Платформа верховенства права
Центральная Азия

Rule of Law Platform
Central Asia

Calle Genova, 21-4º Dcha,
28004 Madrid, Spain
Тел (tel.): +(34) 91 399 25 88
Тел (tel.) / факс (fax): +(34) 91 399 16 29

Recommendations on Constitutional Law endorsed at the Regional Seminar on Constitutional Law (Helsinki, Finland, 17-18.09.2014)

Recommendations concerning the introduction of Constitutional Justice or its jurisdictional strengthening if it already exists

It has been acknowledged that the Constitutional Courts in post-Soviet countries took a leading role in the stabilization and promotion of democracy in their states.

Constitutional Courts as guarantors of the constitutional values, human rights and fundamental freedoms and interpreters of the Constitution became a key factor for the successful transition to democratic states.

Resolving difficult constitutional conflicts which resulted from the deficit in the political decision-making process, Constitutional Courts have contributed to the development of democratic institutions and enabled the balance of powers within the framework of the Constitutional order and their respective role in division of stately functions.

Reasons for introducing constitutional justice in the countries where it did not exist or was not strong enough include:

- the observance of the respect of the Constitution raises awareness of all social and political factors that the Constitution is not just a political document, but legal act of the highest importance and real life bearing, and which has a central role in securing stability and progress in society;
- constitutional review contributes to an overall system of checks and balances where different stately operators act in balanced and orderly manner according to the role prescribed in the Constitution;
- provides a system of self-restraint of exercising public power;
- realizes the rights and freedoms for individuals as protected in the Constitution;
- supports the development of dialogue among social and political factors;
- constitutional complaint as the individual legal remedy in protection of human rights raises awareness of the constitutional rights and freedoms and reduces thus the alienated relation of power toward the citizens;
- restores the rule of law;
- contributes to increasing trust in state institutions.

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There are certain general guidelines which promote and bring about Rule of Law and Constitutional order. These include among others:

- Rule of Law, basic rights of citizens and other constitutional issues must be included in all judicial and administrative training.
- Drafting of new legislation needs the active participation of different branches of administration, factions of Parliament and independent experts. The constitutional evaluation is an important part of drafting.
- Supervision of constitutionality must be effective both during the legislative process and afterwards in the independent judiciary.
- Parliament shall utilize qualified non-partisan experts in the fields of fundamental rights of citizens and rule of law.

The protection of fundamental rights and freedoms by Constitutions and international conventions

1. The experience of participation of the countries referred to as "new democracies", including the former Soviet republics, in the activities of the international organizations (UN, Venice Commission of the Council of Europe) confirms the need to bring constitutional law in line with principles and norms of international law in the sphere of human rights protection. If in formation and activities of authorities preservation of state sovereignty and national particularities is a precondition, the problem of human rights and freedoms go beyond national borders and must be resolved in strict accordance with the international standards defined by the Universal Declaration of Human Rights, the International Covenants of 1966, international and regional conventions, where almost all states are the participants.

2. Broad interpretation by the constitutional courts of basic human rights and freedoms enshrined in national Constitutions in light of international obligations of the states is one of the ways to bring - where necessary – the legislation and practice in line with international standards of human rights.

3. Great experience of consistent implementation of these standards in constitutional law and enforcement practices has been gained. Thus, providing an absolute right to life and abolition of death penalty were achieved in various ways:
- by full and unconditional abolition of death penalty;
- by abolition of death penalty with reservations about its use during war time and / or in an emergency situation;
- by gradually narrowing the list of *corpus delicti* punishable by death execution and implementation of *de facto* moratorium on death penalty and on execution of death sentences previously made;
- by extending the practice of pardoning those sentenced to death and replacement of death penalty with another penalty.

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4. Sensitive issue in many countries - members of the Council of Europe - is to ensure prohibition of inhuman treatment or punishment or torture (Article 3 of the European Convention on Human Rights) in their various forms - from direct physical impacts to infliction of mental suffering. In this regard, a number of countries have adopted comprehensive programs to improve conditions of pre-trial detention, to ensure stricter control over observance of the law in the conduct of investigative action, to establish a system of independent review and monitoring of closed institutions with unlimited access to them in order to secure the observation of proper treatment, this respect, ensure respect for the rights of certain categories of prisoners (for example, Muslims). Despite of presence of a number of guideline documents ("European Prison Rules") or framework conventions, there are no and can not be specific measures to be imposed on all states without exception, however, compliance with basic international standards is imperative.

5. Modern forms of slavery and compulsory labour are modified. In the practice of the European Court of Human Rights (ECHR) cases appeared related to the so-called "domestic slavery" of servants, on "new slavery" - forced prostitution. Here, experience of not only the ECHR, but of Inter-American Court of Human Rights, African Court on Human and Peoples Rights and other regional and specialized courts is valuable. Constitutional justice bodies are already beginning to develop legal position of the international and regional bodies in this sphere.

6. The introduction of new technologies raises questions more acutely about protection of personal data and the extent of invasion into privacy. Similar situation exists in the field of "bio-law". Precedents of ECHR in recent years, the experience of Nordic countries and of the European Union as a whole in addressing these issues are of interest. Translation of these materials into local languages would be extremely useful.

6.a People belonging to vulnerable groups – such as children and handicapped persons – have a more fragile position. It is the state's responsibility on the basis of international human rights standards to give them special protection.

Constitutional control mechanisms and their efficiency

1. In a contest of a democratic transition, a centralized system may ensure the required unitary nature of the law, essential feature of a democratic state. A Constitutional Court bears a special responsibility for ensuring that the Constitution is applied fairly and equally to all members of society. In relation with the other functions charged by a Court, they involve highly sensitive political issues, such as are the reviewing of the Country's electoral laws and elections or upon the powers of the various branches of Government: matters that have a great impact on the country's policies. Therefore, it would be desirable to create a specialized body that can manage and develop expertise in the area of constitutional jurisprudence, in order to avoid a judicial politicization. Furthermore, establishing a specific Court with centralized power in reviewing the constitutionality of laws and Government's acts also provides an "insurance for the future" to the political parties, confident in the

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respect of democratic constitutional limits by the other State Bodies and Institutions.

2. In the case of a centralised model, it is also essential to set up a Court structure that ensures and enshrines its independence and puts it out of the political elite control and its eventual pressures. So, this construction should be focused on the judges' appointment process: it should involve the political actors participation as wide as possible (such as the Italian Constitution provides); on the rules that make difficult the judges' removal, limiting the reasons for which a judge could be dismissed. It also should prescribe the composition (the number of the judges), the length of their term, thus specifying its nature, that is renewable, non-renewable or life-term, as well as the qualifications that a constitutional judge must hold to be appointed. For example, many countries require them to have prior experience as a lawyer or judge, others also allow professors and politicians to be appointed. However, it should be crucial that it is the juridical capacity and ability to act as an independent judge that should count. The independence of the Court should be secured by its overall composition which should be free from interventions from political or executive sphere.

3. Another relevant aspect concerns the access to the Court: as aforementioned, it should be desirable to create a simultaneous use and an interaction between the incidental and direct model both in centralised and diffuse system. Strictly related to the access, it is the need to identify the subjects legally able/entitled to bring a case (via direct or indirect procedure) before the Constitutional Court. Referrals could be brought by lower Courts, by different branches of the central or subnational Government, by citizens and by the same Constitutional Court.

4. Another crucial matter deals with also the effects of the court judgments: *ex nunc* and *ex tunc* effects of them has been recently modulated by the judges in order to allow lawmakers to intervene in the subject of the Court's decision and thus avoid a legal "gap" (in Austria, deferral must not exceed 12 months).

5. Great importance has the relationship among the national ordinary Courts and the Constitutional one as well as among these and the international and supranational Courts. First of all, it is required to have a fixed and stable system that provides the procedure for ensure the application of international Law into the domestic one. In this sense, it is required taking into account the two main ways that allow the interaction between the systems: on the one hand the monistic approach, on the other the dualistic theory. According to the former approach, the international Law does not need to be translated into national Law since they represents a unified legal system, with a hierarchical relation each other. In this sense, the act of ratifying an international treaty immediately incorporates the international law into domestic system. On the contrary, since the second approach considers the international and domestic legal orders as two separated, distinct sets of legal systems, it sustains a non-direct application of the international legislation into the national law but it is required a "translation" of the first legal provisions through a specific internal law.

6. Even the model would be central by its nature, it should be stressed that also the ordinary

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courts apply the standards of human rights and fundamental freedoms and constitutional values in their decision-making.

7. A strong centralized constitutional order would create a secure and balanced system where human rights and fundamental freedoms are respected and societal stability is secured, bearing in mind however, that it is also by itself bound by those rules.

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