

**4<sup>th</sup> Congress of the World Conference on Constitutional Justice**  
**THE RULE OF LAW AND CONSTITUTIONAL JUSTICE**  
**IN THE MODERN WORLD**

11-14 September 2017, Vilnius, Lithuania  
**QUESTIONNAIRE**

The 4<sup>th</sup> Congress of the World Conference on Constitutional Justice will be subdivided into five sessions. Four of them will deal with the main topic of the Congress, “The Rule of Law and Constitutional Justice in the Modern World” (Part A). A special session will be devoted to a stocktaking exercise on the independence of the members of the World Conference (Part B): Constitutional Courts, Councils, Chambers and Supreme Courts exercising constitutional justice (hereinafter all “Courts”).

The Member Courts are kindly requested to reply to the questionnaire below by 30 November 2016 at the latest. The replies relating to the rule of law will be public, whereas the replies relating to the independence of the Courts will be available only to the Member Courts in the restricted Venice Forum.

**A. The rule of law and constitutional justice in the modern world**

Without attempting to give a definition, for the purpose of this questionnaire, rule of law shall refer to a state in which all persons, institutions and entities, public and private, including the state itself, are bound by and accountable to the law.

As a concept of universal validity, the rule of law is a characteristic of modern democratic legal systems. Even if some Member Courts of the World Conference on Constitutional Justice have very specific powers, they all ensure the supremacy of the Constitution, and thus they promote the rule of law.

The need for universal adherence to and implementation of the rule of law at both the national and international levels was endorsed by all Member States of the United Nations in the Outcome Document of the 2005 World Summit. In 2011, the United Nations published the Rule of Law Indicators and, in 2012, a high-level meeting of the General Assembly recognized that the rule of law applies to all states equally, and to international organizations.

At the regional level, the Inter-American Democratic Charter of the Organization of American States, the Constitutive Act of African Union and the Arab League refer to the rule of law. For the Council of Europe, the rule of law is one of the three principles which form the basis of all genuine democracy, together with individual freedom and political liberty.

While the scope of the rule of law is not always defined in the same manner in these instruments, the work of the Venice Commission may be able to provide some guidance for the 4<sup>th</sup> Congress and for the replies to this questionnaire.

Following its 2011 Report on the Rule of Law (CDL-AD(2011)003rev), the Venice Commission, in March 2016, adopted its detailed Rule of Law Checklist (CDL-AD(2016)007), which provides an overview of the wide scope of the rule of law, *inter alia*, covering legality (supremacy of the law, relationship between international law and domestic law, law-making procedures, law-making powers of the executive, emergency situations, private actors in charge of public tasks), legal certainty (accessibility of legislation

and court decisions, foreseeability, stability and consistency, legitimate expectations, non-retroactivity, *nulla poena sine lege, res judicata*), prevention of abuse of powers, equality in and before the law and non-discrimination, access to justice (independence and impartiality of the judiciary and judges, fair trial, including effectiveness of judicial decisions, autonomy of the prosecution service). These topics can help in order to identify elements which are part of the rule of law, even when they are used without an explicit reference to this principle.

In your replies to the questions below, please briefly present the case-law of your Court whenever applicable.

## **I. The different concepts of the rule of law**

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

*The principle of rule of law is established in the following articles of the Constitution:*

**Article 6.** *The State's organs must subject their action to the Constitution and the norms dictated in conformity to it, and must guarantee the institutional order of the Republic. The provisions of this Constitution are binding both for the officials or other members of the said organs as well as for every person, institution or group. The infringement of this norm will generate the responsibilities and sanctions that the law determines.*

**Article 7.** *State organs only act validly once their members have been regularly invested, within their field of competence, and in the manner prescribed by the law.*

*No power, person or group of persons may claim, even if invoking the pretext of extraordinary circumstances, any other authority or rights than those that have been expressly conferred to them by the Constitution or the laws.*

*Any act that contravenes this article is null and void and will originate the responsibilities and sanctions that the law determines.*

**Article 8.** *The exercise of public functions compels officials to strictly comply with the principle of probity in all of their actions.*

*All acts and resolutions of the State's organs, as well as their foundations and the procedures used, are public. However, only a qualified quorum law may establish the reserve or secret of them, when their disclosure compromised the proper performance of the functions of these organs, the rights of persons, national security or national interest. The President of the Republic, The Ministers of State, the deputies and senators, and all other authorities and officials that a constitutional organic law specifies, will have to declare their interests and patrimony publicly.*

*The said law will determine the cases and conditions in which those authorities will delegate to third parties the administration of those assets and obligations which involve a conflict of interests in the exercise of the public function. Furthermore, it may also consider other appropriate measures to resolve them and, in qualified situations, to provide for the disposition of all or part of the assets.*

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

*The Chilean constitutional system has provided a system for the resolution of constitutional conflicts that is rooted in the Constitutional Court, which has been entrusted with the final and unappealable interpretation of the Constitution; an interpretation that must be developed in an integral way, that is, considering the values, principles and spirit of the*

*Basic Charter, in order to ensure the effective enforcement of constitutional supremacy, which is, in short, the effectiveness of the constitutional rule of law and respect for fundamental human rights. (STC 591)*

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

*The Constitution declares the submission of every state organ and person to the Constitution and the law. Thus every aspect of the State must be ruled under the law. It is the main role of the Tribunal to ensure the constitutional supremacy. This is ensured through normative control, in special of the legislative act. This control is preventive as well as repressive.*

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

*The Constitutional Tribunal has declared that: "The principle of legality, traditionally known as the "Closing Principle of Public Law", assumes that the exercise of the powers of public authorities is carried out in accordance with the provisions of the Constitution and laws, so as to diminish the risk of overstepping functions. Therefore, in the case in question, it is possible to speak, more properly, of principle of juridicity, to the extent that ensures the complete submission of public authorities to the rule of law as a whole." (STC 790)*

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

*Case-law related to principle of the rule of law, understood as the principle of legality -wide interpreted-, had developed implicit fundamental rights and expanded, through constitutional principles and values, the existent ones. For instance the right to identity, the right to access to public information.*

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

*The Constitution establishes as a limit to national sovereignty the human fundamental rights that are recognized in international treaties ratified by Chile (Article No. 5.2). There has been some case-law that recognizes international law as a source for the recognition of implicit human rights, not expressly declared in the Constitution. Such is the case of the right to access to public information and the right to personal identity.*

## **II. New challenges to the rule of law**

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

*Since the return of democracy, Chile has not have threats to the rule of law.*

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

*The Tribunal has stated that receiving immigrants is an issue that must be subject to the rules of domestic law, also complying with the obligations of each State under international law. The exercise of administrative and legislative power must respect a framework of discretion not to incur arbitrariness.*

*According to the constitutional decision the following can be defined as limits: The impossibility of restricting entry to the country to a foreigner invoking the right of asylum; the principle of non-discrimination between nationals and foreigners; the possibility that in matters of state decision foreigners invoke the rights of the International Covenant on Civil and Political Rights; the equal rights of a national and foreigner who entered the country legally or later regularizes their situation and that the restrictions made on their rights cannot compromise the essence of the human rights. International human rights law should not conceive the administrative power of admission of foreigners only from the point of view of internal public order and as a security police measure, but that the state's discretion in the matter must be taken with a rights approach, in the examination of the requirements of entry and stay of a foreigner in the country. (STC 2273)*

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

*The Constitutional Tribunal has not had those conflicts. In the case of military justice that was reviewed by the Inter-American Court, the Tribunal in case-law STC 2492 follows the judgment of the Court to declare the unconstitutionality of the judgment of civilians by military courts.*

### **III. The law and the state**

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

*Since case law of the CC is mandatory for all the state powers, it has an important impact on the exercise of their power.*

*For instance, the Court reviews legislative acts. Therefore it has recognized the National Congress and the President to dictate general rules but it must be within the limits established in the Constitution. If a general law is declared unconstitutional by this Court the norm is void.*

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

*In consideration of the principle of legality every State Organ is bound to the Tribunal's resolutions. If it is the case that the Court declares a legal precept as inapplicable due its unconstitutionality, the judge is not allowed to use it in a concrete judgment. There have been cases where judges have not followed the Tribunal declaration of inapplicability, but these are marginal cases.*

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).

*Not directly. However the Constitutional Court has a preventive control of bills, thus it has the role to control the constitutionality of the legal norms that are discussed in Congress, if it is requested so by a number of MPs. For example, The Constitucional Court has recently declared some provisions of a bill on labor reforms unconstitutional and the Congress had to adapt the legislation to constitutional standards as declared by the Tribunal (STC N° 3016(3026))*

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

The different kind of concessionaires are an example of private actors that exercise public functions, that usually are bind by the case law of the Court.

*Regarding this question, the Tribunal has declared that it is not only the organs of the State that must respect and promote the inherent rights of the dignity of the human person, but that obligation also falls on individuals, even if it is subsidiary, since the Constitution ensures the intangibility of such attributes in all circumstances; any subject who is in need of instilling effective validity to what is proclaimed in its precepts. (STC 1287)*

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

*Article 8 of the Constitution provides the principle of probity of public functions. The Tribunal has declared that this principle applies to all the State organs, including every organ that has a public function. (STC 1990)*

*According to case-law, probity is associated, whenever it is defined by the legislator, to the preeminence of the general interest in the particular, to the honest and loyal performance of the function or office and to the observance of faultless conduct. Probity is enshrined as a principle in the Constitution. All public functions, whether performed by a public official or a private individual entrusted by the State for that purpose, are linked to a strict compliance with the principle of probity in all its actions. Note that the Constitution uses the expression "strict", that is to say, adjusted entirely; And does not leave spaces frank or free, because it speaks that in "all its actions" must govern this principle. It is even established in the constitutional norm itself that the conflict of interest in the exercise of the public function can justify interventions on the patrimony of the civil servants. (STC 1413)*

#### **IV. The law and the individual**

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

*Individual access to the Tribunal is against legal precepts that might be applicable in a pending trial. The action of inapplicability of unconstitutional legal precepts are filed by one party of the trial requesting to the Tribunal to declare it as unconstitutional thus the judge is not allow to found its resolution on this particular legal precept. The declaration of unconstitutionality is only for the specific case and has not erga omnes effect. Once a legal*

*precept is declared inapplicable by the Tribunal, then any citizen has the right to file an action of unconstitutionality to request the Tribunal to declare that the precept is void and must be expelled definitely of the legal system.*

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

*The Tribunal has declared that "solve et repete" is not unconstitutional and does not breach the right to access to justice. The obligation to pay 25% of the fine to claim it before a court is a reasonable parameter, which make compatible the purpose of effectiveness of the sanction and the guarantee to a fair and reasonable procedure (STC 2475). However, in other cases the Tribunal declared it unconstitutional, stating that the obligation to pay the complete amount of a fine before filing a request of review of the administrative act before courts is unconstitutional, since it breaches severely the right to access to justice (STC 1580, 1865, 2452, among others).*

*Regarding the obligation of prior mediation before filing legal actions in a special procedure, the Tribunal declared there is no violation of the right to access to justice, since the statutes of limitations of the legal action are suspended during that period and the applicant is not prevented to claim to the Court if mediation does not succeed.*

17. Has your Court developed case-law on other individual rights related to the rule of law?

*The right to access to public information is not expressly recognized in the Constitution. However the Constitutional Tribunal has declared that this right is implicitly recognized, as an essential mechanism to validate the democratic republican regime. Thus in STC 634 the Tribunal declares the following:*

*"It is possible to affirm that the right of access to public information is recognized in the Constitution, although not explicitly, as an essential mechanism for the full implementation of the democratic republican regime and the indispensable assumption of responsibilities, together with the subsequent surrender of Accounts that this supposes on the part of the organs of the State towards the citizenship. At the same time, the publicity of the acts of such bodies, guaranteed, among other mechanisms, by the right of access to public information, constitutes a basic support for the proper exercise and defense of the fundamental rights of persons - Freedom of expression and information, which have the right to receive information - that may eventually be injured as a result of an act or omission coming from State organs."*

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

*Yes. The jurisprudence has declared that the principle of proportionality is implicitly recognized in the Constitution as it is a principle inherent to the rule of law. (STC 2922)*