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The Constitutional Court of the Republic of Serbia
Ustavni sud Srbije

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REPUBLIC OF SERBIA
CONSTITUTIONAL COURT

ANSWERS TO THE QUESTIONNAIRE FOR THE XVIth
CONGRESS OF THE CONFERENCE OF EUROPEAN
CONSTITUTIONAL COURTS IN 2014

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“Cooperation of Constitutional Courts in Europe – Current
Situation and Perspectives”

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I. CONSTITUTIONAL COURTS BETWEEN CONSTITUTIONAL LAW AND EUROPEAN LAW

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

European law, as a normative framework, comprising European *acquis communautaire* and European *acquis non-communautaire*, gives rise to rights and obligations for the Republic of Serbia (and, thus, the Constitutional Court of Serbia) with respect to its Council of Europe membership and EU candidate status.

The Republic of Serbia has been a member of the Council of Europe (CoE) since 3 April 2003. The Constitutional Court of Serbia has since been formally and legally obligated to apply the CoE conventions, protocols and other legal enactments and to assess the compliance of the national laws and other general legal enactments with them. The Republic of Serbia has to date ratified 77 CoE conventions (and signed another eight), including, notably, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), the Framework Convention on the Protection of National Minorities, the European Charter for Regional and Minority Languages, the European Social Charter (Revised), etc. The Republic of Serbia has also acceded to 11 CoE Partial Agreements¹, within which it has been achieving specific interests within the CoE's remit together with the other member-states.

Article 16, paragraph 2, and Article 194, paragraph 3 of the Constitution of the Republic of Serbia (hereinafter: Constitution), which was adopted in 2006, lay down that the generally accepted rules of international law and ratified international agreements shall be an integral part of the legal order in

¹ Including, notably, the Group of Countries against Corruption (GRECO), the European Pharmacopoeia, the CoE Development Bank, the European Support Fund for the Co-Production and Distribution of Creative Cinematographic and Audiovisual Works – EUROIMAGES, the European Commission for Democracy through Law – the Venice Commission, the Enlarged Partial Agreement on Sport, the North-South Centre, the European and Mediterranean Major Hazards Agreement (EUR-OPA), the CoE Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (Pompidou Group), Youth Card, Cultural Roads. Source: Ministry of Foreign Affairs of the Republic of Serbia (<http://www.mfa.rs>).

the Republic of Serbia and be enforced directly. This practically means that the decisions of the Constitutional Court and all other courts and state authorities may be based on generally accepted rules of international law and ratified international treaties. Article 142, paragraph 2 of the Constitution lays down that courts shall be autonomous and independent and under the obligation to perform their duties “in accordance with the Constitution, the law and other general enactments, when so stipulated by the law, generally accepted rules of international law and ratified international treaties”, while Article 145, paragraph 2 of the Constitution stipulates that “court decisions shall be based on the Constitution, the law, ratified international treaties and regulations passed pursuant to the law”.

The Constitutional Court of Serbia has been reviewing the compliance of laws and other general legal enactments with the generally accepted rules of international law and ratified international treaties within its duty to protect the unity of the legal order within the abstract constitutionality review procedure, while ratified international treaties are subject to reviews of their compliance with the Constitution (Article 167, paragraph 1 of the Constitution).

Under Article 18, paragraph 2 of the Constitution, “[H]uman and minority rights enshrined in the generally accepted rules of international law, ratified international treaties and laws shall be guaranteed by the Constitution and, as such, be exercised directly.” Paragraph 3 of this Article stipulates that “[P]rovisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to the valid international human and minority rights standards and the practices of international institutions supervising their implementation.”

On the normative plane, the Republic of Serbia has accepted the highest standards regarding the respect, protection and promotion of human rights, at the national, European and international levels alike. It has assumed all the obligations in that respect when it joined the Council of Europe wherefore the case law of the European Court of Human Rights (hereinafter: ECtHR) is of utmost relevance to the Constitutional Court and its fulfilment of its duty to directly protect human rights and freedoms in the constitutional appeal review procedure. Indeed, constitutional appeals account for most of the Constitutional Court’s caseload (90%).

Article 22 of the Constitution provides everyone with the right to judicial protection in the event any of their human or minority rights guaranteed by the Constitution have been violated or denied, as well as with the right to the elimination of the consequences arising from the violation. Therefore, the protection of fundamental human rights and freedoms is primarily achieved within the framework of the national judiciary including constitutional judicial protection, but such protection may also be sought from international institutions.

In the view of the Constitutional Court, protection of “all constitutionally guaranteed human and minority rights and freedoms, both individual and collective, regardless of their position in the Constitution and whether they are explicitly integrated in the Constitution or are implemented in the

constitutional judicial system via international treaties” shall be exercised before the Constitutional Court.²

The Constitutional Court of Serbia’s Professional Department monitors ECtHR case law and regularly notifies the Court judges and advisers of its judgments and views and its case law on specific issues of interest to the work of the Constitutional Court of Serbia, of the recent developments in the ECtHR, etc. The judges of the Constitutional Court of Serbia have visited the Strasbourg Court on a number of occasions and the advisers in the Professional Department have spent several months working in the ECtHR to acquaint themselves with its operations. A number of educational seminars on the application of the ECHR have been organised within the Court’s successful cooperation with the CoE Belgrade Office. The Court staff are updated on ECtHR case law in a number of other ways as well.

The Constitutional Court is not formally or legally under the obligation to apply the *acquis communautaire* in its work and decision making since the Republic of Serbia is not a member of the European Union³.

- 2. Are there any examples of references to international sources of law, such as**
- a) the European Convention on Human Rights,**
 - b) the Charter of Fundamental Rights of the European Union,**
 - c) other instruments of international law at European level,**
 - d) other instruments of international law at international level?**

The Constitution of the Republic of Serbia sets out that the generally accepted rules of international law and ratified international treaties are an integral part of the legal order of the Republic of Serbia and that they shall be enforced directly, provided that the ratified international treaties are in compliance with the Constitution. The Republic of Serbia ratified the ECHR⁴ before the adoption of the valid Constitution in 2006. The ECHR thus not only became an integral part of the legal order as a ratified international treaty, but the ECHR rights are enshrined as constitutional rights in the Constitution, the highest law of the land, as well.

In its decisions on a wide variety of cases within its remit, the Constitutional Court often refers to the legal views of the European Commission for Human Rights and the ECtHR, based on the interpretation of the content and scope of the individual rights enshrined in the ECHR and Protocols thereto. Therefore, references to the ECHR are not purely declarative; they reflect the Court’s perception of the ECHR as a “living instrument” providing increasingly broader and comprehensive protection of the guaranteed human rights and freedoms through jurisprudence.

² See the Constitutional Court’s Views on the Preliminary Constitutional Appeal Review Procedure of 30 October 2008 and 2 April 2009.

³ The Republic of Serbia was granted the status of EU candidate on 1 March 2012.

Note: All Constitutional Court decisions are available on the Court’s official website <http://www.ustavni.sud.rs/page/jurisprudence/35/>

⁴ The European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Journal of Serbia and Montenegro – International Treaties, Nos. 9/03, 5/05 and 7/05 and Official Gazette of the Republic of Serbia No. 12/10) – illustrations of reference are provided in the relevant chapters of this text.

The Constitutional Court has been referring to the ECHR in a large number of its decisions. It has been citing it both in terms of the general legal views of the ECtHR and the specific disputed constitutional law issues arising in individual cases.

However, the Constitutional Court has been referring to other sources of international law in its jurisprudence as well, such as:

- The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948⁵;
- The International Covenant on Civil and Political Rights⁶;
- The International Covenant on Economic, Social and Cultural Rights⁷;
- The Vienna Convention on Contract Law, ratified by the Decree Ratifying the Vienna Convention on Contract Law⁸;
- The CoE Framework Convention on the Protection of National Minorities⁹;
- Numerous International Labor Organization conventions (Convention No. 87 on Freedom of Association and Protection of the Right to Organise¹⁰, Convention No. 98 on the Right to Organise and Collective Bargaining¹¹, Convention No. 102 on Social Security (Minimum Standards)¹², Convention No. 111 on Discrimination (Employment and Occupation)¹³,

⁵ Constitutional Court Ruling in the case of IUz -43/2009 of 9 July 2009, in which the Court reviewed the provisions of the Law on Judges (Official Gazette of the Republic of Serbia No. 116/08) on the character of judgeships as public offices, and judicial appointment/termination procedures.

⁶ Constitutional Court Decision in the case of IUz -231/2009 of 22 July 2010, in which the Court found that the issues regarding the right to establish a media outlet and enter it in the register of media outlets, as well as the penalties for specific commercial offenses and misdemeanours prescribed by the Law Amending the Public Information Law (Official Gazette of the Republic of Serbia No. 71/09) had not been regulated in compliance with the Constitution and ratified international treaties.

⁷ Constitutional Court Decision in the case of IU -187/2005 of 23 June 2011 on the disputed provisions of the Labour Law (Official Gazette of the Republic of Serbia Nos. 24/05 and 61/05) governing the organisation of trade unions and specific legal protection accorded workers' representatives, the right to maternity leave and right to benefits.

⁸ Constitutional Court Ruling in the case of IUm -159/2008 of 16 July 2008, on the compliance with the Constitution of the provisions of the Agreement between the Government of the Republic of Serbia and the Government of the Russian Federation on Cooperation in the Oil and Gas Sector (Official Gazette of the Republic of Serbia – International Treaties No. 83/08).

⁹ Constitutional Court Decision in the case of IUz -52/2008 of 21 April 2010, in which it found that the provisions of the Law on Local Elections (Official Gazette of the Republic of Serbia No. 129/07) on the division of seats won in local self-government assemblies and the "blank resignation" institute, i.e. the right of the parties on whose tickets the councillors ran to dispose of their mandates freely, were not in compliance with the Constitution and ratified international treaties.

¹⁰ *Supra nota 7*

¹¹ *Supra nota 7*

¹² Constitutional Court Ruling in the case of IU-103/2007 of 18 February 2010 after the review of the provisions of the Law on Employment and Unemployment Insurance (Official Gazette of the Republic of Serbia Nos. 71/03 and 84/04) setting the amount of temporary unemployment benefits.

¹³ Constitutional Court Decision in the case of IUz-299/2011 of 17 January 2013, in which it found the provision of the Law on Employment in State Authorities (Official Gazette of the Republic of Serbia Nos. 48/91, 66/91, 44/98, 49/99, 34/01, 39/02 and 49/05) incompatible with the Constitution because it allowed the fixed-term employment of a civil servant without first advertising the position.

Convention No. 121 on Employment Injury Benefits¹⁴, Convention No. 158 on Termination of Employment¹⁵ et al);

- Convention on the Elimination of All Forms of Discrimination against Women and Convention on the Elimination of All Forms of Racial Discrimination¹⁶;
- European Social Charter (Revised)¹⁷;
- Convention on Road Traffic¹⁸;
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime – Strasbourg Convention (1990), International Convention for the Suppression of the Financing of Terrorism – New York Convention (1999), Criminal Law Convention on Corruption – Strasbourg Convention (1999), UN Convention against Transnational Organized Crime and the Protocols thereto – Palermo Convention, UN Convention against Corruption – New York Convention (2003), CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism – Warsaw Convention¹⁹ et al.

During its reviews of specific constitutional legal issues, the Constitutional Court has also been referring to other international documents although they do not constitute formal sources of law within the meaning of Article 167 of the Constitution, wherefore they cannot be subject to constitutionality reviews. In such cases, the Constitutional Court has been departing from the observation that various international instruments (resolutions, recommendations, charters, etc.) adopted by the individual bodies of international or regional organisations comprise rules of potential relevance to human rights protection. Although such enactments are not international treaties in the true sense of the word and are thus not subject to ratification, the authority of the bodies that adopted them has resulted in their general acceptance as rules of international law, wherefore member states of international organisations abide by and honour them although they are under no legal obligation to do so. For these reasons, the Constitutional Court has referred also to the following documents in its reviews of individual disputed legal issues: Basic Principles of the

¹⁴ Constitutional Court Decision in the case of IUz-314/2011 of 18 October 2012, in which it found the disputed provisions of the Health Insurance Law (Official Gazette of the Republic of Serbia Nos. 107/05, 109/05, 106/06 and 57/11) incompatible with the Constitution and a ratified international treaty because they did not specify that a commuting accident shall be considered an industrial accident (insured case) as provided for in the Convention.

¹⁵ Constitutional Court Ruling in the case of IUz -13/2008 of 15 July 2010 on the right to judicial protection in the event of termination of employment due to security issues regulated by the Police Law (Official Gazette of the Republic of Serbia No. 101/05).

¹⁶ *Supra nota 7.*

¹⁷ Constitutional Court Ruling in the case of IUz -361/2012 of 22 May 2013, in which it reviewed the disputed Health Insurance Law (Official Gazette of the Republic of Serbia Nos. 107/05, 109/05, 30/10, 57/11, 110/12 - CC and 119/12) and the issue of whether people with health insurance, who have failed to select a general practitioner, may be deprived of their constitutional right to health care.

¹⁸ Constitutional Court Ruling in the case of IUp-85/2008 of 17 March 2010 in which the Court established that the vehicle registration certificate form prescribed in the Rulebook on the Registration of Motor Vehicles and Trailers was in compliance with the uniform international road traffic regulations.

¹⁹ Constitutional Court Ruling in the case of IUz-117/2009 of 30 June 2011, rendered after the review of issues regulated by the Law on the Seizure of Proceeds from Crime (Official Gazette of the Republic of Serbia No. 97/08).

Independence of the Judiciary endorsed by UN General Assembly Resolutions²⁰, CoE Committee of Ministers Recommendation No. R (94)12 on the independence, efficiency and role of judges, the European Charter on the statute for judges regarding judicial independence and impartiality²¹, CoE Committee of Ministers Recommendation No. R (95) 5 of 7 February 1995 on the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases²² etc.

The ECtHR considers CoE Venice Commission documents as sources of law (its view arising from its judgments in the cases of *Apostol v. Georgia* of 28 November 2006; *Oya Ataman v. Turkey* of 5 December 2006; *Yumak and Sadak v. Turkey* of 8 July 2008; *Melnychenko v. Ukraine* of 19 October 2004, etc.), wherefore the Constitutional Court has also been taking on board the opinions of this body in its jurisprudence (e.g. Opinion on the Constitution of Serbia CDL/AD(2007)004, the part regarding Article 102, paragraph 2 of the Constitution and the status of people's deputies)²³.

The Constitutional Court has in specific cases taken on board and referred to regulations that are part of the *acquis communautaire* (such as Council Regulation No. 2411/98 of 3 November 1998 on the recognition in intra-Community traffic of the distinguishing sign of the Member State in which motor vehicles and their trailers are registered²⁴ and European Parliament Directive 2006/126/EC; Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems²⁵; travel document standards and recommendations - ICAO 9303, Council (EC) Regulation 2252/2004, as well as ISO, ISO/IEC 14443 and ICAO NTWG standards²⁶; Regulation (EC) No 1059/2003 of the European Parliament and of the Council on the establishment of a common classification of territorial units for statistics (NUTS)²⁷ et al.).

²⁰ Constitutional Court Decision in the case of IU-28/2006 of 19 February 2009, in which it reviewed the authority of the minister charged with the judiciary to launch proceedings to establish grounds for the dismissal of a judge, laid out in the Law Amending the Law on Judges (Official Gazette of the Republic of Serbia No. 44/04).

²¹ Constitutional Court Ruling in the case of IUz -43/2009 of 9 July 2009, in which it concluded that the Law on Judges (Official Gazette of the Republic of Serbia No. 116/08) entitled everyone to have a fair review of their rights and obligations by an independent and impartial court.

²² Constitutional Court Decision in the case of IUz-2/2010 of 14 March 2013, in which it concluded that the Law Amending the Civil Procedure Law (Official Gazette of the Republic of Serbia No. 111/09) provision laying down the 100,000 Euro minimum value of the claim for an appeal on points of law to the Supreme Court of Cassation did not limit the right to such an appeal, i.e. did not render this extraordinary legal remedy inaccessible.

²³ Constitutional Court Decision in the case of IUz-52/2008 of 21 April 2010, in which the Court referred to the view in the Opinion that the intent to tie the deputy to the party position on all matters at all times concentrated excessive power in the hands of the party leaderships, which was a serious violation of the freedom of a deputy to express his/her view on the merits of a proposal or action.

²⁴ *Supra nota 17* – use of the Latin alphabet on the vehicle registration plates in international traffic.

²⁵ Constitutional Court Ruling in the case of IU-279/2006 of 16 December 2010, in which it reviewed the constitutionality of the Law Ratifying the Social Insurance Agreement between the Federal Republic of Yugoslavia and Bosnia and Herzegovina regarding the retention and payment of excessive benefits and the legal effect of final rulings.

²⁶ Constitutional Court Ruling in the case of IUz-778/2010 of 31 March 2011 regarding the provisions on travel document forms of the Law on Travel Documents (Official Gazette of the Republic of Serbia No. 90/07).

²⁷ Constitutional Court Ruling in the case of IUo-50/2010 of 17 November 2011 on the Decree on the Classification of Territorial Units for Statistics (Official Gazette of the Republic of Serbia No. 109/09), according to which the degree of

It needs to be underlined that the Constitutional Court has been relying on the above-mentioned and other sources of international law and on other international documents both in its reviews of the constitutionality of laws and other general enactments and in its adjudication of other matters within its jurisdiction (appeals of the non-reappointed judges and prosecutors in the general election/reappointment procedure conducted within the general judicial reform in the Republic of Serbia; motions to prohibit civil associations; and, notably, in its reviews of numerous constitutional appeal cases)²⁸.

3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?

No, because the Republic of Serbia does not have the status of a European Union member-state.

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?

The jurisprudence of European courts of justice does not formally or legally influence the jurisprudence of the Constitutional Court, but it has referred to the *acquis communautaire* in practice²⁹.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

The Constitutional Court has been referring regularly to the jurisprudence of the European Court of Human Rights in a large number of different cases. Herewith an overview of the most relevant decisions on normative review and constitutional appeal cases in which the Constitutional Court referred to the jurisprudence of the ECtHR.

Examples of cases in which the Constitutional Court reviewed the constitutionality and legality of laws and other general enactments and of other cases

Under the Constitution of the Republic of Serbia, the Constitutional Court shall rule on: the compliance of laws and other general enactments with the Constitution, generally accepted rules of international law and ratified international treaties; the compliance of ratified international treaties with the Constitution; the compliance of other general enactments with the law; the compliance of statutes and general enactments of autonomous provinces and local self-government units with the

development of the local self-government units and regions rather than the ethnic breakdown of the population is the criterion for defining regions for statistical purposes.

²⁸ Examples of Constitutional Court's references to ECtHR decisions are provided in its reply to Question 5 in this chapter.

²⁹ See the Reply to Question 2 in this chapter.

Constitution and the law; and the compliance of general enactments of organisations entrusted with public powers, political parties, trade unions, civil associations and collective agreements with the Constitution and the law (Article 167, paragraph 1.)

In its performance of its abstract review tasks, the Constitutional Court has been intervening by eliminating legislative solutions and provisions of by-laws and other general legal enactments that are not in compliance with the Constitution, generally accepted rules of international law and ratified international treaties. As of 2008, the Court has rendered a large number of decisions in this field vacating legal provisions in contravention of the constitutional principles and, thus, the achieved degree of development of a democratic society, that is, the realisation of rights and freedoms, and has also been referring to ECHR law in these decisions.

The Court has not only been reviewing the constitutionality of these provisions in the formal legal and material legal sense in the process, but has also been emphasising the importance of the “quality” of law, departing from the substance of the autonomous concept of “law” in the meaning of the ECHR and established by the ECtHR, primarily with the aim of ensuring respect of the principle of legal certainty. In its reviews of the constitutionality of general legal enactments, the Constitutional Court has thus also been considering whether the requirements arising from the expression “prescribed by law” have been met, notably: that the law must be adequately accessible, i.e. that everyone must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case; and that a norm cannot be regarded as 'law' unless formulated with sufficient precision to enable the citizen to regulate his conduct³⁰. The Constitutional Court has also taken into account the fact that the concept of “law” in the meaning of Articles 9, 10 and 11 of the ECHR, interpreted in ECtHR’s case law as including general legal enactments that may not have the force of law, but must fulfil the requirement of being formulated with sufficient precision to enable everyone to regulate their conduct in accordance with the consequences which apply to everyone equally, and are available to everyone by way of publication or another form of public communication envisaged by the regulation³¹.

The Constitutional Court has increasingly been relying ECtHR views in its jurisprudence. Its relevant rulings include those on the way in which seats in the National Assembly are assigned³², the

³⁰ The Constitutional Court referred to the views expressed in judgments in the cases of *Sunday Times v. United Kingdom*, App. No. 6538/74 of 26 April 1979 and *Silver and Others v. United Kingdom*, App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 of 25 March 1983, in a number of abstract reviews, notably in its decisions in the following cases: IUz-107/2011 of 24 November 2011 (in which it rendered an interpretative decision on the “silence of the administration” institute and the constitutionally guaranteed right to judicial protection); IUz-299/2011 of 17 January 2013 (in which it reviewed the provisions of the Law on Employment in State Authorities and concluded that the disputed Law had not specified the scope of discretionary powers of the relevant authorities sufficiently and clearly enough); IUz-27/2009 of 21 March 2013 (where it concluded that the norms of Law on Burials and Cemeteries did not satisfy the European regulatory quality standards); IUz-51/2012 of 23 May 2013 (in which it found that the Civil Procedure Law provisions governing the protection of collective rights and interests were vague and imprecise, wherefore they objectively jeopardised the exercise of the rights to legal certainty and equal protection of one’s rights in court), etc.

³¹ The Constitutional Court *inter alia* referred to this view also in its Decision in the case of IUz -1577/2010 rendered in 2013, regarding the constitutionality of specific provisions of the Misdemeanours Law and their compatibility with ratified international treaties.

³² The Law on the Election of People’s Deputies (Official Gazette of the Republic of Serbia Nos. 35/00, 69/02, 57/03, 72/03, 18/04, 85/05 and 101/05) - Decision in the case of IUz-42/2008 of 14 April 2011, in which the Court took the

right of entities that submitted the election tickets to assign seats in local assemblies as they saw fit and invoke the so-called “blank resignation” institute³³, the exclusion of the right to institute administrative disputes in specific areas³⁴, the violation of the right to personal delivery to citizens of enactments on their rights and interests³⁵, the violation of the restriction of the guaranteed right to the inviolability of the confidentiality of correspondence allowed by the Constitution³⁶, individual provisions on the founding and registration of media outlets³⁷, exclusion of individual owners of apartments and other parts of collective residential buildings from the possibility of exercising their legal property rights³⁸, prevention of conflicts of interests of officials holding two or more public offices on the day the Law came into effect³⁹, disputed legal issues regarding judicial reappointment

view that seats are to be assigned to the candidates in the order in which they are listed on the election tickets without exception.

Even before Serbia ratified the ECHR, the Constitutional Court took the view that the mandates of the National Assembly deputies and councillors in the local self-government assemblies may not be conditioned by their membership of the political parties on whose election tickets they ran and that they may not terminate before the expiry of the period to which they were elected because their membership of the political party that fielded them had been terminated or because that political party had ceased to exist (Decisions in the cases of IU-197/2002 of 27 May 2003 and IU-249/2003 of 25 September 2003).

³³ Law on Local Elections (Official Gazette of the Republic of Serbia No. 129/07) – Decision in the case of IU-52/2008 of 21 April 2010, in which the Court took the view that an entity that submitted the election ticket had to assign the won seats to the candidates in the order in which they were listed on the election ticket and that it was not entitled to dispose of the assigned mandates by invoking the “blank resignation” institute (contract between the candidate/councillor and entity that submitted the election ticket entitling the latter to submit a resignation on behalf of the councillor and regardless of his/her will).

³⁴ Law on Planning and Construction (Official Gazette of the Republic of Serbia Nos. 47/03 and 34/06) – Decision in the case of IU -409/2005 of 2 April 2009, in which the Court established that the exclusion of the possibility of instituting an administrative dispute against a second-instance ruling by the relevant minister was not in compliance with the Constitution.

³⁵ Law on Expropriation (Official Gazette of the Republic of Serbia Nos. 53/95, 23/01 and 20/09) – Decision in the case of IUz -17/2011 of 23 May 2013, in which the Court found that a Government ruling establishing public interest for expropriation of real estate is considered to have been delivered to the parties on the day of publication in an official herald of the Republic of Serbia, because such form of delivery is not in compliance with the Constitution and ratified international treaties.

³⁶ Telecommunications Law (Official Gazette of the Republic of Serbia Nos. 44/03 and 36/06) – Decision in the case of IUz -149/2008 of 28 May 2009 in which the Court took the view that only a law may provide for a restriction of the guaranteed right to the inviolability of the confidentiality of letters and other means of communication, permissible under the Constitution.

³⁷ Law Amending the Public Information Law (Official Gazette of the Republic of Serbia No. 71/09) – Decision in the case of IUz -231/2009 of 5 May 2011, in which the Court found that the authority of the minister charged with information to enact a by-law governing the manner in which the register of media outlets is kept and the deadlines within which the founders of the outlets have to apply for registration was not in compliance with the Constitution.

³⁸ Law on Maintenance of Residential Buildings (Official Gazette of the Republic of Serbia Nos. 44/95, 46/98 and 1/01) – Decision in the case of IUz-95/2006 of 17 March 2011, in which the Court established that the disputed provisions of the Law were not in compliance with the Constitution and Article 1 of Protocol 1 to the ECHR, because the decisions on the use and change of purpose of the common building areas, which are the common and indivisible property of the apartment owners, can be taken only in the event all of the owners have the equal right to take decisions and the right to effective protection of that right.

³⁹ Law Amending the Law on the Anti-Corruption Agency (Official Gazette of the Republic of Serbia No. 53/10) – Decision in the case of IY3-1239/2010 of 7 July 2011, in which the Court departed from the constitutional principle prohibiting conflicts of interest and found the provision allowing officials holding two or more public offices - one of

and dismissal⁴⁰, the legal provision that may have violated the right of access to a court i.e. the right to a legal remedy in the event a party was unable to invoke an ECtHR judgment finding a human rights violation in a specific legal situation⁴¹, restriction of the freedom of individuals to choose the location and manner of disposing of their cremated remains⁴² et al.

The Constitutional Court has also rendered a decision to prohibit the work of a civil association, the Fatherland Movement *Obraz*⁴³ expressing the view that the constitutionally guaranteed freedoms of opinion, expression and assembly may not be exercised to deprive other people or groups of those freedoms. Departing from the fact that the state authorities' measures had not achieved the legitimate goal of suppressing activities aimed at violating constitutionally guaranteed human rights and freedoms, the Constitutional Court established that there was a pressing social need to limit *Obraz*' freedom of assembly, i.e. that the criteria for prohibiting the work of this civil association existed in the given circumstances due to its activities aimed at violating guaranteed human and minority rights and inciting ethnic and religious hatred. The Court referred to ECtHR case law in its decision⁴⁴.

In addition, in its review of an appeal a non-reappointed judge filed against the High Judicial Council Decision of 25 December 2009 to terminate his office as of 31 December 2009 pursuant to the new Law on Judges (Official Gazette of the Republic of Serbia No. 116/08), the Constitutional Court rendered a pilot decision⁴⁵ in which it upheld the appeal. The Court stated that the appellant was to have been provided with all the procedural guarantees enshrined in the right to a fair trial, including the one on the adoption of an individual and reasoned High Judicial Council decision that should have specified the individual reasons for his non-reappointment based on the judicial (re)appointment criteria laid down in the Law on Judges and elaborated in the relevant by-law on

which they had been elected to by popular vote - on the day the Law came into effect, to continue holding the other public office without the Agency's consent, incompatible with the Constitution and a ratified international treaty.

⁴⁰ Law Amending the Law on Judges (Official Gazette of the Republic of Serbia No. 101/10) – Decision in the case of IUz-1634/2010 of 22 December 2011, in which the Court took the view that any procedural violations by the authority that had conducted the procedure and which a judge could not be held accountable for, could not constitute legitimate legal grounds for initiating a procedure to dismiss the judge.

⁴¹ Civil Procedure Law (Official Gazette of the Republic of Serbia No. 72/11) – Decision in the case of IUz-147/2012 of 21 February 2013, under which the disputed provision, specifying an objective statutory deadline within which a motion for retrial must be filed (five years from the day the decision became final) is not compatible with the Constitution and ratified international treaty, because, in the event the ECtHR subsequently renders a judgment finding a violation, the disputed provisions will bring into question the constitutionally guaranteed right to judicial protection, i.e. the possibility of eliminating the consequences of the violation.

⁴² Law on Burials and Cemeteries (Official Gazette of the Socialist Republic of Serbia, Nos. 20/77 and 24/85, Official Gazette of the Republic of Serbia Nos. 53/93, 67/93, 48/94 and 101/05) – Decision in the case of IUz-27/2009 of 21 March 2013, in which the Court found that the exclusion of the possibility of burying outside cemeteries the remains of persons, who had opted for cremation while they were alive, violated the constitutional principle prohibiting discrimination, because people who opt for a burial and not cremation are allowed to exercise the right to choose the manner/location of their burial, wherefore the disputed provision of the Law is not in compliance with the Constitution and the ECHR.

⁴³ Decision in the case of VIIU-249/2009 of 12 June 2012.

⁴⁴ ECtHR judgments in the cases of: *Association Nouvelle Des Boulogne Boys v. Franc'* of 22 February 2011; *Féret v. Belgium* of 16 July 2009; *Vejdeland and Others v. Sweden* of 9 February 2012; *United Communist Party and Others v. Turkey* of 30 January 1998; *Refah Partisi and Others v. Turkey* of 13 February 2003; *Herri Batasuna and Batasuna v. Spain* of 30 June 2009; *Freedom and Democracy Party (Özdep) v. Turkey* of 8 December 1999, etc.

⁴⁵ Decision in the case of VIIIU-102/2010 of 28 May 2010.

criteria and standards for assessing the competence, qualification and worthiness of the judicial candidates and on the information and opinions obtained pursuant to that enactment. The Constitutional Court also based its view on ECtHR case law on Article 6, paragraph 1 of the ECHR (violation of the right to a fair trial), notably, on the view that Court had expressed in a number of judgments and under which the absence of a reasoning may hinder access to a court if it precludes effective recourse to the appeals procedure due to insufficiently reasoned grounds on which the first-instance decision is based⁴⁶.

Examples of Decisions on Constitutional Appeals

Decision in the case of Uz -4527/2011 of 31 January 2013 – Right to Life – Article 24, paragraph 1 of the Constitution/ Article 2 of the ECHR

The constitutional appeal was filed by the fathers of two Army of Serbia and Montenegro conscripts killed while they were guarding a military facility on 5 October 2004.

The Constitutional Court upheld the constitutional appeal, found a violation of the right to life and instructed the Belgrade Higher Prosecution Office and the Belgrade Higher Court to take all the necessary measures to ensure the soonest possible completion of the preliminary criminal proceedings regarding the deaths of the appellants' sons.

In its review of the admissibility of the constitutional appeal *ratione personae*, the Constitutional Court emphasised in its decision that there was well-established ECtHR case law in which it considered the applications by relatives of people deprived of their lives under Article 2 enshrining the right to life because their deaths had not been investigated efficiently and effectively, and referred to the following judgments: *Šilih v. Slovenia* of 9 April 2009, *Akdeniz and Others v. Turkey* of 31 May 2001 and *McKerr v. the United Kingdom* of 4 May 2001. Whilst bearing in mind that human and minority rights provisions are to be interpreted to the benefit of promoting values of a democratic society, pursuant to the valid international human and minority rights standards and the practices of international institutions supervising their implementation, the Constitutional Court relied on the above-mentioned jurisprudence in the analogous situation in which the constitutional appeal was filed by close relatives – the fathers of the two young men deprived of their lives under unclear circumstances and regarding whose deaths preliminary criminal proceedings were being conducted and concluded that the constitutional appeal was admissible *ratione personae*.⁴⁷

⁴⁶ In its judgment in the case of *Salov v. Ukraine*, the ECtHR concluded that the lack of a reasoned decision hindered the applicant from raising specific issues at the appeal stage; in the case of *Hadjianastassiou v. Greece*, the applicant was merely provided with a summary of the Court Martial Appeal Court judgment before appeal.

⁴⁷ The Constitutional Court referred to a number of ECtHR judgments in which this Court had expressed its views on the right to life enshrined in Article 2 of the ECHR: *L.C.B. v. the United Kingdom* of 9 June 1998, *Osman v. the United Kingdom* of 28 October 1998, *Streletz, Kessler u Krenz v. Germany* of 22 March 2001, *Oneryildiz v. Turkey* of 30 November 2004, *Guerra and Others v. Italy* of 19 February 1998, *Botta v. Italy* of 24 February 1998, *Hackett v. the United Kingdom* of 10 May 2005, *Mladenovic v. Serbia* of 22 May 2012, *Branko Tomašić and Others v. Croatia* of 15 January 2009, *Oğur v. Turkey* of 20 May 1999, *Bazorkina v. Russia* of 27 July 2006, *Yaşa v. Turkey* of 2 September 1998, *Mahmut Kaya v. Turkey* of 28 March 2000, *Jularić v. Croatia* of 10 January 2011 and *Shanaghan v. the United Kingdom* of 4 May 2001.

Decision in the case of Uz-2356/2009 of 21 January 2010 – Duration of Detention – Article 31 of the Constitution/Article 5 of the ECHR

The appellant and another 31 people have been charged with the crime of criminal association before the Belgrade District Court. The appellant was placed into pre-trial custody on February 2009 pursuant to Article 142, paragraph 1, item 3, of the Criminal Procedure Code – existence of particular circumstances indicating that the defendant will repeat the criminal offence or complete the attempted criminal offence, or perpetrate the criminal offence he has threatened to commit. The grounds were reasoned by the existence of reasonable doubt that the appellant and the co-defendants were members of a well organised criminal group that planned its activities in the longer term and the fact that they had been charged with numerous punishable offences in the 2006-2009 period. After the District Court rendered a decision extending the appellant's custody in which it reiterated the same grounds it had specified in a number of previous decisions to extend his detention, the appellant filed an appeal with the Supreme Court, which dismissed it as inadmissible. In his constitutional appeal, the appellant, *inter alia*, complained that all the decisions to extend his custody, both those rendered by the District Court and by the Supreme Court, listed the same grounds, without having considered the new circumstances.

The Constitutional Court found that, in their decisions to extend the appellant's detention, the competent courts had failed to specify sufficiently clear, convincing and individualised reasons for keeping him in pre-trial custody. They failed to list the subjective circumstances, i.e. the circumstances that would corroborate why the appellant as an individual posed a danger. Both the first and second instance courts had made the following error: they considered the reasons for extending his custody vis-à-vis all the defendants, neglecting to individualise them. Given that the legal and factual situations as to the jobs the defendants held before detention varied and that some of them (including the appellant) had been suspended from their jobs, the courts had been under the duty to consider the realistic possibility that they would reoffend, complete the commission of the attempted criminal offence or perpetrate the crime they threatened to commit in each individual case, whilst taking into account their prior criminal records, if any. The Constitutional Court consequently upheld the constitutional appeal and found a violation of Article 31, paragraphs 1 and 2 of the Constitution (right to limited duration of detention).

The Constitutional Court cited a number of ECHR judgments: *Kay v. United Kingdom* of 1 March 1994 – on the arbitrariness of deprivation of liberty in the event the grounds for such deprivation were not reasoned in a satisfactory manner, *Mansur v. Turkey* of 8 June 1995 – on why deprivation of liberty is arbitrary in the event a court reiterates identical and stereotyped reasons for its decisions to extend detention, without elaborating the new grounds rendering the extension of detention necessary, *Kurt v. Turkey* of 25 May 1998 and *Bayorkina v. Russia* of 27 July 2006 – on the necessity of reasoning the grounds for detention in detail.

Decision in the case of Uz-227/2008 of 9 July 2009 – Presumption of Innocence – Article 34, paragraph 3 of the Constitution/Article 6, paragraph 2 of the ECHR

The appellant was deprived of liberty on suspicion that he had committed a number of crimes (criminal association, acceptance of bribes over a longer period of time, abuse of post, violation of the law by a judge...). The appellant complained against the Belgrade District Court's eight

decisions to extend his pre-trial custody and the Supreme Court's eight decisions dismissing his appeals of the District Court decisions. He specified that all of these decisions used formulations violating his presumption of innocence (e.g. "are the results of their joint undertaking...").

The Constitutional Court found that some of the formulations in the reasonings of the contested decisions on the extension of the appellant's detention indicated that the Belgrade District Court had taken specific facts, which were yet to be proven during the main hearing, as already proven, thus violating the appellant's right to be presumed innocent until a final court judgment is rendered.

The Constitutional Court referred to ECHR case law under, which the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proven guilty according to law: *Deweer v. Belgium* of 27 February 1980, *Minelli v. Switzerland* of 25 March 1983, *Alenet de Ribemont v. France* of 10 February 1995 and *Karakas and Yesilirmak v. Turkey* of 28 June 2005 - it suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty, while the court's expression of such a suggestion before a formal finding of guilt will inevitably violate the presumption of innocence.

Decision in the Case of Uz-88/2008 of 1 October 2009 – Right to a Fair Trial – Article 32, paragraph 1 of the Constitution/Article 6 of the ECHR; Rights of Criminal Defendants – Article 33 of the Constitution and Right to Privacy Inviolability of Means of Communication – Article 41 of the Constitution/Article 8 of the ECHR

The Belgrade District Court had found the appellant guilty of bribery and sentenced him to three years' imprisonment. The Supreme Court first dismissed his appeal of the first-instance judgment as inadmissible and subsequently dismissed his motion to review the lawfulness of the final judgment. In his constitutional appeal, the appellant, *inter alia*, claimed that the court decisions had violated his rights to a fair trial and inviolability of the confidentiality of means of communication because they were based on inadmissible evidence – wiretapped telephone conversations between the appellant and the two co-defendants recorded in the absence of a court warrant with respect to the surveillance and wiretapping of the appellant. Such a warrant had been issued with respect to the other two co-defendants, who had also been charged with bribery and with whom the appellant communicated in June, July and August 2005, whereas the warrant to wiretap the appellant was issued in September 2005.

The Constitutional Court established that the derogation from the constitutional right to inviolability of the confidentiality of means of communication in this specific case satisfied the requirements in the Constitution and was in compliance with the law, wherefore the allegations in the constitutional appeal that the appellant's right to inviolability of the confidentiality of means of communication, as an aspect of the right to privacy enshrined in Article 8 of the ECHR, had been violated were groundless. The Court noted that the Constitution comprised and elaborated in greater detail the other rights enshrined in the ECHR and the International Covenant on Civil and Political Rights, which the appellant claimed had been violated, and thus did not find violations of these rights with respect to these international documents either.

Referring to the judgment in the case of *Schenk v. Switzerland* of 12 July 1988, the Constitutional Court underlined that the fairness of a trial was assessed with respect to the criminal proceedings and presented evidence on the whole, not with respect to the lawfulness of the individual pieces of evidence presented during the proceedings, wherefore the way in which the evidence was obtained and its role in the trial was reviewed within the context of determining whether the trial was fair on the whole. The use of recordings, which were illegally obtained inasmuch as a wiretapping warrant had not been issued by the investigating judge, does not automatically render a trial unfair, nor does it provide grounds for a violation of the right *per se*.

The Constitutional Court further referred to the view expressed in the case of *Khan v. the United Kingdom* of 12 May 2000, that, although the telephone conversation recorded in the absence of any legal grounds was the only piece of evidence in the proceedings, its use could not be considered unfair given that the applicant had the opportunity to challenge its legal validity before two court instances. The ECtHR also observed in this judgment that the lawfulness of specific police methods for obtaining evidence could give rise to an issue under Article 8 of the ECHR and the right to privacy rather than to the right to a fair trial under Article 6 of the ECHR.

Decision in the case of Uz-4078/2010 of 29 February 2012 – Right to a Fair Trial and Right to a Trial within a Reasonable Time – Article 32, paragraph 1 of the Constitution/Article 6 of the ECHR, Right to an Effective Remedy – Article 36, paragraph 2 of the Constitution/Article 13 of the ECHR and Freedom of Assembly – Article 54 of the Constitution/Article 11 of the ECHR

The civil association *Women in Black* appealed the first- and second-instance decisions of the Ministry of Internal Affairs and the Administrative Court judgment prohibiting the event it had planned (100th Anniversary of 8 March) and claimed violations of its rights to a fair trial, to a trial within a reasonable time, of its right to an effective remedy and freedom of assembly.

The Constitutional Court found that: the first-instance decision had not specifies the reasons which had led the Ministry to conclude that the prohibition of the event was necessary to prevent disruption of public traffic and risks to health, public morals and the safety of people and property pursuant to the Law on Public Assemblies; that these shortcomings had not been eliminated in the appeals procedure; that the Administrative Court's judgment dismissing the appeal of the second-instance decision noted that the respondent authority had properly applied the relevant substantive regulations to proper findings of fact. The Constitutional Court therefore established that the appellant's right to a reasoned decision, as an element of the right to a fair trial, had been violated. It also referred to the case law of the ECtHR, which took the view that the absence of a reasoning may hinder access to a court if it precludes effective recourse to the appeals procedure due to insufficiently reasoned grounds on which the first-instance decision is based. For instance, in its judgment in the case of *Salov v. Ukraine*, the ECtHR observed that the lack of a reasoned decision hindered the applicant from raising specific issues at the appeal stage.

The Constitutional Court further observed that the right to freedom of assembly is enjoyed both by the individuals taking part in peaceful events and those organising them, including associations, as the ECtHR, too, concluded in its judgment in the case of *Plattform "Ärzte für das Leben" v. Austria* of 21 June 1988.

Having found that the prohibition of the public event in this specific situation amounted to a violation of the right to freedom of peaceful assembly, the Constitutional Court noted that the ECtHR underlined in the above-mentioned judgment that a demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote but that the participants must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents. It also noted the view of the European Commission for Human Rights in the case of *Christians against Racism and Fascism v. the United Kingdom* of 16 July 1980 that violence or disorder that was incidental to the holding of a peaceful assembly would not remove it from the protection of Article 11 - that it was the intention to hold a peaceful assembly that was significant in determining whether Article 11 was applicable, not the likelihood of violence because of the reactions of other groups or other factors.

The Constitutional Court also observed that the state could not change the day on which the organiser planned to hold the event, because when a public assembly is organised after a given social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously diminished, and cited the ECtHR view in its judgment in the case of *Baczowski and Others v. Poland* of 3 May 2007.

Having concluded that appellants' right to a trial within a reasonable time was violated due to the duration of the proceedings at issue, the character of which necessitated an expedient review, which in this specific case also resulted in the breach of the appellant's right to an effective legal remedy, the Constitutional Court bore in mind the ECtHR's view in its judgment in the case of *Baczowski and Others v. Poland* that it was important for the effective enjoyment of freedom of assembly that the applicable laws provided for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. Unless the authorities are obliged by any legally binding time-frame to give their final decisions before the planned date of the demonstration, the conclusion cannot be drawn that the remedies available to the applicant, given their *post-hoc* character, can provide adequate redress in respect of the restrictions of the freedom of peaceful assembly.

Decision in the case of Uz-5284/2011 of 18 April 2013 – Right to Judicial Protection – Article 22, paragraph 1 of the Constitution/Article 6 of the ECHR, Right to an Effective Legal Remedy – Article 36, paragraph 2 of the Constitution/Article 13 of the ECHR, and Freedom of Peaceful Assembly – Article 54 of the Constitution/Article 11 of the ECHR

The appellants complained, *inter alia*, about a Ministry of Internal Affairs decision of 30 September 2011 prohibiting a public assembly and a procession organised by the Belgrade Pride Parade association that had been scheduled for 2 October 2011 and the “failure of the state authorities to provide them with judicial protection and an effective legal remedy against the listed human rights violations”.

The Constitutional Court found that, although the Law on Public Assemblies formally envisaged the possibility of filing an appeal as a legal remedy for the protection of the freedom of peaceful assembly of the organisers, the time-frame within which the relevant state authority was under the obligation to notify the organiser of the prohibition and the provision specifying that the appeal shall not stay the prohibition essentially did not ensure effective protection of this freedom. Namely, a decision on the appeal of the decision prohibiting the public event scheduled for Sunday,

2 October 2011, which was rendered on Friday, 30 September 2011, would amount to *post hoc* protection – would not be timely and thus would not be effective. (The Constitutional Court had already expressed this view in its Decision in the case of Uz -1918/2009)

The Constitutional Court further observed that the very inability to apply an effective legal remedy and seek the review of a decision restricting an enshrined freedom amounted to a breach of the right to judicial protection and the right to an effective legal remedy and, consequently, the violation of the freedom of peaceful assembly, and it, consequently, upheld the constitutional appeal.

Holding that the prescribed protection objectively could not have been timely, and thus could not have been effective, the Constitutional Court referred to the ECtHR view in its judgment in the case of *Baczkowski and Others v. Poland* of 3 May 2007, that the notion of an effective remedy implied the possibility to obtain a ruling before the time of the planned events.

Decision in the case of Uz-229/2013 of 11 April 2013 – Rights of the Child – Article 64 of the Constitution/Article 8 of the ECHR

The appellants, an underage girl and her mother, complained about the duration of the paternity proceedings, which lasted ten years and nine months.

The Constitutional Court established a violation of the underage appellant's rights of the child and a breach of the right to a trial within a reasonable time with respect to both appellants. It observed that Article 64 of the Constitution explicitly guaranteed children the right to know about their origins and that although this right was not explicitly envisaged under Article 8 of the ECHR, it fell within the scope of the right to respect for one's private life. In the view of the Constitutional Court, this right entails the right of the child to have the possibility of establishing the details of his/her identity and origins, particularly in the event such information is relevant because of its potential impact on the child's personality. The Constitutional Court established that the underage appellant had initiated the paternity proceedings to establish whether the defendant was her biological father, i.e. to learn the details of her identity and origins, which might subsequently impact on her legal relationship with the defendant. In the view of the Constitutional Court, in the civil proceedings, she had a significant interest protected by Article 64 of the Constitution to receive i.e. establish information she needed to learn the truth about her origins. The duration of the proceedings - ten years and nine months - resulted in a prolonged state of uncertainty of the underage appellant regarding her personal identity and deprivation of child support by her biological father.

The Constitutional Court emphasised that courts and other state authorities had to act with particular expedition in cases regarding the civil status of people given the consequences the duration of the proceedings might have, particularly on the enjoyment of the right to family life. The Constitutional Court, *inter alia*, referred to the following ECtHR judgments: *Jevremović v. Serbia* of 17 July 2007, *Bock v. Germany* of 21 November 1998, and *Mikulić v. Croatia* of 7 February 2002. Citing the ECtHR judgment in the case of *Proszak v. Poland* of 16 December 1997, the Court recalled that only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement. It also noted that the conduct of the other party to the proceedings might be taken into account when assessing the duration of the proceedings, and referred to the ECtHR judgment in the case of *Zielinski v. Poland* of 15 May 2005.

Decision in the case of Uz -1286/2012 of 29 March 2012 – Right to a Fair Trial – Article 6 of the ECHR/Article 32, paragraph 1 of the Constitution and Right to Asylum – Article 57 of the Constitution

The appellant, a resident of the Republic of Cuba, filed a constitutional appeal with the Constitutional Court, challenging the administrative decision rejecting his asylum application, claiming violations of his right to a fair trial and the right to asylum.

The Constitutional Court observed that, by adopting the valid Asylum Law, which came into effect on 1 April 2008, the Republic of Serbia accepted the concept of a safe third country, designated as a country on a list drawn up by the Government abiding by the international principles on refugee protection laid down in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, which the asylum seeker resided in or passed through immediately before entering the territory of the Republic of Serbia and in which s/he had the opportunity to file an asylum application, in which s/he would not be subject to persecution, torture, inhuman or degrading treatment or *refoulement* to a state in which his/her life, safety or freedom would be in danger.

The Constitutional Court also concluded that the Asylum Law not only consistently implemented the principle of prohibition of expulsion or return enshrined in the Constitution and the Geneva Convention Relating to the Status of Refugees, but also provided for additional protection, since it laid down that no-one may be expelled or returned against his will to a territory where s/he is at risk of being subjected to torture, or inhuman or degrading treatment or punishment. This provision provides broader protection than the protection guaranteed by Article 3 of the ECHR, under which no one shall be subjected to torture or to inhuman or degrading treatment or punishment, and is in compliance with the ECtHR view expressed, *inter alia*, in its judgment in the case of *Chahal v. the United Kingdom* of 15 November 1996.

The Constitutional Court also noted that the Law imposed upon the competent authorities of the Republic of Serbia the duty to cooperate with the UNHCR in the implementation of its activities in conformity with its mandate. In the view of the Constitutional Court, the above-mentioned provisions of the Act led to the conclusion that the list of safe third countries had been drawn up, *inter alia*, also on the basis of UNHCR reports and conclusions. The Court also assessed that the reports of that organisation contributed to the proper enforcement of the Asylum Law by the competent authorities of the Republic of Serbia, insofar as they would not dismiss an asylum application in the event the asylum seeker arrived from a safe third country on the Government list if that country applied its asylum procedure in contravention of the ECHR. In that respect, the Constitutional Court referred to the ECtHR judgment in the case of *M.M.S. v. Belgium and Greece* of 21 January 2011.

The Constitutional Court, however, noted that the ECtHR had declared as inadmissible the application in the case of *T.I. v. the United Kingdom* of 7 March 2000, underlining that the right to political asylum was not contained either in the ECHR or its Protocols and that it was not its function to examine asylum claims or monitor the performance of Contracting States with regard to their obligations under the Geneva Convention Relating to the Status of Refugees.

The Constitutional Court found the constitutional appeal groundless and dismissed the motion to defer the enforcement of the Ministry of Internal Affairs decision ordering the appellant to leave Serbia.

Decision in the case of Uz-3238/2011 of 8 March 2012 – Right to Dignity and Free Development of Personality – Article 23 of the Constitution /Right to Respect for Private and Family Life – Article 8 of the ECHR

The appellant was born with pseudohermaphroditism and underwent a sex reassignment operation. After the operation, the appellant was unable to obtain legal recognition of his gender, i.e. have his gender data changed in the register of births, which would have enabled him to obtain new personal documents, given that the Law on Vital Records does not allow for subsequent changes of the data on gender. This is why the municipal general administration department rendered a conclusion dismissing the applicant's request for a change of his gender data, declaring that it did not have jurisdiction *ratione materiae* and instructing him to complain to the relevant ministry. The ministry, however, issued the opinion that gender data cannot be altered and that the appellant could initiate extra-judicial proceedings before the court to establish the content of the document (accuracy of the data entered in the register of births).

The appellant filed a constitutional appeal, claiming violations of his right to dignity and free development of his personality, as well as his right to respect for his private and family life and the right to equality.

The Constitutional Court first established that there was no effective legal remedy the appellant could have had recourse to before filing a constitutional appeal and referred to a number of ECtHR judgments on the criteria legal remedies had to satisfy to be considered adequate and effective: *Vernillo v. France* of 20 February 1991, *Lepojić v. Serbia* of 6 November 2007, *Chahal v. the United Kingdom* of 15 November 1996, *Airey v. Ireland* of 9 October 1979 and *Akdivar v. Turkey* of 16 September 1997. The Constitutional Court also cited the judgment in the case of *L. v. Lithuania* of 11 September 2007 in which the ECtHR took the view that an administrative procedure or a procedure before a regular court does not constitute an effective legal remedy in situations in which a human rights breach was caused by or was the direct consequence of the law.

In addition, the Constitutional Court was of the view that the right to respect for one's private and family life enshrined in Article 8 of the ECHR, although not explicitly mentioned in the Constitution, is an integral part of the constitutional right to dignity and the free development of one's personality. The Constitutional Court also referred to the ECtHR judgments in the cases of *Niemietz v. Germany* of 16 December 1992 and *X and Y v. Netherlands* of 26 March 1985 with respect to the notion of private life.

Bearing in mind the ECtHR's views in its judgment in the case of *Goodwin v. the United Kingdom* of 11 July 2002, the Constitutional Court established a discrepancy between the actual and legal situations and that the appellant's right to dignity and free development of his personality and the right to respect for his private and family life had been violated by the municipal administration's failure to fulfil its positive obligation, under which the authorities are under the duty to take actions and adopt enactments respecting guaranteed human rights.

Decision in the case of Uz-4100/2011 of 10 July 2013 – Right to Inviolability of Physical and Psychological Integrity – Enshrined in Article 25 of the Constitution and Article 3 of the ECHR

The appellant was deprived of liberty on 18 July 2005, tried, found guilty of first degree murder and sentenced to 40 years' imprisonment. The appellant is serving his prison sentence at present.

The appellant filed the constitutional appeal against the Ministry of Internal Affairs, the Ministry of Justice and State Administration, specifically its Penal Sanctions Enforcement Administration, the Basic Court and the Basic Public Prosecution Office, claiming that they had violated the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Articles 25 and 28 of the Constitution and Article 3 of the ECHR, the right to judicial protection guaranteed by Article 22 of the Constitution and the right to an effective legal remedy enshrined in Article 36, paragraph 2 of the Constitution and Article 13 of the ECHR.

In view of the allegations in and reasons for the submission of the constitutional appeal, as well as the alleged violations of the appellant's rights, the Constitutional Court assessed the existence of the procedural requirements for reviewing the appeal and the merits of the allegations of violations of the rights with respect to three periods, notably: a) the period the appellant spent in police custody, b) the period the appellant spent in pre-trial custody and c) the period the appellant has spent in prison, serving his sentence.

As per the allegation of the breach of the right enshrined in Articles 25 and 28 of the Constitution and Article 3 of the ECHR, the Constitutional Court referred to ECtHR case law (its judgments in the cases of *Stanimirović v. Serbia*, Application Number 26088/06 of 18 October 2011, paragraphs 39 and 40, *Labita v. Italy (GC)*, Application No. 26772/95, of 6 April 2000, paragraph 131, *V.D. v. Croatia*, Application No. 15526/10, of 8 February 2012, paragraphs 63 and 64 and *Mađer v. Croatia*, Application No. 56185/07, of 21 September 2011, paragraphs 111 and 112), and concluded that these rights contained guarantees of the respect of the substantive and procedural aspects of the prohibition of torture and inhuman or degrading treatment of punishing.

During its consideration of the existence of the procedural requirements for its review of the appeal, the Constitutional Court took into account ECtHR case law, notably 1) the admissibility of the constitutional appeal *ratione temporis* (judgments in the cases of *Stanimirović v. Serbia*, paragraphs 27 and 29, and *Tuna v. Turkey*, Application No. 22339/03, of 19 January 2010, paragraphs 58-63) and 2) the rule on the exhaustion of regular legal remedies before going to the Constitutional Court (judgments in the cases of *Akdivar and Others v. Turkey*, Application No. 21893/93, of 16 September 1996, paragraph 69, *Vernillo v. France*, Application No. 11889/85, of 20 February 1991, paragraphs 27 and 68, *Selmouni v. France*, Application No. 25803/94, of 28 July 1999, paragraphs 75 and 77, *Chahal v. the United Kingdom*, Application No. 22414/93, judgment of 15 November 1996, paragraph 145, *Airey v. Ireland*, Application No. 6289/73, judgment of 9 October 1979, paragraph 23, *Cardot v. France* of 19 March 1991, Application No. 11069/84, paragraph 34 and *Mađer v. Croatia*, paragraph 87).

During its assessment of the merits of the allegations about the violations of the substantive aspect of the prohibition of torture and inhuman or degrading treatment or punishment, the Constitutional Court bore in mind the ECtHR's views and jurisprudence, notably with respect to

excessive use of force (judgments in the cases of *Gömi and Others v. Turkey*, Application No. 35962/97, of 21 December 2006, paragraph 77, *Berliński v. Poland*, Application Nos. 27715/95 and 30209/96, of 20 June 2002, paragraphs 57-65, *Gladović v. Croatia*, Application No. 28847/08, of 10 May 2011, paragraph 37, *Ivan Vasilev v. Bulgaria*, Application No. 48130/99, of 12 April 2007, paragraph 63.), minimum level of severity of ill-treatment (judgments in the cases of *Labita v. Italy*, paragraph 120, *Gladović v. Croatia*, paragraph 34, and *Mađer v. Croatia*, paragraph 106), the standard of proof “beyond reasonable doubt” (judgments in the cases of *Ireland v. the United Kingdom*, Application No. 5310/71, of 18 January 1978, paragraph 161, *Salman v. Turkey*, Application No. 21986/93, of 27 June 2000, paragraph 100 and *Labita v. Italy*, paragraph 121) and the rules on the burden of proof regarding ill-treatment allegations (judgments in the cases of: *Salman v. Turkey*, paragraph 100 and *Sunal v. Turkey*, Application No. 43918/98, of 25 January 2005, paragraph 41). In its consideration of the forms of ill-treatment, the Constitutional Court also took into account ECHR case law (judgments in the cases of *Ireland v. the United Kingdom*, paragraphs 167 and 168 and *Aksoy v. Turkey*, Application No. 21987/93, of 18 December 1996, paragraphs 63 and 64, *Ilhan v. Turkey*, Application No. 22277/93, of 27 June 2000, paragraph 85, *Gäfgen v. Germany*, Application No. 22978/05, of 1 June 2010, paragraphs 88 and 89, *Jalloh v. Germany*, Application No. 54810/00, of 11 July 2006, paragraph 68, *Labita v. Italy*, paragraph 120 and *Hajnal v. Serbia*, paragraph 79).

During its assessments of the merits of the allegations of violations of the procedural aspect of the prohibition of torture and inhuman or degrading treatment or punishment, the Constitutional Court took into account the ECtHR’s views and case law, particularly with respect to the state authorities’ obligations to conduct effective official investigations in the event a person in detention or serving a prison sentence made credible assertions (judgments in the cases of *Stanimirović v. Serbia*, Application No. 26088/06 of 18 October 2011, paragraphs 39 and 40, *Labita v. Italy (GC)*, Application No. 26772/95, of 6 April 2000, paragraph 131, *V.D. v. Croatia*, Application No. 15526/10, of 8 February 2012, paragraphs 63 and 64 and *Mađer v. Croatia*, Application No. 56185/07, of 21 September 2011, paragraphs 111 and 112), that the investigations have to be thorough, prompt and conducted by independent competent authorities that had not been implicated in the alleged ill-treatment, and that the investigations must afford a sufficient element of public scrutiny to secure accountability (judgments in the cases of *Otašević v. Serbia*, paragraph 31, and *Bati and Others v. Turkey*, paragraph 137).

Bearing in mind the above mentioned provisions of the Constitution and the ECHR, as well as the ECtHR views and case law, the Constitutional Court established that both the substantive and procedural aspects of the appellant’s right to the inviolability of his physical and psychological integrity enshrined in Article 25 of the Constitution had been violated during his pre-trial custody and the time he spent in prison serving his sentence.

Some of the Most Often Quoted ECtHR Judgments (in addition to the judgments against Serbia)

Criminal proceedings: *Golder v. the United Kingdom* – right of access to a court; *Deweere v. Belgium* – concept of criminal charges, duration of proceedings; *Minelli v. Switzerland* - presumption of innocence; *Allenet de Ribermont v. France* – presumption of innocence; *Schenk v. Switzerland* – unlawfully obtained evidence; *Khan v. the United Kingdom* - unlawfully obtained

evidence; *Oberschlick v. Austria* – impartiality of the court; *Soering v. the United Kingdom* – expulsion or extradition to another country in which individuals may be subject to torture or inhuman or degrading treatment; *L.C.B. v. the United Kingdom* – right to life as a “hard core” human right; *Osman v. the United Kingdom* – the states’ positive legal obligations regarding the substantive legal aspect of Article 2 of the ECHR; *Streletz, Kessler and Kreuz v. Germany* – the duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences which endanger life, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; *Oneryildiz v. Turkey* – preventive measures to protect life; *McKerr v. United Kingdom* – the states’ positive procedural legal obligation to conduct an independent and effective investigation in case a person is deprived of life; *Guerra and Others v. Italy* and *Botta v. Italy* – the states’ positive obligation to take all the necessary measures to protect the lives of people within their jurisdiction; *Branko Tomašić and Others v. Croatia* – there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals; *Ogur v. Turkey* – investigation should be capable of leading to the identification and punishment of those responsible; *Bazorkina v. Russia* – investigation is not an obligation of result, but of means; *Yaşa v. Turkey and Mahmut Kaya v. Turkey* – existence of an implicit requirement for an active response and reasonable expedition; *Jularić v. Croatia* – despite the existence of obstacles or difficulties preventing progress in an investigation in a particular situation, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in preserving public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts; *Shanaghan v. the United Kingdom* – there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory and the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

Civil Proceedings: *Ruiz Torija v. Spain* – the courts’ obligation to give reasons for their judgments, which cannot be understood as requiring a detailed answer to every argument; *Pavlyulynets v. Ukraine* – the repeated remittal of a case for re-examination by a lower court within one set of proceedings discloses a serious deficiency in the judicial system; *Soares Fernandes v. Portugal* – a civil trial begins with the filing of a lawsuit and ends with the adoption of a decision closing the proceeding, or the delivery of a written decision to the applicant if such a delivery takes place at a later date; *Sunday Times v. the United Kingdom* – interpretation of the expression “in accordance with the law/prescribed by law”, lawfulness requirements; *Lingens v. Austria*, *Oberschlick v. Austria* and *Jerusalem v. Austria* – freedom of expression; *Golder v. the United Kingdom* – right of access to a court; *Ernst and Others v. Belgium* – immunity; *Sporrong and Lönnroth v. Sweden* – property rights; *Santos Pinto v. Portugal*, *Beian v. Romania*, *Tudor Tudor v. Romania* – violation of the right to legal certainty in the event of inconsistencies in the practice of the highest courts, criteria for assessing whether the contradictory decisions of the highest national courts are in compliance with the right to a fair trial – whether there are profound and long-standing differences in approach in the case law, whether the national law envisages a mechanism for addressing them, whether that mechanism is applied and what the effects of its application are; *Garzičić v. Montenegro* – right to appeal on points of law on its merits; *Proszak v. Poland* – the length of proceedings is reckoned from the date the state ratified the ECHR but consideration of its reasonableness takes into account the status of the case on that day and that only delays attributable

to the State may justify a finding of failure to comply with the “reasonable time” requirement; *Buchholz v. Germany* - factors taken into account when reviewing the reasonableness of the length of proceedings; *Van de Hurk v. The Netherlands* - the courts’ obligation to give reasons for their judgments, which cannot be understood as requiring a detailed answer to every argument, the court’s power to give a binding decision which may not be altered by a non-judicial authority; *Hiro Balani v. Spain* - the extent to which the court’s duty to give reasons applies may vary according to the nature of the decision; *Zimmermann and Steiner v. Switzerland* – states’ duty to organise their legal systems so as to allow the courts to comply with the requirements of Article 6 of the ECHR including that of trial within a reasonable time; *Guincho v. Portugal* – the states’ obligation to engage sufficient resources and place them at the disposal of their judicial systems to ensure that there are no unacceptable delays; *Hokkanen v. Finland* – on the essential importance of dealing with custody cases speedily; *Hornsby v. Greece* – protection afforded by Article 6 of the ECHR extends to the enforcement of court decisions as well.

Administrative Proceedings: *M.M.S. v. Belgium and Greece* – the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention; *Van de Hurk v. The Netherlands* - the courts’ obligation to give reasons for their judgments, which cannot be understood as requiring a detailed answer to every argument, the court’s power to give a binding decision which may not be altered by a non-judicial authority; *Helle v. Finland* – an appeals court can in principle endorse the decision of a lower court or state authority in the event it provided adequate reasons for its decision and thus enabled exercise of the right of appeal; *Sporrong and Lönnroth v. Sweden* – property rights; *Fuklev v. Ukraine* – a state’s obligation to organise a system for enforcement of judgments that is effective both in law and in practice, *Iatridis v. Greece* and *James and Others v. the United Kingdom* – on interference in the right to property, on the fair balance that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights, on the necessity of ensuring that interference is lawful and not arbitrary; *The Former King of Greece and Others v. Greece* – states cannot avoid fulfilling the obligation to compensate individuals for expropriated property by enforcing the law; *Pressos Compania Naviera S.A. and Others v. Belgium* – the state cannot adopt laws with retroactive effect with the aim and consequence of depriving the groups of individuals or the states of their claims for compensation that were already in existence; *Soering v. United Kingdom* – expulsion or extradition of an individual to another state in he may be subject to torture, inhuman or degrading treatment.

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

As already mentioned, under the valid Constitution, generally accepted rules of international law and international treaties are an integral part of the legal order of the Republic of Serbia and are directly enforced.

There are a few abstract review cases in the Constitutional Court’s case law in which it expressed a view that diverged from that of the ECtHR in its enforcement of Convention law and

they date back to the period before Serbia acceded to the ECHR. For example, such a divergence was made in the case in which the Constitutional Court reviewed the constitutionality of a law that excluded the right to institute an administrative dispute⁴⁸ and was based on the 1990 Constitution of the Republic of Serbia, which exceptionally allowed for the exclusion of administrative dispute proceedings by law in specific kinds of administrative matters with respect to final individual enactments on the rights, obligations or lawful interests of legal or natural persons. With respect to this issue in principle, the Constitutional Court in 2009 warned the legislature (the National Assembly of the Republic of Serbia)⁴⁹ that the new Constitution, in force as of 8 November 2006, allowed for initiating an administrative dispute on all matters unless another form of judicial protection was envisaged in a specific case (Article 198, paragraph 2); that Article 15 of the Constitutional Law on the Implementation of the Constitution set 31 October 2008 as the deadline by which the laws adopted pursuant to the 1990 Constitution had to be aligned with the new Constitution; that neither the Law on Administrative Disputes nor any other numerous laws excluding the possibility of initiating administrative disputes had been aligned with the valid Constitution before the Constitutional Law deadline or subsequently. In view of the foregoing and pursuant to the constitutional principles of the rule of law and the hierarchy of the national general legal enactments, and in accordance with Article 105 of the Law on the Constitutional Court⁵⁰, the Constitutional Court alerted the National Assembly to the need to align the Law on Administrative Disputes and numerous other laws excluding the possibility of initiating administrative disputes with the valid Constitution as soon as possible. The National Assembly accordingly adopted a new Law on Administrative Disputes⁵¹ and harmonised the provisions in the other laws. The legislation was thus simultaneously brought into compliance with the principles of and rights enshrined in the ECHR.

The alignment of the Constitutional Court's jurisprudence with that of the ECtHR has particularly come to the fore in its reviews of constitutional appeals, that is, in the procedure of protecting the individual human rights and freedoms guaranteed by the Constitution and the ECHR.

For example, the Constitutional Court in 2011 took the position that an appeal on points of law is admissible in cases in which it depends on the value of the claim and that value had not been established in accordance with the law during the proceedings, because the party should not suffer any detriment on account of the court's failure to ask the prosecutor to establish the value of the claim within a reasonable time (and referred to the ECtHR judgment in the case of *Garzičić v. Montenegro*). In addition, the Court took the view that the state was under the obligation to take all measures to ensure the enforcement of a final court decision regardless of whether the enforcement creditor was a private individual, a private company or a company in which the state held a majority stake, thus endeavouring to protect the rights of the parties that file constitutional appeals and

⁴⁸ Case IU-76/2001 of 17 October 2002, where the Court dismissed the initiative to review the constitutionality of a provision in the Law on Weapons and Ammunition (Official Gazette of the Republic of Serbia Nos. 9/92, 53/93, 67/93, 48/94 and 44/98), excluding the right to judicial protection against a final administrative enactment of the Minister of Internal Affairs. The Constitutional Court rendered its ruling on the case before Serbia ratified the ECHR.

⁴⁹ Constitutional Court conclusion in the case of IU-409/2005 of 2 April 2009.

⁵⁰ Official Gazette of the Republic of Serbia Nos. 109/2007 and 99/2011 and Constitutional Court Decision in the case of IU 97/2012 of 20 December 2012.

⁵¹ Law on Administrative Disputes (Official Gazette of the Republic of Serbia No. 111/09).

eliminate any consequences of the established breaches to the extent possible, i.e. provide just satisfaction.

The Constitutional Court gradually aligned its jurisprudence with the view the ECtHR took in its judgments against the Republic of Serbia (e.g. *Vlahović v. Serbia*, *R. Kačapor and Others v. Serbia*, *Crnišanić and Others v. Serbia* and *Grišević and Others v. Serbia*) - that comprehensive constitutional judicial protection should entail both the establishment of a breach and the compensation of the pecuniary and non-pecuniary damages suffered and the state's obligation to pay the entire debt to the applicants established in a final domestic judgment, that is, to award them compensation of pecuniary and non-pecuniary damages and pay from its own funds sums awarded in a final domestic judgment. This primarily concerns cases in which breaches of rights in enforcement proceedings enshrined in the Constitution i.e. the ECHR were established and in which socially-owned companies undergoing restructuring were the enforcement creditors and the applicants' claims regarded the non-payment of their salaries or other incomes. In such cases, the Court ordered the resumption of the discontinued enforcement proceedings and started establishing the right to adequate compensation of non-pecuniary damages due to violations of the right to a trial within a reasonable time and, subsequently, the right to compensation of pecuniary damages as well. The ECtHR observed that obvious headway has been made in the development of the national jurisprudence and that in cases of non-enforcement of final judgments rendered against socially-owned companies undergoing insolvency proceedings and/or those which have ceased to exist, a constitutional appeal should, in principle, be considered an effective domestic remedy in respect of all applications lodged from 22 June 2012 onwards⁵².

The Constitutional Court aligned its jurisprudence also with the view the ECtHR reiterated in its Decision on the admissibility of the *Marinković v. Serbia* Application (No. 5353/11) of 29 January 2013. In that sense, the Court has begun awarding compensation of both non-pecuniary and pecuniary damages in the amounts set in the enforcement decisions from the state budget in all matters concerning the non-enforcement of judgments rendered against companies with a majority social or state capital stake under restructuring⁵³ in accordance with the Law on the Constitutional Court, which sets out that a constitutional appeal must include a motion which the Constitutional Court should rule on and specify the amount of compensation of pecuniary and non-pecuniary damages when such compensation is sought⁵⁴.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

Article 166, paragraph 2 of the Constitution lays down that Constitutional Court decisions shall be final, enforceable and generally binding, which means that the national courts must abide by and enforce them as well. This is particularly relevant with respect to the Constitutional Court's

⁵² The date when the Constitutional Court Decision in the case of Uz 775/2009 of 19 April 2012 was published in the Official Gazette of the Republic of Serbia.

⁵³ E.g. Decisions in the cases of Uz -1645/2010 of 7 March 2013, Uz -1712/2010 of 21 March 2013, Uz -1705/2010 of 9 May 2013, etc.

⁵⁴ Law on the Constitutional Court (Official Gazette of the Republic of Serbia Nos. 109/07, 99/11 and 18/13-Constitutional Court Decision) – Article 85, paragraph 1.

decisions on constitutional appeals, i.e. when the Court exercises its powers under Article 89, paragraph 2 of the Law on the Constitutional Court to annul an individual enactment (including a court decision) whenever it finds that a human or minority right or freedom enshrined in the Constitution has been violated or denied by the enactment or an action.

The Constitutional Court is at the forefront of the efforts to build the rule of law, which is its function, and its decisions, particularly those on constitutional appeals, “radiate” on other courts and their enforcement of European standards on the protection of human and minority rights and freedoms. The Constitutional Court cites ECtHR case law the most often and attaches the utmost relevance to apprising the other national courts of its judgments. On the other hand, the national courts most often refer to the Constitutional Court decisions citing the ECtHR judgments which are relevant to the cases ruled on by other national courts.

Furthermore, the Constitutional Court has been publishing its leading decisions in the Bulletins of the Constitutional Court of Serbia, which are available to all the other courts, state authorities and organisations, etc. The Constitutional Court also publishes its decisions on its official website⁵⁵, in its case law database, and, most importantly, in the Official Gazette of the Republic of Serbia and other official heralds in which other general enactments, the constitutionality and legality of which is subject to Constitutional Court scrutiny, are published.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

We are not aware of such examples.

⁵⁵ <http://www.ustavni.sud.rs/page/jurisprudence/35/>

II. INTERACTIONS BETWEEN CONSTITUTIONAL COURTS

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

The Constitutional Court has been following the jurisprudence of other European and non-European constitutional courts and has in its decisions been citing the legal views and reasoned legal arguments in the decisions of foreign constitutional courts raising the same legal issues⁵⁶.

Constitutional Court judges also rely on foreign constitutional court jurisprudence when they dissent with the views of the majority expressed in the Court's decisions and indicate in their dissenting opinions the arguments made in the decisions of other constitutional courts that they deem extremely relevant to the cases at issue⁵⁷. Constitutional Court judges have been referring to other constitutional courts' views not only in cases in which the Court has reviewed the constitutionality of the general legal enactments, but also in other cases within the remit of the Court, such as cases regarding the prohibition of an association⁵⁸ and constitutional appeal cases⁵⁹.

It, however, needs to be noted that the jurisprudence and legal views of other constitutional courts are traditionally referred to the most in the reports prepared to inform broader and more

⁵⁶ For instance, in its Decision in the case of IUz -261/2009 of 13 September 2012, regarding the issue of the right to sell apartments with protected tenants, the Constitutional Court referred to the views of the Constitutional Court of the Republic of Croatia (Decisions in the cases of U-I-3254/2004 of 9 February 2005, U-I-466/2006 of 29 September 2009, etc.) and the Constitutional Court of Bosnia-Herzegovina (Decision in the case of AP -3955/08 of 17 December 2009); in its Decision in the case of IUz -27/2009 of 21 March 2013, regarding the issue of the restriction of the freedom of choice of the place and manner of burial, the Constitutional Court cited the view of the Constitutional Court of the Republic of Slovenia in its Decision in the case of No. UI-54/99-14 of 13 June 2002.

⁵⁷ In the Constitutional Court case of IUz356/2009 of 7 July 2009, judge Dr. Bosa Nenadić referred to the legal views of the Federal Constitutional Court of the Federal Republic of Germany, the Constitutional Court of the Czech Republic, the Constitutional Court of the Republic of Slovenia and the Constitutional Court of the Republic of Croatia in her separate opinion about Constitutional Court's Conclusion to Dismiss a Motion or Initiative, in which it declared that it did not have the jurisdiction to review the constitutionality of the Constitutional Law on the Implementation of the Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia No. 98/06).

⁵⁸ In its Decision in the case of VIIU-249/2009 of 12 June 2012, the Constitutional Court prohibited the work of the Fatherland Movement *Obraz* association (*supra nota* 43). Judge Katarina Manojlović Andrić issued a dissenting separate opinion, which judge Dr. Olivera Vučić agreed with, which referred to German case law (citing the case of the Federal Constitutional Court of Germany BVerfGE 42, 143 (156)), regarding the prohibition of political parties; in their separate opinion on the Constitutional Court's Decision in the case of IUz-2/2010 of 14 March 2013, judges Katarina Manojlović Andrić and Dr. Bosa Nenadić referred to the Decision in the case of U-I/1569/2004 of the Constitutional Court of Croatia, revoking the provision of the Civil Procedure Act which had set the minimum amount of the claim that may be appealed on points of law to 100,000.00 kunas (around 35,000 Euro).

⁵⁹ Dr. Bosa Nenadić issued a separate opinion about the Decision in the case of Uz -175/2009 of 10 November 2011, in which she held that private plaintiffs and individuals with the status of injured parties and acting in the capacity of prosecutor in criminal proceedings should also be accorded constitutional judicial protection of their right to a trial within a reasonable time whether or not they made a property claim and cited the view of the Constitutional Court of the Republic of Croatia (in the case of U-IIIv-3511/2006 of 22 October 2008).

comprehensive deliberations of the disputed constitutional judicial issues before the decisions on the specific cases are drafted⁶⁰.

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

Language is not the primary consideration of the Constitutional Court when it refers to the jurisprudence of other constitutional courts. However, the fact that the legislations of the former member-republics of the erstwhile Socialist Federal Republic of Yugoslavia originated from the same legal order and have retained numerous common legal institutes has been relevant given that the same constitutional legal issues have been arising with respect to specific contested legislative solutions, wherefore the jurisprudence of the constitutional courts in the region is more similar.

This is also confirmed by the fact that after the dissolution of the SFRY and pursuant to the 2001 Succession Agreement, which came into effect on 2 June 2004 upon ratification by all the successor states, the now independent signatory states face a number of issues of common interest that transcend national borders (e.g. such as war reparations, the property rights of companies headquartered in other former member-republics, exercise of the pension and disability insurance rights, property rights regarding apartments in the territory of the former member-republics, old foreign currency savings, etc.). The citizens have complained to the ECtHR, too, seeking protection of their rights in some of these areas, such as with respect to the old foreign currency savings deposited in banks headquartered in another former member-republic⁶¹.

The constitutional courts in the region have been cooperating directly among themselves and exchanging decisions and views. They have also been following each other's case law on the court websites and exchanging professional publications (bulletins, et al). In addition, as of 2004, the representatives of the constitutional courts in the region have been holding biennial round tables at which they have been exchanging professional opinions and views on specific issues, which are published in thematic publications.

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

The Constitutional Court has been endeavouring to peruse the relevant foreign jurisprudence in its deliberations of and preparations for ruling on all cases in all fields of law. However, given that

⁶⁰ In its Decision in the case of IUz-1245/2010 of 13 June 2013, in which it reviewed the provisions of the Law on Electronic Communications (Official Gazette of the Republic of Serbia No. 44/10), the Constitutional Court observed that the standards of protection of the inviolability of means of communication guaranteed by the Constitution of the Republic of Serbia are higher than those enshrined in international documents, because it allows derogation of this right only for a specified period of time and pursuant to a court decision if necessary to conduct criminal proceedings or protect the safety of the Republic of Serbia, in a manner stipulated by the law, rather than leaving the regulation of this right to the law. In its Decision, the Constitutional Court referred to the following judgments of the Federal Constitutional Court of Germany: 1 BvR 330/96 and 1 BvR 348/99 of 12 March 2003; 1 BvR 668/04 of 27 July 2005; and 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08 of 2 March 2010.

⁶¹ ECtHR judgment in the case of *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and FYROM* (Application No. 60642/08) of 6 November 2012.

constitutional appeal cases regarding civil law account for most of its caseload and that the greatest number of disputed legal issues arise in that field of law, the Constitutional Court has extremely well-developed case law in that field, wherefore it may be indirectly inferred that the Court most often refers to foreign jurisprudence in civil law.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

Given that the Constitutional Court of the Republic of Serbia has borne in mind the legal views expressed in the jurisprudence of other constitutional courts in its reviews of a large number of cases within its remit and that it has been increasingly citing them in its decisions, it may be concluded that the decisions of the foreign constitutional courts have had specific impact on the jurisprudence of the Constitutional Court of the Republic of Serbia as well.⁶²

It also needs to be noted that the parties submitting initiatives to the Constitutional Court to review the constitutionality and legality of the general legal enactments, constitutional appeals and other parties to proceedings before the Constitutional Court have been increasingly referring in their submissions to legal arguments made in comparative constitutional jurisprudence. The Constitutional Court has thus in its reviews of the cases also been assessing the parties' allegations vis-à-vis the legal arguments in the foreign constitutional jurisprudence they have referred to.

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

The Constitutional Court has been cooperating with nearly all the constitutional courts in Europe, both multilaterally, within international bodies and professional associations, with the constitutional courts at the regional level, and bilaterally.

⁶² The Constitutional Court bore in mind the legal positions of the Constitutional Council of France and the Constitutional Court of Spain in its Decision in the case of IU-197/2002 of 27 May 2003 on the contested provisions of the Law on the Election of People's Deputies (on the termination of the mandates of people's deputies in the event of termination of their membership of the political party or coalition whose election tickets they had ran on or the deletion of the political party or another political organisation from the register kept by the relevant state authority), and in its Decision in the case of IU-249/2003 of 25 September 2003 (regarding the same issue with respect to the mandates of the councillors in the local self-government assemblies); in its Ruling on the constitutionality of the Law on Chambers of Commerce (case of IUz-94/2008 of 22 December 2010), the Constitutional Court took into account the decision of the German Federal Constitutional Court 1 BvR 430/65 and 259/66 of 18 December 1974, regarding the constitutionality of the obligation to associate in public law corporations; when it was ruling on the constitutionality of the Law on the Temporary Reduction of Salaries, Wages, Net Wages and Other Incomes in the State Administration and Public Sector (Ruling in the case of IUz-97/2009 of 17 January 2013), the Constitutional Court bore in mind the German Federal Constitutional Court order 2 BvL 20/65 of 9 July 1969, regarding the respect of the legislator's margin of appreciation in setting the tax basis, which the Constitutional Court checks only with respect to the prohibition of arbitrariness, but not with respect to expediency, rationality and fairness; when it was reviewing the disputed provisions of the Law on Employment in State Authorities (Decision in the case of IUz -299/2011 of 17 January 2013), the Constitutional Court also took into account the decisions of the Federal Constitutional Court of Germany (judgment 1 BvR 596/56 of 11 June 1958 and order 1 BvL 14/60 of 14 December 1965).

The Constitutional Court has been cooperating with other constitutional courts within the following international bodies and professional associations: members of the Venice Commission⁶³, the OSCE, the Council of Europe, the Conference of European Constitutional Courts⁶⁴, the Association of Francophone Constitutional Courts (ACCPUF)⁶⁵ and the World Conference on Constitutional Justice⁶⁶. The Court's representatives have been taking part in the conferences and other events organised by these bodies and organisations, which are relevant to the Court because they mostly focus on disputed constitutional judicial issues and problems regarding the realisation of the protection of human rights and freedoms. The Court's representatives prepare reports for these events in which they present the experience of the Constitutional Court of Serbia and the contested issues that may be of relevance also to other courts in the performance of their constitutional judicial tasks. Indeed, it is precisely through this comparative law approach to the leading constitutional judicial issues, which is characteristic of the events organised by international bodies and organisations, that the Court's representatives obtain information and exchange experiences, which they subsequently share with their colleagues.

The Court has been attaching particular importance to its regional cooperation with the constitutional courts of states created in the territory of the former Yugoslavia. Constitutional Courts in the region have been rallying at round tables every two years since 2004, when the first round table was hosted by Bosnia-Herzegovina. The round tables were subsequently hosted by: the Constitutional Court of Montenegro (2006), the Constitutional Court of Croatia (2008), the Constitutional Court of the Former Yugoslav Republic of Macedonia (2010) and the Constitutional Court of Serbia (2012). The 2012 round table focused on the "Effect and Enforcement of Constitutional Court Decisions" and was attended by the representatives and judges of the Bosnia-Herzegovina, Croatian, FYROM, Montenegrin and Serbian Constitutional Courts.

These courts agree that their well-developed bilateral relations geared at building the rule of law in the region benefit from the cooperation of the constitutional courts within a broader framework – from the multilateral exchange of experiences among the regional constitutional courts, of views on complex constitutional judicial issues and of knowledge of European and international standards. Regional cooperation has thus been recognised as an important step towards achieving the universal notion of justice and uniform practice of protecting human rights and freedoms in the region, as well as towards achieving the highest standards in the field, which is in keeping with the states' commitments arising from their CoE membership and their commitment to EU accession.

At the bilateral level, the Constitutional Court has been directly cooperating with over 20 other constitutional courts and has signed agreements on cooperation with many of them. These agreements envisage the development of programmes strengthening institutional cooperation, the exchange of decisions, legal views and publications of relevance to the exercise of the constitutional courts' powers, cooperation on professional projects, bilateral meetings of judges and advisers in order to directly exchange knowledge and experiences and other joint activities. Visits of the

⁶³ The Constitutional Court of Serbia has been a full-fledged member of the Venice Commission since 3 April 2003.

⁶⁴ The Constitutional Court of Serbia has been a full-fledged member of the Conference of European Constitutional Courts since 7 September 2006.

⁶⁵ The Constitutional Court has been a member of the Association of Francophone Constitutional Courts since July 2008.

⁶⁶ The Constitutional Court of Serbia has been a full-fledged member of the World Conference on Constitutional Justice since 21 October 2011.

representatives of other constitutional courts to the Constitutional Court of Serbia and the visits of our Court's representatives to other courts are an important element of our cooperation. Apart from providing us with the opportunities for direct dialogue about issues of common interest to our Courts, these visits have, on occasion, provided us with the chance of discussing the other constitutional courts' effective normative and practical solutions to the specific problems our Court has been facing.

In cooperation with the Konrad Adenauer Foundation, the Constitutional Court of Serbia organised an international regional conference "Constitutional Justice in Theory and Practice" in October 2009, which was attended by 110 participants from the Constitutional Courts of Bosnia-Herzegovina, Montenegro, Croatia, Germany, Serbia, FYROM and Albania, as well as by the representatives of law and other colleges, parliaments, international organisations and NGOs. The conference was organised within the events marking of the 60th anniversary of the adoption of the Basic Law (Constitution) of the Federal Republic of Germany.

In cooperation with the Serbian Association of Constitutional Law and the International Association of Constitutional Law, the Constitutional Court organised a round table on "Key developments in constitutionalism and constitutional law: 1981 — 2011" in Belgrade in May 2012. This event marked the 30th anniversary of the International Association of Constitutional Law.

The Constitutional Court attaches extreme relevance to being apprised of the decisions of other constitutional courts, which is on occasion hindered by the language barriers. Nevertheless, thanks to international support, the Court has translated and published selected decisions of other constitutional courts (e.g. those of Canada, France, Germany, Spain, Slovenia, Slovakia, the Czech Republic, etc.), including two collections of decisions rendered by the Constitutional Courts of Germany (2010) and the Kingdom of Spain (2010).

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