

Constitutional Complaint in the Republic of Serbia – Scope and Limitations

(Belgrade, 29th of November 2019.)

1. The Foundation Centre for Public Law (FCJP) wishes to thank the Judge's Society of Serbia for their cooperation in organizing this conference, especially for the active participation of judges and problematizing the relationship between the Constitutional Court and the ordinary courts. Centre for Public Law would like to thank experts for the competitive and concise presentation of the relevant aspects, and to participants for the constructive discussion that indicated the problems in practice and the ways to solve them.
2. Based on this discussion and short interventions, below are opinions as follows:
 - a) Participants of this conference express their gratitude to FCJP to initiate and organize this debate about constitutional complaint and emphasize how important is the work of FCJP in Serbia: political neutrality, scientific approach, openness as well as selection of experts, present FCJP as a venue at which directions of reform will be set out according to the legal profession. Participants especially emphasize the fact that FCJP, by its authorities, gathered the most different academic, legal as well as political professionals and because of that ensures objective approach to problems of public law.
 - b) The participants agreed that the constitutional standardization of the institute of constitutional complaint is incomplete and inconsistent with constitutional solutions giving a reason to different understanding the subject of constitutional complaint. In that manner, the opinion of the ordinary courts judges are that constitutional court cannot reconsider or undo a final court decisions. Judges of constitutional court and professors from universities are of opinion that basic mandate of constitutional court is checking the constitutionality of ordinary courts decisions considering possibilities of specific violation of constitutional law and the fact that different solution is not applicable for Serbia.
 - c) The fact is that the Law of Constitutional court allows the final courts decisions to be repealed. The participants are aware that is a reason to have a tension between Constitutional court and Supreme Court of Cassation and conflict of authorities of those two courts. The consequences are legal uncertainty as well as unequal protection rights of legal entities in front of courts. The participants therefore point to the inappropriateness of the legal decision on the annulment of final court decisions and, on the basis of comparative solutions, advocate the annulment of court decisions as a general jurisdiction of the Constitutional Court of Serbia.
 - d) The participants emphasized that there is an evidence of continuously rising constitutional complaints that seriously bring load Constitutional court and cause to slow down its work. This is related to the practical problem of maintaining the effectiveness of this legal remedy. Also, the participants point out particular significance of this aspect and warn that efficiency of constitutional complaints in Serbia must take care in coming years.
 - e) The participants conclude that the constitutional complaint today is affirmed as an effective legal remedy for the protection of constitutionally guaranteed rights and that is

not in doubt regarding justifying its existence. The only question is how to improve the existing normative framework of the constitutional complaint and to ensure the efficient work of the Constitutional Court.

f) The participants are agreeing that exist the legal emptiness regarding the status and rights of entities that has legal interested in constitutional complaint procedure. Namely, there is a no reasonable justification not to inform the interested person at all about initiated proceedings on the constitutional complaint, about the results of such proceedings, or about the adoption of decision of the Constitutional Court.

Based on this

it is recommended

a) **Standardisation:**The amendments to the Law on the Constitutional Court should correct the existing decision on the annulment of decisions of the regular courts in proceedings before the Constitutional Court of Serbia. It is suggested that instead of annulment, the Constitutional Court has power to reverse the final court decision of a regular court decision of a regular court when deciding.

b) **Efficiency:** More efficient work of the Constitutional Court of Serbia could be ensured by narrowing the scope of constitutionally guaranteed rights that enjoy immediate constitutional protection and by imposing a fine for lodging a constitutional complaint in apparently in admissible cases.

1. The volume of protection constitutional complaint should be harmonised with requirement to preserve the effectiveness of this remedy: it is proposed to reverse the catalogue of human right to be revise and establish a catalogue of basic and minority rights that may be subject to direct constitutional protection. This view follows from the conviction that the constitutional catalogue of human and minority tights is extremely exhaustive, even inappropriately large. At the same time, social rights function as programmatic principles and constitutional proclamations that are finally shaped by law. They should therefore be exempted from the subject-matter of the constitutional complaint.

2. Considering that there is no remuneration for the use of the constitutional complaint, it is necessary to prevent unnecessary burdening of the Constitutional Court with its frivolous and capricious use. In that sense, it would be necessary to provide for fines for the apparent abuse of the right to a constitutional complaint.

c) **Complementarities:**The Constitutional Court and the Supreme Court of Cassation must decide on the principle of mutual respect. It involves partnership in complex legal issues, the unification of opposing positions, taking into account legal arguments, constitutional values and jurisdiction, then, mutual interaction as well as dialogue on contentious legal positions. The common aim is to preserve the unity of the legal order, the rule of law and the full protection of human rights in all specific cases.

d) **Consultation:** It is suggested to hold regular and extraordinary consultative meetings, as well as roundtables with judges of the Supreme Cassation Court and the Court and Constitutional Court which would actively and problematically address outstanding issues of competence, in particular protection of human rights. Such activities do not

require institutional change, and the discussion points should be provided by profession (constitutional) with a problematic analysis of relevant court decision.

e) Self-restriction: Constitution court must do self-restriction in regards of constitutional complains in order to clearly differentiate its jurisdiction from jurisdiction of regular courts. It must be established a clear and legally defined way which will ensure to Constitutional court not become as “supreme court” or regular court of forth instance, who “re-examining” court decision on same way as institutional courts. The Constitutional Court should only revoke court decisions when a specific violation of constitutional law has been established and if the harmful consequences of unconstitutionality cannot be remedied (by repeating - by reopening court proceedings).

f) Organization: The organizational structure of the Constitutional Court should be adopted to the scope of the work and designed in the light of the ewer-growing trend of constitutional complaints submitted. Regards to this, it is recommended that smaller working bodies be set up within the organizational structure of the Constitutional Court, which should have an effective mechanism for the triage of constitutional complaints submitted. This would increase the effectiveness of the Constitutional Court as a whole.

g) Legislative void: The status of entities with legal interest in the constitutional complaint procedure should be defined by supplementing the legal provisions. It is a matter of defining who has the status of an interested entity, what are the obligations of the Constitutional Court towards the entity with legal interest.

h) International sources of law: So far the Constitutional Court sporadically applied international low as a source. In the area of application and interpretation of human rights, it is recommended to use international low as a source as well as decision of international institutions, especially those institutions that experience is longer and richer in this matter than the Constitutional Court of Serbia.

3. FCJP will be continuously involved in establishment of cooperation between Constitutional Court and ordinary courts in Serbia, and in organisation of experts meetings and connection of legal science with legal practise. We hereby invite Judge’s Society of Serbia and Constitutional court of Serbia to initiate cooperation with FCJP.

The President of FCJP

Prof. Dr. E. Šarčević