



**4th Congress of the World Conference on Constitutional Justice
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“The Rule of Law and Constitutional Justice in the Modern World”

Session 2 - “New challenges to the rule of law”

Report by

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Session 2 on the New challenges to the rule of law was chaired by Mr Abdulayev, President of the Constitutional Court of Azerbaijan

The discussions were based on the key-note presentation made by Mr Zalimas, President of the Constitutional Court of the Republic of Lithuania, and on the presentation of the Venice Commission’s Rule of Law Checklist, made by Mr Vermeulen, Justice of the Council of State of the Netherlands

Key-note presentation

The presentation made by President Zalimas was in itself based on the questionnaire responses given by member courts, and was divided on three parts

- 1 - Major threats to the rule of law at the national level
- 2- Repercussions of international events and developments on the interpretation of the rule of law
- 3 - Collisions between national and international law and difficulties in the implementation of judgements of international courts

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

The two major threats identified in questionnaire responses were

- Economic and financial crisis
- Corruption

In recent years, economic and financial crises have had a huge impact on the work of constitutional courts; and constitutional case law was crucial to guarantee, not only individual rights but also social rights

As explained by Mr Zalimas, according to that case law, 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 (establishment by law, the legitimate purpose, the necessity and proportionality of the measure).

Constitutional principles have indeed played a major role on the crisis case law, and will continue to have a relevant role, despite the fact - that was also referred in Mr Zalimas report - that constitutional courts need to be careful when interfering in the political discretion to decide on issues of economic policies.

- Other threats to Rule of Law were mentioned in the questionnaire responses, including political crisis, armed conflicts, international crimes o torture and inhumane behaviour, organized crime and transnational criminality, flows of refugees and persons seeking international protection, a lack of respect for court judges, a lack of respect for minorities, terrorism, an insufficient level of legal culture, unemployment, inflation of legal rules

The representative of Portugal added to this list the risks emerging of the technological progress, namely in the fields of bioethics and new means of communication.

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

Again, two main events were identified in Mr Zalimas report, namely

- Migration and
- terrorism

As stated in the report, "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"

Counter terrorism measures are challenging the Rule of Law Special in several countries that have approved laws to prevent threats to public order, like the examples given by the representative of Malaysia.

That requires "finding a proper and fair balance between the interest of public security and individual freedom"

In one hand, some participants referred the need to strengthen the State to allow him to fulfil his function of protecting citizen's individual rights. That was the case of the representative of Lebanon.

On the other hand, counter terrorism measures must be necessary, adequate and proportional.

Mr Vermeulen reminded participants that the main legal problem with counter terrorism measures is that they are by definition preventive measures that requires a risk assessment that cannot always be done under judicial supervision.

Notwithstanding, the representative of Portugal, which was followed by the representatives of Germany, stressed the need of establishing limits to restrictions on constitutional rights imposed by counter terrorism measures

The representative of Portugal also warned against the temptation to disseminate in our legal system exceptional laws and measures that can only be justified by the fight against terrorism – what we could refer as a risk of colonization of common criminal procedural law by counter terrorism legislation

3 - Collisions between national and international law and difficulties in the implementation of judgements of international courts

“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”

Measures available for the prevention and settlement of collisions between the national constitution and the norms of international law:

- Preliminary review of the constitutionality of international treaties
- Harmonising interpretation
- Reinterpretation of the Constitutional
- Constitutional amendment
- Prohibition to adopt constitutional amendments contrary to international obligations

Quoting Mr Zalimas: “it is the particular responsibility of the 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*”

In that respect, the representatives of Senegal and Benim remarked that the answer has to be given on the basis of the specific framework of each jurisdiction, but nevertheless they agreed that the universal principles of international law should prevail

The idea of a hierarchy between international and national order - at least from a material point of view - in terms of substantive values - was also emphasized both by Mr Zalimas and Mr Vermeulen

The 2016 Rule of Law Checklist

Mr Vermeulen gave a short presentation of the Commission's 2016 Rule of Law Checklist, and identified some recent rule of law challenges in the light of this checklist.

The Rule of Law Checklist includes at least five principles:

- Legality
- Legal certainty
- Prevention of abuse/misuse of powers
- Equality before the law and non-discrimination
- Access to justice.

Mr Vermeulen expressed three specific concerns

1 - the risk of formalistic conception of rule of law

The rule of law requires "Material, substantive guarantees" and not only procedural rules

The need of a concept of Rule of Law based on substantial values was also referred by some of the courts representatives, namely the one from Senegal. The representative of Colombia went even a little bit further and reminded the Congress of the risk of having Constitutions without constitutionalism.

To strengthen the Rule of Law Mr Vermeulen suggested that the principle of Human dignity should be integrated in the checklist

2 - the need of a closer relation between the Rule of law and human rights

"human rights should have a prominent place in the rule of law concept". Mr Vermeulen suggested.

3 - Rule of law as restraint to majority decision making

- "there is an inherent tension between the rule of law (protecting fundamental minority rights) and democracy"

"In many countries a main cause for these tensions between democracy and rule of law is the rise of strong populist movements" - growth of illiberal societies
