20TH ANNIVERSARY
CONSTITUTION
OF THE REPUBLIC OF MOLDOVA

INTERNATIONAL CONFERENCE

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The role of constitutional justice
in protecting the values of the rule of law

Chisinau, 8-9 September 2014

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SUMMARY

OPENING WORD

Mr Alexandru Tănase,
President of the Constitutional
Court of the Republic of Moldova

I am delighted to greet you here in Chișinău, at the International Conference "The role of constitutional justice in protecting the values of the rule of law", carried out by the Constitutional Court and by the Parliament. I would like to welcome the participation at the Conference of the first Presidents of the Republic of Moldova, Mr Mircea Snegur and Mr Petru Lucinschi, as well as well as the former ad interim President of the Republic, Mr Mihai Ghimpu. It is a special pleasure for me to welcome at this event the President of the Venice Commission, Mr Gianni Buquicchio.

This year, we have celebrated 20 years from the adoption of the Constitution of the Republic of Moldova. This 20th Anniversary of the adoption of our Constitution of 29 July 1994 is an occasion to undertake an overview and to reflect on the future of the rule of law and democracy in our country.

Our great politician, jurist, scholar and writer, Constantin Stere was saying that the State is a legal coat of the people. If we accept that the State is a legal coat of the people, the legal coat of the State is the Constitution. The adoption of the Constitution was a decisive moment in embodying the fundamental goals of the Declaration of Independence of the Republic of Moldova. The Constitution granted to the Republic of Moldova a constitutional order, in line with the ideals and aspirations from the Declaration of Independence. The Preamble of the Constitution itself mentions it expressly that the Basic Law has been adopted "Stemming from the secular aspirations of the people to live in a sovereign country, expressed by the proclamation of independence of the Republic of Moldova."

Following more than four decades of totalitarianism, the people of the Republic of Moldova have embraced the values of civilised world, values founded on respect and promotion of the rights and freedoms of the citizens an on the equality before the law. The Constitution of the Republic of Moldova of 1994 represented the basis for market economy, build-up of social justice, structuring of civil society and a start to the European integration process of the Republic of Moldova. Another equally important goal of the new Constitution was to build-up from scratch state institution inherent to the existence of an independent state, totally different from those of the former Soviet province, as well as to ensure those institutions with mechanisms of democratic functioning, in accordance with the aspirations of the people of the Republic of Moldova.

The two decades from the adoption of the Constitution may be examined in more ways. I would like to stick to one aspect I consider especially relevant to post-totalitarian and post-colonial societies. The constitutional system of the Republic of Moldova passed the most relevant test of democracy: the democratic alternation of power, as a result of free elections. The Republic of Moldova had 4 presidents and two ad interim presidents. In 23 years of independence there was a succession of 14 governments in power, now being the 15th one. In the fall of this year, we are going to have ordinary parliamentary elections, conducted on the ground of political pluralism. This aspect inspires optimism, as it confirms the viability of constitutional democracy in the Republic of Moldova.

Twenty years is a period of time which allows us to undertake certain evaluations and make plans of further development of our State. The Republic of Moldova passed through two phases of constitutional development. The first phase refers to the period when the Republic of Moldova may be considered a presidential or semi-presidential republic. The President of the State used to be elected by the people and, subsequently, he was entrusted with wide prerogatives, as by this granted mandate, the people delegated him a part of its sovereignty. The second phase of constitutional development matches the features of a parliamentary republic,

where the prerogatives of the President of the country are more narrow. The head of the State shall be elected with the vote of 3/5 of the MPs.

Unfortunately, the political context of the last decade did not permit to finalise the constitutional reform undertaken in 2000 and the parliamentary procedure of electing the head of state remains an imperfect one. This has repeatedly triggered the mechanism of dissolution of the parliament when the head of state had to be elected. Due to the fact that the Article 78 of the Constitution has not been amended, as recommended by Venice Commission, there is a risk of the same deadlocks, which can lead to an endlessly repeat of the same procedure of presidential elections, thus generating a vicious circle of elections and dissolutions. Stemming from the abovementioned, it is necessary for that the next parliament to finalise the constitutional reform of 2000, so that there would be avoided constitutional deadlocks. By eliminating the mechanisms that generate a disbalance of constitutional institutions, there would be saved the coherence of the Constitution.

A good part of the national territory of the Republic of Moldova is still under foreign military control and Moldovan citizens from occupied territories do not enjoy the protection of rights and freedoms guaranteed by the Constitution. The transition from former Soviet province to an independent state outlived the initial expectations, which delayed the build-up of a genuinely competitive economy, in line with constitutional principles and values. Unfortunately, a large portion of constitutional values remains a set of pompous phrases which shall be filled with practical content.

The constitutional text is not a mathematical formula, so that it would leave room for interpretation. The Constitution, in general, represents the result of specific historical, political, social and economic conditionings, which confer it what we as constitutionalists call it constitutional identity. When finding legal solutions, particularly in case of the most difficult ones, these aspects should also be considered. During its 20 years, the Constitutional Court of the

Republic of Moldova played an important role in guaranteeing the supremacy of the Constitution. The Constitutional Court has been conceived by the constitutive legislator following the Kelsenian model of constitutional justice. The Constitutional Court of Moldova is a specialised authority of constitutional jurisdiction, separated from the system of law courts, independent from any other public authority, its duties being established in the Constitution itself.

I would like to shortly address the topic of independence of the Constitutional Court. A Constitutional Court will always be subjected to more or less critical remarks, as its rulings cannot satisfy all the interested parties. At the end of the day, the attitude towards the rulings of the Constitutional Court points to the political maturity level of political actors and of the society as a whole. In a democratic society anything can be criticized, including a ruling of the Constitutional Court, however a critical remark on a ruling of the Constitutional Court should not generate the annihilation of the institution itself. The former President of the Federal Constitutional Court of Germany, Mrs Jutta Limbach, was saying, a decade ago: "a democratic state can indeed also exist without constitutional justice, but no one can question the issue of constitutional justice in a state it already exists, without being suspected of totalitarian ideas."

The people of the Republic of Moldova, proclaiming independence, made the choice for a democratic government and for the rule of law. Given democracy and rule of law are fundamental constitutional values, public authorities are compelled to act loyally with regards to the Constitution. The strict respect for the supreme principles and values represents in a practical way the test of the efficacy of the Constitution as a constitution of a state governed by the rule of law, and depriving citizens of a functional interpretation and enforcement of the Constitution would mean to deprive them of what is considered the greatest public good – confidence in its efficacy.

Our reunion at this solemn meeting comes to once again underline the crucial importance of the Constitution of 1994 in edifying the state of the Republic of Moldova. A constitution is not only the basic and founding law of the state, it also being a future project. Our citizens see their future in the big family of European countries. Following the proclamation of independence of the Republic of Moldova, European integration is the most ambitious and far-reaching national project. I would like to believe that the International Conference of Chișinău on "The role of constitutional justice in protecting the values of the rule of law" will contribute to move closer to European standards and to edifying a state governed by the rule of law.

Mr Nicolae Timofti,
President of the Republic
of Moldova

The 20th Anniversary from the adoption of the Constitution of our country generates indeed – including today, in this room – a solemn and sober ambience.

In 1994, the Constitution has instituted democracy and rule of law in the Republic of Moldova, representing till nowadays a safeguard for the sustainability of these values on our soil. Legislative abuses have been prevented due to the involvement of the Constitutional Court.

The constitutional concept and set of principles and norms of the Basic Law served as a foundation for subsequent processes and laws, and for relations within the society, whereas human dignity, human rights and freedoms, as well as political pluralism have acquired a meaning of a permanent and unquestionable goal. The provision on the priority of international regulations over domestic laws played the role of a safeguard in respecting human rights and freedoms in the Republic of Moldova.

As with regards to the institutional framework established by the Constitution, it ensured the development of main state powers, including by their placement within the international economic system.

The Constitution set out the movement of the Republic of Moldova towards civilised world of the Euro-Atlantic community, which we did throughout these 20 years, with a varying pace indeed, but in a progressive and continuous manner.

In 1995 we have become a Member State of the Council of Europe, so that in 2014 we have acquired the status of associated country with the European Union. Thus, the Constitution grounded all our agreements and relations with international community.

At the same time, the Basic Law has been amended, given that it is not immutable, but on the contrary – certain provisions are imperfect, imprecise or outdated, as for instance is the provision of Article 13 on the name of the official language of the country, which has just recently been clarified by an interpretation given by the Constitutional Court. There have also been discussions related to the position of Prosecutor's Office among law enforcement bodies, including the procedure of appointing the Prosecutor General, as well as the election modality of the president of the country. The most important constitutional reform undertaken in 2000 year has not shed suffice light on certain provisions, so that in the last years the debates on reviewing the Basic Law have heated up, being followed by discussions on the opportunity of examining a number of powers of the Constitutional Court. It looks to me perfectly normal and useful for a Constitution to be adapted to the new political, economic and social realities.

I see these discussions as being useful when all the relevant stakeholders are involved – the 3 powers of the state, political parties, constitutional experts and the whole society. We have in this regard a reliable counterpart and a valuable referee, the Venice Commission. We highly appreciate the expertise we have been provided with throughout the years by the Commission. I hope that in a foreseeable future, the Republic of Moldova will manage to secure the intellectual and political potential in order to be able to adopt, in cooperation with the Venice Commission, a new Constitution. I do hope we are not far away from that moment.

As I have pointed out earlier, the constitutional framework covers overall the whole organic and legislative spectre, being ongoingly improved by the Parliament. The weight and value of the constitutional text should matter decisively for a legislative process in a continuous manner and the judgments of the Constitutional Court must be strictly observed, aiming at ensuring the development of the rule of law in the Republic of Moldova.

At the same time, it is extremely important to apply the value system provided by the Basic Law, to spread the meaning of the Constitution in the daily

life of the people. Citizens are waiting, first of all, for the state institutions and by the civil servants to catch up with all the progressive trends of the Constitution.

I am certain this is possible, considering Moldova has European reflexes and aspirations.

Mr Gianni Buquicchio,
President of the Venice Commission

It is a great pleasure for me to be in Chișinău today, to celebrate the 20th anniversary of the Constitution of the Republic of Moldova.

The adoption of the Constitution is an important event in the history of a country. I remember when the Republic of Moldova joined the Council of Europe in July 1995, and then the Venice Commission, less than one year later, in June 1996.

Cooperation between the Venice Commission and the Republic of Moldova has already started in 1993, when the Commission provided comments on what was then the draft Constitution of your country. The Republic of Moldova's new Constitution was adopted in 1994, and through it the country's Constitutional Court was established in 1995.

We know that constitutions guarantee the separation of powers, the rule of law and the protection of fundamental rights. These basic principles and constitutional values need to be respected in order to provide the basis for peace and stability in the country. But the implementation of constitutions, tool turning the abstract provisions into rules that govern everyday life, is an audacious task and should not be the sole responsibility of the legislator. This task is therefore also entrusted to other organs, in particular, to the judges, and first and foremost, to the constitutional judges. This is an important development to observe, and this is where the constitutional justice comes into play.

Mr. President, the Republic of Moldova's Constitution was the basis for the establishment of your country's Constitutional Court. This Court is an

important institution that has helped in providing constitutional stability in the country and it continues to contribute to the development of democracy in Moldova today. At the same time we are all aware of what can happen if constitutions are manipulated by the political agenda of the day. This is where the role played by the Constitutional Courts is crucial, they are in charge of the Constitution, they are the guarantors of the Constitution and this role should not be underestimated. It is therefore very important that this Court renders its judgments independently, without any political influence.

I believe that the Constitutional Court not only provides for the stability of the Constitution and respect for the rule of law, but has, beyond this classical approach, a distinctive role to play in strengthening continuity and development of democracy and the rule of law, using the Constitution as its main pillar. However, as a result of international cooperation, the experiences of other courts and the exchanges of decisions through conferences, has helped constitutional courts in further building their legitimacy.

The Venice Commission as part of the Council of Europe, whose aim is to protect human rights, democracy and the rule of law, understood from the very beginning that the dissemination and consolidation of the common constitutional heritage is key in strengthening common standards throughout Europe and beyond, based on the continent's fundamental legal values. This is what the Venice Commission calls cross-fertilization, and while Constitutions may differ, their basic underlying principles, such as the respect for the constitution and the rule of law, are the same. This, in turn, helps in promoting further development of the common constitutional heritage throughout Europe. The Venice Commission has done this through the publication of its Bulletin of Constitutional Case-Law and the CODICES database, as well as the organization of seminars, and now, through the World Conference on Constitutional Justice. The Constitutional Court of the Republic of Moldova is the founding member of the World Conference on Constitutional Justice.

The topic of today's Conference is *"The role of the constitutional justice in protecting the values of the rule of law"*. The Venice Commission sees constitutional justice as providing for the respect of the Constitution, democratic principles and fundamental rights, and it also plays an important role in strengthening the democracy and in ensuring its continuity.

Constitutional justice is the key element in fostering and deepening the basic values that are contained in constitutions that form the basis of the work of Constitutional Courts whose decisions have a decisive impact on society. There is a general concern for the defense of the human rights and the rule of law, and in doing so the increasing mutual inspiration, that Constitutional Courts of different countries draw from one another, is encouraging.

The definition of the Rule of Law, according to Lord Bingham, is "all persons and authorities within the state, whether public or private, should be bound by, and entitled to the benefit of law publicly made, taking effect generally in the future and publicly administrated in the courts". The Venice Commission report on this issue, which was adopted in 2011, bases itself on this definition and divides it into eight ingredients:

- accessibility of the law, i.e. that it be intelligible, clear, and predictable;
- questions of legal rights should be normally decided by law and not by discretion;
- equality before the law;
- power must be exercised fully, fairly and reasonably;
- human rights must be protected;
- means must be provided to resolve disputes without undue costs or delay;
- trials must be fair;
- compliance by the state with its obligations in international law, as well as in national law.

On the national level, the Constitutional Court has an important role to play in the implementation of the rule of law. It is important to stress here that

the rule of law should not be seen as a blind or sick execution of the laws, which should perhaps be referred to as the rule by the law, but that it is foremost a task of the legislator to adopt laws which are in conformity with the democratic principles of the separation of powers and the respect for human rights.

The Republic of Moldova has faced a number of constitutional challenges, ranging from the struggle with the political and institutional stalemate that resulted from the constitutional provisions on the procedure of the election of the President to last year's adoption of the draft amendment to the law on the Constitutional Court which would have allowed the Parliament to remove the judges from the Constitutional Court on a vote of no confidence of three fifth of its Members.

Subjecting its judges to the need of being trusted by Parliament would have impeded the Constitutional Court's independence, since one of its role is precisely to control the work of the Parliament. Furthermore, to prevent the resurgence of the political and institutional stalemate that occurred not so long ago, your country was invited to revise its Constitution in order to strengthen the system of checks and balances and to clearly set out the competences of the Constitutional Court.

Moreover, already back in 2004, a proposal to introduce an individual application procedure in front of the Constitutional Court of Moldova was discussed. At that time the Venice Commission very much welcomed this initiative as providing for a better and more effective protection of fundamental rights.

As you have already said, Mr. President, I would like to take this opportunity to encourage the Republic of Moldova to reconsider the introduction of such a procedure in front of its Constitutional Court and to also urgently consider amending constitutional rules on the election of the President of the Republic.

The reform process in Moldova is ongoing and, although there have been shortcomings, there are signs that the country is moving in the right direction with the enactment on the 11th August 2013 of the Law on disciplinary liability of judges, which was the last item of the package that included 11 laws the Government had undertaken to get enacted. Moldova is also looking forward to its Parliamentary elections on the 30th of November 2014.

Let me end by saying that I wish a very interesting discussion on the *Role of constitutional justice in protecting the values of the rule of law* and to take this opportunity to congratulate the Republic of Moldova on the 20th anniversary of its Constitution.

Mr Igor Corman,
Speaker of the Parliament
of the Republic of Moldova

It is my pleasure to greet you at this International Conference dedicated to the 20th Anniversary of the Constitution of the Republic of Moldova. It is a special reunion for our country which, symbolically, closes up the series of important events we had in 2014. It is a year that is going to be written in our history as a new beginning for the Republic of Moldova.

The two decades since the adoption of the Constitution encompass times of quest, challenges, but also achievements. During this period of time, the Basic Law went through a number of constitutional reforms, but they did not touch the aspiration of our people for a dignified life. In building up our State, the Constitution fulfilled and it is still fulfilling one of the most important missions – being a factor of stability of the society. The Basic Law protects citizens by guaranteeing human rights and fundamental freedoms, ensuring the respect for the separation of powers in the State and political pluralism.

The supremacy of the Constitution is guaranteed by the Constitutional Court. As the Basic Law itself provides, this is the sole authority which aims to ensure the implementation of the principle of separation of State powers and the respect for the responsibility of the State towards the citizen.

In this process, an important role is also played by the Parliament, being in charge with ensuring the development of legislative framework in relation to constitutional review, and with enforcing the judgments of the Constitutional Court. In other words, the judgments of the Court may be discussed by political actors, but they are undoubtedly enforced by public authorities. Only a strict observance of the rulings and interpretations delivered by the Constitutional Court can safeguard peace and cohesion in the society.

Among all the subjects entitled to submit applications, most of the authors on constitutional review are the MPs, who can apply both as a group and as individuals. This tool is traditionally used, particularly recently, more and more intensely, by the opposition as this contributes not only to the observance and development of the pluralism, but it also prevents eventual abuses from the majority in power. In the context of enlarging the access to constitutional justice, the Parliament examined the draft law on the opportunity to entitle local authorities to submit applications before the Constitutional Court.

Any Basic Law provides that its provisions can be modified, amended or repealed. Howsoever we were proud of our Constitution, once the time passes, things are evolving, society is changing, as well as political reality. Since the adoption of the Constitution, there have been reviewed 40 constitutional norms. The constitutional reform of 2000 was a substantial one, which led from a semi-presidential republic to a parliamentary one, following the modification of the procedure of presidential elections. It is true that following this reform we also inherited the provision on the election of the head of the state with a vote of 3/5 of the MPs, which was at the basis of a number of political crisis and caused Parliament dissolution for 3 times. Aiming at reviewing the procedure of presidential elections, in 2010 there was carried out a referendum which was not validated, though. There have been more proposals on reviewing the Constitution by the Parliament, but no political consensus was reached. This provision of the Constitution was not modified and there exists the risk of repeating such situations in the future. Subsequently, an important task of the future Parliament, which I hope will consist of political forces that would be more willing to cooperate, make compromises and reach a consensus, will be to solve this issue and to examine the opportunity of operating other amendments in the Basic Law of the country.

As I was saying at the beginning of my speech, this Conference concludes a series of important events for our country in 2014. When I am saying this, I

am referring to important results related to European integration: the right to travel with no visa within European community, as well as the signature and ratification of the Association Agreement between the Republic of Moldova and the European Union, subsequently its provisional enforcement starting with 1 September 2014. The association of the Republic of Moldova with the EU represents a partnership based on the respect for shared grounding values of the EU, such as democracy, the respect for human rights and fundamental freedoms, as well as rule of law.

Our country is now living a crucial period of time for its future. Facing new domestic and external challenges, we need unity and solidarity in the whole society and political elite, in order to speed up the implementation of our project of country modernisation based on the European model. Our citizens will be called to cast their votes on 30 November 2014 in the parliamentary elections. It will be a real test of democracy of our country. We must make all the efforts and provide all the conditions in order for the elections to be free and fair. And the Constitutional Court, applying the procedure of constitutional review will put the final seal on the elections result.

Finally, I would like to wish all the participants of this Conference fruitful discussions and I wish to enjoy discovering or re-discovering Moldova!

Mr Iurie Leancă,
Prime Minister of the
Republic of Moldova

I would like to commence my speech by appreciating the initiative of the Constitutional Court of the Republic of Moldova to carry out this International Conference dedicated to the *Role of Constitutional Justice in protecting the values of the rule of law,* aiming at improving and perpetuating these democratic aspirations, in order to ensure the balance and supremacy of the law in the state. And I would also like to congratulate, on behalf of the Government, the judges and employees of the Constitutional Court on the occasion of the 20th Anniversary of the Constitution of the Republic of Moldova.

All of us in the Republic of Moldova, in this year, we celebrate 20 years from the adoption of the Constitution of our country. The anniversary grants us the occasion to recall the history of the Basic Law, to reflect on the impact it had in the short history of our State, but also to design the future. The Constitution, having been adopted by the Parliament 20 years ago, is not only a legal act, but also a moral and political one, expressing our desire to create a democratic and, by all means, a functional state.

If we are to speak about the timeframe, 20 years represent a quite short period. But if we are to undertake an assessment of the changes, we are going to see that a lot has been achieved. However, considering the maturity level of civil society, political and legal culture, we are still at the beginning of the road, although I am convinced this is a certain and positive beginning. All these accompany our thoughts and discussion with regards to the Constitution.

In the last years there are more voices heard on the need to change the Basic Law. This raises a number of questions, such as: whether the current provisions of the Constitution are in line with reality, with current issues and, certainly, with today's goals. Subsequently, there are many discussions on the way should be shared the responsibilities and offices between different state authorities, how there can be improved the management of judiciary and ensured its impartiality, which is the optimal modality in amending the Constitution, so that people would know that they can freely enjoy and defend their rights. All the public debates on this issue are driven by people's desire to see an improvement of the legal framework and of their related procedures. These are the debates that western democracies had only some decades ago, states which are now a model for the Republic of Moldova, even though their constitutionalism evolved throughout centuries.

Subsequently, I urge you not to fear to undertake an exchange of views and to debate, with one condition, though: all the debates, especially those on amending the Constitution of the Republic of Moldova, to act with a high responsibility, considering all possible consequences for citizens and for the State. I strongly believe that the value of the Constitution does not rely only on its text. The vitality of a Basic Law is not fuelled only by the founding values of a society, on traditions, ideas, customs, political and public dialogue between institutions. And I am sure that the respect for the values and principles provided by the Constitution may be strengthened by our deeds. The Constitution set out our common dream of a country we wished to live in. Today, it depends on each one of us and on all of us together when and how this dream will come true.

Honourable audience, every one of us brings in new experiences, new judgments of the Constitutional Court, new trends in constitutional doctrine. All of these not only put in a new light the content and the spirit of the

Constitution, but also emphasize our deep respect and strong commitment to the Constitution.

Although it is my wish to only see positive developments, it is also a reality that there have been threats to our Basic Law. There have been various attempts to use the text of the Constitution in political or group interests. It is clear that such situations are not admissible, as they could transform the Constitution in an empty set of nice words. But, the reality should be different. The Constitution is the highest law of the country establishing limits for state authorities, the exact role of the Constitutional Court, ensuring human rights protection.

It seems we forget an axiomatic fact: the Constitution of a country is not a convenient law, being needed only when its provisions are adequate in a given situation and which can be ignored when they are not desirable. The Constitution must always be respected. This is our goal: to delimit the responsibilities of all State powers and to guarantee that all public authorities act in strict compliance with the Basic Law. Only then we are going to be a truly democratic state and only then the rights and freedoms of the citizens will be enforced efficiently.

I wish you good luck in achieving this aspiration and the strength to respect and make others respect the Constitution of the Republic of Moldova.

INTERNATIONAL CONFERENCE

The role of constitutional justice in protecting the values of the rule of law

SESSION I

„General interest – an instrument of human rights protection: seeking efficiency and balance"

20 ANI

ADOPTAREA CONSTITUȚIEI
REPUBLICII MOLDOVA

Dr. Brigitte Bierlein,
Vice-President of the
Austrian Constitutional Court

THE PRINCIPLE OF PROPORTIONALITY

Let me first thank the Constitutional Court of the Republic of Moldova – and, in particular, its President Mr. Alexandru Tănase – for having invited me to participate in this international Conference on the occasion of the 20th anniversary of the Constitution of the Republic of Moldova. My sincere congratulations on your anniversary and my best wishes for a peaceful, prosperous and successful future.

It is a great honour and pleasure to be here today and to speak to you about *PRINCIPLE OF PROPORTIONALITY.*

The issue, namely the question of general interest, or more simply said, of finding a balance between the rights of the individual and the rights of the community, is a topic that has been hotly debated in Europe, and not just by constitutional or other high courts.

It is a permanent challenge: how to guarantee safety and at the same time protect individual liberties.

By definition, any treaty and any law for the protection of human rights gives priority to rights. The goal is to protect certain individual, fundamental interests – not only from arbitrary state power, but also from collective interests.

The former President of the European Court of Human Rights *Rolf Ryssdal* once said that *"[t]he theme that runs through the Convention [on Human Rights and Fundamental Freedoms] and its case law is the need to strike a balance between the*

general interest of the community and the protection of the individual's fundamental rights".

In this, the former President was simply repeating, almost word for word, the dictum of the Court of Human Rights in the case *Soering vs. United Kingdom,* where the European Court of Human Rights stopped the extradition of an European citizen to the USA, as he would have faced inhumane and degrading treatment.

There is no doubt that the European Court of Human Rights – as well as the national constitutional courts – try to find a balance, both in their interpretations of the law, as well as in their decisions. This balance, governed by the principle of proportionality, *"has acquired the status of general principle in the Convention system".*

However, the rights conferred by most documents, whether national or international, are not absolute.

Let us take the *European Convention on Human Rights* as an example: All but four of the rights guaranteed in it may be restricted in specified circumstances.

- First, certain rights are subject to what may be termed *"express definitional restrictions",* limiting either their content, the circumstances in which they apply, or the persons who are entitled to them.
- Second, according to Article 15 ECHR, all except the absolute rights may be suspended *"in time of war or other public emergency threatening the life of the nation"* provided this is *"strictly required by [...] the situation".*
- Most controversially, however, are those Articles which contain general exceptions primarily of a collective nature. This category differs from the other limitations in requiring case-by-case judgments as to whether priority should be given to individual rights or to public interest goals.

The term *"general"* or rather *"public interest"* is used to justify interference with two rights only:

- the right to peaceful enjoyment of possessions (Art. 1 of Protocol No. 1), and
- the right to liberty of movement and freedom to choose residence if one is lawfully within a territory (Art. 2 sec. 1 and 4 of Protocol No. 4).

Other rights, however, are limited by a range of more specific *"legitimate purposes"*.

Best known are Art. 8 to 11 ECHR (for example the rights to respect for private and family life, home and correspondence, or the right to freedom of thought). But similar restrictions also apply to the rights to a public trial (Art. 6 sec. 1), of free movement and choice of residence, or to leave any country (Art. 2 sec. 2 of Protocol No. 4).

The exceptions are not identical under each Article, nor are they exclusively collective in nature. Some rights, for example, may be limited in order to uphold the rights, freedoms or reputation of others in general, or of specific groups.

Nevertheless, the majority of legitimate purposes mostly fall into one of two categories:

1. what may be termed *"pure"* public interests (such as protecting public safety, public order, health, morals, and national security, preventing crime and maintaining the economic well-being of the country) or
2. what benefits the public generally, as well as identifiable individuals (such as maintaining the authority and impartiality of the judiciary, protecting the interests of justice, preventing the disclosure of information received in confidence and maintaining territorial integrity).

There are also slight variations in the conditions which have to be met before these exceptions are satisfied.

Under Art. 8 to 11 and Art. 2 sec. 2 of Protocol No. 4, interferences must be prescribed by, or be in accordance with, the law and must be necessary in a democratic society.

The interpretation of these exceptions will clearly be a crucial determinant of the practical significance of the *Human Rights Act.*

When a justification is pleaded with respect to a *prima facie* interference with a right, the following three questions are typically addressed:

1. Was the interference in accordance with, or prescribed by, law?
2. Was it genuinely in pursuit of one or more of the legitimate purposes at issue?
3. Taking all relevant circumstances into account, was it necessary in a democratic society for those ends?

Given the broad terms in which the legitimate purposes are framed, the second question is rarely problematic. The first and last questions are therefore the crucial ones.

Both, the rule of law and democratic necessity, could be treated as formal hurdles designed to ensure that impugned actions have been through a process of democratic legitimation and do not restrict individual freedom more than is strictly required.

Alternatively, they could be given substantive content and used as objective standards by which to determine the legitimate scope of individual rights and collective goals.

Although the Convention on Human Rights and Fundamental Freedoms has been part of the Austrian Constitution since 1964, it took about 15 years until the end of the 1970s for the Austrian Constitutional Court to start dealing with guarantees of the Convention in earnest. The year of 1984 marked a watershed in the Austrian Constitutional Court's judicial doctrine on fundamental rights.

The Constitutional Court developed the principle of proportionality for cases pertaining to fundamental rights, a principle, which also applies in cases, where this is not expressly mentioned in the wording of the law.

Furthermore, in its jurisdiction the Constitutional Court follows the principle, that interference in fundamental rights may only occur, if it is suited to achieve the objective, is necessary and not excessive.

An interesting example of this jurisdiction is the decision of June of this year, when the Constitutional Court decided on whether the law pertaining to data retention was constitutional.

The Constitutional Court found that it was unconstitutional and justified its decision as follows (I can only give you a short version here, the decision, however, is available for download on our website):

1. Any interference with fundamental rights which is as massive as data retention must conform to the Austrian Data Protection Act and the European Convention on Human Rights.
2. Whether such interference is constitutionally admissible depends on the following three points:
   - the stipulated conditions for the storage of such data,
   - the requirements governing their deletion, and
   - the security measures in place for access to retained data.
3. Furthermore, several specific legal safeguards were missing, such as
   - the precise clarification of the retention duty,
   - the requirements applying to data access, and
   - the obligation to delete data.
4. Of course, the Constitutional Court is aware that the new communication technologies present new challenges in the fight against crime. The tools

used in this fight must, however, be proportionate. The law under review was clearly disproportionate.

Mister President, excellencies, ladies and gentlemen – I hope, that I managed to give you a brief overview of the challenges the European Constitutional Courts will face in future.

Again, thank you very much for your kind invitation to speak here today. And once again, my best congratulations on behalf of the Austrian Constitutional Court!

Prof. Jiří Zemanek,
Justice of the Constitutional Court
of Czech Republic, Professor
at Charles University in Prague

PUBLIC INTEREST IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

Introduction

The Constitutional Court is a judicial body entrusted with the protection of constitutionality; however, it is set apart from the system of general courts. Compared to institutions with an analogous mission in the context of Europe, it is one of the most powerful in terms of the scope of its powers. Constitutional complaints against unlawful interference by public authorities with fundamental personal rights and freedoms guaranteed by the constitutional order, and, on the national level, directly by binding international standards (in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union), represent - in addition to the review of constitutionality of laws and international treaties, decisions on issues concerning elections and political parties, actions filed against the president of the country, resolution of conflicts of jurisdiction or enforcement of decisions of international courts – its by far most extensive agenda. Constitutional complaints may be filed by individuals and self-governed territorial entities (municipalities, regions) within two months from the exhaustion of all procedural remedies available to them under the law for the protection of their rights. Access to the Constitutional

Court is free; however, the complainant must be legally represented by an attorney-at-law. Cases are usually heard by tribunals consisting of three judges, or, in rare instances, by a plenum of fifteen judges. Decisions of the court are binding on all bodies and persons, established case law is of a quasi-normative (precedential) nature. The Constitutional Court of the Czech Republic has been in existence since the inception of the country, i.e., since 1993 (its predecessor operated briefly during the first Czechoslovak Republic, but not during the Nazi and Communist totalitarian regimes), and its seat is in Brno, i.e., outside the legislative and executive power center.

The position of general interest in the human rights agenda of the Czech Constitutional Court is somewhat ambivalent: on the one hand, it is a tool giving effect to the guarantees of fundamental rights where their *status positivus*, i.e., guaranteing claims against public authorities, is invoked, for instance, in the areas of social rights or access to services of general economic interest; on the other hand, in necessary cases and to the necessary extent, it exerts a restricting influence over the exercise of fundamental rights - typically in the case of freedom of speech of the media in conflict with the protection of privacy of those on whom the media are reporting and who invoke their *status negativus* against interference with their private sphere; in the above-described constellation, the general interest of informing the public is then a kind of "antithesis" of the liberal essence of fundamental rights in a democratic society, based on the rule of law. The role of the Constitutional Court is thus obvious: to seek and effectively enforce, on the level of constitutional law, a fair, i.e., duly substantiated, balance between competing, qualitatively mutually incommensurable social values: fundamental rights and general interest. At the same time, under conditions stipulated by the constitutional Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the Charter of Fundamental Rights of the European Union, as the case may be, the boundaries of fundamental rights and freedoms may be regulated only by law, must apply

equally to all identical cases, must examine the substance and purpose of such rights and freedoms, and must be misused for purposes other than those for which they were laid down. The mutual relationship of fundamental rights and general interest is *exclusive* where the two values cannot be fully upheld side by side, and one must (partly) give way to the other, but *inclusive* in those cases where respecting one of the values is a condition for the fulfillment of the other. These general maxims generally form a part of constitutional doctrines in all European countries. However, the interpretation and application of these principles in the daily practice of constitutional justice may vary.

The Czech Constitutional Court does not view itself as the sole guarantor of this task: rather, it strives to ensure that the protection of fundamental rights against unlawful interference or qualified inactivity of public authorities, as well as cases of their legal restriction, are under control already at the level of the general judicial system, with respect to which the Constitutional Court is in a subsidiary position (as *ultima ratio*). Its attitude is due i.a. to the fact that general interest is primarily of an extra-legal (political) origin, and is vague as a legal notion, cannot be defined in an exhaustive manner on general level, and it only assumes features graspable in terms of constitutional law in the context of a specific law, to which numerous provisions of the catalogues of human rights law refer. It only gains full normative form on the basis of case law, i.e., interpretation in connection with a specific situation and individual case. This is due to the fact that the meaning of the notion of "general interest" varies in different legal relations and areas. The constitutional Charter expressly refers to it only in connection with forced restriction of ownership (expropriation) in its Article 11 (4). Elsewhere, the Charter permits restriction of a fundamental right, for instance, on the grounds of public security and order, health and morality, crime prevention, etc.; the Constitutional Court encompassed same under the notions of "public goods" or "public good". It noted in that context that any restrictions of the exercise of fundamental rights are only conceivable

when there is an extremely intense general interest, their negative impacts need to be minimized, and they may only be used as a last resort; their consequences must not outweigh the benefit associated with the general interest in the implementation of restrictive measures. The Constitutional Court seeks a balance between the two values by applying the proportionality test.

Several examples of case law of the Constitutional Court pertaining to general interest in the context of selected legal areas

1) Not every *collective interest* can be viewed as a general interest of the society: only an interest that can qualify as an interest of *general benefit* can be understood as such. In many cases, the satisfaction of collective interests of certain groups may be in harsh conflict with the general interests of the society (Decision I. ÚS 198/95 of March 28, 1996 – restriction of ownership title by the establishment of a lien).
2) General interest arises from the need to satisfy a necessity of life of a broader unit state, territorial, social, etc. However, it is not conditioned on an *absolute necessity* of such satisfaction. Were it conditioned on that, the institute of expropriation would be practically debased, and the private interest of owners would be disproportionately raised above general interest (Decision Pl. ÚS 34/97 of May 27, 1998 – process of reparcelling in territories subject to incomplete land-consolidation proceedings; in its decision, the Constitutional Court referred to the case law of the Supreme Administrative Court of the First Republic; controversially: Resolution Pl. ÚS 26/13 of August 5, 2014 – Mining Act).
3) General interest cannot be seen solely in the interest of the state or its institutions, but also in the need of the society to (fairly) *define the rights of public owners in cases of their mutual conflict.* According to the case law

of the German Federal Constitutional Court, the condition of general interest within the meaning of Article 14 (3) of the GG is satisfied when expropriation (...) presumes heightened, *substantively objective* public interest. According to the European Court of Human Rights, measures pursuant to Article 1 (1) of the Protocol to the ECHR must follow *legitimate political purposes*. These definitions have a common denominator: their *generality*, which is due to the broad spectrum of situations in which such condition needs to be examined (Decision III. ÚS 455/03 of January 25, 2005 – unauthorized construction).

4) General interest is established in the course of an administrative proceeding by the *measuring of various particular interests*, having considered all conflicts and comments. The *ratio decidendi* of the decision, with the issue of existence of general interest representing the central issue, must then clearly indicate why general interest prevailed over a number of private, particular interests. It must be *found* in the process of deciding on a particular issue: it cannot be determined *a priori*. For those reasons, the determination of public interest in a specific case is typically *a power vested in the executive, rather than legislative, power* (Decision Pl. ÚS 24/04 of June 28, 2005 - weir plants on Elbe river).
5) A certain aspect of human existence becomes a *public good* when it cannot be divided into parts and attributed to individuals as shares conceptually, substantively and legally: unlike public goods, fundamental rights and freedoms are characterized by their distributivity. Aspects of human existence such as personal freedom, freedom of speech, participation in politics and the related right to vote, the right to hold public office, the right of association in political parties, etc. can be conceptually, substantively and legally divided into parts and those can be attributed to individuals (Decision Pl. ÚS 15/96 of October 9, 1996 – sale of apartments of the armed forces in houses owned by the city of Kroměříž).

6) Assessment of the nature of environmental protection as a public good within the meaning of the Preamble and Article 7 of the Constitution *does not exclude the existence of a subjective right* to a favorable environment (Article 35 (1) of the Charter), as well as the right to *seek* same to the extent defined by the law (Article 41 of the Charter) (Decision III. ÚS 70/97 of July 10, 1997 – on protractions in proceedings).
7) Based on the above definition aspects of the delineation of public goods protected by constitutional law, the effort to procure *internal peace in the society* has to be added: it consists in due solution of crimes and just punishment of their perpetrators by means of fair trial (Article 80 (1) and Article 90 of the Constitution, Articles 39 and 40 of the Charter). The individual instruments for the attainment of this public goods (good) include evidence contemplated by the Rules of Criminal Procedure, including the *identification of persons and things* (Section 93 (2) and Section 103 of the Rules of Criminal Procedure) (Decision III. ÚS 256/01 of March 21, 2002 – reconnaissance).
8) The prosecution of crimes, or their prevention, detection and investigation, as well as the fair punishment of perpetrators, can undoubtedly be viewed as a constitutionally approved general interest, or a purpose which, on general level, justifies interference with *the right to informational self-determination* (Decision Pl. ÚS 24/11 of December 20, 2011 – access of penal authorities to data on telecommunication traffic).
9) The need to *protect information sources* is so strong that many *journalists* feel bound by professional codes of ethics which prohibit them from disclosing their sources. Many journalists refer to such codes even before courts, when ordered to disclose the identity of their sources. Despite that, situations sometimes occur where the interests of journalist and the right of the public to information clash with the interests of more or less powerful individuals or institutions. Such conflict frequently relates to

issues of justice, usually when the information in question is – or might be – relevant to a criminal or civil proceeding. The Constitutional Court then has to apply the test of proportionality to the conflict, and consider whether in a particular case, the public interest in the disclosure of the journalist's information source is so strong as to prevail the constitutional right to freedom of speech, from which the right of the media to keep a source of information secret is derived (Decision I. ÚS 394/04 of September 27, 2005 – the right of a journalist not to disclose his/her information source to penal authorities).

10) In the mutual weighing of two contradictory provisions where (...) the mutual conflict of existing constitutional values, i.e. (...) the right to defense in criminal proceedings, which includes the right of the accused to view documentary evidence and the right of free choice of counsel, and the principle of protection of state interest in the secrecy of certain information, plus the international security commitments of the Czech Republic, the gravity of potential interference with the general interest in *complying with a commitment under international law* (Decision Pl. ÚS 7/09 of May 4, 2010 – ad the principle of proportionality in the weighing of a commitment under international law against the right to defense).
11) The selection of payers of a levy is not groundless and arbitrary, and the general interest pursued by the law (protection of the national economy and minimization of negative social impacts) is clear and obvious (Decision Pl. ÚS 17/11 of May 15, 2012 – taxation of electricity generated by photovoltaic (solar) plants).
12) The private law requirement of observance of contracts – the *pacta sunt servanda* principle, or contractual freedom – and the employee's duty of loyalty to the employer, cannot *a priori* exclude another general interest, i.e., the interest of employees being able to approach public authorities in situations where important social interests are threatened by the

employer, such as protection of public health, environmental protection or protection of clean water, or in situations where such public goods have actually been compromised. In this particular case, when deciding whether the sending of a letter alerting public authorities on the fact that the employer – a waste water treatment plant – *does not follow operating regulations* by the employee can constitute grounds for termination of employment with immediate effect due to a particularly gross violation of the work discipline, general courts failed to conduct an adequate assessment and comparison of the general interest in environmental protection and public health on the one hand, and the interest in *observance of contracts* on the other hand (Decision III. ÚS 298/1 of December 13, 2012 – loyalty to the employer).

13) The aim of parliamentary elections is not to obtain a differentiated mirror image of political leanings of the electorate. The set up of the electoral system must give consideration to the ability to govern, derived from the volition of a reliable parliamentary majority, to adopt effective, practically enforceable decisions. General interest thus requires that certain integration stimuli be incorporated into the electoral system, for instance, a closing clause concerning the entry of political parties into the scrutiny for the conversion of votes obtained into mandates, provided its amount does not jeopardize the representative democratic substance of the elections. Such modification of the principles of proportional representation (Article 18 of the Constitution) represents a legitimate restriction of the equality of the right to vote and free competition of political parties (Articles 21 and 22 of the Charter) (Resolution Pl. ÚS 2/14 of August 19, 2014 – Českápirátskástrana).

European dimension of general interest

General interest in countries taking part in the European integration process does not necessarily have a national dimension only. The justice system in EU member states adopted a supranational level of general interest, embodied in particular in secondary legislation of the EU, directly applicable on national level, as a legal restriction of fundamental rights at national level. One of the first cases where the European Court of Justice addressed this conflict (measures under the Common Agricultural Policy v. constitutional protection of ownership) included for instance judgments in 11/70 *Internationale Handelsgesellschaft* 44/79 *Hauer*. *The constitutionalization* of EU law also serves to strengthen the respect of EU bodies for key general interests of the member states, as represented by references to "national identity" (Article 4 (2) of the Treaty on European Union), or rather "compliance with domestic regulations and practice", which leave room for the implementation of general interest, while applying the EU human rights standards at national level (see in particular Title IV of the Charter of Fundamental Rights of the European Union).

The Czech Constitutional Court indicated a good many times than it is aware of this dimension of the problem (cf. for instance its "Lisbon" decisions – Pl. ÚS 19/08 and Pl. ÚS 29/09).

Summary

The Czech Constitutional Court does not understand general interest as a sum of particular interests, nor does it view it as a value of an absolute nature, conditioned on total necessity. When seeking a fair balance that would justify the exceptional piercing of otherwise inviolable, unalienable, permanent and irrevocable fundamental rights (Article 1 of the Charter) under a democratic rule of law, the court examines the specific context of the case and applies the

proportionality principle. Guided by these points of reference, the Constitutional Court often finds itself on the thin line between judiciary reserve and activism. The high number of constitutional complaints and the relatively low number of complainants succeeding before the European Court of Human Rights in Strasbourg testify to the authority it earned from the public through its approach to this thankless task, and the respect afforded to the court by public authorities. The Constitutional Court welcomes the opportunity to share its experience with other supreme guardians of constitutionality in Central and Eastern Europe.

Mr Burhan Üstün,
Judge of the Constitutional
Court of Turkey

PROTECTION OF HUMAN RIGHTS BY THE TURKISH CONSTITUTIONAL COURT

Short History of the Turkish Constitutional Court

Turkey has quite a long history of written constitution. The first written Constitution was accepted during the Ottoman Empire era in 1876. Five separate constitutions have been implemented during the last two centuries.

The Turkish Constitutional Court was established by the 1961 Constitution, which makes it among pioneers in Europe. It was modeled on the continental European constitutional justice practice. Like most European Constitutional Courts, it exercises a posteriori control of the consistency of the laws with the Constitution.

The 1982 Constitution preserved the system of constitutional review established by the 1961 Constitution with a few minor changes.

With the constitutional amendments in 2010, major changes including the introduction of individual constitutional complaint mechanism were made and the powers and structure of the Court were reshaped considerably. The Constitution prescribed a two-year preparation period for the implementation of individual applications.

The Turkish Constitutional Court's task is to ensure that all state institutions abide by the Constitution. Since its establishment in 1962, the Court has helped to secure respect for and effectiveness of democracy, the rule of law and fundamental rights and freedoms. Abiding by the Constitution constantly, the

Constitutional Court guarantees the irreversibility of the fundamental principles of the Turkish Republic.

In the 1982 Constitution, the Constitutional Court, being one of the highest constitutional organs, is on a par with the Grand National Assembly and the Executive and placed as the first judicial organ among "the High Courts". Articles 146-153 of the Constitution lay down in detail the composition, duties, working methods of the Constitutional Court and other issues concerning constitutional review. The new law, Law on Establishment and Rules of Procedures of the Constitutional Court (No 6216, 30 March 2011), was enacted in 2011 spelling out the structure of the Turkish Constitutional Court, its independence, proceedings, disciplinary infractions and disciplinary proceedings.

Structure of the Constitutional Court

Turkish Constitutional Court consists of 17 judges (Article 146 of the Constitution). These judges are appointed for a non-renewable term of 12 years. The mandatory retirement age for the judges is sixty-five. The judges are appointed by the President of the Republic and the Parliament from among various sources such as the candidates proposed by High Courts, Turkish Bar Association, high ranking officials and academicians with vast experience and qualifications.

As per Article 149 of the Constitution, the deciding bodies of the Constitutional Court are plenary assembly, two sections and six commissions. The plenary assembly shall convene with at least twelve members under the chairmanship of the President of the Constitutional Court, or a deputy president determined by the President. The sections convene under the chairmanship of the deputy president with the participation of four members. The sections and the plenary assembly shall take decisions by absolute majority. Commissions are established to examine the admissibility of the individual applications.

There are approximately 80 rapporteur judges who are linked to the President of the Court. The main responsibility of these rapporteur judges is to prepare the files to the plenary assembly, sections and commissions.

There are also around 250 administrative staff employed for daily working of the Court who are linked to the General Secretariat.

Powers and Duties of the Constitutional Court

The Constitutional Court does not carry out *ex officio* review. It has to work on the basis of relevant applications filed in the Court. The Constitution defines a strictly limited range of bodies that are authorized to access to the Constitutional Court. Under the Constitution, recourse to the Constitutional Court can be made as follows:

1. Action for Annulment

The constitutionality of laws, decrees having the force of law and the Rules of Procedure of Turkish Grand National Assembly or the provisions thereof may be challenged directly before the Constitutional Court through an annulment action by persons and organs empowered by the Constitution. The President of the Republic, parliamentary group of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly have the right to apply for an annulment action to the Constitutional Court. If more than one political party is in power, the party having the greatest number of deputies exercises the right to apply for an annulment action. Often, applications are filed in person by the members of the Parliament.

The right to apply for annulment directly to the Constitutional Court lapses sixty days after publication in the Official Gazette of the contested law, the decree having the force of law, or the Rules of Procedure of Parliament.

2. Contention of Unconstitutionality (Concrete Review of Norms)

Unlike the abstract control of norms, contention of unconstitutionality can be initiated any time by the general, administrative and military courts and any party involved in a case that is under scrutiny before a court *a quo*. Applications are made by correspondence.

According to Article 152 of the Constitution, if a court *a quo* finds that the law or the decree having the force of law or a provision thereof to be applied in a pending case is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality that may be submitted by one of the parties, it applies to the Constitutional Court to decide on constitutionality and it postpones the proceeding of the case until the Constitutional Court decides on the issue. The Constitutional Court should decide on the matter within five months from receiving the contention. If no decision is reached within this period, the applicant court *a quo* should decide the case under existing legal provisions. No allegation of unconstitutionality may be made with regard to the same legal provision unless ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.

3. Trial of Statesmen before the Grand Tribunal

The Constitutional Court, acting as the Grand Tribunal, tries for offences relating to their official functions the President of the Republic, Speaker of the Turkish Grand National Assembly, Prime Minister and Ministers, presidents and members of the Constitutional Court, of the Court of Cassation, of the Council of State, of the Military Court of Cassation, of the High Military Administrative Court of Appeals, and their Chief Public Prosecutors, Deputy Public Prosecutors, and the presidents and members of the High Council of Judges and Prosecutors and of the Court of Accounts, the Commander of Turkish Armed Forces (Chief of Staff), the Commanders of the Land, Naval and Air Forces and the General Commander of the Gendarmerie.

The prosecution in matters concerning the Grand Tribunal is exercised by the Chief Public Prosecutor of the Court of Cassation or his deputy. One or several of the assistants to the Chief Public Prosecutor may also participate in the trials.

4. Dissolution of Political Parties

According to Article 69/3 of the Constitution, the dissolution of political parties shall be decided finally by the Constitutional Court, following the filing of a suit to that effect by the Office of the Chief Public Prosecutor of the Court of Cassation. The Constitutional Court examines the case and gives its judgment on the basis of verbal hearings including the defense made by the defendant party and assertions made by the Chief Public Prosecutor; and on

the basis of the report prepared in respect of merits by the appointed rapporteur judge.

The Turkish Constitution enumerates certain prohibitions that could lead to the dissolution of political parties. A political party may be closed, if:

- The statutes and program of a political party are contrary to Article 68/4 of the Constitution.
- A political party becomes an undertaker of actions contrary to Article 68/4 of the Constitution.
- A political party receives financial aid from foreign countries, international institutions and from real persons and legal entities not belonging to Turkish nationality.

The Constitutional Court may rule, instead of dissolving them permanently, that the concerned party be deprived of state fiscal aid wholly or in part, in accordance with the severity of the actions brought before the Court.

While the Court had decided dissolution of a number of political parties in the past, it currently refrains from dissolution unless a party is involved directly in terrorist or violent activities.

5. Financial Audit of Political Parties

According to Article 69 of the Constitution, the auditing of the income, expenditure and acquisitions of political parties is within the competence of the Constitutional Court. The Court receives assistance from the Court of Accounts in performing its task of auditing. The judgments rendered by the Court as a result of the auditing are final.

6. Objection to Loss of Parliamentarian Title or Immunity

The Court also deals with the applications submitted by the members of the parliament whose title or immunity was revoked by a decision of the Parliament.

7. Individual Application (Constitutional Complaint)

Individual application was introduced into the Turkish legal system by the 2010 constitutional amendments and 23 September 2012 was determined as the first day of receiving applications.

Article 148 of the Constitution stipulates that anyone, who claims that his/her constitutional rights set forth in the European Convention on Human Rights have been infringed by a public authority, will have a right to apply to the Constitutional Court after exhausting other administrative and judicial remedies.

The Law on Establishment and Rules of Procedures of the Constitutional Court (Law No: 6216), has been enacted and entered into force. There are seven articles relating to the individual application in this Law. Jurisdiction of the Court *ratione materiae* comprises fundamental rights which are regulated by both the Constitution and the European Convention on Human Rights. But some acts of public power are exempted from the scope of individual application. Basically, direct individual applications against legislative acts and regulatory administrative acts are prohibited. The Constitutional Court judgments and the acts excluded from judicial review by the Constitution are also excluded from the scope of the individual application.

The jurisdiction of the Court *ratione personae* comprises both real and legal persons. But, public legal persons cannot lodge individual applications while, private-law legal persons may apply solely on the ground that their rights concerning legal personality have been violated. Foreigners may not petition individual applications concerning rights exclusive to Turkish citizens.

According to the Law, individual applications are subject to payment of a fee. The amount of fee is determined by the Law as 206 Turkish Liras (approximately 100 US Dollars). Individual applications must be filed within thirty days after the notification of the final proceeding which exhausts legal remedies.

Admissibility examination of individual applications is to be made by commissions. The structure of the commissions has not been regulated by the Law

and it was left to the Rules of Procedure. A commission may decide that an application is inadmissible unanimously. The aim of the admissibility examination is to control whether the application is within the jurisdiction of the Court. But the Law empowered the Court to eliminate some unimportant applications. The Court may decide an application inadmissible if it is manifestly ill-founded or if it does not bear any significance for the interpretation or application of the Constitution or for the determination of the scope and limits of fundamental rights and the applicant did not suffer any significant damage. The rationale behind the recognition of these inadmissibility reasons is to protect the Court from excessive workload and to provide more time to deal with serious fundamental rights allegations.

If an application is found admissible, it is examined by a section on the merits. The sections convene with four members under the chairmanship of a deputy president. Principally the examination is to be made on the file, but section may decide to hold a hearing if it deems necessary to do so.

In order to prevent any conflict between the Constitutional Court and other courts both the Constitution and the Law provided that examination of the sections on the merits is limited to determine whether a fundamental right has been violated and they cannot examine the matters which will be dealt with at the appeal or cassation stages. This provision should be interpreted by the Constitutional Court in a manner that its role in examination of individual application consists solely of determining whether the applicant's fundamental rights have been violated. But it should refrain from further commenting on the actions of the judicial bodies, the facts of the case and the proper interpretation of laws by other courts.

At the end of an examination, the Constitutional Court decides whether the fundamental rights of the applicant have been violated or not. If it finds violation, it may also decide what should be done in order to redress the violation and its consequences.

In case the violation has been caused by a court decision, the Constitutional Court sends the file to the competent court for retrial in order to restore the fundamental rights of the applicant. If the Constitutional Court deems that there will be no use of a re-trial, then it may decide some compensation for the applicant or it may ask the applicant to file a case before the competent first-instance court to seek compensation for the damages s/he suffered.

Finally, the Court may impose a fine of up to 2000 Turkish Liras in addition to the costs arising from the proceedings on the applicants who clearly abused the right of individual application.

The judgments of the Constitutional Court are implemented and followed up by the General Secretariat of the Constitutional Court (i.e. payment of compensation, retrial by the instance courts, etc.). We can say that until now all the judgments of the Court were implemented by the responsible state organs and courts.

As of 14 July 2014, the total number of applications received so far is 22677 and the number of cases pending is 12845. 1665 of these files are at Individual Application Bureau, 9968 files are at Chief Rapporteur Office of Commissions and 1212 files are at Chief Rapporteur Office of Sections.

As of the same date, the number of cases concluded by the Court is 9832. 6315 of these files have been concluded by Chief Rapporteur Office of Commissions and 699 files have been concluded by Chief Rapporteur Office of Sections.

Out of 699 cases concluded by the Sections, 215 cases have been declared inadmissible and 174 cases have been found admissible. The number of cases in which a violation of right was found is 149 and no violation of rights was determined in 25 cases. 6 cases have been decided to be removed from Registry, 303 cases have been joindered and objection to one case has been rejected.

For the short summaries of recent judgments of the Constitutional Court, please consult the following website http://www.anayasa.gov.tr/en/News/Detail/14/ .

SESSION II

„Social protection and financial crisis:
challenges and limitations"

20 ANI

ADOPTAREA CONSTITUȚIEI
REPUBLICII MOLDOVA

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LES DROITS SOCIAUX DANS LA TRANSITION DÉMOCRATIQUE

Abstract

The democratic transition – sometimes endured, sometimes assumed by East European states – from popular socialist democracy to representative liberal democracy allowed for almost all the basic achievements of the communist period to be not only preserved, but even further developed in an increasingly protective spiral for human rights, without properly taking into account the specificity of the rights concerned. Since the '90, many social rights are guaranteed by the State although peculiarities of their legal status were never critically analysed by the doctrine and while judicial practice ran into plenty of difficulties, especially since the beginning of the economic crisis of 2008-2010. Considering the specific context of these States, which seem to be in perpetual economic and democratic transition, and where the social benefits have been understood even in the heat of the transition as being covered by a "cliquet arrière-retour " the justiciability of social rights acquires alarming dimensions: it might as well be transfigures into a double-edged sword that would allow judges to not only govern, but also to manage the economy.

La transition démocratique tantôt subie tantôt assumée par les Etats de l'Est de l'Europe a fait en sorte que tous les acquis sociaux de la période communiste ont été non seulement conservés, mais même développés sans distinction selon la nature des droits concernés. Depuis '90 des nombreux droits fondamentaux de nature sociale sont garantis, mais les particularités de leur régime juridique n'ont jamais

été approfondies par la doctrine, alors que la pratique jurisprudentielle s'est heurtée en plein à des difficultés. En effet, une des principales revendications posées par les citoyens à leurs Etats lors des changements démocratiques a été la protection *effective* des droits humains. Si dans le passé les Etats communistes étaient fiers d'exhiber des longues listes de droits et libertés dans leurs lois fondamentales, leur garantie concrète restait largement déclaratoire. Lors des événements qui ont bouleversé les régimes politiques en Europe de l'Est au début des années '90 on a exigé à l'Etat de pleinement assumer toutes les tâches qui lui incombent, y compris la protection des libertés, mais à aucun moment on ne s'est pas posé la question de savoir s'il n'y avait une quelconque différence entre les diverses catégories des droits, et si leur protection ne devrait pas être circonstanciée selon leur nature. Plutôt, pendant la transition, les droits sociaux de l'époque communiste ont été considérés comme des acquis sociaux, et réclamés en tant que tels pendant la consolidation démocratique, ce qui allait devenir une tâche hautement compliquée, voire même lourde, lorsque la crise économique globale des années 2008 – 2009 allait frapper des économies encore en transition.

Il convient donc de faire quelques pas en arrière et d'essayer de comprendre la manière dont étaient traités les droits fondamentaux et notamment les droits sociaux à l'époque du communisme pour mieux saisir leur développement et portée pendant la transition démocratique, et comprendre pourquoi la tension entre le texte constitutionnel et la réalité sur le terrain était presqu'inévitable vers la fin de la première décennie du troisième millénaire.

1. Les droits sociaux pendant le régime socialiste

A l'époque du droit constitutionnel socialiste, la doctrine soulignait le fait que les droits et les libertés des citoyens n'ont pas d'existence en dehors de la réalité juridique; ils ne sont pas des attributs de l'être humain qui le protège contre le pouvoir étatique mais ils n'existent que dans la mesure où ils sont proclamés et garantis par les constitutions des États; uniquement leur consécration formelle dans

un texte juridique doté de valeur suprême leur donne contenu et efficacité.[1] Outre cela, la garantie des droits et libertés fondamentales était considérée comme atteinte non seulement par le biais des mesures d'ordre juridique, mais aussi par l'établissement des conditions matérielles nécessaires pour leur exercice.[2] La doctrine socialiste considérait les droits fondamentaux non pas comme des droits abstraits, sans lien avec la base économique de l'État, mais dans une étroite interdépendance avec celle-ci.[3] Cela était de nature à les transformer dans des véritables obligations pour l'État,[4] ce qui pourrait expliquer la facilité avec laquelle pendant la transition politique et économique du début des années '90 les droits-créances ont été simplement repris tels quels selon une sorte de « cliquet arrière-retour »[5](suivant la liste plus ou moins variable des droits sociaux qui y figurait déjà dans les constitutions communistes), acceptés en tant que tels (droits-créances contre l'Etat), et perpétuées quand ils n'ont pas été augmentés en nombre et/ou en contenu. En plus, pendant la période socialiste, les droits de nature sociale occupaient la première place dans l'énumération constitutionnelle et jouissent, avant tout, de garanties d'ordre matériel,[6] ce qui leur conférer une certaine priorité dans la garantie par l'Etat.

En effet, avant les années '90 pour les Etats socialistes – qui aspiraient vers le communisme perçu en tant qu'ultime étape de développement (et dissolution)

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[1] Ioan MURARU, *Drept constituțional*, Tipografia Universității din Bucureşti, Bucureşti, 1987, p.195.

[2] Tudor DRAGANU, *Drept constituțional*, Editura didactică şi pedagogică, Bucureşti, 1972, p.209 ; Ion DELEANU, *Drept constituțional*, Editura Dacia, Cluj Napoca, 1974, p.250 *et seq.*

[3] Nicolae PRISCA, « Crearea şi dezvoltarea istorică a instituției drepturilor şi îndatoririlor fundamentale ale cetățenilor în anii puterii populare", *Analele Universității din Bucureşti – seria Drept* n°2/1969, p.19 *et seq.*

[4] Nicolae PRISCA, « Contribuții la studiul instituției drepturilor şi îndatoririlor fundamentale ale cetățenilor », *Analele Universității din Bucureşti – seria Drept*, 1968, p.20.

[5] Cette métaphore – pourtant technique – signifie que le législateur ne pourrait pas revenir sur les garanties offertes ou la mise en œuvre d'un droit fondamental, ni même dans le cadre de la marge de manœuvre qui lui est préservée par la Constitution.

[6] Ioan MURARU, *Drept constituțional*, 1987, *op.cit.*, p.213.

de l'État conçu comme instrument de domination –, la problématique des droits sociaux se posait dans les termes classiques de la répartition et redistribution des richesses. Pour reprendre une terminologie consacrée dans ce temps-là, il s'agissait d'une distribution « selon les possibilités de la société » pendant le socialisme, qui allait devenir une distribution « selon les besoins des personnes » pendant le communisme. Cela impliquait une distribution inégalitaire des richesses, donc une justice sociale distributive[7] – dans la considération des besoins inégaux – afin d'assurer une égalité matérielle. Par conséquent, les affirmations de certains doctrinaires de l'époque socialiste[8] qui insistaient pour que la légalité socialiste ne soit plus définie uniquement d'une manière formelle, mais aussi d'une manière matérielle, pouvant englober des exigences qualitatives par rapport au contenu de la législation, ainsi que le concept même de justice mériteraient qu'on s'y attarde plus qu'on ne le peut.

2. Les droits sociaux pendant la transition démocratique

Lors de la transition commencée à la fin des années '90 les droits sociaux ont été qualifiés comme droits fondamentaux[9] sans le moindre souci pour leur spécificité de droits de la deuxième génération,[10] et la possibilité de leurs titulaires d'ester en justice a fait l'objet de peu des controverses dans la doctrine juridique. Le renversement d'un régime autoritaire et la transition vers un système politique démocratique, accompagné par le remplacement d'une économie dirigée et planifiée par

[7] N'oublions pas que le concept de justice distributive était dans l'air du temps, car le fameux ouvrage de John Rawls, *A Theory of Justice*, était publié pour la première fois en 1971 chez Harvard University Press, pour être révisé (et traduit dans plusieurs langues) en 1975.

[8] A. NASCHITZ, « Orientations actuelles dans le développement du régime de la légalité dans les pays socialistes », *Revue internationale de droit comparé* n°21/1970, p.711-714.

[9] Ioan MURARU, *Drept constituțional si institutii politice*, vol.I, Actami, Bucureşti, 1994, p.127.

[10] Tudor DRAGANU, *Tratat de drept constituțional si institutii politice*, vol.II ; Lumina LEX, Bucureşti, 1998, p.26.

l'économie de marché dans sa version la plus pure et brutale (au moins au début) auraient pu être la cause de plus de bouleversements et polémiques théoriques et conceptuelles au sujet des droits sociaux; pourtant, mise à part l'espace étroit des élites intellectuelles et cafés culturelles, sur le plan juridique la formule de « l'Etat de droit, démocratique et social », consacrée par plusieurs Constitutions[11] adoptées après les années '90 dans l'Europe de l'Est, est passé près qu'inaperçue[12]. Sans essayer ici d'identifier les causes (sans doute multiples et complexes) d'une telle absence des débats juridiques, on ne saurait la constater et déplorer en égale mesure.

C'est ainsi qu'au lieu de consacrer – y compris au niveau juridique – un système socialement juste, les sociétés postcommunistes se sont retrouvées à réclamer de l'État, d'une manière assez paradoxale, une distribution égalitaire de la richesse nationale. Cela a permis de transformer le droit (positif) dans un instrument manipulateur en vue d'accéder non pas aux résultats d'une quelle conque fonction sociale de l'État, mais à une justice sociale égalitariste, et à une sécurité collective absolue (donc impossible). Si pendant l'époque socialiste la fonction économique de l'État éclipsait celle sociale, la redistribution des richesses étant accomplie plutôt en faveur des classes ouvrières et non pas en faveur des personnes nécessiteuses (car la société socialiste était fière d'assurer du travail à tous et accordait peu d'attention à ceux qui ne contribuaient pas à la création même de cette richesse[13]), pendant la

[11] Voir la partie finale du préambule de la Constitution bulgare adoptée en 1991, ou l'article premier de la Constitution roumaine de la même année, ou encore, bien que sous une forme légèrement différente, l'article 2 de la Constitution polonaise adoptée en 1997. La dernière vague des Constitutions adoptées dans la région de l'Europe de l'Est semble présenter une tendance quelque peu différente en ce qui concerne la consécration explicite du caractère social de l'Etat à côte de l'Etat de droit ; ainsi, les constitutions hongroise de 2011, et respectivement tchèque de 2012 ne mentionnent pas expressément la fonction sociale de l'Etat de droit qu'elles consacrent, bien que les droits sociaux y trouvent une place assez large.

[12] Pour une des rares analyses voir Sofia POPESCU, « Statul social si drepturile economice si sociale », *Revista de drept public* n°1/1999, p.21 et s.

[13] A.ATHANASIU, *Dreptul securității sociale*, Actami, Bucureşti, 1995, p.27 et s.

transition démocratique ces deux fonctions étatiques ont connu un repositionnement dramatique, sans pour autant réussir à satisfaire toutes les attentes d'une population fragile et fragilisée encore plus par les nouveaux risques fondamentaux auxquels elle était confrontée. D'une simple charge de minimale justice sociale à l'égard des personnes qui n'avaient pas d'autre choix que de dépendre de l'État (enfants institutionnalisés, personnes avec handicap, etc.), la sécurité sociale s'est vu accroitre d'une manière exponentielle pour accommoder et même couvrir les besoins les plus diverses. Et la distinction entre les droits fondamentaux sociaux qui doivent bénéficier de la garantie étatique, et la sécurité sociale en tant que fonction de l'Etat a vite été effacée à la faveur d'une protection toujours croissante que le citoyen réclamait avec vigueur à un Etat dont par ailleurs il craignait le contrôle excessif de l'époque communiste. Triste paradoxe d'une transition pas encore achevée …

Cette même transition a donné l'occasion à une multiplication incessante, impressionnante et inquiétante des revendications de nature sociale, toutes adressées à un Etat qui se trouvait lui-même en pleine transformation, et dont on attendait, en même temps, qu'il diminue son emprise et influence sur la société et sur l'économie. Cela explique pourquoi aux revendications de nature sociale pure, qui n'ont fait que croitre pendant la transition économique, se sont rajoutées des revendications issus de la restauration des positions d'avant l'époque communiste, fort nombreuses et estimées comme légitimes parfois même en dépit des difficultés – y compris de nature juridique – liées à l'argumentation de leur nécessité impérieuse, ainsi que celles nées de la 'révolution anti-communiste' elle-même. La fonction sociale de l'Etat a changé non seulement de position par rapport à celle économique, mais aussi de contenu, d'ambitions et surtout d'envergure.

De cette manière l'égalité matérielle prônée par le communisme a pu recevoir une nouvelle vie, cette fois-ci dans un contexte politique, économique, institutionnel et social complètement différent. Dans ce contexte, parler d'un État social à côté de l'État de droit comme le font certaines Constitutions des Etats de l'Est de l'Europe, signifie plus que simplement ajouter une dimension matérielle (de contenu) au formalisme intrinsèque à l'Etat de droit libéral. Le chevauchement entre l'État

social et l'État de droit conduit inéluctablement à la nécessaire garantie en justice des droits fondamentaux, avec tous les risques que cela implique : de la validation ou (parfois, même) réalisation de la définition des politiques économiques et sociales à l'aide des tribunaux[14], sous un faible contrôle démocratique, allant jusqu'au « gouvernement des juges »[15].

3. Justiciabilité des droits sociaux

Car en effet, la justiciabilité des droits fondamentaux reste la pierre angulaire de leur inclusion dans la catégorie des droits fondamentaux et le contexte économique globalement morose qui a touché l'Europe de l'Est vers les années 2009-2010 a fourni le cadre pour le meilleur des tests à cet égard.

[14] M. TUSHNET, *Weak Courts, Strong Rights*, Princeton University Press, 2008, *passim*.
[15] E.LAMBERT, *Le gouvernement des juges*, Economica, Dalloz, paris, 2005, *passim*.

Ainsi, d'un point de vue économique tous les droits fondamentaux impliquent des coûts. D'un point de vue juridique, de par leur fonction ontologique de droits humains, tous les droits consacrés par la Constitution ont une finalité sociale, car ils sont censés protéger l'être humain dans le cadre de la communauté organisée sous forme étatique. Toutefois, pas tous les droits sociaux impliquent des dépenses de la part de l'État: la liberté économique, la liberté de travailler, l'égal salaire entre les femmes et les hommes, ou encore le droit à la famille et à l'égale protection juridique des enfants sans discrimination selon qu'ils ont été née dans le mariage ou pas n'exigent pas de prestations de la part de l'État. Afin d'être effectivement assurées, nombre de prestations de nature sociale supposent la préexistence des ressources. Dans la mesure où la principale ressource qui doit être assurée reste l'être humain, et la mise en œuvre de l'État social signifie précisément « respecter, protéger et réaliser ses droits fondamentaux »[16], les politiques de distribution de la richesse nationale ne peuvent pas ignorer les impératifs qui découlent des droits fondamentaux.

Dans la mise en œuvre de ces impératifs, le pouvoir constituant – qui a pris le soin de garantir y compris les droits à des prestations sociales en tant que droits fondamentaux – a également préservé une large marge de manœuvre au législateur. Ainsi, la « réserve de la loi » joue un rôle essentiel non seulement dans la définition et garantie des droits sociaux, mais aussi dans le régime juridique de leur justiciabilité. L'harmonisation entre des impératifs d'ordre purement économique et des impératifs qui dérivent de la nécessaire garantie des droits fondamentaux, surtout de nature sociale, passe obligatoirement par le principe de la proportionnalité, mais la mise en œuvre de ce principe peut se faire aussi bien sur le terrain de la négociation politique, tout comme sur le terrain juridictionnel selon que la primauté dans la gestion des ressources va pour le contrôle démocratique ou

[16] Selon la triade consacrée par la doctrine dans le domaine de la protection internationale des droits humains, cf. B.SELEJAN-GUTAN, H.RUSU, "Are There "Underprotected" Minorities in Europe ?", *AWR-Bulletin - Quarterly on refugee problems* n°2/3/2009, p.130 *et seq.*

pour celui technocratique. Et si à tout cela on rajoute le contexte particulier des Etats qui se trouvent dans une perpétuelle transition économique et démocratique[17], où les acquis fondamentaux ont été compris même dans le feu de la transition comme protégés par un « cliquet arrière-retour »[18], le caractère justiciable des droits fondamentaux acquiert des dimensions inquiétantes : il risque de se transformer dans une arme à double tranchant qui permettrait aux juges non seulement de gouverner, mais aussi de gérer l'économie.

Le cas particulier de la Roumanie est illustratif pour la situation dans laquelle peut se trouver un État social généreux au niveau normatif, mais avec une économie fragile et en pleine mutation. Paradoxalement, la doctrine roumaine ne s'est pas penchée sur cette question, bien que les occasions ont commencé à ne pas manquer. Quant à la jurisprudence, pendant des longues années le système judiciaire et le juge constitutionnel ont fait preuve d'une grande déférence par rapport à la marge de manœuvre préservée en la matière au législateur par le pouvoir constituant. Dans un contexte général marqué par une longue transition politique et économique, où le pouvoir judiciaire n'a fait que gagner en indépendance (et manque de responsabilité devant les autorités représentatives)[19] et la gestion des ressources a été confiée de plus en plus à un ensemble des autorités technocratiques (éloignées elles aussi du contrôle démocratique), la fracture sociale, prévisible par ailleurs, s'est produite

[17] E.S.TANASESCU, « La juridiction constitutionnelle, gardienne des droits dans la transition démocratique », *Processus constitutionnels et processus démocratiques, les expériences et les perspectives,* Atelier interculturel organisé par la Commission de Venise, Maroc 29-30.03.2012, http://www.venice.coe.int/files/2012_03_29_MAR/2012_03_29_MAR_Marrakech_atelier_interculturel.asp (consulté le 3 août 2012).

[18] Cette métaphore – pourtant technique – signifie que le législateur ne pourrait pas revenir sur les garanties offertes ou la mise en œuvre d'un droit fondamental, ni même dans le cadre de la marge de manœuvre qui lui est préservée par la Constitution.

[19] C. E. ALEXE, *Judecatorul în procesul civil, între rol activ si arbitrar,* C.H.Beck, Bucureşti, 2008, p.265-308 ; R.POPESCU, E.S.TANASESCU, « Romanian High Judicial Council – Between Analogy of Law and Ethical Trifles", *Transylvanian Review of Administrative Science*, à paraître 2012.

précisément pendant la crise économique globale. Les politiques économiques et sociales des dernières années ont mis à nu les difficultés que peut rencontrer un système juridique qui exige une excellente couverture sociale dans le contexte d'une économie de marché naissante pour une population dont la solidarité active reste encore un concept vague. La fonction intégrative[20] de la Constitution a trouvé ici ses limites inhérentes, et l'arbitrage entre une gestion politique ou juridictionnelle de la richesse nationale s'est fait au cas par cas, parfois sur la base des dispositions expresses de la loi fondamentale, parfois complètement en dehors du cadre normatif mais sous un contrôle démocratique direct.

Pour ce qui est de l'arbitrage politique, l'austérité prônée à l'aide du renfort international (FMI[21]) et européen (Traité sur la stabilité, la coordination et la gouvernance dans l'Union Economique et Monétaire, couramment appelé le Pacte fiscal[22]) semble avoir été acceptée par l'entière classe politique dans la mesure où trois gouvernements successifs et d'orientation politique différente l'ont poursuivi. Elle s'est concrétisée dans des lois qui mentionnent expressément dans leur titre l'objectif de la « rationalisation des dépenses publiques » et sont une preuve tangible de la gouvernance globale car elles font référence au nécessaire « respect des accords-cadres convenus avec la CE et le FMI »[23]. Par ailleurs, elle a produit aussi

[20] D.GRIMM, „Integration by Constitution" (keynote essay), *International Constitutional Law Review* 2005, p.193 *et seq.*; E.S. TANASESCU, « Despre evaluarea constitutiilor », *Curierul judiciar* n°6/2010, p.1 *et seq.*

[21] La Roumanie a conclu un premier Arrangement *stand by* avec le FMI par l'ordonnance d'urgence n°99/2009, approuvée par la loi n°37/2009, et par la suite elle a déposé plusieurs Lettres d'intentions ratifiées successivement par l'ordonnance d'urgence n°10/2010 approuvée par la loi n°72/2010, par la loi n°257/2010, par la loi n°84/2011, par la loi n°285/2011, par la loi n°286/2011, et, la dernière, vient d'être soumise au Parlement le 19 juillet 2012.

[22] Le Traité sur la stabilité, la coordination et la gouvernance dans le cadre de l'Union Economique et Monétaire a été ratifié par la Roumanie en juin 2012 par la loi n°83/2012 sans que la population s'en rende même compte.

[23] Loi n°329/2009 sur la réorganisation de certaines autorités et institutions publiques, la rationalisation des dépenses publiques, le soutien du milieu des affaires et le respect des ac-

d'autres conséquences, concrétisées dans des lois qui ont un impact non seulement direct, mais aussi immédiat[24] sur les droits fondamentaux.[25] Des contestations politiques se sont fait rarement entendre[26], alors que les manifestations de rue ont été extrêmement éparses. Néanmoins, une partie de résultats de cet arbitrage politique a fait l'objet des contestations juridictionnelles initiées directement par les citoyens.[27]

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cords-cadres avec la Commission Européenne et le Fonds Monétaire International, et la loi n°65/2010 pour compléter l'article 42 de la loi n°329/2009.

[24] Dans le sens d'une application immédiate de la loi, y compris aux situations en plein déroulement, ce qui leur a valu d'être contestées notamment sur la base du principe de la non-rétroactivité de la loi. Le juge constitutionnel ne dispose pas, à ce jour, d'une jurisprudence cohérente en matière de non-rétroactivité ; tantôt il estime qu'une application immédiate de la nouvelle loi n'est pas contraire à la Constitution (décision n°872/2010 par rapport à la diminution des salaires), tantôt il décide dans le sens contraire (décision n°873/2010 par rapport à la diminution des retraites des magistrats ou encore décision n°375/2005 sur l'âge limite pour la retraite des magistrats).

[25] La loi n°119/2010 a démantelé toutes les retraites spéciales de service, à l'exception de celles des magistrats, la loi n°263/2010 a imposé un système unitaire des retraites, la loi-cadre n°284/2010 a imposé des salaires uniformes pour tous les employés payés des fonds publics, la loi n°40/2011 a modifié le Code du travail dans le sens de la « fléxicurité », la loi n°62/2011 a aidé à la redistribution des forces dans le cadre du dialogue social et a rendu la grève plus difficile, la loi n°292/2011 a considérablement réduit la portée de l'assistance sociale accordée par l'Etat, etc.

[26] L'opposition a contesté la loi n°329/2009 par la voie d'un contrôlé préventif de constitutionnalité, mais le juge constitutionnel a trouvé qu'elle n'était pas inconstitutionnelle. (Décision n°1414/2009)

[27] Le juge constitutionnel a été confronté avec une avalanche des exceptions d'inconstitutionnalité visant la même loi n°329/2009, qu'il a rejeté systématiquement (décision n°1149/2010 ; décision n°1604/2010 ; décision n°206/2011 ; décision n°297/2011 ; décision n°366/2011 ; décision n°367/2011 ; décision n°368/2011 ; décision n°377/2011 ; décision n°378/2011 ; décision n°379/2011 ; décision n°409/2011 ; décision n°460/2011 ; décision n°665/2011 ; décision n°961/2011 ; décision n°1.044/2011 ; décision n°1287/2011 ; décision n°1418/2011 ; décision n°544/2012)

Pour ce qui est de l'arbitrage juridictionnel, les juges ordinaires ont pleinement joué leur rôle des gardiens des droits subjectifs et ont fait l'application des dispositions législatives protectrices des droits fondamentaux, sans tenir compte des ressources disponibles.[28] Quant au juge constitutionnel, son intervention a été variable, selon des critères qui restent connus seulement par lui. Ainsi, après avoir insisté sur la nature de droit fondamental du droit au salaire, lorsqu'un nouveau dispositif normatif est venu réduire les salaires dans le secteur public de 25%, le juge constitutionnel a validé le choix du législateur sur des considérations relatives à la « sécurité nationale » (sous-entendue comme une sécurité de nature économique), balayant d'un seul trait les arguments contraires extraits de l'article 41 de la Constitution sur la protection sociale du travail. (Décision n°872/2010) En égale mesure, lorsque les retraites ont été réduites de 15% et toutes les retraites spéciales de service[29] ont été annulées par le législateur, le juge constitutionnel a opéré avec le bistouri et a déclaré inconstitutionnelle seulement la partie du dispositif normatif qui concernait les magistrats. (décisions n°871/2010 et n°873/2010) Une année plus tard, lorsqu'une nouvelle uniformisation de la loi sur les retraites a été entamée, l'idée a été trouvée constitutionnelle (décision n°1237/2010), mais le juge a cru bon d'étendre l'exception qu'il avait concédé pour les magistrats dans la décision n°873/2010 aux conseillers de la Cour des Comptes (décisions n°1283/2011 et n°297/2012). En fin, lorsque l'austérité a touché aussi les prestations relatives aux assurances-maladies, le juge constitutionnel n'est intervenu que pour

[28] Après l'avalanche des contestations connue par les tribunaux ordinaires pendant 2011, levée par l'annulation avec des effets immédiats des retraites spéciales de service à travers la loi n°263/2010, une nouvelle avalanche a été provoquée par l'ordonnance d'urgence du Gouvernement n°59/2011 qui a essayé de régler les problèmes posés par la décision de la Cour Constitutionnelle n°873/2010 (initiée par la Haute Cour de Justice et de Cassation). Pour plus de détails, voir Tiberiu MEDEANU, *op.cit.*, p.446 et s.

[29] Lesquelles, en principe, auraient dû être assumées par les caisses de retraites corporatistes respectives, mais en fait étaient assumées par le budget public en raison de la faillite desdites caisses corporatistes.

maintenir un niveau minimum des prestations sociales sur la base du principe de la proportionnalité des contributions sociales dues par les assurés.[30] En matière des assurances sociales (quantum imposable des retraites) la position du juge constitutionnel n'a pas été différente, même si, pour ne pas heurter le législateur, dans ce cas-ci il a préféré la technique de l'interprétation) celle de l'annulation pure et simple. (Décisions n°223/2012 et n°224/2012)

L'attitude intransigeante par rapport à toute considération d'ordre économique et protectrice des droits fondamentaux qu'affiche le juge ordinaire contraste quelque peu avec celle plus chancelante et inclinée aux compromis que semble préférer le juge constitutionnel, et peut remettre en question le délicat caractère justiciable des droits fondamentaux. Et il ne faut pas oublier que les relations entre ces deux juges n'ont pas été toujours des plus chaleureuses, notamment en matière de gestion des ressources budgétaires et protection du droit social au salaire.[31]

En effet, lorsque le Gouvernement a décidé de temporiser le paiement des sommes dues en tant que rajouts de nature salariales que les magistrats s'étaient

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[30] Une modification de la loi n°95/2006 sur la reforme dans le domaine de la santé a imposé en tant que contribution au système d'assurance maladie de l'Etat une quota unique de 6,5% sur tous les revenus, y compris ceux qui résultent des droits de propriété intellectuelle ou de la location des biens, de tous les contribuables, fixant aussi une contribution minimale *au moins égale* avec le quota de 6,5% calculé sur le salaire brut minima par économie. Lors d'une contestation à l'exécution d'une sommation de paiement, un particulier a soulevé l'exception d'inconstitutionnalité de ce quota minima obligatoire, qui faisait en sorte que la contribution due était plus importante que les revenus obtenus par cette même personne des sources mentionnées dans le Code fiscal. Dans la décision n°1394/2010 la Cour Constitutionnelle a invalidé le quota minima tel qu'interprété par les organes fiscales, et lui a substitué sa propre interprétation qui était dans le sens que le quantum minimum dû par les contribuables *ne peut pas dépasser* les 6,5% perçus sur la base du salaire brut minima par économie. Dans le même sens, de la préservation seulement d'un niveau minimum déjà acquis, voir aussi la décision n°1394/2010 ou la décision n°335/2011.

[31] E.S.TANASESCU, « La crise économique de 2009 vue par la Cour Constitutionnelle de la Roumanie », *Analele Universităţii din Bucureşti – seria Drept* n°3/2010, p.116-123

accordé entre eux-mêmes par le biais des décisions de justice devenues irrévocables au niveau des quinze différentes cours d'appel, et qui risquaient de mettre en danger le budget de l'Etat, la réaction des juges ne s'est pas faite attendre et une grève d'un mois a paralysé le système judiciaire tout au long de septembre 2009. L'intervention de la Haute Cour de Cassation et Justice dans le sens de l'unification de ce qu'elle avait perçu comme une pratique judiciaire divergente n'a pas calmé les esprits car elle a rendu obligatoire non pas le plus petit dénominateur commun entre quinze jurisprudences légèrement différentes, mais le plus haut niveau en matière des salaires des juges, et ce sur la base des dispositions qui n'étaient plus en vigueur à la date à laquelle elle avait rendu sa décision. Ce dernier aspect lui avait valu des critiques de la part du Président, qui a investi la Cour Constitutionnelle avec un conflit juridique de nature constitutionnelle entre l'autorité judiciaire d'un côté, et le pouvoir exécutif et celui législatif de l'autre. Le Président a expliqué qu'à travers deux recours dans l'intérêt de la loi (procédure utilisée pour l'unification de la pratique judiciaire, qui ne résout pas un litige *inter partes*, mais produit des décisions de justice obligatoires pour le futur pour tous les tribunaux) la Haute Cour de Justice et de Cassation a rendu des décisions (n°21/10.03.2008 et n°46/15.12.2008) fondées sur des actes normatifs qui étaient abrogés, ce qui revient à dire que la Haute Cour s'est attribuée des compétences législatives au détriment du Parlement et du Gouvernement. Le spectre du corporatisme judiciaire y était présent mais il n'a jamais été nommé. Dans une décision (n°838/2009) qui n'a pas réussi non plus d'apaiser les esprits la Cour Constitutionnelle a affirmé que « L'interprétation des loi est une opération rationnelle, utilisée par tout sujet de droit en vue de l'application et du respect de la loi, ayant pour finalité la clarification du sens de la loi ou de son domaine d'application. » Les décisions judiciaires d'interprétation de la loi ne peuvent pas être *extra legem* ou *contra legem*. Or, le juge constitutionnel a constaté que, suite à une analyse de la succession dans le temps des divers réglementations concernant les salaires des magistrats, invoquant des vices de technique législative ou des vices de constitutionnalité, la Haute Cour de Justice et de Cassation a fini par remettre en vigueur des normes qui avaient cessé d'exister, ce qui équivaut à un dépassement

des compétences propres au pouvoir judiciaire. Pourtant, les juges ordinaires avaient tenté de prendre au sérieux l'esprit et non pas la lettre du cadre législatif qui leur offrait des rajouts de nature salariale, tout comme le juge constitutionnel l'avait fait par rapport aux salaires des professeurs. (voir notamment la décision n°1221/2008)

Mais il nous semble qu'au-delà de toutes ces considérations, dans la tendance, la richesse de la jurisprudence roumaine ne serait-ce qu'en matière des salaires payés des fonds publics est une bonne illustration du caractère justiciable – donc de véritable droit fondamental – du droit au salaire, même dans l'absence d'une disposition constitutionnelle expresse le concernant. De l'autre côté, la variété de cette jurisprudence montre combien il est difficile de rendre les droits-créances opérationnels, et combien leur protection ne peut être assurée qu'au cas par cas. En fin de compte, le droit au salaire dont il est question ici est opposable directement à l'Etat ; *quid* du droit au salaire dans le secteur privé de l'économie ? Comment est-il protégé en tant que droit fondamental lorsqu'il est notoire que la crise économique a fait baisser les salaires d'abord dans le secteur privé, pour ne toucher le secteur public que beaucoup plus tard ? Et *quid* des autres droits-créances de nature sociale, dont le régime juridique reste entièrement à la discrétion du législateur, sous l'œil bienveillant du juge constitutionnel qui se contente très souvent seulement de rappeler la « réserve de la loi » ?

Dans ce contexte il est presque surprenant que précisément le droit à un niveau de vie décente semble systématiquement protégé par le juge constitutionnel : bien que la réserve du législateur reste préservée (décision n°1576/2011), il a justifié des limitations du droit à la libre circulation (décisions n°79/1994 et décision n°139/1994), il a été à la base des invalidations en mesures d'austérité en matière de retraites (décisions n°82/2009, n°871/2010 et n°873/2010), et la protection sociale qu'il prévoit semble permettre au législateur même d'instituer des exceptions par rapport aux contributions sociales (décision n°35/2012), pour ne pas mentionner que il peut servir comme justification pour l'invalidations des méthodes 'musclées' de collecte des revenus au budget des assurances sociales (décisions n°1394/2010, n°335/2011) ou des cotisations pour les assurances-maladies (décisions n°223/2012

et n°224/2012). Il semblerait que le juge constitutionnel est enclin à tolérer une certaine marge discrétionnaire au législateur, et permettre que des arbitrages politiques soient faits entre les différents impératifs économiques et les différentes politiques sociales, mais en dessous d'un seuil qu'il perçoit comme minimal en matière de protection sociale il impose son propre arbitrage juridictionnel. Il ne reste qu'à identifier, d'une manière raisonnable et prévisible, quel est ce seuil qui sert de frontière entre la politique et le droit. Et on ne peut pas s'empêcher de se demander si, en suivant cette route, la Cour Constitutionnelle roumaine n'est pas en train de rejoindre d'autres juridictions constitutionnelles qui ont fondé la protection accordée aux acquis sociaux non pas sur les dispositions constitutionnelles concrètes qui consacrent des droits fondamentaux sociaux, mais plutôt la nécessaire protection de la dignité humaine.

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« La justiciabilité des droits sociaux n'est pas simplement l'inscription des droits sociaux dans l'arsenal juridique, leur conférant une légitimité et une force ; elle est aussi et surtout l'inscription de la ressource juridique dans les outils de la lutte contre l'injustice sociale »[32]. De ce point de vue, la justiciabilité des droits sociaux n'est qu'un parmi les instruments dont disposent les individus pour faire valoir leurs aspirations, y compris en matière sociale. En revanche, la lutte contre l'injustice sociale n'est pas confinée aux seuls moments judiciaires, mais bien au contraire elle est, et doit être permanente et menée surtout sur le terrain des arbitrages politiques. En cela elle rejoint la lutte, elle aussi permanente, pour la protection et la garantie efficace de la dignité humaine par tous les moyens possibles.

[32] E.MILLARD, « La justiciabilité des droits sociaux : une question théorique et politique », *La revue des droits de l'homme* n°1/2012, pp.452-459.

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FACING THE CHALLENGES OF THE FINANCIAL CRISIS: THE ROLE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

I. Challenges for the concept of the socially orientated state in Lithuania during the financial crisis

A few introductory remarks. During the period of global economic crisis, when austerity became almost imperative in Europe, the Constitutional Court of the Republic of Lithuania, as well as many other European constitutional review institutions, had to undertake a big responsibility to evaluate the decisions adopted by the legislator, the so-called **austerity measures** (certainly not on its own initiative – the majority of the relevant cases were instituted by courts, some – by the parliamentary opposition). The Constitutional Court had to assess whether the introduction of austerity measures was actually determined by objective factors and whether they corresponded to the constitutional requirements, including the concept of the socially oriented state. The biggest challenge posed to the Constitutional Court by the financial crisis is to ensure the respect of the social orientation of the State and to protect the related human rights.

Even if the social orientation of the State of Lithuania is not *expressis verbis* mentioned in the Constitution, it is reflected in its various provisions which consolidate economic, social and cultural, as well as civil and political rights of a human being, the relations between the society and the state, the bases of social

assistance and social security, the principles of the organisation and regulation of national economy, the bases of organisation and activity of state institutions, etc. According to the Constitution as interpreted by the Constitutional Court, the **socially oriented state** is under constitutional obligation and it **must undertake the burden of fulfilment of certain commitments** to the most vulnerable social groups. Under the Constitution these commitments are *inter alia* the ensuring of citizens' rights to receive old age and disability pensions, social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner[1], each human beings' right to receive fair pay for work and social security in the event of unemployment[2], the guarantee to protect and to care for family, motherhood, fatherhood and childhood[3].

I have to note that Lithuania was one of the most painfully affected State by the last global financial and economic crisis. For example, in 2009 the **Gross Domestic Product (GDP) of Lithuania has reduced drastically,** GDP of second quarter of 2009, if compared to 2008, has shrunk by 22,4%. Because of the complicated accumulation of the funds necessary to pay social benefits during economic crisis, the State of Lithuania, as some other European countries, had to apply such austerity measures as reduction of pensions, maternity and paternity benefits, state pensions, etc. The legislator also (and first of all) had

[1] Article 52 of the Constitution: "The State shall guarantee its citizens the right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner, and in other cases provided for by law".

[2] Article 48 of the Constitution: "Each human being may freely choose a job or business, and shall have the right to have proper, safe and healthy conditions at work, to receive fair pay for work and social security in the event of unemployment."

[3] Provisions of Articles 38 and 39 of the Constitution: "Family, motherhood, fatherhood and childhood shall be under the protection and care of the State"; "The State shall take care of families that raise and bring up children at home, and shall render them support according to the procedure established by law. The law shall provide to working mothers a paid leave before and after childbirth as well as favourable working conditions and other concessions."

to cut the remuneration of state servants, politicians and judges, other persons remunerated from the state or municipalities budgets.

The doctrine of the Constitutional Court of the Republic of Lithuania concerning the austerity measures could be divided into **two stages**: from 2002 till 2006 when the Constitutional Court was deciding on the constitutionality of legal acts cutting the social guarantees because of so-called Russian economic crisis (1999-2002), and since 2009 until now, when the Constitutional Court has to assess the measures applied because of the last global economic crisis.

The austerity measures launched in 2009 raised a number of constitutional cases with a complex of constitutional questions. The Constitutional Court had a mission to develop the official constitutional doctrine "case after case" by supplementing its elements revealed in the previous constitutional justice cases. The Constitutional Court had a chance to develop further the set of constitutional requirements for the austerity measures, which obliges to keep the social orientation of a state, to heed the balance between the interests of the person and society, to protect the most vulnerable groups of persons. Today our Constitutional Court has solved the absolute majority of requests related to the last economic crisis and the cut of social payments. There are few petitions, where the problem of the term of state pensions' reduction[4] arises, expected to be solved before 2015.

II. Austerity measures: criteria of constitutionality

First of all, in order to keep the social orientation of a state and to respect the related human rights, the austerity measures have to fit the criteria of constitutionality, i.e. the requirements arising from the Constitution. No surprise that these criteria, as formulated by the Constitutional Court, are based

[4] Which is one year longer than social insurance pensions' reduction was.

on the general criteria of limitation of human rights recognized by international law and the majority of national legal systems.

Here the provisions of the **European Social Charter** (revised)[5] can be recalled: it is stated in Article G of Part V that the rights and principles set forth in Part I[6] when effectively realised, and their effective exercise as provided for in Part II[7], shall not be subject to any restrictions or limitations not specified in those parts, except such as are **prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals** (paragraph 1); the restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed (paragraph 2). Under Article 9 of **the International Covenant on Economic, Social and Cultural Rights** the States Parties[8] recognize the right of everyone to social security, including social insurance; in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are **determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society** (Article 4).

The following criteria or requirements of constitutionality of the austerity measures can be seen from the case law of our Constitutional Court.

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[5] http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm

[6] In Part I of European Social Charter the rights which the Parties accept to ensure are entrenched.

[7] In Part II of European Social Charter the obligations which the Parties undertake are detailed.

[8] http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx

1. Constitutionally justifiable basis

First of all, according to the official doctrine of the Constitutional Court of the Republic of Lithuania, the reduction of social guarantees could be made only when there is a **constitutionally justifiable basis**. This means that the measures applied, such as reduction of old-age pensions and disability pensions, must be grounded upon the circumstances of the extremely difficult economic situation in the state. Only when there is an official statement of a grave economic and financial situation, which is not short-term, and when the state is unable to perform the obligations, the legislator may temporarily reduce the social guaranties. These reductions could be made only by law, adopted by parliament[9].

When especially difficult economic and financial situation occurs in the state suddenly and there is no time to prepare for it, it is constitutionally justifiable to ignore the requirement of *vacatio legis* (e.g., the requirement to provide a sufficient time (6 months for tax laws) for persons to prepare for changes in the regulation of economic life). It could be justified by the necessity of **urgent and effective decisions**, in order to handle the consequences of the economic crisis and to ensure an important public interest – to guarantee the stability of public finances[10].

2. Necessity

Thus the second criterion is **necessity**: the austerity measures must be **necessary**. These measures could be applied only when it is essential to secure vitally important interests of society and the state and to protect other constitutio-

[9] *Inter alia* the Decision of 20 April 2010 on the Construction of the Provisions of Acts of the Constitutional Court Related to Reduction of Pensions and Remunerations During an Economic Crisis

[10] Ruling of 15 February 2013 on the Adoption of the Law on the 2009 State Budget and Related Laws.

nal values. They should be like a **last resort** when the accumulation of the funds necessary to pay the pensions and other social guaranties is not secured.

It needs to be noted that in itself the economic crisis in the state does not suppose the right of the legislator to correct the legal regulation of pensionary relations – to reduce the pensions; first of all, the state must take all possible measures in order to overcome the economic crisis and to secure the accumulation of the funds. The state institutions forming economic and finance policies must implement the measures for overcoming the economic crisis in a **complex manner**, the measures must **be co-ordinated and balanced** between the interests of the person and society. Only in an exceptional case, when it is impossible to accumulate (or one does not succeed in accumulating) the amount of the funds necessary to pay the pensions after all internal and external opportunities have been used, the pensionary legal regulation may be corrected by reducing the pensions[11].

The similar criterion of necessity was also revealed by some other constitutional courts. E.g., **the Constitutional Court of the Republic of Latvia** recognized that the reduction of pensions was in conflict with the Constitution and that the impugned provisions were invalid from the moment of their adoption. The Court stated that the amount of securing the social rights may be subject to change depending on the amount of funds of the state, but the legislator always must heed the fundamental rights of a person[12]. **The Constitutional Court of Ukraine** formulated the doctrinal provisions that the social rights entrenched by laws are not absolute, the realization of these rights may be changed by state. Such measures may be used when the necessity to prevent or eliminate real threats to economic security of Ukraine arises[13].

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[11] Decision of 20 April 2010 on the Construction of the Provisions of Acts of the Constitutional Court Related to Reduction of Pensions and Remunerations During an Economic Crisis.

[12] The Constitutional Court of the Republic of Latvia ruling of 21 December 2009.

[13] The Constitutional Court of Ukraine ruling of 26 December 2011 No. 20-rp/2011.

3. Temporal character

Necessity is intertwinned with temporal character of the measures in question. The austerity measures must be **temporal, short-term.** During economic crisis the reduced pensions can be paid only on **a temporary basis** – only when there is an extraordinary economic and financial situation in the state. However, this doctrinal provision may not be interpreted as meaning that the state is exempted from the duty to look for ways for accumulation of the funds necessary for payment of the pensions. If, before the end of the economic crisis, there arises an opportunity to accumulate or receive the funds necessary to pay the pensions in the amounts that were before the reduction, the legal regulation under which the pensions were reduced must be abolished[14]. It should be mentioned that the Constitutional Court did not assess the financial situation of the state – is it economic crisis or not and it can either state whether the economic crisis is over or not. The Constitutional Court **does not consider the question of economic expediency**, so that evaluation of financial situation of the state usually **is not a constitutional issue** and the Constitutional Court **does not asses the economic indicators** and, of course, does not pronounce itself about the end of economic crisis. The Court has first of all to rely on the decisions of the competent executive authorities, and can rule the issue of presence of economic and financial crisis only in exceptional circumstances when it is obvious that the situation is manifestly different from that existing when the measures in question were applied[15] (i.e. that there is no ground for

[14] *Inter alia* the decision of 20 April 2010 On the Construction of the Provisions of Acts of the Constitutional Court Related to Reduction of Pensions and Remunerations During an Economic Crisis

[15] The administrative courts construed the state's financial situation in the cases of reduced remuneration of judges. For example, Vilnius regional administrative court, while assessing state's financial situation and considering if the economic crisis is over, referred to the Annu-

continuing the application of austerity measures). **A similar reasoning would also apply in assessing the necessity of austerity measures, i.e. whether there are any alternatives to the limitation of social guarantees.**

In this context one can mention the similar practice of the Portuguese Constitutional Court when it had *an a priori* constitutional review case, concerned with the reduction of pensions of public sector staff. The Court recognized that the reduction of pensions of public sector staff was in conflict with the Constitution and stated that the reduction of pensions **should be temporary and the validity of reduced pensions must be defined**[16].

al Government report of 2010 and mentioned the increase of GDP, the growth of export, the decrease of government debt deficit.

[16] The Portuguese Constitutional Court ruling of 19 December 2013 No. 862/2013

4. Proportionality

Next and perhaps the most important criterion of constitutionality of the austerity measures is proportionality. The Constitutional Court has held that the constitutional principle of proportionality is one of the elements of the constitutional principle of a state under the rule of law. In the particular context of austerity measures **three aspects of proportionality** have to be mentioned. The first is traditional: the measures must be **adequate with the legitimate objectives** which are important to society; these measures must be necessary in order to reach these objectives, and that these measures do not have to restrain the rights and freedoms of a person clearly more than necessary in order to reach these objectives[17].

The second aspect is quite specific for Lithuania. That is the requirement **not to breach the existing proportions** between salaries (paid from state budget), pensions and other benefits, i.e. by applying the austerity measures not to destroy the existing system of salaries or pensions, not to apply more severe reductions (significantly larger percent of reduction) just because the persons concerned have more responsible duties, better qualification and education (that exactly happened during the last economic crisis when salaries for state servants and judges were reduced from 0.5 to 35 percent depending on the duties and qualification, the judicial salaries system was completely distorted when salaries of the judges of the Constitutional Court were cut by 35 percent (while for other judges – up to 18 percent) and they became less than those of the judges of ordinary and administrative courts). This is also related to the problem of discrimination: **the austerity measures cannot be of discriminatory character**

[17] The ruling of 11 December 2009 on Wages of Officers of the System of the Internal Service, the Decision of 20 April 2010 on the Construction of the Provisions of Acts of the Constitutional Court Related to Reduction of Pensions and Remunerations During an Economic Crisis.

and have to be equally applied to all the state servants and judges (e.g., for prosecutors in Lithuania those measures were terminated earlier than for other officials). The Constitutional Court of the Republic of Lithuania recognized that a number of legal acts were in conflict with the Constitution because of it disproportionately reducing the remuneration. The salary of state servants holding higher positions and the remuneration of judges of "higher" courts were cut to a greater extent than the others. The Constitutional Court held that there were violated the proportions of the amounts of the remuneration of different positions of state servants and judges[18].

Similarly when there is a necessity to temporarily reduce the pensions in order to secure vitally important interests of society and the state and to protect other constitutional values, the legislator is under obligation to establish a uniform and non-discriminatory scale of reduction of pensions – the pensions should be reduced in a manner **not violating the proportions** of the amounts of the pensions established with regard to pensioners of the same category.

The third aspect of proportionality is that the austerity measures **should not impair the enjoyment of other rights**, i.e. the rights other that the right to pension or other social benefit. Constitution prohibits such legal regulation when a person, while implementing one constitutional right, **would lose the possibility to implement another constitutional right**. E.g., it was recognized by Constitutional Court that it is not permitted to establish any such legal regulation whereby the old-age pension paid to the persons who have a certain occupation or conduct certain business would be reduced to a greater extent comparing with the persons who do not have any occupation and do not conduct any business[19].

[18] The ruling of 1 July 2013 on the reduction of the remuneration of state servants and judges.

[19] The ruling of 22 October 2007 on the State Pensions of Judges, the Decision of 20 April 2010 on the Construction of the Provisions of Acts of the Constitutional Court Related

5. Broad discretion depending on the peculiarities of the constitutional guarantees in question

The Constitution does not exclude the possibility to differentiate the austerity measures. However, **this differentiation is related to the extent of constitutional guarantees in question, i.e. whether they are imperative under the Constitution or dependent on a certain discretion of a state** (therefore also on the economic situation). In general, **the Court does recognize a broad discretion** of the legislative and executive authorities when applying austerity measures.

For example, some of the types of pensions specified *expressis verbis* in Article 52 of the Constitution. One of them is old-age pension. As it has been held by the Constitutional Court, the person who meets the conditions established by law in order to receive the old-age pension, and who has been awarded and paid this pension, has the right to a monetary payment of a respective amount – the right to possession. This right must be protected also under Article 23 of the Constitution, where the right to ownership is entrenched. The other type of pension specified *expressis verbis* in Article 52 of the Constitution is a disability pension. The state has a constitutional duty to ensure the creation of such social protection system *(inter alia* a system of social support and disability pension) so that a person who, due to health disorders (caused by illness, accident, occupational disease, innate health disorders, etc.), permanently or temporarily did not acquire or lost a possibility to earn the living from work or business income, or where such possibilities significantly diminished, in the cases provided by law, would receive social support and/or disability pension[20].

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to Reduction of Pensions and Remunerations during an Economic Crisis, the ruling of 6 February 2012 on the Recalculation and Payment of Pensions upon Occurrence of an Especially Difficult Economic and Financial Situation in the State.

[20] The decision of 20 April 2010 on the Construction of the Provisions of Acts of the Constitutional Court Related to Reduction of Pensions and Remunerations During an Economic Crisis.

Under the Constitution, the law may also establish other pensions, not only those which are *expressis verbis* specified in Article 52 of the Constitution (i.e., not only old-age and disability pensions). The legislator enjoys constitutional powers to establish by the law the pensions and/or types of social assistance granted solely to the state servants or individual groups of state servants, the grouping of which is objectively reasonable. The pensions which are not directly named in Article 52 of the Constitution are at present established *inter alia* in the Law on State Pensions. The peculiarities of state pensions, which, in their nature and character are different from old-age pensions, as well as from disability pensions, imply that during financial crisis the legislator may correct the legal regulation of such pensions of different nature by reducing these pensions to **greater extent than old-age and disability pensions.** However, while doing so, the proportions of the amounts of state may not be violated[21]. The mentioned peculiarities also give **more flexibility** in legal regulation of the reimbursement of losses caused by reduced state pensions.

It could be mentioned that the Portuguese Constitutional Court noted that it is permissible to change the legal regulation of pensions of public sector staff, but it should be done with the respect of number of constitutional principles, especially with the principle of the protection of trust.

Similarly, the Constitutional Court also interpreted some requirements, which arise from the Constitution, regarding social support for the families raising underage children, i.e. issues of awarding and limitation upon payment of maternity, paternity, maternity (paternity) benefits, which had directly been determined by the circumstances of the economic crisis. The Constitution does not *expressis verbis* establish any bases, conditions, terms and amounts of giving

[21] The decision of 20 April 2010 on the Construction of the Provisions of Acts of the Constitutional Court Related to Reduction of Pensions and Remunerations During an Economic Crisis.

support to the families that raise and bring up children at home; these are to be established by the legislator in compliance with the norms and principles of the Constitution. The capabilities of society and the state must be taken into account when regulating by laws the relations of assistance given to the families that raise and bring up children at home and the legislator has a **broad discretion** in this field. The Constitution establishes the guarantee of **a paid leave before and after childbirth to working mothers (short–term maternity leave).** It is implied that the legislator must establish *inter alia* the conditions for giving such a leave, a reasonable (minimum and maximum) length of this leave. The amount of this short-term maternity leave must comply with the average remuneration received during a reasonable time prior to the leave[22].

6. Solidarity

The Constitutional Court has held that the **solidarity principle** entrenched in the Constitution implies that the burden of fulfilment of certain obligations to certain extent should be distributed also among members of society, however, such distribution should be constitutionally reasoned, it cannot be disproportionate, it cannot deny the social orientation of the state and the obligations to the state, which arise from the Constitution. However, the constitutional principle of solidarity does not deny personal responsibility for one's own fate.

First of all, the requirement of solidarity implies **absence of discrimination in applying of austerity measures, i.e. in principle all the groups of society has to share the burden of economic crisis**. The Constitutional Court has held that in case of a difficult economic and financial situation, the financing of all the institutions implementing state powers that are financed with the

[22] Ruling of 27 February 2012 on Awarding Maternity, Paternity, Maternity (Paternity) Benefits and Limitation upon Payment thereof, as well as on Limitation upon the Right of Customs Officials to Hold Another Job.

funds from the budget, as well as the financing of various spheres that are financed with the funds from the state or municipal budget, should normally be revised and reduced. It means that the **judiciary also is not immune from the reduction of remuneration.** If one established any such legal regulation to the effect that only the reduction of the financing of courts or only the reduction of the remuneration and pensions of judges would not be allowed in case of an extremely difficult economic and financial situation in the state, it would mean that courts would groundlessly be singled out from among other institutions that implement state power, and judges — from among other persons that participate in implementing the powers of the corresponding institutions of state power; the consolidation of such an exceptional situation of courts (judges) would not be in line with the requirements for an open, fair and harmonious civil society and the imperatives of justice[23].

On the other hand, the legal regulation of the social security should create preconditions for each member of the society **to take care for one's own welfare**, but not to rely solely on the social security guaranteed by the state. The social support should not create preconditions for a person not to attempt for a higher income, not to search for possibilities to ensure to oneself and one's family by one's own effort the living conditions that are in line with human dignity, and **social support should not become a privilege**.

However, solidarity has to be understood in the context of **positive discrimination of the most vulnerable persons**, i.e. there can be a limit below which the austerity measure cannot be applied (a certain minimum of guaranteed income – a minimal pension or salary). The constitutional principles of justice and proportionality do not mean that it is not allowed to establish a **limit in the amount of the pensions below which the pensions would not be reduced**. But it is not allowed to establish any such legal regulation whereby the pension

[23] The ruling of 1 July 2013 on the reduction of the remuneration of state servants and judges.

becomes reduced to an amount, where the person receiving the pension would not be secured the minimal socially acceptable needs and the living conditions compatible with human dignity. However, as mentioned, the constitutional principle of social solidarity does not imply any social egalitarianism. According to the Constitutional Court, the egalitarianism also is not permitted reducing the remuneration of state servants and judges. The Constitutional Court recognized that the proportions of the amounts of salaries established at the time prior to the occurrence of a particularly difficult economic and financial situation in the state for the persons performing different duties, must be retained[24].

Similarly the Constitutional Court of the Republic of Latvia has held that the state has to define the groups of pensioners who would be immune from the reduction or to whom a different reduction amount would be applied[25]. The Constitutional Court of Ukraine has emphasized that while cutting the social guaranties an adequate living conditions and the human dignity must be maintained[26].

7. Reimbursement of the losses

Finally, the State while applying austerity measures can be obliged to reimburse certain related losses. That is due to the protection of the right to pension or salary as **the property right** (but not a specific sum) in terms of the Constitution. E.g., the right to demand the pensionary maintenance payments, which are established in the Constitution and laws, arises from Article 52 of the Constitution, whereas the proprietary aspects of **this right are defended under Article 23** of the Constitution[27]. Therefore the losses caused by the reduction of

[24] *Ibid.*

[25] The Constitutional Court of the Republic of Latvia ruling of 21 December 2009.

[26] The Constitutional Court of Ukraine ruling of 26 December 2011 No. 20-rp/2011.

[27] *Inter alia* the ruling of 6 February 2012 on the Recalculation and Payment of Pensions upon Occurrence of an Especially Difficult Economic and Financial Situation in the State.

pensions should be **reimbursed** to a certain extent. First of all, it is obligatory to reimburse the losses caused by the reduction which was held unconstitutional. The reimbursement of other losses (which were determined by the legal regulation which was recognized as not in conflict with the Constitution) is the discretion of legislator.

The reimbursement must be implemented during **the reasonable time** after the economic crisis is over, it has to be also **balanced with other commitments** and interests of the State and society. The legislature must, without unreasonable delay, establish the essential elements (grounds, amounts, etc.) of compensation for the reduced old-age pensions. After the economic crisis is over, according to **objective data** (economic indicators, indicators of economic growth, funds accumulated by the state), the capabilities of the state, **a fair compensation** must be ensured to all persons for the losses caused by the reduction. Under the constitutional imperative of social harmony, this may be ensured as appropriate in a fair manner. It is important that the said mechanism should be established by taking account of the consequences of an extreme situation and the **capabilities of the state**, *inter alia,* various obligations assumed by the state, which are related to financial discipline, thus, also to the imperative of balancing the revenue and expenditure of the state budget[28]. In this context it should mentioned that the Constitutional Court of the Republic of Latvia also held that while planning a temporary reduction of pensions, the legislator must ensure its fair reimbursement at a later time[29].

[28] Decision of 7 March 2014 On the Construction of Certain Provisions of the Ruling of the Constitutional Court of the Republic of Lithuania of 6 February 2012

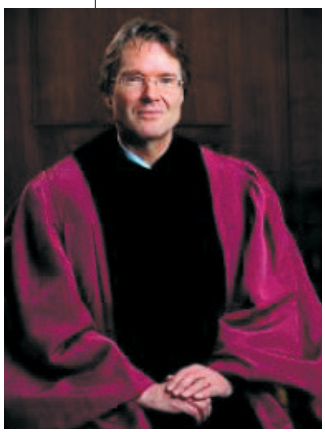
[29] The Constitutional Court of the Republic of Latvia ruling of 21 December 2009

III. Final remarks

The most difficult challenge for the Constitutional Court after its decisions on constitutionality of austerity measures is **to withstand the fierce criticism** that it usually does not deserve. E.g., after the decisions, where the austerity measures adopted by parliament were assessed and some of them were recognized unconstitutional, the Constitutional Court of the Republic of Lithuania was accused that it was not enough sensitive and gentle for the most vulnerable groups of people, moreover, that the court was blamed for its "supporting" financially strongest groups of people, for example, working pensioners, state pensioners, judges and state servants of higher positions. The concept that the constitutional principle of social solidarity does not imply any social egalitarianism was very unwillingly accepted by some groups of the society. It must be mentioned that some politicians additionally strengthened this contention by populist speeches. It is curious that while the Constitutional Court is blamed for decisions concerning austerity measures, it is the activity of politicians and the legislator, which led to the deepest possible economic crisis and more severe austerity measures. E.g., just before the crisis and on the eve of parliamentary elections in summer of 2008 the legislator decided not to accumulate any reserves, but to spend all the surplus in the state budget by increasing the social guarantees (pensions, parental leaves (which were one of the highest and longest in all Europe), etc.) and in such a manner causing ungrounded expectations.

My last final remarks is that obviously the economic and financial problems **strongly affected the doctrine of limitations of social guarantees** of many European constitutional review institutions. We could come to a conclusion that the standards of limitation of social rights during the period of economic crisis has to differ *inter alia* because of various austerity policies used by governments to reduce budget deficits during the grave economic conditions. However, on the other hand, we also cannot deny that there are **universally recognized criteria**

which the austerity measures should meet to avoid violations of the recognised social and economic rights, the settled balance between the interests of a person and society. It should be mentioned that **during the period of global economic crisis the same criteria based on the concept of socially oriented state could be easily recognized in the decisions of many European constitutional review institutions**. This similarity proves that there is **unity in diversity** of every state's constitutional doctrine on austerity measures.



Mr Jan Zobec,
Judge of the Constitutional
Court of Slovenia

CONSTITUTIONAL JURISPRUDENCE IN TIMES OF FINANCIAL CRISIS

1. Introduction

Slovenia is facing a crisis – we call it the public finance crisis, some even speak of the economic crisis, there is talk of the political and social crisis, the crisis of (financial) capitalism, or even the crisis of democracy. However, the daily lives of the people are most significantly affected by the overall deterioration of living conditions – the fall and a further decline in the standard of living and social security, insecurity, anxiety, fear of the future. The macroeconomic data speak for themselves – unemployment, decline in investments, economic downturn, internal debt, government deficit, high borrowing rate. To identify the causes of the widespread deterioration and their origins is a matter of economic, sociological, systemic, political science analysis (and speculation). In times of crisis, life events are concentrated, dramatic, and convulsive. They themselves call for action due to their acuteness and fatality. In such periods, the regulatory role of the state intensifies, as it must. The state must act as this is its fundamental duty and the very purpose of its existence. Its legislative body is the first in line that is called upon to adopt appropriate anti-crisis measures in order to respond to the needs in all areas of social life. This applies even more so if such needs relate to the foundations of the functioning of the state or its ability to effectively ensure human rights and

fundamental freedoms. Among the principles of a state governed by the rule of law is the principle of the adjustment of the law to social relations and the development of society. This principle, adopted by the Constitutional Court (Decision No. U-I-69/03, dated 20 October 2005, OdlUS XIV/2, 75), is inherent to the very nature of law. Life is namely a sequence of changes, a unique continuum – and a chain of events to which the law responds. However, the measures by which the legislature responds must be in harmony with the pressing social reality, which is what we might call the normative power of the crisis.[1] Since the crisis brings new (im)balances in the functional systems (subsystems of the society) and because due to their mutual intertwining and points of intersection the crisis is transferred from one system to another until in the end it covers the entire global society, the legislature that must often act quickly and radically is in a difficult position. In such periods, namely, the resurgence of conflicts is more likely and these tend to be more pronounced and fierce. It is difficult to coordinate competing and even contradictory interests where, due to the crisis, the competition among them becomes even sharper and more serious. Such is even more difficult when it is necessary to act fast. It may happen that the elimination of one of the imbalances results in another imbalance. What is then the role of law in a time of crisis, what should be given priority – the public interest that at this point entails the effectiveness of the state's anti-crisis measures or the law, more precisely constitutionality? Another question is how far the Constitutional Court can intervene, where the boundary between the legal and the political lies. The Constitutional Court is namely a player in the political arena and its decisions have political consequences; the fate of legal acts of general application that are nothing but a legal expression of political will, as such was formulated in the legislative body – where the political interests meet and are synchronised – is in the hands of the Constitutional Court.

[1] Paraphrase of Gurvitch's and Jellinek's idea of a normative power of facticity.

However, there is an essential, insurmountable difference between the legislative body, which is a political body, and the Constitutional Court, whose decisions also have political consequences that are comparable with the decisions of the legislative body. The decisions of the legislature are political decisions, they are adopted in a political manner, through a political discourse and with political responsibility. The decisions of the Constitutional Court on the other hand are legal, adopted on the basis of constitutional law arguments and through a constitutional discourse. There are no people above the Constitutional Court to whom the Court would need to answer to every four years at the elections; there are only two things above the Constitutional Court – the Constitution and constitutional arguments – and the professional public, of course. The weapons and legitimacy of this institution are its arguments: the more convincing, reasonable, and professionally justified they are, the greater the internal legitimacy of the decision based on such arguments is. And the greater the reputation and authority of the highest guardian of the Constitution are.

In the current period of crisis, the Constitutional Court was searching for a balance between the public interest (eliminating or at least reducing the effects and causes of the crisis) on the one hand and the price paid for the realisation of these interests on the other. This usually entails a diminution, reduction, narrowing of rights of individuals or legal entities or an increase in their burdens. This contribution deals firstly with some speculations about the sources of the financial crisis and then with some of the most typical »crisis« cases that the Constitutional Court adjudicated in the last two years.

2. What are the reasons for the crisis

The reasons for the (Slovene) crisis are both external and internal, they are intertwined with one another and in synergy. The global financial (and, consequently, economic) crisis is probably, as established Teubner, really the

consequence of the collective dependence on the [economic] growth, which is so characteristic of the post-modern globalised (world) society.[2] The question is whether self-restoring systems (autopoiesis) tend to be self-destructive and whether autopoiesis also includes growth – and if it does, what happens in the events of excessive growth. Are we perhaps in social systems dealing with turbo autopoiesis (which has a similar effect on the social tissue as does malignant growth have on human tissue)? Is pathological growth and opaqueness, uncontrollability, unpredictability, perplexity, tension, and omnipresent unrest and discomfort connected therewith what could be the reason for the crisis?

In the genome of the western civilisation is obviously written the code of dependency on the growth. Nothing is yet wrong with that in itself. Problems only arise at the point when this addictedness becomes self-destructive. The crisis as the consequence of the expansionistic addictedness, i.e. addictedness to an ever higher production, namely engulfed virtually all functional systems – not only the economic-financial system (in which this is demonstrated most obviously, simply because money makes the world go round). The motto in sports has been (since 1924 Olympic Games in Paris) "faster, higher, stronger" which leads towards twistedness of sports – instead of protecting a healthy mind in a healthy body it forces that prohibited stimulants be used and that the organism be inhumanly exhausted, resulting in what is the exact opposite; in science, the research of what is unknown and the uncovering of answers on what is unknown in fact only opens further and new questions that multiply uncertainties and the need for further researching; the law is choking in the hyper production of norms and judicial decisions. The society is addicted with the judicialisation of everyday life – economic, political, and scientific life. Since

[2] See G. Teubner, A Constitutional Moment? The Logics of Hitting the Bottom, in: The Financial Crisis in Constitutional Perspective (P. F. Kjaer, G. Teubner, A. Febbrajo – Ed.), Hart, Oxford, and Portland, Oregon 2011, p. 5 et seq.

a long time ago (also in states with the tradition of common law), the law is not (only) a means for the resolution of disputes, the law is more and more a means for the implementation of certain interests. And not only public interests. In reality, interests and benefits of lobbies, networks, and interest groups are hidden behind the façade of »democratic« defenders of the public interest and that of rhetoric ombudsmen. Therefore, the law, which is supposed to prevent and resolve disputes, generates disputes by itself which then in return require an even greater regulation (an illustrative proof for that is the vast and entirely unmanageable Slovene legislation regulating insolvency proceedings), which carries in itself new interpretative problems and therefore new conflicts, including between norms themselves (a characteristic example that will be

explained below was the Real Property Tax Act, abrogated by the Constitutional Court, along with all the accompanying regulation) – and so forth. Especially in crises such as the financial, economic, and social crisis, the production of law is correspondingly higher (i.e. the normative power of crisis) due to the need for state intervention, in fact due to the constitutional requirement of a response by the law on the crisis (which the Constitutional Court clearly explained in Decisions Nos. U-I-69/03 and U-II-1/12, U-II-2/12). And, if these are external stimuli, the legal hyper formalism of the judiciary is the next – internal – stimulus to which the legislature (which is always in an interactive relationship with the judiciary) responds with the further hyper production of norms, *ad hoc* solutions, and detailed prescription and regulation of every life situation, all of which leads, along with the growing corpus of domestic and supranational case law and literature, to an even larger and completely unmanageable normative chaos.

2.1. Fiat money!

The fundamental paradigm of the crisis is financial – the crisis is expressed most tangibly and with broadest effects in the economic-financial field of the global turbo capitalism – already because this functional system is connected with the majority of others, the crisis is transferred from it also to other systems, which already by themselves autochthonously suffer from the same syndrome – the syndrome of dependency on growth. What is actually at issue? To put it simply, what is at issue is a situation in which the desire (lust or greed) for profit is greater than the true capacities of the real growth and the human creativity and inventiveness. In other and simpler terms: when economy is at issue, when more is spent than it is created – because the desires that are greater than the capacities can be fulfilled by an illusion – an illusion based on future borrowing, on anticipated and speculative growth, and on the current consumption. In

short, the following motto applies: I want to have, here and now, what I will be (if I will actually be) entitled to (depending on the input of knowledge and effort, as well as on good fortune) – only tomorrow or even what only next generations will be entitled to. Therefore, what is at issue is the problem of the asymmetry of the expansion of subsystems, where the obviously prime subsystem is the financial one – its growth exceeds all others. Why – because it is so easy to create money. For commercial banks, this is *creatio ex nihilo*. Fiat money!

It is not difficult to determine why this has happened; the formula is simple: The globalisation, the information technology that allows for an uncontrollable diffusion of information all around the world in a matter of seconds (the infrastructural framework, the environment in which or within which pathological growth can develop), and the collective addictedness with growth (the energy that fuels the crisis) have brought to a discrepancy between virtual cash flows and (virtual) speculative financial profits connected therewith on the one hand (a fetish of the post-modern capitalism) and the situation in the real economy on the other (with all the symptoms characteristic therefor – borrowing, unemployment, growth of poverty, ecological devastations, and degradations). Precisely the private emission of non-cash money (fiat money) is exploited for an unpredictable increase in self-reference financial speculations. With the creation of value, the emission of money necessarily increases profits – and vice versa, the increase in profits increases the emission of money and the creation of virtual value. This entails spiral growth, which in the end grows into a self-destructive excessive growth. What is then the difference between the necessary dynamic of growth and pathological growth? To a certain degree, a comparison with an individual's addictedness and dependency seems appropriate. However, the definition of one individual's dependency as the compulsive acceptance of self-destructive activity, i.e. activity despite lasting negative consequences, is with regard to social systems not sufficient. When financial crisis is at issue, non-cash money created *ex nihilo* by commercial banks entails a dependency mechanism:

the chaining of transactions of payments releases excessive compulsions of growth in both the financial and real economy. The commercial banks' increasing of expected profits inherent in the supplementing creation of money through credit guarantees causes pressure on the real economy to produce more and to [increase] growth, which further increases the expectancies of profits. This releases a dynamics that no longer corresponds to the static economic cycle, but [represents] an accelerated and uncontrollable spiral of growth. Together with the dynamics of monetary multiplication, bank loans are not requested for the financing of productive investments, but for investing in speculative property or, when the state is at issue, for the financing of poorly controlled non-productive spending, for social transfers, etc. When the interests on bank loans then exceed the expected income gained by such property, a collapse happens, together with a financial crisis and, as a consequence, also an economic crisis.

3. How the state should have dealt with the (financial) crisis and how it did deal with it

3.1. Plain-money reform

As Teubner convincingly concludes, the dynamics of the crisis cannot be successfully (successfully from the viewpoint of the elimination of the crisis) established by means of factor analysis in accordance with which individual reasons are isolated, blamed for causing the crisis, and then neutralised with the introduction of opposite factors into the causal chain that causes the crises, hoping that its repetition will be thereby prevented. All such measures are seriously flawed: No sooner has a law been passed than the loophole appears – either in the form of a possibility to circumvent the law[3] or in the form of

[3] Teubner, p. 5.

its unconstitutionality.[4] A deeper understanding of the crisis is offered by an analysis which regards the factors of factor analysis simply as interchangeable activating conditions, and which attempts to discover the underlying dynamic. Teubner thus suggests the transformation of the "internal constitution" of the global financial economy (societal constitution), namely by the constitutional symbol of the economic functional system, i.e. by transforming the creation of money.[5]

Today, this function is less and less the prerogative of central banks (which only operate in the field of primary emission, which is not bound by the gold standard). With regard to the expansion of non-cash cash flows via bank accounts, non-cash payments and transactions, new communication technologies, and especially the globalisation of financial and capital transactions, the monopoly of the emission of money has been transferred from the hands of central banks to globally active commercial banks.[6] Commercial banks give loans freely and thus create non-cash money (in Europe, the ratio of non-cash to cash money is 4:1).

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[4] By the Council Decision of 19 January 2010 it was established that there exists an excessive deficit, which is not only the result of the temporary excess of reference values regarding the admissibility of the deficit. In the framework of these proceedings, the Council adopted, on 7 June 2013, a Recommendation in which it established that Slovenia is faced with a significantly growing public debt due to persistently high primary deficits, wherefore Slovenia should adopt, inter alia, measures for decreasing the wage bill in the public sector, as well as social transfers. And what is the meaning of that? Certainly, it is a threat for the constitutionality. The resolving of the crisis of public finances is a threat for the constitutionality already due to the fact that it its connected with fast and thus less well-thought taking of measures that are radical as well (dismissing in the public sector, the reduction of social transfers, the introduction of new taxes and the increase of existing burdens, etc.). The fact that this threat is real is also proved by the Council Recommendation, which envisages a secondary plan due to the possibility of the constitutionally-judicial abrogation of anti-crisis measures.

[5] Teubner, p. 13 et seq.

[6] Teubner, p. 22.

Central banks can influence the emission of non-cash money only indirectly – by prescribing interest rates.

I very much agree with the proposal of a plain-money reform, according to which, on the one hand, the creation of non-cash money should be the sole prerogative of national and international central banks, whereas, on the other, commercial banks should be prohibited from creating new money based on the current account credit and should instead be limited to offering loans based on existing credit reserves.[7] I also agree that central banks should be politically independent guardians of the economic constitution in a manner comparable with constitutional courts (guardians of political constitutions), which stand right at the hierarchical peak of legal systems and which are responsible for the adoption of highly political decisions without thereby becoming a part of the political system.[8] However, at this moment I do not see any possibility how such a plain-money reform as proposed by Teubner and several finance experts who would transform constitutional programs both in the law and in the economy on a global scale could be introduced. Since financial markets operate globally, such a reform would only be fully effective as a global fully-fledged money-creation reform.

3.2. Fiscal rule

Therefore, the dynamics of the excessively growing indebtedness of the state budget caused by commercial banks' creation of money, which fuels the development of always new avoidance strategies, should be, for a while, tamed only by transforming the "constitutional symbol or the heart" of the national public financial economy, i.e. the state budget.

[7] Teubner, pp. 19 et seq.
[8] Ibidem and 39 et seq.

This symbol namely also influences other subsystems – depending on how etatised the society is, i.e. what is the degree of state intervention in individual social subsystems. From the viewpoint of the influence that the state has on other subsystems, the state budget can be of key importance. The spiral of the increasing of the public debt can thus be halted only by changing the budgetary mentality of consumerism and the borrowing connected therewith, which is fuelled by the easiness of running into debt as a consequence of the easiness of the creation of non-cash money by commercial banks – and the vicious circle is complete. But how can this be done? There is once again the same dilemma: Either by challenging the individual factors of the crisis, i.e. individual budget users, or by terminating the fundamental dynamics of the crisis of public finances – meaning by [implementing] a fiscal rule. The more the functional systems (subsystems) are etatised, the more important is the anchor (the self-limiting mechanism) in the form of the fiscal rule, which introduces automatism in the planning of the fiscal policy. If I apply the example of the Swiss formula of the fiscal rule (which is also called »*Schuldenbremse*«, i.e. »debt brake«), the fiscal rule precisely determines, on the basis of the condition of the economic cycle and the correspondingly estimated amount of the public income, the allowed amount of public expenses. In simple terms, if the state is in recession, then its factual GDP is lower than its potential GDP (this is the so-called negative output gap), due to which the fiscal rule allows to the state that the expenses of public finances exceed the income, namely by a factor in the amount the predicted GDP is lower than the potential GDP.

The fiscal rule thus functions counter-cyclically. When the state is in recession, the fiscal rule automatically allows it to create a higher deficit, whereby it can increase social transfers and stimulate the economy by reducing taxes or by creating public investments. When the economy flourishes, however, the fiscal rule requires that the state have a surplus of public finances and thus create a reserve for bad times. The fiscal rule thus automatically leads to the

situation that the state budget – or broadly, the balance of public finances – is balanced throughout the economic cycle (the phase of recession and the phase of flourishing), due to which the public debt is gradually and proportionally decreasing while the GDP is increasing. This is an efficient fiscal automatism that has also been introduced a decade ago by Switzerland and Sweden (in fact, each one has its own version of it) and which functions very well, because it prevents politicians from spending too much, i.e. living beyond their means.[9]

This is precisely where the similarity is with the Teubner's proposal [to ensure] supervision over the creation of non-cash money – the reason for both the excessive emission of money by the state and for the excessive borrowing by the state is the same: excessive spending by the state. And if Hayek correctly drew attention to the fact that where democratic governments have unlimited political power with regard to the money one should not expect that they will resist inflationary pressures, in fact political temptations,[10] then these temptations are completely the same where the state in fact does not have the emission of money completely under its control (because the latter passed in the predominant part onto commercial banks in the form of the emission of non-cash money), but it does have unlimited discretion with regard to the borrowing. And because there is more and more non-cash money, the borrowing is easily accessible and the circle is complete. For such reason, we can classify the fiscal rule among the necessary instruments of fiscal constitutionality – which is what nonetheless proves the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union in conformity with which the budgetary position of the general government of a state must be balanced or in surplus (item (a) of the

[9] The logic of the fiscal rule is the logic of Odysseus who was bound to the mast of the ship when passing the Isle of the Sirens. The threat of excessive running into debts is a typical long-term temptation of politicians.

[10] F. A. von Hayek, Denationalization of Money: An Analysis of the Theory and Practice of Concurrent Currencies, Institute of Economic Affairs, London 1978, p. 22 et seq.

first paragraph of Article 3).[11] By the way, it was Eskimos who discovered the fiscal rule long before us.

Therefore, Article 148 of the Constitution (as amended on 31 May 2013) lays down the following provision: "*Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state.*" However, this rule is not self-executing. For such reason, the following paragraph determines: "*The manner and the time frame of the implementation of the principle referred to in the preceding paragraph, the criteria for determining exceptional circumstances, and the course of action when they arise, shall be determined by a law adopted by the National Assembly by a two-thirds majority vote of all deputies*". So far, the implementing law has not yet been adopted, even though the amendment of the Constitution required that the law be adopted within six months after the amendment entered into force – whereas the new fiscal rule and the implementing law are first to be applied in the drafting of the budget for 2015. Hence, it is very likely that an unconstitutional legal gap will emerge in the near future. The fiscal situation is namely rapidly deteriorating and the public debt is increasing - politicians who still think that the money grows in cash machines are pushing Slovenia to the edge of its financial dependence with excessive borrowing.

11 The rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the GDP at market prices.

3.3. Increasing the tax burden, selling off assets owned by the state

A further measure to recovery of the state budget, although not capable of healing the core source of the pathological growth, but at least capable of temporarily extinguishing the consequences of such a growth, could be to sell off assets owned by the state (the so called family silver – systemic banks, insurance companies, companies in the fields of energy, telecommunications…). In addition, state owned property is fertile soil for corruption where largely incompetent, embittered, visionless, and in many cases corrupt economic elites intertwined with politics dominate. Still, the Constitutional Court has no power to command or directly impose the selloff. However, that possibility could be indicated by a decision of the Constitutional Court when considering a tax law and its interference with property rights (the question of necessity – or proportionality in the narrow sense).

In the field of public finances the legislature enjoys a wide margin of appreciation. What will the budget amount to, how will it be structured, and from which sources will it draw are a matter of its political assessment that is subject to political accountability. The Constitutional Court has to apply restraint with regard to such cases. However, the situation may be different when it is obvious that certain budgetary revenues can be realised in another manner, one that is less invasive from the perspective of the human right to private property. Such concerns the possibility to sell off (privatise) state assets – not in the sense of a general sell off (these decisions also fall within the prerogative of policy), but in exceptional cases when the state owns disproportionately large agglomerations, where, for example, the share of the state's assets in the national economy is extremely dominant (energy, telecommunications, banks, insurance companies, and other large corporations, all of these are still in majority state-ownership). If the aim of public finances that is pursued by a property tax is evidently also

attainable through the sale of such property (and therefore by means of a less severe interference with the property rights of citizens), such may demonstrate that an interference with the property of the citizens is not necessary.

When reviewing the Real Property Tax Act (a characteristically "fire-extinguishing measure") the opportunity to evaluate the possible normative power of those facts and circumstances has been missed. The Constitutional Court, while abrogating the Act, limited itself to the principle of legality in taxation matters (Art. 147 of the Constitution, which provides: "The state imposes taxes, customs duties and other charges by law. Local communities impose taxes and other charges under conditions provided by the Constitution and law."), equality before the law (Art. 14, para. 2), the right to legal remedies (Art. 25), and the constitutionally protected financial autonomy of municipalities (Art. 142, which provides: *"A municipality is financed from its own sources.* Municipalities that are unable to completely provide for the performance

of their duties due to insufficient economic development are assured additional funding by the state in accordance with principles and criteria provided by law."), yet avoided to assess the interference with the right to property – and to reconsider its previous position that reads as follows: "In addition to other taxes, property tax may be extended to a yield from a property only if the full taxation of an alleged yield – what is considered are taxes and deductions and other allowances – represents approximately a half division between the private and the public and if such taxation is at the same time in conformity with the principle of equality in taxation. Accordingly, the Constitutional Court established that the taxation in this case, insofar as it exceeded the half of the yield, entailed an interferences with the constitutional right determined in Art. 33 of the Constitution" (Constitutional Court Decision No. U-I-91/98, dated 16 July 1999, Official Gazette RS, No. 61/99, and OdlUS VIII, 196). The Constitutional Court here followed the position of the German Federal Constitutional Court that the state may not impose a burden on private property that would exceed half of the value of the taxed object (income).[12] The so-called Half-Division Principle (*Halbteilungsgrundsatz*) derives from the structure of Art. 14, para. 2 of the German federal Constitution (GG), which states: "Property entails obligations. Its use shall also serve the public good." In the original text this reads as follows:"*Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen*", which in fact entails that it shall serve the public and private good equally *(zugleich = zu gleichen Teilen = by equal parts)*. However, in the Decision No. 2 BvL 37/91 the Chamber also stated that property tax, regarded in combination with other tax burdens, in the overall effect shall not interfere with the very substance, the core of the property – the affected party must be able to pay the tax from the common and expected incomes (*Sollerträge*) – otherwise the outcome of the taxation will be the gradual confiscation of the private property.

[12] See Decision No. 2 BvL 37/91, dated 22 June 1995.

3.4. Decision No. U-II-1/12, U-II-2/12 (establishment of the "bad bank" and the Slovene National Holding Company)[13]

Regarding some other "crisis" cases, two referendum cases should be highlighted. In both cases, the laws, which were under review, were dealing with peripheral sources of the crisis. The first challenged law was namely aimed at ensuring the effective functioning of the banking system and in this regard the need to eliminate the so-called credit crunch, where what is at issue is a situation in which the banks fail to perform one of their basic roles in the economic system (the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act – the so-called Bad Bank Act – MSSBA). The second law (the Slovene National Holding Company Act – SNHCA) was aimed at ensuring effective and transparent management of state assets.

By Decision No. U-II-1/12, U-II-2/12, the Constitutional Court decided that unconstitutional consequences would occur due to the suspension of the implementation or the rejection of the two above mentioned laws in referenda. The Constitutional Court decided that priority must be given to the constitutional values that due to the calling of referenda and even more so due to the possible rejection of the SNHCA and the MSSBA would remain unprotected to such an extent that the balance between different constitutional values would be jeopardized. Therefore, the right to request a call for a legislative referendum had to give way. The values emphasized by the National Assembly that in the assessment of the Constitutional Court have priority over the right to request a call for a referendum in the circumstances of severe economic crisis were the following:

– efficient exercise of state functions, including the creation of conditions for the development of the economic system;

[13] Decision No. U-II-1/12, U-II-2/12, dated 17 December 2012 (Official Gazette, No. 102/12, and OdlUS XIX, 39)

– exercise of human rights, in particular the rights to social security, security of employment, and free enterprise;
– respect for the binding international law obligations of the state; and
– ensuring the effectiveness of the legal order of the European Union in the territory of the Republic of Slovenia.

3.4.1. Between law and politics

The National Assembly demonstrated that immediate implementation of the statutory measures was necessary in order to protect the mentioned values in the circumstances of the economic crisis. Submitting the adopted laws for decision-making in referenda and their potential rejection at such referenda would therefore constitute unconstitutional consequences. Hence, the Constitutional Court held that the referenda regarding the SNHCA and the MSSBA were not constitutionally admissible.

The Constitutional Court also stated the following: «In this Decision, the Constitutional Court is facing a special situation as the SNHCA and the MSSBA are two specific legislative measures among the measures which not only the Government and the National Assembly, but also important international subjects assess to be necessary to ensure the sustainability of the public finances and sufficient resources for enabling the functioning of the state and respect for human rights, which the state has to take care to efficiently ensure. Also at issue is that this concerns statutory measures that are not only important each in itself, but which are even more important as a group of measures by means of which urgent objectives are pursued. Therefore, the urgency of each individual measure on the level of the system is convergent with the urgency of the adoption and realisation of other measures. As far as the SNHCA and the MSSBA are concerned, also their mutual interconnectedness is demonstrated.» (para. 55

of the reasoning of the Decision).[14] The Constitutional Court then continued

[14] These arguments resemble those, proposed by two legal rapporteurs of the Greek Council of State, assigned to study the Greek case of civil suits seeking the cancellation of the Memorandum (law no. 3845/2010) challenging the constitutionality of wage and benefit cuts. The rapporteurs stated that the goal of the measures was to protect the higher public good, serving the need to cut the country's excessive fiscal deficit and external debt, and abide by the obligations Greece has under-taken within the framework of the Economic and Monetary Union, and proceeded to examine the necessity and proportionality of the measures. They stressed that these measures were a part of a whole series of measures which sought not only to cut expenses but also to augment state revenues to save Greece from defaulting on its debts. What seems to be of vital importance is that the impugned measures constituted only a part of the broader agenda of promoting fiscal consolidation and structural reforms of the Greek economy. Being part of a wider program of fiscal consolidation, the attempted reform was not focused on measures to cut wages and benefits for employees of the public sector and pensioners. Contrary, it was aimed at the fulfilment of the country's commitments, undertaken to activate the mechanism of financial support of the Greek economy, and of the obligations stemming from the Treaty provisions of the Economic and Monetary Union. See Xenophon Contiades, Alkmene Fotiadou, Social Rights in the age of proportionality: Global economic crisis and constitutional litigation, International Journal of Constitutional Law, 10(2012), pp. 682, 683.

Nevertheless, the Supreme Court abrogated a part of the austerity measures that the Greek Government had introduced due to requirements of the EU and the IMF with regard to the bail-out. These concerned a decrease in wages in 2012 in the police and the military. Even though the Ministry of Finance had stressed that the Court's decision may result in a hole in the state budget the size of half a billion EUR and that that may entail a discontinuation of all further payments. However, it did not come to this. The Court actually abrogated as unconstitutional the decrease in wages in the police and the military by 10%, while it did not abrogate the decrease of wages of other public servants. It stated that the reason for the different treatment lay in the fact that the police and the military perform key tasks within the state and are therefore entitled to a different treatment than the rest of the public sector, which was affected by a decrease in wages. In circumstances such as they were in 2012 in Greece, the highest court in the state deemed that "police officers and soldiers are the heart of the country" and therefore "deserve special protection." Wages of other public servants

by stating: «Whether the SNHCA and the MSSBA introduce measures which by their nature constitute the correct answer to the alleged situation existing in the state is not something that the Constitutional Court can assess. Whether these Acts are thus statutory measures that in terms of content are good or bad or the most appropriate for regulating the issues that obviously must urgently be regulated, depends on the suitability and appropriateness of the statutory regulation with which the legislature must respond to the existing social needs. Therefore, the suitability and appropriateness of the statutory regulation cannot have an influence on the decision regarding the existence of unconstitutional consequences itself. As the Constitutional Court has already underlined in Decision No. U-II-1/11, also responsibility for the content of statutory regulation, in the case at issue for the content of two economic policy measures that refer to the functioning of the banking system and to the management of state property, for the stated reasons falls entirely on the National Assembly and the Government. A different position would inadmissibly interfere with the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution)» (para. 56 of the reasoning of the Decision). Thereby the Constitutional Court also explained where the line separating political and constitutional law arguments lies and what the equilibrium between law and politics should be like.

However, the question of whether such an approach, while it is in any event consistent with the Constitution, as it (relatively) clearly differentiates between the competences of the legislative branch of power and the Constitutional Court, does not on the other hand open the door for fictitious reactions to unconstitutional situations brought about by (a certain) chain of events or (a

who earned more than 1,500 EUR had been decreased by 20 to 30%. With the help of the bail-out and without additional austerity measures, Greece will allegedly reach a deficit of 4.5% of its GDP by 2016.

certain kind of) crisis? Does it not namely entail that it does not matter how the legislature responds to the crisis, but it is only important that it responds to it and that it substantiates the need for the response by claiming the necessity of such a response, while it is not important whether the measure is in fact capable of bringing about the wanted (targeted) effects? Does it not entail that from a constitutional law perspective there is nothing wrong if the measure is not effective – since there is no mechanism that would force the legislature to, for example, respond to a financial crisis that is threatening human rights by means of an effective measure?

Firstly, (from the viewpoint of mechanical logic) I would say "I do not think so" – and then also that the Constitutional Court (more or less) clearly stated this when it later added: "In the framework of this constitutional review of the admissibility of the referenda, what is in the foreground is neither the question of the constitutionality of the statutory regulation in force nor the question of the constitutionality of the adopted statutory regulation, i.e. the constitutionality of the SNHCA and the MSSBA, which would be submitted for approval in a referendum. When the Constitutional Court does not permit the realisation of a referendum and thus the implementation of the newly adopted act occurs as priority must be given to other constitutionally protected values, not to the right to request the calling of a referendum, such does not entail that after the act is implemented, in the case at issue the SNHCA and the MSSBA, it will not be possible to request a constitutional review thereof and to remedy possible unconstitutionalities on the basis of an appropriate decision of the Constitutional Court. In this case, the above-mentioned possibility of subsequent assessment of the constitutionality of these Acts works as an argument in favour of the other constitutionally protected values which have already been demonstrated to be substantially jeopardised or limited, in comparison to the right to request the calling of a legislative referendum" (para. 57 of the reasoning of the Decision).

However, am I really correct when I say no? The mentioned positions of the Constitutional Court namely speak only of a possibility of constitutional review of an austerity measure that has come into force, while it said nothing about a possibility to review the legislature's failure to respond to the crisis and also nothing about a possibility of effectively remedying the unconstitutional state of affairs brought about by the spiral of crisis. I believe that the Constitutional Court should have such a competence (and it also does have it) and that this derives from the mere purpose of the Constitutional Court as the ultimate guardian of constitutionality (even though I am aware that such a position is controversial – due to the, in my opinion, too rigid understanding of the division of competences, which is expressed in the above cited part of the reasoning of the Decision). Thus, if the crisis results in an unconstitutional legal gap (e.g. the collapse of the system of healthcare insurance), then the state must respond – if it does not respond, it violates its constitutional obligation – such does not only concern one of the principles of a state governed by the rule of law, namely the principle that requires the legislature to adapt to social circumstances, but the state's constitutional obligation to ensure the exercise of positive rights. Therefore, the Constitutional Court is entitled (and obliged) to review also whether an austerity measure that is necessary from the viewpoint of constitutionality is also appropriate for remedying the unconstitutional consequences of the crisis. If such is not the case, the unconstitutional state of affairs continues to exist (a different interpretation of para. 56 of the reasoning of Decision No. U-II-1/12, U-II-2/12 would be hyper-positivist and mechanical). In addition, the Constitutional Court is entitled to intervene in instances when the legislature fails to respond (or fails to respond sufficiently) to cases of crises that result in unconstitutional circumstances (regardless of which subsystem of society they affect).

3.4.2. A short remark

In the light of all of the above, we can at this point draw a parallel with Teubner's model for resolving the crisis. If Central Banks are, or as in his opinion they should be, the guardians of economic constitutionality, then Constitutional Courts are the guardians of political constitutionality – both types of bodies are namely outside of the scope of political power – both concern the safeguarding of constitutionality on grounds of expert and independent decisions that are not politically motivated – despite this they of course produce political consequences *par excellence*. None of these bodies participates in the production cycle of political power – Central Banks are guardians of the economic constitution, Constitutional Courts are guardians of the political constitution. Both types of institutions must enjoy a high level of autonomy (they function according to their own internal, autonomous logic). Both types of institutions are of crucial importance for attaining capillary constitutionality – and they are responsible for a reasonable and public substantiation of their decisions.

3.5. Review of the Fiscal Balance Act

In Cases No. U-I-186/12[15] and No. U-I-146/12[16], the Constitutional Court furthermore reviewed the Fiscal balance Act (already stating its aim in its title) and established the unconstitutionality of certain of its provisions. By the first Decision it established the unconstitutionality of certain provisions of Article 143 of the mentioned Act on the basis of which pensions were decreased that were in part or in their entirety not based on contributions paid, but were acknowledged and determined under special conditions and their payment was provided by the

[15] Decision No. U-I-186/12, dated 14 March 2013 (Official Gazette RS, No. 25/13).
[16] Decision No. U-I-146/12, dated 14 November 2013 (Official Gazette RS, No. 107/13).

state from the state budget. It established that the legislature treated essentially similar positions of beneficiaries of pensions differently, although they should have been treated equally. It namely decreased pensions that were allegedly not based on the payment of contributions also in relation to beneficiaries who paid their contributions to pension and disability insurance funds of other former Yugoslav Republics or to one of the federal funds that existed at that time. With regard to the criterion that pensions depend on contributions paid, such thus concerned essentially similar positions. As the legislature did not demonstrate a sound reason for the different treatment of these pension beneficiaries, such regulation was inconsistent with the Constitution. Moreover, the legislature treated some essentially different positions of beneficiaries of pensions equally without a sound reason for their equal treatment that would derive from the nature of the matter. Firstly, such concerns beneficiaries of pensions that enjoy special protection with regard to social protection according to the Constitution (war veterans and victims of war). With regard to such beneficiaries, the circumstance that their pensions are not entirely based on contributions paid does not entail a constitutionally admissible reason that could justify their equal treatment regarding the decrease in pensions in relation to other beneficiaries of pensions who do not enjoy special constitutional protection. The same applies to beneficiaries of pensions who had a period of unjustified deprivation of their liberty included in their pension-qualifying period and who during this time did not pay any contributions. There was also a violation of the principle of equality in relation to other groups of beneficiaries of pensions with regard to whom the state is responsible for the reasons that their pensions are not entirely based on contributions paid. Such concerns beneficiaries whom the former state of Yugoslavia prevented from joining the general system of old-age insurance or beneficiaries who upon the fulfilment of certain conditions had to retire early in accordance with the laws which in the past determined mandatory retirement. Even though their contributions were not paid, the legislature should

have treated these persons differently and exempted them from the pension decrease. Finally, the Constitutional Court established that the legislature also did not establish sound reasons for the different treatment of certain groups of beneficiaries of pensions whom it had exempted from the pension income decrease. The exemptions namely also included beneficiaries of pensions who, as regards the criterion of the non-payment of contributions, were in an equal position in relation to those affected by the measure of decreasing pensions.

By Decision No. U-I-146/12 the Constitutional Court reviewed the provisions according to which the employment contract of a public servant is terminated due to the fulfilment of the statutory conditions for obtaining an old-age pension. The Constitutional Court reviewed the challenged regulation from several viewpoints, with the main emphasis on an assessment of whether the regulation violated the prohibition of discrimination on grounds of age or sex. The prohibition of discrimination is a universal principle of international law. In addition to the Constitution, it is protected by a number of international instruments that are binding on the Republic of Slovenia and by EU law. In addition to the Treaty on the Functioning of the European Union, two Directives in particular were important, i.e. Directive 2000/78/EC and Directive 2006/54/EC, which are implemented into the national order *inter alia* by the challenged provisions of the Fiscal Balance Act. The Constitutional Court, therefore, considered the primary and secondary legislation of the European Union and the case law of the Court of Justice of the European Union when interpreting the challenged provisions of the Fiscal Balance Act and when reviewing their consistency with the right to non-discriminatory treatment in accordance with the Constitution. The Constitutional Court firstly reviewed if the case at issue concerned an interference with a human right. The answer was in the affirmative: Legal protection with regard to a termination of the employment contract falls within the ambit of the third paragraph of Article 49 of the Constitution. The case thus concerned an allegation of inadmissible discrimination in the exercise

of this human right. The Court found that the challenged regulation entails different treatment of public servants on grounds of their age in the event of termination of an employment contract due to the fulfilment of the conditions for obtaining an old-age pension. In accordance with such, the Constitutional Court firstly established that the main objective of the challenged measure is to ensure the sustainability of public finances. This aim (decreasing expenditures for wages in the public sector) by itself (also considering the standpoints of the Court of Justice of the European Union) is not a constitutionally admissible reason that could render discrimination admissible. However, as the regulation also aims to achieve two additional objectives (the establishment of a balanced age structure of public servants and the prevention of disputes over whether a public servant is able to perform his or her work after a certain age) that may be constitutionally admissible reasons for interferences with the right of older public servants to non-discriminatory treatment (but which by no means entail public finance measures intended to fight the crisis – in spite of the Act's title), the challenged measure passed the first stage of the proportionality test, which requires that the objective as well as the measure be constitutional and legal (the test of legitimacy). The Court then also found that the measure was appropriate and necessary for the attainment of the set objectives. Finally, it further established that it is proportionate in the narrower sense. The affected persons are namely entitled to the full amount of their old-age pension, and apart from that, the challenged regulation in fact did not introduce mandatory retirement, but merely a termination of the employment contract (which does not prevent the affected persons from finding new employment or continuing their professional activities elsewhere). The picture changes if we consider the termination of the employment contract due to the fulfilment of retirement conditions from the viewpoint of discrimination on the grounds of sex. As the conditions for obtaining an old-age pension are determined differently for men and women (which is not an issue with regard to voluntary retirement), the

measure of mandatory termination of an employment contract also treated men and women differently – such different treatment, however, entails a violation of the prohibition of discrimination on grounds of sex. As the interference with the right of female public servants was not supported by a constitutionally admissible objective, the Constitutional Court decided that such a measure was unconstitutional.

4. A short concluding comment

The common message of the cases discussed above can be summarized as follows: the principle of the adjustment of the law to social relations (as one of the principles of a state governed by the rule of law) obligates the legislature to respond to the crisis. However, this does not entail a *carte blanche* for selecting anti-crisis measures. The crisis cannot be tackled by unconstitutional means or in an unconstitutional manner. Such may reduce the effectiveness of its resolution. However, this is only on the face of it. Unconstitutional measures, even though they may seem to be effective at first glance, entail a loosening of the social cohesion, they shatter constitutional integration and contribute to (further) anomie.

SESSION III

„Principle of the constitutional loyalty: embedding Constitution in society"

20 ANI

ADOPTAREA CONSTITUȚIEI
REPUBLICII MOLDOVA


REPUBLICII MOLDOVA
Austrian Development Cooperation
IRZ
PARLAMENTUL

Aldis Lavins,
President of the
Constitutional Court of Latvia

PRINCIPLE OF CONSTITUTIONAL LOYALTY: EMBEDDING CONSTITUTION IN THE SOCIETY. THE ROLE OF THE CONSTITUTIONAL COURT

First of all on behalf of the Latvian Constitutional Court I would like to congratulate Republic of Moldova and its Constitutional Court on occasion of 20th anniversary of the Constitution. As well I would like to express my deep gratitude for the possibility to be here, to enjoy your warm hospitality and to give my presentation alongside the outstanding participants of this conference.

In my presentation I'll examine the principle of Constitutional Loyalty from the point of the Constitutional Court. I'll briefly outline the way in which the Constitutional Court, in applying exactly the principle of constitutional loyalty, implements the Constitution in a particular society and under particular social economic and political circumstances.

The Constitutional Court is not the only one implementing the Constitution. Every branch of power, every institution and also persons can be important in this.

Before I narrow my topic down to only one "embedder" - the Constitutional Court, I'll briefly:

– first, explain what "embedding Constitution in the Society" means;

– second, outline the content of the principle of constitutional loyalty.

The Constitution is embedded in society by implementing the real norms of the Constitution and the principles that follow from it in a particular society. In this process the following should be taken into consideration:

– first, the text of the Constitution (concrete norms);
– secondly, principles and values (not always defined in the Constitution *expressis verbis)',*
– thirdly, the society, in which the Constitution operates - its history, culture, traditions and the social political and economic circumstances of the particular period, as well as,
– who is performing this "embedding" in the particular case.

As regards the understanding of principle of constitutional loyalty numerous aspects should be mentioned.

Firstly, some scholars have emphasized that it is a valuable principle of all constitutions without which a constitution cannot work properly. It is a pre-condition for the effectiveness of the Constitution. The constitutions of some countries directly provide the duty to be loyal to one's state, nation, and the Constitution. The duty to be loyal to the Constitution applies to all - citizens, officials, institutions and branches of power.

With regard to citizens, the duty of loyalty has a narrow scope. An opinion exists that for the state institutions and officials the constitutional loyalty is an obligation, but for citizens - it is a right. In this context, my colleague - the former President of the Constitutional Court *Gunārs Kūtris,*has noted that everybody "should respect the Constitution that we have adopted for ourselves. It is precondition that we - our state and nation - could live happily and develop."

This is the way how the Constitution ensures to us the possibility to plan our future. Therefore, respecting the Constitution is also everybody's obligation to one's own future.

As to institutions, it is natural to expect that the justices of the Constitutional Court, in performing their functions, are loyal to the Constitution, as they have the task to safeguard it.

However, does the fact that other institutions and officials do not have the direct duty to "guard Constitution" mean that they may be disloyal? Answer is - all the state institutions should be loyal to the Constitution. This loyalty requirement derives from:

– obligations of officials;
– oaths (it does not matter whether the oath contains a promise to "observe Constitution" or to "safeguard Constitution");
– principle of the separation of power;
– principle of constitutional supremacy.

At the same time, the Constitution itself permits a certain "exception" to the principle of loyalty, it relates to amendments to the Constitution. The elaboration of amendments to the Constitution, in a certain sense, is contrary to the existing Constitution (at the first glance that seems "disloyal action"). However, the amendments, as of the moment they have been adopted in accordance with the procedure set out in the Constitution, which includes also certain requirements regarding the content of amendments, are compatible with the Constitution. The restrictions regarding the content are linked with the ensuring of the principle of constitutional stability, which at the beginning of this year were discussed by our Lithuanian colleagues assessing amendments to the Constitution.

So the main conclusion is - amendments change the text of the Constitution, but the loyalty requirement remains.

According to one of the greatest of the ancient philosophers *Aristotle* - it is enough to have loyalty to the constitution for the constitution to function in reality and for ensuring its supremacy.

Today, because of different understanding of
– what loyalty is,

– what kind of action requires and
– what restrictions imposes, as well as
– different degrees of willingness to be loyal, an additional mechanism is needed:

l) to ensure the implementation and supremacy of the Constitution, as well as,
2) to control constitutional loyalty.

Nowadays this task is usually done by the Constitutional Court.

Now let's move to the most important issue - what the Constitutional Court does in this respect.

The social political life changes. Speaking about Latvia, during the lifetime of Latvian Constitution, which is more than ninety years old (it is one of the oldest constitutions in Europe), changes have occurred both:

1) in the life of the state and
2) in the understanding of constitutional concepts and principles.

This could raise a question regarding the conformity of the Constitution with the legal reality.

A wisely and responsibly written constitution from one side, and the political economic situation and social legal reality, from other side, influences and shapes each other. The Constitutional Court balances these influences and also reveals the development of the content of the Constitution over time, it demonstrates the completeness of the Constitution - implements the Constitution in the particular environment, under the particular circumstances.

The authority of the Court is based upon the authority of the Constitution, / and the Court, in its turn, strengthens the Constitution with its decisions. The Constitutional Court, in exercising its duties, openly demonstrates its loyalty to the Constitution and at the same time, directly or indirectly, demands it from others.

The Latvian Constitutional Court has discussed loyalty to:

– the state,

– to the Constitution and
– to democratic order of the state in a number of its rulings, (1) justifying restrictions of rights or (2) demanding particular actions by the state.

The Latvian Constitutional Court, like other courts, has derived the constitutional duties of institutions and officials from the principle of the separation of powers.

The Court has repeatedly noted in its rulings that in a democratic state the principle of the separation of powers not only differentiates various branches of power, but also contains the requirement regarding their cooperation, since the aim of all branches of power is the strengthening of democracy in the interests of the people. Therefore, the principle of loyalty applies to any action taken by any branch of power.

The Constitutional Court has developed *ultra vires* constitutional doctrine, which comprises the requirement to the Cabinet of Ministers not only to abide by the mandate of the legislator, but also to abide by the Constitution and its principles.

In the case regarding the compliance of the law on national referendums with the Constitution, containing a dispute regarding procedural issues in connection with a draft law submitted by voters, the Constitutional Court:

– specified the scope of the President of the State constitutional loyalty, and
– revealed the presumption of loyalty following from the Constitution with regard to those exercising the state power.

The Court pointed out that the exercise of the state power is based upon the presumption that all state institutions comply with the Constitution and its jurisdiction, and also duly fulfil their duties. In a democratic state governed by the rule of law all institutions of state power have the duty to abide by the norms and principles of the Constitution. Moreover, whenever state institutions apply the law, it is subject to the control by the judicial power, which guarantees application of legal norms in conformity with the Constitution.

However, the connection of the principle of loyalty with the embedding of the Constitution is most precisely reflected in the relationship between the legislator and the judicial power, analyzed in the case law of the Constitutional Court.

In the first case regarding the decrease of judge's salaries, the Constitutional Court not only noted the requirement that follows from the principle of the separation of power - that the branches of power should cooperate for a shared aim - strengthening of democracy in the interests of people, but also should develop the loyalty principle further. The obligation to hear the judicial power, when dealing with issues essential for it functioning, as well as treating it with respectand true understanding, is directly linked with the requirement of loyalty.

The relationship between politics and judges is constantly changing. At the time, when, possibly, the actions by one branch of power have become

too aggressive and unsubstantiated, the Constitutional Court had to remind it of its loyalty duty and specify the actions and restrictions which followed from it. Thus, responding to actions and decisions by concrete institutions, the Constitutional Court has revealed the content of the loyalty principle and embedded the Constitution in the actual and social legal circumstances.

The Court repeatedly pointed to the requirement of loyal attitude also in a later case regarding the decrease of judges' salaries. In this ruling the Constitutional Court specified the requirement regarding the cooperation between branches of power, noting that the most appropriate and effective way for solving the problems of remuneration could be cooperation between the legislator and the Judicial Council within the scope of their competence.

The interaction between the legislator and the institution representing the judicial power - the Judicial Council - should be aimed at strengthening the democracy and the functioning of a judicial state, as well as ensuring, as effectively as possible, the right to a fair court. This points to the loyalty both as a precondition for an effective cooperation between the branches of power, as well as a principle that helps to implement the Constitution.

We are all aware of the value of the Constitution of the state - it provides peace and stability to our nations. Today, perhaps - more than ever before, we appreciate the possibility to live in peace and stability. I wish for all Ukrainians to live in peace and free of war world. So, perhaps, it is of special relevance today that everybody should respect the values ensured by the Constitution of each particular state.

The respect of compliance with the Constitution characterizes its importance in society. I'd like to see this not as an obligation, but the honor for every citizen and every institution - to comply with, to respect and to defend the Constitution, to be loyal to it.

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THE PRINCIPLE OF LOYALTY IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

I. Concept and description

Examining the issue of constitutional loyalty presumes there should be undertaken a reflection on the essence of constitutionalism itself, given that constitutional loyalty may be described as principle-value being intrinsic to all the constitutions, without it no Supreme Law, no matter how democratic it may be, cannot adequately function.[1] The Venice Commission, it its Opinion on Romania,[2] referred to a loyal cooperation between State institutions, pointing out that it "it has a functional link to the implementation of the Constitution."

[1] Erhard Denninger, "Verfassungstreue und Schutz der Verfassung" (1979) 37 VVDStRL 7; Hans Hugo Klein, "Verfassungstreue und Schutz der Verfassung" (1979) 37 VVDStRL 53, Hartmut Bauer, Die Bundestreue (J.C.B. Mohr, Tubigen, 1992), cited by Anna Gamper, in "*On loyalty and the Federal Constitution*", ICJ - journal, vol. 4, 2/2010, pp. 157-170, www.icl-journal.com.

[2] The Opinion on compatibility with constitutional and rule of law principles of Romania's Government actions in relation to other State institutions and on the Government Emergency Ordinance on modifying the Law no. 47/1992 on the organisation and functioning of the Constitutional Court and the Government Emergency Ordinance on modifying and amending the Law no. 3/2000 on the organisation and carrying out of the referendum in Romania, adopted by Venice Commission at 93rd Plenary Session (Venice, 14-15 December 2012).

Constitutional loyalty represents attachment to constitutional values, respect for the Constitution in its letter and spirit, fulfilment in good faith of the duties and respect for human rights provided by the Constitution, acting within the competences established by the constitutional text and the respect of competences regulated for all the public authorities, cooperation, consultation and fulfilment of competing competences.

When considering their importance, some constitutions provide in an express manner the moral duty of loyalty to the Constitution, in their preamble[3] or constitutional texts.[4] The concept emerges in the doctrine and judicial practice, appealing to it being a genuine call for respect of fundamental rights protected by the Constitution.

Pointing out that there is a need of returning to fundamental values, we will underline below solutions of judicial practice, in order to identify certain issues related to regulating or applying the regulations established by the current Constitution of Romania. We believe that bringing in this case-law may constitute not only a modality to identify certain "vulnerable" constitutional institutions, meaning that they determined controversies and divergences of interpretation and application, but also an occasion to reason on fundamental duties of the addressees of constitutional provisions. No matter how many amendments a constitution may have aiming at improving it, if its addressees do not manifest loyalty in relation to the provisions of the Constitution and the institution it enshrines, *i.e.* to respect it in its spirit and its principles and to apply this spirit in carrying out these principles, the aspirations referred to are

[3] For instance, France (1814 - " *Sûrs de nos intentions, forts de notre conscience, nous nous engageons, devant l'Assemblée qui nous écoute, à être fidèles à cette Charte constitutionnelle [...]),* Luxemburg (1856), China (1982), Turkey (1982) – examples mentioned by Michael Troper, Dominique Chagnollaud, *Traite international de droit constitutionelle*, Dalloz, 2012, p.285.

[4] Italy (1947), France (1852), Pakistan (1973), Rhode Island (1986), Kenya (2010), idem.

compromised. This is due to the fact that *"respecting rule of law cannot be limited only to applying explicit and formal provisions of the law and of the Constitution. This involves, also, a constitutional conduct and practice which would facilitate the compliance with formal rules by all the constitutional bodies and a mutual respect between them."*[5]

II. Enshrinement

1. National legislation

In Romania, the duty of constitutional loyalty is not established in an express manner in the Constitution, being construed by the Constitutional Court by way of interpretation of the provision of Supreme Law. The case-law of the Court evolved from a mere enunciation of the concept of *"loyalty"* and *"loyal conduct"*, to circumstantiating certain *"norms of constitutional loyalty"* deriving from a principle expressly established by the Constitution – the principle of checks and balances of State powers.[6] We will make reference to this case-law, highlighting the main rulings of the Constitutional Court, which circumstantiate the duty of a loyal conduct before the Constitution, as well as loyal cooperation between public authorities. Even though the mentioned duty is not expressly enshrined

[5] Idem, provision 72.

[6] See more on the understanding of the principle of loyal behaviour of public authorities, the Decisions no. 1.257 of 7 October 2009, published in the Official Gazette of Romania, Part I, no. 758 of 6 November 2009; Decision no. 1.431 of 3 November 2010, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2012, Decision no. 727 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012, or the Decision no. 924 of 1 November 2012 published in the Official Gazette of Romania, Part I, no. 800 of 28 November 2012, or the Decision no. 449 of 6 November 2013, published in the Official Gazette of Romania, Part I, no. 784 of 14 December 2013.

in the Constitution, the binding nature of the rulings of the Constitutional Court in their entirety, *i.e.* the unity of the reasoning and of the operative part,[7] determines the fact that those stated in the reasoning would be imposed to all the legal subjects.

2. European legislation and comparative law

The practice of the Romanian Constitutional Court is not singular; such a case-law related to a similar principle exists at the Federal Constitutional Court of Germany. This principle[8] - which imposes cooperation and mutual respect between State authorities (*Organtreue*) – has been brought forward for the first time within the procedure of solving an individual application, whose authors, reasoning on the critique of unconstitutionality of the challenged law by making reference to the so-called constitutional principle of federal loyalty (*Bundestrue*) (known as the principle of favourable conduct in relation to the Federation (*bundesfreundliches Verhalten*), which compels both the Federation and the lands to express mutual respect in their actions, they were asserting that by analogy, there exists a principle of loyalty and mutual respect between the constitutional bodies of the Federation. At that time, the Federal Constitutional Court did not answer to the question whether there is such a constitutional principle and if yes, whether it could be called upon by the author of the individual application.[9] Although, the principle is explicitly recognised by decisions delivered

[7] See Safta, M and Benke, K., *„The binding nature of the reasoning of the Constitutional Court"*, 2010, *Dreptul,* vol. 9, pp. 28-55.

[8] www.ccr.ro – excerpt from the *National report for the XV^th Congress of the Constitutional Courts, presented by the Federal Constitutional Court of Germany,* Speakers: Prof. Dr. Gertrude Lübbe-Wolff, prof. dr. h.c. Rudolf Mellinghoff, prof. Dr. Reinhard Gaier, judges of the Federal Constitutional Court.

[9] Compilation of decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* –BVerfGE 29, 221 <233>.

subsequently.[10] There has been expressed an opinion[11] that this meaning delivered by the German Federal Court to federal loyalty had made a career as "an export model"[12] being also adopted by other federal states.[13]

The same principle is stated in the case-law of the Constitutional Court of the Republic of Moldova, when analysing the concept-principle of the rule of law. Thus, it noted that *"the preamble of the Constitution and the Article 1 para. (3) of the Constitution set forth the defining elements of the State of the Republic of Moldova, which represents supreme values. The rule of law has been on the top of constitutionalising the political system. This means that politics should be bound to a legal norm that would state its scope. Given the intrinsic link between State and law, the development of public power is associated with the development of the legal system. By definition, rule of law presumes the obligativity of respecting the Constitution and the laws, as provided for by Article 7 of the Constitution [...]. A well-functioning rule of law has as an important feature the separation and cooperation of state powers, which should be expressed in the spirit of constitutional loyalty, the loyal conduct being an extension of the principle of checks and balances."*[14]

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[10] BVerfGE 89, 155 <191>; 97, 350 <374-375>; 119, 96 <122>.

[11] Anna Gamper, "On loyalty and the Federal Constitution", icj-journal, vol. 4, 2/2010, pp. 157-170, www.icl-journal.com.

[12] Hans-Peter Schneider, 'Loyalty-Solidarity-Subsidiarity. Three Principles of a Judge Made Federalism in Germany' in idem/Jutta Kramer/Beniamino Caravita di Toritto (eds), *Judge made Federalism*? (Nomos, Baden-Baden 2009) 99, 101. Similarly, Peter Häberle, *Europäische Verfassungslehre* (6th edn Nomos, Baden-Baden 2009) 4., cited in Ana Gamper, see supra 2.

[13] Jens Woelk, 'Die Verpflichtung zu Treue bzw Loyalität als inhärentes Prinzip dezentralisierter Systeme?' (1997) 52 ZÖR 527., cited in Ana Gamper, see supra 2.

[14] Judgment of the Constitutional Court of Moldova no. 7 of 18 May 2013 on constitutional review of the Law no. 64-XII of 31 May 1990 on the Government, in the wording of the Laws no. 107 and no. 110 of 3 May 2013 and of the Decrees of the President of the Republic of Moldova no. 634-VII and 635-VII of 16 May and Government Decision no. 364 of 16 May 2013 (Application no. 16a/2013).

At the European level, actually, the principle of loyal cooperation is at the ground of organisation and functioning of the European Union, provided for by Art. 4 para. (3) of the Treaty on the functioning of the EU, as follows: *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

3. Case-law of the Constitutional Court of Romania. Constitutional loyalty of public authorities

3.1. Parliament

Ruling on the cases concerning constitutional regulation of the role, organisation and functioning of the Parliament, the Court referred to its duty, as it is the case of any public authority and legal subjects, to prove a loyal constitutional conduct. A number of explanations on this duty are presented below, as resulting from the pertinent case-law of the Constitutional Court of Romania.

- **A loyal constitutional conduct entails good faith in interpreting and applying the norms that establish procedural rules on the internal work of the Parliament, in order to avoid potential deadlocks in its work.**

The Court was asked to rule on the constitutionality of the Parliament Decision no. 1 of 9 February 2012 on casting a vote of confidence to the Government. The authors of the application criticised this Decision, grounded on Art. 1 para. (5) of the Constitution of Romania: *"In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory."*, Art. 64 para. (1),

(4), (5): *"(1) The organization and functioning of each Chamber shall be regulated by its own Standing Orders. Financial resources of the Chambers shall be provided for in the budgets approved by them. [...] (4) Each Chamber shall set up Standing Committees and may institute inquiry committees or other special committees. The Chambers may set up joint committees. (5) The Standing Bureaus and Parliamentary Committees shall be made up so as to reflect the political spectrum of each Chamber."*; Art. 103 para. (2) and (3): *"The candidate to the office of Prime Minister shall, within ten days of his designation, seek the vote of confidence of Parliament upon the programme and complete list of the Government. (3) The programme and list of the Government shall be debated upon by the Chamber of Deputies and the Senate, in joint sitting. Parliament shall grant confidence to the Government by a majority vote of the Deputies and Senators"*. In the reasoning part of the application the

authors held that the Decision is vitiated by unconstitutionality entirely, as it was passed with infringements of the constitutional norms on the established procedure for the investiture of the Government, more specifically by ignoring the rules applicable to the procedure of establishing parliamentary committees and obtaining notices of the candidates for the office of minister (the lack of quorum in the committees).

Rejecting the application for unconstitutionality, the Constitutional Court recalled what it had already stated,[15] that *"there is no doubt that constitutional norms make up a unitary system allowing for the constitutional order to be accomplished. [...] Regulatory norms have to ensure on procedural level the possibility for the Parliament to put forth its view on the issues awaiting to be voted in order to be solved. At the same time, it is also related to rationalisation and efficiency of parliamentary life, regulatory norms should not allow for a sine die postponement of a parliament decision. Regulatory norms are constitutional if they ensure the normal, reasonable and accountable development of parliamentary life"*. At the same time, it made it clear that *"the right to postpone the vote is not defined nor conditioned, by a procedure or eventually by a term, its exercise continues, in the same case, the issue to be decided upon may fall into disuse. This would be another aspect when the attributions of the Chamber could not be exercised due to a procedural abuse, an aspect which is in breach of the letter and spirit of the Constitution"*. Subsequently, *"the situation when a parliamentary committee, from various reasons,[16] cannot*

[15] Decision no. 65 of 6 June 1994, published in the Official Gazette of Romania, Part I, no. 156 of 22 June 1994.

[16] Related to the reasons of MPs' absence from the sessions of the committees and chambers, there might be of interest the case-law of other Constitutional Courts. Even though they exceed the researched area this study, as an example we will mention the case-law of the Constitutional Court of Moldova, when by its Judgment no. 8 of 19 June 2012 it stated that *"61. [...] unlike unreasoned absences, parliamentary protest is eminently politically motivated, it being a method of political fight, an action of an MP or of a group of MPs, as a fightback against a cer-*

complete its work, subsequently drafting a report or an opinion cannot hinder the plenum of each Chamber from debating and directly deciding on issues within its competences. Actually, the specificity of work of a Parliament Chamber is to adopt a collective decision, with a majority voting, followed by a public debate. Any other conclusion would equal to an oversized role of the working committees of the Parliament, by conferring enhanced effects to the acts adopted by these committees – a circumstance exceeding constitutional and regulatory framework of their work – and, on the other hand, it would equal to going against the role of the Parliament as a whole in its capacity as representative body of Romanian people that benefits from the originary legitimacy, being the exponent of interests of the whole nation. Or, these hypotheses are totally unacceptable from the perspective of constitutional principles which the Court is called upon to guarantee."[17]

These reasons were associated with the following emphasis: *"interpreting and applying these norms which establish procedural rules should be always carried out in good faith, in the spirit of a loyal conduct towards the Supreme Law. In case of a contrary hypothesis, the result may be a deadlock of institution's work related to complying with constitutional duties, with negative consequences on democratic structures which the State is founded on."*

Beyond these reasons which bring forward the constitutionally loyal conduct of the Parliament, there is needed a reflection on the necessity of more precise regulations of the work of parliamentary committees, within the general work of the Parliament, which would determine the elimination of potential

tain action of the majority, it expressing an indication, with no acts of violence, of the opposition against certain acts or decisions considered illegal or contrary to the common interest, aiming at making the majority to give in." See http://www.constcourt.md/ Activitatea-jurisdictionala/ Actele-Curtii-Constitutionale/Jurisdictia-Curtii-Constitutionale-in-anul-2012.

[17] Decision no. 209/2012 on the application of unconstitutionality of the Parliament Decision no. 1 of 9 February 2012 on casting a confidence vote for the Government, published in the Official Gazette no. 188 of 22 March 2012.

deadlocks in the work of this institution, that has to meet its obligations imposed by its constitutional role of *"the supreme representative body of the Romanian people."*[18]

- **A loyal constitutional conduct implies the observance of the competences of public authorities, as resulted from the letter and spirit of the Supreme Law. The Parliament is not allowed, based on its own regulations, to censor a final and irrevocable judgment, which gained a res judicata authority.**

When solving a legal conflict of constitutional nature between the judiciary represented by the High Court of Cassation and Justice of the one part and the law-making authority, represented by the Senate of Romania, of the other part,[19] the Court held that constitutional loyalty should be also manifested in Parliament's relations with other public authorities, whose competences have to be respected, too. In this context, the Court noted that by bringing up for discussion, within plenary proceedings of the Senate, a final and irrevocable judgment, a judgment which ruled as incompatible the condition of a senator, the discussion being followed by the negative vote on enforcing this judgment: *"The Senate acted as a higher court, which affects the fundamental principle of the rule of law, i.e. the principle of checks and balances of legislative, executive and judiciary within a constitutional democracy, provided for by Art. 1 para. (4) of the Supreme Law."* The Court noted and held that *"the thesis under which a Chamber of the Parliament may – by virtue of its own regulatory provisions – censor in every way a final and irrevocable court judgment, which was granted a res judicata authority, this*

[18] Art. 61 of the Constitution.

[19] Decision no. 972 of 21 November 2012 on the application lodged by the Superior Council of Magistrature concerning a legal conflict of constitutional nature between judiciary represented by the High Court of Cassation and Justice, of the one part and the law-making authority, represented by the Senate of Romania, of the other part, published in the Official Gazette of Romania, Part I, no. 800 of 28 November 2012.

thesis equals to transforming this authority into judicial power, concurrent with law courts with regards to justice administration. Legitimising such an act would have as an effect the acceptance of the idea that in Romania there are people/institutions/ authorities for whom the judgments delivered by the courts provided for by the Constitution and by the law are not legally binding, who are thus above the law. Or, such an interpretation of the provisions referring to regulatory autonomy is in obvious contradiction with Art. 1 para. (4), Art. 16 para. (2), Art. 61 para. (1), Art. 124 and Art. 126 para. (1) of the Constitution." Following the reasons which grounded the founding of legal conflict of constitutional nature, there was stressed the importance, for a well-functioning rule of law, of the cooperation between state powers, *"which should be expressed in the spirit of norms of constitutional loyalty, it being a guarantee of the checks and balances principle in the State."*

- **The duty of constitutional loyalty demands from the legislature not to pass norms contrary to what was ruled by the Constitutional Court, by this being attempted to uphold legislative solutions affected by issues of unconstitutionality.**

Constitutional loyalty equally concerns the relations of the Parliament with the Constitutional Court. Even though the law does not provide for coercion mechanisms aimed at enforcing the rulings of the Constitutional Court, it neither provides for a prohibition for the Parliament to pass norms with an identical or similar content with those found by the Constitutional Court as unconstitutional. However, loyalty to constitutional norms renders such a conduct unconceivable. Facing such situations of disregard for its rulings, when delivering on applications on unconstitutionality, the Constitutional Court sanctioned them by finding unconstitutional the normative acts passed in this manner. Therefore, the Court found[20] unconstitutional the provisions of the

[20] Decision no. 1018 of 19 July 2010, published in the Official Gazette of Romania, Part I, no. 511 of 22 July 2010.

Law on integrity of employees in public office and high ranking officials, on amending and supplementing the Law no. 144/2007 on setting up, organisation and operation of the National Agency of Integrity, as well as on amending and supplementing other normative acts, an act which took up provisions found unconstitutional. On this occasion, the Court held that *"the adoption by the law-maker of certain norms contrary to a ruling of the Constitutional Court, which tends to uphold the legislative solutions affected by issues of unconstitutionality, infringes upon the Supreme Law. Or, in a rule of law, as Romania is proclaimed in the Art. 1 para. (3) of the Constitution, public authorities do not enjoy any autonomy in relation to the law, the Constitution establishing by Art. 16 para. (2) that no one is above the law, and by Art. 1 para. (5) whereby the observance of the Constitution, its supremacy and the laws shall be mandatory."*

Further, facing situations of perpetuance of certain legislative solutions found as unconstitutional, the Court also delivered on its competence to find their unconstitutionality, which means – both quantitatively and qualitatively – more than a mere finding of unconstitutionality of legal provision or provisions challenged at the Court. Constitutional review therefore transcends the strict limits of applications lodged with the Court, aiming at cleaning up the legislative system from those provisions that take up legislative solutions found as unconstitutional. Therefore, noting that following the application lodged with the Constitutional Court on the unconstitutionality of the Law on amending para. (1) of the Art. 27 of the Law no. 47/1992 on the organisation and operation of the Constitutional Court, and prior to being delivered a ruling on this application, the Government passed an Emergency Ordinance comprising a sole article which provided for an identic legislative solution,[21] the

[21] There shall be noted that in the Romanian legal system, emergency ordinances are to be applied immediately, entering into force only after being lodged with the Parliament and published in the Official Gazette of Romania.

Court found unconstitutional the law which was the subject of the application, this law providing for the elimination of the Court's competence to rule on the constitutionality of Parliament decisions. At the same time, the Court noted – concerning the subsequent emergency ordinance, which formally was not subject to constitutional review – that subsequent acts of primary regulation cannot maintain the normative content of an unconstitutional legal norm and thus forming an extension of its existence.[22] The Court stressed in its ruling that the solution chosen by the Government to pass, in a short time prior to the ruling of the Constitutional Court being delivered on the constitutionality of the Law on amending para. (1) of the Art. 27 of the Law no. 47/1992, an emergency ordinance that takes up in its entirety the normative content the criticised law, brings into discussion of the unconstitutional and abusive conduct of the Government towards the Constitutional Court.

- **Constitutional loyalty assumes that interpretation and application of Parliament's acts is carried out in good faith, respecting the role of this authority in a state governed by the rule of law.**

Certainly, constitutional loyalty should also exist in the way there is perceived and interpreted the will and work of the Parliament, as it is reflected in the decisions it issues. This implies the respect for the institutions and good faith in relation to them. In this regard, examining criticism on this issue, actually there was attempted to prevent potential disregards by the Parliament of a ruling of the Constitutional Court delivered in line with the competence provided for by the Art. 146 letter i) of the Constitution, the Court recalled that *"a Parliament decision like any other legal act, has to be interpreted and applied in good faith and in the spirit of loyalty to the Supreme Law."*[23]

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[22] Decision no. 1.615 of 20 December 2011, published in the Official Journal of Romania, Part I, no. 99 of 8 February 2012.

[23] Decision no. 734 of 24 July 2012 on the application of unconstitutionality of the provisions of Art. 3 of the Parliament Decision no. 34 of 6 July 2012 on establishing the subject matter

Similarly, the Constitutional Court rejected the application on the Senate Decision no. 38/2012 on establishing the Inquiry Committee on the signalled abuses in the work of public authorities and institutions in case of the vote within the referendum of 29 July 2012,[24] criticised from a perspective of a similar interpretation, which was opening the way for an eventual interference of the Parliament in the work of the Public Ministry. The Court noted that the criticised decision contains no implicit or express reference to the work of judicial authority, so that the work of the inquiry committee is bound to the constitutional limits of Art. 111. In this regard, the draft of the decision has enclosed the reasoning briefing note, which shows in an express manner, that this inquiry committee *"does not aim at inquiring prosecutors, but to check the notifications of citizens and their authenticity"*, which means that those invited for depositions are citizens who were subject to judicial inquiry. In this way – the Court showed that –*"there is conferred substance to parliamentary control, an essential guarantee of the fundamental principle enshrined in Art. 61 para (1) of the Constitution, which says that the Parliament is the representative body of the Romanian people. Sanctioning eventual abuses of the judicial bodies in handling the cases falls under the competence of the Superior Council of Magistracy, in line with Art. 134 para (2) of the Constitution or under the competence of law courts (malfeasance while in office or related to the job or which hinders the administration of justice), depending on the case."* Though in order to prevent any possible interpretation contrary to the spirit of the Constitution, the Court recalled at the end of its judgment *"the importance of the general constitutional principle of loyal conduct, a principle which derives from the provisions of the Art. 1 para. (4) of the Constitution and is guaranteed by paragraph 5 of the same constitutional article."* As a consequence, the Court found

and date or the national referendum on removing the President of Romania, published in the Official Gazette of Romania, Part I, no. 516 of 25 July 2012.

[24] Published in the Official Gazette of Romania, Part I, no. 699 of 11 October 2012.

that *"it is mainly public authorities that are under the duty to apply and respect it in relation to the values and principles of the Constitution, including in relation to the principle enshrined in Art. 147 para. (4) of the Constitution referring to the general binding nature of the decisions of the Constitutional Court."*

3.2 The President of Romania

The competences of the President of Romania and his duty of a loyal conduct towards the Supreme Law were analysed particularly within legal conflicts of constitutional nature, conflicts which occurred between him and the Prime Minister. The Court held in this regard that ***"institutional relations between the Prime Minister and the Government, of the one part and the President of Romania, of the other part, should operate under the constitutional principle of loyalty and cooperation, aiming at fulfilling the competences distinctly regulated for each authority,"*** at the same time identifying solutions in the spirit of these norms, as follows:

- **The procedure of appointing ministers assumes a loyal cooperation between the President of Romania and Prime Minister. The President of Romania, with no veto power, may extend a reasoned request, for a single time, to the Prime Minister, to undertake a new proposal of appointing another person for the office of minister, the grounds of the request of the President of Romania not being subject to censorship by the Prime Minister.**

The procedure of appointing ministers, regulated by Art. 85 of the Constitution, did generate such legal conflicts of constitutional nature, determined by the lack of clear provisions on the situation when the President of Romania declines the appointment of a minister. Ruling on the request to solve a legal conflict of constitutional nature between the President of Romania and the Government of Romania, lodged by the Prime Minister, the Constitutional Court held: *"institutional relations between the Prime-Minister and the Government should*

operate within the constitutional framework of loyalty and cooperation, for the fulfilment of the constitutional competences distinctly regulated for each authority; cooperation between authorities is a necessary and essential condition for well-functioning of state public authorities."[25]

Delivering a solution for the legal conflict of constitutional nature determined by the refusal of the President to follow the proposal of the Prime Minister concerning an appointment for the office of justice minister, the Court examined the meaning of the provision of Art. 85 para. (2) of the Constitution *"in compliance with the letter of the text, as well as with the basic principles and with the spirit of the Supreme Law."* Following this request for interpretation, it established the procedure to be followed: *"When applying Art. 85 para. (2) of the Constitution, the President of Romania enjoying no veto power, may ask the Prime Minister in a reasoned request, only once, to submit a new proposal of appointment to the office of Prime Minister of another person."* The Court also pointed out that *"the reasons of the President of Romania shall not be censored by the Prime Minister,* [and] *with regards to the possibility of the Prime Minister to reiterate the first proposal, the Court finds that such a possibility is excluded by the very fact that the proposal was not accepted by the President of Romania. Therefore, the Prime-Minister is under the duty to propose another person for the office of prime minister."*[26]

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[25] Decision no. 356 of April 2007, published in the Official Gazette of Romania, Part I, no. 322 of 14 May 2007.

[26] Decision no. 98 of 7 February 2008, published in the Official Gazette of Romania, Part I, no. 140 of 22 February 2008; when ruling on this, the Court noted that *"with regards to the number of cases when the President of Romania may ask the Prime Minister for another nominalization for the vacant office of a minister, the Court found that in order to prevent an institutional deadlock in the law-making process, the constituent legislator provided in the Art. 77 para. (2) of the Supreme Law for the right of the President to request from the Parliament the re-examination of a law prior to its promulgation, only once. The Court notes that this solution has a constitutional value of a principle in solving legal conflicts between two or more public authorities which have conjunct competences in adopting certain measures provided for by the Supreme Law and that*

- **The decision related to Romania's representation at the European Council has to be grounded on the loyal cooperation of the President, Prime Minister and Parliament. The President of Romania attends the reunions of the European Council in his capacity of head of state, though he may delegate this duty, in an express manner, to the Prime Minister. – This appreciation, in concreto, has to meet certain objective criteria.**

The attendance to the European Council has determined a series of conflicts between the two public authorities, and in its rulings the Court made an appeal to the principle of constitutional loyalty. Thus, finding a legal conflict of constitutional nature between the Government, represented by the Prime Minister, and the President of Romania, the Court held that *"in exercising his constitutional competences, the President of Romania attends the reunion of the European Council as head of state. This competence may be delegated by the President of Romania, in an express manner, to the Prime Minister."* At the same time, the Court stressed that, *"in fulfilling their competences, public authorities shall be preoccupied by the well-functioning of the rule of law, thus being under the duty to cooperate in the spirit of the norms of constitutional loyalty."*[27]

Developing this reasoning in another case,[28] the Court stated that *"such a power of appreciation of the President of Romania is not unlimited or arbitrary, but the appreciation in concreto should take into account certain objective criteria, as*

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this principle has a general application in similar cases. Applied to the process of a Government reshuffle and the appointment of new ministers in case of vacant offices, this solution eliminates the deadlock that would be generated following an eventual repeated decline by the President to appoint a minister at the proposal of the Prime Minister."

[27] Decision no. 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012.

[28] Decision no. 449 of 6 November 2013, published in the Official Gazette, Part I, no. 784 of 14 December 2013.

follows as: (1) the best placed public authority in relation with the subjects approached within the European Council, (2) the position of the President of Romania or that of Prime Minister on those subjects should be legitimated by a concordant point of view with that of the Parliament or (3) the difficulties implied by the duty to implement those established at the European Council. The political decision of delegating the competence of attending the reunions of the European Council should take into account the above mentioned, aiming at reaching a consensus between the involved public authorities – the President of Romania, respectively the Prime Minister – and the decision adopted should take into account the constitutional principle of loyal cooperation."

Further, under the conditions of him being sworn in with a new legal conflict of constitutional nature that raised the same issue, the weight of the reasoning of the decision delivered by the Constitutional Court moved to stressing the principle it has previously called upon. The Court stated that *"even there was not proved the existence of a situation that would comprise the features of such a conflict, the Court stresses in this case, too, the binding nature of a loyal cooperation of public authorities. Assessing the best placed public authority at a given moment towards the issue of the reunion of the European Council and the eventual refusal of delegating the Prime Minister should become the subject of discussions and negotiations between the two involved parties, submission of arguments and identification of best solutions, in the spirit of a loyal cooperation."*[29]

- **The principle of constitutional loyalty demands cooperation, constitutional dialogue and consensus in the procedure of signing/ countersigning the decrees of the President of Romania.**

The signing/countersigning of the decrees of the President and the ruling of the Court on the competences of the public authorities involved determined new developments of the principles of constitutional loyalty. Delivering on the

[29] Decision no. 441 of 9 July 2014, unpublished on that date.

application concerning another legal conflict of constitutional nature between the same authorities, related to constitutional provisions on the same issue, the Court developed the mentioned principle, noting that applying it *"represents a bivalent legal operation, being equally opposable to the two public authorities involved in the procedure of issuing the decree on conferring decorations titles of honour [...]. Therefore, based on this principle, on the one hand, the initiator of the decree – the President of Romania – has the possibility to consult with the Prime Minister on reaching a consensus between the two top power positions prior to requesting the countersignature of the Prime Minister concerning the decree on conferring decorations titles of honour. On the other hand, although no constitutional provision binds the Prime Minister to make known the reasons underpinning the refusal of countersigning the mentioned decree, nevertheless, in the spirit of the same constitutional principle, it would be useful that the Prime Minister would openly cooperate with the President, including by initiating consultations with him. [...] under the conditions where neither consultations were initiated by the President or the Prime Minister, nor the refusal to countersign was reasoned, the initiator of the decree has the possibility, at his turn, to proceed to a constitutional dialogue with the Prime Minister aiming at making clear the reasons underpinning the refusal to countersign the mentioned decree and at reaching a consensus, so that there would not be lodged an application with the Constitutional Court, the latter not having the competence to mediate such a consensus."*[30]

In our view, an eventual revision of the Constitution would have to define in a more clear manner the competences of the two mentioned authorities and the relationships between them within various procedures implying the exercise of correlative competences. The opinion of the Venice Commission recommends in this regard: *"the constitutional reform should clarify at least the respective*

[30] Decision no. 284 of 21 May 2014, published in the Official Gazette of Romania, Part I, no. 495 of 03 July 2014.

competences of the President and those of the Prime Minister, particularly in cases where there issues emerged, particularly in foreign policy and relations with the European Union."

3.3 The Government

The Court has repeatedly called for the respect of the principle of constitutional loyalty, in situations where the Government disregarded, be it clear provisions of the Constitution or, in most cases, its spirit. The Court ruled in this regard, for instance, analysing the institution of the assumption of responsibility by the Government on a draft law or legislative delegation, which we are going to refer to below.

- **In the spirit of the norms of constitutional loyalty, the institution of responsibility assumption by the Government on draft law should be interpreted and employed with respect for the role of the Parliament – the sole law-making authority.**

The provisions of Art. 114 of the Constitution, which is essential for this institution, read as follows: responsibility assumption by the Government is carried out *"before the Chamber of Deputies and the Senate, in joint sitting";* the Government shall be dismissed if a motion of censure, tabled within three days from the submission of the draft law, has been voted in line with the provisions of Article 113, i.e. with a majority vote of the MPs and senators; if the Government has not been dismissed, the draft law submitted, amended, or supplemented, as the case may be, with the amendments accepted by the Government, shall be deemed as passed. The Constitution does not establish, hence, in Art. 114, any condition on the nature of the draft law, its structure, the number of draft laws the Government may assume responsibility for in the same day, or in another given period of time, or concerning the moment when the Government decides to assume responsibility. Subsequently, it was the role of the Constitutional Court, in its capacity as guarantor of Constitution's supremacy to elucidate, by interpreting the provisions of the Supreme Law, the rules applicable for this situation.

Without examining as a whole the development of the case-law of the Constitutional Court of Romania in this regard,[31] we only mention the Decision no. 1655/2010,[32] where the Court compiled those previously held on the respective procedure, noting, from the interpretation of Art. 114 of the Constitution that, in order to be in line with constitutional provisions, responsibility assumption

[31] See M. Safta, *Angajarea răspunderii Guvernului asupra unui proiect de lege. Jurisprudența Curții Constituționale în materie,* in "Buletinul Curții Constituționale" no. 2/2010

[32] Official Gazette of Romania of 3 November 2010, Part I, no. 51 of 20 January 2011.

by the Government should meet a number of criteria, as follows: *„the existence of an urgency in passing the measures contained in the law the Government assumed responsibility for; the need for the regulation to be passed with maximum celerity; the importance of the regulated field; the immediate enforcement of the respective law."* The Court explained[33] its approach in identifying these rules, noting that *"the legitimisation of such an act* (A/N responsibility assumption by the Government with the infringement of the mentioned conditions) *with the argument that Art. 114 of the Constitution makes no distinction between the possibility of the Government to assume responsibility, an argument grounded on the idea that everything that is not prohibited is allowed, could lead in the end to an institutional deadlock, i.e. the Parliament thus being unable to legislate – to exercise its fundamental role of sole law-making authority."*

Even under the conditions of establishing certain criteria in this regard, the institution of responsibility assumption by the Government was employed excessively, beyond the spirit of the Constitution, which ultimately led to there being invoking the duty of constitutional loyalty of the Government. Thus, in a decision[34] the Court added, beyond the mentioned criteria of formal nature, that in exercising the option concerning the procedure to be followed in passing a normative act there should be considered the fact that certain fields of law-making, due to the peculiarity (the electoral one, for instance), it recommends for the regulations in the field to be debated in the Parliament, *"but not passed in a procedure of exceptional nature, where the Parliament is avoided and compelled to a tacit vote on normative content which is under, almost, exclusive appreciation of the Government. The mechanism of no confidence vote, regulated by the Art. 114*

[33] Decision no. 1431 of 3 November 2010, Official Gazette of Romania, Part I, no. 758 of 12 November 2010.

[34] Decision no. 51 of 25 January 2012, Official Gazette of Romania, Part I, no. 90 of 3 February 2012.

of the Constitution, may have a delusional nature when the Government has a safe majority in Parliament, the passing of the law which the Government is assuming responsibility for becomes under these conditions a pure formality." These reasons were associated with the stressing of the importance, for a well-functioning of the rule of law, *"of a cooperation between state powers, which should be expressed in the spirit of the provisions on* ***constitutional loyalty,*** *much more when fundamental principles of democracy are at stake."*

Infringement of this principle, also related to the enforcement of Art. 114 of the Constitution, was found by the Court while examining responsibility assumption by the Government for the draft law on national education, when solving a legal conflict of constitutional nature triggered by the halt of legislative procedure from the Senate and responsibility assumption by the Government over this draft law. Therefore, the Court found[35] that responsibility assumption by the Government for the draft law on national education, being under parliamentary debate, respectively in the Senate, in its capacity as decision-making Chamber, is unconstitutional. In its reasoning, the Court stressed *"the importance, for a well-functioning of the rule of law, of cooperation between state powers which should be expressed in the spirit of* ***constitutional loyalty.****"* Respecting this, would have prevented the Government from assuming responsibility on normative act under full legislative procedure in the Parliament.

Situations brought forward are meant to draw attention to certain lacks, in their regard there being attempted to find a solution at the time when initiatives of revising the Constitution were undertaken. Thus, by a sole article, the provision 102 of the legislative proposal on revising the Constitution there was amended para. (1) of Art. 114 of the Constitution, as follows: *"(1) The Government may assume responsibility before the Chamber of Deputies and the Senate, in joint sitting,*

[35] Decision 1431 of 3 November 2010, published in the Official Gazette of Romania, Part I, no. 758 of 12 November 2010.

upon a programme, a general policy statement, or a bill." The Court delivered the following[36] on this legislative solution: *"by limiting quantitatively the possibility of the Government to use this procedure within one parliamentary session, there are eliminated the premises of abusive exercise on behalf of the Government of the constitutional right to assume responsibility before the Parliament, and with regards to the law-making authority, it can exercise its competence in full, as provided for by Art. 61 para (1) of the Constitution."* Ruling on another initiative to revise the Constitution,[37] the Court recalled a recommendation proposed by the Decision no. 799/2011 on amending the provisions of Art. 114 para. (1) of the Constitution, in terms of limiting the subject matter which the Government may assume its responsibility for upon a programme, a general policy statement or a single draft law that would regulate unitary social relations concerning one single field. By its decision, the Court showed that "lacking *such a conditioning on the field of regulation of the draft law would lead to eluding constitutional provisions proposed for amendment, namely the possibility of assuming responsibility only once in a session, as they grant the possibility for the Government to assume responsibility within a draft law, which formally meets the constitutional criteria, but which by its complex structure and an heterogeneous content would incorporate regulations from very different social fields."* Considering the above, with a unanimous vote, the Court recommended reformulating the proposed amendments on the Art. 114 para. (1) of the Constitution.

- **The norms of constitutional loyalty make it binding for the procedure of legislative delegation to maintain its exceptional nature, so that it would not transform itself into an ordinary legislative procedure.**

[36] Decision no. 799 of 17 June 2011 on the draft law concerning the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

[37] Decision no. 799 of 17 June 2011 on the draft law concerning the revision of the Constitution, published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

The institution of legislative delegation (enshrined in Art. 115 of the Constitution), which under certain conditions may serve as a ground for the Government to pass norms of legislative nature, is another constitutional institution which, throughout the years, raised issues of interpretation and enforcement, as well as decisions delivered by the Constitutional Court which sanctioned conducts contrary to the Constitution. Often, the Constitutional Court intervened in order to temper the practice of transforming an exceptional legislative procedure in an ordinary one.[38] In a more or less direct manner, the Court called for the duty of constitutional loyalty, describing Government's conduct as abusive, it thus infringing upon the competence of other public authorities.

We recall as an example here the situation when the Government (while at the Constitutional Court was lodged an application on the unconstitutionality of Government Emergency Ordinance no. 37/2009 on certain measures concerning the improvement of work of public administration – application with its due date for 7 October 2009), adopted on 6 October 2009 the Government Emergency Ordinance no. 105/2009, lodged in the same day with the Senate, as the first notified Chamber, and published on 6 October 2009 in the Official Gazette of Romania, Part I, no. 668. Following the latter emergency ordinance, the Government intervened under two aspects concerning the Government Emergency Ordinance no. 37/2009, approved in the Parliament by the law subject to constitutional review: a) in the content of the Government Emergency Ordinance no. 105/2009 took over entirely regulations of the Government Emergency Ordinance no. 37/2009; b) it repealed this emergency ordinance by Art. XIV para. (1) of the Government Emergency Ordinance no. 105/2009.

[38] K.Benke, *„Dezvoltări recente în jurisprudența Curții Constituționale a României în privința limitelor de care este ținut Guvernul în adoptarea ordonanțelor de urgență"*, in *"Buletinul Curții Constituționale"* no. 1/2009.

Noting that *"by the employed legislative proceeding, the Government determined that the provisions of the repealed normative act which was declared unconstitutional – the Government Emergency Ordinance no. 37/2009 – would continue to produce legal effects, as a new act – the Government Emergency Ordinance no. 105/2009 – which, as explained, took over entirely with certain insignificant amendments, the initial provisions in the field and such a situation "challenges the constitutional conduct of legislative nature of the Executive before the Parliament, and subsequently before the Constitutional Court."* By its Decision no. 1629/2009,[39] the Court declared unconstitutional these legal provisions.[40]

In another decision, the Court found that *"the solution the Government chose to pass, in a short time prior to the ruling of the Constitutional Court on the constitutionality of the Law on amending para. (1) of the Art. 27 of the Law no. 47/1992, an emergency ordinance which takes over entirely the normative content of the criticised law, raises the issue the unconstitutional and abusive conduct of the Government towards the Constitutional Court."*[41]

The Opinion of the Venice Commission we referred to above, in its para. 36 notes: *"the use of government emergency ordinances to immediately bring into force a Law which is being examined by the Constitutional Court amounts to an abuse of*

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[39] Published in the Official Journal of Romania, Part I, no. 28 of 14 January 2010.

[40] The decision refers to Art. I, provisions 1-5 and 26, Art. III, Art. IV, Art. VIII and the Annex no. 1 of the Government Emergency Ordinance no. 105/2009 on certain measures in the field of public service, as well as on strengthening managerial capacity on the level of decentralised public services of the ministries and other bodies of central public administration of the territorial administrative units and of other public services, as well as on regulating certain measures on the office of dignitary of the central and local public administration, chancellery of the prefect and the office of the locally elected representatives.

[41] Decision no. 272 of 9 July 2012 on the application for unconstitutionality of the Law on amending para. (1) of Art. 27 of the Law no. 47/1992 on the organisation and operation of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012.

the instrument of government emergency ordinances and is not in conformity with Supreme principles of correctness derived from the rule of law and the separation of powers." Therefore, the para. 79 of the Opinion recommends: *"The issue of government emergency ordinances should be addressed. One of the reasons for the excessive use of such ordinances (140 emergency ordinances in 2011) appears to lie in the cumbersome legislative procedures in Parliament. Reform of Parliament should therefore be on the agenda. [...] By streamlining the legislative procedure and through recourse to delegated legislation, the need for government emergency ordinances should nearly disappear; paragraphs 4 to 8 of Article 115 of the Constitution on government emergency ordinances could become redundant. At the very least, the incentive to use these ordinances so frequently, i.e. the continued validity of the ordinances if Parliament does not contradict them explicitly, should be removed by introducing a fixed deadline for the approval of Parliament."*

3.4 Law courts

The Constitutional Court also called upon the same principle concerning law courts and their duties in exercising competences provided for by the Constitution.

- **Constitutional loyalty imposes on the law courts the duty not to create norms by jurisprudential way, thus substituting themselves to the legislator.**

Therefore, the Court held: *"delivering on appeals in the interest of law grounded on the non-unitary practice of the law courts that grants certain salary rights to judges, prosecutors, other magistrates, financial judges, financial prosecutors and financial inspectors or to auxiliary specialised personnel of courts and prosecutor's offices, the High Court of Cassation and Justice did not limit itself to making clear the meaning of certain legal norms or their scope. The High Court of Cassation and Justice, having called upon issues of legislative technique – disregard of the provisions of the Law no. 24/2000 – or issues of unconstitutionality – infringement of the provisions*

of delegated legislation – re-entered into force norms that ceased to be applicable, being repealed by normative acts of the law-making authority. However, such a legal undertaking can be carried out only by the law-making authority (Parliament or Government, as the case may be), the sole competent authority to decide on solutions related to this issue."[42]

In this decision, the Court also referred to other cases it declared unconstitutional certain legal provisions which *"are likely to lead to the competences of the law courts being exceeded, which could be detrimental to the law-making authority."* In this regard, there were declared unconstitutional,[43] among others, the provisions of Art. 27 para. (1) of Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination,[44] to the extent to which they may be understood as saying that law courts are competent to annul or to refuse applying certain laws and regulations, considering them discriminatory, and to replace them with norms created by way of jurisprudence or with provisions from other normative acts. *"Taking into consideration the provisions of Art. 27 para (1) of the Ordinance, which institute the right of the person who is considered discriminated to ask in the court, among others, for the previous situation to be restored and for the created situation as a result of a discrimination to be annulled, consequently of the provisions of discriminatory nature, the law court may understand – and this is what occurred in one of the cases examined – that it has the competence to annul a legal provision which it considers discriminatory and, aiming*

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[42] Decision no.838 of 27 May 2009 on the application lodged by the President of Romania, Mr Traian Băsescu concerning a legal conflict of constitutional nature between judiciary, represented by the High Court of Cassation and Justice of the one part, and the Parliament of Romania and Government of Romania of the other part – published in the Official Gazette of Romania, Part I, no. 461 of 3 July 2009.

[43] Decision no. 818 of 3 July 2008, published in the Official Gazette of Romania, Part I, no. 537 of 16 July 2008.

[44] Republished in the Official Gazette of Romania, Part I, no. 99 of 8 February 2007.

at redressing the imbalanced situation between legal subjects and at instituting itself a non-discriminatory legal norm or applying provisions of normative acts applicable to other legal subjects, which served as a basis for the person who went to the court. Such an understanding of ordinance's provisions, by which the law courts are conferred the competence to put down legal norms established by law and to create instead other norms or to substitute them with norms of other normative acts, is obviously unconstitutional, as it is in breach of the principle of power separation, enshrined in Art. 1 para. (4) of the Constitution, as well as in Art. 61 para. (1) which provide that the Parliament is the sole legislative authority of the country. By the virtue of mentioned constitutional texts, the Parliament – and by legislative delegation, based on Art. 115 of the Constitution – the Government have the competence to establish, amend and repeal legal norms of general applicability. Law courts do not have such a competence, their constitutional mission being to administer justice – Art. 126 para. (1) of the Supreme Law –, i.e. to solve, by applying the law, litigations between legal subjects on the existence, scope and exercise of their subjective rights."

3.5 Constitutional loyalty and political statements of public authority representatives.

There were cases where the Constitutional Court used in its decisions a reasoning we may call as "preventive", thus drawing attention to the need of a conduct in line with the Constitution in that given situations, as well as to the consequences it would have in case this conduct is not the prescribed one. It is another way the Constitutional Court of Romania sought to fulfil its role of guarantor for the supremacy of the Constitution, and to present the values the Supreme Law imposes. Actually, certain applications on legal conflicts of constitutional nature between public authorities, even if they did not underpin a solution of finding such conflicts, they pointed out to existent dysfunctionalities between state powers and their representative authorities, thus giving rise to the above mentioned reasoning. This also includes the ***public declarations*** of

the various public authorities' representatives, which should also abide by the principle of constitutional loyalty.

- **Constitutional loyalty demands that in its work of fulfilling the constitutional mandates they were granted, representatives of public authorities, by their views expressed, would avoid there being created conflictual conditions between authorities. Their constitutional statute and role in a constitutional democracy make it binding for them to adequately choose their forms of expression, so that it would not form elements that generate legal conflicts of constitutional nature between public authorities.**

The Court also delivered on that in its Decision no. 53/2005[45] on the application to solve a legal conflict of constitutional nature between the President of Romania and the Parliament, lodged by the President of the Deputies Chamber and by the President of the Senate. Finding, in this context, that the statements of the President of Romania carry a nature of political opinions, expressed on the ground of Art. 84 para. (2) corroborated with Art. 72 para. (1) of the Constitution, which did not give rise to a legal conflict of constitutional nature between public authorities in the meaning of Art. 146 letter e) of the Constitution, the Court noted nevertheless that *"public statements of the representatives of various public authorities, in relation to the context they are made and to their concrete context, may create situations of confusion, insecurity or tensions too, which subsequently could generate conflicts between public authorities, even conflicts of constitutional nature."* Consequently, the Court held that *"fulfilling their constitutional mandates, the representatives of public authorities, by the virtue of positions they express, are under the duty to avoid creating conflictual situations*

[45] Published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005; in this regard, see also the Decision no. 284 of 21 May 2014, published in the Official Gazette of Romania, Part I, no. 495 of 03 July 2014.

between powers. The constitutional statute of the President, as well as their role in a constitutional democracy binds them to choose adequate forms of expression, so that [...] it would not constitute elements that generate legal conflicts of constitutional nature between public authorities."

Similarly, in its Decision no. 435/2006[46] on the application lodged by the President of the Superior Council of Magistrature on solving the legal conflict of constitutional nature between judiciary, of the one part and the President of Romania and the Prime Minister of the other part, the Court found that the declarations of the President of Romania and of the Prime Minister did not give rise to a legal conflict of constitutional nature between public authorities – the judiciary of the one side and the President of Romania and Prime Minister of the other side – in the understanding of Art. 146 letter e) of the Constitution and thus it ruled the following: *"obviously, the freedom of expression and critique is indispensable to constitutional democracy, but it has to be respectful, even when it expresses a firm and critical attitude. Given the independence of judiciary is guaranteed by the Constitution, the Court considers it imperious for magistrates to enjoy effective protection, in a constitutional meaning, against attacks and denigration of any nature, all the more so as magistrates, who are deprived of the right of reply related to their work of restoring legal order, should be able to rely on the support of other state powers – the legislative and executive powers."*

4. Conclusions

We made reference, mostly, to those decisions where the duty of loyal constitutional conduct was enforced *expressis verbis*. We examined situations where the provisions of the Constitution are not clear enough, or interpretable, situations which do not enjoy express constitutional regulations, or where constitutional provisions were not respected. In such situations, the principle of

[46] Published in the Official Gazette of Romania, Part I, no. 576 of 4 July 2006.

constitutional loyalty is the "key" to solving eventual conflicts and to identify solutions in the spirit of the Supreme Law.

The practice also shows situations where neither the haziness, nor the infringements of the letter of the Constitution are at issue. A constitutional conduct deprived of loyalty may be also identified in cases where only the letter of the Supreme Law is respected, disregarding the spirit of its provisions. As noted in the same Opinion of the Venice Commission (para. 74), not everything that can be done according to the letter of the Constitution is also admissible. Examining these situations and, particularly, sanctioning them is difficult, many times them being the expression of certain political conflicts.

Considering the legal force of the reasoning of the decisions delivered by the Constitutional Court, in our view, though it is not expressly enshrined in the Constitution, the principle of constitutional loyalty was "constitutionalised" by case-law, so that it may serve as a ground of finding an infringement of the Supreme Law. This is due to the fact that, at least regarding the relationships between public authorities, constitutional loyalty cannot be dissociated from the principle of powers separation in state.

Ultimately, the principle of constitutional loyalty confers firmness to the entire constitutional edifice, being a *liason* which ensures the well-functioning of public authorities in a state governed by the rule of law.

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JUDICIAL REVIEW UNDER THE NORDIC CONSTITUTIONS

First of all, let me on behalf of the Norwegian Supreme Court (and myself) congratulate the Republic of Moldova with the fact that for 20 years it has had a functioning constitution and the Constitutional Court of Moldova with its 20 years of existence as a court with its most important role in the establishment of constitutionality and rule of law in the Republic of Moldova.

The constitutions of the five Nordic countries

The title of my presentation is the constitutions in the five Nordic countries and judicial review. Seen from the outside the Nordic Countries may be seen as rather homogenous. All the five countries are small, affluent. They are all well-functioning states, placed in the northernmost corner of Europe and predominantly Lutheran. All countries are free and open, with stable democracies and the rule of law is paramount to the court. Changes of power are peaceful and the opposition and civil rights are effectively protected.

You would therefore presume that the constitutional traditions and the actual constitutions of these five countries are rather similar. But no, you will find that the constitutions are rather dissimilar when you start to study them and the same relates to the traditions of constitutional law that you find in these countries.

First of all there are differences between them with respect to **age.** The Norwegian constitution was adopted in 1814 and is 200 years old, while the Icelandic is dated 1944, the Danish 1953, the Swedish in 1974. The youngest is the Finnish, adopted in 1999. This gives a span from the world's second oldest constitution to one of the youngest and most modern ones.

The differences in **length** of those five constitutions are almost as large. If you go by the number of words the Icelandic is the shortest, just a little more than 4 000 words, while the Norwegian has about 5 500 words, and the Danish a little more than 6 000. The Swedish and Finish constitutions are both longer. The differences in length reflect variations in drafting technique used in the constitutional provisions; short abstract provisions and long, detailed ones. And there are also differences with regard to how much that is regulated in the constitutions.

In addition there are differences with regard to the **style** and **format** used. In spite of a revision in 2014 of the language used in the Norwegian constitution you can still see that it was written in the 19th century.

I'm not going into the differences of quality of the constitutions as that is difficult to measure. But if they were to be measured against the yardstick of best European practice with regard to content I think you would have to say that the five texts are of rather varying quality. The highest score will be given to the Finish Constitution, and the lowest to the Norwegian. At the same time the Norwegian Constitution has undoubtedly the highest symbolic function.Even though a rather limited number of Norwegians have read their Constitution they attach a very high value to it.

One additional observation: Norway, Finland and Iceland were all reborn as independent states in connexion with the adoption of their constitutions (in 1814, 1919 and 1944).

There also large differences between constitutional culture and tradition within the Nordic countries. Here you may see two different tendencies – one

in the two easternmost countries and another in the three other countries. But there are also differences between the countries belonging to these main groups.

There are differences with respect to the legal role of the constitutions, and how legally operative they are – to what extent they actually regulate the activities of the powers of state, and how binding they are considered as. There are also differences to which extent they give the people rights that they can be brought to the courts.

Generally speaking you may say that the legal function of the constitution has been strongest in Finland and Norway.

Furthermore we have differences in how the constitutions are interpreted in the different home countries. There is no joint tradition on the method of interpretation of constitutional law in the Nordic countries. What is most interesting is that there exist differences with respect to the relationship between law and politics in the five countries.

Their interpretability varies. In order to understand the Norwegian and Danish constitutions you must have constitutional schooling to understand what the text is all about.

As to **contents** there are also differences between the five. Of course they all regulate the three powers of state – the lawmakers, the executive power and the courts, and the distribution of powers between them, elections, citizen's rights, international cooperation, how to change the constitutions and some other matters. But also here there are many differences between them that I'm not going to use your time to mention. I'll just point to the fact that the rules on change are very different and that is virtually impossible to change the Danish Constitution.

Judicial review

None of the five constitutions provides for the establishment of a Constitutional Court. The opinion and praxis has varied in the countries with respect to whether the ordinary courts may invalidate legislation adopted by the parliament as contrary to the constitution.

Rules as well as reality vary between the Nordic countries with respect to judicial review. On the one side you have Norway where the courts were among the first in the world to practice judicial review (without any support in the constitution); staring as early as in the middle of the 19th century – inspired by the US Supreme Court. On the other extreme you have Finland where the Constitution expressly prohibited courts from performing judicial review until 1999 and where a court must find that there is an evident conflict to allow it to set aside a statute/statutory provision as in conflict with the constitution. The differences areno longer so big and in all five countries you will now find that courts perform judicial review, but there still remain differences with respect to whether this phenomenon is regulated, and how it is practiced.

The Swedish and Finish constitutions allow expressly for judicial review but differently. On the other hand in Denmark, Iceland and Norway you do not find anything in the constitutions about this, but it is considered as an unwritten constitutional principle, in Norway even as part of the constitutional customary law. (There is a proposal, however, to regulate it in the constitution).

As to practical use of the principle, the courts of Denmark, Finland and Sweden have been reluctant to perform judicial review of statutes/statutory provisions. In Denmark the principle has only been used in one – rather special – judgment by the Supreme Court handed down in 1999.

In Finland and Sweden, where the courts have not had the right to perform judicial review until more recent times, you do find a limited number of judgements where judicial review has been performed and few where statutory provisions have been set aside as contrary to the constitution. In Sweden you previously had the same restriction as in Finland, but when it was removed the number of cases increased.

Icelandic courts have practised judicial review since 1944, but the number of cases has increased starting in 1995 when human rights catalogue was included in the constitution.

Norway is the Nordic country with the longest tradition of judicial review; starting as far backas in the 1850's. However, between 1918 and 1975 you will not find any clear examples of judicial review performed by the courts. In a well-known judgment from 1976 the Supreme Court formulated criteria for the intensity of the control to be performed with respect to different categories of legislation. These criteria have been honed in later judgments. During the last ten years there has been an increase in judicial review judgments, many of them very important. In most of these cases there was a split in the parliament in connexion with the adoption of the statutes. These cases have mainly been heard by the entire Supreme Court and the court has in most of them been split – almost 50-50. The results in themselves have also been seen as controversial.

Let me however end this presentation of the differences between the Nordic constitutions, with the fact that we all presently experience changes in the situation due to the European integration through law process that presently takes place.

From a legal point of view the most important thing happening on the legal front is the impact of European law, especially the European Convention on Human Rights and EU/EEA-law. Seen from a Nordic perspective this is the largest reception of foreign law since religious law in the Middle Ages, and it has all happened very quickly – during the last twenty years. And it has an impact on the functioning of the constitutions. One of these is that the courts have been empowered to review national statutes also in relation to the European standards and to do this in harmony with the courts in Strasbourg and Luxembourg.

The European judicial review is also a reason why the constitutional review has intensified in the five countries, especially Sweden.

The European legal impact has also had the effect that many more questions that were previously solved politically or administratively are now reformulated as citizens' legal rights that are to be guaranteed by the courts.

SESSION IV

„Constitutional identity and globalization: unity in diversity”

20 ANI

ADOPTAREA CONSTITUȚIEI
REPUBLICII MOLDOVA


IRZ

Mr Marc Jaeger,
President of the General Court
of the European Union

THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE PROTECTION OF HUMAN RIGHTS

1. Introduction

With regards to our Session on *General interest – an instrument of human rights protection*: *seeking efficiency and balance*, I'd like to share with you some reflections arising from my experience of judge, before, and president, now, of the General Court of the European Union. The protection of human rights needs a permanent dialogue among different legal orders, reason why this protection is the result of the evolution and the dialogue among systems.

Thus, today, I would like to briefly describe how human rights are protected in the legal order of the EU by the European Court of Justice (ECJ) and how this protection is related to the protection afforded by the Constitutional Courts of its Member States and by the European Court of Human Rights (ECourtHR).

As you know, the European system for the protection of fundamental rights is characterized by a three-layered structure. Human rights in Europe are protected by national, supranational (EU) and international (European Convention) norms. Each layer of the multilevel architecture is endowed with a substantive catalogue of fundamental rights. It means that, in Europe, we have a multilevel protection of Human rights.

In my speech, I will focus on the protection of human rights in EU legal order, but, as I have already said, it stands to reason that, since the protection of fundamental rights in Europe is ensured through a multilevel structure in which different overlapping normative orders intertwine, it is impossible to understand a system without taking into account the others. The interaction between the systems is confirmed by the permanent dialogue between ECJ and national courts and between ECJ and ECourtHR. This dialogue generates constitutional dynamics that are largely unknown in traditional statist settings. Obviously, this dialogue has sometimes created tensions among the three systems, but if we look at the evolution of human rights in Europe over the last 50 years, I think that we can maintain that these tensions have allowed the development of the rule of law in this field.

After having recalled the evolution of the protection of human rights in EU, I shall conclude my speech with some remarks on the future of their protection, in the prospect of the EU's accession to the European Convention.

2. The evolution of the protection of human rights in European Union

As you know, the protection of human rights in EU legal order is a success story of judge-made law. It started with the famous 1969 ruling in *Stauder,* in which the ECJ assumed that fundamental human rights are enshrined in the general principles of Community law, the observance of which it ensures. It went on in the 1974, in *Nold j*udgment, where the ECJ held that in safeguarding these rights it is bound to draw inspiration from constitutional traditions common to the Member States. In further, developing its case-law on fundamental rights, the ECJ has often taken inspiration by the ECourtHR's case-law and the conception of human rights protection developed by the ECJ has been later on reflected in

the Treaty on European Union (first in Article F paragraph 2, today in Article 6 paragraph 2).

In 2000, European Parliament, the European Commission, the European Council and the EU member states have signed and proclaimed the Charter of Fundamental Rights of the European Union. The Charter has been the first official EU document to combine in a single text the whole range of civil, political, economic and social rights and certain "third generation" rights, such as the right to good administration or the right to a clean environment.

When the Charter was adopted in 2000, it was not a binding instrument. Only in 2009, with the entry into force of the Treaty of Lisbon, the Charter has become directly enforceable by the EU and national courts of Member States. Indeed, Art. 6(1) of the Treaty on the European Union (TEU) provides that: "the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights". So, there has not been direct incorporation of the Charter in the Lisbon Treaty, but the Charter is given the same legal status.

What are the legal consequences arising from the recognition to the Charter of the same value as the Treaties? The Charter constitutes primary EU legislation and, as such, it serves as a parameter for examining the validity of secondary EU legislation and national measures executing EU acts.

However, I think it is really important to highlight the field of application of the Charter. Indeed, according to article 51, the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. European institutions and Member States therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. However, the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as

defined in the Treaties. This provision implies that fundamental rights in EU legal order are limited to the field of competence of the EU. It means that the Charter is a binding instrument, but its application is limited.

Moreover, article 54 of the Charter states that it cannot: "be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein". It means that rights and liberties protected in the Charter are not absolute, but they can find a limitation.

Now, what have been the consequences of the entry into force of the Charter in the daily practice of the ECJ? I want to share some statistics with you. These statistics show the impact of the Charter in our judicial practice. The number of decisions in which the CJEU (in all its formations: Court of Justice, General

Court and Civil Service Tribunal) quoted the Charter in its reasoning, is more than quadrupled in three years. In 2013 alone, the ECJ referred the Charter more often than in the nine years from the Charter's proclamation in late 2000 to the end of 2009. These statistics show that the charter is a "living instrument" consistently applied by the ECJ. What lies ahead?

3. The accession of EU to European Convention

As you know, the accession of the EU to the European Convention has been discussed for over thirty years. This discussion famously led to Opinion 2/94, in which the ECJ held that the EC lacked the competence to accede. In addition to this hurdle found in EU law, the European Convention was not open to international organisations, but only to state parties. With the entry into force of the Lisbon Treaty and Protocol 14 to the European Convention, these main obstacles to accession have been removed. Article 6(2) TEU not only gives the EU the competence to conclude an accession treaty, but also puts it under an obligation to effectuate it, as it states that the "Union shall accede" to the European Convention.

Among the different arguments in favour of such a development, the most persuasive is that the EU will be object to an external control. I think that from a symbolic and political point of view, it's really important for European citizens to know that EU acts will be submitted to the control of the ECourtHR, an international independent judge.

Nevertheless, I think that it's also important to underline that the standard of protection of human rights in the EU legal order is already very high. Indeed, article 52, paragraph 3 of the Charter states that:

"Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same

as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

This provision ensures the necessary consistency between the Charter and the European Convention by establishing the rule that, insofar as the rights in the present Charter also correspond to rights guaranteed by the European Convention, the meaning and scope of those rights, including authorized limitations, are the same as those laid down by the European Convention. Moreover, the last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the European Convention. Furthermore, the fact that the EU guarantes the same level of human rights protection has been confirmed by the ECourtHR. In the very well-known *Bosphorus* case, the ECourtHR established the principle of presumption of equivalent protection, ruling that the protection of fundamental rights by EU law can be considered to be equivalent to that of the Convention system.

In spite of the efforts of coordination between the two systems, as I have already said, the accession of EU to European Convention is a very important step in the perspective of a Paneuropean system of protection of human rights. From this point of view, the conclusion of the draft accession agreement, in April 2013, is an important step, but it is by no means the last. At this time, a question on the compatibility of the accession agreement is referred to the ECJ. As you can easily understand for reasons of expediency I prefer not to express an opinion in detail on the case. Nevertheless, if the ECJ holds a positive opinion, the agreement would then require the unanimous approval of the Council, in addition to the approval of all Member States "in accordance with their respective constitutional requirements (Article 218(8) TFEU) and, finally, the agreement will have to be ratified by all States of the European Convention.

However, I want to share with you some considerations on a central concern in the negotiation of the draft agreement: the autonomy of the EU legal

order. With regard to this issue, I want briefly recall a solution addressed in the draft agreement which shows the specifity of the EU: the prior involvement of the CJEU in cases in which the EU is co-respondent.

According to the article 3, paragraph 6 of the Draft agreement:

"In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court."

It stands to reason that this provision has been inserted in the draft agreement in order to ensure that the ECourtHR would not adjudicate on the conformity of EU law without that the ECJ first has the opportunity to review it. Moreover, it is also interesting to underline that, in accordance with the autonomy of EU law, the specific modalities of the procedure before the ECJ are not set down in the Draft Agreement and are left to be determined by EU law.

In conclusion, the accession of EU to European Convention will be a very important milestone in the evolution of the protection of human rights in Europe. Nevertheless, I think that National, European and International judges, who have had a fundamental role in the evolution of human rights in Europe, also after the accession, will keep on having a central role in their implementation. I'm certain that the dialogue between the Court of Luxembourg with ECourtHR and National judges of EU MS will keep on being a necessary instrument for further developments in the protection and enforcement of human rights.

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CONSTITUTIONAL IDENTITY IN EUROPEAN CONSTITUTIONALISM

1. Constitutional Identity as an Internationalized Concept

Constitutional law in the contemporary world is essentially influenced by the process of globalization and of regional integration. The Constitution does no longer regulate the basic legal order of the State from an essentially *national* perspective but takes account, in a very significant way, of the strongly increasing international dimension of law. Constitutional law has widely "opened" to international law and is therefore an expression of "open statehood" (as the German Constitutional Court formulates it[1]); constitutional law has been, to a great extent, "internationalized". The *identity* of the constitutional order of the State has changed from a national to an international, or better to an *internationalized* identity.

2. The Internationalization of Constitutional Law as a Characteristic of Contemporary Constitutionalism

The internationalization and in Europe, even more significantly, the supranationalization of constitutional law are characteristics of modern

[1] Vol. 123, p. 267. (FCC).

constitutionalism which reflect the fact that States' activities are regionally and even universally interwoven and to a high degree interdependent.

All important matters a State has to fulfill have an increasingly international dimension: Economy and finance, external and internal security, technology and science, telecommunication, energy, environmental protection, food and agriculture, and even the field of social support (for which in most countries the biggest part of the internal budget of the State is foreseen) is dependent from economic growth which is only reachable through international cooperation. We can see that the State of the 21st-century is no longer *introvert* in fulfilling its tasks, its functions are necessarily *transnational*.

Internationalization of constitutional law is manifold: the direct reception of international law within the national legal order, in many countries even with primacy over national legislation, the interpretation of national constitutional provisions, in particular on fundamental rights, in the light of international human rights conventions - very significant in European countries for the interpretation of national constitutional rights in accordance with the European Convention of Human Rights (ECHR)[2]– or the increasing understanding that Rule of Law is not only State-oriented, but has an important international dimension[3].

It seems that the highest degree of internationalization of constitutional law is the possibility to transfer State competences to multinational organizations, in particular to the European Union. The Constitution allows to establish a supranational order which has direct normative effect in the member States and

[2] See for Germany the jurisprudence of the Federal Constitutional Court vol. 111, 307 (Görgülü) and http://www.bverfg.de/entscheidungen/rs20110504_2bvr236509.html(Security Detention).

[3] See. Rainer Arnold, The external dimension of Rule of Law, Essays in Honour of Giuseppe De Vergottini (in print).

enjoys primacy over national law, in the perspective of the European Union also over the national Constitution[4].

3. The Beginning Constitutionalization of International Law

Law has already reacted and is about to further react to these developments. Sovereignty of the State still exists but is significantly limited and relativized. International law, in particular the United Nations Charter, recognizes the "principle of sovereign equality" of all the States as members of the organization. At the same time it establishes a new world orders the basis for objective principles which the States cannot rule out by reference to sovereignty. These *jus cogens* principles are the first step for a sort of "*universal Constitution*" which, however, seems to be a utopian idea, with a place in *Immanuel Kant's* philosophy[5] but not in contemporary politics.

Nevertheless, international law is, in part, converting from a horizontal coordination system to a vertical principle–based order. It is not erroneous to speak of a certain tendency of the "constitutionalization of international law".

This tendency is even more significant in regional integration systems such as in the 47 Council of Europe member States where the European Convention of Human Rights (ECHR), the leading European fundamental rights document, has been qualified by the Court in Strasbourg, as a constitutional instrument of European public order".[6] The ECHR is regarded, despite the fact that it is in its form an international treaty, as *functional constitutional law*[7].

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[4] See ECJ case 11/70, Rep. 1970, 1125/note 3.

[5] Zum ewigen Frieden, Ein philosophischer Entwurf, 1796.

[6] Loizidou (Preliminary objections) ECtHR 23.3.1995 Series A 310, Z. 75.

[7] See R. Arnold, The concept of European constitutional law, in: The emergence of European constitutional law, XVIIth Congress of the International Association of Comparative Law, Utrecht 2006, National reports, Athens 2009, p. 15-23.

The most striking example for the "constitutionalization" of international law is the multinational legal system of the European Union, a supranational order which is in its nature "constitutional". EU law is multinational law, integrated with the national law of the member States, having normative force in the national internal legal orders, even with primacy over them.

While traditional international law is predominantly *coordination law*, based on the consent of sovereign States, even though it has already developed a set of objective constitutional principles, European Union law constitutes a State-like order where the sovereignty of the member States is substantially limited, much more than in traditional international law.

4. Constitutional Identity in the Supranational EU System

In the supranational legal order of the European Union it is of growing importance to keep intact the member States "national identities". This is clearly expressed, as a basic principle, by article 4 EU Treaty. "National identity" in the perspective of EU law includes "constitutional identity" of the member States. European Union as a community of States needs to respect the identities of its members. The concept of a "Union" requires as a basic condition that all the members of the Union remain intact in their statehood identity, and this means above all intact in the nucleus of their legal orders, namely in the basic elements of their Constitutions. EU membership has as a consequence an adequate limitation of sovereignty, the integration of the national and supranational legal orders and the primacy of supranational law.

However, supranationality finds its limits in the member States constitutional identity. The identity concept is a mechanism of safeguard of the *functional existence* of the member States, defending them against a too far-reaching supranationalization.

The concept of national and constitutional identity has a double dimension: a supranational dimension, of which we have been just speaking, and a national one[8].

5. The Concept of National and Constitutional Identity as Developed in European Constitutionalism – Some Remarks.

The debate on constitutional identity has spread all over Europe. The term of national identity has already appeared in 1993 in the first EU Treaty but did not arouse particular interest at that time. This has significantly changed with the explicit reference to national identity in the text of the (failed) *Constitution for Europe* and now in the new *EU Treaty*. In addition, the jurisprudence of European Constitutional Courts, in particular of the French Conseil constitutionnel[9] as well as of the German *Bundesverfassungsgericht*[10] and the Polish Constitutional Court[11] in their Lisbon Treaty decisions of 2009 and 2010. It seems that also other courts, in particular the Czech Constitutional Court[12], have used similar argumentations without making explicit reference to the term of constitutional identity.

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[8] Seealso R. Arnold, Identité constitutionnelle, un concept national et supranational, in: La Cour Constitutionnelle – Garant de la Suprématie de la Constitution, Table ronde internationale organisée par le Centre francophone de droit constitutionnel de l'Université Mihail Kogalniceanu et l'Association Roumaine de Droit Constitutionnel, Iasi le 24-25 mai 2013, GenovevaVrabie (dir.), Iasi : InstitutulEuropean, 2014, pp. 207 – 218 and R. Arnold, La Cour de Justice de l'Union Européenne comme gardienne de l'identité constitutionnelle des États membres, in : Longcours, Mélanges en l'honneur de Pierre Bon, Paris Dalloz, 2014, p.49-56.

[9] See CC 2006-540 DC Rec., p. 88.

[10] CCF vol. 123, p. 267.

[11] K 32/09.

[12] Pl. ÚS 19/08.

Constitutional identity is a conceptual instrument of defense against her too far-reaching supranationalization of the States' legal orders, a defense of the substantive and functional existence of the State, which finds its particular expression in the basic political decisions and the core elements of its legal culture which is the value basis of the State's Constitution. This defense mechanism is dual: it is an instrument of the European Union as well as an instrument of the member States, each of them developed in its own perspective, in the supranational *and* in the national perspective.

The identity problem focuses on the question which is vital for the 28 EU member States and the EU itself. It is the core question of supranationality: Is EU law able to overrule the national Constitution, in particular the core elements of the Constitution?

The identity concept does not deny supranationality as such, does not deny a limitation of sovereignty for the purpose of multinational integration, does not refuse primacy of EU law over national law but wants to find the adequate *equilibrium* between supranationality and nationality. Absolute primacy of supranational law is moderated by the safeguard of national and with it of constitutional identity of the member States.

The defense of identity is primarily a matter of EU integration but not exclusively. It is a more general concept of safeguarding national identity in the sense of plurality against centralizing tendencies.

This question can, in a less dramatic way, also arise in the context of traditional international law, in particular connected with the problem of how far conceptions elaborated by international courts can be binding. Specifically: Can the Court of Human Rights in Strasbourg completely overrule the solutions found by the national constitutional courts? Or must a basic margin of appreciation of the States be accepted?

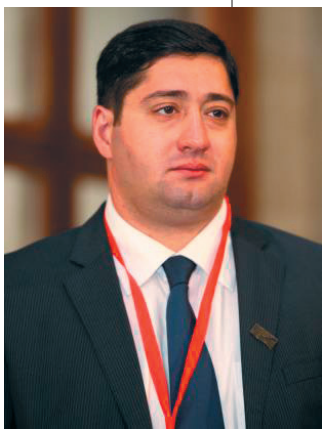
The Strasbourg Court has repeatedly declared its readiness to accept, to a certain extent, own national solutions left to the appreciation of the Signatory States.[13] What corresponds to an internationally and Europe wide recognized value standard, must be respected by the States. This results evidently from the important control function of the Convention. However, in a multilevel fundamental and human rights guarantee system as it exists in Europe the principles of efficiency of European values on the one side and of value subsidiarity and national autonomy on the other side must be both adequately realized.

The more national constitutional identity integrates international concepts, what happens through the current convergence process in European constitutionalism, the less the defense character of the identity mechanism comes into function.

[13] See Anne Peters, Einführung in die Europäische Menschenrechtskonvention, 2003, p. 25-26.

6. Conclusion

We can therefore conclude that national and in particular constitutional identity is currently a central subject in jurisprudence and scientific debate in Europe. In the context of European integration the identity concept intends to uphold an adequate equilibrium between supranational and national power and to safeguard plurality and autonomy of the constitutional core elements of States in Europe. The ongoing convergence process in the field of values (fundamental rights, rule of law elements) is likely to lead to common concepts which will be the starting point for the emergence of a *European constitutional identity*.



Mr George Papuashvili,
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INTERNATIONAL DIMENSION OF CONSTITUTIONAL JUSTICE IN THE LIGHT OF RECENT CASE-LAW OF CONSTITUTIONAL COURT OF GEORGIA

I am highly honored to be part of this conference on a very momentous occasion, which marks the 20th anniversary of the Constitution of the Republic of Moldova. Let me extend my best wishes to my Moldavian colleagues and congratulate the entire Moldavian nation on this very important date. I would also like to express my keen appreciation for this highly interesting and comprehensive conference, and thank the Constitutional Court of the Republic of Moldova for organising this event.

As the essence of our session is the correlation between globalization and constitutional identity, I will take the opportunity and focus on some of the globally meaningful constitutional developments in Georgia. In this context, I will outline few important aspects in domestic legislation and then overview respective case-law of the Constitutional Court of Georgia.

Under the article 6 of the Georgian Constitution, the Constitution is declared as the supreme law of the state and all other legal acts shall correspond with the Constitution. It is a rather disputable issue whether the provisions of international law have to be used in the constitutional decision-making. Yet, as

Georgia is a contracting party of the International Bill of Human Rights[1] along with the European Convention on Human Rights, it is impossible to ignore these instruments and the legal standards deriving from their case-law. Thus, the Constitutional Court of Georgia has adopted an approach whereby the maximum respect has to be given to the requirements of international law, especially the international human rights law, when considering a particular case.

Apart from this, there is a special provision in the Constitution of Georgia which specifies that the Constitution of Georgia shall not deny other universally recognized rights of an individual that are not expressly referred to herein but stem inherently from the principles of the Constitution. This legal norm directly gives the court the right to establish internationally existing human right's standards.

As for the practice of the Constitutional Court of Georgia, let me first overview two landmark cases related to the foreigners' rights. In both circumstances the court considerably extended the purview of constitutional protection by including aliens therein.

In one recent case the Constitutional Court was asked to recognize unconstitutional norm of "Organic law on the Constitutional Court of Georgia" which defined the subjects who were entitled to apply to the court. It excluded foreigners and stateless persons from the list of potential petitioners. The case was particularly complicated by the fact that the Respondent – representative of Parliament of Georgia, was arguing that the norm of the constitution which sets forth competences of constitutional court did not grant the right to apply to the constitutional court to foreigners and stateless persons. The Constitutional Court declared, that everyone despite their citizenship has right to access to the Constitutional Court. The constitution expresses the will of the citizens that

[1] Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

individuals shall have the remedy to protect their rights and this aim may not be achieved through the approach differentiating between citizens and foreigners. Moreover, the Constitutional Court of Georgia held that norm describing competences of the court shall not diminish the right to apply to the Court. Accordingly, the norm of the constitution which omitted foreigners and stateless persons in the list of potential petitioners could not restrict their fundamental right to have access to the court. Hence, the Court rectified legislative deficiency and in accordance with international standards, affirmed the constitutional protection universally.

Lately, in another landmark case, the Constitutional Court of Georgia found unconstitutional and invalidated the provisions of the Law of Georgia "On Ownership of Agricultural Land", whereby a foreigner could become the owner of agricultural land only if the land was inherited or lawfully had been owned by a person who used to be a citizen of Georgia before. At the same time, a foreigner was obligated to sell the land to the citizen of Georgia or/and Georgian legal entity within the period of 6 months after obtaining the ownership of the land. Overall, the disputed legal norm effectively restricted the property rights of the foreigners.

The Constitutional Court clearly stated that one of the characteristics of the human rights is their universal nature. Having human rights is not contingent upon citizenship and equally applies to every person. The recognition of an individual as subject of the right to property is emanated by the simple fact that he/she is a human being, and it is not dependent on his citizenship.

The prohibition on the purchase of agricultural land by a foreigner constitutes restriction of their rights to acquisition of property. Therefore, the reasonable balance between private and public interests is not stricken as it goes beyond the limits of permissible restriction of the right to property. Hence, the Constitutional Court expanded the scope of protection of property rights by giving it a universal character.

Interestingly, after this case was decided, the Parliament enacted provisions establishing similar prohibition. The only difference between those two cases was that in the first case prohibition had been permanent while in current case it had a temporary character. However, in both instances restrictions imposed were general and the Court declared the norms limiting the property right of foreigners unconstitutional since they lost an opportunity to willingly acquire agricultural land on the free market or inherit it without losing Georgian citizenship.

The other two cases that I am willing to discuss, demonstrates both conformity and contradiction with the international standards. Namely, in the first instance, the Constitutional Court of Georgia upheld the Practice of the European Court of Human Rights while in the other case, it chose to ignore the ECHR and apply the Constitution.

The first case concerned the right to conscientious objection. According to the legislation of Georgia, right to conscientious objection was recognized for ordinary military service, however, law on military reserve service, did not grant such right. The applicant challenged the norm of the law on military reserve service before the Constitutional Court with respect to the freedom of religion, thought, conscience and belief. The right to conscientious objection to military service is very disputed and actual in international practice of human rights protection. There is no homogeneous approach on this issue. It has not been a long time since the European Court of Human Rights modified its approach.

The Constitutional Court of Georgia treated the constitution as a living instrument and declared that the freedom of belief is an emanation of human dignity, the right to free development of one's personality. According to the Court, freedom of belief is the basis of personal development and autonomy; meanwhile, this determines the whole architecture of the community and the quality of the democracy, since the pluralism *inter alia* religious pluralism is vitally important for democratic society. Based on this reasoning, the Constitutional Court of Georgia declared the disputed norm unconstitutional, which in turn resulted in recognition of the right to conscientious objection. This decision greatly reflects the standards of international human rights law as the Constitutional Court of Georgia referred to the upgraded practice of the European Court of Human Rights.

In the other case, the court decided on the applicant who was a prisoner and argued that the legal provision which prohibited him the right to participate in elections was unconstitutional. He has delivered arguments before the court which were based on the provisions of the ECHR case-law. However, article 28 of the Georgian Constitution explicitly stated: "A citizen, who is detained in a penitentiary institution following a conviction by a court, shall have no right to participate in elections and referendum." Thus, the court decided that claimant did not have the right to participate in elections under the Constitution

of Georgia and did not uphold the claim despite its being based on the ECHR standards. Later, however, the Parliament repealed the Constitution and as of now prisoners are now allowed to vote freely.

To sum up, it seems evident that both the legal framework and the case-law of the Constitutional Court of Georgia are rather flexible and even more willing to embrace some of the best practices of global constitutional development. The Constitution of Georgia directly sets forth the basis for international human rights law to be adopted, while, on the other hand, the Constitutional Court consistently affirms that international legal standards do not contradict the Constitution. Such a development ensures that the Georgian State meet its international obligations and also paves the way for the greater global integration.

Now I will gladly take some of your questions.

Răzvan Horaţiu Radu,
Government Agent of Romania for the Court of Justice and General Court of the European Union

PRECEDENCE OF EU LEGAL ORDER OVER NATIONAL LAW

The principle of precedence of the European Union's law over national law of Member States is one of the fundamental freedoms,[1] which along with the principle of direct effect and immediate applicability, define the European Union as a *sui generis* entity of international law.

I. Establishing the principle of precedence of the European Union's law over the national law, as a whole

The principle of EU law precedence, foreshadowed in 1962,[2] was held by the Court of Justice of the European Union (CJEU) in its ruling **6/64 *Costa v.* ENEL** on the conflict between Community law (currently, EU law) and a posterior Italian law on nationalizing electricity. The Italian Constitutional Court, which ruled on this law a few weeks before, applied the dualist approach, specific to classical international law and to Italian legal order, solving the conflict in favour of the most recent norm, i.e. national law.

[1] According to the ruling of the Court of Justice of the European Union in **case no. 34/73 – Variola,** the principle of supremacy is a fundamental principle of communitarian legal order (currently, of the European Union).

[2] See the **case 26/62, Van Gend & Loos.**

According to the ruling in case of **6/64 *Costa v.* ENEL:** *"the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".*

The reasoning of the CJEU in this case is grounded on three complementary arguments: the direct and immediate applicability of the Union's law, the conferral of competences to the Union, which accordingly limits the sovereign rights of Member States and, finally, the need to ensure an uniform application of EU law in the whole Union.

The doctrine of precedence of the EU law as derived from the ruling Costa vs. ENEL, being reconfirmed by the subsequent case-law is defined by four main elements:

a. Precedence is an existential condition of the EU law. Achieving common goals makes it necessary to have a uniform application of EU law, and without it the concept of integration being deprived of its meaning. The source of precedence resides in the nature itself of the common EU legal order;

b. Precedence stems from the specific, its own, original nature of EU law and is not tributary in any way to the constitutional law of Member States. Therefore it cannot depend on divergent rules applicable in one or another State.

c. The EU legal order is superior, as a whole, to domestic legal orders. Thus, the principle of precedence applies to all legal norms of the EU, whether emanating from primary or secondary legislation. Subsequently, EU law has precedence over all the act of domestic legal order: administrative, legislative, jurisdictional, or an act of constitutional nature. Thereby, the

CJEU states that domestic constitutional provisions cannot be employed in hindering the application of EU law, such an action being "contrary to the system of Community law."[3] Precedence is thus binding in relation to fundamental rights as they are formulated by national constitution, as well as in relation to principles of national constitutional structure.[4]

d. Finally, the principle of precedence of the EU law is not applicable only to the EU legal order, and in relations between its institutions or between Members States, but also in the systems of national law ("domestic precedence") and in relation to national jurisdictions.

The effects of this ruling does not reside merely in establishing the precedence of EU law as a fact, but particularly in the way the CJEU delivered its reasoning in relation to this principle and its consequences for the relations between EU legal order and that of the Member States.

The CJEU notes the **specific nature of the Community** (currently substituted by the European Union) as an entity created for a limited period, endowed with its own competences, legal entity and capacity, with a capacity of being represented internationally and, particularly, with real powers stemming from a **limitation of competences of the Member States** or from a transfer of competences of the States to the Union. Deriving from this specific, original nature which makes the Union distinct from other classical entity of international law, the CJEU construes that **Member States chose to limit, in certain fields, their sovereign rights** and thus created a set of norms applicable both to their nationals and to them as States.

This phenomenon of sovereignty transfer is essential in grounding the principle of precedence and in understanding its immediate consequences.

[3] See the case 9/65, San Michele.

[4] See the ruling in case 11/70 of Internazionale Handelsgesellschaft.

Thereby, Member States do not enjoy anymore the law-making competences in fields where this transfer of sovereignty operates by conferring competences to the Union. Precedence thus emerges as being consubstantial to the very nature of Union's law, as on it depends its uniform application.

The newly created legal order by the founding and amending treaties is integrating into the legal order of Member States. Subsequently, the treaties would be deprived of their effect if one admits that a domestic *a posteriori* measure prevails over the law stemming from the treaties. Any other solution would damage the uniformity of the Union's law, as its scope of application would vary depending on legislative options of every Member State. In other words, such an interpretation would affect the very idea of the Union, a differentiated application of its law in relation to each Member State leading to discrimination based on nationality, which is prohibited by the treaties.

Precedence is working in relation to all the national norms and is binding to all the institutions of the Member States, including to constitutional jurisdictions, i.e. any national norm, be it of constitutional nature, should be set aside in case of a conflict with a EU legal norm.

Therefore, according to the ruling **11/70, *Internationale Hadelsgesellschaft:*** *"the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure."*

By its ruling in **C-285/98, *Kreil,*** interpreting the Directive on the equality of treatment between women and men, the CJEU held that it contradicted the German domestic regulations which were excluding women, in general, from employment in military jobs involving the use of weapons. Thereby, the CJEU gave priority to EU law over the provisions of German Constitution (as the case Art. 12 of the Basic Law was brought in).

According to the ruling in the case **106/77, *Simmenthal:*** *"a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."*

Additionally, *"in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but — in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States — also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions."*

According to the **principle of loyal cooperation with EU institutions** (Art. 4 of the Treaty on the functioning of the EU), Member States have the duty to set aside the national norm conflicting with the EU law or to render it inapplicable, as may be the case.[5] This is a binding obligation for all national institutions, including local or regional authorities,[6] particularly for the national judge.[7] Thus, in the case of ***Simmenthal,*** the CJEU held that the national judge is under the duty to render inapplicable national law conflicting with EU law. In a subsequent case, the CJEU goes further by making it binding for the British judge, even presuming that national law expressly prohibits it, to suspend the

[5] See the ruling in **the case 104/86, Commission vs Italy.**
[6] See the ruling **the case 103/88, Fratelli Costanzo c./ Commune di Milano.**
[7] See the above cited **Simmenthal case.**

application of national legislation which was discussed as being incompatible with the EU law.[8]

I would note that while in classical international law, international jurisdiction confers on the State, the CJEU directly imposes on the national judge, as a common law judge of EU law, the obligation to ensure that precedence is observed, thus removing when necessary the obstacles of procedural nature imposed by domestic law, be it of constitutional nature.

In concreto, the conflict between an EU provision and a national one **is systematically solved by the CJEU in favour of EU law,** as follows:

Applying EU law is not conditioned by formally setting aside a conflicting national provision: even if repealing, which makes the incompatible text fade from national law, seems to be useful and even binding, for reasons related to ensuring legal certainty,[9] it is considered by the CJEU a formality, without proper effects. The inapplicability of a national provision is not subordinated to it being preliminarily repealed and it is imposed immediately to national authorities.

The EU law, with or without direct effect, may be called upon by individuals before the national judge, who is under the duty to take into consideration the EU law when delivering his ruling. Thus, the national judge is bound to interpret the national law in compliance with the EU law, and if it may be the case, to hold inapplicable the conflicting national provision.[10] Additionally, as seen in the cases **6/90 and 9/90, *Francovich and Bonifaci:*** *"a State must be liable for loss and damage caused to individuals as a result of breaches of Community law."* The obligation to provide reparations for the damage in

[8] See the ruling in **the case 213/89, Factortame I.**
[9] See the ruling in **the case 167/73, Commission vs France.**
[10] See the ruling in **the case 157/86, Murphy.**

such cases is applicable whether the discussed provision enjoys direct effect or not.[11]

II. Applying the principle of precedence of the EU law

II.1 The view of the national Constitutional Courts

Till now, there have been noted two general trends in the case-law of national Constitutional Courts:

– *the first trend,* relevant for beginning of the dialogue between the Court of Luxemburg and national constitutional jurisdictions (1960-1970), when national courts were opposing resistance based on the need to ensure the protection fundamental rights, a field where the EU law was considered to have deficiencies at the time;

– *the second trend* follows the entry into force of the Treaty of Maastricht (1992-2000), when there is emphasized a delimitation between competences allocated to the EU and the protection of national sovereignty.

As far as these trends are concerned, the EU Court has systematically ruled in favour of total and unconditioned precedence on the entire EU law over the whole set of national legal provisions. The rulings of the German and Italian courts of 1970s fit this trend.

In its ruling of 1974, ***Internationale Handelsgesellsghaft (Solange I) BVerfGE 271 (1974)*** **– the Federal Constitutional Court of Germany** is considered to be competent to control the compliance of Community law with fundamental rights provided for by the Constitution, as long as Community law does not

[11] See the rulings in the **cases C-46/93 şi C-48/93, Brasserie du pecheur and Factortame III and C-334/92, Wagner Miret.**

ensure a level of protection of fundamental rights equal to that ensured by the German Constitution. The Court also held that the guarantees of fundamental rights ensured by the Constitution have precedence over Community law, on the German territory.

A similar reasoning was delivered by the Italian Constitutional Court in its decisions ***Granital and Frontini*** (Decision no. 183 of 27.12.1973). Thus, in ***Granital***[12] the Constitutional Court accepted that EU provisional with direct effect have precedence over national law and have to be applied by the national judge with no regard to the moment (prior or following the EU provision) of their passing. One should note that this is about a limited acceptance of EU law precedence. According to the Constitutional Court, the limit imposed to accepting precedence refers to a potential transgression of fundamental values of the Constitution, such as protecting fundamental rights and democratic principles. In other words, it appears that based on this case-law EU provisions may derogate from national Constitution as long as it does not affect fundamental values of the national constitutional system in its entirety.

As a reaction to these standings of the German and Italian Constitutional Courts, the CJEU referred to fundamental rights, for the first time, in its ruling in ***Stauder* 29/69** and, more explicit in **11/70 - *Internationale Handelsgesellschaft,*** holding that these rights are a part of general principles of law, their observance being guaranteed by the CJEU itself and defending these rights, inspired from common constitutional traditions of the Member States, has to be ensured within the structure and goals of the Community.

As with regards to the second trend, in its ruling ***Maastricht (Decision BVerfGE 89 155 (1993),*** the Constitutional Court of Germany found that the provisions emanating from a public authority specific to a supranational organisation, distinct from the state power of Member States, they can also affect

[12] The Decision SpA Granital vs Amministrazione delle Finanze, no. 170 of 8 July 1984.

individuals who are under the protection of fundamental rights in Germany. Thereby, such provisions affect the guarantees ensured by the Basic Law, as well as the tasks of the Federal Constitutional Court, and not only in relation with German authorities. The Constitutional Court declared itself competent to render inapplicable on the German territory a provision of the secondary Community law which is not covered by the Treaty or which is incompatible with the German Basic Law, without repealing at the Community level. Thereby it is admitted that the CJEU itself to breach Community law in case it would not sanction the abuse of office of Community institutions.

According to the Federal Constitutional Court, lacking a European *demos,* the precedence of Community law only operates within the competences expressly assigned by Member States to the Community by the Treaty. In other words, the people of Member States, represented by national parliaments are the source of legitimacy of Community law. In conclusion, the European Union does not have a general competence (Kompetenz Kompetenz) and constitutional provisions remain to be the supreme norm of the internal legal order, considering that Member States are the only ones competent to decide on reviewing the treaties.

In its Decisions of 1992 (**92 308 DC**[13]) and particularly that of 1997 (**97-394 DC**) the Constitutional Council of France made it clear that the essential conditions on exercising national sovereignty impose limits to the application (thus, to the precedence) of the Community law. According to the Decision of 10 June 2004 no. **2004-496** of the Constitutional Council, the obligation to respect the EU law derives from the Art. 88-1 of the Constitution. Grounded on this constitutional provision, the national legislator is compelled to respect Community law when transposing a directive. It is not therefore the duty of a

[13] Decision of the Constitutional Council of France on the Treaty on European Union of 9 April 1992 signed at Maastricht.

constitutional court to review the constitutionality of the national law which is to be transposed.

The Constitutional Council of France held that the principle *pacta sunt servanda,* as a legal basis for the application of Community law, does not itself have an effect on the hierarchy of international and domestic provisions in relation to legal order. In the same spirit, neither the Court of Cassation nor the State Council accept the precedence of Community law over the bloc of constitutionality. According to the case-law of the Constitutional Council of France, the relationship between EU law and national law of Member States would reside in a partition of sovereignty depending on the distinct conferral of competences – a provision has precedence over another one depending on whether the competence is or not exclusive in a field or another.

II.2. The view of the CJEU in relation to the case-law of national Constitutional Courts

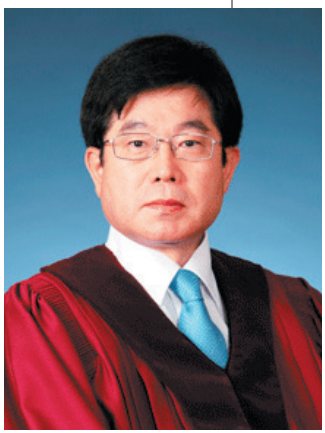
The answer given by the CJEU to this series of rulings of the national Constitutional Courts remains loyal to its established case-law. In its ruling in the case 314/85 – *Foto Frost,* the CJEU reiterated the principle according to which it is solely competent to pronounce itself on the validity of EU institutions acts, in line with the need of uniform application of the EU law, an exigency which is imposed with a special force when there is in discussion an act of the EU.

In the light of the case-law called upon in this article, in relation to the views of the national Constitutional Courts, we can assert that in practice we are witnessing a compromise between the competences of the EU judge and those of the national judge. Therefore, the case-law of the CJEU will always have primacy and will enjoy the presumption of authentic interpretation of EU law. Constitutional Courts, on the other side, will maintain a residual competence, which will only be activated in exceptional cases, when there would be in danger the fundamental principles of national constitutional order or the conferral of competences between the EU and its Member States.

The advantage of such a conclusion is that it takes into consideration the specific, its own nature of the EU law, as well as the constitutional traditions of Member States, that make up the common heritage of European values.

As with regards to the legal order of the Republic of Moldova, following the signature of the Association Agreement with the European Union, along with the beginning of negotiations on joining the EU, the country will have to gradually integrate parts of European legislation. Subsequently, to the extent to which the european orientation of the Republic of Moldova will be continued, the EU legal order will gradually obtain precedence over its domestic legal order.

This process will be complete to the extent to which the Republic of Moldova will become a Member State of the European Union. Subsequently, all the institutions, including the Constitutional Court through its case-law will be bound to take into consideration the legal order of the EU.



Mr Seo Kiseog,
Judge of the Constitutional
Court of South Korea

PRESENTATION ON THE 3RD CONGRESS OF THE WCCJ

On behalf of the Constitutional Court of Korea and myself, I would like to express my congratulations on the 20th anniversary of the Constitution of the Republic of Moldova. I would also like to thank the Constitutional Court of Moldova for giving me this opportunity to say a few words about the 3rd Congress of the World Conference on Constitutional Justice.

The Constitutional Court of Korea will host the 3rd Congress of the World Conference on Constitutional Justice in Seoul from September 28 to October 1. It will be a four-day event addressing the topic of "Constitutional Justice and Social Integration." The invitation to this Congress has been extended not just to member courts of the World Conference, but also to non-member institutions and international organizations in the field of constitutional justice. The leaders of constitutional courts, supreme courts, and constitutional councils, as well as international organizations from almost 100 countries are scheduled to attend the event.

Participants are expected to share experiences and wisdom about "Constitutional Justice and Social Integration" and propose solutions for social integration. The Republic of Korea has achieved surprisingly rapid growth, producing in the process, many causes of conflicts that are yet to be resolved. The Korean Constitutional Court has been playing an important role in mediating such conflicts and achieving social integration. Division and conflict,

however, is witnessed not just in Korea but in other parts of the world as well, so the topic, I believe, is very timely for all of us.

Let me briefly go over the program of the four-day Congress. On the first day, September 28, the regional and linguistic groups of constitutional courts will hold their respective meetings. There will also be a meeting of the Bureau of the World Conference. And lastly, the welcome reception will be held at The Shilla Seoul, which is also the venue of the Congress.

On day 2, September 29, the two-day plenary sessions will take place following the opening ceremony. The first session will address the sub-topic of "Challenges of Social Integration in a Globalized World," and the second session will be about "International Standards for Social Integration." The official dinner will be held at a place where participants will be able to taste and experience the beauty of Korean culture.

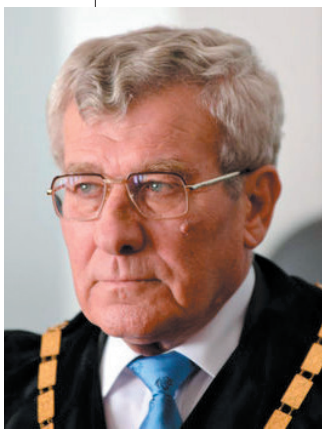
On the third day, September 30, there will be three more sessions, the topics of which will be "Constitutional Instruments Enhancing/Dealing with/for Social Integration," "The Role of Constitutional Justice in Social Integration," and "Independence of Constitutional Courts-Stocktaking." These sessions will be followed by a general discussion and the closing ceremony. The farewell dinner will be held at the National Museum of Korea, which boasts a collection of more than 300,000 national treasures.

For the last day, October 1, we are preparing various kinds of cultural programs. We are also preparing a spouse program for the first two days as well.

The statute of the World Conference on Constitutional Justice was adopted in May 2011 and entered into force in September the same year. In the beginning, only 30 constitutional courts, supreme courts, and constitutional councils joined the World Conference as members, but membership has grown dramatically within three years to 90 countries. In addition to enlargement of

membership, member courts have engaged in active cooperation, and the World Conference has now become a body that brings together leaders in the area of constitutional justice. I personally hope that the upcoming 3rd Congress will give more impetus to the development of the World Conference.

Once again, I congratulate Moldova on its 20th anniversary of the Constitution. Thank you for your attention.



Проф. Димитр Токушев
Председатель Конституционного суда, Болгария

КОНСТИТУЦИОННАЯ ИДЕНТИЧНОСТЬ И ГЛОБАЛИЗАЦИЯ: ЕДИНСТВО В РАЗНООБРАЗИИ

Считаю для себя высокой честью и удовольствием участвовать от имени Конституционного суда Республики Болгарии в этой торжественной сессии и международной конференции, посвященной 20-летию со дня принятия Конституции Республики Молдовы.

В конце XVIII века в принятой во Франции Декларации о правах человека и гражданина отмечается, что в обществе, в котором не обеспечена гарантия прав граждан и не установлено разделение властей, «не имеет конституции» (ст. 16). Созданные в XIX и XX веках национальные государства эмблематически связаны с конституцией. Каждая конституция испытывает влияние воспринятой формы государства и государственного управления, степени развития конкретного общества, национальной истории и политической традиции. Предметом каждой конституции является общий политической порядок, что связано с созданием и поддержанием национального и государственного единства. Национальная конституция – символ национальной свободы и государственной независимости, она придает легитимности самому государству. Конституция - решение о способе и форме существования политического единства национального сообщества. Каждая конституция - фиксирование того, что достигнуто на определенном историческом этапе развития общества, она отражает и закрепляет в законодательном порядке исторические завоевания. Это позволяет выделить одну из ролей конституции – ее *статическую функцию.* Конституция обеспечивает такое состояние общества, которое можно охарактеризовать как стабильное и гарантирующее

нормальное существование правовых и социальных субъектов, способствующее их развитию в благоприятных условиях. Однако, у конституции, имеется и другая функция, которую можно определить как *динамическую.* Она реализуется как движущая сила развития общества, как сила совершенствования общества. Понимание конституции как состояния государственного и общественного устройства определяет ее значение для жизни общества и отдельных лиц. Когда между нормами конституции и состоянием общественных отношений нет согласованности, возникают противоречия, которые отражаются негативно и на самой конституции.

Конституция фиксирует наиболее существенные функции государства и, в частности, те, которые направлены на обеспечение его территориальной целости, поддержание общественного порядка и защиту национальной безопасности. Сущность конституции состоит в конституировании, легитимировании и организации публичной власти и ее ограничении по отношению к гражданам. Национальная идентичность включает и конституционную идентичность государства, присущую его основным политическим и конституционным структурам. Уважение конституционной идентичности каждого государства имеет особое значение, независимо от того, что конституционные институции сходные, сродные и сопоставимые, даже когда созданы в различных государствах

Сегодня на старом континенте создается новая конституционная идентичность, на которой строится и принадлежность к Европейскому союзу. Эта идентичность формируется из ценностей свободы, демократии, прав человека и основных свобод, правового государства.

Европейский союз уважает равенство стран-членов. Действительное соблюдение конституционной идентичности государств-членов является обязательством Европейского союза. Это его обязательство возникает уже с момента его создания.

Разнообразие в единстве, свобода в порядке» – вот лозунг, под которым мы, болгары, в 70-е годы XIX в. добились своей церковно-национальной свободы в пределах Османской империи.

Вероятно является случайностью, а, может быть, и нет, то, что часть этого лозунга входит в девиз Европейского союза. «Единство в многообразии» позволяет видеть Европу как континент с множеством различных традиций и языков, является выражением идеи, что европейцы объединились в союз, чтобы работать на

пользу мира и благосостояния, обогащаясь в то же время духовно множеством существующих на континенте различных культур, традиций и языков. «Единство в многообразии» показывает, что Европа - это континент, который обладает множеством различий, но и то же время континент, на котором различные народы разделяют общие ценности.

Сегодня Республика Болгария является полноправным членом Европейского союза. Моя страна имеет свои европейские права и свои ответственности в повестке дня Европы. И к самым важным из них относится создание общеевропейской идентичности – основанной, разумеется, на гордости и самочувствии отдельных наций и развитии их идентичности.

Европеизация национальных конституций путем включения в них положений, связанных с участием в ЕС, отражает существующее смешанное положение. За исключением некоторых специфических аспектов, европейский конституционализм не затрагивает существенно конституций государств-членов. Европеизация на-

циональных конституций происходит постепенно в ходе созидания Европы, но не приводит к изменениям систем. История европейского конституционализма раскрывает определенные императивы, являющиеся вызовом по отношению к национальным конституциям. К ним добавляются и те, которые проистекают из национальной специфики.

Таким основным императивом, связанным с участием в ЕС, является предписание позволить и обеспечить передачу компетенций Европейскому союзу. Можно указать и на обязательство государств-членов признавать политические права европейских граждан, которые не проживают в государстве, чьи гражданами они являются. Эти граждане должны иметь возможность избирать и быть избранными в государстве проживания, что ставит перед национальной избирательной системой требование учитывать это право.

Государства-члены Европейского союза обязаны также принимать необходимые акты для выполнения положений права Европейского союза, и, если необходимо, вносить соответствующие изменения в национальные нормы. Они, конечно, должны воздерживаться от принятия актов, противоречащих нормам сообщества.

Действительное соблюдение конституционной идентичности государств-членов обязательно для Европейского союза. Уважение национальной идентичности государств, в том числе ее конституционного измерения – требование, которое проистекает из учредительных договоров. Конституционную идентичность можно выдвинуть и как самостоятельное законное основание для дерогации положений права Европейского союза. Сохранение национальной конституционной идентичности может позволить государству-члену развить в определенных границах свое видение в отношении законного интереса, оправдывающего какое-либо препятствие перед некоторыми основными свободами.

Сегодня больше чем всегда, в постоянно меняющемся глобализированном мире, перед странами Европы, и Европой как континентом, встают испытания. Глобализация экономики, демографические перемены, изменение климата, снабжение энергией, новые угрозы безопасности – все это вызовы, которые Европа должна преодолеть в 21 веке. Европейские государства не в состоянии в отдельности справиться с трансграничным характером этих и других подобных проблем. Объединен-

ная Европа должна противостоять навязыванию внеевропейских конституционных моделей, объявляемых уникальными или универсальными.

Европа стоит ныне перед сложной многопластовой проблемой. Она должна сохраниться не только как Европа наций, но и как Европа культур, в самом широком смысле этого понятия, в том числе со своими национальными конституционными идентичностями. Я позволю себе выразить мнение, что установление единой общеевропейской культуры и общеевропейской конституционной идентичности, одинаковых стандартов и всеобщих ценностей для людей малых и больших, богатых и бедных стран – весьма сомнительно. Там где нет различий, говорить о ценностях сообщества нельзя. Национальная и культурная идентичность не должна обезличиваться в процессе глобализации. Чтобы сохранить европейскую конституционную идентичность, как значимый политический факт, следует сохранить национальные конституции, которые воспроизводят утвержденные европейские конституционные ценности, и никоим образом не противоречат им, способствовать их развитию и обогащению на более высоком общем и даже наднациональном уровне в едином стремлении формировать европейскую конституционную цивилизацию. Европа строится на многообразии, которое нужно сохранить, и в этом ее преимущество перед глобализацией. Позвольте завершить свое выступление словами достойного представителя Франции, дважды председателя Европейской комиссии Жака Делора: «Наши современники испытывают чувство головокружения, разрываясь между процессом глобализации, проявления которого они наблюдают и зачастую поддерживают, и поисками своих корней, опоры в прошлом, принадлежности к тому или иному сообществу».

Г-н Юрий Баулин,
Председатель Конституционного Суда Украины

РОЛЬ КОНСТИТУЦИОННОГО ПРАВОСУДИЯ В ЗАЩИТЕ ЦЕННОСТЕЙ ПРАВОВОГО ГОСУДАРСТВА

Прежде всего, хочу выразить благодарность за приглашение принять участие в работе Международной конференции и от имени судей Конституционного Суда Украины поздравить уважаемых организаторов этого форума с 20-й годовщиной принятия Конституции Республики Молдова!

Тема защиты ценностей правового государства и роли конституционного правосудия в этом вопросе, вынесенная для обсуждения на конференции, безусловно, является важной и актуальной.

Идея правового государства имеет длительную историю и занимает важное место в политических учениях прошлого. Мысль о господстве закона в жизни народа, общества, государства родилась как противовес самовластию и произволу личности правителя. Еще Платон писал: «Я вижу близкую гибель того государства, где закон не имеет силы и находится под чьей-либо властью. Там же, где закон – владыка над правителями, а они – его рабы, я усматриваю спасение государства и все блага, какие только могут даровать государствам боги».

Позже в трудах Монтескье, Карла Велькерта, Роберта фон Моля Жан-Жака Руссо. Вольтера и других философов и правоведов, ценностный смысл идеи правового государства был выражен в концепции суверенности народа как источника власти, гарантированности его свободы, подчинении государства обществу. Павел Новгородцев, анализируя природу правового государства, подчеркивал, что она основана на свободе и правах человека, и именно в этом качестве государство сохранило практическую ценность необходимой и целесообразной организации, оказывающей человечеству элементарные, но незаменимые услуги.

Существует несколько определений правового государства, однако при различных конкретных структурных элементах, включенных в эти определения, неизменным выступает свобода личности, объективированная в системе ее неотъемлемых прав. К этому главному, определяющему элементу привел многовековой поиск нормальных отношений между личностью и государством, которое в своей первоначальной сущности «нависло» над индивидом, подавляло его, ограничивало его свободу, навязывая ему стандарты поведения, удобные, прежде всего, государству.

Основополагающими принципами современного правового государства являются, по меньшей мере, следующие:

1) верховенство правового закона, его господство во всех сферах общественной жизни;
2) реальность прав и свобод граждан;
3) взаимная ответственность государства и личности;
4) разделение властей на законодательную, исполнительную и судебную;
5) наличие эффективных форм контроля и надзора за осуществлением законов.

Однако было бы неправильно считать правовым любое государство лишь на том основании, что в нем есть право и закон, ибо сами законы могут быть разными.

Поэтому важно обозначить критерии, позволяющие определять степень демократичности законов, действующих в той или иной стране. К таковым, прежде всего, следует отнести общечеловеческие ценности, которые положены в основу документов, принятых мировым сообществом.

Основным ориентиром в этом направлении является «Всеобщая декларация прав человека», принятая Генеральной Ассамблеей ООН 10 декабря 1948 года и которая провозгласила, что «все люди рождаются свободными и равными в своем достоинстве и правах». Причем в тексте декларации подчеркивается, что всем комплексом прав и свобод люди должны обладать независимо от их расовой принадлежности, цвета кожи, пола, языка, религии, политических или иных убеждений, национального или социального происхождения, имущественного, сословного или иного положения.

Среди важнейших гражданских (личностных), политических прав и свобод в тексте декларации отмечаются право каждого человека на жизнь, на свободу и личную неприкосновенность; свободу от рабства и подневольного состояния; свободу

от пыток и жестокости, бесчеловечного и унижающего достоинство обращения и наказания; право на равную защиту закона; свободу от произвольного ареста, задержания или изгнания; свободу передвижения; свободу совести и религии, свободу убеждений и свободного их выражения; право на убежище, гражданство; право владеть имуществом и другие.

Таким образом, высокая ценность правового государства состоит в том, что оно возникло на путях поиска свободы и, в свою очередь, стремится быть гарантом этой свободы, поэтому приоритет прав человека по отношению к государству является первичным, определяющим, системообразующим его признаком.

Конституция Украины, провозгласив Украину демократическим, правовым и социальным государством, определила сутью и направленностью его деятельности права и свободы человека и их гарантии. Как отметил по этому поводу Конституционный Суд Украины в Решении от 22 сентября 2005 года «Украина как демократическое и правовое государство закрепила принцип уважения и нерушимости прав и свобод человека, утверждение и обеспечение которых является главной обязанно-

стью государства. Принцип правового государства требует от него воздерживаться от ограничения общепризнанных прав и свобод человека и гражданина».

Однако важно подчеркнуть, что ценности правового государства должны быть не только конституционно провозглашены, а и надежно защищены соответствующим государственным механизмом – системой взаимосвязанных форм и средств (нормативных, конституциональных и процессуальных), обеспечивающих надлежащую защиту и реализацию определенных прав и соответствующих обязанностей.

В этом аспекте необходимо отдать должное организаторам конференции, которые придали особое значение деятельности органов конституционной юрисдикции по защите ценностей правового государства. Ведь именно эти органы, де-факто поддерживают, образно говоря, «равновесие» между общепризнанными требованиями к правовому государству и их практической реализацией при формировании системы законодательных актов.

Примером этого может служить Решение Конституционного Суда Украины от 29 декабря 1999 года, в котором было определено, что «лишение человека жизни государством путем применения смертной казни как вида наказания, даже в пределах положений, определенных законом, является упразднением неотъемлемого права человека на жизнь, что не соответствует Конституции Украины».

Завершая свое выступление, хочу подчеркнуть, что необходимым фактором, определяющим успех многих преобразований в государственной и политической жизни современного общества, является уровень политической и правовой культуры. Необходимо избавляться от того правового нигилизма, который особенно отчетливо проявился в последнее время не только у граждан, но и у представителей государственного аппарата. Уважение и соблюдение конституции, законов всеми членами общества, всеми должностными лицами, органами государственной власти, органами местного самоуправления – неотъемлемая черта демократического, правового государства.

В этой связи полагаю, что результаты данной конференции послужат дальнейшему совершенствованию деятельности органов конституционной юрисдикции в демократических правовых государствах.

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РОЛЬ ИНДИВИДУАЛЬНОЙ ИНИЦИАТИВЫ ОТНОСИТЕЛЬНО ТОЛКОВАНИЯ ПОЛОЖЕНИЙ ЗАКОНОВ УКРАИНЫ В ОБЕСПЕЧЕНИИ ОБЩЕГО ИНТЕРЕСА

Вопрос индивидуального и общего интереса в правосудии имеет непреходящее значение и всегда будет колебаться в зависимости от уровня развития общества и состояния в нем правовых отношений, обусловленных объективными обстоятельствами.

В соответствии с частью второй статьи 150 Конституции Украины физические лица как носители индивидуальной инициативы могут быть субъектами права на конституционное обращение об официальном толковании Конституционным Судом Украины проблемных положений законов Украины. Процессуально такое право реализуется на основании статей 42, 43, 94, 95 Закона Украины «О Конституционном Суде Украины».

Исходя из положений статей 94, 95 Закона Украины «О Конституционном Суде Украины» можно утверждать о разнообразии соотношения полученного результата и рассмотрения индивидуальной инициативы для конкретного человека и общественного (общего) интереса.

Баланс в этом соотношении может быть и не в пользу гражданина, даже если будут удовлетворены его требования в конституционном обращении, но фактически будет достигнут общий интерес.

Какое же положительное решение может постановить Конституционный Суд Украины по конституционному обращению гражданина? Концептуально два – дать официальное толкование положения закона или, как это не удивительно (с формальной точки зрения на конституционные предписания), признать норму закона неконституционной.

Рассмотрим эти два направления.

I. Основой первого являются предписания статьи 94 Закона Украины «О Конституционном Суде Украины», в которых указано, что «Основанием для конституционного обращения об официальном толковании Конституции Украины и законов Украины является наличие неоднозначного применения положений Конституции Украины или законов Украины судами Украины, другими органами государственной власти, если субъект права на конституционное обращение считает, что это может привести или привело к нарушению его конституционных прав и свобод». В этой норме обращаю ваше внимание на положение *«может привести или привело к нарушению его конституционных прав и свобод»*. Имеем две условных ситуации: *«привело»*, то есть право уже нарушено, и *«может привести»*, то есть прогнозируется, что в будущем может произойти нарушение какого-то конкретного для субъекта права, закрепленного в Конституции Украины.

Если гражданин с целью защиты своего уже нарушеного конституционного (субъективного) права обращается в Конституционный Суд Украины за официальным толкованием положений закона и такое толкование будет положительным для цели его обращения, то он персонально для себя фактически не получает положительного результата, кроме морального удовлетворения, поскольку решение Конституционного Суда Украины, в котором дано официальное толкование положений закона, не является основанием для пересмотра решения, которое постановил суд общей юрисдикции в деле гражданина. Решение Конституционного Суда Украины, в котором дано официальное толкование положения закона, не является обязательным основанием для пересмотра ранее принятого судом общей юрисдикции решения. Следовательно, такое толкование имеет перспективу для дальнейших споров, которые могут возникнуть во время правоприменения, когда суды общей юрисдикции, разрешая конфликты, должны обязательно учитывать решение Конституционного Суда Украины. Фактически гражданин спровоцировал *«добро»* для других людей, то есть его инициатива является положительной для общего интереса.

Если же в конституционном обращении ставился вопрос об официальном толковании положений закона, учитывая возможное в будущем нарушение его конституционного (субъективного) права, и официальное толкование было положительным для цели обращения гражданина, то в этом случае совпадают положительные результаты как для индивидуального, так и для общего интереса. Пользуясь реше-

нием Конституционного Суда Украины, в котором даны трактовки соответствующих положений закона, лицо может в процессе рассмотрения его иска требовать от суда общей юрисдикции применения закона таким образом, как это определил Конституционный Суд Украины. Таким решением может пользоваться не только субъект права на конституционное обращение, а и любой другой гражданин в процессе рассмотрения в судах его исковых требований.

II. Согласно положениям части второй статьи 95 Закона Украины « О Конституционном Суде Украины» в случае если Конституционный Суд Украины, решая вопрос об официальном толковании положения закона, указанного в конституционном обращении физического лица, приходит к выводу, что такое положение противоречит нормам Конституции Украины, то Конституционный Суд Украины может признать его неконституционным. Поскольку неконституционные нормы не могут быть предметом официального толкования, то законодатель предоставил право нашему Суду в таких случаях выходить за пределы конституционного обращения. В указанной ситуации имеем совпадение индивидуального интереса с общим. Индивидуальный интерес здесь состоит в том, что ранее принятое судом об-

щей юрисдикции решение может быть пересмотрено соответствующим судом в соответствии с нововыявленными обстоятельствами, например на основании пункта 4 части второй статьи 361 Гражданского процессуального кодекса Украины, пункта 5 части второй статьи 245 Кодекса административного судопроизводства Украины, и не может быть применено никакими органами власти.

Общий интерес в этом случае заключается в том, что Конституционным Судом Украины соответствующие положения закона признаются недействующими.

В практике Конституционного Суда Украины было постановлено 7 таких решений. Такое количество решений за 17 лет деятельности Конституционного Суда Украины на первый взгляд кажется незначительным, но речь идет о наличии указанной возможности. Для наглядности практики приведем некоторые из этих решений.

1. В Конституционном Суде Украины выработана доктринальная позиция, которая заключается в том, что положениями статьи 55 (право на обращение в суд за защитой) в системной связи со статьей 124 Конституции Украины (юрисдикция судов распространяется на все правоотношения, возникающие в государстве) установлено неограниченное право гражданина на обращение в суд. Начало такой доктрине положено решением от 30 октября 1997 года № 5-зп в деле об официальном толковании статей 3, 23, 31, 47, 48 Закона Украины „Об информации" и статьи 12 Закона „О прокуратуре". Конституционный Суд Украины дал официальное толкование положений Закона Украины „Об информации", однако относительно содержания части четвертой статьи 12 Закона Украины „О прокуратуре", которой была установлена возможность обжалования принятого прокурором решения в суде лишь в случаях, предусмотренных законом, пришел к выводу о неконституционности этих предписаний как нарушающих конституционное право каждого на обращение в суд, поскольку исключения из конституционных норм устанавливаются лишь Конституцией Украины, а не другими нормативными актами.
2. В Решении от 16 ноября 2000 года № 13-рп/2000 в деле по конституционному обращению гражданина Солдатова Г. И. об официальном толковании положений статьи 59 Конституции Украины, статьи 44 Уголовного процессуального кодекса Украины, статей 268, 271 Кодекса Украины об admini-

стративных правонарушениях (дело о праве свободного выбора защитника) Конституционный Суд Украины, дал официальное толкование положений частей первой, второй статьи 59 Конституции Украины относительно права лица на свободный выбор защитника своих прав (пункты 4, 5 мотивировочной части и пункты 1, 2 резолютивной части решения), исследовав содержание части первой статьи 44 Уголовного процессуального кодекса Украины и части первой статьи 268 Кодекса Украины об административных правонарушениях в контексте данного официального толкования статьи 59 Конституции Украины, пришел к выводу о неконституционности указанных норм кодексов по причине ограничения ими конституционного права лица на свободный выбор защитника (пункт 6 мотивировочной части и пункт 3 резолютивной части решения).

3. В Решении от 22 декабря 2010 года № 23-рп/2010 в деле по конституционному обращению гражданина Багинского А.О. об официальном толковании положений части первой статьи 14-1 Кодекса Украины об административных правонарушениях (дело об административной ответственности в сфере обеспечения безопасности дорожного движения) Конституционный Суд Украины пришел к выводу, что установленные статьей 14-1 и частью шестой статьи 258 Кодекса Украины об административных правонарушениях административная ответственность и процедура привлечения к административной ответственности не основываются на конституционных принципах и правовых презумпциях, обусловленных признанием и действием принципа верховенства права в Украине. Указанные нормы кодексов не отвечают требованиям части второй статьи 8, статьи 22, частей первой, второй статьи 24, части второй статьи 61, статей 62, 64 Конституции Украины, а следовательно, являются неконституционными.
4. В Решении Конституционного Суда Украины от 3 июля 2003 года № 13-рп в деле по конституционному обращению гражданина Дияка Ивана Васильевича об официальном толковании положения части шестой статьи 29 Закона Украины „О выборах народных депутатов Украины“ (дело о сроках обжалования нарушений во время подсчета голосов и установлении результатов голосования) во время рассмотрения поставленного в конституционном

обращении вопроса Конституционный Суд Украины выявил признаки несоответствия Конституции Украины *четвертого предложения* указанного положения, а именно то, что оно нарушает закрепленную Конституцией Украины гарантию осуществления прав и свобод человека и гражданина – право на их судебную защиту (части первая, вторая статьи 55), которое не может быть ограничено (статья 64), а также право каждого на индивидуальные или коллективные письменные обращения к органам государственной власти, органам местного самоуправления и их должностным лицам (статья 40), и признал его не соответствующим Конституции Украины. В этом деле общий интерес имеет уже общественно-государственное значение, поскольку касается политического права граждан на участие в формировании органов государственной власти.

5. Постановляя Решение от 13 марта 2012 года № 5-рп в деле по конституционному обращению гражданки Галкиной З. Г. об официальном толковании положения части четвертой статьи 3 Закона Украины „О предотвращении влияния мирового финансового кризиса на развитие строительной отрасли и жилищного строительства" (дело о запрете расторжения договоров инвестирования жилищного строительства), Конституционный Суд Украины установил наличие признаков несоответствия положения части четвертой статьи 3 этого закона, согласно которому „запрещается расторжение физическими лицами любых договоров, результатом которых является передача застройщиком завершенного объекта (части объекта) жилищного строительства при условии, что такими договорами осуществлена оплата 100 процентов стоимости объекта (части объекта) жилищного строительства", положениям части второй статьи 3, части второй статьи 6, части четвертой статьи 13, части второй статьи 19, частям первой, четвертой статье 41 Конституции Украины.

Приведенные примеры показывают, что украинское законодательство и практика Конституционного Суда Украины максимально объединяют обеспечение общего и индивидуального интереса в процессе реализации права физического лица на конституционное обращение.

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