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CONSTITUTION IN THE GLOBAL CHANGES EPOCH AND THE GOALS OF CONSTITUTIONAL REVEW

INTRODUCTION

Contemporary world, abundant in contradictions, abundant in mutual conflicts, also shares a number of common values which may be said, both in formal and substantive terms, to represent undisputable values of a generally accepted model. One of those values is the separation of powers into three branches. The rule of law or rule of the laws based on the constitution as a supreme legal act, but also, in the broadest sense of the word, as a political act of a State, derives from that value, as well as the established institution of ***interpreter of the constitution*** as a final and supreme authority – constitutional court. Regardless of differences in designations of this institution[2] and major differences regarding the capacity of its responsibilities, almost all of them have the jurisdiction of reviewing the constitutionality of acts (laws or other acts which have the force of law or by-laws). Admittedly, the meaning of the term of ***constitutional review*** may also encompass the assessment of constitutionality, control of constitutionality and even creation of constitutionality. However, the review of constitutionality will be used for the purpose of this work.

As an axiom in the contemporary world, one should take into account the fact that the constitutional courts are based on the Kelsen model[3], that they are more or less well-functioning within the contemporary constitutional systems and that they exercise their role through the review of constitutionality within the national system as well.

Another fact which should be regarded as an axiom is the fact that certain international agreements or conventions, primarily those being of complex type [4], have a very important role in

[1] Judge and Vice-President of the Constitutional Court of Bosnia and Herzegovina, Member of the Venice Commission of the Council of Europe.
[2] There are also constitutional courts, supreme courts or constitutional councils.
[3] Hans Kelsen, professor of public and administrative law at the University of Vienna, author of the so-called Pure Theory of Law, fervent advocate of the Theory of Critical Legal Positivism and creator of the model of constitutional court and founder of the first constitutional court in Austria in 1920. His impressive biography and incontestable influence on legal science forms part of the general knowledge of every lawyer.
[4] Signed, ratified and implemented by several States.

the contemporary world, notably when it comes to their implementation in the national system[5], and that the decisions of the supranational court[6] have a considerable impact on the national legal system either through the determination of the *standards of interpretation of legal norm* or through the application of the uniform case-law. That impact for sure is not limited to an individual case, but it also affects the entire national system, including the national constitutional system.

The impact of bilateral agreements as certain forms of connection or multilateral agreements and legal acts to be adopted on such occasion or those to which a party may accede, regardless of their importance, are not the subject matter of this text.

On this occasion, I would like to mention the presentation which Mr. Valery D. Zorkin had at one of the last conferences. Namely, Mr. Valery Zorkin mentioned in his work *Challenges of Implementation of the Convention on Human Rights* the problem of existence of the impact, notably on the legal activism which, with the help of a number of legal-technical mechanisms, may be regarded as an intrusion into the field of operation of national and state sovereignty, and people's sovereignty[7]; he also emphasized various forms of the use thereof. However, for the purpose of our presentation, ***the concept of implied rights*** is of particular interest (in addition to the creation of positive obligation), which could show us some forms of potential or existing conflicts in the implementation of the review of constitutionality.

EPOCH OF GLOBAL CHANGES

When it comes to the epoch of global changes, the most important part of our presentation relates to the global changes in the constitutions; constitutionality, as a category of existence of a particular constitution, and the review of constitutionality, as a critical dynamism of the interpretation of a constitutional norm and the application of that norm to a precisely determined segment of the legal system. However, the global change in respecting **supranational law** and **supranational court** is not insignificant; it is even the most challenging. I do not speak only of the global acts adopted by the United Nations (such as the Covenant on Political Rights) but also the acts being more important to our life, those that correspond to the abused term of **living space** (European or, more precisely, Eurasian space in geographical terms)[8], among which the European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes a crucial act for a huge majority of the countries of the defined geographical space[9].

[5] For example, European Convention for the Protection of Human Rights and Fundamental Freedoms.
[6] European Court of Human Rights in Strasbourg.
[7] In terms of the rights of individuals compared to the society.
[8] Admittedly, since the time of general Charles de Gaulle, there has been a Europe "from the Atlantic to the Urals" either as an ideal or in real life.
[9] In essence, the *European Convention for the Protection of Human Rights and Fundamental Freedoms is the most important legal instrument in the recent history in general. Its creation is related to the organisational form of a new European architecture following the end of the II World War through the Council of Europe as a form of mutual communication and cohabitation of the States in Europe divided by the ideological fence or curtain.*

All other changes, primarily those of political nature, some of which create tectonic changes in international relations and have an impact on the international consensus on the constitutionality, which draw our attention to huge systems which were disregarded until recently, such as the Asian system, or to be more specific, the Chinese constitutional system, are out of the focus of this work. Therefore, we will mention their impact only superficially.

Contemporary legal science, when making efforts to designate legal and constitutional systems and to compare their similarities and differences, often faces with quick changes amounting to the obsolescence of recent uniformities in national and supranational legal orders[10] .

Thus, for the purpose of this work and without paying attention to big legal systems which show very interesting changes and which would be interesting in terms of a professional discussion, we will focus on the goal of the contemporary reviews of constitutionality under the influence of supranational law and supranational courts.

CONTEMPORANEITY IN CONSTITUTIONAL REVIEWS

In the author's opinion, what mostly contributes to tensions in a review of constitutionality is somewhat unusual, even perhaps partially a *schizophrenic* task that, in the course of constitutional review on a case by case basis, the national constitution and previous case-law as well as international conventions and case-law of the international courts have to be taken into account. In this case we are focused exclusively on effects of an international convention - the European Convention on Fundamental Human Rights and Freedoms and of an international court - the European Court of Justice Strasbourg.

Bosnia and Herzegovina is a very interesting example for the analysis of development but perhaps even more for the assessment of future trends. Under the Constitution of Bosnia and Herzegovina, the European Convention is an integral part of the Constitution. This means that the provisions of the European Convention have a dual character: a) on the one hand, they have the character of international norms that apply everywhere within the organisation that encompasses the signatories of the Convention and, b) they have the character of an *internal* constitutional norm to which the terms *national* and *sovereignty* could also be applied. Since the European Convention is not only a sum of the norms on rights and freedoms, but it also has a **procedural and protective character**, such as the establishment of the European Court, access to a court, the form and name of the act based on which access to judicial protection is sought, the consequences for and obligations of the *State* as to the enforcement of decisions of the Court (to mention just a few), the question also arises as to the enforcement of decisions of the Court.

Unlike other constitutional systems, which assume that the European Convention has the character of an international treaty that: a) has priority over any other law in that system, or b) has

[10] I would like to mention a capital work of the Supreme Court of the Russian Federation and Institute of Legislation and Comparative Law Moskva 2013, edited *V.M. Lebedev and T.Y. Khabrieva*, which presents an overview of contemporary legal systems.

priority over any other law if it is in accordance with the national constitution, or c) has the force of law and is subject to examination as any other norm of law, or d) has the force of the accepted international treaty but the effect of that norm is examined on a case by case basis, as well as other modalities, especially in the field of *enforcement of Court decisions*, the constitutional text gives an explicit order that the European Convention is an **integral part of the Constitution**.

This has its consequences in two directions: one concerning the interpretation of the norm and then we are faced with a new essential fact and that is the existence of the so-called *acquis* (the Strasbourg acts), which again has a very rich reservoir of the interpretations of the norm that have already been reached[11]; and the other direction of the **enforcement of Court decisions**, which, in this example, can be declared direct. Therefore, in the case of Bosnia and Herzegovina, we are also engaged in discussing the principle applicable to ordinary courts within the framework of the national legal order - the principle of subordination.

Since the European Convention is an integral part of the Constitution, then the parts related to *enforcement* have the same constitutional character and the interpretation of national courts finishes with the enforcement of a decision rather than with the creation thereof, as the result of an intellectual contribution to the understanding of the meaning of the norm in the national context.

I immediately reject the objection that this is an isolated case of one country, for no matter how accurate the statement that the specific constitutional order is about the incorporation of the European Convention into the constitutional system, as we have already explained, more precise is the assertion that this concerns a large number of countries (Council of Europe member states), which **have accepted** the enforcement of decisions of the European Court (in various modalities, but ultimately accepting those decisions as **final**).

This brings us to the key dilemma of this presentation: are contemporary trends in constitutional reviews actually develop towards the establishment of ***a superior, final authority*** that is embodied in the European Court?

In fact, the enforcement of decisions is not just the application to a specific case, no matter that it was a cause, but it also contains the **standard** of interpretation of other cases where the factual and legal situation is identical or similar. Thus, the obligation to interpret the regulations as well as the obligation to review the constitutionality of a law in accordance with the established standard is created. Here we are talking only about the effects of individual decisions, but we omit an explanation of what happens where **a structural error in the legal order** is declared by a decision of the European Court, thus imposing the opinion that a certain law or lack of law is contrary to the standards established.

What is it but a classic review of constitutionality? However, we held that this part was far clearer in respect of the consequences.

Therefore, the final theses of this presentation is the following.

[11] As to the interpretation of norms of the European Convention as well as of all accompanying documents, including Recommendations

The contemporary tendency of a constitutional review is very clear – it enters into the unique flow of thoughts of one legal school, into the unique flow of one political philosophical school, and demands that national systems are subject only to such a method, as the only correct one, which claims for its decisions that the **standards** necessary for application are the only correct ones.

At the same time, national systems are faced with a conflict of national sovereignty in this field (and, roughly speaking, if national sovereignty does not have the power to interpret its own constitution or interpret it in a national context, then the question is to which extent national sovereignty has been violated), but also with a conflict of the application of the international standard (as we have already explained it) in the national constitutional and, viewed more narrowly, legal order.

This tendency has already become a rule, international standards have become national, national ones have to adapt to international ones or must be abandoned for being regressive and inapplicable, and in the example of Bosnia and Herzegovina we have shown that they become a **constitutional norm also in the formal sense of the word**.

The ensuing conclusion is that there is no longer a classical national review of constitutionality nor the application of interpretation in a national context, but that the merging of supranational and national law creates not only the basis for interpretation, but also for application of the European supranational constitutional law and thereby for the European supranational review of constitutionality, no matter how controversial it sounds, of a national constitution.

Thank you for your attention.

St. Petersburg, May 2018