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REPORT

"THE COMPETENCE OF THE CONSTITUTIONAL COURT TO CONTROL THE CONFORMITY OF LAWS WITH INTERNATIONAL TREATIES: NEW TRENDS IN CONSTITUTIONAL JUSTICE"

by
Mr Igor SPIROVSKI
Judge, Constitutional Court,
Former Substitute member of the Venice Commission
"the Former Yugoslav Republic of Macedonia"

1. Conditions for the establishment of such a competence

The relationship between the national and the international law and the recognition of the latter's prevalence, in one way or another, seems to be one of the most obvious characteristics of modern constitutionalizam in Europe. Integration processes and creation of supranational mechanisms that ensure the validity and interpretation of norms of international and supranational nature within the internal legal order of states, have modified the traditional understanding of sovereignty, supremacy of the Constitution and the constitutional law in general. As it has been already observed, it is possible to derive the concept of European Constitutional Law applying it to three levels: that of the EU which involves institutional, legal and value principles of constitutional character; that of ECHR with its substantial constitutional content, (both being forms of transnational constitutionalism, constitutionalism beyond the state) and that of national constitutions, as primary sources of common principles of democracy, rule of law and protection of fundamental human rights which Europeans share as a common constitutional heritage. Strong convergence of constitutions of European states in fundamental orientations and their commitment towards mentioned principles, contribute to cooperative interaction among these levels, although serious tensions in the mutual relationship has emerged.

Particularly impressive is the radical opening of the new democracies to international law, whose constitutions incorporate ratified international agreements, and often the general principles or generally accepted norms of international law as part of the internal legal order. Wording of this form of incorporation is different, both in the constitutions of "old" and "new" democracies. In some constitutions the formulation of "universally (generally) recognized **principles** of international law" is accepted (Andorra, Bosnia and Hercegovina, Italy, Slovenia), in others "universally (generally) recognized **rules** (**norms**) of international law" (Austria, Bulgaria, Germany, Greece, Hungary, Montenegro, Macedonia, Serbia, Slovakia). In any case, they refer to the customary international law which results from the general and consistent practice (for which evidence may be also international treaties) which states follow as a legal obligation; they are automatically incorporated and, as a rule, which applies to the mentioned countries, have primacy over domestic law, either explicitly or implicitly. Their primacy applies regardless of the fact whether they are given a formal rank in the constitution or, at least as regards the countries that have the Constitutional Court, whether the Constitutional Court is competent to control the conformity of laws with these principles and rules or not, and is always ensured at the level of decision-making in individual cases. Otherwise, the automatic incorporation would make no sense if it is possible for competent authorities to avoid their application and thus to violate international law. Whether the determination of the contents of these rules and principles is an easy or difficult task, is another matter.

Incorporation of international treaties, on the other hand, has more formal and more apparent scheme, which allows relatively precise determination of the ranks of such treaties in the internal legal order of the country, which is crucial for the analysis of our theme. The Constitution of the Netherlands is frequently cited as an example where ratified self-executing international treaties may have precedence not only over domestic laws, but over the Constitution as well. In some other countries, such ranking gets ECHR (Austria, Bosnia and Hercegovina), and implicitly also in others, as a basis for constitutional interpretation (Portugal, Spain, Romania, Macedonia). In many countries, ratified (approved) international treaties by the parliament have stronger legal force than the laws. It is explicitly determined either by the formula that they shall **prevail** over laws (Albania, Armenia, Bulgaria, Croatia, Czech Republic, France, Poland, Slovakia), or by the formula that laws must be **in conformity** with ratified international agreement (Serbia, Slovenia, Montenegro). Indirectly, however, the idea that international treaties shall prevail in case of conflict with a law is achieved through the formula that ratified international treaties can not be changed by law (Andorra, Macedonia).

Hence, the introduction of the competence of the Constitutional Court to control the conformity of laws with ratified international agreements may be perceived, on the one hand, as a logical consequence of the foundations in the constitution which previously determined the ranks of international agreements. Both the prevalence and conformity formula could justify or explain the introduction of such competence of the constitutional court, but although “shall prevail” means stronger, it does not necessarily mean “higher” in hierarchy; international agreement may have primacy, but not necessarily supremacy. The primacy rule works in all countries whenever an ordinary judge in a particular case finds that a law he/she ought to apply is in conflict with a ratified international agreement. In this context, it can be said that this competence of the constitutional court appears as a logical necessity for Serbia, Slovenia and Montenegro because here, in theirs Constitutions, the law is subordinate to international agreement and a clear hierarchy of legal acts under the principle of legality and constitutionality is established. To this list one could add Albania, whose constitution Article 116 enumerates normative sources of law according to a hierarchical order (constitution, international treaty, law, etc.). In these cases it seems it would be inconsistent if the Constitutional Court has no such jurisdiction. On the other hand, the competence of the Constitutional Court to control the conformity of laws with ratified international agreements in the systems of Bulgaria, Poland and Slovakia is rather a factor that "arranges" the hierarchical order of normative acts and sets ratified international agreements between the Constitution and laws in a formal sense. In other words, if we ask whether an international agreement in the constitutional order of these countries has, besides “primacy”, “supremacy” as well, then the answer can be found only in the provisions on the competence of the Constitutional Court, which is not the case with Serbia and other countries from that group. In this context there is nothing inconsistent in the fact that in Armenia, Czech Republic, Croatia (Andorra and Macedonia too) Constitutional courts don’t have such competence, although the legal force of international agreements is defined in the same way as in Bulgaria, Poland and Slovakia - namely, that they prevail over laws. Indeed, the principle of prevalence function without any objection of inconsistency in countries where there is no constitutional court. Even in countries where a constitutional court exist, prevailing international agreements have ordinary priority in aplication as against conflicting provisions of laws, and there is nothing to suggest that they must be capable of annulling them.

Therefore, it could be said that while in systems in which there is a clear, by the Constitution established hierarchy of normatinite acts, the competence of constitutional courts to control the conformity of laws with ratified international agreements is a matter of legal and logical consistency, in the others it is a matter of choice - logically possible, but not logically necessary. As the competence to control the conformity of laws with generally accepted **principles** and **norms** of international law, and not only with the ratified international agreements, also appears as a matter of choice (for example, Slovakia and Montenegro have not chosen, like Bulgaria, Slovenia and Serbia, to empower their Constitutional Courts with this competence too. The Constitutional Court of Bosnia and Hercegovina has competence to determine whether a law is compatible only with the ECHR, and, like the German constitutional Court, to determine the existence of or the scope of a general rule of public international law pertinent to the ordinary court’s decision).

At this point is convenient to point to the example of the Czech Republic, whose Constitutional Court until 2001 used to have, under Article 87 of the Constitution, competence to annul statutes or individual provisions thereof if they were inconsistent with a constitutional act or an international treaty under art 10 of the Constitution (which stated: "International treaties concerning human rights and fundamental freedoms which have been duly ratified and promulgated and by which the Czech Republic is bound are directly applicable and take precedence over statutes." In the practice of the Court such agreements had a constitutional significance. With constitutional reform of 2001, article 10 was replaced by a new provision stipulating that promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply. Simultaneously article

87 has been changed with result that the jurisdiction of the Constitutional Court to control the conformity of laws with ratified international agreements was revoked. The Court remained competent to control the conformity of laws with the "constitutional order" (new formulation instead of “constitution”). In this choice of the constitution-maker there is nothing inconsistent. At the expense of that, the Court has got new competence for preventive control of the constitutionality of international agreements, which implies, in all, an arrangement that corroborates the idea of supremacy of the Constitution, and primacy of international law. It is very interesting to note that the Czsech Constitutional Court in several decisions after this constitutional reform emphasized that it will not abandon the acquired competence to control laws with international treaties on human rights. The Court reiterates (see: P1.US 12/08 od 2 December 2008) that the change of the Constitution "..cannot be interpreted in the sense that it eliminated the referential norms provided by ratified and promulgated treaties on human rights and fundamental freedoms for the Constitutional Court's assessment, with derogational effects on domestic law" (N 80/26 SbNU 317, 330). The Constitutional Court did not place so much emphasis on the retention of its centralized status in the review of constitutionality, rather on the retention of the referential norms in its review. That was otherwise confirmed by further decisions, in which, in interpretating the term "constitutional order" so as also to include international human rights conventions, the Constitutional Court substantiated, for example, its authority to assess the constitutionality of a statute in the light of international human rights conventions, even though the petitioner invoked solely the provisions of the Charter (Czech Charter on hunman rights).

At the end of this part one last note: consequental adherence to the principle of constitutionality and legality within the hierarchy of normative acts on whose top is the Constitution, which includes ratified international treaties, perhaps implies some form of control of the conformity of ratified international agreements with the Constitution (and also control of the conformity of sub-legislative normative acts with ratified international agreements, but I leave aside this particular question). The most rigid consistency in this respect is found in the constitutions of Serbia and Poland, which have provided “a posteriori” control of constitutionality of ratified international agreements. Other constitutions of this group, but Montenegro, has adopted the “a priori” control of the constitutionality of international agreements as a solution that balances the protection of constitutionality in the unified legal system with protecting the country's credibility in international relations. The way in wich this issue is arranged may have implications for the outcomes of decision-making of constitutional courts in the context of the relationship between international and domestic law, which will be discussed briefly below.

2. The specific nature of the review

Once it is established, the control of conformity of laws with ratified international treaties should not raise specific problems, at far as the content of norms of laws and international treaties and their interpretation is of concern. In this context, it is not more difficult for the constitutional courts to assess the conformity or nonconformity of a law with an international agreement, than to make the same assessment in relation between laws and the constitution. However, the case-law of certain constiutional courts shows that constitutional courts should deal with specific issues of principle.

a) One of them is the validity of international law, namely the identification of applicable norms of international law. Constitutional Court of Slovenia in its decision U-I-103/95 of 24 October 1995 discussed the relationship between the International Covenant on Civil and Political Rights wich requires that juvenile accused persons must be separated from adults, and the United Nations Convention on the Rights of Children. The Convention, similarly to the International Covenant on Civil and Political Rights, also determines in particular that any child from whom liberty has been deprived must be separated from adults. However, the Convention allows an exception to this general principle in a case when this would be in conflict with the child's best interests - "if it is believed this is in conflict with their best interests". The

Constitutional Court found that the Convention is a more recent and special international act in relation to the Covenant. In compliance with general rules of interpretation that later regulations abrogate earlier ones, and that more recent special regulations abrogate older, general regulations, the Constitutional Court decided that it is necessary to review the compliance of the challenged provisions of the Code of Criminal Procedure with the Convention as the more recent and special international act. More serious issue in this context would be to identify applicable norm when there are defferences between universal and regional treaties, and between them an bilateral agreements.

Special challenge is the identification of generally accepted principles or norms of international law in those systems where constitutional courts have also the competence to decide on conformity of laws with this type of international law. In any case, it is necessary for the constitutional courts to give evidence for the existence of such principles and rules that raise legal obligation or that such rules don't exist and could not be invoked in deciding a particular case. It should be emphasized that this is not an easy task and that assumes a high degree of specialization of constituional court's resources, but certainly is not mission impossible. In this respect, what immediately comes to mind is the activity of the German Federal Constitutional Court in the exercise of its jurisdiction to determine whether a rule of international law is part of the internal legal order and whether it creates individual rights and obligations (Article 25 on 102 of the Basic Law -- decision is only a ground for the application of such rule, if any, by an ordinary court in a case that is pending before it. This jurisdiction of the German court could be established only at the request of an ordinary court.), in whose decisions is contained developed methodology for identification of these rules or denial of their existence both in criminal and in civil context. The Federal Constituional Court finds that "a rule of public international law will be considered general within the meaning of Article 25 of the Basic Law if it is recognised by an overwhelming majority of states. General rules of public international law are rules of universally applicable customary international law that are complemented by general legal principles derived from national legal systems. (BvR 38/06 of 04-12-2007) In this regard is significant also the decision of the Constitutional Court of Hungary (53/1993 of October 13, 1993), in which the Court finds that regulations concerning war crimes and crimes against humanity represent *evidence* for the existence of rules generally recognized by international law (since the Hungarian Constitutional Court is not competent to control laws with general rules of international law, but only with international treaties, this decision is even more valuable for the general insighth of the relationship between domestic law and general principles and rules of international law which are accepted as part of the national legal order in most of the states and the possibility to be invoked by the Constitutional courts in control of laws as to the international obligations of the state).

b) This competence of constitutional courts raises an important question in respect of the position of Constitutional Courts when required to decide on conformity of laws with EU treaties. In the case P 37/05 of 19 December 2006, an ordinary court ask the Constitutional Tribunal of Poland whether a norm of a law, stipulating that passenger cars not registered in the territory of Poland in accordance with the road traffic regulations shall be subject to excise duty , conform to Article 90 sentence 1 of the Treaty establishing the European Community stating that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products, and, accordingly, to Article 91 of the Constitution, envisaging that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. The Constitutional Tribunal finds that ruling on the merits of the case would result in the interpretation of provisions of Community law, which would fail to take into account interpretation standards relating to all EU Member States. Furthermore, legal environment, where in relation to identical legal situations the competence of both the ECJ and the Constitutional Tribunal were recognised, would present a threat of the existence of a double line of adjudication upon the same legal provisions. It concludes that, while an ordinary court

could seek the adjudication of constitutionality of laws, in which situation the Constitutional Tribunal must decide, in certain situations relating to the conflict of a statute with Community law, the competence of a court to refer a question of law becomes, in a sense, limited by virtue of both the conflicting rule contained in Article 91 paragraph 2 of the Constitution, and the principles of applying Community law, in particular, the principle of direct application of Community law in the event of a conflict with a statute, and refused to decide on conformity of the law with the Treaty in a concrete norm control. This is exactly the same position which has been taken by the Spanish Constitutional Court, indeed in an opposite direction, examining the place of ratified international treaties in the Spanish legal system with the Constitution on its top and the relation between the latter and the EC law. Both exist somewhat in paralel and the courts may legitimately act in a different way as to the same domestic law. An ordinary judge, the Court said, can refuse to apply a domestic law if it contradicts the EC law, but it has nothing to do with its constitutionality. Eventual breach of EC legislation by a domestic law represents only a conflict between certain norms within the Community which should be solved by ordinary courts, whereby constitutional edifice remains intact. Thus, at least implicitly, ordinary courts plays different roles in different legal realms, which, alone, makes no room for establishment of analogous powers of the Constitutional Court . Othervise, if an ordinary court finds a law to be unconstitutional, it must refer to the Constitutional court for conrete norm review. However, even then, if a law was adopted in implementation of a Directive, the Spanish Constitutional Court would refuce to control its constitutionality.

c) In countries where there is concurrent competence of “a posteriori” control of conformity of laws with international agreements and review of conformity of international treaties with the constitution, a sort of conjoint control may occur. Namely, if the constitution explicitly insist on conformity of nternational agreements with the constitution (as in Serbia-they must not contradict the Constitution), then the assessment of conformity of a law with the international agreement could be constitutionally valid only if it is not disputed that the international agreement is in conformity with the Constitution. The issue also has a procedural dimension in terms of whether the constitutional court during the procedure for assessing conformity of legislation with particular international agreement may, on its own initiative, open a procedure for assessing the constitutionality of that international agreement. Of course, this question exists with respect to relationship between sub-legislative regulations with the laws, but in the context of the relationship between international and nationa law it is incomparably more delicate and requires particular attention, lest this competence of constitutional courts automatically turns into preliminary review of constitutionality of international agreements.

3. The treatment of ratified international treaties by the Constitutional Court of the Republic of Macedonia

In the Republic of Macedonia the relation between national and international law is regulated by two related articles of the Constitution of 1991 and Amendment XXV thereto. According to art.118, international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law. The Parliament ratifies international agreements (art.68) by law. Amendment XXV foresees that courts make judgements on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. It is clear that ratified international treaties are directly applicable and have direct effect (if contain porvisions of such a quality); they are ranked at least at the level of national laws, but with a stronger validity, since *lex posterior derogat legi priori* is excluded as a principle; they are below the Constitution; and, in case of conflict between national law and ratified international agreement, the latter prevails. On the other hand, the Constitution doesn’t specify the position and the applicability of other concluded, but not ratified, international agreements in the domestic legal system, which logically incited some authors to pose the dilemma if the Constitution really has dualistic approach to them, arguing in favour of the monist approach, which could be attained by the courts using appropriate line of interpretation.

The relation between international and national law has been treated by the Constitutional Court in a highly controversial way. The Macedonian Constitution does not expressly provide for a competence of the Constitutional Court to review the constitutionality of international treaties, nor there is a competence to review the conformity of laws with ratified international treaties. However, since the Constitution places ratified treaties into the body of the internal legal order in a rank below the Constitution, the Court from the early ninethies somehow splitted between two options: either to keep with the constitutional provision listing its competences where international treaties are not mentioned as an object of review (article 110), or to build its competence on a theory that since ratified international treaty becomes part of the domestic legal order, it must, as any other regulation, be in accordance with the Constitution, and therefore reviewable by the Court. The first attitude prevailed during the first years, leading to rejection of six initiatives for review of laws for ratification of international treaties concluded by the State. However, the latter theory finally prevailed among majority of judges in 2002. The Court repealed the law on ratification of a bilateral agreement, for the agreement contained provisions breaching the Constitution, but did not repeal the said provisions of the agreement, finding that it would have been in breach of international law. The effect of the decision was that the international agreement ceased to be part of the domestic legal order, not losing its legal force in international law. This case inevitably opened a discussion on possible reform directed to introduction of *a priori* review of constitutionality of international treaties, as probably the most appropriate technique to protect both the constitution and the credibility of the state in international relations. However, the majority of the present composition of the Court, draw back to the previous stance, accepting a reasoning, among other things, that the control of constitutionality in case of international agreements is carried out by the Parliament in the process of their ratification, after which they become part of the domestic legal order and are self executing. It is interesting that this alleged function of the Parliament to exercise constitutional review of international treaties is equally non-existent in the Constitution as it is the competence of the Court to review the constitutionality of international agreements.

On the other hand, the Court does not accept to take ratified international agreements as a criterion for legality of regulations either, which is normally expected, since they are laws too. The Court consistently, with a cerain majority, rejects the applications directed to these types of control. In conclusion, the case-law of the Constitutional Court implies that, in effect, it is indifferent to international law in terms of its status and rank in the hierarchical structure of legal acts, treating it as if it is outside of the constitutional order, and leaving the solutions for possible conflicts between domestic and international law to be found by ordinary judges in concrete cases brought before them.

However, the treatment of the ECHR is substantially different. The duty to treat international human rights treaties in the contitutional order of the Republic of Macedonia in a different manner, and not only through the prism of formal hierarchical relations, derives at least from two reasons relating to substantial aspects. First, freedoms and rights of a man and a citizen recognized in international instruments are, in a great deal, incorporated in the provisions of the Constitution, which take more than 1/3 out of the total number of articles, and, second, according to the article 8 paragraf 1 line1 of the Constitution, the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined in the Constitution, represent one of the fundamental values of the constitutional order of the Republic of Macedonia.

For a long time in the Court has dominated the attitude that the Convention and the case-law of the ECtHR can be taken only as an additional argument in the interpretation of constitutional norms which the Court uses in deciding cases which fall within its competence. At the same time, the Court stressed that ECHR, although it represents a part of the internal legal order, cannot be taken as a direct and autonomous legal ground on which the Court could base its decisions. This goes for both abstract review of constitutionality of legislation and direct

protection of constitutional rights under art.110 of the Constitution. Thus, this subsidiary utilization of ECHR (as well as with other acts of international law) took the form of "*so as it is"*, meaning to corroborate the legal positions of the Court. This could mean, of course, that the Court is free to make use of the Convention only when it is favourable to its stances. However, on the ground of the more profound interpretation of article 8.1.1. of the Constitution, the Court in 2006 underlined that *constitutional* rights and freedoms should be interpreted within the context of the Convention, since the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined in the Constitution, represent one of the fundamental values of the constitutional order of the Republic of Macedonia. This meant that the Convention should be used not only as an additional argument, but as a criterion for the interpretation of the Constitution (U.br.31/2006 of 1.11.2006). The case was additionally peculiar, since the Court was dealing with a situation where the Convention was used to define the right to freedom of assembly as non-absolute one, whereby the contrary could appear from the constitutional provision taken alone (art. 21 of the Constitution stipulate that the exercise of freedom of assembly may be *restricted* only during a state of war or emergency). More precisely, the Court accepted that paragraf 2 of article 11 of the Convention is complementary to the relevant article of the Constitution and that the law which places restrictions on the right to freedom of assembly in strict accordance with art. 11.2 is not against the Constitution. It should be borne in mind that this interpretative approach has nothing to do with the context of article 53 of the Convention, which safegards the level of human rights existing under law or other agreement, because it was directed towards the definition of the said constitutional right, and not to its restriction.

4. Conclusion

The introduction of the competence of the Constitutional Court to control the conformity of laws with ratified international treaties is a direct result of the attitude that international law, under certain conditions, prevails over national law, sometimes even over constitutional law. Constitutional structuring of the hierarchy of normative legal order is different among the countries, but in general, ratified international law has ether primacy, or supremacy over national legislation. Althought this distinction may have theoretical and analitical validity, and may influence the overall strategy for the competences of constitutional court with respect to the general relationship between international and national law, in effect, once this competence is established, constitutional courts enter into same endevour - to provide for the realisation of a coherent hierarchical constitutional order.

The exercise of this competence poses subtle requirements for identification of international law, either customary or treaty law. Although this task is not without any problems when it comes to treaty law, it is a particular chalenge to identify the generally recognized principles and rules of international law.

Special attention should be payed to the peculiarities of the relations between the EU Treaties, as ratified international law, and national law since the control of conformity of laws with the EU treaties by the Constitutional Court leads to inevitable overlaping with the competences of ECJ to give rulings on interpretation and validity of EU law. Methods of Constitutional Courts to avoid such a conflict are already established by constitutional courts in a rather successful way.

The existence of a concurrent competence of "a posteriori" review both of constitutionality of international treaties and the conformity of laws with international treaties, which is otherwise perfectly consequent to the principle of constitutionality and legality, requires carefully designed techniques for avoiding possible shift of the procedure for control of laws with international treaties, into an automatic preliminary review of constitutionality of international treaties.

In the countries where Constitutional Court has not this jurisdiction, it is anyway realized at least on the lewel of international treaties on human rights, as they are, in one way or another, part of the constitutional substance and serves as a basis for constitutional interpretation of human rights. The Constitutional Court of the Republic of Macedonia is one of those which interpret the Constitution within the context of these treaties, especially ECHR.