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CONSTITUTIONAL COURT OF SERBIA
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P A P E R

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The example of the practice of the Constitutional Court of Serbia

I.

The topic set for this Conference, which is therefore the topic of this paper, implies the notion of the ordering of things, i.e. it entails the necessity to view the position of the Constitutional Court in the legal system of the Republic of Serbia. In other words, let us look back, after 45 years, on its role and significance in the contemporary legal-constitutional system of the Republic of Serbia regarding the rights and freedoms of its citizens, as well as regarding the faith in the rule of law, and the effect of law in general.

With the Constitution of 2006 , the Republic of Serbia made a significant turn in its constitutional ordering and turned fully towards the experiences and positively affirmed postulates of constitutional order of developed European states, based on the principle of division of powers, rule of law, and equality of citizens, whose fundamental human rights and freedoms are guaranteed by the highest norms of national and international law, and are protected by numerous institutions that monitor their realization. The role of the Constitutional Court of Serbia is primarily determined by the functions vested by the Constitution, alongside with the significance established by these competences. It is an autonomous and independent state body which protects "constitutionality and legality" as well as "human and minority rights and freedoms"; the Court's decisions are "final, enforceable and generally binding". Furthermore, the Constitution stipulates which constitutional-legal cases are decided by the Constitutional Court, what the subjects of those cases are, what procedures are held before the Court and who may institute them, as well as who may request a proceeding, and to what extent the Court is available to the citizens.

The list of the Court's competences includes: 1) procedures on compliance of laws and other general acts with the Constitution; 2) procedures on compliance on ratified international treaties with the Constitution; 3) procedures on compliance of general acts with generally accepted rules of the international laws and ratified international treatises; 4) procedures on compliance of general acts with the law; 5) procedures on conflicts of competences; 6) electoral disputes for which the court competence has not been prescribed by the Law; 7) procedures on protection of territorial autonomy; 8) procedures on protection of local self-government units; 9) disputes on the constitutionality and legality of general acts and on the banning of a political party, trade union, civic association and religious communities; 10) procedures of determining a violation of the Constitution in a procedure of dismissing the President of the Republic; 11) procedures on constitutional appeals; 12) procedures on other appeals stipulated by the Constitution and the Law; etc. The list of competences also shows the significance of the issues dealt with by the Constitutional Court. The performance of these obligations leads to various roles of the Constitutional Court in the life of contemporary Serbia as a legal state. By judging constitutionality and legality performed by the Constitutional Court, the legal system of the Republic of Serbia is coordinated and 'harmonized' in the widest sense. Issues of electoral disputes, violations of the Constitution by the highest state personnel, banning political parties, associations and religious communities, as well as deciding on disputes on competence, are issues with a notable political significance and therefore very delicate. Consequently, deciding on such cases the Court contributes "to maintaining the necessary social and political peace in the country." Procedures on the relationship of the state and autonomous provinces and local self-government units are issues with a distinct political substance. Deciding on constitutional and other appeals means vesting the Constitutional Court the role

of 'the main guarantor' in protecting human rights and freedoms through controlling legal acts and actions of judicial power, as well as assessing the extent to which judicial power complies with the Constitution, primarily in the sections regarding human rights and freedoms.

Today, the Constitutional Court of Serbia is one of the courts with the widest and most varied competences in the family of European constitutional courts. It is a court that conducts over 20 different procedures. Not undervaluing the importance of any of the above-mentioned competences of the Court, in this paper we shall refer to only two of them, which we consider specific: the control of compliance of ratified international treaties with the Constitution, and preliminary control of the compliance of laws with the constitution (a priori control). On their example, we shall try to point out the following: the position of the Constitutional Court, and its role when disputes occur on which the Court has to decide while acting in compliance with its competences, as well as how the Court 'moves' between the Constitution on one end – being the supreme legal act to be obeyed by everyone in a legal state – and politics on the other end, occurring in the form of laws or international treaties; also, what will the Court be conducted by while assessing whether the executive and legislative bodies have been 'moving' within the Constitution on course of performing their role in establishing social relations or conducting foreign affairs. At first sight, the answer may seem easy, but in fact it is not.

A question arises both in theory and in practice: is the Constitutional Court, in performing its competences, a purely 'judicial body' which 'judges' based on the Constitution, or it is the bearer of the constitutional (or state) control of the legislative and executive power as a political power which establishes (assesses) whether those bodies have acted within the Constitution, i.e. the Law, on course of bringing acts and performing politics?

1. Control of Compliance of Ratified International Treaties with the Constitution

In a modern constitutional state, the emphasis of its constitution is placed on establishing and maintaining the unity and harmony of its legal system. On one hand, it is done with a precisely established hierarchy of legal norms of the country, which stem from the constitution itself and must be in compliance with, but also via a clearly established relation of domestic and international laws. On the other hand, this is provided by establishing an institutionalized system of control and the control of thus established relations between legal acts in the legal system. The framer of the Constitution of the Republic of Serbia has done so: firstly, by the provisions of Art. 16 of the Constitution (which are in the rank of fundamental constitutional principles), establishing that "generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system of the Republic of Serbia"; secondly, by provisions of Art. 194 and 195 of the Constitution of Serbia, according to which the Constitution is the supreme legal act in this system, while the ratified international treaties are directly subsequent to the Constitution, but above the Law; thirdly, by establishing the principle of direct application of the Constitution, as well as generally accepted rules and ratified international treaties; fourthly, with the provisions of Art. 167 of the Constitution establishing the competences of the Constitutional Court as an autonomous and independent state body which shall protect constitutionality (and legality).

The Constitution of Serbia of 2006 extends the normative control, as a classical function immanent to the Constitutional Court, to its farthest limits. Performing this function, the Constitutional Court is vested a significant role in the harmonization of both domestic and international laws. However, in the law it is not sufficient to grant competence for the realization of a certain aim. Success primarily depends on the efficiency of the instruments by which the given competence shall be realized and the manner of its enforcement. Talking about the assessment of "constitutionality" of international treaties, it seems that the framer of the Constitution has made this competence of the Constitutional Court disputed on many grounds.

The key question regarding the control of the constitutionality of international treaties that has been brought before the Constitutional Court is when should (and shall) the Court practice control on compliance of an international treaty with the Constitution. Is it merely subsequent control (a posteriori), which would linguistically derive from the provision of Art. 167 par. 1.2 of the Constitution, or this control can be (and shall be) preliminary control (a priori)? Subsequently, a major question arises: what is the character and effect of the decisions of the Constitutional Court reached in this dispute, as regards to the general stipulation of the Constitution that the decisions of the Constitutional Court are "final, enforceable and generally binding" and that they have a cassatory effect.

If the subsequent control of compliance of ratified international treaties with the Constitution were the kind of control that the Constitution presupposes in the case of controlling the compliance of the law with the Constitution (with a cassatory effect of its decisions), then another matter comes into question: whether a state can refer to the decision of its constitutional court in case of not fulfilling its international obligations, by which noncompliance with the accepted international obligations with the national constitution has been established. In the absence of more accurate constitutional solutions, the answer to this question should be addressed referring to Art. 27 of the Vienna Convention, from which unambiguously follows that rules of international law regarding

the procedure of concluding international treaties are binding upon the parties (states), and "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Art. 11 of the Vienna Convention establishes means of expressing consent to be bound by a treaty on concluding a treaty and consenting to international obligations, i.e. expressing the consent to such treaties, for instance: by ratification, exchange of instruments constituting a treaty, signature, acceptance, approval, accession, or any other means. These instruments, which are also recognized by Serbian legislation on concluding international treaties, have been established so that competent state bodies of each party would previously scrutinize and examine the overall circumstances in the domestic legal system as regarding the procedure (proceedings) of concluding a treaty on one hand. On the other hand, a party should examine clearly and fully all the solutions that constitute the contents of the treaty itself from the standpoint of established relations in the internal legal system. All this is demanded exactly with the aim to raise the security and certainty in the process of contracting and consenting to international obligations, and subsequently to performing them. Consequently, expressing the consent to an international treaty by the National Assembly, as the supreme representative body of the state, is an expression of will of the Serbian state to fully take over and perform the obligations consented to in the ratified international treaty. When a state freely expresses its will regarding the obligations established in an international treaty, what remains is its obligation to "perform the treaty in good faith, according to the rule pacta sunt servanda".

Considering the provisions of the constitution of Serbia on constitutional-judicial control of international treaties, the strict performance of normative control of ratified international treaties a posteriori according to the model of control of the constitutionality of an internal law could lead to the fact that the necessity of assessing the compliance of international treaties with the Constitution turns into a kind of contradiction, so that the state of Serbia could be characterized as an untrustworthy partner and subject in international relations. This definitely cannot be seen as the intention of the framers of the Serbian Constitution of 2006, regardless of the fact that alike the constitutions "of other European states, including those with a long constitutional tradition, they have given a greater significance to the national constitution in comparison with international treaties" because they have included into the fundamental principles of the Constitution, which the constitutional ordering of the state of Serbia is founded on, certain stipulations on international law as an integral part of the internal legal system of the country, as well as stipulations on a legal power 'above the law' and immediate applicability of international treaties.

Performing subsequent control of the constitutionality of international treaties inevitably leads to legal instability and uncertainty in the application of the rules of international law. Namely, vesting the Constitutional Court with the competence, that on proposal of competent proposers, on the citizens' or its own initiative, in a subsequent procedure of abstract control of constitutionality, assess international treaties, with the possibility of potential "cassating an unconstitutional treaty" could lead to "a two-fold legal uncertainty and instability" a) regarding the subjects of the law in the domestic legal system, and b) regarding the subjects of the law in the international legal system.

Bearing in mind the afore mentioned difficulties that can arise as a consequence of practicing subsequent control of ratified international treaties, primarily from the point of responsibility of the state at international level, but also from the standpoint of legal certainty of the subjects that the treaty relates to, it is far more suitable to have this assessment performed before the act of approval, i.e. to be performed as a priori control. A significant advantage of this form of control is obvious and undisputable, it simultaneously "prevents the ratification of a potentially unconstitutional international treaty" and dismisses the possibility of legal uncertainty in application of an international treaty on domestic level, and at the same time it guarantees the respect of generally accepted rules of international law, in compliance with the principle pacta sunt servanda.

Regarding the question of the effect of the Constitutional Court's decision by which the Court could establish that certain provisions of a ratified international treaty or the treaty in whole are in noncompliance with the Constitution, it follows from the Constitution that this would be a case where the Constitutional Court would render noncompliance of a lower act in the legal system of the Republic of Serbia – in this case a ratified international treaty, with a higher legal act – in this case the Constitution. However, in our opinion, it does not have to (and cannot) mean that the Constitutional Court has the competence to dismiss legal rules, or certain provisions of international treaties, nor that the decision of the Court could change the obligations consented to by the Republic of Serbia. The application of a general constitutional rule according to which constitutional court decisions rendered whilst performing normative control act erga omnes, and annul i.e. cassate a normative act which has been established to be noncompliant with the Constitution, as well as in the case of assessment of constitutionality of international treaties, would mean that ratified international treaties can be cassated after several years subsequent to their approval and entering into force. Nonetheless, the application of this constitutional rule would question the expressly stated provisions of the Constitution that establish the position and role of international law in the legal system of the Republic of Serbia, as well as generally accepted rules of international law, the respect of which the Republic of Serbia has manifold consented to.

Since the Constitution does not prescribe the effect of the Constitutional Court's decision and its legal consequences in case that in a control procedure noncompliance of a ratified international treaty with the Constitution has been established, in order to achieve compliance with international treaties with the Constitution, in legal terms there could be two plausible situations: a) to take up modification of the Constitution itself and thus harmonize the rules of the Constitution and the international treaty; and b) to take up modification or revocation of the international treaty, providing that this possibility has been specified in the contract itself, or that it is in conformity with the provisions for suspension of the treaty according to Art. 56 of the Vienna Convention.

Regulating the effect of constitutional-court decisions in the case of establishing noncompliance of an international treaty with the Constitution, the Law on the Constitutional Court of Serbia to a certain extent mitigates the general consequences of the cassatory effect of constitutional-court decisions stipulated in Art. 168 of the Constitution. Unconstitutional provisions of international treaties, according to the Law, do not cease to be effective on the day of publication of the Constitutional Court's decision, but they cease to be effective "in the manner provided by the international treaty or generally accepted rules of international law". This solution could also mean that a ratified international treaty shall not cease to be in effect on domestic level by force of the established decision of the Constitutional Court on the noncompliance of the treaty with the Constitution, until the lawmaker, acting upon the provisions of the Vienna Conference, establishes that the revocation of the international treaty has been done in the manner expressed by the treaty or by generally accepted rules of international law.

Therefore, considering the control of constitutionality of ratified international treaties, the Constitutional Court has, seemingly, a wide range of competences, almost "unlimited". This is the reason why, whilst performing these competences and in this field, the Court can easily 'slip' off the domain of law into the domain of politics. In this area, the activism of the Constitutional Court can least substitute for the flaws of constitutional provisions, since establishing and maintaining international relations of Serbia with other states and international organizations as well as conducting the foreign affairs of the country are by far issues in the domain of activities of political bodies. Generally speaking, in our opinion, regarding the afore mentioned constitutional solutions it is preferable that the Constitutional Court, practicing this function, should be 'wisely abstained', it should respect "the space of free political action" as well as "the freedom of regulating" these issues by competent bodies, and that it should return the responsibility for "a potentially unconstitutional international treaty" to the same state bodies, i.e. to politics. In that case such bodies, but not the Constitutional Court, are obliged to provide harmonization of domestic and international law, which can be done – as it has been mentioned before – in two ways: to take up the procedure of modification of the international treaty, or the procedure of amendment of the Constitution. Both actions are legally possible, but which should be opted for after the Constitutional Court has established a potential noncompliance of international treaties with the Constitution, is in each specific case an issue of political decision of the Parliament and the Government.

In this procedure the Court has not, in its practice so far, tackled political issues, i.e. assessed the appropriateness of the content of an international treaty, but it simply observed how state bodies, in this case the Government and the Parliament 'behaved', i.e. whether they have acted upon the Constitution while practicing their competences. Bound by the Constitution, the Constitutional Court itself is not unlimited in performing assessment. It can only assess and establish whether the state bodies acted within the legal-constitutional framework, and whether they acted in accordance with the prescribed conditions which the law (the Constitution) demands from the 'regulatory politics', i.e. from the lawmaker and executive powers, upon concluding international treaties, or introducing them into the legal system of Serbia.

In other words, talking about the control of constitutionality of international treaties in the practice of the Constitutional Court, this is a field where it still researches and scrutinizes its capacities. In two concluded procedures of subsequent control of the constitutionality of international treaties, the Court did not establish a violation of the Constitution. Assessing the constitutionality of international treaties, the Court has followed the principle of respecting the doctrine on political questions demonstrating its abstention. Assessing the compliance of disputed international treaties with the Constitution, the Court has in a specific way "established the state of uninterrupted coexistence of international treaties and the constitution", so by interpreting the Constitution as a national law, it set off from the fact that pursuing foreign affairs and establishing relations between states is by far a vast field of individual action of legislative and executive powers. Furthermore, their political assessment must be respected in the widest range but only "to the limits of its unambiguous unconstitutionality."

2. Preventative Control of the Constitutionality of the Law – A Priori Control

In the constitutional system of Serbia today there is a diverse system of control of constitutionality of laws, where two legally possible forms exist: a posteriori control (as a rule) and a priori control, the latter being restricted only

to the assessment of the constitutionality of laws. Preliminary control is performed by the Court subsequent to enactment of a law in the Parliament, but prior to its promulgation, i.e. "before its coming into force". Preliminary control of the constitutionality of a law rules out the possibilities of its subsequent control.

After analyzing the provisions of the Constitution of Serbia dealing with this form of control, it follows that preliminary control of the constitutionality in the Serbian legal system is not obligatory but categorically optional. The Constitution does not recognize any cases of compulsory control of the constitutionality of a law a priori. This is the kind of preventative control that is generally performed only related to "laws" , and only on demand of one third of deputies.

Since the procedure of assessing the constitutionality of a law can only be instituted by a group of deputies, there is no doubt that the Constitutional Court would, in such form of control, act as a kind of arbiter between the parliamentary majority and parliamentary minority (opposition). By this means, the parliamentary minority could, with the affirmation of its proposal by the Constitutional Court (which is manifested in proclaiming a law or certain provisions of a law as unconstitutional), in a relatively easy and clear way, disclaim the Government, or the parliamentary majority, and promote its own political program. Therefore, it is exactly in this action, that those in favour of preventative control see its crucial advantage, since it would supposedly lead to the rationalization of parliamentarism, as well as to "keeping the parliamentary majority and judiciary within the boundaries stipulated by the Constitution". However, regarding a priori control, it follows from the Constitution that the Constitutional Court should protect two, seemingly different, constitutional values – first, judging the compliance of a ratified text of law with the Constitution, the Court protects the principle of constitutionality and thereof contributes to the foundation of the rule of law and legal state characterized by legal certainty and compliance of the law with the Constitution; and second, acting upon the demand of the opposition, i.e. the parliamentary minority, the Court contributes to the rationalization of parliamentary process of decision-making and "helps the parliamentary minority to keep the parliamentary majority within the boundaries of the Constitution". However, the Court performs both exclusively from the standpoint of the Constitution (the law) examining the constitutionality of a decision (laws) that are brought by the parliamentary majority, and which tends to forget that it too is "bound by the Constitution", and that the Constitution "determines its boundaries of political actions in the Parliament", i.e. "the framework of practicing legislative policy expressed by the law".

The effectiveness of the system of preventative control stipulated by the Serbian Constitution has largely been challenged by the fact that the Constitution sets forward that the law subject to assessment of constitutionality can also be promulgated before rendering the Constitutional Court's decision. In such case, the Court continues to act upon a "regular procedure". This practically means that thereof the Court will perform subsequent, and not preliminary control of the constitutionality of the law. In case the Constitutional Court renders a decision on unconstitutionality of the law before its promulgation, this decision will, in accordance with the Constitution, "enter into effect on the day of the promulgation of the law". In our view, by these provisions allowing a disproportionately short time limit (of merely seven days) for assessment of constitutionality, the framers of the Constitution question the essence and reason, i.e. raison d'être of the stipulated preventative control. Namely, the text of the law adopted by the National Assembly, assessment of constitutionality of which is performed by the Constitutional Court, should not be promulgated until the Constitutional Court procedure continues, nor should it be promulgated in the case when the Constitutional Court in the procedure of preliminary control establishes noncompliance with the Constitution. The essence of preventative control is in the aim to prevent the promulgation of the text of the law adopted by the Parliament, the constitutionality of which is reasonably disputed, until the Constitutional Court renders a decision on its compliance with the Constitution. The role of the Constitutional Court is exactly in the fact that by its decision in such procedure "it shall prevent the application of potentially unconstitutional legal norms", and consequently the emergence of unforeseeable numbers of unconstitutional acts and actions that are brought or taken up in the application of such a law. Constitutional provisions that enable the promulgation of disputed laws, i.e. their entering into force and being effective despite the fact that their constitutionality is "doubted" by one third of deputies, before rendering a decision on their constitutionality initiated before the Constitutional Court, surely do not contribute to legal certainty and institution of the rule of the Constitution, nor to the development of parliamentarism.

Therefore, the afore mentioned demonstrates that the system of a priori control established by the Constitution of Serbia is not ordered, i.e. normatively drawn up, in the most satisfactory manner, and that its practice lacks not only its advantages but also its application. Not even after three years of the Constitution of 2006 entering into force, has the Constitutional Court been submitted a single demand for a preliminary control of the constitutionality of any law. However, there are also other reasons for that.

Concluding Remarks

We shall conclude this paper with the words that the Constitutional Court of Serbia is sui generis a constitutional

body with a specific role in the legal system. It is a constitutional (legal) body whose decisions bare a distinctly political substance. “Cases of constitutional court practice always include political elements. However, the purpose of constitutional court practice lies exactly in depolitization” (Krbek). “Its arbitration is legal, but it can be political according to its significance” (Djordjevic)

Therefore, the Constitutional Court is bound by the Constitution, and it is not a body that can pursue politics or create sources of law. It is a body “of legal state (constitutional) control” which decides on legal (constitutional) boundaries and conditions which politics (the lawmaker and the government) can act upon, and establish relations whilst making laws and concluding international treaties. Therefore, in the constitutional court practice it takes real skill to find and determine the boundary between ‘regulatory politics’ and ‘legal state (constitutional) control”.

An overall opinion that can be given as an answer related to practicing two of the competences of the Constitutional Court of Serbia is that the analysis of constitutional provisions unambiguously shows that the Constitution itself has largely ‘perplexed’ and even ‘constrained’ the Constitutional Court in performing these functions, not only due to incomplete regulation but also due to certain inadequate constitutional provisions, especially in the domain of a priori control. Regarding the role of the Constitutional Court in performing control of constitutionality of ratified international treaties, judging by the practice so far, the Constitutional Court is no rival to the legislative and executive powers in pursuing foreign affairs and practicing legislative competences. The Court does not struggle for ‘legislative’ nor ‘political’ predominance over the Parliament and the Government, neither for overtaking their competences; it merely ‘guards’ the Constitution and watches over whether the state bodies act within the boundaries of the Constitution in pursuing politics and creating the law (laws). Hence, briefly speaking, the role of the Constitutional Court of Serbia is clear – it is to act as a guarantor of “the bond of politics and the Constitution”.