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# ROLE OF CONSTITUTIONAL COURTS IN NEW DEMOCRACIES

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# PANEL II

## The role of constitutional case-law in consolidating the rule of law

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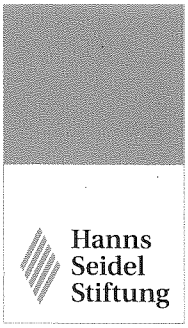
**1.** The rule of law is a fundamental principle which provides an answer to the problem of the content, extent and form of state activity. Its nature is simultaneously substantive, procedural, and formal: it requires state authorities to act within a framework established by the law. Therefore, the actions of citizens may be limited only by valid legal rules which they can know in advance.

By deciding for a state governed by the rule of law, the Constitution shapes the structures of political power and the organisation of society according to the law. The law is understood as a means to the rational and binding ordering of a community. In order to achieve this, the law establishes rules and measures, prescribes forms and procedures, and creates institutions.

Therefore, the rule of law refers simultaneously to the content and the form of the organization of society. In terms of content, the rule of law is indissociable from the idea of justice and the promotion of values of a political, economic and social nature; in terms of form, it establishes procedural guarantees which avoid the arbitrary use of public power.

If that is true, then the *Rechtstaat* is necessarily a constitutional state: it presupposes the existence of a constitution structuring a fundamental legal order, binding on all public powers. A constitution gives the actions of public authorities both measure and form.

This is precisely why constitutional law is not just one of the many laws of the system, but rather a true fundamental legal order endowed with supremacy. This supremacy of the Constitution is a first and decisive expression of the 'rule of law', and several of the latter's elements are deduced from it.




**2.** Constitutional courts are intended to guarantee, in an immediate way, the Constitution and thus the rights secured by it. This is inextricably linked to the protection of the rule of law.

The mere existence of constitutional courts is, in fact, an expression of the rule of law. It reflects the principle of review of the legality of the exercise of the powers of the state and the possibility of challenging legal provisions in court, even when enacted by democratic political institutions. In fact, the (diffuse or concentrated) judicial review of normative acts is associated with the idea of a Constitution which is binding on all state organs. The Constitution is a hierarchically superior set of rules (according to the principle of the primacy of the Constitution). It thus binds all public authorities in the exercise of their powers.

The yardstick of constitutional review by constitutional courts, against which state normative acts are assessed, is the Constitution — understood as an open system of rules and principles. This means that the yardstick of constitutionality is wider than the written Constitution since it covers not only the rules and principles expressly formulated, but also constitutional principles developed from posited constitutional rules (and rules of reference and the so-called "block of constitutionality"). In this sense, the Constitution as a whole - from the rules of legislative competence and procedure to the substantive principles embodied in it - guarantees the rule of law, whenever it is applied by constitutional courts.

**3.** Implementing the rule of law requires constitutional courts to guarantee legal certainty — which demands clear legal provisions and limits to retroactive legislation —, the separation of powers, judicial independence, and the fundamental rights of citizens.

One may wonder how constitutional courts can consolidate the rule of law and in what way their role may be different from the role of other national authorities also involved in consolidating the rule of law— in particular, democratically-elected governments and parliaments.

**4.** In terms of the content of state acts, there is a crucial difference between the role of constitutional courts and the activity of other national authorities (mainly, the democratic legislator) in enforcing the Constitution.


In fact, though it is true that a constitutional court is a court which reviews the constitutional conformity of normative acts (notwithstanding the fact that some constitutional courts have jurisdiction over constitutional complaints or *amparo*), the judicial review of legal provisions cannot — and should not — be equated with the enactment of legislation. In relation to lawmaking bodies, a constitutional court is a *reviewer*, but not a *co-maker* of legal rules.

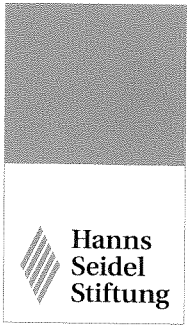
In fact, the functional competence of constitutional bodies is one of the elements that should be stressed when attempting to grasp the limits of the constitutional courts' activity: the powers granted to public bodies must reflect the specific nature of the functions exercised.

*Enacting* and *reviewing* are undoubtedly two different roles, performed by bodies with different competences. Therefore, when it comes to legislation intended to render the Constitution effective, constitutional courts shall not deny the constitutional conformity of an act of the legislator based on considerations that would disregard the specific functional competence of the body in question.

The central problem that arises in this regard stems from the fact that the legislator and the Constitutional Court compete as enforcers of constitutional rules. Both act by making those constitutional rule(s) concrete. In other words: one and the same rule of the Constitution operates as a rule of action (for the legislator) and as a rule of review (for the Constitutional Court). In other words: the same rule of the Constitution may be made concrete at two separate functional levels: by the legislator as a rule of action, and by the Constitutional Court as a rule of review.

***4.1.*** The distinction is often problematic. Let's take the example of the implementation of the principle of equality.

The principle of equality is a rule of action that requires the legislator to treat situations that are substantively alike in the same way. As a rule of review allowing control over the legislator, it also empowers the Constitutional Court to deem unconstitutional a law that establishes unequal solutions if and to the extent that it does not discern any substantive grounds for doing so. The same rule seems, at first glance, to be treated exactly in the same way by the legislator and by the Constitutional Court.




However, the application of that rule is often limited by the specific functions of the Court and the legislator.

As an example, a law that establishes a special treatment for members of the management bodies of trade unions and workers' committees in the event of dismissal can be constitutionally acceptable to the Constitutional Court. The principle of equality does not restrict the legislator's freedom of interpretation, allowing the unequal treatment of substantively unequal situations. Therefore, a decision of the Constitutional Court which, in light of the principle of equality as a rule of review, refuses to deem unconstitutional a law that imposes unequal solutions with regard to the dismissal of workers, because it has found a substantive basis for this legislative differentiation, is acceptable.

But a decision of the Constitutional Court not deeming unconstitutional a legal provision which did not establish such distinction concerning the dismissal of managing bodies of trade unions might also be acceptable. If the legislator decided to protect such workers by other means — it is possible for the Constitutional Court not to deem unconstitutional a rule treating the dismissal of such workers similarly: faced with different possibilities of treating general workers and those who are members of the management bodies of trade unions differently, it is possible for the legislator to make any distinctions in other areas of the law, while having similar rules of dismissal.

In this sense, the principle of equality as a rule of action is more salient than as a rule of review. The meaning of a constitutional provision as a rule of action may be different from the meaning of the same provision in the garb of a rule of review. The lawmaker may enact such rule in many different ways, whereas the court is limited to merely deeming unconstitutional the ones in which there is clear disrespect for the constitutional provision.

**5.** One would think it would be an easier task to review the form of state actions, as the role of the Constitutional Court is to guarantee that actions are decided by the competent public bodies, in accordance with the separation of powers.

However, the task is often problematic, especially when distinguishing between regulatory administrative powers — which may be exercised by the public administration — and lawmaking powers, mostly restricted to the Parliament.


The Portuguese Constitutional Court had an interesting case a couple of years ago. The law on transgender rights had a legal provision stating that:

*«The State shall guarantee the adoption of measures in the educational system, at all levels of teaching and study cycles, promoting the exercise of the right to self-determination in terms of gender identity and gender expression and the right to the protection of people›s sexual characteristics, namely through the development of:*

*a) measures to prevent and combat discrimination on the basis of gender identity, gender expression and sexual characteristics;*

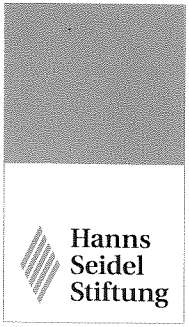
*b) Mechanisms of detection and intervention in at-risk situations endangering the healthy development of children and young people who manifest a gender identity or gender expression that does not coincide with the sex assigned at birth;*

*c) Conditions for the adequate protection of gender identity, gender expression and sexual characteristics, against all forms of social exclusion and violence within the school context, ensuring respect for the autonomy, privacy and self-determination of children and young people undertaking social transitions of gender identity and expression;*

*d) Appropriate training for teachers and other professionals in the educational system in issues related to gender identity, gender expression and the diversity of sexual characteristics of children and youths, with a view to their inclusion as a process of socio-educational integration».*

The law also established that those measures should be decided by the Government, through administrative regulatory rules.

The Constitutional Court was called to decide whether such delegation to the public administration breached the exclusive legislative competence of the Parliament. The question to be decided was whether such a matter should be decided only by law, as is also the case of the definition of crimes and penalties, the assessment and collection of taxes, and restrictions to fundamental rights. Such acts of public authorities must be "typified" or "prefigured" in laws enacted by the Parliament. Concerning its formal aspect, it relates to the distribution of powers between the legislative and administrative powers.




The exclusive competence of the Parliament resorts to an idea of essentiality as a general criterion. The "theory of essentiality" (*Wesentlichkeitstheorie*), developed by the German Federal Constitutional Court starting with the 1972 decision on the fundamental rights of prisoners (BVerfGE 33, 1), took as its starting point the fact that the German Constitution does not contain any general clause on the exclusive regulation by means of a law, but merely refers to federal laws, general laws or legal grounds for the regulation, concretization, and restriction of some fundamental rights. Therefore, the German Court decided that only the essentials must be regulated exclusively by law (*Eingriffsvorbehalt*).

The "theory of essentiality" operates, therefore, as a jurisprudential substitute for a constitutional requirement that a matter must be regulated exclusively by means of an act of Parliament. More than a decision criterion, it is a general orientation that gradually gained ground and complexity through various criteria used in the jurisprudence of the German Federal Constitutional Court. Its main functions are guaranteed, in Portuguese constitutional law, by the requirement set out in the Constitution that a matter shall be regulated exclusively by means of an act of Parliament. The Constitution directly states which areas should be regulated exclusively by acts of Parliament, thus reserving certain matters and the determination of its scope to the parliamentary legislator. This means that, in a constitutional system like the Portuguese one, the essentiality principle is not necessary, all things being equal, as a judicial criterion.

What if the exclusive legislative competence of the Parliament concerns fundamental rights? To what extent does the Parliament need to decide on the kind of measures to be adopted? Is it necessary for the Parliament to give only guidelines to the Administration on how such fundamental rights are to be implemented? Or is it necessary for the law to provide self-contained rules regulating the matter in an exhaustive manner? When the Parliament decides that the rules that will implement fundamental rights shall be decided by the Administration, does this infringe the separation of powers?

In this very controversial ruling (7-6), the Portuguese Constitutional Court decided that administrative measures may go beyond the law they are implementing, in the sense that they may contain technical standards or other details on which the full operability of the law depends.


However, it was decided that everything else should be contained in primary legislation. If the regulation of a certain matter included within the exclusive legislative competence of Parliament is partially found in regulatory instruments, then there is a breach of that exclusive legislative competence.

In such case, the regime regarding the state's duties to promote the conditions allowing the exercise of the right to self-determination of gender identity and gender expression was not found to be substantively complete or self-contained. On the contrary, it was found to be a legal framework leaving a very wide margin of discretion over the definition of the content of the measures of protection or promotion of the exercise of the rights in question.

Therefore, the Constitutional Court deemed those rules invalid for breaching the separation of powers, thus safeguarding the rule of law.

This is a decision which clearly shows how difficult the role of constitutional courts in applying the rule of law is.