



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 3 - “The law and the state”

Key-note presentation by

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Honorable judges, ladies and gentlemen,

Dear colleagues and friends,

At the outset, may I thank you for the invitation to speak and the opportunity to participate in this most interesting Congress. My thanks also to the Lithuanian Constitutional Court for the excellent organization and the wonderful hospitality which we have enjoyed.

Introduction

The questions posed for this plenary session require me to provide the perspective of constitutional justice to the relationship between the Law and the State inherent to the constitutional principle of the rule of law, as my predecessors described it in the first and second Plenary Sessions.

The time for this statement is relatively short, but I will attempt to give an overview of the approach of Constitutional justice institutions.

Others speaking before me have spoken generally of the different concepts of the rule of law and of new challenges to the rule of law. I will speak more particularly (taking up what was said yesterday) about how and what we identify as constitutional elements for these purposes, their

sources and how we apply them. This is constitutionalism in action. I shall provide examples to better explain the framework within which our constitutional justice institutions operate and the method they use.

Based on the questionnaire responses to our Congress today, I shall proceed in three parts. Each part refers to one relevant question from the questionnaire assigned to the third session of this Congress. So my speech will contain observations about the following:

- 1) First, the impact of the case-law of constitutional court on guaranteeing that state powers act within the constitutional limits of their authority.
- 2) Second, the binding force of constitutional decisions on ordinary courts.
- 3) Third, in terms of case law, how have our courts contributed to the development of the standards for law making process and application of law, respect for the rule of law by private actors exercising public functions and accountability of public officials.

1. IMPACT OF THE CASE-LAW OF CONSTITUTIONAL COURTS ON GUARANTEEING THAT STATE POWERS ACT WITHIN THE CONSTITUTIONAL LIMITS OF THEIR AUTHORITY

In a general manner, based on the answers to the questionnaires it can be concluded that the **decisions of the respective Constitutional Courts (or equivalent) are binding** on all state bodies, which have to implement/execute them. The large majority of the participants also confirmed that in practice this binding nature is generally respected and decisions of the Constitutional Court (or equivalent) are duly executed.

Undoubtedly the core element of the rule of law that has been mentioned the most in relation to the state powers is the principle of separation of powers.

The majority of the participants referred to the principle of separation of powers, as being well established and applied in their countries, when specifying the role of constitutional courts in guaranteeing that state powers act within the constitutional limits of their authority. The distribution of responsibilities between the competences of the Entities and the federal state appears sometimes as a complex issue in this context, in particular in **Bosnia and Herzegovina**.

The scope of power is limited by the Constitution and state institutions serve the people. The constitutional principle of the separation of powers is fundamental in the organization and functioning of a democratic state under the rule of law.

As a general tendency Constitutional Courts have held on different occasions that this principle means that legislative, executive and judicial powers must be separated, sufficiently independent, but, at the same time, these branches of power must be balanced.

The concrete content of their respective competences depends on the form of government of the state, on the place of that institution among other state institutions, and on the relationship of its powers with those of other institutions. If the Constitution directly establishes particular powers of a certain state institution, no state institution can take over such powers from another institution, or transfer or waive them; such powers may not be changed or limited by law.

The Constitutional Court ensures that ultimately all state acts have to comply with and be founded in the constitution. Acts by state powers that are not founded in the constitution can be nullified by the Constitutional Court. The exclusive responsibility to review laws and regulations forms the key element of constitutional justice. Some of Constitutional Courts are also competent to review judgements and decisions of administrative courts and check for alleged infringements of a constitutionally guaranteed right or on the score of an illegal regulation, an unconstitutional law, or an unlawful international treaty.

Most constitutional justice models do not provide for the special area of jurisdiction – deciding disputes on competence between state institutions, which is envisaged in the constitutions of some countries (**France, Gabon, Germany, Italy, Korea and Romania**). However, in the majority of our countries, Constitutional Courts (or equivalent) do not directly decide on such conflicts of competence, because their own competence is essentially normative. Such disputes are decided indirectly, i.e. when assessing whether laws and other acts are contrary to the powers of a particular State institution or when deciding on impeachment of state officials.

When it comes to case law, a majority of questionnaire responses indicate that many courts have indeed dealt with core elements of separation of powers. Let me briefly elaborate on the most prominent core elements that, according to the questionnaire responses, are mentioned in constitutional jurisprudence across the world:

- describing the form of government to which the model of the structure of and interrelations among supreme state institutions belongs;
- describing the relation between a law and a sub-statutory legal act;
- separating the powers of the parliament and the government in different shared spheres (taxes, budget, law-making process);
- separating the competence of the parliament and the president (i.e. in the sphere of forming the Government);

- interpreting the powers of the President and the Government in the sphere of concluding international treaties, etc.

To sum up, it should be held that, in their rulings on the issues of the constitutionality of the activities of legislative and executive powers, the constitutional justice institutions clarified the limits of the powers of respective institutions, whereas, in their rulings on the issues related to the activity of the judiciary, the Constitutional Courts, generally protected the function carried out by this branch of state power, and strengthened the independence of judges, as well as the independence of courts as an institutional system.

2. BINDING FORCE OF CONSTITUTIONAL DECISIONS ON ORDINARY COURTS

It must be emphasized that the overall trend displayed by the questionnaire answers is that the judgment of the Constitutional Court (or equivalent) are binding on other courts. Some courts specified that judgments of the Constitutional Court (or equivalent) are binding *erga omnes*. However this is not the case in all countries. For instance, in **Belgium** and **Czech Republic** only those decisions that annul a legislative provision are binding *erga omnes*, the others only *inter partes*.

It is also important to stress that some courts have noted that **not only the content of rulings of the Constitutional Court, but also the content of its decisions and conclusions in which the Constitution is interpreted, i.e. the official constitutional doctrine is formulated, is binding on both law-making institutions (officials) and those institutions (officials) that apply law, including courts of general jurisdiction and specialized courts.**

All courts of general jurisdiction are bound by the official constitutional doctrine, which is formed in the jurisprudence of the Constitutional Court. They may not interpret the provisions of the Constitution differently from how the Constitutional Court interpreted the said provisions in its acts.

Nevertheless, in **those countries where** judgments of the Constitutional Court (or equivalent) are not directly binding, they serve as precedents that are generally respected by the lower courts. This is the case of **Finland** and **Sweden**. In **Mexico** Supreme Court decisions are only binding for lower courts under certain conditions described by law, but ordinary courts, however, have the obligation to respect all Supreme Court decisions as precedents.

As regards the relations between the constitutional jurisprudence and other jurisprudential systems, e.g. the cassation jurisprudence, such relations should be a inter-functional partnership, while confrontation between the jurisprudential systems is deemed to be a thing that must not be tolerated.

Although each of these courts has its own jurisdiction, conflicts may arise in certain areas, in particular when it comes to the question of whether a law is unconstitutional or may be applied in such a way that it complies with the Constitution.

Most countries noted that decisions are respected by lower courts as a general rule, but with a few (rare) exceptions. Thus, the questionnaire answers display that there are not serious conflicts between the Constitutional Court and courts of general jurisdiction or specialized courts, as, in general, ordinary courts and administrative authorities follow and respect the case-law of the constitutional court.

3. CONTRIBUTION OF CONSTITUTIONAL COURTS TO THE DEVELOPMENT OF THE STANDARDS FOR LAW MAKING PROCESS AND APPLICATION OF LAW, RESPECT FOR THE RULE OF LAW BY PRIVATE ACTORS EXERCISING PUBLIC FUNCTIONS AND ACCOUNTABILITY OF PUBLIC OFFICIALS

In this section I shall deal with three issues. First, what are the standards for the law-making process and for the application of the law according to case law? Second, are there specific fields of constitutional adjudication regarding respect for the rule of law by private actors exercising public functions? Third, are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption?

a) on law-making process

All courts except few ones have stated that they have already contributed to standards for law making or to the development of legal concepts. The given examples can be identified referring to those requirements emanating from the constitutional principle of a state under the rule of law that are applicable to law-making subjects:

- comprehensibility/clarity/accessibility of legal norms: a legal regulation established in laws and other legal acts must be clear, easy to understand, and consistent; formulas in legal acts must be explicit (**Albania, Belarus, Bulgaria, Croatia, Czech Republic, Georgia, Korea, Latvia, Lebanon, Lithuania, Moldova, Norway, Romania, Turkey**);
- in order to ensure that the subjects of legal relationships know what is required from them by legal norms, legal norms must be established in advance, legal acts must be published officially, and they must be public and accessible (**Austria, Costa Rica, Denmark, Lithuania**);
- when legal acts are passed, it is compulsory to take account of the procedural law-making requirements, including those established by the law-making subject itself (**Czech Republic, Lithuania, Moldova**); the hierarchy of legal acts, which stems from the Constitution, must be observed;

- law-making subjects may pass legal acts only without exceeding their powers;
- consistency and internal harmony of the legal system must be ensured (**The Netherlands**);
- legal acts may not require the impossible (**Lithuania**);
- the requirements established in legal acts must be based on the general provisions (legal norms and principles) that can be applied with regard to all the specified subjects of respective legal relationships. A differentiated legal regulation must be based exclusively on objective differences in the situation of the subjects of public relationships regulated by relevant legal acts;
- the force of legal acts is prospective, while the retrospective validity of laws and other legal acts is not permitted (*lex retro non agit*), with few exceptions, namely in criminal law (**Armenia, Belarus, Croatia, Hungary, Lithuania, Moldova, Turkey**);
- those violations of law for which responsibility is established in legal acts must be clearly defined (**Austria, Cape Verde, Croatia, France, Italy, Mongolia, Portugal, Romania, South Africa, Slovakia, Switzerland, Ukraine**);
- when setting legal restrictions and responsibility for violations of law, the legislature must pay regard to the requirement of reasonableness, as well as to the principle of proportionality, according to which the established legal measures must be necessary in a democratic society and suitable for achieving the legitimate and universally important objectives (there must be a balance between the objectives and measures); the rights of a person may not be restricted more than necessary in order to achieve the pursued objectives.

b) *on the application of law*

The Constitutional Courts also identified those requirements emanating from the constitutional principle of a state under the rule of law that are applicable to law-applying subjects:

- law-applying institutions must follow the requirement of the equal rights of persons;
- it is not permitted to punish twice for the same violation of law (*non bis in idem*) (**Azerbaijan, Belgium, Croatia, Finland, Italy, Mongolia, The Netherlands, Norway, Portugal, Switzerland**);
- responsibility (sanction, punishment) for violations of law must be established in advance (*nulla poena sine lege*);

- an act is not considered to be criminal if it is not provided for in the law (*nullum crimen sine lege*);
- no retroactive effect (**Belarus, Bosnia and Herzegovina, France, Hungary, Indonesia, Italy, Lithuania**)
- jurisdictional and other law-applying institutions must be impartial and independent (**Algeria, Belgium, Cape Verde, Croatia, Cyprus, Georgia, Italy, Latvia, Macedonia, Mongolia, Portugal, Russia, Senegal, South Africa, Ukraine**); they must seek to establish the objective truth and must adopt their decisions only on the grounds of law;
- judges may not apply any legal act that is in conflict with a higher-ranking legal act, *inter alia*, they may not apply any sub-statutory legal act that is in conflict with the Constitution or a law;
- similar cases must be decided in a similar manner;
- the more lenient law has to be applied if the laws relevant to the offence have been amended (*lex mitior*) (**Bosnia and Herzegovina, Georgia, Moldova**);
- The welfare of the people shall be the supreme law (*salus populi suprema lex esto*) (**Congo**).

c) *respect for the rule of law by private actors exercising public functions*

Some courts reported some individual case law on the question. Those cases dealt, for example, with notaries, bailiffs, arbitrators, lawyers, insolvency administrators, private investigators, sworn translators, taxi drivers, citizens' associations, private teachers, telecommunication companies, power supply companies, private actors exercising administrative tasks, entities governed by private law and that are owned both by private shareholders and the state, environmental and social responsibility of companies and health institutions.

c) *accountability of public officials*

In the overwhelming majority of the countries, public officials are fully accountable for their actions.

Some countries specified that public officials are, as a rule, not exempted from prosecution, but, to some extent, some categories enjoy immunity (president, members of parliament, ministers and judges).

The courts generally answered that there are no problems with the scope of immunity, particularly with the fight against corruption.

Some courts reported some case law on the question of accountability, mostly dealing with the waiver of the immunity of a public official, civil or disciplinary accountability or sentencing criminal behavior of a public official, e.g. as acts of corruption.

The constitutional principle of a state under the rule of law is inseparable from the responsibility of state authorities to the public. This responsibility is constitutionally consolidated by stipulating that state institutions serve the people, that the scope of power is limited by the Constitution, and that state officials who violate the Constitution and laws, who raise personal or group interests above the interests of society, and who discredit state power by their actions may be removed from office under the procedure established in laws.

In order that citizens – the state community – could reasonably trust state officials, and in order that it would be possible to ascertain that all state institutions and officials follow the Constitution and law, and that those who do not obey the Constitution and law would not hold the office requiring the confidence of citizens, it is necessary that the activity of state officials be subject to public democratic control, comprising the possibility of removing from office those state officials who violate the Constitution and law, bring their personal interests or the interests of the group above public interests, or disgrace state power by their actions.

Public democratic control can be realized, among other things, through impeachment: a special procedure provided for in the Constitution and applied in ascertaining the constitutional responsibility of the officials indicated in the Constitution, i.e. in deciding on their removal from office for a gross violation of the Constitution, a breach of the oath, or the commission of a crime.

Some Constitutional Courts have the power to present conclusions on whether the concrete actions of state officials against whom impeachment proceedings have been instituted are in conflict with the Constitution.

For instance, the Constitutional Court of Lithuania has given three conclusions on the constitutionality of the actions of the members of the Seimas and other state officials against whom impeachment cases were instituted. The Constitutional Court recognized in all those conclusions that the actions of the said officials had been unconstitutional. In one of such conclusions, the Constitutional Court recognised that certain actions of the President of the Republic had been unconstitutional and that the Constitution had been violated grossly by the said actions, that resulted both in a breach of the oath and in gross violations of the Constitution.

A similar example can be found in Moldovan case-law, related to the impeachment of a Prime-minister dismissed for corruption.

Thus the Court stated, as a principle, that any political mandate has to be based on high standards of integrity. Additionally, in case that it is found that this condition is not fulfilled, ignoring these findings and the appointing in/ holding leading positions of individuals having cast

doubt on their integrity implies a disrespect for the rule of law state.

The Court held that, in a genuine democracy, normality resides in the immediate resignation of the individuals that have lost their public trust, with no need of being dismissed. Such situations, in which people are being removed from exercising governmental act for reasons of corruption, subsequently being again appointed in top positions of the state (at short periods of time, without there being proved the groundlessness of the accusations that determined the dismissal) are not only reprehensible, but even inadmissible.

In this context, the Court has decided that it is contrary to the principles of the rule of law the appointment as high ranking officials individuals on which there is cast doubt regarding their integrity or who have been dismissed for reasons of corruption. As a matter of principle, the rule of law is not a fiction, with only a declarative nature. The functioning of the rule of law has to be shown in practical actions. In order for the constitutional principle of the rule of law to be respected and taking in consideration the common interest of the citizens, it is imperative to take the necessary measures for assuring the quick application of the suspension or dismissal of the ministers and other high ranking officials that are subject to reasonable doubts in matters of integrity.

The Court also underlined that according to the fundamental value of the rule of law, persons holding public offices must prove that they correspond to high standards of integrity. The values enshrined in the Constitution of the Republic of Moldova in Article 1 para. (3) providing that Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values that shall be guaranteed, implicitly provide for the responsibility of those holding public offices who exercise their functions in order to achieve the public interest.

Conclusion

The subject of today's congress will always be a topical one for us, long as constitutional law will exist. This is because the rule of law and the constitutional justice are important elements in upholding democracy.

The development of the rule of law mechanisms had been greatly stimulated in response to the wars, persecutions and repressions of the first half of the twentieth century.

Following the two world wars Constitutional Courts have emerged on the European continent.

Creation of Constitutional Courts was preceded by brutal social experiments based on severe violation of human rights. Entire nations have experienced military occupation, organized famine,

unjust convictions, and mass deportation, arbitrary nationalizations and total lack of any elements of political pluralism.

This common past of the European countries allows us to understand how important freedom, rule of law, democracy, and human rights are. We understand better than other nations that the renunciation to totalitarian past does not resume to only the abolition of communist or nazi rhetoric, but consists in principal, in the development of different fundamental systems where **the person is the supreme value, and the key role of the State is to deliver justice.**

The basis of democratic states is the law. The essence of law is freedom, since it is only freedom that defines the conditions that allow people to live together as free individuals.

For this reason, a key role in this process is played by the Constitutional Courts, which are called to remove the legal acts in contradiction with the Constitution.

Over the past decades, the constitutional justice in our countries has addressed an enormous range of legal and factual issues. **The constitutional justice is a unique and powerful instrument for promoting civilized values and democratic progress in such a way as to improve the lives of people.**

Europe today, thankfully, bears no comparison to that of the past century. The human rights mechanisms have played a key role in achieving this and must continue to develop and contribute to ever-higher standards of democracy, human rights and the rule of law.

Dear friends,

We are living in a period when the state and society is challenged by critical situations, especially in the field of human rights. In many European countries the political elites try to review the approach of human rights. There is a temptation to limit the human rights on security and other reasons.

In this context I want to mention the statement of former UN Secretary-General Kofi Annan. He stressed that **"We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights".**

I am convinced that this conference will provide significant and valuable insights for better understanding of the importance to strengthening of the mechanisms of rule of law and protection of human rights in our countries. In this respect, only free, vigorous and vibrant Constitutional

Courts can give voice to the supremacy of human rights and meaning to the rule of law and democracy.

With these words, I would like to congratulate you, president Zalimas, and to extend my appreciation to you personally for the professional and dignified manner in which you have organized this congress, making of it a wonderful platform for dialogue.

Thank you for your attention.
