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НАУЧНИ ЧЛАНАК

UDK: 342.565.2(4-672EU)

Раџ примљен: 09.02.2015.

Раџ прихваћен: 17.06.2015.

EUROPEAN MODEL OF CONSTITUTIONAL JUSTICE - ITS EXISTENCE AND PERSPECTIVE**

Abstract: *In a number of states, including the Republic of Serbia, constitutional justice has been assuming the role of the supervisor of the legislative, the executive and the regular judicial power. Although it means that constitutional courts in Europe have increasingly become "the people's courts", they still preserve the character of independent institutions which, while resolving extremely complex objective constitutional conflicts, still occupy, "a position at the intersection of law and politics". On the other hand, an extraordinary activism of constitutional justice in review of rights has resulted in an increased number of proponents in the doctrine of constitutional jurisprudence advocating the standpoint that constitutional justice is a specific power of constitutional control; given its nature, it has come to be the "forth" branch of state authority.*

Key words: *Constitutional justice, constitutional court, constitutional review, normative control.*

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** This paper is presented at the International Conference „The Position and Perspective of Constitutional Justice“, Belgrade, 16-18 October 2013 and published in the Conference Publication, Belgrade, 2014, pp. 307-320.

1. European constitutional justice and its presuppositions

Constitutional justice in general implies the institutionalisation of a special judiciary intended for the protection and implementation of the constitution. Today, all political systems based on the rule of law start from the same premise of the supremacy of the constitution of a state over national laws and other regulations, establishing various ways, procedures and bodies to ensure this supremacy. Constitutional justice is an original institution of European continental law, intended, first of all, for the general supervision of sub-constitutional law, and secondly, for the special constitutional protection through specialised procedures of constitutional justice. The function of normative control of law has been centralised in one special body. The crucial novelty introduced by the Constitutional Court of Austria, according to Brigitte Birlein, Vice-President of the Constitutional Court of Austria, was that the competence of constitutional review of laws and their cancellation, in the event of their incompliance with the constitution, was now concentrated in one constitutionally independent and specialised court with exclusive jurisdiction over constitutional law matters, having a monopoly on them (Birlein, 2013: 1).

By the broadness of its reviewing and protective functions and competences, and by the legal power of its decisions, constitutional justice surpasses similar legal, political and judicial institutions which exercise control and protection as either their main or accessory task. In any case, most European countries today are familiar with the institute of a constitutional court, or a similar body, which is entrusted with the essential competence of constitutional control, or review of the constitutionality of laws, usually perceived as the main function of constitutional justice. May we, due to this, talk about a European model or a European standard of constitutional justice? In our opinion, wherever an explicit function of judicial normative control of sub-constitutional law and the examination of the constitutionality of laws is concentrated in one special constitutional body, it may be rightfully claimed that a model of judicial review of constitutionality has been adopted, which according to its main characteristics, is common to all constitutional justice.¹ As a matter of fact, in its most narrow sense, constitutional justice implies the exercise of the function of immediate application of the constitution to conflicting situations, as the highest ranked law of a state unit, which is obligatorily applied in the procedure of normative control of sub-constitutional law, parliament laws and government regulations, with a possibility of their annulment by a special body which belongs to neither legislative nor judicial branch of power, applying the procedures similar to the classical judicial interpretation and application of law. However, unlike the

¹ By acquiring this competence in 2008, in the revised French Constitution of 1958, Constitutional Council also came closer to this model of constitutional justice.

regular judiciary, a constitutional court is an institution which implements and directly applies only the constitution, and sometimes also international treaties, if they, as is the case in the Republic of Serbia, possess supranational force. In case of the European model, as A. Stone Sweet rightfully claims, „regular judges remain bounded by the supremacy of law within the legal order, while the responsibility of constitutional judges is to ensure supremacy of the constitution.“ (Stone Sweet, 2002: 80)

The most important presuppositions for establishing the constitutional function include the constitution, as the most important legal and political act of a state, and the general process in which constitutional justice is shaped - the work of the constitutional court itself (Pestalozza, 1991: 2; Stojanović, 2013: 113). General presuppositions of constitutional justice, and this should apply to all constitutional courts, find their application not only in normative control, the most important competence of constitutional courts, but also in the rest of its competences, which are either derived from normative control, or close to it. Apart from instituting an independent constitutional court and a special legal quality of the constitution (its rigidity), and other indispensable formal and legal presuppositions for establishing the procedure of constitutional review of legal norms, there are other requirements which are of substantive value for its functioning, such as: respect for political quality of constitutional adjudication, respect for its constitutional limits, its duty to remain loyal to the constitution and its integrity in each and every one of its decisions. This is especially true of „younger“ constitutional courts, but also of the Constitutional Court of Serbia.

Loyalty to the constitution, which for any constitutional court should be “self-explanatory”, has to be reiterated over and over again, especially due to a worrying tendency of politicians to, referring to allegedly ‘essentially altered constitutional reality’, declare the constitution, i.e. its parts or norms, anachronistic, an outdated document or a „legalistic fiction“ which, as an awkward impediment, should be simply ignored. By rejecting these political and instrumental qualifications of the constitution, a constitutional court is obliged to be, *in totum*, loyal to the constitution and to the constitution only. Loyalty to the constitution is, therefore, a common presupposition for all constitutional courts.

Outside the interests provided by the constitution, and those immanent to it, there must be no allegedly „objectively“ higher, superordinate, real or seeming national interest, value and goal due to which the constitution could be declared a „legalistic fiction“, nor could an obvious discrepancy of the Constitution and constitutional reality force the constitutional court to give up this presupposition. As long as the constitutional norm possesses the quality of the highest law in force, and as long as it is the highest ranked law, its respect, application

and protection has to be the main and only task of any constitutional court. If, however, the reality indeed precludes the possibility of harmonisation of the laws with the constitution or solving other constitutional disputes in conformity with the constitution, as is the case, for example, with the Brussels agreements mediated by the European Union, which include provisional self-government institutions in Kosovo, which forced the Constitutional Court to temporarily step aside, i.e. to discontinue its proceedings, then such constitution has to be changed and adapted to the dramatically changed constitutional reality and its manifested legal expressions which, allegedly, „meet the reality“. After all, neither a constitutional court, nor a Government may, for an extended period of time, ignore, take away or usurp the right of the people to decide to change its own legal decision and form a new basis of its legal and political existence.

2. Standardisation of functions and competences of constitutional justice

The competences of constitutional courts have gradually expended, and a good proof of this is the Constitutional Court of Austria. When looking for answers to the question how to divide the competence of a constitutional court into its various functions, one has to start from the constitutional norms of individual states by which these competences have been defined.² Most constitutional courts have accepted, in addition to the institute of constitutional appeal, the standard competences of constitutional courts, so the differences that exist between them refer more to the manner and level of (not) exercising these competences in practice, to the interpretative style and priorities followed by certain constitutional courts in practice, than to a more significant departure from the theoretical model. While some competences, such as normative control, have completely affirmed themselves in all parts of the world, others have remained the competences of constitutional courts only on paper.

Initially the competence of constitutional review implied maintaining the distribution of authorised functions within a federal state, which means the constitutionally established vertical separation of power. This task of constitutional

² Thus, for example, strictly relying on the Constitution, Austrian constitutionalists distinguish the following competences of the oldest European constitutional court: 1) causal adjudication, i.e. deciding property claims against the federal state and its parts; 2) competent adjudication, i.e. solving conflicts of competence and establishing jurisdiction; 3) examining the constitutionality of regulations and laws; 4) examining the constitutionality of national, i.e. supranational treaties; 5) examining the constitutionality of agreements between federal state and its parts; 6) examining re-announcement of laws and regulations; 7) electoral adjudication; 8) deciding on citizens' complaints and specialised administrative adjudication. (Öhlinger, 2000: 415; Walter, Mayer, 2000: 450),

justice is now in the background, i.e. it has been consummated by the general function of protection of the constitution, primarily by means of the rule of law, one element of which is the functional separation of power. Constitutional justice has steadily spread to a number of unitary states, so it is now present in almost any „new democracy“ of Eastern Europe. Since among federal states, beside Austria and Germany, a constitutional court successfully operates also in the Russian Federation, it can be concluded that this institution is equally acceptable to both federal and unitary states.³ Moreover, the continual expansion of constitutional justice has been a strong argument against the allegations that it is by far less influential in unitary than in federal states.

Bearing in mind the competences of „new“ and „old“ constitutional courts, it is easy to notice that a legal protection of the constitution has become more encompassing, as over time competences of constitutional justice have expanded in a large number of states, independent of the “federal“ competences, having gone even further than the original Austrian model. Hence the key or general characteristic of European constitutional justice has been the expansion of constitutional courts’ competences, including finding solutions to those constitutional disputes which are not necessarily tackled by constitutional justice, such as electoral disputes, or something that has not been expected to emerge in practice - establishing the responsibility of high state officials or prohibiting the work of political parties or associations. When normative control of law is in question, regardless of whether the competence for deciding constitutional appeals is present or not, the main measure of control becomes human rights or the fundamental legal position of a person guaranteed by the constitution, taking supremacy over the principle of separation of power. If combined with the constitutional appeal, review of constitutional justice may in principle be conducted against any sovereign act of public authorities, and is complete and absolute, regardless of whether this act comes from legislative, executive or judicial power, i.e. regardless of whether it concerns general norm or its application in the form of individual orders aimed at concrete persons.

In a number of states, including the Republic of Serbia, constitutional justice has been assuming the role of the supervisor of legislative, executive and regular judicial power. Besides, in an increasing number of states, competences of the constitutional judiciary not only theoretically, but also actually, include rectifying violations of the constitution by normative acts, laws and other levels

³ All former Yugoslav republics retained their constitutional courts, adjusting them, however, to the Austrian-German model. Previous to that, they had instituted new constitutions in which they adopted, as any other state of Eastern Europe, liberal-democratic constitutionality, parliamentarism and institutions of a civil state. (For more on this, see O. Vučić, *Istorija ustavnog sudstva na tlu bivše Jugoslavije*, in: Vučić, Petrov, Simović, 2010: 69-93)

of sub-constitutional law, as well as the establishment and rectification of those violations which occurred either due to individual unconstitutional decisions or official actions of public authorities. Though it means that European constitutional courts have increasingly become „the people’s courts“, they nevertheless preserve the character of independent institutions which, by resolving extremely complex objective constitutional conflicts, still occupy, according to G. Leibholz, „a place on the intersection of law and politics“. On the other hand, an enormous activism of constitutional justice in review of rights has resulted in an increased number of advocates, in the doctrine of constitutional jurisprudence, of the position that constitutional justice represents a power of a kind, a special power of constitutional control, which, by its nature, has come to be the „forth“ branch of state authority.

A higher political quality of constitutional justice is also confirmed by its composition, the manner of selection of its members and their status. Not only their competence, but also the manner of selection of constitutional court members and their status have been largely standardised. Uniformity can be observed also in respect of the criteria and manner of selection of the judges. There is a tendency to balance the influences of legislative, executive and regular judicial power when determining the personnel composition of a constitutional court. Legal profession is certainly indispensable, but regardless of the requirements for the expertise, there is a striking politicisation of the selection, as the influence of formal executive power, though perhaps imperceptible in the public eye, has nevertheless been predominant. However, deals of political parties, those in power and those in opposition, or just those in power, are no longer being hidden. All respectable political parties are interested in having „their own“ judge in the constitutional court. In practice, places are allocated based on a long-standing „agreement“ between the largest political parties, which is contrary to Kelsen’s intention that in the process of appointment of judges to office their expertise should take precedence over political parties’ assessments (Walter, Mayer, 2000: 444).⁴ The political quality of constitutional adjudication can explain, but not justify, this unfortunate practice, which is true of all constitutional courts.

2.1 Constitutional courts’ functions

A constitutional court exercises its function of the protection of the constitution through a whole range of competences attributed to it. The competences of a constitutional court may certainly be narrower or broader, but without an

4 On the efforts invested within the normative framework, as well as on its application to the selection of constitutional judges in the Republic of Serbia, see for more detail O. Vučić, „Izbor i sastav ustavnih sudova - mukotrpan put dostizanja evropskih standarda“ (Vučić, 2012: 132).

exception, they are always aimed at one and the same goal – the preservation of the authority of the constitution, as the highest ranked law in a state unit. On closer inspection, its general function reveals several actual functions, depending on whether, by an individual competence of the constitutional court, some more concrete and more immediate goal is accomplished, i.e. whether this protection can be seen in relation to individual, “more concrete“ functions of the constitution. This means that the function of the constitutional court and the function of the constitution are in a mutual relationship of parallelism (Marković, 2008: 45).

If we look at the basic functions of a modern constitutional court and its most general goals from this angle, there are three main functions that can be discerned. In other words, constitutional courts today, or the majority of them, standardly perform three basic functions. The first one is the function of immediate protection of human rights and freedoms in the proceedings of deciding constitutional appeals or citizens’ applications, which is a relatively recent phenomenon. Hence, wherever an individual is able to directly, and on his own, invoke the constitutional court, without the circumventive path of regular courts, the constitutional court’s acting is *in totum*, i.e. completely oriented toward the protection of human rights. If, besides, it is about general norm, the idea of separation of powers is naturally present, but the prevailing thinking still concerns individual legal protection. This protection clearly manifests as immediate or direct. By its nature, this dimension brings the constitutional function closer to the function of the regular judiciary. A crucial difference is, however, preserved: constitutional courts protect human rights by their interpretation and application of the constitution, „the specific constitutional law“, while in the case of the regular judiciary, the protection of human rights and freedoms is achieved through interpretation and application of law (Stojanović, Vučić, 2009: 883). This function is not characteristic of all constitutional courts, i.e. some exercise it only indirectly, through normative review of law, such as, for example, the Italian Constitutional Court.⁵

While the function of preserving the separation of power and constitutionally authorised functions in general, as well as a general protection of the rule of law, are still prevalently carried out through the normative control of rights and resolving the jurisdiction disputes between different state bodies, the function of protection of democratic order from abuse and usurpation by public authorities is carried out, by some constitutional courts, through their acting as special criminal tribunals. The function of protecting democratic order is

⁵ In Austria, however, it is possible to lodge a state legal appeal only against sovereign acts of administration, and not against judicial decisions, so this has been amended by an individual proposition for normative control, if it is stipulated that the basic law has been directly and de facto violated by a general norm.

primarily realised through constitutional courts' competence of examining the constitutionality of activities of political parties and prohibiting those which, according to their goals and their members' conduct, act in a counter-constitutional way. Due to a possible gravity of infringement, the function of establishing the responsibility of the highest state officials for a violation of the constitution should fall in this category. In both instances, the constitutional court's function resembles that of special criminal proceedings. Individual encroachments upon the constitution, especially if they come from state officials in possession of wide scope of legal and factual power, or hostile, aggressive and militant behaviour of political groups aimed at the constitutional order, should be constitutionally sanctioned. In most countries, constitutional courts have been assigned also this „backup“ task, or function. This function has so far been very rarely exercised, but increasing political extremism in Europe, planned and organised resort of violence with elements of terrorism, do not preclude the possibility of, under certain circumstances, this function of constitutional courts coming to the forefront.

Based on the above presented, it could be concluded that theoretical and practical reasons for the establishment and functional development of European constitutional justice may be sought in the effort to preserve the constitution in general, and protect human rights, federalism, the vertical separation of power and rule of law, in particular.

2.2 Normative control of law

The function of constitutional courts is, *grosso modo*, that of control and correction, and is largely realised through normative control of law. Constitutional courts primarily control acts of legislative, executive and judicial power, the most important manifested forms of making laws and applying them, in respect of their compliance with the constitution. In addition to the provisions of constitutional rank, the measure of control in certain states may also be laws, so here normative control includes the examination of legality, which is certainly a too ambitious task to be set for constitutional justice. There is a tendency that international agreements, which have „passed“ constitutional and parliamentary ratification, emerge as a yardstick of measure, for example in Bulgaria and Serbia, either individually or parallel to constitutional review.⁶ In cases where a violation of the constitution has been established, the constitutional court, through its activity, rectifies all decisions and actions of all carriers of public authority to the extent that they are brought in harmony with the law of the highest rank.

⁶ In Serbia, the Constitutional Court declared unconstitutional a great number of laws due to their inconformity with the constitution and international treaties or only because they are in discord with an international agreement.

Normative control of law is *a posteriori* core of constitutional courts' constitutional function⁷, as their other kinds of competences constitutional courts may, but are not obliged, to exercise. *A priori* review is applicable only to a smaller number of constitutional courts.⁸ It is only in the assessment of the constitutionality of international agreements, where this is logically justified by the principle *pacta sunt servanda*, that it has been more widely applied, for example in Germany, Spain, the Russian Federation, Slovenia, Serbia, etc. According to this model of normative control, certain constitutional courts (German, Czech and Polish), „became famous“ for assessing not only the constitutionality of „ordinary“ international treaties, but also of the compliance of the founding treaty of the European Union (agreements from Maastricht and Lisbon) with the national constitutional law.

Incidentally, it is possible for the Constitutional Court of Serbia to assess the constitutionality of international treaties preventively or subsequently. In the latter case, review is carried out according to the Austrian model of control of state agreements, but departing from it considering the effect of the decision. In practice, the Constitutional Court has exclusively applied *a posteriori* review of international treaties, where the effect of its decision, due to international implications, stops at the establishment of unconstitutionality, which is more adequate for the preventive control of an international treaty.⁹

It is a rule that constitutional courts proceed at a request of authorised persons, and not at an official maxim. It is common to most European countries that initiation of the proceedings for normative control is accepted from parlia-

7 The Constitutional Court of Portugal is one of rare European constitutional courts which almost exclusively exercises only its competence of examining the constitutionality and legality of normative acts.

Modelled on French Constitutional Council, the control of constitutionality *a priori* can be done by the Constitutional Court of Romania, as the appraisal of constitutionality of laws is performed before their promulgation. The Polish and Hungarian Constitutional Courts can also perform the so-called preventive review of constitutionality of laws, but only at the request of head of the state, and in Poland presidential veto is to be previously used. On the other hand, in 2008, in France, in a revised Constitution, limited review of constitutionality of laws was introduced.

8 So far, the Constitutional Court of Serbia has not “discovered” that any international treaty is in conformity with the Constitution. Among others, it has exercised the power of constitutional review over the Stabilization and Association Agreement, the Agreement with the Russian Federation in the area of gas industry, several bilateral contracts on social insurance, etc.

9 The Constitutional Court has, *ex offio*, assessed the constitutionality of the Law on alterations and additions to the Law on the Constitutional Court. In its decision it has found that the provision, which deprives the Constitutional Court of the possibility to quash a judicial act in proceedings on a constitutional complaint, is unconstitutional.

mentary minorities (abstract control) and courts (incidental control). Initiation of the proceedings *ex officio* has been very rarely applied, and as a rule, if it was necessary for resolving prejudicial questions. The Constitution of Serbia is one of rare constitutions which allows for the initiation *ex officio* without any preconditions or restraints.¹⁰

A constitutional court is *dominus litis*, master of the suit, which is basically always conceptualised as something contradictory. Rejecting an application *alimine*, should disburden the Court of the cases which clearly have no prospect of success. For the majority of constitutional courts, a hearing open to the public is, in practice, more of an exception than a rule, as there is a wide margin of appreciation when it comes to determining one. It is certainly true that courts do not often use debate in order to establish a right, as it is time-consuming and brings small gains. According to Geiger (1981: 8), „it would be more becoming to constitutional justice proceedings to see oral debate as something superfluous“. However, the principled openness of constitutional justice proceedings, together with the „rule“ of taking decisions subsequent to an oral discussion, fail to emphasise the necessity to carefully weigh all the arguments before making the decision of not having a public hearing. Due to infrequency of public hearings, Heberle talks about „hardly bearable deficit of openness“ of constitutional justice proceedings (Häberle, 1976: 384). On the other hand, in certain proceedings which are of particular relevance for the rule of law and general public, some constitutional courts allow for a direct broadcast of their debates. The deliberation of judges and vote are, however, always in private. Nevertheless, it is not excluded that a decision may communicate the majority of votes with which it has been taken. Dissenting opinions, which in numerous courts are often applied, also break through the principled anonymity of deciding.

The effects of constitutional courts' decisions mainly depend on the type of constitutional disputes. In the normative control of rights and in deciding constitutional appeals, decisions of constitutional courts have the effect of cessation. When normative control *in abstracto* is in question, the rule is that a decision is effective from the moment it is published, which means *pro futuro*. If concrete control is in question, the decision of the constitutional court in any given case can have a retroactive effect. As in cessation there is no retroactive or judicial „revival“ of former norm, certain constitutional courts, among which also the Constitutional Court of Serbia, apply another adequate means for avoidance of

10 The Constitutional Court *ex officio* assessed the constitutionality of the Law on Amendments to the Law on the Constitutional Court. In its decision it found that the provision that deprives the Constitutional Court of the possibility to cancel a judicial act in the proceedings on a constitutional appeal, was not in compliance with the Constitution.

legal gaps, which is postponing the publishing of a decision, i.e. the Austrian model of postponing the effects of a decision.

In addition to decisions of cessation, individual constitutional courts developed in their jurisprudence so-called *interpretative decisions*, whereby they actually act as a positive legislator. Due to a long-standing fear of creation of legal gaps as a consequence of the decisions on cessation, and the tendency to, when possible, act in a less radical way, a large number of constitutional courts, adopting the practice of older European constitutional courts, German and Italian in particular, have gradually started issuing interpretative decisions, where out of several possible interpretations, a verbal interpretation which brings the law in conformity with the Constitution is applied. In this case, in the wording of a decision, there is an observation that a law is in conformity with the Constitution, on the condition that it is interpreted in the way established by the Constitutional Court in the rationale of its decision.

For a long time the interpretative style of constitutional courts was a strict interpretation of the literal wording of constitutional norms, a logical and systematic interpretation accentuating the historical perspective, but also disregarding theological thought. It is considered that it was a kind of an expression of judicial self-restraint toward the legislator. The new interpretative style of constitutional courts means turning toward value-oriented and substantive interpretation of the constitution, which is modelled on the case-law of the European Court of Human Rights and recent adjudication of the German Federal Constitutional Court. However, in this extensive style of interpretation, which is strikingly remote from the literal wording of constitutional law, Ernst Wolfgang Böckenförd sees a risk „of a transition from the legislative rule of law to the constitutional jurisdictional state“.

2.3 Special competences

In addition to the general normative control of law, constitutional justice has from its beginnings, and in some states over time, acquired other competences which may also be designated as special protection of the constitution. Some of them are complementary to normative control, such as deciding constitutional appeals of citizens or resolving federal disputes. There is no doubt that also these competences of a constitutional court represent special proceedings for examining the norm and determining its meaning. On the other hand, some competences of constitutional courts, which used to belong to other state authorities, primarily to the regular judiciary, due to their importance for a constitutional life of individual states, have been transferred to constitutional courts. This has been the case, for example, with the resolution of competence disputes betwe-

en different authorities or the disputes over presidential or parliamentary elections. The third kind of special competences of constitutional courts can be designated as immediate protection of constitutional order, where the constitutional court acts as a special criminal court. In some states, the constitutional court can take to court high state officials, such as, for example, president of the republic, the prime minister, ministers, and even judges, for a violation of the constitution and law. The character of special criminal proceedings is common also to the proceedings for prohibition of political parties or associations, as well as for an individual suspension of constitutionally guaranteed rights and freedoms. It is common to these different competences that they manifest as immediate protection and application of the constitution, realised according to the rules of corresponding proceedings of the constitutional court.

In the case-law of European constitutional courts, some of these competences sometimes come to the forefront, pushing aside the regular activity of constitutional justice; such examples are deciding on the prohibition of political parties (Turkey), assessing the constitutionality of the statute of an autonomous province (Spain), the electoral law (Hungary), the lawfulness of presidential elections (Bulgaria), the constitutionality of the referendum for revocation of the president (Romania), etc.

3. Perspective of constitutional justice

It seems that the negative criticism on account of constitutional justice by the participants of the political process has been significantly reduced. This criticism was particularly prominent in the initial stages of a constitutional court activity, when this institution was still looking for its proper place and the optimal way of acting in the constitutional system. Where a constitutional court built its authority on the validity of its decisions, there open derogation of the correctness of its acting ceased, together with the endless search of its proceeding for proof of political bias, the allegations that the constitutional court is in the service of the opposition, or that it is in the service of public authorities, etc. This does not mean, however, that all objections to the work of constitutional courts have stopped, neither can it reasonably be expected. The functioning of any constitutional institution is subject to criticism, especially if it comes from objective and neutral thinking, but it is important that this criticism is no longer directed at the institution as such or at its alleged politicization, but that it concerns only the legal quality of the interpretation of the constitution contained within its decisions. This means that constitutional justice has become a stable institution of a democratic state ruled by law. Its existence is no longer called into question. On the contrary, it is justified to expect its further expansion, both

in respect of its territory and the authorised functions. In short, the position of constitutional courts has continually been on the rise.¹¹ „Older“ constitutional courts, which long ago affirmed their independent position, are naturally inclined toward maintaining it, while less influential constitutional courts, primarily those established in „new democracies“, shall make efforts to strengthen their position of an unbiased guardian of the constitution, the decisions of which are always respected and strictly carried out.

It is uncertain, however, whether constitutional justice will keep its place „on the intersection of law and politics“ and whether politics will anxiously wait for its decisions, or the focus of its activity shall be shifted in another direction. It is hard to foresee the development of constitutional justice in the nearer future, especially that, in addition to their common characteristics and similar issues, national constitutional courts have their own priorities when it comes to their activity. Besides, it is largely up to the participants in the proceedings whether constitutional courts will go in the direction which is less desirable for the rule of law. If a constitutional court is preoccupied with constitutional disputes of lesser significance, it will hardly be able to fulfill its mission. On the other hand, it is highly likely that most European courts will continue to have an active relationship, beside the ever tensed one with the national legislative, executive and judicial power, with the case-law of the European Court of Human Rights, but also the case-law of the European Court of Justice, which is given primacy in the processes of harmonisation of national legal systems with the primary and secondary law of the European Union. This is also true of constitutional courts of the countries which are not member-states of the Union. For constitutional courts of these countries, the cooperation with constitutional courts of the member-states will not be only desirable, but also quite indispensable.

This is why we can agree with Brigitte Bierlein’s (2013: 1) observation that „the exchange of experiences, opinions and ideas, and cooperation between individual constitutional courts will become increasingly significant“, especially if the task of constitutional courts is primarily seen in „the harmonisation of national constitutional law, on the one hand, and the constitutionalisation of European law, on the other.“ There is no reason to doubt that this process of cooperation on the regional plane is going in the direction of increased progress, especially in the region of former-Yugoslavia, regardless of the fact that, so far, only two of the former-Yugoslav republics have become the European Union member-states.

When the Constitutional Court of Serbia is in question, it can be expected that its priority will remain the assessment of the constitutionality of laws, but also,

11 A negative exception is, it seems, the position of the constitutional court in Hungary, jurisdiction of which has been, after the constitutional changes in 2013, significantly reduced.

increasingly, the examination of their compliance with international treaties, in the processes of harmonisation of domestic law with the EU law, as well as immediate deciding on violations of fundamental human rights. The main task, however, will be seeking a solution to the problem of enormous number of pending constitutional appeals which threaten to completely obstruct the functional capacity of the Constitutional Court and paralyse its work. The procedural reform, conducted in 2012, has significantly improved the efficiency of the Constitutional Court, but it still cannot be considered sufficient, neither are there any prospects that without taking further steps this burning issue could be efficiently solved in any foreseeable future. This is why the Constitutional Court of Serbia shall be forced, in cooperation with other constitutional courts which have, if not completely solved the same problem, then reduced it to bearable proportions, to learn from experiences of others and accept them in the way which will not essentially devaluate the efficiency of the national constitutional justice proceedings for the protection of human rights and freedoms.

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ЕВРОПСКИ МОДЕЛ УСТАВНОГ ПРАВОСУЂА

Резиме

*Нема сумње да су опште премисе, функције и компетенције уставног правосуђа у европском простору у значајној мери стандардизоване, *inter alia*, у њеној димензији нормативне контроле права. Полазећи од заједничких надлежности уставних судова, може се утврдити даља велика сличност уставних решења у државама са специјалним уставним судом, како у погледу предмета уставне контроле (нормативни и појединачни акти суверених форми – одлуке редовног правосуђа или управни акти), те начина њеног активирања, тако и у самом поступку контроле и правном дејству одлука уставних судова. Због тога је могуће говорити о постојању једног јединственог модела уставног правосуђа у Европи које се понајвише ослања на немачко-аустријски модел уставног судства.*

Уставно судство у низу држава, укључујући Републику Србију, задобија улогу општег контролора законодавства, извршења и ординарног судства. Мада то значи да европски уставни судови све више постају „судови обичних људи“, ипак, они задржавају карактер независних институција, које, решавајући изузетно озбиљне, објективне уставне конфликте и надаље заузимају

место на „пресеку права и политике“. С друге стране, ванредно активна улога уставног судства у контроли права довела је до тога да у доктини све више присталица наилази становиште да уставно правосуђе представља својеврсну, специјалну власт уставне контроле, која би по својој природи била посебна, „четврта“ грана државне власти.

За Уставни суд Републике Србије може се очекивати да ће и надаље његови приоритети бити оцена уставности закона, али све више и испитивање њихове конформности са међународним уговорима, у процесу хармонизације домаћег права са правом ЕУ, као и непосредно одлучивање о повреди основних права човека. Главни задатак, међутим, биће решавање проблема хиперинфлације уставних жалби која прети да у потпуности уруши функционалну способност Уставног суда и потпуно паралише његов рад.

Кључне речи: *Уставно правосуђе, уставни суд, контрола уставности, нормативна контрола.*