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

Vilnius, 11-14 September 2017

4th Congress of the World Conference on Constitutional Justice "The Rule of Law and Constitutional Justice in the Modern World" was held in Vilnius, Republic of Lithuania, on 11-14 September 2017.

300 experts on constitutional law from 90 countries of the world, as well as representatives of the European Court of Human Rights, the European Commission for Democracy through Law (Venice Commission) and other institutions participated at the Congress, organized by the Constitutional Court of Lithuania together with the European Commission for Democracy through Law (Venice Commission).

The Congress was opened by Dalia Grybauskaite, President of the Republic of Lithuania. Dainius Žalimas, President of the Constitutional Court of the Republic of Lithuania, Viktoras Prantskietis, Speaker of the Seimas of the Republic of Lithuania, Guido Raimondi, President of the European Court of Human Rights, Gianni Buquicchio the President of the Venice Commission of the Council of Europe held opening statements.

In the framework of the Congress, each country had prepared its national report containing answers to various questions related to the theme of the Congress, taking into account the practice in the country in question.

Within the framework of the five sessions of the Congress, various concepts of the rule of law, new challenges to the rule of

law, the interrelationship of the law and the state, the law and individual rights, as well as the importance of the independence of constitutional justice bodies in ensuring the protection of constitutional human rights were discussed.

At the final meeting, the speakers of the plenary sessions summarized the issues discussed during the sessions.

Following the results of the Congress, the Vilnius Communiqué was adopted.

IV Конгресс Всемирной конференции по конституционному правосудию «Верховенство права и конституционное правосудие в современном мире»

Вильнюс, 11-14 сентября 2017 года

11-14 сентября 2017 года в столице Литовской Республики городе Вильнюсе состоялся IV Конгресс Всемирной конференции по конституционному правосудию на тему «Верховенство закона и конституционное правосудие в современном мире».

В Конгрессе, организованном Конституционным Судом Литвы совместно с Европейской комиссией за демократию через право (Венецианская комиссия), приняли участие 300 специалистов по конституционному праву из 90 государств мира, а также представители Европейского суда по правам человека, Европейской комиссии за демократию через право (Венецианская комиссия) и других институтов.

Работу Конгресса открыла Президент Литовской Республики Даля Грибаускайте. С приветственной речью выступили также Председатель Конституционного Суда Литовской Республики Дайнюс Жалимас, Председатель Сейма Литовской Республики Викторас Перанцкетис, Председатель Европейского суда по правам человека Гвидо Раймонди, Председатель Венецианской комиссии Совета Европы Джанни Букиккио.

В рамках темы Конгресса каждая страна подготовила свой национальный доклад, содержащий ответы на различные вопросы, связанные с темой Конгресса, с учетом практики, существующей в соответствующей стране.

В рамках пяти сессий Конгресса были обсуждены различные концепции верховенства права, новые вызовы верховенству права, а также взаимосвязь закона и государства, закона и индивидуальных прав, а также значение независимости органов конституционного правосудия в обеспечении защиты конституционных прав человека.

На заключительном заседании докладчики пленарных заседаний обобщили рассмотренные в ходе них вопросы.

По итогам Конгресса принято Вильнюсское коммюнике.

Concept of the 4th Congress of the World Conference on Constitutional Justice

Strasburg, 27 July 2017

The rule of law is a prominent multifaceted and uniquely structured constitutional principle, which has its origins in ancient civilizations, and is also characteristic of modern legal systems. In its continuous development over the centuries, the principle of the rule of law is now composed of a multitude of elements and every legal system has a different constituent element and content for this principle.

Despite the existence of a unique pattern of the principle of the rule of law in every country, it nonetheless constitutes the cornerstone of every legal system in the modern world, where it is integrally linked to democracy and the protection of human rights. The rule of law is a generally recognised principle, inseparable from the constitution itself. As a fundamental constitutional principle, it requires that the law be based on certain universal values, thus it is essentially inherent in every constitutional issue.

The prevalent modern concept of the rule of law refers to the "*governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.*"[1] The European Commission for Democracy through Law (Venice Commission) identified common core elements of the Rule of Law, which are

[1] Report of the United Nations Secretary-General Kofi Annan; see Doc. S/2004/616, 23 August 2004, par. 6.

legality, including a transparent, accountable and democratic process for enacting laws, legal certainty, the prohibition of arbitrariness, access to justice before an independent and impartial court, including judicial review of administrative acts, respect for human rights as well as non-discrimination and equality before the law.[2]

The constitutional courts and equivalent bodies are the predominant guardians of the legal order based on the supremacy of law and the constitution as the supreme law. Constitutional courts (or equivalent institutions), within the framework of their constitutional competence, ensure the respect for and the implementation of national constitutions and have a strong influence on shaping the content of the principle of the rule of law. Many different aspects of this principle are revealed in constitutional justice cases. The impact of constitutional justice in strengthening the state under the rule of law and ensuring the defence of individual rights is essential as is the interest to explore it.

Constitutional justice institutions can only carry out their function of safeguarding the supremacy of the constitution if they are genuinely independent. Therefore, notwithstanding the unquestionable importance of ensuring the respect for and the implementation of the fundamental principles, it is equally essential to guarantee that constitutional courts be able to fulfil their purpose. For that reason, it is indispensable to guarantee the independence of courts, which is one of the central elements of the principle of the rule of law.

A permanent dialogue on the rule of law and on the implementation of this principle contributes to the strengthening of common constitutional values throughout the world. In the majority of countries, certain constitutional values may be perceived in a similar way, whereas the understanding of others may differ eminently. Nonetheless, the on-going processes of global integration in the modern world contributes to the common understanding of constitutional values and, consequently, their transformation into universal ones. The topic chosen for the 4th Congress of the World Conference provides an opportunity to discuss different aspects of this principle, which despite its unchanging core elements, is constantly evolving and unfolding. It is also of particular interest to the Central and Eastern European region, which, as a result of the oppression and occupation it experienced for half of a century, was devoid of the existence of the rule of law and constitutional justice.

[2] Report on the Rule of Law (CDL-AD(2011)003rev) and the Rule of Law Checklist (CDL- AD(2016)007).

The 4th Congress offers the possibility for participants to share different experiences on the rule of law and prepare for new challenges in the field of constitutional justice. Constitutional case law reveals the issues that challenge or, in some circumstances, threaten the rule of law. Constitutional justice institutions would therefore benefit from looking into the problems raised by the topic of the 4th Congress . The global integration process also contributes to new challenges that appear in the field of constitutional justice, such as the issues related to the multi-level constitutionalism, data protection, etc.

Constitutional justice institutions could therefore use this international co-operation platform to share their relevant experiences in administering constitutional justice so as to provide guidelines for how to deal with relevant issues. For that purpose, participants of the 4th Congress of the World Conference on Constitutional Justice are invited to discuss the general topic "*The Rule of Law and Constitutional Justice in the Modern World*", subdivided as follows:

I. The different concepts of the rule of law;
II. New challenges to the rule of law;
III. The law and the state;
IV. The law and the individual.

Концепция IV Конгресса Всемирной конференции по конституционному правосудию

Страсбург, 27 июля 2017 года

Верховенство права является имеющим многогранную и своеобразную единую структуру конституционным принципом, берущим начало в древних цивилизациях и характерным для современных правовых систем. Пройдя длительный путь развития на протяжении веков, сегодня принцип верховенства права состоит из множества элементов, но в каждой правовой системе данный принцип имеет свои элементы и содержание.

Несмотря на специфичность принципа верховенства права в каждой стране, он тем не менее является краеугольным камнем каждой правовой системы современного мира, неразрывно связанным с демократией и защитой прав человека. Верховенство права является общепризнанным принципом, неотделимым от самой конституции. Как основополагающий конституционный принцип он требует, чтобы право основывалось на определенных всеобщих ценностях, поэтому он по существу характерен каждой конституционной проблеме.

Современная широкая концепция верховенства права относится к "управлению, в котором все лица, учреждения и организации, как государственные, так и частные, включая само государство, подотчетны законам, которые публично обнародованы, одинаково применяются и независимо рассматриваются судами, соответствуют международным нормам и стандартам относительно прав человека[1].

Европейская комиссия за демократию через право (Венецианская комиссия) определила всеобщие основополагающие элементы верховенства права, каковыми являются законность, включая прозрачный, подотчетный и демократический процесс принятия законов; правовую определенность; запрет произвола; доступность независимого и беспристрастного суда, что включает судебный контроль за административными актами, уважение прав человека, а также запрет дискриминации и равенство перед законом[2].

Конституционные суды и эквивалентные органы являются основными стражами правового порядка, основанного на верховенстве права и конституции как основного закона. Конституционные суды (или эквивалентные институты) в рамках своей конституционной компетенции обеспечивают соблюдение и реализацию национальных конституций и оказывают большое влияние на формирование содержания принципа верховенства права. Многие аспекты этого принципа выявлены при осуществлении конституционного правосудия. Влияние конституционного правосудия в процессе укрепления государства, руководствующегося верховенством права и обеспечением защиты личных прав, достойно изучения.

Органы конституционного правосудия могут выполнять свою функцию по обеспечению верховенства конституции, если они действительно независимы. Поэтому, несмотря на бесспорную важность обеспечения уважения и осуществления основополагающих принципов, не менее важно гарантировать выполнение конституционными судами своей задачи. Именно поэтому необходимо гарантировать независимость судов, что является одним из главных элементов принципа верховенства права.

Постоянные дискуссии относительно принципа верховенства права и его реализации способствуют укреплению общих конституционных ценностей во всем мире. В большинстве стран некоторые конституционные ценности могут восприниматься одинаково, в то время как восприятие иных может значительно отличаться. Тем не менее продолжающиеся в современном мире процессы глобальной интеграции способствуют общему пониманию конституционных цен-

[1] Report of the United Nations Secretary-General Kofi Annan; see Doc. S/2004/616, 23 August 2004, par. 6.

[2] Report on the Rule of Law (CDL-AD(2011)003rev) and the Rule of Law Checklist (CDL- AD(2016)007).

ностей и, следовательно, их трансформации во всеобщие ценности. Тема, выбранная для IV Конгресса Всемирной конференции, дает возможность обсудить различные аспекты этого принципа, который, несмотря на неизменность основных элементов, постоянно развивается и расширяется. Этот принцип особо важен для стран Центральной и Восточной Европы, которые вследствие полувековой оккупации были лишены верховенства права и конституционного правосудия.

IV Конгресс предоставляет участникам возможность поделиться своим опытом в области верховенства права и подготовиться к новым вызовам в сфере конституционного правосудия. Конституционное прецедентное право выявляет проблемы, которые бросают вызов или в некоторых случаях угрожают верховенству права. Поэтому институты конституционного правосудия могли бы воспользоваться возможностью обсудить проблемы, поднятые на IV Конгрессе. Процесс глобальной интеграции способствует также преодолению таких вызовов в области конституционного правосудия, как проблемы, связанные с многоуровневым конституционализмом, защитой информации и т. д.

Поэтому институты конституционного правосудия могли бы использовать эту международную платформу сотрудничества для обмена опытом по осуществлению конституционного правосудия, давая рекомендации относительно решения соответствующих проблем. С этой целью участникам IV Конгресса Всемирной конференции по конституционному правосудию предлагается общая тема обсуждения "Верховенство права и конституционное правосудие в современном мире" и ее подтемы:

1. Различные концепции верховенства права
2. Новые вызовы верховенства права
3. Закон и государство
4. Закон и индивидуум.

Session 1.
The Different Concepts of the Rule of Law

Yi-Su Kim

Acting President of the Constitutional Court of Korea

Key-note presentation

Introduction

President Gianni Buquicchio of the Venice Commission, President Dainius Zalimas of the Lithuanian Constitutional Court, Presidents, Chief Justices, ladies and gentlemen, I am very grateful to have the opportunity to speak to you today. I also would like to congratulate and sincerely express my appreciation to the organizers and all the participants who are here today, and who have also prepared and attended the past three Congresses.

The 3rd Congress of the World Conference on Constitutional Justice was held in Seoul, Korea. I am therefore especially honored to have been invited as keynote speaker to the first session of today's event, the 4th Congress of the World Conference on Constitutional Justice.

The Congress is entitled "The Rule of Law and Constitutional Justice in the Modern World", and it is split into five sessions. The first session concerns "the different concepts of the rule of law". Based on the questionnaire responses submitted to this Congress, I have been asked to provide some thoughts on this very pertinent and meaningful topic.

In light of the diversity of our world, settling on a unanimous and exhaustive definition of the rule of law may seem difficult. Yet in the interests of constitutional justice, we can agree on an over-

lapping consensus over the core components of the rule of law. As the concept paper for this Congress suggests, a common core revolves around concepts such as the supremacy of law, equality before the law, and that laws must be public, clear and prospective. Likewise, a recent report by the Venice Commission also mentions a consensus on the following: legality, certainty, prohibition of arbitrariness, access to independent and impartial courts, respect for human rights and equality before the law. Despite some variations, the questionnaire responses to our Congress confirms this common core of shared ideas.

Based on the questionnaire responses to our Congress today, I shall proceed in four parts. Except for the third part of my speech, each part refers to one relevant question from the questionnaire assigned to the first session of this Congress. The third part of my speech together addresses questions number three, four and five, since they all focus on issues concerning case law. So my speech will contain observations about the following: First, what are the legal sources for the rule of law as a constitutional principle in various countries? Second, has the substantive concept of the rule of law become the dominant understanding? Third, in terms of case law, how are key components of the rule of law defined, what areas of law is this concept especially prominent in, and has the concept changed over time? Fourth, to what extent does international law have an impact on the interpretation of the rule of law?

1. Legal sources for the rule of law as a constitutional principle

The rule of law is a central constitutional principle. As expected, at the head of the relevant sources of law which establish the principle of the rule of law stands the text of the constitution itself. In many constitutions, there are explicit articles referring to the rule of law. This concept is also covered in sources further down the hierarchy of norms, such as national legislation. For some

jurisdictions, international legal instruments also function as one legal source for the rule of law.

However, the questionnaire responses also make it evident that case law of constitutional courts and equivalent institutions play a major role in elaborating and developing the concept of the rule of law. By their very nature, texts of codified constitutions are often open-textured. When it comes to complex concepts such as the rule of law, it is not surprising that comprehensive definitions are not usually given in the constitutional text. Therefore, it is often up to the judiciary to apply the concept of the rule of law to specific contexts, and thereby flesh out its meaning. Constitutional jurisprudence is thus indeed one of the major legal sources for the concept of the rule of law.

This observation is especially important since a significant number of questionnaire responses emphasized that there is not any “one” particular defined concept of the rule of law. Instead, the rule of law is made up of several principles. It is this bundle of principles which are found in the constitutional text, legislation, case law and international sources of law. Also, as suggested by question four of the questionnaire, the individual elements of the rule of law are often found in constitutional case law.

Constitutional case law especially plays a major role in jurisdictions where the rule of law is not explicitly referred to in the constitutional text. Instead, via the process of adjudication, the principle of the rule of law can be deduced from existing constitutional articles. The rule of law in these jurisdictions can firmly be considered as an unwritten constitutional principle. The constitutional court or equivalent institution is entrusted with the major task of developing the concept of the rule of law, especially if aspects of the principle are not directly mentioned in the constitutional text.

To conclude the first part of my speech, the questionnaire responses strongly suggest, as expected, that the relevant legal sources of law which establish the principle of the rule of law are mainly the constitutional text itself and constitutional case law.

2. Dominance of the substantive concept of the rule of law

The second point I would like to raise is based on the responses to the second question of the questionnaire. The question asks the following: "How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?"

After surveying the questionnaire responses, my main conclusion is that it seems the substantive concept of the rule of law has become the dominant concept. In general, a substantive concept of the rule of law is understood as a definition where the substance of the law is also of consequence. For example, the law must protect and not violate human rights. Whereas the formal notion is mainly concerned with procedural aspects, and not the content of the law. For example, key components of the formal concept of the rule of law are the clarity, certainty and non-retroactivity of the law.

A very significant reason for the rise of the substantive conception of the rule of law is the inclusion of the protection of human rights in the concept. Those arguing for merely a formal conception of the rule of law claim that if substantive elements such as human rights are part of the concept of the rule of law, then we are speaking about not the rule of law but the rule of good law. And to determine what the rule of good law is, we would have to provide an answer to what we understand as core elements of a good life. Advocates for the formal understanding of the rule of law argue that to answer such a question is not the purpose of the concept of the rule of law.

However, from the responses of the questionnaire it is evident that the majority of constitutional courts and equivalent institutions today see the protection of human rights as a key component of the rule of law. Disastrous historical experiences have to some extent discredited a mere formal conception of the rule of law. History has taught us that the formal conception of the rule of law is not enough. We only need to think back to Nazi Germany,

apartheid South Africa, and the history of slavery in the United States.

Another powerful argument for a substantive conception of the rule of law is that within the formal conception of the rule of law lies itself a substantive element, namely the goal of securing human dignity. Formal attributes of the rule of law such as the need for clear, stable and prospective laws serve the primary purpose of allowing individuals to be able to plan their lives, thus treating them as valued individuals, possessing dignity and rights. So the success of the substantive notion can also be explained by the fact that in the end, the formal conception of the rule of law is based on a substantive core.

It must also be stressed that opting for a substantive conception does not mean abandoning the formal conception. As is clear from the questionnaire responses, adopting a substantive conception means accepting and applying the formal conception, and then to go further. To be an effective check on the government's monopoly of coercive force, the rule of law must be understood as both a formal as well as a substantive concept.

A small minority of questionnaire responses do explain that traditionally it is the formal conception that dominated in their jurisprudence. But they also admit that in recent years, substantive elements have been recognized. Alternatively, some courts have pointed out that instead of settling on whether the rule of law as a concept is entirely formal or substantive, it is better to say that the concept of the rule of law contains several sub-principles. And among these sub-principles, some are formal while others are substantive.

When we analyze the linguistic differences involved, such as trying to ascertain what the differences or similarities are between the English terminology of the "rule of law", the German word "Rechtsstaat" and the French expression "etat de droit", the gradual move from a formal to a substantive concept can also be clearly traced. These are three major expressions which are used in the questionnaire answers, functioning as equivalents to each

other. However, as is well known, these terms are not exact synonyms.

The English term "rule of law" was most famously popularized in the 19th century by the Oxford professor Albert Dicey. In the orthodox English Diceyan context, the rule of law includes at least two prominent aspects. First, government under the law. Second, equality before the law. The principle of the rule of law exists as a check on Parliament's power in a procedural and formal sense. Whatever law Parliament may pass, it must apply equally to everyone, including the highest ranking public officials of the country. Also, public power must be justified by legislation. So, based on this definition, for a long time the "rule of law" in the English language, had been understood in very formal terms. However, at the dawn of the 21st century, it is not unusual for British judges to argue that the rule of law includes the protection of human rights. This evolution of understanding in the United Kingdom as well as in other parts of the common law world is also evidenced by the questionnaire responses to our Congress from common law jurisdictions.

Let me move from English terminology to German terminology. Some questionnaire responses, even though written in English, specifically mention the German term of the "Rechtsstaat", literally meaning a "state of law". For a long time, this was also seen as a formal concept. The German Imperial Constitution of 1871 did not contain a catalogue of rights. The Weimar Constitution of 1919 did contain a rights catalogue, but fierce debate continued over the entrenchment of fundamental rights. Thus before the Second World War, the idea of the "Rechtsstaat" was still heavily dominated by the formal conception, drawing strongly on legal positivism. The end of the Second World War brought about a turning point. The idea of the Rechtsstaat in the new German Constitution of 1949 became strongly substantive. The respect for human dignity and fundamental rights today stand at the apex of the German Constitution. Many civil law countries around the world have taken modern

German constitutional law, including the substantive "Rechtsstaat", as an inspiration, including the Republic of Korea.

Roughly 25 per cent of the questionnaire responses to our conference have been submitted in French. Now, the terminology for rule of law used in francophone jurisdictions is "etat de droit". Even though the French concept also literally means a "state of law", unlike the German Rechtsstaat, there has been historically a much weaker emphasis on the role of judges. Also, unlike in Germany, legal positivism did not play as prominent a role in 19th century France. Already after the First World War, with the expansion of executive power, the idea emerged in France that gaps left by legislation had to somehow be filled by general principles of law. Sources that were drawn upon included ideas that could be traced back to the 1789 Declaration of the Rights of Man. Thus substantive elements have always been partly included in the French tradition.

So we can see that philosophical, political, historical and cultural differences give us a diversity of views. Yet in the end, what has been clear from the questionnaire answers is that even though the rule of law may have started out as a formal concept, in our world today, the concept has become a substantive one. I now turn to the third section of my speech, surveying questions three, four and five, which are based on responses regarding constitutional case law.

3. The Rule of Law in constitutional jurisprudence

In this section I shall deal with three issues. First, what are the core elements of the principle of the rule of law according to case law? Second, are there specific fields of constitutional adjudication where the concept of the rule of law plays an especially prominent role? Third, has the concept of the rule of law changed over time in constitutional case law?

When it comes to case law, some questionnaire responses have emphasized that some courts do not usually come forward with theoretic elaborations on the substance and limits of the rule

of law concept as a whole. However, a majority of questionnaire responses indicate that many courts have indeed pinpointed core elements of the rule of law in their case law. Let me briefly elaborate on the most prominent core elements that, according to the questionnaire responses, are mentioned in constitutional jurisprudence across the world.

Undoubtedly the core element of the rule of law that has been mentioned the most is the principle of legal certainty. Its prominence can partly be explained by the fact that legal certainty lies at heart of the formal conception of the rule of law. Also, like the rule of law concept itself, the principle of legal certainty consists of a number of sub- principles such as clarity, consistency, predictability and non-retroactivity of the law. Another core element of the rule of law that is prominently featured in the questionnaire responses is the idea of the principle of legality. Other aspects of the rule of law that are also mentioned frequently are the need for independent and impartial courts, equality before the law and access to justice. Again, these are all predominantly features of the formal conception of the rule of law.

However, in addition to the above, the protection of fundamental rights has become one of the most cited elements of the rule of law. Thus even though a majority of core elements of the rule of law stated in constitutional jurisprudence are formal in nature, it is the strong prominence of one substantive element, namely the protection of human and fundamental rights, which has firmly established the substantive conception of the rule of law in case law. According to the questionnaire responses, the protection of human rights ranks near the top of the list of concepts that are referred to in constitutional jurisprudence as elements of the rule of law.

In what context are core elements of the rule of law mentioned, and in which particular fields of law has the rule of law played the most prominent role? The majority of questionnaire responses indicate that there is no particular field in which the rule of law is most important. The rule of law is important in all fields of

law. By virtue of the jurisdiction of constitutional courts and equivalent institutions, and by virtue of the concept of the rule of law itself, no area of law can be exempt from the concept of the rule of law.

But some questionnaire responses have indeed pointed out particular fields of law where the rule of law may be mentioned more often than others. They include the criminal law, where for example the issue on non-retroactivity of criminal punishment is of paramount importance. The field of human rights law is another strong contender where the rule of law is mentioned explicitly maybe more often than in other fields of law. The questionnaire responses also indicate that tax law is another such area of law. Also, due to the close connection between the idea of the rule of law and democracy, electoral law is another arena for the strong display of arguments based on the rule of law.

However, it must be emphasized that the overall trend displayed by the questionnaire answers is that the concept of the rule of law applies to all areas of law. This is especially so since some questionnaire answers speak of the “constitutionalization” of the law. Through this process, constitutional principles, including the rule of law, are applied to all fields of law.

Throughout this wealth of constitutional case law, to what extent has the understanding of the rule of law changed? The overwhelming majority of the questionnaire responses document no change. Some courts have also indicated that since they do not provide theoretical definitions of the rule of law in their case law, the question of change cannot be answered. However, even if some process occurred that may be called change, it is better understood as a development or elaboration of the concept of the rule of law, rather than a change in the concept itself.

Elaborations include the following: application of the rule of law reflecting changing social circumstances, development of the meaning of legal clarity, the evolution of the separation of powers, introduction of the principle of proportionality, the expansion of fundamental rights and mechanisms of judi-

cial review, and of course a general shift from a formal to a more substantive understanding of the rule of law. For some courts, the move towards a substantive concept was partly caused by the internationalization, and in the European context the Europeanisation, of society. At this point I shall turn to the fourth and final section of my speech, asking what role international law plays in the interpretation of the concept of the rule of law.

4. International law and the rule of law

Only very few of the questionnaire responses deny the influence of international law on the interpretation of the concept of the rule of law in their jurisdictions. The overwhelming majority mention an influence in one form or another.

Constitutional courts and equivalent institutions which are part of a regional human rights protection system are especially receptive to international influence. European jurisdictions are influenced by the European Convention of Human Rights as well as the values of the European Union. Regional human rights treaties in Latin-America and Africa also influence their respective members. No regional human rights protection system currently covers the whole Asian continent. But within the questionnaire responses, sub-regional cooperation in the field of human rights, such as the ASEAN Declaration on Human Rights have been mentioned as a source of international influence. Also, some responses from the Middle East refer to the treaties of the Arab League.

Even without a formal regional human rights mechanism, various jurisdictions do take into account international law and influences from abroad. This is because most states in the world have signed up to at least one of the major international human rights treaties. Since the protection of human rights has come to be understood as an element of the rule of law, these treaties and the opinions of their respective monitoring bodies naturally play a role in the interpretation of the rule of law. Examples of these treaties mentioned in the questionnaire responses include the following:

The ICCPR, the ICESCR and the UN Convention on the Rights of the Child.

In addition to treaty law, questionnaire responses also mention the Universal Declaration of Human Rights, and international customary law, especially the connection between *ius cogens* and human rights. Also, some questionnaire responses mention the influence of foreign case law, such as that of the US Supreme Court, the German Constitutional Court, and the Supreme Court of Canada.

To what extent international law actually affects the interpretation of the rule of law of course largely depends on the status of international law in the respective domestic legal system. However, even if international law is viewed as inferior to the domestic constitution, questionnaire responses suggest that there is no objection to the idea that international law can offer supplementary standards in interpreting constitutional principles such as the rule of law.

Conclusion

Finally, please allow me to conclude with the following points. Even though pinning down an exact concept of the rule of law is not easy, we can nevertheless settle on a minimum working definition based on a common core. This is evident from the questionnaire responses to our Congress today.

One useful way that has been applied to defining the rule of law is to think of various layers of definitions. We can start with the rule of law's main purpose, namely to provide some sort of legal limitation to the coercive powers of the state. We can thus identify the rule of law as a concept with a solid and uncontroversial core: the principle of legality. We can then add another rather uncontroversial layer, which is composed of the core elements of the formal conception of the rule of law, for example legal certainty, access to justice and equality before the law. In light of negative historical experiences, a further layer that includes the separation of powers and of course the protection of fundamental rights can

be added. Even further, we may add layers concerning issues of social justice and welfare.

There may be some disagreement as layers of definitions increase. But these disagreements are resolved by focusing on an overlapping consensus. A common concept is achieved especially through cooperation among our jurisdictions in the spirit of mutual understanding, learning and openness.

Thank you for your attention.

Mourad Medelci
President of the Constitutional Council of Algeria

Respondent

Mister Chairman,

Excellences, Ladies and Gentlemen,

The contribution of our countries in the questionnaire responses constitutes an important area for the exchange of information and very useful opportunity to share experiences.

I would like to pay tribute to His Excellency Yi-Su KIM for reconstructing a very good summary which gives him, at the same time, the opportunity to shed light on a highly relevant tracks that will help stimulate our debate today.

Thus, the hard core of the concept of the Rule of law informs us about a powerful common denominator between all our institutions and countries, all of which consider the fundamental principles of the Rule of Law laid down in our Constitutions and in constitutional jurisprudence, the density of which is growing steadily.

Indeed, the protection of human rights, equality before the law and the separation of powers are principles shared by all today, as well as the independence of justice.

At the same time, and over the past few years, the sources of law are referring to International Law, which, constitutes at least, according to our countries, one useful indicator and, increasingly, an absolute reference. The debate we are having today will probably remind us of the strengths and weaknesses of this trend that needs consideration, particularly on the renewed content of national sovereignty.

Progress is expected to ensure the best effective operational compromises.

Furthermore, Professor Yi-Su KIM suggested, in his brilliant presentation, a cross analysis of the subject related to the concept of the Rule of Law in order to better highlight the substantive concept of the Rule of Law, dominant but which relies necessarily on a formalism that reinforces clarity and legal certainty as corollary principles of the Rule of Law.

In fact, in order to expose the different concepts of the Rule of Law, President KIM has expertly opposed the aspect of formal law to aspect of the substantive law in an evolutionary retrospective. The historical evolution of political regimes based on procedural safeguards and those prefacing to guarantee substantive law has given different conceptions on what is the Rule of Law.

The various concepts began to evolve at the end of the Second World War. However, a conceptual approach is now tending towards a globalized normativity of the Rule of Law.

Ladies and Gentlemen,

Our Constitutional Courts and Councils attracted special attention as they contribute, through abundant case laws, to shed light on the scope of institutional actors in charge of putting into action the Rule of Law.

Much progress has clearly been made in favor of the implication of the citizen in the mission of guaranteeing our Constitutions, through the exception of unconstitutionality.

In this regard, you refer, Mr. Chairman, in the summary of the questionnaire responses, to the relevant question of the law constitutionalization. I fully agree with this idea and particularly its implications for the place occupied by the citizen in our constitutions.

We are witnessing today, under the effect of constitutional justice and more particularly with the extension of the scope of referral of constitutional courts to the litigant, an acceleration of the constitutionalization process in all branches of law, public and private. These latter have as a common matrix the constitution in which all rights find their founding principles and to which any litigant may have recourse to challenge the constitutionality of any legislative provision that might adversely affect him.

By accessing to constitutional justice, the citizen is not merely an actor with a separate constitutional space, and rights recognized by the fundamental law, but becomes an essential actor in the process of constitutional control of laws. The exercise of this new way of law enables the citizen-litigant to participate directly in possible interpretations of the constitution and to recover this latter, which is the expression of his volition, but also to recover the laws that his representatives have elaborated and adopted on his behalf and which he now has the possibility to challenge.

Is that not a significant step in the concept of the Rule of Law and the idea of constitutional democracy?

Algeria, like other countries in the sub-region and, more broadly, a large number of African countries, has established a mechanism that has already given us the opportunity to benefit from the experience of those who preceded us in this area.

Our debates today will allow us to come back to this new and powerful segment of constitutional justice, which has substantially transformed our action programs and consolidated our monitoring missions relating to the respect of our Constitutions.

Here is an area where the Rule of Law works on subjects close to citizens' concerns and which leads to enrich considerably the case law.

Finally, I would like to suggest that the debate should be engaged on the importance of the judge who is also a principal actor and merits full consideration to improve his capacities and strengthen his independence.

Over all these questions, I would be remiss if I did not single out the role and the effectiveness of the Venice Commission and its President, who has contributed in a very important way to shed light on the field of constitutional justice.

The best tribute we can pay to this institution, which brings together all continents, is to contribute to the debate, which was excellently led by our eminent speaker and President of the South Korean Court that successfully hosted the 3rd Congress in Seoul.

Session 2.
New challenges to the rule of law

Dainius Žalimas

President of the Constitutional Court
of the Republic of Lithuania

Key-note presentation

Dear Colleagues, Honourable Judges,
Dear President and Members of the Venice Commission,
Dear Friends,Distinguished Guests, Ladies and Gentlemen.

Introduction

This session on new challenges to the rule of law naturally continues the topic of the first session, which was devoted to the concept of the rule of law. After defining the formal and the substantive concepts of the rule of law, identifying their typical elements and relationships, as well as the possibly universal elements of the understanding of the rule of law, it is logical to examine the current threats that could shake the foundations of the rule of law, in particular its substantive conception that includes the goal to secure human dignity and ensure human rights. These threats and challenges may be common in the today's globalised and interdependent world; therefore, they may be related to the repercussions of international developments on the interpretation of the rule of law. Also it seems logical, after considering the impact of international law on the interpretation of the rule of law in the first session, to continue by dealing with collisions between national and international law, in particular collisions between constitutional and international jurisprudence, as well as their impact on ensuring the rule of law and the ways to settle the arising difficulties. It should be pointed out that this session is devoted to new challenges (both internal and external) to the rule of law, i.e. the recently experienced and current challenges faced by our courts, which either have been recently solved or still remain to be solved, or are even likely to arise in the nearest future, although some courts indicated the challenges faced in the distant past.

Based on the questionnaire responses to the three relevant questions, my report consists of three parts. The first part deals with the major threats to the rule of law at the national level. The second part examines the repercussions of international events and developments on the interpretation of the rule of law in the states that have responded to the questionnaire. The third part focuses on the collisions between national and international law faced by our courts, as well as the related difficulties in implementing the decisions of international courts and bodies. My report is based on and aims to generalise all 65 replies to the questionnaire we received from constitutional or supreme courts or councils of various states (more than half of them are replies from European courts). There are only a few states that stated they have not encountered any of the above mentioned challenges. On the basis of this general overview, my report also aims at identifying the common or most typical challenges to the rule of law, as well as the possible responses to these challenges. I hope this could be useful for continuing our dialogue on the further topics of the rule of law from the agenda of our Congress.

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

The question posed to our courts was the following: "Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?" This question implies the need to indicate the threats that could

shake the foundations of or seriously impede the rule of law in the respective country.

Around a quarter of the countries that submitted replies to the questionnaire (16 countries: Albania, Armenia, Belgium, Cambodia, Cameroon, Cape Verde, Chile, Denmark, France, Guinea, Indonesia, Mali, Norway, South Africa, Sweden, and Togo) answered this question negatively, i.e. they have not faced any major threats to the rule of law at the national level. Some of the other countries (7 countries: Croatia, Czech Republic, Estonia, Finland, Germany, Madagascar, and the Netherlands) stated they had not faced any threats that could be considered major threats to the rule of law, but they noted they did have some difficulties or challenges that needed to be overcome.

In general, the countries in their responses to the questionnaire indicated the following major threats or challenges to the rule of law recently faced by them:

– An **economic and financial crisis** was the most frequent answer. As a major threat or challenge, it was indicated in the responses of 20 countries (Belarus, Croatia, Cyprus, Democratic Republic of Congo, Estonia, Finland, Germany, Ghana, Italy, Jordan, Kyrgyzstan, Latvia, Lithuania, Mexico, the Netherlands, Portugal, Romania, Senegal, Slovenia, and Ukraine). This is not only because an economic crisis was indicated as an example in the formulation of the question. Most of the said countries referred specifically to the global economic and financial crisis that occurred in 2008; therefore, in the replies of some countries, the global economic and financial crisis is also mentioned as an international development with repercussions on the interpretation of the rule of law. A few countries indicated the economic crises arising from a specific background (for instance, the economic crisis of 2013 (bail-in) in Cyprus; the economic recovery after the war in Kosovo; the economic crisis of 2014–2015 as the result of foreign aggression and the national political crisis in Ukraine);

– **Corruption** is the second most frequently occurring answer. As a major threat or challenge, it was indicated in the replies of 8 countries (Bosnia and Herzegovina, Costa Rica, Croatia, Czech Republic, Georgia, Kosovo, Kyrgyzstan, and Ukraine). However, I believe that, at least looking at the Corruption Perceptions Index of 2016 by Transparency International,[1] corruption is a much more widespread phenomenon, which can be seen as a constant challenge to the rule of law rather than an *ad hoc* threat in a number of countries throughout the world;
– **Other major threats or challenges** of specific character, faced by individual countries, include: political crises (Indonesia and Jordan), armed conflicts (Ukraine[2]), international crimes of torture and inhumane behaviour (Democratic Republic of Congo), organised crime and transnational criminality (Italy and Kosovo), flows of refugees and persons seeking international protection (Austria, Denmark, and Lebanon), a lack of respect for court judgments (Croatia and Czech Republic), poverty (Madagascar), a lack of respect for minorities (Czech Republic), terrorism (Austria and Italy), an insufficient level of the legal culture (Belarus), unemployment (Bosnia and Herzegovina and Kosovo), inflation of legal rules (Turkey), etc. Finland indicated the rise of social media as a future threat to the principle of the rule of law. Some of these threats (such as terrorism and flow of refugees) are dealt with in Part 2 of this report as international developments potentially having repercussions on the interpretation of the rule of law.

Let me explore the first two types of the identified major threats and challenges (economic (financial) crises and corruption) in greater detail, as they are common to a significant number of our courts.

[1] Transparency International, https://www.transparency.org/news/feature/corruption_perceptions_index_2016.
[2] In Ukraine, the foreign aggression resulted in thousands of casualties and a flow of internally displaced persons, and it continues to seriously affect the rights of people, especially those living near and in the conflict zone and the occupied territories of Crimea and Donbass.

Economic (financial) crises. As it is clear from the replies to the questionnaire, economic and financial crises result in the major challenge to constitutional courts of balancing, in a fair manner, competing constitutional values – social guarantees (individual social rights), on the one hand, and the need to cope with a significant budget deficit (the public interest of fiscal stability), on the other hand. In other words, constitutional courts face the problematic issue of how to reconcile the inevitable anti-crisis (austerity) measures and the requirements of the rule of law, since these measures usually affect the level of guaranteeing social and economic rights and, to a certain extent, require derogations from such legal principles as legal certainty and equal rights.

The constitutional or equivalent courts of the following states provided rather detailed information on their case law dealing with the constitutionality of anti-crisis (austerity) measures: Croatia, Estonia, Germany, Italy, Latvia, Lithuania, Portugal, Romania, and Slovenia. It is worth underlining the decisive role of constitutional courts in this field, as international courts usually rely on and do not substitute the assessment of domestic courts.[3] One of the deepest economic and financial crises, accompanied by one of the biggest downfalls in GDP of as much as 20 percent, was experienced in 2009–2010 by two Baltic States – Latvia and Lithuania. The Constitutional Court of Lithuania had a considerable number of cases in which it assessed the constitutionality of various anti-crisis (austerity) measures, such as the sudden and significant reduction of pensions and other social benefits, as well as salaries in the public sector. The case law of the Lithuanian Constitutional Court singles out the following criteria that must be taken into account when assessing the constitutionality of austerity measures, in particular their compliance with human rights and the social orientation of the State: (1) the constitutionally justifiable basis of austerity measures (the existence of a particularly difficult financial situation when the income of the state budget is drastically declined); (2) their necessity (the measures in question are *ultima ratio*, i.e. necessary for safeguarding financial stability and saving economy from default); (3) their temporary character (the necessity of the measures is under periodic review and they are applied only as long as the difficult financial situation requires); (4) their proportionality (the measures are proportional to the need to preserve fiscal stability and do not distort the pre-crisis proportions of the same kind of benefits; (5) due regard to the limits of discretion of the legislature (the Constitutional Court is self-restrained in adjudicating on purely economic issues, i.e. as a rule, the assessment by the Government of a difficult economic situation and the expediency of the measures in question is not subject to dispute); (6) the principles of social solidarity and non-discrimination (the measures in question should be applied without discrimination except in cases where, on the basis of social solidarity, a certain minimum benefit is established, which is not subject to reduction); and (7) the duty to compensate for certain losses (in particular those that occurred due to anti-constitutional measures).[4] Similarly, the Constitutional Court of Latvia has noted that measures for overcoming the crisis and restrictions on the related rights of persons must meet certain criteria, i.e. they must be introduced on the basis of due assessment, abiding by the principles of a state governed by the rule of law; a difficult economic situation in the state provides the grounds to apply certain measures derogating from the terms set in law; however, such measures cannot be acceptable unless there is a prescribed time limit.

The Constitutional Court of Portugal points out that the legislator's freedom to shape the anti-crisis legislation is constitutionally bound by such principles associated with the rule of law as equality, the protection of legitimate expectations, and proportion-

[3] E.g., *Mockienл v. Lithuania*, ECtHR, 4 July 2017, application no. 75916/13.

[4] *Žalimas D.* "Taupymo priemoniш konstitucingumo kriterijai Lietuvos Respublikos oficialiojoje konstitucinлje doktrinoje", *Teisл*, 2015, Vol. 94, p. 59.

ality. The Court also considered that the Constitution opposes an intolerable, arbitrary, oppressive, or overly accentuated downgrading of those minima in terms of certainty and security, which people, the community, and the law must respect as essential dimensions of a democratic *Estado de direito*, which is included in the principle of a democratic state based on the rule of law. The Italian Constitutional Court emphasises that a financial emergency cannot under any circumstances legitimise legislative choices that are irrational or not based on a reasonable balance of conflicting values or interests.[5] The case law of the Constitutional Court of Romania identifies the following criteria of the constitutionality of anti-crisis measures: objectivity (established by law, predictable and determinable), affordability (fair and balanced option), non-discrimination, proportionality (between the objective and the measures);[6] however, as the Constitutional Court has stated on a number of occasions,[7] the establishment of a certain threshold for the application of austerity measures can be reasonable as an exclusive choice by the legislator. The Constitutional Court of Slovenia, in its Decision No. U-I-186/12, noted that a pension in an

[5] For example, the Constitutional Court of Italy, in one of its judgments of 2015, declared unconstitutional the provision that, for 2012 and 2013, limited the automatic revaluation of pension income in respect of the full amount thereof for pensions worth an overall amount of up to three times the minimum INPS (Italian National Institute for Social Security) pension, with the result that pensions higher than that threshold (1 217.00 euros net) were excluded from any revaluation. In failing to comply with the reference legislation enacted both previously and subsequently (both in respect of the duration of the measure for more than one year and also due to the fact that it applied to pensions that were not particularly high), the contested provision breached the limits of reasonableness and proportionality because it limited itself to recalling generically the "contingent financial situation", and the overall design did not make it clear why financial requirements should prevail over the countervailing rights of pensioners, which had been affected by such a far-reaching initiative.

[6] The purpose of the measures in question should be the fight against "the economic crisis,global phenomenon structurally affecting the Romanian economy", when the financial data and the forecasts made by the competent authorities in this field outline the "image of a deep economic crisis, which may endanger the economic stability of Romania and, thereby, public order and national security". This situation should require "the adoption of certain exceptional measures, which, by the efficiency and prompt application, leads to reducing its effects and to bringing about the re-launch of the national economy".

[7] E.g. by Decision no. 358 of 30 September 2003 or Decision no. 4 of 18 January 2000.

established amount is an acquired right determined by statute; however, the economic inability of the state to provide social expenses can represent a constitutionally admissible reason for the legislature to decrease the legally determined acquired rights for the future, and this is consistent with the principle of trust in the law; in order to be consistent with the principle of equality, the classification of groups of beneficiaries whose pensions are to be decreased cannot be arbitrary. The Constitutional Court of Croatia also underlines the importance to observe the principle of equality and the temporary character of measures in response to demands caused by the crisis (Decision no. U-IP-3820/2009 et al. of 17 November 2009): the special importance of the anti-crisis measure for the stability of public expenditures can have priority over the requirements for achieving absolute equality and equity, while the temporary character of that measure is based on a qualified public interest (maintaining the stability of the country's financial system). The Supreme Court of Estonia assessed the decrease of financial benefits by taking into consideration the principle of legitimate expectations (along with the relevant fundamental rights – the right of ownership, the fundamental right of equality, and the freedom to conduct business).

Conclusion. Thus, it can be concluded that, according to the case law of our courts, measures for overcoming an economic (financial) crisis must meet certain criteria that are based on and developed through the general criteria of the limitation of human rights as recognised by international law[8] (establishment by law, the legitimate purpose, the necessity and proportionality of the measure). These criteria include objectivity, non-discrimination, an exceptional and temporary character of the measures in question, the observance of other relevant constitutional principles,

[8] *Žalimas D.* "Facing the Challenges of the Financial Crisis: The Role of the Constitutional Court of the Republic of Lithuania", http://www.constcourt.md/public/files/file/conferinta_20ani/programul_conferintei/Dainius_Zalimas.pdf; Žalimas, D., "Taupymo priemoniш konstitucingumo kriterijai Lietuvos Respublikos oficialiojoje konstitucinлje doktrinoje", *Teisл*, 2015, Vol. 94, p. 59.

such as social solidarity, and the broad discretion of the political branch of power to decide the issues of economic policy. The replies of Bulgaria, Algeria, and Indonesia make it evident that economic (financial) crises can also be seen as challenges provoking positive changes and reforms in the administration of the state and the public financial sector.

Corruption. According to the Venice Commission, corruption refers to particular challenges – actions and decisions that offend the rule of law.[9] For example, in the report of Ukraine, it is noted that corruption jeopardises the good functioning of public institutions and diverts public action from its purpose, which is to serve the public interest; it disrupts the legislative process, affects the principles of legality and legal certainty, introduces a degree of arbitrariness in the decision-making process, has a devastating effect on human rights, and undermines citizens' trust in the institutions.[10] As underlined by the Constitutional Court of Moldova in its case law,[11] corruption undermines democracy and the rule of law, leads to violations of human rights, undermines the economy, and erodes the quality of life; therefore, fight against corruption is an integral component of ensuring respect for the rule of law. In the reply of Bosnia and Herzegovina, it is emphasised that, in the circumstances when the citizens of the state are losing trust in the rule of law because of corruption (including other factors), the strengthening of the rule of law is of utmost importance; it is political institutions and courts that should restore that trust; and the role of the Constitutional Court, especially in view of its jurisdiction, is exceptionally important and noteworthy. Raising the authority of the Constitution in cases of corruption is emphasised in the report of Kyrgyzstan.

[9] This challenge was topical and pervasive at the time of the drafting of the document of the Venice Commission – CDL-AD(2011)003rev-e Report on the rule of law, adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011),

[10] Ukraine quotes the Resolution of Parliamentary Assembly of the Council of Europe (Resolution 1943 (2013)) on corruption as a threat to the rule of law:

[11] E.g. Judgment no. 22 of 05.09.2013, Judgment no. 6 of 16.04.2015.

Some examples from the states of the Central and Eastern European region show the connection between the existing cases of corruption and the legal culture. In the report of Croatia, it is stated that "unstable political and legal culture leads to corruption, a lack of understanding and inappropriate actions by certain persons in bodies of state authority, and to a lack of respect for institutions and court judgments". In the report of the Czech Republic, it is acknowledged that, obviously, "corruption, a lack of respect for minorities (ethnic or religious), or the ignorance of judicial decisions by politicians occurs and affects the legal culture".

Replies to the questionnaire do not provide more detailed information on the case law related to the constitutionality of anti-corruption measures. It can only be presumed that they should also involve the criteria for restricting certain human rights, balancing public and private interests, transparency in the administration of the state and in the activities of all three branches of state power.

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

More than a third of the countries responded that they had not faced any repercussions of international events and developments on the interpretation of the rule of law (26 countries: Albania, Armenia, Belgium, Bosnia and Herzegovina, Cambodia, Cape Verde, Croatia, Cyprus, Georgia, Guinea, Korea, Kyrgyzstan, Latvia, Luxembourg, Macedonia, Madagascar, Mali, Mexico, Mongolia, Niger, Russia, South Africa, Sweden, Thailand, Togo, and Ukraine). The rest of our courts most often indicated the phenomena mentioned as examples in the formulation of the question – migration and terrorism. Migration (floods of refugees) was indicated by 19 countries (Belarus, Bulgaria, Cameroun, Canada, Chile, Costa Rica, Denmark, Finland, Germany,

Hungary, Italy, Jordan, Kosovo, Norway, Portugal, Romania, Senegal, Slovenia, and Turkey), while terrorism was pointed to by 24 countries (Algeria, Azerbaijan, Belarus, Canada, Cameroun, Congo, Finland, France, Gabon, Germany, Ghana, Hungary, Indonesia, Jordan, Kosovo, the Netherlands, Norway, Portugal, Romania, Senegal, Slovakia, Slovenia, Switzerland, and Turkey). Some other events and developments of international significance mentioned by our courts are, for example, organised crime (Algeria, Czech Republic, Kosovo, Lithuania, Portugal, and Romania) and cybercrime (Norway).

The replies to the question on the repercussions of international events and developments on the interpretation of the rule of law often refer to recently adopted (or proposed) national legislation and, in rare cases, even constitutional amendments[12] dealing with various issues of migration and terrorism. There are also reports about newly established institutions in the field, as well as the indication that the competent national law enforcement agencies tend to gain more competences, in particular in counter-terrorism activities. However, not all the constitutional courts or equivalent bodies that reported about the changes in the legislation have heard cases on the constitutionality of measures aimed to control migration processes or to combat terrorism. For example, Croatia, Czech Republic, Denmark, Mongolia, Slovakia, and Ukraine reported that they have not any decisions on these issues. According to the reply of Austria, it is not yet

[12] For example, in Slovakia, the question of terrorism has recently prompted the amendment of Art. 17.3 of the Constitution, according to which, in addition to the general time limit for detention of 48 hours, a special time limit of 96 hours was introduced for crimes of terrorism, in which the suspect must be interrogated and either released or taken before the court. This constitutional amendment did not lead to any major controversy and is not considered problematic. In Hungary, a constitutional amendment is tabled to include Article 51/A "on the state of terrorist threat" in the Fundamental Law. The Sixth Amendment to the Fundamental Law adopted in June 2016 permits the Government to initiate a "state of terrorist threat" by submitting a request for the Parliament to declare the state of terrorist threat, and the Government can start exercising emergency powers as soon as it makes the request. The argument for adopting this constitutional amendment went that it would be necessary to manage the adverse results from the migration crisis, including also threats of terrorism.

clear whether the recent legislative developments modify the prevailing understanding of the rule of law (*Rechtsstaat)* until these amendments are not adjudicated by the Federal Constitutional Court. Estonia states that "it is impossible to point out that, for instance, the growth of terrorism in the world has had any effect on the consideration of the rule of law in Estonian criminal procedure law".

Some courts reported that the legislative acts dealing with the issues of migration and counter-terrorism activities have already become a subject of constitutional review. These replies make it evident that the major challenge to the constitutional courts and equivalent bodies is to assess the constitutionality of the migration control or counter-terrorism measures that inevitably involve certain restrictions on the relevant human rights and freedoms (the right to asylum, social rights, guarantees in criminal procedure, etc.). Such factors as a significant increase in the number of persons seeking protection and a growing number of terrorist attacks have prompted the legislator to sharpen (tighten) laws on migration and counter-terrorism. This results in tension between the need for governments to control societies for the sake of their security and individual freedoms (i.e. between the public and individual interests). Thus, here again (as in the case of the already discussed austerity measures), the constitutional courts and equivalent bodies have to find a proper and fair balance between competing values, by verifying the justification by the government of the restrictions of fundamental rights.

From the responses of our courts, it follows that this justification should be grounded on the same criteria as provided by international law and interpreted in the case law of international tribunals (e.g. the European Court of Human Rights). It seems that it is most important to guarantee access to justice (the possibility of judicial scrutiny of the measures applied) and to comply with the principle of proportionality in restricting human rights and freedoms (in particular, proportionality *sensu stricto* – the requirement to apply less intensive measures of interference).

For example, the *ultima ratio* in extreme circumstances is a state of emergency. Its application is discussed in the reply of the Council of State of France: upon the declaration of a state of emergency, some rights and freedoms are to be limited; the measures applied must be exceptional and strictly controlled by courts; in these circumstances, this exceptional regime of a state of emergency does not contradict the principle of the rule of law.

As regards the ordinary measures, our courts faced the cases involving the issues of immigration restrictions, social benefits for immigrants, control and surveillance measures, the protection of private life, and data protection. First, I can refer to the reply of the Supreme Court of Canada: although it is acknowledged that courts should be restrained in respect of the legislative and the executive, they also have to ensure that the counter-terrorism laws are in line with the Constitution and that the state does not go beyond its legitimate powers; the preference should be given to fundamental rights; however, the state may limit these rights when it can justify these restrictions. Like in many other countries, in Canada, the hardest task seems to be finding a balance between national security and the necessity to limit fundamental rights in the least restrictive manner possible. For instance, in the case of *Charkaoui*, the Supreme Court of Canada declared anti-constitutional certain provisions of the procedure of detention and expulsion of foreigners as incompatible with the right to a fair trial: it was found that they did not provide for a sufficient opportunity to be heard, and the legislator could use other, more lenient, measures to restrict the right to a fair trial in cases where secret information forms a basis for the security ban.

Similarly, the Federal Constitutional Court of Germany held that the authorisation of the Federal Criminal Police Office to carry out covert surveillance measures for the purpose of protecting against threats from international terrorism is, in principle, compatible with the fundamental rights; however, the specific design of these powers does not satisfy the principle of proportionality in several regards. The Constitutional Court of Slovakia, in one of its

judgments (Ref. No. PL. ÚS 10/2014), found unconstitutional the legislation laying down the obligation for internet and telecommunication service providers to retain, for some time, all traffic data on the communication: the challenged provisions could not be considered necessary for attaining the objective pursued by them, even if the objective itself was legitimate; it was noted that the fight against serious crime and, ultimately, public safety could be achieved by other means that constitute a less intensive interference with the right to privacy when compared with the preventive and systematic retention of the data. In a similar manner, the Constitutional Court of Romania (Decision no. 1258 of 8 October 2009) recognised unconstitutional the provisions on the retention of data in the electronic communications sector, as it found them depriving the principle of protecting personal data and confidentiality of its content: the Court came to the conclusion that the legal obligation requiring the continuous retention of personal data makes the exception to the principle of the effective protection of the right to personal life and freedom of expression absolute as a rule; therefore, this right appears to be regulated in a negative fashion, its positive side losing its predominant character; the Court also found excessive the interference in the personal life of those individuals with whom the persons under surveillance might communicate. On the other hand, the Constitutional Court of Romania did not deny the purpose of the legislation itself, which was to ensure the adequate and effective legal means compatible with the ongoing process of modernisation and technologisation of media so that crime can be prevented and controlled.

As it follows from the replies of the majority of our courts, such international events and developments as the migration crisis or the spread of terrorism had no particular repercussions on the interpretation of the rule of law. For example, the Constitutional Court of Portugal did not move away from its existing line of interpretation with regard to the meaning of the principles of *Estado de direito* and proportionality, applying them in accordance with the requirements derived from the interests at stake and maintaining

the exceptional nature of restrictions on human rights. In Ruling no. 296/15, the rule under which the right of certain foreign nationals to social integration benefit was subjected to the minimum term of the last three years of legal residence in the country was found by the Court to be unconstitutional as not complying with the principle of proportionality: as the Court ruled, the imposition of a three-year time period – which effectively results in the denial of the award of means of subsistence to a foreign citizen in a socially at-risk situation until that time period is up – is excessive and intolerably collides with the right to a benefit that ensures the basic means of survival. In Ruling no. 403/15, the Constitutional Court of Portugal found unconstitutional the rule providing for access by intelligence services to the communications-related data needed to identify the service subscriber or user, to find and identify the source, destination, date, time, duration, and type of communication, the telecommunications equipment, or its location: the Court acknowledged that access to such data must be necessary, appropriate, and proportionate in a democratic society in order for intelligence services to be able to fulfil their legal mission; but it also concluded that intrusion into communication data had not been regulated by the procedure that would provide the guarantees and possibilities of protection of a similar scope to which the Constitution subjects criminal procedure.

On the other hand, dealing with personal data protection issues within the context of fighting against terrorism, the Constitutional Court of Turkey expressed the need to adopt "a more sensitive approach in establishing the balance between security and freedoms" in time when the country is facing "devastating and violence-inciting terror activities" that constitute "serious risks to the rule of law"; according to the Court, "the need to protect the right to life and ensure security may push the countries to take much severe measures than they would do under normal circumstances". In one of its decisions, the Constitutional Court of Turkey justified the regulations providing for the possibility for the Undersecretary of Public Order and Security to collect

and possess personal data necessary for fighting against terrorism on account of the need to fulfil the duties of this official and the established restriction to collect this data solely for the purposes of fighting against terrorism; according to the Court, this authority cannot be considered disproportionate interference with the right to demand the protection of personal data under the scope of private life and does not render the exercise of this right impossible or extremely difficult.[13]

Conclusion. To sum it up, the states respond to international events and developments, such as migration and terrorism, by adopting measures that restrict certain human rights and freedoms, in particular the right to asylum and the right to privacy. In this context, constitutional courts and equivalent bodies have the particular responsibility in ensuring the rule of law by finding a proper and fair balance between the interests of public security and individual freedom. As it follows from the case law of our courts, it is unlikely that the migration crisis or the spread of terrorist threats could have significant repercussions on the interpretation of the rule of law. The essence of the rule of law remains the same as long as the same criteria for assessing the constitutionality of restrictions on human rights are applied, i.e. the criteria that are also recognised by international law and international tribunals. They include: (1) the legitimate aim – none of our courts have disputed the legitimacy of the objectives to control migration or to combat terrorism, as they are necessary for ensuring national and public security; and (2) necessity in a democratic society and proportionality – the measures applied should be exceptional and adequate to the aim pursued, in particular the requirement should be observed to apply less restrictive (or the most lenient) possible measures of interference. The latter requirement also means that the right in question cannot be denied in essence, i.e. the application of restrictions cannot become an absolute rule. In

[13] AYM, E.2010/40 K.2012/8, 19/1/2012

addition, the possibility of the judicial scrutiny of the measures applied (access to justice), without which the rule of law is inconceivable, also plays a decisive role in assessing the constitutionality of these measures.

It is the general understanding of our courts that, when assessing a disputed legal regulation, in particular its compliance with the principle of proportionality, we should duly take into account such factors as technological progress, the rapid development of communications, and other changes in our societies and international life. However, this adjustment should not lead to the new criteria of constitutionality, less restrictive approaches to the limitation of human rights, or the broadening of the powers of state authorities at the cost of human rights.

3. Collisions between national and international law and difficulties in the implementation of judgments of international courts

The rule of law is inconceivable without due respect for international law. The compliance with international law and, in particular, with human rights law, including binding decisions of international courts, is enlisted as one of the elements of the principle of legality forming the concept of the rule of law by the Venice Commission in the Rule of Law Checklist.[14]

The question put to our courts actually comprised a few interrelated issues and was the following: "Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional/international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such

[14] The European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, 2016.

courts/bodies? What is the essence of these difficulties? Please provide examples".

Nearly half of the replies (26 countries: Algeria, Armenia, Azerbaijan, Belarus, Cameroun, Cape Verde, Chile, Canada, Democratic Republic of Congo, Cyprus, Estonia, Georgia, Guinea, Indonesia, Jordan, Kazakhstan, Kyrgyzstan, Lebanon, Macedonia, Madagascar, Mali, Mongolia, Sweden, Thailand, Togo, and Turkey) to this question were negative, i.e. no cases of collisions between national and international law or related difficulties were reported. Sometimes these collisions are not reported due to the reason that a certain court does not have jurisdiction to assess the conformity of international treaties with the constitution and (or) assess the conformity of laws with international treaties (e.g. Macedonia).

To a certain extent, collisions between national and international law, in particular those arising out of a different interpretation of law (including human rights) by competent national and international courts, are inevitable. This is due to the fact that both legal systems (national and international law) are of a different origin and autonomous, albeit they have the common areas of operation (in particular, human rights) and the mechanisms for their coordination; both of them claim supremacy in their respective spheres of application (national constitutions are usually proclaimed within the respective country to be supreme law with which international obligations cannot be in contradiction; meanwhile, under international law, the fundamental principle is *pacta sunt servanda* and the supremacy of international law in international relations with its logical consequence – the prohibition to rely on national law, including the constitution, in justifying noncompliance with international obligations). Therefore, it seems natural that, due to the parallel development of both systems, from time to time certain inconsistencies or collisions may occur. Most often this can happen when national courts deal with a certain issue that has never before been considered by international tribunals, and the latter later find the practice of national courts

inconsistent with international obligations (e.g. precisely this happened when, in 2004, the Constitutional Court of Lithuania had to deal with the consequences of impeachment related to passive electoral rights without the possibility to refer to any relevant practice of international tribunals and, in 2011, the European Court of Human Rights[15] came to a slightly different conclusion on the same issue).

Thus, it is not surprising that the cases of collisions between national and international law arising out of a different interpretation of law (or a certain right) by a national constitutional court and a regional or international tribunal (body) are reported by a number of states (e.g. by Austria, Croatia, Czech Republic, Denmark, Finland, Germany, Hungary, Italy, Korea, Latvia, Lithuania, Mexico, Moldova, Portugal, Slovenia, South Africa, and Ukraine).[16] They involve differences in interpreting the content or scope of a particular right and the different assessment of the proportionality of restrictions on a particular right.[17] Mostly, differences with the ECtHR are reported (e.g. by Denmark, Germany, Hungary, Italy, Moldova, Portugal, Romania, Slovenia,

[15] Thereinafter referred to as the ECtHR.

[16] Some of them reported about single or rare (e.g. Bulgaria, Croatia, Latvia, and Lithuania) or numerous (e.g. Austria, Germany, and the Netherlands) collisions, also minor or slight (e.g. Croatia, Finland, and Ukraine) or deeper (e.g. Lithuania) differences in their case law.

[17] The illustration of slightly different approaches on the content and scope of a particular right is provided by the Constitutional Court of Ukraine. It had differences with the ECtHR in the interpretation of the right to judicial protection, in particular one of its components – the right to enforce the judgment without undue delay. The Constitutional Court of Ukraine ruled that the national legal provisions providing for the extension of the period for the execution of court judgements did not violate the principle of the compulsory enforcement of judicial decisions. The ECtHR found the violation of the right to a fair trial (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (thereinafter referred to as the ECHR) in two cases against Ukraine for undue delay in the execution of court decisions, which deprived the right to a fair trial of its practical effect. Austria reported that its Constitutional Court did not follow the recent reading by the ECtHR of Article 4 of Protocol No. 7 to the ECHR regarding the exact scope of the right not to be subjected to double jeopardy and understanding of "civil rights and obligations" within the meaning of Article 6 of the ECHR. Most recently, unlike the ECtHR in various judgments, the Constitutional Court of Austria has held that the requirement for landowners to tolerate the use of their land for hunting cannot be seen as imposing a disproportionate burden on landowners who are opposed to hunting for ethical reasons.

and Ukraine). The rights and freedoms in question included the right to a fair trial (Italy, Portugal, and Ukraine), the right to an effective remedy (Slovenia), the freedom of expression (Denmark and Hungary), the right to privacy (Germany and Romania), the right to pursue an entrepreneurial activity (Hungary), and the right to be elected (Moldova). In South Africa, a different interpretation was applied by the UN Committee on Economic, Social and Cultural Rights concerning the right to water. Some of the countries that reported about collisions with international law and differences in interpretation with international courts (e.g. Bosnia and Herzegovina, Cambodia, Czech Republic, Finland, Lithuania, South Africa, and Switzerland) also reported about the related difficulties in the implementation of judgments of international (regional) courts or bodies.

Obviously, the prevention and settlement of collisions between national and international law depends on the national constitution and its interpretation by competent constitutional courts or equivalent bodies. The place of international law, as well as the ways and methods of implementing international obligations within the national legal system, can be determined only in accordance with the respective constitution. In this respect, states may have a very broad choice of instruments to ensure that the principle of *pacta sunt servanda* is observed; their choices are determined by the monist or dualist approach to international law, legal traditions, and the experience of a given country. Not the last, if not decisive, is the role of constitutional courts and equivalent bodies in taking a more or less friendly approach to international law. Most of our constitutions have rather abstract provisions on respect for international law. It is our responsibility to reveal their content by adopting the more or less friendly treatment of international law, including judgments of international tribunals. As demonstrated by the replies to the questionnaire, constitutional courts are able to find ways to prevent or settle collisions between national and international law, including those arising out of a different interpretation by national and international courts.

It is mostly due to interpretation by constitutional courts and equivalent bodies that national legal systems can be characterised by openness to international law (e.g. in Germany, Latvia, Lithuania, and Portugal), even if the constitution provides for its unconditional supremacy. There are constitutional principles whose interpretation and combination can open the constitution to the influence of international law; these principles give rise to the duty of the constitutional court (or an equivalent body) to take into due account the relevant rules of international law. For example, in Lithuania, such principles include the rule of law (inconceivable without respect for international law), *pacta sunt servanda* (expressly requiring the fulfilment of international obligations in good faith), open civil society (implying openness to the rules of international community), and the geopolitical orientation (including the orientation to European legal standards). The openness of Portuguese constitutional case law to international law means that it includes frequent references to the ECHR, the EU Charter of Fundamental Rights, and other international legal instruments, as well as to the case law of the European Court of Justice[18] and the ECtHR.

As follows from the replies of our courts, the following measures are available for the prevention and settlement of collisions between the national constitution and the norms of international law:

– **Preliminary *(a priori)* review of the constitutionality of international treaties** (e.g. Gabon, Lithuania, and Slovenia). It prevents the rules of international law that do not comply with the constitution from entering into the national legal system;

– **Harmonising interpretation**. This method seems to be most frequently applied by our courts and it naturally follows from the openness of the constitution to international law. Harmonising interpretation was indicated to be in use in practice by the constitutional courts or equivalent bodies of Algeria, Azerbaijan,

[18] Thereinafter referred to as the ECJ.

Canada, Croatia, Denmark, Estonia, Finland, Indonesia, Jordan, Lebanon, Lithuania, Macedonia, the Netherlands, Norway, South Africa, Switzerland, Ukraine, etc. In some countries (e.g. Moldova and Slovenia), the duty of harmonising interpretation is expressly provided for by the constitution. In other countries, it is implied by the constitutional principles providing for the openness of the constitution to international law: for example, in Lithuania, international and EU law is perceived as a source for the interpretation of relevant constitutional provisions; international and European human rights standards are considered to be the minimum constitutional standards for the protection of human rights. In revealing the content of constitutional provisions and developing the official constitutional doctrine, the Constitutional Court of Lithuania relies on the case law of the ECtHR, the ECJ, and other international bodies.

The Supreme Court of Denmark generally strives to interpret Danish legislation in conformity with the practice of the ECJ and the ECtHR. The Supreme Court of Estonia interprets the Constitution on the basis of international legal norms (by substantially incorporating international legal norms into the Estonian legal order). The Constitutional Council of France reports that, although it does not decide on collisions between national and international law explicitly, it has to refer to the explanations of norms of international law while exercising the review of constitutionality in order to decide on the particular question; the Council seeks to harmonise the requirements arising from international conventions with French national law. In its reply, the Supreme Court of Canada reported about the case of *B010 v Canada* on citizenship and immigration, in which the presumption of the compliance of national laws with the international commitments of Canada was affirmed; it undertook the interpretation of national law that would comply with the international commitments to fight the organised illegal transit of immigrants and to ensure the rights of persons seeking international protection (e.g. with the provisions of the Convention relating to the Status of

Refugees and the Convention of Palermo (the UN Convention against Transnational Organised Crime). In South Africa, the Constitutional Court highlighted the constitutional obligation to harmonise national and international norms in the *AZAPO* case: "the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law". The Court also applied harmonising interpretation for overcoming difficulties in the enforcement of the judgment of the regional court (the SADC Tribunal) in the *Fick* case:[19] it proclaimed that the interpretation of national law should be in line with international obligations and, therefore, in order to uphold the rule of law, national law on the execution of court orders should be extended to allow the execution of an order by the SADC Tribunal.

In the Netherlands, the Administrative Jurisdiction Division of the Council of State uses the concept of "reading together" of constitutional and international fundamental rights provisions (e.g. in the *Jezus redt* case, the provisions of the Constitution concerning the freedom of religion and the freedom of expression were interpreted in the light of these same rights under the ECHR). Similarly, the Supreme Court of Norway reported about its practice (e.g. the so called "Maria-case" of 2015) that the fundamental rights provided for by the Constitution have to be interpreted in the light of their international counterparts. In the case law of the Constitutional Court of Romania on criminal law issues related to the case law of the ECtHR, it is acknowledged that the national constitutional court has not only the right, but also the obligation, to interpret the Constitution removing any inconsistency between the domestic text and the European one;

– **Reinterpretation of the Constitution (the official constitutional doctrine) or the change of case law** (e.g. Finland, Moldova, and Portugal). This is another consequence of the openness of the national constitution to international law: to

[19] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

maintain this openness, the interpretation of the constitution (national law) should be adapted to that of international law once the difference between national and international law is found (usually by an international tribunal or body). This means the change (modification) of the already established case law by harmonising it with the interpretation provided by international (regional) courts and bodies. A good example comes from Moldova: following the judgment of the ECtHR in the case of *Tanase v. Moldova*, the Constitutional Court of Moldova considered it necessary to revise its own case law on the ban for the Moldovan nationals with multiple nationality to hold public positions, and declared this ban unconstitutional as it had already been recognised by the ECtHR as a disproportionate restriction of electoral rights in the situation of Moldova, where multiple nationality is a widespread phenomenon. Another example is Finland, where the minor differences between national and international law (e.g. in balancing the freedom of speech and the right to privacy, in interpreting the *non bis in idem* principle), faced by Finnish courts, normally are solved by changing the position of Finnish courts so as to make it in line with the international (European) interpretation. The Constitutional Court of Portugal also acknowledged that it had even gone to the point of modifying its own case law in the light of that of the ECtHR (e.g. following the case of *Feliciano Bichão v. Portugal*).

The possibility of the reinterpretation of the official constitutional doctrine is not excluded by the Constitutional Court of Lithuania, either. The established interpretation of the Constitution may be changed provided this could enhance the level of protection of human rights or other constitutional values. However, as it follows from the ruling of 5 September 2012, the reinterpretation is not possible when it could change the overall constitutional regulation and the balance between constitutional values (this is why, taking into account that the institutions of impeachment and the constitutional oath cover a far wider range of officials than just the members of the Parliament and having

regard that the Constitutional Court cannot have the legislative power to establish concrete time-limits for the prohibition to hold state offices, the reinterpretation was not considered to be an acceptable option after, in the case of *Paksas v. Lithuania*, the ECtHR dealt only with the right to be elected to the Parliament and found a disproportionate restriction of this right with regard to the constitutional prohibition for life to stand in parliamentary elections for those officials who were removed from their office through impeachment procedure);

– **Constitutional amendment** (e.g. France, Lithuania, and Ukraine). The Constitutional Council of France held that, according to the Constitution, when a collision between the Constitution and an international treaty arises, there is an obligation to amend the Constitution in order that the international treaty could be valid (the case of the entry into force of the Treaty of Lisbon). Ukraine reports about the constitutional amendments adopted in 2016 in order for the ratification of the Rome Statute to become possible.

Similarly, the Constitutional Court of Lithuania ordered to change the Constitution when, after the judgment of the ECtHR in the case of *Paksas v. Lithuania*, an inconsistency between the Constitution and the ECHR appeared (the ruling of 5 September 2012). The Court emphasised that, taking into account the supremacy of the Constitution and the constitutional principle of *pacta sunt servanda*, the duty arises to remove the said inconsistency by amending the Constitution so that the applicable provision of the ECHR (and the judgment of the ECtHR) could be operative and enforced in Lithuania. In another case (the ruling of 18 March 2014), the Court also acknowledged the possibility of another option – the denunciation of the international treaty concerned. However, in the case of human rights treaties, in particular the ECHR, this option cannot be acceptable under the Constitution, as it would be contrary to such constitutional principles as the rule of law, open civil society, and the geopolitical orientation;

– **Prohibition to adopt constitutional amendments contrary to international obligations** (Lithuania and Switzerland).

The Constitutional Court of Lithuania, in its rulings of 24 January 2014 and 11 July 2014, clarified that one of the substantial limitations on amending the Constitution is the prohibition to adopt amendments that would be contrary to the existing international obligations as long as these obligations are not denounced in accordance with international law. Again, this restriction follows from the constitutional principles of the rule of law and *pacta sunt servanda*. Similarly, the rule that amendments to the Constitution must comply with the imperative norms of international law was indicated by Switzerland.[20]

Respect for international law cannot be separated from the implementation of judgments of international courts and bodies. They have their own competence, granted by the respective international treaties, to interpret the norms of international law (the provisions of those treaties) and to adopt binding decisions. As in the case of constitutional courts and equivalent bodies whose case law reveals the content of the constitution, the case law of competent international tribunals reveals the content of the respective international instruments. Without respect for judgments of international tribunals, we cannot have true judicial dialogue between national and international courts.

In general, the authority of international courts and bodies is not questioned. For example, the judgments of the ECtHR and the Inter-American Court of Human Rights are considered binding, since the corresponding obligation is expressly provided for in the respective conventions. As regards such UN bodies as the UN Human Rights Committee, some states (e.g. Austria, Czech Republic, and Korea) regard their decisions as having no binding force (i.e. consider them to be recommendations), since the corresponding treaties do not establish unambiguous obligations to carry out these decisions. However, in some instances, the question can be raised as to how a refusal to comply with a decision of

[20] If an amendment to the Constitution denies an international treaty that encompasses *ius cogens* norms, such an amendment could not be proposed to the Nation, because amendments to the Constitution must abide by imperative international legal norms.

the UN body would be consistent with the obligation to implement the respective treaty provisions in good faith.

The replies of some courts identify certain limitations on the openness of national constitutions to international law, as well as on the implementation of judgments of international tribunals. In some instances, this can be seen as harmonious competition, as constitutional courts attempt to maintain a higher level of protection of human rights when they define the constitutional limits they have to safeguard (for example, fundamental rights in Germany). The Constitutional Court of Italy has developed the doctrine of "counterlimits", according to which the incorporation or implementation of international legal norms or judgments of international tribunal is not permissible when it is at odds with the fundamental principles of the constitutional order (the core of the constitutional identity) or inherent human rights (e.g. in Judgment no. 238 of 2014, the Court applied the doctrine of counterlimits to customary international law when it recognised inadmissible the implementation of the judgment of the UN International Court of Justice in the case of *Jurisdictional Immunities of States*, seeking to protect a higher constitutional standard of access to justice in cases concerning the reparation of damage done by war crimes). As it follows from the case law of the Constitutional Court of Italy, the doctrine of "counterlimits" must be employed specifically for the purpose of protecting a higher constitutional standard of fundamental rights: the minimum levels of protection for the fundamental rights laid down in the ECHR, as interpreted by the ECtHR, constitute a non-derogable limit pursuant to Article 117(1) of the Constitution for the Italian legislator only "downwards", but not "upwards"; respect for international obligations can never be the cause for a reduction in protection below that already available under national law, but may and must constitute an effective instrument for expanding such protection; the overall result of the integration of the guarantees provided under the legal system must be positive in that the impact of the individual provisions of the ECHR on Italian law must result in an increase in protection for the entire system of fundamental

rights. In the recent judgment no. 49 of 2015, the Constitutional Court of Italy held that national courts are not bound to abide by any judgment whatsoever of the Strasbourg Court, but rather only by the judgments of the Grand Chamber, those constituting "settled law" and "pilot judgments", taking into account the fact that the application and interpretation of the general system of rules (both Convention law and national law) is a matter in the first instance for national courts, acting in accordance with the substance of the case law of the Strasbourg Court, and without prejudice to the margin of appreciation of national authorities.

However, sometimes such broad and vague concepts as "the foundations of the constitutional order" can raise doubts regarding a friendly approach to the implementation of judgments of international tribunals, and only the future practice can dispel doubts whether these concepts can also be employed for justifying the non-implementation of any decision of an international tribunal that might seem unfavourable. For example, in Russia, after the adoption by the ECtHR of the judgment in the case of *Markin v. Russia*, the mechanism for "the protection of the Russian constitutional legal order" was created. It was consolidated in the Judgment of 14 July 2015 of the Constitutional Court of Russia, the consequence of which was the emergence of the power of the Constitutional Court to declare unenforceable any decision of an international tribunal that would be found threatening to "the foundations of the constitutional order"; rules of an international treaty, in the event that they violate constitutional provisions that have great importance for Russia, cannot be and are not applicable in the legal system. This approach has been criticised in the Opinion of the Venice Commission.[21]

[21] "[...] The Russian Constitutional Court has been empowered to declare an international decision as 'unenforceable', which prevents the execution of that decision in any manner whatsoever in the Russian Federation. This is incompatible with the obligations of the Russian Federation under international law. [...] The freedom of choice as to the execution of judgments refers to the manner of execution, which is not absolute. The State has to execute; only the modality of execution may be at States' discretion, although even this discretion is not unfettered". Appendix CDL-AD(2016)005 Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation,

Other difficulties in the implementation of judgments of international tribunals are varied. We can see a lack of political will of the legislator to enact the relevant law (e.g. in Costa Rica, where the Parliament has still not adopted the legislation necessary to implement the judgment of the Inter-American Human Rights Court concerning *in vitro* fertilization; in Bosnia and Herzegovina, no agreement has been reached on amendments to the Constitution in order to enforce the judgement of the ECtHR in the case of *Sejdić and Finci v. Bosnia and Herzegovina* concerning the possibility for persons not belonging to any of the three constituent peoples to stand as candidates for elections to the Parliament and to the Presidency of Bosnia and Herzegovina (similarly, in the cases of *Zornić v. Bosnia and Herzegovina* and *Pilav v. Bosnia and Herzegovina*[22]), or the failure by the legislator to amend the Constitution (e.g. in Lithuania, where, regardless of the ruling of the Constitutional Court ordering the constitutional amendment, no such amendment has been adopted yet in order to implement the before mentioned judgment of the ECtHR in the case of *Paksas v. Lithuania*); there are also difficulties arising out of the judgments of international tribunals (such as a possible lack of subsidiarity or the erroneous understanding of national law[23]).

Conclusion. To sum it up, to a certain extent, collisions between national and international law, often resulting from a different interpretation of the same legal issue by national and international courts, are a natural consequence of the parallel development of autonomous national and international legal orders. However, the rule of law is inconceivable without due respect for

[22] Although the judgment of the ECtHR does not order specific measures that the state is obliged to undertake in order to redress the established violation of rights, in practice, in compliance with the reasons for the judgment, its enforcement requires, among other things, amendments to the relevant provisions of the Constitution of Bosnia and Herzegovina.

[23] This factor was indicated in the report of the Supreme Court of Finland with regard to the Finnish Mental Health Act.

international law; the adherence to less stringent standards of human rights protection than those required by international obligations or the non-implementation of judgments of international tribunals, in particular when this goes hand in hand with compromising the authority of those tribunals, can hardly be consistent with the rule of law. It is for the sake of the rule of law that collisions between national and international law are removed and the judgments of international tribunals are implemented.

Therefore, it is the particular responsibility of constitutional courts and equivalent bodies to ensure consistency between national and international law by maintaining both the supremacy of the constitution and the principle of *pacta sunt servanda*. While interpreting the constitution and the principle of the rule of law, our courts can make the respective constitution, to a greater or lesser extent, open to international law and favourable to the implementation of judgments of international tribunals. It is on the grounds of the case law of constitutional courts and equivalent bodies, as well as the instruments they may use in preventing and removing the collisions between national and constitutional law (such as the preliminary review of international treaties, harmonising interpretation, the reinterpretation of the official constitutional doctrine, ordering or restricting constitutional amendments) that the constitutions that, at the first glance, might seem not so friendly to international law (due to the declaration of their absolute supremacy) may be transformed into friendly ones, developed in harmony with international law. As the protection of the national constitutional identity is the mission of constitutional courts and equivalent bodies, they also have the particular responsibility to ensure that this mission is carried out in compliance with the rule of law, i.e. not for creating conflicts with international obligations and promoting self-isolation from international law, but, on the contrary, for the enhancement of the protection of fundamental rights and the progressive integration of international law into the national legal system.

Concluding remarks

Thus, the analysis of the replies of our courts to the questions on major threats to the rule of law, the repercussions of international events and developments on the interpretation of the rule of law, and collisions between national and international law shows that the role of constitutional courts and equivalent bodies remains the same – to preserve and maintain the core elements of the rule of law, such as the supremacy of the constitution, a fair balance between constitutional values, and harmony between national and international law. These elements cannot be subject to essential changes due to the discussed challenges (managing economic crises, fighting corruption, controlling migration, combating terrorism, or preventing and settling collisions with international law). If we stick to the substantial conception of the rule of law, certainly the most important task is to guarantee that, in face of the before mentioned challenges, the protection of human rights is not compromised, in particular that temptations to have free hands for restricting human rights or avoiding international obligations are precluded. On the other hand, challenges to the rule of law can at times be associated with positive opportunities to progressively develop the interpretation of the constitution, while strengthening the protection of human rights and other constitutional values and, ultimately, the consolidation of the rule of law itself.

Thank you all for your kind attention!

Ben Vermeulen

Judge of the Council of State of the Netherlands

Presentation of the Venice Commission's Rule of Law Checklist

President Zalimas,
Colleagues, Honourable Judges,
President and Members of the Venice Commission,
Distinguished Guests,
Ladies and Gentlemen.

Just a few personal words beforehand, also on behalf of my fellow countryman Maarten Feteris. It is an honour and pleasure to be at this conference. I also attended the Third World Conference in Seoul, Korea, three years ago. That conference was organized very well, both in terms of logistics and content and of social and cultural interaction. It is clear to me that the organizers of this conference, the Lithuanian Constitutional Court and its staff, the Lithuanian government and the Venice Commission, are striving for that same high level of excellence and communication. And I am sure that they will succeed: our friends and colleagues have put into this not only their mind, but also their music and culture, *their Lithuanian heart and soul*. Thank you!

1. Introduction

Based on the responses to the questionnaire Professor Žalimas, President of the Constitutional Court of Lithuania, has provided us with a thorough report on 'new challenges to the

rule of law'. I will not comment on his report, but will give a short analysis of the Commission's 2016 Rule of Law Checklist, as well as identify and evaluate – in the light of the checklist - a recent trend in state and society that challenges the rule of law.

As you know, the Venice Commission provides the Secretariat of the World Conference on Constitutional Justice, and organises in co-operation with the host Court each congress, including the wonderful congress we attend these days. But the primary task of the Venice Commission – officially named the European Commission for Democracy through Law – is to assist and advise states (all the Member states of the Council of Europe, but also several other States that also are Member of the VC) in constitutional issues in order to improve the democratic functioning of their institutions and the protection of human rights. In the slipstream of its opinions, addressed to individual states, the Venice Commission also publishes general reports. The 2016 Rule of Law Checklist is such a report.

The 2016 Checklist has its origin in the Report on the Rule of Law[1] that was adopted by the Venice Commission in March 2011. This report identified common features of the concept of *Rule of Law* and the related concepts of *Rechtsstaat* and *Etat de droit.* A short checklist to evaluate the state of the Rule of Law in single countries was appended. However, the Report did not try to give an all-encompassing, exact definition of these concepts. At an international conference in 2012 it was concluded that in order to be able to apply the Rule of Law as a practical, operational concept, it would not be necessary and not feasible to find a final – generally acceptable – definition. But it would be very useful to produce - in addition to the conceptual Rule of Law report - a more elaborate checklist with more or less detailed benchmarks.

2. The 2016 Rule of Law Checklist

Since 2012, the Commission has focused on determining several core elements of the rule of law, which according to its 2016 Rule of Law Checklist[2] include at least five principles :

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

- The **principle of legality** is at the basis of every established and well-functioning democratic rule of law state. It entails the supremacy of the law, namely the fact that State action must be authorised by the law (the positive-foundational aspect of legality) and must be applied in accordance with the law (the negative-restricting aspect of legality).

Furthermore, the law should establish the relationship between international and national law and should set out in what cases exceptional measures may be adopted to derogate from the normal regime of protection of citizens' rights.

- **The principle of legal certainty** prescribes the accessibility of the law. The law must be certain, foreseeable, stable and take into account legitimate expectations. Basic principles such as *nulla poena sine lege* and non-retroactivity of criminal law are essential protections flowing from the principle of legal certainty.

- **Preventing the abuses of powers** implies having safeguards in the legal system against arbitrariness; the discretionary power of the officials may not be unlimited, and must be regulated by law.

- **Equality before the law and non-discrimination** also are essential principles flowing from the concept of the rule of law. It is paramount that equal cases are treated equally, and that the law guarantees the absence of any discrimination on grounds

[1] CDL-AD(2011)003rev.
[2] TCDL-AD(2016)007.

such as race, sex, colour, language, religion, political opinion and so on. Positive measures may be allowed, but only as long as they are proportionate and necessary.

- **Access to justice** implies the presence of an independent and impartial judiciary and the recognition of the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of justice and thus to the achievement of the classical formula: "justice must not only be done, it must also be seen to be done". In countries where **constitutional justice** is provided, the rule of law demands that there should be effective access to the constitutional court, and that parliaments and the executive take into account the arguments used by the constitutional court and abide by its judgments.

In the 2016 Checklist these principles are analysed, and subdivided into their more specific components, formulated as benchmarks. All benchmarks reflect and are related to hard and soft law standards.

Of course, the Venice Commission itself since its adoption uses the Rule of Law Checklist in the assessment of draft constitutional and legislative reforms; until now in at least 8 opinions, concerning France, Turkey, Moldova, Ukraine and Poland. Other Council of Europe institutions as well as the EU Parliament and Constitutional courts also refer to the Checklist. I assume that the coming years the Checklist will be applied as an authoritative corpus of rule of law standards.

3. A few reflections on the Checklist

3.1 No formalistic conception

The Checklist (para. 15), in line with the 2011 Report, warns against a purely formalistic conception of the Rule of Law, that merely requires that actions of public officials be authorized by law. Such a concept of the rule of law – that may be defined as 'the rule of the law', 'rule by the law' or even 'law by rules' – is qualified as a distorted interpretation. Indeed, the Checklist con-

tains other and more principles and benchmarks than those associated with the formalistic conception of the German 'Gesetzesstaat' (or: 'formeller Rechtsstaat'). However, the principles and benchmarks in the Checklist primarily are of a formal and/or procedural character. To a large extent they correspond to Lon Fuller's eight principles of legality, developed in his Morality of the Law (1964), and are derived from the Anglo-Saxon rule of law-tradition.

Understandably, the Venice Commission has chosen to differentiate the concept of rule of law from that of human rights and democracy. Indeed, for instance the Preamble of the Statute of the Council of Europe differentiates between these core values, mentioning the rule of law as one of the principles which form the basis of all genuine democracy, together with individual freedom and political liberty. The risk of fully including human rights and democracy in the concept of the rule of law may be, that this concept becomes a catch all- phrase containing a whole variety of legal desiderata, thereby losing its focus.

3.2 Rule of law and human rights

Nevertheless, I believe some additions of a substantive nature would be necessary, in that *human rights should have a more prominent place in the rule of law* concept as well as in a future update of the Checklist. This is in line with the comments today, that all stressed that fundamental rights as expression of human dignity should have an important place within the rule of law concept. The Venice Commission rightly has emphasized that the rule of law and human rights are interlinked. I would even claim that the protection and promotion of human rights are to be realized through respect for the rule of law. Indeed, *the realization of human rights is what the rule of law is about*. As the Commission observed, the rule of law would be an empty shell without this dimension (para. 31; see also para. 33).

In sum: it is necessary to add to the Checklist, based on the Anglo-Saxon concept of rule of law, substantive elements included in for instance the German concept of the 'materieller Rechtsstaat', such as fundamental rights protection and separation of powers.[3]

3.3 Rule of law as a restraint to majority decision making

The Checklist also indicates that the *rule of law is linked to democracy*. However, this link is less clear – or to be more precise: of another nature - than the harmonious connection between the rule of law and human rights. According to the Venice Commission, the Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules (para. 33). This observation - the rule of law protects minorities against arbitrary majority rules – rightly suggests that these two values – democracy vs rule of law - do not necessarily coincide, and indeed may conflict. I would even put it more strongly: there is an inherent tension between the rule of law (protecting fundamental minority rights) and democracy. It is this tension that must be clearly identified, in order to understand the challenge that populist tendencies currently pose to the rule of law.

Often democracy and rule of law are regarded as aspects of a more or less coherent set of interconnected values, in that democracy is a part of the rule of law, or the rule of law is an inherent feature of democracy. I myself however believe that both concepts are not necessarily in harmony with each other, and even may fundamentally clash. In a famous essay in *Foreign Affairs*

[3] Furthermore, I believe that the five rule of law principles (legality; legal security; prevention of abuse of powers; equality/non-discrimination; access to justice) which currently are distinguished in the Checklist, have a more vital meaning when they specifically function as instruments of human rights protection. For instance, restrictions on human rights should live up to strict requirements of legality.

1997 Fareed Zakaria already has given a fundamental analysis of democracies which are in conflict with the rule of law (or constitutionalism), the so-called *illiberal democracies*. According to Zakaria, illiberal democracies are increasing around the world, more and more are limiting the freedoms of the people they pretend to represent. He pointed out that in western countries electoral democracy and civil liberties/freedoms most of the time still go hand in hand. But in other countries these two concepts are coming apart; the majority is not held in check; and the position of minorities and opposition is weak. Illiberal democracies believe that they have the mandate to act in the way they see fit as long as they hold regular elections.

Zakaria argued that democracy without constitutional liberalism creates centralized regimes, and results in authoritarian regimes, erosion of liberty, ethnic tensions. The lack of fundamental liberties makes opposition very difficult. Critics are imprisoned; the media are controlled by the state. Non-governmental organizations are suppressed or prohibited. Centralizing of different branches of the government leads to a weakening of the separation of powers, attacking the independence of the judiciary. As an example he mentioned Russia, that already under Jeltsin was developing in the direction of authoritarianism. Currently, even several Council of Europe states may be qualified as illiberal democracies. And an extreme example is Venezuela, formerly an illiberal democracy now degenerated into dictatorship.

In many countries a main cause for these tensions between democracy and rule of law is the rise of strong populist movements. Economic insecurity; cuts in social welfare; worries about social cohesion, inspired by mass immigration, Islamic fundamentalism and terrorist threats; the euro-crisis and interferences in national sovereignty by international organizations like the EU and the European Court of Human Rights; all these issues foster the opinion that there is a widening gap between citizens and the political institutions, and they all inspire these movements.

Though there is a great variation between different versions of populism, there are at least a few basic characteristics. Populism:

1. is anti-elitist and sets 'the true and pure – common – people [*populus/demos*] against corrupt political and legal elites, the so called establishment. Only the populists adequately represent 'the' people and are truly democratic; the traditional political parties are not;

2. is anti-pluralistic: the morally pure people is one and unified and must be protected against the loss of its own authentic nature. Often populism appeals to the notion of a homogeneous people, and rejects mass emigration because that will subvert its unity;

3. does not accept rule of law limitations to majority rule: because populist rule is the correct manifestation of the will of the people, rule of law principles like judicial control or protection of fundamental minority rights should not constrain its operation.

I believe that populism in the form of an illiberal-democratic response poses a serious threat to the rule of law – to *liberal* democracy characterized by values of legal certainty, separation of powers, judicial control, and fundamental freedoms. In the long run it may even become a threat to *democracy as such* (for instance by limiting the freedom of expression, association etc. and thereby of disturbing free election processes). One of the reasons that this threat is real, is that populism often raises some plausible issues, and may function as a useful corrective to the unresponsiveness of the political and legal elites. For instance it may identify relevant problems, for instance i) that parts of the population in fact are not adequately represented; ii) that certain sensitive social, economic and legal issues (such as Islamic fundamentalism; the side-effects of immigration; the undemocratic aspects of the EU and the operation of the European Central Bank; the infringement of national sovereignty by supranational courts) should openly be discussed, not being hidden by political correctness; (iii) that established political parties are losing their legitimacy and cling to power by forming cartels.

For the time being the principles and institutions guarding the rule of law hopefully will withstand populist tendencies. But in the long run, legal rules and judicial procedures will not be sufficient: it is necessary that plausible populist criticism is openly and fundamentally addressed, by refuting the illegitimate aspects of it on the basis of good reasons and by taking the legitimate criticism seriously.

4. Concluding remarks

Mr. Chairman, colleagues and friends, let me conclude.

(i) The Venice Commission's Rule of Law Checklist provides us with a valuable, practical set of operational requirements to measure the rule of law quality of the political/legal systems in various countries.

(ii) The five principles the Checklist has identified are fundamental to the rule of law. However, in my view some material, substantive guarantees - such as protection of fundamental rights and separation of powers - should be added to these more or less procedural-formal principles.

(iii) There is a tension between majoritarian/electoral democracy and the rule of law, currently deepened by the rise of populist movements. I believe for the time being the constitutional principles and institutions guarding the rule of law generally will withstand populist tendencies. But in the long run legal rules and judicial procedures will not be sufficient. A rule of law democracy can only survive on the basis of a social infrastructure, a legal culture, a living reality – preconditions that legal procedures and institutions by themselves cannot realize.

Session 3.
The law and the state

Alexandru Tănase

Former President of the Constitutional Court of the Republic of Moldova

Key-note presentation

Honorable judges, ladies and gentlemen,

Dear colleagues and friends,

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

Introduction

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

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

Others speaking before me have spoken generally of the different concepts of the rule of law and of new challenges to the

rule of law. I will speak more particularly (taking up what was said yesterday) about how and what we identify as constitutional elements for these purposes, their sources and how we apply them. This is constitutionalism in action. I shall provide examples to better explain the framework within which our constitutional justice institutions operate and the method they use.

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

1) First, the impact of the case-law of constitutional court on guaranteeing that state powers act within the constitutional limits of their authority.

2) Second, the binding force of constitutional decisions on ordinary courts.

3) Third, in terms of case law, how have our courts contributed to the development of the standards for law making process and application of law, respect for the rule of law by private actors exercising public functions and accountability of public officials.

1. Impact of the Case-law of Constitutional Courts on Guaranteeing that State Powers Act within the Constitutional Limits of their Authority

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

Undoubtedly the core element of the rule of law that has been

mentioned the most in relation to the state powers is the principle of separation of powers.

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

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

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

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

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

right or on the score of an illegal regulation, an unconstitutional law, or an unlawful international treaty.

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

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

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

To sum up, it should be held that, in their rulings on the issues of the constitutionality of the activities of legislative and executive powers, the constitutional justice institutions clarified the limits of the powers of respective institutions, whereas, in their rulings on

the issues related to the activity of the judiciary, the Constitutional Courts, generally protected the function carried out by this branch of state power, and strengthened the independence of judges, as well as the independence of courts as an institutional system.

2. Binding Force of Constitutional Decisions on Ordinary Courts

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

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

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

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

have the obligation to respect all Supreme Court decisions as precedents.

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

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

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

3. Contribution of Constitutional Courts to the Development of the Standards for Law Making Process and Application of Law, Respect for the Rule of Law by Private Actors Exercising Public Functions and Accountability of Public Officials

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

a) on law-making process

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

- comprehensibility/clarity/accessibility of legal norms: a legal regulation established in laws and other legal acts must be clear, easy to understand, and consistent; formulas in legal acts must be explicit (**Albania, Belarus, Bulgaria, Croatia, Czech Republic, Georgia, Korea, Latvia, Lebanon, Lithuania, Moldova, Norway, Romania, Turkey**);
- in order to ensure that the subjects of legal relationships know what is required from them by legal norms, legal norms must be established in advance, legal acts must be published officially, and they must be public and accessible (**Austria, Costa Rica, Denmark, Lithuania**);
- when legal acts are passed, it is compulsory to take account of the procedural law-making requirements, including those established by the law-making subject itself (**Czech Republic, Lithuania, Moldova**); the hierarchy of legal acts, which stems from the Constitution, must be observed;
- law-making subjects may pass legal acts only without exceeding their powers;
- consistency and internal harmony of the legal system must be ensured (**The Netherlands**);
- legal acts may not require the impossible (**Lithuania**);
- the requirements established in legal acts must be based on the general provisions (legal norms and principles) that can be applied with regard to all the specified subjects of respective legal relationships. A differentiated legal regulation must be based exclusively on objective differences in the situation of the subjects of public relationships regulated by relevant legal acts;

- the force of legal acts is prospective, while the retrospective validity of laws and other legal acts is not permitted (lex retro non agit), with few exceptions, namely in criminal law (**Armenia, Belarus, Croatia, Hungary, Lithuania, Moldova, Turkey**);
- those violations of law for which responsibility is established in legal acts must be clearly defined (**Austria, Cape Verde, Croatia, France, Italy, Mongolia, Portugal, Romania, South Africa, Slovakia, Switzerland, Ukraine**);
- when setting legal restrictions and responsibility for violations of law, the legislature must pay regard to the requirement of reasonableness, as well as to the principle of proportionality, according to which the established legal measures must be necessary in a democratic society and suitable for achieving the legitimate and universally important objectives (there must be a balance between the objectives and measures); the rights of a person may not be restricted more than necessary in order to achieve the pursued objectives.

b) *on the application of law*

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

- law-applying institutions must follow the requirement of the equal rights of persons;
- it is not permitted to punish twice for the same violation of law (*non bis in idem*) (**Azerbaijan, Belgium, Croatia, Finland, Italy, Mongolia, The Netherlands, Norway, Portugal, Switzerland**);
- responsibility (sanction, punishment) for violations of law must be established in advance (*nulla poena sine lege*);
- an act is not considered to be criminal if it is not provided for in the law (*nullum crimen sine lege*);
- no retroactive effect (**Belarus, Bosnia and Herzegovina, France, Hungary, Indonesia, Italy, Lithuania**)

- jurisdictional and other law-applying institutions must be impartial and independent (**Algeria, Belgium, Cape Verde, Croatia, Cyprus, Georgia, Italy, Latvia, Macedonia, Mongolia, Portugal, Russia, Senegal, South Africa, Ukraine**); they must seek to establish the objective truth and must adopt their decisions only on the grounds of law;
- judges may not apply any legal act that is in conflict with a higher-ranking legal act, *inter alia*, they may not apply any substatutory legal act that is in conflict with the Constitution or a law;
- similar cases must be decided in a similar manner;
- the more lenient law has to be applied if the laws relevant to the offence have been amended *(lex mitior)* (**Bosnia and Herzegovina, Georgia, Moldova**);
- The welfare of the people shall be the supreme law (*salus populi suprema lex esto*) (**Congo**).

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

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

d) accountability of public officials

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

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

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

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

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

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

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

Some Constitutional Courts have the power to present conclusions on whether the concrete actions of state officials against

whom impeachment proceedings have been instituted are in conflict with the Constitution.

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

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

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

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

In this context, the Court has decided that it is contrary to the principles of the rule of law the appointment as high ranking officials individuals on which there is cast doubt regarding their integrity or who have been dismissed for reasons of corruption.

As a matter of principle, the rule of law is not a fiction, with only a declarative nature. The functioning of the rule of law has to be shown in practical actions. In order for the constitutional principle of the rule of law to be respected and taking in consideration the common interest of the citizens, it is imperative to take the necessary measures for assuring the quick application of the suspension or dismissal of the ministers and other high ranking officials that are subject to reasonable doubts in matters of integrity.

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

Conclusion

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

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

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

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

nationalizations and total lack of any elements of political pluralism.

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

The basis of democratic states is the law. The essence of law is freedom, since it is only freedom that defines the conditions that allow people to live together as free individuals. For this reason, a key role in this process is played by the Constitutional Courts, which are called to remove the legal acts in contradiction with the Constitution.

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

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

Dear friends,

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

In this context I want to mention the statement of former UN Secretary-General Kofi Annan. He stressed that "**We will not**

enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights".

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

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

Thank you for your attention.

Gagik Harutyunyan

President of the Constitutional Court
of the Republic of Armenia

Respondent

Esteemed participants in this International Congress,

Colleagues,

Ladies and Gentlemen,

I welcome all the participants in the World Congress and express my deep satisfaction that our cooperation at international level is already bearing a generous harvest of fruit. I have been fortunate enough to take part in four of our Congresses and to preside over the Conference Bureau, and I can say with certainty that today there can no longer be any doubt that a single world family of constitutional justice has been formed and consolidated. The Council of Europe's Venice Commission, its greatly respected President, Mr Gianni Buquicchio, and the Secretary General of our Conference, Mr Schnutz Dürr, have played an enormous and invaluable role in bringing this about. I wish to thank them for their tireless work and wish them continued success.

Dear colleagues,

At this session of the Congress our keynote speaker, Mr Alexandru Tănase, has presented a magnificent analytical report on the theme of "the Law and the State". This is one of the classic and yet still topical themes of constitutional law. In the report presented today three fundamental aspects were picked out:

1) the impact of the case-law of constitutional courts on the exercise of state powers;

2) the binding force of constitutional court decisions on ordinary courts;

3) the place and role of constitutional court decisions as a source of law.

All three of these aspects have a pivotal role in the effective exercise of constitutional justice and the guarantee of stable and dynamic development of the State.

On the basis of an analysis of the constitutional practices of individual countries the general point is put forward in the report that constitutional court decisions have been by and large the decisive factor in the implementation of fundamental constitutional principles, the guarantee of the principle of the separation of powers and the strengthening of constitutionalism in a country. All this is the result of the dynamic development of the system of constitutional justice in the world, especially over the last 50-60 years.

We think it appropriate to also examine the problem of constitutional conflicts and consider the role of constitutional courts in overcoming them. This power is wielded by a mere 29 of a total of some 120 constitutional courts existing around the world. As of 2015 our constitutional court has this power too. We believe that this prerogative is extremely important and forward-looking for ensuring the necessary dynamism of societal development. At the same time, we must proceed systematically and very cautiously when choosing a model for settling disputes regarding constitutional powers. Without wishing to go into the details of this problem, I will simply tell you that, on 19-21 October 2017, we organised an international conference in Yerevan jointly with the Council of Europe's Venice Commission on the theme of "the role of the constitutional courts in overcoming constitutional conflicts". The question is considered not only from the viewpoint of individual States' experience but also in the light of modern-day challenges to the establishment of constitutional democracy. You are all very welcome to participate in the work of the Yerevan International conference.

I would like to further add that, with regard to the establishment of constitutional democracy in a country, constitutional

courts are faced with new challenges in connection with the deepening deficit of constitutionalism in the modern world. This was discussed yesterday by other participants. I will just provide one example. As you know, each year the World Justice Project determines and analyses a rule of law index covering over 110 countries around the world. The situation is alarming, not only because, for example, in over 60% countries the rate of corruption exceeds 50%, meaning that in nearly 70 countries over half the state institutions are corrupt, but also because there has been a substantial decline in the last 10 years in both new democracies and many old democracies. Other measurements taken by the rule of law index paint a similar picture. Yesterday the Lithuanian Court President Žalimas also strongly emphasised in his report that, according to questionnaire data, many countries consider that one of the main challenges to the rule of law is corruption.

Our investigations on the basis of the rule of law checklist devised by the Venice Commission show that, alongside the guarantee of effective judicial constitutional supervision, there is also an imperious need for systematic constitutional monitoring on the basis of ongoing and multidimensional evaluation and analysis of the real state of constitutionalism in a country and, on that basis, the introduction of a scientifically grounded mechanism for governing the process of consolidation of constitutional democracy. We have devised not only a system of indicators for constitutional monitoring but also conceptual methodical and methodological approaches for performing that task. From 2018 onwards our scientific group will use 320 indicators to determine the level of constitutionalism in 140 countries of the world and prepare recommendations for improving the system of constitutional monitoring taking account of present challenges.

Our rapporteur has also looked at another important issue, namely the functional relations between the constitutional court and other courts. We believe that the nature of those relations is largely shaped by the choice of model used for individual constitutional complaints in a given country. The introduction of a full

constitutional complaint requires the necessary degree of legal and constitutional culture in a country. Otherwise it may generate antagonism between the constitutional court and general courts.

In turn, if the institution of individual constitutional complaints is lacking, there is no guarantee at all of legally competent constitutional supervision. This is my profound conviction based on the comprehensive analysis of the situation in over 120 countries.

For the new democracies, one good example might be found in the constitutional reforms in our country where, since 2006, citizens have been entitled to apply to the Constitutional Court. However, the judicial acts of ordinary courts are not subject to judicial constitutional supervision. To avoid any possible conflict, we opted for the alternative of instituting a full constitutional complaint. It was stipulated in Article 169, paragraph 1. 8 of the Constitution that an application to the Constitutional Court may be filed by anyone who, in a specific case when the final judicial act has been adopted and the possibilities of judicial protection have been exhausted, challenges the constitutionality of a law provision applied by the act in question which has resulted in a violation of their basic rights and freedoms enshrined in Chapter 2 of the Constitution, **taking into account also the interpretation of the respective provision in law enforcement practice.**

On the basis of this latter provision the Constitutional Court assesses not only the constitutionality of legal and regulatory acts but also the constitutionality of their interpretation when applied by general courts. We believe that it is precisely the existence of such a prerogative that makes it possible, on the one hand, to avoid a functional and institutional conflict and, on the other hand, guarantee the direct effects of fundamental human rights.

With regard to the third problem highlighted in the main report, I would like to emphasise that the legal positions of constitutional courts are above all a source of constitutional development. As we all know, one only has to look at over 540 volumes of Supreme Court decisions to appreciate that the United States Constitution is a living constitution. In European law too,

legal precedent has become a durable fixture in legal practice. Today we can talk confidently of the case-law of the courts in Strasbourg or Luxembourg. The legal acts of many countries also mention the case-law of constitutional courts. Consequently, the legal positions adopted by constitutional courts are not only a source of constitutional development but also an extremely important source of law as a whole. And that means that, when exercising legislative or law enforcement functions, all state authorities must be guided by the decisions and specific legal positions of the Constitutional Court, alongside the Constitution itself, as these play a most important role in the constitutionalisation of law and the legal system as a whole.

In addition to what I have already said, I would also like to lay particular emphasis on the special role of constitutional courts in dealing with legislative loopholes and legal uncertainty. I am not exaggerating if I say that nearly 70% of the constitutional complaints arriving in our Constitutional Court raise this issue in one way or another. In the light of this situation, we have clearly enshrined the principle of legal certainty in our Constitution, in Article 79, stressing that "when restricting basic rights and freedoms, laws must define the grounds and extent of restrictions and be sufficiently certain to enable the holders and addressees of those rights and freedoms to act accordingly".

The theme discussed also brings to the forefront the need to examine the issue of liability under constitutional law. We believe that the lack of a well-defined and legally competent system of liability under constitutional law is one of the major bottlenecks in the present-day constitutions of many countries. By our estimates, of the 140 constitutions in force around the world that we have studied, only 9% (those of Portugal, Poland, Croatia, Greece or Finland for example) take a systematic approach to establishing the institution of the constitutional law liability of fundamental constitutional institutions. In France, there was even a constitutional law, no. 93-952 of 27 July 1993, which introduced a special

section into the Constitution "on the criminal liability of members of government".

For us, the starting point is a provision which states that, to ensure the primacy of the Constitution and the necessary level of constitutionalism in the country, it is necessary for the political conduct of the country's political institutions, the public conduct of authorities and the social conduct of every member of society to be based precisely on the principle of the primacy of law. In particular, this makes it necessary at the constitutional level to enshrine a clearly defined and effective mechanism for guaranteeing liability under constitutional law that at the same time is an effective mechanism for vanquishing corruption and preventing the oligarchisation of authority in societal systems in transition. We believe that the successful attainment of this goal is one of the main aspects of establishing constitutional lawfulness and reinforcing constitutional democracy in a country.

Colleagues, allow me once again to thank Mr Tănase for his most interesting report and wish our Congress continued success in its work.

Thank you for your attention.

Session 4.
The law and the individual

Christoph Grabenwarter
Judge of the Constitutional Court of Austria

Key-note presentation

I. Introduction

The Rule of Law is determined not only by the relationship between the law and the state, but also by the relationship between the individual and the law. Access to legal material and the foreseeability of measures based on the law are two elements that have been consistently defined in the case law of the European Court of Human Rights over the last decades. When it comes to courts and in particular to constitutional courts, questions of access to a court and the independence of judges are of primary concern and interest. While the latter issue will be dealt with in the following session, access is the core question for session 4. It is against this background that I will discuss – guided by the answers to the questionnaire – various questions of access to a court and related individual rights before I will present some thoughts on the concept of the Rule of Law beyond individual rights.

II. Individual access to constitutional courts

In many countries, the constitutional court is a court which is specialised in legal questions of fundamental importance for the state. Many of the competences of a constitutional court relate to potential conflicts between state organs. But, as we all know, constitutional courts have become courts, which increasingly decide – whether directly or indirectly – cases of legal interest for individuals.

Fundamental rights play an important, if not the most important, role in this regard. The replies to the questionnaire sent out prior to our conference show sufficiently well that fundamental rights enshrined in the constitution establish a connection between the constitutional court of a country and its citizens or those subject to its jurisdiction. As a first example, I will mention the regulation of the constitutional complaint in Latvia: Among other requirements for admissibility, an individual may contest only those legal norms that violate the fundamental rights of the respective individual. A second example is very illustrative: In South Korea, one must distinguish a constitutional review of statutes from a constitutional complaint. Adjudication on constitutional review of statutes deals with the question of whether the South Korean Constitution, including fundamental rights, has been violated. In contrast, when deciding constitutional complaints, the judges examine solely the question of whether or not fundamental rights have been violated. These two selected examples clearly indicate the genuine link between constitutional justice, fundamental rights and the status of the individual. In Germany, the Federal Constitutional Court is often referred to as a *Bürgergericht,* which means a court serving the citizens. Those among us who participated in the World Conference in Rio de Janeiro six years ago will remember that we dealt with this issue during our opening session there: One key element to effectively meet the requirements of such an attribution is individual access to constitutional courts.

Individual access – if there is one – may be organised in many ways. A comparative view reveals a variety of systems which cannot easily be placed in a few distinct categories. But, there are at least a few similarities which can be described as follows:

- First, it has to be emphasised that there are only a few examples of an *actio popularis* in the strict sense. One of these examples is Macedonia. Art 12 of the Rules of Procedure of the Constitutional Court reads as follows: "Anyone can submit an initiative for assessing the constitutionality of a law and the constitutionality and legality of a regulation or other common act assessment procedure". A similar system can be found in Croatia. But, the scepticism towards an *actio popularis*- system is clearly predominant. In Hungary, the *actio popularis* was abolished in 2012. The Venice Commission examined this measure and concluded that removing the *actio popularis* should not be regarded as an infringement of the European constitutional heritage. As *Hans Kelsen* put it in his famous lecture on constitutional justice (*Staatsgerichtsbarkeit*) in 1929, *actio popularis* is the broadest guarantee for a comprehensive constitutional review, as any individual may petition the constitutional court. However, *Kelsen* concluded that an *actio popularis* did not provide a practical means to apply constitutional review, as it can attract abusive complaints.
- Secondly, there are only a few countries that do not provide for at least some kind of individual access to challenge the constitutionality of a norm or individual act.
- The third observation concerns the significance of the (ordinary) courts with regard to access of individuals to the constitutional court. One could speak of an intermediary role of the (ordinary) courts. In its Study on Individual Access to Constitutional Justice issued in 2011, the Venice Commission makes a distinction between "normative constitutional complaints" and "full constitutional complaints"; the former are directed against the application of unconstitutional normative acts (laws), whereas the latter are directed against

unconstitutional individual acts, whether or not they are based on an unconstitutional normative act.

"Normative constitutional complaints" exist in two different variations: If an ordinary court has doubts on whether or not a normative act applicable in a concrete case violates the constitution, it brings a request for the annulment of the law in question or a preliminary question before the constitutional court. In the first variation, the parties to the proceedings before the ordinary court may only suggest that a request for annulment be submitted to the constitutional court. This was the legal situation in Austria before 2015. In the second variation, the parties to proceedings before the ordinary court may be in a stronger position, which is the legal situation in Austria since 2015: A party in a legal matter that has been decided by a court of first instance may allege infringement of his rights because of the application of an unconstitutional law.

A "full constitutional complaint" means that an individual may challenge any act by the public authorities which directly and currently violates their fundamental rights. The most prominent variation in this regard is the "constitutional complaint", where an individual is given a remedy against final decisions by ordinary courts.

- The last possibility for individual access to constitutional courts I would like to mention is the challenge made against a general norm where the applicant needs to prove that the legal provision interferes directly with his rights, legal interests or legal position.

III. Access to ordinary and lower courts as fundamental right

The right to a fair trial is one of the most important fundamental rights and the access to an independent and impartial court is a main procedural aspect. With a view to Article 6 of the ECHR

(which correspond to Article 14 of the International Covenant on Civil and Political Rights), the ECtHR stresses that the right of access to a court must be "practical and effective" and not "theoretical or illusory". Constitutional courts around the world are – together with ordinary courts – the main guardians of this right. The replies to the questionnaire show that many constitutional courts deal with similar questions. Many examples from the case law show that individual access to courts is a sensitive topic around the world and that problems are not limited to a specific geographical region or legal culture. Limitations of access to a court can occur in various forms and one has to keep in mind that not all of them violate fundamental rights with regard to access to a court. Let me highlight just one specific feature, which seems to be of constitutional relevance in many countries, which is the imposition of court fees on the parties to the proceedings.

The main issue of access of the individual to a court is reflected in a judgment of the Estonian Supreme Court – and I quote: "[t]he right to judicial protection and the right to appeal are important fundamental rights and [...] these rights must be guaranteed for everyone and not only to persons who are able to participate in covering expenses". The Hungarian Constitutional Court refers to a "discrimination on [...] ground of [a person's] financial situation".

As already indicated, the imposition of court fees is not illegitimate in itself. As the Constitutional Court of Latvia puts it: "Payment of various fees as a restriction upon a person's right to free access to court is admissible only if this is not an obstacle preventing from exercising the right to free access to court". It is obvious that a constitutional court has to assess every specific regulation in its context, which often is a difficult task. Sometimes cases resemble each other: In 1961, the Italian Constitutional Court declared the so called "*solve et repete*-method" in tax law unconstitutional. This method implies that you first pay your taxes as a necessary precondition for bringing a judicial claim for the purpose of ascertaining the illegality of that tax. The

Constitutional Court held that this contradicted the principle of equality, because it discriminates taxpayers on the basis of their economic status, allowing only wealthy people to seek justice, and also contradicted the constitutional principles that grant access to a court to all citizens on an equal basis. Likewise, in a recent judgment, the Constitutional Court of Bosnia and Herzegovina declared a provision unconstitutional which stipulated that a court must not take any action whatsoever if a taxpayer failed to pay the fee prescribed by the law.

IV. Other individual rights related to the rule of law

As the replies to the questionnaire indicate, the Rule of Law is a predominant factor in the case law of constitutional courts around the world. As it is observed in the Rule of Law Checklist of the Venice Commission: "The Rule of Law has become 'a global ideal and aspiration', with a common core valid everywhere". In this context, the importance of human and fundamental rights mentioned before is sometimes set against the principle of the Rule of Law. In fact, there may be discrepancies in individual cases, but in general there is – as the Constitutional Chamber of the Supreme Court of Kyrgyzstan framed it in its reply – "a great deal of overlap between the two concepts". The genuine link becomes apparent in a short sentence taken from the case law of the South Korean Constitutional Court – and I quote: "The Constitution is based on the underlying ideology of realizing a government under the Rule of Law that protects the people's fundamental rights from the abuse of governmental power". I am going to address this issue in the final part of my speech with regard to the Rule of Law as a general concept in the absence of specific fundamental rights in the text of a constitution.

At this stage, two specific observations may be made when reading the respective replies by the constitutional courts:

- The Rule of Law is of particular importance in the context of criminal law. Just to mention a few examples from the case law

of some constitutional courts: The German Federal Constitutional Court has developed four principles under the principle of "Rechtsstaat": protection of legitimate expectations, proportionality, effective protection of legal interests, and the independence of courts. Other courts e.g. the Constitutional Courts of Azerbaijan and Chile also made use of the principle of the Rule of Law to establish the principle of proportionality as inherent to the constitution. The Constitutional Court of Belarus dealt with the right of witnesses in criminal proceedings to legal assistance in 2015. In various judgments, the Constitutional Courts of Belgium and Lithuania established case law on the main principles of modern criminal law and individual rights at the same time, such as *ne bis in idem*, *nullum crimen sine lege* and *nulla poena sine lege*. In 2016, the Constitutional Court of the Russian Federation declared some provisions of the Criminal Procedure Code as unconstitutional and this example illustrates the close link between the Rule of Law and fundamental rights: The Court had to deal with the legal situation that female defendants were treated differently from male defendants with regard to the right to have their criminal cases considered by a jury. The main argument of the Court was that the principle of legal equality of men and woman with regard to access to a court, derived from three provisions of the Russian Constitution reflecting the Rule of Law.

- My second observation is that constitutional courts often have to deal with the lack of legal certainty of laws. I just give you one example from the case law of the Hungarian Constitutional Court: In a judgment delivered in 2013, the Court found a penal provision unconstitutional, which prohibited the public use of totalitarian symbols, because it was too vague as it defined the range of criminal conducts too widely. Here again, the connection to fundamental rights is apparent to the Court, which held that the provision in question violated the principle of the Rule of Law and legal certainty and, through this restricted disproportionately, the freedom of expression. And just to show you the variety of what can possibly be extracted from the principle of legal certainty: According to the Constitutional Court of Latvia, it requires that final judgments of the courts are not contested, which means that the conclusion of legal proceedings must be legally enduring.
- This brief overview demonstrates that the concept or principle of the Rule of Law is almost a *constitutional passe-partout* for constitutional courts. While it seems to be impossible to trace every particular element in the tradition of a legal system – the close interrelation to the idea and realisation of fundamental rights in many cases is made clear. In this context, reference should be made to the Rule of Law Checklist of the Venice Commission, which identifies common features of the Rule of Law around the world.

V. The Rule of Law as a general concept in the absence of specific fundamental rights

The Rule of Law might have a specific function in constitutional systems, where fundamental rights are not fully codified. One has to bear in mind that nowadays, most constitutions contain a comprehensive list of fundamental rights. In these cases, a recourse to the principle of the Rule of Law to fill the gap is rarely needed. For example, the French *Conseil Constitutionnel* insists in its reply that the fundamental rights are enshrined in the Constitution itself and therefore there is no need to fall back to the more general principle of the Rule of Law. The same approach seems to be pursued in several other countries, such as Finland or Madagascar. In this context, the advantages of a written catalogue of fundamental rights outweighs the difficulties with regard to the application of the principle of the Rule of Law, which is a general concept. It is, therefore, understandable that constitutional courts tend to refer to written rights laid down in the consti-

tution. If the European fundamental rights catalogues are integrated into constitutional law, as is the case in Austria, the Constitutional Court directly refers to the European Convention on Human Rights and increasingly to the Charter of Fundamental Rights of the European Union. Sometimes the national concept of the Rule of Law *("Rechtsstaat")* and references to European fundamental rights are combined.

However, hardly any catalogue of fundamental rights is exhaustive and self-explanatory. This is where the Rule of Law comes into play: Constitutional courts use this principle to interpret and refine existing fundamental rights. Even in constitutions in which there is a specific right, constitutional courts go beyond this. For access to courts in disputes against public authority, the case law of the Federal Constitutional Court is based upon the guarantee of effective protection of legal interests under Article 19 § 4 GG. In other legal disputes, a comparable guarantee of effective protection through the courts has been derived from Article 20 § 3 in conjunction with Article 2 § 1 of the Basic Law. The guarantee not only includes access to a court, but also the right to a comprehensive review of the facts and law. We can find a similar line in the case law of the European Court of Human Rights under Article 6 of the Convention.

Another example can be found in the case law of the Turkish Constitutional Court: The second part of the Turkish Constitution entitled "Rights and Duties of the Individual" contains a comprehensive list of fundamental rights. Article 36 reads as follows: "Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction". The execution of court judgments without delay is mentioned in the third part of the Turkish Constitution as an obligation of the public authorities. The Turkish Constitutional Court stated that in a system in which the Rule of Law prevails, the non-execution of court judgments cannot be accepted. Therefore, the fundamental right enshrined in Article 36 of the

Turkish Constitution includes the right of the individual to having court judgments executed without delay. In other words, the Turkish Constitutional Court converts an objective rule into an individual right. This is not a standalone judgment: The Turkish Constitutional Court interprets the objective duty of the judiciary to conclude the cases as quickly as possible (Article 141 of the Turkish Constitution) as an individual right covered by the right to a fair trial enshrined in Article 36 of the Turkish Constitution.

These are just two examples in which the principle of the Rule of Law is used as a tool for interpretation and further development of fundamental rights. A similar approach with regard to procedural guarantees can be observed in the case law of the Georgian Constitutional Court.

V. Concluding remarks

The foregoing observations lead me directly to my concluding remarks. The perspective of the individual shows the particular quality of the Rule of Law-principle. It is not a standalone concept, but rather a basic concept related not only to democracy, but also to individual fundamental and human rights. It is the foundation of fundamental individual guarantees, but it also fills gaps where the rights do not offer sufficient protection. The extent to which objective principles fill a gap in individual rights varies according to the particular constitutional framework. However, the idea that the Rule of Law and fundamental rights are inseparable constitutional elements and principles is confirmed not only by national constitutions, but by international, regional and European texts as well, above all with regard to human rights such as e.g. the European Convention on Human Rights.

Mogoeng Mogoeng

Chief Justice of the Constitutional Court of South Africa

Respondent

Your Excellency, Mr Zalimas, the President of the Constitutional Court of the Republic of Lithuania, esteemed judicial Colleagues, distinguished guests, ladies and gentlemen, I greet you.

I wish to congratulate President Zalimas, the Judges of the Constitutional Court of Lithuania and the Government of Lithuania for a well organised 4th Congress of the World Conference on Constitutional Justice. I also thank you for the hospitality that the people of Lithuania have extended to us.

The topic "The Law and the Individual" is essentially about how, the law that conceptually exists for the benefit not just of a group or groups but also for an individual, does in reality or practical terms redound to the good of even an individual citizen.

It entails the possibility an individual has to vindicate his or her rights, especially constitutional rights, when threatened or believed to have been infringed. This possibility manifests itself in the form of the entitlement to personally challenge or have someone else challenge on the individual's behalf a perceived or actual violation of his or her individual rights and the accessibility of courts or justice to all, including the financially under-resourced and the vulnerable.

I intend to touch on some of the critical issues so appropriately raised by Justice Christoph Grabenwarter, based largely

on the South African experience but with some cursory reflection on the position in some African jurisdictions.

South Africa has, so to speak, codified fundamental human rights in its Bill of Rights. They range from individual liberties, group and political rights to socio-economic rights. They are all justiciable. The Bill of Rights renders it inevitable that individuals be able to enjoy or benefit optimally from rights entrenched in the Constitution and also that they be allowed to personally assume responsibility for their protection and enforcement.

And section 34 of the South African Constitution gives an individual the right of access to justice. This entails the right to have any dispute capable of being resolved through the application of the la adjudicated upon by a court of law or any impartial tribunal or forum. I must hasten to say that some of our groundbreaking judgments relate to the vindication of socio-economic rights in areas like health, housing etc.

Additionally, not only does an individual have the right to challenge any law or conduct perceived to be an actual violation of their right, on grounds that they are inconsistent with the Constitution and are therefore invalid. A person or entity acting on behalf of an individual(s) or in the furtherance of the interests of the public may approach any court including the Constitutional Court to vindicate their or others' constitutional rights.

For, in South Africa all courts from High Court level all the way through the Supreme Court of Appeal up to the Constitutional Court, which is the apex court in all matters, do have the jurisdiction to entertain an individual's challenge to the constitutionality of laws or conduct.

The gross inequality arising from the institutionalised impoverishment of a section of our population during our shameful past, of necessity renders it near-impossible for the vulnerable and indigent individuals to challenge a violation of their rights. This is compounded by the prohibitively high costs of litigation. In recognition of this reality, section 35 of our Constitution

makes express provision for the State to ensure that an indigent person is provided with legal representation at State expense in criminal cases. As regards constitutional and other matters of a civil nature, a statutory mechanism has been created for the assistance of an indigent individual. The organised legal profession, universities' law clinics, public interest litigation centers do assist individuals to vindicate their constitutional rights although some do at times represent themselves. Where individuals are unrepresented South African courts, including the Constitutional Court, do facilitate their representation through the Registrar's office if they are deserving and financially under– resourced.

In sum individuals, whether poor or wealthy, enjoy access to justice and legal representation although the rich perceptibly enjoy the monopoly of the best legal brains. This, as you would imagine, tends to generally tilt the prospects of success in favour of those with superior legal representation.

Costs could impede access to justice. Because the South African legal system recognises the awarding of costs against the losing party, a principle has been developed by our Constitutional Court in recognition of the possible chilling effect of awarding costs against individuals or entities that litigate against the State in constitutional matters. As a result, even if a party loses against the State, each party would be ordered to pay its own costs. Cost orders are only made against individuals in constitutional litigation against the State where court process is being abused through vexatious or baseless serial litigation.

But, a litigant is sometimes barred from lodging an appeal unless they have paid costs awarded against them. Again, this would be in cases where a person, for example, brings endless applications or appeals on the same hopeless legal point and facts. That abuse is dealt with that firmly.

In conclusion, an individual may challenge any unconstitutionality on his or her own behalf or in the public interest and in

any court in South Africa including the Constitutional Court. A quick look at some of the African jurisdictions has revealed that in Benin, Gabon and the Democratic Republic of Congo an individual does have direct access to the Constitutional Court. But in Gabon and the Democratic Republic of the Congo that direct access is limited to certain matters and only in terms of certain procedures. However, in Algeria, Mali, Senegal and Tunisia an individual cannot apply directly to the Constitutional Court for judicial review.

Vilnius Communiqué

13 September 2017

The World Conference on Constitutional Justice held its 4th Congress in Vilnius from 11 to 14 September 2017, upon the kind invitation of the Constitutional Court of the Republic of Lithuania.

The World Conference now unites 111 Constitutional Courts and Councils and Supreme Courts as well as Constitutional Chambers (hereinafter all referred to as "Constitutional Courts") emanating from all five continents. It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law (Article 1.1 of the Statute of the World Conference).

Delegations from 91 Constitutional Courts and equivalent bodies participated in the 4th Congress, which had a total of 422 participants.

The topic of the Congress, proposed by the host Court and approved by the Bureau of the World Conference, was *The Rule of Law and Constitutional Justice in the Modern World*. The Congress divided this theme into four sub-topics:

1. The different concepts of the rule of law;
2. New challenges to the rule of law;
3. The law and the state;
4. The law and the individual.

On the basis of the replies to a questionnaire, each sub-topic was introduced by a key-note speaker and then discussed by the participants. In the closing session, the key-note presentations and the discussions of each session were summarised by rapporteurs.

Despite the fact that the principle of the rule of law is interpreted in each state in a specific manner, it nonetheless constitutes the cornerstone of every legal system in the modern world, where it is integrally linked to democracy and the protection of human rights. The rule of law is a generally recognised principle, inseparable from the constitution itself. As a fundamental constitutional principle, it requires that the law be based on certain universal values, thus it is essentially inherent to every constitutional issue.

Within the framework of their constitutional competence, Constitutional Courts ensure the respect for and the implementation of national constitutions and exert a strong influence on shaping the content of the principle of the rule of law. The different aspects of this principle are revealed in the case law on constitutional justice. The impact of constitutional justice on the strengthening of the state under the rule of law and on ensuring the protection of individual rights is as essential as is the interest to explore it.

There is a wide range of constitutional systems and the influence of Constitutional Courts depends on the powers they exercise on the basis of their respective constitutions.

In addition to the main topic, and following the practice introduced by our previous congresses, the 4th Congress also included a stocktaking exercise on the independence of Constitutional Courts, members of the World Conference.

The discussions at the 4th Congress on this point showed that a number of courts had come under pressure from the executive and the legislative powers of their respective countries, but also from the media. This generally occurs when courts render decisions that displease other state powers or political actors. Several courts have been subjected to fierce and unfair criticism.

The participants call upon the member Courts of the World Conference to resist pressure and to render their decisions only on the basis of the constitutions of their respective countries and the principles enshrined in them. Solidarity provided by peer

courts, expressed via regional fora and the World Conference, can be helpful for a court struggling under pressure. The World Conference, through its Bureau, is ready to offer its good offices to courts that come under pressure, should they so wish. The World Conference deplores any unconstitutional attempt to undermine the rule of law in any country.

The 2nd General Assembly of the World Conference amended the Statute of the World Conference and elected the Constitutional Council of Djibouti and the Constitutional Courts of the Dominican Republic, Indonesia and Italy as members of the Bureau until the next regular General Assembly, which will take place in 2020 (Article 4.b.1 of the Statute).

The 12th meeting of the Bureau of the World Conference (Vilnius, 11 September 2017) approved the financial report presented by the Venice Commission of the Council of Europe, which acts as the Secretariat of the World Conference.

The Bureau accepted the offer of Constitutional Council of Algeria to host the 5th Congress in 2020.

The member courts of the World Conference and all other delegations present today express their sincere gratitude to the Constitutional Court of the Republic of Lithuania for generously hosting the 4th Congress, which was organised in an outstanding manner, and to the Venice Commission for its excellent secretarial support.

Вильнюсское коммюнике

13 сентября 2017 г.

С 11 по 14 сентября 2017 года в Вильнюсе по приглашению Конституционного Суда Литовской Республики состоялся IV Конгресс Всемирной конференции по конституционному правосудию.

В настоящее время Всемирная конференция объединяет 111 конституционных судов и советов, верховных судов и конституционных палат (далее – "конституционные суды") со всех континентов мира. Конференция способствует защите прав человека и верховенства права, развитию конституционного правосудия как ключевого элемента демократии, воспринимаемого как конституционный контроль, включающий прецедентное право в области прав человека (статья 1.1 Устава Всемирной конференции).

В работе Конгресса приняли участие представители делегаций конституционных судов и эквивалентных органов из 91 страны. В целом количество участников составило 422 человека.

Тему Конгресса, предложенную принимающим судом и утвержденную Бюро Всемирной конференции "Верховенство права и конституционное правосудие в современном мире", Конгресс разделил на четыре подтемы:

1. Различные концепции верховенства права
2. Новые вызовы верховенства права
3. Закон и государство
4. Закон и индивидуум.

На основании ответов на вопросник каждая подтема была представлена основным докладчиком, а затем обсуждена участниками. В заключительной сессии докладчики подвели итоги по докладам и обсуждениям каждой сессии.

Несмотря на то, что принцип верховенства права в каждом государстве толкуется по-своему, тем не менее он является краеугольным камнем каждой правовой системы в современном мире и неразрывно связан с демократией и защитой прав человека. Верховенство права является общепризнанным принципом, неотделимым от самой конституции. Как основополагающий конституционный принцип он требует, чтобы право основывалось на определенных всеобщих ценностях, что, по сути, присуще каждой конституционной проблеме.

Конституционные суды в рамках своей конституционной компетенции обеспечивают соблюдение и реализацию национальных конституций и имеют большое влияние на формирование содержания принципа верховенства права. Различные аспекты этого принципа раскрываются в прецедентном праве конституционного правосудия. Влияние конституционного правосудия в процессе укрепления государства, руководствующегося верховенством права и обеспечением защиты личных прав, достойно изучения.

Существует широкий спектр конституционных систем, и влияние конституционных судов зависит от полномочий, которые они осуществляют на основе своих конституций.

В дополнение к основной теме и следуя практике, представленной предыдущими Конгрессами, на IV Конгрессе также была проведена оценка независимости конституционных судов в государствах-членах Всемирной конференции.

Дискуссии, развернувшиеся по этому вопросу на IV Конгрессе, показали, что ряд судов подвергся давлению не только со стороны исполнительной и законодательной властей своих стран, но и со стороны средств массовой информации. Это обычно происходит, когда суды принимают решения, которыми недовольны другие органы государственной власти или политические субъекты. Несколько судов подверглись жестокой и несправедливой критике.

Участники призывают суды государств-членов Всемирной конференции противостоять давлению и принимать решения, основываясь только на конституцию своей страны и закрепленные в ней принципы. Солидарность, проявленная судами-партнерами посредством региональных форумов и Всемирной конференции, может помочь суду, испытывающему подобное давление. Всемирная конференция через Бюро готова предложить свои услуги подобным судам, если они того пожелают. Всемирная конференция осуждает любые неконституционные попытки, угрожающие верховенству права в любой стране.

Вторая Генеральная Ассамблея Всемирной конференции внесла поправки в Статут Всемирной конференции и избрала Конституционный Совет Джибути и Конституционные Суды Доминиканской Республики, Индонезии и Италии в качестве членов Бюро до следующей очередной Генеральной Ассамблеи, которая состоится в 2020 году (статья 4.b.1 Устава).

12-ое заседание Бюро Всемирной конференции (Вильнюс, 11 сентября 2017 года) утвердило финансовый отчет, представленный Венецианской комиссией Совета Европы, выступающей в качестве Секретариата Всемирной конференции.

Бюро приняло предложение Конституционного Совета Алжира о проведении V Конгресса в 2020 году в Алжире.

Суды государств-членов Всемирной конференции и все другие делегации выражают свою искреннюю благодарность Конституционному Суду Литовской Республики за отличную организацию IV Конгресса и Венецианской комиссии за ее прекрасную секретарскую поддержку.

Конституционное
ПРАВОСУДИЕ

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стран новой демократии

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