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REPORT

"CONSTITUTIONAL LAW AS JURISPRUDENTIAL LAW: THE LITHUANIAN EXPERIENCE"

by

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Prior to the advent of the Constitutional Court, Lithuania (as all countries that emerged or re-emerged on the rubbles of the Soviet Union) never before has had neither constitutional clauses strictly affirming the supremacy of the Constitution nor an institution entitled to perform constitutional review. Both legal science and legal practice were guided by a conviction that courts' jurisprudence did not create positive law but only applied it and that the supreme form of interpretation of law was the "authentic" (i.e. legislative) one. Judicial interpretation of the Constitution was almost totally lacking; courts made but very modest attempts to increase its volume. Consequently, neither 1992 Constitution nor 1993 Law on the Constitutional Court did explicitly mention constitutional interpretation as a task for the to-be-established Constitutional Court. This was typical not only of Lithuania but of virtually all countries of the region which experienced the so-called constitutional renaissance.

Things have changed radically since the constitutional courts, in addition to their "technical" function of elimination of unconstitutional acts from the legal system, launched the formation, on a case-by-case basis, of the official constitutional doctrine formulated in its jurisprudence. Here, "official" means "ultimate", i.e. the final determination of what the constitution says on a specific legal matter is an exclusive domain of a constitutional court and not that of the actors of the political process or the public opinion, or the legal science, or other courts. This is so because constitutional review inevitably presupposes judicial interpretation both of the text of the original constitutional document and of the challenged legal act and, further, re-interpretation of the official doctrine already formulated in the constitutional court's jurisprudence, irrespective of whether such function is explicitly mentioned in the constitution or not (as is the case in most countries, not excluding Lithuania). The power of the resolution of constitutional courts' rulings (wherein it is recognized that the challenged norm is or is not in conflict with certain constitutional provisions) is always retrospective. This minimalist attitude, however, is not applicable to the official doctrine formulated by a constitutional court in the part of reasoning of its ruling. This doctrine does not only substantiate the resolution, it is also prospective because the law-making bodies have to pay heed to the said reasoning if they want to avoid annulment, on the basis of unconstitutionality, of their law-making innovations in the future. Thus, the official constitutional doctrine does prescribe certain guidelines (which also means limits) for the law-makers' discretion in their future law-making activities and, in this respect, shall be treated as a source of law. The constitutional court's role cannot be limited to that of the so-called negative legislator. Although constitutional courts are meant to substitute for legislators properly so called, yet all national constitutional review systems may provide numerous examples of such legal interpretation where courts, to paraphrase Gadamer, instead of finding a meaning of the legal text, in fact provide the latter with a meaning, especially in cases where the legal text is based on a compromise and/or is ambiguous. This equally, if not to a much greater extent, applies to constitutional clauses, especially given the abstract character and vagueness of most constitutional principles. In many cases, courts have to choose between several alternatives of meanings of which only one is approved and maintained (not necessarily the one until then favored by the legislator) while others are rejected as unconstitutional. If this is not a de facto law-making, so what is it? The same can be said about the cases in which a constitutional court upholds statutory provisions. Such upholding amounts to a positive sanctioning of a law-maker's will and is, too, a de facto law-making even if the respective constitutional

court itself avoids calling it so. Constitutional courts also often find themselves in situations where they have to consider the constitutionality of such legal acts which are no longer valid or the constitutionally of ad hoc legal regulation the validity of which had expired after the onetime implementation. In such cases, constitutional review would serve no practical purpose if, in the future, the legal power of the constitutional court's reasoning was ignored.

Therefore, the commonplace American saying that the Constitution is what the court says it is is not only a metaphor and shall not be considered as typical for the American context only. It reveals the very essence of constitutional review as exercised by courts, especially in a centralized constitutional review system (which is characteristic of both Tajikistan and Lithuania). The official interpretation of a constitution as formulated in a constitutional court's jurisprudence is inevitably legally superior in relation to all other interpretations including those provided by the legislator, the head of state, or the executive. True, the logic of the rule of law is often in collision with political expediency determined by interests and not arguments, and it would be audacious to assert that the logic of the rule of law does always prevail over political considerations, especially in countries which have a longstanding tradition of law's servility to politics. "How many divisions has the Pope?" Stalin was reported to have said. Nevertheless, from the point of view of the legal logic, rulings of a constitutional court cannot be overcome otherwise than by a constitutional amendment which is the only means of a political rejection of a ruling which is not beyond consideration. The legislator properly so-called has become "informally", however legally bound by the constitutional court's rulings—until (and if at all) it endeavors to amend constitutional provisions on which a specific ruling is based. There are two preconditions for the efficacy of the constitutional jurisprudence as the source of law: (i) the constitutional court, as well as the whole judicial branch, must enjoy at least a minimum of institutional and procedural autonomy; (ii) there must be at least a minimum of respect to the constitutional court's decisions from the part of the political establishment. In a society of a mature constitutional culture, politicians usually do not question rulings of the Constitutional Court (whereas scholars, journalists, commentators etc. may). A lot depends on the quality of the legal culture of the political class and the society at large. It is well known that the Soviet heritage is not constructive for the nurturing of respect to law, especially in situations where it collides with politics or public impatience.

In Lithuania, the Constitutional Court has naturally self-assumed the function of formulation of the official constitutional doctrine. This self-assumption was based on the broad interpretation of the mission of the Constitutional Court—to ensure the supremacy of the Constitution, the consistency of the legal system and the hierarchy of legal acts. At the same time, this self-assumption amounted to intrusion into what until then was "obviously" a part of the exclusive competence of legislators and the executive, and to a certain usurpation of competence by the constitutional judges. From the outset, very few (if any) challenged the right of the Constitutional Court to be the sole interpreter of the Constitution. Today, after having realized how the powerful––due solely to the persuasiveness of its jurisprudence! – this non-political body has become in the state some political actors search for ways of reducing the acceptance of the official constitutional doctrine, but with no great success, yet.

However, the function of official constitutional interpretation is not the privilege of the constitutional court. It binds the court itself. From 2006 and on, the Constitutional Court of the Republic of Lithuania, on many occasions, has emphasized that it jurisprudence is continuous and shall not be arbitrarily altered without explicit and proper motivation. From a comparative perspective, one would find very few examples on the world scale of such open self-restrictive stand where the court of

ultimate jurisdiction applies stare decisis to its own forthcoming jurisprudence. There is the logical, the legal and at the same time the moral imperative for the continuity of the Court's jurisprudence: if the political establishment, the legal community and the society at large are expected to respect the law, the ultimate interpreter of the constitution must be predictable. The constitutional court cannot rely on different standards in like legal situations; this would result in distortion of constitutional justice. In the Lithuanian Constitutional Court's rulings, it has been underlined more than once that deviation from the Court's own precedents is permitted only when it allows for better defense of values enshrined in the Constitution, human rights in particular, and it must be explicitly motivated in each case (especially given the fact that the Court's rulings have erga omnes and ex nunc effect). E.g., in mid-1990s, the Constitutional Court related the constitutional provision that no one can be punished for the same crime a second time to the sphere of criminal law and criminal procedure, however, in subsequent cases this interpretation was expanded so that now the said provision is perceived as an expression of the principle non bis in idem which is not limited exclusively to punishment for criminal offences. But even such alterations of the official doctrine are sparse.

The emergence of constitutional justice tends to bring about the radical transformation of the paradigm of the constitutional law. In Lithuania, before the advent of the Constitutional Court, the Constitution was perceived as the "Basic Law", i.e. the original text of the constitutional document (as later amended). It was defined as the "statute" of the highest legal force, however, in the absence of direct application of the Constitution (characteristic of the Soviet legal tradition more than of any other), this "statute" gave the legislator a vast discretion in "concretizing" constitutional provisions in ordinary statutes and even sub-statutory legislation. For decades, the prevailing opinion was that the sources of the constitutional law included not only the Constitution itself but also statutes and various sub-statutory legal acts (as well as international treaties) without which most constitutional provisions were mere declarations. The constitutional law so perceived amounted to just one more "branch of law" and in this sense it was comparable to administrative law, civil law, labor law, criminal procedure law etc. With the development of the official constitutional doctrine, this paradigm was doomed to change. This change involved three key elements: (i) official affirmation of the concept of the living Constitution, i.e. jurisprudential Constitution which is constantly developed by means of its official interpretation; (ii) elevation of the acts of the Constitutional Court—a completely new source of law—in their status to the level of the sources of constitutional law; and (iii) exclusion from the list of sources of constitutional law of all other acts except the constitutional document and the acts of the Constitutional Court (as they contain official interpretation of the Constitution). Following the Constitutional Court's jurisprudence, such constitutionalist approach was also accepted (albeit not overnight) by the Lithuanian legal science. This approach leaves no room, in the system of sources of constitutional law, for any other acts except for the Constitution as interpreted in the official constitutional doctrine, i.e. initial constitutional document (as later amended) and the acts of the Constitutional Court. The latter have been elevated to the level of the Constitution itself, while all statutes and sub-statutory acts were wiped out of the system of sources of constitutional law. This new paradigm of the constitutional law also amounts to the new constitution-centered paradigm of the whole legal system and does not allow for interpretation of any constitutional provision or concept according to its explication in ordinary, i.e., sub-constitutional, legislation; on the contrary, any such explication is always potentially subject to constitutional review (regarding the acts of the Seimas, the President of the Republic, the Government, and acts adopted in a referendum – by the Constitutional Court, and regarding ministerial and municipal legal acts – by administrative courts). The Constitution (including its official interpretation contained in the Constitutional Court's jurisprudence) is perceived as

the ultimate source and the criterion of legality of any regulation valid on the national territory.[1] In this paradigm, the Constitution is self-generating, and the Constitutional Court has become the tool and the driving force for this self-generation. To generalize, the Constitutional Court has reshaped the perception of the Lithuanian national legal system so as to clearly delineate two levels of legal regulation: the constitutional one and the ordinary (sub-constitutional) one. This, given the two preconditions for the efficacy of the constitutional jurisprudence as the source of law (mentioned above), shall, in a longer perspective, contribute to the implementation of the model of politics governed by law.

[1] In interpreting the Constitution, the Constitutional Court, of course, could not escape the fact that the Lithuanian national legal order co-exists with other legal orders. In this context, the doctrine of the EU law within the Lithuanian legal system has also been formulated: "[T]he Constitution consolidates not only the principle that in cases when national legal acts establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied, but also, in regard of European Union law, establishes expressis verbis the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), save the Constitution itself" (Constitutional Court ruling of 14 March 2006, the formula repeated also in several subsequent Constitutional Court rulings).