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THE CONSTITUTION AND THE CONSTITUTIONALISM IS THE CONSTITUTION CONDITION SINE QUA NON FOR THE CONSTITUTIONALISM

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Abstract

This paper analyses the relation between the constitution and constitutionalism. It elaborates the traditional notion of constitutionality and separate factors determining their reality and compliance with the constellation of real social relations. The paper also elaborates concepts of limited constitution, symbolic constitution and the idea of constitution behind the constitution, given the dilemmas these categories open in relation to the constitutional and judicial control of the constitutionality and which are more and more challenging for the constitutional and legal science. Often the effect of "broken mirror" especially if the aforementioned concepts are used may create a completely distorted image of actual situations. That raises the question: Is constitutional review possible without written Constitution? Is constitution invisible, that is, constitution is what the judges say is a constitution? The paper deals with the question does constitutional judges begin with its reconstruction in the process of interpretation of the "mischievous phrases" of the constitution? Does the taking away of the "traditional" constitution from the constitutional judges really jeopardize the concept of constitutionalism? Finally, it seems that the constitutional legal science rigidly adheres to the traditional notion

about the constitution in the formal sense as stable, written and codified act. It can be concluded that the constitution is the core of the constitutionalism. However constitution and constitutionalism cannot be equated. The implementation and fostering of the constitutionalism in practice seems to be conditioned by a number of other factors such as political culture, constitutional history, political, social and legal certainty and economic stability. The constitution may project the idea of achieving constitutionalism, but whether it will be implemented in the real sense of the word depends finally on the state and the will of the society.

Keywords

Constitution, Constitutionalism, Limitted Constitution, Symbolic Constitution

1. Introduction

The introduction of the concept of written constitution in the 18th century is a consequence of ideological, philosophical, historical, and social and political circumstances (Jovicic.2006). The constitution is an inseparable link between the state and the law on the one hand, and the state and the society on the other hand. For Liphard the written constitution is "a document, clearly designed as the highest law for which the parliamentary majority has much bigger moral obligation to observe than if it is an amorphous collection of basic law and custom" (Lijphard.1999).

The existence of the constitution is the foundation of the traditional notions of the constitutionalism, as an idea, ideology and awareness of limited and controlled power. The constitution is a foundation, element and simultaneously an objective of the constitutionalism. Although the existence of written constitution per se is not a guarantee of constitutionalism, however it would not be wrong if we accept the premise that, the constitution as an act provides for and regulates basic instruments and means for limitation and control of state authorities.

2. Traditional Notions of Constitution

The features of the constitution in the formal sense should be primarily considered as a postulate for the existence of the constitutionalism. Hence, the constitution should be considered as a, written act with highest legal power" (Treneska.2015). It means that the constitution, in its written form which offers greater precision and determination and whose content has been fixed in writing, is a codified act in which the relevant constitutional law matter has been concentrated, and the constitution is an act with greatest legal power implying to hierarchical superiority over all other legal acts. The two important elements of the constitution in formal sense, the authority

and the procedure for its adoption and review (Lijphard.1999), are the elements that give a status of a basic law (Lex superior) to the constitution as an act.

Kelsen embedded the concept of stable and hard to amend constitution in the definition of constitution, insisting on the need of "constitution as a system of provisions which can be amended only if actions are undertaken in a special procedure, whose objective is to impede the amendments of these norms" (Kelzen.1951). He defines the constitution as the highest norm within the frames of the state law. In this sense the constitution is a basic criterion, benchmark and starting point of every legal system.

3. The Reality of the Constitution

The issue of the reality of the constitution is essentially an issue of reality of the legal acts in general. Their application and implementation is the essence of the law and the objective of the legal acts, and in this manner the fulfilment of their task – regulating specific social relations as well. Otherwise, the non-application of the law and the failure to fulfil its task deprives the law of its essence. However, there is often a discrepancy among the goal which is desired to be achieved and the real effects of the achieving of the legal norm. Very often the discrepancy between the law in books and the law in action is significantly big, and in this case measures must be undertaken and actions to overcome it should be implemented.

The constitution as well, in its traditional sense, is not an exemption of this phenomenon. Although conceived as a long-term written act whose amendment procedure would be more difficult than the regular legal procedure, this per se does not mean that the constitution is once and for all given act. On the contrary, the occurrence of discrepancy between constitutional reallia and constitutional formalia is a frequent phenomenon. Finally, the evaluation of the legal system and the final assessment of the constitution can only be conducted on the basis of their implementation in reality. As a result of this, it seems that their implementation and putting into practice, is the core of the issue of reality of the legal acts.

The issue of assessment of the reality of the constitution is a complex one. It seems that the analysis of the elements influencing the reality of the constitution can bring us closest to its essence:

- The main features of the constitution and its character is a key element that determines its reality. It is of particular importance to determine whether the constitution is a general legal act or ideological and political document, that is, positive legal act or act

which is programmatic. As a result of this, it is considered that when the constitution is seen as a positive legal act, it is believed a priori that the social reality will be included and translated into its provisions. This act reflects the constitutional reality. Contrary to this, the constitutions having programmatic or ideological elements as objectives which should be pursued in future or strivings to which the established system should aim, it seems they do not correspond to the real constitutional momentum. If these elements are visibly unfeasible and give the impression of complete imbalance between the constitution and de facto constellation of social relations, then the constitution is qualified as mystifying, cosmetic and completely unreal.

- The content of the constitution is the second element which determines its reality. Namely, the constitution regulating and guaranteeing fundamental human rights and freedoms on the one hand, and the state order and the established political system on the other hand, must be adapted to the conditions and needs of the society and state. It is therefore clear that in order the constitution to be realistically achievable and applicable in the real sense of the word, it is necessary to regulate this *materiae constitutionis* in a way that it reflects not only the real picture of the social relations, but also to be possible, applicable and to live.
- The age of the constitution, conditions its reality, as well. It is assumed that there is a slight possibility the constitution that was adopted a long time ago and did not undergone amendments for a long period of time, to realistically reflect the constitutional reality. Social relations are a variable category. They are constantly susceptible to changes and inevitably impose the need of harmonisation of the legal acts they regulate, and according to this, the constitution as well. The legal acts need to be changed whenever they become obsolete and unadjusted to the society for which they are intended. The constitution is also an act susceptible to amendments. Its amendment is imminent if the intention is to maintain the constitutional system in which there will be no discrepancy between the constitutional provisions and the reality. Although the constitutional review process may be constructed as extremely difficult to implement and although the constitutor may predict absolute prohibition on amending certain constitutional provisions, it does not mean that the constitution will not be subjected to amendments when the time comes. Therefore it seems that its "modernity", that is, its "youth" is one of the conditions for reality of the constitution.

If all the aforementioned factors are being cumulatively analysed, it will be inevitably concluded that the authority competent for control of the constitutionality of the legal acts is of outmost importance for the reality of the constitution. Namely, the longevity of the constitution as an act, its flexibility as a quality enabling it harmonisation with the changing social relations, is directly conditioned by the activity and methodologies in the process of interpretation of the constitutional norm. On the other hand, the content of constitution and the way in which it regulates the *materia constitutionis* reflects the intention and the skill of the constitutor to create a text that will have the quality to survive through the history and to skilfully adapt to the reality. Probably the most appropriate example of such a constitution is the Constitution of the United States which exists in the cradle of the constitutional history for more than 200 years. Namely the reasons for this should not be sought only in the constitutional text, but also through the decisions of the Supreme Court, which seems to inject its youth, and modernize and adapt it to the new constellation of social relations.

Hence, it will not be wrong if we conclude that the activity of the constitutional courts in the process of interpretation of the constitutional norm, the decision making in conditions of existing constitutional gap, acceptance of self-restriction techniques while undertaking actions or demonstration of the forms of judicial activism, of course determines the existence of the constitution and its longevity and "modernity".

4. Limited constitution, Symbolic constitution and Constitution behind Constitution a Different Concepts of Contemporary Notion of the Constitution

Modern constitutional concepts completely accept the definitions of constitution in formal and material sense, as well as the classifications of constitutions made according to different criteria. In contemporary constitutional law it is common to expect the entire *materia constitutionis* not to be covered by an act, which means that, the part of the usual constitutional materia does not have to be found in the constitutional text. However, today the concepts of limited constitution, symbolic constitution and the idea of constitution behind the constitution, given the dilemmas these categories open in relation to the constitutional and judicial control of constitutionality, are a growing challenge for the constitutional law.

Because of the possibility every act to face the challenge for control of constitutionality and the danger of individual interest (interest of constitutional judges) to dominate the

expectations and the needs of the society, the role of the constitutional court is not negligible. In this context, it seems that the aforementioned concepts look at the constitution from a completely different perspective.

Thus, the idea of *limited constitution* indicates to the position of the court in the system of organisation of powers. In its essence the concept refers to a constitution that provides for clear limitations of the legislature. These limitations of the legislature should not only be provided for and guaranteed, but must also be practiced by the courts in such form to refuse the application of the unconstitutional laws. The problem arises when, by rejecting the unconstitutional law, the court opposes its opinion for unconstitutionality with the opinion of other branches of the state authorities Or, according to *Cliteur,,* not elected and not responsible before any entity, the element of the state authorities annuls the conclusions of constitutionality of two elected and responsible authorities" (Cliteur.P.B.1993). While trying to find solution for the "unlimited" powers of the legislator, the concept of "Limited Constitutionality" produces new problem connected to the "limited" powers of judges. Namely, while trying to ensure the principle of constitutionalism, the aforementioned concept of limited constitution, by limiting the legislator in the creation of the unconstitutional laws, encourages the conditions for "government of judges" (Bernhardt.1996).

The terms, *symbolic constitution* or *constitution behind the constitution* are not less important. The symbolic constitution refers more to a constitution which remains silent for many issues from the constitutional matter. It transforms the act of control of constitutionality in "an art accomplished in the interspace of strict analysis of the constitutional norm on the one hand and the imagination, on the other hand" (Wittevee.W.J.1993). The essence of the problem consists in the possibility of creating new constitutional rule, new constitutional norm, and the lack of special rules that would limit the "interpretative community" of the constitutional judges in the creation of the new constitutional rule. It produces a dilemma on the mechanisms that would limit the judges in the act of control of constitutionality. The legal mechanisms established by the constitution, other acts regulating this matteriae, will certainly help if the act of control of constitutionality is rationalized on a level of interpretation of the written constitutional provisions, but in case there is no such provision, the doctrine of self-restraint of judges is the only possible mechanism that can be used. This in fact implies that only the self-restraint theory can provide avoidance of the risk of abuse of the so-called invisible constitution, that is, abuse of the situation when the constitution remained silent regarding certain issue.

If the aforementioned categories of limited constitution, constitution behind the constitution and symbolic constitution obtain a radical extension in the direction: need to limit the legislation and executive in the process of creating unconstitutional acts; a hidden background of the constitutional provisions that leaves space for different interpretations; constitutional gaps that allow the creation of new rules, and if constitutional judges are considered as guardians of the constitution, then the dilemma *qius custodiet ipsos custodies* justifiably imposes. Thus, the theory faces several questions: Does the constitutional judges begin with the reconstruction of the constitutions in the process of interpretation of its "mischievous phrases"? Does taking away the "traditional" constitution from the constitutional judges really jeopardize the concept of constitutionalism? And finally, is constitutional revolution by the constitutional judges possible?

5. Is constitutionalism possible without constitution?

The new position and the relation between the branches of the government and the adaptation of the principle of separation of powers to the new circumstances, since the first half of the 19th century, in the constitutional literature is often marked as contemporary constitutionalism. The tectonic shift of the focus of decision making process towards the legislative – executive – judicial power, and the manifested will, ambition and activity of the courts to control and supervise the action of political authorities is a feature of the modern constitutionalism.

This also means that the competent authorities performing control of the constitutionality of the legal acts, at one point of their actions, in the process of interpretation of the constitution, will confront the will of the citizens expressed in the acts that are subject to control of constitutionality. So the "least dangerous branch of the government" that declares the law or the act of executive as unconstitutional, entirely impedes the will of citizen's representatives and performs control, but not on behalf of the majority but against it. Finally, as *Graglia Lino* concludes, regardless of whether it is about social political engineering or conservative judicial activism, the final effect is that the fundamental rights of the citizens are not decided by voting in the authority representing the will of the citizens, but they depend on the beliefs and the result of the decision making by persons not elected by the citizens (Gralia.1996).

In this context the "judicial aristocracy" or "juristocracy" appears as a center of power, and its decision connected to the interpretation of the Constitution are superior and have grater legal power than the decisions of other branches of the government directly elected by the citizens. The danger of this phenomenon hides in the possible transformation of the system from the rule of citizens to the rule of the elite. Set up in this way, the concept of completeness is contrary to the concept of constitutionalism as "limited power", and a power performed in conditions when the overall governance, activity and law making is brought under the constitution and the laws.

Thus, the aforementioned is in collision with the traditional opinions about the constitutionality as ideology of controlled and limited powers. It seems that the issue with the phenomenon of the so-called judicial paramountcy, further deepens when the judges distort the process of interpretation of the constitution, in the realization of the function of the control of constitutionality. Often the effect of "broken mirror" especially if the concepts of symbolic constitution and constitution behind constitution are used, may create a completely distorted image of actual situations. That raises the question: Is constitutional review possible without written Constitution? Is the constitution invisible, that is, the constitution is what the judges say is a constitution?

Namely the process of moving the focus of decision making in the direction - legislative body-executive-judiciary, and the danger that the third branch of the government appears in the role of (co)legislator, is contrary to the romantic concepts of the separation of powers as an instrument which limits the government, and concept that provides and secures the constitutionalism.

As a result of the aforementioned, it seems that the constitutional law as legal science rigidly adheres to the traditional notion of the constitution in the formal sense as written and codified act. Only through the accumulation of two basic factors: existence of a constitution in the formal sense and application of the self-restraint doctrine, seems that the reconstruction of the constitution by the interpretive community of the constitutional judges and the creation of new constitutional rules in the process of interpretation of the constitution, may be limited.

6. Instead of Conclusion: The relation Constitutionalism-Constitution

If we start from the premise that the constitutionalism is a doctrine, ideology and finally a state of mind for the necessity of controlled and limited government, then the constitution

undoubtedly presents its basic element and its essence. The constitution seen as legal and political act including basic instruments, measures and mechanisms for limitation of political power is the core of the constitutionalism.

This thesis is supported by a set of elements which per se are basic mechanisms for limitation of government, and which are essentially constitutional matter. They primarily include:

- Human rights and freedoms,
- Principle of separation of powers,
- Supremacy of the constitution,
- Status constitutionality – establishment of institutions pursuant to the constitution,
- Functional constitutionality – determining their competences and functions pursuant to the constitution,
- Guaranteed constitutionality – the existence of a special authority (the Constitutional Court) that will perform the function of a guardian of the constitution and protection of the principle of the constitutionality.
- The principle of the Rule of law.

Hence it must be concluded that it seems that in the modern constitutional systems the constitution is a starting point in the implementation of the constitutionality.

However the dilemma remains, whether the constitution itself, is a guarantee that there will be limited and controlled political power in the real sense of the word, in the existing system. In this regard it seems that the age, compliance of the constitutional formalia with the constitutional realia, quality and quantity of the provisions with a programme character are important determinants.

Finally, Deskoska point out that the constitutions may also exist without constitutionalism, provided they are political means and instruments for meeting short-term party interests (Deskoska.2006). If we add to this the fact that they can be mystifying, completely unharmonized with the concrete constitutional momentum, simply put "programme pamphlets" or according to F. Lasalle "a simple piece of paper", in that case the question whether these constitutions represent guarantee for the constitutionalism, arises.

On the other hand, through the example of the United Kingdom the constitutional history points out that the written form of the constitution or the constitution in a formal sense does not guarantee the existence and fostering constitutionality. In the aforementioned case when the

constitution is regulated by unwritten legal rules (constitutional conventions or constitutional customs) that are fostered for a long historical period and seem to become not only part of the historical past of the people, but are incorporated in its identity, their amendment is far more difficult than the amendment of the written legal norm. However, these unwritten legal rules for limiting state authorities fostered throughout the historical past are a sufficient guarantee of maintaining the idea of constitutionalism and its practice in reality.

Finally it can be concluded that the constitution is the core of the constitutionalism. However constitution and constitutionalism cannot be equated. The implementation and fostering of the constitutionalism in practice seems to be conditioned by a number of other factors such as political culture, constitutional history, political, social and legal certainty and economic stability. The constitution may project the idea of achieving constitutionalism, but whether it will be implemented in the real sense of the word in practice finally depends on the state and the will of the society.

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