4th Congress of the World Conference on Constitutional Justice

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

Session 3 - "The law and the state"

Response by

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Esteemed participants in this International Congress,

Colleagues,

Ladies and Gentlemen,

I welcome all the participants in the World Congress and express my deep satisfaction that our cooperation at international level is already bearing a generous harvest of fruit. I have been fortunate enough to take part in four of our Congresses and to preside over the Conference Bureau, and I can say with certainty that today there can no longer be any doubt that a single world family of constitutional justice has been formed and consolidated. The Council of Europe's Venice Commission, its greatly respected President, Mr Gianni Buquicchio, and the Secretary General of our Conference, Mr Schnutz Dürr, have played an enormous and invaluable role in bringing this about. I wish to thank them for their tireless work and wish them continued success.

Dear colleagues,

At this session of the Congress our keynote speaker, Mr Alexandru Tănase, has presented a magnificent analytical report on the theme of "the Law and the State". This is one of the classic and yet still topical themes of constitutional law. In the report presented today three fundamental aspects were picked out:

1) the impact of the case-law of constitutional courts on the exercise of state powers;

2) the binding force of constitutional court decisions on ordinary courts;

3) the place and role of constitutional court decisions as a source of law.

All three of these aspects have a pivotal role in the effective exercise of constitutional justice and the guarantee of stable and dynamic development of the State.

On the basis of an analysis of the constitutional practices of individual countries the general point is put forward in the report that constitutional court decisions have been by and large 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. All this is the result of the dynamic development of the system of constitutional justice in the world, especially over the last 50-60 years.

We think it appropriate to also examine the problem of constitutional conflicts and consider the role of constitutional courts in overcoming them. This power is wielded by a mere 29 of a total of some 120 constitutional courts existing around the world. As of 2015 our constitutional court has this power too. We believe that this prerogative is extremely important and forward-looking for ensuring the necessary dynamism of societal development. At the same time, we must proceed systematically and very cautiously when choosing a model for settling disputes regarding constitutional powers. Without wishing to go into the details of this problem, I will simply tell you that, on 19-21 October 2017, we organised an international conference in Yerevan jointly with the Council of Europe's Venice Commission on the theme of "the role of the constitutional courts in overcoming constitutional conflicts". The question is considered not only from the viewpoint of individual States' experience but also in the light of modern-day challenges to the establishment of constitutional democracy. You are all very welcome to participate in the work of the Yerevan International conference.

I would like to further add that, with regard to the establishment of constitutional democracy in a country, constitutional courts are faced with new challenges in connection with the deepening deficit of constitutionalism in the modern world. This was discussed yesterday by other participants. I will just provide one example. As you know, each year the World Justice Project determines and analyses a rule of law index covering over 110 countries around the world. The situation is alarming, not only because, for example, in over 60% countries the rate of corruption exceeds 50%, meaning that in nearly 70 countries over half the state

institutions are corrupt, but also because there has been a substantial decline in the last 10 years in both new democracies and many old democracies. Other measurements taken by the rule of law index paint a similar picture. Yesterday the Lithuanian Court President Žalimas also strongly emphasised in his report that, according to questionnaire data, many countries consider that one of the main challenges to the rule of law is corruption.

Our investigations on the basis of the rule of law checklist devised by the Venice Commission show that, alongside the guarantee of effective judicial constitutional supervision, there is also an imperious need for systematic constitutional monitoring on the basis of ongoing and multidimensional evaluation 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. We have devised not only a system of indicators for constitutional monitoring but also conceptual methodical and methodological approaches for performing that task. From 2018 onwards our scientific group will 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 taking account of present challenges.

Our rapporteur has also looked at another important issue, namely the functional relations between the constitutional court and other courts. We believe that the nature of those relations is largely shaped by the choice of model used for individual constitutional complaints in a given country. The introduction of a full constitutional complaint requires the necessary degree of legal and constitutional culture in a country. Otherwise it may generate antagonism between the constitutional court and general courts.

In turn, if the institution of individual constitutional complaints is lacking, there is no guarantee at all of legally competent constitutional supervision. This is my profound conviction based on the comprehensive analysis of the situation in over 120 countries.

For the new democracies, one good example might be found in the constitutional reforms in our country where, since 2006, citizens have been entitled to apply to the Constitutional Court. However, the judicial acts of ordinary courts are not subject to judicial constitutional supervision. To avoid any possible conflict, we opted for the alternative of instituting a full constitutional complaint. It was stipulated in Article 169, paragraph 1. 8 of the Constitution that an application to the Constitutional Court may be filed by anyone who, in a specific case

when the final judicial act has been adopted and the possibilities of judicial protection have been exhausted, challenges the constitutionality of a law provision applied by the act in question which has resulted in a violation of their basic rights and freedoms enshrined in Chapter 2 of the Constitution, **taking into account also the interpretation of the respective provision in law enforcement practice.**

On the basis of this latter provision the Constitutional Court assesses not only the constitutionality of legal and regulatory acts but also the constitutionality of their interpretation when applied by general courts. We believe that it is precisely the existence of such a prerogative that makes it possible, on the one hand, to avoid a functional and institutional conflict and, on the other hand, guarantee the direct effects of fundamental human rights.

With regard to the third problem highlighted in the main report, I would like to emphasise that the legal positions of constitutional courts are above all a source of constitutional development. As we all know, one only has to look at over 540 volumes of Supreme Court decisions to appreciate that the United States Constitution is a living constitution. In European law too, legal precedent has become a durable fixture in legal practice. Today we can talk confidently of the case-law of the courts in Strasbourg or Luxembourg. The legal acts of many countries also mention the case-law of constitutional courts. Consequently, the legal positions adopted by constitutional courts are not only a source of constitutional development but also an extremely important source of law as a whole. And that means that, when exercising legislative or law enforcement functions, all state authorities must be guided by the decisions and specific legal positions of the Constitutional Court, alongside the Constitution itself, as these play a most important role in the constitutionalisation of law and the legal system as a whole.

In addition to what I have already said, I would also like to lay particular emphasis on the special role of constitutional courts in dealing with legislative loopholes and legal uncertainty. I am not exaggerating if I say that nearly 70% of the constitutional complaints arriving in our Constitutional Court raise this issue in one way or another. In the light of this situation, we have clearly enshrined the principle of legal certainty in our Constitution, in Article 79, stressing that "when restricting basic rights and freedoms, laws must define the grounds and extent of restrictions and be sufficiently certain to enable the holders and addressees of those rights and freedoms to act accordingly".

The theme discussed also brings to the forefront the need to examine the issue of liability under constitutional law. We believe that the lack of a well-defined and legally competent system of liability under constitutional law is one of the major bottlenecks in the present-day constitutions of many countries. By our estimates, of the 140 constitutions in force around the world that we have studied, only 9% (those of Portugal, Poland, Croatia, Greece or Finland for example) take a systematic approach to establishing the institution of the constitutional law liability of fundamental constitutional institutions. In France, there was even a constitutional law, no. 93-952 of 27 July 1993, which introduced a special section into the Constitution "on the criminal liability of members of government".

For us, the starting point is a provision which states that, to ensure the primacy of the Constitution and the necessary level of constitutionalism in the country, it is 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 precisely on the principle of the primacy of law. In particular, this makes it necessary at the constitutional level to enshrine a clearly defined and effective mechanism for guaranteeing liability under constitutional law that at the same time is an effective mechanism for vanquishing corruption and preventing the oligarchisation of authority in societal systems in transition. We believe that the successful attainment of this goal is one of the main aspects of establishing constitutional lawfulness and reinforcing constitutional democracy in a country.

Colleagues, allow me once again to thank Mr Tănase for his most interesting report and wish our Congress continued success in its work.

Thank you for your attention.