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Конференция Европейских Конституционных Судов

# **CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES**

*National report prepared for the XVth Congress  
of the Conference of European Constitutional Courts by  
The Constitutional Court of the Republic of Serbia*

## I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

1. **The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

The election and appointment of the Constitutional Court of Serbia judges is *materie constitutionis* - i.e. it is regulated by the Constitution. The 2006 Constitution of the Republic of Serbia<sup>1</sup> introduced a combined system of determining the composition of the the Constitutional Court, which involves the election i.e. appointment of the judges by all three branches of government. Namely, the National Assembly elects five Constitutional Court judges from among ten candidates nominated by the President of the Republic; the President of the Republic appoints five Constitutional Court judges from among ten candidates nominated by the National Assembly, while the Supreme Court of Cassation appoints five Constitutional Court judges from among ten candidates proposed at a joint session of the High Judicial Council<sup>2</sup> and the State Prosecutorial Council<sup>3</sup>. Pursuant to Article 172, paragraph 4, of the Constitution of the Republic of Serbia, one successful candidate from each candidate list must be from the territory of the autonomous provinces.

Under Article 172, paragraph 5, of the Constitution, a Constitutional Court judge shall be elected or appointed from among prominent lawyers who are at least forty years of age and have at least 15 years of experience in practicing law. A Constitutional Court judge shall be appointed to a nine-year term of office and shall be eligible for one re-election i.e. reappointment.

Article 174 of the Constitution lays down that the duties of a Constitutional Court judge shall terminate upon the expiry of his/her term of office. The office of a Constitutional

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<sup>1</sup> The text of the Constitution of the Republic of Serbia was published in the Official Gazette of the Republic of Serbia No. 98 of 10 November 2006.

<sup>2</sup> Article 154 of the Constitution of the Republic of Serbia reads as follows: "The High Judicial Council shall appoint and dismiss judges in accordance with the Constitution and the law, nominate to the National Assembly the candidates applying for judgeship for the first time, nominate to the National Assembly the candidates for the posts of Supreme Court of Cassation President and court presidents in accordance with the Constitution and the law, participate in the proceedings on the termination of the office of the Supreme Court of Cassation President and court presidents in the manner laid down in the Constitution and the law, and perform other duties specified by the law."

<sup>3</sup> Under Article 165 of the Constitution of the Republic of Serbia: "The State Prosecutorial Council shall nominate to the National Assembly the candidates to be elected Deputy Public Prosecutor for the first time, elect Deputy Public Prosecutors with permanent tenure, assign Deputy Public Prosecutors with permanent tenure to other Public Prosecution Offices, decide in proceedings on the termination of office of Deputy Public Prosecutors in the manner laid down in the Constitution and the law, and perform other duties specified by the law. "

Court judge may terminate prior to the expiry of his/her term of office for one of the following reasons:

- At his/her own request;
- When s/he fulfils the full retirement age requirements (under the valid regulations, the term of office of a Constitutional Court judge shall terminate when s/he turns 65); or
- By dismissal.

A Constitutional Court judge shall be dismissed in the event s/he:

- becomes a member of a political party;
- violates the conflict of interests prohibition;
- permanently loses the ability to perform the duties of a Constitutional Court judge;
- is convicted to a prison sentence or for an offence rendering him/her unworthy of the office of Constitutional Court judge.

The Constitutional Court establishes whether the conditions for the dismissal of a judge are fulfilled. The dismissal proceedings are instituted by the authorised nominator i.e. the authority that nominated the candidate for a seat in the Constitutional Court and the Constitutional Court may file an initiative to institute the dismissal proceedings. The National Assembly decides on the termination of office of a Constitutional Court judge regardless of which authority had elected or appointed him or her.

*Therefore, the authorities electing or appointing Constitutional Court judges (the President of the Republic, the National Assembly, the Supreme Court of Cassation) may institute proceedings for the termination of office of a judge they nominated but only for the reasons laid down in the Constitution. The existence of grounds for the termination of judicial office is established only by the Constitutional Court. The National Assembly votes on the termination of office, notwithstanding which authority elected or appointed the judge.*

## **2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?**

The funds for the work of the Constitutional Court are provided for in the budget of the Republic of Serbia. The Court submits its request for the funds it needs at the annual level to the Ministry of Finance, which drafts the Law on the Budget of the Republic of Serbia and forwards it to the Government of Serbia, which is authorised to submit it for adoption. Every year, the National Assembly adopts a Law on the Budget, comprising a section on funds allocated to the Constitutional Court.

The Court does not have the chance to attend or actively participate in the parliamentary debate on the Draft Budget Law or its amendments i.e. it cannot influence the Assembly decision on the amount of funds to be allocated for the work of the Court. We are of the view that the Constitutional Court should be given a more

active role reflecting its status and importance in that procedure and that the budgetary autonomy of the Constitutional Court should be regulated by a law.

The Court annual budget i.e. annual financial plan is drafted by a permanent Court body, the Organisational and Financial Affairs Commission. Its members are appointed from among the Court judges to three-year terms of office and they may be re-appointed once. The Commission is in charge of drafting the budget execution plan, the annual budget execution report and the public procurement plan and of reviewing any other issues regarding the provision and use of budgetary funds and the provision of other resources for the work of the Court.

The draft annual financial plans are upheld and the budget execution plans, annual budget execution reports and public procurement plans are adopted at Constitutional Court sessions attended by the Court President and judges.

Orders on the disposal of Court funds are issued by the Court President, while the Court Secretary is charged with drafting and enforcing acts on the Court's financial activities. The Court President may delegate specific powers regarding the disposal of funds to the Court Secretary.

The Court is fully autonomous in the disposal of funds allocated to it by the Law on the Budget. The funds are spent in accordance with the approved amounts and purposes. Changes in the amounts of approved funds can be made during the year by amending the Law on the Budget in accordance with a revision of the budget.

**3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?**

Yes, the parliament can amend the law on the organisation and functioning of the Constitutional Court without consultation with the Court itself.

The organisation of the Court, the proceedings before the Court, the legal effects of its decisions and other issues of relevance to the work of the Court are regulated by the Law on the Constitutional Court, which was adopted on 24 November 2006 and came into effect on 6 December 2007.<sup>4</sup>

Article 107 of the Constitution states that any law, and thus the Law on the Constitutional Court, may be submitted for adoption by any Assembly Deputy, the Government, the Assembly of an Autonomous Province or by at least 30,000 voters. The Constitutional Court thus may not propose a law. The right to propose a Law on the Constitutional Court has to date been exercised by the Government of the Republic Serbia (which submitted for adoption the text drafted by the Justice

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<sup>4</sup> Official Gazette of the Republic of Serbia, No. 109/07 of 28 November 2007.

Ministry). Draft laws are submitted to the National Assembly for adoption. They are first reviewed by the parliamentary working bodies and then by the Deputies at a parliamentary session. A law is adopted if it receives the votes of the majority of the Deputies present at the session, which must be attended by more than half of all Deputies (the National Assembly has 250 Deputies).

Regulations on the adoption of laws and general acts accordingly apply to the adoption of amendments to all laws, including the Law on the Constitutional Court.

An authorised propounder is not obliged to seek the Constitutional Court's opinion on a Draft Law Amending the Law on the Constitutional Court. However, the Ministry of Justice has in practice as a rule organised debates during the drafting of the Law on the Constitutional Court and of the amendments to it and invited the Constitutional Court President and judges to hear their views on the amendments to the Law.<sup>5</sup>

Therefore, the parliament amends all laws, including the Law on the Constitutional Court, in accordance with the established procedure, which does not stipulate previous obtaining of the opinion or consent of the Court. The submitter (propounder) of the law, notably the Government of the Republic of Serbia (via the Ministry of Justice of the Republic of Serbia) may, as it indeed has to date, consult on the amendments being drafted, despite the fact it is not required.

#### **4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?**

The Constitutional Court is vested with the power to review the constitutionality of all general legal acts adopted by the National Assembly and the Government.

The Constitutional Court has on a number of occasions reviewed the National Assembly Rules of Procedure<sup>6</sup>.

For instance, the Court on 10 December 2009 issued a Decision IY3-62/2009 dismissing the initiative to review the constitutionality of the provisions of Article 112, paragraph 2, of the National Assembly Rules of Procedure<sup>7</sup> regarding the duration of the measure suspending a Deputy from a National Assembly session. However, in its letter to the

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<sup>5</sup> The Justice Ministry on 18 June 2010 held a round table on amendments to the Law on the Constitutional Court, in which the Constitutional Court President and judges took part.

<sup>6</sup> See Decision IY-121/2007 of 17 September 2009 dismissing the initiative to review the constitutionality of the provisions of Article 136, Article 146 (paragraph 1), and Articles 161 and 162 of the Rules of Procedure of the National Assembly of the Republic of Serbia (Official Gazette of the Republic of Serbia, No 14/09) on the National Assembly's jurisdiction to adopt an authentic interpretation of a law; see Decision IY-456/2004 of 3 July 2008 establishing the incompatibility of the Rules of Procedure of the National Assembly of the Republic of Serbia (Official Gazette, Nos. 56/05 and 81/06) with the Constitution.

<sup>7</sup> Official Gazette of the Republic of Serbia, Nos. 69/94, 70/94, 4/01, 15/01, 59/01, 62/01, 30/02, 57/03, 12/04, 16/04, 29/04, 54/04, 81/06, 13/09 and 14/09 – updated text

National Assembly, the Court pointed out that it found, during its consideration of the initiative, a legal lacunae (legal gap) in the National Assembly Rules of Procedure regarding the Deputies' rights to a legal remedy affording a review of the disciplinary measure decided by the Assembly Speaker. The National Assembly acted on the Constitutional Court's letter and regulated the issue in its new Rules of Procedure<sup>8</sup>, which came into force on 5 August 2010.

**5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.**

All of the following general legal acts in the legal order of the Republic of Serbia are subject to a constitutionality and legality review:

- Laws and other general acts of the National Assembly,
- Ratified international treaties,
- General acts of the President of the Republic,
- Decrees, decisions and other general acts of the Government,
- General acts of other state authorities and organisations,
- Statutes and other general acts of autonomous provincial authorities,
- Statutes and other general acts of local self-government units,
- General acts of political parties, trade unions and associations of citizens,
- General acts of organisations exercising public functions,
- Statutes and other general acts of companies and institutions,
- General legal acts of chambers and other associations,
- General acts of funds and other associations,
- Collective agreements,
- etc.

The constitutionality of a law may be reviewed before (*a priori*) and after (*a posteriori*) it is adopted. The latter is the predominant form of reviewing the constitutionality of laws and other general legal acts in Serbia's constitutional system.

**6. a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

Pursuant to Article 171 of the Constitution, state and other authorities, organisations exercising public functions, political parties, trade unions, associations of citizens or religious communities are obliged to observe and enforce Constitutional Court decisions, wherefore neither the National Assembly nor Government are exempted from that obligation.

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<sup>8</sup> The Rules of Procedure of the National Assembly of the Republic of Serbia were published in the Official Gazette of the Republic of Serbia, No. 52/10.

There are no deadlines within which the parliament is to act on a Constitutional Court decision establishing the unconfirmity of a law or another general legal act and pass a new law or another general legal act or amend some of their provisions. The procedure for adopting new laws and other general legal acts is implemented in accordance with the relevant general constitutional and legal provisions, and not in a special procedure or within special deadlines.

Once the Constitutional Court publishes its decision on the unconfirmity of a law or another general legal act, the National Assembly suggests to the authorised propounder, the Government or the relevant ministry, to draft a proposal for the adoption of a new law or the amendment of the repealed legal act. This obligation, however, is not laid down either in the Law on the National Assembly or the National Assembly Rules of Procedure.

Therefore, the efficiency of the Government i.e. the parliament in proposing i.e. adopting legal acts depends on numerous factors, but not on a normative condition – on either a special procedure or special deadlines differing from the regular and general procedure for proposing i.e. adopting laws and other general legal acts.

**6. b) Parliament can invalidate the constitutional court's decision: specify conditions.**

There is not such a possibility in the legal system of the Republic of Serbia, i.e. National Assembly can not invalidate a Constitutional Court decision. The Constitutional Court decisions are final, enforceable and generally binding<sup>9</sup>.

**7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?**

The Constitutional Court's cooperation with the other authorities regards their jurisdictions laid down in the Constitution and unfolds in accordance with the Law on the Constitutional Court.

1. The Constitutional Court's relationship with the National Assembly is regulated by the Constitution, the Law on the Constitutional Court<sup>10</sup> and the Law on the National Assembly<sup>11</sup>. This relationship unfolds in a number of ways:
  - a. The National Assembly may appear before the Constitutional Court in the capacity of authorised propounder of proceedings for reviewing the constitutionality and legality of general acts adopted by other entities.

<sup>9</sup> Article 166, paragraph 2, Constitution of the Republic of Serbia.

<sup>10</sup> Chapter VI of the Law on the Constitutional Court regulates the relationship between the Constitutional Court and the National Assembly.

<sup>11</sup> Official Gazette of the Republic of Serbia, No 9/10.

A proposal to institute *a posteriori* review proceedings may be, *inter alia*, filed by at least 25 Deputies<sup>12</sup>, while *a priori* review proceedings i.e. the review of the constitutionality of a law before it comes into effect, are instituted at the request of at least one-third of all Deputies<sup>13</sup>.

- b. The National Assembly has the status of party in the review proceedings whenever the Constitutional Court is reviewing the constitutionality or legality of a general act adopted by the Assembly. The Court submits to the National Assembly for reply the proposal of the authorised propounder and the ruling on institution of proceedings for reviewing the constitutionality of a law or the constitutionality or the legality of another general act adopted by the National Assembly<sup>14</sup>. The law does not define the deadline for the reply and the Court establishes it in each individual case, taking into account the complexity of the constitutional legal matter and its urgency. In the case the Assembly fails to submit its reply within the set deadline, the Court continues the proceedings for reviewing the constitutionality or legality of the act. The parliament's reply i.e. opinion is not binding on the Court. This relationship is the most frequent form of cooperation between the Court and the Assembly.

When the Court establishes that a law or another general act passed by the National Assembly is not in conformity with the Constitution, generally accepted rules of international law, ratified international treaties or the law, the Court forwards its decision to the effect to the National Assembly. The decision is simultaneously published in the Official Gazette of the Republic of Serbia, as of which date it is has legal effect.

- c. As already mentioned in the answer to Question 1 of the Questionnaire, the Constitution of the Republic of Serbia lays down the National Assembly's constitutive role in the determination of the composition of the Constitutional Court. Notably: it nominates ten candidates for seats in the Constitutional Court to the President of the Republic and elects five judges on the list of ten candidates nominated by the President of the Republic. Regardless of who appointed or elected them, the judges (including the five judges appointed by the Supreme Court of Cassation) take office by giving oath before the National Assembly Speaker. As mentioned, the National Assembly decides on the termination of office of a Constitutional Court judge for any of the reasons laid down in the Constitution.
- d. The Constitutional Court notifies the Assembly of a competent authority's failure to fulfil its obligation to adopt a general act for the enforcement of the provisions of the Constitution, a law or another general act<sup>15</sup>. Although it is not

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<sup>12</sup> Article 168, paragraph 1, of the Constitution of the Republic of Serbia: "Proceedings for the review of constitutionality and legality may be instituted by state authorities, territorial autonomy or local self-government authorities, and by at least 25 deputies. The proceedings may also be instituted by the Constitutional Court".

<sup>13</sup> Article 169, paragraph 1, Constitution of the Republic of Serbia

<sup>14</sup> Article 107, Law on the Constitutional Court

<sup>15</sup> Article 106, Law on the Constitutional Court

obliged to, the Constitutional Court communicates a copy of its notification to the parliament also to the competent authority at issue.

- e. Under Article 105 of the Law on the Constitutional Court, “(T)he Constitutional Court shall notify the National Assembly about the situation and problems in accomplishing constitutionality and legality in the Republic of Serbia, issue opinions and indicate the need for adopting and amending laws or for taking other measures to protect constitutionality and legality”.
- f. Chapter XII of the Law on the National Assembly regulates the National Assembly’s relationship with the Constitutional Court. Article 57 of the Law normatively asserts the National Assembly’s obligation to submit a reply i.e. opinion on a proposal, initiative or ruling to institute the proceedings for reviewing the constitutionality of a law i.e. the constitutionality and legality of another general act adopted by the Assembly.

Under the Law on the National Assembly, the National Assembly shall consider the Constitutional Court notifications about the situation and problems in accomplishing constitutionality and legality and the Court opinions and suggestions regarding the adoption or amendment of laws.

2. The relationship between the Constitutional Court and the Government is regulated by the Constitution, the Law on the Constitutional Court and the Law on the Government<sup>16</sup>, and is achieved in the following ways:
  - a) Like all state authorities, the Government, too, may appear before the Constitutional Court in the capacity of authorised propounder of proceedings for reviewing the constitutionality and legality of general acts, but only of *a posteriori* review proceedings.

The specificity of its involvement in the proceedings, vis-à-vis the other state authorities, needs to be highlighted here: the Government is entitled to supervise the constitutionality and legality of the general acts of municipalities, cities and the City of Belgrade and may suspend their enforcement and the enforcement of other individual acts based on them by a decision that comes into force on the day of publication in the Official Gazette of the Republic of Serbia. The Government is obliged to institute proceedings for reviewing the constitutionality and legality of the general legal act whose implementation it had suspended within five days from the day the decision comes into force<sup>17</sup>. If it fails to do so, the Government decision suspending the general legal act shall no longer be valid and the disputed general act may be applied again. The Government does not review the constitutionality and legality of the act but can only appear as an authorised propounder of such proceedings before the Constitutional Court, which, given the centralised normative control in Serbia’s legal system, is the only one that exercise that power.

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<sup>16</sup> Official Gazette of the Republic of Serbia, No 65/08

<sup>17</sup> Article 192, paragraph 1, Constitution of the Republic of Serbia

- Therefore, the Government has broader powers with respect to the general legal acts of local self-government units than the other state authorities, because it is the only one that may suspend their implementation even without a Constitutional Court decision, albeit for only five days, until the review proceedings are launched before the Constitutional Court.
- b) The Government may also appear as a party in the proceedings before the Constitutional Court, when the latter is reviewing the constitutionality and legality of a Government general act. The Government is in those cases obliged to heed the request of the Court and submit its reply within the set deadline to a proposal, initiative or ruling on the initiation of proceedings for reviewing the constitutionality or legality of a general legal act it adopted<sup>18</sup>, i.e. “submit the disputed general act and required documentation and provide the data and information relevant to the Court proceedings and decision-making<sup>19</sup>”.
  - c) From the viewpoint of the Constitutional Court, the most important aspect of its relationship with the Government of the Republic of Serbia is the latter’s enforcement of the Court decisions. Namely, the Law on the Constitutional Court lays down that the Government shall ensure the enforcement of a Constitutional Court decision if necessary, in the manner specified in the Court ruling<sup>20</sup>. Apart from this formalised relationship laid down in the law, the Constitutional Court has no other constitutional and legal demands on the Government with respect to the exercise of its constitutional function, which is in accordance with the principle of the independence of the Constitutional Court from all branches of government, including the executive.
3. The relationship between the Constitutional Court and the President of the Republic is regulated by the Constitution and the Law on the Constitutional Court and has the following forms:
    - a) The President of the Republic may be authorised propounder of the proceedings for an *a posteriori* review of the constitutionality and legality before the Constitutional Court.
    - b) All general acts of the President may be subject to a Constitutional Court review of their constitutionality and legality, in which case the President of the Republic has the status of a party in the proceedings.
    - c) The Constitutional Court is vested with the power to establish whether the President of the Republic violated the Constitution. Pursuant to Article 118, paragraph 3, of the Constitution, the Court is obliged to reach a decision to that effect within 45 days from the day the proceedings were instituted. That proceeding before the Constitutional Court is regulated in greater detail by Articles 93-98 of the Law on the Constitutional Court and it may

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<sup>18</sup> Article 33, paragraph 1, Law on the Constitutional Court

<sup>19</sup> Article 34, paragraph 1, Law on the Constitutional Court

<sup>20</sup> Article 104, paragraph 2, Law on the Constitutional Court

be instituted only by the National Assembly at the request of one third of the Deputies. The National Assembly Speaker and the President of the Republic are summoned to the hearing. The Constitutional Court's consideration is limited only to the violations of the Constitution alleged in the National Assembly act. The Constitutional Court forwards its decision to the President of the Republic and the National Assembly Speaker and the decision comes into force on the day on which it is communicated to the National Assembly. When the National Assembly Speaker receives the Constitutional Court decision finding a violation of the Constitution by the President of the Republic, s/he shall call a session for a vote on the dismissal of the President of the Republic within a maximum of 15 days from the day s/he received the Constitutional Court decision<sup>21</sup>. A parliamentary decision on the dismissal of the President for a violation of the Constitution is voted in by a two-thirds majority<sup>22</sup>. There is also the possibility that the parliamentary majority does not uphold the decision and that it is not voted in.

- d) The President of the Republic has a constitutive role in the determination of the composition of the Court, reflected in his/her nomination of 10 candidates for the post of Constitutional Court judge to the National Assembly and the appointment of five judges on the National Assembly's list of 10 candidates.
4. Pursuant to Article 108 of the Law on the Constitutional Court, the Court shall cooperate on issues of interest to the preservation of constitutionality and legality also with other state authorities, and other authorities and organisations, scientific and other institutions, companies and other legal persons, which may be invited to a public hearing to render their opinions and explanations in accordance with Article 38 of the Law.<sup>23</sup>

Given that the cooperation of state authorities and organisations exercising public functions with the Constitutional Court is not optional but obligatory because it regards the exercise of the Court's constitutional function, the Law on the Constitutional Court determined a misdemeanour responsibility and fining of an authority or its responsible person, which failed to submit to the Court the disputed

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<sup>21</sup> Article 235, paragraph 1, National Assembly Rules of Procedure

<sup>22</sup> Article 118, paragraph 1, Constitution of the Republic of Serbia

<sup>23</sup> The Constitutional Court on 2 February 2010 hosted a debate on the Local Election Law, which was attended by the propounders of motions and initiatives for the review of its constitutionality and by the representatives of the National Assembly, the State Administration and Local Self-Government Ministry, the Human and Minority Rights Ministry, law school professors, etc. On 5 October 2010, the Court hosted a public debate on the Law on Churches and Religious Communities, which was attended by the propounders of motions and initiatives for the review of its constitutionality and by the representatives of the National Assembly, the Ministry of Religions, the Ministry of Justice, the Ombudsman, the Commissioner for Information of Public Importance, the representatives of religious communities and eminent legal experts in this field.

act, the required documents, the data and information relevant to the Court proceedings and decision-making within the set deadline, and of state and other authorities, organisations exercising public functions, natural and legal persons, which failed to submit the data and information of relevance to the Court proceedings and decision-making within the set deadline.

## **II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT**

### **1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?**

The Constitution vests the Constitutional Court with the power to settle conflicts of jurisdiction between state authorities.

Under the Law on the Constitutional Court, a conflict of jurisdiction may be positive (when both conflicting authorities claim jurisdiction) or negative (when both authorities disclaim jurisdiction for the resolution of the dispute at issue)<sup>24</sup>.

In cases of a positive conflict of jurisdiction, a motion is filed upon receipt of the act by which a party is seeking a decision of that authority on his/her rights. In case of a negative conflict of jurisdiction, i.e. when the authorities disclaim jurisdiction, a motion shall be filed within 15 days from the day the decision of the other authority that disclaimed jurisdiction became legally-binding i.e. became final.

### **2. Specify whether the Constitutional Court is competent to resolve such litigation.**

The Constitutional Court is vested with the power to resolve conflicts of jurisdiction pursuant to Article 167, paragraph 2, items 1-4, of the Constitution of the Republic of Serbia.

### **3. Which public authorities may be involved in such disputes?**

The Constitutional Court may resolve conflicts of jurisdiction between the following authorities:

- a) courts and other state authorities;
- b) republic and provincial authorities or the authorities of local self-government units;
- c) provincial authorities and the authorities of local self-government units, and
- d) authorities of different autonomous provinces or different local self-government units.

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<sup>24</sup> The proceedings are launched by a motion of an authorised propounder, which shall include the names of the authorities claiming or disclaiming jurisdiction and their reasons therefor. Given the importance of such conflicts and the necessity of their efficient resolution, the conflicting authorities are obliged to respond to the Constitutional Court request to declare themselves within eight days from the day they receive the request

These authorities comprise:

- Courts of all jurisdictions,
- State administration authorities (all ministries, state administration authorities within the ministries (directorates, inspectorates, departments), special organisations (secretariats, bureaus))<sup>25</sup>
- Authorities of autonomous provinces specified in the provincial statutes,
- Local self-government authorities (authorities of municipalities, cities and the City of Belgrade),
- National Bank of Serbia,
- State Audit Institution,
- Ombudsman,
- Commissioner for Information of Public Importance, etc.

- 4. Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples.**

Organic disputes before the Constitutional Court of Serbia regard the conflicts of jurisdiction between the state authorities listed in the answer to the previous question.

However, it is possible that an authority in conflict of jurisdiction initiate a review of the constitutionality and legality of a general legal act within the proceedings on a conflict of jurisdiction. In such instances, the Constitutional Court treats the review of the constitutionality and legality of the legal act as the preliminary issue, on which the outcome of the proceedings on the conflict of jurisdiction depends. In such situation, it suspends consideration of the conflict of jurisdiction until the completion of the normative review proceedings. The Constitutional Court may decide to launch the proceedings for the review of a general legal act *ex officio*<sup>26</sup>, in which case it suspends the proceeding on the conflict of jurisdiction until the review proceedings is completed.

To date, the Constitutional Court has had no cases of conflict of jurisdiction within which it needed to review the constitutionality (and legality) of an act.

- 5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?**

A proposal to review a conflict of jurisdiction may be filed by one or both conflicting authorities or the person whose right gave cause to the conflict of jurisdiction.

The proceedings are deemed instituted on the day of submission of the proposal to the Court.

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<sup>25</sup> See the 2005 Law on State Administration and the 2008 Law on Ministries.

<sup>26</sup> Article 50, paragraph 2, and Article 53, Law on the Constitutional Court

**6. What procedure is applicable for the adjudication of such dispute?**

A special procedure for resolving conflicts of jurisdiction and regulated by Articles 68-74 of the Law on the Constitutional Court applies.

**7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.**

The Constitutional Court may first decide to suspend the proceedings on a specific legal matter until the conflict of jurisdiction is resolved.

In the case the procedural requirements are not met, the Court may issue a ruling dismissing the proposal for the review of the conflict of jurisdiction.

In the case the Court proceeds with considering the merits of the conflict, it shall issue a ruling on which authority has jurisdiction over the specific legal matter.

The Court issues a decision abolishing all actions already undertaken or acts already adopted by the authority found to be without jurisdiction. All provisions of the decision on the conflict of jurisdiction come into force on the day they are communicated to the authorities in conflict of jurisdiction i.e. the person whose right gave cause to the conflict of jurisdiction.

Most conflicts of jurisdiction in the Court's jurisprudence had broken out between the administrative authorities and the courts. In 2010, most of the cases regarded the conflict between the regional customs offices and the newly-established misdemeanour courts. Over 250 proposals for the resolution of such conflicts were submitted to the Court in a very short period of time, from late April to mid June 2010.

**8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.**

Given that all Constitutional Court decisions, including those on conflict of jurisdiction, are binding, the authorities in conflict of jurisdiction are obliged to enforce them as well.

This practically means that an authority, found to have the jurisdiction in conflict of jurisdiction proceedings, is obliged to assume jurisdiction (in the event it had disclaimed it earlier) over a specific legal matter and procedure, i.e. to resume exercising the jurisdiction which had been disputed by the other authority in the proceedings before the Constitutional Court. This, of course, also means that the authority found not to have the jurisdiction must stop exercising jurisdiction in a specific legal matter without delay. All the actions and acts it had already undertaken or adopted shall be declared null and void by a Constitutional Court decision, as noted in the answer to the previous question.

### III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

**1. The Constitutional Court's decisions are:**

- a) **final;**
- b) **subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**
- c) **binding *erga omnes*;**
- d) **binding *inter partes litigantes*.**

a) Pursuant to Article 166 of the Constitution of the Republic of Serbia, the Constitutional Court is an autonomous and independent state authority protecting constitutionality and legality and human and minority rights and freedoms and *its decisions are final, enforceable and generally binding*.

b) Under the above provision, a Constitutional Court decision is not subject to appeal.

c) Constitutional Court decisions in proceedings reviewing the constitutionality and legality of general legal acts are binding *erga omnes*.

d) Constitutional Court decisions on constitutional appeals are binding *inter partes litigantes*. However, in the case that more than one person is in the same legal situation and only some of them filed a constitutional appeal, the Court decision finding that an individual act or action at issue violated or deprived the appellant(s) of a constitutionally guaranteed human or minority right or freedom shall apply also to individuals who had not filed a constitutional appeal.<sup>27</sup>

**2. As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**

- a) **repealed;**
- b) **suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**
- c) **suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**
- d) **other instances.**

A Constitutional Court decision establishing the unconformity of a general legal act or specific provisions of a general legal act with the Constitution, generally accepted rules of international law, ratified international treaties or the law shall be published in the Official Gazette of the Republic of Serbia. The general legal act and acts adopted for its enforcement (in the case the Constitutional Court establishes their unconformity, too) shall cease to be valid on the day of publication.

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<sup>27</sup> Article 87, Law on the Constitutional Court

In the event the general legal act regards the provisions of a ratified international treaty, it shall cease to be valid in the manner laid down in the treaty and generally accepted rules of international law.

A general legal act, which was declared not to be in compliance with the Constitution, generally accepted rules of international law, ratified international treaties or the law by the Constitutional Court decision, may not apply to relations that arose before the date of publication of the Court decision unless a legally-binding decision has been rendered on them; a final individual act adopted on the basis of that legally-binding general legal act may no longer apply or be enforced. Any already initiated enforcement of such an act shall be discontinued.<sup>28</sup>

Everyone, whose right has been violated by a final or legally-binding individual act adopted on the basis of a general act declared not to be in compliance with the Constitution, generally accepted rules of international law, ratified international treaties or the law by the Constitutional Court decision, is entitled to file a request with the competent authority that it amend the individual act within six months from the day of publication of the Court decision in the Official Gazette of the Republic of Serbia, unless more than one year has passed between the communication of the individual act and the submission of the proposal or initiative.<sup>29</sup> If it is established that the amendment of the individual act cannot obviate the consequences of the application of the general act that has been found incompatible, the Constitutional Court may order that the consequences be obviated by *restitutio in intergum*, damage compensation or in another manner<sup>30</sup>.

The Court decision on the manner in which the consequences of applying a general legal act that is not in compliance with the Constitution, generally accepted rules of international law, ratified international treaties or the law, shall be published in the Official Gazette of the Republic of Serbia and take effect on the day of publication.

The Constitutional Court decision on whether the President of the Republic violated the Constitution shall take effect on the day of submission to the parliament.

The Court decisions shall have effect both on general acts that are in force at the time of the review and on acts that were no longer in force at the time of their review.

### **3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

- a) A Constitutional Court decision establishing that general legal act is not in compliance with the Constitution, generally accepted rules of international law, ratified international treaties or the law, is binding on all state authorities, and

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<sup>28</sup> Article 60, paragraph 3, Law on the Constitutional Court

<sup>29</sup> Article 61, Law on the Constitutional Court

<sup>30</sup> Article 62, Law on the Constitutional Court

thus the courts, which, of course, will no longer apply general legal acts repealed by a Constitutional Court decision. If the issue of the compliance of a law or another general act with the Constitution, generally accepted rules of international law, ratified international treaties or the law is raised before a court of general or special jurisdiction, the court is obliged to suspend its consideration of the legal matter and launch the proceedings for reviewing the constitutionality and legality of that act before the Constitutional Court.

- b) In constitutional appeal proceedings, the Constitutional Court also reviews individual acts and actions, i.e. decisions and acts and failures to act by the courts. Pursuant to Article 170 of the Constitution of the Republic of Serbia, a constitutional appeal may be filed “against individual general acts or actions of state authorities or organisations exercising public functions that violate or deprive a person of a human or minority right or freedom enshrined in the Constitution, if other legal remedies for their protection have been exhausted or do not exist.”

The Law on the Constitutional Court also allows for the filing of constitutional appeals in the case “the legal remedies have not been exhausted but the appellant’s right to a trial within a reasonable time has been violated”<sup>31</sup>. The filing of a constitutional appeal does not suspend the application of the challenged individual act or the action.

In its proceedings on the constitutional appeal, the Constitutional Court reviews whether the individual act or action by a court of general or special jurisdiction violated or deprived a person of a human or minority right or freedom enshrined in the Constitution. In its decision finding a breach or denial of a constitutionally guaranteed right or freedom, the Court may a) establish the appellant’s right to compensation of non-pecuniary damages via the competent state Damages Commission<sup>32</sup>, and order the court whose decision resulted in the violation of the right, as established in the Constitutional Court decision, to eliminate as soon as possible the detrimental consequences (e.g. to take measures to complete the proceedings before that court as soon as possible), b) annul the court sentence or decision or court action violating human and minority rights and freedoms<sup>33</sup> if the detrimental consequences could not have been eliminated in another manner, and order the court to review the rights of the party in the disputed court proceedings (i.e. the appellant who filed the constitutional appeal with the Constitutional Court) and thus adopt a new individual act eliminating the detrimental consequences caused by the prior court sentence or decision, which the Constitutional Court annulled; c) order the publication of important constitutional appeals in the Official Gazette. The Constitutional Court decision is binding on the court, whose individual act or action the Constitutional Court found to be violating or denying a person of his or her human or minority rights and fundamental freedoms, and shall be enforced in the manner specified by the Constitutional Court.

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<sup>31</sup> Article 82, paragraph 2, Law on the Constitutional Court

<sup>32</sup> Article 90, Law on the Constitutional Court

<sup>33</sup> Article 89, paragraph 2, Law on the Constitutional Court

**4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found- as a result of *a posteriori* and/or *a priori* review?**

There is no deadline within which the parliament has to adopt a new general legal act or specific provisions of general acts and thus fulfil its constitutional obligation once the Constitutional Court reaches a decision on the incompliance of a general legal act or specific provisions of a general legal act in *a posteriori* review proceedings.

The parliament's efficiency depends the most on the authorised propounder's efficiency in submitting the draft of the new general legal act and on the social and political circumstances, i.e. on what the majority of the Deputies think of the act, as well as on the realistic possibilities of including the new general legal act in the parliament agenda in view of its previously set priorities and obligations.

In an *a priori* review, the Constitutional Court reviews the text of the adopted law<sup>34</sup> which has not been promulgated by the President of the Republic yet. The purpose of this form of review is to prevent a law, found not to be in compliance with the Constitution, generally accepted rules of international law and ratified international treaties, from taking effect although it received a majority vote in parliament. The parliament, however, has no any obligation with respect to the outcome of the *a priori* review; its obligations to introduce the general legal act in the legal order do not go beyond its adoption of the text of the law.<sup>35</sup>

**5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.**

As already mentioned, neither the Constitution nor the laws lay down deadlines within which the parliament must eliminate the unconstitutional flaw i.e. adopt new general legal acts in accordance with the Constitutional Court decision on the incompliance of the prior general legal acts with the Constitution, generally accepted rules of international law, ratified international treaties or the law.

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<sup>34</sup> Exceptionally, an *a priori* review of decisions taken by the autonomous provinces may also be conducted at the request of the Government.

<sup>35</sup> The Constitutional Court has not been asked to conduct *a priori* reviews yet. The reasons probably lie in the specific features of the proceedings and the requirements that this form of review entails: such reviews are conducted once the law is adopted but before it is promulgated by the President of the Republic at a reasoned request by at least one-third of the Deputies; the proceedings must be conducted before the Constitutional Court within seven days; in the event the Court fails to rule on the constitutionality of the disputed law within the legal deadline, which is quite likely, the law may be promulgated, wherefore the exercise of this constitutional function by the Court becomes ineffective due to the overly short deadline within which it has to render a decision.

The Constitutional Court may invoke Article 105 of the Law on the Constitutional Court and highlight the importance and urgency of adopting a new general act to ensure constitutionality and legality. Its opinion, however, is not binding on the parliament<sup>36</sup>.

**6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

Given that Constitutional Court decisions are generally binding<sup>37</sup>, and everyone is obliged to respect and enforce them<sup>38</sup>, it follows that the legislature is not exempted from that obligation either. Accordingly, when the legislature is obliged to adopt a new legal solution instead of the one the Court declared unconstitutional<sup>39</sup>, the unconstitutional solution ought not to be adopted within another normative act of the parliament, given that it has been repealed by a Constitutional Court decision. There have, however, been instances of the parliamentary majority voting in a legal solution which the Constitutional Court had already declared unconstitutional.

For instance, in the case *IY-28/2006* regarding the review of the constitutionality of the provision in Article 10 of the Law Amending the Law on Judges,<sup>40</sup> the Court found that the legislator “again incorporated the disputed provision in the Law on Judges... only one year after the previous provision of the Law on Judges ceased to be effective under Constitutional Court decision *IY-122/2002* of 11 February 2003...” In the 2006 review proceedings, the Court again repealed the provision and indicated that the legislator not only violated the constitutional principles on the separation of powers and the independence of the judiciary, but also the provisions of Article 171 of the Constitution under which everyone is obliged to respect and enforce the Constitutional Court decisions. This provision has not been applied since that Court decision was published.

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<sup>36</sup> See the Letter to the National Assembly on the review of constitutionality in case *IY3-62/2009*, in which the Court indicated the problem of the legal lacunae (legal gap) in the National Assembly Rules of Procedure regarding the regulation of the rights of the Deputies; See the Letter to the National Assembly on the review of the constitutionality of Article 8 of the Law on Rehabilitation, *IY-33/2008*, in which the Court indicated the need to amend the law, i.e. regulate the issue of the right to compensation of damages and restitution of confiscated property to the rehabilitated persons, and regulations on the procedure for establishing a person’s right to rehabilitation and compensation of damages; See the Letter to the National Assembly on the review of constitutionality in case *IY-409/2005*, in which the Court indicated the need to urgently bring into conformity with the 2006 Constitution of the Republic of Serbia the Law on Administrative Disputes and a number of other laws precluding the possibility of initiating proceedings to settle administrative disputes. Soon afterwards, on 29 December 2009, the National Assembly adopted a new Law on Administrative Disputes (published in the Official Gazette of the Republic of Serbia, No 111/2009), which is in conformity with Article 198, paragraph 2, of the Constitution and provides for administrative proceedings aimed at reviewing the legality of final individual acts on rights, obligations or legally vested interests in all cases unless another form of judicial protection is stipulated by the law.

<sup>37</sup> Article 166, paragraph 2, Constitution of the Republic of Serbia

<sup>38</sup> Article 171, paragraph 1, Constitution of the Republic of Serbia

<sup>39</sup> It should be borne in mind that sometimes there is no need to adopt new normative acts or specific provisions instead of the repealed ones.

<sup>40</sup> Official Gazette of the Republic of Serbia, No. 44/04

**7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?**

Pursuant to Article 171, paragraph 1, of the Constitution, state and other authorities, organisations exercising public functions, political parties, trade unions, associations of citizens and religious communities are obliged to respect and enforce Constitutional Court decisions.

The Constitution<sup>41</sup> also vests the Constitutional Court with the power to issue a special ruling regulating the manner in which its decision will be enforced. This Court ruling is binding.

Pursuant to Article 104 of the Law on the Constitutional Court, the Government shall if necessary ensure the enforcement of the Constitutional Court decisions either directly or via a competent state administration authority in the manner laid down in the Constitutional Court ruling.

The Law on Proceedings before the Constitutional Court and the Legal Effectiveness of its Decisions<sup>42</sup>, which had been in force before the present Law on the Constitutional Court, laid down that anyone “in a state or another authority or another legal person who fails to enforce a Constitutional Court decision” shall be held criminally responsible and punished by a fine or maximum six months’ imprisonment<sup>43</sup>. The current Law on the Constitutional Court does not include the provision on criminal responsibility that existed in the prior law.

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<sup>41</sup> Article 171, paragraph 2, Constitution of the Republic of Serbia

<sup>42</sup> Official Gazette of the Republic of Serbia, No. 32/91

<sup>43</sup> Article 65 of the Law on Proceedings before the Constitutional Court and the Legal Effectiveness of its Decisions (Official Gazette of the Republic of Serbia, No. 32/91)