A PRIORI AND A POSTERIORI CONTROL: FRENCH MODIFICATION

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Annotation. The article investigates two types of constitutional control: preliminary (a priori) and subsequent (a posteriori). Given certain peculiarities of constitutional proceedings in France, particularly the 2008 judicial reform that introduced a posteriori control in the form of priority question of constitutionality (QPC), the relevance of the research topic is beyond doubt. The implementation of preliminary control by the Constitutional Council was provided for in the 1958 French Constitution, thus the article examines the procedure for its implementation. Simultaneously, differences are sought between a priori and a posteriori control, which the French judicial system has recently received, which is the purpose of this article. It was found that only subsequent control guarantees standards concerning the territorial structure of the state, its unitary and decentralized nature, as well as ways of consulting voters in case of changing territorial community boundaries. However, several issues, such as the Powers of the President of the Republic, the principle of annual budget, or verification of financial laws cannot be subject to QPC. It is concluded that the differences between a priori and a posteriori types of constitutional control lie in their purpose and methods of referral. The advantages of subsequent control are identified and its positive impact on the legal order of the French Republic as a whole is emphasized.

Key words: Constitutional Council, French Republic, constitutional control, a priori control (preliminary), a posteriori control (subsequent), priority question of constitutionality (QPC).

1. Problem statement.

The European model of constitutional justice recognizes constitutional courts as having the ability to check the constitutionality of laws both a priori and a posteriori. However, the French organization of constitutional jurisdiction avoids so-called "European schemes." This applies to both the method of appointment and the functioning and control of the Constitutional Council. Regarding the appointment method, appointment by political bodies, as organized in France, is unique in Europe. Finally, concerning control, only in 2010 (when it came into force), fifty-two years after the Constitutional Council's creation, did France join other European states by allowing the Council to exercise a posteriori (subsequent) control over laws. Given this, the relevance of this research is obvious.

2. Source analysis.

The issues of types of constitutional control are frequently studied in both French and Ukrainian scholarship. Among French scholars, we can highlight: Jean Rivero, Vincent Schnebel, Olivier Le Bot, David Szymczak, Guillaume Drago, Bertrand Mathieu, and others. In Ukraine, research on the above topics is carried out by: Vasyl Lemak, Mykhailo Savchyn, Oleh Pankevych, Ivan Peresh, and many other scholars.

3. The article aims to analyze the concepts of a priori and a posteriori constitutional control and their specific implementation in the French Republic.

4. Main content.

The assessment of legislative provisions for compliance with the Constitution is carried out through mechanisms such as preliminary and subsequent constitutional control. Preliminary control – a priori control, occurs after a law is adopted by parliament but before its promulgation. In contrast, a posteriori verification (subsequent control) is conducted on an already effective normative legal act. In the French Republic, since 1958, the constitutional jurisdiction body – the Constitutional Council – only checked legislative provisions for constitutionality before their promulgation. Following the implementation of the 2008 constitutional reform provisions in France, a posteriori constitutional control appeared in the form of a priority question of constitutionality (QPC). The implementation of a posteriori control is detailed in Organic Law No. 2009-1523 of December 10, 2009. In summary, any person may, during court proceedings, assert that a published legislative provision violates rights and freedoms guaranteed by the Constitution. The court verifies compliance with conditions established by organic law and refers the question to the supreme court regarding its ruling, which in turn filters and, if necessary, refers the question to the Constitutional Council. The essence is that when necessary, the Constitutional Council (as an exception) reviews laws whose provisions violate human rights. And the constitutional mechanism for reviewing legislative provisions a posteriori is called the priority question of constitutionality [1].

It is important to note that the scope of a priori control is more limited than that of a posteriori. A posteriori control is broader. Sometimes it concerns only the law, as in France. In most cases, its scope goes far beyond, extending to the control of other regulatory acts (treaties, regulations) or even jurisdictional and administrative acts that implement them. As for a priori control, a strict form and a broad form can be distinguished. The strict form leaves only marginal space for preventive control. A priori control is limited to treaties, referendum projects and the admissibility of popular initiatives. All countries (except Belgium) provide for a priori control of treaties. The second option, broad a priori control, gives considerable space to ex post facto control, which extends, in particular, to the control of laws. The general model applies to five countries: France, Andorra, Romania, Portugal and Hungary – but with a relativization for the latter, which does not open up the possibility of addressing parliamentarians and therefore significantly limits the possibilities of referral. The choice of broad a priori control is particularly notable in the case of Portugal, a country that exercises most of its constitutional justice in the form of diffuse control. If we take the law, in France, as in other countries, it is promulgation that delimits the boundary between a priori and a posteriori. Indeed, this only applies to laws and does not apply, for example, to treaties or even to the rules of procedure of the assembly (at least in France). The deviation for each of the acts subject to constitutional control leads to a distinction between a priori and a posteriori on the basis of the promulgation of laws (whatever they may be), the ratification of treaties, the implementation of the rules of procedure of the assembly, jurisdictional acts and individual administrative acts. We add that for the sake of completeness, the proposed criterion also applies to draft texts: the control carried out before publication represents an a priori hypothesis [2].

As defined by Ukrainian scholar Oleg Pankevych, the following types of constitutional control are mainly distinguished: mandatory and optional. Mandatory is carried out by the relevant bodies on the basis of the principles and norms of the constitution and legislation in general. This type of control is characteristic of the French Republic: all organic laws before their official publication, as well as the regulations of the chambers of parliament before their practical application, must be submitted to the Constitutional Council, which gives an opinion on the compliance of these legislative provisions with the constitution. The mechanism for reviewing organic laws in the constitutional court is a component of the law-making process, a mandatory stage of the legislative process preceding promulgation. In turn, optional control is implemented exclusively on the initiative of those who have, in accordance with legal norms, such authority. This form of control is dominant [3, p. 48–49].

A priori review is essentially an abstract review, detached from any factual data. It concerns a statement that has not yet been interpreted or applied. It can only be concrete when the judge focuses his review on the legislative facts, that is, on compliance with the procedure for adopting the text. As for a posteriori review, it is abstract when the court examines a regulatory act (upon

referral to the state authorities, upon referral by an ordinary court, upon direct appeal against the law, or even in the event of an independent appeal during the review of an appeal against an act of application of the law). In this case, in essence, the review of constitutionality is detached from the facts of the dispute, and it is completely wrong that the review carried out by way of a preliminary ruling is sometimes described as "concrete". Post factum control is specific in only two cases: on the one hand, when it is carried out exceptionally (which in Europe only applies to Portugal), on the other hand, when the court directs a direct appeal to protect fundamental rights against an act of application of the law (in this case, the court verifies whether the judicial act that last decided the dispute correctly applied the norms to the specific case, the relevant constitutional provisions) [2].

The French scholar Ottavio Quirico believes that a priori control is based on an abstract law, while a posteriori control is based on a specific person. In the first case, the cause is an objective law, while in the second hypothesis, the starting point of the check is the violation of a subjective law [4, p. 81].

A priori control is considered closed, somewhat politicized and monopolistic, while a posteriori control is characterized by signs of openness, depoliticization and competition, according to another scholar, Julien Bonnet. The contrast between closed a priori and open a posteriori control can also be seen at the procedural level. A posteriori control creates a gap in terms of openness and transparency of the constitutional assessment of the law. The positions of the filter judges are known, the hearing is open and accessible to all, and the adversarial nature is even more pronounced [5].

The specifics of a priori and a posteriori control can also be seen in the reference standards used by the Constitutional Council. Some of them are general, namely the constitutional rights and freedoms referred to by the QPC, even those recently enshrined and awaiting application in a DC decision (French: Décision de conformité, conformity decision). Similarly, a breach of an international obligation or interference by the legislator in the sphere of regulatory power will not be considered by the Council. However, many constitutional norms can only be invoked a priori, especially those governing the legislative procedure, which occupy an increasing place in DC decisions. Incidentally, such decisions concern the review of the constitutionality of ordinary laws, organic laws, resolutions of the National Assembly and the Senate, as well as treaties and international obligations. Only a priori control guarantees standards relating to the territorial organisation of the State, its unitary and decentralised character, and the means of consulting the electorate in the event of a change in the boundaries of a territorial community. France's relations with supranational legislation are also not subject to the control of Article 61–1, whether it is paragraph 14 of the 1946 Preamble or the constitutional requirement for the transposition of directives. The powers of the President of the Republic, the principle of annuality of the budget or the verification of financial laws cannot be subject to the QPC. The principles of the normativity of laws, consent to taxes, etc. have not been included in the autonomous concept of rights and freedoms constitutional within the meaning of Article 61–1 of the Constitution. Finally, certain constitutional rules may apply autonomously a priori, but only indirectly in a posteriori control. In addition to negative incompetence, the lack of recognition of certain objectives of constitutional value, the principle of financial equalisation between local authorities and Article 6 of the Ecological Charter cannot "in themselves" constitute grounds for a QPC. Finally, the priority of the question of constitutionality through a double filter designed to examine the substance of the question of unconstitutionality – first by a judge and then by the Council of State or the Court of Cassation – is analogous to the system of referral of preliminary questions to the European Court by ordinary courts, which has no equal in other domestic European systems [5, p. 89].

5. Conclusions.

The difference between a priori (prior) and a posteriori (subsequent) control lies, first of all, in the goal. The goal of prior control is to prevent the entry into force of an unconstitutional norm, while the other is to eliminate an unconstitutional norm from the legal order altogether. As for the method of referral, the former occurs at the initiative of state authorities, and the latter - at the initiative of both state authorities and individuals.

The emergence of a posteriori (subsequent) constitutional control in the French Republic makes it possible to "cleanse" the French legislative order of all its laws that have escaped a priori control (prior laws or through political consensus).

In addition, the emergence of a posteriori control in France has stopped frequent appeals to the European Court of Human Rights to reduce the application of laws that conflict with certain rights and freedoms. Another advantage is that any litigant can file a QPC (subject to the criteria), which means a gradual streamlining of the entire legislative framework. Although the double filter system significantly complicates access to the Constitutional Council, thereby transferring the risk of overloading from the latter to the higher courts – the Council of State and the Court of Cassation, the very emergence of such an institution is a real breakthrough in the constitutional jurisprudence of the French Republic. Thus, overall, the 2008 constitutional reform brought the French model of constitutional control closer to European systems.

References:

1. Loi organique n° 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution. URL: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000021446446 [in French]
2. Olivier Le Bot. Contrôles de constitutionnalité a priori et a posteriori en Europe. *Nouveaux Cahiers du Conseil constitutionnel*. № 40. (Dossier : Le Conseil constitutionnel: trois ans de QPC) - juin 2013. URL: https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/controles-de-constitutionnalite-a-priori-et-a-posteriori-en-europe. [in French]
3. Pankevych O. Z. Derzhavne pravo zarubizhnykh derzhav: pidruchnyk. Lviv: Lvivskyi derzhavnyi universytet vnutrishnikh sprav, 2019. 259 s. [in Ukrainian]
4. Ottavio Quirico. Le contrôle de constitutionnalité français dans le contexte européen et international: Une question de priorités. *Uropean journal of legal studies.* 2010. Vol 3. Issue. P. 77–98. [in French]
5. Julien Bonnet. Les contrôles a priori et a posteriori.URL: https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/les-controles-a-priori-et-a-posteriori. [in French]

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