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THE FUNDAMENTAL FREEDOMS AND RIGHTS OF THE INDIVIDUAL AND THE CITIZENS RECOGNIZED BY THE INTERNATIONAL LAW AND DETERMINED BY THE CONSTITUTION, THROUGH THE PRISM OF THE COMPLEX RELATIONSHIP BETWEEN THE CONSTITUTIONAL COURT AND THE REGULAR COURTS

(DILEMMAS OF THE CONSTITUTIONAL JUDGES)

-Abstract-

This paper examines the competence of the Constitutional Court of the Republic of North Macedonia to annul judgments rendered by regular courts, with a focus on the dilemmas arising from this competence and the varying constitutional court orders issued over several years. Considering that the Constitution grants the Constitutional Court the authority to independently regulate its work through an Act adopted by the Court itself, the issue discussed in this paper represents a highly significant constitutional and legal matter. It has profound implications for the functioning of the Constitutional Court, the relationship between the Constitutional Court and regular courts, and the overall coherence of the legal order. The paper analyzes previous constitutional court practices in this area, offers a critical evaluation of these practices, and proposes an approach that reinforces the constitutionally established role of the Constitutional Court as the guardian of the Constitution and the protector of rights and freedoms within its jurisdiction.

Key words: Constitutional Court, regular courts, annulment of judgments, human rights and freedoms, Act of the Constitutional Court.

I. IMPORTANT CONSTITUTIONAL LEGAL ISSUES AND DILEMMAS, DILEMMAS OF CONSTITUTIONAL JUDGES

The issue of the competence of the Constitutional Court of the Republic of North Macedonia to annul judgments of the regular courts, as was regulated in the now former Rules of Procedure of the Constitutional Court from 1992[1], is of exceptional importance considering the position and competences of the Court in our legal order. This issue, in the past, was often subject to misinterpretation of procedural provisions, but it also imposed the need to be

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[1] Rules of Procedure of the Constitutional Court of the Republic of North Macedonia ("Official Gazette of the Republic of Macedonia" no. 70/92 and "Official Gazette of the Republic of North Macedonia" no. 202/19, 256/20 and 65/21)

subject to further clarification in the new Act of the Constitutional Court of 2024[2]. The provisions of this Act that refer to the procedure for the protection of freedoms and rights established in Article 110 paragraph 3 of the Constitution are of delayed application, that is, they will be applied from January 1, 2025.

The question of whether the Constitutional Court, when deciding on a request for the protection of freedoms and rights, can annul judgments of regular courts, undoubtedly caused dilemmas. Proof of that is the continuous different approach and different interpretation of constitutional and procedural provisions by constitutional judges in the past. Precisely because of the importance of the question, the need for a broader constitutional and legal elaboration was imposed.

In the context of the previous discussion in which I pointed out some of the weaknesses of the Court's Rules of Procedure that I noticed in the first half of my term, in this Chapter, I will address two of the constitutionally legally extremely important issues that are also subject of a wrong interpretation of the provisions of the Rules of Procedure, but can also be subject of clarification through the Rules of Procedure.

The question of whether the Constitutional Court, when deciding on a request for protection of freedoms and rights, can overturn decisions of regular courts, is undoubtedly extremely important constitutional legal question. The continuously different approaches and different interpretations of the constitutional and procedural provisions by the constitutional judges speak to the importance of this question.

My position is clear, and due to the significance of the question, it necessitates a broader constitutional legal elaboration.

Namely, the Constitutional Court, in accordance with Article 56 of the Rules of Procedure, in the decisions by which it determined a violation of freedoms and rights, up to the decisions in 2023 annulled the individual acts by which the violation was committed, regardless of whether they were acts of courts or administrative bodies organs. Thus in the case No. 84/2009 of 10.2.2010[3], the Court annulled the final and binding Decision no. 01-31/2 of February 6, 2008 passed by the Municipal Election Commission-Zajas, which rejected the candidacy.

Since the day of my election as a constitutional judge, this question has arisen before the Court on several occasions. The first confrontation with this dilemma for me was in May 2019, during the hearing and deciding on the request for protection of freedoms and rights in the case No. 57/2019[4]. The Court decided in that case that the right to freedom of thought and expression of Pavlina Zefic, a lawyer from Skopje, and Pance Toskovski, a lawyer from Skopje, was violated according to Article 110 paragraph 3 and Article 16 paragraph 1 of the Constitution of the Republic of North Macedonia. With the Decision that established a violation, by a majority vote, decided to annul the Resolution 09 KOK-40/18 of 16.10.2018,

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[2] Act of the Constitutional Court of the Republic of North Macedonia ("Official Gazette of the Republic of North Macedonia" no. 115/24).

While in the Rules of Procedure of the Court in Article 56 it was only regulated that with the decision on the protection of freedoms and rights, the Constitutional Court will determine whether there is a violation and, depending on it, will annul the individual act, will prohibit the action by which the violation was committed or will reject the request, in article 57 of the Act of the Court it is determined that with the decision that determined a violation of freedoms and rights, the Court will also determine the method of removing the consequences of the application of the individual act or action by which those rights and freedoms were violated

[3] Decision, U.No.84/2009 available at: https://ustavensud.mk/%d0%bf%d0%be%d0%b4%d0%bd%d0%be%d1%81%d0%b8%d1%82%d0%b5%d0%bb/%d0%b3%d1%80%d0%b0%d1%93%d0%b0%d0%bd%d0%b8/842009-0-0/(last retrieved: 17.11.2024)

[4] Decision,U.No.57/2019,available at: https://ustavensud.mk/%d0%bf%d0%be%d0%b4%d0%bd%d0%be%d1%81%d0%b8%d1%82%d0%b5%d0%bb/%d0%b3%d1%80%d0%b0%d1%93%d0%b0%d0%bd%d0%b8/%d0%a3-%d0%b1%d1%80-572019/ (last retrieved: 17.11.2024)

adopted by the Basic Court Skopje 1 Skopje, by which Pavlina Zefic, a lawyer from Skopje, was fined to pay EUR 1,000 in Denar equivalent, the Resolution 09 KOK-40/18 of 16.10.2018, adopted by the Basic Court Skopje 1 Skopje, by which Pance Toskovski, a lawyer from Skopje, is fined to pay EUR 1,000 in Denar equivalent, and Resolution KOKZ-47/18 of 17.12.2018, adopted by the Court of Appeals Skopje, in the part in which lawyers Pavlina Zefic from Skopje and Pance Toshkovski from Skopje are fined to pay EUR 500 in Denar equivalent each. At the hearing before the Court, different opinions were heard on whether the Constitutional Court can annul decisions of regular courts, including disputed resolutions. I represented the position that the Constitutional Court has such jurisdiction without hesitation, but some judges thought otherwise, and two judges expressed their own separate opinion.[5]

In the case No 230/2020 of 12.11.2020[6], the Court annulled Decision no. 02-200/2 of July 19, 2018 of the Judicial Council of the Republic of North Macedonia, Decision USPI no. 10/2019 of October 16, 2019 of the Administrative Court of the Republic of North Macedonia and Decision USPIŽ no. 17/2019 from 6.5. 2020 of the Supreme Court of the Republic of North Macedonia with which the request for the suspension of the judicial position was rejected.

In January 2023, acting upon the request for protection of freedoms and rights, at the Court hearing of case No. 146/2021[7], the same question recurred. The Constitutional Court discussed the request of Vlatko Stojanovski from Skopje, represented by lawyer Filip Medarski, for protection of freedom and right to express his thoughts publicly, which the applicant believed was violated during the events in the Assembly of the Republic of North Macedonia on 27 April 2017.

The proposal of the judge-rapporteur for the Court to reject the request did not receive the necessary majority at the session of the Court on 11 January 2023. The case was reconsidered at an informal meeting of the judges, where new knowledge and facts emerged, which provided a new, convincing context with a decisive influence. This was the reason why the judge-rapporteur amended the report with an analysis of specific circumstances and facts, to fully establish the factual situation and answer all the doubts that were raised in the previous hearings. The judgerapporteur presented the amended report that contained a different proposal than the previous one at the session of the Court on 18 January 2023. The proposal of the judge-rapporteur was for the Court to establish a violation of freedoms and rights, namely, the freedom of belief, conscience, thought and public expression of thought of the applicant Vlatko Stojanovski from Skopje, employed in the Publishing Company MEDIA PLUS Focus DOOEL Skopje. During the events in the Assembly on 27 April 2017, as an accredited journalist, he was not able to inform the public on the issue of public interest from the constitutive session of the Assembly, as a result of the failure of the state and its

[5]Dissenting Opinions, U. No. 57/2019, available at: https://ustavensud.mk/%d0%b8%d0%b7%d0%b4%d0%b2%d0%be%d0%b5%d0%bd%d0%b8-%d0%bc%d0%b8%d1%81%d0%bb%d0%b5%d1%9a%d0%b0/%d0%98%d0%b7%d0%b4%d0%b2%d0%be%d0%b5%d0%bd%d0%be-%d0%bc%d0%b8%d1%81%d0%bb%d0%b5%d1%9a%d0%b5-%d0%bf%d0%be-%d0%bf%d1%80%d0%b5%d0%b4%d0%bc%d0%b5%d1%82%d0%be%d1%82-%d0%a3-%d0%b1%d1%80-572019/ (last retrieved: 17.11.2024)

[6]Decision, U.No.230/2020 https://ustavensud.mk/%d0%bf%d0%be%d0%b4%d0%bd%d0%be%d1%81%d0%b8%d1%82%d0%b5%d0%bb/%d0%b3%d1%80%d0%b0%d1%93%d0%b0%d0%bd%d0%b8/%d0%a3-%d0%b1%d1%80-2302020/(last retrieved: 17.11.2024)

[7]Decision, U. No. 146/2021, available at: https://ustavensud.mk/%d0%bf%d0%be%d0%b4%d0%bd%d0%be%d1%81%d0%b8%d1%82%d0%b5%d0%bb/%d0%b3%d1%80%d0%b0%d1%93%d0%b0%d0%bd%d0%b8/%d0%a3-%d0%b1%d1%80-1462021/ (last retrieved: 17.11.2024)

authorities to take appropriate measures based on the provisions of Articles 16 paragraphs 1, 2 and 3, in relation to Article 110 paragraph 1 line 3 of the Constitution. On that basis, it was decided the verdict MALVP.705 / 2020 of 14.01.2021 of the Basic Civil Court Skopje and the verdict GZ-2666/21 of 31.09.2021 of the Court of Appeals in Skopje, to be nullified.

Regarding the first point of the proposal, the Court was unanimous in deciding that the applicant's rights were violated. However, the proposal from the second point of the judge-rapporteur, that both verdicts of the basic and appellate courts be nullified, did not receive the necessary majority. A debate ensued on this point. Some of the judges believed that the Constitutional Court cannot invalidate verdicts of regular courts and that the Court may only establish a violation, while its decision can serve as a basis for repeating the procedure before the regular courts. I opposed this position, along with some of my fellow judges. I believed that the Constitutional Court should not only establish a violation, and that the proposal to nullify the verdicts was not acceptable, but that the Court had jurisdiction and was the only one, from a constitutional aspect, to properly approach the issue by nullifying both verdicts. In the debate, diametrically opposed positions and arguments emerged. I will present my personal stances.

My position is that the Constitutional Court has constitutional jurisdiction and authority to nullify verdicts of regular courts. If the constitutional values and norms, the constitutional setting, function and competencies of the Court, which directly arise from the Constitution, are correctly interpreted and if the legal nature of the Court's Rules of Procedure, especially Articles 56 and 82, is correctly interpreted, as I stressed in the debate, there should be no dilemmas among the judges, i.e. it should be unequivocally established that the Constitutional Court can nullify the verdicts of regular courts.

Let me make it clear, as I have previously emphasized on several occasions, about the constitutional setting of the Court. The Constitutional Court is bound only by the Constitution, it is the bearer of the so-called "fourth" constitutional-judicial power, it is above all state bodies, and is not subject to the principle of separation of powers. The Constitutional Court is a body of the Republic that protects constitutionalism and legality. The Constitution is the only guarantee of its functioning and only in this way can it fulfill its competences, ensure the supremacy of the Constitution in the legal order, protect the fundamental values of the constitutional order, especially the first-ranked "freedoms and rights of the individual and citizen, recognized in international law and established in the Constitution"[8]. It is a fact that the Constitution entrusts the Constitutional Court with the role of a direct, immediate protector of a limited scope of human rights and freedoms only, those established in Article 110 line 3, "protects the freedoms and rights of the individual and citizen relating to freedom of belief, conscience, thought and public expression of thought, political association and action, and the prohibition of discrimination against citizens on the grounds of gender, race, religion, national, social and political affiliation". But even this limited scope represents an extremely important independent constitutional legal mechanism for protection, which unequivocally implies that it must be effective.

[8] Regarding the dual nature of constitutional rights, especially the freedoms and rights of the individual and citizen, my position is expressed in "Loyalty to the Constitution- 3 "The Theory of Living Constitutionalism, Interpretation of the Constitution

II. SUPPLEMENTING THE WEAKNESSES OF THE COURT'S RULES OF PROCEDURE, CAN THE CONSTITUTIONAL COURT OVERTURN DECISIONS OF REGULAR COURTS?

About the legal nature and features of the Rules of Procedure, the reader already knows my position. The act of the Court, which is currently, in my opinion, unfortunately, "christened" the Rules of Procedure of the Court, has a sui generis legal nature and features; it is unique in our constitutional-legal system. It arises from the Constitution; between the Constitution and the act of the Court there is nothing else, which gives the Rules of Procedure of the Court the character and legal nature of constitutional matter. It is above the law! The very fact that the current Rules of Procedure of the Court regulate issues that, in principle, if its sui generis nature is not recognized, could not be subject to "procedural" regulation, confirms its legal nature. For example, the legal effect of the Court decisions, provisional measures, status and immunity issues for judges, entities who can initiate a procedure before the Court, etc. The act of the Court is a "sub-constitutional act".

This is, in my opinion, correct and constitutional interpretation of the constitutional setting, function and jurisdiction of the Constitutional Court, as well as of the legal nature and legal force of the provisions of the Court's Rules of Procedure. If this is correctly understood, and if Article 56 of the Rules of Procedure is analyzed through this prism, which states that "with the decision for protection of freedoms and rights, the Constitutional court will define whether there is an infringement and depending on that, it will annul the individual act, prohibit the action causing the infringement or refuse the request", my question to the judges is whether the Court has any choice, besides when determining a violation, to annul an individual act, in this case, 2 judgments of the basic and appellate courts. Simply put, it does not! The provisions of the Rules of Procedure are clear, if the Court determines a violation, the words "depending on that, it will annul the individual act" have an imperative and cumulative nature, they do not allow for any choice by the judges, but clearly determine that "once a violation is determined", it must annul the individual acts through which the violation was committed. Judges are obliged to act and decide according to the Constitution and the Rules of Procedure, and I have already stated that the Rules of Procedure is a constitutional category and that fact cannot be ignored.

I made it clear that the decisions of the Constitutional Court are final and executive, that everyone is obliged to respect them, and that it is unacceptable for a decision of the Constitutional Court to be treated as a "new fact or evidence" as a prerequisite for repeating the procedure before the regular courts. I believe that it is unacceptable for the decision on whether the decision of the Constitutional Court constitutes a new fact and evidence for repeating the procedure or not, to be left to the regular courts. I made it clear that, for me as a judge, it is unacceptable to make a declaratory decision without determining the legal fate of the individual acts through which the violation was committed. In that case, we only have a declaration, a declaratory decision, "that there is a violation, but whether the consequences of such a violation will be eliminated", does not depend on the Constitutional Court, someone else will evaluate that. It is an unacceptable stance! In this context, Article 82 of the Rules of Procedure should also be properly understood, which reads: "By a decision with which the Constitutional court decides for protection of freedoms and rights from art. 110 paragraph 3 of the Constitution, the Constitutional court will determine the way of eliminating the consequences from applying the individual act or action, with which those rights and freedoms have been violated". With such arguments, I opposed the judges who suggested that the Court should only establish a violation, without even referring to the legal fate of the two judgments.

Moreover, the Law on Courts was also reviewed, invoking Article 13 of the Law, according to which judgments have a superior and inviolable nature, or "(1) The court decisions shall be pronounced in the name of the citizens of the Republic of Macedonia. (2) The legally valid court decision shall have undisputed legal effect. (3) The court decision may only be amended or abolished by a competent court in a procedure prescribed by law. (4) The court decisions shall be binding for all legal entities and natural persons and shall have greater legal force with regard to the decision of any other body. (5) Everyone shall be obliged to obey the legally valid and enforceable court decision under threat of legal sanctions". Unsustainable and weak arguments from a constitutional-legal point of analysis were the positions of some colleagues that the Law on Courts was a systemic, two-thirds law, and that they determined the legal force and features of the judgments. Answering such allegations is easy -the Constitutional Court has jurisdiction to assess the constitutionality of systemic laws, in their entirety, or their provisions, and when it has that right and jurisdiction, it is irrelevant to the Constitutional Court that a law defines and gives legal features to the judgment. What is relevant is that the legal solutions are in line with the Constitution. In this context, it is undisputed that the decisions of the courts cannot be equated with the acts of any other state body or organization with public authorities. Unlike other entities, the judicial decision comes from judicial authority, whose independence is guaranteed by the Constitution. And this is absolutely correct! However, this specific difference does not justify the approach by which the constitutional review of court decisions and the constitutional-judicial sanction of the judgments of the regular courts would be limited to declaration. This interpretation is neither in the spirit of the intention of the creator of the constitution nor in the spirit or by the "letter" of the Constitution. The judiciary, as a separate power, is established in point 4 of Section III of the Constitution, titled "Organization of State Authority", which regulates the pillars of power and the separation to legislative, executive and judicial powers. The Constitutional Court is regulated in a separate Section IV of the Constitution. Essential difference is that, unlike the holders and bodies of legislative, executive and judicial power, the Constitutional Court, as a body of the Republic that protects constitutionality and legality, is not subject to the principle of separation of powers. The Constitutional Court is bound only by the Constitution, it is the bearer of the so-called fourth constitutional-judicial power and is above all state bodies. The Constitution is the only guarantee in its operation. In this context, the jurisdiction of the Constitutional Court is to be the guardian of the Constitution, to ensure the fundamental values of the order – among which are the basic freedoms and rights of the individual and citizen, as well as the separation of power, to be a controller of these powers and, at the same time, to secure their independence through the fundamental value of the separation of power and the "checks and balances" principle. The Constitutional Court is the one that protects the independence of the judicial power, and, with that, is placed above that power. If the Constitutional Court has such jurisdiction, and it undoubtedly does, it is illusory not to be able to place it above the judicial power, including in the review of their judgments when it needs to decide on the protection of the freedoms and rights of the individual and citizen, whether they are within the framework of the Constitution, whether they are constitutional, etc.

Starting from the fact that the constitutional function of the Constitutional Court is to protect the rights of the individual and citizen, that the Constitution establishes and defines, directly and indirectly, the exercise of that function in Article 110 line 3, it follows that the creator of the constitution established constitutional-judicial protection according to the principle that absolutely all acts and actions of state power (specifically of the holders and bodies of the three powers, legislative, executive and judicial) are subject to constitutional review by the Constitutional Court. If constitutional values and norms are interpreted in this way, the position of the Constitutional Court and the legal nature of the Rules of Procedure make it

clear that there is a constitutional obligation for the legislator, in carrying out constitutional competencies and powers, to take care in court decisions to exclude the immunity from constitutional judicial control and sanction by the Constitutional Court in legislative decisions. The legislator must ensure that the legal effect of decisions of the Constitutional Court is taken into account, i.e. that all acts of the state and public authorities are subject to constitutional judicial control and sanction in the same way, thereby ensuring equal legal effect of the Constitutional Court decisions. This means that when the legislator regulates the features, legal nature and effect of the judgments of the regular courts by legislative decisions, they must also take care to ensure that these requests are subject to constitutional judicial control and sanction. The exclusion of court decisions cannot be excluded from this constitutional function of the Constitutional Court. In that sense, the failure of the legislator to regulate this issue in the Law on Courts does not in any way mean that the provisions of Article 13 of the Law on Courts represent an exemption of the judgments of regular courts from constitutional judicial control and review, including their annulment. It is undeniable that court judgments have an inviolable effect, that court decisions can only be changed or annulled by competent courts in a procedure established by law, that court decisions are binding on all legal and natural persons and have greater force on the decisions of any other organ, and that everyone is obliged to respect them, but this applies to the other two branches of government, the legislative and executive, the local as well as to all other public authority bodies, which are subject to the principle of separation of powers. However, such imperative legal norms and the effects provided for by them do not and cannot apply to the Constitutional Court.

Where the Constitutional Court finds a violation of a constitutionally guaranteed right or freedom, it shall, based on Articles 56 and 82 of the Rules of Procedure, unequivocally determine the manner of removing the effects of the act that caused the violation, including its annulment. Any restriction on the Court in the exercise of this function would constitute a violation of the constitutionally established position, functions and powers of the Constitutional Court.

Another argument infavor of my position is the fact that in most cases of requests for protection of the individual and citizen rights and freedoms filed to the Constitutional Court, court judgments are cited as a source of violation of constitutional rights. The position of some judges according to which court judgments should be excluded from the constitutional court sanction – annulment, while recognizing the Court's power to apply this measure to all other individual acts and actions of other authorities, represents a kind of s constitutional-legal-systemic inconsistency.

Taking into account that, according to Article 51 of the Rules of Procedure, only a final or executive individual act can be subject of constitutional judicial review, which means that before exhausting judicial control, as an available legal remedy for some acts or actions, it cannot be subject of a request for protection addressed to the Constitutional Court. This means that in most cases, court judgments are the last act in the series by which the violation of rights can be remedied by their control and sanction, regardless of whether it is made by a court decision in the process of ensuring legal protection or by the failure of the judicial body to establish and remove the violation of rights committed in the previous phases of decision-making on the citizen's rights and freedoms. Therefore, legal elimination of court decisions in terms of annulment of the Constitutional Court decision negates the prerequisites for effective implementation of the Constitutional Court decision in many cases and diminishes the constitutional significance of the request for protection of citizen's rights and freedoms, as direct and immediate constitutional protection from acts and actions of any holder of state/public authority.

Furthermore, exposing court decisions to constitutional judicial control in the procedure upon a request for protection of freedoms and rights, as well as imposing sanctions-annulment of judgments, is not contradictory or opposite to the constitutional principle of independence of the judicial authority, nor to the legal provisions of the Law on Courts regarding the jurisdiction and legal features and effects of court judgments. On the contrary, the authorization of the Constitutional Court as the body competent to ensure constitutional judicial protection in all its competencies established by the Constitution, including the competence to decide on requests for protection of freedoms and rights, is in function of exercising the fundamental value of the rule of law, whose function is essential to secure and affirm all other fundamental values, especially the basic freedoms and rights of the individual and citizen, recognized by international law and established in the Constitution. The constitutional significance and purpose of the request for protection of freedoms and rights are not achieved by declaratively establishing the existence of a violation, but by removing the consequences arising from the established violation, regardless of which of the state bodies is the author of the disputed act.

As can be seen below in the authoritative decision of the Constitutional Court of Serbia, "only in this way can this institute (constitutional complaint) represent an effective mechanism for removing the consequences of established violation of rights, i.e. ensuring such an effect to the Constitutional Court decision that will give the best results in removing the consequences of the established violation of constitutional rights and freedoms".

Like my colleagues in Serbia, I believe that:

"No competition or mutual exclusion exist between the constitutionally established jurisdiction of the Constitutional Court to act on constitutional complaints and the legally established jurisdiction of the courts of general and special jurisdiction, nor exposing court decisions to constitutional-court control in the constitutional-complaint procedure have any significance for constitutionally prohibited extrajudicial control of court decisions, as this is certainly not a decision-making process "on the same matter". These two types of legal protection are attained in special and independent procedures, by separate bodies, to ensure full protection of the rights and freedoms guaranteed by the Constitution, for which the Constitution itself, by regulating the system of regular and special constitutional-judicial protection, has established a special means of legal protection in the form of a constitutional complaint, allowed against individual acts and actions of all state bodies, which undoubtedly encompasses the acts and actions of the judicial bodies."

Identically, in support of my views, I will refer to the following position of the Serbian Constitutional Court: "The Court considers that in a relationship that is characterized by an explicit constitutional establishment of direct constitutional-judicial protection of human rights and freedoms, with a simultaneous constitutional determination that court decisions are based on the Constitution (Article 145 paragraph 2), it implies that court decisions must, first and foremost, respect human rights and freedoms, as their core value. Starting from the meaning, systematic and logical connection of the relevant norms of the Constitution that refer to the role and place of the Constitutional Court in the system of public authority, and especially its role in the direct protection of the rights guaranteed by the Constitution in deciding on citizens' constitutional complaints, it follows that the effect of the constitutional principle on the independence of the judiciary (Article 4 paragraph 4 of the Constitution) and the principle of "inviolability" of court decisions for extrajudicial authorities (Article 145 paragraphs 3 and 4 of the Constitution) should be understood in such a way that court decisions remain absolutely "inviolable" for legislative and executive authorities, which retain the standard meaning and effect of the principle of independence of the judiciary. Court decisions are indeed not "untouchable" in assessing whether they violate fundamental human rights guaranteed by the Constitution, as in the procedure of normative control, the

Constitutional Court assesses the constitutionality of laws and the legality of regulations of the executive branch, as well as in the procedure of constitutional appeal, where the Constitutional Court assesses the conformity of court decisions with constitutionally guaranteed human rights and freedoms. The basis of both procedures is the intention of the constitutional maker to subordinate all acts of public authority to the Constitution, i.e. to the rights guaranteed by the Constitution. The Constitutional Court decision, resulting from both procedures, does not perform a "positive" correction of either the law or the court decision. As it is "natural", from the statement of the Constitutional Court, that the legal norm is not by the Constitution, the understandable and only possible consequence is that the general norm loses the property of valid law, the finding that a court decision that violates a "specific constitutional right" must inevitably result in annulling of an individual act of the judicial authority is contrary to the Constitution. The right of the legislative body to correct "its" legal norm remains undisputed, to bring it into line with the Constitution, as well as the right of the judicial authority to review and correct its own decision. Neither the Constitutional Court can write the law instead of the legislator, nor can the constitutional judiciary finally resolve specific disputes and take over jurisdiction. Although such consequences of the decision of the Constitutional Court are not explicitly established by the Constitution, according to the Constitutional Court, the establishment of normative control and constitutional appeal implicitly accepts them."

All these personal arguments of mine, supported by the positions of my colleagues from the Constitutional Court of Serbia, I believe sufficiently clarify the dilemma of my colleagues in the Constitutional Court.

Unfortunately, the outcome in case No. 146/2021 was that the Court literally split in votes, and despite the unanimous finding of a violation of constitutionally guaranteed rights, the Court, by its indecision to annul both judgments, in my opinion, did not ful fill its essential role as a guardian of constitutionality, protector of human and citizen rights and freedoms. As a contribution to my arguments and as a comparative analysis of this case, I will convey integrally the decision of the Constitutional Court of the Republic of Serbia which resolved the dispute between the Constitutional Court and the Supreme Court regarding the question of whether the Constitutional Court can annul and revoke the judgments of regular courts in Serbia.

What is it about? In a general session held on 28 September 2009, the Supreme Court of Serbia adopted a conclusion stating that the Constitutional Court cannot annul and revoke judicial decisions and procedures in its handling of constitutional appeals. The conclusion stated that the Constitutional Court can only establish violations of human rights, as the European Court of Human Rights in Strasbourg does. The Supreme Court considered that the Constitutional Court has no authority to annul and revoke judicial decisions, but it can only determine and establish that a human right or freedom is violated by the judgment of a regular court/courts, and such a determination would enable and provide a basis for the injured party to exercise the right to damage compensation.

The legislator also became involved in such a dispute, and, in 2011, adopted the Law Amending the Law on the Constitutional Court ("Official Gazette of the Republic of Serbia" No. 99/2011), which amends the provision of Article 92 paragraph 2 in a way that the Constitutional Court can annul all individual acts, except the acts, judgments of regular courts. After a short time, the Constitutional Court, upon its own initiative, launched a procedure to assess the constitutionality of this provision, and, on 20 December 2012, adopted a decision based on which the disputed provision in the part that reads "except a court decision" is not in compliance with the Constitution and therefore revoked it. The

integral text of the Decision of the Constitutional Court of Serbia IUz-97/2012[9] is given below.

Court: Constitutional Court Date: 20.12.2012

Case number: IUz-97/2012

The Constitutional Court, composed of the President, Dragisa B. Slijepcevic, Ph.D., and judges Olivera Vucic, Ph.D., Marija Draksic, Ph.D., Bratislava Dokic, Vesna Ilic Prelic, Goran Ilic, Ph.D., Agnes Kartag Odri, Ph.D., Katarina Manoljovic Andric, Milan Markovic, MA, Bosa Nenadic, Ph.D., Milan Stanic, Dragan Stojanovic, Ph.D., Tomislav Stojkovic, MA, Sabahudin Tahirovic, and Predrag Cetkovic, based on Article 167 paragraph 1 point 1 of the Constitution of the Republic of Serbia, at the session held on 20 December 2012, adopted the following:

D E C I S I O N

With the Constitutional Court Resolution No. IUz-97/2012 of 12 July 2012, adopted by the Court upon its own initiative, in relation to the provision of Article 168 paragraph 1 of the Constitution of the Republic of Serbia, a procedure was initiated for determining the unconstitutionality of Article 89 paragraph 2 of the Law Amending the Law on the Constitutional Court, in the part which reads: "except a court decision". In adopting the aforementioned decision, the Court assessed as justified the question of conformity of the Constitution with the provision of the Law on Exclusion of Court Decisions from the Application of the Measure of Annulment as a Constitutional Court Sanction for Established Violations of Human or Minority Rights and Freedoms Guaranteed by the Constitution. Based on Article 107 paragraph 1 of the Law on the Constitutional Court ("Official Gazette of the Republic of Serbia", No. 109/2007 and 99/2011), the Court delivered the aforementioned decision to the National Assembly for a response. As the National Assembly did not respond, the Court, based on the provisions of Article 34 paragraph 3 of the Law on the Constitutional Court, continued the procedure and established the following:

The Constitution of the Republic of Serbia establishes that the Constitutional Court is an independent and impartial state body that protects constitutionality and legality, human and minority rights and freedoms, and that the decisions of the Constitutional Court are final, executive and generally binding (Article 166); that a constitutional complaint may be filed against individual acts or actions of state bodies or organizations entrusted with public authority that violate or deny human or minority rights and freedoms guaranteed by the Constitution, if no other legal remedies for their protection have been exhausted or provided (Article 170); that everyone is obliged to respect and implement the decision of the Constitutional Court, that the Constitutional Court regulates the manner of its implementation as necessary through its decision, and that the execution of the decisions of the Constitutional Court is regulated by law (Article 171); and that the organization of the Constitutional Court, the proceedings before the Constitutional Court, and the legal effects of its decisions are regulated by law (Article 175 paragraph 3). Under the provisions of Article 89 paragraphs 2 and 3, contained in the basic text of the Law on the Constitutional Court ("Official Gazette of the Republic of Serbia" No. 109/2007), adopted in November 2007, due to the legal development of the institute of constitutional complaint, which was established for the first time in the legal system of the Republic of Serbia with the 2006 Constitution, it was prescribed that: "When the Constitutional Court determines that a disputed individual act or action violated or denied a human or minority right or freedom guaranteed by the Constitution, it shall annul the individual act, prohibit its further implementation or order implementation of certain actions and shall specify a deadline for elimination of harmful

[9] Decision, No. IUz-97/2012, available at: https://ustavni.sud.rs/sudska-praksa/baza-sudske-prakse/pregled-dokumenta?PredmetId=8199 (last retrieved: 17.11.2024)

consequences. The Constitutional Court decision to adopt constitutional complaint is a legal basis for filing a claim for damage compensation or elimination of other harmful consequences before the competent authority, by the law." The provisions of Article 33 of the Law Amending the Law on the Constitutional Court ("Official Gazette of the Republic of Serbia" No. 99/2011), adopted in December 2011, amended the provisions of Article 89 paragraphs 2 and 3 of the basic text of the Law:
"When the Constitutional Court determines that an individual act or action violates or restricts human or minority rights and freedoms guaranteed by the Constitution, except for a court decision to prohibit further implementation of the action or to determine the adoption of another measure or action that eliminates the harmful consequences of the established violations or restrictions of guaranteed rights and freedoms, and to determine the method of fair compensation for the applicant, the Constitutional Court shall also decide on the request of the applicant for compensation of material or non-material damage when such a request is submitted."
Before the disputed amendments to the Law on the Constitutional Court entered into force, the Constitutional Court applied the provisions of Article 89 of the original text of the Law and the powers and obligations arising from those provisions of the Law about the newly formed constitutional institute for constitutional appeals, determining it as a general practice in its proceedings as follows: 1) "except when the Constitutional Court accepts the constitutional appeal and determines that human or minority rights and freedoms, guaranteed by a specific provision of the Constitution, are violated or restricted by the disputed act or action and the harmful consequences cannot be eliminated in any other way, the Court shall, in paragraph 2 of the decision, annul the individual act and return the matter to the body whose act was annulled for further proceedings and decision. In that case, the Court may order adoption of a new act and order completion of the procedure as soon as possible", and 2) "when the Constitutional Court determines that a human or minority right and freedom guaranteed by a specific provision of the Constitution is violated or restricted by the disputed act or action, the Court may annul the individual act, prohibit its further implementation or order implementation of a specific action, and may order removal of harmful consequences within a specified period (e.g. return to the previous state, compensation for damage, publication of the decision)". The above legal practices, which were also applied in cases where the subject of dispute was a court decision, were based by the Constitutional Court on the following circumstances:
1. the provisions of Article 89 paragraphs 2 and 3 of the Law on the Constitutional Court provide that when the Constitutional Court determines that an individual act or action is violated or deprived a human or minority right or freedom guaranteed by the Constitution, it shall annul the individual act, i.e. prohibit further execution or order certain action and determine that harmful consequences must be eliminated within a certain period;
2. Article 8 paragraph 1 of the Law on Proceedings before the Constitutional Court provides that provisions of the relevant procedural laws must be applied accordingly in cases not regulated by this law; an
3. considering the circumstances of the then-current state of the legal regulation of the rules of procedural law, the adoptive decision of the Constitutional Court made in a constitutional complaint procedure was not foreseen as a basis for any form of repeated/ supplementary decision-making on the legal relationship for which the judicial authority decided, thus violating the right guaranteed by the Constitution. Instead, it was only foreseen as possibility of repeating a legally completed civil or criminal proceeding, based on the decision of the European Court of Human Rights against the Republic of Serbia.
The Constitutional Court acted according to the adopted positions, and thus, until the controversial amendment to the Law on the Constitutional Court came into force on 4

January 2012, it annulled the disputed court decisions when it determined that the disputed court decision violate constitutionally guaranteed rights. In carrying out its jurisdiction based on the submitted constitutional complaint against the decisions of the judicial authorities, the Constitutional Court acted within the limits of its constitutional jurisdiction, examining the disputed court decisions to the extent necessary to determine whether the issuance of the court decision resulted in a violation or deprivation of the constitutional rights and freedoms listed in the constitutional complaint. The Constitutional Court re-examined the court decisions within the limits of the reasons stated in the constitutional complaint, and the measure of revocation of those decisions was imposed only in cases where it was considered necessary to eliminate the consequences of the established violation of constitutional rights and freedoms. In cases where a violation of a right guaranteed by the constitution occurred before the court of first instance, the Court revoked only the decision of the last instance court, so that the court, in the repeated proceedings, after the statement of the legal remedy, would remove the violation. Therefore, neither the authorization given by the Law on Revocation of Court Decisions, nor the procedure of the Constitutional Court in imposing that measure, had the character of instance control about the decisions of the courts that were subject of constitutional appeal. The achieved level of protection of constitutional rights and freedoms, which was achieved through the procedure of the Constitutional Court following constitutional appeals of the above-mentioned, constitutionally based and legally prescribed manner, made the constitutional appeal an effective legal tool in the legal system of the Republic of Serbia, which was confirmed in the legal interpretations of the European Court of Human Rights in the past period of application of the decision from the basic text of the Law. The assessment that the constitutional appeal in the legal system of the Republic of Serbia is an effective legal remedy was expressed by the European Court in the judgment "Vincis and Others v. Serbia" (Application No. 44698/06) of 1 December 2009, in which it stated: "The Court considers that the constitutional appeal, in principle, should be regarded as an effective domestic remedy within the meaning of Article 35 paragraph 1 of the Convention in respect of all applications lodged as from 7 August 2008, the date on which the first substantive decisions of the Constitutional Court on the merits of the above-mentioned appeals were published in the Official Gazette of the defendant State".

In evaluating the constitutionality of the new legal solution by which court decisions are exempted from measures for annulment, which simultaneously means narrowing of the powers of the Constitutional Court to pronounce the necessary measures for removal of established violations of constitutional rights and freedoms, the Court determined that the relevant provision of the Law in the disputed case is inconsistent with the Constitution, for the following reasons:

Starting from the fact that the constitutional function of the Constitutional Court is to protect human and minority rights and freedoms, in addition to the protection of constitutionality and legality (Article 166 paragraph 1) and that for the direct realization of that function, the Constitution establishes and defines constitutional appeal as a legal means for protection of human or minority rights and freedoms guaranteed by the Constitution, which are violated and curtailed by individual acts or actions of state authorities or organizations to which public powers are entrusted (Article 170), the Court believes that in this way the constitutional legislator established constitutional-judicial protection according to the principle that absolutely all acts of public authority, by representatives of all branches of government, in the same way, are subject to review of constitutionality and constitutional-judicial protection of human and minority rights and freedoms. According to the understanding of the Constitutional Court, such determination of the Constitutional Court is binding also for the legislative body in the exercise of the powers under Article 175 paragraph 3 of the Constitution – to regulate by law the legal effect of the decisions of the Constitutional Court,

as well as the powers under Article 171 paragraph 3 of the Constitution – to regulate by law the implementation of the decision of the Constitutional Court. In this sense, in the legal regulation of the effect of the decision of the Constitutional Court, the legislative body is obliged to prescribe and ensure the subjecting of constitutional-judicial control not only of all acts of public authority but also of equal treatment of decisions of the Constitutional Court, in the form of equal powers of the Constitutional Court to pronounce certain measures. Accordingly, by excluding court decisions from the possibility to annul measures, the constitutional principle of general and equal submission of acts of public authority to constitutional-judicial control in an equal manner is violated, i.e. the requirement for equal effect of Constitutional Court decisions. Still, the Constitutional Court assessed that the constitutional authorization of the legislator to regulate the legal effect and implementation of the decisions of the Constitutional Court is limited by the constitutional right established in the Constitution. The Constitutional Court, as independent state body, according to Article 171 paragraph 2 of the Constitution, assessed with its decision that it is necessary to regulate the manner of its implementation. In this sense, the Constitutional Court assessed that determining the manner of eliminating the harmful consequences caused by an individual act or action of a state body or a holder of public powers, which resulted in a violation or denial of any of the rights or freedoms guaranteed by the Constitution, essentially means regulating the manner of implementing the decision of the Constitutional Court by which the violation or denial of rights or freedoms is established. Hence, the Court assessed that any limitation on the Constitutional Court about determining measures or actions for eliminating the harmful consequences of established violations of constitutional rights is not by the provisions of Article 171 paragraph 2 of the Constitution, and thus not by the constitutionally established position of the Constitutional Court in Article 16 paragraph 1 of the Constitution.

The Court notes that in the Republic of Serbia, since the establishment of the institute for constitutional appeals, the factual situation shows that court decisions are the most common subject of constitutional appeals, which result in violations of constitutional rights. Excluding court decisions from the measure of annulment, while at the same time limiting the Court's authority to apply this measure to (other) individual acts and actions as a sanction, according to those sources of violations of constitutional rights, also represents a kind of legal-systemic contradiction, given that, according to the Constitution, individual acts of state bodies and holders of public powers are subject to judicial control in the sense of Article 198 paragraph 2 of the Constitution, and cannot be subject of constitutional appeals before the exhaustion of judicial control as an available legal remedy, as stipulated in Article 170 of the Constitution and Article 82 of the Law on the Constitutional Court. With rare exceptions, a condition for filing a constitutional appeal is the exhaustion of available legal remedies for obtaining legal protection. This means that in most cases, the decision of the court is the final act in the series, by which the violation of rights can be remedied through its control and annulment, regardless of whether it was made by a court decision in the process of securing legal protection or with the failure of the court to eliminate the violation of rights committed in the previous stages of decision-making for the rights and obligations of the persons. Therefore, the legal elimination of court decisions from the scope of annulment of the decision of the Constitutional Court negates the prerequisites for the effective action of the decision of the Constitutional Court in many cases and devalues the constitutional significance of introducing the institute of the constitutional complaint as a universal legal means for protection of constitutional rights and freedoms from violations committed by acts and actions of any public authority.

Considering the disputed legal issue from the aspect of the provisions of Article 4, Article 143 paragraph 1 and Article 145 paragraphs 3 and 4 of the Constitution, which establish the position and functions of the judicial authority and the authorization of judicial decisions, the

Constitutional Court is of the opinion that subjecting court decisions to constitutional-judicial control in the procedure for constitutional complaints, as well as with the pronouncement of the measure of annulment of the court decision in connection with the determination of the Court that the constitutional rights and freedoms have been violated by the decision of the judicial authority, is not contrary or contradictory to the constitutional principle of independence of the judicial authority, nor to the constitutional provisions that the judicial authority belongs to the general and special jurisdiction courts, that court decisions are binding for everyone and cannot be subject to extrajudicial control or that the court decision can only be considered by the competent court in a procedure prescribed by law. On the contrary, the authorization of the Constitutional Court as a body competent to provide constitutional-judicial protection in all its competencies established by the Constitution, including the competence to decide on constitutional complaints, is in function of exercising the constitutional principle of the rule of law, which, according to the provisions of Article 3 of the Constitution, is based on inalienable human rights, and, among other things, realizes constitutional guarantees for human and minority rights, independent judicial authority and obedience to the Constitution and the law by (each) government. From the correlation of constitutional provisions, according to which the establishment of rights and freedoms guaranteed by the Constitution is a prerequisite for the rule of law and the constitutional appeal, is a legal remedy aimed at protecting against violations or denials of human or minority rights and freedoms guaranteed by the Constitution, which are made by state bodies, the Court established that the constitutional significance and purpose of the constitutional appeal is not achieved through declarative determination of the existence of a violation of rights, but rather through the removal of consequences arising from the ascertained violation of constitutional rights and freedoms, regardless of which state body issued the disputed act. A condition for this is the existence of an effective mechanism for removing the consequences of the established violation of rights, i.e. ensuring the decision of the Constitutional Court has such an effect that it will provide the most effective way of removing the consequences of the established violation of constitutional rights and freedoms. The Court considers that there is no competition or mutual exclusion of the constitutionally established competence of the Constitutional Court to act on constitutional appeals and the legally established competence of general and special jurisdiction courts, nor does the submission of court decisions to constitutional -court control in the procedure for a constitutional appeal have any significance as constitutionally prohibited non-judicial control of court decisions, since it is not about deciding “for the same issue”, the two types of legal protection being provided in special and independent proceedings by separate bodies, with the aim of ensuring complete protection of the rights and freedoms guaranteed by the Constitution in the legal order, for which the purpose of the Constitution itself, by regulating the system of regular judicial and special constitutional-court protection, established a special means of legal protection in the form of a constitutional appeal, permitted against individual acts and actions of all state bodies, which certainly covers acts and actions of judicial authorities. The Constitutional Court assessed that the challenged amendment to the Law on the Constitutional Court, which excludes the possibility for the Constitutional Court to annul a court decision due to a violation of constitutionally guaranteed human rights and freedoms, is not based on an objective interpretation of the relationship arising from the constitutional concept of direct constitutional-court protection of fundamental human rights and freedoms established by the provisions of Article 166 and Article 170 of the Constitution, which, by positive order, belongs to the Constitutional Court, and the principle of independence of the judiciary, which, in the domain of establishing the jurisdiction of court decisions, is embodied in the constitutional provisions that court decisions are binding on everyone, cannot be subject to extrajudicial control, and that a court decision can be reviewed only by the

competent court, in a procedure prescribed by law, established by the provisions of Article 145 paragraphs 3 and 4 of the Constitution. The Court considers that in a relationship characterized by the explicit constitutional establishment of direct constitutional-court protection of human rights and freedoms, with a simultaneous constitutional determination that court decisions are based on the Constitution (Article 145 paragraph 2), it is implied that the court decisions must, above all, respect human rights and freedoms, as their valuable core. Departing from the meaning, systematic and logical linking of the relevant provisions of the Constitution related to the role and place of the Constitutional Court in the system of public authority, and especially its role in the direct protection of rights guaranteed by the Constitution when deciding on citizens' constitutional complaints, leads to the conclusion that the effect of the constitutional principle on the independence of the judiciary (Article 4 paragraph 4 of the Constitution) and the principle of "non-infringement" of court decisions for non-judicial bodies (Article 145 paragraphs 3 and 4 of the Constitution) should be understood so that court decisions remain absolutely "non-infringible" for the legislative and executive authorities, which retained the standard meaning and effect of the principle of independence of the judiciary. However, court decisions are not "non-infringible" for the assessment of whether they have violated the fundamental human rights guaranteed by the Constitution, as in the procedure of normative control, the Constitutional Court assesses the constitutionality of laws and the legality of regulations of the executive branch, so in the procedure of constitutional complaint, the Constitutional Court assesses the conformity of court decisions with the Constitution and the law, in terms of protection of human rights and freedoms. The basis of both types of procedures is the intention of the constitution-maker to have all acts of public authority subordinated to the Constitution, i.e. to the rights guaranteed by the Constitution. The decision of the Constitutional Court arises from both procedures, which does not result in a "positive" correction of either the law or the court decision. As it is "natural" from the Constitutional Court's observation that the legal norm is not by the Constitution, the clear and only possible consequence is that the general norm loses its property of valid law, so the observation that a court decision that violates a "specific constitutional right" must inevitably result in the invalidity (nullity) of an individual act of the judiciary that is contrary to the Constitution. The right of the legislative body to correct "its" legal norm, to bring it in line with the Constitution, as well as the right of the judiciary to review and correct its own decision, remain intact. Neither the Constitutional Court can write the law instead of the legislator, nor can the constitutional judiciary finally resolve specific disputes and take over its jurisdiction. Although such consequences of the decision of the Constitutional Court are not expressly established by the Constitution, according to the Constitutional Court, the establishment of normative control and constitutional appeal is implicitly accepted by the Constitution.

The function of the Constitutional Court established by the Constitution is not only independent protection of constitutionality and legality but also protection of human and minority rights and freedoms (Article 166 paragraph 1 of the Constitution). As the rights and freedoms guaranteed by the Constitution are indirectly protected by the protection of the principles of constitutionality and legality, the specific choice of human and minority rights, as the object of constitutional protection, shows that the Constitution has in mind the direct protection of those rights.

To prevent future violation of the right guaranteed by the Constitution, it is necessary to establish legal invalidity of an individual act, with the expectation that the competent court will es tablish a legal status that corresponds to the legal understanding of the Constitutional Court. If the main objective of submitting a constitutional appeal is to protect a violated or threatened right, it is reasonable to expect that the decision of the Constitutional Court, which should provide that protection and effectively eliminate the violation of the fundamental

right, will be appropriate for this purpose. Only if such protection proves to be insufficient, can the Constitutional Court continue the effect of its decision by determining the way of fair satisfaction, in addition to eliminating the unconstitutional individual act. This means that the correction of an individual act is not sufficient, but it is undoubtedly the first and most important result of the decision of the Constitutional Court, by which it is established that a human or minority right has been violated by an individual act. If this legal action is not recognized by the decision of the Constitutional Court, then in not-so-rare cases, constitutional protection will be theoretical and illusory. It would be unreasonable to leave in force a single act that violates the rights guaranteed by the Constitution, invoking the constitutional order that excludes the possibility of extra-judicial review of court decisions.

For all the reasons stated, the Court assessed that, by excluding the acts of the judicial authority from the application of the annulment measure, the constitutional principle of general and equal submission of acts of public authority to constitutional court control is violated, as if there is no constitutional basis for legally prescribing different powers to the Constitutional Court, i.e. different actions of the Constitutional Court decisions taken to protect the rights and freedoms guaranteed by the Constitution, nor to establish those differences based on the type of disputed acts, depending on which branch of the government the creator of the disputed act belongs. Therefore, assessing that the exclusion of court decisions from the possibility of annulment is not based on any constitutional and legal basis and reason, the Court established inconsistency of the disputed provision of the Law with the Constitution, based on the provisions of Article 42a paragraph 1 point 2 and Article 45 point 1 of the Law on the Constitutional Court; the Constitutional Court made a decision as in the introductory part of this Decision.

Based on Article 168 paragraph 3 of the Constitution, the provision of Article 89 paragraph 2 of the Law on the Constitutional Court, referred to in the introductory part of the Decision, ceases to be in force as of the day of publication of the Constitutional Court's Decision in the "Official Gazette of the Republic of Serbia", in the part which states "except a court decision".

President of the Constitutional Court,
Dr. Dragisa B. Slijepcevic

III. CONCLUSION

The conclusion that can be drawn from the position of the Constitutional Court of Serbia appears to be well-founded and aligns with the arguments presented. Its reasoning is clear and substantiated. By contrast, opposing interpretations raise concerns about the extent to which the Constitutional Court fully upholds the constitutionally guaranteed rights and freedoms of individuals and citizens. Furthermore, such interpretations may be perceived as potentially diminishing the Court's role, function and jurisdiction as the guardian of the Constitution, thereby risking a perception of constitutional protections as ineffective or declaratory in nature.

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