PRELIMINARY REQUESTS OF THE COURTS ON THE CONSTITUTIONALITY OF THE RULE OF LAW AS AN ELEMENT OF RELATIONSHIP BETWEEN CIVIL AND CONSTITUTIONAL PROCESSES

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ABSTRACT

Purpose: The instability of legal regulation in transition countries (or as they are also called "transit States"), leads, sooner or later, to claims and litigation in the provision and protection of fundamental (fundamental) human rights, sometimes as part of several lawsuits simultaneously. And as a rule, lawsuits concerning the same parties have clear, systemically important relationship between themselves. We set a goal and intend to reveal under this Article the procedural and substantive aspects of the implementation of indirect access to constitutional justice through the institution of preliminary inquiries of ordinary courts regarding the constitutionality of law.

Methodology. The interdisciplinary methods, such as method of analysis, systematic and other methods developed the basis for the establishment of systemically important relationship between civil and constitutional litigation. Dispositive method and the method of complex analysis were used to emphasize the equality of court proceedings and the transition of one court procedure into another one based on the implementation of these preliminary requests of the courts. The integrative method was used to verify the data integrity obtained in this process.

The Main Results of the Study. The authors state that the preliminary request of the courts is a special element of the systemically important relationship (dynamic and static) between civil and constitutional proceedings. They are a fact of the limits of the due process as the basic constitutional basis of judicial protection. We form the conclusion that the preliminary request of the courts forms the systemically important relationship between civil and constitutional justice. The authors also highlight the static systemically important relationship regarding the impact of the finalized constitutional process on the finalized civil proceedings (resumption of the civil process in connection with newly discovered or exceptional circumstances).

Keywords: Constitutional Court, Civil Proceedings, Dynamic Relationship, Static Relationships, Preliminary Court Request, Supreme Court, Constitutional Representation, Decision of the Constitutional Court.

INTRODUCTION

Many European transition countries strive to become the countries of sustainable democracy. The distinctive features of the latter from the view of legal analysis are:

1. The presence of constitutional control;
2. Effective protection of human rights;
3. The implementation of the rule of law in all spheres of public life.

Naturally, the rule of law is interpreted in its own way in every State, but it always remains the cornerstone of any modern legal system. The rule of law is a universally recognized principle inseparable from the constitution as such (Gowder, 2016). The problem of introducing and distribution of the rule of law in the transition countries is complicated by both constant (sometimes contradictory) reforms and the fact that the essence of this principle also changes over time. We affirm that the interpretation of the elements of the rule of law under permanent changes directly depends on the legal culture of society and its readiness for change. The new challenges in the area of the rule of law are equally felt by both the States of stable democracy and transit States. This and the conditions for complicating the system and structure of legal relations in specific cases, lead sooner or later to the disputes and judicial protection of the rights and freedoms of individuals. The courts of the first instance are faced with the need to resolve the case on the principles of the rule of law when considering court cases. In the event when the controversial case is connected with a radical change in social relations, it is the judge who feels the consequences of social evolution and at the same time the need to adhere to the rule of law. Ideally, this enables the judge to form a new legal position regarding the interpretation of the specific rule of law in disputed relations. The indicated legal position, if confirmed by the higher courts, will acquire the features of a convincing precedent. Moreover, the legal position of the court should be based on constitutional law. We declare that the constitutionality of the adopted (or amendments) law raises a lot of doubts in transition countries under the rule-making and law-making conditions. And a judge, when considering a legal case, may doubt the compliance of a particular norm of law with the norms of the Constitution. In such a case, there is a special procedural mechanism in the countries with a centralized form of constitutional review for allaying a doubt of a judge-a preliminary request to verify the compliance with the specific rule of law of the Constitution. Such requests are submitted by ordinary judges either directly to the body of constitutional review (for example, Lithuania), or to the body that implements an intermediate filter of constitutionality of the norm (for example, Bulgaria). We declare that the preliminary requests of ordinary judges are an important element of the systemically important relationship and interaction of the civil process with constitutional justice.

Preliminary Court Request with a Centralized Form of Access to the Constitutional Justice: Constitutional Regulation in Some European Countries

A centralized model of access to the constitutional justice is present in many countries of Central and Eastern Europe. The essence of a centralized form of constitutional review lies in the fact that a special court has unique powers-to consider the constitutionality of normative acts. The defining advantages of the centralized model should be considered as:

1. The unity of judicial practice;
2. Legal security, since such a model does not allow the existence of various decisions on the issue of unconstitutionality, which could lead to ambiguities in the application of the law.

We are examining the procedural and substantive aspects of the implementation of indirect access to constitutional justice within this publication and affirming the joint similarity between the actions of courts of a number of European countries regarding the formation of a court request-an appropriate petition for the need to revise the rule of law for its compliance with the Constitution. Such an initiative arises in connection with a specific legal case during the consideration of cases by general courts. The practical mechanism of this initiative is limited to the judge's initiative (judicial activism) to make a motivated request if he (she) doubts the constitutionality of the norm, which is the normative basis for resolving (for example) civil cases. Such a request is submitted directly to the Constitutional Court or to the body conducting the interim filter of the prospects of constitutionality or non-constitutionality of the norm (as a rule, the highest judicial body of the country). At the same time, the judge suspends legal proceedings.

For example, Germany secured the legal basis for the institution of a court request at the level of the Basic Law of 1949 (Basic Law, 1949) and the Law on the Federal Constitutional Court of 1951 (hereinafter-FCC) (Law of Germany, 1951). If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law (Article 100.1 of the Basic Law of Germany). In particular, § 80 of the Law *"On the Federal Constitutional Court"* states, that the courts shall directly request a decision by the Federal Constitutional Court, if the requirements of Article 100(1) of the Basic Law are met. The courts make a request for unconstitutionality on their own initiative, regardless of the opinion of the participants in the process on this issue. The possibility of appeal is determined by the conviction of the court that the law is unconstitutional. Its appeal to the Constitutional Court is connected with the application of the controversial norm in a specific judicial process, and official German laws constitute the subject of control. Moreover, the general courts of Germany are not authorized to exercise abstract control on the constitutionality of norms.

The objects of verification of the Constitutional Court (CC) of Austria at the request of general and special courts are a fairly wide range of acts, namely: the decisions of the bodies of the Federation and the lands, the questions of unconstitutionality of which is considered by the CC of Austria on the proposal of any court considering the case, in which this act is applied (Article Art. 89.2; 89.3; 139.1 of the Austrian Constitution); the laws of the Federation or the lands, the questions of unconstitutionality in which the Administrative or Supreme Court is authorized to raise when considering cases as an appellate instance (Art. 89.2; 89.3; 140.1 of the Constitution). An appeal against State agreements does not contain amendments and additions to laws and the Constitution; it passes to the Constitutional Court in the same manner (Articles 140a, 139.1 of the Austrian Constitution) (Law of Austria, 1920). The general courts, when appealing to the Austrian Constitutional Court, also suspend the proceedings in the case under consideration until the latter decides on the constitutionality or unconstitutionality of the norm to be applied in a particular case.

The Law of Spain "*On the Constitutional Court"* (Law of Spain, 1979) enshrines the court's initiative to petition for verification of a legal norm for its constitutionality (Article 35), structurally placed immediately after the initiative of the government, deputies and other entities (Article 34). The raise of the question of unconstitutionality shall cause the temporary suspension of the proceedings on judicial procedure until the Constitutional Court decides on its admission (part 3 of article 35 of the said Law). When protection should be granted because, according to the Chamber or, where appropriate, the Section, the law applied violates fundamental rights or public freedoms, shall lay the question before the full Court to suspend the deadline for delivering judgment, in accordance with the provisions of Articles 35 et seq. (Part 2, Article 55 of this Law). Consequently, an appeal to the Constitutional Court of Spain, in contrast to the German institution of inquiry, is possible not only on the independent initiative of the court considering the case, but also at the so-called "*double initiative*", when the parties or the prosecutor appeal during the trial in the general court with a motion to verify the constitutionality of the norm, and the court upholds such a motion. Ordinary courts in Spain appeal only after the hearing of the case, but before the retirement to the jury room to make a decision. Thus, the decision of the Constitutional Court of Spain is necessary for making a decision on the case, even if the proceedings in the ordinary court continue and there are doubts about the constitutionality of the provision.

The Law "*On the Constitutional Court*" of Hungary gives the authority to appeal to the Constitutional Court only to the President of the Supreme Court of the country (paragraph (9) of section 69 of this Law) (Law of Hungary, 2011). Chapter 8 of the mentioned Law, which is called *"Judicial Initiative for Norm Control in Concrete Cases*", contains clear instructions regarding the actions of a judge who considers the norm applicable in a particular case unconstitutional. In this case, the judge shall suspend the judicial proceedings and, in accordance with Article 24 (2) b) of the Fundamental Law, submit a petition for declaring that the legal regulation or a provision thereof is contrary to the Fundamental Law, and/or the exclusion of the application of the legal regulation contrary to the Fundamental Law (Law of Hungary, 2011).

In Bulgaria, the right to make a request belongs to the Supreme Administrative Court (Article 150 of the Constitution of the Republic of Bulgaria) (Law of Bulgaria, 1991).

The right to appeal to the Constitutional Court in the Republic of Poland have the President of the Supreme Court and the President of the Supreme Administrative Court, in accordance with the Law of the Republic of Poland *"On the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal"* dated November 30, 2016 (Law of Poland, 2016), as well as a group of judges of the said courts, who consider specific cases, in which regulatory acts can be applied, the compliance of which with the Constitution of Poland should be subject to challenge. Based on this Law, proceedings before the Constitutional Tribunal mean the suspension of judicial proceedings. After hearing the arguments of the participants in proceedings, the Tribunal may issue a decision to temporarily resolve disputable matters, and in particular to suspend any enforcement actions, if this is necessary to prevent serious damage or to protect a particularly important public interest (Part 2, Article 86 of the Act) (Law of Poland, 2016).

According to Paragraph 2, Article 95 of the Constitution of the Czech Republic

> *"Should court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court" (Law of the Czech Republic, 1993).*

The Constitutional Court Act (Law of the Czech Republic, 1993) of the Czech Republic enshrines the provision according to which, having established that fact, the judge suspends the proceedings and appeals to the Plenum of the Court with a corresponding petition to the Constitutional Court (paragraph (C) §3; §78; §79 of this Law). The conclusion of the Constitutional Court is mandatory for all courts.

The Constitution of the Republic of Lithuania (Law of the Republic of Lithuania, 1993), among other things, provides for the right of courts to appeal to the Constitutional Court regarding the issues, enshrined in the Part 1, Article 105 of the Constitution, namely, on the conformity of laws of the Republic of Lithuania and other acts, adopted by the Sejm, to the Constitution of the Republic of Lithuania. The Basic Law of the Republic of Lithuania does not provide for an interim evaluation on the admissibility, eligibility and validity of such appeals by the Supreme Court of the Republic of Lithuania or other higher authority. Besides, the Law *"On the Constitutional Court of the Republic of Lithuania"* (Law of the Republic of Lithuania, 1993) defines the procedure for a judge in case of appeal to the Constitutional Court:

> *"Provided that there are grounds to believe that the law or other legal act which should be applied in a concrete case is in conflict with the Constitution, the court (judge) shall suspend the consideration of the case and, with regard to the competence of the Constitutional Court, shall apply to it with a petition to decide whether the law or other legal act in question is in compliance with the Constitution" (Part 1, Article 67).*

In case of appeal to the Constitutional Court, the suspended case shall be attached to the court's ruling (Paragraph, Part 3, and Article 67 of the mentioned Law).

Similarly, the situation is settled in the Slovak Republic (Law of the Slovak Republic, 1992): Paragraph 2, Article 144 of the Constitution of the Slovak Republic directly establishes the direct actions for a judge-he (she) shall suspend the proceedings and shall submit a proposal for the commence of proceedings according to Art. 125, para. 1 of this Constitution. In the same way, the judicial initiative of the procedure for the disqualification of an unconstitutional law is regulated by the legislator of Estonia, Azerbaijan, Georgia, the Republic of Belarus and other countries of Eastern Europe.

Preliminary Request in the Mechanism of the Procedural Actions of Judges in Case of Doubt about the Constitutionality of the Rule of Law: The Experience of Countries in Transition

The systemically important relationship between civil and constitutional proceedings at the initiative of the courts of incidental constitutional control are connected, inter alia, by the normative regulation of the procedural actions of judges who are considering legal cases.

As we have already described above, in case of doubt of the constitutionality of the rule of law, a judge in a centered form of constitutional review should suspend the case and appeal directly to the Constitutional Court (if it is fixed in the legislation of the country) or to the body that provides an intermediate filter of constitutional and legal interpretation of specific provisions the law.

However, there is a procedural confusion of the actions of the courts in the mechanism of preliminary requests in Ukraine, which has recently joined the active form of a centralized form of constitutional review. Thus, Article 10.6 of the Code of Civil Procedure of Ukraine enshrines the following:

"If the court finds that a law or other legal act is contrary to the Constitution of Ukraine, the court does not apply such a law or other legal act, but applies the norms of the Constitution of Ukraine as the norms of direct action. In this case, the court, after making a decision on the case, applies to the Supreme Court to resolve the issue of submitting an opinion on the constitutionality of a law or other legal act to the Constitutional Court of Ukraine, the resolution of the issue of constitutionality of which falls under the jurisdiction of the Constitutional Court of Ukraine" (Law of Ukraine, 2004).

The other procedural codes have been amended as described above, with the exception of the Criminal Procedure Code of Ukraine. We declare that there is a mixture of centralized and decentralized forms of constitutional review in Ukraine nowadays, due to recent changes to the procedural codes. However, such a confusion of forms has not lead to a "*hybrid*" (mixed) form of access to constitutional justice, how it happened in Brazil or Colombia. We substantiate that the latest changes to the procedural codes of Ukraine (2017) laid the fundamental mistake of a possible distortion of the principle of the rule of law when introducing it during the resolution of court disputes. Formally, the instructions of the Code of Civil Procedure of Ukraine explicitly specify: not to apply an unconstitutional law, to resolve a dispute on the basis of the norms of the Constitution, and then, as a matter of course, appeal to the Supreme Court of Ukraine.

However, the practical application of this norm has essentially formed the actual legislative possibility of alternative actions of courts, where we find the courts' excessive discretion. Namely, now general courts practically perform a series of actions that we combine according to such criteria:

1. General court is not authorized to determine whether the legal act complies with the Constitution (although the procedural code establishes the corresponding procedure);
2. The court, having refused to satisfy the claim, did not apply the norms of the Constitution of Ukraine as norms of direct action;
3. The court applied the norms of the law and did not find legal grounds for applying to the Supreme Court in order to resolve the issue of making a submission to the Constitutional Court on the unconstitutionality of the norms of the law;
4. The court independently applied the norms of the Constitution of Ukraine as the norms of direct action, and not the norms of an unconstitutional law, without further appeal to the Supreme Court with the corresponding request. We emphasize that, as a result of the recent actions, the recurrence of the examination of the same case by several courts is formed simultaneously (for example, the review of the case by a court of appeal and the investigation of the same issue of law by the Plenum of the Supreme Court in an extra-procedural manner).

The last actions of the courts virtually mitigate the institution of preliminary inquiry and the participation of general courts in a centralized form of access to constitutional justice. We emphasize that, having protected human rights from an unconstitutional (in the court's opinion) law, the decision cannot be considered prejudicial, as the Constitutional Court of Ukraine does not make an official interpretation of the Basic Law. In this case, there is a subjective interpretation of the Constitution of Ukraine by general courts. Besides, the false conclusions of general courts on the unconstitutionality of laws in the State, in which the main source of law is a normative act, are possible. The risk of the future can be the actual leveling of the rule of law and

the imbalance of the principles of application of the rule of law, which could undermine the direct effect of the norms of the Constitution.

The courts can also act differently. In particular, the court has the right to indicate directly that the local court is not entitled to determine whether the legal act complies with the Constitution of Ukraine. It follows that the local court is incompetent in declaring a particular provision of the law unconstitutional. However, if judicial practice goes exclusively this way, there will be a complete reanimation of the application of the principle of legality, rather than the principle of the rule of law in judicial enforcement. The remedy to the situation lies in the institution of constitutional complaint.

According to the Law of Ukraine *"On the Constitutional Court of Ukraine*" (Law of Ukraine, 2017), a constitutional complaint is one of the forms of appeals to the Constitutional Court of Ukraine regarding the constitutionality of a law or its separate provision, which was applied to the final court decision in the complainant's case.

To file a constitutional complaint, one should:

1. To be a subject of the right to a constitutional complaint (any natural or legal person, except for legal entities under public law);
2. Obtain a final court decision in the case that is not subject to appeal;
3. The said decision must be based on a provision of the law that may contradict the constitution of Ukraine;

The compliance with these conditions and the formal requirements of the Law on the content of the constitutional complaint is extremely important; as most complaints are revert back by the Constitution Court of Ukraine at an early stage.

The satisfaction of a constitutional complaint and the acknowledgment of a law or its provision as unconstitutional are recognized as an exceptional circumstances by the procedural law and is the basis for the review of a court decision (if such a decision has not yet been executed). In this case, if the negative decision was based on a law that was declared unconstitutional, the new trial may have a different result, because during the new trial the court may not apply an unconstitutional rule.

Thus, the constitutional complaint is a new additional mechanism for protecting the rights of individuals in respect of whom the judgment has been passed. The preparation of a constitutional complaint requires high-quality legal argumentation regarding the unconstitutionality of certain provisions of the law, which are the basis of a court decision. Filing a constitutional complaint gives a chance to repeal the disputed norm of the law as unconstitutional and to review the court case in exceptional circumstances.

But such a mechanism, although it is new, has become a fairly popular legal instrument at the national level (in terms of the possibility of reinstatement of proceedings if the law is recognized as unconstitutional), but it is not effective in time. The civil case is considered again, but taking into account the new legally significant circumstances for the case specified in the decision of the Constitutional Court.

Preliminary Request as an Element of Systemically Important relationship between Civil Proceedings and Constitutional Proceedings

Studying the characteristics of the relationship between civil proceedings and constitutional proceedings, we declare that the relationship between these types of proceedings

should be mutual (mutual), that is, it involves the impact of one jurisdictional process on another one and vice versa.

For example, a final court decision made in civil proceedings serves as a kind of "*litmus test*" for the correctness of the current rule of law in its application. The frequency of appeals of courts (judges) with preliminary requests about the unconstitutionality of norms, as well as with constitutional complaints on the same issue, is an external factor of a certain defectiveness of the norms applied by the court in the consideration of civil disputes. And it testifies to the indirect effect of civil proceedings on constitutional proceedings. In turn, the adoption of a decision by the Constitutional Court, which, among other things, establishes the method and procedure for its execution, and also assigns responsibility for authorized bodies (for example, Articles 90, 97 of the Law of Ukraine "*On the Constitutional Court of Ukraine*") (Law of Ukraine, 2017), forms a reverse effect on the resumption of civil proceedings in the same case.

The links between civil and constitutional proceedings are static and dynamic ones. The definition of static and dynamic relationship between system elements is recognized by the science of system analysis (Bauer & Reinhard, 2007). We declare that we consider the procedural relationship between constitutional proceedings and civil proceedings from the standpoint of the doctrine of judicial law as an integral system of several branches of law.

Static connections involve the effect of a completed lawsuit on completed process, and, therefore, are in a state of static. Dynamic links arise between unfinished proceedings. An example of static connections is the resumption of civil proceedings in connection with a newly discovered or exceptional circumstance. Namely, it is the recognition of a legal norm of law applicable in the same case by the Constitutional Court as unconstitutional (as in the countries of the continental legal system) or constitutional or unconstitutional (as in Ukraine). Another example of the static form of the relationship between constitutional and civil proceedings is the authority of the Constitutional Court to take certain actions aimed at modifying the judicial review of the case at the stage of enforcement proceedings: the authority of the Constitutional Court to take measures on its own initiative in exceptional cases to ensure a constitutional complaint by issuing a security order, which is an executive document. The basis for securing a constitutional complaint is the need to prevent the irreversible consequences that may arise in connection with the implementation of the final judicial decision, and the way to ensure a constitutional complaint is to temporarily prohibit a certain action.

The example of dynamic relations is the commencement of constitutional proceedings upon the preliminary request of the court on their own initiative or petitions of the parties to a civil case. Moreover, the proceedings in such a case, as well as the commencement of constitutional proceedings in connection with the constitutional representation of the Supreme Court, are suspended for the period of consideration of appeals to the Constitutional Court. We emphasize that the influence of one process on another one must be direct, that is, it must undergo a specific procedural activity. Thus, a specific judicial proceeding in a civil case is suspended in connection with the application of the parties to a civil case for commencement constitutional proceedings on the same issue in the Constitutional Court. Similar procedural actions may be performed in a civil case by a court on its own. Besides, the court decisions that have entered into legal force are subject to cancellation or amendment in case of resumption of civil proceedings on the grounds of exceptional circumstances with regard to the recognition of the rule of law, applied in the case, as unconstitutional/constitutional by the Constitutional Court.

CONCLUSION

We have proved within this article that the correct application of preliminary requests of courts (judges) on the constitutionality of the norm creates the prerequisites for the correct and efficient implementation of the rule of law in the activities of courts in the transitional period and the transitional legislation of the State. The significance of the preliminary requests of the courts on the constitutionality of the rule of law is also manifested in the fact that the rule of law in court decisions ensures the unification of three ideas, on which the States with sustainable development are based social unity, mass equality and depersonalization (Gowder, 2016).

Systemically important relationship between civil and constitutional legal proceedings affect the entire period of the judicial process and its transformation. We distinguish:

Static Systemically Important Relationship

1. The initiative of constitutional review after the completed civil proceedings (filing a constitutional complaint);
2. The effect of the completed constitutional proceedings on the completed civil proceedings (resumption of civil proceedings on the grounds of newly discovered circumstances);

Dynamic Systemically Important Relationship

1. Incidental constitutional control through the constitutional representation of the Supreme Court and the commencement of constitutional proceedings leads to suspension of consideration of other similar civil cases for the period of consideration of the case by the Constitutional Court;
2. The application of the security order of the Constitutional Court in the enforcement of the decision in a civil case;
3. The opinion of the Constitutional Court, expressed in the resume part of the decision on the fact that the law was interpreted in a manner inconsistent with the Constitution;
4. The reference to the resumption of civil proceedings in the same civil case;
5. Resumption of civil proceedings in others cases, suspended for the period of consideration of the civil case by the Constitutional Court since the adoption of the decision by the Constitutional Court.

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