

CONSTITUTIONAL COURT AS AN AUTHORITY FOR DISPUTE RESOLUTION

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Abstract: The article presents an analysis of the powers of the Republic of Serbia Constitutional Court to resolve competency and electoral disputes. The leading method in this study is the system analysis, which allows a comprehensive review of the system of measures and procedures aimed at implementing the dispute resolution function of the constitutional justice body of Serbia. Analyzing the evolution of the organizational process and the expansion of the practice of Serbian Constitutional Court, the author concluded that the modern constitutional legislation of the Republic of Serbia provided the judicial constitutional control body with sufficiently effective capabilities to resolve a wide range of legal disputes to protect the principles of the rule of law, constitutionality, legitimacy, and separation of powers, as

well as rights to regional autonomy and local governance.

Keywords: Constitutional control, constitutionality, legitimacy, dispute on competence, electoral disputes, constitutional proceedings.

1. Introduction

The European-type concept of constitutional justice has encountered nearly a hundred years of experience; it underwent several stages of reform during this period. However, to date, the implementation of the dispute resolution function is considered one of the most important areas of its activity.³ That doesn't happen by accident, the fact is that modern socio-political life is characterized by an abundance of conflicts related both to the process of forming the highest bodies of state power

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and to the delimitation of the competence of state bodies and other entities that exercise power. Besides, it is practically impossible to make such a detailed differentiation of the competence of state authorities to explicitly exclude periodically arising disputes on competence. Thus, the causes of disputes over competence in the activities of state bodies may vary. However, their solution lies in the plane of activity of a neutral body that is outside the traditional system of separation of powers, and which can consider a political conflict of competencies in the legal framework based on specially established legal procedures. That is why the constitutional courts of several European countries have the status of the fourth judicial control authority in the state,⁴ designed to balance the other three, ensuring the protection of basic constitutional values; the power to resolve disputes on competence is the most often used authority (after compliance assessment) by the body of constitutional supervision.

⁴ See: Leibo, Yu. Constitutional control in foreign countries: collective monograph / [Yu.I. Leibo et al]; Eds. E.Y. Pavlov, E. Kremyanskaya (In Russ.): Moscow: MGIMO, 2015: 246.

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Another important

manifestation of the implementation of the dispute resolution function by modern constitutional courts is the review of electoral disputes. Indeed, the existence of an institution of representative democracy is the most important sign of a modern state, which claims to be democratic. Therefore, it is difficult to imagine a modern state without a developed electoral system that ensures the participation of citizens in the exercise of power. Moreover, the level of democracy of the governmental system depends on its ability to reflect the will of citizens, implemented through suffrage. That is why the latter is guaranteed by the constitution as a basic political right, becoming an object of special protection from the constitutional justice bodies. This refers not only to the protection of suffrage and the resolution, respectively, of political disputes arising in the process of forming the highest state bodies, through the offices of the special powers of the constitutional courts to resolve electoral disputes.⁵

⁵ See: Tumanov V.A., Polovchenko K.A. Constitutional Bases of Judicial Power. Constitutional Law of Foreign Countries: Textbook (In Russ.) // Ed. by M.V. Baglai, Ju.I. Lejbo, L.M. Jentin. Moscow, INFRA-M, 2016:334.

As for the constitutional control body of modern Serbia, it should first be noted that Serbian Constitutional Court, being one of the oldest in Europe, was formed back in 1963 during the existence of socialist Yugoslavia and acted in full accordance with the socialist principles of organization of State: the unity of state power and the supremacy of parliament. According to Section 1 of the Law on the Constitutional Court of the Socialist Republic of Serbia of 1963, the Constitutional Court was an independent body of the Republic, protecting constitutionality and legitimacy based on the Constitution and within the framework of its constitutionally established rights and obligations. It can be stated with confidence that with the formation of the Constitutional Court in the Socialist Republic of Serbia in 1963, a fairly effective institution of judicial constitutional control was created that meets the goals and objectives facing the constitutional system of Serbia of that historical period.⁶

The 90s became a new stage in the development of constitutional justice in Serbia, which is related, first of all, to the departure from socialist principles in organizing the political and economic structure of the country. Thus, the very first post-socialist Constitution was adopted in Serbia in 1990. The main message of its adoption was the rejection of the socialist experiment, which lasted almost 50 years. The main constitutional beginning of the new Basic Law of 1990 was the principle of separation of powers, established along with the principle of political pluralism. As for the Constitutional Court itself, the 1990 Constitution regulated the status of the Constitutional Court of the Republic of Serbia in quite a new way; the Court was now an organ for protecting constitutionality and legitimacy in a state based on the rule of law.⁷ In accordance with Section 125 of the Serbian Basic Law of 1990, the Constitutional Court had, among others, the power to resolve disputes on competence, including

⁶ For details refer: Polovchenko, K.A. GENESIS OF THE INSTITUTE OF CONSTITUTIONAL JUSTICE IN THE REPUBLIC OF SERBIA: 1963-1974 / Economic problems and legal practice, 2017, №4:68.

⁷ Polovchenko, K.A. TRANSFORMATION OF THE INSTITUTE OF CONSTITUTIONAL JUSTICE IN SERBIA IN THE 90TH OF THE 20TH CENTURY // Economic problems and legal practice, 2017, № 5:76.

between courts and other bodies,⁸ also, during this period, the constitutional justice body of Serbia was first vested with the power to resolve electoral disputes.⁹

The new Constitution of Serbia of 2006 clearly defined the role and place of the Constitutional Court in the constitutional system of the state. Thus, according to article 166 of the current Basic Law of the Republic of Serbia, the Constitutional Court is an autonomous and independent state body that protects the constitutionality and legitimacy, as well as the rights and freedoms of individuals and minorities; the Courts decisions are final and binding.¹⁰ As can be seen, such a definition of the Constitutional Court has become more

voluminous compared to the one presented in the 1990 Constitution, it also reflects the role of the Constitutional Court as a public defender of not only constitutionality and legitimacy but human and minority rights and freedoms as well. Also, the creators of the 2006 Constitution established the basic rules governing the status of the Constitutional Court following the already established constitutional tradition in a special chapter named the ‘Constitutional Court’, thus separating it from the judicial system itself.¹¹ As a result, the Serbian doctrine designated the status of the Constitutional Court under the 2006 Constitution as the bearer of the ‘fourth’ constitutional and judicial power, authorized to ensure the functioning of

⁸ Thus, under the Law on Constitutional Court of the Socialist Republic of Serbia of 1963, competency disputes were to be resolved by the Constitutional Court including disputes between courts and republican bodies, as well as between courts and other public authorities acting in the territory of the Republic (Article 42). However, recognizing the supremacy of parliament and in the absence of a separation of powers, the competency disputes between the highest bodies of state power were out of the question. The Constitutional Court of the SRS also had the power to resolve disputes on the rights and obligations between socio-political associations in the territory of Serbia, if their resolution was not within the jurisdiction of other courts, i.e. the powers of

the Constitutional Court were complementary and subsidiary.

⁹ This is quite understandable, since during the implementation of the socialist constitutionality concept in the former SFRY, the Constitutional Court, in the conditions of a single-party system, simply could not deliver a judgment on electoral disputes.

¹⁰ Polovchenko, K.A. Constitutional control in the Republic of Serbia. Constitutional control in foreign countries: collective monograph (In Russ.) / Moscow: MGIMO-University, 2015: 234.

¹¹ Marković, R. Constitutional Court in the 2006 Constitution of the Republic of Serbia (In Serb.) / Belgrade University School of Law Publishing, 2–2007: 12.

the three initial branches of government within the constitutional framework.¹² The 2006 Constitution of Serbia provided for a wide range of disputes on powers, the resolution of which falls within the competence of the Constitutional Court;¹³ also, the power of the Constitutional Court to resolve electoral disputes was drastically modified. Thus, under the current constitutional legislation of Serbia, the function of resolving disputes of the Constitutional Court has become one of its main areas of expertise.

2. Methods

The object of the presented study is a complex of constitutional-legal relations arising during the implementation of the function of dispute resolution by the Constitutional Court. The research undertaken in the article was conducted using several general scientific and special methods of

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cognition and research. The leading method in this study is a system analysis that allows a comprehensive review of the system of measures and procedures aimed at implementing the function for resolving disputes by the constitutional justice body of Serbia. Also, in the course of the research, the formal legal and comparative methods (especially involved for this study) were abundantly used in the analysis of the particular procedural issues related to the peculiarities of the exercise of the authority of the Constitutional Court on the resolution of legal disputes. Characterizing the overall function of the Constitutional Court on the resolution of disputes, proper attention should be paid to the fact that the basis of the competency disputes between the public authorities may vary, but their resolution is obliged to be assigned to the neutral arbitrator, positioned outside the traditional system of separation of

¹² According to Professor Marković, 'The Constitutional Court is a special constitutional body, which is not a court, although the name contains the word 'court'. Moreover, this body is called a 'court' because it exercises the functions of monitoring constitutionality, legitimacy, and human and minority rights protection based on a methodology, that is, rules and procedures similar to those applied by courts

of general and special jurisdiction'. See: Marković, R. Constitutional Court in the 2006 Constitution of the Republic of Serbia, Belgrade University School of Law Publishing, 2-2007: 14.

¹³ Polovchenko, K.A. Expanding competence of the Constitutional Court: the experience of Serbia / Gaps in Russian legislation, 2017, №4:92.

powers and capable of resolving a political dispute based on specially established legal procedures. Such a body, of course, is the current constitutional court. As for the resolution by the Constitutional Court of electoral disputes, in these types of proceedings the Court acts as an arbitrator between various political forces, while being the guarantor of the basic constitutional value - the democratic state structure. Thus, the powers of the Constitutional Court related to the implementation of the dispute resolution blend seamlessly into the competence of the constitutional control body; the author comes to the above conclusions in the course of this study.

3. Results and discussion

3.1. Constitutional court authority to resolve competence disputes

The modern theory of constitutional justice provides for a wide variety of competency disputes before constitutional courts, such disputes can be divided using various criteria. For example, if the differentiation is based

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on the position of the subject of the dispute regarding disputed competence, then competency disputes are divided into positive (when two or more authorities hold that they are authorized to decide on a specific issue) and negative competency disputes (when no one in the system of power does not accept responsibility for making decisions on a specific issue).

Depending on the nature of the relationship between the subjects of the competency dispute, such disputes are divided into vertical competency disputes, arising between holders of power of various hierarchical levels (primarily between the state and various political and territorial units established on its territory by the constitution¹⁴), and into horizontal disputes on competence, arising between holders of power of the same hierarchical level. In turn, horizontal competency disputes subordinated to constitutional courts are divided into disputes between the highest authorities, between state authorities of various federal subjects in federal states, and also between bodies of various administrative and territorial units,

¹⁴ When it comes to vertical disputes on competence, this is, first of all, referred to

federal disputes on competence between the federation and its subjects.

including autonomous and municipal entities.

The current Constitution of Serbia provides for the jurisdiction of the Constitutional Court of Serbia of practically all of the above types of competency disputes, except for disputes related to the federal structure of the state, due to the unitary nature of the Republic of Serbia.

Thus, according to paragraphs 1-4 of Part 2 of Article 167 of the Constitution of the Republic of Serbia, the competence of the Constitutional Court includes the resolution of disputes on competence between courts and other state bodies; disputes on competence between the bodies of the Republic and the authorities of the autonomous region or the bodies of local self-government units; disputes on competence between the authorities of the autonomous region and the bodies of the local government; and disputes on competence between bodies of various autonomous territories or various units of local self-government.

Consequently, the Constitutional Court of Serbia resolves the following vertical disputes on

competence: between republican (state) and regional bodies or local authorities (bodies of territorial units), as well as between regional bodies and local authorities in the autonomous region (clauses 2 and 3 of Part 2 of Article 167 of the Law on the Constitutional Court). As professor Simović has aptly noted, the presence of vertical disputes over competence indicates the existence of real decentralization in unitary Serbia, where conflict of authority can arise between central and local government bodies, and the Constitutional Court in this regard acts as a guarantor of territorial autonomy and local self-governance stipulated by the 2006 Constitution.¹⁵

In contrast to vertical, horizontal competency disputes arise between power holders of the same hierarchical level. These are, as a rule, disputes over competencies that arise between bodies representing three classical branches of government: legislative, executive and judicial. In this sense, the wording provided for in paragraph 1 of Part 2 of Article 167 of the Constitution of Serbia is an example

¹⁵ Vučić, Petrov, Simović. Constitutional courts in former Yugoslavian republics (In Serb.) / Belgrade, 2010:178

of an exception to this rule, since it provides that the Constitutional Court is authorized to resolve disputes on competence between courts and other state bodies. An adequate interpretation of this constitutional wording suggests that the Constitutional Court is not authorized to adjudicate on competency disputes unless one of the parties is a body representing the judiciary.

Thus, the 2006 Constitution unjustifiably narrowed the authority of the Serbian Constitutional Court to resolve horizontal competency disputes, since it excluded from the competence of the Constitutional Court disputes between the legislative and executive authorities, the unresolved conflict between which could well lead to a ‘malfunction’ of the state mechanism of Serbia. Moreover, given the double-headed structure of the Serbian executive branch, some potential conflicts within the executive branch itself (taking into account its specific structure), such as between the Government and the President of Serbia are left without a ‘conflict resolver’. According to professor Simović, in such situations, the

Constitutional Court would be the most suitable body to assume the role of a neutral and impartial arbitrator, able to find a legal solution to a political conflict.¹⁶

On the other hand, as can be clearly seen from the foregoing, the constitutional wording set forth in clause 1 (2) of section 167 of the Constitution of Serbia and providing for the power to resolve competency disputes between courts and other state bodies is very similar to the wording provided for in the Serbian constitutions of 1963, 1974 and 1990, representing the established constitutional tradition of limiting the competence of the Constitutional Court to resolve horizontal disputes between Serbian public authorities exclusively on those cases when one of the parties involved is a judicial authority. On a related note, professor Marković draws attention to the fact that another disadvantage of such a constitutional wording is that the competence of the Constitutional Court did not include the power to resolve competency disputes between the judicial authorities themselves.¹⁷

¹⁶ Vučić, Petrov, Simović. Constitutional courts in former Yugoslavian republics (In Serb.) / Belgrade, 2010:179.

¹⁷ Marković, R. Constitutional law (In Serb.) / Belgrade, 2014:554

Another variety of horizontal disputes resolved by the Constitutional Court of Serbia are competency disputes between bodies of various autonomous regions or local self-government units (clause 4 Part 2 of Article 167 of the Constitution), which also testifies to the freedom of horizontal connections between autonomies and territorial units in conditions of decentralization of state power in Serbia and the special role of the Constitutional Court in protecting territorial autonomy and local self-governance in Serbia.

When it comes to the legal regulation of proceedings for the resolution of disputes on competence, it reflects the specifics of this type of dispute under the jurisdiction of the Constitutional Court. Particular attention should be paid to the list of entities having the right to appeal to the Constitutional Court to resolve a dispute on competence. According to Part 2 of Article 68 of the Law on the Constitutional Court of Serbia, a request for resolution of a dispute on competence is to be filed by one or both bodies in a disputed relationship, as well as by a person whose right has become the basis for a dispute on competence. Thus, the

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scope of persons participating in the dispute, in addition to the very parties, also includes persons concerning whose right the corresponding dispute arose; the participation of such persons in the process of the legal argument is not conditional on the presence of the corresponding legal interest. The request for the resolution of a dispute on competence should contain the name of the body claiming or rejecting the competence and the reasons based on which this should be performed (Article 69 of the Law on the Constitutional Court).

The deadline for filing a request for resolution of a dispute on competence is indicated in Serbian law in a quite unusual way. Article 70 of the Law on the Constitutional Court provides that in case the authorities reject the competence, a request for resolution of a dispute on competence is filed within 15 days from the date the decision of the second body that recognized itself incompetent entered into force. Thus, the Serbian legislators limited themselves to setting a deadline for initiating proceedings on a negative competency dispute, while the Law on the Constitutional Court does not mention

anything about the deadline for initiating a positive competency dispute, which is undoubtedly a drawback of regulating proceedings on this kind of cases. At the same time, proceedings for the resolution of a dispute on competence shall be deemed initiated from the date of the appeal to the Constitutional Court. The deadline for the submission of objections by the participating authorities is eight days from the date of delivery (Article 72).

Regard is to be had to the fact that the proceedings on competency disputes in the Constitutional Court are the result of a dispute between public authorities or other holders of power over the competence of which of the bodies involved in the exercise of competence, so ambiguously defined by the Constitution. Given the nature of this category of constitutional disputes, the Constitutional Court, when reviewing a dispute on competence, is limited solely to resolving the dispute itself. Thus, the Serbian Constitutional Court in the course of proceedings in such cases determines exclusively the competent authority, without considering the issue on the merits of which a dispute over competence has arisen.

As provided for in the constitutional legislation of the socialist period, the current Law on the Constitutional Court provided that the Court has the right to adopt a decision on the suspension of proceedings in the bodies between which a dispute arose until the end of the proceedings for the resolution of a dispute on competence in the Constitutional Court (Article 73). When it comes to the order of entry into legal force of a decision on competency disputes of the Constitutional Court of Serbia, the Law on the Constitutional Court stipulated that a decision of the Constitutional Court enters into legal force from the date of delivery to bodies between which a dispute arose and, respectively, to a person whose right was disputed. As a matter of fact, the Serbian legislators only specified that with the adoption of a decision by the Constitutional Court, acts adopted by an incompetent body are canceled (Article 74 of the Law on the Constitutional Court).

Considering the practice of the Constitutional Court in resolving competency disputes, the experience of the constitutional control body in resolving vertical disputes over this issue

was quite extensive during the socialist period. However, at the present stage, the practice of the Serbian Constitutional Court in resolving vertical disputes is almost imperceptible in the total number of conducted trials. As for the practice of resolving horizontal disputes, in the early post-socialist period of the 90s of the 20th century, it was also very insignificant and, according to the Serbian researcher Irena Pejić, the reason for this was the unwillingness of the Constitutional Court to enter into conflict with political authorities.¹⁸ At present, although the authority of the Constitutional Court of Serbia is constitutionally limited exclusively to disputes, where one of the parties involved should be a judicial authority, nevertheless, this is the most widespread type of competency dispute in the Constitutional Court practice, in which, as a rule, courts and governing bodies are also bear a part. One of the most conceptually significant decisions in cases of this kind is the Decision of the Constitutional Court IU 175/99 on a dispute on competence, the parties to

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which were the opština municipal community court and the opština governing body.¹⁹

When it comes to the horizontal disputes over competencies between the legislative and executive branches of government, Serbian Constitutional Court practice went along the path of considering such disputes in the framework of the proceedings on normative control cases; this largely refers to the lack of legal confirmation of this power to the Constitutional Court of Serbia. Moreover, during the consideration of such cases, the Constitutional Court formulated several legal positions with the determination of the ‘functional boundaries’ of the branches of Serbian official authority, thereof making a significant contribution to the development of Serbian constitutionalism. These include the Decision of the Constitutional Court of Serbia IUp-153/2008 of 19.06.2012 recognizing the unconstitutionality of the act of the Government on the formation of the National Assembly. The position of the Constitutional Court was

¹⁸ Pejić, I. Constitutional Court and disputes on the separation of powers (In Serb.) / Journal of Criminology and Criminal Law.

The Academy of Criminalistic and Police Studies publishers, Belgrade, 2013

¹⁹ Official Gazette of the Republic of Serbia 84/02

stated as follows: ‘The principle of functional stability cannot be violated not only by normative decisions of the executive branch, but also by decisions of the legislators and, respectively, by laws adopted by the National Assembly of Serbia’. While declaring the decision of the Government on the formation of the National Assembly unconstitutional, the Constitutional Court of Serbia also specified: ‘This means that the Government is not entitled by interpreting its functional authorities or the functional authorities of other state bodies, primarily the President,²⁰ to violate the functional distinction established by the Constitution or constitutionally established limits of authority to vest oneself or another state body with powers not provided for by the

Constitution, and such functional powers cannot be considered immanent to the corresponding constitutional functions’.²¹

3.2. Constitutional court authority to resolve electoral disputes

First of all, it should be noted that the authority of the constitutional control body to resolve electoral disputes is known to several oldest European constitutional courts, which have extensive competence in protecting the fundamentals of the constitutional system, human rights, and freedoms.²² A special place among them is occupied by the Federal Constitutional Court of Germany, which, as an appeal instance, exercises control over the validity of elections.²³ Although the Serbian

²⁰ Polovchenko, K.A. DISTINGUISHING CHARACTERISTICS OF THE PRESIDENTIAL STATUS IN THE SYSTEM OF STATE GOVERNANCE OF SERBIA // Journal of Law and Administration, 2015:51.

²¹ It should be noted that in such cases the Constitutional Court of Serbia acts as a body with its own ‘constitutional field’ located at the intersection of law and politics. For details refer: Pejić, I. Constitutional Court and disputes on the separation of powers (In Serb.) / Journal of Criminology and Criminal Law. Belgrade, 2013

²² Polovchenko, K.A. Dissertation on ‘Constitutional Courts of Russia and Ukraine (comparative analysis)’ / Moscow,

2003:12; Vodyanickaya, E.A. Constitutional control in Austria / Constitutional control in foreign countries: collective monograph (In Russ.) [Yu.I. Leibo et al], Eds. E.Y. Pavlov, E. Kremyanskaya - MGIMO-University, 2015: 292

²³ Thus, the Federal Constitutional Court is considering appeals against the Bundestag decisions, filed as a result of verification of electoral integrity. ‘The purpose of such proceedings is to protect objective suffrage, which ensures the legitimate composition of the Bundestag.’ The right to appeal the decision of the Bundestag in the Federal Constitutional Court belongs to every deputy whose authority is disputed, as well as every voter whose protest was rejected by the

Constitutional Court is one of the oldest in Europe, its power to resolve electoral disputes appeared only with the adoption of the 1990 Constitution of Serbia. Generally, this is quite understandable, since, during the implementation of the concept of socialist constitutionality in the former SFRY, the Constitutional Court simply was not able to adjudicate on electoral disputes under conditions of a one-party system. In the fair opinion of professor Simović, the resolution of electoral disputes acquires its full meaning and significance only in conditions of political pluralism.²⁴

The 1990 Constitution of Serbia provided for the extremely narrow authority of the Constitutional Court to resolve electoral disputes. Thus, paragraph 1 of Part 1, Article 125 of the Constitution stipulated that the

Constitutional Court was authorized to make decisions on electoral disputes that were not within the competence of other courts or other state bodies. Moreover, the detailed regulation of the content of this authority should have been established by the Law, which was never adopted. The lack of detailed regulation has led to the fact that from 1990 to 2005 the Constitutional Court of Serbia adjudicated on electoral disputes only twice.²⁵ A number of experts in the field of constitutional justice of Serbia, including Bosa Nenadić, the President of the Constitutional Court of Serbia from 2007 to 2010, noted that in the absence of proper statutory regulation, the Constitutional Court of Serbia has lost the exercise of the authority to resolve electoral disputes, above all, due to the predominantly political nature of these

Bundestag, provided that the appeal is supported by at least one hundred voters, one faction or a minority of the Bundestag, comprising at least one-tenth of the German Parliament deputies. A complaint against the Bundestag decision may be filed within one month from the date of such a decision. At the same time, in the course of the preliminary proceedings, the Federal Constitutional Court has the right to verify the constitutionality of the provisions of the Bundestag Elections Law, if this is necessary to decide on the validity of the elections themselves. As noted by professor Yuri Leibo, ‘complaints of this kind have never been successful, since the violations were

not so significant that their influence on the composition of the parliament could be ascertained.’ For details refer: Leibo, Yu. Constitutional control in the Federal Republic of Germany / Constitutional control in foreign countries: collective monograph / [Yu.I. Leibo et al]; Eds. E.Y. Pavlov, E. Kremyanskaya (In Russ.) / Moscow, MGIMO-University, 2015:300

²⁴ Vučić, Petrov, Simović. Constitutional courts in former Yugoslavian republics (In Serb.) / Belgrade, 2010: 224

²⁵ Nenadić, B. Electoral Disputes Under the Jurisdiction of the Constitutional Court of Serbia. Constitutional Issues in Serbia / Niš, 2004.:279

disputes. Thus, in its definitions, the Constitutional Court gave a restrictive interpretation of its authority in respect of electoral disputes, in particular, excluding from its object violations that arise during the verification of a deputy's mandate. In particular, in its determinations of 1995 and 1997 (IU-275/95, IU-18/97), the Constitutional Court of Serbia drew attention to the fact that since the verification of the mandate is 'a part of the process of election of deputies', and 'courts of general jurisdiction decide in relation to such disputes', therefore disputes related to the mandate verification do not apply to electoral disputes provided for in paragraph 7 of Article 125 of the Constitution of Serbia of 1990. This led to the accusation of judges of the Constitutional Court of Serbia not having enough courage to protect the independence of the Constitutional Court from political pressure.²⁶

An analysis of the above definitions suggests that the 'self-restraint' of the Serbian Constitutional Court, on the contrary, was caused by the

desire to avoid participating in decision-making on purely political issues. Otherwise, it would lead to the politicization of its activities and would run counter to its status as an independent body, which excludes any participation of the Constitutional Court in the current political process. In all fairness, an attention also should be paid to the fact that several Serbian experts (supporters of judicial activism) were inclined to think that the model of the negative legislator designed by Hans Kelsen, has already outlived its time and that the Constitutional Court should go at the forefront of the liberal transformation of society, actively influencing the political process in the state.²⁷ No doubt, such an approach fundamentally changed the role and purpose of the Constitutional Court, unjustifiably transforming it from a guarantor of constitutional values into their creator, and thereby replacing the constitutional legislator.

At the same time, the unsatisfactory regulation of the scope and content of the authority of the

²⁶ Nenadić, B. Electoral Disputes Under the Jurisdiction of the Constitutional Court of Serbia. *Constitutional Issues in Serbia / Niš*, 2004:267

²⁷ Violeta Beširević. 'Governing without judges': The politics of the Constitutional Court in Serbia. *I•CON* (2014). Vol. 12; No. 4: 979

Constitutional Court to resolve electoral disputes stimulated Serbian scientific thought to doctrinal development of this scientific and practical problem. As a result, Serbian constitutionalists attempted to develop a theoretical model of the electoral dispute that would provide effective and comprehensive protection of the electoral right.²⁸ The breadth of the controversy of Serbian constitutionalists on this topic is clearly evidenced by the issues they raised during scientific discussions, the content of which was generalized by professor Nenadić: 1) Can the disputes arising from the formation of any government bodies (legislative, executive and judicial), regardless of whether they were elected by direct election or by representative bodies, be attributed to electoral disputes; 2) Is the protection of electoral rights (within the framework of an electoral dispute) in the Constitutional Court limited in time, i.e. whether it refers exclusively to violations of electoral rights that arose during the electoral process, or the disputes that may become the subject of the protection

of electoral rights after the election (in the post-election and inter-election periods) should also be attributed to the electoral disputes; 3) Are electoral disputes aimed at protecting the full range of electoral rights, including those related to or directly derived from active and passive suffrage; 4) Does it follow from the Constitution that the law can provide for constitutional and judicial protection only for certain types, respectively, of the aspects of suffrage, making it dependent on the established procedure for exercising suffrage.²⁹

It is quite reasonable that the classical definition of an electoral dispute as a dispute arising from a violation of electoral law seems irrelevant in the presented study, since it includes, among other things, the protection of electoral rights through a constitutional complaint. And since the constitutional complaint is the exclusive remedy for all human rights guaranteed by the Constitution, professor Simović rightly draws attention to the fact that the resolution of electoral disputes by the Constitutional Court is a different,

²⁸ Vučić, Petrov, Simović. *Constitutional courts in former Yugoslavian republics (In Serb.)* / Belgrade, 2010:225

²⁹ Nenadić, B. *Electoral Disputes Under the Jurisdiction of the Constitutional Court of Serbia. Constitutional Issues in Serbia* / Niš, 2004: P. 281-282.

genuine, and basic mechanism for protecting electoral rights.³⁰ It goes without saying that disputes on the constitutionality (legitimacy) of normative acts governing the appointment, conduct and establishment of election results should be excluded from the definition of an electoral dispute to be considered by the Constitutional Court, since normative control differs from the authority for electoral disputes resolution (also being the basic authority of the Constitutional Court).³¹

Another important aspect related to the establishment of the scope of the Constitutional Court authority to resolve electoral disputes is the answer to the question of whether its powers should apply to all violations of the electoral law during the election process (from the ballot day until the mandate confirmation), or the power of the Constitutional Court is wider and extends including post-election rights. Thus, back in 1989, i.e. before the

adoption of the 1990 Constitution, professor Stojanović insisted that the Constitutional Court is obliged to resolve the issues of legitimacy of both the acquisition and the termination of a deputy mandate. According to academician's opinion, it is this approach that allows the most complete protection of suffrage, since otherwise 'post-election rights are excluded from the content of passive suffrage, as a result of which it remains without content'.³² Professor Pajvančić adheres to a similar opinion, pointing out that if actions aimed at unlawfully depriving the parliamentary mandate are not authorized, this will denote 'the possibility of subsequently changing the will of voters, and therefore violating not only the right of a deputy but also an active and passive suffrage of a large number of citizens'.³³

Furthermore, several Serbian constitutionalists called for expanding the competence of the Constitutional Court through 'disputes on violations

³⁰ Vučić, Petrov, Simović. Constitutional courts in former Yugoslavian republics (In Serb.) / Belgrade, 2010:225

³¹ Pajvančić, M. Constitutional Court Decisions on Electoral Disputes (In Serb) / Legal life 12/1996:339.

³² Stojanović, D. Fundamental Rights: Human Rights and Freedoms in the

Constitutions of European States (In Serb.) / Niš, 1989. P. 127.

³³ Pajvančić, M 'The Protection of Civil Rights and Liberties'. Proceedings of the Faculty of Law in Novi Sad 1-3/1998-1999. P. 228.

committed in the process of election and dismissal of bodies and persons of the National Assembly in accordance with the Constitution'.³⁴ Thus, prof. dr Marijana Pajvančić also entitled to the opinion that disputes arising in the process of election by the National Assembly are to be considered as electoral and to be resolved in the Constitutional Court, 'since such disputes are not subject to consideration by courts of general jurisdiction'.³⁵ This approach is fully consistent with paragraph 3 of Part 1 of Article 9 of the Law on Administrative Disputes, which excludes acts that the National Assembly takes on matters referred to its powers directly by the Constitution from the protection exercised by the courts. The opposite opinion was expressed by professor Marković, pointing out that 'the suffrage of the National Assembly is not a human right, but the authority of

the very National Assembly'. Thus, disputes arising in the exercise of the electoral authority of the National Assembly cannot be classified as electoral disputes, resolved by the Constitutional Court in a special procedure, since this does not violate the citizens' suffrage in the sense of Article 52 of the Constitution.³⁶ Besides, the Serbian doctrine under the electoral dispute means a specific, individual dispute, which is raised as a result of a violation of a specific subjective constitutional right of citizens – suffrage.³⁷

Certain adjustments to the scope and content of the powers of the Constitutional Court to resolve electoral disputes were introduced by the new 2006 Constitution. Thus, under paragraph 5 of Part 2, Article 167 of the Constitution, the Constitutional Court only resolves those electoral disputes

³⁴ Nenadić, B. Electoral Disputes Under the Jurisdiction of the Constitutional Court of Serbia. *Constitutional Issues in Serbia* / Niš, 2004:283.

³⁵ Pajvančić, M. *Slobodan Beljanski. Constitutional law and organizational law on judicial courts (In Serb.)* / Belgrade, 2003: 65.

³⁶ This refers to Article 52 of the Constitution of Serbia of 2006: Every citizen of age and working ability of the Republic of Serbia shall have the right to vote and be

elected. Suffrage shall be universal and equal for all, the elections shall be free and direct and voting is carried out by secret ballot in person. Election right shall be protected by the law and in accordance with the law. See: Marković, R. *Constitutional Court in the 2006 Constitution of the Republic of Serbia*, P. 35.

³⁷ Đukić-Veljović Z., Vuković N. *Constitutional Legal Protection of Electoral Law (In Serb.)* / Archives of Legal and Social Sciences, 3-4/2006. P. 1398.

that are not assigned by law to the competence of the courts. Thus, although the powers of the Constitutional Court were expanded in comparison with the 1990 Constitution of Serbia, since then the Constitutional Court was authorized to resolve only those electoral disputes that were not within the competence of both the courts and other state bodies (clause 7 of Part 1 of Article 125), however, this Constitutional Court authority remains of subsidiary nature.

Drafting the 2007 Law on the Constitutional Court, the legislators took into account the development of the Serbian doctrine and extended the authority of the Constitutional Court to resolve electoral disputes to all stages of the electoral process, including the protection of suffrage at its last stage, which is the verification of mandates (Article 79 of the Law on the Constitutional Court). At the same time, detailing the scope and content of the powers of the Constitutional Court to resolve electoral disputes provided for in the Constitution of 2006, the Law on the Constitutional Court narrowed the content of electoral disputes to be

considered by the Constitutional Court, limiting it by only disputes arising from direct elections, respectively, from elections to which the electorate is involved.³⁸ According to the Constitution, Assembly deputies and the President of the Republic are elected by direct election from state bodies; Assembly members of the autonomous region are elected from the autonomous regional bodies; and opština municipal assembly deputies, as well as the opština chairman, are elected from local opština administrative bodies (in accordance with the Law on Local Self-Government of 2002).

Procedural issues of the judicial consideration by the Constitutional Court of electoral disputes are settled in the 2007 Law on the Constitutional Court of Serbia rather consistently. Thus, Article 75 of the Law on the Constitutional Court stipulates that a request for a decision on an election dispute, in respect of which the law does not provide for the jurisdiction of the courts, can be filed either by any voter, candidate for the presidency or, respectively, for deputy of the National

³⁸ Marković, R. Constitutional Court in the 2006 Constitution of the Republic of Serbia

(In Serb.) / Belgrade University School of Law Publishing, 2–2007: 35.

Assembly, representative body of the autonomous region, and local government unit, as well as the person nominating the candidate. Also, the Law provides requirements for the content of the request; the latter should include the grounds and evidence justifying the reason for the request for a decision on the election dispute. The Law contains a preventive deadline for submitting a request, which is 15 days starting from the date of completion of the contested election process (P. 1, 2, 3 of Article 75 of the Law on the Constitutional Court).

The Constitutional Court delivers one copy of the received request for a decision on an election dispute to the body responsible for holding the elections, in connection with whose activities the election dispute was opened so that the latter would submit a response and necessary acts and documentation within the prescribed time period (Art. 76 of the Law on the Constitutional Court).

Whether during the consideration of an election dispute in the Constitutional Court it will be proved that violations during the election process significantly affected the election results, the Constitutional Court

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of Serbia by its decision cancels the results of the entire election process or stage of this process, which should be indicated in the Court decision. In this case, the entire election process or its particular stages are repeated within ten days from the date of delivery of the decision of the Constitutional Court to the competent authority. The decision of the Constitutional Court on the cancellation of the results of the entire electoral process or its stages comes into force from the moment the decision of the Constitutional Court is delivered to the competent authority (Article 78).

The Serbian legislators decided to provide guarantees of protection in the Constitutional Court of the entire electoral process, also including protection against violations of its last stage, which is the verification of mandates. Thus, Part 1 of Article 79 of the Law on the Constitutional Court of Serbia provided that a complaint against a decision taken in regard to the verification of the mandate of a people's deputy can be submitted by a candidate or the person who has nominated this candidate for people's deputies, within 48 hours from the date of the decision. The body whose decision is appealed is

required to submit the necessary documents to the Constitutional Court within 24 hours after filing the complaint. The legislators ordered the Constitutional Court to make its decision within 72 hours of filing a complaint. Noteworthy is that the provisions of the Law governing the proceedings in the Constitutional Court for the resolution of electoral disputes are also applied as part of the proceedings for complaints regarding the verification of the mandate of a people's deputy (Article 79 of the Law on the Constitutional Court).

4. Conclusions

Reviewing the research conducted in the presented article and taking into account the current status of the Serbian Constitutional Court as the bearer of the 'fourth' constitutional judicial power, authorized to ensure the functioning of the three initial branches of government within the framework of the constitutional field, it could be stated with confidence that the function of disputes resolution of the Serbian constitutional justice body is absolutely rightfully and seamlessly represent one of the current main areas of its practical activity. Thus, the Constitution of 2006

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and the Law on the Constitutional Court of 2007 endowed the Serbian constitutional justice body with broad opportunities to resolve both vertical and horizontal competency disputes to protect the principles of the rule of law, constitutionality, legitimacy, and separation of powers, as well as the right to a regional autonomy and local self-governance. However, some particular regulatory 'imperfections' somewhat limited the potential of these opportunities concerning disputes involving the highest state authorities representing the legislative and executive branches of government. As a result, the Constitutional Court was forced to use other powers, such as, in particular, normative control, to resolve disputes between the 'political' authorities. Nevertheless, when it comes to the powers of the Constitutional Court of Serbia to resolve electoral disputes, the new constitutional law has made significant changes to this Constitutional Court authority. Again, this authority, on the one hand, is still subsidiary, i.e. the Constitutional Court is authorized to proceed on constitutional disputes if there is no courts' jurisdiction over these cases, on the other hand, at present, this

power of the Constitutional Court guarantees the protection of electoral rights regarding the entire electoral process in the framework of the election of National Assembly deputies, the President of the Republic, the assembly of the autonomous region, opština municipal assembly, as well as the opština chairman. And yet, despite all the innovations in regulation, as before (under the 1990 Constitution), the exercise of the power of Serbian constitutional justice authority to resolve an electoral dispute is still a rare act. As a result, the electoral disputes remain imperceptible in the total volume of cases reviewed by the Constitutional Court of Serbia. But this is no longer the problem of deficiencies in the legislation on constitutional control of Serbia, but rather the passivity of the subjects of the electoral process, their reluctance and, perhaps, disbelief in the ability to defend their voting rights in the Constitutional Court. However, this is the subject of another scientific study.

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