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EXECUTIVE-LEGISLATIVE RELATIONS

Contribution to the course from the perspective of constitutional theory and comparison of laws

Case 1

(facts of the case)

Once upon a time, in the future, the ASEAN Economic Community (AEC) has developed to a strong regional organisation, based on a legally binding international treaty, with far-reaching obligations of the member states to implement the AEC's decisions. Often, this implementation must be done by legislation. However, in the member state S problems have occurred. State S has a presidential governing system. Furthermore, according to art. 1 of its constitution, it is a free and democratic constitutional state based on the rule of law and the principle of separation of powers. While the President and the Ministers, all factions in the Parliament and also the vast majority of the population support the idea of ASEAN integration in the AEC, often the members of parliament cannot find a consensus about the best way to implement an AEC decision and finally fail to implement it at all. More and more often, the AEC needs to take measures against S for failure to fulfil its obligations. Finally, the Parliament discusses the bill for an "ASEAN Obligations Fulfilment Act (AOFA)" that shall be adopted as an ordinary law and provides for the following clause:

"Art. 1

For a period of five years after the entry into force of this Act, laws may also be adopted by the President with the approval of all Ministers of State if they are intended and necessary to fulfil the State's obligations under ASEAN Economic Community law, the Parliament has failed to adopt the necessary law in time and the ASEAN Secretariat has issued a formal notice about the failure to fulfil obligations."

Mrs. X, a Member of the Parliament, doubts that this law is the right way to solve the problem. One evening she meets you on a vast tour exploring the cafes of Yogyakarta. When she learns that you are studying law, she asks if such a law would be constitutional and which authorities in the state may need to examine this question under which circumstances. She also wants to know if such a solution could be adopted by the way of constitutional amendment.

What will you (correctly ...) answer her?

SUBJECTS: Constitutionality of laws; principle of democracy; principle of separation of powers; fulfilment of international obligations; "Ermächtigungsgesetz" ["Enabling Act"] of 1933; constitutional review of laws.

A. Constitutionality of the proposed ordinary law

- The law will be constitutional if it meets the requirements of *constitutionality in form* (legislative competence, form, procedure) and of *constitutionality in substance* (no violation of fundamental rights, constitutional provisions on the institutions and proceedings, constitutional principles or other constitutional norms by the contents of the law).¹

I. Constitutionality in form

- 1) Legislative *competence*: (+)
 - the competence of the Parliament of State S to pass such a law
 - a) Vertically (regulative competence at the national level)²: (+)
 - the law concerns a question of the legislative procedure at the national level, which can by nature only be regulated at the national level
 - b) Horizontally (regulative competence of the Parliament): (+)
 - there are no clues in the facts of the cases indicating that in the State S within the national level the regulative competence for such questions is reserved to other institutions
- 2) No violation of constitutional requirements concerning the form: (+)
 - there are no indications in the facts of the case that the proposed law, if adopted as an ordinary law, will miss any requirements concerning its form
- 3) No violation of constitutional requirements in the legislative procedure: (+)
 - there are no indications in the facts of the case for a violation of the constitutional rules for the ordinary legislative process

II. Constitutionality in substance

- 1) No violation of fundamental rights: (+)
 - since they will not be directly concerned by the proposed law
- 2) No violation of the constitutional provisions on the state institutions and proceedings: (-)
 - the rule that under certain conditions henceforth the President may adopt laws is incompatible with the constitutional provisions that reserve the adoption of laws to the Parliament; it creates a subsidiary *parallel presidential legislative competence* which is not provided for in the Constitution
 - the need to comply with the obligation to implement the decisions of the ASEAN Economic Community cannot justify to deviate from constitutional rules; State S may either leave the AEC or adjust its Constitution to its needs

¹ Structure of the examination following the German practice.

² This topic is relevant in federal states, where the legislative competences are divided between the federal parliament and the state parliaments, but also in unitary states if the decision on certain topics is reserved to the autonomous regions.

- 3) No violation of constitutional principles: (-)
 - a) Violation of the principle of democracy (art. 1 Const.): (+)
 - in any democracy the *important decisions reserved by the Constitution to the legislator*, in particular those affecting fundamental rights, *must be taken by the Parliament as the primary representative of the people* in the formalised, open legislative procedure, which allows a broad public discourse; the democratic legitimation of a decision of the President, even if he is directly elected, is not sufficient
 - b) Violation of the principle of separation of powers (art. 1 Const.): (+)
 - this principle requires a clear *separation of the core functions of the legislative and the executive*; allowing the President to pass laws would give it up and destroy the balance

B. Constitutionality of a constitutional amendment

I. Constitutionality in form: (+)

- 1) Competence for constitutional amendments: (+)
 - usually with the parliament; there are no indications that under the Constitution of State S it is shifted to a special institution (such as the MPR in Indonesia)
- 2) Special form of the constitutional amendment
 - in particular *explicit modification of the text of the constitution*
 - may be required explicitly (cf. [art. 79\(3\) German BL](#)) or implicitly (cf. [art. 37\(2\) Indonesian Constit. 1945](#))
- 3) Special procedural requirements for constitutional amendments
 - in particular adoption with the necessary *qualified majority*

II. Constitutionality in substance: (-)

- 1) No violation of limits of constitutional amendment set explicitly in the Constitution: (+)
 - such explicit limits are common in modern constitutions (see, for example, art. 37(5) Indonesian Constit. 1945, art. 79(3) German BL, art. 89(5) French Constit. 1958))
- 2) No violation of the unwritten limits of constitutional amendment
 - a) The theory of unwritten limits of constitutional amendment in the modern constitutional state
 - the absolute protection of the *core of the constitution* that forms the *identity of the constitution*
 - the definition of the constitutional identity by the *fundamental constitutional principles*

- b) No violation of the unwritten limits of constitut. amendment: (-)
- key elements of the fundamental constitutional principles must not be abandoned
 - to allow the President to replace the Parliament as legislator abandons key elements of both, separation of powers and democracy, creating a *constitutionalised presidential dictatorship*
 - the model of the Enabling Act ["Ermächtigungsgesetz"] in Nazi Germany in 1933

C. The competence to look into the constitutionality of laws

I. The competence of the President to veto the law

- usually, the president has the right to veto a law (in some countries: to initiate constitutional review) for reasons of unconstitutionality

II. The competence of public authorities and courts to look into the constitutionality of laws adopted on the basis of the proposed law

- note that all those laws will be unconstitutional too!
- authorities may refuse to apply such a law (with the risk of judicial review)
- in many countries courts must not apply the unconstitutional law but refer it to the Constitutional Court for constitutional review

III. Constitutional review by the Constitutional Court

- if provided for in the Constitution of S
- 1) Abstract constitutional review
 - 2) Concrete constitutional review (on judicial referral)
 - 3) Constitutional review of laws in (individual) constitutional complaint proceedings

Further reading:

Dieter Grimm, Constituent Power and Limits of Constitutional Amendments, Nomos 2-2016, www.nomos-leattualitaneldiritto.it/wp-content/uploads/2016/09/Grimm_Nomos22016.pdf

Yaniv Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, doctoral thesis London 2014, http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf