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Responding to threats to the rule of law and fundamental rights: the evolving powers of the Constitutional Court

REPORT BY

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The rule of law is perceived as a fundamental principle, which generally implies the supremacy of law in all the areas of the functioning of the state and constitutes the foundation of the Constitution and the constitutional legal order[1]. Constitutional courts perform the essential function of ensuring the supremacy of the Constitution within their national legal systems, as well as of guaranteeing the rule of law as inseparable from the supremacy of the Constitution. It is the also Constitution which has to safeguard and protect human rights, and ensure that all human rights are implemented without discrimination ("individualisation" is identified as the new feature of constitutionalism of the XXIst century law).

I will present a few guiding principles from the case-law of the Constitutional Court of Lithuania, in which the principle of the supremacy of the Constitution and the principle of a state under the rule of law[2] have had fundamental importance for the development of the powers of the Constitutional Court, mostly in response to serious threats to the rule of law and fundamental rights.

First principle: no legal act would have the immunity from constitutional control.

The Constitutional Court assumed four types of legal acts which are not expressly mentioned in the Constitution (Article 102 and Article 105) and whose compliance with the Constitution is investigated by the Constitutional Court.

First, Lithuania is among a few countries where the Constitutional Court has been given a formal role in the constitutional amendment procedures.[3] Though this is not expressly established by the provisions of the Constitution, the Constitutional Court is vested with the powers to review the constitutionality of the constitutional amendments with regard to not only the procedural, but also substantive aspects of constitutionality thereof (meaning laws adopted by the Seimas or by referendum, amending the Constitution).[4]

In its rulings of 24 January 2014 and 11 July 2014, the Constitutional Court identified the expressly established and implied substantive and procedural limitations on the alteration of the Constitution. (CC:

> *"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."*)

[1] The Implementation and Protection of the Principles of the Rule of Law in Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine. 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> [last viewed 10.04.2017].

[2] In the Lithuanian Constitution and official constitutional doctrine, the term "a state under the rule of law" is used to express the idea of the rule of law.

[3] The European Commission for Democracy through Law (Venice Commission). Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, 2015. Available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)002-e> [last viewed 10.04.2017].

[4] In the ruling of 24 January 2014. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta850/content> [last viewed 10.04.2017].

Accordingly, the Constitutional Court held that no amendments to the Constitution may be adopted that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state,[5] thus identifying the unamendable fundamental constitutional values or the "eternal clauses". The Constitutional Court stressed that, if interpreted otherwise, the essence of the Constitution itself would be denied.[6] (CC: "if the Constitution were construed in a different way, it would be understood as creating preconditions for putting an end to the restored "independent State of Lithuania, founded on democratic principles", as proclaimed by the Act of Independence of 16 February 1918"). The substantive limitations imposed on the alteration of the Constitution are equally applicable to the Parliament and in the event of the alteration of the Constitution by referendum.

Constitutional courts must, therefore, safeguard the constitutions against those laws amending the constitutions that violate the essence of the constitutions themselves. There are no alternative means of ensuring that the constitution is amended in compliance with the procedure prescribed by the constitution and that the fundamental values enshrined in the constitution are respected[7].

It also plays an important preventive role, e.g. by preventing clearly unconstitutional referendums – the Central Electoral Commission may not register an initiative to hold a referendum, which clearly contradicts the Constitution (examples of impossible referendums in Lithuania – with regard to re-introduction of the death penalty, with regard to seperate obligations arising from the membership of Lithuania in the EU, radical changes in the form of governance, etc.).

Thus constitutional control of the constitutionality of constitutional amendments, both on substantive and on procedural grounds, is considered to be a way to ensure the supremacy of the Constitution, which is a fundamental requirement for a democratic state under the rule of law.

The principle, according to which no legal act may be immune from constitutionality control, applies to other legal acts not expressly mentioned in the Constitution as well. According to constitutional doctrine, the purpose of the constitutional judicial control, as a constitutional institute, and the contextual meaning of the constitutional provisions that consolidate it, determine the powers of the Constitutional Court to investigate the compliance of all legal acts adopted by referendum with (first of all) the Constitution,[8] just as determines its powers to review the constitutionality of constitutional amendments, adopted by referendum.

The third type of legal acts which are subject to constitutional control and which are not expressly mentioned in the Constitution are legal acts of an individual character (individual acts). The Constitutional Court investigates the compliance of individual acts with the Constitution and laws. For example, in its ruling of 30 December 2003, the Court noted that the Constitutional Court enjoys the powers to investigate the compliance of acts of the President of the Republic with the Constitution and laws irrespective of whether these acts are of an individual or normative character (whether they are of one-off (ad hoc) application or of permanent validity also).[9]

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[5] See Constitutional Court ruling of 11 July 2014. Available at: <http://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content> [last viewed 10.04.2017].

[6] Žalimas, D. The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law. *In*: Constitutional Court of the Republic of Slovenia - 25 Years. International Conference Commemorating the 25 th
of the Constitutional Court of the Republic of Slovenia, BLED, 23 June 2016. Available at: <http://www.us-rs.si/media/zbornik.25.let.pdf> [last viewed 10.04.2017].

[7] National Report of the Constitutional Court of the Republic of Lithuania to the XVIIth Congress of the Conference of European Constitutional Courts "Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles". Available at: <http://www.confeuconstco.org/reports/rep-xvii/lituanie_EN.pdf> [last viewed 10.04.2017].

[8] The ruling of 28 March 2006. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta925/content> [last viewed 10.04.2017].

[9] Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1245/content> [last viewed 10.04.2017].

The fourth type of legal acts which are subject to constitutional control and which are not expressly mentioned in the Constitution is considered in the context of the ruling of 28 September 2011.[10] In this ruling, the Court established its powers to review the constitutionality of sub-statutory acts of the Seimas (i. e. the State Family Policy Concept approved by a Resolution of the Seimas). This act expressed the will of the Seimas regarding the future legal regulation of certain social relations and formed the basis for preparing and adopting the corresponding legal acts.

The Court also established its powers to review the constitutionality of sub-statutory acts of the Seimas and the Government in the ruling of 24 September 2009.[11] The Court took into account the specificity of the Seimas Resolution as not a normative, but a programme document, reflecting the legislature's will on certain political tendencies; the Court took into account the specificity of the Government's Conception which does not consolidate the legal regulation (legal norms) that directly influences the legal relations. The Court acknowledged that the mentioned acts should be assessed in the aspect of the constitutionality of their content, based on the grounds of which law-making procedures should take place.

The constitutional doctrine on non-imunity of legal acts from constitutional control is based on the concept of the integrity of the Constitution, as well as on the principles of the supremacy of the Constitution and a state under the rule of law, on the hierarchy of all legal acts, as well as on the other constitutional imperatives.

Second guiding principle concerning evolving powers of the constitutional court to ensure the rule of law is impermissibility of overruling the power of the final act of the Constitutional Court.

The Constitutional Court has consistently held that the power of its decisions may not be overruled by repeatedly adopting an analogous legal act. According to paragraph 2 of Article 107 of the Constitution, "the decisions of the Constitutional Court on the issues within its competence according to the Constitution shall be final and not subject to appeal".

The constitutional prohibition on overruling the power of a final act of the Constitutional Court is one of the means to ensure the supremacy of the Constitution and the rule of law. Therefore, if an analogous legal act were adopted in disregard of the said prohibition, such an act could not constitute a legal basis for acquiring any legitimate expectations, rights, or legal status.

The Constitutional Court may also declare the unconstitutionality of the consequences of the application of a legal act which was adopted in violation of the prohibition on overruling the final acts of the Constitutional Court, even if those consequences had appeared before these acts (CC rulings, decisions, conclusions) were adopted. Although the Court's power to annul the legal power of the legal act that is in conflict with the Constitution and also the legal consequences that were caused by the said legal act and which emerged prior to the adoption of such a decision of the Constitutional Court is treated as an exception. This exceptional situation (in addition to some other exceptional situations) is decided by the Court on a case-by-case basis.[12]

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[10] Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1112/content> [last viewed 10.04.2017].
[11] Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1287/content> [last viewed 10.04.2017].
[12] About what is taken into account by the Court in these situations please look, for example, the decision of 19 December 2012. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1039/content> [last viewed 10.04.2017]. In the ruling of 27 May 2014, the Court indirectly applied authority to recognise the consequences of applying legal act violating the prohibition to overrule the power of the final act of the Constitutional Court as being in conflict with the Constitution. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta857/content> [last viewed 10.04.2017]. Another two rulings of the Court on the situation when the Seimas had violated the prohibition to overrule the power of the final act of the Constitutional Court: the rulling of 30 May 2003 (available

Third guiding principle – harmonisation of the provisions of the Constitution with international law and the law of the European Union.

In the Rule of Law Checklist, adopted by the Venice Commission, compliance with international law and, in particular, with human rights law, is enlisted as one of the elements of the principle of legality.[13]

The Lithuanian official constitutional doctrine has explicitly recognised the principle of respect for international law (*pacta sunt servanda*) as an element of the principle of the rule of law. The constitutional principle of respect for international law leads to the openness of the Constitution towards international law. The constitutional principle of respect for international law is supplemented by the principles of an open, just, and harmonious civil society and the geopolitical orientation of the state, which imply the integration of the State of Lithuania into the community of democratic states.

This openness gives rise to certain implications. Firstly, international law is perceived as the minimum necessary constitutional standard for national law. Secondly, the openness of the Constitution to international law provides the basis for the constitutional presumption of the compatibility of international law with the Constitution. Thirdly, it gives rise to the duty of the Constitutional Court, when interpreting the provisions of the Constitution, to pay regard to the international legal context (the duty of consistent interpretation). The three constitutional justice cases demonstrate the importance of the consistent interpretation of the Constitution with international law for protecting human rights on the national level and strengthening the rule of law[14]: the rulling concerning the constitutionality of the death penalty (ruling of 9 December 1998)[15], the already mentioned rulling concerning the constitutionality of the State Family Policy Concept (ruling of 28 September 2011)[16] and the rulling concerning criminal responsibility for genocide (ruling of 18 March 2014)[17].

In addition, the constitutional protection of international obligations is consolidated in the Lithuanian constitutional doctrine, formulated in relation to the constitutionality of constitutional amendments which has been mentioned earlier.[18] According to this doctrine, the adoption of constitutional amendments incompatible with international obligations is not allowed as long as these obligations are not renounced in accordance with the international legal norms. In this way, the international obligations of Lithuania become an essential part of legality, as an element of the principle of the rule of law (and the minimum necessary constitutional standard for national law, in particular, in the sphere of human rights).[19]

Thus, this friendly approach on the constitutional level towards international commitments, especially in the field of human rights, is tightly interrelated with the aspirations to protect democracy and the rule of law as the core elements of the constitutional identity of Lithuania.

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at: <http://www.lrkt.lt/en/court-acts/search/170/ta1244/content> [last viewed 10.04.2017]) and the rulling of 24 December 2002 (available at: http://www.lrkt.lt/en/court-acts/search/170/ta1214/content> [last viewed 10.04.2017]).

[13] The European Commission for Democracy through Law (Venice Commission). Rule of Law Checklist, 2016. Available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e> [last viewed 10.04.2017].

[14] *Ibid*.

[15] Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1135/content> [last viewed 10.04.2017].

[16] Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta1112/content> [last viewed 10.04.2017].

[17] Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta853/content> [last viewed 10.04.2017].

[18] The ruling of 24 January 2014, related to the constitutional status of the Central Bank of Lithuania, is one of the most recent examples of the harmonising type of internalisation of European Union law. Žalimas, D. Impact of International and the European Union Law on the Constitution: Towards the European Constitutional Identity?

[19] Available at: <http://www.lrkt.lt/data/public/uploads/2016/12/31449_konstitucinis_teisines-valstybes.pdf> [last viewed 10.04.2017].

However, examples of an unfriendly approach towards international commitments may be found in the constitutional jurisprudence of some other countries as well, which in this manner (and as laid down in the Rule of Law Checklist) constitutes threats to the rule of law. As an example of an unfriendly approach, the decision of 14 March 2014 of the Constitutional Court of the Russian Federation may be provided – it recognises that the agreement between the Russian Federation and the so-called "Republic of Crimea", located in the territory of Ukraine, is an international treaty, as well as that the so-called "Republic of Crimea" has the status of an international legal entity, is in clear contradiction with provisions of international law. The decision breaches numerous fundamental constitutional principles, including the territorial indivisibility of Ukraine,[20] unlawfully acknowledges the right to self determination, which only belongs to international legal entities, the right to sign an international treaty, to a subject which may in any way be recognised as such under international law.

Other examples of an unfriendly approach and non-compliance with the Rule of Law Checklist - decision of the Constitutional Court of the Russian Federation. In its judgment of 14 July 2015, the Constitutional Court of the Russian Federation assumed the power to declare the judgments rendered by the European Court of Human Rights against Russia as "unenforceable". This position was codified 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.

Conclusions

The reviewed powers of the Constitutional Court are implied powers, strengthened specifically by means of its jurisprudence. They are developed in the gradual process of interpretation of the Constitution and stem from the Constitution as an integrity.

These implied powers show that the Court is the main guardian of the legal order based on the supremacy of law and the Constitution as the supreme law, ensuring the foundations of a state under the rule of law and other related constitutional values established in the Constitution.

A challenge for the future is how the mentioned achievements of the Court and other constitutional interpretations can be further developed, also having in mind that, in the Court's jurisprudence, the concept of the rule of law is considered to be broad and non-exhaustive. Thus, the Court keeps developing its content in the process of constitutional adjudication and is bound by it in its activities.

[20] Available at: <http://www.lrkt.lt/data/public/uploads/2016/12/31449_konstitucinis_teisines-valstybes.pdf> [last viewed 10.04.2017].