The Constitutional Standards of Responsible Governance

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Ladies and gentlemen,

"*The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness*".

These words were coined in 1780 in the Preamble of the first constitution in North America – the Constitution of Massachusetts. This sentence encapsulates the very essence of the topic we are dwelling upon here – the idea of responsible governance.

The elusive term of responsible governance describes how public institutions conduct public affairs and manage public resources. This was specifically the driving force for Enlightenment understanding of a constitution for a body politic.

To look at the issue more pragmatically from the standpoint of modern constitutionalism the question I believe is not merely how a government or a parliament should operate so that their actions or inaction be purposeful and responsible. The greater question is what safeguards should be in place so that the essential arrangements of the Constitution be preserved?

From the modern constitutionalism perspective responsible governance is about enforcing constitutional principles and values in public decision-making (that includes both national and local government as well as any public authority).

And here we encounter several paradoxes that I deem necessary to highlight.

1) Paradox of choice. Constitution provides an analytic lens for forging the rules, norms, processes and practices that incorporate values into legislative, administrative and judicial decisions. But the responsibility in implementing public policies in a democratic society lies with governmental authorities entrusted and empowered by the Constitution and legislation to do so. And here facing the multiple choice national legislator or government may choose either option based on available information and his or her best judgment. Constitutions set certain limits on this margin of appreciation. And when a case is brought before the constitutional bench a constitutional judge confronts a delicate task to verify whether the decision-maker complied with limits set by the Constitution, but at the same time the constitutional judge should not overstep his or her own powers and not impose own policy choice.

2) Paradox of constitutional monopoly. Constitutional text, values and principles are addressed to the whole body politic, the Government, legislators and citizens. Constitutional Court has exclusive competence to interpret the Constitution, to give meaning to its often open-ended provisions. And here lies this paradox: while all are bound by the Constitution the exact meaning of constitutional commitments can be spelt out by the Court. But the Court can speak only when a case is brought before it. In all other myriad of cases the constitutional meaning is discerned by political consensus or conventions – only when a dispute or controversy arises the Court receives the opportunity to expound the constitutional text. So the question arises how vigorous should the Court be in imposing its understanding of a constitutional provision, in disrupting long standing consensus among political stakeholders?

3) Paradox of institutional balance. Separation of powers in modern democracy more or less confines to the ***trias politica*** model. Each branch has separate and independent powers and areas of responsibility to the exclusion of any other branch. The *rationale* of this principle is to prevent the concentration of unchecked power and to provide for checks and balances in the Government. The Constitutional Court as guardian of the Constitution must oversee and remedy when necessary institutional balance between the three branches of power in democratic society.

But here we encounter the paradox of institutional balance. Indeed the principle of separation of powers imposes functional independence for each branch of power. But *ratio iuris* here is to safeguard the constitutional order as whole against either branch usurping power of others. Therefore institutional balance implies the necessity or inevitability of interaction between branches in their respective spheres. No constitutional system can rely on the watertight separation.

4) Paradox of administrative state. Within recent 30 years the democratic state sustained profound transformations with the rise of independent administrative authorities. Designed to limit political influences in sensitive areas of national economy and public administration these institutions are supposed to reconcile in themselves two contradictory features: administrative functions and independence. Statutory regulation by independent agencies is rapidly becoming the most important mode of regulation, and indeed in many areas - like banking, insurance, public utilities, deposit guarantee schemes, railways - the leading instrument of regulation and public policymaking.

The rise of administrative state represents an important challenge to constitutionalism. Independent authorities constitute another constitutional paradox that is barely captured in constitutional theory, as they effectively challenge the *trias politica* model of separation of powers. The separation principle therefore has difficulties in accommodating the organizational phenomenon of independent authorities. And the challenge that constitutional justice is facing when confronted with independent administrative authorities is to make them constitutionally visible, to enforce democratic control over their spheres of public decision-making and ensure there full force of constitutional values.

Indeed the modern state is identified not only with its representative institutions but also with the administrative structures operated as public bureaucracies. Public bureaucracies organised via independent administrative authorities do offer a degree of political neutrality in spheres sensitive enough to require such kind of authorities. And here Constitutional courts face a delicate dilemma: on the one hand they need to guarantee and preserve independence of neutral institutions and the neutrality of the regulation as they serve important social interests, and on the other hand set checks and balances on their discretion and mitigate the risk of arbitrariness.

These are the paradoxes that constitutional bench encounters today. They are especially relevant for setting constitutional standards of responsible governance. But it would be wrong and short-sighted to overemphasise the role of a constitutional judicature in setting such standards and disregard the role government might have in securing and advancing constitutional rights and values. Firstly, because Government can and must act on its own motion in this area while a Constitutional Court can speak only if a case is brought before it. Secondly, indeed Government guided by the framework established by the Constitution can be understood to play a central role in securing and advancing constitutional rights and values. Where Constitution sets limits on state power or ordains positive obligations. Government's role in implementing Constitution becomes crucial. But such implementation should go hand in hand with democratic responsibility and vigorous constitutional control.

Today we live in a turbulent world. Legitimacy deficit, rise of political populism and power demise infect various spheres of public decision-making. Based on Ukrainian recent experience I would identify the following risks for constitutional democracy that the Constitutional Court is called upon to mitigate:

populism. Constitutionalism is antithetical to populism, first because populism is usually associated to illiberal politics and fluid majorities of the day; second, because populism at its essence is an anti-system phenomenon. Constitutional court as guardian of the Constitution in many instances is becoming the final barricade against populist assaults on democracy and constitutional values. But the irony of the moment is that without popular support a Constitutional Court may not withstand democracy's majoritarian doom.

In April 2018 the Constitutional Court of Ukraine repealed in toto the Referendum Law as unconstitutional. In its judgment the Court referred not only to procedural irregularities of this legislative enactment but also invoked substantive unconstitutionality whereas the Parliament encroached on issues that are reserved to constitutional regulation. In particular the law was designed to bypass constitutional amendment procedure by establishing provisions for adopting new Constitution on national referendum. I see this judgment as important tool to tame populism threat.

majoritarian excess. Democracy by definition is the rule by majority. It has the inherent danger of becoming a "tyranny of the majority". These are rare cases. The real danger of

majoritarian excesses is that unrestricted majority rule can easily overstep constitutionally imposed limits in pursuing short lived political gains.

This year the Constitutional Court of Ukraine invalidated the system of penitentiary investigators introduced recently into the Code of Criminal Procedure. The system was based on exclusive investigatory jurisdiction of penitentiary investigators over any offense committed in penitentiary facilities, but both penitentiary investigators and the penitentiary establishments were subordinated to the minister of justice. The Constitutional Court of Ukraine noted that this system is not capable to ensure effective investigation of violations of constitutional human rights for life and respect for human dignity, i.e. positive obligations of the state under the Constitution.

Constitutional Court ability to speak. Constitutional Court can speak and remedy any encroachment on the Constitution only when it is seized on the matter. Unlike the Parliament or the Executive the Court may not address any issue on its own motion. Therefore even omnipotent courts must wait until a case is filed.

In Ukraine this risk has been indirectly addressed in 2016 constitutional reform. The reform introduced direct constitutional complaint mechanism thus opening the Constitutional Court doors to everyone seeking protection of his or her constitutional rights. Constitutional complaint allows everyone upon exhaustion of available national remedies challenge any law applied in his or her case as contrary to rights and freedoms guaranteed by the Constitution.

Today the Constitutional Court received 926 constitutional complaints. 648 of them were returned on procedural grounds, 269 constitutional complaints were allocated among judges-rapporteurs; 190 inadmissibility decisions issued and 79 constitutional complaints to be considered by the Constitutional Court.

Direct constitutional complaint empowers the Court to serve as a true guardian of constitutional principles and values as the Court becomes less dependent upon good will of the President, legislators or the Supreme Court in receiving an opportunity to deploy its weaponry to protect the Constitution.

To conclude I would like to say that the concept of governance changes. Now it becomes more and more associated with a perceived shift from a hierarchical bureaucracy to heterarchy and networks. Bureaucracies of modern state that were

subject to control by legislature that is itself accountable to the electorate, give their place to markets and networks. And this is the challenge to the constitutional judicature as we are responsible for ensuring that the latter mechanisms remain appropriately democratic, responsible and compliant with constitutional values and principles.

Thank you!