frequently face the question of how far they may review the discretion of political authorities and where the limits of judicial review lie.

The debate on the limits of judicial review of discretion therefore leads to a compromise between the constitutional principle of separation of powers and the requirement that public authority must remain subject to legal control. The fundamental rule emerging from constitutional jurisprudence – which can be regarded as a general principle of law – is that absolute discretion cannot exist in a democratic state governed by the rule of law. Consequently, constitutional courts may review the legality of the choices made by state authorities when several legally permissible options are available.

At the same time, the doctrine of the limits of judicial review implies that courts must refrain from interfering with the political or economic expediency of the decision adopted by the competent authority. Constitutional courts must therefore exercise a certain degree of judicial restraint; otherwise, the principle of separation of powers would be undermined. Judicial review of discretion is therefore objectively limited. Courts may not assess the value-based policy choices of state institutions, since such an assessment would amount to reviewing the political expediency of the decision.

The early jurisprudence of the German Federal Constitutional Court, particularly the Lüth judgment (1958), established that constitutional rights operate as an objective order of values (objektive Wertordnung) that influences the entire legal system and constrains the actions of state authorities. The doctrine of the objective order of values later became the foundation for a more active form of constitutional review, enabling courts to assess parliamentary and administrative decisions while simultaneously respecting the autonomy of democratic institutions.

Such an approach appears both justified and necessary because the positive legal system is not capable of regulating in detail every aspect of practical political life. Judicial power ends where the court has verified whether the contested act was adopted *ultra vires*, whether due process requirements were respected, and whether the decision complied with general principles of law, such as good administration, the rule of law, the protection of legitimate expectations, and proportionality.

In essence, the court should limit itself to verifying whether, in exercising its discretion, the state authority committed a manifest error, abused its powers, or

[25] Grimm (n 23) 95–100.

clearly exceeded the limits of its discretion. Courts should also examine whether the decision-making process complied with the relevant procedural requirements and whether the factual circumstances underlying the contested decision were established accurately.

In contemporary constitutional jurisprudence, several principal methods of reviewing discretion have developed. One of the most important is the principle of proportionality, which allows courts to assess whether the measures adopted by state authorities are suitable, necessary, and proportionate to the objective pursued. This method is particularly widespread in European constitutional jurisprudence and is considered one of the central instruments of constitutional reasoning[26].

At the same time, constitutional courts are not empowered to predict whether the chosen legal measures will effectively achieve the intended constitutional objective. However, in certain situations where the measures adopted by state authorities clearly contradict the welfare of the nation, the interests of society and the state, or fundamentally negate the constitutional values protected by the constitution and laws, such measures may be recognised as an improper exercise of discretion.

Another important instrument for reviewing the limits of discretion derives from the principle of good administration, which requires that decisions adopted by public authorities be adequately reasoned and justified. The obligation to provide reasons for discretionary decisions is derived from the duty to state reasons established in administrative law and is also reflected in Article 41 of the Charter of Fundamental Rights of the European Union.

A similar understanding of the judicial role can be found in the jurisprudence of the Court of Justice of the European Union[27], which often characterises the court's role as that of a "rational formalist". According to the case law of the Court of Justice[28], judicial review of complex economic assessments carried out by the European Commission is limited to verifying compliance with procedural and reasoning requirements, the accuracy of the facts, the absence of manifest errors of assessment, and the absence of misuse of powers[29]. Courts are not entitled to replace the economic assessment made by the competent institution with their own.

In conclusion, the discretion of the highest state authorities is not unlimited, and constitutional courts may intervene when the acts of parliament, the president, or the government clearly violate the principle of proportionality or disregard the protection of fundamental rights. According to postmodern constitutional doctrine, it would be incompatible *per se* with the principle of the rule of law if

[26] A Barak, Proportionality: Constitutional Rights and Their Limitations (Cambridge University Press 2012) 3–8.
[27] Case C-148/19 P, BTB Holding Investments and Duferco Participations Holding v European Commission EU:C:2020:354 (Court of Justice, 7 May 2020).
[28] Case C-290/07 P, Commission v Scott EU:C:2010:480 (Court of Justice, 2 September 2010) para 66 and the case law cited therein.
[29] Case C-300/16 P Commission v Frucona Košice EU:C:2017:706 (Court of Justice, 20 September 2017) para 63.

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the results of political discretion exercised by the highest state authorities were entirely exempt from judicial review.

As Aharon Barak has observed, 'the broader the scope of non-justiciability, the fewer opportunities judges have to bridge the gap between law and society and to protect the constitution and democracy'[30]. In light of these considerations, it can be argued that today there are no acts that are in principle entirely excluded from constitutional review. In matters concerning the exercise of state power, ensuring effective judicial protection is regarded as an essential element of the rule of law. Consequently, constitutional courts assume a significant leadership role in reviewing *ex post* the value-based choices of state authorities and in defining the limits of judicial review of discretion.

IV. Limits of Constitutional Review in the Fields of National Security and Foreign Policy

Constitutional courts frequently review decisions adopted by the executive branch in matters concerning national security and foreign policy. In this respect, it should first be noted that in areas of particular political sensitivity – such as national security and foreign policy – legislative bodies and state institutions typically enjoy a broad margin of discretion, which is often established through *sui generis* special legislation. Nevertheless, it must be clearly stated that in such cases the doctrine of immunity of state acts does not apply. Decisions related to foreign policy, national security, or other strategic state interests remain subject to constitutional review and do not fall outside the jurisdiction of constitutional justice.

Such an approach serves not only to maintain the balance between the branches of government but also to assess the state's ability to respond effectively and promptly to strategic challenges. Consequently, issues relating to national security today fall within the scope of constitutional judicial review.

In the Lithuanian legal system, due to its particular geopolitical situation and the influence of neighbouring states such as Belarus and Russia[31], the protection of national security interests has been consistently developed since the restoration of independence. Since Lithuania regained independence in 1990, the legal regulation of national security has evolved into a constitutionally significant doctrine applicable to the activities of Lithuania's legislative, executive, and public

[30] Barak (n 8).

[31] In response to Russia's war of aggression against Ukraine since 2014, in particular the unprecedented build-up of the Russian Federation's armed forces near the borders of Ukraine, and the open military aggression of the Russian Federation against Ukraine and its people launched on 24 February 2022, the European Union's Strategic Roadmap on Security and Defence, adopted on the basis of the European Council conclusions of 24–25 March 2022 (EUCO 1/22), assesses Russia as a long-term and immediate threat to European security. On 23 November 2022, the European Parliament adopted a Resolution on the designation of the Russian Federation as a state sponsor of terrorism (2022/2896(RSP)), which, taking into account the ongoing war of aggression against Ukraine since 2014 and in particular the build-up of the Russian Federation's armed forces on the borders of Ukraine since 24 February 2022, Russia's renewed illegal, unprovoked and unjustified war of aggression against Ukraine, recognized Russia as a state sponsor of terrorism and a state using terrorist means (point 2)

administrative institutions. Lithuania's focus on national security is reinforced by the provisions of the Constitution of the Republic of Lithuania adopted by referendum on 25 October 1992[32].

The Preamble of the Constitution enshrines Lithuania's aspiration to create an open, just, and harmonious civil society and a state governed by the rule of law. The Constitution also establishes the principles of state sovereignty, the inviolability of the territory, democratic governance, and the sovereignty of the people. These concepts imply that national security in Lithuania is understood not only as the physical protection of the state against military or terrorist threats but also as the protection of the state's identity, constitutional order, and economic structure.

Certain constitutional provisions explicitly emphasize the importance of ensuring national security. The Constitution assigns the responsibility of guaranteeing national security to the Government, highlighting it as one of the core functions of the executive branch alongside safeguarding territorial integrity and maintaining public order. For example, Article 94(1) of the Constitution provides that the Government shall, *inter alia*, guarantee the security of the State. By requiring the Government to "protect the inviolability of the territory" and "guarantee national security", this provision integrates security considerations into the everyday functioning of state governance. The wording of this provision also implies that national security constitutes a multi-institutional responsibility requiring coordination among governmental institutions, effective implementation of legislation, and active participation in international relations.

In addition, Article 46(3) of the Constitution requires the legislature, when regulating economic relations, to establish a legal framework ensuring that economic activity serves the common welfare of the Nation[33]. This connection between the common welfare of the people and national security indicates that the legal framework governing economic activity must also be interpreted as serving national security interests. In this context, the constitutional obligation imposed on the legislature extends to regulating economic activities in a manner that protects the common good of the nation, which includes the safeguarding of national security.

Although the Constitution refers to national or state security in several provisions, it does not establish a single and immutable definition of national security nor does it create a fixed institutional framework for ensuring national security. Instead, the Constitution leaves the detailed regulation of national security to the legislature and the Government, allowing them to adapt legal regulation to evolving geopolitical circumstances. Threats to national security may vary in nature and may be unpredictable or difficult to define in advance. Consequently, it is impossible to formulate an exhaustive definition of the concept of national

[32] Constitution of the Republic of Lithuania with Constitutional Acts, 25 October 1992 <https://www.lrs.lt/home/Konstitucija/Constitution.htm> (accessed 15.02.2026).
[33] Constitution of the Republic of Lithuania with Constitutional Acts, 25 October 1992, Article 46.

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security. The concept is necessarily broad and allows state authorities a significant degree of discretion in determining what measures are required to protect national security.

For example, paragraph 11 of Lithuania's National Security Strategy identifies the essential national security interests of the Republic of Lithuania as including state sovereignty, territorial integrity, democratic constitutional order, peace, the welfare of the population, a secure environment for the development of the state, and the vitality and unity of the Euro-Atlantic community.

Although the Constitutional Court has refrained from articulating a single comprehensive definition of national security, its jurisprudence clearly establishes that national security constitutes a general constitutional principle of exceptional importance for the survival and functioning of the state.

The Constitutional Court's case law also recognizes that national security considerations may justify the establishment and application of legal regimes restricting the freedom of economic activity in sectors of strategic importance for national security. Such regulation may include special requirements aimed at preventing threats to the security of the state or society. The Constitutional Court has clarified that such regulation may provide for the screening of persons wishing to engage in economic activities in sectors important to state or public security in order to prevent threats in advance.

Furthermore, the Constitutional Court has held that under Article 46(3) of the Constitution the legislature may impose conditions requiring that persons seeking to engage in economic activities in sectors important to state and societal security must not maintain relations with institutions, natural persons, or legal entities of foreign states that pose a threat to national security. However, the imposition of such restrictions must comply with the constitutional principle of proportionality. It must therefore allow for the assessment of the individual circumstances of each person, including the nature of the relevant contacts, the potential threat posed to national security interests, and other relevant factors necessary to determine appropriate measures affecting the individual concerned.

Thus, the jurisprudence of the Constitutional Court confirms that national security interests occupy a special sui generis status within the Lithuanian legal system. These interests are protected through a multi-level system of legal sources, ranging from the Constitution – the supreme legal act – to statutes, strategic policy documents, and governmental regulations, which together form the functional and institutional framework of national security protection.

The approach of the Constitutional Court emphasizes[34] that ensuring national security is not an end in itself but rather a means of protecting the fundamental constitutional values of the state: inherent human rights and freedoms, democracy, state independence, and the constitutional order.

[34] Resolution of the Constitutional Court of the Republic of Lithuania 30 July, 2020.

In cases involving the protection of national interests, the concept of national interest is interpreted not in isolation but through a systematic and teleological interpretation of the Constitution as a whole. Such an interpretative approach seeks to ensure the functional rather than merely formal effectiveness of constitutional values.

One of the essential features of the national security doctrine developed in constitutional jurisprudence is the recognition of broad institutional discretion. Both the Government and the President enjoy a wide margin of discretion in assessing preventive risk factors related to individuals or transactions that may affect national security interests – for example in cases concerning deprivation of citizenship[35] or the screening of foreign investments and strategic transactions.

If interpreted otherwise, the discretion granted to state authorities in safeguarding national security could not be effectively exercised within the constitutional and European Union legal framework. The Court of Justice of the European Union has likewise recognized that Member States enjoy a broad margin of discretion in matters of national security, while simultaneously emphasizing that Member States must exercise their powers in compliance with EU law and the principle of proportionality[36]. At the same time, the Constitutional Court has developed an important component of the national security doctrine – the requirement of individual assessment[37]. According to the jurisprudence of the Constitutional Court, even where potentially threatening connections exist, each factual situation must be assessed individually. This includes evaluating the nature, duration, relevance, and actual impact of the relevant relationships on national security interests.

The competent authorities applying the relevant legal provisions must assess whether a particular action by an individual poses a threat to the essential national security interests of the Republic of Lithuania by evaluating the individual circumstances of each case to the extent possible. Such assessments may also be subject to judicial review. Similarly, the jurisprudence of the Court of Justice of the European Union requires that in situations where a person may lose the status of a Union citizen – *inter alia* due to considerations related to national security – the individual and family circumstances of the person concerned must be taken into account[38].

Another significant aspect emerging from constitutional jurisprudence concerns the procedural standards governing national security assessments. These

[35] Resolution of the Constitutional Court of the Republic of Lithuania, 9 October, 2025, Nr. KT51-N10/2025.

[36] In the field of citizenship, see, for example, judgment of the Court of Justice of the European Union of 2 March 2010 in Case C 135/08 J. Rottmann v Freistaat Bayern 45, paragraphs 55-56, judgment of 12 March 2019 in Case C 221/17 G. Tjebbes and Others v Minister van Buitenlandse Zaken, paragraph 48, judgment of 18 January 2022 in Case C 118/20 JY v Wiener Landesregierung, judgment of 25 April 2024 in Joined Cases C 684/22 to C 686/22 S.Ö. and Others v Stadt Duisburg and Others, paragraph 36.

[37] Resolution of the Constitutional Court of the Republic of Lithuania, 22 September 2022; Resolution of the Constitutional Court of the Republic of Lithuania, 9 October, 2025.

[38] Judgment of the Court of Justice of the European Union of 12 March 2019 in Case C 221/17 G. Tjebbes and Others v Minister van Buitenlandse Zaken, paragraph 45; Judgment of 25 April 2024 in Joined Cases C 684/22 to C 686/22 S.Ö. and Others v Stadt Duisburg and Others, paragraph 51).

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standards have been shaped by general principles of law, including the principles of proportionality, good administration, and procedural fairness. Although cases concerning the protection of national interests often involve a certain degree of evaluative uncertainty and broad institutional discretion, constitutional doctrine consistently emphasizes that such discretion cannot be exercised in disregard of due process requirements. The principle of procedural fairness requires that individuals be informed in a timely manner of proceedings affecting them, be given the opportunity to present explanations, be informed of the reasons underlying the decision, and that decisions be based on objective evidence and individual assessment of the circumstances, to the extent permitted by the *sui generis* legal framework governing national security.

This jurisprudential development also reflects procedural rights recognized in European Union law, particularly the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. The application of these principles in national security contexts requires particular consistency because of the potential impact on the exercise of other constitutional rights. Consequently, constitutional jurisprudence consistently emphasizes that even in sensitive national security situations the principles of the rule of law must be respected. This includes ensuring compliance with the principle of proportionality, individual assessment of circumstances, and adequate reasoning of decisions. In conclusion, when defining the limits of constitutional review in the fields of national security and foreign policy, particular emphasis must be placed on the functional effectiveness of national security as a constitutional value. The protection of this value is closely linked to fundamental principles of European public law, most notably the standards of good administration, legality, and proportionality.

Although decisions adopted by state authorities inherently involve broad institutional discretion, such discretion cannot be interpreted independently of the principles of individual assessment, proportionality, good administration, protection of legitimate expectations, and procedural fairness. These principles do not merely constitute formal procedural requirements; rather, they structure the legal framework within which national security decisions are adopted. They ensure that such decisions are based not solely on strategic or political considerations but are proportionate, predictable, and legally justified.

Within the broader context of European public law, the protection of national security is increasingly recognized as a priority both in European Union law[39] and in the regulatory frameworks of Member States. The Lithuanian case is particularly notable in that, due to specific geopolitical and institutional circumstances, a law-based approach to protecting national interests emerged relatively early – even

[39] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union <https://eur-lex.europa.eu/eli/reg/2019/452/oj> (accessed 15.02.2026).

before the formal development of security-related regulatory mechanisms at the EU level.

The model of national security protection developed in Lithuanian constitutional jurisprudence therefore reflects the logic of postmodern constitutional law.

Conclusions. The postmodern conception of constitutional law allows the constitution to be understood as a dynamic system of values and principles operating within a multi-layered normative environment, rather than merely as a closed text of national law.

This conception explains the nature of constitutional law as a jurisprudential form of law: constitutional norms acquire their concrete meaning primarily through judicial practice.

In contemporary democracies, constitutional courts act as active shapers of the constitutional order; however, their role must not evolve into the substitution of the political discretion of other branches of government.

The function of the constitutional court is not to review the political or economic expediency of state decisions, but rather to examine the constitutional limits within which the discretion of state institutions is exercised.

In the fields of national security and foreign policy, state authorities are granted a broad margin of discretion; nevertheless, such discretion cannot eliminate the requirements of proportionality, individual assessment, procedural fairness, and adequate reasoning.

From this perspective, Lithuanian constitutional jurisprudence reflects the logic of postmodern constitutional law, as it reconciles the protection of national security with the principles of the rule of law and the protection of fundamental rights.

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Юргіта Паужайте-Кулвінскієне

ПОСТМОДЕРНИЙ КОНСТИТУЦІОНАЛІЗМ І СУДОВИЙ КОНТРОЛЬ НАД ДИСКРЕЦІЄЮ ДЕРЖАВИ В ГАЛУЗІ НАЦІОНАЛЬНОЇ БЕЗПЕКИ ТА ЗОВНІШНЬОЇ ПОЛІТИКИ

Анотація. Сучасне конституційне право дедалі більше функціонує в складному правовому середовищі, сформованому глобалізацією, наднаціональною інтеграцією, технологічним розвитком та геополітичною нестабільністю. У цьому контексті традиційне розуміння конституційного права як замкнутої національної правової системи поступово витісняється постмодерною конституційною парадигмою, що наголошує на правовому плюралізмі, гнучкості інтерпретацій та динамічній взаємодії різних правових порядків.

Метою статті є аналіз того, як постмодерне розуміння конституції впливає на тлумачення дискреційних повноважень державних інституцій, зокрема у сферах національної безпеки та зовнішньої політики, а також визначення меж конституційного судового контролю в цих чутливих сферах публічного управління. Дослідження базується на доктринальному, систематичному та порівняльно-правовому методах. Особлива увага приділяється практиці конституційних судів (США, Німеччина, Литва) та взаємодії конституційних принципів, таких як верховенство права, пропорційність, поділ влад і ефективний судовий захист. У статті показано, що сучасне конституційне право дедалі більше функціонує як право, де конституційні норми набувають конкретного змісту через судову інтерпретацію. Отже, конституційні суди відіграють ключову роль у балансуванні конкуруючих конституційних цінностей, забезпечуючи при цьому, щоб дискреційні повноваження політичних інституцій залишалися в межах конституційних обмежень. Робиться висновок, що навіть у високочутливих сферах політики, таких як національна безпека та зовнішні відносини, дискреційні повноваження державних інституцій не можуть бути позбавлені конституційного контролю. Водночас судовий нагляд у таких справах має залишатися стриманим і зосередженим на перевірці законності, пропорційності, процесуальної справедливості та відсутності очевидної помилки, а не на заміні політичного прийняття рішень.

Ключові слова: постмодерний; конституція; конституційний суд; судовий контроль; дискреція; національна безпека; зовнішня політика; конституційний плюралізм; верховенство права.