



## Key-note Speech

### 5<sup>th</sup> Congress of the World Conference on Constitutional Justice

#### Session C

### "Limitations of the role of constitutional courts in maintaining peace"

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His Excellency Gianni Buquicchio, President Emeritus, Special Representative of the Venice Commission, His Excellency Anwar Usman, Chief Justice of the Constitutional Court of Indonesia, Distinguished Presidents of constitutional justice bodies, and Ladies and Gentlemen!

I am sincerely glad to welcome all the participants of the 5th Congress of the World Conference on Constitutional Justice and would like to express my gratitude to the speakers for the very interesting presentations.

Session C is devoted to the topic "Limitations on the Role of Constitutional Courts in maintaining peace". In this session, we will consider the general trends in the functioning

of constitutional courts in terms of relations with other state bodies, the attitude of the media to the activities of constitutional control bodies, as well as the importance of appeals (requests) as an immanent condition for initiating constitutional proceedings.

Of course, the important role of the constitutional court in establishing peace in the state, in the context of the country's sustainable development, political and social stability, is difficult to overestimate, since the decisions of the constitutional control body improve the legislation regulating all spheres of public relations.

Through their legal positions, the bodies of constitutional control actively contribute to the constitutionalization of the rule-making process, guiding the legislator towards the consistent and purposeful implementation of constitutional norms and values in the legislation.

Based on this, the main institution designed to detect and correct violations of the fundamental principles of legal regulation committed in the process of lawmaking is the constitutional court.

Following these questions, let us consider the current dynamics of the organization of the activities of constitutional courts.

**1. What are the limitations of your court in contributing to peace? (e.g. acting only upon request; limitation by the scope of the request)**

Today it is extremely difficult to imagine a democratic state without a body of constitutional control, functioning in order to protect the Constitution, ensure its supremacy and stability, observe the principle of separation of powers, and protect the human rights and freedoms provided for by it.

At the same time, active processes of informatization, continuous technological development lead to the emergence of new social relations, which in turn may contain challenges to constitutionally protected values.

Based on the replies of the countries participating in the questionnaire, it follows that constitutional courts cannot initiate constitutional proceedings on their own initiative. The submission of an appeal (request) falling under the jurisdiction of the constitutional court is an indispensable condition for initiating constitutional proceedings. However, for example, the Constitutional Court of Serbia has the right to initiate the procedure for assessing constitutionality and legality on its own initiative, based on a decision taken by a two-thirds majority of all judges. Thus far, the Constitutional Court of Serbia has been very restrained in exercising this power.

In turn, in Côte d'Ivoire, the Constitutional Court can consider an appeal only if the appeal is referred to it by the competent authorities. Moreover, in Mauritania, only the President of the Republic, the Prime Minister and the Chairman of the National Assembly are vested with the right to appeal to the Constitutional Council. In some cases, the case can be referred to the Constitutional Court by one third of the deputies, and only as an exception can be referred to the court by an individual.

Further, I would like to draw your particular attention to the aspect of the obligation to submit applications (requests) to the constitutional courts. To a small extent, an indispensable condition for filing an appeal can be assessed as a limitation in contributing to peace, however, it is important to understand that the specifics of the activities of constitutional courts implies the implementation of constitutional control by considering appeals (requests).

As a rule, citizens of the country, striving for social and legal equality, exercise their constitutional rights by applying to the constitutional courts for the protection of their violated rights. Consideration by the body of constitutional control of the issues specified in the appeals (requests), with the exception of special procedures regarding written court hearings, is carried out at trials proceeding on the basis of the principles of competition and equality of the parties - participants in the case under consideration. In this case, on the one hand, the applicant, having applied to the constitutional court with a request, raises the issue of inconsistency of a certain provision of the law or other normative legal act, and the body that issued the act defends the position on the compliance of the challenged provision with the Constitution. Thus, in the process of considering the case, the Constitutional Court, based on an examination of the issue, the positions heard, makes an appropriate decision on the constitutionality or contradiction of the norm of the Constitution.

In such a way, the decisions of the constitutional courts perform the function, as mentioned earlier, of improving legislation, since shortcomings in the legal regulation of certain issues can harm not only to a particular person, but also to society as a whole.

## **2. Have issues that were supposedly finally settled by a judgment of Court remained in a state of conflict?**

Today, the rapidly changing political and economic conditions both within the state and on a global scale require effective measures to protect the rights and freedoms of man and citizen, as well as maintaining the rule of law. In such circumstances, the decisions of the constitutional courts, which have an impact on all legislative regulations and contribute to the resolution of dissonant situations that have arisen in the process of applying certain legal provisions by the subjects, acquire extreme importance.

The decisions of the Constitutional Court, which establish in the process of constitutional proceedings the shortcomings of legal regulations and determine possible ways to eliminate them, at the same time, also entail legal consequences due to the termination of the norm in an unconstitutional interpretation. In this regard, the decisions of the constitutional courts must a priori have such characteristics as finality, general obligation, non-appealability.

The special significance of the decisions taken by the constitutional courts, as noted earlier, lies in the establishment of the unconstitutionality of laws and other regulatory legal acts or their provisions, which require the strict execution by the relevant state bodies of the decision expressed in bringing the normative legal acts issued by them into conformity with the Constitution.

At the same time, non-execution or improper execution of decisions of constitutional courts, the binding nature of which has a constitutional and legal basis, not only harms the

interests of justice, but also undermines citizens' trust in the judicial system and, in general, the state, obliged to recognize and protect the rights and freedoms of man and citizen, which is one of the most important prerequisites for maintaining social peace.

Based on the responses of the participating States, in the overwhelming majority of countries, the decisions of the constitutional courts are final and generally binding, not giving rise to conflict situations. At the same time, there is an obvious problem in the execution of decisions of constitutional courts, which can be mediated by a variety of factors. In particular, such problems may be associated with the lack of a clearly regulated mechanism for the execution of decisions, or difficulties in its implementation associated with the need for additional funding from the state budget and other features of public administration.

In the course of reading the responses of the participating States, I drew attention to the experience of the Constitutional Court of Slovakia in terms of the decision of 24 October 2012. Thus, in 2012, the Constitutional Court interpreted Article 150 of the Constitution, which provides that the President of the Republic appoints the Prosecutor General based on a proposal by the National Council, ruling that the President's role was not merely ceremonial and that the President could request a different candidate, if there were legitimate doubts regarding a candidate which might threaten the authority of the office to which s/he was to be appointed.

Later, in June 2014, a new President took office and shortly thereafter the terms of office of three constitutional judges expired. The Parliament had proposed six candidates for the three vacant positions, as required by the Constitution. The President considered the above

interpretation to be fully applicable to the nomination of constitutional judges and only appointed one judge to the Constitutional Court. His request for four new candidates from the Parliament for the two remaining vacancies was however refused. The Parliament held that the interpretation relating to the Prosecutor General was not applicable to the case at hand and that the President had to choose from among those six candidates precisely three of them to become constitutional judges, not just one. Candidates whom the President refused to appoint all filed constitutional complaints and the Constitutional Court found a violation of the candidates' constitutional rights to access to public office.

However, the President of Slovakia, not recognizing the decision of the Constitutional Court as generally binding, requested an opinion on the matter from the Venice Commission. The Commission stressed that the Constitutional Court is the final arbiter in constitutional matters in Slovakia and that the ruling should nonetheless be respected, since it represented the final opinion of a majority of the Constitutional Court's plenum. For this reason, the Commission concluded that there could be thenceforth no doubts that the 2012 interpretation relating to the Prosecutor General was not applicable to the appointment procedure of constitutional judges and advised the President to respect it. Later the President appointed three new judges to the Constitutional Court, as he was required.

In this example, we have fully confirmed the significance of the decisions of the constitutional courts and the importance of their strict and proper execution, taking into account the special status and key role of the constitutional control body that oversees the compliance with the Constitution of each law or other regulatory legal act.

**3. Has the role of your court in settling disputes and thus contributing to peace been challenged by other state powers, the media, etc.?**

There is no doubt that the process of drafting a law, its adoption and further implementation are complex processes that are further fraught with the emergence of uncertainty in the content of legal norms, their ambiguous understanding and application. At the same time, it is obvious that the adoption of ideal laws is an impossible task for law-making bodies due to the constantly evolving, dynamic social relations. In this regard, the role of constitutional courts in eliminating contradictions in laws and other normative legal acts and bringing them into full compliance with the Constitution is being strengthened.

As can be seen from the replies, other state bodies do not dispute the role of the constitutional court in the participating states; this is facilitated by the special status of the body of constitutional control in the judiciary, whose acts are final and not subject to appeal.

In addition, constitutional courts in general practice carry out their activities based on the principle of independence, which consists in their subordination only to the Constitution and the sectoral law. This principle implies the prevention of interference in the activities of the body of constitutional control, which may entail liability provided for by law.

At the same time, the very specificity of the activities of constitutional courts, supreme courts and courts of general jurisdiction consists in making decisions that somehow can be perceived negatively by one of the parties participating in the judicial process.



Challenging the role of the Constitutional Court by the mass media is quite acceptable, in view of the right to freedom of expression, freedom of speech and the press proclaimed by the Constitutions of many countries. Another issue is the competence of certain assessments, since the constitutional control bodies, when considering a case, carry out enormous work on a comprehensive study of the issue, from all angles and positions, in order to make an appropriate decision.

**4. Is your court confronted with a positive or rather critical attitude in society and in the media as far as the trust in reconciliation by your court and/or the judiciary in general is concerned**

In any democratic State, the relationship between public authorities and the media is regulated exclusively by the Constitution and laws, which, on the one hand, guarantee the freedom of the media, their right to receive information, as well as their dissemination, and on the other hand, provide access to information under the jurisdiction of public authorities.

The role of the media is not only that they perform the function of informing society, but also that they act as a means of control by society over the activities of the authorities. Therefore, in democratic countries, the media are free and operate in accordance with the law, and censorship is not allowed at all.

The general world trend in relation to the activities of constitutional control bodies is rather positive than negative. Despite the presence of criticism of any part of the population of

the country, the decisions of the constitutional courts remain binding, non-execution or improper execution of which entails liability provided for by law.

If we take the Constitutional Court of the Kyrgyz Republic as an example, then, however, as in any democratic society, decisions cause reactions in society, both positive and negative. Such an assessment on the part of society is natural, since it is a kind of feedback from society on the actions of the highest body of the judiciary, exercising constitutional control.

A similar situation persists in Finland, Burkina Faso, Canada, Cambodia, North Macedonia and Portugal.

In many countries the decisions of the constitutional control bodies receive a rather positive reaction from civil society and the media. For example, the reaction of the Albanian media and society to the decision of the Constitutional Court of Albania of 2010, according to which the agreement between Albania and Greece on the delimitation of their respective areas, the continental shelf and other maritime areas belonging to them under international law, declared to be incompatible with the Constitution, was very positive.

To the decisions of the constitutional courts of a number of countries, such as Algeria, Andorra and Angola, society and the media are quite positive and trusting.

Undoubtedly, the implementation of constitutional control in conditions that exclude any external influence creates a fertile ground for achieving the tasks and goals set for the

court, which at the same time helps to increase the level of public confidence, including the media, in the activities of public authorities.

Thus, in Austria, Denmark, the Czech Republic, Germany, Korea, Switzerland, Thailand and a number of other countries, according to the replies provided by them, the attitude towards the Constitutional Court is very positive. This is primarily because constitutional justice bodies generally maintain good relations with the media. Only a decision that is consistent with the Constitution can be accepted by the Constitutional Court as correct, even if it does not lead to reconciliation, but, on the contrary, to hostility or deepening antagonism. The Czech response is admirable because there has never been a case where the Constitutional Court has been accused of not promoting reconciliation with its decisions, and it has never been praised for promoting reconciliation.

Often, constitutional control bodies, due to the volatility of the political situation in the country, are forced to work in various pre-conflict and post-conflict situations, in which even a positive voice from the public helps protect them against attacks of other authorities. In this aspect, attention should be paid to the number of appeals received by the Constitutional Court of Bosnia and Herzegovina. Thus, in 2018, the Constitutional Court received 7,767 appeals, which is a clear indicator of the public's increased trust in its work every year.

Unfortunately, the bodies of constitutional justice, however, as well as all public authorities are not protected from all kinds of unjustified attacks, including from the media, which in turn directly affects the level of public trust, especially in the direction of its decline. At the same time, the bodies of constitutional control show tolerance for criticism, since criticism

stems from the essence of a democratic regime, in which freedom of expression is important and from which the activities of the relevant courts are not excluded.

Despite the underlying phenomena that occur during the implementation of constitutional legal proceedings and after its completion, public trust in the constitutional justice bodies is constantly growing, and their activities are generally positively assessed by civil society, which is confirmed by the growing number of appeals.

I would like to take this opportunity to once again express my gratitude to the organizers of this Congress represented by the Constitutional Court of the Republic of Indonesia and the Venice Commission of the Council of Europe for the excellent preparation, its excellent organization, for the hospitality and warm welcome.

**Thank you!**