4th Congress of the World Conference on Constitutional Justice
Vilnius, Republic of Lithuania, 11-14 September 2017

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

Session Session 2 – New challenges to the rule of law

Key-note speech by

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Dear Colleagues, Honourable Judges,
Dear President and Members of the Venice Commission,
Dear Friends,
Distinguished Guests,
Ladies and Gentlemen,

Introduction

This session on new challenges to the rule of law naturally continues the topic of the first session, which was devoted to the concept of the rule of law. After defining the formal and the substantive concepts of the rule of law, identifying their typical elements and relationships, as well as the possibly universal elements of the understanding of the rule of law, it is logical to examine the current threats that could shake the foundations of the rule of law, in particular its substantive conception that includes the goal to secure human dignity and ensure human rights. These threats and challenges may be common in the today's globalised and interdependent world; therefore, they may be related to the repercussions of international developments on the interpretation of the rule of law. Also it seems logical, after considering the impact of international law on the interpretation of the rule of law in the first session, to continue by dealing with collisions between national and international law, in

particular collisions between constitutional and international jurisprudence, as well as their impact on ensuring the rule of law and the ways to settle the arising difficulties. It should be pointed out that this session is devoted to new challenges (both internal and external) to the rule of law, i.e. the recently experienced and current challenges faced by our courts, which either have been recently solved or still remain to be solved, or are even likely to arise in the nearest future, although some courts indicated the challenges faced in the distant past.

Based on the questionnaire responses to the three relevant questions, my report consists of three parts. The first part deals with the major threats to the rule of law at the national level. The second part examines the repercussions of international events and developments on the interpretation of the rule of law in the states that have responded to the questionnaire. The third part focuses on the collisions between national and international law faced by our courts, as well as the related difficulties in implementing the decisions of international courts and bodies. My report is based on and aims to generalise all 65 replies to the questionnaire we received from constitutional or supreme courts or councils of various states (more than half of them are replies from European courts). There are only a few states that stated they have not encountered any of the above mentioned challenges. On the basis of this general overview, my report also aims at identifying the common or most typical challenges to the rule of law, as well as the possible responses to these challenges. I hope this could be useful for continuing our dialogue on the further topics of the rule of law from the agenda of our Congress.

1. Major threats to the rule of law at the national level

The question posed to our courts was the following: “Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?” This question implies the need to indicate the threats that could shake the foundations of or seriously impede the rule of law in the respective country.

Around a quarter of the countries that submitted replies to the questionnaire (16 countries: Albania, Armenia, Belgium, Cambodia, Cameroon, Cape Verde, Chile, Denmark, France, Guinea, Indonesia, Mali, Norway, South Africa, Sweden, and Togo) answered this question negatively, i.e. they have not faced any major threats to the rule of law at the national level. Some of the other countries (7 countries: Croatia, Czech Republic, Estonia, Finland, Germany, Madagascar, and the Netherlands) stated they had not faced any threats that could be considered major threats to the rule of law, but they noted they did have some difficulties or challenges that needed to be overcome.

In general, the countries in their responses to the questionnaire indicated the following major threats or challenges to the rule of law recently faced by them:

– An **economic and financial crisis** was the most frequent answer. As a major threat or challenge, it was indicated in the responses of 20 countries (Belarus, Croatia, Cyprus, Democratic Republic of Congo, Estonia, Finland, Germany, Ghana, Italy, Jordan, Kyrgyzstan, Latvia, Lithuania, Mexico, the Netherlands, Portugal, Romania, Senegal, Slovenia, and Ukraine). This is not only because an economic crisis was indicated as an example in the formulation of the question. Most of the said countries referred specifically to the global economic and financial crisis that occurred in 2008; therefore, in the replies of some countries, the global economic and financial crisis is also mentioned as an international development with repercussions on the interpretation of the rule of law. A few countries indicated the economic crises arising from a specific background (for instance, the economic crisis of 2013 (bail-in) in Cyprus; the economic recovery after the war in Kosovo; the economic crisis of 2014–2015 as the result of foreign aggression and the national political crisis in Ukraine);

– **Corruption** is the second most frequently occurring answer. As a major threat or challenge, it was indicated in the replies of 8 countries (Bosnia and Herzegovina, Costa Rica, Croatia, Czech Republic, Georgia, Kosovo, Kyrgyzstan, and Ukraine). However, I believe that, at least looking at the Corruption Perceptions Index of 2016 by Transparency International,[1] corruption is a much more widespread phenomenon, which can be seen as a constant challenge to the rule of law rather than an *ad hoc* threat in a number of countries throughout the world;

– **Other major threats or challenges** of specific character, faced by individual countries, include: political crises (Indonesia and Jordan), armed conflicts (Ukraine[2]), international crimes of torture and inhumane behaviour (Democratic Republic of Congo), organised crime and transnational criminality (Italy and Kosovo), flows of refugees and persons seeking international protection (Austria, Denmark, and Lebanon), a lack of respect for court judgments (Croatia and Czech Republic), poverty (Madagascar), a lack of respect for minorities (Czech Republic), terrorism (Austria and Italy), an insufficient level of the legal culture (Belarus), unemployment (Bosnia and Herzegovina and Kosovo), inflation of legal rules (Turkey), etc. Finland indicated the rise of social media as a future threat to the principle of the rule of law. Some of these threats (such as terrorism and flow of refugees) are dealt with in Part 2 of this report as international developments potentially having repercussions on the interpretation of the rule of law.

[1] Transparency International, https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

[2] In Ukraine, the foreign aggression resulted in thousands of casualties and a flow of internally displaced persons, and it continues to seriously affect the rights of people, especially those living near and in the conflict zone and the occupied territories of Crimea and Donbass.

Let me explore the first two types of the identified major threats and challenges (economic (financial) crises and corruption) in greater detail, as they are common to a significant number of our courts.

Economic (financial) crises. As it is clear from the replies to the questionnaire, economic and financial crises result in the major challenge to constitutional courts of balancing, in a fair manner, competing constitutional values – social guarantees (individual social rights), on the one hand, and the need to cope with a significant budget deficit (the public interest of fiscal stability), on the other hand. In other words, constitutional courts face the problematic issue of how to reconcile the inevitable anti-crisis (austerity) measures and the requirements of the rule of law, since these measures usually affect the level of guaranteeing social and economic rights and, to a certain extent, require derogations from such legal principles as legal certainty and equal rights.

The constitutional or equivalent courts of the following states provided rather detailed information on their case law dealing with the constitutionality of anti-crisis (austerity) measures: Croatia, Estonia, Germany, Italy, Latvia, Lithuania, Portugal, Romania, and Slovenia. It is worth underlining the decisive role of constitutional courts in this field, as international courts usually rely on and do not substitute the assessment of domestic courts.[3]

One of the deepest economic and financial crises, accompanied by one of the biggest downfalls in GDP of as much as 20 percent, was experienced in 2009–2010 by two Baltic States – Latvia and Lithuania. The Constitutional Court of Lithuania had a considerable number of cases in which it assessed the constitutionality of various anti-crisis (austerity) measures, such as the sudden and significant reduction of pensions and other social benefits, as well as salaries in the public sector. The case law of the Lithuanian Constitutional Court singles out the following criteria that must be taken into account when assessing the constitutionality of austerity measures, in particular their compliance with human rights and the social orientation of the State: (1) the constitutionally justifiable basis of austerity measures (the existence of a particularly difficult financial situation when the income of the state budget is drastically declined); (2) their necessity (the measures in question are *ultima ratio*, i.e. necessary for safeguarding financial stability and saving economy from default); (3) their temporary character (the necessity of the measures is under periodic review and they are applied only as long as the difficult financial situation requires); (4) their proportionality (the measures are proportional to the need to preserve fiscal stability and do not distort the pre-crisis proportions of the same kind of benefits; (5) due regard to the limits of discretion of the legislature (the Constitutional Court is self-restrained in adjudicating on purely economic issues, i.e. as a rule, the assessment by the Government of

[3] E.g., *Mockienė v. Lithuania*, ECtHR, 4 July 2017, application no. 75916/13.

a difficult economic situation and the expediency of the measures in question is not subject to dispute); (6) the principles of social solidarity and non-discrimination (the measures in question should be applied without discrimination except in cases where, on the basis of social solidarity, a certain minimum benefit is established, which is not subject to reduction); and (7) the duty to compensate for certain losses (in particular those that occurred due to anti-constitutional measures).[4] Similarly, the Constitutional Court of Latvia has noted that measures for overcoming the crisis and restrictions on the related rights of persons must meet certain criteria, i.e. they must be introduced on the basis of due assessment, abiding by the principles of a state governed by the rule of law; a difficult economic situation in the state provides the grounds to apply certain measures derogating from the terms set in law; however, such measures cannot be acceptable unless there is a prescribed time limit.

The Constitutional Court of Portugal points out that the legislator's freedom to shape the anti-crisis legislation is constitutionally bound by such principles associated with the rule of law as equality, the protection of legitimate expectations, and proportionality. The Court also considered that the Constitution opposes an intolerable, arbitrary, oppressive, or overly accentuated downgrading of those minima in terms of certainty and security, which people, the community, and the law must respect as essential dimensions of a democratic *Estado de direito*, which is included in the principle of a democratic state based on the rule of law. The Italian Constitutional Court emphasises that a financial emergency cannot under any circumstances legitimise legislative choices that are irrational or not based on a reasonable balance of conflicting values or interests.[5] The case law of the Constitutional Court of Romania identifies the following criteria of the constitutionality of anti-crisis measures: objectivity (established by law, predictable and determinable), affordability (fair and balanced option), non-discrimination, proportionality (between the objective and the measures);[6]

[4] Žalimas, D., "Taupymo priemonių konstitucingumo kriterijai Lietuvos Respublikos oficialiojoje konstitucinėje doktrinoje", *Teisė*, 2015, Vol. 94, p. 59.

[5] For example, the Constitutional Court of Italy, in one of its judgments of 2015, declared unconstitutional the provision that, for 2012 and 2013, limited the automatic revaluation of pension income in respect of the full amount thereof for pensions worth an overall amount of up to three times the minimum INPS (Italian National Institute for Social Security) pension, with the result that pensions higher than that threshold (1 217.00 euros net) were excluded from any revaluation. In failing to comply with the reference legislation enacted both previously and subsequently (both in respect of the duration of the measure for more than one year and also due to the fact that it applied to pensions that were not particularly high), the contested provision breached the limits of reasonableness and proportionality because it limited itself to recalling generically the "contingent financial situation", and the overall design did not make it clear why financial requirements should prevail over the countervailing rights of pensioners, which had been affected by such a far-reaching initiative.

[6] The purpose of the measures in question should be the fight against "the economic crisis, global phenomenon structurally affecting the Romanian economy", when the financial data and the forecasts made by the competent authorities in this field outline the "image of a deep economic crisis, which may endanger the economic stability of Romania and, thereby, public order and national security". This situation should require "the adoption of certain exceptional measures, which, by the

however, as the Constitutional Court has stated on a number of occasions,[7] the establishment of a certain threshold for the application of austerity measures can be reasonable as an exclusive choice by the legislator. The Constitutional Court of Slovenia, in its Decision No. U-I-186/12, noted that a pension in an established amount is an acquired right determined by statute; however, the economic inability of the state to provide social expenses can represent a constitutionally admissible reason for the legislature to decrease the legally determined acquired rights for the future, and this is consistent with the principle of trust in the law; in order to be consistent with the principle of equality, the classification of groups of beneficiaries whose pensions are to be decreased cannot be arbitrary. The Constitutional Court of Croatia also underlines the importance to observe the principle of equality and the temporary character of measures in response to demands caused by the crisis (Decision no. U-IP-3820/2009 et al. of 17 November 2009): the special importance of the anti-crisis measure for the stability of public expenditures can have priority over the requirements for achieving absolute equality and equity, while the temporary character of that measure is based on a qualified public interest (maintaining the stability of the country's financial system). The Supreme Court of Estonia assessed the decrease of financial benefits by taking into consideration the principle of legitimate expectations (along with the relevant fundamental rights – the right of ownership, the fundamental right of equality, and the freedom to conduct business).

Conclusion. Thus, it can be concluded that, according to the case law of our courts, measures for overcoming an economic (financial) crisis must meet certain criteria that are based on and developed through the general criteria of the limitation of human rights as recognised by international law[8] (establishment by law, the legitimate purpose, the necessity and proportionality of the measure). These criteria include objectivity, non-discrimination, an exceptional and temporary character of the measures in question, the observance of other relevant constitutional principles, such as social solidarity, and the broad discretion of the political branch of power to decide the issues of economic policy. The replies of Bulgaria, Algeria, and Indonesia make it evident that economic (financial) crises can also be seen as challenges provoking positive changes and reforms in the administration of the state and the public financial sector.

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efficiency and prompt application, leads to reducing its effects and to bringing about the re-launch of the national economy".

[7] E.g. by Decision no. 358 of 30 September 2003 or Decision no. 4 of 18 January 2000.

[8] Žalimas, D., "Facing the Challenges of the Financial Crisis: The Role of the Constitutional Court of the Republic of Lithuania", http://www.constcourt.md/public/files/file/conferinta_20ani/programul_conferintei/Dainius_Zalimas.pdf; Žalimas, D., "Taupymo priemonių konstitucingumo kriterijai Lietuvos Respublikos oficialiojoje konstitucinėje doktrinoje", *Teisė*, 2015, Vol. 94, p. 59.

Corruption. According to the Venice Commission, corruption refers to particular challenges – actions and decisions that offend the rule of law.[9] For example, in the report of Ukraine, it is noted that corruption jeopardises the good functioning of public institutions and diverts public action from its purpose, which is to serve the public interest; it disrupts the legislative process, affects the principles of legality and legal certainty, introduces a degree of arbitrariness in the decision-making process, has a devastating effect on human rights, and undermines citizens' trust in the institutions.[10] As underlined by the Constitutional Court of Moldova in its case law,[11] corruption undermines democracy and the rule of law, leads to violations of human rights, undermines the economy, and erodes the quality of life; therefore, fight against corruption is an integral component of ensuring respect for the rule of law. In the reply of Bosnia and Herzegovina, it is emphasised that, in the circumstances when the citizens of the state are losing trust in the rule of law because of corruption (including other factors), the strengthening of the rule of law is of utmost importance; it is political institutions and courts that should restore that trust; and the role of the Constitutional Court, especially in view of its jurisdiction, is exceptionally important and noteworthy. Raising the authority of the Constitution in cases of corruption is emphasised in the report of Kyrgyzstan.

Some examples from the states of the Central and Eastern European region show the connection between the existing cases of corruption and the legal culture. In the report of Croatia, it is stated that "unstable political and legal culture leads to corruption, a lack of understanding and inappropriate actions by certain persons in bodies of state authority, and to a lack of respect for institutions and court judgments". In the report of the Czech Republic, it is acknowledged that, obviously, "corruption, a lack of respect for minorities (ethnic or religious), or the ignorance of judicial decisions by politicians occurs and affects the legal culture".

Replies to the questionnaire do not provide more detailed information on the case law related to the constitutionality of anti-corruption measures. It can only be presumed that they should also involve the criteria for restricting certain human rights, balancing public and private interests, transparency in the administration of the state and in the activities of all three branches of state power.

[9] This challenge was topical and pervasive at the time of the drafting of the document of the Venice Commission – CDL-AD(2011)003rev-e Report on the rule of law, adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e.

[10] Ukraine quotes the Resolution of Parliamentary Assembly of the Council of Europe (Resolution 1943 (2013)) on corruption as a threat to the rule of law: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19948&lang=en.

[11] E.g. Judgment no. 22 of 05.09.2013, Judgment no. 6 of 16.04.2015.

2. Repercussions of international events and developments on the interpretation of the rule of law

More than a third of the countries responded that they had not faced any repercussions of international events and developments on the interpretation of the rule of law (26 countries: Albania, Armenia, Belgium, Bosnia and Herzegovina, Cambodia, Cape Verde, Croatia, Cyprus, Georgia, Guinea, Korea, Kyrgyzstan, Latvia, Luxembourg, Macedonia, Madagascar, Mali, Mexico, Mongolia, Niger, Russia, South Africa, Sweden, Thailand, Togo, and Ukraine). The rest of our courts most often indicated the phenomena mentioned as examples in the formulation of the question – migration and terrorism. Migration (floods of refugees) was indicated by 19 countries (Belarus, Bulgaria, Cameroun, Canada, Chile, Costa Rica, Denmark, Finland, Germany, Hungary, Italy, Jordan, Kosovo, Norway, Portugal, Romania, Senegal, Slovenia, and Turkey), while terrorism was pointed to by 24 countries (Algeria, Azerbaijan, Belarus, Canada, Cameroun, Congo, Finland, France, Gabon, Germany, Ghana, Hungary, Indonesia, Jordan, Kosovo, the Netherlands, Norway, Portugal, Romania, Senegal, Slovakia, Slovenia, Switzerland, and Turkey). Some other events and developments of international significance mentioned by our courts are, for example, organised crime (Algeria, Czech Republic, Kosovo, Lithuania, Portugal, and Romania) and cybercrime (Norway).

The replies to the question on the repercussions of international events and developments on the interpretation of the rule of law often refer to recently adopted (or proposed) national legislation and, in rare cases, even constitutional amendments[12] dealing with various issues of migration and terrorism. There are also reports about newly established institutions in the field, as well as the indication that the competent national law enforcement agencies tend to gain more competences, in particular in counter-terrorism activities. However, not all the constitutional courts or equivalent bodies that reported about the changes in the legislation have heard cases on the constitutionality of measures aimed to control migration processes or to combat terrorism. For example, Croatia, Czech Republic, Denmark, Mongolia, Slovakia, and Ukraine reported that they have not any decisions on these issues. According to the reply of Austria, it is not yet clear whether the recent legislative developments modify

[12] For example, in Slovakia, the question of terrorism has recently prompted the amendment of Art. 17.3 of the Constitution, according to which, in addition to the general time limit for detention of 48 hours, a special time limit of 96 hours was introduced for crimes of terrorism, in which the suspect must be interrogated and either released or taken before the court. This constitutional amendment did not lead to any major controversy and is not considered problematic. In Hungary, a constitutional amendment is tabled to include Article 51/A “on the state of terrorist threat” in the Fundamental Law. The Sixth Amendment to the Fundamental Law adopted in June 2016 permits the Government to initiate a “state of terrorist threat” by submitting a request for the Parliament to declare the state of terrorist threat, and the Government can start exercising emergency powers as soon as it makes the request. The argument for adopting this constitutional amendment went that it would be necessary to manage the adverse results from the migration crisis, including also threats of terrorism.

the prevailing understanding of the rule of law (*Rechtsstaat)* until these amendments are not adjudicated by the Federal Constitutional Court. Estonia states that “it is impossible to point out that, for instance, the growth of terrorism in the world has had any effect on the consideration of the rule of law in Estonian criminal procedure law”.

Some courts reported that the legislative acts dealing with the issues of migration and counter-terrorism activities have already become a subject of constitutional review. These replies make it evident that the major challenge to the constitutional courts and equivalent bodies is to assess the constitutionality of the migration control or counter-terrorism measures that inevitably involve certain restrictions on the relevant human rights and freedoms (the right to asylum, social rights, guarantees in criminal procedure, etc.). Such factors as a significant increase in the number of persons seeking protection and a growing number of terrorist attacks have prompted the legislator to sharpen (tighten) laws on migration and counter-terrorism. This results in tension between the need for governments to control societies for the sake of their security and individual freedoms (i.e. between the public and individual interests). Thus, here again (as in the case of the already discussed austerity measures), the constitutional courts and equivalent bodies have to find a proper and fair balance between competing values, by verifying the justification by the government of the restrictions of fundamental rights.

From the responses of our courts, it follows that this justification should be grounded on the same criteria as provided by international law and interpreted in the case law of international tribunals (e.g. the European Court of Human Rights). It seems that it is most important to guarantee access to justice (the possibility of judicial scrutiny of the measures applied) and to comply with the principle of proportionality in restricting human rights and freedoms (in particular, proportionality *sensu stricto* – the requirement to apply less intensive measures of interference).

For example, the *ultima ratio* in extreme circumstances is a state of emergency. Its application is discussed in the reply of the Council of State of France: upon the declaration of a state of emergency, some rights and freedoms are to be limited; the measures applied must be exceptional and strictly controlled by courts; in these circumstances, this exceptional regime of a state of emergency does not contradict the principle of the rule of law.

As regards the ordinary measures, our courts faced the cases involving the issues of immigration restrictions, social benefits for immigrants, control and surveillance measures, the protection of private life, and data protection. First, I can refer to the reply of the Supreme Court of Canada: although it is acknowledged that courts should be restrained in respect of the legislative and the executive, they also have to ensure that the counter-terrorism laws are in line with the Constitution and that the state does not go beyond its legitimate powers;

the preference should be given to fundamental rights; however, the state may limit these rights when it can justify these restrictions. Like in many other countries, in Canada, the hardest task seems to be finding a balance between national security and the necessity to limit fundamental rights in the least restrictive manner possible. For instance, in the case of *Charkaoui*, the Supreme Court of Canada declared anti-constitutional certain provisions of the procedure of detention and expulsion of foreigners as incompatible with the right to a fair trial: it was found that they did not provide for a sufficient opportunity to be heard, and the legislator could use other, more lenient, measures to restrict the right to a fair trial in cases where secret information forms a basis for the security ban.

Similarly, the Federal Constitutional Court of Germany held that the authorisation of the Federal Criminal Police Office to carry out covert surveillance measures for the purpose of protecting against threats from international terrorism is, in principle, compatible with the fundamental rights; however, the specific design of these powers does not satisfy the principle of proportionality in several regards. The Constitutional Court of Slovakia, in one of its judgments (Ref. No. PL. ÚS 10/2014), found unconstitutional the legislation laying down the obligation for internet and telecommunication service providers to retain, for some time, all traffic data on the communication: the challenged provisions could not be considered necessary for attaining the objective pursued by them, even if the objective itself was legitimate; it was noted that the fight against serious crime and, ultimately, public safety could be achieved by other means that constitute a less intensive interference with the right to privacy when compared with the preventive and systematic retention of the data. In a similar manner, the Constitutional Court of Romania (Decision no. 1258 of 8 October 2009) recognised unconstitutional the provisions on the retention of data in the electronic communications sector, as it found them depriving the principle of protecting personal data and confidentiality of its content: the Court came to the conclusion that the legal obligation requiring the continuous retention of personal data makes the exception to the principle of the effective protection of the right to personal life and freedom of expression absolute as a rule; therefore, this right appears to be regulated in a negative fashion, its positive side losing its predominant character; the Court also found excessive the interference in the personal life of those individuals with whom the persons under surveillance might communicate. On the other hand, the Constitutional Court of Romania did not deny the purpose of the legislation itself, which was to ensure the adequate and effective legal means compatible with the ongoing process of modernisation and technologisation of media so that crime can be prevented and controlled.

As it follows from the replies of the majority of our courts, such international events and developments as the migration crisis or the spread of terrorism had no particular repercussions on the interpretation of the rule of law. For example, the Constitutional Court

of Portugal did not move away from its existing line of interpretation with regard to the meaning of the principles of *Estado de direito* and proportionality, applying them in accordance with the requirements derived from the interests at stake and maintaining the exceptional nature of restrictions on human rights. In Ruling no. 296/15, the rule under which the right of certain foreign nationals to social integration benefit was subjected to the minimum term of the last three years of legal residence in the country was found by the Court to be unconstitutional as not complying with the principle of proportionality: as the Court ruled, the imposition of a three-year time period – which effectively results in the denial of the award of means of subsistence to a foreign citizen in a socially at-risk situation until that time period is up – is excessive and intolerably collides with the right to a benefit that ensures the basic means of survival. In Ruling no. 403/15, the Constitutional Court of Portugal found unconstitutional the rule providing for access by intelligence services to the communications-related data needed to identify the service subscriber or user, to find and identify the source, destination, date, time, duration, and type of communication, the telecommunications equipment, or its location: the Court acknowledged that access to such data must be necessary, appropriate, and proportionate in a democratic society in order for intelligence services to be able to fulfil their legal mission; but it also concluded that intrusion into communication data had not been regulated by the procedure that would provide the guarantees and possibilities of protection of a similar scope to which the Constitution subjects criminal procedure.

On the other hand, dealing with personal data protection issues within the context of fighting against terrorism, the Constitutional Court of Turkey expressed the need to adopt “a more sensitive approach in establishing the balance between security and freedoms” in time when the country is facing “devastating and violence-inciting terror activities” that constitute “serious risks to the rule of law”; according to the Court, “the need to protect the right to life and ensure security may push the countries to take much severe measures than they would do under normal circumstances”. In one of its decisions, the Constitutional Court of Turkey justified the regulations providing for the possibility for the Undersecretary of Public Order and Security to collect and possess personal data necessary for fighting against terrorism on account of the need to fulfil the duties of this official and the established restriction to collect this data solely for the purposes of fighting against terrorism; according to the Court, this authority cannot be considered disproportionate interference with the right to demand the protection of personal data under the scope of private life and does not render the exercise of this right impossible or extremely difficult.[13]

[13] AYM, E.2010/40 K.2012/8, 19/1/2012.

Conclusion. To sum it up, the states respond to international events and developments, such as migration and terrorism, by adopting measures that restrict certain human rights and freedoms, in particular the right to asylum and the right to privacy. In this context, constitutional courts and equivalent bodies have the particular responsibility in ensuring the rule of law by finding a proper and fair balance between the interests of public security and individual freedom. As it follows from the case law of our courts, it is unlikely that the migration crisis or the spread of terrorist threats could have significant repercussions on the interpretation of the rule of law. The essence of the rule of law remains the same as long as the same criteria for assessing the constitutionality of restrictions on human rights are applied, i.e. the criteria that are also recognised by international law and international tribunals. They include: (1) the legitimate aim – none of our courts have disputed the legitimacy of the objectives to control migration or to combat terrorism, as they are necessary for ensuring national and public security; and (2) necessity in a democratic society and proportionality – the measures applied should be exceptional and adequate to the aim pursued, in particular the requirement should be observed to apply less restrictive (or the most lenient) possible measures of interference. The latter requirement also means that the right in question cannot be denied in essence, i.e. the application of restrictions cannot become an absolute rule. In addition, the possibility of the judicial scrutiny of the measures applied (access to justice), without which the rule of law is inconceivable, also plays a decisive role in assessing the constitutionality of these measures.

It is the general understanding of our courts that, when assessing a disputed legal regulation, in particular its compliance with the principle of proportionality, we should duly take into account such factors as technological progress, the rapid development of communications, and other changes in our societies and international life. However, this adjustment should not lead to the new criteria of constitutionality, less restrictive approaches to the limitation of human rights, or the broadening of the powers of state authorities at the cost of human rights.

3. Collisions between national and international law and difficulties in the implementation of judgments of international courts

The rule of law is inconceivable without due respect for international law. The compliance with international law and, in particular, with human rights law, including binding decisions of international courts, is enlisted as one of the elements of the principle of legality forming the concept of the rule of law by the Venice Commission in the Rule of Law Checklist.[14]

[14] The European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, 2016, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e.

The question put to our courts actually comprised a few interrelated issues and was the following: “Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional/international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts/bodies? What is the essence of these difficulties? Please provide examples”.

Nearly half of the replies (26 countries: Algeria, Armenia, Azerbaijan, Belarus, Cameroun, Cape Verde, Chile, Canada, Democratic Republic of Congo, Cyprus, Estonia, Georgia, Guinea, Indonesia, Jordan, Kazakhstan, Kyrgyzstan, Lebanon, Macedonia, Madagascar, Mali, Mongolia, Sweden, Thailand, Togo, and Turkey) to this question were negative, i.e. no cases of collisions between national and international law or related difficulties were reported. Sometimes these collisions are not reported due to the reason that a certain court does not have jurisdiction to assess the conformity of international treaties with the constitution and (or) assess the conformity of laws with international treaties (e.g. Macedonia).

To a certain extent, collisions between national and international law, in particular those arising out of a different interpretation of law (including human rights) by competent national and international courts, are inevitable. This is due to the fact that both legal systems (national and international law) are of a different origin and autonomous, albeit they have the common areas of operation (in particular, human rights) and the mechanisms for their coordination; both of them claim supremacy in their respective spheres of application (national constitutions are usually proclaimed within the respective country to be supreme law with which international obligations cannot be in contradiction; meanwhile, under international law, the fundamental principle is *pacta sunt servanda* and the supremacy of international law in international relations with its logical consequence – the prohibition to rely on national law, including the constitution, in justifying non-compliance with international obligations). Therefore, it seems natural that, due to the parallel development of both systems, from time to time certain inconsistencies or collisions may occur. Most often this can happen when national courts deal with a certain issue that has never before been considered by international tribunals, and the latter later find the practice of national courts inconsistent with international obligations (e.g. precisely this happened when, in 2004, the Constitutional Court of Lithuania had to deal with the consequences of impeachment related to passive electoral rights without the possibility to refer to any relevant practice of

international tribunals and, in 2011, the European Court of Human Rights[15] came to a slightly different conclusion on the same issue).

Thus, it is not surprising that the cases of collisions between national and international law arising out of a different interpretation of law (or a certain right) by a national constitutional court and a regional or international tribunal (body) are reported by a number of states (e.g. by Austria, Croatia, Czech Republic, Denmark, Finland, Germany, Hungary, Italy, Korea, Latvia, Lithuania, Mexico, Moldova, Portugal, Slovenia, South Africa, and Ukraine).[16] They involve differences in interpreting the content or scope of a particular right and the different assessment of the proportionality of restrictions on a particular right.[17] Mostly, differences with the ECtHR are reported (e.g. by Denmark, Germany, Hungary, Italy, Moldova, Portugal, Romania, Slovenia, and Ukraine). The rights and freedoms in question included the right to a fair trial (Italy, Portugal, and Ukraine), the right to an effective remedy (Slovenia), the freedom of expression (Denmark and Hungary), the right to privacy (Germany and Romania), the right to pursue an entrepreneurial activity (Hungary), and the right to be elected (Moldova). In South Africa, a different interpretation was applied by the UN Committee on Economic, Social and Cultural Rights concerning the right to water. Some of the countries that reported about collisions with international law and differences in interpretation with international courts (e.g. Bosnia and Herzegovina, Cambodia, Czech Republic, Finland, Lithuania, South Africa, and Switzerland) also reported about the related difficulties in the implementation of judgments of international (regional) courts or bodies.

Obviously, the prevention and settlement of collisions between national and international law depends on the national constitution and its interpretation by competent constitutional courts or equivalent bodies. The place of international law, as well as the ways and methods of implementing international obligations within the national legal system, can be determined

[15] Thereinafter referred to as the ECtHR.

[16] Some of them reported about single or rare (e.g. Bulgaria, Croatia, Latvia, and Lithuania) or numerous (e.g. Austria, Germany, and the Netherlands) collisions, also minor or slight (e.g. Croatia, Finland, and Ukraine) or deeper (e.g. Lithuania) differences in their case law.

[17] The illustration of slightly different approaches on the content and scope of a particular right is provided by the Constitutional Court of Ukraine. It had differences with the ECtHR in the interpretation of the right to judicial protection, in particular one of its components – the right to enforce the judgment without undue delay. The Constitutional Court of Ukraine ruled that the national legal provisions providing for the extension of the period for the execution of court judgements did not violate the principle of the compulsory enforcement of judicial decisions. The ECtHR found the violation of the right to a fair trial (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (thereinafter referred to as the ECHR) in two cases against Ukraine for undue delay in the execution of court decisions, which deprived the right to a fair trial of its practical effect. Austria reported that its Constitutional Court did not follow the recent reading by the ECtHR of Article 4 of Protocol No. 7 to the ECHR regarding the exact scope of the right not to be subjected to double jeopardy and understanding of “civil rights and obligations” within the meaning of Article 6 of the ECHR. Most recently, unlike the ECtHR in various judgments, the Constitutional Court of Austria has held that the requirement for landowners to tolerate the use of their land for hunting cannot be seen as imposing a disproportionate burden on landowners who are opposed to hunting for ethical reasons.

only in accordance with the respective constitution. In this respect, states may have a very broad choice of instruments to ensure that the principle of *pacta sunt servanda* is observed; their choices are determined by the monist or dualist approach to international law, legal traditions, and the experience of a given country. Not the last, if not decisive, is the role of constitutional courts and equivalent bodies in taking a more or less friendly approach to international law. Most of our constitutions have rather abstract provisions on respect for international law. It is our responsibility to reveal their content by adopting the more or less friendly treatment of international law, including judgments of international tribunals. As demonstrated by the replies to the questionnaire, constitutional courts are able to find ways to prevent or settle collisions between national and international law, including those arising out of a different interpretation by national and international courts.

It is mostly due to interpretation by constitutional courts and equivalent bodies that national legal systems can be characterised by openness to international law (e.g. in Germany, Latvia, Lithuania, and Portugal), even if the constitution provides for its unconditional supremacy. There are constitutional principles whose interpretation and combination can open the constitution to the influence of international law; these principles give rise to the duty of the constitutional court (or an equivalent body) to take into due account the relevant rules of international law. For example, in Lithuania, such principles include the rule of law (inconceivable without respect for international law), *pacta sunt servanda* (expressly requiring the fulfilment of international obligations in good faith), open civil society (implying openness to the rules of international community), and the geopolitical orientation (including the orientation to European legal standards). The openness of Portuguese constitutional case law to international law means that it includes frequent references to the ECHR, the EU Charter of Fundamental Rights, and other international legal instruments, as well as to the case law of the European Court of Justice[18] and the ECtHR.

As follows from the replies of our courts, the following measures are available for the prevention and settlement of collisions between the national constitution and the norms of international law:

– **Preliminary *(a priori)* review of the constitutionality of international treaties** (e.g. Gabon, Lithuania, and Slovenia). It prevents the rules of international law that do not comply with the constitution from entering into the national legal system;

– **Harmonising interpretation**. This method seems to be most frequently applied by our courts and it naturally follows from the openness of the constitution to international law. Harmonising interpretation was indicated to be in use in practice by the constitutional courts or equivalent bodies of Algeria, Azerbaijan, Canada, Croatia, Denmark, Estonia, Finland,

[18] Thereinafter referred to as the ECJ.

Indonesia, Jordan, Lebanon, Lithuania, Macedonia, the Netherlands, Norway, South Africa, Switzerland, Ukraine, etc. In some countries (e.g. Moldova and Slovenia), the duty of harmonising interpretation is expressly provided for by the constitution. In other countries, it is implied by the constitutional principles providing for the openness of the constitution to international law: for example, in Lithuania, international and EU law is perceived as a source for the interpretation of relevant constitutional provisions; international and European human rights standards are considered to be the minimum constitutional standards for the protection of human rights. In revealing the content of constitutional provisions and developing the official constitutional doctrine, the Constitutional Court of Lithuania relies on the case law of the ECtHR, the ECJ, and other international bodies.

The Supreme Court of Denmark generally strives to interpret Danish legislation in conformity with the practice of the ECJ and the ECtHR. The Supreme Court of Estonia interprets the Constitution on the basis of international legal norms (by substantially incorporating international legal norms into the Estonian legal order). The Constitutional Council of France reports that, although it does not decide on collisions between national and international law explicitly, it has to refer to the explanations of norms of international law while exercising the review of constitutionality in order to decide on the particular question; the Council seeks to harmonise the requirements arising from international conventions with French national law.

In its reply, the Supreme Court of Canada reported about the case of *B010 v Canada* on citizenship and immigration, in which the presumption of the compliance of national laws with the international commitments of Canada was affirmed; it undertook the interpretation of national law that would comply with the international commitments to fight the organised illegal transit of immigrants and to ensure the rights of persons seeking international protection (e.g. with the provisions of the Convention relating to the Status of Refugees and the Convention of Palermo (the UN Convention against Transnational Organised Crime). In South Africa, the Constitutional Court highlighted the constitutional obligation to harmonise national and international norms in the *AZAPO* case: "the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law". The Court also applied harmonising interpretation for overcoming difficulties in the enforcement of the judgment of the regional court (the SADC Tribunal) in the *Fick* case:[19] it proclaimed that the interpretation of national law should be in line with international obligations and, therefore, in order to uphold the rule of law, national law on the execution of court orders should be extended to allow the execution of an order by the SADC Tribunal.

[19] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

In the Netherlands, the Administrative Jurisdiction Division of the Council of State uses the concept of “reading together” of constitutional and international fundamental rights provisions (e.g. in the *Jezus redt* case, the provisions of the Constitution concerning the freedom of religion and the freedom of expression were interpreted in the light of these same rights under the ECHR). Similarly, the Supreme Court of Norway reported about its practice (e.g. the so called “Maria-case” of 2015) that the fundamental rights provided for by the Constitution have to be interpreted in the light of their international counterparts. In the case law of the Constitutional Court of Romania on criminal law issues related to the case law of the ECtHR, it is acknowledged that the national constitutional court has not only the right, but also the obligation, to interpret the Constitution removing any inconsistency between the domestic text and the European one;

– **Reinterpretation of the Constitution (the official constitutional doctrine) or the change of case law** (e.g. Finland, Moldova, and Portugal). This is another consequence of the openness of the national constitution to international law: to maintain this openness, the interpretation of the constitution (national law) should be adapted to that of international law once the difference between national and international law is found (usually by an international tribunal or body). This means the change (modification) of the already established case law by harmonising it with the interpretation provided by international (regional) courts and bodies. A good example comes from Moldova: following the judgment of the ECtHR in the case of *Tanase v. Moldova*, the Constitutional Court of Moldova considered it necessary to revise its own case law on the ban for the Moldovan nationals with multiple nationality to hold public positions, and declared this ban unconstitutional as it had already been recognised by the ECtHR as a disproportionate restriction of electoral rights in the situation of Moldova, where multiple nationality is a widespread phenomenon. Another example is Finland, where the minor differences between national and international law (e.g. in balancing the freedom of speech and the right to privacy, in interpreting the *non bis in idem* principle), faced by Finnish courts, normally are solved by changing the position of Finnish courts so as to make it in line with the international (European) interpretation. The Constitutional Court of Portugal also acknowledged that it had even gone to the point of modifying its own case law in the light of that of the ECtHR (e.g. following the case of *Feliciano Bichão v. Portugal*).

The possibility of the reinterpretation of the official constitutional doctrine is not excluded by the Constitutional Court of Lithuania, either. The established interpretation of the Constitution may be changed provided this could enhance the level of protection of human rights or other constitutional values. However, as it follows from the ruling of 5 September 2012, the reinterpretation is not possible when it could change the overall constitutional regulation and the balance between constitutional values (this is why, taking into account that the

institutions of impeachment and the constitutional oath cover a far wider range of officials than just the members of the Parliament and having regard that the Constitutional Court cannot have the legislative power to establish concrete time-limits for the prohibition to hold state offices, the reinterpretation was not considered to be an acceptable option after, in the case of *Paksas v. Lithuania*, the ECtHR dealt only with the right to be elected to the Parliament and found a disproportionate restriction of this right with regard to the constitutional prohibition for life to stand in parliamentary elections for those officials who were removed from their office through impeachment procedure);

– **Constitutional amendment** (e.g. France, Lithuania, and Ukraine). The Constitutional Council of France held that, according to the Constitution, when a collision between the Constitution and an international treaty arises, there is an obligation to amend the Constitution in order that the international treaty could be valid (the case of the entry into force of the Treaty of Lisbon). Ukraine reports about the constitutional amendments adopted in 2016 in order for the ratification of the Rome Statute to become possible.

Similarly, the Constitutional Court of Lithuania ordered to change the Constitution when, after the judgment of the ECtHR in the case of *Paksas v. Lithuania*, an inconsistency between the Constitution and the ECHR appeared (the ruling of 5 September 2012). The Court emphasised that, taking into account the supremacy of the Constitution and the constitutional principle of *pacta sunt servanda*, the duty arises to remove the said inconsistency by amending the Constitution so that the applicable provision of the ECHR (and the judgment of the ECtHR) could be operative and enforced in Lithuania. In another case (the ruling of 18 March 2014), the Court also acknowledged the possibility of another option – the denunciation of the international treaty concerned. However, in the case of human rights treaties, in particular the ECHR, this option cannot be acceptable under the Constitution, as it would be contrary to such constitutional principles as the rule of law, open civil society, and the geopolitical orientation;

– **Prohibition to adopt constitutional amendments contrary to international obligations** (Lithuania and Switzerland). The Constitutional Court of Lithuania, in its rulings of 24 January 2014 and 11 July 2014, clarified that one of the substantial limitations on amending the Constitution is the prohibition to adopt amendments that would be contrary to the existing international obligations as long as these obligations are not denounced in accordance with international law. Again, this restriction follows from the constitutional principles of the rule of law and *pacta sunt servanda*. Similarly, the rule that amendments to the Constitution must comply with the imperative norms of international law was indicated by Switzerland.[20]

[20] If an amendment to the Constitution denies an international treaty that encompasses *ius cogens* norms, such an amendment could not be proposed to the Nation, because amendments to the Constitution must abide by imperative international legal norms.

Respect for international law cannot be separated from the implementation of judgments of international courts and bodies. They have their own competence, granted by the respective international treaties, to interpret the norms of international law (the provisions of those treaties) and to adopt binding decisions. As in the case of constitutional courts and equivalent bodies whose case law reveals the content of the constitution, the case law of competent international tribunals reveals the content of the respective international instruments. Without respect for judgments of international tribunals, we cannot have true judicial dialogue between national and international courts.

In general, the authority of international courts and bodies is not questioned. For example, the judgments of the ECtHR and the Inter-American Court of Human Rights are considered binding, since the corresponding obligation is expressly provided for in the respective conventions. As regards such UN bodies as the UN Human Rights Committee, some states (e.g. Austria, Czech Republic, and Korea) regard their decisions as having no binding force (i.e. consider them to be recommendations), since the corresponding treaties do not establish unambiguous obligations to carry out these decisions. However, in some instances, the question can be raised as to how a refusal to comply with a decision of the UN body would be consistent with the obligation to implement the respective treaty provisions in good faith.

The replies of some courts identify certain limitations on the openness of national constitutions to international law, as well as on the implementation of judgments of international tribunals. In some instances, this can be seen as harmonious competition, as constitutional courts attempt to maintain a higher level of protection of human rights when they define the constitutional limits they have to safeguard (for example, fundamental rights in Germany). The Constitutional Court of Italy has developed the doctrine of “counterlimits”, according to which the incorporation or implementation of international legal norms or judgments of international tribunal is not permissible when it is at odds with the fundamental principles of the constitutional order (the core of the constitutional identity) or inherent human rights (e.g. in Judgment no. 238 of 2014, the Court applied the doctrine of counterlimits to customary international law when it recognised inadmissible the implementation of the judgment of the UN International Court of Justice in the case of *Jurisdictional Immunities of States*, seeking to protect a higher constitutional standard of access to justice in cases concerning the reparation of damage done by war crimes). As it follows from the case law of the Constitutional Court of Italy, the doctrine of “counterlimits” must be employed specifically for the purpose of protecting a higher constitutional standard of fundamental rights: the minimum levels of protection for the fundamental rights laid down in the ECHR, as interpreted by the ECtHR, constitute a non-derogable limit pursuant to Article 117(1) of the Constitution for the Italian legislator only “downwards”, but not “upwards”; respect for

international obligations can never be the cause for a reduction in protection below that already available under national law, but may and must constitute an effective instrument for expanding such protection; the overall result of the integration of the guarantees provided under the legal system must be positive in that the impact of the individual provisions of the ECHR on Italian law must result in an increase in protection for the entire system of fundamental rights. In the recent judgment no. 49 of 2015, the Constitutional Court of Italy held that national courts are not bound to abide by any judgment whatsoever of the Strasbourg Court, but rather only by the judgments of the Grand Chamber, those constituting "settled law" and "pilot judgments", taking into account the fact that the application and interpretation of the general system of rules (both Convention law and national law) is a matter in the first instance for national courts, acting in accordance with the substance of the case law of the Strasbourg Court, and without prejudice to the margin of appreciation of national authorities.

However, sometimes such broad and vague concepts as "the foundations of the constitutional order" can raise doubts regarding a friendly approach to the implementation of judgments of international tribunals, and only the future practice can dispel doubts whether these concepts can also be employed for justifying the non-implementation of any decision of an international tribunal that might seem unfavourable. For example, in Russia, after the adoption by the ECtHR of the judgment in the case of *Markin v. Russia*, the mechanism for "the protection of the Russian constitutional legal order" was created. It was consolidated in the Judgment of 14 July 2015 of the Constitutional Court of Russia, the consequence of which was the emergence of the power of the Constitutional Court to declare unenforceable any decision of an international tribunal that would be found threatening to "the foundations of the constitutional order"; rules of an international treaty, in the event that they violate constitutional provisions that have great importance for Russia, cannot be and are not applicable in the legal system. This approach has been criticised in the Opinion of the Venice Commission.[21]

Other difficulties in the implementation of judgments of international tribunals are varied. We can see a lack of political will of the legislator to enact the relevant law (e.g. in Costa Rica, where the Parliament has still not adopted the legislation necessary to implement the judgment of the Inter-American Human Rights Court concerning *in vitro* fertilization; in

[21] "[...] The Russian Constitutional Court has been empowered to declare an international decision as 'unenforceable', which prevents the execution of that decision in any manner whatsoever in the Russian Federation. This is incompatible with the obligations of the Russian Federation under international law. [...] The freedom of choice as to the execution of judgments refers to the manner of execution, which is not absolute. The State has to execute; only the modality of execution may be at States' discretion, although even this discretion is not unfettered". Appendix CDL-AD(2016)005 Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)016-e.

Bosnia and Herzegovina, no agreement has been reached on amendments to the Constitution in order to enforce the judgement of the ECtHR in the case of *Sejdić and Finci v. Bosnia and Herzegovina* concerning the possibility for persons not belonging to any of the three constituent peoples to stand as candidates for elections to the Parliament and to the Presidency of Bosnia and Herzegovina (similarly, in the cases of *Zornić v. Bosnia and Herzegovina* and *Pilav v. Bosnia and Herzegovina*[22]), or the failure by the legislator to amend the Constitution (e.g. in Lithuania, where, regardless of the ruling of the Constitutional Court ordering the constitutional amendment, no such amendment has been adopted yet in order to implement the before mentioned judgment of the ECtHR in the case of *Paksas v. Lithuania*); there are also difficulties arising out of the judgments of international tribunals (such as a possible lack of subsidiarity or the erroneous understanding of national law[23]).

Conclusion. To sum it up, to a certain extent, collisions between national and international law, often resulting from a different interpretation of the same legal issue by national and international courts, are a natural consequence of the parallel development of autonomous national and international legal orders. However, the rule of law is inconceivable without due respect for international law; the adherence to less stringent standards of human rights protection than those required by international obligations or the non-implementation of judgments of international tribunals, in particular when this goes hand in hand with compromising the authority of those tribunals, can hardly be consistent with the rule of law. It is for the sake of the rule of law that collisions between national and international law are removed and the judgments of international tribunals are implemented.

Therefore, it is the particular responsibility of constitutional courts and equivalent bodies to ensure consistency between national and international law by maintaining both the supremacy of the constitution and the principle of *pacta sunt servanda*. While interpreting the constitution and the principle of the rule of law, our courts can make the respective constitution, to a greater or lesser extent, open to international law and favourable to the implementation of judgments of international tribunals. It is on the grounds of the case law of constitutional courts and equivalent bodies, as well as the instruments they may use in preventing and removing the collisions between national and constitutional law (such as the preliminary review of international treaties, harmonising interpretation, the reinterpretation of the official constitutional doctrine, ordering or restricting constitutional amendments) that the

[22] Although the judgment of the ECtHR does not order specific measures that the state is obliged to undertake in order to redress the established violation of rights, in practice, in compliance with the reasons for the judgment, its enforcement requires, among other things, amendments to the relevant provisions of the Constitution of Bosnia and Herzegovina.

[23] This factor was indicated in the report of the Supreme Court of Finland with regard to the Finnish Mental Health Act.

constitutions that, at the first glance, might seem not so friendly to international law (due to the declaration of their absolute supremacy) may be transformed into friendly ones, developed in harmony with international law. As the protection of the national constitutional identity is the mission of constitutional courts and equivalent bodies, they also have the particular responsibility to ensure that this mission is carried out in compliance with the rule of law, i.e. not for creating conflicts with international obligations and promoting self-isolation from international law, but, on the contrary, for the enhancement of the protection of fundamental rights and the progressive integration of international law into the national legal system.

Concluding remarks

Thus, the analysis of the replies of our courts to the questions on major threats to the rule of law, the repercussions of international events and developments on the interpretation of the rule of law, and collisions between national and international law shows that the role of constitutional courts and equivalent bodies remains the same – to preserve and maintain the core elements of the rule of law, such as the supremacy of the constitution, a fair balance between constitutional values, and harmony between national and international law. These elements cannot be subject to essential changes due to the discussed challenges (managing economic crises, fighting corruption, controlling migration, combating terrorism, or preventing and settling collisions with international law). If we stick to the substantial conception of the rule of law, certainly the most important task is to guarantee that, in face of the before mentioned challenges, the protection of human rights is not compromised, in particular that temptations to have free hands for restricting human rights or avoiding international obligations are precluded. On the other hand, challenges to the rule of law can at times be associated with positive opportunities to progressively develop the interpretation of the constitution, while strengthening the protection of human rights and other constitutional values and, ultimately, the consolidation of the rule of law itself.

Thank you all for your kind attention!

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