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CONFERENCE CELEBRATING THE 15TH ANNIVERSARY OF THE CONSTITUTIONAL COURT OF MOLDOVA

ON

"GUARANTEEING THE CONSTITUTION'S SUPREMACY, BASIC FUNCTION OF THE CONSTITUTIONAL COURT"

CHISINAU, MOLDOVA, 26 FEBRUARY 2010

REPORT

"THE PROTECTION OF FUNDAMENTAL RIGHTS AND LIBERTIES –CONSTITUTIONAL GUARANTEE"

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1. - I am very happy and honoured to participate in this international Conference organized for the 15th Anniversary of the Constitutional Court of the Republic of Moldova by the Venice Commission and the German Foundation for International Legal Cooperation.

In this session, we are going to discuss the comparative legal aspects of constitutional protection of fundamental rights and liberties by Constitutional Courts.

This is a very rich and fruitful topic. Comparing countries, which in some respects appear so distant, is indeed conducive to a more thorough approach of their respective system of constitutional and legal thinking.

Belgium, as an old liberal democracy, may certainly seem very different from the young State of Moldova. However, I think that the Belgian experience can bring new lessons to Moldova. The reverse is of course also true. To take only one example, the Belgian Constitutional Court has been operative only in 1985, just ten years before the Constitutional Court of Moldova. This example shows that comparisons should be made and may be fruitful.

2.- Belgium has one of the oldest Constitutions in the world still in operation, dating back to 1831. It is nearly as old as the US Constitution and Belgians are very proud of this great legal stability. This means that in nearly 180 years, Belgium has not experienced a real political or legal revolution, giving birth to a new Constitution. All the socio-economic and political changes have since this remote date happened in the form of a constant evolution, rather than by way of a revolution.

The initial text of 1831 was very progressive for its time. It is often said, quite rightfully, that the original Belgian institutions were a kind of written translation of the British constitutional system. The freedoms and liberties recognized were also very much in advance for their time. These basic rights and freedoms have remained untouched until recently(1970).

It is easier to export a written Constitution than a British style unwritten one. This fact explains the prestige and success of the Belgian Constitution in Europe and in the world. During all the XIXth century and the beginning of the XXth century, the Belgian Constitution was held as the model and paradigm of liberal Constitution.

2.- From the very beginning, Belgium has been a country ruled by law. The original meaning of this expression was to reject arbitrary acts of government and administration and to trust impersonal and abstract rules, i.e. law. This terminology can be found in major European languages: Etat de Droit, Rule of Law, and Rechtsstaat, with more or less the same meaning.

But, at the same time, Belgians shared with its French and British neighbours what can be called a genuine cult of laws, this expression being here narrowly construed and applying only to legislative acts of Parliamentary assemblies. In Belgium too, the supremacy of Parliament lasted a very long time and its end came, as I will explain later, on an apparently accidental manner.

3.- Starting 1831, all the ordinary judges(judicial power and administrative judges) have been entitled not to apply executive acts and regulations(as well as acts of subordinate units such as provinces and municipalities) when these acts violate higher norms(Constitution or laws). This old original rule is the first layer of protection of rights and liberties. For instance, judge will not apply a municipal regulation imposing a tax contrary to the principle of equality.

However, the powers of the judge are limited: he does not apply the regulation in the present case, but he is not allowed to cancel it, to annul it *erga omnes.*

This second layer of protection has been put in place in 1948, after the Second World War, by the establishment of a "*Conseil d'Etat*"(Council of State) more or less fashioned on the French model.

This special court has, *inter alia*, the power to annul (or to cancel) all acts of the Executive or of subordinate units, put it differently, all the acts and regulations that are inferior to statutes of Parliament. This explains that the Belgian Constitutional Court is never competent for this kind of acts, for which only the Council of State has power. I think that the opposite solution is adopted in Moldova.

4.- To sum up, all executive acts (or acts of subordinate units) are subject to judicial review, by the ordinary courts or by the Council of State.

But this review came to an end when statutes or legislative acts were challenged. The judicial review of legislative acts was for a long time rejected in Belgium. Such a review was said to be opposed to the absolute sovereignty of Parliament and to the concept of separation of powers. The Parliament itself was the democratic judge(because being elected) of the conformity of statutes to higher norms(Constitution and international law). This was very powerful dogma in Belgium. In the last four decades, this dogma has nearly disappeared.

5.- First, in 1971, judges declared themselves having power to review all internal rules, including parliamentary statutes, in the light of international commitments of the country. This means that clear and precise texts of treaties have prevalence on domestic statutes. In these instances, judges apply these international rules and not domestic law, even if incorporated in a parliamentary statute.

This was indeed a big jump. It was the very first case judges were allowed not to apply a legislative rule. This case-law move was a form of "quiet revolution" involving many practical consequences.

Indeed, Belgium is a Contracting Party in most international treaties in the field of fundamental rights, for instance the UN Pact on Civil and Political Rights, the UN Pact on Elimination of all Forms of Racial Discrimination and, of course, the European Convention on Human Rights.

This means that when a Belgian judge finds these texts precise enough(and having thus what is called "direct effect"), he will give preference to these international commitments over all kind of domestic law. For some lawyers and courts, this superiority of conventional international law having direct effect applies even in regard of the Belgian Constitution itself.

If I may suggest here a comparison with the Moldovan Constitution, Article 4 of this text obviously gives a great weight to international law in the field of human rights and freedoms:" Constitutional provisions for human rights and freedoms shall be understood and implemented in accordance with the Universal Declaration of Human Rights, and with other conventions and treaties endorsed by the Republic of Moldova". Article 4 § 2 goes on stating:" Wherever disagreement appear between conventions and treaties signed by the Republic of Moldova and her national laws, priority shall be given to international regulations."

These texts seem comparable to the Belgian situation. There is a difference, however. In Belgium, when there is a discrepancy between international and domestic provisions in the field of Human Rights, the most favourable or protective provision will apply, be it treaty or domestic rule. In Moldova, it is apparently always the international regulation that prevails. I think the Belgian solution is closer to the subsidiarity principle as set forth, for instance, in Article 53 of the ECHR that provides that the most protective rule shall apply.

6.- I have not yet spoken of the Belgian Constitutional Court. The setting up of this Court came somewhat by accident in the period 1980-1985.

From 1970 on, Belgium has transformed its internal structure, gradually becoming a federal State. This is a long and difficult process that is not yet completed. The reasons of this change will not be touched upon in this brief paper.

Creating a federal State logically involves creating a new set of rules at the federated entities' level. These new rules have the same legal status as federal laws *sensu stricto* adopted by the Belgian Parliament. Obviously, conflicts may arise between these two sets of rules that are both of legislative nature. There was no judge at that time having power to solve this kind of conflict, as Belgium firmly rejected any form of Constitutional review of laws.

The Constitution was then revised and introduced a new Court, separated from all the others courts(as it seems to be the case in Moldova too) and typically called at that time "Court of Arbitration".(This name will be transformed into the current denomination of "Constitutional Court" only in 2007).

The "Court of Arbitration" was only competent to solve the federal-type problems. It was at the outset not competent to tackle human rights issues. The initial name was thus adequately chosen.

7.- However, experience shows that evolution can be very rapid and sometimes runs against the original intent. The history of the Belgian "Court of Arbitration" is somewhat parallel, although in a very different context, to the evolution of the French "Conseil Constitutionnel".

In 1988, the Constitution was once again changed in order to devolve competences in the field of education to federated entities. For historical reasons, schools and education have always been considered in Belgium as a very sensitive issue. For the first time, the Belgian Constitution granted powers to the(still then) Court of Arbitration in the area of human rights and freedoms, namely if constitutional rules regarding freedom in education and equality are deemed to be violated.

The Court construed these new powers very broadly, completely disconnecting the principle of equality from educational matters. Through this very bold and extensive case-law, the Court reached in a indirect way all constitutional rights and freedoms, as well as rights enshrined in international treaties, these rights being considered not *in se, "an sich",* but in conjunction with the principle of equality.

This jurisprudence was, once again, a form of "quiet revolution", but eventually it was well received by the Belgian politicians.

In 2003, the formal situation was changed and all fundamental rights set out in the Belgian Constitution were included into the powers of the Court. The very name of the Court was finally reshaped in 2007, the Court becoming a "Constitutional Court".

This very rapid but quiet revolution took place in a few years (1985-2003) and is telling a lot about the fundamental role Constitutional Courts play in Europe. In 1985, the" Court of Arbitration" was conceived solely as a judicial institution allowing the smooth functioning of the new federal rules. Nowadays, this federal role is of course maintained, but the bulk of Court's work is focusing on human rights issues. The change in denomination operated in 2007 just took note of this major change.

However, the Court's review still remains incomplete: the Court has technically only powers over some designated provisions of the Constitution, not over Constitution as a whole. This seems very peculiar to Belgium. So, the Belgian constitutional order still express its ancient distrust against the constitutional review of laws.

8.- The Constitutional Court comprises twelve judges, half of them Dutch-speaking, the other half French-speaking. In each language group of six judges, three must come from high levels of the judiciary or the University, three must be old members of the various Parliaments (these members being of course out of charge). This last rule may sound astonishing but is designed to allow the Court to keep in close contact with political realities. The judges are formally nominated by the King,

but on lists presented by a majority of two-thirds alternatively by the House of Representatives and the Senate. This provision is very important for the credibility of the Court that often has to decide on major and delicate political, ethical or economic issues. A majority of two-thirds is a strong guarantee that all the major political parties have in some way a say in the Court's decisions.

9.- The Court is functioning on the classical European or Kelsenian model.

There are two ways to get access to the Court.

The first one is aimed at annulment or cancellation of a new legislative rule in a short time after its official publication in the Official Gazette. In this case, the Court exercises a kind of abstract review (*Abstrakte Normenkontrolle*).

This way of proceeding is not only open to public authorities (Federal Council of Ministers, Governments of federated entities, and in some cases, Presidents of legislatives assemblies) but also to any natural or legal person showing an interest.

This point must be stressed. Individuals, businesses and NGOs who feel threatened in their fundamental rights by a new law may ask for the cancellation of such a rule. Associations and NGOs very frequently exercise this right. One may say that nearly all new statutes in sensitive fields(e.g. police investigations, criminal law or ethical issues) are systematically challenged in the Constitutional Court. This possibility highlights the truly democratic aspect of the Court's functioning and some lawyers even speak of a new form of" judicial democracy".

In some instances, the Court may, on demand, suspend the application of a new rule, if this application seems to be contested on serious grounds and may give rise to grave and difficult to repair damages. This is a kind of rapid and provisory constitutional justice.

The other way of getting access to the Court is the concrete review(*Konkrete Normenkontrolle*). If any judge thinks that a legislative rule may hurt the Constitution(or, more precisely, these constitutional rules entrusted to the Court's powers-*see n°7 in fine*), he may-or sometimes he must- ask a preliminary question to the Constitutional Court. This may be called an exception of non-constitutionality. The ordinary judge has indeed no power to solve himself this question. He must ask the Constitutional Court for a preliminary ruling and, after receiving it, he will eventually decide the case.

This procedure is called" question préjudicielle" or "preliminary ruling" more or less in line with what happens before the European Court of Justice in Luxembourg.

The main advantage of this way of proceeding is that it allows challenging very old laws, for instance the Napoleonic Code civil of 1804. The other advantage is that it permits a more concrete approach, focusing not so much on the legal rule itself, as it is written in the books, but on its interpretation and implementation. In this respect too, the Belgian experience comes close to the developments of other European Constitutional Courts.

Nowadays, the Court delivers about 200 rulings per year, divided between annulment procedures(about 35-40%) and preliminary rulings (about 65-60%).

10.- No field of Belgian law is really immune from the Constitutional Court's case law. Its legal but also political influence may hardly be denied.

Contrary to the original intent, the Court mainly adjudicates in human rights' field and very often corrects the legislative work and in some cases issues directives to the lawmaker. It has grown to a necessary partner in the lawmaking process. Its rulings, although sometimes very harsh for the parliament seem to be well accepted and fairly implemented.

The rights and liberties set forth in the Belgian Constitution are however, for most of them, quite old and outdated, dating back to 1831. Despite some later additions, this list of fundamental rights is not to be compared to more modern lists, such as, for instance, the detailed(even too detailed list) of basic rights enumerated in the Constitution of the Republic of Moldova.

The Belgian Constitutional Court has found a way out. Using special ways of legal reasoning, the Court has indirectly incorporated in its review all the rights set out in international treaties relating to fundamental rights and liberties and, first of all, the European Convention on Human Rights. The Belgian Constitutional Court frequently quotes Strasbourg's case law and is very much influenced by its jurisprudence. Except when domestic law is more favourable (*see supra n°5 in fine*), the ECHR has become a powerful tool in the hands of the Court. Adding to that, the Belgian Court discovers(or creates) general principles or fundamental principles in order to fill the gaps remaining in its extensive and sometimes very bold case law.

The strictness of the Court's review may vary depending on the matter and the principles concerned. In economic and budgetary areas, for example, the Court exercises only a very light scrutiny. But for fundamental issues, such as birth's equality or access to judge, the Court's scrutiny becomes very strict. One must however avow that this case law may sometimes appear unpredictable.

11.- In summary, the Belgian case shows that a judicial institution created for very different purposes-in this instance the functioning of a newly created federal State- rapidly becomes primarily a Court mainly focused on human rights issues.

This seems to be a path followed by many others countries in Europe.

In this new role, the Court functions as an integral part of the lawmaking process and of democratic and social life. The in Belgium deeply rooted fear of "*gouvernement des juges*"(government by judges) has in a few years been overcome. The rule of law concept, already present in 1831, must now be seen as nearly complete.