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CONSTITUTIONAL COURT INDEPENDENCE

INTRODUCTION

Constitutional court, a distinct institution of the state that commands high authority, is competent for the protection of constitutionality and as such it is a legacy of modern times. As such it has been developed continuously. Like the law itself („law in public action”), constitutional court has been meeting various challenges and dilemmas, as well as open issues that necessitate continuous reforms.

Constitutional judiciary is the “crown jewel” of the legal protection and the rule of law and its core functions are to limit, rationalize and control the power of state and social power. The functions thereof represent a “substantive co(operation) resting upon the fundamental consensus” i.e. on the constitution as a legal founding block of the legal order in state and society.

The constitution as a part of (political) culture of a country, that has its founding function and it operates as its integration factor; the symbol of statehood and according to the “open spirit” philosophy (Carl Poper) opens itself towards progress, future; a written constitution is a changeable regulatory optimum. It is a reflection of public opinion and the reality, it has a managerial function.

In functional terms, constitutional judiciary has been identified as an effective barrier to authoritarianism.

REFERENDUM

Montenegro - a state of hundred years – became an independent state again on the merit of its citizens’ decision at the referendum on May 21, 2006. It soon became a member of the United Nations, and in 2007 it also became a member of the Council of Europe whose statute in its preamble promotes respect of human rights and individual political freedoms which every genuine democracy rests upon as the core value of the Council of Europe. In this way Montenegro renewed its independence after 88 years. It needed a new constitution for the new, renewed state since “the state and the constitution are purpose to each other, and the need for constitution correlates with the need to earn statehood”. In October 2007 the Constitution of Montenegro was promulgated as “the highest norm in rank and the most succinct norm in the hierarchy of law” (Peter Haberle, *Constitutional State*, Zagreb 2002, p. 145).

The purpose and aim of adopting the Constitution is the establishment of democratic constitutional order which, although as imperfect as any other man-

made system, represents the best system of rule that humankind has ever come up with as argued by Churchill (1874-1965).

THE CONSTITUTIONAL COURT OF MONTENEGRO

The Constitution of Montenegro from 2007 established the Constitutional Court as an authority distinct from other branches of power and it was vested with safeguarding constitutionality and legality i.e. constitutional-legal structures and human rights and freedoms that are enshrined in the Constitution. The Constitutional Court of Montenegro, as the guardian of constitutional democracy, decides about the situations in which other branches of power do not administer disputes in compliance with the principle of the rule of law. The guarantee of the “rule of law” is one of the criteria for accession to the EU that it spelled out in the so called Copenhagen criteria requesting each state-candidate to achieve *inter alia* “the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.

In addition to other core values such as: freedom, peace, tolerance, respect of human rights and freedoms, multiculturalism and democracy, the Constitution of Montenegro in its preamble spells put the basic commitments of the peoples to be the rule of law; and in its articles 1 and 2 it defines the state as civic, democratic, ecological and welfare state based on the rule of law.

GENERAL INTERNATIONAL STANDARDS OF INDEPENDENCE OF CONSTITUTIONAL JUDICIARY

Constitutional doctrine and international acts on independence of regular courts, in reference to constitutional judiciary provide guarantees of the independence of the constitutional court as the most superior legal act in the country.

The basic UN principles define the independence of judiciary in its first principle: “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country”.

The Recommendation R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges sets the following principle: “The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law.” “The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges”.

Consequently, international standards are binding for the states to provide legal-normative guarantees of independence of judiciary that primarily refer to the

manner in which judges are appointed, their responsibilities and their removal, mandate, immunity and material status.

One of the major guarantees for the independence of constitutional judiciary is the *selection* method, *appointment of a judge of constitutional court* and the competent body in charge of that. Comparative constitutionality gives examples of various practices/procedures of appointment of the judges of constitutional court ranging from the participation of only one authority of the state, then other body representing state (parliament, judicial council etc.), to the participation of several bodies of the state in that procedure, then the system in which one body nominates and the other appoints the judge. Each of these systems has its relative merit, and the best one is considered to be the one that guarantees the independence and competence of constitutional court judge.

The nomination procedure for the judges of constitutional court determines in fact the composition of constitutional court. Each judge's personal profile is the crucial determinant of the quality of the court's delivery; the nomination and appointment procedure for constitutional judges are an extremely important guarantee of constitutional and judicial independence.

Constitutional judge's position is determined by *the duration of tenure*. In relation to this there is always an issue about what could be the best solution for constitutional judiciary: either a long or short tenure of its judges, renewable tenures or unlimited "lifelong" tenure of judges; but also the dilemma on whether a longer tenure automatically ensures continuity and greater creativity of the work of constitutional court or, contrary to that, leads to the bureaucratization of that institution.

The next guarantee of independence of constitutional court is related to *incompatibility*¹ i.e. certain limitations ensuing from the very nature of constitutional judicial function. It refers to the extra-judicial activities, either public or private which are in some way incompatible with the function of constitutional court. The incompatibility principle has been applied for a long time in modern European countries and, by rule, it has been elevated to the level of constitutional principle. This principle eliminates possibility of parallel functions of constitutional judge and any other public function, or any other professional activity, engagement etc.

Constitutional court judges cannot engage in extrajudicial activities that can compromise their judicial impartiality. A constitutional court judge has to meet high standards of conduct in his/her everyday life as it reflects upon the identity and integrity of judicial independence. When it comes to extrajudicial activities,

¹ The purpose of this principle is to provide protection of constitutional court judge from influence of any authority of the state and from all subjects that adopt general legal acts which can be reviewed by constitutional court on the grounds constitutionality and legality.

particularly political² ones, its noteworthy that this is where the principle of limited freedom of political activity is applied. This means not just a formal ban on political party membership, but genuine limitation as an expression of the need to preserve the independence and impartiality of constitutional court.

The issue of *immunity*³ of constitutional court judges is also very important in analysis of impartiality of constitutional court and constitutional judge. In constitutional court of European countries the status of judge in terms of immunity is similar and they have higher or lower level of immunity. Immunity as the concept covers the freedom of opinion and vote in deliberation (substantive immunity) and protection from incarceration and criminal and other proceedings (procedural immunity) unless a competent body so approves.. In many countries constitutional judges are granted the same immunity as the MPs get, and in others they have only a functional immunity.

An important presumption for the independence of constitutional court is its *financial independence* since there can be no true independence without financial independence in exercising core functions. If there is no such autonomy and when the government or parliament determine the court's budget, they can have a big influence on the work of the court.

A great contributor to the independence of juridical function is the material status of judges i.e. judges' salaries. This guarantee is perceived as the primary prerequisite of the independence of constitutional court. Appropriate material status of judges of constitutional courts can be a barrier to improper impact on judges' personal and moral integrity.

Regarding the salary of constitutional court judges, comparative law can only provide general criteria (clear and definite) since the salaries for judges have to fit into the general standards in a country.

Anyway, state has to guarantee appropriate material status for judges of constitutional courts to a level that balances against the gravity and dignity of the function of constitutional judge. If we start from general international standard on

² L. M. Singhvi, the author of the draft UN Declaration on the independence of Judiciary, wrote: .."No matter what judges do or fail to do, controversies on the question of "politisation" of the judiciary will always remain in greater or lesser measure, because the judiciary does not function in a vacuum. It is possible to increase professionalisation of the judiciary and reduce its politisation by changing methods and sources of recruitment and by placing security of tenure and prospects of promotion beyond the reach of any patronage by the Executive and the Legislature. But the modern judiciary would still have to decide questions which are political in nature, have political consequences and which inevitably bring the judges within the range of political fire", UN Doc. E/CN.4/Sub.2/1985/18/Add.I (1985), it. 93.

³ Immunity of constitutional judges involves the principle by which a judge is free to present his/her views on any issue under deliberation and that a judge to a certain degree has to be protected in a criminal procedure that can be instituted against him/her on the grounds of the offence committed while exercising the constitutional judiciary office by being exempted from incarceration without an approval given by a competent authority.

just and satisfactory remuneration as an equivalent for invested work, then the issue of salary for judges should meet that standard combined with special international standard valid only for the judges of constitutional courts. This standard for salaries and pensions⁴ of the constitutional judges implies that salaries and pensions should be appropriate, commensurate with the status, dignity and responsibility of that function.

Regarding judges' delivery, we are faced with the issue of judges' *legal responsibility*. A specific form of this responsibility is disciplinary accountability⁵, which is defined as accountability in case a judge infringes on the duty or obligation related to work or in case of his/her tardy judicial work.

However, disciplinary responsibility is treated differently in relation to judges of regular courts as compared to constitutional judges. While the disciplinary proceeding for regular court judges is a rule, the issue of disciplinary accountability of constitutional judges is treated in different manner. In that regard, the constitutions and the laws on constitutional court in most of the European countries do not contain provisions on their disciplinary accountability.

The abovementioned constitutional and other guarantees make the foundation of independence of judges in their discharge of judicial function but alone they do not provide for true independence because constitutionally declared independence does not materialize into practice automatically.

GUARANTEES OF INDEPENDENCE OF THE CONSTITUTIONAL COURT OF MONTENEGRO

The Constitution of Montenegro⁶ (promulgated on October 22, 2007) has generally speaking opted for European "Austrian" continental model of constitutional judiciary according to which the constitutional court is separated from the structures of state authorities⁷ as an instrument of constitutionalization in terms of limiting and controlling state power, as a distinct body that protects constitutionality and legality i.e. constitutional-legal order, human rights and freedoms enshrined in the Constitution. As a guardian of constitutional democracy, constitutional court decides in the situations when other bodies of

⁴ ... that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge - European Charter on the Statute for Judges, Article 6, item 6.4

⁵ International documents related to the standards of judicial independence have defined general conditions and standards for disciplinary responsibility of judges so that this responsibility has to be stipulated in the law and envisaged only for the most serious breach of disciplinary principles i.e. for breaching standards of judicial conduct as stipulated by law.

⁶ Official Gazette of Montenegro, No. 1/07

⁷ the rule is organized by the principle of division of powers: legislative - delivered by the Parliament; executive power - exercised by the government; and judiciary - exercised by the court; the power is limited by the Constitution and the law; constitutionality and legality is protected by the Constitutional Court (Article 11, paragraph 1, 2, 3 and 6).

power do not adjudicate disputes in compliance with the principle of the rule of law.

The Law on the Constitutional Court of Montenegro⁸ proclaimed the principles of independence and impartiality of the Constitutional Court. Pursuant to this law: “No one shall have any influence on the Constitutional Court and its process of deciding about the issues from its jurisdiction.”⁹

The competence of the Constitutional Court is on the whole a constitutional subject matter (*material constitutionis*). Within nine areas of the court’s competencies¹⁰, the Constitutional Court of Montenegro deliberates on all forms of “breaches of the Constitution”, one of them being: constitutional-legal disputes that are not typical “constitutional disputes”.

One particularly important competence of the Constitutional Court stipulated in the new Constitution is consideration of constitutional complaints, which was not a part of legal system in Montenegro, at least not in this form. This legal remedy enables any person (either physical or legal) to request institutional protection of human rights and basic freedoms in national jurisdiction before lodging application to the European Court of Human Rights in Strasbourg.

The Constitutional Court has seven judges¹¹. The judges of the Constitutional Court are appointed to the term of nine years at the proposal of the President of Montenegro and after their appointment by the Parliament of Montenegro. A candidate for a constitutional judge has to be a person who is a prominent lawyer who is held in high professional esteem. The President of the Court is also a constitutional category. The Parliament appoints the President to the term of three years after a proposal given by the President of Montenegro choosing among judges. The President of the Constitutional Court is a judge at the same time.

⁸ Official Gazette of Montenegro, No. 64/08 dated October 27, 2008

⁹ Constitutional Court deliberates cases independently and impartially for which it has jurisdiction stipulated by the Constitution of the Republic of Montenegro. No one shall influence the court’s decision upon issues from its jurisdiction (Article 2, *Ibid*).

¹⁰ The Constitutional Court deliberates about: 1) Conformity of laws with the Constitution and confirmed and published international agreements; 2) Conformity of other regulations and general acts with the Constitution and the law; 3) Constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all other efficient legal remedies have been exhausted; 4) Whether the President of Montenegro has violated the Constitution; 5) The conflict of responsibilities between courts and other state authorities, between state authorities and local self-government authorities, and between the authorities of the local self-government units; 6) Prohibition of work of a political party or a non-governmental organization; 7) Electoral disputes and disputes related to the referendum, which are not the responsibility of other courts; 8) Conformity with the Constitution of the measures and actions of state authorities taken during the state of war or the state of emergency; 9) Performs other tasks stipulated by the Constitution. (Article 149 of the Constitution).

¹¹ Article 153, paragraph 1, 2, 3 and 4 of the Constitution.

The function of a judge of the Constitutional Court is incompatible¹² with any other public function or professional engagement.

The President of the Constitutional Court enjoys the same immunity as the members of the Parliament¹³. This is to say that the President and judges of the Constitutional Court cannot be criminally prosecuted nor incarcerated unless the Parliament so allows and unless they have been caught performing a criminal offence punishable by more than five years of imprisonment.

The Constitutional Court of Montenegro stipulates four grounds¹⁴ for termination of office prior to the expiry of the period for which he/she was elected: 1) at his/her own request, 2) if s/he qualifies for pension based on age; 3) s/he has been sentenced to an unconditional imprisonment sentence and 4) by removal.

The President and judge of the Constitutional Court shall be removed for any act that deems him/her unworthy of the judicial function, if s/he permanently loses capacity to deliver the function or comes public with his/her political convictions. The Constitutional Court summons a session at which the reasons for removal are discussed and it informs the Parliament about the decision thereof. The Constitutional Court can decide to suspend the President or a judge of the Constitutional Court against whom the criminal procedure has been instituted.

The Law on Constitutional Court defines the procedure for removal from the office in detail¹⁵.

¹² “The President and the judge of the Constitutional Court shall not discharge duties of a Member of the Parliament or other public duties or professionally perform some other activity.” (Article 153, paragraph 5 of the Constitution)

¹³ The President of Montenegro, the Prime Minister and members of the Government, the President of the Supreme Court, the President and the judges of the Constitutional Court, and the Supreme State Prosecutor shall enjoy the same immunity as the Member of the Parliament. (Article 86, paragraph 4 of the Constitution)

¹⁴ Article 154 of the Constitution.

¹⁵ Judge of the Constitutional Court shall submit request for termination of office before the expiry of a term to which he has been elected to the President of Montenegro and to the Parliament; if the Parliament does not adopt a decision on the request referred to in paragraph 1 of this article within 30 days as of the date of its submission, the office of the judge of the Constitutional Court shall terminate upon the expiry of that time-limit. (Article 7)

Competent court shall with no delay notify the Constitutional Court about the institution of the criminal proceeding against the President or the judge of the Constitutional Court. In the situation referred to in paragraph 1 of this article, the proposal to terminate the office of the President of the Constitutional Court shall be submitted by at least three judges of the Constitutional Court, and the proposal to terminate the office of the judge of the Constitutional Court shall be submitted by the President of the Constitutional Court.

The quoted constitutional and legal guarantees are based on international standards both in terms of institutional and individual independence of the constitutional court judges. The Constitution, however, does not have the provision on obligations to provide appropriate material status for judges of the Constitutional Court nor an obligation to adopt a special act that would enable enforcement of the declared constitutional principles and the role of the Constitutional Court in the legal order and concrete circumstances. The issue of financial independence of judges of the Constitutional Court has not been regulated by the Law on the Constitutional Court of Montenegro either. Instead, it was regulated by the Law on salaries and other remunerations for the holders of judicial functions¹⁶.

CONCLUSION

Having in mind the importance that the constitutional court has in terms of protecting the constitutional order and particularly the rule of law and protection of human rights and freedoms, its independence merits continuous efforts on improving its position as the institutional pillar for provision of democracy, limitation of power, protection of human rights and the rule of law.

The president or the judge upon whose exercise of office is going to be decided shall not participate in the decision making. (Article 8)

The initiative for determining whether the requirements for the termination of office, because of meeting the conditions for old-age pension or because the conviction on unconditional prison sentence, are fulfilled, or the initiative for determining the reasons for termination of office of the judge of the Constitutional Court, shall be submitted by the President of the Constitutional Court, and for the President of the Constitutional Court shall be submitted by at least three judges of the Constitutional Court

Competent court shall with no delay notify the Constitutional Court about the delivery of the final convicting verdict against the President or the judge of the Constitutional Court. (Article 9)

The Constitutional Court shall notify the President of Montenegro and the Parliament on the expiry of the term of office of a judge of the Constitutional Court and of the fact that the judge has met the old-age pension requirements, no later than six months before the requirements for termination of office are fulfilled. (Article 10)

¹⁶ Law on Salaries and other Remunerations of Holders of Judicial Functions (official Gazette of the RoM, No, 36/07 and 53/07)