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2nd CONGRESS
THE ROLE OF CONSTITUTIONAL COURTS IN INTERPRETING THE PROVISIONS OF NATIONAL CONSTITUTIONS IN THE CONTEXT OF THE GENERALLY RECOGNIZED PRINCIPLES AND NORMS OF INTERNATIONAL LAW AND EU LAW, JUDGMENTS OF INTERNATIONAL COURTS

Kyiv, 2017

ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS

ЧАСОПИС
АСОЦІАЦІЇ КОНСТИТУЦІЙНОГО ПРАВОСУДДЯ КРАЇН РЕГІОНІВ БАЛТІЙСЬКОГО ТА ЧОРНОГО МОРІВ

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країн регіонів Балтійського та Чорного морів

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Видано за підтримки Координатора проектів ОБСЄ в Україні. Публікації, що ввійшли до цього Часопису, відображають виключно погляди авторів і містять результати їхніх наукових досліджень, що не обов'язково збігаються з офіційною позицією Координатора проектів ОБСЄ в Україні.

Часопис містить доповіді, тези, статті учасників Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів, а також документи, прийняті конституційними судами Грузії, Молдови, Литви та України під час цього заходу.

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Координатор проектів в Україні

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ЗМІСТ

ВСТУПНЕ СЛОВО

Шановні читачі!

Для мене є велика честь презентувати перший номер „Часопису Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів“, рішення про заснування якого було ухвалено Генеральною асамблеєю Асоціації 2 червня 2017 року в місті Харків, що мало на меті всебічне висвітлення її діяльності.

Асамблея також визначила, що на шпальтах Часопису повинні розглядатися актуальні питання конституційної юстиції та конституційного права відповідно до цілей, затверджених Статутом Асоціації.

До таких питань, зокрема, віднесено:

1) звіт Генерального секретаря Асоціації про її діяльність після закінчення строку його повноважень;

2) результати засідань Генеральної асамблеї Асоціації та прийняті нею рішення;

3) огляд роботи відповідного конгресу Асоціації, його матеріали та резолюції;

4) акти конституційних судів – членів Асоціації на тему відповідного конгресу Асоціації.

Окремий розділ видання присвячено науковим статтям, результатам наукових досліджень, а також аналітичним оглядам практики з актуальних питань конституційної юрисдикції та конституційного права не лише тих країн, конституційні суди яких є членами Асоціації, а й інших держав.

Учасники Асамблеї погодилися не обмежувати коло дописувачів видання суддями та суддями у відставці. Планується, що Часопис стане не тільки трибуною конституціоналістів країн регіонів Балтійського та Чорного морів, а й надасть можливість публікувати свої наукові напрацювання іншим фахівцям у галузі конституційного права.

Водночас, на мою думку, засновникам Часопису слід приділити більше уваги заходам щодо залучення до співпраці з виданням молодих науковців, тим самим „влити свіжу кров“ у розуміння особливостей складного, а інколи й суперечливого процесу розвитку вітчизняної та зарубіжної конституційної юрисдикції. Тож вважаю за доцільне не обмежуватися надалі

нинішнім фактичним інформаційно-публіцистичним статусом Часопису як міжнародного періодичного видання, а почати підготовку до визнання його міжнародним фаховим виданням у галузі конституційного права.

До того ж це розширить читацьку аудиторію видання, яку нині становлять судді та працівники апаратів конституційних судів – членів Асоціації, інших конституційних судів, за рахунок судів загальної юрисдикції, державних службовців, юристів-практиків, викладачів, аспірантів, студентів вищих юридичних навчальних закладів.

Асамблея також установила, що „Часопис Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів“ виходитиме раз на рік англійською мовою. Видання надсилатиметься до конституційних судів – членів Асоціації, а також до інших конституційних судів, наукових установ і закладів. За згодою членів Асоціації акти конституційних судів та статті можуть друкуватися іншими мовами.

Для вирішення питань, пов'язаних із виданням друкованого органу Асоціації, конституційний суд, що головує в Асоціації (у цьому році така честь надана Конституційному Суду України), створює на період свого головування Редакційну раду, яку очолює Генеральний секретар Асоціації. Він також визначає тираж і забезпечує розміщення електронної версії видання на офіційному веб-сайті Асоціації.

На завершення хочу побажати шановним читачам приємних вражень і корисних результатів від перегляду матеріалів, що увійшли до першого номера „Часопису Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів“.

З глибокою повагою
Голова Асоціації конституційного правосуддя
країн регіонів Балтійського та Чорного морів,
в. о. Голови Конституційного Суду України,
доктор юридичних наук, професор,
академік НАПрН України **Юрій Баулін**

INTRODUCTORY REMARKS

Dear readers,

It is a great honour for me to present you the first number of the "Journal of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions". The decision to establish this printed publication was approved by the General Assembly of the Association on June 2, 2017 in the city of Kharkiv in order to ensure comprehensive coverage of its activities.

The General Assembly also decided that the relevant issues of constitutional justice and constitutional law should be published in the Journal, in accordance with the aims provided for by the Statute of the Association.

These issues include, in particular, the following:

1) annual report of the Secretary General of the Association on its activities upon the termination of his/her authority;

2) the results of the meetings of the General Assembly of the Association and adopted resolutions;

3) summary of the relevant Congress of the Association, its materials and resolutions;

4) acts of the constitutional courts – members of the Association on the topic of the relevant Congress of the Association.

A separate section of the publication is devoted to scientific articles, research summaries, and analytical reviews of practice on topical issues of constitutional justice and constitutional law not only of those countries the constitutional courts of which are members of the Association but also other states.

The Assembly agreed not to restrict the circle of contributors to the publications of judges and former judges. It is planned that the Journal will become not only the tribune for constitutionalists from the countries of the Baltic and Black Sea regions, but will also provide an opportunity to other specialists in the field of constitutional law to publish their researches.

At the same time, in my opinion, the founders of the Journal should pay more attention to measures to attract young researchers to co-operation with the publication, thereby "pouring fresh blood" into understanding the specific features of the complex, and sometimes contradictory, development process of domestic and

foreign constitutional justice. Therefore, I think it is expedient not to be further restricted to the current actual information and journalistic status of the Journal as an international periodical, but to begin preparations for its recognition as an international professional publication in the field of constitutional law.

Furthermore, it will expand the readership of the publication, which today consists of judges and staff of the constitutional courts – members of the Association, other constitutional courts, in order to include courts of general jurisdiction, civil servants, practicing lawyers, lecturers, postgraduates, and students of higher law institutions.

The General Assembly also established that "Journal of the Association of the Countries of Constitutional Justice of the Baltic and Black Sea Regions" will be issued once a year in English. The publication will be distributed among the constitutional courts – members of the Association, as well as other constitutional courts, academic institutions and establishments. Upon the consent of the members of the Association, acts of constitutional courts and articles may be published in other languages as well.

In order to resolve issues related to the publication of the printed body of the Association, the constitutional court presiding in the Association (this year, such honour is given to the Constitutional Court of Ukraine), establishes for the period of its presidency the editorial board headed by the Secretary General of the Association. It also determines the circulation and provides the publication of the electronic version of the publication on the official website of the Association.

In conclusion, I would like to wish the distinguished readers positive impressions and useful results from the review of the materials included in the first number of the "Journal of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions".

Respectfully yours,

Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions,
Acting Chairman of the Constitutional Court of Ukraine,
Doctor of Law, Professor,
Full Member of the National Academy of
Legal Sciences of Ukraine **Yurii Baulin**

ВІТАЛЬНЕ СЛОВО ГОЛОВИ АСОЦІАЦІЇ КОНСТИТУЦІЙНОГО ПРАВОСУДДЯ КРАЇН РЕГІОНІВ БАЛТІЙСЬКОГО ТА ЧОРНОГО МОРІВ ЮРІЯ БАУЛІНА

Шановні почесні гості!
Шановні учасники Конгресу, пані та панове!

Дозвольте оголосити Другий конгрес Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів відкритим.

Від імені суддів Конституційного Суду України щиросердно вітаю учасників із початком роботи Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів і дякую за згоду взяти в ньому участь.

Цей захід організовано Конституційним Судом України на базі Національного юридичного університету імені Ярослава Мудрого спільно з Координатором проектів ОБСЄ в Україні, Німецьким фондом міжнародного правового співробітництва та за підтримки Національної академії правових наук України.

Тож я хочу представити шановному зібранню пана Вайдотаса Вербу – Координатора проектів ОБСЄ в Україні, пана Василя Тація – ректора Національного юридичного університету імені Ярослава Мудрого, та пана Олександра Петришина – Президента Національної академії правових наук України, і подякувати їм за допомогу й розуміння важливості проведення цього заходу.

У роботі Конгресу беруть участь представники міжнародних організацій, керівники та представники органів конституційної юрисдикції, органів державної влади України, іноземних держав, дипломатичного корпусу, наукових установ і навчальних закладів та судді Конституційного Суду України у відставці.

Тема нашого Конгресу – «Роль конституційних судів у тлумаченні положень національних конституцій у контексті загальновизнаних принципів і норм міжнародного права та права ЄС, рішень міжнародних судів».

Загальновідомо, що офіційне тлумачення – це роз'яснення змісту й мети правових норм, сформульоване в спеціальному акті уповноваженим органом у межах його компетенції, яке має обов'язкову юридичну силу для всіх, хто застосовує роз'яснювані норми. Тобто воно завжди є нормативним і загальнообов'язковим.

До обставин, що зумовлюють необхідність тлумачення конституційних положень, як правило, відносять наявність у суб'єктів права їх неоднозначного розуміння, що може призвести до розбіжностей між нормами конституції та політико-правовою дійсністю й мати наслідком виникнення конституційних конфліктів.

Отже, слід погодитися з думкою багатьох фахівців у галузі конституційного права, що без розширеного, творчого тлумачення конституція ризикує залишитися програмним документом, що складається лише з позитивних норм (букви), в якому не враховується її ідеологія (дух), тобто неписані конституційні норми та цінності, без чого акт вищої юридичної сили не може слугувати дієвим інструментом забезпечення свободи людини та обмеження державної влади.

Крім цього, шляхом офіційного тлумачення орган конституційної юрисдикції об'єктивно впливає на правотворчий процес, оскільки акти тлумачення визначають також межі розуміння конституційних приписів відповідними державними органами, органами місцевого самоврядування, усіма, хто причетний до формування національної системи права, а також до правозастосування як форми реалізації правових норм.

Окрему проблему для інтерпретації конституційних положень становить теоретичне питання про логічні взаємозв'язки таких, наприклад, їх принципів та понять, як «правова держава» та «демократія», «правова держава» та «соціальна держава» тощо.

Звертаючись до практики Конституційного Суду України із зазначеного питання, слід підкреслити, що важливе місце у цьому напрямі його діяльності посідає соціально-юридичний підхід до реалізації та захисту конституційних прав і свобод людини і громадянина. Це є не тільки специфічною формою

вітчизняного конституційного контролю, а й логічним наслідком динамічної трансформації вітчизняних суспільно-політичних процесів та інститутів, а також світових тенденцій зближення правових систем, їх розбудови на основі спільних принципів і стандартів, серед яких одне з провідних місць відведене тлумаченню положень національних конституцій.

Рішення Конституційного Суду України є визначальними для виконання рішень Європейського суду з прав людини (далі – ЄСПЛ), у тому числі для запобігання подальшим подібним порушенням Конвенції про захист прав людини і основоположних свобод. Більше того, розвиток судових практик, в основі яких лежить обґрунтоване тлумачення конституційних прав і свобод та які базуються на практиці ЄСПЛ, важливий для захисту прав індивіда та є невід'ємною складовою верховенства права у його міжнародному, європейському та національному вимірах.

Зарубіжний досвід теж переконливо доводить, що функціонування цієї форми конституційного контролю, без перебільшення, є головним вектором розвитку сучасного конституціоналізму, оскільки:

- по-перше, сприяє однозначному розумінню конституційних положень як у процесі правозастосування, так і в процесі правотворення, утвердженню правила правової визначеності як обов'язкової складової принципу верховенства права;
- по-друге, розширює можливості органу конституційної юрисдикції у реалізації його головної функції – захисту прав людини і громадянина;
- по-третє, сприяє поглибленню демократичних засад держави та імплементації загальновизнаних міжнародних демократичних стандартів у діяльність вищих органів державної влади.

З огляду на це вважаю, що наша зустріч та обмін досвідом будуть корисними для всіх учасників, зокрема, окресленням нових шляхів вирішення зазначених проблемних питань.

Дещо відхиляючись від теми заходу, хочу звернути увагу присутніх на те, що він не випадково відбувається у приміщенні Національного юридичного університету імені Ярослава Мудрого. За роки, що минули з часів його

заснування, альма-матер багатьох сучасних відомих юристів, до речі, й моя, неодноразово зазнавала реорганізацій. Змінювалися назва, структура, методика занять, однак незмінними лишалися високий рівень викладання матеріалу та органічне поєднання освіти з науковою роботою щодо дослідження актуальних загальнотеоретичних і прикладних проблем. Над цими проблемами тут працювали й нині працюють науковці з усіх галузей права, авторитет яких визнаний далеко за межами України. Це стало запорукою провідної ролі Національного юридичного університету імені Ярослава Мудрого у сфері підготовки висококваліфікованих фахівців для роботи в різних секторах правової системи України.

Тож, користуючись нагодою, зичу керівництву Національного юридичного університету імені Ярослава Мудрого на чолі з доктором юридичних наук, професором, академіком Національної академії правових наук України Василем Тацієм, науковим співробітникам і працівникам міцного здоров'я, бадьорого настрою, подальших успіхів у роботі на благо нашої Вітчизни.

І на завершення бажаю всім плідної роботи, а шановним зарубіжним гостям – ще й приємних вражень від перебування на древній і вічно молодій українській Слобожанщині.

ВІТАЛЬНЕ СЛОВО ПРЕЗИДЕНТА УКРАЇНИ ПЕТРА ПОРОШЕНКА

Шановні учасники Конгресу!

Щиро вітаю вас із відкриттям Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів.

Знаковим є те, що цей захід відбувається в Україні невдовзі після того, як Сенат Нідерландів, останнім із європейських парламентів, ратифікував Угоду про асоціацію між Україною та ЄС, завершивши цей важливий етап обраного нашою державою шляху євроінтеграції.

Тож надзвичайно актуальними є питання, винесені на обговорення учасників Конгресу, які пов'язані з визначенням ролі конституційних судів у тлумаченні положень національних конституцій у контексті загальновизнаних принципів і норм міжнародного права та права ЄС, рішень міжнародних судів. Дійсно ефективна протидія викликам сьогодення не можлива без пошуку нових і вдосконалення існуючих методів та способів захисту таких фундаментальних цінностей, як права і свободи людини і громадянина.

Рік тому Верховна Рада України підтримала зміни до Конституції України в частині правосуддя, розроблені відповідно до стандартів Ради Європи та найкращих міжнародних практик. Ці зміни заклали фундамент для подальших трансформацій судової системи.

Разом зі змінами у судовій системі відбувається і реформа Конституційного Суду України. У ході цієї копіткої роботи велика увага приділяється запровадженню інституту конституційної скарги як ефективного механізму захисту прав і свобод людини через безпосереднє звернення до Конституційного Суду України.

Тому важливою є фахова дискусія суддів-практиків та науковців щодо проблем, пов'язаних із тлумаченням національних конституцій у контексті загальновизнаних принципів і норм міжнародного права та права ЄС, рішень міжнародних судів, які стосуються, в тому числі, і прав людини.

Переконаний, що конструктивний обмін знаннями стане імпульсом для подальшого розвитку європейської правової думки та зміцнення партнерських зв'язків між конституціоналістами країн – учасниць Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів, інших конституційних судів Європи.

Цей форум, без сумніву, сприятиме консолідації зусиль суддів, учених, юристів-практиків задля вироблення прогресивних наукових підходів у захисті й утвердженні гарантій прав і свобод людини.

Бажаю учасникам Конгресу плідної роботи, цікавих дискусій та успішної реалізації всіх наукових ідей і задумів.

ВІТАЛЬНЕ СЛОВО ГОЛОВИ ВЕРХОВНОЇ РАДИ УКРАЇНИ АНДРІЯ ПАРУБІЯ

Шановні друзі!

Сердечно вітаю вас від себе особисто та від імені Верховної Ради України з нагоди проведення в Україні Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів.

Ви завітали до України, яка твердо і рішуче, з вірою у перемогу ідеалів Миру й Справедливості продовжує невпинний поступ до розбудови державних інститутів на засадах демократії, утвердження верховенства права, створення умов охорони і захисту прав і свобод людини. Відповідно до європейських цінностей здійснюється конституційна реформа у сфері правосуддя.

Членство Конституційного Суду України в Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів, а також у Конференції європейських конституційних судів є яскравим свідченням того, що в нашій державі є і функціонує конституційне правосуддя як гарантія реального конституціоналізму, забезпечення прямої дії Конституції України у формуванні правової системи в демократичному суспільстві.

Конституційний Суд України пройшов нелегкий шлях минулих двох десятиліть, зберігаючи високі стандарти незалежності, професійності й відповідальності перед українським народом, створюючи додаткові механізми захисту прав і свобод людини і громадянина через інститут конституційної скарги. Сьогодні єдиний орган конституційної юрисдикції в Україні переживає процеси перебудови в очікуванні оновленого закону про свій статус і нову структурну побудову діяльності з посиленням ролі конституційного правосуддя у гарантуванні верховенства Конституції у правовій системі.

Конституційний Суд повинен бути Судом Права і Справедливості, формувати єдине праворозуміння в державі, дотримуючись європейських цінностей і стандартів організації конституційного судового контролю. Адже

конституційне правосуддя має всі можливості ухвалювати такі рішення, які підтверджували б його рішучість і мужність в охороні Конституції, зберігаючи незалежність від інших органів державної влади та політичної кон'юнктури.

Найбільшою цінністю для суддів є їх внутрішня свобода правових переконань, коли їх не можна примусити приймати рішення під диктовку, з політичних чи корисливих мотивів. Саме таким чином, взаємодіючи з українським парламентом, Конституційний Суд України в змозі забезпечувати стабільність у суспільстві і зміцнення конституційного правопорядку.

Дозвольте щиро побажати всім вам, шановні учасники Конгресу, творчих успіхів у проведенні цього форуму в ім'я утвердження принципів та цінностей конституціоналізму. Добра вам, особистого щастя і міцного здоров'я!

ВІТАЛЬНЕ СЛОВО РЕКТОРА НАЦІОНАЛЬНОГО ЮРИДИЧНОГО УНІВЕРСИТЕТУ ІМЕНІ ЯРОСЛАВА МУДРОГО ВАСИЛЯ ТАЦІЯ

Шановні учасники Конгресу!
Шановні гості та колеги!

Ми раді вітати вас у стінах Національного юридичного університету імені Ярослава Мудрого, який є найбільш авторитетним і потужним закладом юридичної освіти і науки в Україні.

У демократичній державі конституційне судочинство має особливо важливе значення, оскільки саме державний орган конституційного контролю гарантує верховенство Основного Закону країни, вирішує в останній інстанції складні юридичні питання і забезпечує баланс між гілками влади. В Україні, як відомо, єдиним органом конституційної юрисдикції є Конституційний Суд України, повноваження якого загальним чином визначаються в Основному Законі. Одним із таких повноважень є офіційне тлумачення Конституції України.

Зважаючи на тему Другого конгресу, повноваження Конституційного Суду України з офіційного тлумачення Конституції України, на нашу думку, можна розглядати у двох аспектах:

– по-перше, у контексті загальновизнаних принципів та норм міжнародного універсального права та європейського регіонального права;
– по-друге, у контексті рішень міжнародних судів *(case law)*.

Стосовно першого напряму слід зазначити, що практично у всіх своїх рішеннях Конституційний Суд України посилається на відповідні норми універсального міжнародного права щодо прав людини, насамперед йдеться про Міжнародний пакт про громадянські і політичні права, а також про Міжнародний пакт про економічні, соціальні і культурні права, які прийняті 16 грудня 1966 року.

Серед регіональних (європейських) міжнародних договорів з прав людини Конституційний Суд України найбільш часто використовує договори,

укладені в межах Ради Європи, перш за все Конвенцію про захист прав людини і основоположних свобод та Європейську соціальну хартію.

Слід особливо зазначити, що Конституційний Суд України у своїй практиці активно посилається і на правові акти Європейського Союзу, рекомендаційні акти міжнародного і регіонального (європейського) характеру, зокрема, на Основні принципи незалежності судових органів, схвалені Генеральною Асамблеєю Організації Об'єднаних Націй, Віденську декларацію і Програму дій, прийняту на 2-й Всесвітній конференції з прав людини, Рекомендації Комітету Міністрів Ради Європи щодо незалежності судочинства та інші.

Щодо другого напряму офіційного тлумачення Конституції України, а саме використання Конституційним Судом України у своїй практиці рішень міжнародних судів *(case law)*, слід зазначити, що Конституційний Суд України фактично не звертався у своїх рішеннях до практики Міжнародного Суду ООН, що, очевидно, пов'язано з правовою природою таких рішень. Рішення цього Суду є обов'язковими лише для сторін, які беруть участь у справі, і тільки у даній справі. Саме тому Міжнародний Суд ООН розглядає власні рішення лише як допоміжний засіб.

Натомість у практиці Конституційного Суду України дуже поширеним є посилання на рішення Європейського суду з прав людини (далі – ЄСПЛ). При цьому слід особливо підкреслити, що Конституційний Суд України використовує не лише рішення ЄСПЛ у справах проти України, а й його практику в рішеннях проти інших країн – учасниць Конвенції про захист прав людини і основоположних свобод 1950 року, яка для України набрала чинності з 11 вересня 1997 року. Конституційний Суд України використовує рішення, які були прийняті ЄСПЛ і до цієї дати.

Слід зазначити, що Україна однією з перших держав – учасниць Європейської Конвенції з прав людини прийняла унікальний за своєю природою правовий акт – Закон України «Про виконання рішень та застосування практики Європейського суду з прав людини», згідно з яким національні суди України при розгляді справ застосовують Конвенцію та практику Суду як джерело права.

Користуючись нагодою, дозвольте звернути увагу присутніх на нашому Конгресі шановних суддів Конституційного Суду України на назрілу необхідність тлумачення цієї норми. Маємо на увазі вирішення Судом питання про співвідношення юридичної сили рішень ЄСПЛ та інших джерел внутрішнього права України, зокрема співвідношення рішень ЄСПЛ із законами України.

Згідно із Загальнодержавною програмою адаптації законодавства України до законодавства Європейського Союзу, Україна здійснює адаптацію внутрішнього законодавства до актів Союзу, одним із джерел якого є рішення Європейського суду. У Національному юридичному університеті імені Ярослава Мудрого ці питання вивчаються, відповідні пропозиції щодо удосконалення актів і судової діяльності подаються до державних органів.

Слід звернути увагу, що практика використання Конституційним Судом України як міжнародно-правових актів, так і практики міжнародних судів є подібною до відповідної практики конституційних судів інших держав – учасниць Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів.

Також, користуючись нагодою, хочу окреслити перспективи подальших наукових пошуків у стінах нашого навчального закладу. Насамперед зазначу, що з метою вироблення спільних підходів до вирішення актуальних правових проблем у контексті викликів сьогодення Національний юридичний університет імені Ярослава Мудрого та Національна академія правових наук України планують проведення з 3 по 6 жовтня 2017 року Першого Харківського міжнародного юридичного форуму «Право та проблеми сталого розвитку в умовах глобалізованого світу», який має стати унікальною платформою для спілкування політиків, міжнародних експертів, науковців та громадських діячів. Планується, що цей захід стане щорічним і проводитиметься восени, протягом першого тижня жовтня.

Провідні теми Форуму 2017 року будуть присвячені одній із головних цілей стійкого розвитку, проголошених ООН і найбільш актуальних для нашої держави: сприяння побудові мирного та відкритого суспільства, забезпечення

доступу до правосуддя для всіх, гарантування продовольчої безпеки, а також імплементація міжнародних стандартів у цих сферах. Панельні дискусії відбудуться за такими напрямами: «Міжнародне гуманітарне право: глобальні та регіональні виклики», «Світ без корупції: міф чи реальність?», «Право на справедливий суд: європейська традиція та український контекст», «Правові засади екологічної та продовольчої безпеки».

Своє бажання взяти участь у міжнародному науковому заході новітнього формату висловили провідні науковці багатьох країн, очільники міжнародних організацій і представники української та міжнародної громадськості. Спікерами форуму стануть досвідчені науковці з університетів Женеви, Берліна, Вільнюса, Стокгольма, Праги, Монреаля, Лексінгтона, Граца, Мінська, Астани та інших міст, провідні посадовці установ Європейського Союзу, Ради Європи, Міжнародного Комітету Червоного Хреста, судді конституційних та адміністративних судів Німеччини та Болгарії. Міжнародні та національні громадські організації запропонували проведення власних заходів у межах форуму, серед них – Датський інститут прав людини, Українська Гельсінська спілка, Міжнародна фундація виборчих систем, Женевський центр демократичного контролю за збройними силами та інші. В цілому очікується участь понад 800 осіб із 15 країн світу.

Конференції, круглі столи, семінари, тренінги, майстер-класи та інші заходи, що наповнюватимуть представлені напрями, проводитимуться у суперсучасному інформаційному ресурс-центрі – 10-поверховому навчально-бібліотечному комплексі, Палаці студентів та в інших корпусах і приміщеннях Національного юридичного університету імені Ярослава Мудрого.

Університет має позитивний досвід проведення широкомасштабних заходів, що збирали правників та академічну громадськість із різних країн світу і були підтримані міжнародними організаціями та фондами, зокрема ОБСЄ, Радою Європи, USAID та іншими. Хотілося б бачити серед учасників цього важливого заходу також і колег, присутніх на цьому зібранні.

Наостанок хочу побажати учасникам Конгресу плідної роботи та запевнити у нашій щирій готовності до подальшого плідного співробітництва.

ВІТАЛЬНЕ СЛОВО ПРЕЗИДЕНТА НАЦІОНАЛЬНОЇ АКАДЕМІЇ ПРАВОВИХ НАУК УКРАЇНИ ОЛЕКСАНДРА ПЕТРИШИНА

Шановний пане Юрію Васильовичу Баулін!
Шановний пане Олексію Валерійовичу Філатов!
Шановний пане Вайдотас Верба!
Шановні панове голови та судді конституційних судів країн регіонів Балтійського та Чорного морів!

Від імені президії Національної академії правових наук України маю честь привітати вас із початком роботи Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів. Харків, який є провідним центром юридичної науки та освіти в Україні, де знаходяться Національний юридичний університет імені Ярослава Мудрого, Національна академія правових наук України, Національний університет внутрішніх справ, юридичні факультети університетів, має всі необхідні умови та ресурси для проведення такого важливого міжнародного Конгресу.

Конституційне судочинство в Україні, що перебуває на етапі свого становлення, реформування в напрямі європейських стандартів практики конституційного правосуддя, інтеграції до європейського правового простору, вимагає сьогодні прискіпливої уваги з боку науковців, провідних міжнародних експертів, діючих суддів країн, що стали на шлях демократичного розвитку, формування засад правової державності та забезпечення принципу верховенства права.

Запроваджена судово-правовою реформою конституційна скарга, яка в країнах сталої демократії становить до 80 % навантаження в діяльності конституційних судів, передбачає істотне оновлення напрямів роботи Конституційного Суду України. Для цього першочергового значення набуває вивчення досвіду функціонування конституційних судів країн сусідніх із

Україною регіонів, чому, власне, і присвячений Другий конгрес Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів.

Після здобуття незалежності України Національна академія правових наук України взяла безпосередню участь у реалізації найважливіших правових реформ: Конституції України, кримінального та цивільного законодавства, судової та правоохоронної системи України, загальнодержавних програм інвестиційної діяльності, малого підприємництва, підготовки державних службовців, розвитку юридичної освіти, правової культури населення, адаптації законодавства України до законодавства Європейського Союзу, профілактики та боротьби зі злочинністю, протидії легалізації доходів, одержаних злочинним шляхом, та корупції.

Сьогодні академія докладає необхідних зусиль для наукового забезпечення таких процесів реформування в нашій країні: проведення судово-правової реформи, децентралізація та реформи системи місцевого самоврядування, адміністративної діяльності, профілактики і боротьби з корупцією та злочинністю. Серед найбільш значущих наукових праць академії – п'ятитомні «Правова система України: історія, стан та перспективи» та «Правова доктрина України». У 2013 році Національною академією правових наук України спільно із всеукраїнським юридичним журналом «Право України» було видано англомовну версію видання «Правова система України: історія, стан та перспективи». У 2015–2017 роках у Лондонському видавництві *Wildy, Simmonds and Hill Publishing* вийшли перші чотири томи п'ятитомної монографії «Правова доктрина України» англійською мовою.

У 2014 році академія розпочала роботу з підготовки нового унікального видання – «Велика українська юридична енциклопедія», яке повинне охопити всі галузі й інститути права та складатиметься з 20 томів. У 2016–2017 роках вийшли друком перші три томи цього видання: «Історія держави і права», «Філософія права», «Загальна теорія права».

Бажаю всім нам плідної роботи, творчих здобутків, вагомих результатів у здійсненні конституційного судочинства в напрямі забезпечення принципу верховенства права, захисту основоположних прав і свобод людини і громадянина!

ВІТАЛЬНЕ СЛОВО ПЕРШОГО ЗАСТУПНИКА ГОЛОВИ ХАРКІВСЬКОЇ ОБЛАСНОЇ ДЕРЖАВНОЇ АДМІНІСТРАЦІЇ МАРКА БЕККЕРА

Шановні учасники Конгресу!

Від імені глави області Юлії Світличної вітаю всіх присутніх і бажаю успіху в проведенні цього заходу.

Дуже символічно, що таке високе зібрання відбувається в місті Харкові – правничому центрі України – в день першої річниці конституційної судової реформи, якою започатковано низку змін у сфері правосуддя. Реформа не оминула увагою й Конституційний Суд України – орган, який посідає провідне місце в правовій демократичній державі.

Значення конституційного судочинства для становлення засад правової демократичної державності й формування розвинутого громадянського суспільства, насамперед на пострадянському просторі, є особливо важливим. Як головний захисник та інтерпретатор Основного Закону Конституційний Суд покликаний забезпечити, з одного боку, стабільність і непорушність таких конституційних цінностей, як права і свободи людини, територіальна цілісність, незалежність, а з іншого – бути «законодавцем мод» у царині конституційного правотворення.

Не можу не звернути увагу на роль органів конституційного контролю у гарантуванні незалежності й територіальної цілісності країни. Взагалі, в пострадянських країнах ця проблема є однією з ключових. Я маю на увазі такі країни, як Грузія, Молдова, Вірменія, Азербайджан і, безумовно, Україна. Ми добре пам'ятаємо два рішення Конституційного Суду України від 14 і 20 березня 2014 року, в яких орган конституційної юрисдикції дав безкомпромісну оцінку актам Верховної Ради Автономної Республіки Крим щодо проведення референдуму й оголошення незалежності Криму.

Заслуговує на увагу й розірвання партнерських стосунків із Конституційним Судом Російської Федерації, який «благословив» грубе порушення загальновизнаних принципів і норм міжнародного права. Ці рішення ще стануть у нагоді суспільству в процесі деокупації та відновлення територіальної цілісності України, а також притягнення винної сторони до відповідальності згідно з нормами міжнародного права.

Звісно, Україна не стоїть на місці, а проводить важливі соціально-економічні реформи, в тому числі й у конституційно-правовій сфері, одна з яких – конституційно-судова.

Переконливою видається позиція суб'єкта конституційної та законодавчої ініціативи – Президента України, який вважає судову реформу однією з найочікуваніших у суспільстві, оскільки справедливий, безсторонній, неупереджений суд є важливою гарантією ефективної боротьби з корупцією, надходження в Україну інвестицій, забезпечення прав і свобод кожного та побудови держави, керованої верховенством права.

Прикро, що Верховна Рада України понад місяць тому провалила голосування за новий Закон України «Про Конституційний Суд України» і таким чином заблокувала на певний час можливість безпосереднього звернення до органу конституційного контролю з боку фізичних та юридичних осіб приватного права. На жаль, і місцева влада не може розглядатися як потенційний суб'єкт на звернення до Конституційного Суду України. Втім, вважаю, ця проблема є тимчасовою, і дуже скоро довгоочікуваний інструментарій – конституційна скарга – отримає своє практичне втілення для кожного, хто на законних підставах перебуває на території України.

І, безумовно, оновленому складу Конституційного Суду України я бажаю натхнення і плідної роботи у захисті Конституції України та основоположних прав і свобод людини і громадянина.

ВІТАЛЬНЕ СЛОВО ХАРКІВСЬКОГО МІСЬКОГО ГОЛОВИ ГЕННАДІЯ КЕРНЕСА

Шановні високоповажні гості та присутні!

Для мене велика честь вітати голів та суддів конституційних судів країн регіонів Балтійського та Чорного морів на українській землі, в історичному місті Харкові, яке вважається юридичною столицею України.

Розвиток сучасної держави неможливий без органічного, рухомого, інноваційного законодавчого процесу, що відображає прагнення країни та її громадян до кращого життя і побудови рівноправного, справедливого суспільства.

Розбудовуючи сучасну правову, демократичну європейську державу, Україна початку XXI століття прагне зростати й на міжнародному рівні.

Бажаю всім учасниками конгресу плідних дискусій, продуктивної співпраці, творчої наснаги, нових цікавих зустрічей, а також приємного знайомства з нашим містом та його гостинними мешканцями.

REPORTS

ДОПОВІДІ

Aurel Băieşu,
Judge of the Constitutional Court of the Republic of Moldova

SOVEREIGNTY OF THE STATE AND THE HIERARCHY OF PRINCIPLES AND NORMS UNANIMOUSLY RECOGNIZED AT INTERNATIONAL LEVEL IN CONSTITUTIONAL CASE-LAW

Currently, in spite of instability, swift developments and existing challenges, human rights, democracy and rule of law remain in the spotlight of external action. Protecting these values is a priority for each state and for the European community as a whole. Protecting human rights and safeguarding democratic values needs an ongoing dialogue between law systems.

A key-role within these systems is played by constitutional courts. An efficient constitutional justice contributes to consolidating the rule of law and democracy, defending fundamental human rights and freedoms and promoting constitutional values and principles, it being carried out by adopting well-reasoned judgments, based on principles of constitutional and international law.

In contemporary world, constitutional law is, in its essence, under the influence of globalisation and regional integration processes. The Constitution does no longer regulate the basic legal order of the state from a national perspective only, but it resolutely considers its international dimension. Constitutional law has its doors wide open to international law and we are thus presented with an ”open statehood” (as held by the German Constitutional Court); constitutional law was to a great extent ”internationalised.” The identity of the constitutional order of the State has changed from a national one to international or rather to an internationalised *identity*, it being determined by the need to ensure collective or regional security[1].

[1] “*Constitutional Identity in European Constitutionalism*”, Prof. Dr. Rainer Arnold, Regensburg University, Germany. Presented within the International Conference “The role of constitutional justice in protecting the values of the rule of law”, 8-9 September 2014, Chișinău, Republic of Moldova.

At the same time, the concept of constitutional identity has to be protected at a supranational level, in case it would be under the threat to be deprived of content, there emerging also the need for political decision-making that by virtue of legal culture would ensure security.

The Constitution of the Republic of Moldova provides in Article 4 "Human Rights and Freedoms" that constitutional provisions on human rights and freedoms are to be interpreted and applied in line with the Universal Declaration of Human Rights, with conventions and other treaties to which the Republic of Moldova is a party; wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations. Concurrently, Article 8 of the Supreme Law provides that the Republic of Moldova commits to observe the Charter of the United Nations and the treaties to which it is a party, to ground its relationships with other states on the unanimously recognised principles and norms of international law.

Aiming at explaining the content of the provisions cited above, the Constitutional Court of the Republic of Moldova underlined in its jurisprudence the primacy of international regulations on human rights. The Court also held that *„international jurisdictional practice [...] is binding for the Republic of Moldova as a state that joined the European Convention on Human Rights and Freedoms."*

Observing international commitments undertaken by state's own will is a legal tradition and a constitutional principle, as an inseparable part of rule of law.

The legal order created by international law has to be transposed on national level by virtue of the principle *pacta sunt servanda*. It is for this reason that its primacy emerges as an effect of the very nature of fundamental human rights – in case of the European Court of Human Rights, or as an effect of the nature and goals that laid at the basis of creating the European Union – in case of jurisprudence of the Court of Justice of the European Union.

Therefore, besides national law, international and European standards lie at the heart of constitutional principles' creation.

In this context shall be remarked the quick diffusion of internationally recognised fundamental human rights principles into the internal law and their reflection in national constitutional jurisprudence.

It should be noted that the jurisprudence of the European Court of Human Rights and the provisions of the European Convention on Human Rights not only have an important relevance and guide the solutions rendered by the Constitutional Court of the Republic of Moldova, but also, under certain circumstances, they play a crucial role in examining cases before the Court. This holds true especially when the case pending before the Court concerns in its substance the issue of guaranteeing and respecting a constitutional right enshrined in the Constitution and in the European Convention on Human Rights.

For the Republic of Moldova, the process of European integration has consistently influenced the emergence of new challenges, including in the field of constitutional justice. In this context, the promotion and protection of European democratic values and the rule of law are crucial for the Moldovan constitutional justice.

With the entry into force of the Association Agreement between the Republic of Moldova and the European Union, our state has become a partner in the relations with the EU, and the need to promote and guarantee European principles and values has grown into a national necessity.

In the context of the European path of the Republic of Moldova and aspirations related to European integration, the Republic of Moldova has committed to adjusting the legislation to the requirements of the EU law. Thus, according to national legal provisions: *„The defence of rights, freedoms, legitimate interests of citizens, equality and social equity, as well as compatibility with the EU law,* ***are mandatory conditions for any legislative act.”*** The function of transposing the jurisprudence of European institutions is particularly evident in the European space, where by the exchange of practices, the courts disseminate the legal culture and European values, by implementing them at national level.

Given the need to adjust legislation to the *acquis communautaire* and considering the priority of European integration, the recent jurisprudence of the Constitutional Court contains more and more references to the EU law[1].

[1] As an example, in its Judgment of 20 September 2013 on the constitutionality of certain decisions of the Parliament on the revocation and appointment of the Director General of the Administrative Council of the National Energy Regulatory Agency, the Constitutional Court held that as stated in the

The Constitutional Court of the Republic of Moldova brought forward in its decisions relevant provisions of the *Preamble to the Treaty on European Union*[1], noting that „the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights."

I would like to underline in my communication that an important element in the correlation between national and international law is the **sovereignty of the state,** which is precisely the sensitive core of this relationship. I am saying this, as it is precisely the sovereignty of the state that has to be a foundation for the protection of human rights and not for their violation. It should be noted that in this area, the limitation of the sovereignty of a state is not done in favour of another state or international entity, but in favour of individuals and their rights.

At international level, there can be no absolute sovereignty, as the national state is an element of the international system. The constitutional sovereignty of the state does not mean the functioning of state in a vacuum, but it manifests itself externally by the establishing relations of cooperation with other states and international entities. These relations are mainly based on international treaties.

The Constitutional Court of the Republic of Moldova[2] noted that the state's right to assume international obligations constitutes an element of sovereignty and the delegation of certain powers to international organisations, by concluding treaties, does not employ any renunciation of sovereignty. These treaties represent conventions, whereby the bearer of sovereignty delegates certain powers to another authority.

Directive 2009/72/EC and respectively in the Directive 2009/73/EC, the energy and gas regulators must be fully independent from any public or private interests, which does not preclude judicial and parliamentary control.

[1] Judgment No. 4 of 22 April 2013 (on the staying in office of the Prime Minister dismissed by a motion of no confidence (on suspicion of corruption).

[2] By Judgment no. 24 of 09.10.2014 on the constitutional review of the Association Agreement between the Republic of Moldova, of the one part, and the European Union and the European Atomic Energy Community and their Member States, of the other part, and of the Law no. 112 of 2 July 2014 on the ratification of the Association Agreement.

In light of the above, the Constitutional Court of the Republic of Moldova held that the state, when it is a party to an international treaty, by this very fact it agrees to give up competences within the limits established by the international regulations. From this point of view, the Republic of Moldova's membership in the United Nations or its status as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms or other international treaties bears the significance of giving up competences of the state authority and implies the state's obligation to comply with the decisions of international institutions (e.g. UN Security Council, ECtHR, etc.).

At the same time, the Court noted that the factor of cooperation within the Agreement between the Republic of Moldova and EU Member States does not change the political system of the country and it does not restrict the right of the people to express their will, in the political decision-making by way of free elections. Subsequently, the sovereignty of the people is not limited.

The Court also emphasized that the orientation of the Republic of Moldova towards the European democratic values is inseparable from other international commitments, which derive from membership in international organisations.

At the same time, by virtue of the principle of ***observing the rights inherent to the sovereignty of a state*****,** the Constitutional Court, in its recent judgment of 2 May 2017, held that the **status of neutrality enshrined in the Constitution does not constitute an obstacle within the defence policy of the Republic of Moldova.**

Given the context where 11 percent of the territory of the Republic of Moldova is under the occupation of Russian troops, the goal of neutrality is to enhance State's security and not to limit its defence capacity. The Court underlined that neutrality proclaimed by the Republic of Moldova should continue as a foreign and security policy instrument, as long as it remains more appropriate than other instruments to safeguard national interests. Since joint efforts are necessary to combat the dangers threatening collective security, these cannot be addressed through national measures, but only through international cooperation, especially through joint actions at European level. Such defence requires a multinational approach.

The Court found that given the context that the Russian Federation did not withdraw its occupation troops from the Eastern region of the country, but on the contrary has consolidated its military presence in the Transnistrian region of the Republic of Moldova, this constitutes a violation of constitutional provisions regarding the independence, sovereignty, territorial integrity and permanent neutrality of the Republic of Moldova, and it also constitutes a violation of international law.

Any country that does not participate in international security cooperation, it risks to be isolated. Such a country would not be a respected and equal partner in Europe. In case of a threat, it might not be able to rely on solidarity and support from its partners and it would become particularly vulnerable to certain dangers.

Subsequently, Article 11 of the Constitution, by which the Republic of Moldova has proclaimed its permanent neutrality, should be seen as an instrument of protection, not as an obstacle in protecting the independence, democracy and other constitutional values of the Republic of Moldova.

Concluding,

I would like to mention that we are now witnessing a time when power and territory become grounds for attempts against constitutional sovereignty. At the same time, the existence of a common constitutional language, at least at European level, ensures a consolidated dynamism of constitutional jurisdiction in a state governed by the rule of law, thus reaffirming the orientation and commitments to European democratic values. In an international society facing new challenges, the stability of constitutional justice becomes an axiom of democratic aspirations of any state.

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NATIONAL CONSTITUTIONAL PARADIGM AND THE PRINCIPLES AND NORMS OF INTERNATIONAL AND EU LAW[1]

Introduction

A national constitutional paradigm comprises a set of values, principles and rules[2], *inter alia*, which predetermines the understanding of a constitution, including the guidance as to the interpretation of the constitution by the constitutional court. One can note the following traditional elements of national constitutional paradigm as revealed in the activities of the Lithuanian Constitutional Court by interpreting the Constitution and disclosing the meaning and the content of its provisions. First, the Constitution is perceived as **supreme law** within a national legal order, therefore all legal acts (even the applicable acts of international law and the European Union[3] law) must comply with the Constitution as supreme law. Second, the Constitution is perceived as a **jurisprudential constitution** that is inseparable combination of the text of the Constitution and the official constitutional doctrine developed in the constitutional jurisprudence (case law of the Constitutional Court) and

[1] Article prepared on the basis of the report delivered on 1 June 2017 in Kharkiv at the 2nd Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (BBCJ) "*The Role of Constitutional Courts in Interpreting Provisions of National Constitutions in the Context of the Generally Recognised Principles and Norms of International Law and EU Law, Judgments of International Courts*".

[2] One can refer to the definition of T. Kuhn, according to which a paradigm is understood as a whole of values, principles and rules accepted by scientific community or research approach, which determines the choice of research aims and the interpretation of the data obtained; it is in between of a theory and a worldview. See: Valančienė, D. Legal Science in the Face of the Paradigm of Old and New Science. *Summary of the Doctoral Dissertation Social Sciences*, Law (01 S) Vilnius, 2015, p. 41.

[3] Thereinafter referred as the EU.

providing the official and binding interpretation of the text of the Constitution. Third, as a consequence of the perception of jurisprudential constitution, there are only **two main sources of the Constitution** (constitutional law): the text of the Constitution and the acts of the Constitutional Court (the official constitutional doctrine). Fourth, as a consequence of perception of the Constitution as supreme law, the national legal system can be described as constitution-centric[1].

One can notice the opposite positioning of the Constitution towards international and the EU law and *vice versa*. On the one hand, the distinguished position of the Constitution is often expressed as **the supremacy of the Constitution** within a respective national legal order, including its supremacy over international and supranational legal orders (in Lithuania and Ukraine the principle of supremacy of the Constitution seems to be expressly established, while in Georgia and Moldova one can find this principle with some reservations). On the other hand, both international law (Art. 27 of the 1969 Vienna Convention on the Law of Treaties[2], Art. 3 of the 2001 International Law Commission (ILC) Draft Articles on State Responsibility[3], Art. 13 of the 1949 ILC Draft Declaration on the Rights and Duties of States[4]) and the EU law (in the case law of the European Court of Justice[5]) claims supremacy over national law in the reign of their respective

[1] Žalimas, D. Viability of the Constitution and the Role of the Constitutional Court. Round Table „Theoretical and Practical Problems of the Constitutional Justice in Ukraine", Lviv, 16 May 2015. Available at: <http://lrkt.lt/data/public/uploads/2015/10/viability-of-theconstitution-lvivroundtable.pdf>.

[2] The 1969 Vienna Convention on the Law of Treaties. Available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

[3] The 2001 ILC Draft Articles on State Responsibility for Internationally Wrongful Acts. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

[4] The 1949 ILC Draft Declaration on the Rights and Duties of States. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/2_1_1949.pdf>.

[5] In the Declaration concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the 2007 Treaty of Lisbon, it is recalled that "in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law". Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12008E/AFI/DCL/17>.

legal orders. The main consequence is that a State cannot invoke the provisions of its internal law (even of the Constitution) for justification of its failure to comply with international or the EU law.

Thus, the main issue dealt with in this article is **the place of international and EU law within national constitutional paradigm**. Since the texts of national constitutions usually are very modest on this issue (e.g., in Lithuania there are only two provisions of the Constitution[1] regarding the place of treaties and general international law[2], and perhaps only the place of the EU law is clearer defined in the text of the Constitution[3]), a particular responsibility here belongs to constitutional courts. Namely the constitutional courts, as judicial authorities having the exclusive competence to interpret officially the relevant constitutional provisions, face the challenge how to interpret clarify the relationship of a national constitution with international and the EU law. It is up to the constitutional courts to find out the constitutional principles determining the approach to international and the EU law.

1. Approaches towards International and the EU Law

Different courts may cope with this task in a different way. A friendly approach towards international and the EU law is typical for European courts. It is also common to the constitutional framework of our states and to our courts belonging to the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (BBCJ). I will elaborate on the Lithuanian example in the following chapter of this article, however at this stage I can note that our approach can be

[1] The text of the Constitution of the Republic of Lithuania is available at: <http://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192>.

[2] Art. 135(1) of the Constitution, which obliges the Republic of Lithuania to follow in its foreign policy the universally recognised principles and norms of international law; Art. 138(3) of the Constitution, according to which the ratified treaties form a constituent part of a national legal order.

[3] All the EU countries should have specific constitutional provisions on at least on **two principal issues related to the EU membership**: 1) delegation of certain competences to the EU supranational institutions; 2) incorporation of the EU law into national legal system. These two principles are provided in Arts 1 and 2 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, which is a constituent part of the Constitution of the Republic of Lithuania.

defined as very favourable to international and the EU law taking into account the wording of the Constitution.

Similar favourable approach is typical for other three BBCJ countries and courts. E.g., **Georgia** explicitly recognises that its legislation shall comply with the universally recognised principles and rules of international law, however, still maintaining the supremacy of the Constitution over international treaties. In the preamble of the Constitution of Georgia[1] it is declared that citizens of Georgia express the will to secure universally recognised human rights and freedoms[2]. Similarly, in Art. 6(2) of the Constitution of Georgia it is declared: "The legislation of Georgia shall comply with the universally recognised principles and rules of international law. A treaty or international agreement of Georgia, unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia, shall take precedence over domestic normative acts". Art. 7 of the Constitution of Georgia provides that "The State shall recognise and protect universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law", etc[3].

[1] The Constitution of Georgia. Available at: <http://www.constcourt.ge/en/court/legislation/constitution.page>.

[2] "We, the citizens of Georgia, whose firm will is to establish a democratic social order, economic freedom, a rule-of-law and a social state, to secure universally recognised human rights and freedoms, to enhance state independence and peaceful relations with other peoples, drawing inspiration from centuries-old traditions of statehood of the Georgian nation and the historical-legal legacy of the Constitution of Georgia of 1921, proclaim the present Constitution before God and the nation".

[3] Apart from Chapter I ("General Provisions"), there are also some other provisions of the Constitution of Georgia declaring commitments to the universally recognised principles and rules of international law: e.g., Art. 9(2) ("Relations between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia shall be governed by Constitutional Agreement. Constitutional Agreement shall be in full compliance with the universally recognised principles and norms of international law, specifically in terms of human rights and fundamental freedoms"); Art. 38 ("1. Citizens of Georgia shall be equal in their social, economic, cultural, and political lives irrespective of national, ethnic, religious, or language origin. According to universally recognised principles and rules of international law, citizens of Georgia shall have the right to develop their culture freely, use their

According to its Constitution[1], **Moldova** seems to have the most favourable approach to international law among the BBCJ countries. In the Constitution of the Republic of Moldova one can find the explicit provision on the priority of international law in the sphere of human rights and freedoms and the expressly provided duty to interpret the Constitution in line with international law (Art. 4(1): "Constitutional provisions on human rights and freedoms shall be interpreted and are enforced in accordance with the Universal Declaration of Human Rights, with the conventions and other treaties to which the Republic of Moldova is a party"; Art. 4(2): "Wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations"). On this basis the Constitutional Court of Moldova has specifically acknowledged the binding nature of the judgments of the European Court of Human Rights[2]; in cases of divergence between a judgments of the Constitutional Court and the European Court of Human Rights, the judgment of the Strasbourg Court is considered as a circumstance constituting a basis for the review of the constitutional judgment[3].

mother tongue in private and in public, without any discrimination and interference. 2. According to universally recognised principles and rules of international law, minority rights shall be exercised so as not to contradict the sovereignty, state system, territorial integrity, and political independence of Georgia").

[1] Constitution of the Republic of Moldova. Available at: <http://www.constcourt.md/public/files/file/Baza%20legala/Constitutia_engl___25.11.16.pdf>.

[2] Judgement of the Constitutional Court of Moldova No. 10 of 16 April 2010. Available at: <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=55&l=en>.

[3] Following the judgment of the ECtHR in the case of *Tănase v. Moldova* (in which the ECtHR found that the law prohibiting the nationals of Moldova with multiple citizenship from being elected to the Parliament (as a deputy) was disproportionate and, thus, violated Article 3 of Protocol No. 1 to the Convention), the Constitutional Court of Moldova considered it necessary to revise its own case-law, namely its judgement No. 9 of 26 May 2009, and declared unconstitutional the legal provisions that prohibited nationals of Moldova holding multiple citizenship from taking any other public position (Judgment of the Constitutional Court No. 31 of 11 December 2014 on review of Judgement of the Constitutional Court of Moldova No. 9 of 26 May 2009).

The text of the Constitution of **Ukraine**[1] seems to be closest to that of Lithuania. In the Constitution of Ukraine it is explicitly provided that Ukraine is bound by the universally recognised principles and norms of international law in the sphere of its foreign policy: "The foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law" (Art. 18).

To **the East from Ukraine** one can find a completely opposite and even **hostile approach** towards international law. Although Art. 15 of the Constitution of the Russian Federation[2] seems to be very favourable to international law (universally recognised principles and norms of international law declared to be a constituent part of national legal order[3]), the position of the Constitutional Court of the Russian Federation is to declare absolute superiority of national constitution when it comes to the implementation of the will of political leadership of the state. One can remember the similar doctrines from the time of the Nazi regime and the tragic consequences they had brought. It is well known that all the judiciary in Russia serves as an instrument for internal legalisation of breaches of international law, repressions and persecution of their own people, in particular those who stand against the aggressive and authoritarian policy.

One can provide a few examples from the practice of the Russian Constitutional Court, which are relevant to Ukraine and demonstrate us what can be the consequences of deliberate breaches of international law by the judiciary. Completely ignoring and gravely breaching universally recognized principles of international law, on 19 March 2014 (actually during one night) the Constitutional Court of

[1] Constitution of Ukraine. Available at: <http://www.ccu.gov.ua/en/docs/180>.

[2] The Constitution of the Russian Federation. Available at: <http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter1.aspx>.

[3] Art. 15 of the Constitution of the Russian Federation states that „Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied".

the Russian Federation opened the way to the annexation of Crimea[1] and, by the same token, to the further escalation of the Russian aggression against Ukraine. Being highly qualified professional lawyers, the judges of the Constitutional Court of the Russian Federation were perfectly aware of the criminal nature of aggression as well as of the fact that already from the 1938 Austrian anschluss the analogous acts (namely those directed at the annexation of Crimea) have been regarded as an aggression that cannot be justified by any arguments. Therefore, the judges of the Constitutional Court of the Russian Federation can be held legally and morally responsible for all the consequences of the Russian aggression against Ukraine, including tens of thousands of killed and wounded, more one million internally displaced people, heavy repressions against the indigenous Crimean people – the Crimean tartars, persecution of many other Ukrainian nationals who refused to comply with the Russian occupation regime.

Another example when the Russian Constitutional Court has been used as an instrument of political authorities for the purposes contrary to international law is the 14 July 2015 Judgment of this Court, whereby it assumed the power to declare the judgments rendered by the European Court of Human Rights and other international courts against Russia as "unenforceable"[2] each time when it will find it appropriate to defend the constitutional foundations of Russia. Most likely one of the consequences of this position will be non-implementation of the future international judgments regarding Crimea and other grave breaches of international law.

[1] The Court passed the judgment in the case "On the verification of the constitutionality of the international treaty, which has not yet entered into force, between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea to the Russian Federation and the formation of new constituent entities within the Russian Federation". Available (in Russian) at: <http://doc.ksrf.ru/decision/KSRFDecision155662.pdf>.

[2] This position was consolidated in the statutory provisions, and the first judgment concerning the impossibility to execute the judgment of the European Court of Human Rights (in the case of *Anchugov and Gladkov v. Russia* concerning the disenfranchisement of prisoners) was adopted on 19 April 2016. The Constitutional Court of the Russian Federation ruled that it was impossible to execute the judgment of the ECtHR in the case of *Anchugov and Gladkov* in the sense of amending the legislation of the Russian Federation to exclude from disenfranchisement some categories of convicted persons serving a sentence in places of deprivation of liberty.

The identity that is claimed by the Russian court to be an object of defence against international and European law seems to be not only the aggressive policy of the state, but also the so-called "traditional" orthodox values, including inequality between men and women, discrimination against the LGBT people, justification of domestic violence. It could be mentioned that in the speech named "Constitutional Identity of Russia: Doctrine and Practice", which was delivered on 16 May 2017, the Chairman of the Constitutional Court of the Russian Federation Valery Zorkin (while analysing *inter alia* the problem of expansion of supranational legal regulation in the sphere of protection of human rights and the allegedly growing activism of supranational courts) stated that "the protection of human rights should not harm moral societal basis and should not deny it's religious identity"[1]. Thus, one can see how important sometimes could be for the constitutional court to take either the friendly or the hostile approach towards international law and what different consequences could arise for the reputation of the state and the court from one or another choice.

2. Relevant Universal Constitutional Principles

What principles relevant for the determination of relationship between the Constitution and international (and the EU) law can be derived from the Constitution by the Constitutional Court? In answering to this question, let me turn to the Lithuanian example.

At the first sight, the Constitution of the Republic of Lithuania does not seem to be friendly or favourable to the principles and norms of international law. As mentioned already, Art. 135(1), which is placed in Chapter XIII "Foreign Policy and National Defence", literally refers to international law only in the context of Lithuanian foreign policy: it is stated, that "in implementing its foreign policy, the

[1] „Защита прав человека не должна подрывать нравственные устои общества и разрушать его религиозную идентичность". Зорькин, В. Д. Конституционная идентичность России: доктрина и практика. Доклад на Международной конференции «Конституционное правосудие: доктрина и практика» (СПб., 16 мая 2017 года). Available at: <http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=82>.

Republic of Lithuania shall follow the universally recognised principles and norms of international law". One can even have an impression that in dealing with internal affairs of its own people Lithuania is not bound by international law. However, this is only a superficial impression.

The most important is to take into account that the Constitution is an integral act: no constitutional provision may be understood in isolation. Therefore, the above referred provision of Art. 135(1) of the Constitution has to be understood and interpreted in the light of explicit and implied constitutional principles. As it follows from the case law of the Constitutional Court of the Republic of Lithuania, the following four interrelated constitutional principles can be distinguished as relevant for determining the significance of international and the EU law: the principle of *pacta sunt servanda,* the principle of a state under the rule of law, the principle of open civic society and the principle of geopolitical orientation**.** I believe that, at least to certain extent, they exist in national constitutions of all the BBCJ countries (for example, in all of our constitutions there are provisions on the respect for international law and international commitments). Therefore, despite the differences in the wording of our constitutions, we can find common denominators when discussing about the role of international and the EU law in our constitutional frameworks.

The principle of *pacta sunt servanda* is explicitly established by the above referred Art. 135(1) of the Constitution, however, it is broader in scope than interpreted only literally. According to the Constitutional Court of the Republic of Lithuania, the principle of *pacta sunt servanda* obliges the Republic of Lithuania to implement in good faith all of its international obligations arising out of treaties, general international law and the EU law[1]. The principle of respect for international law (*pacta sunt servanda*) has also become a long-standing Lithuanian constitutional tradition and an inseparable part of the principle of the rule of law[2]. That corresponds,

[1] The ruling of Constitutional Court of the Republic of Lithuania of 24 January 2014. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta850/content>.

[2] The Constitutional Court's rulings of 14 March 2006 and 5 September 2012. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1357/content>; <http://www.lrkt.lt/en/court-acts/search/170/ta1055/content>.

for example, with the approach expressed in the Rule of Law Checklist approved by the Venice Commission[1].

The constitutional principle *pacta sunt servanda*, as the constitutional tradition, has its roots already in the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement[2]. This Declaration was adopted under the conditions of the fight against the second Soviet occupation of Lithuania. It is regarded as a primary source of constitutional law and one of the constitutional foundations of the independent State of Lithuania. Para. 22 of this Declaration proclaimed the determination of the State of Lithuania to contribute to the efforts of other nations to establish global peace founded on justice and freedom and based on the Atlantic Charter, the Universal Declaration of Human Rights, and other international legal acts[3]. This provision implied the obligation of the State of Lithuania to follow and to contribute to the progressive development of international law.

Not surprisingly, the second principle important in identifying the place of international and the EU law in the national constitutional paradigm is **the principle of a state under the rule of law**, which means first and foremost the rule (supremacy) of law. According to the Constitutional Court of the Republic of Lithuania, this principle is one of the universal and unquestionable values upon which the Constitution is based on[4]. The rule of law means also the supremacy of

[1] The Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) CDL-AD(2016)007-e2016. Available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e>.

[2] The 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement. Available at: <http://www.lrkt.lt/en/legal-information/lithuanias-independence-acts/declaration-of-the-council-of-the-lithuanian-freedom-fight-movement/364>.

[3] For more about the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement and its constitutional and international legal significance, see: ŽALIMAS, D. Legal Status of Lithuania's Armed Resistance to the Soviet Occupation in the Context of State Continuity. *Baltic Yearbook of International Law*, 2011, vol. 11, pp. 92–99.

[4] „As the act of supreme legal power and as the social contract, the Constitution is based on universal and unquestionable values — the attribution of sovereignty to the nation, democracy, the recognition of and respect for human rights and freedoms, respect for law, the rule of law, the limitation of the scope of

highest universal values, such as human dignity and democracy; any constitution and law has to protect these values. In essence they cannot have a different meaning or be interpreted in isolation from the universally agreed concepts, i.e. the universal values protected by the Constitution may not be filled with a specific national content so as to form the basis for the so-called "sovereign democracy" (the concept that is so popular to the East from Ukraine). As mentioned already, the rule of law is inseparable from the respect for international law and cannot be employed for non-implementation of international commitments.

As a constitutional value, the rule of law is explicitly proclaimed not only in the preamble of the Constitution of the Republic of Lithuania, but also in the preambles of constitutions of Georgia, Moldova and Ukraine. E.g., as mentioned already, in the preamble of the Constitution of Georgia it is declared that citizens of Georgia express the will to establish a democratic social order, economic freedom, a rule-of-law and a social state, to secure universally recognised human rights and freedoms; in the preamble of the Constitution of the Republic of Moldova it is stated that the rule of law, civic peace, democracy, human dignity, fundamental human rights and freedoms, the free development of human personality, justice and political pluralism are considered to be supreme values[1]. In the preamble of the Constitution of Ukraine it is declared that it has been adopted striving to develop and strengthen a democratic, social, law-based state.

The third important principle is **the principle of open civic society** declared in the preamble of the Constitution of the Republic of Lithuania (similarly, this principle can be derived from the preambles of the constitutions of Georgia,

powers, the duty of state institutions to serve the people and their responsibility to society, public spirit, justice, and the striving for an open, just, and harmonious civil society and the state under the rule of law". See: the Constitutional Court's rulings of 25 May 2004, 19 August 2006, and 24 September 2009, its decision of 19 December 2012, its ruling of 24 January 2014 and its ruling of 11 July 2014. Available at: <http://www.lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2017>.

[1] In addition, under Art. 1(3) of its Constitution, the Republic of Moldova is governed by the rule of law (and 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).

Moldova or Ukraine). The Constitutional Court of the Republic of Lithuania has emphasized that this principle supposes the openness of the State and its people to international community and to international law. The Court noted, that "the preamble of the Constitution declares that the Lithuanian nation strives for an open, just, and harmonious civil society and a state under the rule of law. One of the most important ways of implementing this striving is the consolidation of a democratic and humanistic legal order on the basis of constitutional provisions and principles"[1].

In its ruling of 18 March 2014[2] the Court noted that the respect for international law is also linked to the striving for an open, just, and harmonious civil society, which is expressed through the constitutional principle of a state under the rule of law; it implies, *inter alia*, the openness to universal democratic values and integration into the international community founded on these values. Therefore, the principle of open civic society is the opposite to self-isolation; it excludes the isolation of the country and its Constitution from international and European law. Thus, it is also due to the principle of open civic society, the supremacy of the Constitution cannot be understood as a *carte blanche* for refusing to comply with international or European law or inventing national standards on universally recognised values.

The fourth significant principle is **the principle of geopolitical orientation of the State of Lithuania**. This principle implies the full membership of the Republic of Lithuania in the EU and NATO and the necessity to fulfil the international obligations related with that membership[3]. As underlined by the Constitutional Court, this geopolitical orientation is grounded on the universal democratic constitutional values which are common with Western (European and North American) states.

Together with the principle of *pacta sunt servanda*, the principle of geopolitical orientation is an important element of constitutional identity and a part of

[1] The ruling of Constitutional Court of the Republic of Lithuania of 9 December 1998. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1135/content>.

[2] The ruling of Constitutional Court of the Republic of Lithuania of 18 March 2014. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta853/content>.

[3] This is the content of this principle as defined by the Constitutional Court in its ruling of 7 July 2011. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1107/content>.

constitutional tradition of Lithuania which origins can be also traced to the above referred Para. 22 of the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement. The statement on adherence to the Wrester democratic values, including the commitment to the Universal Declaration of Human Rights, has demonstrated the orientation of the State of Lithuania that has been completely different from that of the then occupying state – the Soviet Union.

Similarly, the European orientation of Moldova is established as a part of constitutional identity of the State of Moldova. In its judgment of 9 October 2014, the Constitutional Court of Moldova stated that the Declaration of Independence of the Republic of Moldova declared about the disintegration from the Soviet totalitarian space and about the reorientation of the new independent state towards European democratic values[1]. The striving of the Republic of Moldova for the establishment of the relations with European countries in all the areas of common interest, as well as the sought direction towards approximation to European democratic values have been entrenched in the constituent act of the state. Any other geopolitical orientation, as, e.g. sometimes expressed in the speeches of the president of Moldova, should be understood as contrary to the Constitution. Most probably, in a similar manner, the European and transatlantic geopolitical orientation of Georgia and Ukraine could be revealed by the respective constitutional courts. One should take into account that the geopolitical orientation is relevant not only to foreign policy and national security; it has wider implications as results in obligation, e.g., to harmonise national law with the European standards even before the accession to the EU as well as to implement the association agreements with the view of eventual membership in the EU.

[1] Jurisprudence of the Constitutional Court of the Republic of Moldova. In: The Implementation and Protection of the Principles of the Rule of Law in Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine. On the Basis of the International Conference of the Justices of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine (Vilnius Forum), held in Vilnius on 24–25 October 2016. Vilnius: The Constitutional Court of the Republic of Lithuania, 2016. Available at: <http://www.lrkt.lt/data/public/uploads/2016/12/31449_konstitucinis_teisines-valstybes.pdf>.

As regards the place of the EU law in the national constitutional paradigm, it is in addition determined by Art. 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, which is a constituent part of the Constitution of the Republic of Lithuania. It requires from the Republic of Lithuania to share with or confer on the EU the competences of the State institutions in the areas provided for in the EU founding treaties. By virtue of this constitutional provision, the EU law can serve as a source in interpreting the constitutional status and powers of the State institutions[1] (e.g., in this manner the status of the National Bank of Lithuania, as a national central bank that is a part of the European central banks system whose competence of monetary emission is delegated to the European Central Bank, was defined in the ruling of the Constitutional Court of 24 January 2014[2]). Therefore, Art. 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union can be seen as a specific constitutional ground for openness of the Constitution to the EU law, i.e. for the EU law as the source of interpretation of the Constitution.

3. Implications of the Relevant Constitutional Principles: Friendly Approach and Harmonisation

The combination of the constitutional principles of *pacta sunt servanda*, the rule of law, open civic society and geopolitical orientation, which are to large extent common to all the BBCJ countries, may result in implications reflecting a particularly friendly approach to international and the EU law. I believe that these implications can be identical in all the BBCJ countries despite of different wording of our constitutions provided that constitutional courts in the respective countries come to the same understanding of the above referred constitutional principles.

[1] Žalimas, D. Viability of the Constitution and the Role of the Constitutional Court. Round Table „Theoretical and Practical Problems of the Constitutional Justice in Ukraine", Lviv, 16 May 2015. Available at: <http://www.lrkt.lt/data/public/uploads/2015/10/viability-of-theconstitution-lvivroundtable.pdf>.

[2] The ruling of Constitutional Court of the Republic of Lithuania of 24 January 2014. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta850/content>.

One can see at least five main implications identifying the place of international and the EU law in national constitutional paradigm.

First, it is **the presumption of compatibility of international and the EU law with the Constitution**. In particular, the commonness with and openness of the Constitution to the protected universal democratic values leads us to the necessity to presume that international and the EU law is compatible with the Constitution rather than to seek inconsistencies.

Second, **international and the EU law is a source for interpretation of the Constitution**. It only logical that international and the EU law must be employed for interpretation of the relevant constitutional provisions, once the Constitution is open to international and the EU law and the EU membership is seen as the constitutional purpose. Then the Constitution should be understood according to the same universal values as protected by international and the EU law.

That leads to *the duty of harmonisation or consistent interpretation* of the Constitution with international and the EU law. This duty is incumbent on the Constitutional Court as it is obliged by the Constitution to ensure its supremacy with all the relevant principles (including the respect for international law, the rule of law, openness to international and EU law, geopolitical orientation). Indeed, there is no ground or reason to invent a bicycle – any other standards than those already developed on a universal or European scale, in particular when the official constitutional doctrine on a specific issue is not sufficiently developed. In such cases the Constitutional Court of the Republic of Lithuania chooses internalisation of international or the EU law incorporating the corresponding provisions into the official constitutional doctrine (as a result, the provisions of the Constitution are given the same meaning and content as under the corresponding norms of international or the EU law). Besides, in the cases when the content of law is widely developed in the sphere of EU law (for example, competition law, environmental law), there is also no ground to invent a specific national standard. One of the most prominent examples of the EU law as a source of interpretation of constitutional provisions is the above mentioned instance of the ruling of the Constitutional Court of 24 January 2014 where the Court revealed the constitutional status of

the National Bank of Lithuania as both the central national bank and a part of the European central banks system.

Accordingly, recognising the authority and competence of international and European courts, their case law should be treated as binding and should be also applied when the respective international and European norms are applied by the Constitutional Court in interpreting the Constitution. It is natural that, according to their competence, international and European courts provide the final and binding interpretation of the corresponding legal instruments. Therefore, contrary to the Russian approach, which questions the authority of international courts, the case law of international courts should be understood as an inseparable part of international and the EU law. Otherwise the uniform understanding and application of international and European norms would not be possible.

Third, **international and the EU law has to be perceived as the minimum necessary constitutional standard,** in particular for the protection of human rights. The Constitution can be interpreted in a way that is different from international or the EU law only when it is established as providing a higher standard of protection of human rights. In other words, the Constitution may not establish lower, but can provide for higher standards of such protection[1]. In its ruling of 18 March 2014[2] the Constitutional Court of the Republic of Lithuania stated that the criminal laws of the Republic of Lithuania that are related to responsibility for international crimes, including genocide, may not establish any such standards for the protection of human rights that would be lower than those established under the universally recognised norms of international law; disregard for the said requirement would be incompatible with the principle of *pacta sunt servanda* and the pursuit for an open, just, and harmonious civil society and a state under the rule of law.

[1] The ruling of Constitutional Court of the Republic of Lithuania of 24 January 2014. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta850/content>; the ruling of Constitutional Court of the Republic of Lithuania of 5 September 2012. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1055/content>.

[2] The ruling of Constitutional Court of the Republic of Lithuania of 18 March 2014. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta853/content>.

Fourth, **inconsistency between the Constitution and international or the EU law has to be perceived as anomaly that has to be removed under the Constitution**. Due to a parallel development of national constitutional law, international law and the EU law, there could be rare instances of collisions between the Constitution and international or the EU law. They have to be removed within the framework of the above mentioned constitutional principles, in particular *pacta sunt servanda*, open civic society, geopolitical orientation. The Constitutional Court of the Republic of Lithuanian held that, under the constitutional principle of *pacta sunt servanda* (Art. 135(1) of the Constitution), there is a duty for the Republic of Lithuania to remove the incompatibility between the Constitution and the European Convention of Human Rights even by means of the necessary amendments to the Constitution so that international obligations regarding human rights could be carried out. Another theoretical possibility of denouncing of the respective international obligations (denouncing of the ECHR), at least in the sphere of human rights protection, would be inconsistent with the principles of open civic society and geopolitical orientation of the State of Lithuania; however, perhaps in some other fields the latter possibility could be discussed.

Fifth, **the respect for international and the EU law is the material (substantive) criterion for constitutionality of constitutional amendments**. Taking into account the above mentioned principles, in particular that of geopolitical orientation, open civic society and *pacta sunt servanda*, the Constitutional Court of the Republic of Lithuania formulated the substantive restriction on the amendments to the Constitution: no amendment to the Constitution, which can be contrary to the EU membership obligations or other international obligations, can be adopted unless at the same time the constitutional grounds for the EU membership[1] or the relevant international obligations are denounced in accordance with international law (amendments of this kind would violate the integrity of the Constitution as they would be contrary to the constitutional principles of *pacta sunt servanda*, the rule

[1] They are consolidated in Articles 1 and 2 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union and can be changed only by referendum.

of law, geopolitical orientation). A failure to comply with these limitations would constitute a ground for declaring a particular constitutional amendment as contrary to the Constitution. Therefore, as a consequence, in practice no amendments to the Constitution, which would be contrary to the universally recognised norms of international law or to the EU membership obligations, can be adopted (e.g., such referendums as on the reintroduction of death penalty or the approval of the EU Association with Ukraine would not be possible).

Concluding Remarks

To sum it up, international and the EU law has an important role in the national constitutional paradigm. This is due to disclosure of the relevant constitutional principles, such as *pacta sunt servanda*, the rule of law, open civic society and the Western geopolitical orientation. They can be regarded as universal or common to all the BBCJ countries as they are based on the same democratic values. They can be found in our constitutions by means of interpretation taking into account all the potential of the constitutional provisions declaring about the commitments to international human rights standards, universally recognised norms of international law and the rule of law in general. Therefore, despite of the differences in wording of our constitutions, we can find the same applicable principles and the same answers as to the issue of international and the EU law within national constitutional paradigm. This provides a good basis for all of the BBCJ courts to speak in common language.

The four above mentioned constitutional principles are able to transform the initial isolative approach towards international and EU law into a friendly one. Moreover, they inevitably extend the national constitutional paradigm by obliging to employ international and the EU law as the source of interpretation of the Constitution and the progressive development of the official constitutional doctrine. The Constitution (its interpretation) cannot be developed in a way opposite to the development of international or the EU law.

Constitutional courts have a decisive role in transformation of national constitutional paradigm into friendly, inclusive and harmonious with international

and the EU law. In lack of explicit provisions of the Constitution, the constitutional courts are able even to pronounce on the Western or European geopolitical orientation as a part of constitutional traditions or constitutional identity of their respective states, taking into account the fundamental constitutional acts on distancing from the occupation or totalitarian regimes (e.g., in Moldova). As it follows from the experience of Lithuania, even before the accession to the EU, the constitutional courts of the BBCJ countries should have the duty to interpret national constitutions in line with the EU law, taking into account the European aspirations (association with the EU) of their countries, i.e. filling the established Western (European) geopolitical orientation with a corresponding legal content.

Zaza Tavadze,
President of the Constitutional Court of Georgia

THE INTERNATIONAL DIMENSION OF CONSTITUTIONAL JUSTICE: THE APPLICATION OF INTERNATIONAL JURISPRUDENCE IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

Ladies and Gentlemen,
Dear Colleagues,

It is always a great pleasure to take part in this forum – the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions. This is the Association's second Congress, and I would like to underline the fact that its welcoming atmosphere has already proved to be a wonderful platform for our courts to deepen mutual co-operation and exchange information for the benefit of our common goal, to ensure effective constitutional justice. In particular, I wish to thank the Constitutional Court of Ukraine as well as other stakeholders for organising this important event.

The main purpose of this session is to improve our understanding of national perceptions of international jurisprudence, and especially how judicial bodies at the national level apply the rules of international law when administering justice. During my address, I will present the Constitutional Court of Georgia's approach to applying international standards. In order to identify this tendency in the practice of my court, I will refer to items of Georgian case-law which illustrate various levels of interaction between judicial institutions beyond national borders.

In our modern, globalized world, meaningful co-operation between national bodies for constitutional control and international courts is obviously very important. This is especially true in Europe, where the member states of the Council of Europe are strongly encouraged to align themselves with the European Court of Human Rights (ECtHR) in order to ensure they meet their international obligations.

In my perspective, an effective dialogue between our Constitutional Court and the European Court of Human Rights is therefore particularly important, and I would like to underline the fact that, over the years, our court has actively sought to implement European standards within Georgia's legal system.

To begin with, I will outline the legal framework which provides a basis for Georgian national courts to follow international legal standards. I shall then refer to a few instances when we applied the case-law of the Strasbourg court during constitutional decision-making.

Georgia's Constitution contains a special provision (Article 39) which specifies that the Constitution shall not deny any universally recognised rights of an individual that it does not expressly refer to but which inherently stem from the principles it sets out. This provision directly grants the court the right to invoke international human rights standards. Since Georgia is a signatory of both the International Bill of Human Rights[1] and the European Convention on Human Rights, these instruments and the legal standards which stem from their case-law cannot be ignored. Our Constitutional Court has therefore adopted the approach of ensuring maximal respect for the requirements of international law, and especially for international human rights law, when considering individual cases.

The Constitutional Court of Georgia has followed the interpretation of the Strasbourg tribunal quite a number of times, and today I will discuss some of the cases we have considered which refer to the case-law of the Strasbourg tribunal. In 2011[2], for example, the Constitutional Court cited the landmark Strasbourg case of *Bayatyan vs. Armenia* to answer the key question of whether a conscientious objector can be protected by the constitutional right to freedom of religion. Our Constitutional Court applied the ECtHR's approach and adopted a broad reading of this constitutional right to include conscientious objection within the scope of freedom of religion. As a result of this decision, people do not have to undergo compulsory military service based on their religious beliefs.

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

[2] Ruling, "The Public Defender of Georgia vs. the Parliament of Georgia" (1/1/477; 22 December, 2011).

More recently[1], the Constitutional Court of Georgia also referred to the practice of the Strasbourg court in a ruling on the constitutionality of national procedural regulations concerning the use of hearsay evidence in criminal cases. Our court referred to landmark judgments against the United Kingdom[2], and concluded that hearsay evidence alone cannot serve as a decisive basis for a criminal conviction.

The main question for the Constitutional Court in this case was to evaluate if hearsay evidence met the constitutional standard for indisputable evidence, and if the possibility was high enough for a criminal court to use such evidence as the only and decisive proof against the accused.

After careful consideration of the disputed legislation and the practice of the ECtHR, our court noted that hearsay is generally a less reliable form of evidence, that its use risks the formation of false assumptions about the guilt of an individual, and that it might therefore only be admissible in exceptional cases and according to clear rules prescribed by law. Taking into account the prevalent practice of criminal courts as well as a systemic analysis of Georgia's Code of Criminal Procedure, the Constitutional Court found that the disputed law did indeed permit the use of hearsay evidence as the sole reliable proof for a criminal conviction. The law was thus found to violate the principle of *in dubio pro reo* and was therefore declared unconstitutional.

Following this ruling, a great number of criminal cases were re-opened across the country, and the approach of common courts when assessing the indirect proof of evidence began to change[3]. Many people were found innocent after retrial as a result of our court's decision.

Lastly, I wish to discuss a case[4] which was also based on an analysis of international practice and brought about great change in my country. The detractors of a particular law argued that it caused a disproportionate distribution of electoral

[1] Ruling, "Zurab Mikadze vs. the Parliament of Georgia" (548; 22 January, 2015).

[2] "Al-Khawaja and Tahery vs. The United Kingdom", App: N26766/05 and N22228/06; also, "Horncastle and Others vs. the United Kingdom", App: N4184/10.

[3] Research on "Hearsay Evidence in Common Courts", available [in Georgian] at: http://bit.ly/2ddnOA9

[4] Ruling, "Ucha Nanuashvili and Mikheil Sharashidze vs. the Parliament of Georgia" (547; 22 May, 2015).

districts and parliamentary mandates. More specifically, they pointed to significant differences between the populations of various electoral districts, and claimed that parliamentary mandates were as a result so unequally divided as to undermine the value of the electorate's vote. In one instance, the number of voters registered in a particular district was 22 times greater than in another, and yet both these districts were represented in parliament by a single majoritarian seat.

The Constitutional Court indicated that an electoral system must ensure that the will of each citizen is adequately reflected by the outcome of elections. Accordingly, the legislator must provide proper guarantees to ensure that citizens have equal access to elections and an equal ability to influence their outcome. The state must take into account the number of registered voters in each municipality, and the law must attempt to form electoral districts as equal as possible. Only under such a system it is possible to actually realise democratic representation with sufficient public legitimacy. The court concluded that the current system did not ensure that citizens are equally able to influence the outcome of elections, and therefore found the disputed law unconstitutional.

It is important to note that in this ruling, the court referred to several documents of the Venice Commission regarding electoral law, and that it essentially followed these standards. As a result of our court's decision, the Georgian parliament initiated a process of legislative reform to ensure that the standards developed by the court and by the Venice Commission are fully implemented in the country's electoral system.

In conclusion, I would like to underline the fact that the Constitutional Court of Georgia is quite open to the adoption of international standards in its jurisprudence. It is fair to say that both the legal framework and the case-law of our court remain flexible and capable of embracing some of the best practices of global constitutional developments. Our Constitution provides a direct basis for the adoption of international human rights law, while on the other hand the Constitutional Court is willing to affirm international legal standards where these do not contradict the Constitution. A development such as this ensures that Georgia meets her international obligations, and paves the way for greater global integration.

Thank you very much for your attention!

DISCUSSION

ДИСКУСІЯ ТА ОБГОВОРЕННЯ

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ЧИ МОЖЕ ІСНУВАТИ В УКРАЇНІ ОФІЦІЙНА КОНСТИТУЦІЙНА ДОКТРИНА?

На міжнародній конференції «Конституційний контроль і процеси демократичної трансформації в сучасному суспільстві», проведеній 7–8 жовтня 2016 року в м. Києві Конституційним Судом України спільно з Європейською Комісією «За демократію через право» (Венеціанською Комісією), Координатором проектів ОБСЄ в Україні та Німецьким фондом міжнародного правового співробітництва, Голова Конституційного Суду Литви й водночас Голова Всесвітньої конференції конституційного правосуддя професор Д. Жалімас представив наукову доповідь на тему: "*The Official Constitutional Doctrine: Concept, Significance and the Main Principles of Development*"[1].

За академічною назвою містився несподівано актуальний для українського політико-правового контексту зміст, адже йшлося про рівень сформованості засад, принципів, парадигми органічного конституціоналізму в країні, де ще відносно недавно панував тоталітаризм.

Україна, як і Литва, вивільнилася з комуністичних тенет, але Литва вже багато років належить до так званих сталих консолідованих демократій, водночас як Україна – лише до демократій електорального типу[2]. За даними *Freedom House*, в Європейському Союзі країною з електоральною демократією в 2006 році

[1] Офіційна конституційна доктрина: концепція, значення і основні принципи розвитку.

[2] Див.: Харпфер Кристиан В. Посткоммунистическая Европа и постсоветская Россия // Демократизация / пер. с англ. под ред. М. Г. Миронюка; сост. и науч. ред.: К. В. Харпфер, П. Бернхаген, Р. Ф. Инглхарт, К. Вельцель. – М.: Изд-во Высшей школы экономики, 2015. – С. 529, 532.

залишалася тільки Естонія. Решта країн, разом із Великою Британією і США, характеризувалися найвищим рівнем розвитку ліберально-демократичного режиму.

Консолідованими демократіями нині називаються політичні режими, інститути яких є достатньо сильними, щоб підтримувати народоправство традиційними (політичні свободи, вибори, референдум, плебісцит) засобами. Йдеться про передбачуваний і гарантований верховенством права, усталеною політичною практикою демократичний процес.

Україна належить до країн-кандидатів на вступ до цього міжнародного клубу. Адже наш конституційний процес залишається поки що дискретним, характеризується революційними перериваннями поступовості. Власне, на порівнянні досягнутого у цій сфері Литвою, з одного боку, і Україною – з іншого, побудоване дане есе. Доповідь Д. Жалімаса створює для цього необхідні й зручні передумови.

Цікаво, що загальне поняття конституційної доктрини Д. Жалімаса передбачає існування двох автономних значень. Перше з них слід розуміти як концепцію, юридичну теорію конституціоналізму, сформульовану науковцями. Друге є втіленням розуміння права, притаманного виключно державному органу конституційної юрисдикції.

Саме у цьому випадку можна говорити про існування *офіційної* конституційної доктрини. На відміну від поглядів науковців, остання є юридично зобов'язуючою ("*binding*") концепцією, що ґрунтується виключно на офіційному тлумаченні Конституції литовським Конституційним Судом. Тобто офіційна доктрина є пов'язаною з поглядами наукової спільноти лише на філософському рівні. Її існування пояснюється, насамперед, потребою в забезпеченні цілісності національної правової системи.

Сама по собі офіційна доктрина може існувати лише тоді, коли більшість поглядів на роль і функції основного закону є усталеними («класичними»). У випадку, коли погляди конституційних суддів є хронічно змінюваними, говорити про офіційну конституційну доктрину можна лише із застереженнями, тобто умовно.

ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS

Для транзитивних суспільств більш характерною є не усталеність, а швидкоплинність настроїв і ціннісних установок їх політико-правової еліти, до якої належить і спільнота конституційних суддів. Сам по собі демократичний транзит означає перехід («повернення в лоно цивілізації» – М. Горбачов) від соціалістичних практик до стилю життя в умовах глобалізованого капіталізму.

Даний процес вимагає модифікації національних конституційних доктрин і практик, що виявляється в переорієнтації їх цінностей від простої (тоталітарної – Б. Гаврилишин) демократії до демократії ліберальної; від «позитивних» або пасивних прав людини до прав «негативних» або активних; від директивної економіки до свободи й непередбачуваності ринку; від уніфікації і колективізму до індивідуалізму і широкої варіативності способів накопичення й витрачання ресурсів; від цензури до необмеженої свободи вираження поглядів; від загальнонародної власності на повітря (стаття 13 Конституції України) до приватного володіння і розпоряджання землею.

Транзит до органічного конституціоналізму відбувається непросто, що й доводить історія українського мораторію на продаж земель сільськогосподарського призначення. За таких обставин офіційна конституційна доктрина України просто не може бути остаточно сформованою. Хіба що в ній говорилося б про перманентну зміну політико-правових пріоритетів.

Друге, на чому зупиняється Д. Жалімас, – це визнання *значущості* офіційної конституційної доктрини, що виявляється в трьох нормативних вимогах: а) офіційна доктрина повинна глибоко розкривати зміст основного закону; б) таке розкриття змісту має бути юридично обов'язковим; в) офіційна доктрина має підсилювати *верховенство* основного закону.

Для країни консолідованої демократії наведені вимоги виглядають закономірними, однак усе стає набагато складнішим у випадку демократій електоральних, адже зміст конституційної доктрини країни залежить і від того, чим заповнений її загальний культурний простір.

На Заході конституційні ідеали визначає філософія американських батьків-засновників, наукові здобутки М. Вебера, Н. Лумана і Дж. Б'юкенена, на Сході – парадигма китайського капіталізму без інтелектуальної свободи. Зокрема,

наважуся стверджувати, що в Україні початковий світоглядний фундамент чинного Основного Закону держави становив не більше, ніж нашвидкуруч переосмислений марксизм.

Адже більша частина українських уявлень про політичний лібералізм і верховенство права походять з альтернативної самоосвіти, факультативного читання і закордонних стажувань. Саме тому в Україні не сформувалася канонічна конституційна культура. Про те, що органічна конституція є ефективним обмежувачем завжди загрозливої для свободи і ринку влади, досі не повідомляє жоден університетський підручник.

Не дивно, що в 90-ті роки XX століття відсоток конституційних суддів, які вірили в креативну здатність капіталізму («американського стилю життя») беззастережно, був незначним. З часом справа дещо поліпшилася, але говорити про консенсус у визначенні параметрів офіційної конституційної доктрини України поки що зарано.

На думку Д. Жалімаса, *значущість* офіційної конституційної доктрини полягає в тому, що вона вимагає усвідомлення сутності *верховенства* основного закону. Водночас офіційна доктрина слугує джерелом широкого ("*wide*") розуміння суті й ролі сучасного конституційного права в цілому.

Спроба застосування даного підходу до аналізу ситуації в Україні викликає досить несподіваний ефект: офіційне розуміння права не сприймає національну Конституцію 1996 року як *право свободи* ("*freedom's law*" – Р. Дворкін), розглядаючи її просто як найбільш авторитетне джерело в межах наявного законодавства. Не дивно, що усвідомлення Конституції України як втілення метаправа, яке боронить свободу народу і кожного індивіда з позиції *суспільство versus держава,* є ментально дискомфортним для значної частини українських конституційних суддів.

В Україні майже не звертають увагу на той факт, що органічний конституціоналізм було винайдено як деперсоніфікований регулятор *капіталізму* – широкої за своїм спектром нормативної системи, що ґрунтується на необмеженій інтелектуальній свободі і характеризується добре помітною тенденцією до скасування будь-яких бюрократичних обмежень і віз.

Така система має сприйматися як *біполярна*, де пришвидшений поступ, ринок і свобода захищаються конституцією, а порядок і соціальна дисципліна – поточним законодавством. На жаль, в Україні верховенство конституції розуміється суто ієрархічно – як вищість старшого за званням закону над законом за званням нижчим. Це означає, що верховенство права сприймається у нас за адміністративною (влада – підкорення), а не політичною (свобода – порядок) моделлю. Відверто кажучи, такий підхід має небагато спільного з органічним конституціоналізмом.

За цих умов логічним є сприйняття конституційного права як права... *старшого*. Але в тому-то й парадокс, що за хронологією подій конституційне право є правом-підлітком. Тобто верховенство конституції означає переважання цінності свободи над традиційними цінностями ієрархії і порядку. На жаль, сприйняття верховенства конституції як переважання ідеї свободи над бюрократичним порядком не є укоріненим не лише в державному апараті, а й в українській академічній спільноті.

Наступною тезою Д. Жалімаса є твердження про те, що сформульована конституційним судом офіційна доктрина має сприйматися суспільством як жива конституція ("*the living Constitution*"). З цим важко не погодитись. В Україні живою конституцією так само прийнято вважати сукупність рішень і висновків Конституційного Суду України. З іншого боку, про що не говорить Д. Жалімас, – все, що має ознаки життя, з часом мусить дорослішати або застарівати. Ця закономірність є добре помітною на прикладі низки рішень Верховного Суду США, присвячених захисту громадянських прав у XIX–XX століттях.

Як стверджує далі Д. Жалімас, всі без винятку нормотворчі й виконавчі ("*law-making and law-applying*") органи не можуть сприймати зміст основного закону інакше, ніж це встановлено офіційною конституційною доктриною. З іншого боку, як усі ми знаємо, ні конституцію, ні офіційну конституційну доктрину не можна вилучити з критичного дискурсу громадськості.

Транзит до свободи і демократії передбачає постійне переосмислення філософії основного закону. Оскільки громадянське суспільство росте й розвивається під захистом конституції, аналітичний інтерес до неї також не стоїть на місці.

З іншого боку, в чому твердо переконаний Д. Жалімас, самі по собі «наукові висновки не мають жодного впливу на зобов'язуючу природу рішень, ухвалених органами конституційної юрисдикції». Звідси випливає його переконання в тому, що... «академічна юридична доктрина і офіційна конституційна доктрина виконують різні функції».

Більш схожим на правду, однак, є те, що професійна свідомість конституційних суддів апріорі не може бути відокремленою від академічної свідомості професорів права, погляди яких утворюють інтелектуальний каркас сучасного конституціоналізму. Саме в цьому аспекті роль А. Дайсі (1835–1922) або Р. Дворкіна (1931–2013) важко переоцінити.

Очевидно, що академічна доктрина впливає на офіційну конституційну доктрину не прямо, а опосередковано. Йдеться про формально розділені, але змістовно пов'язані між собою юридичні наративи. І якщо це так, то між офіційною конституційною доктриною, з одного боку, і академічною конституційною доктриною – з іншого, мають складатися відносини взаємопроникнення, юридичної *інтертекстуальності*[1].

Йдеться про те, що будь-яка конституційна доктрина-текст містить у собі віддзеркалення інших політико-правових текстів. У ролі останніх можуть виступати «доктрина Л. Брежнєва» (кінець 1960-х) і «Доктрина Д. Монро» (1823), «Чотирнадцять пунктів» В. Вільсона (1918) і «Атлантична хартія» (1941) разом із «Чотирма свободами» Ф. Рузвельта (1941) тощо.

Конституційні судді завжди є прихильниками певних політико-правових ідей, цінностей та ідеалів. І ця прихильність продовжує діяти навіть тоді, коли вона прямо не усвідомлюється і не акцентується її носіями.

Отже, можна очікувати, що конституційні судді, чиє інтелектуальне зростання відбувалося в університетах «ліги плюща», матимуть у своїй голові помітно інший образ конституційного права, ніж той, що мав сформуватися

[1] Інтертекстуальність (*intertextuality*) – термін, введений у 1967 році зірковою представницею постструктуралізму Ю. Крістевою (1941) для позначення властивості текстів, яка проявляється в наявності між ними незримих зв'язків, внаслідок чого останні повсякчас явно або неявно посилаються один на одного.

у свідомості суддів, вихованих під впливом юридичної аури П. Стучки, А. Вишинського або І. Трайніна.

Як і будь-яка інша ідеологія, доктрина офіційного конституціоналізму багато в чому нагадує собою феномен, який В. Гейзенберг свого часу називав різновидом ірраціональної світської віри в «те, що є основою життя». Така віра, писав він, «залишається непохитною навіть при зіткненні з безпосереднім життєвим досвідом, і тому її не може розхитати нове знання. Історія минулих десятиліть на багатьох прикладах вчить тому, що цей <...> різновид віри часто підтримується і тоді, коли він повністю суперечить собі, і що його кінець настає лише разом із смертю віруючих»[1].

Даний «різновид віри завжди належав до значних сил в історії людства. Виходячи з наукових традицій XIX століття можна було б сподіватися, що будь-яка віра повинна ґрунтуватися на раціональному аналізі всіх аргументів, на послідовних висновках, і що інший різновид віри, при якому справжня або уявна істина [сприймається] просто як основа життя, взагалі не повинен мати місця»[2]. Однак у реальному житті, як ми знаємо, все відбувається дещо інакше[3].

Зрештою, ніщо інше, як неподоланна прихильність окремих представників політичних еліт до марксистсько-ленінського світосприйняття, пояснює необхідність люстрації в країнах Східної та Центральної Європи. При цьому про вину суб'єктів (об'єктів) люстрації, що закономірно, не йдеться. Актуальними в даному випадку є не корупція чи моральний занепад, а фактично незмінювана поведінкова програма, «класово-матеріалістичний підхід», який має зовсім небагато спільного з дійсним верховенством права.

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[1] Див.: Гейзенберг В. Физика и философия. Часть и целое / В. Гейзенберг. – М.: Наука, 1989. – С. 129.

[2] Там само.

[3] Не виключено, що засвоєння людьми політико-правових ідей здійснюється за правилами, схожими з правилами психологічного *вдруковування* ("*imprinting*"). Останнє являє собою психофізіологічний механізм, відповідно до якого враження і образи, сприйняті в початковий період розвитку індивіда, вкарбовуються в його свідомість як стійка поведінкова програма, визначальні риси якої в подальшому практично не піддаються змінам.

Усе це доводить, що в посттоталітарних країнах, які походять з СРСР, офіційна конституційна доктрина не може не відобразити в собі залишки радянського впливу. Щоб переконатися в цьому, достатньо ознайомитися з низкою відомих рішень Конституційного Суду України. Про експлуататорів і капіталістів у них наразі не йдеться, але цілком помітним залишається компліментарне ставлення до Президента і Української держави в цілому.

Однак повернімося до концепції Д. Жалімаса. На його переконання, офіційна конституційна доктрина існує як автономний юридичний феномен, що характеризується певним набором принципів: а) поступовий ("*gradual*") розвиток; б) послідовність ("*consistency*"); в) неприйнятність усвідомлення змісту конституції крізь призму поточного законодавства; г) відповідність доктрини вимогам міжнародного права і права Європейського Союзу.

Зокрема, принцип *поступовості* проявляється в тому, що конституційна доктрина формується подібно до коралового рифу, від справи до справи ("*case by case*"). З іншого боку, про що не згадує Д. Жалімас, таке самозростання вартості не може не підкорятися законам діалектичної трансформації, іноді аж до самозаперечення.

В економіці цей ефект відомий як «парадокс наслідків» М. Вебера, в політиці – як деградація мети через використання порочних засобів. У результаті, як писав з цього приводу Л. фон Мізес, «в ім'я свободи і поступу самі прогрес і свобода опиняються поза законом»[1]. «Той, хто наважиться обмежити свободу заради малого добра, – говорив також Ф. фон Гаєк, – заради великого добра знищить її повністю».

«Чорні лебеді» трапляються іноді й на побутовому рівні, наприклад, як необхідність обертати автомобільне кермо в бік (а не проти!) заносу, якщо необхідно вивести машину з віражу. У будь-якому випадку досвід свідчить про те, що наміри людей і результати часто не збігаються.

Це правило працює й у зворотному керунку. Президентська республіка, як прийнято вважати, провокує встановлення авторитарного або й диктаторського

[1] Мизес Л. фон. Всемогущее правительство. Тотальное государство и тотальная война / Л. фон Мизес. – М.; Челябинск, 2013. – С. 15.

політичного режиму. Однак США – найрозвиненіша ліберальна демократія в світі – побудовані саме на цій формі правління. Якщо ж врахувати те, що політичні відносини є основним предметом регулювання в конституційному праві, то ефект неочікуваних наслідків в еволюції конституційної доктрини слід вважати закономірним.

Ба більше, фокус конституційного регулювання полягає в тому, що орієнтовані на пришвидшений поступ основні закони містять у собі приховану провокацію їх власного порушення. Наприклад, захист свободи є конкурентним по відношенню до державного порядку, однак низка органічних конституцій гарантує право народу на демократичне повстання. Схожі аргументи можна застосувати й до права на зброю, американського "*the right to keep and bear arms*".

Але якщо право на зброю і демократичне повстання закріплюються в основному законі, то вони ж мають бути присутніми в офіційній конституційній доктрині. Така вимога робить відверто проблематичним офіційне тлумачення конституції в обставинах, коли точки революційної біфуркації суспільством ще не досягнуто.

Це також підриває принцип поступовості ("*gradual*") і послідовності ("*consistent*") у розвитку органічної конституційної доктрини у випадках, коли остання допускає можливість «культурних вибухів» (Ю. Лотман[1]) громадянської непокори. За будь-яких обставин концепція офіційної конституційної доктрини вимагає серйозного інтелектуального супроводу, коментування.

У своїй доповіді Д. Жалімас висуває також тезу про те, що будь-яка нова конституційна доктрина повинна формуватися на основі вже існуючої доктрини ("*new doctrine is formulated on the basis of the existing doctrine*"). До того ж правило щодо цього він пропонує закріпити в зобов'язуючому рішенні конституційного суду.

Але чи можна застосувати аналогічну вимогу стосовно конституційної доктрини України, де протягом тільки останніх 12 років двічі змінювалася форма правління? Схоже на те, що залежно від демократичної зрілості країн

[1] Про стратегію дискретного політичного розвитку див.: Лотман Ю. Культура и взрыв / Ю. Лотман. – М.: Прогресс, 1992.

їх доктрини можуть поділятися на «холодні», «теплі» й «гарячі». При цьому конституційні доктрини в електоральних демократіях можуть бути лише «гарячими» або «теплими», але ніколи – «холодними». Останнє ж є прерогативою демократій консолідованих, до яких належить і Литва.

Якщо дане твердження є справедливим, то принципи розвитку офіційної конституційної доктрини Д. Жалімаса можна вважати застосовними до консолідованих демократій, але далеко не завжди до «гарячого» українського конституціоналізму.

Що ж стосується принципу *відповідності офіційної конституційної доктрини вимогам міжнародного права і права Євросоюзу*, то й тут Україна поки що залишає за собою простір для маневру. Адже нам і досі не відомо, чого більше прагнуть українці: президентської чи парламентської республіки; унітарної чи федеративної держави; загальнонародної чи приватної власності на землю?

Не менш проблемними виявилися у нас питання цензури й академічної свободи, а також вільного переміщення людей, товарів, послуг і капіталу. Для їх розв'язання Україна може запозичити конституційний досвід країн Євросоюзу, а також Канади або США.

На перший погляд здається, що американський конституціоналізм не має прямого відношення до українських політико-правових реалій. Але насправді весь західноєвропейський конституціоналізм перебуває під потужним американським впливом. Американці винайшли конституціоналізм приблизно так само, як А. Зінгер – голку у швейній машинці, що падає вертикально. У кожному з випадків ефект проявився в надзвичайному прискоренні.

Американський конституціоналізм транслюється світом не лише завдяки ефектові «інтертекстуальності», а й просто через політику США. Якщо кожен із президентів США зобов'язується у своїй присязі «охороняти, захищати й підтримувати Конституцію Сполучених Штатів»[1], то це означає, що парасольку НАТО також можна вважати одним із елементів американської

[1] Переклад Н. Комарової.

ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS

конституційної культури. Адже без США (37 % світового військового бюджету) європейський конституціоналізм виглядав би скромніше.

Отже, офіційна конституційна доктрина Литви є не лише продуктом її інтелектуальної свободи, а й сукупністю генералізацій у межах євроатлантичної правової культури. Натомість стратегія Конституційного Суду України твориться в суттєво іншому геополітичному контексті.

Хоча М. Грушевський і мріяв вирвати Україну із «слов'янських обіймів», чинний Основний Закон України розроблявся під значним впливом російського конституціоналізму. Досить лишень згадати симультанне з Росією включення й виключення з українського конституційного проекту розділу під назвою «Громадянське суспільство».

Як стверджує Д. Жалімас, міжнародне право разом із правом Європейського Союзу є важливими джерелами литовської конституційної доктрини. На жаль, про конституційну доктрину України так просто не скажеш.

З іншого боку, українська правова система є відносно сприйнятливою як до американських, так і до європейських конституційних впливів. Невипадково вона балансує між президентською (1996–2004; 2010–2014) і парламентською (2004–2010; 2014–2017) формами правління. До того ж ще в Конституції УНР 1918 року траплялися суб'єктивні права в «негативному» (американському) потрактуванні[1].

Оскільки за кількістю людських втрат у Другій світовій війні[2] Україна посідає перше місце у світі, варто було б вкотре добре замислитися над зміною наших конституційних пріоритетів. Так само ми не маємо права ігнорувати в конституційному сенсі масштаб українських пожертв на вівтар комунізму.

Д. Жалімас звертає увагу на те, що офіційна конституційна доктрина Литви тісно пов'язана з науковою конституційною доктриною, адже значний відсоток конституційних суддів був рекрутований з академічного середовища.

[1] Див. статтю 17 Конституції УНР 1918 року.

[2] Приблизно 7 млн, що становить 16,7 % втрат відносно тогочасного населення України. Див.: Гунчак Т. Україна: перша половина XX століття. Нариси політичної історії / Т. Гунчак. – К., 1993. – С. 253.

З іншого боку, офіційна доктрина Литви є односпрямованою, а наукова – багатовекторною.

На жаль, такої конституційної консолідованості бракує Україні, яка, з огляду на діяльність Конституційної Асамблеї (2013) та Конституційної Комісії (2015), перебуває на стадії формування офіційної конституційної парадигми.

При цьому, схоже, основною причиною конституційної незавершеності в Україні залишається етатизм. Хоча максимум з того, на що виявилися спроможні більшовики – це... «скопіювати деякі удосконалення, винайдені капіталістами»[1], недовіра до свободи, індивідуалізму і приватного володіння в цілому залишається тут неподоланною в підсвідомості фобією.

Українське право ніби й визнає рівність суб'єктів права власності (частина четверта статті 13 Конституції України), але не на основний економічний ресурс – землю; ніби й гарантує заборону цензури (частина третя статті 15 Конституції України), але не стосовно російських серіалів і польської «Волині»[2]; ніби й запроваджує академічну свободу, але із забороною відрахування за неуспішність більше 3–5 % «бюджетних» студентів. Усе це *volens-nolens* має дуже характерний для законсервованого соціалізму присмак.

Проте вважається, що національний річний ВВП в розмірі 3,7 тис. доларів США на особу є ознакою країн із найгіршими перспективами для демократії. Гарантовану демократію обіцяє показник у 8,1 тис. доларів США на особу. Звідси ж випливає загальний висновок про те, що «бідність є практично несумісною з демократією». Крім того, остання не знає «більш страшного ворога, ніж нафта»[3]. Оскільки розмір українського ВВП у 2013 році становив

[1] Мизес Л. фон. Всемогущее правительство. Тотальное государство и тотальная война / Л. фон Мизес. – М.; Челябинск: Социум, 2013. – С. X.

[2] Див.: а) «Одного разу в Ростові» та інші. Держкіно не пустило на екрани 12 фільмів та серіалів [Електронний ресурс]. – Режим доступу: http://life.pravda.com.ua/culture/2016/10/24/219286/view_print; б) У Києві скасували показ фільму «Волинь» [Електронний ресурс]. – Режим доступу: http://www.bbc.com/ukrainian/news_in_brief/2016/10/161017_ko_volyn

[3] Див.: Фиш Стивен М. Неудавшаяся демократизация / М. Фиш Стивен, Д. Виттенберг // Демократизация. – М.: Изд-во Высшей школы экономики, 2015. – С. 434–435.

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лише 3,1 тис. доларів США на особу, можна сказати, Україна серйозно ризикує своєю демократією[1].

Захищаючи по-соціалістичному «інтереси народу», Верховна Рада України уже впритул підійшла до межі, за якою Україну чекає авторитарне правління. Про те, що саме цю модель закладено в «офіційну конституційну доктрину» від «Батьківщини» Ю. Тимошенко, експертному середовищу добре відомо[2].

Конституція України (в редакції 2016 року) поєднує в собі патримоніальне правління з обмежено провінційним поглядом на реалії світу. Якщо український законодавець і далі блукатиме схожими манівцями, наш Основний Закон стане взірцевою «хартією формальної свободи і фантастичних прав»[3].

Загалом про свободу, індивідуалізм, ринок і приватну власність конституційна доктрина України мала б промовляти з упевненістю В. Маяковського: «Я знаю – город будет, я знаю – саду цвесть [!]»[4]. Насправді ж ми зупинилися на анекдотичній брежнєвській версії цих крилатих рядків.

Творити офіційну конституційну доктрину України без переформатування конституційних цінностей не можна так само, як і стояти на місці. Починати слід із загальновідомого: метою конституції є свобода народу і право вільно чинити власною долею; індивід – це мета в собі, а не засіб чи ресурс у руках держави; гідність спирається на приватну власність і право на володіння зброєю...

Очевидно, що для досягнення мети нам необхідно скористатися світоглядними напрацюваннями К. Поппера, Б. Малиновського, Ф. фон Гаєка, Дж. Ролза та інших, бо без їх допомоги ми не поховаємо у своїх душах відголоски утопічних амбіцій. З іншого боку, відома «теорія перспектив» Д. Канемана і

[1] До того ж 61 % від цієї суми здобуто не на чорноземах, а у сфері послуг // Світ у цифрах 2013 року. – К.: Тиждень, 2013. – С. 226.

[2] Див.: Юридичний коментар до «Порівняльної таблиці змін до Конституції України, підготовленої Блоком Юлії Тимошенко» // Конституційний процес в Україні (2005–2008). – Х.: Права людини, 2009. – С. 300–316.

[3] Так називали царський Маніфест від 17 жовтня 1917 року. Див.: Дунаев В. Очерки науки о государстве / В. Дунаев, А. Никитинский. – М.: 1909.

[4] Див.: Маяковский В. «Рассказ о Кузнецкстрое и о людях Кузнецка» (1929).

А. Твєрскі говорить про те, що економічні стимули і ризики в поведінці людей є універсальними в масштабах світу.

За свідченням ще одного нобелівського лауреата – Р. Маерсона, в Україні «ціла нація переживає проблеми через особливості свого конституційного ладу». Йдеться про дисбаланс політичної сили і адміністративної слабкості конституційного поста президента, дефіцит свободи в регіонах, невиправдану централізацію влади загалом. Зокрема, «якщо Донецьк вимагає для себе особливих прав – такі самі права мають бути у решти регіонів» тощо[1].

У підсумку все це, однак, означає, що негаразди українського конституціоналізму піддаються діагнозу як на теоретичному (причини), так і практичному (наслідки) рівнях. Тож підстави для нашого обмеженого оптимізму ніби присутні.

Rechytskyi V. May the Official Constitutional Doctrine of Ukraine Have a Success? *The article analyzes possibilities of practical application of the concept of the «official constitutional doctrine» proposed by D. Žalimas, Lithuania, in the analysis of current Ukrainian socio-political situation.*

The author emphasizes that usage of the concept of «official constitutional doctrine» in modern Ukraine is significantly complicated by the fact that Ukraine belongs to so-called «electoral democracies» pool, whereas the Republic of Lithuania is an example of a successful «consolidated democracy».

Considering the above-mentioned difference of socio-political models, the author focuses on main risks for the Ukrainian constitutional process in the modern European and global context. The author analyses existing obstacles and challenges of the constitutional process is Ukraine, and provides some practical recommendations for overcoming them.

Key words: *constitution, constitutionalism, electoral democracy, consolidated democracy, paradox of consequences, official constitutional doctrine, interpretation of the constitution, constitutionalism in post-totalitarian countries, Constitution of Ukraine.*

[1] Марчак Д. Интервью з Р. Маерсоном: В вашей конституции есть конфликт, раскалывающий страну [Електронний ресурс]. – Режим доступу: http://biz.liga.net/all/all/intervyu/2840514-maerson-v-vashey-konstitutsii-zalozhen-konflikt-raskalyvayushchiy-stranu.htm

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EUROPEAN UNION LAW AND THE GERMAN CONSTITUTION

1. Constitutional justice and the control of supranational law

The German Federal Constitutional Court (FCC) has developed a rich jurisprudence on supranational issues[1]. For explaining this phenomenon some procedural remarks shall be made within the initial reflections on the subject.

a) *The individual and judicial review of the integration reform treaties*

The particularly important reform treaties of EC/EU, the Maastricht Treaty as well as the Lisbon Treaty, have been submitted to the FCC for constitutional review, by means of individual complaint[2].

It has to be remarked *a priori* that the judicial review of an international treaty is not excluded as an instrument of high politics. Rule of law in the German understanding is far advanced and submits all public power measures to judicial

[1] The term "supranational" as it is used in the following contribution indicates the particular structure of the European Union and of the historical in proceeding European Community (European Communities). The FCC has largely used this term in the Lisbon Treaty decision of 2009 while it had been reticent to take this formulation in the jurisprudence before. However, the FCC has promptly accepted, in its early jurisprudence already, the specific structure of the European Communities as they were outlined in 1964 in Costa/ENEL by the European Court of Justice (Case 6/64, Rep.1964, 1251), FCC vol. 22, 293 (autonomy of law, direct effect on the primacy over national law) without speaking of supranationality. In later decisions the FCC qualified the European Community/European Union as a "Staatenverbund" (Association of States), a term which has no clear contents and which was, until this moment, not known as a category of constitutional or international law (FCC vol. 89, 155). However, this last mentioned term (which is not identical with the term "confederation") was introduced by the FCC to express that the member states of the EC/EU are the "Masters of the (integration) treaties". ("Herren der Verträge"). Also this statement is rather ambiguous.

[2] See Art. 93.1 no. 4a BL and s. 90 of the Act on the FCC.

control. A political question doctrine is not recognized as such[1]. However, the FCC restricts its control power to the constitutional law issues and does not interfere with the discretionary power of the political actors. This is well reflected by its jurisprudence[2]. Of course, the exact borderline is sometimes difficult to define.

An individual complaint can be directed against any action of public power whether it is an executive, judicial or even legislative action. In case of international treaties, the German Act of approval adopted by the Federal Parliament in cooperation with the Federal Council, can be the object of an individual complaint. It shall be noted that Germany adheres to the traditional dualist theory of transformation of international treaties into internal law. This means that international treaties are not incorporated directly, as a source of international law, into the internal German legal order but are transformed through the Acts of approval to the treaties. Such an Act has two functions: first, to transform the international treaty into German federal law, so that the treaty gets a rank of an ordinary federal piece of legislation in the internal order, and secondly, to authorize the Federal President to ratify the treaty.

In the field of European integration, the act of approval is an object of constitutional review. It is considered as the "bridge" between the national and supranational order, which contains the"integration program"[3] and defines the competences of the supranational institutions.

The German Act of approval is the basis for the constitutional review by the FCC because it is German law and realizes the constitutional requirements for the European integration as established by Article 23 BL.

However, constitutional review of the Act of approval is embedded into the procedural system as it exists for the access to the FCC. This means that the individual has to fulfill the requirements of an individual complaint to the FCC,

[1] See recently to the doctrine of political question in a comparative (US and Italian) perspective Caterina Drigo, Le Corti costituzionali tra politica e giurisdizione, Bologn, 2016.

[2] See for example FCC vol. 123, 267 (financial help for Greece), BVerfG, Judgment of the Second Senate of 07 September 2011 – 2 BvR 987/10 – paras. (1–142), http://www.bverfg.de/e/rs20110907_2bvr098710en.html (English version).

[3] As it was formulated by the FCC in vol. 89, 155, C I 3.

in particular the possibility of violation of fundamental rights or of the other rights mentioned expressly in Article 93.1 no. 4a BL.

Therefore, the individual complaint can only be admitted if such a right is invoked by the complainant. Regularly a fundamental right is not directly concerned in case of an international treaty, such as the integration reform treaties which are relevant in our context. However, the constitutional jurisprudence has found a way out in the Maastricht case, in 1993[1]. It was said that the violation of the right to vote to the Federal Parliament as protected constitutionally by article 38 BL can be object of an individual complaint against an integration reform treaty. The reason is that the transfer of further competences to the supranational organization, as it is effectuated by an integration treaty, diminishes the number of competences of Federal Parliament and infringes by this, indirectly, the individual's right to vote. The admissibility of the individual complaint in such cases was therefore confirmed by the FCC despite its traditional hesitation to enlarge the possibilities of access to the Court.

Object of the individual complaint are the German Acts of approval to the integration (reform) treaties. The individual can impugn through an individual complaint all kinds of public power measures including legislation. The condition is that the complainant's fundamental rights or other rights as enumerated in Article 93.1 no. 4a BL are directly and individually concerned by such measure. As the individual complaint is an extraordinary recourse the legal remedies must be exhausted before access to the Constitutional Court can be given. This means in case of legislation that the individual can launch a complaint only if legislation concerns this person directly and individually. If a piece of legislation does not directly concern a person in her/his rights, an individual complaint is only possible against the executed act which implements the piece of legislation. In this case, the concern person has to address first the competent courts such as the administrative tribunals and go up until the last instance judgment. Against this last instance judgment the individual

[1] See FCC vol. 89, 155. (Maastricht Treaty); FCC vol. 123, 267, BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 – paras. (1–421), http://www.bverfg.de/e/es20090630_2bve000208en.html (English version) Lisbon Treaty) (individual complaints in part well funded); the inter-organ remedy according to article 93.1 no. 1 BL dismissed).

complaint is admissible. It is evident that the constitutional court examines, on the basis of the individual complaint, not the legality but the constitutionality of the executive act. It is sometimes difficult to draw the borderline between legality and constitutionality in a very exact way.

As the Acts of approval to international treaties in the field of European integration transfer competences to the supranational organizations they have a direct impact, in the view of the FCC, on the functions of the Federal Parliament by diminishing their competences and correspondingly a negative impact on the right to vote. Therefore a direct complaint against the Acts of approval has been considered admissible by the FCC[1].

It shall also be mentioned that lodging the individual complaint (or other constitutional remedies directed against the Act of approval) is admitted *before* the Federal President has ratified the treaty, ratification which is authorized by the Act of approval. Constitutional review in Germany is regularly a review a posteriori; jurisprudence has established the rule that the execution of the Act of approval by the Federal President, that is the ratification of the treaty, shall not take place until the decision of the FCC has been rendered. The reason is evident: the international treaty could not be impugned with success once the ratification has been effectuated. Therefore the Federal President abstains from depositing the ratification document until the constitutional court's decision has been rendered. Regularly, the FCC and the Federal President agree upon such treatment; formally, the FCC could pronounce an interim measure against the President not to ratify until the rendering of the FCC's decision[2].

b) The Act of approval as an object of constitutional remedies other than the individual complaint

Launching an individual complaint does not exclude that other remedies are also applied, alternatively or cumulatively, against the Acts of approval to integration

[1] FCC vol. 89, 155

[2] See K. Schlaich/St.Korioth, Das Bundesverfassungsgericht, 8th ed., 2010, p.224 et sequ. – For the relation between FCC and Federal President in the above-mentioned context see FCC BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 – paras. (1–421), http://www.bverfg.de/e/es20090630_2bve000208en.html/para. 98

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treaties. If the integration (reform) treaty has impact on the exercise of functions of a supreme State organ or a "part" of it (e.g. a parliamentary group) an action can also be launched against the Act of approval for this specific reason[1].

It is furthermore possible that the abstract review of legislation (e.g. one fourth of the members of the Federal Parliament or the Government of one of the 16 Federation member States[2]) would address the FCC for review of an Act of approval in this context[3].

It shall be underlined that these constitutional remedies must not be based on the violation of fundamental rights but give also the possibility to invoke the *ultra-vires* quality of the supranational act as well as an incompatibility with the German *constitutional identity*[4].

These arguments are of an objective constitutional character, they are not subjective fundamental rights. Therefore altered vires or constitutional identity cannot be invoked through an individual complaint to the FCC, at least not in an isolated form. What would be possible is to invoke a violation of the fundamental right or of another right enumerated in Article 93.1 no. 4a BL effectuated by a supranational *ultra vires* act or an act which is deemed to be contrary to the constitutional identity. The *ultra vires* quality or the nonconformity with constitutional identity of the relevant act would cause, through these deficits, a violation of the fundamental rights as such.

In contrast, *ultra vires* and constitutional identity are arguments that can be put forward directly (and not in the mentioned combination with fundamental rights) through the other constitutional remedies (especially the abstract and possibly also the concrete review of legislation; imaginable also for inter- organ controversies).

c) Individual constitutional complaints against executive actions and judicial decisions

It shall be added that the individual constitutional complaint against (German) executive actions and jurisprudence is, of course, possible.

[1] See Art. 93.1 no.1 BL and s. 63 Act on the FCC.

[2] See Art. 93.1 no. 2 BL and s. 76 Act on the FCC.

[3] See in general Schlaich/Korioth, note 6, ibid.

[4] See below.

However, it is necessary to make some differentiations in this context. Secondary law of the European Union (legal acts adopted by the supranational institutions such as in particular regulations and directives) is autonomous law, supranational law which is different from German law. Constitutional remedies, such as the individual complaint, are not admissible if they aim at the control of supranational law. The FCC has refused to submit supranational secondary law to the control of the FCC. However, there have been made important exceptions, namely concerning ultra vires and constitutional identity. The Maastricht decision of the FCC[1] has extended the power of review also to supranational secondary law if it is deemed to be ultra vires. The FCC claims for the exclusive power to state whether a secondary legal act of the EU (a regulation or a directive) is conform to the competences transferred to the supranational organization. The dogmatic basis for this control is the mentioned Act of approval to the integration treaties which itself defines the transferred competences. This was the starting point for the FCC to claim the exclusive right to evaluate whether the EU measure is *intra* or *ultra* the transferred competences.

The jurisdiction of the FCC has been extended, by this, essentially to secondary EC/EU law. The same idea has been applied, by the FCC in the Lisbon Treaty decision, to constitutional identity.

d) Solange II and constitutional identity concepts

Invoking fundamental rights in legal actions concerning EU law, either by individual complaints or by means of other constitutional remedies, has to take into consideration the solutions developed by national and European jurisdiction: the *Solange II* concept established by the FCC in 1986[2], which is in principle valid at present, and the identity concept as put forward by the FCC the Lisbon Treaty decision in 2009[3].

[1] Vol. 89, 155.

[2] Vol. 73, 339.

[3] FCC BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 – paras. (1–421), http://www.bverfg.de/e/es20090630_2bve000208en.html

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As it is well known, the question whether German authorities and tribunals applying supranational law have to conform with German or with supranational fundamental rights was a major issue in German constitutional jurisprudence. The fundamental rights protection of the individual was regarded as an identifying characteristic of the constitutional order. In 1974, in its first Solange decision[1], the FCC stated the lack of fundamental rights protection on the supranational level and felt obliged to apply the German fundamental rights of the Basic Law in order not to leave unprotected the individual concerned by a supranational legal act executed by a German authority. This solution was expressly declared as an i*nterim* solution which should be applicable only until the moment when the supranational organization has established an own fundamental rights protection system, substantively and functionally comparable to that of the German constitutional order.

In 1986, 12 years later, the same question was object of a constitutional complaint ending up with a different result in the second *Solange* decision in 1986[2]. The FCC now confirmed the existence of the fundamental rights protection of the individual on the supranational level established by the jurisprudence of the European Court of Justice which had developed, in the previous years, general principles of community law with the function of fundamental rights binding the supranational institutions. These general principles have been derived from the common constitutional tradition in Europe as expressed by national constitutions and international treaties such as the European Convention of Human Rights (ECHR). The FCC qualified this jurisprudential type of protection as comparable to the protection contained in the German Basic Law. The FCC now declared that it will no longer apply the German fundamental rights but leave this task to the European Court of Justice. This court should apply the supranational fundamental rights (in form of general principles of Community law) and control the observance of these rights by the supranational organization. The FCC explained its own function as a role of an observer on whether the efficient protection of the individual through the supranational fundamental rights continues or gets reduced in a general and

[1] Vol. 37, 271.

[2] Vol. 73, 339; confirmed later by the FCC in the *Banana Market* decision, vol. 102, 147.

manifest way. In this latter case only, the FCC would fully reopen its jurisdiction and apply the German fundamental rights.

Under this *Solange II* concept an individual complaint or a review application launched by the German tribunal to the FCC would be rejected as inadmissible except such a general and manifest reduction of the individual's protection would be plausibly put forward by the initiators of these remedies[1]. Stating such a degree of reduction of the fundamental rights protection is exclusively reserved to the FCC itself and cannot be made by other German tribunals[2].

With the entry into force of the EU fundamental rights charter in 2009 a written text on fundamental rights which is, in substance and function, similar to the protection system established by the German Basic Law has been created. This has to be considered as the final shift to the supranational order, according to the perspective of the German FCC, of the fundamental rights protection of the individual concerned by EU law executed or applied by national authorities.

The protection by the EU charter comes into effect for actions of the supranational institutions as well as for actions of the member States insofar as they execute EU law[3]. Given the fact that the major part of the EU law is executed by member State institutions, the EU charter has a broad field of application. However the exact borderline between purely national actions and EU-related actions of the member States is unclear in some subtle details and debated between the EU Court of Justice and the German FCC. While the EU court adheres to a broader understanding of the field of application of the charter[4], the perspective of the FCC is rather restricted[5].

Constitutional identity modifies, according to the view of the FCC, to some extent the applicability of Article 51.1 EU charter as well as the *Solange II* concept.

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[1] See FCC vol. 102, 147.

[2] Ibid.

[3] See Art. 51.1 ‚EU charter: addresses member States" only if they are implementing EU law". The term "to implement" has to be interpreted in the right way.

[4] See EUCJ Akerberg Fransson, case C-617/10, ECLI:EU:C:2013:10; Melloni, EUCJ case C-399/11, ECLI:EU:C:2013:107

[5] FCC Antiterrordatei, BVerfG, Judgment of the First Senate of 24 April 2013 – 1 BvR 1215/07 – paras. (1–233), http://www.bverfg.de/e/rs20130424_1bvr121507en.html (English version)

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If a fundamental rights question, e.g. regarding human dignity, is to be considered as belonging to German constitutional identity the solution is based, under this perspective, on the German concept of human dignity as developed in the framework of article 1.1 BL, and not all the EU fundamental rights charter even if its applicability would be given. The reason is that, according to this view, an aspect of constitutional identity enjoys primacy over EU law, that is also over the applicability clause of Article 51.1 EU charter. The fundamental rights aspect, in our example the concept of human dignity, has to be assessed under national constitutional law.

Furthermore, if constitutional identity is concerned, also the *Solange II* concept steps back. It shall be reminded that according to this concept the FCC has limited its jurisdiction in the field of EU (secondary) law executed by German authorities. In such cases it does no longer apply the German fundamental rights but leaves Sir fundamental rights protection to the supranational order. The judicial protection is left in so far to the supranational courts, the General Court and the EU Court of Justice. This concept corresponds essentially to the rule embodied by Article 51.1 EU charter. Also from the standpoint of the Solange II concept, constitutional identity opens the way to German constitutional law, including the field of fundamental rights.

In a summary it can be said that the concept of the FCC on constitutional identity also extends to the field of fundamental rights, insofar as they are directly linked with human dignity. This implies a re-nationalization of the fundamental rights solutions notwithstanding Article 51.1 EU charter and the *Solange* II concept. However, it must be underlined that constitutional identity the latest defined by the FCC in accordance with the intangibility clause of Article 79.3 BL does not embrace all the fundamental rights but only the protection of human dignity and aspects of other fundamental rights which are particularly linked to human dignity.

2. Ultra vires and constitutional identity

a) Who is competent for the ultra vires statement?

Integration power is based, in the view of the FCC, on the principle of competence conferral, the "principe de compétences attribuées". Member States of

the EU have not lost their sovereignty whose expression is in particular this principle. Supranational institutions can act only within the competences attributed to them by the integration treaties to which the national Acts of approval refer. If they act outside the transferred competences, they act "ultra vires" violating by this national sovereignty.

One of the main questions is who is entitled to interpret substance and reach of these competences, the member State or the European Union? The answers differ: the EU Court of Justice claims for the final power of interpretation, being the ultimate interpreter of the autonomous supranational order. The national courts have to proceed, at least in the last instance, with the preliminary question to the EU Court of Justice on whether the legal act of the EU in question is covered by the relevant EU competence. The Court has therefore to interpret the contents of the competence laid down in EU primary law and also the contents of the relevant legal act of the EU in order to qualify this as being within or outside the transferred competence.

However, the FCC claims for the exclusive right to finally interpret the EU competence to act by referring to the German Act of approval to the integration treaties. This Act is the measure for the FCC whether the EU legal act is within EU competence described in this Act or not. The FCC applies its own perspective and view of interpretation[1]. The FCC in the *Mangold* case[2] did not refuse to use the preliminary question proceedings. It even stated that addressing the EU Court of Justice is indispensable for knowing the supranational perspective of the competence question. However, the view of the EU court is not recognized as binding by the FCC; in case of divergence between the view of the EU Court end of the FCC priority is given, by the FCC, to the own national standpoint.

In conclusion, the final word in the interpretation on whether a supranational legal act is covered or not by a primary law competence is up to the EU Court of

[1] Vol. 89, 155.

[2] BVerfG, Order of the Second Senate of 06 July 2010 – 2 BvR 2661/06 – paras. (1–116), http://www.bverfg.de/e/rs20100706_2bvr266106en.html (English version)

Justice. This results from the idea and system of preliminary proceedings as provided in Article 267 TFEU which the national courts have to use for a last instance interpretation EU law.

b) The FCC perspective on the term "ultra vires"

The "ultra vires" problem which has been a main aspect in the Maastricht decision has been mitigated in the *Mangold* decision[1]: only a manifest and serious infringement of the competence distribution system between EU and member states would be a qualified violation which leads to a ultra vires statement. Under this perspective simple errors of the EU institutions regarding the competence are not sufficient.

c) The constitutional identity problem

In the Lisbon Treaty decision the FCC[2] has introduced constitutional identity of the member State as a main argument for the limitation of the integration power. The Court understands German constitutional identity in a rather limited form by deriving the concept from the "intangibility clause" of Article 79.3 BL. This clause excludes a number of basic matters (Article 1 BL guaranteeing the protection of human dignity and the principles of Article 20 BL, the basic qualities of the State, democracy, republic, social state, federalism and rule of law) from formal constitutional reform. As the integration Article 23 BL makes a reference to article 79, the constitutional reform article, the FCC takes the intangibility clause as a basis for its understanding of constitutional identity.

This term (in the EU terminology embedded in the term "national identity" which embraces constitutional identity as well, as Article 4 TEU shows) plays an important role in European constitutionalism. According to the vision of the FCC this term has to be defined exclusively from the national standpoint. The FCC claims for the exclusive power of interpretation of what constitutional identity is and the exclusive power to state and to sanction the infringement of constitutional identity by EU law.

[1] See note 23.

[2] See note 13.

In the view of the FCC this exclusive power has not been transferred, insofar as its interpretation and the sanction of infringement are concerned, to the supranational institutions. Such a transfer has not been possible because the power to protect the own constitutional identity of the State is necessarily linked to the State's sovereignty.

It is rather doubtful whether constitutional identity in the static way, based on Article 79.3 BL, as the FCC has defined it, is really acceptable. It seems that not a static but a dynamic perspective should be a criterion for its interpretation. The Constitution is a living instrument and is continuously developing; the same should be said for constitutional identity which can change in the course of time. This question cannot be deepened in this context[1].

A short reflection shall be dedicated to the question which is not yet completely resolved. It exists a dilemma between the interpretation of constitutional identity which is finally up to the national constitutional courts and the sanction, the declaration of the EU legal act as not applicable in the member State for infringement of constitutional identity, declaration which is, according to the confirmed jurisprudence, the exclusive right of the supranational court[2]. How can this dilemma probably be resolved?

The first phase takes place before the national constitutional court which interprets the relevant aspect of national constitutional identity. However, the constitutional court has to address, with a preliminary question, the EU Court of Justice asking for interpretation of the EU legal act in question and its validity under a primary EU law.

Within the second phase the EU Court of Justice interprets the legal act of the EU and reviews it under Article 4 Treaty on the European Union (TEU). It is evident that the EU Court of Justice cannot review the EU legal act under national constitutional identity. The court cannot interpret and apply national constitutional law. However,

[1] See Rainer Arnold, La Cour de Justice de l'Union Européenne comme gardienne de l'identité constitutionnelle des États membres, in: Longcours, Mélanges en l'honneur de Pierre Bon, Paris Dalloz, 2014, p.49-56.

[2] See e.g. Foto Frost, ECJ case 314/85, *European Court Reports 1987-04199,* ECLI:EU:C:1987:452

Article 4 TEU is important in this context; the EU Court of Justice has to interpret the primary law term "national identity" which embraces also constitutional identity. As Article 4 TEU is a part of EU primary law it falls within its jurisdiction.

The interpretation of this provision has to develop general principles regarding the aspects of constitutional identity which can be accepted under the European perspective. By interpretation of Article 4 TEU a *control framework* has to be set up by the EU Court of Justice. This framework contains, in a general and abstract way, all the aspects which could be considered, by the national constitutional courts, as being part of national constitutional identity.

It is evident that common values as required by Article 2 TEU could not be overridden by reference to the national constitutional identity.

A further step is to decide on the question whether the EU legal act in question infringes one of the aspects of constitutional identity which are recognized, in the framework of these general principles developed by the EU Court of Justice, as *accepted aspects* under the EU perspective according to Article 4 TEU.

The EU Court of Justice has furthermore to decide whether the EU legal act really infringes one of the identity aspects. Infringement requires a certain degree of serious intervention. If the supranational court can state that the EU legal act interferes seriously with an aspect which is recognized under Article 4 TEU as an aspect of national constitutional identity, the court can declare the EU legal act as incompatible with Article 4 TEU and therefore void.

In conclusion, resolving the above-mentioned problem means for the national constitutional court and the EU Court of Justice to cooperate. This cooperation is divided into two categories of judicial action: the first is carried out through the national constitutional court by interpreting and defining the national constitutional identity which is deemed relevant in the concrete case; the second has to be made by the EU Court of Justice which controls, with reference to the mentioned framework of generally accepted aspects of constitutional identity, the aspect of constitutional identity put forward by the national constitutional court. This control function of the EU Court of Justice results from Article 4 TEU and precedes the possible sanction of an incompatibility declaration was a consequence of annulment of the EU legal act.

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КЛЮЧОВІ ПИТАННЯ ТЕОРІЇ ТА ПРАКТИКИ СУЧАСНОГО КОНСТИТУЦІЙНОГО ПРАВОСУДДЯ

Одним із ключових питань теорії і практики сучасного конституційного правосуддя, яке, на мій погляд, доцільно розглянути у ході дискусій на Другому конгресі Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів, є співвідношення положень національних конституцій і міжнародних зобов'язань кожної країни, зокрема України. Почати варто з того, що є конституція країни, яка має найвищу юридичну силу, принаймні на території цієї країни, і є міжнародні зобов'язання країни – акти міжнародного права. Наприклад, для України – це Конвенція про захист прав людини і основоположних свобод (далі – Конвенція). Важливе значення у цьому контексті має Закон України «Про виконання рішень та застосування практики Європейського суду з прав людини» (далі – ЄСПЛ).

Україна є членом Ради Європи та ратифікувала Конвенцію, у нас з'явилися міжнародні зобов'язання, але треба враховувати і національні особливості нашої Конституції. Якщо Україна має намір укладати міжнародний договір, але він суперечить Конституції України, то укладення такого міжнародного договору можливе лише після внесення відповідних змін до Конституції України. Чинні міжнародні договори, згода на обов'язковість яких надана Верховною Радою України, є частиною національного законодавства України (стаття 9 Конституції України).

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Таким чином, виникають певні проблеми щодо реалізації вказаних конституційних положень, які полягають у визначенні:

- по-перше, яким чином співвідносяться між собою Конституція України та чинний міжнародний договір як частина національного законодавства, навіть якщо це міжнародний акт, ратифікований Верховною Радою України;
- по друге, чи є Конституція України актом вищої юридичної сили лише для внутрішньої системи права, чи його треба розглядати в широкому сенсі.

Що я маю на увазі – країна хоче самоізолюватися з цією Конституцією чи вона хоче розвиватися в руслі існуючих зобов'язань? Зокрема, чи можна вважати, що процес глобалізації завершено? На мою думку, він триває, і Україна бере участь у ньому. Ми не можемо сказати: ми будемо жити так, як нам заманеться, а весь світ нехай живе по-іншому. Тобто Україні потрібно знайти своє місце у світовому правопорядку. Це виклик для України, на який ми маємо дати відповідь.

Загальновідомо, що при ратифікації договорів держави нерідко роблять певні застереження, виходячи з принципу субсидіарності та керуючись тим, що:

- по-перше, деякі положення міжнародного акта не завжди відповідають конституції країни;
- по-друге, держави розуміють, що не можуть виконати всі зобов'язання, а тому роблять застереження: це ми ратифікуємо, а це – ні.

В Україні також не ратифіковано низку положень міжнародних актів, особливо в частині, що стосується соціально-економічних прав людини – у держави немає можливості їх забезпечити. Не виключено, що невдовзі міжнародні суди задовольнятимуть позови громадян. І що тоді робити державі? Їй потрібно кілька бюджетів лише для забезпечення виконання внутрішніх законів, не кажучи вже про міжнародні зобов'язання. Тому треба враховувати, що кожна національна система має свої особливості, і водночас діяти на перспективу. Який вектор розвитку обираємо: демократичні, європейські цінності – і цим шляхом йдуть держава та суспільство, чи обираємо інший

шлях – азіатський? Це так само, як відповісти зараз на питання: є в Україні агресор чи немає, є агресія Росії чи ні, якщо вона підтримує бойовиків ЛНР і ДНР? Так, підтримує. Подібні запитання виникатимуть щоразу щодо конкретних зобов'язань України.

Робота нашого Конгресу якраз і свідчить про те, що нам треба шукати шляхи для дотримання європейського вектору розвитку з урахуванням національних особливостей кожної країни.

Ми ж розуміємо, хто писав Конституцію України 1996 року, ми розуміємо, що вона є напівсоціалістичною. Але вона така, яка є. Можна тлумачити дух Конституції в сьогоднішніх умовах, можна інакше дивитися на ті чи інші її статті, тому Конституційний Суд України намагається пристосувати, осучаснити Конституцію України. Але є й певні межі, які не можна переступити – прямі заборони в Конституції, прямі приписи, і цю особливість нашої національної Конституції теж треба розуміти і враховувати.

Другий момент, на якому я хотів би зупинитися, стосується досвіду інших конституційних судів. Пані Тома Бірмонтієне наводила нам прецедентну практику. Професор Маттіас Хартвіг теж наголошував, що в цьому питанні треба бути обережними. Однак є певні рішення конституційних судів у подібних ситуаціях і є протилежні рішення. Це стосується практики Конституційного Суду України, інших конституційних судів і практики ЄСПЛ. Верховний Суд США також змінював свою практику в різних справах. Життя змінюється – тоді думали так і справи вирішували відповідно, сьогодні думаємо інакше – і справу вирішуємо інакше.

Є певні традиції у кожного суду. Для Конституційного Суду України, наприклад, не характерно наводити в структурі рішення порівняльне право, а для Конституційного Суду Молдови – це вже звичайна річ. На мою думку, якщо не в рішенні, то хоча б у матеріалах, які вивчає суддя, готуючись до вирішення справи, повинні бути й акти міжнародного права, і практика конституційних судів. Тут нам може серйозно допомогти Венеціанська Комісія (і ми в резолюції про це пишемо), тільки треба звертатися до неї і отримувати цю практику, а також практику ЄСПЛ у подібних справах, зокрема висновки

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самої Венеціанської Комісії та інших поважних міжнародних органів. Проте виникає запитання: чи варто це прописувати у рішенні? Деякі мої колеги вважають, що не потрібно робити у рішеннях Конституційного Суду України такі викладки, на мою ж думку, таку практику можна було б запровадити.

І третій момент. За 9 років моєї каденції я побачив зміни, які сталися у середовищі конституційних судів різних країн. Проблеми виникали і в Угорщині, і в Таджикистані, і в Конституційного Трибуналу Польської Республіки, і в конституційних судах Туреччини та України.

Хочу нагадати, що 24 лютого 2014 року було прийнято постанову Верховної Ради України, в якій дано політичну оцінку Рішенню Конституційного Суду України від 30 вересня 2010 року щодо порушення конституційної процедури ухвалення Закону № 2222 при внесенні змін до Конституції України. Пані Тома Бірмонтієне згадувала про ексклюзивний конституційний контроль за внесенням змін до конституції. Це так, але в Україні знайшли крайнього – Конституційний Суд України. При цьому треба чесно визнати: парламент порушив конституційну процедуру внесення змін до Конституції України. Усі це визнають. Але що робити Конституційному Суду? Заплющити очі і сказати, що все було добре? Але ж це не так – було порушено конституційну процедуру внесення змін до Конституції України, і Конституційний Суд України на це прямо вказав. Що робити, якщо він визнав неконституційним закон? Як діяти Президенту України, Верховній Раді України, Кабінету Міністрів України, чим керуватися? Парламент мав можливість у конституційний спосіб змінити Конституцію України, але цього не зробив. Політики знайшли винного – Конституційний Суд України, порушили кримінальну справу проти суддів, які ухвалювали рішення. Вже три роки триває слідство. Це і є той самий тиск, що застосовується до суддів Конституційного Суду України.

Відомо, що кожний конституційний суд проходить стадії заснування, становлення, розвитку, занепаду, підйому тощо. Якщо говорити про Федеральний Конституційний Суд Республіки Німеччина, то, як каже професор Райнер Арнольд, він є самодостатнім і багато років працює успішно. І ми радіємо спілкуванню з німецькими колегами, переймаємо їхній досвід,

цінуємо високий авторитет цього Суду. Думаю, це пов'язано і з менталітетом народу. У нас інша політична ситуація, інший менталітет – ми сподіваємося, що ситуація змінюватиметься на краще, але треба розуміти і враховувати, що в кожній країні – свої особливості політичної ситуації.

Тому я роблю висновок, що всім конституційним судам потрібна підтримка на рівні Асоціації конституційного правосуддя. Так, ми не можемо вказати тій чи іншій державі, що і як робити, але висловити занепокоєння, зауважити політикам, що не можна тиснути на конституційний суд – це наш пріоритетний обов'язок задля захисту та забезпечення повноцінної діяльності конституційного суду кожної країни.

Тож ми дуже вдячні за можливість зустрітися в Україні і обговорити питання, в тому числі незалежності конституційних судів, про що йшлося на сьогоднішньому засіданні.

Думаю, що в резолюції, яку ми сьогодні ухвалимо, а також на засіданні Генеральної асамблеї Асоціації наших судів ми це відобразимо, щоб підтримати конституційні суди у цьому напрямі.

Yurii Baulin,
Acting President of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions,
Acting Chairman of the Constitutional Court of Ukraine,
Doctor of Law, Professor,
Full Member of the National Academy of Legal Sciences of Ukraine

KEY ISSUES OF THEORY AND PRACTICE OF MODERN CONSTITUTIONAL JUSTICE

One of the key issues of theory and practice of modern constitutional justice, which, in my opinion, is appropriate to consider during the discussion at the Second Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions concerns the correlation between the provisions of the national constitutions and international commitments of each country, in particular Ukraine. It starts with the fact that there is the constitution of the country, which has the highest legal force, at least within the territory of this country, and there are international commitments of the country – acts of international law. For example, for Ukraine it is the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the «Convention»), as well as the Law on the Implementation of the Judgments and Application of the Case-Law of the European Court of Human Rights.

Ukraine is a member of the Council of Europe and it has ratified the Convention, and thus, we have international commitments, but we should also take into account the national specificities of our Constitution. If Ukraine intends to conclude an international treaty, but it contradicts the Constitution of Ukraine, the conclusion of such an international treaty is possible only after making appropriate changes to the Constitution of Ukraine. Existing international agreements, the consent to the binding nature of which was granted by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine (Article 9 of the Constitution of Ukraine).

Thus, there are certain problems with the implementation of these constitutional provisions, which are rooted in:

- how the Constitution of Ukraine and the existing international treaty interrelate as part of national legislation, even if it is an international act, ratified by the Verkhovna Rada of Ukraine;
- is the Constitution of Ukraine an act of higher legal force only for the domestic system of law, or should it be considered in a broad sense?

What do I mean – does the country want to self-isolate with this Constitution or does it want to develop in line with existing international commitments? In particular, can we assume that the globalisation process is over? In my opinion, it is ongoing, and Ukraine is participating in this process. We cannot say: we will live as we want, and let the whole world live differently. That is, Ukraine needs to find its place in the world order. This is a challenge for Ukraine, which we need to answer.

It is well-known that when ratifying treaties states often make certain reservations based on the principle of subsidiarity and guided by the fact that:

- firstly, some provisions of the international act do not always correspond to the constitution of the country;
- secondly, the states understand that they cannot fulfill all the obligations, and therefore make a reservation: we ratify this, and we do not ratify that.

A number of provisions of international instruments have not been ratified by Ukraine too, especially with regard to social and economic human rights – the state does not have the opportunity to ensure them. It is possible that soon the international courts will satisfy the claims of citizens. And what should the state do then? It needs several budgets only to ensure the implementation of domestic laws, not to mention international commitments. Therefore, we must take into account that each national system has its own specific features and at the same time to act in perspective. What vector of the development do we choose: democratic, European values – and the state and society go this way, or shall we choose another way – the Asian one? This is the same as answering the question: is there an aggressor in Ukraine, Russia's aggression or not, does it support the fighters of Luhansk National Republic and Donetsk National Republic? Yes, it does. Such questions will arise each time with regard to specific commitments of Ukraine.

The work of our Congress shows that we need to look for ways to comply with the European development vector, taking into account the national peculiarities of each country.

We are aware who wrote the Constitution of Ukraine in 1996, we understand that it is semi-socialist. But it is what it is. We could interpret the spirit of the Constitution in today's conditions, we could look at some of its articles differently, so the Constitutional Court of Ukraine is trying to adapt and modernise the Constitution of Ukraine. But there are certain boundaries that cannot be crossed – direct prohibitions in the Constitution, direct orders, and this feature of our national Constitution must also be understood and taken into account.

The second point I would like to raise concerns the experience of other constitutional courts. Mrs. Toma Birmontienė gave us examples of jurisprudence. Professor Matthias Hartwig also emphasised that care should be taken in this matter. However, there are certain decisions of the constitutional courts in similar situations and there are opposing decisions. This applies to the jurisprudence of the Constitutional Court of Ukraine, other constitutional courts and the ECHR case-law. The US Supreme Court also changed its practice in various cases. Life is changing – at that particular time they thought in that way and the cases were considered accordingly, today we think differently – and we decide differently.

There are certain traditions in every court. For the Constitutional Court of Ukraine, for example, it is not typical to present comparative law in the structure of its decisions, and for the Constitutional Court of the Republic Moldova it is already an ordinary matter. In my opinion, if not in a decision, then at least in the materials being studied by the judge, in preparing for the case, there should be acts of international law and the constitutional courts case-law. The Venice Commission can seriously help us in this matter (and we mention it in the Resolution), but we should just appeal to it and to get this jurisprudence, as well as the case-law of the ECHR in similar cases, in particular the opinions of the Venice Commission itself and other respectable international bodies. Yet, the question arises: is it worth prescribing in the decision? Some of my colleagues believe that it is not necessary to make such remarks in the decisions of the Constitutional Court of Ukraine, in my opinion, such a practice could be introduced.

And the third point. During nine years of my tenure, I have seen the changes that have occurred in the constitutional courts of different countries. There have been problems in Hungary, Tajikistan, the Constitutional Tribunal of the Republic of Poland, and the Constitutional Courts of Turkey and Ukraine.

I would like to remind you that on February 24, 2014 the Verkhovna Rada of Ukraine adopted the resolution, which provided the political assessment of the Decision of the Constitutional Court of Ukraine dated September 30, 2010 concerning the violation of the constitutional procedure for the adoption of the Law No. 2222 when amending the Constitution of Ukraine. Mrs. Toma Birmontienė referred to the exclusive constitutional control for amending the constitution. This is true, but Ukraine has found the Constitutional Court of Ukraine responsible for this. At the same time, we must honestly admit that the parliament had violated the constitutional procedure for amending the Constitution of Ukraine. All of this has been recognised. But what should the Constitutional Court do? To close its eyes and say that everything was fine? But this is not the case: the constitutional procedure for amending the Constitution of Ukraine had been violated, and the Constitutional Court of Ukraine explicitly stated this. What should I do if the Court declared the law unconstitutional? What should the state do today, tomorrow, the day after tomorrow? How should the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine act, what to be guided with? The Parliament was able to change the Constitution of Ukraine constitutionally, but it did not. Politicians found the culprit – the Constitutional Court of Ukraine, initiated criminal cases against judges who adopted the decision. The investigation has been under way for three years. This is the same pressure that applies to judges of the Constitutional Court of Ukraine.

It is known that each constitutional court passes the stages of foundation, formation, development, decline, recovery, etc. Speaking about the Federal Constitutional Court of Germany, Professor Rainer Arnold says that it is self-sufficient and has been successful for many years. And we are glad to communicate with our German colleagues, take their experience, appreciate the high authority of this Court. I think this is associated with the mentality of the people. We have

a different political situation, different mentality – we hope that the situation will change for the better, but we must understand and take into account that each country has its own specific features of the political situation.

Therefore, I conclude that all constitutional courts need support at the level of the World Conference of Constitutional Justice. Yes, we cannot indicate to one or another state what and how to do, but to express our concern, to point out to politicians that they cannot put pressure on the constitutional court – this is our priority duty in order to protect and ensure comprehensive functioning of the constitutional court of each country.

Thus, we are very grateful for the opportunity to meet in Ukraine and discuss issues, including the independence of the constitutional courts, as discussed at today's meeting.

I think that in the Resolution we are going to adopt today, as well as at the BBCJ General Assembly, we will reflect it in order to support the constitutional courts in this area.

MATERIALS OF THE PARTICIPANTS OF THE 2ND CONGRESS

МАТЕРІАЛИ УЧАСНИКІВ ДРУГОГО КОНГРЕСУ

Володимир Горбань,
завідувач кафедри державно-правових дисциплін
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ПРОБЛЕМА ВЗАЄМОУЗГОДЖЕННЯ МІЖНАРОДНОГО І НАЦІОНАЛЬНОГО ПРАВА У ЗАСТОСУВАННІ ПРИНЦИПУ ВЕРХОВЕНСТВА ПРАВА МІЖНАРОДНИМИ І НАЦІОНАЛЬНИМИ СУДАМИ, ОРГАНАМИ КОНСТИТУЦІЙНОЇ ЮРИСДИКЦІЇ

Чи є рішення міжнародних судів, Європейського суду з прав людини (далі – ЄСПЛ) категоричним імперативом для національних судів у застосуванні принципу верховенства права? Чи перебувають національні конституційні суди в ієрархічному підпорядкуванні міжнародним судам у тлумаченні принципу верховенства права, а національні суди – у його застосуванні? У пункті 2 проекту резолюції Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів (далі – Конгрес), що відбувся 1–2 червня 2017 року у м. Харкові, учасникам Конгресу пропонувалося, зокрема, таке формулювання: «...органи конституційної юрисдикції зобов'язані враховувати рішення ЄСПЛ при тлумаченні норм національного права і конституції, тобто поступово інтегрувати рішення ЄСПЛ у національне право. Законодавець може відступати від вимог міжнародного договору лише у виняткових випадках, передбачених міжнародними договорами, і лише тоді, коли це необхідно для захисту фундаментальних національних конституційних принципів».

У виступах, запитаннях та відповідях учасників Конгресу виявлено такі основні позиції:

- верховенство права в міжнародному, європейському та національному вимірах є однією з актуальних проблем тлумачення права (Ю. Баулін);
- Конституційний Суд України є органом формування єдиного праворозуміння (А. Селіванов);
- права людини – це те, що нас об'єднує, але право треба знаходити у власній країні, а не в Європі. На це спрямована конституційна реформа в Україні (М. Енберг);
- рішення ЄСПЛ та інших національних конституційних судів стають джерелами права в Україні (В. Таций);
- верховенство права передбачає обов'язкове виконання країнами рішень міжнародних судів, ЄСПЛ. Обговорення співвідношення міжнародної і національної юрисдикції судів впливає на інші погляди. Так, наприклад, у справі фінської студентки стосовно знаходження розп'ять Христа в навчальних закладах Баварії Конституційний Суд визначив їх розміщення таким, що відповідає баварській традиції. Проблема абортів у Баварії також вирішується інакше, ніж деінде (М. Хартвіг);
- Конституційний Суд ФРН у 1986 році зробив застереження щодо керування у країні Хартією прав людини і основоположних свобод Європейського Союзу і рішеннями ЄСПЛ доти, доки вони не будуть суперечити німецьким, тоді ФРН може повернутися до власних правових джерел. Згідно зі статтею 8 Конституції Польщі європейське право не може бути вищим за власне національне. Загалом у ЄС існує так зване «м'яке» (декларації, рекомендації тощо) і «жорстке» (зобов'язуюче) право (Р. Арнольд).

Автор цього матеріалу привернув увагу учасників Конгресу до статті 29 Загальної декларації прав людини ООН, яка за змістом прямо пов'язана з частиною третьою Преамбули Декларації про необхідність захисту прав людини верховенством права. Йдеться про те, що кожна людина має не тільки права, а й обов'язки перед суспільством, у якому тільки й можливий вільний і повний розвиток її особистості. Тому стаття 29 Декларації передбачає можливість обмеження людини у здійсненні своїх прав і свобод законом

виключно з метою забезпечення належного визнання й поваги прав і свобод інших та задоволення справедливих вимог моралі, громадського порядку і загального добробуту в демократичному суспільстві[1].

У дискусіях стосовно проблеми співвідношення юрисдикції міжнародних і національних судів, органів конституційної юрисдикції у захисті прав людини і тлумаченні верховенства права не слід забувати, що об'єднані нації все ще належать до різних правових систем із різним праворозумінням, у тому числі розумінням прав людини. Глобалізація надала правам людини правовий статус універсальної цивілізаційної цінності, але вона є процесом, а не завершеним явищем. Глобалізація ще не привела до формування єдиної загальнолюдської цивілізації, і конкуренція чи навіть конфліктні зіткнення різних типів і видів цивілізацій є реальністю не тільки в міжнародному, а й у європейському просторі. Це стосується і загального розуміння права та прав людини, і конкретних прав у конкретних суспільствах, конкретних обмежень тих чи інших прав і свобод.

Досі неспростовними залишаються основні висновки з доповіді Ф. Лапорти «Глобалізація і верховенство права. Деякі сумніви вестфальця», представленої на XXII Всесвітньому конгресі з філософії права 2005 року у м. Гранада, про асиметрію між соціально-економічною глобалізацією і глобалізацією юридичною, про дефіцит глобального права (не існує наднаціонального і глобального правового регулювання, не існує і глобального судді, суду; кримінальне право сповідує принцип територіальності, за яким застосування зарубіжного кримінального права заборонено, тому діяльність Міжнародного кримінального суду є неефективною)[2]. Про складнощі реалізації верховенства права в умовах юридичного плюралізму йшлося також на XXVI Всесвітньому конгресі з філософії права і соціальної філософії 2013 року в м. Белу-Орізонті[3].

[1] Загальна декларація прав людини ООН; Прийнята і проголошена в резолюції 217 А (III) Генеральної Асамблеї від 10 грудня 1948 року [Електронний ресурс]. – Режим доступу: http:// zakon 3. rada. gov. ua/ laws/ shov/ 995015

[2] Лапорта Ф. Глобализация и верховенство права. Некоторые сомнения вестфальца / Ф. Лапорта // Проблеми філософії права. – 2006–2007. – Том IV–V. – С. 37, 40.

[3] Антонов М. Права людини, демократія, верховенство права та сучасні соціальні виклики у складних суспільствах / М. Антонов, С. Максимов // Право України. – 2013. – № 12. – С. 326.

Український дослідник П. Рабінович констатує проблему неусуванності й нездоланності плюралізму праворозуміння, завдяки чому такі теорії не можуть не бути різними. Завдання створення універсальної теорії права, яка б узагальнила сутність і закономірності національного і міжнародного правового регулювання, ще тільки пропонується до розв'язання[1].

Наведені приклади наукових висновків щодо проблеми, яка розглядається, знаходять підтвердження в сучасних документах ООН, Європейського Союзу. Так, у розглянутій 16 березня 2012 року на 66-й сесії Генеральної Асамблеї ООН доповіді Генерального секретаря «Чинення правосуддя: програма дій зі зміцнення верховенства права на національному і міжнародному рівнях» окремим п'ятим пунктом стверджувалося, що хоча відповідальність за забезпечення верховенства права на національному і міжнародному рівнях лежить на державах – членах ООН і їх населенні, ООН готова надавати їм допомогу в цьому на узгодженій на міжнародному рівні нормативній базі. Однак ця допомога має ґрунтуватися на «національному прагненні в прив'язці до національного контексту»[2]. У пункті 11 Декларації наради на високому рівні Генеральної Асамблеї ООН з питань верховенства права на національному і міжнародному рівнях (прийнятій резолюцією 67/1 Генеральної Асамблеї ООН від 24 вересня 2012 року) визнавалася важливість національної самостійності в питаннях забезпечення верховенства права, зміцнення інститутів правосуддя і безпеки, які, зокрема, враховують потреби і права всіх людей, зміцнюють довіру і заохочують соціальну єдність суспільства та економічне процвітання[3].

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[1] Рабінович П. Проблема формування універсальної теорії права як спільної концептуальної основи теорій національного права і міжнародного права / П. Рабінович // Право України. – 2013. – № 5. – С. 241.

[2] Отправление правосудия: программа действий по укреплению верховенства права на национальном и международном уровнях : доклад Генерального секретаря ООН, 16 марта 2012 года, A/66/749 [Електронний ресурс]. – Режим доступу: https://documents-dds–ny.un.org/doc/UNDOC/GEN/N12/267/03/PDF/N1226703.pdf?OpenElement

[3] Декларация совещания на высоком уровне Генеральной Ассамблеи по вопросу о верховенстве права на национальном и международном уровнях [Електронний ресурс]. – Режим доступу: https:documents-dds-ny.un.org/doc/UNDOC/LTD/N12/51653/PDF/ N1251653.pdf?OpenEleme

Європейський Союз у міжнародному праві вирізняється суттєво більшою, ніж усі країни – члени ООН, мірою інтеграції як у законодавчій, так і в судовій системі з обов'язковою юрисдикцією. Проте відзначаючи цей факт у «Контрольному списку запитань для оцінки дотримання верховенства права» (пункт 40), Європейська Комісія «За демократію через право» разом з тим вказує на все ще нездійсненне завдання досягнення повного верховенства права навіть у країнах зі сталою демократією (пункт 29); на меншу міру розвитку міжнародної правової системи порівняно з національними конституційними і правовими системами (пункт 40); на те, що принцип верховенства права не диктує вибору між монізмом і дуалізмом, а обов'язковість виконання міжнародного законодавства, яке стало частиною внутрішнього законодавства, не означає, що воно завжди повинне мати верховенство над конституцією чи звичайним правом (пункт 48)[1].

Декілька прикладів стосовно порушеної проблеми. В об'єднаній Європі Німеччина вирізняється своїм традиційним конфесійним християнським плюралізмом і державною децентралізацією з часів Аугсбурзького релігійного миру 1555 року (принцип «чия країна, того й віра») і Вестфальського трактату 1648 року про децентралізований союз незалежних держав. Тому в Баварії, яка має власну Конституцію 1946 року і Конституційний Суд, однак не ратифікувала Конституцію ФРН 1949 року, може мати місце судовий захист, не властивий усій Німеччині, тим більше Європі, католицької традиції розміщення розп'ять Христа в навчальних закладах. Італія з її Латеранською угодою держави і католицької церкви 1929 року також відзначається особливими обмеженнями прав людини (наприклад, права на аборти). Польща і без формальної угоди характеризується стійкою католицькою морально-правовою традицією.

Інший аспект проблеми тлумачення і застосування принципу верховенства права в захисті прав людини – це експеримент створення суспільства на

[1] Контрольный список вопросов для оценки соблюдения верховенства права. Принят на 106-м пленарном заседании Венецианской Комиссии (Венеция, 11–12 марта 2016 года) [Електронний ресурс]. – Режим доступу: http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule%20of%20Law%20Check% 20List%20–%20 Russian.pdf

засадах мультикультуралізму (тобто денаціоналізації) в розвинутих країнах Заходу. Результати експерименту визнаються кризовими внаслідок стійкої тенденції міжцивілізаційної контроверсійності «паралельних суспільств», створюваних афро-азіатськими іммігрантами в цих країнах з їх титульними націями. Такі суспільства – це етнічні анклави, де іммігранти створюють свою чисельну більшість в окремих місцевостях, районах міст і власний правопорядок, перетворюючись на *"No-go zones"* (англ.) або *"Zones de non droit"* (фр.), що означає їх фактичну непідконтрольність законам, правоохоронним, судовим та іншим державним органам і службам країн, які масово приймають іммігрантів. У дослідженні Й. Вагнера «Судді без закону. Ісламська паралельна юстиція загрожує нашій правовій державі» (Берлін, 2010) розкривається нелегальна чи напівлегальна діяльність шаріатських судів у всіх великих містах Німеччини і неспроможність державної влади протидіяти їм. Те саме зазначається в дослідженні французького політолога Ж. Кепеля «Окраїни республіки» (2011). З 2009 року парламенти й уряди багатьох європейських країн почали вводити заборони на носіння ісламських символів у громадських місцях, на вуличні молитви мусульман тощо. Влітку 2016 року міністр внутрішніх справ Франції Б. Казньов заявив, що з грудня 2015 року було закрито більше 20 мечетей і молитовних будинків за пропаганду екстремізму, а під загрозою закриття перебувають ще близько 120 ісламських культових об'єктів. Конференція Європейських церков виступила проти прийняття Туреччини до Європейського Союзу на підставі істотної різниці ісламської спадщини Туреччини з християнською спадщиною в Європі[1].

Наведені дані демонструють зразки конфліктів у здійсненні прав одних людей із правами інших людей, які становлять переважну суспільну більшість

[1] Детальніше про це: Горбань В. І. Глобалізація і демократія: етнічний аспект / В. І. Горбань, О. В. Горбань // Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди «Право». – 2016. – Вип. 24. – С. 97–114 [Електронний ресурс]. – Режим доступу: http://doi.org/10.5281/zenodo.192590; Горбань В. І. Глобалізація і демократія: політико-правовий і етнотериторіальний аспекти / В. І. Горбань, О. В. Горбань // Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди «Право». – 2015. – Вип. 23. – С. 3–17 [Електронний ресурс]. – Режим доступу: http://dx.doi.org/10.5281/zenodo.46492

у своїй країні і яким належить суверенітет як народу-творцю демократії. Отже, існує конфлікт суверенітетів прав людини і прав народу як проблема їх судового захисту за принципом верховенства права. Стаття 29 Загальної декларації прав людини ООН в таких випадках передбачає пріоритетний захист загальних цінностей демократичного суспільства – справедливих вимог його моралі, громадського порядку і загального добробуту, яким створює загрозу здійснення прав людьми інших цивілізаційних цінностей, іншого праворозуміння.

Україна, ставши на шлях незалежного державно-правового розвитку з 1991 року, у 1995 році увійшла до Ради Європи і взяла на себе обов'язки та зобов'язання із реформування своєї державно-правової системи відповідно до європейських принципів прав людини, верховенства права і демократії. Для цього необхідно було реформувати соціалістичну державно-правову систему, із якої Україна виходила. Тобто державно-правова система України стала перехідною і досі лишається такою. Складнощі чвертьстолітнього переходу, що триває, пов'язані з історично запізнілим формуванням української нації в територіальних межах різних державно-правових систем: польської, австрійської, литовсько-руської, козацької запорізько-гетьманської, російської та радянської.

Українська юридична наука досі перебуває в пошуках парадигми реформування національної державно-правової системи: чи запозичувати «наднаціональну» й «універсальну» за своїм характером романо-германську систему[1], до якої, за одними висновками, Україна вже й належить[2] або, за іншими, наближається як окремий східно-європейський підтип[3]; чи навпаки, не ігнорувати «величезного історичного пласта правової традиції українського народу», яка своєрідно формувалася на євразійському перетині

[1] Корчевна Л. Українське право і романо-германська традиція / Л. Корчевна // Право України. – 2004. – № 5. – С. 19–22; Задорожний Ю. Роль римського права у контексті формування правової доктрини в країнах романо-германської правової сім'ї / Ю. Задорожний // Право України. – 2006. – № 11. – С. 41–44.

[2] Скакун О. Теорія держави і права: підручник / пер. з рос. – Х.: Консум, 2001. – С. 525–526.

[3] Правова система України: історія, стан та перспективи: у 5 т. – Т. 1: Методологічні та історико-теоретичні проблеми формування і розвитку правової системи України / за заг. ред. М. В. Цвіка, О. В. Петришина. – Х.: Право, 2008. – С. 722–723.

різноманітних цивілізаційних і релігійних впливів та зумовила національно особливу правосвідомість[1]. За оцінкою іноземного члена НАН України і НАПрН України В. Батлера, перехідна українська правова система самобутньо поєднує в собі елементи соціалістичного, тоталітарного, романо-германського, слов'янського права (звичаєвого, заснованого на релігійних принципах християнського православ'я) і є змішаною правовою системою внаслідок вагомого впливу інших правових традицій. Проте і європейська правова система – це певна суміш загального права з романо-германським правовим досвідом, а «гармонізація» правових систем «ще далека від завершення»[2].

Верховенству права як основоположному принципу правової системи України вперше було надано юридичної сили Конституцією України 1996 року в статті 8. Але тією самою Конституцією було закладено обмежувальне тлумачення цього принципу, оскільки відповідно до статті 129 розділу «Правосуддя» судді при здійсненні правосуддя мали підкорятися лише закону, тобто право ототожнювалося із законом. 2 листопада 2004 року Конституційний Суд України дав офіційне тлумачення верховенства права, за яким «право не обмежується лише законодавством як однією з його форм, а включає й інші соціальні регулятори, зокрема норми моралі, традиції, звичаї тощо, які легітимовані суспільством і зумовлені історично досягнутим культурним рівнем суспільства... Таке розуміння права не дає підстав для його ототожнення із законом, який іноді може бути й несправедливим, у тому числі обмежувати свободу та рівність особи»[3].

Це тлумачення як за буквою, так і за своїм духом відповідає юридичній методології, поширюваній у межах Програми технічної допомоги Європейського

[1] Мірошниченко М. Методологічні передумови класифікації правової системи України / М. Мірошниченко // Право України. – 2003. – № 11. – С. 33–36.

[2] Батлер В. Україна на правовій карті світу / В. Батлер // Право України. – 2013. – № 9. – С. 138–145.

[3] Рішення Конституційного Суду України у справі за конституційним поданням Верховного Суду України щодо відповідності Конституції України (конституційності) положень статті 69 Кримінального кодексу України (справа про призначення судом більш м'якого покарання) // Конституційний Суд України: Рішення. Висновки. 2004 / відп. ред. П. Б. Євграфов. – К.: Юрінком Інтер, 2005. – С. 314.

Союзу *(TACIC)* Україні і, зокрема, обґрунтуванню Р. Циппеліусом розуміння законів як об'єктивованих правил і необхідності їх «об'єктивного», а не «суб'єктивного» тлумачення у виданій 2004 року в Україні праці «Юридична методологія». Вибір між цими двома варіантами тлумачення полягає в тій чи іншій орієнтації інтерпретатора: на волю осіб, які брали участь у прийнятті закону, чи на потреби й розуміння справедливості, що побутують у суспільстві, тобто на спільні переважній більшості людей («міжсуб'єктні» і в цьому розумінні «об'єктивні»), а не особисті уявлення[1]. Теоретичні основи «об'єктивного» тлумачення права випливають із положення історичної школи права про право як продукт народного духу і з гегелівського трактування світової історії як процесу розвитку духу від суб'єктивного до об'єктивного, у якому людський розум формує суспільну моральність та виявляється в прийнятих (легітимованих) народом звичаях, законах. Закони мають бути формою такого об'єктивного духу[2]. Уявлення про демократичну легітимність закону, як стверджує Р. Циппеліус, також не дають змоги ставити його суть у залежність від особистих уявлень чи мотивів депутатів парламенту, які мають представляти народ і тому орієнтуватись у законодавчій діяльності на «властиві більшості народу потенційно *прийнятні для більшості уявлення* про справедливість і саме їх відображати в законі»[3]. У відкритому демократичному суспільстві вся складність реалізації, застосування права, як зазначає Р. Циппеліус, полягає в пошуку такої міри справедливості правозастосовних рішень, які узгоджують принципово рівні у своїх правах уявлення про справедливість кожного члена суспільства з уявленнями і переконаннями про неї усіх інших членів суспільства. Критерієм справедливого рішення стає якнайширший консенсус, якнайповніше схвалення більшості[4].

Тлумачення Конституційним Судом України принципу верховенства права змістовно збігається з посиланнями на зв'язок верховенства права в

[1] Циппеліус Р. Юридична методологія / переклад, адаптація, приклади з права України і список термінів Р. Корнута. – К.: Реферат, 2004. – С. 36.

[2] Там само, с. 37–38.

[3] Там само, с. 38–39.

[4] Там само, с. 39.

захисті прав людини з вимогами справедливої суспільної моралі, громадського порядку і загального добробуту (стаття 29 Загальної декларації прав людини ООН); про врахування потреб і прав усіх людей, заохочення соціальної єдності суспільства при забезпеченні верховенства права (пункт 11 Декларації наради на високому рівні Генеральної Асамблеї ООН з питань верховенства права на національному і міжнародному рівнях); про залежність реалізації верховенства права від конкретних юридичних, історичних, політичних, соціальних і географічних умов різних країн, зокрема конституційного устрою і традицій відповідної країни (пункт 34 Контрольного списку запитань для оцінки дотримання верховенства права Європейської Комісії «За демократію через право»).

Але Верховній Раді України знадобилося 12 років для усунення суперечності статті 129 Конституції України зі статтею 8. Зі змінами, внесеними згідно із Законом України від 2 червня 2016 року № 1401-VIII, стаття 129 Конституції України стверджує: «Суддя, здійснюючи правосуддя, є незалежним та керується верховенством права»[1]. Проте розширювальне, не тотожне закону, тлумачення принципу верховенства права донині не стало правилом у судовій практиці України. Російський і український варіанти перекладу частини третьої Преамбули Загальної декларації прав людини ООН на сайті Верховної Ради України досі містять формулювання «щоб права людини охоронялися силою закону» замість «верховенством права», що відповідає англомовному *"Rule of Law"*[2]. Збереження такого неточного перекладу є недбалістю чи вираженням позиції? Українські студенти юридичного профілю, яким викладачі розповідають про принцип верховенства права з посиланням на Загальну декларацію прав людини, на навчальних заняттях користуються електронним ресурсом, знаходять у розміщеному на сайті Верховної Ради України тексті

[1] Конституція України. Редакція від 30 вересня 2016 року, підстава 1401-19 [Електронний ресурс]. – Режим доступу : http://zakon3 rada.gov.ua/laws/shov/254к/96-вр

[2] Загальна декларація прав людини ООН; Прийнята і проголошена в резолюції 217 А (III) Генеральної Асамблеї від 10 грудня 1948 року [Електронний ресурс]. – Режим доступу: http:// zakon 3. rada. gov. ua/ laws/ shov/ 995_015

Декларації замість верховенства права силу закону. То що проголошувалося Декларацією: верховенство права чи верховенство закону?

Актуальність використання в судовій практиці України тлумачення принципу верховенства права, наданого Конституційним Судом України в листопаді 2004 року, диктується далекою від демократичної легітимності і вираження «народного духу» українською законодавчою практикою. За результатами її аналізу М. Козюбра в усьому масиві законів України відзначає більше половини законів про внесення змін до раніше прийнятих, а до деяких законів протягом часу їх дії зміни вносилися багаторазово, іноді понад 100 разів. При цьому мотивація прийняття законів часто є результатом впливу лобістських угруповань, політичної, бізнесової чи іншої корпоративної доцільності, «підкилимових» домовленостей і брутальних торгів. Спостерігається тенденція до зростання кількості неконституційних законів чи їх окремих положень. Детально не регламентовані кодифікованими процедурними актами широкі дискреційні повноваження органів виконавчої влади та їх посадових осіб часто призводять до порушення прав і свобод громадян[1]. За сім років, що минули після цього аналізу, кардинальних змін в Україні не відбулося.

Проте науковці продовжують доктринальні дискусії щодо розуміння права, прав людини і верховенства права[2]. Голова Верховного Суду України Я. Романюк закликає до єдності судової практики в Україні як однієї з фундаментальних засад судочинства за зразками прецедентного права в ЄСПЛ (з посиланням на публікацію 2001 року колишнього голови ЄСПЛ Л. Вільдхабера) і Англії (з посиланням на книгу Р. Кросса 1985 року). Відповідно до прецедентного права принцип здійснення правосуддя полягає в тому, що «подібні справи мають вирішуватися однаково». «Вирішення аналогічних справ по-різному

[1] Козюбра М. Верховенство права: українські реалії та перспективи / М. Козюбра // Право України. – 2010. – № 3. – С. 13, 15.

[2] Рабінович П. Верховенство права як омріяний результат здійснення прав людини (підходи до інтерпретації, критерії оцінювання) / П. Рабінович, О. Луців // Право України. – 2017. – № 3. – С. 100–111; Пацурківський П. Алгебра верховенства права, або буттєвий устрій людського світу / П. Пацурківський, Р. Гаврилюк // Право України. – 2017. – № 3. – С. 112–125.

може призвести до порушення законних очікувань осіб на судовий захист». Також Я. Романюк посилається на пункт 50 Доповіді «Верховенство права», схваленої Венеційською Комісією у березні 2011 року, стосовно несумісності суперечливих судових рішень із принципом юридичної визначеності[1].

Насправді поєднання Я. Романюком принципу прецедентного судочинства загального права Англії з окремими прецедентами в діяльності ЄСПЛ виглядає еклектичним. П. Рабінович у дослідженні європейського праворозуміння за рішеннями ЄСПЛ якраз зазначає втрату в ньому нормативності, стандартизованості феномену права, які змінюються «всезагальністю унікалізації» в особливих ситуаціях конкретних випадків, справ[2]. Підтвердженням такого висновку є відповідь Голови ЄСПЛ Ж.-П. Кости на запитання головного редактора журналу «Право України» О. Святоцького про те, як узгоджуються з правовою визначеністю невиняткові рішення ЄСПЛ, у яких він суттєво змінює свої позиції з певних питань, вдається до іншої інтерпретації положень Конвенції про захист прав людини і основоположних свобод. Ж.-П. Коста відповів, що у кожному окремому випадку Суд враховує конкретні обставини справи, застосовуючи однакові принципи і тести, проте результати такого застосування різняться в різних справах. Отже, треба брати до уваги конкретні обставини кожної справи[3].

У наведеній відповіді Ж.-П. Кости знаходимо ключ до розв'язання проблеми дослідження автора цього матеріалу. **По-перше**, в судових рішеннях щодо тлумачення і застосування права аналогія за *подібністю* справи призводить до меншої міри справедливості рішення, ніж рішення за *конкретними* обставинами справи, оскільки істина конкретна в кожному окремому випадку. Тому чим менше аналогій, тим більше справедливості, а отже, і верховенства

[1] Романюк Я. Методологічні підходи до тлумачення цивільно-правових норм судом / Я. Романюк // Право України. – 2017. – № 1. – С. 82–90.

[2] Рабінович П. Сучасне європейське праворозуміння / П. Рабінович // Право України. – 2006. – № 3. – С. 5–6.

[3] Інтерв'ю Голови Європейського суду з прав людини Жана-Поля Кости головному редакторові журналу «Право України» Олександру Святоцькому // Право України. – 2010. – № 10. – С. 129–130.

права. Відповідно, поступова інтеграція міжнародного, зокрема європейського, права і рішень міжнародних судів у національне українське право і рішення українських судів не означає механічного слідування їм, буквального перенесення і повторення. Необхідно вивчати, наскільки конкретні обставини прийнятих норм міжнародного права і правозастосовних рішень відповідають конкретним українським реаліям і чи збігається міра їх справедливості.

По-друге, категоричність та ієрархічність у взаємодії міжнародного, європейського і національного права створюють загрози верховенству права в умовах далекого від завершення процесу глобалізації і збереження суттєвих відмінностей у міжнародному праві загалом (у контексті праворозуміння і правових систем), в особливому, відносно міжнародного, європейському праві (в контексті англійського, континентального і скандинавського права, окремих національних і навіть регіональних звичаїв і традицій) та в конкретно-історичному відносно них перехідному, змішаному типі українського національного права. Характер взаємодії має ґрунтуватися, з одного боку, на «національному прагненні в прив'язці до національного контексту», та з іншого – на допомозі, з визнанням національної самостійності у забезпеченні верховенства права, зміцненні інститутів правосуддя і безпеки задля довіри і соціальної єдності.

З огляду на конкретні обставини реформованої перехідної правової системи України важливо уникати конфліктогенних рішень, які не матимуть якнайширшого консенсусу, схвалення в українському суспільстві. Небезпечним своєю руйнівною силою для перехідного стану України буде примусове нав'язування ззовні таких правових рішень, які суперечитимуть легалізованим в українському суспільстві нормам моралі, звичаям і традиціям з їх особливостями у західній і південно-східній частинах України. Формула взаємоузгодження міжнародного, європейського і національного, зокрема українського, права така: *кожне з них автономне, всі прагнуть до інтеграції, з огляду на потреби й розуміння справедливості, що побутують у конкретному суспільстві і є об'єктивними для нього, тобто сприймаються (легітимуються) переважною більшістю його членів.*

По-третє, верховенство права на захисті прав кожної окремої людини має межу міри своєї якості, за якою воно перетворюється на «дурну безкінечність»

(за Гегелем). Такою межею є обов'язок кожної людини здійснювати свої права не всупереч правам і свободам інших людей, тим більше вимогам *домінуючої* в конкретному суспільстві і тому *справедливої для нього* моралі, громадському порядку і загальному добробуту. У випадках порушення людиною такого обов'язку і радикального, не схильного до консенсусу, протиставлення себе суспільству верховенство права має ставати на захист прав і свобод переважної більшості людей, тобто суверенітету народу.

Висновки автора цього матеріалу та їх аргументацію враховано в остаточній редакції пункту 2 резолюції Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів, прийнятій його членами 2 червня 2017 року.

Horban V. The Problems of mutual harmonisation of international and national law in application of the principle of the rule of law by international and national courts, bodies of constitutional jurisdiction. *The author substantiates the interrelationship between the protection of human rights by the rule of law and the obligation of a person not to exercise his/her rights contrary to the rights of other people, the fair requirements of public morality, public order, and general well-being.*

Proceeding from the controversial nature of global expansion of the principle of the rule of law in the conditions of pluralism of legal understanding in various legal systems and civilizations, inter-civilizational conflicts at the international and national (in multicultural societies) levels ways of mutual harmonisation of international and national law in application of the rule of law to protect human rights are revealed: not to translate norms of international law and judgments of international courts into national law and decisions of national courts mechanically, but to interpret and apply them in accordance with the specific historical level of requirements of justice, objectified in the norms of morality, customs, traditions and national legislation legitimised by the specific society; to avoid conflict between international law and national one, based on the sovereignty of the people; in cases of conflict, not inclined to consensus with the society exercise of their rights by a minority of people, the rule of law shall protect the rights of the social majority, both in law-making and in the law-enforcement aspects.

Key words: *the principle of the rule of law, European Court of Human Rights, international law, national law.*

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ДО ПИТАННЯ ПРО НЕОБХІДНІСТЬ ЗАКРІПЛЕННЯ НА КОНСТИТУЦІЙНОМУ РІВНІ ЗАСАД ЕКОНОМІЧНОГО ЛАДУ ДЕРЖАВИ

«Безліч окремих планів не складають великого цілого. Самі плановики мали б визнати, що це навіть гірше, ніж відсутність плану взагалі». Ці слова відомого австрійського філософа і економіста Фрідріха Августа фон Хайека якомога краще характеризують строкату палітру українських реформ.

Україна вже більше двадцяти п'яти років перебуває в стані суцільного реформування. Важко назвати хоча б один політичний, економічний чи соціальний інститут, котрий не був би підданий реформуванню.

Двадцять п'ять років – строк, достатній для того, щоб відчути та оцінити результати цих численних перетворень. Неможливо однозначно визначити, які зі змін, що відбулися, найбільше вплинули на якість життя людини. Важко також встановити співвідношення позитиву та негативу, привнесених кожним реформаторським кроком окремо.

Втім, у загальному підсумку можна із впевненістю стверджувати, що саме реформування економіки найбільше вплинуло як на долю держави в цілому, так і на долю кожної людини окремо. Адже ще з часів К. Маркса відомо, що всі явища політичного, морального та інтелектуального світу в підсумку зводяться до явищ економічного світу та «економічної структури» суспільства. Саме економічні підвалини обумовлюють напрям і розвиток політичних і соціальних систем у державі, визначають прогрес чи регрес усього суспільства, накладають свій відбиток на його мораль, на політичні та громадянські погляди тощо.

Також сьогодні вже впевнено можна констатувати і повний провал вітчизняних економічних реформ. За роки суверенітету реальний ВВП України

скоротився на 35 відсотків, що згідно з даними Всесвітнього банку є найгіршим результатом у світі за останню чверть сторіччя. За цей період країна втратила не просто окремі підприємства і наукові комплекси, а цілі галузі суспільного виробництва. З вітчизняної промисловості та нашого лексикону зникли такі поняття, як космічна промисловість, мікроелектроніка, верстатобудування, літакобудування, приладобудування, роботи, автоматика тощо. Без цієї складної і дорогої продукції вичерпалися доходи, зникли виробництва-суміжники, збідніла державна скарбниця, розчинилися міжнародні очікування і національні перспективи.

Очевидно, що такий глобальний регрес не може бути наслідком окремих недоліків у реформуванні тих чи інших аспектів економічних відносин. Це результат концептуальної помилки на рівні вибору стратегічного напряму розвитку.

Це фіаско обраної свого часу ліберальної економічної моделі. Саме завдяки пресловутій умовно некерованій «невидимій руці ринку» стрілки прогресу в Україні рушили назад і повернули з космічних програм на час німого кіно: чорної металургії, найпростішої хімії, екстенсивного сільського господарства.

«If you not miller – you are grain» (якщо ти не мельник – ти зерно), – говорить давня англійська мудрість. Іншими словами, не управляєш ти – управляють тобою. Україна свого часу відмовилась від ідеї повноцінного державного управління економікою, а отже, і від статусу «мельника» в економічних відносинах, і тому опинилася в ролі економічного «зерна» в глобальних жорнах. Адже третього не дано.

Хто винен? І що робити? Ці питання сьогодні актуальні, як і завжди. Відповідь на них одна – це «економічна наука». Це вона, економічна наука, свого часу виявилася неспроможною розпізнати штучність створеної дилеми «ринок – план». Насправді ж після відмови від адміністративно-командної моделі економіки вибір поставав не між «планом» і «ринком», а між «стихійним ринком» і «регульованим ринком». Так сталося, що ця проста істина тривалий час залишалась у темряві, а на початку реформ ні вітчизняна економічна наука, ні численні іноземні «консультанти» навіть не наважилися

запропонувати суспільству життєздатну модель поєднання енергії ринку з державним управлінням.

Сьогодні дедалі більше економістів і звичайних тверезо мислячих людей вже розуміють, що в умовах глобалізації ніхто, крім держави, не здатний захистити національну економіку і вітчизняного товаровиробника від нищівних сил транснаціональних корпорацій та колоніально-експансіоністськи налаштованих економік розвинених країн. Лише національно орієнтована держава зацікавлена у збереженні і розвитку на її території високотехнологічних, наукоємних галузей економіки. Це є запорукою успіху держави як інституту, покликаного забезпечити добробут і соціальну захищеність населення, збереження людського та природно-ресурсного потенціалу. В сучасних глобально-економічних умовах вітчизняні підприємства і навіть їх об'єднання не здатні протистояти трендам світового розподілу праці. Єдиний, хто спроможний це зробити, – це держава.

Історія нас вчить, що всі розвинені держави, починаючи від Англії часів Олівера Кромвеля до сучасного Китаю, досягли свого економічного успіху саме завдяки виваженому державному регулюванню власних економік, яке включало в себе, у тому числі, як м'які, так і жорсткі протекціоністські заходи. Давно настав час Україні пригадати ці уроки.

Частина вини за те, що свого часу український соціум та політикум зробили неправильний ліберально-економічний вибір, лежить і на науці господарського права. Вона не спромоглася вчасно запропонувати суспільству та державі привабливу й ефективну модель правової регламентації «регульованого ринку» як альтернативу «стихійному ринку». Ті правові концепти державного регулювання економіки, котрі були сконструйовані, насправді є муляжами. Вони не здатні поєднати рушійну енергію «ринку» з обміркованістю «плану». Запропоновані господарським правом ідеї виявилися спробами пристосування запозичених із радянської економіки методів управління до умов капіталізму. В силу численних внутрішніх недоліків і зовнішніх неузгодженостей головне досягнення школи господарського права України – Господарський кодекс України – так і не став тим, заради чого створювався – основою державного

регулювання економіки. І з цим неможливо сперечатися, адже про це свідчить практика, а практика, як відомо, – критерій істини.

Проблема визначення стратегії розвитку економіки України має тектонічний характер, і її вирішення також лежить у площині економічної науки. Ним може бути формування нової для нашої країни соціально-економічної парадигми: «Єдиний спосіб існування сильної економіки – це гармонійне поєднання енергії ринку і державного управління нею в інтересах усього суспільства».

У створенні цієї парадигми провідна роль належить науці господарського права. Вона має віднайти «філософський камінь» – правову концепцію, котра дозволить на засадах прогнозування, планування та управління скерувати рушійну енергію економічної активності в напрямі стабільного розвитку держави на благо усього суспільства.

Втілення ж цієї парадигми покладено на Конституцію України. Повноцінна й життєспроможна економічна концепція та правовий фундамент її реалізації мають бути закріплені на конституційному рівні в окремому «Економічному» розділі Конституції України. Її розвиток – у новому Економічному кодексі України, який, перебуваючи в органічному зв'язку з конституційними засадами «економічної структури» суспільства, має увібрати в себе головний інструментарій державної економічної політики.

Сталість, послідовність, непідвладність економічному кон'юнктурному впливу та політичному впливу з боку геополітичних суперників – ось головні вимоги до засад концептуалізації економічного ладу держави. Тому саме на конституційному рівні мають бути гарантовані протекціоністська та патерналістська спрямованість економічної політики. Необхідно на найвищому конституційному (як найбільш зрозумілому, прозорому і стабільному) рівні визначити загальні засади функціонування економіки держави. Закріпити регульований ринок як концепцію вітчизняної економіки. Визначити соціальну спрямованість державного управління економікою; свободу і межі підприємницької діяльності; цілі, систему органів, принципи та способи державного управління економікою; завдання і механізми функціонування

державного сектору економіки. Саме на рівні Конституції України слід вирішити базові питання права власності – виключні права народу України на землю, надра, інші природні ресурси; виключні права держави на стратегічні галузі економіки (у тому числі, порядок їх націоналізації); цілі та межі приватизації тощо. Окремо закріпити засади забезпечення інноваційної спрямованості економіки. Максимальну увагу слід приділити питанню орієнтації України у світовому економічному середовищі з метою запобігання підкоренню державної економічної політики інтересам іноземного капіталу. На противагу існуючій сьогодні картині безсистемного регулювання економічних процесів за допомогою численної кількості суперечливих законів і підзаконних актів, новий «Економічний» розділ Конституції та новий Економічний кодекс повинні містити повноцінні дієві економіко-правові механізми комплексного управління економікою держави, починаючи від структурно-галузевих питань і закінчуючи конкретними методами і способами управління.

Bryntsev O. On the issue of the need to consolidate the principles of the economic system of the state at the constitutional level.

The article is devoted to the problems of implementation of the foundations of the economic system of Ukraine in the Constitution of Ukraine and in the economic legislation. It emphasizes the harmfulness of the «spontaneous market» for the state, society and individual citizens. There is a need to consolidate the concept of «regulated market» in the Constitution of Ukraine and in the new Economic Code as the only correct concept that can ensure the economic independence of the state and the welfare of its population.

Key words: *reform, economics, economic law.*

Vadym Malyshchuk,
Assistant Consultant to MP of Ukraine

WHERE IS OUR FREEDOM?

Implementation of values of the Ukrainian Constitution in all spheres of human life is achieved through the proper legal protection and harmonious combination of the interests of people, a society and a state. It is possible only if the protection of rights and freedoms of each individual, and appropriate conditions for realization of the creative potential are ensured. A qualitative indicator of the effectiveness of the state functions is a justice served by a judicial system.

Theoretically, the mechanism of legal regulation can exist without the use of state coercion. We can assume that subjects of law realize it on the basis of public consciousness and the spirit of law. They avoid offenses, strictly fulfill their obligations. In this case, the philosophical view point of Leon Petrazhitsky will be idealistic. He considered that the phenomenon of law is the reason of discourtesy, the defect of the human psyche, and his task is to make the human needless and to be canceled[1].

Constitutional changes that were adopted by Ukrainian parliament last year must provide the new development stage of judicial system in Ukraine. New forms to ensure the rule of law are provided to the Constitutional Court of Ukraine. These changes are explained not only by the public necessity for justice but also they are historically conditioned by the building process of the Ukrainian independent, rule-of-law state.

Obviously, respect for human rights and freedoms in the society depends on the readiness of judges for responsible and independent justice.

It is necessary to prefer the rule of law over the supremacy of normative legal acts (laws) of the state.

[1] Верховна Рада України. Конституція України [Електронний ресурс] – Режим доступу: http://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

It is important to distinguish positive and negative human rights and freedoms in this approach. These issues shall ensure the observance of the principle of the limited power of state, the effective check-and-balance system, and the assertion of constitutionalism.

It is hard to agree with the followers of political science – Etatism due to the activity of the state should be defined only as a limited rule of the majority. Human rights and freedoms define the boundaries of the democratic governance in the society.

The illegal actions of the Ukrainian authorities in the end of 2013 and at the beginning 2014 are demonstrative. The enactment of the Order No. 905 by the Cabinet of Ministers of Ukraine on November 21, 2013, is a demonstrative violation of the rule of law. It has suspended from the signing process of the Association Agreement between Ukraine and the European Union[1].

The Government has violated the provisions of Article 11 of the Law of Ukraine "On the Principles of Internal and Foreign Policy". This law has determined that the integration of Ukraine into the European political, economic, legal spheres in order to get membership in the European Union is the policy priority[2].

The Government has violated the hierarchy of normative legal acts and illegally took the powers of the Parliament – Verkhovna Rada of Ukraine. It has caused mass protests by citizens, as only the Verkhovna Rada of Ukraine defines principles of internal and foreign policy, according to Article 85.5.1 of the Constitution of Ukraine[3].

Besides, the refusal to sign the Association Agreement (which is already signed) by the ex-president of Ukraine V. Yanukovych, was a failure of the requirements of the above-mentioned law.

Violations of human rights and freedoms which were caused by law enforcement agencies were not protected by the court system. The courts have made unlawful

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[1] Верховна Рада України. Кримінальний кодекс України [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/laws/show/2341-14

[2] Гоббс Т. Левіафан, або Суть, будова і повноваження держави церковної та цивільної / Т. Гоббс; пер. з англ. Р. Димерець [та ін.]; наук. ред. Т. Польська. – К. : Дух і Літера, 2000. – 600 с.

[3] Демиденко Г. Г. Історія вчень про право і державу: Навч. посібник / Г. Г. Демиденко. – Х.: Консум, 2004. – 432 с.

decisions about limiting rights and freedoms of citizens who were opposing the provocative actions of state authorities and their public officials.

So, it was impossible to ensure the rule of law because the crimes of law-enforcers were received rigidly by society and those crimes accelerated the delegitimization of that Ukrainian government.

The legal order in Ukraine was breached due to non-observance of Article 19 of the Constitution of Ukraine. Article 19 provides that the bodies of state power and local self-government and their officials shall act only on the basis of, within the limits of, and by means foreseen by the Constitution of Ukraine and laws of Ukraine.

There was an attack on the constitutional values of Article 3 of the Constitution, where a person, his or her life and health, honour and dignity, inviolability and security are the highest social values in Ukraine. Constitutional values were demonstratively violated by the state.

The responsibility of the state is to establish and maintain the human rights and freedoms, which took place only due to the determination of the citizens to resist the "Leviathan"[1].

How do you think, is there too much contradictions? Yes or not, but it only confirms the theory about the collision of civilizations in the contemporary era described by Samuel Huntington.

Obviously, the legal order was always lacking in the conditions of the Ukrainian state formation. Almost proportionally, there was a lack of freedom too. Huntington pointed out that freedom is always considered less, as order can exist without freedom, but freedom exists only in order[2].

I think that those who seek sacred in the government and try to compensate the lack of order by limiting freedoms, as a rule, deprive the society of everything.

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[1] Закон України «Про засади внутрішньої і зовнішньої політики» [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/laws/show/2411-17

[2] Кабінет Міністрів України. Розпорядження «Питання укладання Угоди про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським Співтовариством з атомної енергії і їх державами – членами, з іншої сторони» № 905-р [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/laws/show/905-2013-%D1%80

Nowadays, the fulfillment of the positive obligations of the state is complicated by the scale of the challenges faced by our statehood and territorial integrity. Therefore, it is very important to adhere the provisions of the Constitution of Ukraine and the Convention for the Protection of Human Rights and Fundamental Freedoms[1].

It is useful to mention the Hegelian approach about the role of state, where the realization of human potential depends on the priorities of state, and its goals are crucial for the sovereignty of individual. In the context of Article 3 of the Constitution of Ukraine, human rights and freedoms and their guarantees determine the essence and the direction of activity of state, where a state is before a human for state's activities. The establishment and maintenance of human rights and freedoms are the main duties of the state.

It is important for us to find out the role of social values benchmarks of our society stipulated in the Constitution of Ukraine, their influence on the formation of the principles of relations between a person and state when we advocate the rights and freedoms of human as definition of the democratic governance boundaries.

The highest social and value orientations are enshrined in Article 3 of the Constitution of Ukraine. It determines that people, their lives and health, honour and dignity, inviolability and security are the highest social values in Ukraine.

The content of this article was approved on June 21, 1996 at the fifth session of the Verkhovna Rada of Ukraine of the II convocation.

One of the reporting MP's arguments to support this provision was a statement that such wording is practically in all constitutions around the Europe. Human rights are established as fundamental values in all European constitutions. They got the dominant features, established as fundamental and their guarantee and protection became a priority for the states.

However, human rights in the Ukrainian constitution were established as the highest social values, it differs from wordings of other European constitutions. For example, the Spanish Constitution defines them as a basis of political order and social life, and emphasizes the relevance of the Universal Declaration of Human

[1] Конституции зарубежных государств: учеб. пособие / сост. В. В. Маклаков. – 2-е изд., исправ. и доп. – М.: Издательство БЕК, 1999. – 584 с.

Rights. The Republic of Greece emphasizes respect and protection of human as the primary responsibility of the state. The Italian Constitution has established that Italy recognizes and guarantees human rights and requires the fulfillment of the inalienable obligations which derive from political, economic and social solidarity.

The Basic Law of the Federal Republic of Germany recognizes human dignity untouchable. Respect and protection is the responsibility of any public authority. Also it emphasizes recognition, inviolability and inalienability of human rights as the basis of every human community, peace and justice in the whole world[1].

It shows us the fundamental nature of human rights and takes them as their core value. It has an important meaning to determine the priority of values. The competition of values depends on satisfaction or dissatisfaction of the fundamental value. This is very important for adherence to the principle of proximity. The interruption in the realization of human rights has very important meaning. The admissibility and proportionality of the interference is analyzed by the European Court of Human Rights and has a big meaning for national justice.

In the Ukrainian version, comparison loses its meaning because human rights are the highest social values according to Article 3 of the Constitution of Ukraine. It is difficult to determine the proportionality of the interference when there is a presumption that any other values are less than the values in Article 3 of the Constitution of Ukraine.

Vsevolod Rechytsky explains this conflict of values in his work "The Simple Values of Constitutionalism". He wrote that the Constitution of Ukraine recognizes individual life as the highest social value, which, as a direct effect of the constitutional norms, forces society and courts to accept a soldier's refusal to go to war even in a time of war: all that he would defend in war — freedom, independence, territorial integrity, sovereignty of his homeland/country, etc. — matters less, according to the Constitution, than his life[2].

Leaving the battlefield without permission or refusal to act with a weapon can save a human's life, which is determined as the highest social value in the

[1] Council of Europe. European Convention on Human Rights [Електронний ресурс]. – Режим доступу : http://www.echr.coe.int/Documents/Convention_ENG.pdf

[2] Huntington S. The Clash of Civilizations and the Remaking of World Order / S. – New York: Simon & Schuster, 1996. – 368 c.

Constitution of Ukraine, but it will be a crime according to Article 429 of the Criminal Code of Ukraine. In fact, an attack on the highest social values, recognized by the Constitution, is under the threat of punishment. It prevents them from being saved and observed[1].

It is obvious that it is impossible to achieve the effect of the rule of law and to guarantee the protection of human rights without the protection of sovereignty, independence, territorial integrity, and inviolability of borders, public order and citizens' security.

Nevertheless we do not have clear limits for permissible interference to the realization of human rights and freedoms because of legal certainty rejection and having such declarations in the Constitution. It is impossible to refuse regulation of social relations even accordingly to the idealistic, philosophical theory of Leon Petrazhitsky that was mentioned at the beginning of this article.

The above mentioned contradictions and historical events indicate depreciation of values that were taken for special protection and guaranteed by the Constitution of Ukraine

It gives grounds to confirm that the violation of human rights in Ukraine is the result of contradictions in the Constitution of Ukraine and social values orientations of society, and also imperfections of mechanisms of restraint and checks and balances between the branches of government.

Nowadays, the necessity for transition of Ukrainian constitutionalism to a new level of development is required. Social instinct for evolution and self-preservation should be the impact for rethinking values and strategic goals of the Ukrainian Constitution.

For a better understanding of process, after launching of electronic petitions to the President of Ukraine in August 2015, the first successful petition was the initiative on "free possession of firearms". This petition was registered the day after launching the digital resource on the official site of the President of Ukraine and

[1] Rechytsky V. The Simple Values of Constitutionalism / V. Rechytsky // Krytyka. – 2010. – [Електронний ресурс]. – Режим доступу: https://krytyka.com/en/articles/simple-values-constitutionalism

received 36 244 signatures. So far it is the second of the most popular petitions. But the most famous, which received 38 326 signatures, was the initiative concerning cancellation of customs clearance and excise tax on import of cars.

The formation of civil society as an equal opponent to the state, liberalization and free market relations will bring us closer to the *new social dynamics and real constitutionalism*. After that, Ukrainian society will be able to use effectively the real product of constitutionalism: rights and freedom.

Малищук О. Де наша свобода? *У статті розглянуто проблеми конституційного визначення основних цінностей для суспільства та їх значення для безпеки вільної держави. Автор акцентує на важливості визначення допустимих меж втручання держави у реалізацію прав і свобод людини, а також аналізує історичні події в Україні, що призвели до вирівнювання конституційних цінностей, які захищаються та гарантовані державою.*

Ключові слова: *права і свободи людини, конституційні цінності, держава.*

ЗАКЛЮЧНЕ СЛОВО

Шановні пані та панове!
Шановні колеги!

Програму Другого конгресу Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів вичерпано, наша робота завершується. Упродовж двох днів ми обмінювалися думками щодо ролі конституційних судів у тлумаченні положень національних конституцій у контексті загальновизнаних принципів і норм міжнародного права та права Європейського Союзу, рішень міжнародних судів, зокрема у галузі захисту прав і основоположних свобод людини і громадянина.

Було окреслено коло проблем, що виникли у процесі запровадження національних конституційних парадигм, які ґрунтуються на загальновизнаних принципах і нормах міжнародного права і права Європейського Союзу, рішеннях міжнародних судів. Як з'ясувалося, окремі з них є актуальними не лише для України, а й для інших країн – учасниць Конгресу. Зокрема, це стосується наукових концепцій та практичних методів визначення співвідношення верховенства права та верховенства конституцій з урахуванням національних особливостей розуміння права й у контексті загальновизнаних принципів і норм міжнародного права.

У цьому аспекті важко переоцінити значення глибоких і змістовних доповідей, дискусій, пропозицій учасників Конгресу щодо можливих шляхів вирішення тих чи інших питань на відповідній правовій основі, обміну досвідом здійснення конституційного правосуддя. Сподіваюся, що корисним також було особисте спілкування суддів Конституційного Суду України, представників української правової науки зі своїми зарубіжними колегами.

Від імені суддів Конституційного Суду України та від себе особисто висловлюю вдячність усім учасникам Конгресу, хто виступав із доповідями, повідомленнями, брав участь у дискусіях.

Ще раз нагадую, що висвітленню цього заходу буде присвячено один із розділів чергового номера журналу «Вісник Конституційного Суду України» – друкованого органу Конституційного Суду України.

Успішному проведенню Конгресу сприяв високий професіоналізм наших перекладачів та працівників Національного юридичного університету імені Ярослава Мудрого, котрим я адресую загальну вдячність учасників зібрання.

Сподіваюсь, що співпраця Конституційного Суду України зі структурами ОБСЄ в Україні та органами конституційної юрисдикції держав – учасниць Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів триватиме і в майбутньому.

Хай щастить усім у справі зміцнення провідної ролі конституційних судів у тлумаченні положень національних конституцій у контексті загальновизнаних принципів і норм міжнародного права, права Європейського Союзу та рішень міжнародних судів з метою утвердження принципу верховенства права й удосконалення наукових підходів і практики захисту прав і основоположних свобод людини і громадянина.

Другий конгрес Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів оголошую завершеним.

Голова Асоціації конституційного правосуддя
країн регіонів Балтійського та Чорного морів,
в. о. Голови Конституційного Суду України,
доктор юридичних наук, професор,
академік НАПрН України **Юрій Баулін**

CONCLUDING REMARKS

Ladies and Gentlemen,
Dear colleagues,

The programme of the Second Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions has been exhausted, our work is coming to an end. Within two days we shared views on the role of constitutional courts in interpreting the provisions of national constitutions in the context of generally recognised principles and norms of international law and EU law, judgments of international courts, in particular in the field of the protection of human and citizen's rights and fundamental freedoms.

We outlined the range of problems that arose in the process of introducing national constitutional paradigms based on generally recognised principles and norms of international law and EU law, judgments of international courts. As it turned out, some of them are relevant not only for Ukraine but also for other countries – participants of the Congress. In particular, it concerns scientific concepts and practical methods for determining the relationship between the rule of law and the supremacy of the constitutions, given national peculiarities of understanding of law and in the context of generally recognised principles and norms of international law.

In this aspect, it is difficult to overestimate the meaning of deep and substantive reports, discussions, proposals of the participants of the Congress on possible ways to resolve a particular issue on an appropriate legal basis, and exchange of experience in administering constitutional justice. I hope that personal communication between the judges of the Constitutional Court of Ukraine, representatives of the Ukrainian legal science with their foreign colleagues was also useful.

On behalf of the judges of the Constitutional Court of Ukraine and myself, I express my sincere gratitude to all the participants of the Congress, who delivered reports, presentations, and participated in the discussions.

I would like to remind you again that one of the sections of the next issue of the publication «Bulletin of the Constitutional Court of Ukraine» – the printed body of the Constitutional Court of Ukraine – will be dedicated to the coverage of this event.

The high professionalism of our interpreters and the staff of the Yaroslav Mudryi National Law University contributed to the success of the Congress and I would like to express sincere gratitude on behalf of the participants of the meeting to these people.

I hope that the cooperation of the Constitutional Court of Ukraine with the OSCE structures in Ukraine and the bodies of constitutional jurisdiction of the states – member the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions will continue in the future.

Let the luck favours you in strengthening the leading role of the constitutional courts in interpreting the provisions of national constitutions in the context of generally recognised principles and norms of international law, EU law and judgments of international courts in order to establish the principle of the rule of law and to improve scientific approaches and practices of the protection of fundamental human and citizen's rights and freedoms.

Let me declare the Second Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions closed.

Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions,
Acting Chairman of the Constitutional Court of Ukraine,
Doctor of Law, Professor,
Full Member of the National Academy
of Legal Sciences of Ukraine **Yurii Baulin**

DOCUMENTS OF THE 2ND CONGRESS

ДОКУМЕНТИ ДРУГОГО КОНГРЕСУ

The Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions

Annual Report (2016)

1. **General Remarks**
2. **Activities accomplished**
3. **Calendar of events**

1. General Remarks

The Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (BBCJ) was established in 2015 on the initiative of the Constitutional Court of Moldova and the Constitutional Court of Lithuania. During the meeting hosted by the Constitutional Court of Lithuania on 26 October 2015 in Vilnius, the President of the Constitutional Courts of Georgia, **Mr George Papuashvili,** the President of the Constitutional Courts of Moldova, **Mr Alexandru Tănase**, the President of the Constitutional Court of Lithuania **Mr Dainius Žalimas** and the President of the Constitutional Court of Ukraine **Mr Yurii Baulin** signed the ***Declaration on the Establishment of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions*** and approved its Statute.

The goal of the Association aims at promoting the protection of human rights and fundamental freedoms, as well as the independence of constitutional courts, implementing rule of law principles, and enhancing the exchange of experience between its members.

Following the signature of the Declaration, the members decided that the Constitutional Court of Moldova shall hold the presidency of BBCJ until 1 January 2017 as the Court having initiated the Establishment of BBCJ.

2. Activities accomplished

As the Court holding the Presidency of the Association during the period October 2015 – January 2017, the Constitutional Court of Moldova was actively involved in promoting the goals and aims of BBCJ Association – to underline the role of constitutional courts in affirming the supremacy of the constitution and constitutional justice, respect for human rights and fundamental freedoms, as well as to promote the need to respect the independence and sovereignty of states and their territorial integrity.

a) General Assembly

On 1 July the Association held its first General Assembly during which it discussed and decided on a number of important issues related to the Association, as follows:

- amendments to certain articles of the Statute of BBCJ in order to extend the possibility of other countries of the Baltic and Black Sea Regions, namely EU associated/candidate countries, to become members of BBCJ Association.
- approval of the symbols of BBCJ Association (logos, corporate color and flag).

The General Assembly approved the content and design of the website of BBCJ Association www.bbcj.eu. The site aims at informing the public on the current activities of BBCJ and is run by the Constitutional Court holding the presidency of the Association.

The General Assembly also decided that the Presidency of BBCJ Association shall start on 1 January and shall last until 31 December, to cover a full calendar year.

b) 1st BBCJ Congress

The most important event of the Association was the organization of the first BBCJ Congress hosted by the Constitutional Court of Moldova which brought into attention *"The role of constitutional courts in the protection of democratic values."* The event was attended by high representatives of the Venice Commission, Presidents

and judges of BBCJ member Courts, the Secretary General of the Organization for Democracy and Economic Development – GUAM, as well as by international legal experts in constitutional justice. Welcome speeches were delivered by the President of the Republic of Moldova Mr Nicolae Timofti and the Speaker of the Parliament Adrian Candu.

Subjects discussed during the Conference referred to the independence of Constitutional Courts under the aspect of recent developments and challenges, effects of the acts delivered by constitutional courts (rulings, judgments, decisions), optimization of the powers of constitutional control bodies, particularly the competence of interpretation of the laws, as well as horizontal effect of the constitutional rights, duty to interpret law consistently with the constitution (indirect effect) and direct effect of constitutional provisions.

c) working meetings of members

- On **17 December 2015** a summit of the Presidents of the Constitutional Courts of Ukraine, Georgia, the Republic of Lithuania, and the Republic of Moldova – members of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (BBCJ) – took place at the Constitutional Court of Ukraine, in Kyiv. During the meeting the parties discussed the issues of communication among members of the Association, joint projects and action plans for the coming year, as well as the possibilities for future enlargement of the Association.
- On **18 December 2015** Presidents of BBCJ member courts met Ukraine's President Poroshenko in Kyiv and expressed their concern over Ukraine's territorial integrity and the respect for international law in administering constitutional justice.

Conscious of the necessity to defend the fundamental international legal principles and standing in solidarity with its Ukrainian colleagues, members of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (BBCJ) joined the so-called Batumi process — the initiative launched by

the Ukrainian Constitutional Court in September 2015 in Batumi – to condemn the Constitutional Court of the Russian Federation for its role in committing aggression against Ukraine, i.e. for its role in the annexation of Crimea.

- On **24–25 October 2016** the Constitutional Court of Lithuania hosted the Forum organized within the framework of the cooperation project „Assistance to the Constitutional Courts of Georgia, Republic of Moldova and Ukraine in ensuring the implementation and protection of the rule of law", supported and funded by the Ministry of Foreign Affairs of Lithuania within the Development Cooperation and Democracy Promotion Programme.

During this event the delegates marked the one year anniversary of the creation of the Association.

d) BBCJ Publications

In 2016 the Constitutional Court of Moldova, as the Court holding the presidency of BBCJ Association, has published the compilation of reports and speeches delivered during the 1st BBCJ Congress held on 30 June – 1 July 2016 in Chișinău. The publication has been delivered to all BBCJ members as well as to the participants in the Congress.

e) External actions:

- BBCJ statement on pressure and undue interference in the work of several European Constitutional Courts (17.03.2016)
- Statement of BBCJ on the attempted coup d'état in Turkey (21.07.2016)

ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS

Calendar of events

25 October 2015	Vilnius, Lithuania	Signature of the Declaration on the Establishment of BBCJ Association and of its Statute
12–17 November 2015	Washington DC, USA	Participation of BBCJ members at the Federalist Society's National Lawyers Convention
15–17 December 2015	Kyiv, Ukraine	Summit of BBCJ members
18 December 2015	Kyiv, Ukraine	Meeting of BBCJ members with the President of Ukraine Petro Poroshenko
17.03.2016		BBCJ statement on pressure and undue interference in the work of several European Constitutional Courts
30 June 2016	Chisinau, Republic of Moldova	First BBCJ Congress
1 July 2016	Chisinau, Republic of Moldova	General Assembly of BBCJ Association
21 July 2016		Statement of BBCJ on the attempted coup d'état in Turkey
24-25 October 2016	Vilnius, Lithuania	Forum of the Constitutional Courts of Georgia, Republic of Lithuania, Republic of Moldova, and Ukraine

RESOLUTION
of the 2nd Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (June 1-2, 2017, Kharkiv, Ukraine)

We, the participants of the 2nd Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (hereinafter – the Congress), experts, scholars, having discussed the role of constitutional courts in interpreting the provisions of national constitutions in the context of generally recognised principles and norms of international law, European Union law, and judgments of the international courts:

INTENDING to strengthen the rule of law and the supremacy of the constitution in the activities of the bodies constitutional jurisdiction;

PROMOTING respect for international law and European Union law as the systems of law based on generally recognised democratic human values,

EMPHASISING the importance of exchanging experience on the implementation of international democratic values into the case-law of bodies of constitutional jurisdiction;

TAKING INTO ACCOUNT the competence of the constitutional courts of the countries of the Baltic and Black Sea Regions, the role of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights (hereinafter – the ECHR) related to its understanding of a law-based state;

PAYING REGARD to the specific features of the formation of modern paradigm of constitutionalism in each country;

RECOGNISING the presumption of compatibility of international law and European Union law with national constitutions based on the principle of subsidiarity,

HAVE CONCLUDED:

1. Constitutional jurisdiction is the most important factor in strengthening, developing and protecting the fundamental human values embodied in the constitutions underpinning the activities of the courts of the states which participated in the Congress. Their decisions and judgments have a decisive influence on the activities of the bodies of state power, local self-government and civil society institutions.

2. Respect for human and citizen's rights and fundamental freedoms guaranteed at the constitutional level is the basis of law order and justice. The participants of the Congress noted that the bodies of the countries carrying out legislative and law enforcement functions should also adhere to the provisions of universally recognised acts of international law, international instruments for the protection of human and citizen's rights and fundamental freedoms.

The participants of the Congress stressed that given the provisions of the 1950 European Convention for the Protection of Rights and Fundamental Freedoms, bodies of state power, including government, legislator, courts and body of constitutional jurisdiction, must make every possible effort to fulfill international commitments undertaken by the states participating in the Congress, including the implementation of the ECHR judgments. In particular, bodies of constitutional jurisdiction have to gradually integrate the ECHR judgments into domestic law.

3. The participants of the Congress noted in their reports and presentations that there is a tendency to unify the principles of constitutional jurisdiction when protecting human and citizen's rights and fundamental freedoms both at the regional and pan-European levels. The main criteria in this crucially important area of activity of the bodies of constitutional jurisdiction of the states participating in the Congress are the provision of the 1948 Universal Declaration of Human Rights, UN covenants on these issues, the provisions of the 1950 European Convention for the

Protection of Rights and Fundamental Freedoms, resolutions and recommendations of the European Union governing bodies, the ECHR judgments, opinions and recommendations of the European Commission for Democracy through Law (Venice Commission) and other international human rights organisations and institutions.

4. Bodies of constitutional jurisdiction have a particular responsibility for the harmonisation of national constitutions and national legal systems with the universally recognised norms of international law, European Union law and other applicable international obligations as well as in general for consolidating the European orientation of their respective states. The participants of the Congress acknowledge the role of international law and European Union law in interpreting national constitutions and underline that the international and European standards should be perceived as minimum constitutional standards for the protection of fundamental rights.

The participants of the Congress strongly condemn the use of constitutional jurisdiction for the internal legalisation of grave breaches of international law as well as for justification of non-implementation of judgments of international and European courts.

5. When adopting decisions on cases, the bodies of constitutional jurisdiction represented by the participants of the Congress more and more often refer to the patterns of the genesis of constitutionalism and corresponding jurisprudence in other countries, thus promoting the development of their constructive relationships both at the regional and at the pan-European and the global levels.

6. The Congress considers these trends to be positive given the following: although the constitutions of the participating states differ, their basic principles, in particular on the protection of human rights and human dignity, form a common ground, and legal arguments, based on these principles which are used in one country, with account of the differences in national legislation on the principle of subsidiarity, can be a source of inspiration for another.

7. It is expedient not only to improve the exchange of information and experience between the bodies of constitutional jurisdiction of the states participating in the

Congress, but also to systematically familiarise with them the members of the World Conference on Constitutional Justice (WCCJ), the Conference of European Constitutional Courts (CECC), and other regional and linguistic associations of the bodies of constitutional jurisdiction.

8. Proper exercise of the powers by the bodies of constitutional jurisdiction, including on the protection of human and citizen's rights and fundamental freedoms is possible only provided the constitutional requirements for the independence of these bodies as well as immunity of judges and their subordination exclusively to constitution and the rule of law are observed.

Interference with the activities of the bodies of constitutional jurisdiction by other bodies of state power, political and public pressure is unacceptable. These subjects of power and public legal relations must refrain from any attempts of undue influence on judges in the performance of their duties. At the same time, the Congress underlines the importance of transparency and accountability of the bodies of constitutional jurisdiction for their activities to civil society.

The participants of the Congress, agreeing with the benefit of this event,

HAVE DECIDED:

1. To recognise that the exchange of experience between the constitutional courts participating in the Congress is necessary to ensure the effective application of acts of international law in the protection of human and citizen's rights and fundamental freedoms, taking into account the specific features of national constitutions and the principle of subsidiarity as a generally recognised rule in relations between the Council of Europe member-states.

2. To emphasise that application of the jurisprudence of international courts in the activity of the bodies of constitutional jurisdiction of the states participating in the Congress contributes to strengthening the principle of the rule of law, and is important for ensuring the protection of human and citizen's rights and fundamental freedoms guaranteed by the national constitutions and declared in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms as well as in the other acts of international law.

3. To apply the norms of international law and European Union law as important sources of interpretation of national constitutions and of progressive development of national constitutional doctrine in the activities of constitutional courts participating in the Congress.

4. To recognise that the conflict between the jurisprudence of the national constitutional court and international courts in ensuring the protection of human and citizen's rights and fundamental freedoms should be resolved through reviewing the jurisprudence of national constitutional courts with account of the specific features of the norms of national constitutions in accordance with the generally recognised principle of subsidiarity or through adoption of relevant constitutional amendments in case the review of national judicial practice is impossible.

5. To consider that ensuring of implementation of the principle of the rule of law which is the basis of the development of national constitutional doctrine of the states participating in the Congress in exercising of authorities by bodies of constitutional jurisdiction, including on the protection of human and citizen's rights and fundamental freedoms, is incompatible with the facts of interference with their activities by the bodies of state power, politicians, representatives of mass media and civil society institutions. The Congress calls upon these subjects of power and public legal relations to refrain from any attempts of undue influence on judges in the performance of their duties.

6. To continue the development and implementation of a unified technique of systematisation of constitutional courts' acts, with account of CODICES database, which will enable the formation and development of the national constitutional doctrine with regard to the jurisprudence of the constitutional courts of the states participating in the Congress.

7. To recognise the practice of exchange of the acts of the constitutional courts of the states participating in the Congress, wherein the universally recognised norms and principles of international law, European Union law and the jurisprudence of international courts, including on the protection of human and citizen's rights and fundamental freedoms to be useful.

RESOLUTIONS OF THE GENERAL ASSEMBLY

РЕЗОЛЮЦІЇ ГЕНЕРАЛЬНОЇ АСАМБЛЕЇ

RESOLUTION I

The General Assembly of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, convened on June 2, 2017 in Kharkiv,

has unanimously decided:

To approve the report of Secretary General of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions for 2016.

Annex: report of Secretary General of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions for 2016.

Kharkiv, June 2, 2017

Yurii Baulin,
Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions

RESOLUTION II

The General Assembly of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, convened on June 2, 2017 in Kharkiv,

has unanimously decided:

To support the application of the Constitutional Court of the Republic of Moldova to host the XVIII Congress of the Conference of European Constitutional Courts in the course of the Circle of Presidents of the Conference of European Constitutional Courts.

Annex: letter of the President of the Constitutional Court of the Republic of Moldova Alexandru Tănase to the President of the Conference of European Constitutional Courts Zaza Tavadze.

Kharkiv, June 2, 2017

Yurii Baulin,
Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions

RESOLUTION III

The General Assembly of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, convened on June 2, 2017 in Kharkiv,

has unanimously decided:

To establish the printed publication of the Association «Journal of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions».

Annex: the concept of the «Journal of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions».

Kharkiv, June 2, 2017

Yurii Baulin,
Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions

RESOLUTION IV

The General Assembly of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, convened on June 2, 2017 in Kharkiv,

has unanimously decided:

The Presidency of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions shall be held by the Constitutional Court of Georgia from January 1, 2018 to December 31, 2018.

Kharkiv, June 2, 2017

Yurii Baulin,
Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions

RESOLUTION V

The General Assembly of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, convened on June 2, 2017 in Kharkiv,

has unanimously decided:

To hold the next Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions in the second half of May 2018 in Tbilisi, Georgia.

Kharkiv, June 2, 2017

Yurii Baulin,
Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions

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RESOLUTION VI

The General Assembly of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, convened on June 2, 2017 in Kharkiv,

has unanimously decided:

To forward the Final Resolution of the Second Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions to the World Conference on Constitutional Justice, the Conference of European Constitutional Courts and the European Commission for Democracy through Law (Venice Commission), the European Court of Human Rights, the European Court of Justice.

Kharkiv, June 2, 2017

Yurii Baulin,
Acting President of the Association of Constitutional Justice
of the Countries of the Baltic and Black Sea Regions

APPLICATION OF THE NORMS AND PRINCIPLES OF INTERNATIONAL LAW, EU LAW AND ECHR JUDGMENTS IN THE ACTS OF THE CONSTITUTIONAL COURTS – MEMBERS OF THE ASSOCIATION

ЗАСТОСУВАННЯ НОРМ ТА ПРИНЦИПІВ МІЖНАРОДНОГО ПРАВА, ПРАВА ЄС ТА РІШЕНЬ ЄСПЛ У АКТАХ КОНСТИТУЦІЙНИХ СУДІВ – ЧЛЕНІВ АСОЦІАЦІЇ

ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS

CASE-LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze vs. Parliament of Georgia 2/4/532,533, August 8, 2014

Subject of Dispute

Persons recognized legally incapable were appealing a list of norms of the Civil Code of Georgia, Civil Procedure Code of Georgia and the "Law of Georgia on Psychiatric Care", which in their opinion, contradicted Articles 14, 16, 17, 18, 24, 36, 41 and 42 of the Constitution of Georgia. Namely, disputed were the norms of the Civil Code of Georgia, that A. Restricted persons recognized incapable due to their severe intellectual disability or mental illness, in their freedoms to willingly and actively acquire civil rights and responsibilities; B. Declared legally void expression of will of legally incapable persons; C. Prohibited persons who were recognized legally incapable from the right to marry; D. Declared legal guardians as lawful representatives of the persons, who were then empowered to represent the subject of their guardianship with third parties without specific appointment, including at the courts, and were entitled to sign every necessary agreement on behalf of persons recognized legally incapable.

Also disputed were those norms of the Civil Code, A. That appointed guardians to legally represent the interests and defend persons recognized legally incapable in the courts; B. When the person recognized legally incapable had had recovered from their disability, only the legal guardians, family members or psychiatric institutions had the right to apply to the courts to annul legal guardianship, and to restore the persons in their capacities.

Additionally, disputed were the norms of the "Law of Georgia on Psychiatric Care", that A. Stipulated, that in the place of a person recognized legally incapable, the information about his/her disease and psychiatric care was to be given to his/her legal guardian, B. Stripped of the person recognized legally incapable from the right to participate in private legal matters; C. In order to administer treatment,

it requested an informed consent of the legal guardian of the person recognized legally incapable, but sidestepped the will of the person him/herself. D. Allowed the legal guardian of the incapacitated person to choose psychiatric care facility, and to stop medical examinations/treatment; E. Gave the right to doctors, for the purposes of security, to restrict enacted rights of the persons recognized legally incapable; F. Declared treatment voluntary, if the legal guardian, not the patient, had asked for it, and had signed informed consent.

Reasoning

With regard to Article 16 of the Constitution of Georgia (the right to take necessary actions for the purposes of autonomy and for personal development), the Court first evaluated the group of norms of the Civil Code of Georgia, which constituted a unified regime and restricted persons, who had been recognized legally incapable, due to their severe intellectual disability or "mental illness", from their liberties to willingly acquire and act upon rights and responsibilities, to represent selves with third parties, sign deals and turned them entirely dependent on their legal guardians for an indeterminate amount of time. Therefore, an entire class of persons, much like claimants in the present case, were declared as lacking the ability to express their free will, regardless of complexity of specific relations or risks. Considering this, taking away capacities in an absolute and blanket manner, for an indeterminate amount of time, amounted to losing autonomy, in practically every aspect of life and was seen, as a highly intense interference in the right.

The legitimate purpose of a restriction, according to respondent, was to defend the rights and interests of the persons with mental disabilities. The Court determined that Article 58, which annulled every single deal negotiated by a mentally disabled person, including those deals that benefited these persons, undoubtedly went beyond the purpose to defend the persons with mental disorders, and were disproportionate restrictions. Therefore, this norm was declared unconstitutional with regard to Article 16 of the Constitution of Georgia.

Those norms stipulating the status of being recognized legally incapable as well as those that totally replaced the individual's will with the will of his/her legal guardian

ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS

was not interpreted as justifiable means with the aim of taking care of the person recognized legally incapable. The existing normative approach was completely ignoring the reality, that limitation of mental disorders is characterized with the wide-ranging gradations limiting the ability of persons with mental disorders to comprehend the results of their actions to a varying degree. The disputed norms, however, were applied to every and all persons with the status of recognized as mentally incapable, and took away from them the possibility to realize those capacities, which they did still have in their possession. The Court pointed out that an optimal mechanism to recognize a person legally incapable should allow a court to take into consideration the damage on the decision-making capacity of a person with mental disorders and must ensure as much as possible, that the rights and freedoms of this person are protected. Furthermore, the purpose of guardianship lies in supporting the person in the decision-making process and not in substituting their will in every field of life. Therefore, it was determined, that the disputed norms disproportionately restricted the right to free development of personality of the persons recognized legally incapable, and were declared unconstitutional with regard to Article 16 of the Constitution of Georgia.

Another group of norms evaluated with regard to Article 16 of the Constitution were those norms of the "Georgian Law on Psychiatric Care", that restricted legally incapable persons in their freedom to choose the psychiatric care facility, a doctor and decide on commencing treatment. The Court pointed out that, the right to self-development includes that right of an individual to submit him/herself to this or that kind of treatment, choose a doctor and a care facility. When a person is incapable to give informed and freely made consent to the treatment plan, interference in the right is permissible, if this will benefit the welfare of the person in question; however, when the person is capable to consent independently in an informed manner, allowing an interference in his/her health, such decisions shall only be made with his/her consent.

Since recognition of legal incapacity does not involve examination of the level of mental disorder, a person recognized legally incapable may possess this kind of capacity, but he/she is unconditionally excluded from the process of medical decision-making that will impact his/her health, which results in ignoring of his/

her rights. Therefore, these norms also disproportionately interfered in the right, protected by Article 16 of the Constitution and thus, were declared unconstitutional.

The Court did not find interference in Article 16 in those norms of Civil Procedure Code that took away the right from incapable persons to independently apply to a court, when they had recovered from their mental disorder, with the request for restoration of capacities, and to join legal proceedings, launched at the initiative of other persons. Furthermore, the part of the norm, that afforded a guardian, a doctor and a psychiatric care facility to go to the court and ask for restoration of the capacity of the person, was not intended to violate the right to self-development, since the aim of the norm was to restore a person in his/her rights.

The Court pointed out, that these disputed norms instituted a restriction on the right enshrined in Article 42 of the Constitution (right to apply to a court). Therefore, the Court determined, that a person recognized incapable must not depend on the goodwill of his/her legal guardian, family members or psychiatric care facilities to be able to enjoy the right to apply to a court, a right that will protect these persons from abuses of power. Based on these reasons, the above-described norms were declared unconstitutional with regard to the Paragraph 1 of Article 42 of the Constitution of Georgia.

Additionally, these norms were evaluated by the Court with regard to Article 14 of the Constitution. The Court determined, that the disputed norms established specific norms for the persons recognized legally incapable and capable persons were not given any preferential treatment with regard to the norm in question. There was no differential treatment between adults, regardless of their status of recognized capacities. Therefore, these norms were declared constitutional with regard to Article 14 of the Constitution.

The respective article of the Civil Code of Georgia that prohibited marriage, if one of the future spouses was recognized legally incapable, was evaluated with regard to Article 36 of the Constitution. The disputed norms took away from the person recognized legally incapable the possibility to turn cohabitation with a partner into legal recognition of their voluntary union into an act of creating a family. The legitimate purpose of the disputed norms was to protect the persons recognized legally incapable from forced marriage and protect their right to property from interference.

The court found, that there was a least restrictive mechanism to achieve this legitimate purpose – by allowing marriage through the consent of legal guardian or respective body, which allowed for individualization of interference into the right to marry. If a person has social skills to understand non-material results that accompanies a marriage, which is not established at any moment when the recognition of incapacity takes place, taking away the right to marry represents a disproportionate interference in the right. Therefore, without taking into the account the individual mental capacities, restricting the right of the persons recognized legally incapable was declared unconstitutional with regard to Paragraph 1 of Article 36 of the Constitution of Georgia.

The following norms, that regulated recognition of a person legally incapable, limitation of the right to marry and regulations related to psychiatric care, were assessed in relation to Article 14 of the Constitution of Georgia, since the claimant argued, that persons recognized legally incapable were subjected to differential treatment when compared to persons with equal skills but not recognized as incapable. The Court found, that the general characteristic of the social group in question is the recognition as legally incapable, which is based on their mental disorder. Membership of the group or transferring to other group is not dependent on the will of the persons recognized legally incapable. The Court concluded, that classical discrimination was taking place, regulated by Article 14 of the Constitution and hence, it applied "strict scrutiny" test to find out if it was justified.

Within the test, the Court determined, that since it was possible to identify individual capacities of the persons and tailor the status of incapable onto them, the existing norms, that dictated the process of recognition of persons legally incapable, annulment of the acts of persons recognized incapable, and complete substitution of the free will of a person recognized legally incapable with the will of the legal guardian, also the prohibition of the right to marry, were not interferences absolutely necessitated and therefore, violated Article 14 of the Constitution of Georgia.

Furthermore, the claimant disputed the norm of the "Law of Georgia on Psychiatric Care" that disallowed a person recognized incapable to receive information about his or her own disease and psychiatric care with regard to Article 16

of the Constitution (the right to free development of his/her personality), Article 24 (right to freedom of expression), and Article 41 (the right to become acquainted, in accordance with a norm prescribed by law, with the information about him/her stored in state institutions as well as official documents existing there). The Court highlighted, that the disputed norm regulated relations, that arise in the process of psychiatric care, which is not part of the right to freedom of expression, which includes the right to disseminate information (with regard to Article 24). At the same time, since psychiatric care facility, even it is a state institution, is not a body tasked with carrying out public functions, and for the purposes of Article 41, cannot be counted as "state institution". Therefore, the disputed norm was declared constitutional with regard to both constitutional rights.

As for Article 16 of the Constitution, the Court indicated, that it defends the right of a person to independently make decision regarding own health and treatment, and access own health records is crucial for making such decisions. Therefore, the disputed norm restricted the claimant in his right protected by Article 16, to access information about own health, thus constituted an interference in this right. The Court declared the norm as disproportionally restrictive, since it failed to recognize varying degrees of the quality of specific mental capacities of persons recognized legally incapable, and with blanket ban, stripped them of their rights to receive information about their own health conditions. Therefore, the norm was declared unconstitutional with regard to Article 16 of the Constitution.

Paragraph 3 of Article 15 of the "Law of Georgia on Psychiatric Care" allowed the doctors, in exceptional cases, with the purpose of safety, "to limit the rights of patients placed under stationary care, including the right to be protected from inhuman and undignified treatment. The norm was challenged with regard to Paragraph 1 of Article 17 of the Constitution, which stipulates, that "honor and dignity of an individual is inviolable". Paragraph 2 of Article 17 prohibits various forms of inviolability in physical and mental integrity, among others, inhuman treatment and infringement upon honor and dignity. The Court pointed out, that this is an absolute right and the state is mandated not only to restrain from such treatment, but to ensure that third parties do not interfere with this right. Word-by-

word analysis of the norm illustrated, that it allowed in certain conditions to treat patients placed under stationary care, in a manner that was inhuman and degrading. Therefore, the disputed norm was declared unconstitutional with regard to Paragraph 1 and 2 of Article 17 of the Constitution.

Also disputed was norm of the "Law of Georgia on Psychiatric Care" that declared, that with the consent of legal guardian of a patient, the placement of a patient in the stationary care facility was voluntary treatment. The norm was disputed with regard to Paragraphs 1 and 2 of Article 18 of the Constitution, which defends inviolability of liberty of an individual – right to movement and restriction of the right to free movement, including, for the purposes of forced treatment and allows interference with the right only with a court decision.

The Court determined, that for the purposes of Article 18 of the Constitution, the placement of a person in psychiatric stationary facility, based only on the consent of his/her legal representative, cannot be interpreted as the will of the person, even if the patient is devoid of his/her ability to express his/her will that will meet the standard for such expression. Due to peculiar characteristics of mental disorder, placement in the stationary facility may last for long periods of time, for several months or even years, i.e. far beyond the 48 hours that the Constitution allows for. Therefore, interference with Article 18 in such form, nature and intensity, specific procedural safeguards are required, namely verification by the courts, if restriction of personal liberty takes place for more than 48 hours. Since the disputed norm allowed for extra-judicial interference with the individual's right to liberty, it was declared unconstitutional with regard to Paragraphs 1 and 2 of Article 18 of the Constitution of Georgia.

Citizens of Georgia – Ucha Nanuashvili and Mikheil Sharashidze vs. Parliament of Georgia 1/3/547, May 28, 2015

Subject of Dispute

Claimants challenged the constitutionality of norms of the Election Code of Georgia, which stipulated that for the parliamentary elections A. 73 single-mandate majoritarian electoral districts were to be created, of which 10 districts – in Tbilisi

(Paragraph 1 of Article 110); B. For the parliamentary elections, each municipality, except Tbilisi, constituted a single-mandate majoritarian electoral district. These norms were disputed with regard to Article 14 (equality before law) and Paragraph 1 of Article 28 (right to vote) of the Constitution of Georgia.

Reasoning

The Constitutional Court noted, that right to vote, enshrined in Article 28 of the Constitution, does not require any particular electoral model to be implemented, but existing model must ensure free and equal representation of the popular will in formation of a government. The lawmakers must ensure, that citizens have equal access to elections and equal opportunity to influence final results of the elections. Active voting right is significantly limited by minimizing the weight of the vote.

The disputed norms had exactly this kind of effect: in 2012 parliamentary elections, the number of single-mandate districts created varied greatly in the number of voters. e.g. in Kazbegi Electoral District, registered voters were 17 times fewer, compared to the Vake District and 22 times fewer than Saburtalo Electoral District. Despite these differences, the constituents of each electoral district could only elect one representative to the Parliament of Georgia. There were total of 3.613.851 voters registered in all of Georgia, of which 1.025.455 were registered in Tbilisi. Therefore, Tbilisi had 28% of all voters, but only14% (10 mandates) of all mandates. Therefore, numerous residents of Tbilisi could wield lesser impact on the results of majoritarian elections, compared to those constituents who resided in other electoral districts (e.g. Kazbegi, Abasha, Krtsanisi, etc.) and were registered voters. Such distribution of mandates, which precludes to form proportionate single-mandate electoral districts represents interference with the rights of the claimants.

According to the argument of the respondent, such deviation from the principle of voter proportionality was conditioned by the fact that majoritarian elections entail representation of administrative units, rather than the representation of the constituents. After analysis of constitutional provisions (Articles 4, 5 and 52) the Court concluded that local municipal units do not enjoy constitutional legitimacy to participate in forming the national bodes of government and elect their

representatives to the Parliament. The only subject, that participates in forming the Government and elects its representatives to the Parliament are the people. The essence of majoritarian system is not to ensure territorial representation, but the personified representation when the people elect specific individuals and thus establish more direct relationship between the voters and the elected representative.

The Court acknowledged that it is virtually impossible to establish what represents an absolutely proportionate «weight» of votes in the process of delineating the borders between electoral districts, but such inequality will be acceptable if it is supported by reasonable arguments and if a government strives to minimize voter inequality.

The Court did not rule out a possibility that administrative borders of territorial units are taken into consideration when electoral districts are determined. On some occasions, peculiarities of certain regions can dictate rational disproportionate division between electoral districts. The deviation may be justified if certain constitutional-legal reasoning is present, e.g. the Court took into the consideration that municipalities, as a rule, are firmly established territorial units and coupling electoral districts with municipal units may eliminate risks of election subjects manipulating electoral borders. However, even after consideration of this argument, the difference between electoral districts should not be more than it is necessary.

The Court reviewed proportionality principle of votes and based its judgment on the «Venice Commission» 2002 «Code of Good Practice in Electoral Matters» and noted, that permissible deviation from this principle may not go above 10%, and in exceptional cases (e.g. to protect the rights of minorities) – 15%.

In the case under review, the electoral districts were mechanically linked with municipalities, without taking into consideration the number of voters registered. As a result, unusually high deviation from the principle of voter proportionality had taken place and it resulted in disproportionate representation in the representative body of the government. Therefore, the impugned norms were declared unconstitutional with regard to Paragraph 1 of Article 28 of the Constitution of Georgia.

The Court also determined, that unequal treatment of voters registered in high-density electoral districts were evident in contrast with electoral districts that had

very few voters registered in them. The collective weight of one segment of voters was unjustifiably increased at the expense of other group of voters. Consequently, the Court found that the impugned norms did not respond to constitutional principle of equality before the law and declared disputed norms unconstitutional with regard to Article 14 of the Constitution.

Citizen of Georgia Zurab Mikadze vs. the Parliament of Georgia 1/1/548, January 22, 2015

Subject of Dispute

Claimant, Zurab Mikadze disputed the norms of the Criminal Procedure Code of Georgia which stated, that hearsay is admissible evidence, if is supported by other evidence (Paragraph 3 of Article 76) and provided that judgment of conviction (Paragraph 2 of Article 13) and indictment (Paragraph 1 of Article 169) could be based on hearsay. These norms were disputed with regards to Paragraph 3 of Article 40 of the Constitution (Principle of founding judgment of conviction on the irrefutable evidence).

Reasoning

Before the consideration on merits of Zurab Mikadze's constitutional claim, Paragraph 3 of Article 76 of the Criminal Procedure Code was amended. The new version of the norm specified, that hearsay supported by other evidence that is not hearsay. Therefore, since the disputed norm was abolished, the constitutional proceedings were terminated with regards to this part of the claim.

The Constitutional Court interpreted the principle enshrined in Paragraph 3 of Article 40 of the Constitution, that imposition of responsibility should be based only on irrefutable evidence. The principle intends to eliminate errors or risks of arbitrariness in the process of prosecution, by banning dubious evidence that could be used against defendant.

The Court explained, that the definition of hearsay (Article 76), Paragraph 1 of Article 169, which requires totality of evidence sufficient for a probable case

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for indictment of a person, and the requirement of Paragraph 2 of Article 13, that judgment of conviction should be based only on a body of consistent, clear and convincing evidence that, beyond reasonable doubt, proves the guilt of a person in the Criminal Procedure Code "together form procedural basis, that transforms hearsay into the valid evidence, not only for indictment, but also for conviction of an accused." If hearsay is confirmed by other evidence, nothing excludes the possibility, that court will found a judgment of conviction essentially on a hearsay. Therefore, hearsay, as a rule, was an acceptable, trustworthy, and valid evidence, much like other types of evidence.

Against this reality, the Constitutional Court noted, that in general, hearsay is a less trustworthy evidence and has many risks. Since a source of information is a person who does not appear in the court, the court has no opportunity to evaluate his/her disposition and attitudes towards events in question. It is true, that law requires identification of the source of the information, but it fails to specify how the source can be properly verified. Besides, warning the witness about the liability for perjury, which is an important safeguard to ensure trustworthiness of testimony, is not effective tool in this case, since the person, who has testified cannot confirm the trustworthiness of the person who disseminated the information.

This situation was further aggravated by the following: hearsay could be used even when an eyewitness (on whose words were the basis of hearsay) appeared himself/herself in the court and testified there. There was a possibility to use several hearsays to prove the same fact and the law even allowed a double hearsay (when even the source of information named by the witness, had not witnessed the fact himself/herself).

Given these characteristics of hearsay, the Court determined that automatic admission of hearsay was not justified. However, the Court also noted, that hearsay can be used in special cases, if an objective reason exists, which makes it impossible to interrogate the very person, whose words are basis for hearsay and when this is required by the interests of justice (e.g. when there is a threat of intimidation of witness). The most important aspect is that, in each case, the trial court should evaluate the arguments brought by the body in charge of criminal prosecution to justify the use of hearsay.

However, instead of this, the disputed norms established a general rule of admissibility of hearsay and its application was admissible even, when there was no necessity for it stemming from the interests of justice. Neither the reasonable doubt standard required for the judgment of conviction, nor the standard of probable cause, required for indictment of a person, could rule out application of hearsay, as one of the main evidence in the case. There was a high probability, that the effect of a hearsay on the court and on the jury would be stronger, than it was allowed by its limited trustworthy nature.

The Court highlighted, that the use of hearsay carries with it the risk of creating of false impression with regards to guilt of a person and can only be admissible in exceptional cases and not as a general rule, as prescribed by the Criminal Procedure Code of Georgia. Therefore, the normative content of the disputed norms, which allowed to found judgment of conviction or indictment on a hearsay, was declared unconstitutional with regards to Paragraph 3 of Article 40 of the Constitution.

Public Defender of Georgia vs. the Parliament of Georgia 1/1/477, December 22, 2011

Subject of Dispute

The Public Defender of Georgia disputed the constitutionality of Paragraph 2 of Article 2 of the Law of Georgia on Military Reserve Service with regard to Article 14 (right to equality before the law) and Paragraphs 1 and 3 of Article 19 (freedom of religion) of the Constitution of Georgia. The disputed norm made it mandatory for every citizen of Georgia to serve in the military reserve service, including those persons, who had conscientious objection, i.e. whose faith forbade them to serve in the military service.

Reasoning

The Constitutional Court interpreted right to freedom of religion, protected by Article 19 of the Constitution of Georgia, which includes the right to choose, reject or change religious or non-religious faiths, without interference of state,

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i.e. protects the inner realm of human thinking. Interference in the inner space of an individual can be exercised by ideological, psychological and moral pressure, intimidation, coercion to abandon certain belief systems or forcing someone to change it, which is absolutely prohibited by the Constitution of Georgia. At the same time, the right to freedom of religion includes the right to practice the religion and live according to its rules, since without it, recognition of freedom of religion would be meaningless. The right of an individual to lead his/her life according to his/her faith, can be restricted based on the Paragraph 3 or Article 19, when it is necessary for the protection of rights of others.

The Court also interpreted conscientious objection and noted, that it is based on religious or on non-religious belief, which forbids a person to kill others. Therefore, these persons refuse take weapons and serve during the wartime, which necessarily presupposes the use of force, and refuse serve in the military service during the peace, which is preparation for wartime actions.

The Court determined, that the refusal of the conscientious objectors is directly related to these people, their lifestyles and it not directed at sharing these beliefs with the others. Conscientious objection is expressed only when the state requires these persons to act against their faith and is caused by the necessity to maintain this faith, due to which, in terms of consequences, there is only little difference between having the faith and expressing it. Based on the afore-mentioned, the Court was able to conclude, that Article 19 of the Constitution protects the right to conscientious objection. Additionally, the Court pointed out, that conscientious objection, it is not enough that the decision is motivated by faith; such decision must be a unconditional requirement of his/her faith and it must be of crucial importance for determination of personality and identity of a person.

Following interpretation of Article 19 of the Constitution, the Court provided systematic interpretation of the disputed norm of the Law on Military Reserve Service and determined, that there was not difference between the activities of a reserve and a military personnel, since the immediate function of a military reserve was to participate in combat activities and to prepare for them. Therefore, the reserve and the military service could provide similar grounds for conscientious objection.

Despite this, Georgian legislation only acknowledged the conscientious objection of military recruits, by allowing them to serve in an alternative, nonmilitary service and did not grant the same opportunity to those who were called to serve in reserve or who were already serving in reserve. Due to this, it was determined, that the disputed norm constituted an interference into the right to freedom of religion.

According to the respondent, the legitimate aim of the interference was to defend the Country and state security, which was aim of Article 101 of the Constitution as well. Article 101 stipulated the obligation to defend Georgia. The Court noted, that Article 101 per se, does not specify that defending Georgia must be conducted through the mandatory military service; defending Georgia does imply that it must only be defended with weapons of war. Therefore, Article 101 of the Constitution of Georgia did not rule out that right to conscientious objection was be protected under Article 19 of the Constitution.

Discussing proportionality of interference, the Court pointed, that in exceptional cases (and not in general), coercion to reject expression of faith might be extremely close to violating inner realm of freedom of religion. The disputed norm meant to coerce persons with conscientious objection to act against their beliefs and serve in the military reserve service. If they refused to do so, they would be held liable. "The State requires persons with conscientious objection to act against the requirements of their own beliefs, which in fact, in the given situation, practically amounts to demanding them to reject their faith by their acts".

Therefore, the disputed norm constituted a non-justified and intense interference in the freedom of religion, which was amounted to deprivation of possibility to exercise the right at all. Furthermore, achieving aim could have been done with less interference – an alternative civil service could have been introduced for persons called into military reserve service too. Therefore, it was determined, that the disputed norm violated the freedom of religion.

The Court evaluated the disputed norm with regard to Article 14 of the Constitution. Imposing an uniform duty to serve in the military reserve service on everyone, the Law did not intend to restraint any minority. However, the Court noted, that the neutral nature of the law does not itself and always preclude

unjustified differentiation. «A general and a neutral law, if it treats everyone in an equal manner, including those who are unequal, is itself violating the principle of equality."

Since the persons called to serve in reserve can have different faiths including faiths, which generate conscientious objection, a neutral law introducing a uniform duties for them, in fact established a differential, unequal regime. Therefore, the disputed norm prescribed equal treatment of essentially unequal persons (those reservists, who had conscientious objection and those reservists, who did not have it). Furthermore, it was established, that reservists were differentiated based on "religion and other views", i.e. based on a specific ground listed under Article 14 of the Constitution.

Evaluating interference in the right to equality, the Court noted: "When a norm, on the one hand, results in violating the right to freedom of religion, and on the other hand, differentiates these persons from others, based on the ground of faith... it is impossible to be compatible to constitutional requirements, which mandate that in everyone is equal before the law regardless of their faith."

Hence, the normative content of the disputed norm, which established a duty to serve in the military reserve service for those persons, who were motivated by their faith to reject military service, was declared unconstitutional both, with regard to the Paragraphs 1 and 3 of Article 19, and Article 14 of the Constitution. However, the general constitutionality of military reserve service was not challenged in this case and therefore the judgment did not address this issue.

Citizens of Georgia Valeri Gelbakhiani, Mamuka Nikolaishvili and Alexander Silagadze vs. the Parliament of Georgia 1/4/557,571,576, November 13, 2014

Subject of Dispute

The claimants disputed normative content of Paragraph 3 of Article 329 of the Criminal Procedure Code of Georgia, which prohibited the application of the following rules of the Code to the criminal prosecution cases, that were initiated before entry into force of the Code (on October 1, 2010): A. Being accused for maximum term of 9 months until the pre-trial hearing and, B. Use of jury trial.

According to the claimants, the disputed norm violated Article 14 (right to equality before the law) and Paragraph 1 and Paragraph 2 of Article 42 (right to fair trial) and Paragraph 5 (principle of retroactive application of the more lenient law).

Reasoning

For the purposes of right to equality before the law, the Constitutional Court considered the accused persons in criminal prosecution cases that started October 1, 2010 and after that date as essentially equal, since they had equal procedural status and equal interest with regards to procedural safeguards. The differential treatment significantly distanced these two groups of persons from the equal opportunities – for the first group, the prosecution could have lasted forever, while for the latter group, it should terminate after 9 months. Therefore the differential treatment was considered to be intensive. Automatic application of the terms provided in the new Code on cases initiated before its entry into force would result in automatic release from responsibility of accused persons, who were hiding or would leave investigation with less than 9 months, which would truly damage the implementation of thorough investigation and administration of justice in these cases. However, according to the strict scrutiny test, the Court found, that there existed at least restrictive means to achieve the stated aim - namely, if the 9 month period would start running not from the moment of indictment in the old cases, but from the date, when the Code of 2009 entered into force, it would place both groups of accused persons on the equal footing and would not endanger the legitimate aim as well. Additionally, Article 14 of the Constitution was found to be violated by the fact that, jury trials did not apply to the criminal prosecution cases started before the entry into force of the Code of 2009. The Court could not see any justification for this differential treatment. Discrimination with regards to the right of access to jury trial, was considered by the Court to violate the right to fair trial as well.

Furthermore, the Court reviewed whether the disputed norm violated the principle of application of the more lenient law. It should be ascertained, whether the Constitution allows or requires the lawmaker to retroactively apply a law that mitigates liability. The Court rejected the argument, that since the second sentence

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of Paragraph 5 of Article 42 bans retroactive application of laws that impose liability, hence the opposite – that is application of legislation that mitigates liability is mandatory. According to the Court, this line of argumentation would not be justified, since these postulates serve substantially different goals and do not precondition each other. Prohibition of retroactive application of a law comes from the principle of rule of law state and is related to the principle of legal certainty and ensuring legal safety. These values are not basis for retroactive application of laws that mitigate liability. However, in the Court's opinion, the latter is also related to the principle of rule of law state, since "it serves to achieve the two of its main goals" - A. To protect a person from such interference in his liberty, which is not necessary to achieve legitimate aim in a democratic and rule of law state and B. To promote humanity.

The Court concluded, that "a person must be held liable, for committing an act, that is genuinely dangerous for society, and at that, within legal framework, that is objectively necessary and enough to achieve the aims of imposing punishment for the specific offence." Therefore, when the state no longer considers a certain act to be dangerous for society or believes that the punishment pertaining to it is excessive, imposition of responsibility, prescribed by laws before their amendment or application of more severe penalties for an act becomes meaningless. It is true, that the Constitution does not establish such unconditional and absolute duty of retroactive application of more lenient law as it does with regards to prohibition of retroactive application of the laws that introduce responsibility. However, the Constitution it does restrict the state's discretion and requires, that the state does not interfere in the right more than necessary.

The Court also pointed out, that the procedural norms are be related to Paragraph 5 of Article 42 only if in substance they are linked to decriminalization or de-penalization of an act, or mitigation of punishment. The scope of jurisdiction of jury trials and the 9 months period of being an accused, including a rule of termination of prosecution does not still define the scope of responsibility and is not logically related to the decriminalization of an act or mitigation of liability. Therefore, the Court found, that the disputed norm did not violate Paragraph 5 of Article 42 of the Constitution.

CASE-LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

Case No. 8/95, Ruling „On the Compliance of Paragraph 4 of Article 7 and Article 12 of the Republic of Lithuania's Law "On International Treaties of the Republic of Lithuania" with the Constitution of the Republic of Lithuania", 7 October 1995

Summary

The case was initiated by the Government of the Republic of Lithuania. In its petition it requested an investigation into whether the provision "The Government of the Republic of Lithuania shall submit by its own decision international treaties of the Republic of Lithuania to the Supreme Council of the Republic of Lithuania for ratification" of Paragraph 4 of Article 7 of the Law "On International Treaties of the Republic of Lithuania" and whether the provision "international treaties of the Republic of Lithuania shall have the force of law on the territory of the Republic of Lithuania" of Article 12 of the same law were in compliance with the Constitution. The petition was based on the fact that Paragraph 3 of Article 138 of the Constitution states that "international treaties which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania", which allows one to state that only the international treaties ratified by the Seimas may have the force of law while the legal force of other international treaties that were ratified or joined after the adoption of the Constitution in 1992 remains indeterminate.

The request also indicated that item 2 of Article 84 of the Constitution provides that the President of the Republic "shall sign international treaties of the Republic of Lithuania and submit them to the Seimas for ratification", while other articles of the Constitution do not directly indicate which subjects may submit international treaties to the Seimas for ratification.

The Constitutional Court held that according to the Constitution not only the President but also the Government have the concrete authorisation to conclude international treaties, as without having them it is impossible to implement foreign

policy. However, none of the articles of the Constitution, which establish the competence of the institutions of State power, point out that the Government or any other entities of power are entitled to submit international treaties to the Seimas for ratification. This right in accordance with the Constitution as the integral statute is the prerogative of the President of the Republic of Lithuania. Therefore, Paragraph 4 of Article 7 of the impugned Law contradicted the provision of item 2 of Article 84 of the Constitution that the President of the Republic "shall submit them to the Seimas for ratification".

Having compared the contents of the norms of Paragraph 3 of Article 138 of the Constitution and those of Article 12 of the impugned Law, the conclusion is to be made that according to the meaning they partly coincide, as both confirm that the treaties ratified by the Seimas shall acquire the force of law. Thus, the provision of Article 12 of the impugned Law "shall have the force of law", when applied to international treaties ratified by the Seimas, does not contradict the Constitution; however, providing the said provision is understood that international treaties of the Republic of Lithuania had the force of law, i.e. including those international treaties that have not been ratified by the Seimas, then the said provision unfoundedly extends their juridical force in the system of sources of law of the Republic of Lithuania. From this standpoint the provision of Article 12 of the impugned Law that international treaties of the Republic of Lithuania "shall have the force of law" contradicted the Constitution.

Headnotes

The legal system of the Republic of Lithuania is grounded on the fact that any law or other legal act, as well as international treaties, must not contradict the Constitution, because Paragraph 1 of Article 7 of the Constitution prescribes: "Any law or other statute which contradicts the Constitution shall be invalid." This constitutional provision of itself cannot invalidate a law or an international treaty but it requires that the provisions thereof should not contradict the provisions of the Constitution. Otherwise the Republic of Lithuania would not be able to ensure legal defence of the rights of the parties of international treaties, which arise

from those treaties, and this in its turn would hinder from fulfilling obligations according to the concluded international treaties. This would violate the most important principles of the 1969 Vienna Convention on the Law of International Treaty, which was undertaken to respect and execute by the Republic of Lithuania, namely: *pacta sunt servanda* – "every treaty is binding to be performed" (Article 26 of the Convention) and "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27 of the Convention).

The principle *pacta sunt servanda* does not mean that different states may not choose different ways and forms of implementation of the norms of international law in their internal legal system. This is the sovereign right of every state.

The classification of international treaties into different kinds is an objective phenomenon which has its legal, logical and constitutional substantiation. Pursuant to the Constitution only the legislature by the way of ratification may decide which statute of international law shall be the constituent part of the legal system of the Republic of Lithuania having the force of law. The Seimas shall have the right of legislation and the legislation shall not be delegated to any other institution of the State power. Any recognition that non-ratified international treaties have the force of law would deny the legislative prerogative of the Seimas.

Case No. 2/98, Ruling „On the Compliance of the Death Penalty Provided for by the Sanction of Article 105 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania", 9 December 1998

Summary

The case was initiated by a group of Seimas members. The petitioner requested the Constitutional Court to investigate whether the sanction of Article 105 of the Criminal Code which provided for the death penalty was in compliance with Articles 18, 19 and Paragraph 3 of Article 21 of the Constitution.

The request was based on the arguments that valid Article 105 of the Criminal Code (the wording of the Republic of Lithuania's law of 3 December 1991, law of 8 June 1995 and law of 30 April 1997) provided that for murder with aggravating

circumstances an individual may be sentenced to death. Article 18 of the Constitution indicated that the rights and freedoms of individuals shall be innate. The most important human right is the right to life. Under Article 19 of the Constitution, the right to life of individuals shall be protected by law. Thus, there should exist no laws permitting denial of an individual's right to life. Paragraph 3 of Article 21 of the Constitution provides that it shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments. Even though under Article 105 of the Criminal Code the death penalty may only be imposed on persons who have committed a grave crime, i.e. murder with aggravating circumstances, however, the gravity or cruelty of crime may hardly be deemed to be the basis for the cruelty of the punishment. In the course of carrying out of the death sentence sufferings are caused which may be deemed to be a form of torture of a person.

The Constitutional Court held that the death penalty for murder with aggravating circumstances provided for by the sanction of Article 105 of the Criminal Code contradicted Articles 18, 19 and Paragraph 3 of Article 21 of the Constitution.

Headnotes

Defining the death penalty, Article 24 of the Criminal Code specifies that it is an exclusive punishment. The exclusive nature of the death penalty is determined by the following circumstances: (1) This punishment may be given for two crimes only as provided for by the Criminal Code, i.e. murder with aggravating circumstances and genocide. (2) The death penalty may be imposed only when the murder which is specified by Article 105 of the Criminal Code is completed. (3) The death penalty may not be imposed, and, if imposed, carried out on women and persons who at the time of the commission of the crime were under eighteen years of age. Nor may the death penalty be imposed when the law permits the court to decide whether to bring someone to criminal liability and carry out the judgement in cases when a crime punishable by death has been committed but the statutory limitation period has ended also. In case the court recognises that it is impossible to apply statutory limitation in a concrete case, the death penalty is changed for imprisonment.

(4) A court, after it has imposed the death sentence on an individual, may change it by life imprisonment. (5) The death penalty may be changed for life imprisonment under the amnesty or clemency procedure.

Deciding the issue whether this punishment as provided in the sanction of Article 105 of the Criminal Code is in compliance with the Constitution, one has to take account of the fact that the Constitution is an integral act in various articles whereof the protection of human life has been consolidated. It is also important to assess corresponding trends of the attitude of the international community regarding the death penalty, the international obligations of the State of Lithuania, and the experience of the historical development of the State of Lithuania in establishing this punishment in criminal laws.

The severity of criminal punishment (the degree of the punishment) must correspond to the nature of the crime committed and the degree of its danger, as well as the personality of the criminal and the circumstances of the case which either extenuate or aggravate the liability. In a certain respect, the limitations and hindrances which are imposed on the convicted person is a retribution for the crime that he has committed. The modern theory of criminal law, however, categorically dissociates itself from the talion principle (an eye for an eye, a tooth for a tooth) which existed in ancient societies and states.

By means of a criminal punishment, one attempts to influence an individual who has committed a crime so that he would never commit new crimes, i.e. to correct the criminal, as well as to influence the other members of society so that they would not commit crimes. Alongside, the violated law and order are restored. To achieve these ends, a corresponding system of punishments is established in criminal laws. Among them the death penalty takes an exceptional place which, by its cruelty, should deter potential criminals from the commission of crimes. The death penalty is a physical termination of an individual, it is deprivation of his life irrespective of the way this is done: by shooting, hanging, lethal injection or any other way.

There is an evident trend in contemporary criminal law of European countries: a criminal punishment ought to combine punishment with preservation of humanness, respect towards an individual and his dignity, while the aim of

punishment would be to restore the violated order and to ensure security of people. The social reintegration of a person who has committed a crime, his education to respect laws during the service of the sentence, are of importance. The significant principle of criminal laws is that the punishments provided for therein should not be more severe than necessary for correction of a person who has committed a crime so that he would not commit another crime in the future.

The State of Lithuania, recognising the principles and norms of international norms, may not apply virtually different standards to the people of this country. Holding that it is a member of the international community possessing equal rights, the State of Lithuania, of its own free will, adopts and recognises these principles and norms, the customs of the international community, and naturally integrates itself into the world culture and becomes its natural part.

Human life and dignity constitute the integrity of a personality and they denote the essence of an individual. Life and dignity are inalienable properties of an individual, therefore, they may not be treated separately. The innate human rights are innate opportunities of an individual which ensure his human dignity in the spheres of social life. They constitute that minimum, that starting point from which all the other rights are developed and supplemented, and which constitute the values which are unquestionably recognised by the international community. Thus, human life and dignity, as expressing the integrity and unique essence of the human being, are above law. In such a case, the aim of the Constitution is to ensure the protection and respect of these values. The exceptional protection of the innate rights as provided for by its Article 18 prevents the establishment of the death penalty in the sanction of Article 105 of the Criminal Code.

The right to life of an individual is ensured by a rather broad system of legal means which is established by the Constitution itself as well as a number of other laws. The legal regulation together with moral, religious and other social norms is, first of all, devoted for the protection of the right to life of an individual.

Paragraph 3 of Article 21 of the Constitution provides: "It shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments." Assessing the death penalty through the prism of the treatment which is prohibited

by the Constitution, its specific aspect is disclosed. The degradation of the dignity of the convict derives essentially from the cruelty of the death penalty itself. The cruelty manifests itself by the fact that after the death sentence has been carried out, the human essence of the criminal is negated as well, he is deprived of any human dignity, as the state in that case treats the person as a mere object to be eliminated from the human community.

Case No. 8/2012 "On the Compliance of Paragraph 5 (Wording of 22 March 2012) of Article 2 of the Republic of Lithuania's Law on Elections to the Seimas with the Constitution of the Republic of Lithuania", 5 September 2012

Summary

This constitutional justice case was initiated by a group of members of the Seimas, requesting an investigation into the constitutionality of Paragraph 5 (wording of 22 March 2012) of Article 2 of the Law on Elections to the Seimas, under which a person who had been removed from office or whose mandate of a member of the Seimas had been revoked by the Seimas through impeachment proceedings was not allowed to stand for election as a member of the Seimas if less than four years had elapsed from the entry into force of the decision to remove him/her from office or to revoke his/her mandate of a member of the Seimas.

The doubts of the petitioner were substantiated by the following arguments. By adopting the impugned law, the Seimas did not follow the official constitutional doctrine set out in the ruling delivered by the Constitutional Court on 25 May 2004 in the constitutional justice case concerning the provision of the Law on Presidential Elections that was, in principle, analogous to the impugned provision of the Law on Elections to the Seimas. In the opinion of the petitioner, by establishing the same legal regulation that had already been recognised as anti-constitutional, the Seimas exceeded the powers conferred on it by the Constitution; by means of a law, it established the legal regulation that was different from the one established in the Constitution with regard to the election to the Seimas of a person who was removed from office or whose mandate of a member of the Seimas was revoked

through impeachment proceedings; and it openly ignored the above-mentioned ruling of the Constitutional Court and tried to overrule it by means of a law.

The Constitutional Court recalled that it was held in its ruling of 25 May 2004 that, under the Constitution, if a person grossly violated the Constitution, breached his/her oath, or committed a crime whereby the Constitution was also grossly violated and his/her oath was breached and, for this reason, through impeachment proceedings, he/she was removed from the office of the President of the Republic, the President or a justice of the Constitutional Court, the President or a justice of the Supreme Court, the President or a judge of the Court of Appeal, or his/her mandate of a member of the Seimas was revoked, such a person may never subsequently be elected as the President of the Republic or a member of the Seimas, or hold the office of a justice of the Constitutional Court, a justice of the Supreme Court, a judge of the Court of Appeal, a judge of another court, a member of the Government, or the Auditor General, i.e. he/she is never subsequently allowed to hold those offices specified in the Constitution whose beginning is linked with taking the oath provided for in the Constitution. A different interpretation of the provisions of the Constitution would make legally meaningless and pointless the constitutional institute of impeachment for a gross violation of the Constitution and a breach of the oath; in addition, a different interpretation of the provisions of the Constitution would be incompatible with the essence and purpose of constitutional liability for a breach of the oath and a gross violation of the Constitution, with the essence and purpose of the constitutionally established oath as a constitutional value, as well as with the requirement, which stems from the overall constitutional legal regulation, that all state institutions must be formed only from such citizens who unreservedly obey the Constitution adopted by the Nation and who, while in office, unconditionally follow the Constitution, law, as well as the interests of the Nation and the State of Lithuania.

The Constitutional Court pointed out that the legal position of the Constitutional Court *(ratio decidendi)* expressed in constitutional justice cases has the power of precedent and that the Constitutional Court is bound by both the precedents that it itself has established and the official constitutional doctrine that substantiates

them. On the basis of the official constitutional doctrine and precedents that it itself has developed, the Constitutional Court must ensure the continuity (coherence and non-contradiction) of the constitutional jurisprudence and the predictability of its decisions. It may be possible to deviate from the precedents developed by the Constitutional Court, as well as to create new precedents and modify the official constitutional doctrine substantiating these precedents, only in cases where this is unavoidably and objectively necessary, as well as constitutionally grounded and justified. The reinterpretation of the official constitutional doctrine so that it would be modified is impossible and constitutionally impermissible if, by doing so, the system of values entrenched in the Constitution is changed, the guarantees for the protection of the supremacy of the Constitution in the legal system are reduced, the concept of the Constitution as an integral act and a harmonious system is denied, the constitutional guarantees for the rights and freedoms of the person are undermined, and the constitutionally consolidated model of the separation of powers is altered.

The Constitutional Court held that the legal regulation in question, under which a person who had been removed from office or whose mandate of a member of the Seimas had been revoked following impeachment proceedings for a gross violation of the Constitution and a breach of his/her oath was allowed to stand for election as a member of the Seimas after the period of four years, was in violation of: Paragraphs 2 and 3 of Article 59 of the Constitution, which consolidate the essence and purpose of the oath of a member or the Seimas; Article 5 of the Law on the Procedure for Entry into Force of the Constitution of the Republic of Lithuania, which establishes the oath of a member of the Seimas; Paragraph 1 of Article 82 of the Constitution, which consolidates the essence and purpose of the oath of the President of the Republic; Paragraph 2 of Article 104 of the Constitution, which consolidates the oath of a justice of the Constitutional Court; Paragraph 6 of Article 112 of the Constitution, which consolidates the oath of a person appointed as a judge; Article 74 of the Constitution, which provides for the right of the Seimas to remove the President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, and the President and judges of the Court of Appeal from office, as well as to revoke the

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mandate of a member of the Seimas, through impeachment proceedings for a gross violation of the Constitution and a breach of the oath; Paragraph 2 of Article 34 of the Constitution, which prescribes that the right to be elected is established by the Constitution and election laws; and the principle of a state under the rule of law.

The Constitutional Court also noted that, as held in its ruling of 25 May 2004, committing a crime in itself does not mean that a person, at the same time, has violated the Constitution or breached his/her oath; some crimes may be of such a nature that they are not directly related to a breach of the oath referred to in the Constitution or a gross violation of the Constitution. Paragraph 2 of Article 56 of the Constitution, under which a person who has served punishment imposed by a court judgment may stand for election as a member of the Seimas, means that the Constitution does not prescribe that a person who has been removed from office through impeachment proceedings for having committed a crime whereby the Constitution has not been grossly violated and the oath has not been breached is not allowed to stand for election as a member of the Seimas; notably, while making this exception, the Constitution *expressis verbis* provides that such a person may stand for election as a member of the Seimas. Taking account of this, the Constitutional Court recognised that Paragraph 5 of Article 2 of the Law on Elections to the Seimas, insofar as it provided that a person was not allowed to stand for election as a member of the Seimas if he/she had been removed from office or his/her mandate of a member of the Seimas had been revoked by the Seimas through impeachment proceedings for having committed a crime whereby the Constitution had not been grossly violated and the oath had not been breached, was in conflict with Paragraph 2 of Article 34, Paragraph 2 of Article 56, and Article 74 of the Constitution.

In addition, the Constitutional Court emphasised that Paragraphs 1 and 2 of Article 107 of the Constitution give rise to the prohibition on repeatedly establishing, by means of later adopted laws or other legal acts, any such legal regulation that is incompatible with the concept of the provisions of the Constitution as set out in the acts of the Constitutional Court. If the legislature, nonetheless, adopted a law that disregarded the said prohibition, such a law could not be a lawful ground for acquiring certain rights or legal status. A different interpretation would be incompatible with

the principle of the supremacy of the Constitution, the constitutional principles of the separation of powers and a state under the rule of law, as well as with the general legal principle of *ex injuria jus non oritur* (illegal acts cannot create law).

Thus, the above-mentioned legal regulation ignored the concept of constitutional liability for a gross violation of the Constitution and a breach of the oath, as disclosed in the Constitutional Court's ruling of 25 May 2004, and it disregarded the fact that, under the Constitution, a person may never stand for election as a member of the Seimas if he/she grossly violated the Constitution and breached his/her oath and, for this reason, was removed from office or his/her mandate of a member of the Seimas was revoked following impeachment proceedings; having established such a legal regulation, the legislature tried to overrule the force of the Constitutional Court's ruling of 25 May 2004 and violated the prohibition on repeatedly establishing, by means of later adopted laws and other legal acts, any such legal regulation that is incompatible with the concept of the provisions of the Constitution, as set out in the rulings of the Constitutional Court, as well as failed to comply with the principles of the integrity and supremacy of the Constitution, exceeded its powers established in the Constitution, and violated the constitutional principles of the separation of powers and a state under the rule of law.

In view of this, Paragraph 5 of Article 2 of the Law on Elections to the Seimas was also held to be in conflict with Paragraphs 1 and 2 of Article 5, Paragraph 1 of Article 6, Paragraph 1 of Article 7, and Paragraphs 1 and 2 of Article 107 of the Constitution and the constitutional principle of a state under the rule of law.

The Constitutional Court drew attention to the fact that the impugned provision of the law had been adopted in response to the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Paksas v Lithuania* of 6 January 2011. By this judgment, the European Court of Human Rights, in particular taking account of the permanent and irreversible prohibition for the applicant to stand in parliamentary elections, found that this restriction was disproportionate and constituted a violation of Article 3 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention).

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In the ruling, it was held that the European Court of Human Rights has a subsidiary role in the implementation of the Convention and its protocols; it does not replace the competence and jurisdiction of national courts and it is not an appeal or cassation instance with regard to the judgments of national courts. Even though the jurisprudence of the European Court of Human Rights, as a source for the interpretation of law, is also important for the interpretation and application of Lithuanian law, the jurisdiction of the European Court of Human Rights does not replace the powers of the Constitutional Court to officially interpret the Constitution.

The Convention and its Protocol No 1 – the international treaties ratified by the Seimas – have the force of a law in the Lithuanian legal system. The Constitutional Court emphasised that, in cases where a legal regulation laid down in an international treaty that has been ratified by the Seimas and has entered into force competes with a legal regulation established in the Constitution, the provisions of such an international treaty do not take precedence in terms of application. The Lithuanian legal system is based on the principle that no law or another legal act, including the international treaties of the Republic of Lithuania, may be in conflict with the Constitution.

Consequently, in itself, a judgment of the European Court of Human Rights may not serve as the constitutional grounds for the reinterpretation (modification) of the official constitutional doctrine if such reinterpretation, in the absence of relevant amendments to the Constitution, were to change the overall constitutional regulation in substance, disturb the system of values entrenched in the Constitution, and diminish the guarantees for the protection of the supremacy of the Constitution in the legal system. The Constitutional Court held that the constitutional institutes of impeachment, the oath, and electoral rights are closely interrelated and integrated; the change of any of the elements of these institutes would result in the change of the content of other related institutes, i.e. the system of values entrenched in related constitutional institutes would also be changed.

At the same time, the Constitutional Court underlined that respect for international law and compliance with the voluntarily undertaken international

obligations constitute a legal tradition and a constitutional principle of the restored independent State of Lithuania; under Paragraph 1 of Article 135 of the Constitution, the Republic of Lithuania must observe the universally recognised principles and norms of international law; therefore, this leads to the duty of the Republic of Lithuania to remove the above-mentioned incompatibility between the provisions of Article 3 of Protocol No 1 to the Convention and the provisions of the Constitution. In view of the fact that the Lithuanian legal system is based on the principle of the supremacy of the Constitution, the Constitutional Court held that the adoption of the appropriate amendment to the Constitution is the only way to remove this incompatibility.

Ruling No. Kt2-N1/2014, Case No. 22/2013 „On the Compliance of the Republic of Lithuania's Law Amending Article 125 of the Constitution and Article 170 (Wording of 15 March 2012) of the Statute of the Seimas of the Republic of Lithuania with the Constitution of the Republic of Lithuania", 24 January 2014

Summary

This constitutional justice case was initiated by the Seimas, which requested an investigation into whether the Law Amending Article 125 of the Constitution, in view of the manner of its adoption, was not in conflict with the Constitution. The petitioner doubted as to whether, in the course of adopting the said law, the legislature had observed the requirement that a motion to alter or supplement the Constitution may be submitted to the Seimas by a group of not less than 1/4 of all the members of the Seimas, as stipulated in Paragraph 1 of Article 147 of the Constitution, since, in the course of the consideration of the said law, the Committee on Legal Affairs of the Seimas had in substance changed the content of the Draft Law Amending Article 125 of the Constitution, which had been submitted by a group of 45 members of the Seimas.

In its ruling, the Constitutional Court noted that the constitutional regulation governing the alteration of the Constitution is determined by the concept, nature, and purpose of the Constitution itself. The Constitutional Court also pointed out

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that the Constitution is the supreme law and it reflects the social contract – the commitment democratically assumed to the present and future generations by all the citizens of the Republic of Lithuania to live in observance of the fundamental rules consolidated in the Constitution and to obey these rules. The stability of the Constitution is one of the preconditions for securing the continuity of the state and respect for the constitutional order and law as well as ensuring the implementation of the objectives declared in the Constitution by the Lithuanian nation, upon which the Constitution itself is founded. The stability of the Constitution constitutes such a property of the Constitution that in conjunction with other properties (primarily in conjunction with a special, supreme, legal force of the Constitution) distinguishes the constitutional regulation from the (ordinary) regulation laid down by the legal acts of lower legal force. The Constitution is an integral act; therefore, any amendment thereto may not create any such new constitutional regulation under which one provision of the Constitution would deny or contradict another provision of the Constitution, so that it would be impossible to construe such provisions as being in harmony; any amendments to the Constitution may not violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them. Consequently, the concept, nature, and purpose of the Constitution, the stability of the Constitution as a constitutional value, and the imperative of the harmony among the provisions of the Constitution imply certain material and procedural limitations on the alteration of the Constitution.

Material limitations on the alteration of the Constitution are the limitations consolidated in the Constitution regarding the adoption of the constitutional amendments of certain content; the latter amendments stem from the overall constitutional regulation, and they are designed to defend universal values, upon which the Constitution is based, and protect the harmony of these values and the harmony of the provisions of the Constitution.

In its ruling, the Constitutional Court held that the Constitution does not permit any such amendments thereto that would deny at least one of the constitutional values lying at the foundations of the State of Lithuania – the independence of the state, democracy, republic, and an innate character of human rights and freedoms, with the

exception of the cases where Article 1 of the Constitution would be altered in the manner prescribed by Paragraph 1 of Article 148 of the Constitution, or Article 1 of the Constitutional Law "On the State of Lithuania", which is a constituent part of the Constitution, would be altered in the manner prescribed by Article 2 of the latter law.

The aforementioned fundamental constitutional values are closely interrelated with the geopolitical orientation of the state of Lithuania, which is consolidated in the Constitution and implies European and transatlantic integration pursued by the Republic of Lithuania.

The Constitutional Act "On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions" lays down the limits that may not be overstepped by the Republic of Lithuania in the processes of its participation in international integration and consolidates the prohibition on joining any new political, military, economic, or other unions or commonwealths of states formed on the basis of the former USSR. According to the Constitutional Court, the provisions of the said constitutional act should enjoy the same protection as the provision "[t]he State of Lithuania shall be an independent democratic republic", which is stipulated in Article 1 of the Constitution and Article 1 of the Constitutional Law "On the State of Lithuania". Thus, under the Constitution, no amendments may be made to the Constitution that would deny the provisions of the Constitutional Act "On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions", with the exception of the cases where certain provisions of this constitutional act would be altered in the same manner as provided for in Article 2 of the Constitutional Law "On the State of Lithuania".

The Constitutional Act "On Membership of the Republic of Lithuania in the European Union" was adopted while executing the will of the citizens of the Republic of Lithuania, as expressed in the referendum; thus, the full participation of the Republic of Lithuania, as a Member of the European Union, in the European Union is a constitutional imperative grounded in the expression of the sovereign will of the Nation. The constitutional grounds for the membership of the Republic of Lithuania in the European Union, without the establishment of which in the Constitution, the Republic of Lithuania could not be a full Member of the European Union, and the expression of the sovereign will of the Nation, as the

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source of these grounds, determine the requirement that the provisions of Articles 1 and 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" be altered or annulled only by referendum. Under the Constitution, as long as the aforesaid constitutional grounds for membership in the European Union, which are consolidated in Articles 1 and 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union", have not been annulled by referendum, it is not permitted to make any such amendments to the Constitution that would deny the commitments of the Republic of Lithuania arising from its membership in the European Union.

The constitutional principle of the respect for international law, as consolidated in Paragraph 1 of Article 135 of the Constitution, i.e. the principle of *pacta sunt servanda,* means the imperative of fulfilling in good faith the obligations assumed by the Republic of Lithuania under international law, *inter alia,* international agreements. Thus, the Constitution does not permit any such amendments to the Constitution that would deny the international obligations of the Republic of Lithuania (among them the obligations of the Republic of Lithuania arising from its membership in the NATO) and at the same time – the constitutional principle of *pacta sunt servanda,* as long as the said international obligations have not been renounced in accordance with the norms of international law.

Under the Constitution, neither is the Seimas permitted to introduce any such amendments to the Constitution that would deny the provisions of Chapter I "The State of Lithuania" and Chapter XIV "Alteration of the Constitution" of the Constitution, as these provisions may be amended only by referendum. In view of the imperative of the harmony among the provisions of the Constitution, it is either not permitted to introduce by referendum any such amendments to the Constitution that would, without correspondingly amending the provisions of Chapters I and XIV of the Constitution, lay down the constitutional regulation contradicting the provisions of Chapters I and XIV of the Constitution.

As held by the Constitutional Court, procedural limitations on the alteration of the Constitution are related to the special procedure for the alteration of the Constitution provided for in Chapter XIV "Alteration of the Constitution" of the Constitution.

In its ruling, the Constitutional Court noted that the notion "[a] motion to alter or supplement the Constitution of the Republic of Lithuania", as employed in Paragraph 1 of Article 147 of the Constitution, should not be interpreted literally as meaning an abstract proposal or idea lacking in clarity and concreteness to alter or supplement the Constitution; as pointed out by the Constitutional Court, this notion means a draft amendment to the Constitution – a draft law amending the Constitution.

Paragraph 1 of Article 147 of the Constitution specifies special subjects who enjoy the right to submit to the Seimas a motion to alter or supplement the Constitution: a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters. Only the said subjects have the right to submit to the Seimas a concrete draft amendment to the Constitution – a draft law amending the Constitution; the said right is not conferred on any other subjects. Under the Constitution, only the draft laws amending the Constitution that have been submitted by a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters may be considered and voted upon in the Seimas; the Seimas may not consider and vote upon any such motion to alter or supplement the Constitution that would be proposed by subjects other than the subjects specified in Paragraph 1 of Article 147 of the Constitution. Therefore, when the Seimas considers certain draft laws amending the Constitution, which have been submitted by the subjects specified in Paragraph 1 of Article 147 of the Constitution, it may introduce only such modifications to the proposed draft laws that do not affect these draft laws in substance, i.e. modifications that are aimed at editing the proposed draft amendments to the Constitution in order to improve the texts of these draft laws in terms of the Lithuanian language and legal technique or that make the proposed draft formulations more accurate or concrete without changing the scope of the proposed constitutional regulation. Paragraph 1 of Article 147 of the Constitution gives rise to the prohibition on changing in substance, during the consideration in the Seimas, the content of a proposed draft law amending the Constitution, submitted by a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters, in such a way that would distort the objective

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of the proposed constitutional regulation, would alter the scope of the proposed constitutional regulation, would introduce essentially different means to achieve the objective sought by the proposed constitutional regulation, or would propose that a different provision of the Constitution be altered. Any draft law amending the Constitution that has been subject to amendments of an essential character should be deemed a new draft law – a new motion to alter or supplement the Constitution, which may be submitted only by the subjects specified in Paragraph 1 of Article 147 of the Constitution. In the course of the consideration of a draft law amending the Constitution in the Seimas, structural subdivisions of the Seimas and individual members of the Seimas have, under the Constitution, the right to propose for the Seimas such modifications of the draft under consideration that do not affect the draft in substance, or the right to propose that the draft under consideration would be rejected or that the subject who has submitted the draft for consideration would submit a new, essentially changed, draft law.

The Constitutional Court held that, in view of its content, Draft Law Amending Article 125 of the Constitution No. XP-799(2), which had been voted upon by the Seimas, differed in substance from Draft Law No. XP-799, which had been submitted by the group of 45 members of the Seimas, which initiated the amendment to Article 125 of the Constitution: although both draft laws in question sought the same objective, i.e. to create legal preconditions for adopting the currency of the Economic and Monetary Union of the European Union – the euro, the scope of the constitutional regulation proposed by Draft No. XP-799 was altered by Draft No. XP-799(2), which also contained the proposal for the alteration of a different provision of the Constitution as well as proposed the essentially different means to achieve the aforesaid objective if compared to Draft No. XP-799. In the light of the foregoing, the Constitutional Court recognised that the Law Amending Article 125 of the Constitution, in view of the manner of its adoption, was in conflict with Paragraph 1 of Article 147 of the Constitution.

At the same time, the Constitutional Court recognised that Article 170 (wording of 15 March 2012) of the Statute of the Seimas, establishing the peculiarities of the submission and consideration of draft laws amending the Constitution, as also being

in conflict with the aforesaid provision of the Constitution, insofar as that article did not prohibit the Committee on Legal Affairs of the Seimas from changing in substance any draft laws amending the Constitution that were submitted by the subjects specified in Paragraph 1 of Article 147 of the Constitution, as well as that it did not prohibit the submission of a text of a draft law amending the Constitution for the first voting where such a text was changed in substance, since such legal regulation would create, during the consideration of draft laws amending the Constitution in the Seimas, preconditions for the subjects not provided for in Paragraph 1 of Article 147 of the Constitution to submit to the Seimas such a draft law amending the Constitution that would differ in substance from the draft law submitted by the subjects provided for in Paragraph 1 of Article 147 of the Constitution.

The Constitutional Court held that the recognition of the Law Amending Article 125 of the Constitution as being in conflict with the Constitution does not mean that Article 125 of the Constitution in the wording valid prior to the entry into force of the said law enters into force; thus, it follows that the Constitution does not provide for the exclusive right of the Bank of Lithuania to issue currency.

In its ruling, the Constitutional Court noted that one of the areas where, under Article 1 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union", the Republic of Lithuania, as a Member State of the European Union, shares with and confers on the European Union the competences of its state institutions is the economic and monetary union, the currency of which is the euro. The constitutional imperative of the full participation of the Republic of Lithuania in the European Union implies the constitutional obligation of the Republic of Lithuania as a full member to participate in the integration of the member states into the economic and monetary union by adopting a common currency of this union – the euro – and conferring on the European Union the exclusive competence in the area of monetary policy; such a constitutional obligation of the State of Lithuania is concurrently an obligation arising from its membership in the European Union, which the State of Lithuania is obliged to fulfil while observing its geopolitical orientation consolidated in the Constitution and the constitutional principle of *pacta sunt servanda*. In order to implement the said obligation of the State of Lithuania,

the competence of the Bank of Lithuania in the area of monetary policy, *inter alia,* the issuing of currency, must be conferred on the European Central Bank. In view of this fact, the constitutional status of the Bank of Lithuania should be defined as that of the central bank of the Republic of Lithuania, part of the competence of which has been conferred on the European Central Bank, and which is a constituent part of the system of the European central banks. The legislature, when regulating the activity of the Bank of Lithuania, must pay heed to the constitutional status of the Bank of Lithuania as well as to the guarantees of the independence of the Bank of Lithuania and the Chairman of the Board of the Bank of Lithuania, which should also be applied in observance of the principle of *pacta sunt servanda*.

Ruling No. Kt11-N4/2014, Case No. 31/2011-40/2011-42/2011-46/2011-9/2012-25/2012 „On the Compliance of Certain Provisions of the Criminal Code of the Republic of Lithuania that are Related to Criminal Liability for Genocide with the Constitution of the Republic of Lithuania", 18 March 2014

Summary

In this case, subsequent to the petitions of a group of members of the Seimas, the Court of Appeal of Lithuania, the Panevėžys Regional Court, and the Kaunas Regional Court, the Constitutional Court investigated whether the provisions of the Criminal Code (hereinafter – the CC) regulating criminal liability for the crime of genocide were not in conflict with the Constitution.

The Constitutional Court recognised that Article 99 of the CC (wording of 26 September 2000), insofar as this article provided that actions are considered to constitute genocide if they are aimed at physically destroying, in whole or in part, persons belonging to any national, ethnical, racial, religious, social, or political group, was not in conflict with the Constitution.

The Constitutional Court noted that genocide is among the gravest international crimes: according to international law, the actions (e.g., killing, causing serious bodily or mental harm, deliberately inflicting on the relevant group of people the conditions of life calculated to bring about its physical destruction in whole or in

part) which are aimed at destroying, in whole or in part, any national, ethnic, racial, or religious group are considered to constitute genocide. Article 99 of the CC, when defining the crime of genocide, in addition to the protected national, ethnic, racial and religious groups, had also established the protected social and political groups, i.e. such two groups that are not provided for in the definition of the crime of genocide within the meaning of the universally recognised norms of international law. Having surveyed the main acts of international law of significance to the case, the Constitutional Court held that, in their national law, states enjoy certain discretion, in view of a concrete historical, political, social, and cultural context, to establish a broader definition of genocide than that established according to the universally recognised norms of international law, and, among other things, political and social groups can be included in the definition of genocide. The Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court, a party to which the Republic of Lithuania is, and which are universal international treaties that consolidate the universally recognised norms of international law on the grounds of which international crimes are defined, do not preclude the possibility of the establishing of a broader definition of genocide. The inclusion of social and political groups in the definition of genocide as formulated in Article 99 of the CC had been determined by the concrete international legal, historical, and political context – the international crimes committed by occupational totalitarian regimes in the Republic of Lithuania.

With consideration of such an international and historical context – the aforesaid ideology of the totalitarian communist regime of the USSR upon which the extermination of entire groups of people was grounded, the scale of repressions of the USSR against residents of the Republic of Lithuania, which was a part of the targeted policy of the extermination of the basis of Lithuania's political nation and of the targeted policy of the treatment of Lithuanians as an "unreliable" nation – the Constitutional Court's ruling noted that, during a certain period (in 1941, when mass deportations of Lithuanians to the Soviet Union began and non-judicial executions of detained persons were carried out, and in 1944–1953, when mass repressions were carried out during the guerrilla war against the occupation of the

Republic of Lithuania), the crimes perpetrated by the USSR occupation regime, in case of the proof of the existence of a special purpose aimed at destroying, in whole or in part, any national, ethnic, racial or religious group, might be assessed as genocide as defined according to the universally recognised norms of international law. The Constitutional Court held that under the said norms, actions may also be recognised as genocide if they are deliberate actions aimed at destroying certain political or social groups that constitute a significant part of a national, ethnical, racial, or religious group and the destruction of which would have an impact on the respective national, ethnical, racial, or religious group as a whole. Thus, the actions carried out during a certain period against certain political and social groups of the residents of the Republic of Lithuania might be considered to constitute genocide if such actions – provided this has been proved – were aimed at destroying the groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation. In case of the absence of any proof of such an aim, in its turn it should not mean that, for their actions against residents of Lithuania (e.g., their killing, torturing, deportation, forced recruitment to the armed forces of an occupying state, persecution for political, national, or religious reasons), respective persons should not be punished according to laws of the Republic of Lithuania and universally recognised norms of international law. In view of concrete circumstances, one should assess whether those actions entail crimes against humanity or war crimes.

The provision of Article 95 of the CC to the effect that the statutory limitations on a judgement of conviction (a period established by a criminal law, where, after this period has been lapsed, a person who has committed a criminal act may not be subject to a judgement of conviction) do not apply for the actions, provided for in Article 99 of the CC, against the persons belonging to social or political groups, was recognised as being in compliance with the Constitution, too. The Constitutional Court noted that, under the Constitution, the legislature may established such a legal regulation to the effect that no time limits are applied as regards criminal liability for the gravest crimes. Under the universally recognised norms of international law, no statutory limitation, also, no statute of limitations

for delivering a judgement of conviction, applies to the crime of genocide as defined under the Convention on the Prevention and Punishment of the Crime of Genocide and other international legal acts (i.e. the crime of genocide aimed exclusively at national, ethnical, racial, or religious groups); on the other hand, this does not preclude from establishing, in national law, other crimes, inter alia, the crime of genocide aimed against social or political groups, that would be subject to no statute of limitations. The Constitutional Court emphasised that the crime of genocide constitutes particularly grave criminal actions committed against certain groups of people (killing members of certain groups, causing serious bodily or mental harm to members of these groups, deliberately inflicting on these groups the conditions of life calculated to bring about their physical destruction in whole or in part, etc.).

The Constitutional Court recognised that the regulation, established in Paragraph 3 (wordings of 26 September 2000 and 22 March 2011) of Article 3 of the CC, to the effect that a person may be brought to trial under Article 99 of the CC for the actions that had been aimed at physically destroying, in whole or in part, the persons belonging to any social or political group, where such actions had been committed prior to the time when liability was established in the Criminal Code for the genocide of persons belonging to any social or political group, was in conflict with the Constitution. The Constitutional Court noted that, according to the universally recognised norms of international law, national laws establishing criminal liability for crimes recognised under international law or the general principles of law may have a retroactive effect, however, this is not applied for the crimes defined according to national law. Thus, in view of Paragraph 1 of Article 135 of the Constitution that obliges the Republic of Lithuania to fulfil, in good faith, its international obligations arising under the universally recognised norms of international law, only the criminal laws that provide for liability for the genocide within the definition of the universally recognised international laws (i.e., the genocide against national, ethnic, racial or religious groups) may have a retroactive effect. Such a method would be the only one heeding the requirement, stemming from the Constitution, that the criminal laws of the Republic of Lithuania related to liability for international crimes not establish any such standards that would be lower than those established under the

universally recognised norms of international law. This requirement and thus also the principle of *nullum crimen, nulla poena sine lege* (no crime and no punishment without a previous law), which is consolidated in Paragraph 4 of Article 31 of the Constitution and stems from the constitutional principle of a state under the rule of law, would be disregarded if criminal laws provided that they have a retroactive effect on the crimes as defined exclusively under national law. The Constitutional Court recognised that the regulation, established in Paragraph 3 of Article 3 of the CC, to the effect that a person may be brought to trial under Article 99 of the CC for the actions that had been aimed at physically destroying, in whole or in part, the persons belonging to any social or political group, where such actions had been committed prior to the time when liability was established in the Criminal Code for the genocide of persons belonging to any social or political group, had disregarded Paragraph 4 of Article 31 of the Constitution, according to which, punishment may be imposed or applied only on the grounds established by law, and had disregarded the constitutional principle of a state under the rule of law.

The Constitutional Court noted that, under the universally recognised norms of international law, the exception to the principle of *nullum crimen, nulla poena sine lege* is also applicable to the deliberate actions that are considered to constitute genocide, i.e. the deliberate actions aimed at destroying a significant part of any national, ethnical, racial, or religious group that would have an impact on the survival of the whole respective group, comprising certain social or political groups. This exception should also be applied for crimes against humanity and war crimes that may be directed against certain social or political groups of people (i.e. groups not included in the list of protected groups in the definition of genocide as established under the universally recognised norms of international law).

CASE-LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF MOLDOVA

1. Rights and freedoms of persons with mental disabilities[1]

According to the challenged provisions of Article 24 of the Civil Code, a person who, following a psychiatric disorder (mental illness or mental disability) cannot acknowledge or direct his/her actions can be declared incapable by the court, and guardianship shall be established in this respect *(JCC no. 33 of 17.11.2016, § 102).*

The Court noted that human dignity can be seen from two perspectives: first – as an inherent and inalienable value, and secondly – as a "right of the personality", which includes the values of psychological life of every human being, thus determining the position of the latter in the society and imposing due respect for each person. This "right of the personality" conditions the existence of minimum guarantees for every person to enjoy the opportunity to act freely within the society and to fully develop their personality in a social and cultural environment *(JCC no. 33 of 17.11.2016, §104).*

According to international acts, respect for human dignity, individual autonomy, including the right to make personal choices, as well as respect for the person's independence are fundamental principles *(JCC no. 33 of 17.11.2016, § 105).*

The aforementioned principles are the key elements defining the concept of legal capacity *(JCC no. 33 of 17.11.2016, § 106).*

The Civil Code of the Republic of Moldova recognizes the legal capacity of all persons. Thus, any person has the standing capacity and, except as provided by law, legal capacity. Also, the Civil Code stipulates that no one may be restricted in his/her standing capacity or deprived, in whole or in part, of legal capacity, except for the cases expressly provided by the law *(JCC no. 33 of 17.11.2016, § 107).*

In the light of the provisions of the UN Convention on the Rights of Persons with Disabilities, despite the fact that people with mental disabilities have the right

[1] Judgment no. 33 of 17.11.2016 on the control of constitutionality of certain provisions of the Civil Code and Civil Procedure Code of the Republic of Moldova (*legal capacity of persons with mental disabilities*).

to recognition irrespective of they place, of their legal capacity, it is possible to apply particular safeguarding measures which shall be adapted to the particular situation of that person (art. 12 par. (4)) *(JCC no. 33 of 17.11.2016, § 108).*

Thus, the Court held that guardianship can be established when the restrictions involved are proportionate to the level of disability of the person with mental disorders and only for a definite period of time, with subsequent assessment of the need to maintain this measure by the competent authority having established it *(JCC no. 33 of 17.11.2016, § 109).*

With reference to the proportionality of the protection measures, the European Court, in its case law stressed that strict scrutiny is called for where measures that have such adverse effect on a person's personal autonomy are at stake and that consideration of alternative measures while depriving a person from legal capacity is a factor to be taken into account when considering the proportionality of such measures (*M.S. v. Croatia*, no. 36337/10, 25 April 2013, § 97) *(JCC no. 33 of 17.11.2016, § 111).*

The European Court held that deprivation of legal capacity should be a measure of last resort, applied only where the national authorities, after carrying out a careful consideration of possible alternatives, have concluded that no other, less restrictive, measure would serve the purpose or where other, less restrictive measure, have been unsuccessfully attempted. (*Ivinović v. Croatia* no. 13006/13, 8 September 2014, § 44) *(JCC no. 33 of 17.11.2016, § 112).*

Also, the European Court established in its case law the need for a "customized solution" in cases of declaration of incapacitation of individuals. In the case *Shtukaturov v. Russia*, the European Court ruled that national law of the defendant state provided full capacity and full incapacity of adults with mental disorders, but it did not provide for any "borderline" situation, such as partial deprivation of legal capacity, other than for drug or alcohol addicts. Therefore, the European Court found that the national legislation in this case does not provide a "customized solution" for adults with mental disorders by the fact that existing legislation at the time did not did not give the judges another choice but to fully deprive the person of legal capacity or to declare it as incapable (see *Shtukaturov*, no. 44009/05, judgment of 27 March 2008, § 95) *(JCC no. 33 of 17.11.2016, § 113).*

The Court held that the **protection measure for the persons with mental disorders should be flexible and provide a suitable solution for each situation or degree of disability.** Moreover, such a measure should not automatically involve full deprivation of a person with mental disorders of legal capacity *(JCC no. 33 of 17.11.2016, § 114).*

Therefore, in respect of aforementioned persons it is **necessary to establish alternative and provisional safeguarding measures** *(JCC no. 33 of 17.11.2016, § 115).*

The Court held that guardianship, as special measure for the protection of persons with mental disorders, **shall apply only in respect of those persons who cannot fully acknowledge or conduct their actions.** This security measure shall be established as a last resort, following the exhaustion of other less restrictive measures, the fact being ascertained by the courts while examining the application for declaration of incapacitation and subsequent assessment of the necessity to maintain the state of incapacity and only to the extent that it does not fully deprive the person of the right to enter into minor legal acts or to carry out other activities that are inherent to his/her personality *(JCC no. 33 of 17.11.2016, § 118).*

Moreover, when establishing the guardianship, the legal representative must take into account the preferences of the person *(JCC no. 33 of 17.11.2016, § 119).*

The Court has emphasized that guardianship in itself is not unconstitutional, but in order to be compatible with the Constitution it shall be interpreted in the meaning that the declaration of legal incapacity targets only people fully lacking discernment and in respect of which the application of other less restrictive protection measures proves to be ineffective. *(JCC no. 33 of 17.11.2016, § 120).*

2. Recourse action against judges[1]

Article 27 of the Law on Governmental Agent no. 151 of 30 July 2015 establishes the right of recourse of the State against individuals whose actions or inactions determined or significantly contributed to the violation of the European Convention.

[1] Judgment no. 23 of 25.07.2016 on the exception of unconstitutionality of Article 27 of the Law no. 151 of 30 July 2015 on the Governmental Agent (*recourse action*).

Moreover, according to the challenged legal provision, the amounts awarded by the European Court in a judgment or decision, by friendly settlement agreement in a case pending before the European Court or by unilateral declaration, shall be returned by judicial decision, proportionally to the degree of guilt. *(JCC no. 23 of 25.07.2016, § 77).*

The Court found that, under the challenged law, it is possible for the state to initiate recourse action solely on the basis of a judgment or decision of the European Court. This rule does not require the existence of a court ruling, adopted within separate trial proceedings by which the culpability of the person is ascertained. Moreover, the challenged legal provisions fails to indicate which particular actions or inactions in respect of which the persons concerned might be held materially liable, the only criterion being the existence of the damage covered by the state following a violation of the European Convention *(JCC no. 23 of 25.07.2016, § 81).*

At the same time, the Court found that the mechanism for the recourse action initiated by the state for illegal actions of the investigation bodies, of the prosecution or of the courts is provided in Article 1415 of the Civil Code. The aforementioned rule provides that the state **in case of rendering compensations in respect of damages caused by certain actions** of the investigation bodies, of the prosecution or of the courts is entitled to initiate recourse against the person holding leading position within the aforementioned bodies **if the guilt thereof is ascertained by a court sentence**. Article 1405 of the Civil Code lays down exhaustively the list of actions by of the investigation bodies, of the prosecution or of the courts which entail the liability of the state, i.e. illegal conviction, illegal criminal prosecution, illegal application of preventive measures in the form of preventive custody or the affidavit not to leave the locality, illegal application of arrest or community service work as administrative sanction *(JCC no. 23 of 25.07.2016, § 82).*

Thus, according to the aforementioned provisions, the state is entitled to initiate recourse actions against a person holding leading positions within the investigation bodies, the prosecution bodies or within courts only if there exists a court sentence finding the culpability of the person for committing the actions clearly established by the law and in respect of which the state has repaired the incurred prejudices *(JCC no. 23 of 25.07.2016, § 83).*

Based on the above, the Court held that the provision of Article 27 of the Law on the Governmental Agent, as opposed to Article 1415 of the Civil Code, fails to require the necessity to ascertain the element of guilt by a court decision, and thus making possible the initiation of a recourse action by the state on the mere grounds of existence of a judgment or decision by the European Court *(JCC no. 23 of 25.07.2016, § 84).*

The Court noted that, in accordance with European standards in this field, accountability of judges cannot result only from the findings of the European Court by which it stated a violation of the Convention. In this regard, the Venice Commission in *Amicus Curiae* Opinion of 13 June 2016 stated that:

> "41. The ECHR only establishes the liability of the defendant State. It cannot reasonably be said or presumed that the primary focus of the ECtHR's jurisprudential role in dealing with the case of any applicant before it would be to assess, quantifyand review the nature or degree of guilt (criminal abuse or criminal intention or gross negligence) on the part of each of those judges whose decisions in the national courtswas brought before the ECtHR. That has to be the object of a different, internal judicial procedure.
>
> 42. It must be remembered that the matter which is before the ECtHR is not the prosecution of the judges involved in the case at the national level. Therefore, even following any determination of that Court in the applicants favour (including the finding of a violation) would not of itself meet the standard required for determining the individual's criminal culpability, as the case is not procedurally framed as a prosecution of the wrongdoing of the individual or judge. *(JCC no. 23 of 07.25.2016, § 85)"*

Based on the case law of the European Court the idea emerges that the reason for finding of judicial errors does not reside in the civil, criminal or disciplinary liability of a judge, rather in granting to the aggrieved person the right to corresponding compensation. In particular, the Court paid particular importance to whether judicial error committed by lower courts, i.e. the mistakes related to the administration of justice, can be neutralized or corrected in a different manner (see *Giuran v. Romania*, 21 June 2011, §§ 32, 40). Thus, the proceedings before the European Court do not seek to determine the level of guilt (criminal abuse or gross negligence) of judges whose decisions adopted at national level led to subsequent examination of applications by the European Court *(JCC no. 23 of 25.07.2016, § 86).*

With respect to the friendly settlement of a case pending before the European Court, under Article 39 of the European Convention, and a unilateral declaration of the state by which it acknowledges a violation of the European Convention, the Venice Commission stressed in its *Amicus Curiae* Opinion that these proceedings before the European Court may be motivated by political considerations more than legal ones. Thus, in terms of Article 27 of the Law on the Governmental Agent, judges are not only vulnerable to external influence by the government, but may also **become liable for reasons beyond the exercise of their judicial function** *(JCC no. 23 of 25.07.2016 § 87).*

The Court pointed out that judges **cannot be compelled to perform their duties being threatened with sanctioning, which may negatively influence the decisions that are to be taken**. As a matter of fact, while exercising their duties, judges should have unlimited freedom to decide the cases on an impartial manner, in accordance with the current legal provisions and guided by their own assessments, unaffected of bad faith. For these reasons, the judge's findings that led to the adoption of a decision in a particular case, which consequently has been repealed or amended, cannot serve as a reasonable ground for material sanctioning of a judge *(JCC no. 23 of 25.07.2016, § 94).*

To this end the Court emphasized that institution of regress actions in itself is not contrary to constitutional principles, as long as the mechanism of holding judges materially liable provides the guarantees which are inherent for judicial independence *(JCC no. 23 of 25.07.2016, § 102).*

At the same time, the enjoyment by the state of the right to recourse action in terms of art. 27 of the Law on the Governmental Agent, based solely on the judgment of the European Court, on the friendly settlement agreement or on the unilateral declaration by the Government by which it acknowledges the violation of the European Convention, lacking the finding of the judge's guilt by a court sentence adopted within separate judicial proceedings is negatively influencing the independence of the entire judiciary system, and thus is contrary to Articles 6 and 116 para. (1) and (6) of the Constitution *(JCC no. 23 of 25.07.2016, § 103).*

3. Extended confiscation of assets – an instrument to fight against organized crime and corruption[1]

The Court held that in order to discourage organised crime, it is essential to punish the offenders by seizing the object of crime. In this sense, the confiscation and recovery of assets obtained from criminal activities represent an efficient way to fight against organised crime *(JCC No. 6 of 16.04.2015, § 56).*

The confiscation impedes the use of assets of criminals as funding sources for other criminal activities, removing the danger to corrupt the society *(JCC No. 6 of 16.04.2015, § 57).*

The Court held that the *confiscation measure* is constitutionally regulated only when offences or contraventions are committed, i.e. in established situations in accordance with the law as representing the facts with a certain level of social danger *(JCC No. 6 of 16.04.2015, § 65).*

Having examined the criminal law, the Court established that *'extended confiscation of property',* as a safety measure, and the crime of illicit enrichment were introduced in the Criminal Code by the Law no. 326 of 23 December 2013 (Art. 106/1 of the Criminal Code) *(JCC No. 6 of 16.04.2015, § 66).*

The Court mentioned that while *special confiscation* represents forced or voluntary transfer of assets into state's property (including currency) used to commit crimes or that resulted from criminal activity, then the *extended confiscation* is applied to other assets, which, although not used in committing crimes, originated from criminal activities *(JCC No. 6 of 16.04.2015, § 67).*

The Court noted that, according to Art. 1061 para. (2) of the Criminal Code, extended confiscation is ordered, if the following conditions are met cumulatively: *a) value of assets obtained by the person convicted during 5 years before and after committing the crime before the date when the sentence was adopted, significantly exceeds his/her illicit income*; *b) the court establishes based on evidence that the respective assets result from criminal activities described*

[1] Judgement of the Constitutional Court No. 6 of 16.04.2015 on constitutional review of some provisions of the Criminal Code and Criminal Procedure Code (extended confiscation and illicit enrichment).

in para. (1) (JCC No. 6 of 16.04.2015, § 70).

According to provisions set forth, criminal origin of assets should *be established by the court based on submitted evidence (JCC No. 6 of 16.04.2015, § 71).*

Regarding the possibility of confiscating the assets transferred by convicted person or a third person to a family member, a company under the control of convicted person or other persons who knew or know about illicit origin of assets, the Court mentioned that according to Art. 5 para. (24) of the *Directive 2014/42/EU:*

> „(24) [...] Such confiscation should be possible at least in cases where third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value. The rules on third party confiscation should extend to both natural and legal persons. In any event the rights of bona fide third parties should not be prejudiced" (JCC No. 6 of 16.04.2015, § 73).

The Court concluded that the challenged rule does not represent an interference in the right to private property, in accordance with Art. 46 of the Constitution, and does not affect the principle of presumption of innocence as component part of the right to fair trial, to the extent to which the presumption of illicit enrichment is challenged by the evidence provided by the state authorities *(JCC No. 6 of 16.04.2015, § 74).*

As for the enforcement manner of the examined rule, according to Article 1061 para. (2) let. a) of the Criminal Code, extended confiscation is ordered only if the value of assets acquired by the convicted person 5 years before and after the offence, before the adoption of the sentence substantially exceeds the revenues from illicit enrichment *(JCC No. 6 of 16.04.2015, § 75).*

Setting the 5-year term has the goal to avoid abuses and divergences of interpretation of the period when the court has to consider it to establish the existence of a disproportion between the assets acquired by a convicted person and illicit revenues obtained by this person *(JCC No. 6 of 16.04.2015, § 76).*

At the same time, the Court held that the Law No. 326 of 23 December 2013 that regulated the institution of extended confiscation of property was published in

the Official Gazette of the Republic of Moldova on 25 February 2014, when it has entered into force *(JCC No. 6 of 16.04.2015, § 77)*.

The Court mentioned that according to Article 22 of the Constitution, no one shall be sentenced for actions or drawbacks which did not constitute an offence at the time they were committed. No punishment more severe than that applicable at the time when the offence was committed shall be imposed. This principle proceeds from the principle of legality that represents a value of the rule of law *(JCC No. 6 of 16.04.2015, § 78)*.

In this context, the Court underlined that the principle *lex retro not agit* is applied in criminal matters, according to which the law cannot be retroactive, and the principle *mitior lex*, according to which, more favourable criminal norm will be applied in situations determined by the succession of criminal law *(JCC No. 6 of 16.04.2015, § 79)*.

Respectively, the Court underlined that the provisions of Art. 106/1 of the Criminal Code cannot be applied retroactively regarding the confiscation of assets acquired before the date of its entering into force. Ordering the extended confiscation measure on assets acquired before the date the law entered into force violates the constitutional principle of non-retroactivity. Thus, based on the non-retroactivity of the criminal law principle, only the assets acquired after the date of entry into force (25 February 2014) may be confiscated *(JCC No. 6 of 16.04.2015, § 83)*.

4. Right to silence – component of the right of defense[1]

The Court noted that the right to silence is a part of the right to defense, as an element of a fair trial (*JCC no. 28 of 18.11.2014, § 33*).

However, according to the case-law of the European Court, "the right to silence is not absolute" (Weh vs. Austria, 8 July 2004) (*JCC no. 28 of 18.11.2014, § 37*).

The Court held that in order to ensure traffic safety and protection, the legislator has inserted in the Contravention Code the responsibility for committing illegal acts, relevant to road traffic (*JCC no. 28 of 18.11.2014, § 41*).

[1] Judgment no. 28 of 18.11.2014 on the control of constitutionality of Art. 234 of Contravention Code of the Republic of Moldova (administrative sanctions against the owner of the vehicle for nondisclosure of the identity of the person entrusted with driving the vehicle.

The Court noted that, according to the Law no.131 of 7 June 2007 on road safety, vehicle owners have the right to grant, as established, to other persons possessing driving license, the right to drive and use the vehicle (art. 23 para.(2) b)) (*JCC no. 28 of 18.11.2014, § 42*).

Concurrently, art. 23 para.(1) of the Law stipulates that the vehicle owner shall, at the request of the police and within the specified deadline, disclose the identity of the person, entrusted to drive the vehicle on public roads (*JCC no. 28 of 18.11.2014, § 43*).

The Court noted that failure of the owner or trustee (user) of the vehicle to disclose, at the request of the police, the identity of the person entrusted to drive the vehicle, constitutes an offense (art.234 of the Contravention Code). Communication of knowingly false information regarding the identity of that person is also subject to contravention penalty (*JCC no. 28 of 18.11.2014, § 44*).

The Court found that road safety is of particular importance for society. Hence, road safety is a positive obligation of the state. As a road user, the vehicle is a source of increased danger to others, and the driver is obliged to comply with certain regulations imposed by the authorities, in order to avoid the risks associated with its use. The vehicle owner is responsible for the damage resulted from using the vehicle he possesses (*JCC no. 28 of 18.11.2014, § 45*).

The Court noted that the legislator in the process of regulation of property relations on vehicle and road safety, is entitled to set certain requirements regarding the vehicle owner, including the possible responsibility (*JCC no. 28 of 18.11.2014, § 46*).

The Court held that a person, when enjoying the right of non-disclose of personal data of his family members and close relatives, as the owner, cannot shirk the responsibility clearly defined by law (*JCC no. 28 of 18.11.2014, § 47*).

Therefore, the major social importance of road safety may impose responsibilities towards citizens, such as to inform the police of the person entrusted with driving the vehicle, in order to protect the road users from accidents and negative consequences, and create legal conditions for bringing to justice those who violate traffic rules (*JCC no. 28 of 18.11.2014, § 52*).

The Court found that there is no less restrictive measure to ensure the road safety, so the establishment of such a liability is proportionate to the aim pursued, and the consolidation of such responsibilities is not excessive (*JCC no. 28 of 18.11.2014, § 53*).

The Court noted that imposition of administrative sanctions against a vehicle owner or his representative occurs in case they refuse to disclose the authorities the identity data of the person entrusted with driving the vehicle, and only if the vehicle concerned committed an offense or violation (*JCC no. 28 of 18.11.2014, § 54*).

The Court therefore held that the owner is guaranteed the right provided for in art. 377 of the Contravention Code, and namely the right not to testify against himself or close relatives, in respect of the substance of the possible offense or violation involving the vehicle (*JCC no. 28 of 18.11.2014, § 55*).

At the same time, the Court emphasized that the mere obligation of the owner or trustee to disclose the identity data of the person driving the vehicle cannot lead to the incrimination of other subsequent offenses, law enforcement bodies being responsible of proving any violation of the law (*JCC no. 28 of 18.11.2014, § 56*).

In light of the above, the Court noted that administrative sanctions against the vehicle owner or his trustee in case any of them refuses to disclose the identity of the person he entrusted the vehicle to, is not a violation of Articles 21 and 26 para.(1) of the Constitution (*JCC no. 28 of 18.11.2014, § 58*).

CASE-LAW OF THE CONSTITUTIONAL COURT OF UKRAINE

Summary to the Decision of the Constitution Court of Ukraine No. 11-rp/1999 dated December 12, 1999 in the case upon the constitutional petition of 51 People's Deputies of Ukraine on conformity to the Constitution of Ukraine (constitutionality) of the provisions of Articles 24, 58, 59, 60, 93, 190-1 of the Criminal Code of Ukraine in the part that stipulates death penalty as a type of punishment (case on death penalty)

Subject of the right to constitutional petition – People's Deputies of Ukraine – applied to the Constitutional Court of Ukraine with a petition to examine the constitutionality of the provisions of Article 24 of the Criminal Code of Ukraine on death penalty as the exceptional measure applied in cases of commitment grave offences which are stipulated in Special Part of the Code. The subject affirms that the right to life provided by the Constitution of Ukraine is absolute, and, while interpreting the Basic Law, a profound and clearly outlined respect to the value of human life, integral and inalienable human right to life as one of the fundamental principles of building a democratic society ruled by law should be taken into consideration. Therefore, in the context of the Constitution, imposition of death penalty as the exceptional measure should be regarded as a "arbitrary deprivation of a human being's right to life".

The Constitution of Ukraine defines a human being, his/her life and health, honour and dignity, immunity and safety as the highest social value (Article 3.1), and establishment and protection of human rights and freedoms is the main duty of the state (Article 3.2).

The constitutional key provision in recognising human right to life is the provision stipulating this right as an integral (Article 27.2), inalienable and inviolable (Article 21). The right to life belongs to human being from birth and is protected by the state.

The Constitution of Ukraine declares that the constitutional rights and freedoms, in particular the right to life, are guaranteed and may not be cancelled (Article 22.2), and that it is prohibited to introduce any changes or alternations to the Constitution

of such changes or alternations envisage cancellation of rights and liberties of human being and citizen (Article 157.1). It is prohibited to diminish the scope and contents of existing rights and freedoms including an integral human right to life in the adoption of new laws or in the amendment of laws that are in force (Article 22.3).

By their contents, provisions of Article 22.2 of the Constitution of Ukraine stipulate the duty of the state to guarantee constitutional rights and freedoms, the right to life in the first place, on the one hand, and, on the other hand, the duty to refrain from adoption of any acts whatsoever, which may entail consequent cancellation of constitutional rights and freedoms including the right to life. Deprivation of a human being of life by the state through execution as a mesure even within the provisions stipulated by law is regarded as cancellation of the integral right to life and thus incompliant with the Constitution.

Every person has the right to free development of his/her personality not violating rights and freedoms of other people. Constitution of Ukraine attributing an integral right to life to each human being (Article 27.1) and guarantying protection of this right from cancellation, at the same time establishes provision that each person has the right to defend his/her life and health, lives and health of other people from illegal encroachments (Article 27.3). The Criminal Code of Ukraine has established provisions related to acts of a person in the situation of necessary self-defense in order to protect his/her life and health, lives and health of other persons if dictated by urgent necessity to prevent or terminate socially dangerous encroachments.

Constitutional support of an integral right to life attributable to each person as well as other rights and freedoms of a person and a citizen in Ukraine is based on the following fundamental principle: all exceptions related to rights and freedoms of human being and citizen shall be established by the Constitution of Ukraine itself rather than by laws or other normative acts. In accordance with Article 64.1 of the Constitution of Ukraine "Constitutional human and citizen's rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine".

The Constitution does not contain any provision whatsoever related to a possibility to engage death penalty as an exception from provisions of the Constitution covering an integral right to life attributable to each person.

Disclosing the contents of the integral right to life attributable to each person, we should consider inconsistency of death penalty with the purposes of punishment as well as possibility of judicial error, when execution of the verdict of death penalty disables improvement of such error and its effects. This does not comply with constitutional guarantees of protection of human and citizen rights and freedoms (Article 58 of the Constitution of Ukraine).

Death penalty as a punishment also contradicts Article 28 of the Constitution of Ukraine stipulating that "nobody may be exposed to tortures and cruel and inhuman treatment or disgraceful punishment". This article reflects provisions of Article 3 of the Convention on protection of human rights and fundamental freedoms.

Thus, the Constitutional Court of Ukraine held that inalienable right of each person to life is an integral part of the person's right to human dignity. As fundamental rights of person, they predetermine possibility of realisation of other rights and freedoms of persons and citizen; they may neither be restricted nor cancelled. Provisions of articles of the Criminal Code of Ukraine, which envisage the death penalty as a type of punishment do not comply with the Constitution of Ukraine (are unconstitutional).

Summary to the Decision of the Constitutional Court of Ukraine No. 17- rp/2010 dated June 29, 2010 in the case upon the constitutional petition of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine on conformity with the Constitution of Ukraine (constitutionality) of paragraph 8 of Article 11.1.5 of the Law of Ukraine "On Militia"

Subject of the right to constitutional petition – the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine – applied to the Constitutional Court with a petition to recognise as unconstitutional the provisions of paragraph 8 of Article 11.1.5 of the Law "On Militia" No. 565-XII dated December 20, 1990 as amended (hereinafter referred to as "the Law") according to which militia has a right to arrest people suspected of vagrancy and to detain them in specially designated premises – for the period up to 30 days under the substantiated court decision.

Ukraine is a democratic, law-based state; the human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as

the highest social value; human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State which is answerable to the individual for its activity; affirmation and ensuring of human rights and freedoms is the main duty of the State (Articles 1, 3.1, 3.2 of the Constitution).

The principle of the rule of law is recognised and effective in Ukraine (Article 8.1 of the Fundamental Law).

One of the elements of the rule of law is the principle of legal certainty which states that restriction of the fundamental human and citizens rights and implementation of these restrictions are acceptable only on condition of ensuring predictability of application of the legal norms established by these restrictions. In other words, restriction of any right should be based on the criteria which provide a person the possibility to distinguish lawful behaviour from unlawful behavior, and to foresee legal consequences of his/her behavior.

Pursuant to Article 29 of the Constitution every person has the right to freedom and personal inviolability (Article 29.1), no one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law (Article 29.2), in the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours (Article 29.3).

The provisions of Article 29 of the Constitution define detention, arrest and holding in custody as enforcement measures which restrict the right to freedom and personal inviolability of a person and can be applied only on the grounds and in accordance with the procedure established by law.

The Constitutional Court deems that the word combination "only on the grounds and in accordance with the procedure established by law" envisages the obligation of the state bodies and their officials to ensure observance of norms of both material and procedural law during arrest.

The above-mentioned means that a detained person has a right for the competent court to check not only observance of norms of procedural law by the state bodies and their officials which were the grounds for arrest, but arguments for suspicion

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which were the grounds for arrest, lawfulness of the object-matter of its enforcement and whether it was necessary and justified under particular circumstances.

Arrest shall not be recognised as well-founded in any case if deeds, which are incriminated to a detainee, could not be qualified or were not considered by law as violation of law at the time of their execution.

The disputed provision of the Law provide police with a right to arrest people who are suspected of vagrancy and to detain them in specially designated premises – for the period up to 30 days under the court decision.

This norm means that the objective of such an arrest is to ascertain involvement of a person in vagrancy, i.e. committing of crime or other violation of law. This right was conditioned on criminal responsibility for such deeds envisaged by Article 214 of the Criminal Code in its wording as of 1960. However, components of crime defined by this article were decriminalised by the Law "On Introducing Amendments and Supplements to the Criminal Code of Ukraine, Criminal Procedural Code of the Ukrainian SSR and the Code of the Ukrainian SSR on Administrative Offences" No. 2547-XII dated July 7, 1992.

According to Article 92.1.22 of the Constitution the principles of civil legal liability acts that are crimes, administrative or disciplinary offences, and liability for them shall be determined exclusively by the laws of Ukraine.

The Criminal Code envisages that criminality of acts, as well as their punishment and other criminal legal consequences are determined exclusively by this code (Article 3.3). However, the system analysis of the norms of this code testifies that vagrancy is not indicated in it as an action injurious to the public and responsibility for its perpetration is not provided.

Neither the Code of Administrative Offences nor other laws provide the definition of vagrancy as a violation of law either.

The disputed provision of the Law establishes only the grounds for arrest. The Law does not envisage the content, signs of vagrancy and the procedure which is accessible enough, clearly-worded and provided in its enforcement, i.e. the procedure which would enable to prevent the risk of willful arrest of any person on suspicion of vagrancy while this does not conform to the principle of legal certainty.

The system analysis of the norms of the Criminal Procedural Code, specifically Articles 106, 115, 149, 165[2], and the Code of Administrative Offences (Articles 260, 261, 262 etc.) taking into consideration that vagrancy is not determined by laws as a crime or administrative offence gives grounds to conclude that these norms do not envisage the procedure and the order of consideration by courts of issues concerning arrest of a person on suspicion of vagrancy.

With regard to the above-mentioned, the Constitutional Court considers the that provisions of paragraph 8 of Article 11.1.5 of the Law do not conform to Articles 8.1, 29.1, 29.2, 29.3, 55.2, 58.2 of the Fundamental Law.

Pursuant to the Constitution everyone who is legally present on the territory of Ukraine is guaranteed freedom of movement, free choice of place of residence, and the right to freely leave the territory of Ukraine, with the exception of restrictions established by law (Article 33.1).

Provisions of the Constitution of Ukraine and international legal acts found their further development and specification in the Law "On Freedom of Movement and Free Choice of Place of Residence in Ukraine" No. 1382-VI dated December 11, 2003 (hereinafter referred to as "the Law No. 1382"). In particular, Article 2 of the Law No. 1382 envisages guarantee of freedom of movement and free choice of place of residence, and Articles 12, 13 define people whose freedom of movement and free choice of place of residence are limited.

The above-mentioned articles of the Law No. 1382 do not envisage restriction of the right to freedom of movement and free choice of place of residence of a person on suspicion of vagrancy.

Given the above, the Constitutional Court deems that provisions of paragraph 8 of Article 11.1.5 of the Law do not conform to Article 33.1 of the Constitution.

Examining the issue raised in the constitutional petition the Constitutional Court identified – on the mentioned grounds – non-conformity of the provisions of Article 11.1.11 of the Law on the right of police to take photographs, to conduct sound recording, filming and video recording, fingerprint identification of people who are arrested on suspicion of vagrancy to the Constitution which is the reason for considering it unconstitutional according to Article 61.3 of the Law of Ukraine "On the Constitutional Court of Ukraine".

Thus, the Constitutional Court of Ukraine held:

1. To recognise as non-conforming with the Constitution of Ukraine (unconstitutional) the provisions of Article 11.1 of the Law "On Militia" No. 565-XII dated December 20, 1990 as amended, in particular:

- paragraph 8 of Article 11.1.5 according to which militia has a right to arrest people who are suspected of vagrancy and to detain them in specially designated premises – for the period up to 30 days under the court decision;
- Article 11.1.11 in part of the right of militia to take photographs, to conduct sound recording, filming and video recording, fingerprint identification of people who are arrested on suspicion of vagrancy.

2. The provisions of paragraph 8 of Article 11.1.5 and Article 11.1.11 of the Law "On Militia" recognised unconstitutional lose their legal effect from the day the Constitutional Court adopts this Decision.

References:

Judgments of the European Court of Human Rights:
"Yeloyev v. Ukraine" (06.11.08);
"Novik v. Ukraine" (18.12.08);
"Soldatenko v. Ukraine" (23.10.08);
"Nikolay Kucherenko v. Ukraine" (19.02.09).

Summary to the Decision of the Constitutional Court of Ukraine No. 20-rp/2011 dated December 26, 2011 in the case upon the constitutional petitions of 49 People's Deputies of Ukraine, 53 People's Deputies of Ukraine and 56 People's Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of item 4 of Chapter VII "Transitional Provisions" of the Law of Ukraine "On the State Budget of Ukraine for 2011"

Subject of the right to constitutional petition – 49 People's Deputies of Ukraine, 53 People's Deputies of Ukraine and 56 People's Deputies of Ukraine – applied to the Constitutional Court of Ukraine with a petition to recognise item 4 of Chapter VII "Transitional Provisions" of the Law of Ukraine "On the State Budget of Ukraine

for 2011" (hereinafter referred to as "the Law") as non-conforming with Articles 1, 3, 6, 8, 16, 17.5, 19.2, 21, 22, 43.1, 46, 48, 58, 64, 75, 85.1.3, 92.1.1, 92.1.6, 92.2.1, 95.1, 95.2, 95.3, 116, 117 of the Constitution of Ukraine (unconstitutional).

The People's Deputies of Ukraine stated that by this Law the Verkhovna Rada of Ukraine vested the Cabinet of Ministers of Ukraine with the right to establish the procedure and amount of social benefits, envisaged by the laws, and to change the volume of social benefits depending on the available financial resources of the Budget of the State Pension Fund of Ukraine for 2011, and by doing so the Parliament restricted the constitutional right of citizens to social protection.

The authors of the petitions also stated that the subject matter of the regulation of a law on the State Budget of Ukraine is an exhaustive list of legal relationships determined by the Constitution of Ukraine and the Budget Code of Ukraine, and decisions regarding specific features of application of other effective laws are not included therein.

The Constitution of Ukraine determines the guarantees for social protection, in particular, legal securing of the fundamentals of social protection, forms and types of pension provision (Article 92.1.6), determining sources of the state social security (Article 46.2), control over the use of funds of the State Budget of Ukraine (Article 98).

The volume of the social provision depends on the social and economic possibilities of the State, however they should secure the constitutional right of everyone to a sufficient standard of living sufficient for an individual and his or her family which is guaranteed by Article 48 of the Constitution of Ukraine.

The Constitutional Court of Ukraine takes into consideration the provisions of international law acts. Pursuant to Article 22 of the Universal Declaration of Human Rights the amount of social security benefits is established with account of financial resources of each State. The European Court of Human Rights in its Judgment of October 9, 1979 in the case "Airey v. Ireland" stated that the realisation of the human social and economic rights mostly depends on the economic and especially financial situation within the State. Such provisions also apply to admissibility of reducing the volume of the social benefits which is mentioned by the European Court of Human Rights in its Judgment of October 12, 2004 in the case "Kjartan Ásmundsson v. Iceland".

ASSOCIATION OF CONSTITUTIONAL JUSTICE OF THE COUNTRIES OF THE BALTIC AND BLACK SEA REGIONS

The Constitutional Court of Ukraine proceeds from the fact that the adherence to the constitutional principles of social and legal state, and the rule of law (Articles 1, 8.1 of the Fundamental Law of Ukraine) determines the implementation of the legislative regulation of public relations on the basis of equity and equality, with account of the State's obligation to provide decent living conditions for every citizen of Ukraine.

The social and economic rights envisaged by laws of Ukraine are not absolute. The mechanism of realisation of these rights may be changed by the State, in particular, through impossibility of their financing by proportional redistribution of funds to maintain the balance of interests of the whole society. In addition, such measures may be stipulated by the necessity to prevent or eliminate real threats to economic security of Ukraine, which under Article 17.1 of the Constitution of Ukraine is the most important function of the State. At the same time, the content of the fundamental right may not be violated, which is the generally recognised rule, indicated by the Constitutional Court of Ukraine in its Decision No.5-rp/2005 dated September 22, 2005 (case on permanent use of land plots). Establishing such legal regulation under which the amount of pensions and other social payments and assistance will be lower than the level set in Article 46.3 of the Constitution of Ukraine is inadmissible, and will not provide adequate living conditions for individuals to live in society and maintain their human dignity, that would run contrary to Article 21 of the Constitution of Ukraine.

Thus, changing the mechanism of calculation of certain types of social benefits and assistance is constitutionally permissible to the extent which puts into question the very nature of the content of the right for social protection.

In the view of the above mentioned the Constitutional Court of Ukraine considers that the disputed provisions of the Law do not contradict Articles 8, 21, 22, 46, 48, 64 of the Constitution of Ukraine.

According to the Constitution of Ukraine, the fundamentals of social protection, forms and types of pension are determined exclusively by the laws of Ukraine (Article 92.1.6), the Cabinet of Ministers of Ukraine is authorised to take measures to ensure the rights and freedoms of citizens and pursue a policy of social protection (Articles 116.2, 116.3).

The Cabinet of Ministers of Ukraine as the highest executive authority has the constitutional power to direct and coordinate activities of ministries and other executive agencies, including the Pension Fund of Ukraine.

The Cabinet of Ministers of Ukraine is the body which ensures the state policy in the social sphere, and the Pension Fund of Ukraine is the body implementing such policy, including at the expense of the funds of the State Budget of Ukraine.

The Verkhovna Rada of Ukraine by introducing item 4 of Chapter VII "Transitional Provisions" to the Law of Ukraine "On the State Budget of Ukraine for 2011", identified the Cabinet of Ministers of Ukraine as a state body which is to ensure the implementation of the social rights of citizens envisaged by laws of Ukraine, i.e. provided the Cabinet of Ministers of Ukraine with the right to determine order and volume of social benefits based on the available financial resources of the budget of the Pension Fund of Ukraine, which is consistent with the functions of the Government of Ukraine, as defined in Article 116.2-3 of the Constitution of Ukraine.

Thus, item 4 of Chapter VII "Transitional provisions" of the Law does not contradict Articles 92.1.6, 116, 117 of the Constitution of Ukraine.

The purpose and the specific feature of the State Budget of Ukraine are to ensure the appropriate conditions for the implementation of other laws of Ukraine, which provide state financial obligations to the citizens aimed at their social protection, including provision of benefits, compensations and guarantees (paragraph 4 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 6-rp/2007 dated July 9, 2007 in the case on social guarantees of citizens).

In its Decision No. 26-rp/2008 dated November 27, 2008 in the case on the balanced budget, the Constitutional Court of Ukraine mentioned that the provisions of Article 95.3 of the Constitution of Ukraine concerning the State's aspiration to balance the budget of Ukraine in the systemic connection with the provisions of Articles 46, 95.2 of the Constitution should be understood as the State's intention to maintain the even balance when defining by a law on the State Budget of Ukraine of revenues and expenditures and adopting laws and other regulations that may affect the revenue and expenditure of the budget. In the Decision of the Constitutional Court No. 6-rp/2004 dated March 16, 2004 in the

case on printed periodicals the Court also emphasised that the State's aspiration to balance the State Budget is realised through identification of sources of government revenue and spending needs.

In view of the above mentioned the Constitutional Court of Ukraine considers the principle of a balanced budget as one of the defining one along with the principles of equity and proportionality in the activities of public authorities, particularly in the process of elaboration, adoption and implementation of the State Budget of Ukraine for the current year. Article 40.1.11 of the Budget Code of Ukraine stipulates that the subject matter of regulation of the State Budget of Ukraine is the additional provisions that regulate the budget process.

With regard to the above, the Constitutional Court of Ukraine concluded that item 4 of Chapter VII "Transitional Provisions" of the Law establishes the mechanism of implementation of the provisions of laws of Ukraine "On Status and Social Protection of Citizens who Suffered from Chornobyl Disaster", "On Social Protection of Children of War", "On Pensions Provision of Individuals Released from Military Service and Some Other Individuals", and therefore do not contradict Articles 75, 85.1.3, 95 of the Constitution of Ukraine.

Thus, the Constitutional Court of Ukraine held to recognise as conforming with the Constitution of Ukraine (constitutional) item 4 of Chapter VII "Transitional Provisions" of the Law of Ukraine No. 2857-VI "On the State Budget of Ukraine for 2011" dated December 23, 2010 with subsequent amendments.

Summary to the Decision of the Constitutional Court of Ukraine № 3-rp/2015 dated April 8, 2015 in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the conformity to the Constitution of Ukraine (constitutionality) of the provisions of Article 171-2.2 of the Code of Administrative Proceedings

The subject of the right to constitutional petition – the Ukrainian Parliament Commissioner for Human Rights – appealed to the Constitutional Court of Ukraine to recognise the provisions of Article 171-2.2 of the Code of Administrative

Proceedings, according to which decision of local general court as administrative court in cases concerning decisions, actions or omission of subjects of authority on bringing to administrative liability shall be final and may not be appealed, as such that do not meet the requirements of Articles 8.1, 55.1, 55.2, 64, 129.3.8 of the Constitution (unconstitutional).

Ukraine is a democratic, law-based state where human rights and freedoms and their guarantees determine the essence and orientation of its activity; the State is answerable to the individual for its activity; to affirm and ensure human rights and freedoms is the main duty of the State (Articles 1, 3.2 of the Constitution).

In Ukraine, the principle of the rule of law is recognised and effective; the Constitution of Ukraine has the highest legal force; laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it (Articles 8.1 and 8.2 of the Fundamental Law of Ukraine).

Bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine (Article 19.2 of the Constitution).

According to the Fundamental Law, human and citizen's rights and freedoms are protected by the court; everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Articles 55.1, 55.2).

According to Article 92.1.14 of the Constitution, the judicial system, judicial proceedings and the status of judges are determined exclusively by the laws of Ukraine.

One of the main principles of judicial proceedings is ensuring complaint of a court decision by appeal and cassation, except in cases established by law (Article 129.3.8 of the Fundamental Law).

The Constitutional Court considers that the right to judicial protection includes, in particular, a possibility to challenge court decisions in appeal and cassation, which is one of the constitutional guarantees of implementation of other rights and freedoms, their protection from violations and illegal encroachments, including false and unjust judgments.

The Verkhovna Rada of Ukraine, by determining the judicial system and proceedings by the law, has to establish such scope of the right of the participants of the proceedings to instance appeal of decisions of local court which would ensure effective judicial protection. Restriction of the access to appeal or cassation is possible only in exceptional cases with mandatory compliance with the constitutional norms and principles. In establishing the restriction of the right to appeal and cassation of court decisions, the legislator shall be guided by such rule of law component as proportionality.

Thus, according to the Constitution it is allowed to restrict the right to challenge in court the decisions by appeal and cassation (Article 129.3.8), yet it may not be arbitrary and unfair. This restriction should be established by the Constitution and laws of Ukraine only; shall pursue the legitimate aim; shall be provided by the public need to achieve this aim, proportionate and reasonable. In case of restriction of the right to challenge court decisions, the lawmaker is obliged to introduce a legal regulation that will allow to achieve a legitimate aim optimally with a minimum interference with the implementation of the right to judicial protection and not to violate the substantive content of such right.

Chapter 17 of the Code of Administrative Offences (hereinafter referred to as «the Code») regulates the jurisdiction of cases on administrative offences both to courts (judges) (Articles 221, 221-1) and other subjects of authority: administrative commissions at executive committees of village, settlement and city councils; executive committees of the above councils; bodies of internal affairs, bodies of state inspections and other bodies (officials), authorised by the Code (Article 213).

The Code provides for that exclusively district, district in city, city or city-district courts (judges) are duly authorised to impose such administrative penalties as administrative arrest, correctional labour, community service, seizure with compensation or confiscation of the object, which became an instrument of committing or a direct object of the administrative offence (Articles 28.1, 29.1, 30-1.2, 31, 32.1).

Analysis of the legislation establishing administrative offences which entail such administrative penalty as a fine, allows to conclude that cases on administrative offences are under jurisdiction of both courts (judges) and other subjects of authority.

For instance, the Code provides for a fine, imposed by the court in the amount of up to five thousand non-taxable minimum incomes for certain types of administrative offences (Article 162-1.3). According to the Customs Code, a fine for violation of customs regulations not imposed by the court, but by another subject of authority (body of income and charges) is set in the amount of one thousand non-taxable minimum incomes (Articles 469, 477) or 300 percent of the unpaid sum of customs duties (Article 485).

These types of administrative penalties in terms of the degree of their severity are proportionate to the penalties prescribed by the Criminal Code, including fines, community service, correctional labour, confiscation of property, arrest (Articles 51, 53, 56, 57, 59, 60). Such administrative sanctions and penalties, envisaged by the Criminal Code, restrict the constitutional rights of citizens, namely to freedom and personal inviolability; to freely own, use and dispose of his/her property; to labour (Article 29, 41, 43 of the Constitution).

The Code establishes that the ruling of the judge in the case on administrative offence concerning bringing to liability may be appealed to a court of appeal; a ruling of a court of appeal shall come into force immediately after its delivery, shall be final and may not be appealed (Articles 294.2, 294.10).

At the same time pursuant to Article 288.1 of the Code a ruling in cases on administrative offences, delivered not by the court, but by the other subject of authority, may be appealed to a «higher authority (superiour official)» as well as to a local general court as an administrative court in the order determined by the Code of Administrative Proceedings, with particularities established by the Code. For instance, according to Article 18.1.2 of the Code of Administrative Proceedings, all administrative cases concerning decisions, actions or omission of subjects of authority in cases on bringing to administrative liability fall under the jurisdiction of local general courts as administrative courts. The provisions of Article 171-2.2 of the Code of Administrative Procedure, the constitutionality of which are challenged, stipulate that the decisions of a local general court as an administrative court in cases concerning decisions, actions or omission of subjects of authority concerning bringing to liability shall be final and may not be appealed.

The Constitutional Court of Ukraine considers that the legislator's restriction of the right of an individual to challenge decision of local general courts as administrative courts in appeal and cassation is justified only regarding the decisions in cases on minor administrative offences. In other events, in cases on bringing to administrative liability individuals must have the right to instance appeal of the decision of local general courts as administrative courts.

Having made it impossible to challenge in court of appeal the decisions of local general courts as administrative courts in cases concerning rulings of the subjects of authority on imposing administrative penalties that are proportionate to the penalties established by Criminal Code in terms of their severity, the legislator allowed disproportion between the purpose and measures, taken for its achievement.

According to Article 70.2 of the Law «On the Constitutional Court of Ukraine», the Constitutional Court of Ukraine may, where necessary, determine in its decision or opinion the procedure and terms of their execution and oblige appropriate state bodies to ensure execution of the decision and adherence to the opinion.

Thus, the Constitutional Court of Ukraine held:

To recognise the provisions of Article 171-2.2 of the Code of Administrative Proceedings of Ukraine as non-conforming to the Constitution of Ukraine (unconstitutional).

The provisions of Article 171-2.2 of the Code of Administrative Proceedings, declared unconstitutional, shall lose validity from the day of the adoption of the Decision by the Constitutional Court of Ukraine.

To recommend to the Verkhovna Rada of Ukraine to immediately resolve the issue concerning the challenge in court of decisions of local general courts as administrative courts in cases on decisions, actions or omission of the subjects of authority on bringing an individual to administrative liability.

References:

Decision of the Constitutional Court of Ukraine № 26-rp/2009 dated October 19, 2009.

European Court of Human Rights
Judgment in the case «Delcourt v. Belgium» dated January 17, 1970.
Judgment in the case «Hoffmann v. Germany» dated October 11, 2001.
Judgment in the case «Ashingdane v. the United Kingdom» dated May 28, 1985.
Judgment in the case «Krombach v. France» dated February 13, 2001.
Judgment in the case «Engel and Others v. the Netherlands» dated June 8, 1976.
Judgment in the case «Gurepka v. Ukraine» dated September 6, 2005.
Judgment in the case «Menarini Diagnostics v. Italy» dated September 27, 2011.

Summary to the Decision of the Constitutional Court of Ukraine № 2-rp/2016 dated June 1, 2016 in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the conformity to the Constitution of Ukraine (constitutionality) of the provision of the third sentence of Article 13.1 of the Law «On Psychiatric Care» (case on judicial control over hospitalisation of disabled persons to psychiatric institution)

According to the Fundamental Law, all people are free and equal in their dignity and rights; Human rights and freedoms are inalienable and inviolable; constitutional rights and freedoms are guaranteed and shall not be abolished; everyone has the right to respect of his or her dignity; every person has the right to freedom and personal inviolability; human and citizens' rights and freedoms are protected by the court; Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Articles 21, 22.2, 28.1, 29.1, 55.1, 55.2).

The Constitutional Court considers that restrictions of the realisation of constitutional rights and freedoms may not be arbitrary and unfair, they have to be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate aim, be conditioned by public need to achieve this aim, proportionate and reasonable, in case of restriction of the constitutional right or freedom legislator shall introduce such legal regulation which will make it possible to optimally achieve the legitimate aim with minimal interference in the implementation of this right or freedom and not to violate the essential content of such right.

The Constitution stipulates that citizens deemed by a court to be incompetent do not have the right to vote (Article 70). In this regard, the said persons are subject to restrictions provided for in Articles 72, 76, 81 and 103 of the Fundamental Law. In the Constitutional Court's opinion, recognition of a person to be incapable can not deprive him or her of other constitutional rights and freedoms or restrict them in a manner that undermines their essence.

According to the Civil Code, a natural person may be recognised by the court as legally incapable if he/she is not capable to perceive and (or) control his/her actions due to chronic and stable mental disorder; A natural person shall be recognised as legally incapable from the effective date of the court decision thereon; natural person shall be placed in ward; legally incapable natural person shall be not entitled to take any legal actions; the guardian shall take legal actions on behalf and in favour of a legally incapable natural person; the guardian shall bear liability for the damage inflicted by a legally incapable natural person (Articles 39.1, 40.1, 41). The procedure for recognition of a natural person as legally incapable is established in Articles 236-241 of the Code of Civil Procedure.

Systematic analysis of the legislation gives grounds to state that legally incapable persons are a special category of individuals (natural persons) who temporarily or permanently are not capable at their own discretion to implement property and personal non-property rights, perform duties and bear legal responsibility for their actions due to chronic, stable mental disorder. Incapable persons should be provided with legal possibilities to satisfy individual needs, implementation and protection of their rights and freedoms. Although, due to health reasons disabled persons are not able personally to implement certain constitutional rights and freedoms, including the right to freedom and personal integrity, they may not be completely deprived of these rights and freedoms, therefore the state is obliged to create effective legal mechanisms and guarantees for their maximum implementation.

The Constitutional Court of Ukraine proceeds from the fact that the fundamental values of the effective constitutional democracy include freedom, availability of which is a prerequisite of development and socialization of an individual. The right to freedom is an integral and inalienable constitutional human

right and provides for a possibility to select one's own behavior with the purpose of free and comprehensive development, act independently according to their own decisions and plans, prioritise, do whatever is not prohibited by law, freely and at one's own discretion move throughout the state, choose a place of residence etc. The right to freedom means that a person is free in his or her activity from outside interference, except for restrictions established by the Constitution and laws.

The Constitutional Court of Ukraine takes account of the requirements of the effective international treaties ratified by the Verkhovna Rada of Ukraine, and the practice of interpretation and application of these treaties by international bodies which jurisdiction is recognised by Ukraine, including the European Court of Human Rights. Since Article 29 of the Constitution of Ukraine corresponds to Article 5 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), then according to the principle of friendly attitude to international law, the practice of interpretation and application of the said article of the Convention by the European Court of Human Rights should be taken into account when considering this case.

Analysis of the mentioned international documents leads to the conclusion on the need for judicial review of the interference with the right to freedom and personal inviolability of a person with mental disorder during his/her hospitalisation to psychiatric institution without his/her consent.

According to the first and third sentences of Article 13.1, Article 13.2 of the Law «On Psychiatric Care» № 1489-III, dated February 22, 2000 with subsequent amendments (hereinafter referred to as "the Law"), a person is hospitalised to a psychiatric institution voluntarily – at his/her request or upon his/her conscious consent; person recognised as legally incapable in the manner prescribed by law, is hospitalised to psychiatric institution at the request or upon the consent of his/her guardian; hospitalisation of a person in cases stipulated by paragraph one of this article, is carried out upon the decision of the psychiatrist.

According to Article 1.9 of the Law, conscious consent of a person is a consent freely expressed by a person able to understand information provided in accessible way, about the nature of his/her mental disorder and forecast of its possible

development, objective, procedures and duration of psychiatric care, diagnostic methods, treatment and medicines that can be used during psychiatric care, their side effects and alternative methods of treatment.

Hospitalisation of a legally incapable person to a psychiatric institution at the request or with consent of his/her guardian upon the decision of psychiatrist provides long-term psychiatric care in the hospital. Legally incapable person hospitalised to a psychiatric institution in the manner provided for in Article 13 of the Law, stays in such an institution around the clock without possibility to leave its territory voluntarily, and his/her actions are constantly monitored by medical personnel.

Given the above, it appears that hospitalisation of incapable person to a psychiatric institution under Article 13 of the Law is a restriction of the right to freedom and personal inviolability of person enshrined in Article 29 of the Constitution of Ukraine, and therefore should meet the criteria set out in this decision.

The procedure of hospitalisation of legally incapable person to a psychiatric institution at the request or with the consent of his/her guardian upon the decision of the psychiatrist which is established by law does not provide for the judicial control of such hospitalisation, since the legislator has actually considered it as voluntary, even though hospitalisation of incapable person is carried out without his/her conscious consent.

The Constitutional Court of Ukraine considers that such hospitalisation by its nature and consequences is a disproportionate restriction of the constitutional right of incapable persons to freedom and personal inviolability, therefore it should be carried out in compliance with the constitutional guarantees of the protection of human and citizens' rights and freedoms, with account of the mentioned international legal standards, legal positions of the Constitutional Court and exclusively upon the court's decision pursuant to Article 55 of the Fundamental Law.

Judicial control over hospitalisation of incapable person to a psychiatric institution in the manner provided for in Article 13 of the Law is a necessary guarantee of the protection of his/her rights and freedoms enshrined, in particular,

in Articles 29, 55 of the Fundamental Law. After independent and impartial consideration of hospitalisation of incapable person to a psychiatric institution, the court has to adopt a decision about the legitimacy of restricting the constitutional right to freedom and personal inviolability of such person.

The Constitutional Court finds that the State, in performing its main duty – promoting and ensuring human rights and freedoms (Article 3.2 of the Constitution) – must not only refrain from violations or disproportionate restrictions of human rights and freedoms, but also take appropriate measures to ensure their full implementation by everyone under its jurisdiction. To this end, the legislator and other public authorities should ensure effective regulation that meets the constitutional norms and principles, and should create mechanisms necessary to meet human needs and interests. At the same time, particular attention should be focused on especially vulnerable categories of individuals, including, in particular, persons with mental disorders.

The Constitutional Court, the sole body of constitutional jurisdiction in Ukraine, which task is to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the State throughout the territory of Ukraine, considers that legal regulation of hospitalisation of incapable person to a psychiatric institution established in Article 13 of the Law, does not comply with the requirements of Article 3 of the Constitution regarding the duty to establish a proper legal mechanism for the protection of the constitutional rights and freedoms of individuals, including those legally incapable, from arbitrary restrictions of his/her constitutional right to freedom and judicial protection.

Thus, the Constitutional Court of Ukraine held:

To declare as such that does not conform to the Constitution (unconstitutional) the provisions of the third sentence of Article 13.1 of the Law «On Psychiatric Care» № 1489-III, dated February 22, 2000 with subsequent amendments in conjunction with the provisions of Article 13.2 concerning hospitalisation to psychiatric institution at the request or with the consent of guardian upon the decision of psychiatrist without judicial control of the person, declared to be legally incapable in the manner prescribed by law;

To recommend to the Verkhovna Rada of Ukraine to immediately to bring the provisions of the legislation in the field of psychiatric care in accordance with this decision.

References:

Judgment of the European Court of Human Rights in the case «Winterwerp v. Netherlands» dated October 24, 1979;

Judgment of the European Court of Human Rights in the case «Storck v. Germany» dated June 16, 2005;

Judgment of the European Court of Human Rights in case «Gorshkov v. Ukraine» dated November 8, 2005;

Judgment of the European Court of Human Rights in the case «McKay v. United Kingdom» dated October 3, 2006;

Judgment of the European Court of Human Rights in the case «Stanev v. Bulgaria» dated January 17, 2012;

Resolution of the General Assembly of the United Nation Organisation «Principles for the protection of person with mental illness and the improvement of mental health care» № 46/119, dated February 18, 1992;

Recommendation of the Parliamentary Assembly of the Council of Europe on psychiatry and human rights № 1235, dated January 1, 1994;

Convention on the Rights of Persons with Disabilities dated December 13, 2006;

Recommendation of the Committee of Ministers concerning the Legal Protection of Persons Suffering from Mental Disorders Placed as Involuntary Patients № R (83) 2, dated February 22, 1983;

Decision of the Constitutional Court of Ukraine № 3-rp/2003 dated January 30, 2003;

Decision of the Constitutional Court of Ukraine № 15-rp/2004 dated November 2, 2004.

FEEDBACK LETTERS

ВІДГУКИ ЩОДО ЗАХОДУ

**COURT OF JUSTICE
OF THE
EUROPEAN UNION**

The President

Luxembourg, 26 June 2017

Mr. Victor Kryvenko
Acting Chairman of the Constitutional Court of Ukraine
and Acting President of the BBCJ
14 Zhylianska street
Kyiv 01033
Ukraine

Dear President,

Thank you very much for your letter of 21 June 2017 informing me of the excellent work that was done at the annual Congress of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, which took place in Kharkiv on 1-2 June 2017, and enclosing a copy of the Resolution that was adopted on that occasion. I wholeheartedly endorse the ideas set out in that Resolution and I welcome, in particular, the view expressed by the Congress that international and European norms of constitutional law and practice should be perceived as minimum standards for the protection of fundamental rights.

May I take this opportunity to wish both the Constitutional Court of Ukraine and the BBCJ all the very best for the future.

Yours faithfully,

Koen LENAERTS

REPUBLICA MOLDOVA CURTEA
CONSTITUTIONALA

PCC-01/ 351

Chişinău, 14 July 2017

Mr Viktor KRYVENKO
Acting President of the Constitutional Court
of Ukraine

Dear Mr President,

Once returned home from the CECC Congress in Batumi where we had our share of emotions that culminated with a victory that otherwise wouldn't have happened without your encouragement and support in the election of the Constitutional Court of Moldova to hold presidency of the Conference of European Constitutional Courts in 2020-2023, I would like to express my immense gratitude. Also, please convey my sincere thanks to Mr Stanislav Shevchuk, Mr Ihor Slidenko and Mr Mykola Melnyk.

The co-operation within the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions represents the main pillar of our foreign relations and unites its members in one single entity, a force with a strong voice, based on the same aspirations, values and principles. Its role and importance is reaching new highs and becomes more relevant within the regional, European and worldwide context. It gives me great pleasure to underscore the contribution of the BBCJ to the promotion and development of constitutionalism in its member countries and beyond.

Please accept, Mr President, the assurances of my highest consideration.

Yours sincerely,

Tudor PANȚÎRU
President

Над випуском працювали:
Бірюк Л. І.,
Васильченко І. В.,
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Свідоцтво про внесення до Державного реєстру суб'єктів видавничої справи
серія ДК № 2570 від 27.07.2006 р.

26 жовтня 2015 року. Голови конституційних судів Грузії, Литовської Республіки, Республіки Молдова та України підписали Декларацію про заснування Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів (м. Вільнюс, Литовська Республіка).

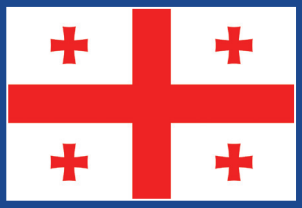
17 грудня 2015 року. Робоча зустріч Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів. Обговорено напрями співробітництва, місце та дату проведення майбутнього засідання (м. Київ, Україна).

30 червня – 2 липня 2016 року. Голова Конституційного Суду України Юрій Баулін та судді Ігор Сліденко, Станіслав Шевчук взяли участь у Першому конгресі Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів (BBCJ) "Роль конституційних судів у захисті демократичних цінностей" (м. Кишинеу, Республіка Молдова).

2 березня 2017 року. Робоча зустріч голів конституційних судів – членів Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів (BBCJ), яку в поточному році очолює Конституційний Суд України (м. Кишинеу, Республіка Молдова).

1 червня 2017 року. Другий конгрес Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів (BBCJ) на тему: „Роль конституційних судів у тлумаченні положень національних конституцій у контексті загальновизнаних принципів і норм міжнародного права та права ЄС, рішень міжнародних судів“ (м. Харків, Україна).

11 вересня 2017 року. У рамках проведення 4-го Конгресу Всесвітньої конференції конституційного правосуддя «Верховенство права та конституційне правосуддя в сучасному світі» відбулася робоча зустріч Асоціації конституційного правосуддя країн регіонів Балтійського та Чорного морів (м. Вільнюс, Республіка Литва).




Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (BBCJ) was established by the Constitutional Courts of Georgia, Republic of Lithuania, Republic of Moldova and Ukraine on 26 October 2015 in Vilnius.

The goal of BBCJ is to underline the role of constitutional courts in affirming the supremacy of the constitution and constitutional justice, respect for human rights and fundamental freedoms, as well as to promote the need to respect the independence and sovereignty of states and their territorial integrity.

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