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"The Rule of Law and Constitutional Justice in the Modern World"

Session 1 - "The Different Concepts of the Rule of Law"

Key-note speech by

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Introduction

President Gianni Buquicchio of the Venice Commission, President Dainius Zalimas of the Lithuanian Constitutional Court, Presidents, Chief Justices, ladies and gentlemen, I am very grateful to have the opportunity to speak to you today. I also would like to congratulate and sincerely express my appreciation to the organizers and all the participants who are here today, and who have also prepared and attended the past three Congresses.

The 3rd Congress of the World Conference on Constitutional Justice was held in Seoul, Korea. I am therefore especially honored to have been invited as keynote speaker to the first session of today's event, the 4th Congress of the World Conference on Constitutional Justice.

The Congress is entitled "The Rule of Law and Constitutional Justice in the Modern World", and it is split into five sessions. The first session concerns "the different concepts of the rule of law". Based on the questionnaire responses submitted to this Congress, I have been asked to provide some thoughts on this very pertinent and meaningful topic.

In light of the diversity of our world, settling on a unanimous and exhaustive definition of the rule of law may seem difficult. Yet in the interests of constitutional justice, we can agree on an overlapping consensus over the core components of the rule of law. As the concept paper for this Congress suggests, a common core revolves around

concepts such as the supremacy of law, equality before the law, and that laws must be public, clear and prospective. Likewise, a recent report by the Venice Commission also mentions a consensus on the following: legality, certainty, prohibition of arbitrariness, access to independent and impartial courts, respect for human rights and equality before the law. Despite some variations, the questionnaire responses to our Congress confirms this common core of shared ideas.

Based on the questionnaire responses to our Congress today, I shall proceed in four parts. Except for the third part of my speech, each part refers to one relevant question from the questionnaire assigned to the first session of this Congress. The third part of my speech together addresses questions number three, four and five, since they all focus on issues concerning case law. So my speech will contain observations about the following: First, what are the legal sources for the rule of law as a constitutional principle in various countries? Second, has the substantive concept of the rule of law become the dominant understanding? Third, in terms of case law, how are key components of the rule of law defined, what areas of law is this concept especially prominent in, and has the concept changed over time? Fourth, to what extent does international law have an impact on the interpretation of the rule of law?

1. Legal sources for the rule of law as a constitutional principle

The rule of law is a central constitutional principle. As expected, at the head of the relevant sources of law which establish the principle of the rule of law stands the text of the constitution itself. In many constitutions, there are explicit articles referring to the rule of law. This concept is also covered in sources further down the hierarchy of norms, such as national legislation. For some jurisdictions, international legal instruments also function as one legal source for the rule of law.

However, the questionnaire responses also make it evident that case law of constitutional courts and equivalent institutions play a major role in elaborating and developing the concept of the rule of law. By their very nature, texts of codified constitutions are often open-textured. When it comes to complex concepts such as the rule of law, it is not surprising that comprehensive definitions are not usually given in the constitutional text. Therefore, it is often up to the judiciary to apply the

concept of the rule of law to specific contexts, and thereby flesh out its meaning. Constitutional jurisprudence is thus indeed one of the major legal sources for the concept of the rule of law.

This observation is especially important since a significant number of questionnaire responses emphasized that there is not any “one” particular defined concept of the rule of law. Instead, the rule of law is made up of several principles. It is this bundle of principles which are found in the constitutional text, legislation, case law and international sources of law. Also, as suggested by question four of the questionnaire, the individual elements of the rule of law are often found in constitutional case law.

Constitutional case law especially plays a major role in jurisdictions where the rule of law is not explicitly referred to in the constitutional text. Instead, via the process of adjudication, the principle of the rule of law can be deduced from existing constitutional articles. The rule of law in these jurisdictions can firmly be considered as an unwritten constitutional principle. The constitutional court or equivalent institution is entrusted with the major task of developing the concept of the rule of law, especially if aspects of the principle are not directly mentioned in the constitutional text.

To conclude the first part of my speech, the questionnaire responses strongly suggest, as expected, that the relevant legal sources of law which establish the principle of the rule of law are mainly the constitutional text itself and constitutional case law.

2. Dominance of the substantive concept of the rule of law

The second point I would like to raise is based on the responses to the second question of the questionnaire. The question asks the following: “How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?”

After surveying the questionnaire responses, my main conclusion is that it seems the substantive concept of the rule of law has become the dominant concept. In general, a substantive concept of the rule of law is understood as a definition where the substance of the law is also of consequence. For example, the law must protect and

not violate human rights. Whereas the formal notion is mainly concerned with procedural aspects, and not the content of the law. For example, key components of the formal concept of the rule of law are the clarity, certainty and non-retroactivity of the law.

A very significant reason for the rise of the substantive conception of the rule of law is the inclusion of the protection of human rights in the concept. Those arguing for merely a formal conception of the rule of law claim that if substantive elements such as human rights are part of the concept of the rule of law, then we are speaking about not the rule of law but the rule of good law. And to determine what the rule of good law is, we would have to provide an answer to what we understand as core elements of a good life. Advocates for the formal understanding of the rule of law argue that to answer such a question is not the purpose of the concept of the rule of law.

However, from the responses of the questionnaire it is evident that the majority of constitutional courts and equivalent institutions today see the protection of human rights as a key component of the rule of law. Disastrous historical experiences have to some extent discredited a mere formal conception of the rule of law. History has taught us that the formal conception of the rule of law is not enough. We only need to think back to Nazi Germany, apartheid South Africa, and the history of slavery in the United States.

Another powerful argument for a substantive conception of the rule of law is that within the formal conception of the rule of law lies itself a substantive element, namely the goal of securing human dignity. Formal attributes of the rule of law such as the need for clear, stable and prospective laws serve the primary purpose of allowing individuals to be able to plan their lives, thus treating them as valued individuals, possessing dignity and rights. So the success of the substantive notion can also be explained by the fact that in the end, the formal conception of the rule of law is based on a substantive core.

It must also be stressed that opting for a substantive conception does not mean abandoning the formal conception. As is clear from the questionnaire responses, adopting a substantive conception means accepting and applying the formal conception, and then to go further. To be an effective check on the government’s

monopoly of coercive force, the rule of law must be understood as both a formal as well as a substantive concept.

A small minority of questionnaire responses do explain that traditionally it is the formal conception that dominated in their jurisprudence. But they also admit that in recent years, substantive elements have been recognized. Alternatively, some courts have pointed out that instead of settling on whether the rule of law as a concept is entirely formal or substantive, it is better to say that the concept of the rule of law contains several sub-principles. And among these sub-principles, some are formal while others are substantive.

When we analyze the linguistic differences involved, such as trying to ascertain what the differences or similarities are between the English terminology of the “rule of law”, the German word “Rechtsstaat” and the French expression “etat de droit”, the gradual move from a formal to a substantive concept can also be clearly traced. These are three major expressions which are used in the questionnaire answers, functioning as equivalents to each other. However, as is well known, these terms are not exact synonyms.

The English term “rule of law” was most famously popularized in the 19th century by the Oxford professor Albert Dicey. In the orthodox English Diceyan context, the rule of law includes at least two prominent aspects. First, government under the law. Second, equality before the law. The principle of the rule of law exists as a check on Parliament’s power in a procedural and formal sense. Whatever law Parliament may pass, it must apply equally to everyone, including the highest ranking public officials of the country. Also, public power must be justified by legislation. So, based on this definition, for a long time the “rule of law” in the English language, had been understood in very formal terms. However, at the dawn of the 21st century, it is not unusual for British judges to argue that the rule of law includes the protection of human rights. This evolution of understanding in the United Kingdom as well as in other parts of the common law world is also evidenced by the questionnaire responses to our Congress from common law jurisdictions.

Let me move from English terminology to German terminology. Some questionnaire responses, even though written in English, specifically mention the German term of the “Rechtsstaat”, literally meaning a “state of law”. For a long time, this was also

seen as a formal concept. The German Imperial Constitution of 1871 did not contain a catalogue of rights. The Weimar Constitution of 1919 did contain a rights catalogue, but fierce debate continued over the entrenchment of fundamental rights. Thus before the Second World War, the idea of the "Rechtsstaat" was still heavily dominated by the formal conception, drawing strongly on legal positivism. The end of the Second World War brought about a turning point. The idea of the Rechtsstaat in the new German Constitution of 1949 became strongly substantive. The respect for human dignity and fundamental rights today stand at the apex of the German Constitution. Many civil law countries around the world have taken modern German constitutional law, including the substantive "Rechtsstaat", as an inspiration, including the Republic of Korea.

Roughly 25 per cent of the questionnaire responses to our conference have been submitted in French. Now, the terminology for rule of law used in francophone jurisdictions is "etat de droit". Even though the French concept also literally means a "state of law", unlike the German Rechtsstaat, there has been historically a much weaker emphasis on the role of judges. Also, unlike in Germany, legal positivism did not play as prominent a role in 19th century France. Already after the First World War, with the expansion of executive power, the idea emerged in France that gaps left by legislation had to somehow be filled by general principles of law. Sources that were drawn upon included ideas that could be traced back to the 1789 Declaration of the Rights of Man. Thus substantive elements have always been partly included in the French tradition.

So we can see that philosophical, political, historical and cultural differences give us a diversity of views. Yet in the end, what has been clear from the questionnaire answers is that even though the rule of law may have started out as a formal concept, in our world today, the concept has become a substantive one. I now turn to the third section of my speech, surveying questions three, four and five, which are based on responses regarding constitutional case law.

3. The Rule of Law in constitutional jurisprudence

In this section I shall deal with three issues. First, what are the core elements of the principle of the rule of law according to case law? Second, are there specific fields of constitutional adjudication where the concept of the rule of law plays an especially prominent role? Third, has the concept of the rule of law changed over time in constitutional case law?

When it comes to case law, some questionnaire responses have emphasized that some courts do not usually come forward with theoretic elaborations on the substance and limits of the rule of law concept as a whole. However, a majority of questionnaire responses indicate that many courts have indeed pinpointed core elements of the rule of law in their case law. Let me briefly elaborate on the most prominent core elements that, according to the questionnaire responses, are mentioned in constitutional jurisprudence across the world.

Undoubtedly the core element of the rule of law that has been mentioned the most is the principle of legal certainty. Its prominence can partly be explained by the fact that legal certainty lies at heart of the formal conception of the rule of law. Also, like the rule of law concept itself, the principle of legal certainty consists of a number of sub-principles such as clarity, consistency, predictability and non-retroactivity of the law. Another core element of the rule of law that is prominently featured in the questionnaire responses is the idea of the principle of legality. Other aspects of the rule of law that are also mentioned frequently are the need for independent and impartial courts, equality before the law and access to justice. Again, these are all predominantly features of the formal conception of the rule of law.

However, in addition to the above, the protection of fundamental rights has become one of the most cited elements of the rule of law. Thus even though a majority of core elements of the rule of law stated in constitutional jurisprudence are formal in nature, it is the strong prominence of one substantive element, namely the protection of human and fundamental rights, which has firmly established the substantive conception of the rule of law in case law. According to the questionnaire responses, the protection of human rights ranks near the top of the list of concepts that are referred to in constitutional jurisprudence as elements of the rule of law.

In what context are core elements of the rule of law mentioned, and in which particular fields of law has the rule of law played the most prominent role? The majority of questionnaire responses indicate that there is no particular field in which the rule of law is most important. The rule of law is important in all fields of law. By virtue of the jurisdiction of constitutional courts and equivalent institutions, and by virtue of the concept of the rule of law itself, no area of law can be exempt from the concept of the rule of law.

But some questionnaire responses have indeed pointed out particular fields of law where the rule of law may be mentioned more often than others. They include the criminal law, where for example the issue on non-retroactivity of criminal punishment is of paramount importance. The field of human rights law is another strong contender where the rule of law is mentioned explicitly maybe more often than in other fields of law. The questionnaire responses also indicate that tax law is another such area of law. Also, due to the close connection between the idea of the rule of law and democracy, electoral law is another arena for the strong display of arguments based on the rule of law.

However, it must be emphasized that the overall trend displayed by the questionnaire answers is that the concept of the rule of law applies to all areas of law. This is especially so since some questionnaire answers speak of the "constitutionalization" of the law. Through this process, constitutional principles, including the rule of law, are applied to all fields of law.

Throughout this wealth of constitutional case law, to what extent has the understanding of the rule of law changed? The overwhelming majority of the questionnaire responses document no change. Some courts have also indicated that since they do not provide theoretical definitions of the rule of law in their case law, the question of change cannot be answered. However, even if some process occurred that may be called change, it is better understood as a development or elaboration of the concept of the rule of law, rather than a change in the concept itself.

Elaborations include the following: application of the rule of law reflecting changing social circumstances, development of the meaning of legal clarity, the evolution of the separation of powers, introduction of the principle of proportionality, the

expansion of fundamental rights and mechanisms of judicial review, and of course a general shift from a formal to a more substantive understanding of the rule of law. For some courts, the move towards a substantive concept was partly caused by the internationalization, and in the European context the Europeanisation, of society. At this point I shall turn to the fourth and final section of my speech, asking what role international law plays in the interpretation of the concept of the rule of law.

4. International law and the rule of law

Only very few of the questionnaire responses deny the influence of international law on the interpretation of the concept of the rule of law in their jurisdictions. The overwhelming majority mention an influence in one form or another.

Constitutional courts and equivalent institutions which are part of a regional human rights protection system are especially receptive to international influence. European jurisdictions are influenced by the European Convention of Human Rights as well as the values of the European Union. Regional human rights treaties in Latin-America and Africa also influence their respective members. No regional human rights protection system currently covers the whole Asian continent. But within the questionnaire responses, sub-regional cooperation in the field of human rights, such as the ASEAN Declaration on Human Rights have been mentioned as a source of international influence. Also, some responses from the Middle East refer to the treaties of the Arab League.

Even without a formal regional human rights mechanism, various jurisdictions do take into account international law and influences from abroad. This is because most states in the world have signed up to at least one of the major international human rights treaties. Since the protection of human rights has come to be understood as an element of the rule of law, these treaties and the opinions of their respective monitoring bodies naturally play a role in the interpretation of the rule of law. Examples of these treaties mentioned in the questionnaire responses include the following: The ICCPR, the ICESCR and the UN Convention on the Rights of the Child.

In addition to treaty law, questionnaire responses also mention the Universal Declaration of Human Rights, and international customary law, especially the

connection between *ius cogens* and human rights. Also, some questionnaire responses mention the influence of foreign case law, such as that of the US Supreme Court, the German Constitutional Court, and the Supreme Court of Canada.

To what extent international law actually affects the interpretation of the rule of law of course largely depends on the status of international law in the respective domestic legal system. However, even if international law is viewed as inferior to the domestic constitution, questionnaire responses suggest that there is no objection to the idea that international law can offer supplementary standards in interpreting constitutional principles such as the rule of law.

Conclusion

Finally, please allow me to conclude with the following points. Even though pinning down an exact concept of the rule of law is not easy, we can nevertheless settle on a minimum working definition based on a common core. This is evident from the questionnaire responses to our Congress today.

One useful way that has been applied to defining the rule of law is to think of various layers of definitions. We can start with the rule of law's main purpose, namely to provide some sort of legal limitation to the coercive powers of the state. We can thus identify the rule of law as a concept with a solid and uncontroversial core: the principle of legality. We can then add another rather uncontroversial layer, which is composed of the core elements of the formal conception of the rule of law, for example legal certainty, access to justice and equality before the law. In light of negative historical experiences, a further layer that includes the separation of powers and of course the protection of fundamental rights can be added. Even further, we may add layers concerning issues of social justice and welfare.

There may be some disagreement as layers of definitions increase. But these disagreements are resolved by focusing on an overlapping consensus. A common concept is achieved especially through cooperation among our jurisdictions in the spirit of mutual understanding, learning and openness.

Thank you for your attention.