

*Notes for the Statement
of Minister of Justice of the Russian
Federation K.A. Chuychenko
at the Conference of Ministers of Justice
of the Council of Europe
“Judicial Independence and the Rule of Law”
on the topic “Exercising the Principle
of Separation of Powers
in National and International Justice”*

November 9, 2020

Dear colleagues,

Let me thank the Council of Europe and the Ministry of Justice of the Hellenic Republic for inviting me to take part in the Conference.

Charles de Montesquieu wrote in his preeminent work “The Spirit of the Laws” that there would no liberty unless the judicial power is separated from the legislative and executive powers.

Nowadays, the rule of law and democracy rely on the principle of separation of powers. This very principle underlies judicial independence in both, national and international terms.

Owing to the right to a fair trial guaranteed by article 6 of the European Human Rights Convention, there is a high standard of judicial independence established in all European states. The right to an effective remedy has become the foundation of constitutional architecture of our countries and the guarantee of the implementation of the subsidiarity principle.

The idea of separation of powers, however, suggests that the rule of law cannot be ensured by an infinite expansion of court powers. In a democratic state, the fundamental principle of power is the peoples rule. This is why a number of issues still remains a sole responsibility of legislative and representative bodies rather than judicial ones. Otherwise, our democracy would end up with “juristocracy”.

This also concerns the activity of international tribunals, which are becoming increasingly involved in the settlement of political disputes addressing sovereign issues of national security, state borders, social and economic setup.

We should remember that the Vienna Convention, while enshrining the primacy of international treaties, allows, in its article 46, for the states to disavow their consent to be bound by rules that conflict with national law provisions of particular importance. In every state, such rules include constitutional norms that establish the principle of separation of powers, including in international sphere. Let me give one example.

Over the past decades, investment arbitration has outgrown the boundaries of traditional commercial arbitration based on the autonomy of parties and contractual freedom. The power of investment arbitration has come up closely with the power of constitutional courts of states. Measures of national economic, tax, environmental policy and protection of people's health are now considered in arbitration.

Yet, the rules of court organization are traditionally within the exclusive prerogative of the legislative power. The European Court of Human Rights draws on this very principle too. The executive power cannot exempt itself from national judicial control through agreeing to the provisional application of an international treaty establishing the mandatory competence of international arbitration.

Empowerment of a supranational body with the corresponding competence without the adoption by the parliament of a law on treaty ratification is a flagrant violation of the right to be tried by an independent court established by law, which is guaranteed by the European Convention.

In conclusion, I would like to say that comprehension of the so-called political issue doctrine has become a long-standing need throughout the European space. This concept makes it possible to distinguish between legal issues that are subject to consideration in national and international courts, and purely political issues that are within exclusive competence of governments and parliaments, whose legitimacy is based on democratic mechanisms

of the peoples rule. It is based on this doctrine that urgent measures taken in our countries to combat the coronavirus pandemic should be evaluated.

This approach is aimed to maintain confidence in national and international courts, to protect them from suspicion of political engagement and bias, and to ensure the implementation of the common values on which the Council of Europe relies.

Thank you for your attention!
