

FORUM OF BALKAN CONSTITUTIONAL COURTS

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Individual approach to constitutional legal justice with special reference to control of constitutionality and legality

The Constitutional Court in Montenegro has six decades long tradition. Its competences and authorities have changed in time, in accordance with the changes in the system.

Today, the Constitutional Court has nine competences, within which it resolves all forms of „breaching the Constitution“, among which there are constitutional –legal disputes that are not typical „constitutional disputes“.

Competences of the Constitutional Court of Montenegro are defined by the provisions of Article 149 paragraph 1 of the Constitution of Montenegro, so that the Constitutional Court rules:

- on compliance of the law with the Constitution and ratified and published international treaties;
- on compliance of other regulations and general acts with the Constitution and the law;
- on constitutional appeal due to the violation of human rights and freedoms guaranteed by the Constitution, after having exhausted all efficient legal remedies;
- if the President of Montenegro has violated the Constitution;
- on conflict of competences between the courts and other state authorities, between the state authorities and authorities of local self-government units and between the authorities of local self-government units;
- on banning the work of a political party or a non-governmental organization;
- on election disputes and disputes in connection with the referendum that are not under the competence of other courts;
- on compliance of measures and actions of state authorities taken during the state of war and state of emergency with the Constitution;
- does other tasks laid down by the Constitution.

I – Control of legality of the law and constitutionality and legality of other regulations and general legal acts

Grading of constitutionality or legality of general legal acts, so called normative control, is the basic competence of the Constitutional Court. It is the subsequent control of the constitutionality of the law, that is, constitutionality and legality of all other regulations and general legal acts. Almost all general legal acts (with the exception of acts having the power of constitution) within the legal order are subject to control of constitutionality and legality, as well as those that have become invalid during the procedure for grading their constitutionality and legality before the Constitutional Court, if the Constitutional Court establishes that consequences of their application have not been remedied.

The procedure for grading the constitutionality or legality of a general act shall be initiated by a proposal of authorized proposer. The authorized proposers are the court (ordinary), other state authority, local self-government authority and five deputies. Also, the procedure for grading the constitutionality or legality may be initiated by the Constitutional Court independently. Any legal entity and natural person (*actio popularis*) shall have the right to file the motion for initiating the procedure

The proposal for grading compliance of the law with the Constitution and ratified and published international treaties, that is, other regulations and general acts with the Constitution and the law may be filed by:

- 1) ordinary court, especially if within the procedure being conducted the issue is raised of compliance of the law, i.e. other regulation or general act to be applied in the procedure before the court, with the Constitution and ratified and published international treaties, that is, with the Constitution and the law;
- 2) other state authority if it is the matter of the law, or other regulation or general act applied by that authority in its work;
- 3) local self-government authority if it is the matter of the law, i.e. other regulation or general act governing the issues pertaining to the local self-government;
- 4) five deputies.

In case when the proposal is filed by an ordinary court, the judge or the president of the panel of judges will stop the procedure and initiate the procedure for grading constitutionality, that is, constitutionality and legality of the respective regulation before the Constitutional Court and notify the President of the court thereof, who shall notify the President of the Supreme Court of Montenegro.

In the procedure before the Constitutional Court initiated by the ordinary court, the Constitutional Court shall rule within 45 days following the filing of a proposal, at the latest.

The Constitutional Court may on its own initiate the procedure for grading the compliance of the law with the Constitution and ratified and published international treaties, i.e. of other regulation and general act with the Constitution and the law, especially when:

- during the procedure upon the constitutional appeal the question is raised on compliance of the law with the Constitution and ratified and published international treaties or on compliance of other regulation and general act with the Constitution and the law, on the basis of which the individual act which is the subject of constitutional appeal has been adopted, or when

- during the procedure for grading the compliance of the law with the Constitution and ratified and published international treaties or of other regulation and general act with the Constitution and the law the question of constitutionality is raised, that is, question of legality of other provisions or other regulations in connection with the provisions which are the subject of grading.

The request for initiating the procedure for grading compliance of the law with the Constitution and ratified and published international treaties or of other regulation and general act with the Constitution and the law may be filed by any natural person and legal entity, as well as any organization, settlement, a group of people and other forms of organization without the capacity of legal entity, which do not have to have direct legal interest in filing the request.

The proposal, that is, the request for grading the compliance of the law with the Constitution and ratified and published international treaties or of other regulation and general act with the Constitution and the law should contain: name of the law, or other regulation or general act, designation of the contested provision, name and number of the "Official Gazette of Montenegro" in which it is published, reasons the proposal or the initiative are based on, as well as other data of significance for grading the constitutionality and legality.

If the regulation whose constitutionality, i.e. legality is contested has not been published in the "Official Gazette of Montenegro" a copy of that regulation shall be attached to the proposal, i.e. initiative, as a rule.

The proposal, that is, initiative, may be filed until the law, that is, other proposal or general act are in force.

It is a general constitutional principle that the Constitutional Court exercises control of constitutionality (and legality) only concerning the normative acts which are within the legal order, that is, which came to force and are valid at the moment of initiating the procedure for grading their constitutionality, that is, legality. However, the Court may grade the compliance of the law with the Constitution, that is, of other regulation and general act with the Constitution and the law after the termination of their validity, if they ceased to be effective during the procedure for grading the constitutionality and legality, and consequences of their application have not been remedied

(decision of the Constitutional Court on compliance of the law, other regulation or general act during the period of their validity).

In the procedure for grading the compliance of the law with the Constitution and ratified and published international treaties, that is, of other regulation and general act with the Constitution and the law, the Constitutional Court is not limited by a proposal, that is, initiative. It means that the Constitutional Court, even when the authorized proposer, that is, initiator withdraws the proposal, that is, initiative, may continue the procedure for grading the constitutionality or legality, if it finds that continuation of the procedure is founded.

During the procedure and at the request of the legislator of the contested general act, the Constitutional Court may, before making the decision on constitutionality or legality, stop the procedure and give opportunity to the legislator of the general act to remedy the observed unconstitutionality or illegalities within the given period. If unconstitutionality or illegality is not remedied within the specified period, the Constitutional Court will continue the procedure.

The Constitutional Court may order during the procedure to suspend the execution of an individual act or action until the adoption of final decision, at the request of the one filing a proposal or initiative, if the one filing a proposal or an initiative makes occurrence of irremediable harmful consequences certain. This measure will last until the closure of the procedure at latest, and may be even shorter, if during the procedure the Constitutional Court decides that reasons of its application (suspension) due to the changed circumstances have stopped: in that case, the Constitutional Court will abolish the measure of suspension of execution of individual act, that is, action. The request for suspending the execution of an individual act, that is, action, the Constitutional Court will dismiss when adopting the final decision.

If due to the termination of validity of the law which the Constitutional Court has established being incompliant with the Constitution and ratified and published international treaties, that is, due to the termination of validity of other regulation and general act which the Constitutional Court established being incompliant with the Constitution and the law, on the day of publishing the decision of the Constitutional Court a legal gap would happen, the Constitutional Court in its decision will determine the date of publishing the Decision in the Official Gazette of Montenegro that cannot be longer than three months following that of making the decision and notifies the competent state authorities and public thereof on website, and delivers the Decision to the parties to the procedure.

If until the date determined in the decision, the law conforms to the Constitution and ratified and published international treaties, that is, other regulation and general act with the Constitution and the

law, the Constitutional Court reviews if consequences of enforcement of that law, other regulation or general act have been remedied.

If the Constitutional Court establishes that consequences of enforcement of the law, other regulation and general act have been remedied, it will not publish the decision and the procedure will be suspended

If the Constitutional Court establishes that consequences of enforcement of the law, other regulation and general act have not been remedied, it will publish the decision in the Official Gazette of Montenegro.

Decision of the Constitutional Court will be published in the Official Gazette of Montenegro, as well as in the manner in which the act of whose constitutionality or legality it has been ruling was published. Legal consequences of the decision are connected to the moment of publishing the decision of the Constitutional Court in the Official Gazette of Montenegro. Namely, the Constitution stipulates that on the day of publishing the decision of the Constitutional Court in the Official Gazette of Montenegro the law which has been established as incompliant with the Constitution and ratified and published international treaties, i.e. other regulation or general act which has been established as incompliant with the Constitution and the law shall cease to have effect. It is also established that the law or other regulation, i.e. individual provisions which by the decision of the Constitutional Court were incompliant with the Constitution and the law, cannot apply to the relations set up before publishing the decision of the Constitutional Court if they have not been validly resolved by that date.

Decisions of the Constitutional Court are mandatory and enforceable. State authorities, state administration authorities, local self-government authorities, local administration, legal entities and other entities exercising public authorities shall, within their jurisdiction, execute the decisions of the Constitutional Court, and their execution, when needed, shall be provided by the Government of Montenegro.

The Decision of the Constitutional Court in the field of abstract control of constitutionality and legality of general legal acts has the character of *res judicata* and generates legal consequences to all (*erga omnes*). It will end the constitutional dispute and remove the unconstitutional regulation from the legal system. From the point of view of time element – the repealing decision of the Constitutional Court has the effect of *ex nunc*, exceptionally of *ex tunc*.

The execution of final individual acts adopted on the basis of the law, other regulation or general act, that is, of their individual provisions, which by the decision of the Constitutional Court have been established as inconsistent with the Constitution and ratified and published international treaties, that is, with the Constitution and the law cannot be allowed or implemented, and if the execution has started, will be suspended.

Moreover, anyone whose right has been violated by final or valid individual act, adopted on the basis of the law or other regulation and general act for which by the decision of the Constitutional Court it has been established that it has not been and is not in compliance with the Constitution, ratified and published international treaties or the law, shall be entitled to ask the competent authority to amend that individual act, if that amendment does not affect the rights of conscientious third parties. Proposal for amending the final or valid individual act may be filed within six months following that of publishing the decision in "Official Gazette of Montenegro". When determining the above deadline the law maker has obviously took a stand that "in case of a conflict" two basic principles of the rule of law – principle of legal certainty and principle of constitutionality and legality – has to a certain extent take care of the principle of legal certainty and should not go back in the past when remedying consequences of unconstitutionality, that is, illegality.

The Constitutional Court may, by the decision establishing that the law or other regulation and general act is not compliant with the Constitution, ratified and published international treaty or the law, determine the method of indemnity for all persons whose right has been violated by final or valid individual act adopted on the basis of that law or that regulation, irrespective of whether they have filed the initiative for grading the compliance of the law or other regulation and general act with the Constitution, ratified and published international treaties or the law.

II – Control of constitutionality of ratified and published international treaties

The Constitution of Montenegro of 2007 for the first time explicitly establishes that "ratified and published international treaties and generally accepted rules of the international law are an integral part of the interior legal order; that they have precedence over local legislation and are directly enforced when they regulate relationships different from the interior legislation".

Also, in a part of the Constitution dedicated to constitutionality and legality it is established that the law must be compliant with the Constitution and ratified international treaties and that other regulation must be compliant with the Constitution and the law. The competence of the Constitutional Court, in the field of abstract control, is therefore extended to ruling on the compliance of the law with the Constitution and ratified and published international treaties.

This competence includes the obligation of the Constitutional Court, in the procedure of ruling on the constitutionality of the law, to also review its compliance with the international treaties and also to implement appropriate international standards in its decisions.

From language and legal meaning of these provisions it arises that the international treaty by its legal effect is above the law, that is, that ratified and published international treaties and generally accepted rules of international law have stronger legal effect than the law and are immediately after the Constitution by their legal effect.

Legal consequences of the law which is incompliant with the international treaty are the same as consequences of incomppliance of the law and other regulation with the Constitution of Montenegro. That law ceases to be valid on the date of publishing the decision of the Constitutional Court.

When speaking about the grading of constitutionality of ratified and published international treaties, it is undisputed that the law ratifying international treaty may be subjected to control. However, the question is raised if the Constitutional Court grades only formal or, again, also the substantive constitutionality of the law ratifying international treaty. If grading its substantive constitutionality, the Constitutional Court would also have to grade the provisions of international treaty which in norm technical regard make an integral part of the law on ratification. Thereat, on one side, legal nature and character of international treaty as legal act would have to be taken into account, then method of drawing conclusions, method of executing obligations assumed by that treaty, as and how they change, and on the other side, the character (general commitment, enforceability and finality) and effect (*erga omnes*) of the decisions of the Constitutional Court which are establishing the incomppliance of a lower legal act – in this case of ratified international treaty with the higher legal act –in this case the Constitution.

Starting from the above, and especially from the provisions of the Constitution of Montenegro, the Constitutional Court in the former practice, in its multiple decisions or orders, expressed its view that the Constitutional Court, in the procedure of grading compliance of the law with the Constitution may only grade the formal constitutionality of the law ratifying international treaty, that is, the procedure of its adoption, and not the contents of the contract. Provisions of the ratified and published international treaties (agreements) are beyond the constitutional judicial control since the Constitution does not have the legal basis for grading the substantive legal contents of an international treaty, as an integral part of the law, with the Constitution.