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THE CONSTITUTIONAL COURT OF SLOVENIA

**THIRD CONFERENCE
OF SECRETARIES GENERAL
OF CONSTITUTIONAL COURTS AND
EQUIVALENT BODIES**

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REPORT

by Mr Mr Vladimir I. ZHISHKEVICH
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Dear Ladies and Gentlemen!

Let me express the words of gratitude the organizers of the iii international conference of secretaries general of constitutional courts and courts of equivalent jurisdiction for the possibility to share certain modest considerations as regards the practical activities of the secretariat of the constitutional court of the republic of belarus.

This is the third time when the heads of apparatuses of the european constitutional courts may share their experience. I would like to emphasize that the high level of two previous conferences has made it possible to learn various service backgrounds of the colleagues of other countries and to use many things in our daily work. Beyond doubt, we have got invaluable knowledge from the presentations of our colleagues at the conferences of the secretaries general of the constitutional court in kiev and in madrid. I hope that the present conference will be more successful in view of the fact that we observe the increasing interest in the practice accumulated in other states.

It seems that many of difficulties emerging in practical activities of the constitutional courts and courts of equivalent jurisdiction shall have many similar and, may be, even identical things. In my opinion, their overcoming, as well as solution of the tasks that are before the apparatuses which secure the work of judges and the constitutional court or the constitutional council as a whole, as well as the progress in optimisation of the work of the law specialists shall also have many things in common.

The work of the lawyers who secure the work of the constitutional court shall be determined in many respects by the competence of the court. Legal position and competence of the constitutional court of the republic of belarus shall be determined in article 116 of the constitution of the republic of belarus as well as in the law "on the constitutional court of the republic of belarus". The powers specified by the law shall make it possible for the constitutional court of the republic of belarus to produce the judgments on the conformity of enactments of any other state body to the constitution, international legal acts ratified by the republic of belarus, laws and decrees in instances where the relevant proposals are submitting by the state bodies listed in article 6 of the law "on the constitutional court of the republic of belarus". Those subjects may be the president, both chambers of the parliament (house of representatives, council of the republic), the council of ministers, the supreme court, the supreme economic court.

On each case taken by the constitutional court for its consideration the specialists of the secretariat, before the hearing of the case at the sitting of the constitutional court shall give their stands in the analytical note by way of its referring to the judge-speaker on the concrete case. Beforehand, the judge-speaker shall form in written form the issues for their study by legal experts of the secretariat of the constitutional court. The order of the judge-speaker shall be forwarded to the head of the secretariat of the constitutional court. Simultaneously, there may be also forwarded the requests to the specialists of the relevant establishments of science, specialized state bodies, interested organizations. The list of organizations for forwarding the requests shall be determined by the judge-speaker or by the chairperson of the constitutional court. In this case the function of the specialist of the secretariat of the constitutional court shall be covering the requests with respect to the respondents and controlling the timely replies. The judge-speaker on the case may set the task before the legal experts of the secretariat as regards

generalization of positions of different departments and scientific institutions with presentation of comparative analysis or with the systematized table.

There are 10 members of the staff of legal experts who secure the work of the constitutional court of the republic of belarus and who are engaged in processing the documents for preparation of draft decisions of the constitutional court. They are concentrated in the department of legal expertise of the secretariat of the constitutional court. Moreover, each judge shall have one assistant for securing all the operative work of the judge. Assistants judges are also the lawyers, but their functions are connected indirectly with the preparation of draft decisions of the constitutional court.

Under the task of the judge-speaker the legal experts of the secretariat shall form “ basic legal position” on the concrete case. The line (algorithm) of work of the specialists shall be consisted of the following actions:

1) selection of enforceable enactments that are referring directly or indirectly to the subject of consideration of the constitutional court. Both domestic enforceable enactments and international treaties ratified by the republic of belarus shall be involved here;

2) analysis of the content of the european convention for the protection of human rights and fundamental freedoms, search and filing of decisions of the european court of human rights as for the similar point (european convention for the protection of human rights and fundamental freedoms may not be subject to direct application by the constitutional court of the republic of belarus. However, specialists of the secretariat shall constantly use the european convention for the protection of human rights and fundamental freedoms as compass reading and base themselves in their conclusions on legal positions of the european court of human rights);

3) clarification of the legal norms, their evaluation; comparison both from the point of view of applicability in the particular case and with their hierarchy taken into account;

4) forming up the logic chain of constitutional principles and european legal standards related to the legal conflict under consideration;

5) framing and stating legal grounds for consideration of the legal problem and adoption of decision;

6) wording proposals on “basic legal position”. At this stage the legal expert of the secretariat shall be self-dependant and his/her work may be subject to correction at his/her request. In addition, depending on the complexity of the issue the head of the secretariat may form the group of experts that finally at the end of the work shall propose the single document;

7) submission of the prepared document. This document is rather flexible in its form. Very often it is the analytical note with the conclusions and proposals. In certain instances it may be presented the draft decision of the constitutional court. It shall be emphasized that the preliminary work of the specialist of the secretariat shall not be resulted in presentation of the draft decision of the constitutional court.

The constitutional court while considering the draft decision may modify the concept of decision, may apply other arguments etc. But, starting from this stage, the specialists of the secretariat engaging further in additional elaboration of decision must perform in full the orders and must be guided by position of judges of the constitutional court.

Once again about the powers of the constitutional court. The law “on the constitutional court of the republic of belarus” shall not mention the institute of the constitutional complaint in its classical version. Nevertheless, the constitutional court of the republic of belarus considers the complaints of citizens on a range of issues. If the written complaints of citizens contain the legal issues concerning the constitutionality of enforceable enactments of local councils of deputies, executive and administrative bodies, as well as other state bodies, they shall be reported thereon by the head of the secretariat to the chairperson of the constitutional court for the specification of further actions.

The constitutional court shall often receive the complaints of citizens with the issues that are not within its competence. In this case the complaints shall be forwarded within five days period of time to the relevant state bodies, other organizations (officials) with notification of the citizens, or those complaints shall be subject to reply within fifteen days period of time with explanation about the appropriate state body, other organization (right official) to which and to whom they must make their appeals. Correspondence with citizens in this case shall be conducted by the secretariat of the constitutional court. Their replies to the complaints of the citizens shall be given by the head of the secretariat of the constitutional court or deputy head of the secretariat of the constitutional court who shall be dealing with legal issues.

The constitutional court of the republic of belarus shall uphold gradually the position on direct effect of the constitutional norms. This position is expressed in numerous decisions the court adopted. Guiding by this position, the constitutional court shall apply in its activities article 40 of the constitution of the republic of belarus. This norm enshrines the right of citizens to appeal to any state bodies and to furnish replies in point of substance. Article 40 of the constitution in combination with article 122 of the constitution of the republic of belarus shall contain the possibility to consider by the constitutional court the cases where the initiators are the citizens. Those cases are related to decisions of local councils of deputies, executive and administrative bodies, i.e. Enforceable enactments adopted by local councils of deputies, executive and administrative bodies.

Our colleagues from other states may highlight that in analogous cases (e. G. In germany) the disputes shall be subject to consideration by the administrative courts that are set up therefore. But the republic of belarus has no administrative courts, and the courts of common law are not entitled to consider the issues on the legality of enforceable enactments. The constitutional court of the republic of belarus by applying directly the norms of the constitution of belarus (articles 40 and 122 on the strength) shall take proceedings on the case as a result of the complaints of citizens on the conformity between the constitution, enforceable enactments of higher legal force and the enforceable enactments of local councils of deputies, executive and administrative bodies.

It shall be emphasized that the hierarchy of enforceable enactments in the republic of belarus shall be formed up on the basis of the special law “on enforceable enactments of the republic of belarus”. The law in question shall form a number of provisions on the procedure of enforcement of enforceable enactments in case of clash between them. At the same time, the law applying practice has quite a lot of difficulties as regards use of “contiguous” norms of law in different spheres of legislation.

It is necessary to make the reservation here that the procedure of taking to consideration these cases shall not be specified in details in the law “on the constitutional court of the republic

of belarus”, in the rules of procedure of the constitutional court, as well as in other documents regulating activities of the constitutional court. Therefore, in a number of instances the criteria of assessment of relativeness of consideration of the case in the constitutional court shall be clarified by the constitutional court itself.

Practical example. Land relations in the republic of belarus shall be regulated by the land code. One of its articles stipulates the right to allotment for the disabled person the plot of land for installation of garage not far from his/her place of residence. Moreover, the code shall specify the condition: high degree of disablement (i group of invalids is envisaged in that particular case). At the same time, the special law “on social security of invalids in the republic of belarus” shall fix the right of an invalid to the plot of land for construction of garage nearby the place of residence under the condition that the invalid has violations of loco motor apparatus (without specification of the group of invalids). In practice the complexity of settling the conflict shall be in the fact that it takes place lack of coincidence of two normative acts both as regards the structure of the subjects of law and as regards the scope of privileges granted by the law, as well as in the fact that both laws have been adopted recently. Norm of the land code theoretically is of higher legal force, but the norm of the law “on social security of invalids” was adopted by the parliament later on and under the common law (whereas the law is a special law) the more subsequent norm shall be subject to application. Thus, in practice there are instances, where not only the norms regulating relations, but the rules of application of the norms may be incompatible.

Perhaps, more stable systems of legislation do not face those facts. However, at the stage of forming its system of legislation the republic of belarus faces the indicated clashes. Practice of consideration of these cases in the constitutional court is still shaping and experts of the secretariat of the constitutional court shall make assessment of each of such an application from the point of view of its relativeness and admissibility of its consideration by the constitutional court. Specialists of the department of legal expertise of the constitutional court may come to the conclusion that the application of citizens raises the problem which may be subject to consideration by the constitutional court. In this particular case there shall be prepared the detailed full-scale document on the legal problem raised in the application and submitted to the chairperson of the constitutional court for the specification of further procedure of examination of the application of a citizen in the constitutional court. In case of positive result, the chairperson of the constitutional court shall appoint the judge-speaker on the case and examination of the case shall be exercised under the regular procedure specified by the rules of procedure of the constitutional court.

If there are doubts or it is necessary to make more precise study of the material, then the specialists of the secretariat are set the concrete task on additional elaboration of the material or on drawing the draft decision of the constitutional court. Consequently, specialists of the department of legal expertise shall draw the draft decision of the constitutional court that shall be submitted for consideration of the session of judges of the constitutional court. In case of accept of the concept presented by the experts of the secretariat during the discussion of the draft at the session of judges of the constitutional court, then the constitutional court may take the matter for proceedings and after that deliver the decision.

Assistant judges shall form slightly different group of lawyers. As it was already noted, preparation of draft decisions of the constitutional court shall not be the basis of their activities. However, in some instances assistant judges shall make draft decisions of the constitutional court. At the same time, an assistant judge shall act under direct order of the judge and shall

discuss with the judge the concept of the decision, its substance and reasoning. Draft decision of the constitutional court prepared under the indicated scheme shall be submitted for the session of judges by the judge, and not by the assistant judge. Use of that scheme may point out certain dependency of the specialist while preparing analytical materials and the draft decision, because the assistant judge in his/her activities is subordinated to the judge, but formally is on the staff of the secretariat of the constitutional court.

Practice of the constitutional court of the republic of belarus has quite specific figure of participation of experts of the secretariat in forming the legal position of the constitutional court. Judges of the constitutional court of the republic of belarus shall often prepare draft decisions of the constitutional court without involvement of experts of the secretariat. In that case the draft after discussion of its concept at the session of judges may be referred for additional elaboration to the secretariat. This draft shall be corrected, edited and discussed with the judge-speaker. The judge-speaker may agree or disagree with the proposals and remarks the experts raise by making additional elaboration of the text of decision. If the proposals of the expert of the secretariat touch upon the legal position, the expert, as a rule, shall be invited to take part in the session of the judges of the constitutional court.

In the instance, if the remarks and the proposals of the expert were not taken into account, the expert may draw the expert advise that shall be presented for consideration of the chairperson of the constitutional court. Resolution of the chairperson of the constitutional court on the given advise shall be transferred to the judge-speaker for the discussion at the session of the judges.

The stated above shall be the schematic variants of participation of specialists of the secretariat of the constitutional court in preparation of decisions of the constitutional court of the republic of belarus.