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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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The Constitutional Court of Montenegro*

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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?**

President and judges of the Constitutional Court of Montenegro are appointed and revoked by the Parliament of Montenegro. The Constitution of Montenegro stipulates four grounds¹ for revocation of the president and judges of the Constitutional Court: 1) prior to the expiry of the period for which he/she was elected, at his/her own request; 2) when he/she fulfils the requirements for age pension; 3) if he/she was sentenced to an unconditional imprisonment sentence and 4) by release from duty.

The President or a judge of the Constitutional Court shall be released from duty if he/she has been found guilty of an offence that makes him/her unworthy of the duty, if he/she permanently loses the ability to perform the duty or if he/she expresses his/her political convictions in public.

The Constitutional Court shall establish the emergence of the reasons for cessation of duty or release from duty in its session and it shall inform the Parliament of that case. If the criminal procedure is initiated against the president or a judge of the Constitutional Court, the Court may decide that they are suspended for the period of duration of that action.

The Law on Constitutional Court² stipulates the details of establishing reasons for the release from duty.

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

Financial resources for the work of the Constitutional Court are provided from the special allocation of the budget of Montenegro. The Constitutional Court proposes the allocation of annual budget for the work of the Constitutional Court and submits it to the Government of Montenegro³.

Ministry of Finance prepares the draft state budget. The Government of Montenegro reviews the draft budget and the Parliament of Montenegro adopts the budget for all spending units, including the Constitutional Court of Montenegro.

¹ Article 154

² Official Gazette of Montenegro, No. 64/08

³ Article 90, Law on the Constitutional Court of Montenegro

The President of the Constitutional Court can take part in the session of the Parliament discussing the proposed budget of Montenegro⁴.

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?

The Parliament of Montenegro adopts the Law on the Constitutional Court of Montenegro which sets forth the organization of the court, the procedures before this court and other issues pertaining to the work of the Constitutional Court.

The Constitutional Court does not take part in the procedure of proposing and enacting the Law.

The Constitutional Court exercises its competencies⁵ ensuing from the Law on the Constitutional Court, adopts the rules of procedure independent from any authority and the rules define the method of work and passing decisions, relations with public and international legal cooperation, professional advancement and other issues relevant for the work of the Court.

The Parliament cannot amend the Rules of Procedure of the Constitutional Court of Montenegro.

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

Yes.

As a part of its nine lines of competence, the Constitutional Court reviews the conformity of a law with the Constitution and other ratified and published international treaties; reviews compliance of legislation and general acts with the Constitution and law i.e. the Court reviews the constitutionality and legality of laws, general acts and other regulations enacted by legislative and executive power.

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

The Constitutional Court reviews all bylaws for enforcement of laws and other general acts adopted by the Government of Montenegro (regulations, ordinances, decrees etc.). Besides that, the Constitutional Court decides about the conflict of competence between executive power (Government) and courts and units of local

⁴ Article 91, Law on the Constitutional Court of Montenegro

⁵ Article 5, Law on the Constitutional Court of Montenegro

self-government and reviews the conformity of measures and acts that the Government makes during the state of war or state of emergency⁶.

- 6. 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.**

The Constitution of Montenegro stipulates that on the day when the decision of the Constitutional Court is published in the Official Gazette of Montenegro, a law that was found not to be in conformity with the Constitution, confirmed and published international treaty as well as any other piece of legislation that is found not to be in conformity with the Constitution and the law shall cease to be valid. Law or other piece of legislation, or some provision that the Constitutional court found not to be in compliance with the Constitution and law do not apply to the relations created before the decision of the Constitutional Court was published provided that they were not irrevocably decided prior to that day⁷.

Consequently, the Constitution explicitly determines only the legal effects/validity of the decision of the Constitutional Court regarding the unconstitutionality of the law or unconstitutionality or illegality of some other legislation or some of their provisions.

Legal effect of the decisions of the Constitutional Court in its other functions is regulated by the Law on the Constitutional Court of Montenegro, defining the essence of every constitutional dispute/organic litigation.

Elimination of legal effects of unconstitutional or illegal act is subject to statutory limitation of time (six months from the day of publishing the decision in the Official Gazette of Montenegro), unless more than one year has passed between the delivery of an individual act and the submission of the request and only to the person who has submitted the proposal for establishing unconstitutionality or illegality⁸.

The competent authority whose decision has been repealed in the procedure for constitutional complaint has to decide within 30 days of the day when it receives the decision of the Constitutional Court to take note of it and adhere to the legal reasoning in the decision as well as to act in reasonable time⁹.

⁶ Article 149, paragraph 1 – items 2, 5 and 8 of the Constitution

⁷ Article 152, Constitution of Montenegro

⁸ Article 47, Law on the Constitutional Court of Montenegro

⁹ Article 57, Law on the Constitutional Court of Montenegro

The decision of the Constitutional Court in which a constitutional complaint has been upheld has its legal effect as of the day of its delivery to the participants in the proceedings¹⁰.

The decision of the Constitutional Court resolving the conflict of jurisdiction shall have legal effect from the date of its publication in the Official Gazette of Montenegro¹¹.

The decision banning the work of a political party or of a non-governmental organization shall be delivered to a political party or to a non-governmental organization in question and shall have legal effect from the date of serving of the decision of the Constitutional Court to the competent authority in charge of entry of a political party or a non-governmental organization in the registry¹².

The decision of the Constitutional Court annulling the entire electoral procedure or a part of it shall have legal effect as of the date of serving of the decision of the Constitutional Court to the competent authority¹³.

The proceeding of deciding on the violation of right during elections for the President of Montenegro, Mayor of the Capital City, mayor of the Old Capital and mayors gets legal effect as of the day when it is submitted to the competent authority¹⁴.

The proceedings deciding on compatibility with the Constitution of measures and actions of public authorities undertaken during the state of war and emergency have legal effects as of the day of serving the decision to the competent authority¹⁵.

¹⁰ Article 59, Law on the Constitutional Court of Montenegro

¹¹ Article 71, Law on the Constitutional Court

¹² Article 75, paragraph 2, Law on the Constitutional Court

¹³ Article 81, Law on the Constitutional Court

¹⁴ Article 85, paragraph 2, Law on the Constitutional Court

¹⁵ Article 89, Law on the Constitutional Court

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 Constitutional Court conducts prescribed procedure in administering all disputes related to the violation of legal order. As a part of abstract control of **constitutionality and legality**, the Constitutional Court looks into formal and material constitutionality i.e. legality of a regulations passed by all three powers. Abstract control includes the obligation of the Constitutional Court to consider also the law's compliance with international treaties in the procedure of constitutionality review and to implement appropriate international standards in its decisions.

The Constitutional Court also makes an abstract control of other regulations passed by executive power, public administration and local self-government.

Constitutional Court makes so called **concrete control of specific legal acts**. It protects human rights and fundamental freedoms in the proceedings upon the constitutional complaint. In this proceedings the Constitutional Court can repeal the ruling passed by regular courts in Montenegro, including the decisions of the Supreme Court as well as other individual acts passed by other competent body if it finds that such an act violates rights and freedoms of citizen concerned.

Besides, the Constitutional Court is competent for passing decisions on the violation of the Constitution by other branches of power (whether the President of Montenegro violated the Constitution etc.).

The Constitutional Court decides about the conflict of jurisdiction of state authorities of judicial and executive powers as well as the conflict of jurisdiction between authorities of local self government and units of local self-government.

2. Is the Constitutional Court competent to resolve such litigation?

Yes.

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

All public authorities: Parliament, Government, regular courts, authorities in local self-government and other state authorities.

- 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.**

The Constitutional Court in those litigations adjudicates all forms of “breaches of the Constitution” that were caused by unconstitutional law, regulation or other general or individual act.

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

The procedure before the Constitutional Court for the assessment of constitutionality and legality may be initiated by the court, other state authority, local self-government authority and five Members of the Parliament¹⁶.

The Constitutional Court itself may also initiate the procedure for the assessment of constitutionality and legality¹⁷.

Anyone who believes that his human right and freedom guaranteed by the Constitution was violated by an individual act of state authority, local self-government authority or legal person vested with public powers can lodge a constitutional complaint and it can be lodged by another person, based on his/her authorization as well as the Protector of human rights and freedoms who may, concerning complaint s/he has in work, lodge constitutional complaint provided that the complainant agrees with that¹⁸.

The procedure to determine whether the President of Montenegro has violated the Constitution shall be initiated by the Parliament, at the proposal of minimum 25 Members of the Parliament¹⁹.

The proposal to resolve a conflict of jurisdiction may be submitted by one or more conflicting authorities, as well as the person who is unable to exercise his rights due to the acceptance or rejection of jurisdiction, within 15 days as of the day of rejection or acceptance of jurisdiction²⁰.

The proceedings deciding to ban the work of a political party or a non-governmental organization shall be initiated by a proposal which, within their competences, may be submitted by: the Protector of human rights and liberties; the Council of Defense and

¹⁶ Article 150, paragraph 2 of the Constitution

¹⁷ Article 150, paragraph 3 of the Constitution

¹⁸ Article 49, Law on the Constitutional Court

¹⁹ Article 98, paragraph 3, Constitution

²⁰ Article 66, Law on the Constitutional Court

Security; state administration authority in charge of protection of human and minority rights; or state administration authority in charge of entry of a political party or a non-governmental organization in the registry²¹.

The proceeding of deciding on the violation of right during elections for the Members of Parliament and Municipal Delegates can be initiated by a voter, a candidate for a Member of Parliament or a Municipal delegate, as well as by the party/group that submitted the electoral list²².

The appeal initiating the proceeding for deciding on violation of right during referendum may be filed by a voter and authority calling the referendum²³.

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

The proceedings shall be deemed initiated on the date of the submission of the proposal to the Constitutional Court, or on the date of issuance of a ruling of the Constitutional Court initiating proceedings²⁴.

By a ruling, the Constitutional Court can²⁵:

- determine that the law, or some of its provisions, do not comply with the Constitution and with ratified and published international treaties, or that at the time when it was in force they did not comply with the Constitution;
- determine that another regulation, or some of its provisions, do not comply with the Constitution and law, or that at the time when it was in force the same did not comply with the Constitution and law;
- determine the existence of the violation of human rights and freedoms guaranteed by the Constitution;
- determine whether the President of Montenegro violated the Constitution;
- resolve the conflict of jurisdiction;
- ban the work of a political party or of a non-governmental organization;
- adopt an appeal on violation of the rights during the elections or during the referendum;
- decide upon the compatibility with the Constitution of measures and actions of public authorities undertaken during the state of war and emergency;
- reject: a proposal for determination of unconstitutionality and illegality; a proposal for determination whether the President of Montenegro violated the Constitution; a proposal for ruling of the conflict of jurisdiction and a proposal for the ban of the work of a political party or of non-governmental organization;
- decide upon the constitutional complaint and appeal.

²¹ Article 72, Law on the Constitutional Court

²² Article 76, paragraph 1, Law on the Constitutional Court

²³ Article 84, paragraph 1, Law on the Constitutional Court

²⁴ Article 39, Law on the Constitutional Court

²⁵ Article 32, Law on the Constitutional Court

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

The decision of the Constitutional Court can repeal any act (cassation). It puts an end to a constitutional dispute and eliminates an unconstitutional regulation from the legal order, it eliminates violation of human rights and freedoms of citizens, resolves the dispute over jurisdiction, determines whether the President violated the Constitution, decides about banning a political party or non-governmental organization, determines if there was a violation of law in the course of elections etc.

From the standpoint of its temporal effect, the decision of the Court by which it repeals an act has the *ex nunc* effect, and exceptionally the *ex tunc* effect; while regarding the parties to the proceedings in constitutional dispute it has *erga omnes* or *inter partes effect*.

Constitutional Court can order to stop the enforcement of an individual act or actions that have been taken on the basis of the law, other regulation or general act, the constitutionality, i.e. legality of which is being assessed, if the enforcement thereof could cause irreparable damage²⁶.

Exceptionally, the Constitutional Court in the course of the proceeding may order the suspension of the enforcement of an individual act until taking the final decision, at the request of the complainant, if complainant demonstrates that enforcement will cause irreversible detrimental consequences²⁷.

Example – procedure before the Constitutional Court

The procedure on deciding about ban on the work of a political party or a non-governmental organization, participants in the proceedings and the legal effects of the decision of the Constitutional Court have certain specifics compared to the review of constitutionality and legality of general legal acts.

The Constitution of Montenegro prescribes that the Constitutional Court performs institutional control of the unconstitutionality of the activities of political parties and non-governmental organizations as a part of two competencies that the Court has: deciding about ban to political party or non-governmental organization and reviewing the legality of general acts.

The procedure of deciding about the prohibition of the work of political party or non-governmental organization is initiated by relatively small number of qualified initiators, that is by: the Protector of Human Rights and Liberties; the Council of Defense and Security; state administration authority in charge of protection of human

²⁶ Article 150, paragraph 3, Constitution of Montenegro

²⁷ Article 52, paragraph 2, Law on the Constitutional Court

and minority rights; state administration authority in charge of entry of a political party or a non-governmental organization in the registry.

The proposal requesting the ban to the work of political party or non-governmental organization has to specify the prohibited activity and/or the facts and circumstances of unconstitutional activity that can be reason to ban the work of a political party or non-governmental organization.

The Constitutional Court may ban the work of a political party or of a non-governmental organization if their activities are directed or aimed at: 1) violent destruction of constitutional order (aimed at violent destruction of constitutional order or infringement on the territorial integrity of Montenegro), 2) violation of human rights and freedoms or instigating of racial, religious and other hatred and intolerance.

When the Constitutional Court bans the work of a political party or of a non-governmental organization, that political party or non-governmental organization shall be erased from the register.

All general acts adopted by a political party or non-governmental organization can be the subject of constitutional-judicial review if the party/organization has been registered in compliance with the law.

In the review of constitutionality and legality of general acts of political party or non governmental organization, the Constitutional Court applies general procedure of normative review and the Court took stand that provisions of acts of political party which define internal relations between bodies of that party and define relations among its members should not be subject to constitutional judicial review.

If the Constitutional Court finds that the acts of the party are not compliant with the Constitution and the law, political party shall be deleted from the register²⁸.

*Practice*²⁹

1. Deciding about the proposal of the Minister of Justice in 1991, the Constitutional Court repealed provisions of the statutes of three political parties which prescribed that any citizen can become a member of the party provided s/he is over 15 i.e. younger than 18 on the ground that this provision is in conflict with the provision of the Article 14 of the Law on Citizen Associations that stipulates that only persons over 18 can become member of a party. The Constitutional Court found that political party is entitled to prescribe special conditions under

²⁸ Article 18, paragraph 2, item 1 of the Law on Political Parties (Official Gazette of the RoM, 21/04)

²⁹ 1. Decision U 114/91 dated June 25, 1993; U 20/93 dated December 15, 1993; U 87/93 dated December 8, 1993; U 87/93 dated April 27, 1994; 2. Order: U 42/97 dated February 26, 1998; U 17/00 dated January 23, 2001; 3. Order: U 90/02 dated December 20, 2002.

which a citizen can become a member of that very organization but that such terms and conditions cannot change the statutory conditions that members of each and every political organization have to observe.

2. Constitutional Court deliberated in several cases and did not uphold the initiative for the review of general acts of political parties about their internal organization and relations between bodies and members of those organizations since the Court found that the freedom of political association, as pledged by the Constitution, is based on the volunteerism and that is why any political party is free to independently regulate all relations within its party.
3. In 2002 the Constitutional Court turned down the initiative of the Ministry of Justice to review constitutionality and legality of the acts of one association since it found that the association was not registered into the register of NGOs kept by the Ministry of Justice i.e. that the association does not exist as a legal entity and therefore the disputed acts do not legally exist.

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

The decision of the Constitutional Court shall be generally binding and enforceable. When necessary, at the request of the Constitutional Court of Montenegro, the Government of Montenegro³⁰ secures the enforcement of the decision of the Constitutional Court and pays for that from its budget.

Example: The Constitutional Court has requested the Government to execute the decisions of the Court only twice.

1. The first case concerned the execution of the order of the Court to stop the execution of individual acts and actions based on the General conditions of the Distribution of Electricity. The Court issued such order after it initiated constitutional and legal review of this general act as the Public Electricity Enterprise (EPCG) kept applying that act in relation to collecting payments for electricity bills. In the Act U 39/93 dated July 19, 1993 the Constitutional Court requested the Government to take appropriate measures so as to provide enforcement of that decision of the Court.
2. The other case concerned execution of the decision 18/94 in which the Court upheld the constitutional complaints of the workers in the Culture, Information and Documentation Centre "INDOC" in Tivat by which decision the Court revoked the Decree of the President of the Municipal Council of Tivat on introducing extraordinary measures in this institution. The Government, through its competent agencies, ensured the execution of the Decision of the Constitutional Court.

³⁰ Article 151 paragraph 3 of the Constitution

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*.

The decisions of the Constitutional Court are generally binding, enforceable and final. The decisions of the Constitutional Court are binding which means that before it is published no one can invoke law, or other general or individual act that was found to be unconstitutional or illegal.

The decisions of the Constitutional Court are enforceable which means that state and other authorities within their scope of competence are bound to enforce decision of the Constitutional Court. If they fail to do so, they will be criminally sanctioned for – failure to enforce a decision³¹.

The Constitutional Court's decision is final, which entails that there are no legal remedies that can contest its decisions and there can be no further deliberations about it. The Constitution does not allow for remedy against the decision of the Court in which it repeals a piece of legislation after such decision is published or served to the participants in the proceeding.

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.

Effect of the decision of the Constitutional Court *vis a vis* a law or provision that was found to be incompliant with the Constitution has preventive, suspending and revising effect.

In that aspect, the effect of the Constitutional Court's decisions entails that it is prohibited to apply the law that has been invalidated relevant to future legal relations but also to those that were made before the day when the decision of the

³¹ Article 395, paragraph 1 of the Criminal Court (Official Gazette of the RoM, 70/03, 13/04m 47/06 and the Official Gazette of Montenegro No. 40/08 and 25/10)

Constitutional Court is published, unless they have been finally settled.³² In this way the decision of the Constitutional Court has a limited effect – *ex tunc* but also the preventive effect because the execution of final and irrevocable individual acts adopted on the basis of the regulations that cannot be applied cannot be allowed or enforced and if the enforcement has started, it shall be suspended.

The decision of the Court also suspends the irrevocability clause of individual acts with the view to eliminate its incompliance with the Constitution.

For the purpose of reparation anyone whose right was violated by a final or legally binding individual act, enacted based on law or other regulation which has been, at its own initiative found by the Constitutional Court to be incompatible with the Constitution, with ratified and published international treaties shall have right to request the competent authority to amend that individual act.³³, provided that s/he lodged the request for amendment of the final or irrevocable act within six months of the day when the decision of the Constitutional Court was published in the Official Gazette of Montenegro and provided that between one year has not elapsed between the delivery of the individual act and the submission of the request. These conditions are cumulative and if any of these conditions have not been met it can give a competent authority the reason to turn down the request for amendment of the individual act.

- 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?**

Yes.

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

No such cases.

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

There is no such possibility.

³² Article 46, Law on the Constitutional Court

³³ Article 47, Law on the Constitutional Court