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"The Rule of Law and Constitutional Justice in the Modern World"
Session 3 – "The law and the state"

Report by
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I have tried to pick out the most relevant points made by Alexandru Tanase and Gagik Harutyunyan in their presentations.

In his presentation, Alexandru Tanase, former President of the Constitutional Court of Moldova, analysed the relationship between the Law and the State and identified the constitutional elements thereof, their sources and the ways in which they are applied. In his analysis he identified three aspects:

1) the impact of the case-law of constitutional courts on guaranteeing that state powers act within the constitutional limits of their authority;
2) the binding force of constitutional decisions on ordinary courts;
   and
3) the ways in which courts have contributed to the development of standards for the law-making process and the application of law, and the accountability of public officials.

With regard to the first element, i.e. **the impact or repercussions of the case-law of constitutional courts,** he began by highlighting the fact that the decisions of the respective constitutional courts (or their equivalent) are binding on all state bodies which have to enforce them.

He underlined the fact that the core element of the rule of law is the principle of the separation of powers, a point to which most participants referred, and highlighted the role of constitutional courts in guaranteeing that state powers act within the constitutional limits of their authority.

The distribution of responsibilities between the authorities sometimes seems to be complex, in particular in Bosnia and Herzegovina, given that the constitutional principle of the separation of powers is fundamental in the organisation and functioning of a democratic state under the rule of law. Constitutional Courts have accordingly, on various occasions, held that this principle means that legislative, executive and judicial powers must be separate but, at the same time, balanced.

All acts by the state must ultimately be based on the Constitution; otherwise they would be null and void.

With regard to possible conflicts of jurisdiction, he established that in the majority of our countries, constitutional courts (or their equivalents) did not directly decide on such conflicts, since their own jurisdiction was essentially normative. Such disputes were decided indirectly, i.e. when assessing whether laws and other acts are contrary to the powers of a particular state institution or when deciding on whether state officials should be prosecuted.

However, he underlined the fact that in their rulings on the constitutionality of the activities of legislative and executive powers, constitutional courts clarified the limits of the powers of the relevant institutions.

Conversely, in their rulings on issues relating to the activities of the judiciary, the constitutional courts, generally protected the function carried out by this branch of state power and strengthened the independence of judges as well as the independence of courts as an institutional system.

With regard to the **second theme**, i.e., **the binding force of constitutional decisions on ordinary courts,** he said that, generally speaking, the judgments handed down by constitutional courts were binding *erga omnes*, although this was not the case in all countries. In Belgium and the Czech Republic, for instance, only those decisions that annul a legislative provision are binding erga omnes while the others are only inter partes.

All courts of general jurisdiction are bound by the official constitutional doctrine, which is reflected in the jurisprudence of the Constitutional Court.

The provisions of the Constitution may not be interpreted differently from the way in which the Constitutional Court has interpreted the said provisions in its acts.

In countries where the judgments of the Constitutional Court (or its equivalent) are not directly binding, they serve as precedents that are generally respected by the lower courts. This is the case in Finland and Sweden.

In Mexico Supreme Court decisions are only binding on lower courts under certain conditions described by law, while ordinary courts are obliged to respect all Supreme Court decisions as precedents.

With regard to the **third theme, i.e. the contribution of Constitutional Courts to the development of standards in the law-making process and the application of the law,** and the accountability of public officials, the following questions arise:

1. What are the standards for the law-making process and for the application of the law according to case law?

2. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, making it impossible to fight against corruption effectively?

In replying to these questions, Dr Tanase first talked about the *law-making* process. He underlined the fact that most constitutional courts have contributed to the development of legal concepts through the law-making process, in other words by ensuring that legal norms are understandable, clear and accessible; in order to ensure that the subjects of legal relationships know what is required from them by legal norms, the latter must be established in advance. He stressed the fact that when legal acts are passed, it is necessary to take account of the hierarchy of legal acts and of the procedural law-making requirements, i.e. law-making subjects may not exceed their powers in passing legal acts; legal acts may not require the impossible; the criteria established in judicial acts must be based on general provisions; the force of judicial acts is forward-looking; and the violations of law for which responsibility is established in legal acts must be clearly defined.

With regard to the ***application of the law****,* in their rulings the Constitutional Courts also identify the requirements emanating from the constitutional principle of a state under the rule of law and underline the following main criteria: institutions applying the law must comply with the requirement of the equal rights of persons; the same infringement of the law may not be punished twice; responsibility for breaches of the law must be established in advance; an act cannot be considered to be criminal if it is not provided for in the law; laws cannot have a retroactive effect; law-applying institutions must be impartial; judges may not apply any legal decision that is in conflict with a higher-ranking legal decision; similar cases must be decided in a similar manner; if the laws relevant to the offence have been amended, the more lenient law has to be applied ; and last but not least the welfare of the people must be the supreme law.

With regard to the **accountability of public officials**, he said that in most countries, public officials are fully accountable for their actions, provided that they are not exempt from

prosecution. Although in some cases some categories enjoyed immunity, it was emphasised that the constitutional principle of a state under the rule of law is inseparable from the state authorities' responsibility towards the public.

In conclusion he stressed the importance acquired by constitutional courts which were established in the wake of brutal social experiments based on severe violation of human rights, after which the importance of freedom, the rule of law and human rights was enhanced.

Professor Gagik Harutyunyan expressed his deep satisfaction that co-operation at international level was already yielding substantial results. He had taken part in all of the Congresses and could say with certainty that today there could no longer be any doubt that a world network of constitutional justice had been established and consolidated.

On the basis of an analysis of the constitutional practices of each country, he had established that the decisions of constitutional courts were the decisive factor in the implementation of fundamental constitutional principles, the guarantee of the principle of the separation of powers and the strengthening of constitutionalism in a country.

It was necessary to proceed very cautiously when choosing a model for settling disputes regarding constitutional powers.

He extended a warm invitation to the academic event which would take place on 19-21 October 2017 in Yerevan, an international conference co-organised with the Council of Europe's Venice Commission on the theme of "the role of the constitutional courts in overcoming constitutional conflicts".

With regard to the establishment of constitutional democracy in a country, constitutional courts were faced with new challenges on account of the deepening deficit of constitutionalism in the modern world; accordingly, the investigations on the basis of the "rule of law checklist" devised by the Venice Commission showed that, alongside the guarantee of effective judicial constitutional supervision, there was also an imperious need for systematic constitutional monitoring on the basis of on-going and multidimensional evaluation of the factors and analysis of the real state of constitutionalism in a country and, on that basis, the introduction of a scientifically grounded mechanism for governing the process of consolidation of constitutional democracy

He stressed the fact that not only a system of indicators for constitutional monitoring but also conceptual, methodical and methodological approaches for performing that task had been devised. From 2018 onwards a scientific group would use 320 indicators to determine the

level of constitutionalism in 140 countries of the world and prepare recommendations for improving the system of constitutional monitoring in each country.

Professor Harutyunyan mentioned the fact that the Constitutional Court assessed not only the constitutionality of legal and regulatory acts but also the constitutionality of their interpretation when applied by general courts. The legal positions of constitutional courts were above all a source of constitutional development and played the most important role in the constitutionalisation of law and the legal system as a whole.

He also drew attention to the special role of constitutional courts in dealing with legislative loopholes and legal uncertainty; for this reason the principle of legal certainty had been clearly enshrined in the Constitution.

The themes discussed also brought to the fore the need to examine the issue of liability under constitutional law. He believed that the lack of a well-defined and legally competent system of liability under constitutional law was one of the major bottlenecks in the present-day constitutions of many countries.

Finally, as the starting point to ensure the primacy of the constitution and the necessary level of constitutionalism in a country, it was necessary for the political conduct of the country's political institutions, the public conduct of authorities and the social conduct of every member of society, to be based on the principle of the rule of law. And this, in particular, made it necessary at the constitutional level to enshrine a clearly defined and effective mechanism for guaranteeing liability under constitutional law.

The above are the main ideas set out in the papers presented by Dr Alexandre Tanase, former president of the Constitutional Court of Moldova and Professor Gagik Harutyunyan. I hope I have done justice to the brilliance of their authors.

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