Strasbourg, 23 May 2001
<cdl\doc\2001\cdl-ju\32-e>

Restricted
CDL-JU (2001) 32
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

The role of the Constitutional Court with regard to the Legislator

Report by Mr Ján Klučka, Member

* * *

Seminar on "The Role of the Constitutional Court in the State and Society"
(Kyiv, 10-11 May 2001)

organised by the Constitutional Court of Ukraine in co-operation
with the Venice Commission and
the German Foundation for International Legal Cooperation

The role of the Constitutional Court with regard to the Legislator

Constitutional Courts as guardian of the constitutionality

l. Under the historic model of the parliamentary constitutional system the supremacy of the legislature over the other branches of government has precluded any form of judicial review of constitutionality because the same parliament that can pass a law with the simple majority could also change the constitution just as easily. Constitutional justice in the proper sense of the word could develop only when instead of the principle of sovereignty of the parliament (where the representative body itself decides on the constitutionality of its own laws) has prevailed the idea of the supremacy of the Constitution and constitutional review performed by a special body independent of the legislative and executive power. The basic idea about the supremacy of the constitution and the right to judicial review spread originally from England over to the United States and the European states acting on the American example have made provisions for reviewing the acts of public authorities in terms of their constitutionality by setting up special courts with constitutional jurisdictions (concentrated review of the constitutionality). The introduction of constitutional review means a break-up of the former principle of unity of powers in view of which the former socialist system did not know constitutional review of the legislative acts.

2. The principle of supremacy of the constitution over the other rules of laws and other sub-legislative norms may be therefore safeguard only in so far as a method of judicial review of constitutionality of laws is provided for. Once he constitution is laid down as a supreme law of the state its observance needs to be guaranteed. Generally speaking the setting up of the constitutional jurisdiction is linked with the desire to guarantee democratic constitutional stability of the state (in the light of the past and present dangers) a to prevent constitutional mandates to be eroded and eventually suppressed by the parliamentary majority which disregards the constitution. The main object of the constitutional justice is therefore to defend the constitution from situations that might threaten its integrity and to interpret its provisions by defining the meaning and concepts embodied thereof and to identify the general constitutional framework within which the public authority may only act. Constitutional justice involving the principle of vertical separation of power represents logic and efficient counterpart protection vis à vis legislative and executive power. Only independent judicial review of both executive and legislative acts represents indispensable means of assuring that other branches of government shall not exceed the constitutional limits of their authorities.

3. The traditional Kelsenian model of constitutional justice provides for a court (which is distinct and separate from the ordinary court system) with a different composition and different procedures and having the power to review the constitutionality of norms passed by a parliament and if necessary to annul any such norms found to be conflict with the constitutional text. The creation of a constitutional court with the competence to annul unconstitutional laws makes it possible the principle that all powers are subject to the law while at the same time guaranteeing the law will conform to the constitution. The constitutional review exercised by constitutional courts presupposed their certain superiority in relation to the other branches of power. The status of the judicial body with the power to provide the constitutional review should only be held by

the institution that the specific system of the separation of powers hold such limiting relation to the legislative power that it may annul its statutes.

4. Assigning constitutional court such quasi-legislative function obviously has had theoretical and practical difficulties. A constitutional court should decide solely on the legal and constitutional grounds whereas a legislative body decides policy. Giving the constitutional court such a role can also threatens legitimacy and acceptability of the existing legislative body. Especially with respect of the laws passed by the elected parliament competence of the independent judicial body to review the constitutionality of its laws appears to be contrary to the principle of the sovereignty of people. Furthermore the annulment of a law has always political repercussions. It has been therefore difficult for any executive and legislative branches of any government to allow another independent organ to look over their shoulders and point out their mistakes but if the constitutional review is exercised properly it can result in fewer mistakes by legislative officials a closer approximation of the legislative and executive branch action to the standards set by the rule of law and to help more effective enforcement of constitutional rights.

The review of the constitutionality of generally binding legal rules before Constitutional Court

l. It is generally possible to subject to review of the constitutionality all categories of legislation including statutes, presidential and governmental decrees or ordinance with the force of laws, regulations of self-administrative bodies ,legislative measures as well as some other categories of rules. Even constitutional amendments and delegation of sovereignty to supranational bodies can be liable to control by the constitutional court. The review of which of these is to be in practice reserve for the constitutional court should depend on their practical importance, their rank within the hierarchy of norms and the factual capacity of the court to deal with its caseload. It would appear reasonable to monopolize before constitutional court only the review of the highest-ranking norms since the annulment of these should not rest with every regular court for reasons of respect for parliament as supreme democratic organ of state. Today's legal regulations and practice of the constitutional courts confirm various kinds of this proceeding. Obviously one can mention the repressive (*a posteriori)* review of the legal rules in force and preventive (*a priori)* review of legal norms and international treaties, which did not entry into force. The repressive review may be either abstract or specific and the effects of the judgment (finding) of the constitutional court can be *ex tunc* (annulment) or *ex nunc* (abrogation). The decision of the constitutional court declaring an act of legislation null and void can be therefore either declaratory or constitutive depending on the doctrine applied in dealing with unconstitutional acts of legislation. The subject matter of this competence of the constitutional court is to review both the laws passed according to procedures, which contravene to the constitution as well as the constitutionality of the substantive content of a law (full constitutional review).

2. The aforementioned proceedings are in practice reinforced by the limitation as those who may be have standing to challenge a legislative norm before constitutional courts. Continental legal orders usually restrict this possibility to the relevant organs of state (head of the state, government, public prosecutor) or the significant percentage thereof (number of the deputies of the parliament).It should be pointed out that the members of the parliamentary minority opposition have also the right to challenge the laws before constitutional court. This principle is in accord with the original conception of the constitutional court as a curb on the majority to keep it within constitutional limits. The standing provisions are however not the same for all

types of proceedings whereas standing to file a priori review of constitutionality is (as a rule) limited strictly to the state bodies and public officials unlike the challenges to enacted legislation where some constitutions authorize standing also for private entities (very often within the framework of the constitutional complaint proceedings dealing with the individual protection of fundamental rights and freedoms). In the last of the mentioned case this principle is obviously supplemented by the specific (*indirect, accessory)* review of the constitutionality of rules arises out of the proceedings in process before the courts of ordinary jurisdiction which however have to be convicted about the unconstitutionality of certain rule. Court's decision has to proceed on the basis of this decision.

3. Provided that procedural requirements have been met the constitutional courts have no discretion to refuse reviewing the constitutionality of enacted or no-enacted laws and to control over their case load by the „selected " cases. According to continental legal doctrine and practice constitutional court must decide every question properly before it.

Constitutional Review and legislation

l. Through any of the aforementioned proceedings the constitutional courts entry into contact and concrete relation both with the legislative body (ies) and legislative process as well. The impact of the proceedings on the legislative body and legislative process is however not uniform and fully depends on the particularities of concrete proceeding on constitutional review before constitutional court. According to traditional approach the constitutional court has no positive power in relation to the legislator and it may be only a *negative legislator* whereas the role of a positive legislator is reserved exclusively for the parliament. The constitutional review process is always in danger of infringing on the freedom of the legislature to exercise its constitutional discretion. Therefore the question of the „delimitation" of competences between a constitutional court on one hand and the legislature on the other hand is one of the most important issues to be resolved. Before turning the look at this issue in some details one should start with the fundamental principle of the separations of powers according to which judiciary has to respect the legislative competences of the parliament and parliament on the other hand may not influence the judiciary in any other way than by statute. In a constitution with separation of power each public authority has its own area of operation with its own responsibility and decisions that are to be respected by the other organs. As long as there are no constitutional orders or restrictions the parliament is free in its legislative work. The free discretion is conceded to it by the constitution itself. Constitutional courts and constitutional review *must respect* the freedom of discretion of the legislature provided for in the constitution and constitutional review may only *control* whether legislator has misused its competence and thereby violated the constitution.

2. The most critical point of the demarcation between constitutional review and the legislature is the control of the *substantive constitutionality* of a law. Whereas the supervision of the formal competences of the legislature does not pose too much difficulties the control of the substantive constitutionality of a law intervenes much more into the sphere of the legislature. If constitutional review controls whether a law may encroach the human rights of the people of whether a law satisfies the requirements of the rule of law the constitutional court has not only to prove the formal competence of the parliament bout also has to examine the substantive content of the law. This point also explain the general tendency in Europe where the constitutional courts are regarded as indispensable to the functioning of democratic institutions and as the „guardians of fundamental rights" which constitute the essence of democracy. Although the constitutional control by courts started with the supervision and delimitation of the formal competences

between state institutions a full constitutional review requires control of the substantive content of the law. The freedom of discretion of the legislature provided for in the constitutions includes only the right (or competence) to enact a law that satisfies the requirements of the rule of law and respect for the human rights laid down in the constitution. Therefore *real control* of the legislature depends fully upon constitutional review of the substantive content of laws.

3. It is not the task of constitutional review to scrutinize legislative acts on the basis of whether represent a *wise use* of the free discretion conferred to parliament by the constitution. As a politically neutral body is definitely not for the constitutional court to examine these rules from the viewpoint of their suitability. Especially a constitutional court is not allowed to substitute its own considerations for the concrete political considerations of law maker (s).The doctrine of judicial self-restraint play decisive role in the practice of every constitutional court.

4. The another criteria for drawing boundary between constitutional review and legislature could be *the form and nature* of legal supervision by constitutional courts. As previously noted according to traditional approach the constitutional review has no positive power in relation to the legislator and it may be only *negative* legislator whereas the role of a positive legislator is reserved for the parliament. Taking into consideration the fact that constitutional review has the specific task of preventing the misuse of the freedom of discretion it should be as far as possible only proceed *vis à vis* the legislature in a negative (cassational) form. The constitutional review process should be therefore limited to reviewing and if appropriate annulling laws passed by the legislature. Constitutional review should avoid formulating (more or less detailed) the terms of the laws of the legislature or making too detailed descriptions of the legislative process. This is necessary since otherwise constitutional review should abrogate the specific separation of powers between judicial review and the legislature and the constitutional court would make itself in effect a legislator. Thus while the legislature has to respect the negative decisions of the constitutional review proceeding a constitutional court also has to respect the discretion of the legislator provided for in the constitution.

4.l. In the case of repressive review the unconstitutional provision is declared void or annulled and the decision of constitutional courts finding legislative act as unconstitutional has regularly *erga omnes* effect (or even force of law).As general rule is valid that the provision of these acts are either directly annulled or at least not longer applicable since the day of the publication of the relevant decisions in the Official Gazette. It should be pointed out that due to the "annulation" effect of its decisions constitutional court itself must not be regarded as a further legislative body. In certain systems the constitutional court can declare a law unconstitutional but defer its removal (for a certain period) to grant the legislature enough time to make new provision that will harmonize with its decision. In other cases the constitutional court can even directly amend or modify rather that annul an unconstitutional provision of the law. If the legislator fails to abrogate the unconstitutional provisions of the law within the certain time limit these provisions cease to be valid. The annulment of a law by the constitutional court cannot negate that its respective provisions have been in force for a certain time and that legal affairs were regulated on the respective basis. The legal effects of the acts exercised on the basis of such law should be therefore respected in full scale. Decisions of the courts or administrative authorities based on an unconstitutional law may be therefore considered unchallengeable by virtue of the principle of *res iudicata*.

4.2. Decisions of constitutional court having effect of the nullity of relevant legislative norm give rise to a *legal vacuum* and that is why it is for the relevant legislative body to take care to fill this gap along the lines indicated by the decision of constitutional court. The constitutional

court may order the legislature to amend the provision or to give notice to this effect. In some sensitive cases it seems appropriate to accord the Constitutional Court specific power to set a later date on which the law is to lose its force in order the legislature a chance to fill properly this vacuum. The constitutional practice however (and from time to time) confirm that such decision does not bar to adopt a new law even identical with the text of prior law annulled by the decision of constitutional court.

5. Within the framework of *a priori* (preventive) review of the constitutionality the constitutional courts are entrusted with power to analyse proposed legislation even before it goes into effect. In a case of a finding of unconstitutionality of such legislation this may be referred back to the legislative body enabling it to "constitutionalise" its act or depending on the understanding the role of parliament to overrule the court's decision. The effect of the decision of the constitutional court consists in the prohibition of the final enactment (promulgation) of law or in the suspension of the internal process of ratification of international treaty. No legislative measure is annulled or declared null and void. It needs to be pointed out that a priori review increases overall politicisation of constitutional courts and also injects the court into legislative process before the process if fully completed. An adverse decision on the law not yet in force is in effect a command to the legislature to revise this law often with indication (more or less detailed) of how it should be revised. This involvement into legislative process can undermine separation of powers principle. At the same time this competence injects the constitutional court necessarily into a political battle between legislature and the executive. Although the same kind of dialogue occurs when a court issues an adverse decision on a fully enacted law that often occurs much later well after the law making body has completed its part in the legislative process.

6. For the sake of completeness it should be added that the constitutional courts in a few countries have a special competence to deal with the *legislative omission* of concrete legislative body(ies) namely to identify a legislative gap that is (according to decision of constitutional court) "unconstitutional". Unconstitutionality in such a case results not from the existence of legislative act but from its non-existence where the constitution requires such an act to be adopted. This competence brings the constitutional court directly into legislative process- due to it is mandating or at least suggesting future legislation and may be connected with its power to recommend or order laws to be adopted so as to remedy *lacunae*. The enforceability problem raises closely with this competence whereas legislative failure to respect the constitutional court decision can damage the court's prestige.