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Normative Control of Law as the Basic Power of Constitutional Court

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Abstract

The article presents an analysis of the leading activity of the Constitutional Court of Serbia –via the general scientific method of ascent from the abstract to the concrete. As a result, the proceedings in the Constitutional Court of Serbia on cases of preventive control of the constitutionality of a law adopted by the National Assembly. In conclusion, the author comes to the conclusion that scope of authority related to the normative control is one of the most extensive, and the constitutional normative regulation in Serbia is one of the most detailed in Central and Eastern Europe.

Keywords: Constitutional, Appeal, Legal, Proceedings, Court.

Control Normativo de la Ley Como Poder Básico del Corte Constitucional

Resumen

El artículo presenta un análisis de la actividad principal del Tribunal Constitucional de Serbia, a través del método científico general de ascenso de lo abstracto a lo concreto. Como resultado, el proceso en el Tribunal Constitucional de Serbia sobre casos de control preventivo de la constitucionalidad de una ley adoptada por la Asamblea Nacional. En conclusión, el autor llega a la conclusión de que el alcance de la autoridad relacionada con el control normativo es

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uno de los más extensos, y la regulación normativa constitucional en Serbia es una de las más detalladas en Europa Central y Oriental.

Palabras clave: Constitucional, Apelación, Jurídica, Procedimientos, Juzgado.

1. INTRODUCTION

Constitutional control is at the center of the entire system of control over the legality and ensures the supremacy of constitutional orders, precise enforcement of the constitution, and serves as the main guarantor of the protection of constitutional rights and freedoms of citizens. The institution of judicial constitutional control of the European type is almost a hundred years old. The constitutional court as an organ of judicial constitutional control was created by Hans Kelsen in the first quarter of the 20th century as a tool of constitutionalization, in the sense of limiting and controlling the state power (Marković, 2007). In the 1990s, the main focus of its activities was the total protection of human rights and freedoms (Polovchenko, 2002: 8). Nevertheless, up to the present, the normative control remains the most important function determining its place and role in the system of state authorities. Thus, according to the Serbian professor Petrov:

> There are simply no constitutional courts without powers related to the normative control, especially without control of the constitutionality of laws. At the same time,

other powers, which may be numerous and significant, do not determine the nature of this body (2010: 18).

These basic areas of the Constitutional Court activity correspond to its basic powers, which noticeably stand out from its wide range of powers both in their meaning and in the volume of cases considered by the Constitutional Court**.** The powers related to the control of constitutionality and legality and consideration of constitutional complaints. On the other hand, by the above definition, the constitutional legislator emphasized that the Constitutional Court personifies the fourth constitutional judicial power authorized to ensure the functioning of the three branches of power within the constitutional field. At the same time, as Olivera Vučić points out, the Constitutional Court most consistently exercises this role through the normative control and, consequently, through the control of constitutionality and legality of legal acts (Vučić et al., 2010: 117).

2. METHODOLOGY

The dissertation research was carried out using a number of both general scientific and science-specific and special methods of cognition and research. The main methods for this study are the general scientific method of ascent from the abstract to the concrete, as well as the special scientific formal legal method. The fact is that in the course of the practice of applying the normative control, a number of scientific constructions of controlling constitutionality have been

agreed. Therefore, the order of implementation of these scientific abstractions in the practice of the Serbian body of constitutional control is of undoubted scientific interest. So, characterizing the modern content of the powers of the Constitutional Court of Serbia in the field of normative control, one should pay attention to its considerable volume.

3. RESULTS AND DISCUSSION

Despite the fact that, as a general rule, the Constitutional Court of Serbia exercises control over the constitutionality and legality of the general acts, which have entered into force and were in force at the time of commencement of proceedings on constitutionality (legality), however, according to part 5 of Article 168 of the 2006 Constitution, the Constitutional Court has the right to verify the compliance of laws and other general acts with the Constitution of Serbia, as well as general acts with the law even after they lose their legal force, if the procedure for verifying the constitutionality is initiated no later than within six months after the loss of the legal force. It must be said that this power of the Constitutional Court of Serbia is traditional, but unlike the Constitution of 1974 and the Constitution of 1990, the current Constitution has reduced the term from one year to six months.

It should be noted that the proceedings before the Constitutional Court in cases involving preventive control are regulated in the 2007 Law on the Constitutional Court of Serbia. Thus, in accordance with

Part 1 of Article 66 of this Law, the text of the law adopted by the National Assembly, signed by the Secretary of the National Assembly or a person authorized by the Secretary, is submitted together with the request for verification of the constitutionality of the law.

Moreover, according to part 2 of Article 66 of the Constitutional Court Law, a copy of the request for verification of the constitutionality of the law is not sent to the National Assembly before its promulgation, moreover, in the framework of the constitutionality control of the law that has not entered into force in the procedure of preventive control in the Constitutional Court the public hearings are not held, which is an exception from the general rule established by Article 37 of the Law on the Constitutional Court, and is aimed at speeding up the proceedings within the framework of preventive of control (Indriastuti, 2019; Bagherian Jelodar et al, 2017).

According to part 3 of Article 66 of the Law on the Constitutional Court, the latter is obliged to notify the President of the Republic, that a procedure has been initiated to control the constitutionality of a law prior to its promulgation, which seems to be quite reasonable, taking into account that according to paragraph 2 of part 1 of Article 112 of the 2006 Constitution, the President of the Republic by his decree promulgates laws in accordance with the Constitution. As mentioned above, the procedure for controlling the constitutionality of a law prior to its promulgation is urgent and is carried out in accordance with the term established directly by the Constitution (Vučić et al., 2010).

Taking the above into account, the provision of Part 2 of Article 169 of the Constitution of Serbia seems to be unsuccessful, as according to it the challenged law may be promulgated before a decision on unconstitutionality is taken. Thus, the proceedings in the Constitutional Court of Serbia on cases of preventive control of the constitutionality of a law adopted by the National Assembly, but having not entered into legal force, do not suspend the entry into force of the challenged law. In addition, Part 3 of the above Article provides that if the law is promulgated before a decision on constitutionality is taken, the Constitutional Court will continue to consider the request in accordance with the usual procedure for verifying the constitutionality of the law as a follow-up procedure.

As Professor Nenadić notes, such a constitutional decision, when the challenged law is promulgated, will enter into force before the Constitutional Court makes a decision on the case within the time frame stipulated by the Constitution, which does not contribute to either legal certainty or the implementation of the principle of constitutionality (Nenadić, 2009: 133). As a result, the leading Serbian constitutional scholars are asking the logical question, what then is the goal of such preventive control? After all, the purpose of the existence of this institution is precisely the prevention of the entry into force of an unconstitutional law or its unconstitutional provisions (Marković, 2007; Nenadić, 2009; Vučić et al., 2010; Machado et al, 2019).

Moreover, according to paragraph 5 of Article 66 of the Law on the Constitutional Court of Serbia, even if the Constitutional Court decides that a non-promulgated law does not comply with the

Constitution, it enters into force on the day the law is published, i.e. the decision on the recognition of an unpublished law that does not comply with the Constitution enters into force on the day the law is promulgated. According to Professor Marković, it would be much more logical to have a regulatory decision, according to which the recognition of the unconstitutionality of the law as part of preventive control prevented its publication (Marković, 2007; García-Santillán et al., 2018).

As is the case, for example, in France in accordance with Part 1 of Article 62 of the 1958 Constitution, according to which a provision recognized as unconstitutional cannot be made public or applied (Leibo, 2015). Probably, the Serbian constitutional legislator, in the process of establishing the foundations of constitutional justice, sought to combine the preventive and the follow-up types of control over the constitutionality of laws to ensure comprehensive protection of the 2006 Constitution, but as a result of this regulation, the essential content of the institution of preventive control of the constitutionality of laws was almost lost.

In general, the overwhelming majority of Serbian constitutionalist scholars point out the unsatisfactory regulation of the preventive control of the constitutionality of laws, which has, in fact, nullified the strengths of this institution, and advocate a fundamental revision of the institution of preventive control in the Serbian constitutional law (Petrov, 2008; Marković, 2009). First, this revision should include expanding the circle of persons who have the right to appeal to the Constitutional Court in cases of preventive control of

constitutionality at least by giving this right to the head of state. Secondly, it should include the extension of the terms of consideration of cases on the preventive control of constitutionality, since the seven-day period simply does not provide the Constitutional Court with an opportunity to make a quality decision on the case.

The third measure concerns the need to suspend the process of promulgation of the challenged law until a decision is rendered by the Constitutional Court. And the fourth measure concerns the exclusion of laws recognized by the Constitutional Court as being in compliance with the Constitution in the procedure of preventive control from the procedure of verification as part of the follow-up control. In the present state, the institute, in the opinion of Professor Nenadić, looks like nothing more than a "constitutional possibility" (Nenadić, 2009: 133), since for more than ten years of its existence, the Constitutional Court has not made a single decision within the framework of preventive control.

The preventive control provided for by the 2006 Constitution is not limited solely to laws that have not entered into force. Thus, the Serbian Constitution of 2006 provided another option for preventive law enforcement. Namely, Article 186 of the Constitution provided that the Government may initiate proceedings before the Constitutional Court to verify not only the constitutionality, but also the legality of the decision of the autonomous region before it enters into force. Thus, the Serbian constitutional legislator provided for the possibility of controlling the general acts of an autonomous region not only for compliance with the Constitution of Serbia, but also with the Serbian

laws. The only body at whose request the proceedings for the preventive control of decisions of an autonomous region can be initiated is the Government as the highest collegial executive body of the Republic of Serbia.

In addition, attention should be paid to the fact that the preventive control over the constitutionality and legality of the decisions of the bodies of an autonomous region is not mandatory, but optional. The government is obliged to submit, together with the request, the text of the challenged decision of the autonomous region. In contrast to the preventive verification proceedings of laws that have not entered into force, within the framework of preventive control over decisions of an autonomous region, the Constitutional Court is entitled, upon the Government's proposal, to postpone the entry into force of the disputed decision of an autonomous region. In accordance with Part 3 of Article 67 of the Law on the Constitutional Court, the latter first of all makes a decision to postpone the entry into force of the challenged decision, in accordance with the terms established by the Rules of the Constitutional Court. Contrary to the general rule established by the Law regarding the proceedings before the Constitutional Court, the challenged decision is not sent to the body that adopted it to present its opinion.

In addition, as mentioned above, there are no public hearings on this type of cases. Moreover, the decision by which the Constitutional Court suspends the entry into force of the disputed decision of an autonomous region enters into legal force on the day it is delivered to the body of the autonomous region which made the contested decision.

According to Part 4 of Article 67 of the Constitutional Court Law, proceedings on this type of cases are carried out in an expedited manner in accordance with the time limits established by the Rules of Court. Thus, the Constitutional Court takes the final decision on the verification of the constitutionality or legality of the challenged decision of an autonomous region within 60 days from the date of the aforementioned decision to suspend the entry into force.

4. CONCLUSION

The analysis of the powers of the Constitutional Court of Serbia in the field of normative control, allows speaking about their pivotal position in the structure of the competence of the Serbian body of constitutional control. According to the figurative expression of Professor Marković, the regulatory control of the law was and remains king of disputes over which the decisions are made by the constitutional court. Control of norms, above all the control of the constitutionality of laws, is the main power of the constitutional court, while all other powers "are derived and do not express the essential content of constitutional justice" (Marković, 1973: 15). As for the content of the normative control in Serbia, the Serbian constitutional legislation provides for a mixed system of control of the constitutionality of laws, which include the follow-up control, as the main one, as well as preventive control.

The follow-up regulatory control covers a wide range of so-called general legal acts, covering both laws and regulations of public authorities and general acts of public associations, including political parties and trade unions and even collective agreements, which seems unjustified, taking into account the limited the possibilities of the only constitutional control body in the state and the huge amount of its practice. In addition, the Constitutional Court of Serbia exercises the traditional for Serbia control over the legality of general legal acts, which is not an entirely successful decision, taking into account that the control over legality in most modern states is the prerogative of courts of general jurisdiction or special courts.

As for the powers of the Constitutional Court of Serbia to prevent the monitoring of constitutionality and legality, its object is the laws prior to their promulgation, as well as the decisions of the autonomous regional bodies. A comparative analysis of the regulation of proceedings in the Constitutional Court on the preventive monitoring of laws and decisions of the autonomous territory organs provides grounds to conclude that, in contrast to the preventive control of laws, the purpose and essential content of the institute of preventive control have been duly taken into account in the proceedings of constitutionality and legality control of the acts of autonomous regions that have not entered into force. This also applies to the question of the suspension of the action of the challenged act and the terms of the consideration of such cases as well as the consequences of the decisions of the Constitutional Court.

To ensure accelerated consideration of such cases in the Constitutional Court by the Law on the Constitutional Court, it was specifically provided that the opinion of the autonomous education body that adopted the disputed act is not required, and the proceedings on this type of case take place without public hearings. In general, it can be stated that the scope of powers of the Constitutional Court related to the normative control is one of the most extensive, and the modern regulation of the activity of the normative control body of Serbia's constitutional justice is one of the most extensive and detailed among the states of Central and Eastern Europe.

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