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PECULIARITIES OF CONSTITUTIONAL CONTROL IN THE BENELUX COUNTRIES

ОСОБЛИВОСТІ КОНСТИТУЦІЙНОГО КОНТРОЛЮ В КРАЇНАХ БЕНІЛЮКСУ

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The Kingdom of Belgium, the Kingdom of the Netherlands, and the Grand Duchy of Luxembourg have been geographically, culturally, and economically interconnected for a long historical period. Their union, which later became known as Benelux, dates back to 1943 with the first common customs agreement signed. In 1960 Benelux Treaty was implemented mostly in the form of economic cooperation, but in 2010 this Agreement was updated and expanded, and justice became one of the main topics of cooperation, in addition to economic and financial issues.

In this scientific article the peculiarities of constitutional control in each of the three countries were considered in detail, the historical and legal origin of this control was investigated. Attention was paid to the peculiarities of each of the Constitutional Courts of Luxembourg and Belgium, as well as the reasons for the absence of «constitutional review» as part of the general judicial system of the Netherlands.

The author also drew attention to how constitutional control was created and legally established in countries with such a form of government as a constitutional monarchy, and it was also investigated how democratic the institutions of constitutional control are in these countries, based on the reports of the Venice Commission.

Such foreign scholars as Comella V. F., Uzman J., Gerkrath J., Thill J., and others studied this topic. In addition to the reports of the Venice Commission and scientific articles by foreign authors, some legislative acts of these countries and their Constitutions were analysed.

The research of constitutional control in these countries is interesting due to the importance of the institution of constitutional justice through the prism of defining the concept of such a form of government as a constitutional monarchy, which is present in all three states mentioned in the article (the Kingdom of the Netherlands has been a parliamentary constitutional monarchy since 1848; the Kingdom of Belgium - since 1830 due to the events of the Belgian Revolution; the Grand Duchy of Luxembourg - since 1868). However, due to the reforms in these countries that are currently taking place in the field of constitutional control, this topic is relevant and requires further research.

Key words: Benelux, constitutional control, constitutional courts, constitutions of the Benelux countries.

Королівство Бельгія, Королівство Нідерландів і Велике Герцогство Люксембург були взаємопов'язані географічно, культурно та економічно протягом тривалого історичного періоду. Їхній союз, який пізніше став відомий як Бенілюкс, бере свій початок у 1943 році, коли було підписано першу спільну митну угоду. У 1960 році Договір Бенілюксу реалізовувався переважно у формі економічного співробітництва, але в 2010 році ця Угода була оновлена та розширена, і правосуддя стало однією з головних тем співпраці, крім економічних та фінансових питань.

У цій науковій статті детально розглянуто особливості конституційного контролю кожної з трьох країн, досліджено історико-правове походження цього контролю. Було звернено увагу на особливості кожного з Конституційних судів Люксембургу та Бельгії, а також розглянуто причини відсутності «конституційного контролю» як частини загальної судової системи Нідерландів.

Було приділено увагу тому, як було створено та законодавчо закріплено конституційний контроль у країнах з такою формою правління як конституційна монархія, а також досліджено, наскільки демократичними є інститути конституційного контролю в цих країнах, спираючись на звіти Венеціанської комісії.

Даною темою займалися такі зарубіжні вчені, як Комелла В. Ф., Узман Дж., Геркрат Дж., Тіл Дж. та ін. Окрім доповідей Венеціанської комісії та наукових статей іноземних авторів, було проаналізовано деякі законодавчі акти цих країн та їхні Конституції.

Дослідження конституційного контролю цих країн є цікавим через важливість інституту конституційного правосуддя крізь призму визначення поняття такої форми правління як конституційна монархія, що наявна в усіх трьох держав, про які йде мова у статті (Королівство Нідерландів є парламентською конституційною монархією з 1848 року; Королівство Бельгія – з 1830 року через події Бельгійської революції; Велике Герцогство Люксембург – з 1868 року). Проте у зв'язку з реформами в цих країнах, які зараз відбуваються у сфері конституційного контролю, ця тема є актуальною та потребує подальших досліджень.

Ключові слова: Бенілюкс, конституційний контроль, конституційні суди, конституційне право країн Бенілюксу.

Main part. The Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg have historically had many close political, economic and cultural ties. In 1958, a political and economic union of these countries was formed under the name «Benelux». Although countries are close to each other in geographical location, the form of government, and form a joint Benelux union, constitutional control in these countries differs somewhat. Peculiarities of constitutional control in each of these countries, we will explore in this paper.

Regarding the form of constitutional control in these countries, I agree with the following opinion: Belgium and Luxembourg, due to the fact that they have separate specialized bodies (Constitutional Court) for exercising constitutional control, have an Austrian (centralized) model of control. As for the Netherlands, V.F. Comella writes that «… The two remaining countries, the Netherlands and the United Kingdom, are exceptional in that they have no system of constitutional review of legislation. The Constitution of the Netherlands explicitly prohibits judges from setting aside legislation on constitutional grounds…» [1, p.462].

The Belgian Constitutional Court originates from the Court of Arbitration, which was constitutionally introduced in Belgium in 1980, with the task of delimiting the jurisdiction of each authority. The competence of the Arbitration Court was gradually extended (for example, by the Constitutional Amendment of 15 July 1988 or the Special Act of 9 March 2003) until it received its «own section» in the Belgian Constitution (Article 142). On 7 May 2007, the name of the Court of Arbitration was changed to «Constitutional Court».

Analysing of Article 142 of the Constitution of Belgium «…There is for all Belgium a Constitutional Court…», we can say that the legislator has constitutionally enshrined not only the establishment of the Constitutional Court but also its territorial jurisdiction.

The main subject of consideration of the Constitutional Court is conflicts between laws («statutes» in Special act of 6 January 1989 on the Constitutional Court), federal laws («decrees» in Special act of 6 January 1989), and rules referred to in Article 134 of the Constitution of Belgium, as well as between the federal laws themselves and between

the rules referred to in Article 134 themselves. The Court also monitors the non-violation by the above-mentioned legislative acts of Articles 10 (absence of class differences, equality of Belgians before the law, and equality of men and women), 11 (exercise of rights without discrimination), and 24 (freedom in the field of education) of the Constitution. For some reason, the legislator pays detailed attention to the control over violations of these 3 articles [2].

Still, Article 1 of the Special Act of 6 January 1989 on the Constitutional Court extends the Court's jurisdiction: the Court's frame of reference for direct review of the constitutionality of legislation is now not just Articles 10, 11 and 24 of the Constitution, but the whole of Title II (Articles 8 to 32) and Articles 171 (the requirement of lawfulness regarding taxation), 172 (the principle of equality in tax matters) and 191. The constitutional amendment of 6 January 2014 extended the jurisdiction of the Court to an a priori review of regional referendums (Article 39bis) and the review of decisions of the House of Representatives or its bodies concerning the election expenditure for the election of that legislative assembly.

Interesting is judgment № 62/2016 (about Treaty on stability; demand for annulment; admissibility; primacy of EU Law; national identity). Several citizens and non-profit organizations asserted that the strict budgetary objectives established in the Fiscal Compact would lead to the authorities no longer being able to fulfil their constitutional obligations in terms of fundamental social rights (Article 23 of the Constitution). In the Court's view, having an interest as a citizen or a person who has the right to vote is likewise not sufficient, because the challenged acts have no direct effect on the right to vote. Nonetheless, the Court considered whether the challenged acts interfered with any other aspect of the democratic rule of law which would be so essential that its protection is in the interest of all citizens. Parliament is indeed the only constitutional body empowered to approve the annual budget and set medium-term budgetary targets, and although the Fiscal Compact provides detailed targets and deficit reduction, it leaves national parliaments completely free to draw up and approve budgets. The Fiscal Pact not only creates a rigid budgetary structure but also imposes certain powers on the EU institutions, as allowed by the Constitution (Article 34). However, the Court`s main conclusion, in this case, is that «…under no circumstances can there be any discriminatory violation of the national identity contained in the basic political and constitutional structures or of the fundamental values of protection that the Constitution affords to any person…» [3, p. 779].

Constitutional control in the Kingdom of the Netherlands is very specific, as it is constitutionally absent. According to Article 120 of the Constitution of the Netherlands «…The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts…» [4].

The availability of such an article in the text of the Constitution of the Netherlands has some historical circumstances. Jerfi Uzman considers that this article «…is a fairly clear expression of a rooted legal tradition dominated by downright scepticism about the role of the courts in a democracy…». This scepticism appeared for the first time in the (1798) Constitution of the Batavian Republic, the predecessor of the Kingdom of the Netherlands, but roots of such legal tradition went from the «British–French» idea: «…ultimately in 1814–1815 by the new Constitution for what was eventually to become the Kingdom of the Netherlands, the 'French' idea of a strict separation of powers, involving an extremely modest role for the courts, remained…British constitutional law has always inspired many an architect of the Dutch constitution. Central to the British tradition is of course the doctrine of parliamentary sovereignty. This Anglo-French coalition ultimately won…and the prohibition of judicial constitutional review, currently displayed by Article 120, was a fact…» [5, p. 261–262].

The European Commission for Democracy through Law in its Opinion «on the Legal Protection of Citizens, adopted Venice Commission at its 128th Plenary Session» № 1031/2021 considers that this Article 120 of the Constitution of the Netherlands «…makes the Netherlands the only Council of Europe and Venice Commission Member State that completely excludes constitutional review…». In fact, constitutional review is exercised by the Advisory Division of the Council of State that provides a priori advice on the constitutionality of bills. But the main problem is that Council «…will not systematically be asked for advice also on later amendments in Parliament…often unconstitutionality is revealed only in the practice of the application of laws…» [6]. But this problem is somewhat alleviated by Article 94 of the Constitution of the Netherlands, which establishes a monistic system through which Dutch courts will not apply national law when it is contrary to international law, in particular, the European Convention on Human Rights.

This paradox of combining «constitutional prohibition of constitutional control by courts» with an «introduction of important changes through court`s decisions, at the level of decisions of other constitutional courts» is explained by Janneke Gerards: «...The explanation for this paradox can be found in… traditional openness to international law. It often has been said that this openness is due to the small size of the Netherlands, its closeness to the sea, and its history of international trading. This combination accounts for a strong orientation to foreign countries as well as a great interest in international regulation of trade matters and peaceful international relations. The Netherlands see a strong role for themselves in international law, and supporting the development of the international legal order forms an important part of its foreign policy. This orientation even finds its expression in the Constitution, which explicitly states that the Dutch Government «shall promote the international legal order»…» [7, p. 216].

The only Constitutional Court in the Kingdom of the Netherlands is the Constitutional Court of Sint Maarten, according to Articles 127, 128 of the Constitution of Sint Maarten (On October 10, 2010, became a self-governing state with significant autonomy (status aparte) within the Kingdom of the Netherlands).

Returning a little to the function of the Advisory Division of the Council of State, it should be noted that its function is not inherently similar to that would be performed by the Constitutional Court. Jurgen C.A. de Poorter writes that «…The Council of State only gives advice and thus does not issue binding judgments. The Government is not bound to adhere to the advice of the Council of State and has only the obligation to justify any deviations from the advice in a report. This means that the context in which the Council of State conducts its constitutional review is fundamentally different from that in which a constitutional court would operate. The advice from the Council of State plays a role in the political, not legal, domain…» [8, p. 92].

Constitutional review in the Grand Duchy of Luxembourg is based on Article 95ter of the Luxembourg Constitution: «…The Constitutional Court decides, by means of opinion… on the conformity of laws with the Constitution…». But this provision is limited to Article 2 of the Law of 27 July 1997 on the organization of the Constitutional Court: «…The Constitutional Court decides, according to the procedures determined by this law, on the conformity of laws with Constitution, with the exception of those which carry the approval of treaties…» [9]. Jean Thill and Jörg Gerkrath write that the peculiarity of the Constitutional Court of Luxembourg is also that judges «…are selected from the judges of ordinary and administrative courts and continue to serve as ordinary judges…», and therefore in fact «…they sit as «part time» constitutional judges…» [10, p. 1139].

Here is an example from the case law of the Court. Theoretically, the Constitutional Court answers only the question

of the conformity of laws with the Constitution and is therefore not called upon to refer a preliminary question to the Court of Justice of the European Union. However, in one case (decision № 119 of 16 June 2017 in the case of emission quotas) the Constitutional Court was forced to first apply to the Court of Justice of the European Union with a view to setting the framework for compliance with the law under reference with European legislation before analysing its compliance with the Constitution.

The process of constitutional reform is currently underway in Luxembourg, which also affects Chapter VI of the Luxembourg Constitution. It is proposed to supplement Article 95 of the Constitution with the following sentences?: «…(3)The Constitutional Court shall settle conflicts of attribution in the manner determined by law…(4)The powers of the Constitutional Court may be extended by a law adopted by a qualified majority, which collects at least two-thirds of the votes of the members of the Chamber of Deputies, and votes by power of attorney are not allowed…(8)The provisions of laws declared unconstitutional by a decision of the Constitutional Court shall lose their legal force on the day following the publication of this decision in the forms prescribed by law, unless the Constitutional Court orders another postponement by the Constitutional Court…» [11].

Conclusions. Thus, despite some proximity and similarity of countries in the form of government, constitutional control in each of the Benelux countries has its own characteristics. Thus, the Constitutional Court of Belgium has only recently received a new name, and also considers the constitutionality of laws only concerning a specific list of articles of the Constitution; the Kingdom of the Netherlands does not have its own Constitutional Court, but only in one of its autonomies; The Constitutional Court of Luxembourg does not review the constitutionality of laws approving treaties and is also affected by major constitutional reform.

However, it should be noted that despite such features of constitutional control in the above-mentioned countries, these states use different ways to overcome the defects of their systems of constitutional control (constitutional reforms, expansion of legislative restrictions, or monism etc.). Benelux countries are still considered states with a high level of democracy and the rule of law.

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