

XVIIth Congress of the Conference of European Constitutional Courts

Role of Constitutional Courts in upholding and applying constitutional principles

Notes on the Congress Theme

1st Thematic subsection: “The role of the Constitutional Court in defining and applying explicit/implicit constitutional principles.”

Constitutional principles play a significant role in the process of constitutional review, although framework and scope of application of those principles may vary among the member states of the Congress. A principle can be expressed explicitly or implicitly by the constitutional norms. While some constitutions literally defines the essence of basic principles, others are mainly developed by practice of the constitutional courts. In the latter case, constitutional courts have an essential role to identify and define the scope of principles implied by constitutional order. In this context, it is important to determine the sources on which a constitutional court may base its interpretation of constitutional principles. In particular, it is arguable whether a constitutional court may rely on the principles recognised by international law and practice. In addition, the importance of the preamble of constitution may also be addressed when construing the constitutional principle.

Constitutional courts may have to answer to several substantial questions in the process of determining the scope of application of constitutional principles. Namely issues concerning formation and development of principles, and their legal character. Specifically, whether constitutional principles have independent meaning or they should always be interpreted in connection with concrete constitutional right. In addition, distinction should be made between fundamental rights and principles in terms of how they are interrelated based on their constitutional meaning. Moreover, the importance of constitutional principles should be highlighted in the protection of constitutional legal order.

In light of this situation, the following questions arise:

- What are the sources in the process of defining and identifying implicit/explicit constitutional principles by the Constitutional Court?
- What is the role of internationally recognised principles in the process of interpreting the constitutional principles?
- What is the importance of the preamble of constitution in defining constitutional principles?
- Legal character of constitutional principles: how are they formed and interpreted over time?
- Distinction between constitutional principles and rights, how are they interrelated?

2nd Thematic subsection: “Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.”

The role of a constitutional court in the process of amending a constitution may vary among the member states of the Congress. While the authority of the constitutional court to review constitutionality of constitutional amendments is acknowledged by the practice of some member states, others reject such idea.

When determining the role of the constitutional court in the process of amending a constitution, it is worthy of attention to define the nature of a constitutional amendment. Specifically, whether the amendment procedure absolutely remains in the political sphere or may be subjected to judicial scrutiny.

Furthermore, the issue of the nature and scope of amendment powers raise several important questions. Namely, are there any constitutional principles so fundamental in a sense that they cannot be amended by a legislator? It should be mentioned that some constitutions explicitly define “unamendable provisions”. It is argued that such “eternal provisions” on the one hand, limit the power of constitutional legislator and at the same time, give legitimacy to the constitutional court to carry out the constitutional review of constitutional amendments.

In the absence of explicit unamendable norms in the constitution, special attention may be given to the role of a constitutional court in the protection of basic constitutional principles. The constitutional doctrine distinction is made between primary and secondary constituent powers.

While the primary (original) constituent power belongs to the founding constitutional authorities (pouvoir constituant), secondary (derived) constituent power is carried out by the constitutionally established legislator (pouvoir constitué). This theory suggests that the power to amend a constitution may be substantially limited by primary constituent power even in the absence of any explicit limits in the constitutional text. Against this background, a question arises as to whether a constitutional court may establish hierarchy between constitutional norms in order to protect primary constitutional principles. In this regard, it is also important to define the sources on which a constitutional court may base its interpretation.

Apart from substantive constitutionality discussed above, constitutional practice has also established the notion of procedural constitutionality of constitutional amendment. Examination of procedural constitutionality implies judicial review that determines whether the constitutional amendment is adopted in compliance with the procedure defined by the constitution. In this respect, it is subject to discussion whether a constitutionally established amendment procedure *per se* constitutes the authority of the judicial branch to examine the constitutionality of an amendment on procedural grounds.

Against this backdrop, the following questions arise:

- The nature of a constitutional amendment; does the involvement of the court in the amendment procedure bear any risk of "politicization of judiciary"?
- Unamendable norms in constitution; what are the role and the scope of application of these provisions in the process of constitutional review of a constitutional amendment?
- May the constitutional court define hierarchy between the constitutional norms in the absence of explicit "eternal provisions"?
- What may be the source of authority for the constitutional court to review procedural constitutionality of a constitutional amendment?