



**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 1 – “The different concepts of the rule of law”

Report by

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Dear Mr. President of the Venice Commission, heads and members of constitutional control bodies, ladies and gentlemen!

It is a great honor and a great responsibility for me to speak to such a representative audience.

Before starting to my mission, first of all, on behalf of the Constitutional Council of the Republic of Kazakhstan and on my own, I would like to congratulate the leadership of the Venice Commission, the Constitutional Court of Lithuania and the participants with the successful holding of this Congress, within which we were able to discuss common vital issues of constitutional and legal development in our countries.

The first session, for which I was defined as a rapporteur, was about "Different concepts of the rule of law". The keynote speaker at this session was the Acting Chairman of the Constitutional Court of the Republic of Korea, Mr. Kim Yi-Su, and the co-rapporteur was the Chairman of the Constitutional Council of Algeria, Mr. Murat Medelci.

My generalizations are based on the speeches of the keynote speaker, the co-rapporteur and the discussions that followed after them, as well as the positions of foreign colleagues who responded to the questionnaire which was sent to the members of the World Conference.

In the world's legal space, the principle of the rule of law as a constitutional value determines the strategic directions for the development of the national political and legal system of most countries that have embarked on the path of democratic development. The questions of its full realization are of concern of progressive mankind for many centuries. In the 21st century, it is the rule of law and, in general, the rule of law recognized by the international community as the most important signs of a civilized development of the state.

As research results shows, the legal sources of the rule of law are very diverse. In some countries, the principle of the rule of law is explicitly provided for in the constitution and is detailed in national legislation. An important source is the international legal instruments - the Statute of the Council of Europe, the Treaty on the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Statute of the Venice Commission and others.

Many participants of the Congress emphasized that in the development of the content of the rule of law, the bodies of constitutional jurisdiction play an important role, which through the interpretation of constitutional norms form the concept of the institution which is under consideration, highlighting its elements that ultimately determine the basic directions of legal policy. This is especially important in countries where the rule of law is not explicitly enshrined in the constitution.

A significant number of participants pay attention that there is no single and well-established concept of the rule of law. We can only talk about the dominance of one of them in the views and approaches of the constitutionalists.

Specialists distinguish two basic concepts of the rule of law: formal and substantive (material), associated with theories of the corresponding legal positivism and natural law.

The formal interpretation of the rule of law focuses on procedural aspects, the subordination of power to a formal law, putting aside the judgments about the validity of the laws themselves, their effectiveness and predictability.

The contentious concept of the rule of law, along with the formal ones, puts forward demands for the quality of laws that must be based on fundamental human rights, meet the demands of the social and political structure of society, proceed from the highest unwritten principles of morality and justice, and be clearly enforced in law enforcement practice.

I am pleased to note that most of our colleagues support the so-called formal content approach, which is based not only on the need to follow the provisions of the law, but also on the content of these laws, so that they are based on generally recognized constitutional values, man and find the right application.

The keynote speaker correctly stated that, despite the different approaches to consolidating the rule of law in the national jurisdictions of individual states, there is a certain consensus on the main constituent components of this principle.

A number of participants proposed their original approaches to the classification of elements of the rule of law. Each of them is interesting in its own way and deserves attention. However, despite the different wording of the authors, they, in one way or another, refer to the components that are systematized in the report of the Venice Commission on the Rule of Law adopted in 2011 at its 86th plenary session, which lists six components, namely, the legality, including a transparent, accountable and democratic legislative process; legal certainty; prohibition of arbitrariness; access to justice provided by independent and impartial courts; respect for human rights; non-discrimination and equality before the law.

The main speaker proposed two more elements: the separation of powers, social justice and well-being.

Regarding the topic under discussion, various terms can be found in official documents and in law theory: the rule of law, constitutional state, supremacy of law and others (in the English terminology "Rule of law", in German - "Rechtsstaat", French – "Etat de droit").

As it was correctly noted, they, despite the closeness of their content, bear several different semantic loads. If the concept of the "rule of law" ("Rechtsstaat"), which appeared due to written constitutions, was opposed to the absolutist regime and more focused on the nature of the state, then the rule of law ("Rule of law") originated in courtrooms in the absence of a written codified constitution.

The French theory of the rule of law ("Etat de droit"), formed on the basis of the Declaration of Human Rights and Citizen of 1789, implies the conduct of judicial (constitutional) supervision of customary legislation.

All these terms are used in international practice and constitutional legislation of various countries.

Despite certain difficulties, the rule of law is consistently studied and implemented in countries that in the recent past have been guided by the ideas of so-called socialist legality. At the present time, in these countries there is also a transition from a very positivist approach - the rule of law to a more general concept - the rule of law, which is perceived not as an instrument of power, but as a value that requires respect and implementation in real life.

A checklist of questions to assess compliance with the rule of law adopted at the 106th plenary session of the Venice Commission is a correct understanding and dissemination of the rule of law on an international scale. It is aimed at creating a mechanism for assessing the rule of law in a particular country in terms of its constitutional and legal structure, existing legislation and judicial practice.

In the opinion of colleagues, there is no need to single out any branches of law or spheres in which the rule of law is of particular importance. Most of the replies to the questionnaire state that the rule of law is important in all areas of jurisprudence, and none of them can be an exception.

Particular attention was paid in the discussions to the influence of international law on the interpretation of the concept of the rule of law in national jurisdictions. Most speakers recognize the important role of international instruments in the formation and development of the components of the rule of law in individual countries, in particular the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, Economic, Social and Cultural Rights, the European Convention on Human Rights and Fundamental Freedoms, the Convention on the Rights of the Child and other universal and regional treaties constituting the international bill of human rights.

And some states are guided by the provisions of the mentioned acts, even if they are not their participants. The degree of influence of supranational law, of course, depends on the place of international treaties in the hierarchy of the current law of a particular country. Owing to the universally recognized nature of many international agreements, States are trying to ensure maximum harmony between their standards and national legislation, adopting legislative and other measures that meet the requirements of a higher legal order, which is a guarantee of full implementation of the rule of law principle.

I would like to take this opportunity to say a few words about Kazakhstan's experience. In our country, the principle of the rule of law is not directly enshrined in the Basic Law. At the same time, a number of constitutional norms contain its main features and elements.

Thus, according to the Constitution adopted by the republican referendum on August 30, 1995, the Republic of Kazakhstan claims to be a democratic, secular, legal and social state whose highest values are the person, his life, rights and freedoms (art. 1, para. 1). The Constitution has the highest legal force and direct effect on the entire territory of the Republic (Article 4). Everyone must observe the Constitution and legislation of the Republic of Kazakhstan, respect the rights, freedoms, honor and dignity of others (Article 34). Laws and other legal acts that are recognized as unconstitutional, including those infringing on the rights and freedoms of a person and citizen enshrined in the Constitution, are abolished and cannot be applied (art. 74, para. 2).

As can be seen, the Constitution of Kazakhstan traces not just the positivist approach to strict observance of laws, but also the idea of the necessity of adopting the so-called legal laws, whose uniform and equal application is called upon to provide an independent judiciary to all subjects, and the conformity to the spirit and letter of the Constitution - the body constitutional control.

The Constitutional Council of the Republic of Kazakhstan from the very beginning of its activity regularly indicates the priority and the supreme legal force of the Constitution, which contains the basic elements of the rule of law, guides public authorities to the large-scale implementation of these values in daily work.

Thus, it is obvious that the rule of law has become the universal dominant universal principle of modern constitutional legislation, recognized by states and international organizations.

Most members of the international community recognize the rule of law as a global ideal that needs to be pursued. In this continuous process, it is important not only to formally establish the above-mentioned components of the rule of law, but to provide a meaningful aspect that ensures that the measures taken correspond to the demands of society and development on the basis of respect for the law as a social value.

The rule of law is closely linked to a democratic society, they are interdependent. As the Venice Commission correctly notes, the rule of law can be successfully implemented only in a country whose population feels collective responsibility for the implementation of this principle and wants to make it an integral part of its own legal, political and social culture. Thank you for attention.
