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Review

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THE LEGAL NATURE OF THE CONSTITUTIONAL COURT

Summary: *The paper contains a review of the legal nature of the constitutional-judicial function as a state function of more recent date and its place in the existing traditional system of trichotomous separation of powers. Today, it is generally accepted that the constitutional judiciary is the most effective mechanism for preserving the constitutional separation of powers. Considering the fact that the separation of powers does not exclude the possibility of overlapping the jurisdictions of different holders of state power, the role of the Constitutional Court is particularly important in this respect.*
It is precisely the specificity of the constitutional-judicial function, which is reflected in the resolution of constitutional disputes, that opens the dilemma whether the constitutional court is a form of specific legislative action, a judicial authority or a separate state body sui generis. Although the Constitutional Court has similarities with both the legislature and the judiciary, the numerous differences and peculiarities of the Constitutional Court function are sufficient to make the Constitutional Court a separate state body.

Key words: *constitutional court, constitutional-judiciary review, negative legislature, judicial authority, sui generis authority.*

JEL classification: *K1,K10*

INTRODUCTION

The constitutional-judicial function, in relation to traditional state functions, belongs to the more recent state functions. The separation of the constitutional-judicial function as a special function of state power dates back to the twenties of the previous century, that is, the appearance of the Austrian Constitutional Court. However, the very idea of constitutional review emerged much earlier (Kosutic 2013, 33), and received its legal form in the US Supreme Court ruling, *Marbury Vs. Madison* from 1803. With this decision, the US Supreme Court established the right of regular courts to examine the conformity of law with the constitution. On the European soil, on the other hand, the concept of the sovereignty of parliament, stemming from Rousseau's idea that "law is an expression of the general will", which was translated into a legal principle by the French Declaration of Human and Citizens' Rights of 1789 and later by the Constitution of 1791, was a major obstacle to the introduction of judicial review of constitutionality. Also, the constitutional review was considered to be contrary to the monarchical form of government. Although they did not accept the US constitutional review system, European states have built a new system in which constitutional review is entrusted to a specialized constitutional court body. In this sense, we can speak of constitutional courts in a broader and narrower sense. By Constitutional Court in the broad sense, we mean state bodies which, in court proceedings, decide on certain constitutional issues (constitutional disputes) for the purpose of protecting the constitution. On the other hand, Constitutional courts, in the narrow sense, are referred to as special state bodies formed exclusively for the purpose of reviewing constitutionality. However,

notwithstanding the fact that the constitutional judiciary is now regarded as part of the separation of powers, a question has arisen as to its place in the existing system of the separation of powers. Regardless of the very legal nature of the Constitutional Court, it is indisputable that the introduction of constitutional judicial control contributed to the strengthening of the principle of separation of powers. In that sense, the constitutional court function contributes to the opening of the basic goal of the separation of powers, which is to prevent the abuse of power. (Pajic Savija 2014, 246). The separation of powers implies the establishment of a balance between the law-making authority and the law-interpreting authority. (Allan 2003, 584). The role of the constitutional courts in this context has also become more significant and broader. In that sense, the Constitutional Court today "plays an important role in the process in which the adoption of normative acts is preceded by the creation of policy in the state and where the government, embodied in the legislative and executive branches, and political parties, which participate in the government or form its opposition, appear as actors." (Pejic 2013, 57). It was the constitutional courts that served as a „trademark"nor as evidence of the country's democratic character (Solyom 2003, 134). Today, "Constitutional courts are tasked with protecting democratic values, individual rights and serving as a rampart protecting the state from returning to a totalitarian past. (Trochev 2004, 514). Precisely because of this, in the first years of the transition process in post-communist states, the role of the Constitutional Court was crucial in defining the limits of authority of the most important holders of state power (Hatwig 1992, 449-470). Today, it is indisputable that a constitutional court is necessary for every democratically organized state. The emergence of the constitutional has influenced that the principle of separation of powers is viewed in a much broader sense. In the constitutional theory, discussions were held regarding the place of the constitutional court in the traditional trichotomous separation of powers, that is, given the powers it possesses, one could speak of a separate state function. It is precisely the specificity of the constitutional-judicial function, which is reflected in the resolution of constitutional disputes, which opens the dilemma whether the constitutional court is a form of specific legislative action, a judicial authority or a separate state body sui generis.

1. THE CONSTITUTIONAL COURT AS A "NEGATIVE LEGISLATOR"

According to the first view, the Constitutional Court indirectly performs a legislative function, that is, it appears as a "negative legislator". This idea originated from H. Kelsen and it greatly influenced the design of the constitutional courts of the western world (Sweet 2000, 134-135). It is based on the fact that the Constitutional Court, by repealing unconstitutional laws, shares the legislative powers with parliament (Kelsen 1942, 187). Kelsen himself distinguished between parliament, as a "positive legislator," and the Constitutional Court, as a "negative legislator". Unlike parliament, which, as a positive legislator, is free to legislate, within the limits set by the constitution itself, the legislative function of a constitutional court, as a "negative legislator," is limited solely to the annulment of those laws that are contrary to the constitution (Sweet 2007, 83). While the legislature is bound by the constitution only with regard to the procedure of passing laws, exceptionally and by general constitutional principles, when it comes to the content of the law itself, the activity of a negative legislator or constitutional judge is fully subordinated to the constitution (Kelsen 1942, 225). The Constitutional Court is therefore often referred to as "a third chamber that has the power to influence decision-making policy in the sense that it encourages certain legal solutions by its decisions while repealing others" (Epstein, Knight, Shvetsova 2001, 125). In this sense, it is often said that there is a gradual transformation of parliamentary democracy into a "judicial democracy" or even a "judicial government".

In support of the claim that the Constitutional Court, by solving constitutional disputes, performs a legislative function, the main arguments are the similarities of the constitutional judicial function with the legislative one, i.e. differences with respect to the judicial function.

"The Constitutional Court, by exercising normative control and removing unconstitutional law from the legal order, determines which law cannot survive in the legal order. In this way, the constitutional court, by deciding on the constitutionality of the law, also exercises its legislative function. Such action of the Constitutional Court has two limitations. First, the Constitutional Court is not directly involved in the legislative process itself, but there must be concrete or abstract dispute about the constitutionality of the law. Second, constitutional courts are often late in exercising their right to control the law" (Hönnige 2010, 4). Although the Constitutional Court itself does not legislate, the decision of the Constitutional Court is *"Ex constitutione*, in the rank of a law which (in whole or in part) abolishes a certain law, goes hand-in-hand with statutory regulations that are undisputed, that is, those that have withstood constitutional-judicial review - and is superior with respect to legal norms that, as unconstitutional, this decision directly repeals " (Tomic 2004, 67). Unlike the legislator who legislates, the Constitutional Court determines which acts cannot be considered law. "When the Constitutional Court decides, it only examines the logical compatibility of the law with the constitution, so the decisions are quasi-legislative. The court has the role of the legislature, but only in the negative sense, because it can promulgate laws, not pass them " (Tripkovic 2004, 319).

Although the boundaries of the constitutional court are set within the constitution itself, its role is also a creative one, since it enjoys a high degree of autonomy in decision-making. Since the decisions of the Constitutional Court are generally binding, they also affect the subsequent activity of the legislator, in terms of his endeavour to adjust his future legislative activities precisely to the views arising from the decisions of the Constitutional Court. In this sense, we can speak about the direct and indirect influence of the Constitutional Court on the legislature. Direct influence implies that the Constitutional Court, by its decisions, manages to influence the legislative policy itself and the legal solutions (Sweet 2000, 93). This implies that the constitutional court, through the very content of the decision, manages to realize its political goals (Smolak 2011, 212). The Constitutional Court's indirect influence on the legislature can be achieved in two ways. The first is reflected in achieving the effect of self-control by the government and the parliamentary majority in anticipation of the Constitutional Court's decision to repeal an act. Another form of indirect influence is the so-called "Corrective review", which implies a reconsideration of a legislative proposal in accordance with a decision of the Constitutional Court (Sweet 2000, 94). Considering the fact that the influence of the Constitutional Court on the legislature is indisputable, the main objection to the Constitutional-judicial power is the existence of a danger of usurpation of the legislative power by the Constitutional Court.

In support of the claim that the function of a constitutional court is much closer to a legislative rather than a judicial function, the following facts are also cited. First of all, the decisions of the Constitutional Court, as opposed to the decisions of the regular court, work *erga omnes*. The Constitutional Court is called upon to resolve disputes arising out of a violation of the legal order, regardless of the existence of a specific dispute. Also, the Constitutional Court is empowered to initiate proceedings on its own for reviewing constitutionality, unlike a regular court before which proceedings can be instituted solely at the request of a party. The fact that the constitutional court differs from regular courts, i.e. that its nature is closer to the legislative body, is also indicated by the fact that constitutional courts resolve specific disputes based on conflict of acts, while on the other hand, regular courts resolve disputes between legal acts. Consequently, a constitutional dispute is not a party dispute, and constitution and law are the only yardsticks in constitutional court decision making.

Notwithstanding the fact that the Constitutional Court, while resolving constitutional disputes, especially in the process of abstract constitutional review, exerts influence on the legislative power, it should nevertheless be borne in mind that the Constitutional Court is not almighty and that there is a border between the Constitutional Court and the legislative body, as well as other holders of state power, set out in the constitution itself. In this respect, the Constitutional Court is distanced from the legislative process, on the one hand, as distanced from the application of

these regulations, on the other. The constitution, as the legal act of the highest legal force governing the organization and jurisdiction of the highest holders of state power, should ensure their independence. Accordingly, the legislature is protected by the constitution itself from the possible usurpation of power by the constitutional court. On the other hand, the task of the Constitutional Court is to safeguard the constitution and to take care solely of whether other holders of power exercise their jurisdiction within the limits set by the constitution. Any act by the Constitutional Court beyond the limits of the powers established by the constitution would constitute a violation of the principle of constitutionality. The main task of the Constitutional Court is "to eliminate unconstitutional laws from the legal order, to remedy the grave errors of the legislature and other qualified cases of unconstitutionality" (Stojanovic 2009, 359). H. Kelsen himself emphasized that while constitutional jurisdiction is the activity of a negative legislator, this does not mean that the constitutional court exercises a legislative function characterized by the freedom to create norms, which does not exist in cases of annulment of laws. His conclusion is that the constitutional court function is realized as a purely legal mission of interpreting the constitution.

We believe that it is wrong to identify the constitutional-judicial function with the legislative function, primarily because of the fact that the constitutional-judicial function cannot be equated solely with the function of normative control. The Constitutional Court also performs other tasks that are not necessarily concerned with examining the constitutionality of the law. Although the effects of normative control are reflected in the laws themselves and the legislature, this does not mean that we can equate constitutional activity with the legislative function. Law is an expression of political will, and politics emerges as the democratic power of shaping the law. However, the Constitutional Court, when deciding on the constitutionality of legislative acts or acts of other authorities, should not be placed in the role of the legislator (Scholz 2014, 39).

2. THE CONSTITUTIONAL COURT AS A COURT AUTHORITY

In the second view, the emphasis is placed on the judicial aspect of the constitutional judicial function, that is, the constitutional court is viewed as a judicial body (Marcic 1963, 202). Such an understanding was represented by R. Lukić. "At first glance, it seems beyond doubt that the assessment of the constitutionality of the law, i.e. determining whether a law is constitutional or not, and imposing a sanction against it in the event that it is found to be unconstitutional, i.e. its annulment-appears to be a typical judicial job, that the authority exercising this control performs a judicial function and issues a judicial act" (Lukic 1966, 95). D. Stojanovic also agrees that "Constitutional courts essentially are and remain courts...The Constitutional Court is not a political state body, but it is a court, which acts and decides on the basis of strict legal reasoning, not political reasons " (Stojanovic 2015, 67-68). There is an opinion in German legal theory that The Federal Constitutional Court is, therefore, a part of the third power, although it has a special status in comparison with other forms of judicial power; it is a more independent federal court than any other constitutional body. The Constitutional Court is similarly characterized by K. Hese. For him, the Federal Constitutional Court is an independent federal court, which stands above other courts in its constitutional position (Hesse 1999, 278-279). In this sense, constitutional courts are also often referred to as "a special type of political court whose priority is to preserve the supremacy of the constitution, the integrity of constitutional authority, and to act as the supreme and ultimate guardian of human rights" (Tanchev, 8). In this respect, the decisions of the constitutional courts are only legal in terms of form, while in their content they are often political. The opposite is pointed out by R. Lukic, who says that the constitutional judiciary is as legal as the rest of the judiciary. If the Constitutional Court were to be considered as a political court then its task would not be to assess the constitutionality of the law but its political expediency (Lukic 1966, 98).

The main arguments in support of the claim that the Constitutional Court is a court, that is, its function is a typical judicial job, are the procedure and method of the constitutional court decision making. The procedure before the Constitutional Court is a court proceeding according to strictly defined rules, and in deciding the Constitutional Court relies solely on the legal standard without indulging in the assessment of the expediency of the impugned act. The fact that the Constitutional Court is activated only if there is a dispute speaks of the fact that the Constitutional Court is a judicial body. Like any court, the Constitutional Court also decides on the disputed issue by a court ruling. The decision of the Constitutional Court establishing the unconstitutionality of the law, Lukić believes, is an individual legal act as well as a court ruling. Although it repeals a law, which is a general legal act, it does not change its nature since the decision of the Constitutional Court refers to a "well-defined law and not to all laws of a given type" (Lukic 1966, 96). Supporters of this view, however, do not dispute the differences between the constitutional judiciary and the regular judiciary, which are primarily concerned with the parties in dispute themselves, and the decision itself, as discussed above. Such differences, however, are considered a consequence of the specific nature of the dispute itself, which the Constitutional Court has been called upon to resolve. "The Constitutional Court does not resolve regular court disputes (litigation, guilt, etc.), but special, constitutional disputes, which are not party disputes, i.e. disputes between the parties, but rather disputes between legal acts " (Markovic, 2007, 22).

However, the Constitutional Court cannot really be equated to an ordinary court, first and foremost because of the scope of jurisdiction that is significantly broader than the jurisdiction of regular courts. "In relation to the 'ordinary' court, the Constitutional Court has, with regard to constitutional norms and principles - both those enshrined therein and the implications contained therein, especially those internationally recognized patterns - tasks that are far more deliberate and far-reaching in their consequences and prerogatives compared to the other judiciary " (Tomic 2004, 66). In this sense, the Constitutional Court goes beyond the scope of the ordinary court because its role is also of a creative nature. Also, the Constitutional Court takes into account not only legal but also political criteria when making a decision. There is another important difference between the conduct of ordinary courts and constitutional court action. Unlike a regular court, constitutional courts can act on their own initiative.

3. THE CONSTITUTIONAL COURT AS AN AUTHORITY *SUI GENERIS*

The third theoretical approach defines the constitutional judiciary as an authority *sui generis* which exercises a specific state function. It is true that the Constitutional Court has similarities with both the legislature and the judiciary, but the differences and specificity of the constitutional judiciary are sufficient to distinguish the Constitutional Court as a separate state body. In the constitutional theory, it is increasingly expressed that the Constitutional Court is independent state power. Thus, I.Pejic points out that "the area of constitutional judicial review occupies its authentic constitutional space, which is at the intersection of law and politics ... The Constitutional Court, as a filigree legal corrective, is embedded in the structure of the separation of powers and has not been rejected by it for many years. Based on the force of legal principles and without the ability to act by coercion, the Constitutional Court clearly has the authority, which in Weber's terms can designate it as "the fourth power." " (Pejic 2013, 69). In that sense, the constitutional court function is constituted as a separate and independent function, separate from the legislation and the executive, but also from the judicary. Between the legislative and executive powers, which by their very nature are highly political functions, and the judicial power, which seeks to be completely depoliticized, the Constitutional Court “stands somewhere halfway between political authorities, executive and legislative, and non-political, the judiciary powers " (Orlovic 2008, 240). Therefore, it is undoubted that today the constitutional-judicial function is a special branch which can be designated as the fourth lever of state power. In order to avoid any dilemmas, Z. Tomić even suggests that, following the

model of Poland, the name of the constitutional tribunal should be used instead of the name constitutional court, which would indicate that the constitutional court is “a special authority outside the judicial organism, but not beyond the power-sharing matrix" (Tomić 2004, 66). The fact is that the constitutional courts, based on the Austrian model, have certain common features that distinguish them as separate state bodies: constitutional review is carried out under different assumptions depending on the particular constitutional system of a particular state, a constitutional court is an independent body that does not belong to a regular judicial power, deciding on constitutional appeals is separated from the jurisdiction of regular courts, the independence of the constitutional court is based, among other things, on financial and administrative autonomy, there is a monopoly of constitutional-judicial control or concentration of power in one institution, constitutional judges are often appointed by the highest political bodies, the jurisdiction of the constitutional court is peculiar, and its decisions are legal and political in nature, although they may also be of an advisory nature, constitutional control of the law prevails, and it is most often subsequent, repressive, although the possibility of prior control of the law is also implied in a smaller number of countries.

CONCLUSION

Not only legal theory but also constitutional solutions and the practice of the court itself confirm the fact that the constitutional court is a separate state body. Namely, the majority of the constitutions allocate the provisions on the constitutional court into separate parts of the constitution, outside the part related to the regulation of authorities, i.e. legislative, executive and judicial function. Even where the provisions relating to the constitutional judiciary are not systematized within a separate section of the constitution, a careful analysis of the constitutional provisions governing, above all, the election and jurisdiction of the constitutional court, as well as the legal effect of its decisions, it can be concluded that constitutional court is a special state body exercising a special state function.

Regarding the position of the Constitutional Court in the system of the separation of powers, it is our opinion that the third view according to which the Constitutional Court occupies a special place in the constitutional separation of powers is the most acceptable one. In this sense, the Constitutional Court, regardless of its similarities to legislative function, with regard to the legal effect of its decisions, and with the judicial function, in terms of procedure and manner of decision-making, is a separate constitutional body. It is, therefore, necessary for the constitutional court to “preserve its independence in order to prevent political pressure from the legislature and the executive that could influence the court’s decisions themselves. The absence of such independence could jeopardize the differentiation of politics and law, potentially culminating in the dominance of politics over law.“ (Hein 2011, 17). Although it is the task of the Constitutional Court to safeguard the constitution and the constitutionally established separation of powers, it does not constitute any "super-authority" that rises above the constitutional separation of power, but rather a specific function of state power that is itself covered by the constitution.

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