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**ANALYSIS OF THE CONSTITUTIONAL COURT WORK TARGETING
LEGAL CERTAINTY AND THE RIGHT TO A FINAL DECISION**

CONCLUDING OBSERVATIONS

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PART V

CONCLUDING OBSERVATIONS

I. ASSESSMENT OF THE STATE OF AFFAIRS

Introducing a constitutional complaint by the 2007 Constitution of Montenegro as a remedy for direct protection before the Constitutional Court ensured also additional protection of fundamental human rights and freedoms on the national level. Furthermore, by the ratification of the European Convention of Human Rights (ECHR), the legal order of Montenegro was completed with additional human rights guarantees and made subject to the supervision exercised by the independent bodies of the Council of Europe. At the same time, Montenegro undertook to harmonise its legal system and its judicial system, with the standards and case-law of the European Court of Human Rights (ECtHR) as an independent judicial body responsible for the application of the ECHR in the member states of the Council of Europe. These changes have led to an increase in the complexity of the legal order of Montenegro and, hence, the tasks that are placed before its authorities in the domain of all three branches of government and, finally, before the courts and the Constitutional Court, which are reflected in the direct application of the ECHR and the ECtHR case-law as part of its own law and jurisprudence.

Only a decade since it was introduced into the constitutional system of Montenegro in its present form, the constitutional complaint before the Constitutional Court has become a significant legal remedy in ensuring the protection of human rights and freedoms. This is confirmed by the following findings: (1) the constitutional complaint proved in practice to be an easy and widely available legal remedy; (2) constitutional complaint has become effective in terms of the standards of the ECtHR; (3) the Constitutional Court does not only protect the constitutional rights and freedoms, but also the rights and freedoms guaranteed by the ECHR and other international conventions which Montenegro has undertaken to comply with; (4) the Constitutional Court decisions on constitutional complaints expanded the scope of legal protection of guaranteed rights and freedoms; (5) overall, the level of protection of certain constitutional rights in the Constitutional Court's decisions on constitutional complaints is slowly raised following the standards and the case-law of the ECtHR; (6) deciding on priority cases in the proceedings on constitutional complaints is becoming more efficient; (7) the extent of enforcement of the Constitutional Court's decisions rendered in the proceedings on constitutional complaints is increasing over the course of time.

It is also important to note that direct protection of human rights and freedoms by the Constitutional Court, in the proceedings on constitutional complaints, increases the impact of this Court, primarily on the exercise of judicial power whose primary function is the protection of human rights and freedoms. Unlike the legislative control of the constitutionality of legal provisions, which essentially establishes direct constitutional dialogue with the parliament and other holders of the legislative power, the exercise of this function of the Constitutional Court requires permanent (constitutional) dialogue with the bodies of the judiciary, primarily with the Supreme Court as the highest court in the country, and also with the independent institutions whose scope of responsibility also includes the protection of fundamental rights and freedoms (Protector of Human Rights and Freedoms, the Agent of Montenegro before the European Court of Human Rights).

However, despite the above-mentioned developments regarding the state of the protection of human rights by the Constitutional Court, the following issues are still raised as

serious: the duration of proceedings before the Constitutional Court and the overall effectiveness and accountability of the Constitutional Court in the protection of constitutionality and legality, legal (un)certainty and (un)equal treatment, (un)predictability of decisions, providing assessments of non-legal content, such as the impression of the politicisation of the constitutional justice and a kind of silent collaboration with political power. A general assessment of the protection of fundamental rights and freedoms in Montenegro cannot be made without indicating that according to the 2018 annual report of the ECtHR, with 318 cases before this Court, Montenegro was first according to the number of applications compared with the number of inhabitants, while one year earlier it was placed the fifth with 138 cases¹. Of course, this fact might have arisen as a result of various circumstances but it certainly warrants attention in terms of further analysis of the reasons for the increase in the number of cases before the ECtHR.

The limitations on the effective exercise of the control by the Constitutional Court, i.e. the “protection of constitutionality and legality” by the Constitutional Court and keeping the State authorities within the bounds set by the Constitution and laws are partly caused by inadequate and incomplete legislative solutions, i.e. the problems concerning the quality of certain provisions of the Constitution, Law and the Rules of Procedure, and partly by non-application of the constitutional and legal provisions by the entities whose acts and actions are examined (controlled) by the Constitutional Court with respect to their constitutionality (legality), however, they also occur due to non-application of certain legal solutions by the Constitutional Court itself, while certain problems arise from the existing organisation and the manner of work of the Court and its Office (considering the number of the cases and the complexity of constitutional law matters decided by the Constitutional Court) and the level of human, technical and financial resources and inadequate premises available to the Court.

In this regard, the efforts made in the previous period by the Constitutional Court to raise the level of protection of human rights and freedoms and to act more expediently, without taking additional legislative measures in a timely manner, followed by changes in the organisation of the work of the Court and its Office (in particular strengthening its human resources and changing the method and manner of its work), will prove to be insufficient and may call into question the functional capacity of the Court to overcome the inflow of constitutional cases, i.e. its capacity to decide within a reasonable time. In addition to the consequences arising therefrom for the Court itself, that can weaken the authority of the Constitutional Court, it is undeniable that such a situation will negatively affect the protection of the violated constitutional rights of the citizens and other legal entities, and the legal certainty in the legal order as a whole. Namely, the increased burden on the Court with the total number of cases when compared to the period prior to the introduction of the constitutional complaint and especially the visible increase in the number of cases in the recent years (including the year 2018 which saw a record number of cases), not only in the number of cases on constitutional complaints but also in the domain of legislative control, threaten to prolong additionally the length of proceedings before the Constitutional Court and could also have an impact on the quality of decisions rendered by the Constitutional Court.

Without ambition to analyse all factors that can have impact on the independence, accountability, professionalism and overall efficiency of the functioning of the Constitutional Court, we will largely focus on four groups of issues defined in the project task, and which are of direct relevance to the exercise of the functions of the Constitutional Court.

¹ See *Annual Report 2018*, Statistics, ECtHR, Strasbourg, 2018, p. 175.

II. PROPOSALS FOR AMENDMENTS TO LAW ON THE CONSTITUTIONAL COURT

1) Proposals related to the provision of Article 39 paragraph 2 of the Law

Constitutional complaint is a recent, relatively “new legal remedy” in the legal order of Montenegro. The legislative solutions related to this legal remedy are not rarely subject to review even in the countries with a long tradition of direct protection of human rights by a constitutional court. This is inevitably required by the necessity of providing the most complete and effective protection possible of human rights and freedoms which are becoming increasingly complex over the course of time. That is all the more reason for the legislative solutions contained in the legislation of Montenegro to be viewed in the continuity of time and to be monitored in relation to their own experience and indicators in practice and are inspired by a very abundant case-law of the Convention and comparative law.

From this perspective, and in accordance with the project task, some of the solutions contained in the Law on the Constitutional Court have been analysed first.

Article 39 paragraph 2 of the Law on the Constitutional Court stipulates the obligation of the Court that it "must" finish the cases falling within its jurisdiction within 18 months at the latest. It is realistic to assume that the aim of introducing a provision of such content in the Law on the Constitutional Court was to prevent violations of the right to a trial within a reasonable time and to strengthen the confidence of citizens in the effective decision-making of the Constitutional Court.

In comparative legislation, such setting of time-limits is rare when it comes to constitutional courts. It is generally believed that lawmakers are reluctant to regulate this issue, in view of the constitutional presumption that it is a guardian of the constitution, which is also at the top of legal protection in the national system and a guarantor of the protection of human rights and freedoms, implying inherently that it will itself endeavour to ensure compliance with the reasonable time requirement when deciding on matters falling within its jurisdiction.

Although the 18-month period set out in the Law for proceedings in the cases of the Constitutional Court is not in itself short, it has not yet been confirmed in practice. This is an additional reason why the aforementioned legal provision warrants special consideration, both from the perspective of its legislative expression and the appropriateness of setting a time-limit to the role of the Constitutional Court (which is imposed an obligation that it "must decide" on all cases falling within its jurisdiction) and from the perspective of the actual prerequisites that must be met for it to be complied with in practice. As to the time-limit prescribed for the proceedings of the Constitutional Court, a number of legal issues have been raised regarding the meaning of the said provision (whether the prescribed time-limit is a guideline or an obligation), the nature of the prescribed time-limit and the consequences if that time-limit is exceeded. The way it is formulated, this provision implies that any case formed on a constitutional complaint must be completed within the aforementioned period, regardless of the complexity of the challenged legal issue, the total number of cases pending before the Court at the time when the decision is made, different procedural situations that may exist, etc. To this end, a detailed overview is provided below in the special part of this analysis, presenting comparative solutions and the case-law of the ECtHR, including the recommendations of the author of this analysis on how to potentially overcome certain dilemmas caused by this provision and its (non-)application in practice.

The objective obstacles for the Constitutional Court to comply with the right to a trial within a reasonable time may be of a legal nature (the complexity of constitutional issues, the

late actions by other bodies whose involvement may affect the length of the proceedings before the Court, incompleteness and vagueness of legislative provisions, etc.), frequent amendments to substantive and procedural laws (and the related “transitional regimes”, as a rule, not regulated by the law), and also of a factual nature (large inflow of new cases, insufficient professional capacity of the Office of the Court due to a limited number of staff, etc.). In such circumstances, failure to comply with the statutory time-limit leads to multiple negative consequences. First of all, this calls into question the authority of the legislator as well as the credibility and reputation of the Constitutional Court in the eyes of the domestic and international public, since it is assumed that in a legal state the laws are applied and that the Constitutional Court, as the highest body protecting the law, should not violate that law by its own actions contrary to the explicit legal provision whose constitutionality was not contested.

The discussion on this issue and the provision of Article 39 paragraph 2 of the Law should be initiated by the Constitutional Court itself, by informing the Parliament, in accordance with Article 149 paragraph 3 of the Constitution, of the identified problem which most directly concerns the possibility of exercising its constitutional role to protect constitutionality and legality within the “prescribed time”), both from the aspect of the Constitution and from the aspect of the jurisprudence of the ECtHR which the ECtHR expressed in several of its decisions that a reasonable time should be determined depending on the circumstances of each particular case and that the role and tasks of the constitutional courts differ from those of the ordinary courts.

Legal remedies for the protection of the right to a trial within a reasonable time in the proceedings before the Constitutional Court

Since the requirement and provisions of Article 6 § 1 of the ECHR and of Article 32 of the Constitution of Montenegro with regard to the exercise of the right to a trial within a reasonable time relate also to the proceedings conducted before the constitutional courts, we believe that the Law on the Constitutional Court should also provide for certain formal remedies that the applicant submitting the constitutional complaint could use in the event of manifest delay in the proceedings before the Constitutional Court when resolving the constitutional dispute on constitutional complaint or caused by inappropriate inactivity of the Court (e.g. in cases which by their nature require special attention and urgent action or if the Constitutional Court has not acted on a constitutional complaint over a longer period of time, etc.).

The ECtHR case-law and the comparative case-law of the Constitutional Court have shown that a remedy which is a combination of an acceleratory (accelerating the proceedings) and a compensatory (compensation for damage that may have been caused) remedy turned out to be a good form of protection (assuming that it is applied effectively in practice).

The current legislative provisions lead to the conclusion that in case of non-compliance with the right to a trial within a reasonable time by the Constitutional Court itself the applicants of the constitutional complaint in Montenegro can only resort to the ECtHR.

It should also be pointed out that the proceedings of constitutional courts within a reasonable time in modern European countries are, as a rule, reviewed only by the ECtHR, with the exception of those countries where this is done at the national level by the constitutional court itself (e.g. in Germany).

There are no provisions or case-law in the comparative law where the protection of the right to a trial within a reasonable time before the Constitutional Court would be provided by an ordinary court.

The issue of protecting the right to a trial within a reasonable time before the Constitutional Court on the national level has become more prominent notably after the Supreme Court of Montenegro declined jurisdiction in September 2018 and rendered the first judgment by which it found, on the action for fair redress filed by the applicant of the constitutional complaint, that there had been a violation of the right to a trial within a reasonable time in the proceedings before the Constitutional Court and imposed an obligation on the State of Montenegro to compensate the damages. Considering the number of issues raised by the Supreme Court Judgment Tpz.br.26/2018 of 10 September 2018 and the consequences of the commenced practice, this new situation can be figuratively called the "vicious circle". The author of this analysis believes that this situation occurred due to a misunderstanding or, namely, misinterpretation of the provision of Article 2 paragraph 2 of the Law on the Protection of the Right to a Trial within a Reasonable Time. As this decision is underlain by misconception of the meaning and scope of a legal provision which cannot essentially be applied to the institution of the constitutional judiciary, the commenced practice of the Supreme Court should certainly be ceased for several reasons. It is indisputable that there is a problem (citizens addressing the court due to lengthy proceedings before the Constitutional Court), but it is also undeniable that according to the Constitution and the applicable legislation of Montenegro, for the time being, no explicit authorisations have been provided for filing any remedies for a violation of the right to a trial within a reasonable time in the proceedings before the Constitutional Court and, hence, there are no provisions concerning the jurisdiction over such legal remedy, conditions for filing such remedy nor measures that could be imposed. The current situation should be overcome in the dialogue between the Constitutional Court and the Supreme Court, with the participation of the academic community, and in particular of the distinguished constitutionalists. In the end, the legislator and the Constitutional Court itself are competent to resolve the dispute. The analysis provided a more detailed assessment of the consequences and issues raised by the Supreme Court's decision and gave certain recommendations in this regard.

2) Proposals related to the provision of Article 52 of the Law

The provision of Article 52 paragraph 1 of the Law stipulates that state authorities, state administration bodies, local self-government bodies and local government bodies, legal persons and other entities exercising public powers shall, within their jurisdiction, enforce the decisions of the Constitutional Court, and their enforcement shall, where necessary, be "ensured by the Government of Montenegro". The provision of paragraph 2 of that same Article prescribes that in a decision, the Constitutional Court may set the deadline and manner of enforcement of the decision, as well as the authority that is required to enforce it. Following the expiry of the deadline referred to in paragraph 2 of this Article, the authority that is required to enforce a decision of the Constitutional Court shall submit a report on the enforcement of the decision of the Constitutional Court to the Constitutional Court.

As regards legislative regulation of the manner in which the decisions of the Constitutional Court are enforced, the analysis shows that certain issues have remained underregulated. First of all, the legislator has not specified the manner in which the enforcement of decisions of the Constitutional Court is ensured by the Government of Montenegro. Or else, if that is not done, there is no need to copy the constitutional provisions in the Law and, thus, only "lower their rank". Furthermore, the analysis showed that instead of regulating the measures that can be taken in the event of non-enforcement of the Constitutional Court's decisions by the Law, these matters have been regulated by the Rules of Procedure. By their nature and importance, these matters are *materia legis* and not the object of regulation by an act that has, by its nature, a subordinate force, i.e. the matters of enforcement of the Constitutional Court's decisions are not matters that are regulated by acts

that have the character of *lex interna*. Moreover, according to the provisions of the Rules of Procedure these measures apply only if the Court determines the manner of enforcement of its decision and they do not relate to measures that may be taken in the event of failure to enforce any decision of the Constitutional Court.

It should also be considered whether, with a view to ensuring the enforcement of the decisions of the Constitutional Court more effectively, a criminal law protection should be regulated which would prescribe punishment for an official and a responsible person who refuses to enforce a decision of the Constitutional Court. The provisions of Article 395 of the Criminal Code of Montenegro do not include these decisions, and there is no reasonable explanation for sanctioning the non-enforcement of decisions of the ordinary courts and not those of the Constitutional Court. Although in the countries in the region, which recognise criminal liability for non-enforcement of the constitutional court's decisions, it is considered that such provisions did not change the situation much and that they are very rarely used, it seems that such a measure would not be superfluous in the period until the Constitutional Court asserts its position and authority and until the level of constitutional culture and confidence in the Constitution and law is raised, including also the respect for the decisions of the Constitutional Court.

3) Proposals related to the provision of Article 74 of the Law

As regards the provision of Article 74 of the Law, we would like to point out that, unreasonably and without valid reasons, this provision is not applied in practice at all, and a question was rightfully raised as to whether such a practice of the Constitutional Court is in accordance with the Constitution and the ECHR. What is undeniable is that the interested parties (persons who have a legal interest concerning the decision-making of the Constitutional Court but do not have the status of participants in the proceedings before the Constitutional Court) have been deprived of their explicitly defined right.

Moreover, neither the Law on the Constitutional Court nor the Rules of Procedure contain provisions on this and they should: whether the Constitutional Court has an obligation to deliver to the interested parties as well all the documentation submitted to the Court by the participants in the proceedings or obtained by the Court and whether those persons have the right to declare on those documents; whether those persons have the right to inspect the case files and in what manner; whether an interim order should be delivered to the interested parties as well, if it is issued in the proceedings before the Constitutional Court on a constitutional complaint and, finally, whether the Constitutional Court is obliged to deliver a decision on the constitutional complaint to those persons, in particular, when such decision has found that there has been a violation. There is obviously a legal vacuum in the Law on the Constitutional Court concerning these issues, which, in the opinion of the author of this analysis, and taking into account the comparative experiences and views of the ECtHR which the Court expressed in several of its decisions (in which the Court dealt, *inter alia*, with the issues of the rights of the interested parties in the proceedings before a constitutional court, i.e. application of the adversarial principle (*audi alteram partem*) before the constitutional courts) should have been regulated, as that is, after all, required by the right to a fair trial guaranteed by the Constitution in Article 32 of the Constitution of Montenegro and by Article 6 § 1 of the ECHR.

4) Proposals related to Article 77 paragraph 2 of the Law

As regards the enforcement of the Constitutional Court's decisions on constitutional complaints, it has been assessed that the enforcement of these decisions is less complex than the enforcement of the decisions rendered by the Court when conducting legislative control. This is also the reason why these decisions of the Constitutional Court are generally enforced, with minor exceptions in situations which occurred due to differences in the legal positions of the Supreme Court and the Constitutional Court. The main controversy between these two courts is the one that arises in the procedure for the enforcement of the Constitutional Court's decisions on constitutional complaints by the courts, with regard to the meaning of the provision of Article 77 paragraph 2 of the Law which stipulates that in the repeated proceedings the competent authority “shall respect the legal reasoning of the Constitutional Court stated in the decision and shall decide in the repeated proceedings within a reasonable time”.

Of course, it is not possible to avoid all the situations that can arise due to different positions of the Constitutional Court and the Supreme Court on certain legal issues, but it is undeniable that the challenged legal issues must be considered in a mutual dialogue while respecting the constitutional jurisdiction of each of these two bodies. In doing so, the main criterion must be the jurisdiction of these authorities as defined in the Constitution. The Constitutional Court must respect the fact that the Supreme Court is the highest court in the judicial system, whose primary function is to protect human rights and freedoms on the basis of the Constitution, ratified and published international treaties and laws. On the other hand, the Supreme Court must take into account the position of the constitutional guardian, its role and powers in the interpretation and application of the Constitution, and its powers in the exercise of the control of the constitutionality of each act and action of the legislative, executive and judicial branches of government. Naturally, in the exercise of the constitutional control, the Constitutional Court must remain within the limits of its constitutional jurisdiction – the protection of the freedoms and rights guaranteed by the Constitution, and it must not exercise instance or other type of control of the acts and actions of judicial and other branches of government.

In respect of the provision of Article 77 paragraph 2 of the Law and the duty to respect “the legal reasoning of the Constitutional Court”, the jurisprudence of the Supreme Court of Montenegro should move in the direction in which that Court moves concerning the case-law and views of the ECtHR developed in the application of the ECHR.

Concerning an answer to the question whether, for a number of reasons mentioned in this analysis, a legal obligation should be stipulated in Article 77 of the Law on the Constitutional Court that in the repeated proceedings the competent courts sitting in a new composition should decide on the contested case that was sent back by the Constitutional Court for a retrial and that the Constitutional Court shall decide in a plenary session when there is a “repeated decision” before this court, we would like to point out that such a provision and practice exist in certain European constitutional courts.

5) Professional representation and the right to free legal aid in the proceedings on constitutional complaints

Although established as a layman's legal remedy, a constitutional complaint is in principle a strictly formal remedy which can be filed in writing and must have the content prescribed by law. Only complete constitutional complaints that the Constitutional Court has found to meet procedural requirements and not to be manifestly ill-founded are considered and decided on the merits.

In the opinion of the author of this analysis, introducing a system of mandatory professional representation in disputes on constitutional complaints would be effective and

necessary at least for some types of cases (as is the case before some European courts), the quality of the submissions would improve and, thus, the efficiency of the constitutional court proceedings would be enhanced. The practice of self-representation and representation by attorneys who do not have the professional knowledge to provide legal assistance can certainly be a reason behind long proceedings before the Constitutional Court, especially in complex cases, and may lead to submission of incomplete constitutional complaints (which, according to the law, need to be delivered to the applicant to rectify the deficiencies).

Therefore, in the opinion of the author, professional legal assistance should be required in a certain type of disputes before the Constitutional Court, including the right to free legal aid under the conditions prescribed for proceedings conducted before ordinary courts. It seems rather unfair that professional representation is mandatory before ordinary courts while such an obligation does not exist in a constitutional law dispute (where the case is exceptionally significant to the applicant, there are complex challenged legal issues, etc.) in which the Constitutional Court decides whether there has been a violation of the Constitution and whether it will repeal the challenged judicial act on the grounds of violation of the fundamental human right or freedom that may have occurred and remand the case for retrial.

III. PROPOSALS FOR AMENDMENTS TO THE RULES OF PROCEDURE OF THE CONSTITUTIONAL COURT

The analysis of the provisions of the Rules of Procedure of the Constitutional Court of Montenegro, in particular the provisions concerning the organisation of work, shows that certain provisions of the Rules of Procedure should also be reviewed from the perspective of their impact on the efficiency of the proceedings before the Constitutional Court and on the quality of the protection of human rights and freedoms by the Constitutional Court. Without elaborating further (due to the subject matter of this analysis and the fact that some provisions of the Rules of Procedure were also examined in the previous two analyses that were developed within the framework of the same project), we would like to point out only to the provisions that may affect, primarily, the efficiency of the decision-making of the Constitutional Court. To that end,

- the provisions governing the first phase of the Constitutional Court procedure on the constitutional complaints, i.e. the phase of “triage” of constitutional complaints, in which the specialised office of the Constitutional Court and sole judges (rapporteurs) should be involved more and in which the Panel ruling on the requirements for deciding on the merits of constitutional complaints should be involved less, should be re-examined. In the constitutional complaint cases that are to be dismissed, the judge rapporteur and the advisor who worked on the case should immediately draft and submit a proposal for a ruling on dismissal to the competent panel (regardless of whether the constitutional complaint does not fulfil the procedural requirements or is manifestly ill-founded);

- to achieve more efficient and cost-effective work of the Court, a somewhat simpler procedure of the Court should be provided for the repetitive cases (whose number is increasing in the work of the Court – which is demonstrated also by the structure of the present cases formed on constitutional complaints submitted on the grounds of the so-called child allowance), including the adoption of the so-called “clone decisions”. In the cases that are repetitive according to their content (with the same disputed legal issue), the so-called standard decisions could be prepared and they would contain main facts from the particular case, however, in the reasoning of the Court's position the first analogous decision adopted could be cited, so that the reasoning of these decisions would be short and would be much less time consuming to process;

- the time-limits should be reviewed with a view to providing additional procedural discipline. For instance, it would be necessary: to set at least provisional time-limits for responding to constitutional complaints, and for submitting files and documentation, especially in priority cases; to introduce provisions on the time-limit for service of a decision on the participants in the proceedings because the time-limit for the service of the copy of decision is not prescribed by the Law on the Constitutional Court or the Rules of Procedure, and this is a fact which is important for determining the date of the completion of the proceedings and, in some cases, for the exercise of the right as well (for example, detention cases, the cases of applicants with special needs, etc.);

- it would also be necessary to review the scope of activity of the Redaction Commission set out in Article 46 of the Rules of Procedure and the need for the Commission to approve the final texts of all decisions of the Court, including the rulings. It seems appropriate that the Commission should only approve the text of the decisions published in the official gazette and, possibly, of the rulings of the Court whose proposal was amended at the session of the Court (considering an increasing number of decisions of the Court and of its panels and the need for more extensive involvement of the judges and of the Office of the Court to ensure more efficient work of the Court with a view to resolving a large number of cases). The decisions and rulings adopted at the sessions of the panels should only be proofread, if appropriate, before they are dispatched from the Constitutional Court.

Analysing the work of the Constitutional Court in the application of the provision of Article 74 of the Law and considering certain provisions of the Rules of Procedure which are related to this provision (relating to the rights of the so-called interested parties in the proceedings before the Constitutional Court), it is necessary to apply, first of all, the provision of the Law and, thus, the provisions of the Rules of Procedure as well, but it would also be necessary to make appropriate amendments to the Law and/or to the Rules of Procedure, to attain the adversarial principle (*audi alteram partem*) and the principle of equality of “parties” in the proceedings before the Constitutional Court, as pointed out in Part two of this analysis. The non-application of these provisions leads in a certain way to a decrease in the length of the proceedings, but it certainly does not provide the essence of the right to a fair trial guaranteed by the Constitution and the ECHR.

Furthermore, the provision of Article 42 of the Rules of Procedure should be applied consistently. Having examined the Court's decisions, it has been noted that in a large number of cases a constitutional complaint is not delivered to the entity which adopted the challenged act to provide response (as it is evident that the requested response of the entity which adopted the challenged act was also missing – the Supreme Court of Montenegro)². A failure to provide response in cases where significant differences occur in views relating to the controversial legal issues, in particular when the Constitutional Court decides for the second time on essentially the same challenged act because the body which adopted that act did not comply with the constitutional grounds (Article 74 paragraph 2 of the Law) or legal positions of the Constitutional Court (Article 3 paragraph 2 of the Law), leads to a situation where no debate is opened and where differences are not resolved during the proceedings before the Constitutional Court, but new disputes arise after the decision of the Constitutional Court, in the process of enforcement of the Court's decision, resulting in repeated delaying to resolve the dispute to the detriment of those whose rights these courts should protect.

After the Constitutional Court adopts a decision finding that there has been a violation of a human right or freedom guaranteed by the Constitution and after it is served on the participants in the proceedings, which is the moment when it begins to produce legal effect,

² See UŽ-III br. 50/14 of 31 March 2017, UŽ-III br. 385/13 of 27 September 2016, UŽ-III br. 624/14 of 26 June 2017, UŽ-III br. 491/15 of 29 May 2017 etc.

an obligation occurs to enforce that decision i.e. to comply with the order of the Constitutional Court which must be clearly stated. This part of the procedure calls for two observations to be made.

The first observation relates to the fact that the moment of dispatching a constitutional court decision from the Court has not been specified. It is implied that the dispatch of any act of the Constitutional Court has its own “internal path”, in accordance with the provisions of the Rules of Procedure, so that the repealing decision, which is in the focus of the enforcement, must also go through the prescribed procedural phases, including consideration by the Redaction Commission. However, it is not necessary to elaborate on the fact that prolonging the dispatch of the decision (regardless of whether that is justified or not) can change the circumstances which have significant impact on the ability to enforce the decision. For this reason, it would be appropriate to limit the time in which a decision is to be dispatched from the Court (especially in cases resolved as urgent).

The second observation concerns the provisions of the Rules of Procedure which regulate the service of the decision on the participants in the proceedings. Namely, the provisions of Article 98 paragraphs 3 and 4 of the Rules of Procedure provide that if a decision or a ruling of the Constitutional Court cannot be served on the participants in the proceedings for any reason whatsoever, the service shall be made by posting it on the notice board of the Constitutional Court, and that in such case the service shall be deemed to have been effected on the eighth day after the date of posting the decision, ruling or conclusion on the notice board of the Constitutional Court. Bearing in mind that the body which is obliged to enforce the decision of the Constitutional Court is also deemed to be a participant in the proceedings, this provision covers this body as well, and it is not clear for which reasons the decision could not be served on the competent authority. Even in the situation when organisational changes in the structure of bodies occur, including dissolution, the Court must be informed of the legal successor that will take over the cases of the dissolved body, therefore, in that respect this provision is unclear and questionable.

As regards service of decisions of the Constitutional Court, it should also be noted that the provisions of Article 83 paragraphs 2 and 3 of the Rules of Procedure stipulate that if “the Constitutional Court concludes that harmful effects of determined violation of human right or freedom enshrined in the Constitution cannot be efficiently remedied ..., the Court shall adopted a decision on just satisfaction for the complainant who has suffered the violation”, and that just satisfaction shall be paid from the budget of Montenegro at the request of the complainant which shall be submitted to the Government “within three months from the date on which the decision of the Constitutional Court was served on the complainant”. These provisions impose an objective time-limit on the complainant for submitting the claim for just satisfaction (three months) which is significantly shorter than the usual limitation period for claims, which may raise a question about the enforcement of a decision of the Constitutional Court, especially in situations when the service is effected by posting on the Court's notice board.

IV. PROPOSALS FOR CHANGING THE ORGANISATION AND METHOD OF WORK

The organisation of performance of specialised tasks in the proceedings on the constitutional complaint must be arranged in a way to ensure that all actions are running smoothly, that there is not much room for discretionary behaviour and idling, that the judges and advisers working on the constitutional court cases in general and, in particular, those related to constitutional complaints, should be provided expert assistance with regard to

information on legal positions or views of the Court and the standards developed in its own jurisprudence and the case-law of the ECtHR, as well as good examples of the case-law of constitutional courts of other countries, and to use as rationally as possible the time available for work and the resources of the specialised office on constitutional law cases.

In the light of the above, attention should also be paid to the following issues:

- In accordance with the case-law established on the basis of applicable provisions of the Law and of the Rules of Procedure, the movement of the files is not regulated precisely, as noted in the analysis on the assessment of the decisions of the Constitutional Court, which was made within the framework of this project. All constitutional complaints received in the Constitutional Court are first referred to the session of the Panel ruling on the requirements for deciding on the merits of constitutional complaints which, after conducting prior analysis, examines: firstly, whether the constitutional complaint meets the procedural requirements (the existence of an individual legal act or action by a public authority, timeliness, exhaustion of legal remedies, etc.); secondly, if the Panel finds that a constitutional complaint meets the procedural requirements, the same session shall proceed with examining whether the constitutional complaint at hand is manifestly ill-founded. The constitutional complaints found by the Panel not to meet the procedural requirements for proceedings and the constitutional complaints that are considered to be manifestly ill-founded are assigned to one of the judges who are members of the Panel ruling on the requirements and to a specific advisor to prepare a proposal for a ruling on dismissal. At one of the subsequent sessions, the same Panel will decide on a proposal for a ruling dismissing constitutional complaints on these two grounds. Thus, in effect, the same case, which is ruled on procedurally, is discussed twice, which should be simplified;

- The provisions of Article 49 of the Rules of Procedure prescribe that the advisor in the constitutional court case shall be selected in the order of receipt and type of constitutional proceedings, type of challenged acts and alphabetical order of advisors' surnames, on the date of receipt by the Constitutional Court (paragraph 3) and that the Constitutional Court's IT system automatically selects judge rapporteur and advisor in each constitutional court's case according to a preset algorithm in accordance with the criteria set out in paragraphs 1 and 3 of this Article (paragraph 4). Bearing in mind a small number of staff – advisers and the diversity of legal fields occurring in constitutional complaints, it is questionable whether it is realistic that the advisers can be specialised for the processing of particular cases, which is an essential prerequisite for effective and efficient work on constitutional complaints;

- The Constitutional Court should draw up a programme for resolution of the constitutional complaints from previous years (especially those submitted to the Court two years ago or more than two years ago), making an effort to resolve them as soon as possible, because as such they are a cause for *prima facie* doubt as to the reasonableness of the length of the proceedings on those constitutional complaints;

- Decisions rejecting constitutional complaints, where possible, should be designed in a way that the reasoning is short and concise (the so-called “small merits”), so that the human resources of the specialised office are not excessively engaged in the preparation of long and detailed reasoning, especially in situations where reference can be made to the position of the Court already expressed in an earlier resolved case;

- Since the decisions of the Constitutional Court lack the date on which a constitutional complaint was submitted to the Constitutional Court, it would be necessary to slightly redesign the content of the decision in which the Constitutional Court would also provide main information on when i.e. on which date the constitutional complaint was filed. This would certainly be appropriate in order to identify the constitutional complaint more easily,

but it is also necessary from the perspective of monitoring the exercise of the right to a trial within a reasonable time before the Constitutional Court.

V. PROPOSALS FOR CHANGES IN THE OFFICE OF THE CONSTITUTIONAL COURT

Having examined the organisation of the Office of the Constitutional Court, it is evident that:

Firstly, in the initial phase of the proceedings on the constitutional complaint, in which it is examined whether the procedural requirements are met for the decision-making of the Constitutional Court, the tasks of the prior control of submissions, primarily a "triage" of the constitutional complaints, are not integrated organisationally. In the practice of the constitutional courts that organised the examination procedure at one place in a form of an office (department or another form), such an organisational solution allows the judges rapporteurs and panels of the Court to deal with the disputable issues raised in the cases on the merits and it has proved to be a specialised, economical and efficient form of the operation of the specialised office (the tasks carried out in such organisational forms include: examining procedural requirements for timeliness and admissibility of constitutional complaints; preparing draft rulings dismissing constitutional complaints and terminating the proceedings on the submitted constitutional complaints; submitting constitutional complaints for the conduct of the proceedings of making decision on the merits; harmonisation of the jurisprudence of the Court relating to prior control of the admissibility of constitutional complaints with the case-law of the ECtHR; specialised drafting of the rulings dismissing constitutional complaints and terminating the proceedings on the submitted constitutional complaints before they are served on the participants in the proceedings, etc.);

Secondly, the Court has established an organisational unit (Department), which should monitor in more detail the case-law of both the Constitutional Court and of the ECtHR, principally in respect of Montenegro, and beyond, and a wider application of the European standards by the Constitutional Court, in order to ensure uniform proceeding by the Court in the same or similar legal situations and to create consistent jurisprudence of the Constitutional Court; it would also be important to monitor within this organisational form the case-law of large constitutional courts, that is, of the courts recognised as exemplary constitutional courts³. According to the findings of this analysis, the Court does not have the human resources for this type of constitutional court activities, which complicates systemic harmonisation of the Constitutional Court case-law, including the harmonisation with the ECtHR case-law. In this regard, in the opinion of the author, it is necessary to staff, without delay, this department which would provide greater assistance to the judges and advisers working on the cases (within the meaning of Article 23 paragraph 2 of the Rules of Procedure), because monitoring national and foreign case-law is a complex and a highly demanding task in respect of the scope of engagement it requires,

³ In this analysis, the author did not address in more detail the issues related to all the problems that may occur because of the inadequate organisation of the Specialised Office of the Court, i.e. the absence of two important organisational units, since these issues were also discussed in the analysis on "Overview of decisions of the Constitutional Court of Montenegro". The author considers that the assessments and recommendations made in this analysis are acceptable especially in the part pointing out how the absence of these organisational units affects the trial within a reasonable time and the attitude towards citizens addressing the Constitutional Court and to whom the Constitution guarantees the right to a fair and public trial within a reasonable time. For more information on this, see the analysis "*Assessment of the decisions of the Constitutional Court – constitutional complaints*", documentation of the Constitutional Court of Montenegro, Podgorica, 2017, pp. 15 and _____

Thirdly, there are 13 employees who work on the cases in the Department – the organisational unit of the Office in charge of constitutional complaints: the Head of the Department, 10 Constitutional Court Advisors and 2 Advisers, 7 of whom work on the cases on the merits and 4 work on the cases for which a previous decision on dismissal was made. The fact that the act on systematisation of work posts stipulates that there are to be 23 staff members in the Department for constitutional complaints (the Head of the Department, 15 Constitutional Court Advisors and 7 Advisers) also confirms that this number is insufficient. It is obvious that these figures show that one of the reasons for delays in the Constitutional Court proceedings on constitutional complaints is precisely the problem of understaffing and vacancies at key posts for specialised tasks of preparing decisions on constitutional complaints. In this respect, it is necessary to immediately start filling the above mentioned vacancies, selecting the candidates according to their educational and professional references. Raising the level of efficiency and quality in the work of the specialised office of the Constitutional Court requires also further (practical) training of the existing advisors and associates in the Court.

This department (or the Case-law Department) should also be trained to monitor the enforcement of the Constitutional Court's decisions rendered on constitutional complaints.

Furthermore, in the opinion of the author of this analysis, it would be appropriate to consider opening an unpaid internship programme in the Court, which is a practice in the European constitutional courts, especially for postgraduate students.

The examination of the constitutional law literature on the Constitutional Court of Montenegro shows that even the legal science has failed to monitor the jurisprudence of the Constitutional Court and we believe that at least some of the reasons for lengthy Constitutional Court proceedings in the protection of human rights would be thus eliminated. Therefore, the Court should establish ongoing cooperation with law schools, even more so since in the current composition of the Court there are no university professors of constitutional or public law.

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The problems noticed in the functioning of the Constitutional Court in the proceedings on constitutional complaints are partly related to the constitutional and legal framework of its jurisdiction and powers, and are largely beyond the legal framework, and even beyond the Constitutional Court itself whose legislative power is exceptional. A closer examination of these issues surpasses the subject matter and scope of this analysis, but due to their objective importance, they had to be at least mentioned in this analysis as well. Namely, it is well known that even the best and the most precise constitutional and legal rules and the best decisions of a constitutional court in any country, including Montenegro, cannot ensure the rule of constitutionality and legal security in the society without stronger support of the institutions of political power in respect of affirmation of the fundamental democratic values on which the contemporary Montenegrin state is based according to the Constitution (such as the rule of the constitution and law, the division of power, human dignity, justice and equality, and social justice) and the confirmation of the constitutional principle of independence and autonomy of the judicial branch of government in the exercise of the protection of rights and legal interests of the citizens. It should also be added that the legal science needs to make more substantial efforts to build a constitutional culture and to promote general loyalty to the Constitution and law, which would also contribute to raising the social awareness of the importance of the constitutional justice.

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