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INDEPENDENCE OF THE CONSTITUTIONAL JUDICIARY AS PREREQUISITE FOR FULFILLING THE ROLE OF THE CONSTITUTIONAL COURT

The modern democratic state implies the existence of a constitutional order based on the principles of separation of powers and the rule of law. However, the constitutional principles and constitutional norms remain mere proclamations if there is no institution that is outside and, to some extent, above all three branches of powers, and whose task is to be the guardian of the constitutional foundations of the state, and thus the guardian of the democratic constitutional order. The role of the guardian of the Constitution is vested in the Constitutional Court. By the development of the concept of universal protection of human rights, the rights and freedoms of citizens are becoming superior values protected by a democratic society, which means that their implementation and protection are guaranteed by the Constitution itself. Thus, the competences of the Constitutional Court are being extended, which is increasingly getting an additional role. In fact, in a number of European countries, the Constitutional Court is no longer limited only to the control of compliance of laws and other general enactments with the Constitution and the compliance with the law of general enactments of lower legal force, but has been extended also to provide protection to citizens in the event that by an individual enactment or the action of the authorities their constitutionally guaranteed rights and freedoms were violated or denied. Finally, the third, also new role, the Constitutional Court is receiving by the development of transnational organisations and supranational law such organisations are creating, which have a direct impact on the internal law of the member states. In exercising this role, the Constitutional Court should be the institution whose task is at the national level to determine the measure of the state's obligation in which to subordinate its internal law to supranational law, but also to set the limits of that obligation.

These three principle roles of the modern constitutional judiciary necessarily require the existence of a strong, independent and autonomous institution that is able to successfully realise them. Ensuring and preserving the role and rank of the Constitutional Court, its reputation and authority in real life, implies that the Court, in relation to those who are supervised by it, is autonomous and independent and that its

decisions outweigh the decisions of any public authority. The independence and neutrality of the Constitutional Court as an authority whose task is to preserve and maintain harmony in the constitutional order of a country and to guarantee the protection of fundamental rights and freedoms, necessarily requires for it to be a specific institution that is different from any other state authority, both in terms of the position of the Constitutional Court in the system of state authorities, as well as in terms of the manner of its functioning, the status of judges of the Constitutional Court and the legal effect of the decisions of the Constitutional Court.

If we start from the above we can conclude that there are three main aspects of the independence of the Constitutional Court: organisational, functional and financial independence. On the other hand, there is no independence constitutional judiciary without the "incontestability" of the Constitutional Court's decisions. Therefore, the decisions of the Constitutional Court must be generally binding, final and enforceable.

Organisational independence of the Constitutional Court is provided by the fact that this body was established by the Constitution itself in a way that does not belong to any of the three branches of powers. The only "contact" of the Constitutional Court with the other branches of powers is realised only in the part concerning the election of judges of the Constitutional Court. I believe that it is necessary to emphasize that, in the normative sense, it is of particular importance for the independence of the Constitutional Court if the issues related to its organisation and operation are regulated, in addition to the Constitution, by a law of "constitutional rank", i.e. which has a stronger legal power than "ordinary" law. In any case, no issue concerning the exercise of the functions of the Constitutional Court should be regulated by the acts of the executive power.

In particular, the organisational independence of the Constitutional Court consists of constitutional guarantees and on their basis adopted legislation on the composition and mode of election of judges of the Constitutional Court, on the election of the President of the Constitutional Court, on the right of the Court to autonomously, in accordance with its rules of procedure, govern its internal organisation and operation.

The issue of the method of election of judges of the Constitutional Court and the President of the Court is certainly the most important issue for the organisational

independence of this institution. Both in theory and in practice constantly debated are the method and due process for the election of judges of the Constitutional Court which provides: on the one hand, the full independence of the Court as an institution in relation to the state authorities involved in the nomination and election of judges, whose enactments and actions the Court is otherwise controlling and, on the other hand, a high level of professionalism, accountability and impartiality of those who are elected. It is indisputable that there is no ideal model and that it is almost impossible to find, i.e. that it is impossible to avoid the influence of political actors in the personnel composition of the Constitutional Court. The model accepted by the Constitution of Serbia, which, following the Italian model, involves all three branches of power in the election of judges of the Constitutional Court, whereby each of the three branches of power elects one-third of the judges, seemingly provides a balance and eliminates the dominant influence of any authority on the composition of the Constitutional Court. However, I am convinced that by the establishment of objective criteria for the election of judges, the implementation of which requires a choice of competent and experienced individuals is the most effectively prevention of influence of political actors in the operations and decisions of the Constitutional Court and that the rate of independence of the Court depends only on the quality of elected judges as professionals of strong and moral personality.

Another important issue is the duration of the term of office of judges. The mandate, which is considerably longer than the mandate at any other authority (of course, with the exception of regular court judges who hold a permanent function), should also ensure that the elected judges will not be "tied" to the power that has elected them.

As for the organisational aspect of the independence of the Constitutional Court, also should be noted the so-called regulatory autonomy of the Court, which is reflected in the entitlement of the Constitutional Court to independently regulate its internal organisation and method of operation.

Functional independence of the Constitutional Court is actually the foundation of the overall independence of this institution and therefore must be complete. This means particularly that the Constitutional Court, in so far as it performs its constitutional function, cannot be subjected to the control of any other state authority, nor can it be held accountable for its operations and decisions to any other authority.

Functional independence is also ensured by the fact that the jurisdiction of the Constitutional Court may be prescribed only by the constitution. On the other hand, such a broad functional independence imposes on the Constitutional Court a high degree of self-responsibility. Since the decisions of the Constitutional Court in the field of abstract control, namely in the determination of unconstitutionality of any law essentially have the effect of denying the will of the freely elected representatives of the people, and the decisions in the procedure for the protection of constitutional rights and freedoms have the effect of denial of the decisions of a body of the independent judicial power, this imposes an obligation on the Court for its decisions, without exception, to be well thought out, with deep constitutional foundations and reasoned, in order to make sure that they constitute the rule of the constitution and not the rule of the constitutional judges. It is evident that the extension of the jurisdiction of the Constitutional Court itself does not affect its functional independence, but it transfers a body, whose authority was based partly on the fact that it does not intervene frequently, i.e. only when there is a serious imbalance in the legal system, into a body for "daily interventions".

Financial independence of the Constitutional Court is a matter which, in my opinion, has so far not received due attention. Namely, practice often shows that for the real independence of the Constitutional Court it is very important that the law guarantees the financial independence of this body and that the law defines mechanisms through which those guarantees are implemented. Law on the Constitutional Court of Serbia has five years ago for the first time introduced a complex mechanism that completely prevents the executive power to provide in the state budget insufficient funds for the operation of the Constitutional Court or to deny the Court funds provided by the budget (Constitutional Court of Serbia brings its own budget, which must be accepted by the Finance Minister and the Government).

When we talk about the constitutional independence of the judiciary, we cannot bypass the **individual independence judges of the Constitutional Court**, which is the condition *sine qua non* for the successful implementation of constitutional protection. The basic elements of personal independence of judges of the Constitutional Court are relating to the manner and reasons for termination of office prior to the expiry of term of office of elected judges, constitutional or statutory guarantees regarding the rights of

judges after their expiry of the term of office, immunity during the term of office and appropriate material status of judges.

Each of the aforementioned forms and elements of independence the constitutional judiciary is a prerequisite for the Constitutional Court to fulfil its primary role. An analysis of comparative law solutions will show us that in normative terms all these forms and elements of independence are more or less, in one way or another, included in the legal systems of any modern state. However, whether or not the role of the Constitutional Court has a perspective in the future depends primarily on whether and how the regulatory framework is implemented in practice. For example, a transparent and balanced method of electing judges of the Constitutional Court will not mean anything, if the one who is in charge and obligated to elect judges fails to do so and thus leads to the blockage of the Constitutional Court. It will not mean anything if the Constitutional Court gets its budget, if it is denied the opportunity to use the funds from that budget. All this may be methods to "discipline" the Constitutional Court and to compromise its independence. Is it possible to prevent such influences and how does one go about it? It is my deep belief that there is only one way. The Constitutional Court has to take decisions that it can at any given moment defend with strong and indisputable arguments and all actors on the public stage in a society, above all political actors, both from the government and the opposition, must, even if reluctantly, accept that the existence of the institution such as the Constitutional court, which is by defending the Constitution defending fundamental democratic values in a society, in the interest also of the one who is challenging the Constitutional court and some of its decisions. The efforts of the constitutional judiciary by the authority of its decisions to preserve the authority and independence of the institution of the Constitutional Court itself should be permanent and persistent and the result of these efforts will certainly strengthen the implementation of the role of the Constitutional Court.