The Control of Constitutionality of Constitutional Amendments -The Brave New World Ante Portas

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***Abstract*—** the paper analyzes the problem of control of constitutionality of constitutional amendments by constitutional courts. In this context, the paper explores the relationship of the judicial control of constitutionality and the principle of separation of powers, as well as the relationship between the judicial control of constitutionality, etc. clauses of eternity. The paper elaborates the more frequent replacement of traditional Kelzen`s theory for control of conformity of laws (acts) with the constitution under ,,Theory of degrees" (Die Stuffentheorie), with the doctrinal concept of control of the constitutionality of those provisions that regulate materia constitutionis- constitutional provisions. The paper also brings up the issue of whether the interpretation of the ,,clumsy" phrases of the Constitution and the introduction of the concepts of ,,symbolic constitution" and ,,constitution behind constitution "on the one hand and the introduction of doctrinal concept of control of the constitutionality of constitutional norms, on other hand, is overhanging constitutional courts ,,as the sword of Leviathan". Finally, the main dilemma remains. Does the control of the constitutionality of constitutional norms reflect the so-called ,,passive virtue" of constitutional courts and at the same time determines the right constitutional momentum for the start of a new phase of constitutional development, or the perception of the ,,Brave New World ante Portas" is expected.

***Keywords*—** Constitution, Constitutional Amendments, Fundamental Constitutionality, Constitutional Courts, Modern Constitution.

I. Introduction

ONE of the most intriguing issues for the constitutional law, is the issue whether constitutional laws (acts) and constitutional amendments can be the subject of the control of constitutionality. The answer to this question is directly conditioned by the place of these acts in the legal system.

1. Thus, one theoretical standpoint defends the thesis that the constitutional laws (acts) and constitutional amendments, given the fact that they regulate materiae constitutionis and, accordingly, have the same legal force with the constitutional provisions, can not be a subject to the control of constitutionality. The mentioned theoretical standpoint, rigidly adheres to Kelzen's Doctrine of Degrees in Law (Die Stuffentheorie), which predicts the possibility of control of conformity of legal norms of the lower degrees with those of the higher degree. The above mentioned doctrine is the theoretical basis for the traditional exercise of the judicial control of the conformity of legal acts with the constitution.

2. On the other hand, one broader theoretical standpoint is based on the thesis that in order to achieve, in the true sense, protection of the established legal order, the constitutional courts have the power to control the constitutionality of both constitutional laws and constitutional amendments. The doctrinal concept of the ,,unconstitutionality of constitutional law" is based on the notion that the subject of constitutional control can be all legal norms and provisions, solely in order to protect the values and principles that the constitution maker valued them as fundamental one. The concept of "Fundamental constitutionality" in contemporary constitutional law is also referred to the Doctrine of "Absolute rooting of constitutional values and principals". Its most important task is to ensure the protection of the "Spirit of the Constitution". The theoretical basis for the abovementioned contemporary doctrine in constitutional law literature, is Kelsen's standpoint that the constitution may prohibit acts from having some content, and consequently the legislator can not pass a single act, even a constitutional one, that would have a content which is not in conformity with the constitutionals provisions. Thus, the constitutionals prohibitions on changing the form of government or the prohibition on changing the democratic order by constitutional laws or amendments is obligatory for the legislator-constitution maker. It leaves no room for maneuvering and possibly adopting constitutional laws (acts) or amendments that would be in collision with the mentioned prohibitions. This constitutional provisions that can not be revised with constitutional acts and amendments also known as "clauses of eternity" or "guarantees of eternity" can be interpreted as an assumption for the control of the material constitutionality of legal acts. Thus the constitutional act or the constitutional amendment that would regulate the issues that the constitution considers to be definitely regulate, can be a subject of control of the constitutionality by constitutional courts. In this context, the decisions of the Italian Constitutional Court which evaluate the material constitutionality of the constitutional acts that relate to the republican form of government, can be pointed.

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II. CONCEPTUAL FRAMEWORK

A. Comparative overview

The Doctrine of unconstitutionality of constitutional provisions is initially associated with the control of the material rather than the formal constitutionality of legal norms. The aforementioned doctrinal concept (verfassungswidrigen Verfassungsrechts), although its roots and initial elements are found in the Norwegian Constitution of 1814, has been established and exercised through the decisions of the Federal Constitutional Court of Germany. Neither the Basic Law (the Constitution) nor the Federal Law on Constitutional Court, contain provisions that expressis verbis provide the Federal Constitutional Court with the power to exercise control over the constitutionality of constitutional norms. The Federal Constitutional Court of Germany determines that constitutional norms are subject to the control of constitutionality, solely because no constitutional norm can be derived from the context and be interpreted independently. Namely, in the explanation of Court`s first decision of 1951 (Südweststaat-Streit), the Federal Constitutional Court of Germany set the grounds for the doctrine of unconstitutionality of the constitutional norms (provisions) and emphasized that the individual constitutional provision cannot be isolated and interpreted independently. The Constitution possesses internal unity, which assumes that the meaning of the individual part of the constitutional text is related to the meaning of all other parts of the constitution and in general with the spirit of the „Basic Law". The Constitution includes constitutional principles and values that are so fundamental and basic, and are an expression of the law to that extent that they have a supremacy over the constitution itself and require obligation for the constitution-maker itself. The doctrine, two years later, was supplemented by the standpoint that when one of the norms (provisions) of the Basic Law exceeds the limits of the principle of justice and supra-constitutional law, the Federal Constitutional Court is obliged to abolish this constitutional provision.

The doctrine of unconstitutionality of constitutional norms has been established through the decisions of the Constitutional Court of the Czech Republic, although the Constitution does not explicitly determine this competence of the Constitutional Court. The Constitutional Court brought the category of constitutional laws (acts) under the category of laws (acts) and found that they are also subject to the control of the constitutionality. Namely, in 2009 the Court determined that excluding the control of the constitutionality of constitutional laws (acts) from the competence of the Constitutional Court would completely eliminate its role as protector of constitutionality and legality (Decision Pl.US 19/93). This examples portraits European systems of control of constitutionality that have positive approach to control the constitutionality of constitutional norms, without expresis verbis constitutional provision that would give constitutional court such competence.

B. Research Analysis- Case study of Republic of Macedonia

Consequently, the question that is a subject of this study is, what is the standpoint of the Macedonian Constitutional Court regarding the issue of control of the constitutionality of the constitutional norms (provisions) and whether the doctrine of unconstitutionality of the constitutional norms is enough inspirational for this Constitutional Court too. Unfortunately not. In the context of the above mentioned, the Constitutional Court of the Republic of Macedonia in 2001, rejected the Initiative for initiating a procedure for control of the constitutionality of the Draft Amendments to the Constitution of the Republic of Macedonia (Decision U.no.188 / 2001) on the grounds that "the Constitutional Court has no competence to review the conformity of the constitutional amendments with the Constitution, because the constitutional provisions must be determined as the highest legal provisions and expression of the political will of the entities in the state. Namely, for the Constitutional Court the Constitution is an act in respect of which the Court control the constitutionality of all other lower acts. Hence, the control of the constitutionality of the text of the Draft Amendments to the Constitution is not in the competence of the Constitutional Court".

The stated decision is an indicator that the Constitutional Court of the Republic of Macedonia firmly supports and accepts the traditional theoretical standpoint of control of constitutionality of legal acts, and the established practice to control the conformity of only lower legal provisions with those of the Constitution.

C. Research Findings

Finally, the provisions of the Constitution of Republic of Macedonia and The Rules of Procedure of the Constitutional Court, that apply to the Constitutional Court of the Republic of Macedonia leave us with the impression that this institution is the most powerful institution in the system. However, this impression is not correct. The practice that this body develops, lead us to the conclusion that the Constitutional Court exercise more the techniques of the Doctrine of self-restraint and Bickel's passive virtue performed at its extreme. Macedonian Constitutional Court cannot be related to the constitutional courts in the contemporary political systems that develop and implement the Doctrine of control of (un)constitutionality of constitutional norms. The implementation of this doctrine requires well-reasoned and elaborated decisions which exhale the determination of the Court to keep the "spirit of the Constitution"

III. CONCLUSION

Finally, it must be emphasized that the implementation of this contemporary doctrinal concept of control of constitutionality of constitutional provisions is a powerful tool of the constitutional courts. Conditio sine qua non for its implementation is the capacity of the court to deliver argmented and inspirational decisions, as well as the sense for the so-called passive virtue. The establishment of this

practice, hides the danger of the possibility of transforming constitutional courts into hidden constituencies and the possibility to practice enhanced judicial activism under the cover of the terms "symbolic constitution", "living constitution" or "constitution behind a constitution". That is why parallel with the concept of control of (un)constitutionality of constitutional provision, the constitutional courts should develop and exercise of the so called Bickel`s passive virtue. This virtue allows the constitutional courts to make a real assessment of the de facto constitutional momentum and reach decisions that would be inspirational and enlightening and at the same time trigger for a new and advanced constitutional development.

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