T R I B U N A L C O N S T I T U C I O N A L

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF MOLDOVA

INTERNATIONAL CONFERENCE ON

Evolution of constitutional control in Europe: lessons learned and challenges

Independence of a constitutional court as the main prerequisite for the efficiency of its mission

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Chişinău, Republic of Moldova, 2 - 3 March 2017

The Council of Europe already has in-depth reflection on the independence of courts in general and on the meaning and scope of the establishment of constitutional courts as bodies specifically tasked with administering justice in constitutional matters.

By "constitutional court" I mean a judicial body that deals exclusively or primarily with issues of constitutionality and has the last say on them. For instance, the Portuguese Constitution provides in the chapter referring to the organisation of the courts that "in addition to the Constitutional Court, there shall be" other categories of courts [art. 209 (1)] and defines autonomously the Constitutional Court in a different section [art. 221]; in parallel the powers of the general courts in civil and criminal matters and in administrative and tax matters are defined "without prejudice to the specific competence of the Constitutional Court" [arts. 210-212]. The 'specific competence' in question is the authority to declare a piece of legislation invalid on the grounds of its unconstitutionality, be it in the context of the so-called '*abstract review*' – at the request of public authorities empowered to do so by the constitution and without a connection with any specific case – or in the context of a dispute in which a constitutional issue has been brought to light – what is known as '*incidental control*'.

In some countries – but not in Portugal –, individuals have the right to address complaints to the constitutional court for violations of their fundamental rights by public authorities (including other courts), which is yet another way of triggering the competence of the constitutional (the most prominent examples of the procedure are the German *Verfassungsbeschwerde* and the Spanish *recurso de amparo*).

The very existence of such a constitutional court is the main distinguishing feature between the so-called '*concentrated'* model of constitutionality control, originally conceived by the Austrian jurist Hans Kelsen in the 1920s, and the '*diffuse'* model that developed in the United States in the early 19th century following the landmark Supreme Court decision in *Marbury v. Madison*. And the consequence of the constitutional court being part of the judiciary as a specialized category of court is the applicability to that institution of the general principles ruling courts, unless the specific mission of that court requires a different treatment.

As it is generally recognized [see CDL-AD(2013)014, §76], since World War II, constitutional courts were typically established in Europe in the course of a transition to democracy; first in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe. The purpose of these courts was to overcome the legacy of the previous regimes and to protect the human rights that such regimes did not uphold. Instead of the principle of the unity of power, which excluded any control over parliament, the system of the separation of powers was introduced. In place of the supreme role of parliament (being under complete control of a single party), the new system was based

on the principle of checks and balances between different branches of government. Consequently, even parliament has to respect the supremacy of the constitution and it can be controlled by other organs, especially by the constitutional court. Constitutional justice is a key component of checks and balances in a constitutional democracy.

Certainly the constitution binds all state powers whether in relation to the development of decision criteria or in terms of its application. But such binding force gives rise to specific problems where the judicial review of its compliance by the administration or the legislature is at issue. As it has been acknowledged in relation to the jurisdiction of administrative courts, judicial review of acts of public authority does not derive from strict separation, but rather from the "crossing" or "intersection" of powers, that is to say, of a certain understanding of their interdependence. Keyword: *administrative discretion*.

Due to the openness and to the very nature of constitutional norms, the same concept applies even with stronger reasons to the judicial review of legislative acts: *legislative discretion* is the keyword here. Indeed constitutional adjudication on the basis of highly abstract provisions is not the same as interpreting and applying a civil code or a penal code containing narrowly drafted specific rules.

The diversity of functions of each power is necessarily projected on the meaning of the substantive law in relation to each of them: to the courts such a law is only a *rule of judgment*, that is to say, the standard to review an action already verified; for the other powers, the same law is a *rule of action*, since it establishes the criteria and the modes of the action in view of a given end. Thus, when it is impossible to identify only one solution as compatible with the substantive law, there is space for judgments of opportunity or convenience, that is to say, to *administrative discretion* and at another more important level to the *freedom of the democratic legislator*. Hence the pertinence of the distinction between the substantive rule as a *norm of function* and as a *standard of control*. The guidance provided to the legislature or to the executive by substantive rules, namely by basic principles such as equality or proportionality, in general can go – and in most cases does go – beyond the limits of judicial control based in them. This is due, as mentioned, not only to the type of function exercised by each power, in particular the proximity to the situations to be assessed and the rationality relevant to the assessments in question, but also to considerations of an organizational nature such as collegiality and the possibility of confronting different opinions and, above all, the intensity and immediacy of the democratic legitimacy of the choices to be made by each power: in a democratic state based on the rule of law, provided that the constitutional limits are respected, the options closer to the voters' choices shall prevail. In the area of legislative or administrative merit in which 'one opinion is opposed to another' the judiciary is not justified in second-guessing the evaluation of those who exercise a primary function.

In other words, concerning the interpretation and application of constitutional law, one could say that "courts and legislatures are effectively partners in the process of specifying and giving concrete meaning to abstract rights provisions" and that as a consequence of the direct applicability and binding force of the constitutional provisions with regard to fundamental rights and the guaranteed access to the law and the courts in order to defend those same rights, "the *right to vote* and the *right to contest* are equally non-negotiable features of the constitutionalist enterprise"[1].

Recent factors such as globalization, economic and financial crises, development of transnational and supranational organizations and multilevel protection of fundamental rights through judicial review, contribute to sharpen the tensions inherent to the separation of powers principle, reinforcing the need to clarify the position of the judiciary in a modern democracy and especially the relationship of constitutional courts with the other public powers. As the Consultative Council of European Judges (CCJE) summarized in 2015, "over recent decades, the relationship between the three powers of the state (legislative, executive and judicial) has been transformed. The executive and legislative powers have grown more interdependent. The power of the legislature to hold the executive to account has decreased. At the same time, the role of the judiciary has evolved. The number of cases brought to the courts and the number of legislative acts the courts must apply have increased dramatically. The growth of executive power in particular has led to more challenges to its actions in court and this in turn has led some to question the scope of the role of the judiciary as a check on the executive. There has been an increasing number of challenges in the courts to legislative powers and actions. As a result, the judiciary has increasingly had to examine and has sometimes even restrained the actions of the other two powers. Today, for parties in litigation, and for society as a whole, the court process provides a kind of alternative democratic arena, where arguments between sections of the public and the powers of the state are exchanged and questions of general concern are debated. Courts rule on issues of great economic and political importance. International institutions, especially the Council of Europe and the European Court of Human Rights (ECtHR), the European Union and the Court of Justice of the European Union (CJEU) have all had a considerable influence in member states, particularly in strengthening the independence of the judiciary and in its role in the protection of human rights. Moreover, the application of European and international rules and standards and the implementation of decisions of the ECtHR and the CJEU have provided new challenges for the judiciaries in the member states […]" [CCJE, Opinion No. 18 (2015), § 1].

[1] See M. KUMM, "Constitutional Courts and Legislatures. Institutional. Terms of Engagement" in *Católica Law Review*, vol. I, n. 1 (Jan. 2017), p. 55 (56); and arts. 18 (1) and 20 (1) of the Portuguese Constitution.

But "in principle the three powers of a democratic state should be complementary, with no one power being 'supreme' or dominating the others. In a democratic state, ultimately it is the will of the people, expressed through the proper democratic process that is supreme (sovereignty of the people). It is also fallacious to imagine that any one of the three powers of state can ever operate in complete isolation from the others. The three powers rely on one another to provide the totality of public services necessary in a democratic society. […] In this way the three powers function in a relationship of interdependence, or of convergence and divergence. Accordingly, there can never be a complete 'separation of powers'. Rather, the three powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole. It has to be accepted, therefore, that a certain level of tension is inevitable between the powers of the state in a democracy. If there is such 'creative tension', it shows that each power is providing the necessary check on the other powers and thus contributing to the maintenance of a proper equilibrium. If there were no such tension between the three powers, the suspicion might arise that one or two powers had stopped holding the other to account on behalf of society as a whole and thus, that one or more powers had obtained domination over the rest. Thus, the fact of tension between the judiciary and the other two powers of the state should not necessarily be seen as a threat to the judiciary or its independence, but rather as a sign that the judiciary is fulfilling its constitutional duty of holding the other powers to account on behalf of society as a whole" [*ibidem*, § 9].

So "the judiciary must be independent to fulfil its role in relation to the other powers of the state, society in general, and the parties to litigations. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. Judicial independence is the means by which judges' impartiality is ensured" [*ibidem*, § 10]. Effective jurisdictional protection requires independent courts, because no one is impartial deciding on his own interests – *nemo iudex in causa sua*. "Only an independent judiciary can implement effectively the rights of all members of society, especially those groups that are vulnerable or unpopular. Thus, independence is the fundamental requirement that enables the judiciary to safeguard democracy and human rights" [*ibidem*, § 10].

And "the principle of the separation of powers is itself a guarantee of judicial independence. However, despite the frequently expressed importance of judicial independence, it must be pointed out that nobody – including the judiciary - can be completely independent from all influences, in particular social and cultural influences within the society in which it operates. […] No judiciary – as with any power in a democratic state - is completely independent. The judiciary relies on the others to provide resources and services, in particular on the legislature to provide finances and the legal framework which it has to interpret and apply. Although the task of deciding cases

according to the law is entrusted to the judiciary, the public relies on the executive to enforce judicial decisions. Shortcomings in the enforcement of judicial decisions undermine judicial authority and question the separation of powers. Whilst all three powers share responsibility for ensuring that there is a proper separation between them, neither that principle nor that of judicial independence should preclude dialogue between the powers of the state. Rather, there is a fundamental need for respectful discourse between them all that takes into account both the necessary separation as well as the necessary interdependence between the powers. It remains vital, however, that the judiciary remains free from inappropriate connections with and undue influence by the other powers of the state" [*ibidem*, § 11].

As said, within the European Council there is already a significant documentary collection and an elaborate doctrine on the topic of the independence of courts and judges, both on the *general institutional framework* and the *personal impartiality of the judge*, which in its essential features is valid also in relation to constitutional courts. I refer mainly to the CCJE's Magna Charta of Judges (2010), several CCJE Opinion's[2], several Venice Commission documents[3] and the 2015 Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice[4] as well as the European Charter on the Statute for Judges (1998) and the OSCE Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus and Central Asia (2010) – judicial administration, selection and accountability.

Constitutional courts, as any other court, must be independent and, generally, constitutional court judges enjoy the same guarantees of independence, security of tenure, impartiality and absence of personal liability and are subject to the same incompatibilities as the judges of the remaining courts [see, e.g., Port. Const., art. 222 (5)], notwithstanding the fact that the former "must be protected from any attempt of political influence due to their position, which is particularly exposed to criticism and pressure from other state powers. Therefore, constitutional court judges are in need of special guarantees for their

[2] See especially: No. 1(2001) on standards concerning the independence of the judiciary and the removability of judges; No. 2(2001) on the funding and management of courts; No. 17(2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence; No. 18(2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy; and No. 19(2016) on the he role of court presidents.

[3] Mainly the Study on the composition of constitutional courts [CDL-STD(1997)020]; the Report on the independence of the judicial system Part I: the independence of judges [CDL-AD(2010)004]; the Opinion on the draft law on the amendments to the constitution, strengthening the independence of judges and on the changes to the constitution proposed by the Constitutional Assembly of Ukraine [CDL-AD(2013)014]; and the Opinion on the Draft Law on the Constitutional Court (Ukraine) [CDL-AD(2016)034].

[4] See CDL-PI(2015)002.

independence" [CDL-AD(2008)029, § 14; see also art. 222 (6) of the Portuguese Constitution and arts. 22-35 of the Law of the Portuguese Constitutional Court].

So due to their specific mission, constitutional courts require different safeguards, namely in what respects the classic topics of composition, rules of appointment and tenure but also concerning the more modern need of an effective communication strategy.

As a contribution to the debate, I briefly suggest the following ideas:

1. Composition of the court

The keyword is *balanced composition*: the panel of judges composed by an odd number of highly qualified lawyers shall be linked to the composition of society reflecting its pluralism in what concerns namely world views, gender, when applicable ethnic, geographic or linguistic groups, and professional experiences (some should be career judges but not all of them; academics, solicitors, politicians and public officials are also welcome, precisely because constitutional and statutory interpretation differ in many aspects [see CDL-AD(2004)024, § 18]).

"Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions" [CDL-STD(1997)020, p. 2]. Indeed, "by likening the composition of the court to the composition of society, such criteria for a pluralistic composition can be an important factor in attributing the court with the necessary legitimacy for striking down legislation adopted by parliament as the representative of the sovereign people" [CDL-AD(2005)039, § 3]. Nonetheless, "once appointed, each judge is member of the court as a collegiate body with an equal vote, acting independently in a personal capacity and not as a representative of a particular group […]" [*ibidem*, § 13].

2. Rules of appointment

As a source of *input-legitimacy*, it is important to establish a link between elections and the judges' appointment. Direct elected presidents and/or parliament deciding on the basis of qualified majorities (in order to ensure the agreement of the minority opposition and to foster the election of moderate candidates) constitute the ground for positive systems. Co-option may be considered just for a restricted number of judges in order to ensure the appointment of some judges with special skills or qualities which the peers think are

missing or insufficiently present in the panel. In any case, prior to the election, candidates should be heard before a parliamentary committee in a public session.

"[T]he procedure for appointing judges to the constitutional court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the constitutional court and to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why, for example, the German Law on the Constitutional Court (the *Bundesverfassungsgerichtsgesetz*) provides for a procedure of electing the judges by a two-third majority in Parliament. This requirement is designed to ensure the agreement of the opposition party to any candidate for the position of a judge at the constitutional court. The German experience with this rule is very satisfactory. Much of the general respect which the German Constitutional Court enjoys is due to the broad-based appointment procedure for judges" [CDL-AD(2004)043, § 18]. But the Venice Commission has also stated that while the "parliament-only" model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors [see CDL-AD(2012)009, § 8].

The Portuguese Constitutional Court is composed of thirteen judges, ten of whom are appointed by the Assembly of the Republic (parliament) and three co-opted by those ten; six of the judges who are appointed by the Assembly of the Republic or are co-opted must obligatorily be chosen from among the judges of the remaining courts, and the others from among jurists [Constitution, art. 222 (1) (2)]. The election procedure foreseen in arts. 14 and 16 of the Law of the Constitutional Court is the following: nominees to fill vacant seats are submitted in a single list with each list containing the names of all nominees in alphabetical order, identifying those who are judges in other courts. Those nominees are elected who obtain two-thirds of the vote cast by MPs present, providing that these represent an absolute majority of parliamentary representatives.

3. Tenure (period of appointment and irremovability)

A key-issue to the independence and also to the representativeness of constitutional courts is the length of the judges' tenure and its stability. As a matter of fact, to make the court overrule its own judgments by appointing new judges could operate as an alternative to an unviable legislative displacement of judicial interpretations[5]. So it has been long acknowledged that "the duration of a constitutional judge's term of office combined with the issue of re-election is very significant to the make-up of the court. These criteria may

[5] See M. KUMM, op. cit., pp. 61-63.

affect issues of turnover, the possibility of a political shift in the court, the independence of the judges and institutional stability“ [CDL-STD(1997)020, p. 13].

Constitutional judges and international courts' judges as well are commonly appointed for a limited period of years (mostly 9 to 12). Internally it is important to avoid that a ruling party might be "in position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms" [CDL-STD(1997)020, p. 21]. Accordingly, the Venice Commission favors long, non-renewable terms and considers that the non-renewability even further increases the independence of a constitutional court judge [see CDL-STD(1997)020, p. 15; and [CDL-AD(2009)042, § 14].

Besides "it is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office" [CCJE, Opinion No. 1 (2001), § 57].

The judges of the Portuguese Constitutional Court are independent and irremovable, and their duties may not cease before the term for which they were appointed has elapsed except in, among other compulsory reasons like death or permanent physical incapacity or renunciation, dismissal or compulsory retirement as a result of a disciplinary or criminal procedure [arts. 22 and 23 of the Law of the Constitutional Court]. It is the exclusive responsibility of the Constitutional Court to exercise disciplinary authority over its judges [*ibidem*, art. 25 (1)]. Legislation regarding the legal and criminal liability of the judges of the Supreme Court of Justice is applicable to judges of the Constitutional Court as well as legislation regarding respective preventive detention [*ibidem*, art. 26 (1)]. In what concerns crimes committed in an official capacity, should criminal proceedings be moved against a judge of the Constitutional Court and should he/she be charged with a crime, the continuation of the process depends on decision by the Assembly of the Republic and only if the proceedings are authorized to continue, shall the Court suspend the judge from his duties [*ibidem*, art. 26 (2) (3)]

4. Communication strategy

According to the Lincoln Formula (*Gettysburg Address*), democracy is not only government *of* the people but also *for* the people. This perspective stresses the importance of *output-legitimacy*: the objective satisfaction of social needs, the positive results of the exercise of public authority. In the case of constitutional courts what is at stake is whether their defense mission of the Constitution has effectively materialized and if that result is correctly perceived by the society.

Indeed public services have moved in recent years "towards more openness and have accepted that they must provide a fuller explanation of their work for the public they

serve. As a consequence, the notion of accountability to the public has become of increasing importance throughout public life. […] Judicial authority must be exercised in the interest of the rule of law and of those seeking and expecting justice. Therefore, the judiciary faces the responsibility of demonstrating to the other powers of the state and to society at large the use to which its power, authority and independence have been put" [CCJE, Opinion No. 18 (2015), §§ 21 and 22]. In addition, constitutional courts decide on fundamental matters to society and the state. The administrative and financial autonomy from which the constitutional courts benefit in order to protect their independence also justifies that, "just as the legislature and the executive are accountable for how they allocate resources, so also must the judiciary account to society for how the financial resources allocated to it are spent in the fulfillment of its duties towards society" [*ibidem*, § 22]. Those resources come, ultimately, from tax paying citizens.

"In the judicial context, 'accountable' must be understood as being required to give an account, that is: to give reasons and to explain decisions and conduct in relation to cases that the judges must decide. 'Accountable' does not mean that the judiciary is responsible to or subordinate to another power of the state, because that would betray its constitutional role of being an independent body of people whose function is to decide cases impartially and according to law" [CCJE, Opinion No. 18 (2015), § 20].

So accountability implies communication with the public through the media and eventually with other powers of the state. The process of communication bears the risks of misunderstandings and abuses that might undermine the authority, legitimacy and ultimately the independence of the court. To face those risks it is critical to adopt a correct communication strategy focused on the specific mission of a constitutional court in a democracy constrained by the rule of law where the protection of the fundamental rights of the citizens is no less important than their will expressed in a majority vote.

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Chişinău, 3 March 2017