Modern Constitutional Justice: Challenges and Prospects

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Introduction

Contemporary world, in particular modern scientific and practical contemplation of jurists and political scientists, including theoreticians of the state organisation in general, is faced with the existing situation, i.e. with the existing philosophy and law related situation.

All agree about the following: democratic elections, rule of law and fundamental human rights are the essence of the democratic order. Also, whoever takes this issue seriously does not dispute the fact that an independent and highest judicial body must exist as a guarantee and interpreter of the highest ranking law which, as a rule, is called Constitution[1] and that, at the national[2] level it must be applied. More or less it has been uniformly accepted that there are supranational conventions which, in their essence, have the character of constitutionality in the largest sense[3] and by mere belonging to certain supranational organisation [4] and by ratification of supranational conventions, the capacity of jurisdiction of supranational courts is also accepted[5].

At the same time, there are several directions in interpretation of international law – it is because we have introduced international law in order to determine term "supranational". There are theoreticians and practitioners, who are in minority but still exist, who claim that *international law*[6]*,* in its nature*,* has been *fragmentised* into scientific and legal disciplines (international maritime law or commercial law are the examples). The majority, in particular considerable majority that emerged after the democratization in the 90s, claim that international law finally reached the level it belongs to – the level of *constitutionalization,*[7] *i*n respect of which *Watts A.* talks about incompatibility of the law of reversed effort with international rule of law or, for

[1] Or just like in the Federal Republic of Germany, *Grundgesetz, Basic law*
[2] Within the meaning of territorial- national jurisdiction
[3] For example: European Convention for the Protection of Human Rights and Fundamental Freedoms
[4] For example: Council of Europe – international organization of wider European region
[5] In preceding examples the reference is made to the European Court of Human Rights in Strasbourg
[6] For the needs of this presentation it has been flagrantly and even inaccurately defined *as a group of norms and rules imposing an obligation on all State communities.*
[7] Listing at least major authors claiming the aforesaid would take too much space

example, *M. Koskeninniemi* talks about unity of international law[8]. However, that is not the end and it is about subordination of national law to international *supranational* law and about subordination of the highest or all national courts to international, *supranational* court.

This loud cry of globalization covers all law schools, all prominent and great theoreticians and practitioners except few[9] and although the idea of international law as common property of mankind and human civilisation is excellent and accepted by the mentioned author entirely, in particular when it comes to the field of the guarantees and protection of human rights, let us remember another cry of *H. Kelzen*[10]; *„... Idea of freedom... which is dominating...“,* because neither did Milton's antihero from the Lost Paradise recognise the freedom, but he rather turned to loud majority and made mistake!

Challenges of constitutionality /constitutional justice

When it comes to this discussion, it is indisputable that the constitutions and constitutional courts exist and that, as a rule, those courts have the capacity of the highest national courts and that their decisions are final in the field regulated by the constitutions and that, in the field of *constitutionality* and *constitutional justice* and adjudication, their authority as supreme interpreter of the constitution is not challenged.

If we accept these basic premises given that all of us come from such kind of countries and the courts in the countries we come from are of that kind, we will have a task to find out whether there are the challenges in our job and in our area and what our prospects are; do we work in the best possible manner and are we going to repeat the best possible highest result in the years to come as better result cannot be achieved or there is something new happening in societies we represent and defend by *adjudication* or there is something new that is revealing either new or old modified horizons. If our intention is to discuss current and new trends, let us start with the basics.

From the very beginning of civilisation the mankind refers to the same terms, which are used even nowadays; Plato and Aristotle write about the rule of law; Henry de Bracton[11] reveals a key sentence of the rule of law Ipse *autem rex non debet esse homine sed su lege, quia lex facit regem*... The king is under no man, yet he is under God and the law, for the law makes the king."[12] Thus, the study is created about the *Rule of law.* At the same the following is opened to us: the origin of constitutionalism starting from the Aristotle's Constitution of Athens, through theoreticians of the *natural school of law* and Kelzen's school of *pure theory of law* and all the way to contemporary Jurgen Habermas, who bravely clears the path to new and different trends,

[8] Zlatko M Knežević, Decisions of the European Court of Justice and their effects on the standards of national constitutional courts - the case-law of Bosnia and Herzegovina, Sarajevo, April 2016, regional conference
[9] See the presentation of *Valery Zorkin from 2015*
[10] H. Kelzen: Problem of parlamentarism, Beograd, 2010, p. 7.
[11] Henricus de Bracton, *De legibus et consuetudinibus Anglie*
[12] According to B. Milosavljević *Introduction to Theory of Constitutional Law*, Beograd 2011

which we have already discussed at the beginning of the text. So, starting from the rule of law, the basic and pure norm (Kelzen), the constitution as a choice between the power and law and *standardisation of bans* as an exception and *freedom as a rule*, we have finally reached the essence of constitutionalism – liberty of person.

We have also reached the present position relating not only to the constitutionalism but, in the narrow sense of the word, to the current position of the constitutional judiciary, which is fighting between two approaches – the constitutional positivism and constitutional *activism*[13].

It should be noted that constitutional courts also have interaction *in et sub* with the European Court of Justice[14], the Court of Justice of European Union[15] for the countries which are the members of the European Union.

For the needs of this work it is necessary to point to the national context within which the author acts. Specific nature of the Constitution of Bosnia and Herzegovina, in addition to some specific features that we do not see in this work, is that the European Convention is *an integral part of the Constitution*! An explicit constitutional provision[16] refers to the aforementioned and it is not only that the rights guaranteed under the Constitution are indisputably applied when it comes to the case-law of the Constitutional Court, but violations, if any, of the European Convention are also established on equal grounds.[17] In some specific situations additional international documents referred to in Annex I to the Constitution are applied. Moreover, there is only one case of the European Court of Human Rights connected with Bosnia and Herzegovina and this case is related to violations of the European Convention regarding collective rights and rights of minorities in the field of election legislation. As regards the aforementioned case, the European Court of Human Rights found that the political rights of minorities have been violated in the country which is constituted as a country of three peoples (three equal and constitutional peoples)[18].

Thus, the constitutional complaint which is called the appeal in the constitutional system of Bosnia and Herzegovina is an integral part of the Constitution, which proclaims the European Convention an integral part of the Constitution and, in addition to the European Convention, there is an obligation to apply other listed international documents from the field of protection of human rights. In such context, the issue of the position and mutual relations of the European Court of Human Rights and Constitutional Court is not only an issue of parallelism but even! an issue of *potential subordination and hierarchical position.*

General issues of contemporary challenges

[13] It is true that all remarks relating to simplification are correct, but this work has no aspirations of scientific character but rather of the professional character.
[14] For the constitutional courts of the countries that are an integral part of the Council of Europe
[15] Court of Justice of European Union
[16] Constitution of Bosnia and Herzegovina
[17] Very comprehensive and valuable collection of case-law on www.ustavnisud.ba
[18] Case Sejdic/Finci vs Bosnia and Herzegovina

When it comes to Bosnia and Herzegovina, general issues affecting mutual influences and challenges of the constitutional justice are broken into several levels.

The first level is the relationship of the decisions of the European Court of Human Rights and decisions of the Constitutional Court and their mutual correlation. The principles of interpretation of the European Convention and law related tools used for discovering the content of the norm[19] indicate that the traditional form of constitutionalism is not applicable. The simplest answer, which would refer to the form of subordinate position is actually incorrect. There is no such kind of relationship and it cannot exist either, but it follows from the very essence of its activity – given that the supranational court [20] exerts its influence on the State in its capacity as another party and the national court exerts its influence on an individual. Although this thesis bears another different influence when it come to the European Union Court of Justice and national courts of the member states of the European Union, it is nevertheless correct in this case.

The principle of harmonised interpretation is not unambiguous as it implies mutual interaction and, as such, it imposes that that *harmonisation of colours* does not men mixing oil and water, but it rather creates *a common intellectual product*. If that principle is violated then a problem arises. Ignoring the specific nature of a country, mechanistic conveyance of, not fundamental rights standards, but interpretations of those standards without taking into account the *national context*[21] leads to the current reactions starting from open resistance to interpretation, through legal initiatives relating to the changes of *effects* of the decisions of supranational court (in a sense that they are of *declarative character and not of constitutive character)* and going all the way to amendments to the Constitution as the highest act and giving *a posteriori* obligation to the highest national court (the Constitutional Court*)* to check *applicability* of the decision of a supranational court within the domestic constitutional system.

The key challenge has been clearly determined - what kind of relationship will be between the supranational court - i.e. the European Court of Human Rights with the highest national courts, in particular constitutional courts when it comes to interpretation of application and implementation of all indisputable norms of supranational documents such as the European Convention.

The time will show which direction this relationship goes to; either to *full subordination* of national courts to interpretation by supranational court or to *fragmentation of approach* and considerably wider application of *free margin of appreciation*[22] in each national context. Serious danger of diversity caused by migration wave of Biblical proportions or narrowing of rings with the aim of defending the fundamental right to life against the explosion of terrorism, is of no help in answering the question.

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[19] For example, Principle of harmonized interpretation

[20] European Court of Human Rights

[21] National context is a brilliant term which is used in international justice and theory as a form of excuse why some standards are used within the context of implementation of decision and why some of them are not used (see, the use of terms of the Venice Commission and more about this issue will come at some later point).

[22] Principles of interpretation of margin of appreciation are still acceptable tools for interpretation

Another serious challenge is reflected in mutual relationship of *secularism* and religious rights, including the rights to display religious insignia not only in private sphere but also in public sphere, which should be acceptable activity symbolising the statehood and state organisation. On the one hand, there are always interesting decisions of a supranational court *floating* between full liberal acceptance of *symbols* and rigid relationship when those symbols enter the sphere of very grave criminal liability with an explanation that the fundamental rights under the European Convention must be interpreted differently within the context of fight against terrorism, and going all the way to national or state related decision with regards to some very important rights to be *suspended* under extraordinary circumstances which are, nevertheless, prolonged by decisions of the State bodies.

We are also faced with the following challenge: the position and role of constitutional courts

The constitutional courts used to have the role of final authority and guardian of not only the Constitution but also of supranational rights and that role was specified declaratively and until recently it was indisputably guaranteed by the constitutions and accepted by general public. However, the conflict of *priorities* between the political sphere of power (legislative and particularly executive power) has reduced or seriously tries to reduce the role of constitutional courts. Given the series of changes taking place in Hungary or recent changes in Poland, the political sphere indicates that the inherited rights to independence and separation are interpreted in a manner which suits political sphere, which spends the democratic mandate, which was indisputably acquired during democratic election, on disciplining the constitutional judiciary.

It is a very small step from such conduct to *disciplining* the basic norms of supranational documents and that was shown by the reaction to the recent migrant crisis - freedom of movement of people came down to freedom of protection or separation of national space regardless of affiliation to associated community or it was even against the positions of the bodies of that associated community and there even was no intention to make an excuse but only offering justification for the protection from the other ones and different ones.

Finally, when the challenges are discussed one is faced with the challenge of inequality resulting in overall diversity. In the European space, there is a closed circle of members of the European Union, the circle of countries which, more or less, unsuccessfully try to make access to the Union, and that is the circle of countries which, for different geopolitical reasons, are on the margin of or even in the latent conflict with the closed circle and, all in all, there circles inside the circles.

Concluding remarks

After looking at the activity of the most significant supranational advisory body[23] in the field of constitutional law or constitutionality[24], one releases that the issues of constitutional justice and constitutionality are imposed almost on daily basis and that there is no final solution or holy letter which gives a final solution forever. Constitutionality is a living organism which is moving and seeks fresh approach, the acceptance of standards and also the respect for diversity without imposition, and all of this is aimed at creation of constitutional identity or the identity of civilization-related minimum of the rights and freedoms until the final aim is achieved - the liberty of a person as an ideal. In this case it is not possible to talk about the lost paradise that poet Milton, who was mentioned at the beginning of the text, refers to. To the contrary, we have to respect each other in diversity of approaches in the national contexts with the perspective of unity in defence of rights and freedoms.

Only by blooming of hundreds of flowers on the tree of fundamental human rights and freedoms the relevant role and calling can be achieved leading towards the future of unity of mankind.

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[23] European Commission for Democratization through Law – Venice Commission
[24] Compilation of Venice Commission opinions, reports and studies on constitutional justice, www. venice.coe.int