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AN APPEAL TO THE CONSTITUTIONAL COURT AND A CONSTITUTIONAL APPEAL

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Abstract. *The Constitution of the Republic of Serbia (2006) and the Constitutional Court Act (2007) envisage vast competences of the Constitutional Court. The competence which proves to be a rather interesting matter of current debate refers to lodging special appeals with this Court. The Constitution has envisaged that these special appeals may be filed in several cases, in two of which the Court has explicitly precluded the right to file a constitutional appeal. This yields a conclusion that an appeal to the Constitutional Court and the constitutional appeal are two different legal remedies which consequently imply different competences of the Constitutional Court.*
A constitutional appeal may be lodged against individual legal acts or actions of state bodies of authority or organizations vested with delegated public authorities whose legal acts or actions either violate or deny the human or minority rights and freedoms guaranteed under the Constitution. A constitutional appeal may be lodged only if the appellant has exhausted all other legal remedies envisaged by the law or if a legal remedy has not been prescribed (Article 170 of the Constitution). On the other hand, an appeal to the Constitutional Court may be lodged directly on the grounds of constitutional provisions only for the purpose of protecting specific rights, such as: the rights of judges, public prosecutors and deputy public prosecutors concerning the termination of their public offices; the rights of the members of parliament concerning the confirmation of their terms of office, and the right to the province autonomy and local self-government.
In spite of the apparent differences between these two legal remedies, the legal practice has recently encountered a problem regarding the application of these two types of appeal. The problem is related to a recent case on the termination of offices of judges, pubic prosecutors and deputy public prosecutors. In a large number of cases, the appellants concurrently lodged both legal remedies seeking adequate constitutional protection. The Constitutional Court was of the opinion that the unappointed judges and prosecutors are entitled to file an appeal with the Constitutional Court; thus, the Constitutional Court implicitly resolved the dilemma that was present in the general public on whether it was the issue of the judges' removal from office or a general judicial appointment.
Apart from the inexact general terminology, the Constitution contains quite an imprecise definition on the legal nature of an appeal to the Constitutional Court. Considering the

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fact that an appeal to the Constitutional Court may be filed against individual legal acts and actions in different procedural circumstances, this may lead to a (wrong) conclusion that these appeals are different modalities of the constitutional appeal.

Key words: *A constitutional appeal, an appeal to the Constitutional Court.*

1. AN APPEAL TO THE CONSTITUTIONAL COURT

The 2006 Constitution of the Republic of Serbia envisages the application of an appeal to the Constitutional Court as a special legal instrument which is used in specific circumstances, explicitly determined in the Constitution. The first impression is that these rights shall be distinguished from human and minority rights which are subject to a different kind of protection envisaged in the Constitution, which prescribes a different legal instrument – a constitutional appeal.

In that context, there is a question whether and why the framers of the Constitution singled out some of the human and minority rights and freedoms, prescribing a different kind of legal protection by using an appeal to the Constitutional Court. In this paper, the author has tried to answer the following question: Are these appeals really different legal instruments or only modalities of the same legal instrument?

Looking into the legal provisions on the institute of the constitutional appeal as contained in the Constitution, it may be observed that Article 101 paragraph 5 of the Constitution envisages the possibility of filing an appeal with the Constitutional Court against the decision related to confirming the terms of office of Members of Parliament (MPs); this provision obliges the Constitutional Court to decide on the appeal within 72 hours. In this case, the framers of the Constitution envisaged an urgent proceeding before the Constitutional Court considering that the issue is related to constituting one of the most important bodies of public authority – the National Assembly (the legislative body), as well as to exercising the principle of national sovereignty (which is non-existent without observing the will of the electoral body as expressed in elections).

In Article 148 paragraph 2 of the Constitution, an appeal to the Constitutional Court is defined as a legal instrument aimed against the decision of the High Judicial Council on the termination of tenure of judicial offices. The same provision specifies that lodging this appeal precludes the right to lodge a constitutional appeal. This provision yields a conclusion that there are two different legal instruments, given that lodging one of these legal instruments precludes the use of the other. As a matter of fact, this explicit constitutional provision has given rise to numerous dilemmas in practice, particularly regarding how the highest state officials - judges and prosecutors (who are all but lay persons) have been induced to lodge both a constitutional appeal and an appeal to the Constitutional Court on the same legal issue, even though these two legal instruments are mutually exclusive. If they are but different modalities of the same legal instrument, why is the Constitution so explicit on excluding the concurrent application of both instruments?[1] Moreover, why did

[1] The High Judicial Council is entitled to issue a decision on the termination of a judge's tenure of office. An appeal against this decision may be filed with the Constitutional Court. The filed appeal excludes the right to lodge a constitutional appeal. (Article 148 para.2 of the Constitution of Serbia, *Official Gazette of the Republic of Serbia*, no. 98/2006

the Constitutional Court issue an opinion that the judges and prosecutors who had not been selected for tenure of office had the right to appeal to the Constitutional Court? Why did the Court opt for the appeal to the Constitutional Court instead of choosing the constitutional appeal? What are the legal consequences of such a holding? All these issues will be discussed further on in this paper.

Article 155 provides that an appeal to the Constitutional Court may be filed against a decision of the High Judicial Council, in cases stipulated by the law. Further elaborating on Article 154 of the Constitution,[2] Article 13 of the High Judicial Council Act envisages that (in addition to deciding on the termination of judicial offices) the High Judicial Council is also entitled to: appoint judges for a permanent tenure of office; submit proposals to the National Assembly on the candidates for the first judicial appointments; propose to the National Assembly the appointment and the removal of the President of the Supreme Court of Cassation as well as the chairmen of other courts; appoint lay judges (who sit on a judicial panel in the capacity of jurors); decide on transferral and recourse of judges, decide on objections concerning the suspension of judges, and render a number of other decisions.[3]

The next provision related to applying this legal instrument is envisaged in Article 161 paragraph 4 of the Constitution pertaining to the decision on terminating the tenure of office of a public prosecutor and a deputy public prosecutor. A public prosecutor and a deputy public prosecutor may lodge an appeal with the Constitutional Court against this decision. The Constitution explicitly provides that lodging an appeal with the Constitutional Court clearly precludes lodging a constitutional appeal.

Then, Article 187 paragraph 1 of the Constitution specifies that a body of authority designated by the Statute of the Autonomous Province shall have the right to lodge an appeal with the Constitutional Court, provided that an individual legal act or action of a state authority or a body of the local self-government obstructs the exercise of the competences of the autonomous province. [4]

Finally, Article 193 paragraph 1 of the Constitution provides that the body of authority designated by the Municipality Statute shall have the right to lodge an appeal with the Constitutional Court, provided that an individual legal act or action of a state authority or a body of the local self-government obstructs the exercise of the competences of the municipality.

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[2] Pursuant to the Constitution and the statutory law, the High Judicial Council is entitled: to appoint and remove the judiciary; to submit proposals to the National Assembly on the candidates for the first judicial appointments; to propose to the National Assembly the candidates for the President of the Supreme Court of Cassation as well as the candidates for the chairmen of other courts; to participate in the proceedings related to the termination of the tenure of judicial office of the President of the Supreme Court of Cassation and the chairmen of other courts as stipulated in the Constitution and the law, and to perform other duties specified by the law.

[3] See: Article 13 of the High Judicial Council Act, *Official Gazette RS*, no. 116/08.

[4] This provision is similar to the legal solution in the German legal system, according to which municipalities and municipal districts (leagues) may lodge a constitutional appeal with the Federal Constitutional Court when they consider that a federal or state legal act has violated the right of the local governance guaranteed by the Basic law of the land. However, the appeal is lodged against a general (federal or state) act and not against an individual legal act or action of a public authority (as it is envisaged in the Serbian Constitution). See: Ivo Krbek, *Ustavno sudovanje (Constitutional Justice)*, Zagreb, 1960, p.71, 72; and Ratko Marković, *Ustavni sud u Ustavu republike Srbije (The Constitutional Court in the 2006 Constitution of the Republic of Serbia*), Annals of the Law Faculty in Belgrade, year LV, 2/2007, p. 37

The above provisions on the application of an appeal to the Constitutional Court point out to the specific rights which are explicitly protected in the Constitution (such as: the right to the local self-government and province autonomy; the right to observe the will of the electoral body as expressed in free and direct elections; the rights of judges and prosecutors whose tenure of office is terminated).[5] They also show that the framers of the Constitution singled out these rights from the corpus of human and minority rights and freedoms, primarily wishing to highlight their importance and significance. All these legal provisions have something in common: in all cases, an appeal to the Constitutional Court is lodged against an individual legal act or action. Taking this fact into account, we might construe that they are different modalities of the same legal instrument. However, if this is so, why would the framers of the Constitution use different terminology (*an appeal to the Constitutional Court* and *a constitutional appeal*) for the same legal instrument? Moreover, why does the Constitution explicitly provide that the application of one of these legal instruments excludes the possibility of using the other? The analysis of constitutional provisions alone cannot yield a clearer conclusion on the legal nature of this instrument and its relation to the constitutional appeal.

However, after analyzing the relevant provisions contained in the Constitutional Court Act[6] pertaining to the proceeding on appeal of judges, public prosecutors and deputy public prosecutors against the decision on the termination of their terms of office, as well as pursuant to the Constitutional Court opinion[7] on the legal requirements and proceedings concerning the public hearing on this matter, we may conclude that these are two different legal instruments.

Thus, pursuant to Article 99 of the Constitutional Court Act, a judge, a public prosecutor or a deputy public prosecutor are entitled to file an appeal with the Constitutional Court against the decision on the termination of their term of office within 30 days from the date of being served the decision, whereas the body of authority which has issued the

[5] Ratko Marković, *Ibid*, p.37

[6] Official Gazette of the Republic of Serbia, no. 109/07

[7] The Constitutional Court Act provides that the Constitutional Court is entitled to render decisions, rulings and conclusion, and enlists the specific circumstances for issuing each of these legal acts. Thus, the Court issues *decision*s when it has established that an act, a statute of an autonomous province or a unit of local self-government, or some other general act does not comply with the Constitution; when it has established that an act which has been adopted but has not been officially promulgated by a decree is not in compliance with the Constitution; when the Court decides on the procedure on appeal of judges against the decision concerning the termination of their terms of office and other decision of the High Judicial Council, etc). *Rulings* are issued when the Court: initiates a proceeding; decides on a conflict of jurisdiction between the state and other bodies in accordance with the Constitution; does not accept the initiative for initiating a proceeding for establishing unconstitutionally or illegality, etc). *Conclusions* are issued when the Court does not issue decisions and resolutions (see Articles 44, 45, 46 and 48 of the Constitutional Court Act, Official Gazette RS, No. 109/07). In this context, there remains a question on the position of the Court *opinions* in the overall structure of legal acts rendered by the Constitutional Court, particularly considering the fact that opinions are not recognized as a legally binding authority in Serbian legislation, which raises an issue of their actual legal effect. The Constitutional Court opinions have their stronghold in Article 8, para. 2 of the Constitutional Court Act, which provides that "*matters of procedure which are not regulated by this Act shall be decided on the merits of each individual case by the Constitutional Court*". It is obvious that the legislator was very much aware of the numerous unresolved issues stemming from the wide jurisdiction of the Constitutional Court. However, for reasons of legal security, the author believes that such important procedural matters are to be regulated by statutory legislation.

decision on their dismissal (i.e. the High Judicial Council) is entitled to reply to the appeal within 15 days from the date of being served the appeal. An important issue which is additionally elaborated in the opinions of the Constitutional Court is the principle of the adversary nature of this procedure. Namely, after the expiry of the time limit for submitting an answer to appeal, the Constitutional Court is obliged to schedule a public hearing, summoning the appellant and a representative of the authority which has rendered the decision on dismissal (Article 100 paragraph 1 of the Constitutional Court Act). Upon the participants' proposal, the Constitutional Court may exclude the general public from the hearing but only in cases prescribed by the law. Apart from the participants in the proceeding, the public hearing may also be attended by the accredited representatives of the media and the professional audience. The Constitutional Court may also allow a hearing which excludes general public but allows the presence of the professional public.[8] The Constitutional Court may issue a decision to uphold the appeal and annul the decision on removal, or to reject (dismiss) the appeal. However, a further implementation of the Constitutional Court decision upholding the appeal has not been comprehensively regulated by the law. There is no doubt that the Constitutional Court decisions are final, enforceable and universally binding (Article 7 paragraph 1 of the Constitutional Court Act); yet, in case of upholding the appeal and cancelling the decision on dismissal (or some other decision issued within the jurisdiction of the High Judicial Council), it is not quite clear whether the Constitutional Court will render a decision on the merits of each individual case or whether it will allow the body that issued the decision (i.e. the High Judicial Council) to issue a new decision in line with the legal opinion of the Constitutional Court stated in its decision. Yet, given the fact that, in legal theory, the annulment of some act makes the act invalid for future reference and cancels all legal consequences produced by this act, the answer to this question may be slightly more comprehensible.[9] The Constitutional Court decision in the proceeding concerning the appeal of judges, public prosecutors and deputy public prosecutors against the decision on the termination of their terms of office has legal effect from the date of being served to the participants in the proceeding (Article 102 of the Constitutional Court Act). Moreover, the Constitutional Court Act provision regulating the procedure on appeal of judges, public prosecutors and deputy public prosecutors against the decision on the termination of their terms of office shall be accordingly applied in the proceedings on appeal against other decisions within the jurisdiction of the High Judicial Council.

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[8] For more detail, see: Opinions of the Constitutional Court on the requirements and proceedings for holding a public hearing on the appeal of judges, public prosecutors and deputy public prosecutors against the decision on the termination of their terms of office; *www.ustavni.sud.rs*, assessed on 25th September 2010.

[9] In regulating the procedure on appeal against the decision on the termination of judicial offices and the decision on the judge's professional responsibility, the Constitutional Act on the Constitutional Court of the Republic of Croatia is quite specific; namely, if the Constitutional Court decided to canceling the appeal as ill-founded, the disputed decision is nullified and the case is remanded to the State Judicial Council for a new proceeding. The State Judicial Council is then obliged to issue a new decision (instead of the nullified decision), where it is bound by the legal opinion of the Constitutional Court regarding the violation of the appellants' constitutional rights stated in the decision on cancellation. Unlike the Serbian Constitutional Court Act which employs the term "annulment", the Croatian Act uses the terms "cancel and remand for a new proceeding". See Article 98 para. 3 and para.4 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, *Narodne novine*, no. 49/2002

However, as mentioned before, an appeal to the Constitutional Court may be filed only in specific situations which are enlisted in the Constitution (to protect local self-government and province autonomy, as well as the rights of MPs regarding the confirmation of their mandates). In view of regulating the procedure on appeals filed by a body authority designated by the Statue of the Autonomous Province or the Statute of a unit of the local government, the legislator has envisaged the application of provisions regulating the constitutional appeal procedure. In case where the Constitutional Court establishes in the course of this procedure that an individual legal act or action of a state authority or a body of the local government has obstructed the exercise of the competences of the autonomous province or the local government, the individual act will be nullified and the Court will either prohibit or order a further performance of certain action, and order that all the detrimental consequences are to be rectified.

As for the appeal of MPs against the decision concerning the confirmation of their terms of office, the Constitutional Court Act envisages the application of the relevant provisions regulating the electoral disputes procedure. The appeal against the decision concerning the confirmation of MPs' mandates may be filed by the MP candidate as well as by those who have proposed the candidate. The public authority against whose decision the appeal has been filed is obliged to submit the requisite documentation to the Constitutional Court within 24 hours of the submittal of the appeal. The Constitutional Court shall render a decision within 72 days from the submittal of the appeal. Considering the important and specific subject matter (election law), the framer or the Constitution and the legislator have envisaged an urgent procedure on this issue. This procedure has no similarities whatsoever with the proceeding on appeal of judges, public prosecutors and deputy public prosecutors against the decision on the termination of their terms of office, nor with the proceeding on appeal of a body designated by the Statute of the Autonomous Province or the Statute of a unit of a local self-government (in case where the right to province autonomy or local self-government has been obstructed by an individual legal act or action of a state authority or a body of the local self-government). The only thing all these proceedings have in common is the use of the legal instrument bearing the same name; yet, even though the name of the legal instrument for instigating these proceedings may be the same, the legal nature of this instrument is different.

2. A CONSTITUTIONAL APPEAL

1. *A constitutional appeal* provides a direct constitutional protection of human and minority rights and fundamental freedoms. This legal instrument is the most powerful and the most efficient legal mechanism of human rights' protection, which concurrently protects the Constitution as part of the objective legal order. The very existence of the constitutional appeal gives additional significance and reinforces the human rights. It also strengthens the citizens' confidence and trust that there is a powerful mechanism for the protection of their rights, that the Constitutional Court is always there as the last resort and safeguard of their rights, and that the case is not over and done with even though all other legal mechanisms have been exhausted. This fact significantly helps in promoting this institution and raising its reputation and authority.

In the Constitution of Serbia (2006), the constitutional appeal has been laid down rather widely and defined as a legal instrument which may be lodged against an individual legal act or action of a public authority or organization exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, provided that other legal remedies for their protection have either been exhausted or have not been specified, or provided that the law precludes the right to their judicial protection (Article 170).[10] Thus, the constitutional appeal protects all constitutionally guaranteed human and minority rights and freedoms (both individual and collective), irrespective of their position in the Constitution and whether they are explicitly stipulated in the Constitution or implemented in compliance with the ratified international agreements. [11]

On the other hand, only individual legal acts and actions of public authority may be the subject matter of constitutional appeals. The statutory legislation is not the subject matter of constitutional control by means of a constitutional appeal. [12]

Yet, the Constitutional Court Act has envisaged that the constitutional appeal may be lodged even if all the legal instruments have not been exhausted, in case of a violation of the applicant's right to be tried in a reasonable time (Article 82 paragraph 2). Such a legal provision is an exception which is, to some extent, contradictory to the specific legal norm and embodies a certain "legal modification" of the constitutional appeal.[13]

The Constitutional Court Act (Article 83 paragraph 1) envisages that the constitutional appeal may be lodged by any person[14] who deems that his/her human or minority rights

[10] The constitutional appeal raises an issue of the relationship between the Constitutional Court and the regular courts because the basic prerequisite for using this legal instrument is the exhaustion of all regular legal remedies for human rights' protection. There are opinions that judicial decisions cannot be the subject matter of the Constitutional Court control by means of a constitutional appeal because it would constitute a violation of the principle of the separation of powers and the principle of judicial independence and impartiality (given that Article 145 of the Constitution precludes the possibility of exercising extrajudicial control of judicial decision and that the Constitutional Court is an independent and autonomous public body of authority). However, the Constitutional Court has a constitutional obligation and competence to review individual legal acts and actions of all public authorities (including the judiciary) for the purpose of protecting citizens and their fundamental rights from the arbitrary decisions of any public authority.

[11] In sessions held on 30th December 2008 and 2nd April 2009, the Constitutional Court adopted the Opinions concerning the preliminary procedure for reviewing a constitutional appeal, which *inter alia* contained this opinion. For more detail, see: *www.ustavni.sud.rs* (assessed on 25th September 2010).

[12] However, if there is a reasonable doubt in the constitutionality and legality of a general act which was used as the basis for enacting an individual act which is being challenged by the constitutional appeal, the Court will discontinue the proceeding on constitutional appeal and *ex officio* initiate the proceeding for assessing the constitutionality and legality of this general act.

[13] This exception can be justified. Namely, upon the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 2003, the Serbian citizens were enabled to refer to the European Court of Human Rights. Considering the fact that the Serbian citizens did not have at their disposal an effective legal remedy for the protection of their right to be tried in a reasonable time (which is guaranteed by the European Convention), the legislator reached for the constitutional appeal and broadened its effect. However, this has increased the risk of an additional workload on the Constitutional Court owing to the increased number of constitutional appeals filed on this legal ground. For this reason, the key question posed by both legal theory and practice is whether this right should be protected before the Supreme Court of Cassation or before respective courts of appeal, which would thus be exercising their right to supervise the operations of the lower courts.

[14] A consitutional appeal may also be lodged on behalf of another person by some other natural or legal person, on the basis of a written authorization, or by some public body or other authority in charge of monitoring and the exercise of human and minority rights and freedoms (such as the Civil Defender -Ombudsman, municipal

and freedoms guaranteed by the Constitution have been violated or denied by an individual legal act or action of a state authority or organization vested with some public authority. The legal grounds for submitting a constitutional appeal seem to be laid down rather broadly, not only in respect of the persons authorized to file a constitutional appeal but also regarding the requirements for its application, particularly considering the fact that a constitutional appeal may be used whenever other legal instruments for the protection of the constitutionally guaranteed rights have either been exhausted or have not been specified. Yet, this certainly does not mean that "*the constitutional appeal, which is essentially a supplementary and extraordinary legal instrument, is to be transformed into a regular protection mechanism which may always be used upon exhausting all other available legal remedies for the protection of the constitutionally guaranteed human rights*."[15]

A constitutional appeal may be submitted within 30 days from the date of being served an individual legal act or from the date of undertaking the action which is the subject matter of the constitutional appeal. [16]

The constitutional appeal, as a rule, does not preclude the implementation of an individual act or action it has been submitted against. However, acting on the applicant's proposal, the Constitutional Court may suspend the implementation of an individual act or action if the implementation would cause irreparable damage to the appellant, provided that suspension is not contrary to the public interest and provided that it would not cause any considerable damage to a third party (Article 86 paragraph 2).[17]

If an individual act or action has violated or denied the constitutionally guaranteed human and minority right or freedom to a number of persons, only some of whom have lodged the constitutional appeal, the Constitutional Court decision shall accordingly apply to the persons who may not have filed the constitutional appeal but who have found themselves in the same legal situation.

2. The constitutional appeal procedure is regulated by the Rules of Procedure governing the operation of the Constitutional Court (Articles 72-74). [18] It includes several phases.

The first phase includes *the assessment of procedural presumptions*, where the reporting judge examines whether all the procedural requirements have been met for the

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ombudsmans, the Commissioner for the Information of Public Interest, the Commisssioner for the Protection of Equality, etc.

[15] Constitutional Court Act, Article 84 para.1

[16] Constitutional Court Act, (Article 84 para.1). This time limit is not absolute because the Constitutional Court will allow restitution to a person who on justified grounds failed to observe the time limit for submitting a constitutional appeal, if such person submits a proposal for restitution within 15 days from the cessation of the reason which caused the failure to file a consitututional appeal, and if the person simultaneoucly submits a constitutional appeal. Restitution cannot be requested after the expiry of a period of 3 months from the date of the failure to observe the time limit.

[17] As a rule, the Constitutional Court will decide on the appellant's proposal on suspension of the implementation of an individual act or action which is the matter of the constitutional appeal within a period of 90 days from the the submittal of the proposal.

[18] The Rules of Procedure governing the operation of the Constitutional Court, *Official Gazette of RS,* no. 24/2008 and 27/2008. In Articles 36 and 37, it also provides for establishing the Constitutional Appeal Boards in the fields of criminal law, civil law and administrative law. The, Constitutional Court may also establish constitutional appeal boards in other areas. The Constitutional Appeal Board first considers the reporting judge's proposal of the decision on the matter involved in a constitutional appeal, and then the Board gives opinion on the proposal.

court to act on appeal. In case the procedural presumptions do not exist, the reporting judge drafts a proposal of the decision to dismiss a constitutional appeal and submits this proposal to the President of the Constitutional Court who is obliged to schedule a session.

However, the reporting judge may decide to serve the constitutional appeal on a state authority or organization vested with some public authority (whose individual act or action has been the legal ground for lodging a constitutional appeal), and sets the time limit for serving the answer to appeal, the case file, requisite documents or other information necessary for the decision-making process. Here, we may conclude that the public hearing is not part of the constitutional appeal procedure. The principle of the adversary nature of the proceeding is almost non-existent here because it is exercised only through the right to submit an answer, whose ultimate effect depends on the discretionary authority of the reporting judge who assesses the merits of each individual constitutional case.

The Constitutional Court is obliged to discontinue the procedure in thee procedural situations: (1) if a constitutional appeal has been withdrawn; (2) if the authority which enacted the challenged individual act annuls, repeals or revises the act in accordance with the request contained in the constitutional appeal, or if the action which caused the violation or denial of the constitutionally guaranteed human right and freedom has ceased, with the consent of the appellant (complainant); and (3) if other procedural presumptions for the conducting the procedure have ceased (Article 88 of the Constitutional Court Act).

However, if the procedural presumptions for conducting the constitutional appeal procedure have been satisfied, the reporting judge prepares a proposal of the decision, which is then submitted to the Chairman of a relevant Constitutional Appeal Board.

The next phase is *the review of the constitutional appeal* before a relevant Board. The Board may consider it necessary to request from the reporting judge to provide some additional data or information which may be significant in the decision-making process on the constitutional appeal. When the Board estimates that the constitutional issue in a specific case has been completely resolved, the Board gives a written opinion on the proposal of the decision submitted by the reporting judge. Then, the proposal of the decision and the opinion of the respective Board are submitted to the President of the Constitutional Court for adjudication in session.

The Constitutional Court may decide either to uphold the constitutional appeal or to reject and dismiss it as ill-founded.

When the Constitutional Court determines that the challenged individual act or action has violated or denied some human or minority right and freedom guaranteed under the Constitution, and that the constitutional appeal has been well-founded, the Court will annul the individual act or prohibit further performance, or order a certain action to be performed, and order the detrimental consequences to be rectified within a specified time limit (Article 89 paragraph 2).

A Constitutional Court decision upholding the constitutional appeal constitutes a legal ground for filing a request (motion) for damages or rectification of other detrimental consequences before a competent authority, in accordance with the law. (Article 89, paragraph 3) [19]A Constitutional Court decision upholding the constitutional appeal has legal effect from the date of being served on the participants in the proceedings.

[19] On the basis of the Constitutional Court decision, the appellant may file a request (motion) for damages with the Damages Commission in order to reach an agrement on the amount of damages. If the request for damages

The practice of the Constitutional Court shows that the constitutional appeal proceeding is the most frequently practiced competence of this court in the broad spectrum of competences envisaged in the 2006 Constitution. On the one hand, it is the direct consequence of the citizens' insufficient information on the legal nature of this legal instrument and, on the other hand, it is a result of the fact that the constitutional appeal has been introduced in the legislation as a kind of a filter for the European Court of Human Rights in Strasbourg. The overall situation has been additionally complicated by the decision of the European Court of Human Rights in the case *V.A.M vs. Serbia*[20] where the ECHR concluded that the Serbian legal system does not provide its citizens an efficient legal remedy for the adequate protection of the right to be tried within a reasonable time as guaranteed in Article 13 (right to an effective legal remedy before national authorities) in relation to Article 6 paragraph 1 (right to be tried within a reasonable time) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[21] For this reason, the Constitutional Court Act has departed from the principle of subsidiarity of this legal instrument, envisaging the right to lodge a constitutional appeal in case of a violation of the right to be tried within in a reasonable time (discussed earlier in this paper). Given the fact that most constitutional appeals are filed on this legal ground, there is a question whether the Constitutional Court will be able to provide an efficient legal protection of citizens' rights, particularly having in mind the inadequate number of Constitutional Court judges who are to handle such a large number of constitutional appeals. Moreover, considering that the Constitutional Court jurisdiction is laid down in quite broad terms, its current competences significantly depart from the prior competences of the Constitutional Court in the formerly existing legislation where this Court was primarily concerned with the control of constitutionality and legality of general legal acts. How shall this affect the constitutional appeal lodged against a violation of the right to be tried within a reasonable time? Will it turn this "effective" legal remedy into an "ineffective" legal remedy?

Consequently, there is a growing number of demands (coming primarily from the Constitutional Court itself) to revise the Serbian Constitution particularly in the part concerning the jurisdiction of the Constitutional Court, *i.e.* to cut down on its competences in order to enable the Court to exercise in full capacity its primary role as the guardian of constitutionality and legality. Considering that this may take a while due to the complex procedure for changing the Constitution, it may be worthwhile to consider amending the Constitutional Court Act in terms of introducing a more efficient constitutional appeal procedure, having in mind the principle of procedural economy in particular. Thus, it would be worth thinking about introducing a provision that the Court decisions are to be rendered by a panel of judges instead of the judicial plenum, a provision that a constitutional appeal may be considered inadmissible on the grounds of the abuse of the right to file a submission, a provision on the compulsory representation of parties by legal professionals, as well as a provision obliging the party to exhaust all regular legal reme-

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is not accepted, or if the Commission fails to act upon it within 30 days from the date of filing the request, the applicant is entielded to file a legal claim (complaint) for damages with the competent court. (Article 90)

[20] Case *V.A.M vs. Serbia*, application no. 39177/2005, *Official Gazette of RS*, no.53/2007

[21] Stevan Lilić, *Da li je ustavna žalba efikasan pravni lek za suđenje u razumnom roku?* (Is the Constitutional Appeal an efficient legal remedy in cases concerrning the right to be tried within a resonable time?), Annals of the Law Faculty in Belgrade, year LV, 2/2007, p. 7

dies for the violation of a constitutional right by filing an appeal in the regular proceedings before a competent public authority. Likewise, the proceedings for the violation of the right to be tried within a reasonable time should be in the jurisdiction of regular courts (courts of appeal and higher courts), *i.e.* a court of a higher instance than the court where the case has been subject to an unreasonably long procedure. [22]

3. An Appeal to the Constitutional Court and a Constitutional Appeal

The major issue which has been repeatedly put forward in this paper is the one concerning the relation between these two legal instruments, particularly in terms of their legal nature. Therefore, are they two distinct legal instruments or different modalities of the same legal instrument?

As a matter of fact, every legal remedy has its specific nature and characteristics governing its specific function in the legal system. In order to be able to determine the legal nature of a particular legal remedy, we have to observe its substantive and procedural elements. Thus, we have to consider the legal grounds for applying a legal remedy, its legal effect and the character of the specified time limits, the competences of relevant public authorities acting on a specific legal remedy, as well as the procedure regulating the decision-making process.

As for the appeal against the decision concerning the termination of the terms of office of judges, prosecutors and deputy prosecutors, as well as the appeals against other decisions within the jurisdiction of the High Judicial Council as envisaged in the Constitution and the statutory law, we may conclude that these appeals constitute a different legal instrument as compared to the constitutional appeal. Namely, the Constitution explicitly provides that an appeal to the Constitutional Court filed by judges, prosecutors and deputy prosecutors against the decision on the termination of their terms of office clearly precludes the possibility of lodging a constitutional appeal, which is quite logical because in that case the same body (the Constitutional Court) would have to decide on the same legal matter twice. Furthermore, the provisions contained in the Constitutional Court Act, as well as the elaboration of these provisions contained in the Opinions on the requirements and procedure for instituting a public hearing on the proceeding related to the appeals filed by judges, prosecutors and deputy prosecutors against the decision on the termination of their terms of office, clearly envisage different rules of procedure and different legal grounds for applying one or the other legal remedy.

Whereas the constitutional appeal is aimed at protecting constitutionally guaranteed human and minority rights and freedoms after all other legal instruments have either been exhausted or have not been specified, the appeal to the Constitutional Court is a special

[22] There was a similar situation in the Republic of Croatia, where the Constitutional Act on the Constitutional Court introduced a legal instrument designated as *a constitutional complaint* against the violation of the right to be tried in a reasonable time. Only a few years after introducing this legal instrument, the Croatian Constitutioal Court was overloaded with complaints filed on this legal ground, which only prolonged the proceedings and essentially made this legal instrument highly irrelavant. For this reason, under the Courts Act, this competence was transfered from the jurisdiction of the Constitutional Court to the jurisdiction of regular courts. Whereas the legal protection mechanism remained the same, the name of the legal instrument was changed into *a request* (motion) for the protection of the right to be tried in a reasonable time. See, Stevan Lilić, *Ibid*, p. 83

legal instrument aimed at providing immediate protection to a dismissed official (judge, public prosecutor or deputy public prosecutor). In the Constitution, this legal instrument is clearly distinguished from the constitutional appeal, not only by a different wording and designation ("*an appeal*") but also by an explicit constitutional provision that the appeal filed upon these legal grounds excludes the right to lodge a constitutional appeal.[23] This similar terminology is certainly an inconvenient solution which may cause confusion in legal practice; yet, if the legislator had intended them to be the same legal instrument, he would certainly have used the same legal term.[24]

Taking into account such a synthetic and integrative approach, we can say with certainty that an appeal to the Constitutional Court is not a legal instrument which employs compleltely uniform rules of procedure in all cases it may apply to. Thus, upon analyzing the procedural elements of this legal instrument, we can observe that the procedural rules applied in the proceeding on appeal against other decisions of the High Judicial Council are different from the procedural rules applied in the proceeding on appeal of the bodies designated by the Statue of the autonomous province or the Statute of a unit of a local self-government in case when their right to province autonomy or local self-government has been violated or denied by an individual legal act or action of a state authority or a body of the local government.

In case of a violation of the right to province autonomy and local self-government, the legislator has envisaged the application of relevant rules of procedure regulating constitutional appeal. In that context, some constitutional authors consider that these are actually different modalities of a constitutional appeal which, to a certain extent, depart from the general model of a constitutional appeal. However, in the author's opinion, it does not mean that there are different forms (modalities) of a constitutional appeal but rather that there are two distinct legal instruments, not only because their implementation is based on entirely different legal grounds but also because they have rather different social, legal and political implications. In addition, the enlisted legal grounds for filing an appeal with the Constitutional Court point to the fact that there may be different modalities of this legal instrument, but certainly not different forms of a constitutional appeal. Furthermore, the appropriate application of some procedural rules implies adjusting these rules of procedure to the character of the legal remedy.[25] Even if the rules of procedure were the same, it does not necessarily imply that these two legal instruments can be equated.

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[23] See: *www.ustavni.sud.rs*, assessed on 25th September 2010.

[24] In Croatia, the legislator used the legal term *constitutional complaint*, which might be more pertinent to the legal nature of this institute. On the other hand, the legal instrument for the protection of judges in case of their removal from office is designated as *an appeal* against the decision on removal from a judicial office and the decision on the judges' professional responsibility. Thus, terminologically speaking, the legislator has made a distinction between these two legal instruments. Article 103 of the Constitutional Act on the Constitutional Court of the Republic of Croatia provides that the prospective candidates for judicial offices are entitled to file a constitutional complaint against the decision of the State Judicial Council on the judicial appointments only after they have exhausted the legal course of action before the Administrative Court, on the grounds of the request filed on the basis of special provisions contained in the Administrative Proceedings Act pertaining to the protection of human rights and freedoms guaranteed under the Constitution. See: *Ustavni Zakon o Ustavnom sudu Republike Hrvatske* (Constitutional Act on the Constitutional Court of the Republic of Croatia), *Narodne novine*, no. 49/2002.

[25] In analogy, the circumstance that the transitional and final provision of the Administrative Proceedings Act call for an appropriate application of the Litigation Proceedings Act does not mean that the administrative complaint and the litigation complaint are the same legal remedies.

Finally, when it comes to the appeal of the Members of Parliament against the decision concerning the confirmation of their parliamentary mandates, the Constitutional Court Act has envisaged quite different rules of procedure pertaining both to the proceeding on appeal of public official (judges, public prosecutors and deputy public prosecutors) and to the proceeding on the violation of the right to a province autonomy and local self-government. In addition, the legal grounds for filing this legal instrument clearly indicate that this legal remedy has nothing to do with a constructional appeal. The procedure is urgent and appropriately regulated by provisions governing the election disputes procedure.

In all these cases, there is an evident conclusion that these are two different legal remedies which have their own independent normative framework and procedural reality.

IN LIEU OF A CONCLUSION

In the Republic of Serbia, the question of differentiating between these two legal instruments has become particularly interesting and significant in legal practice in terms of providing relevant legal protection to judges, public prosecutors and deputy public prosecutors who failed to be appointed in the proceedings carried out on the basis of the public announcement for the general selection of judges for judicial offices in the courts of general and special jurisdiction as well as the general selection of public prosecutors and deputy public prosecutors. The general selection for these public offices was regulated by the legal provisions contained in the new Serbian Constitution (2006) and new statutory legislation governing this matter. However, the judges and the public prosecutors who had been appointed under the formerly existing legislation were now put in an awkward situation and compelled to seek legal protection of their rights by concurrently applying both legal instruments even though, under the Constitution, the use of one legal instrument clearly precludes the use of the other. Namely, the judges who had been appointed according to the former regulations and whose judicial duty was officially terminated on the date when the newly appointed judges took office (Article 101. paragraph 1 of the Judiciary Act) were equalled in their status with the novice judges selected for their first judicial duty (Article 100 paragraph 3 of the Judiciary Act); hence, they sought legal protection of their rights by filing a constitutional appeal. In its interpretation of the legal provisions contained in the Judiciary Act, the High Judicial Council considered that the judicial duty of the unappointed judges was terminated by force of law. The High Judicial Council also construed that the Judiciary Act provision envisaging the legal remedy of filing an appeal with the Constitutional Court may only apply to those judges who were appointed on the basis of the new public announcement and whose term of office started as of 1st January 2010. For these reasons, the High Judicial Council considered that the unappointed judges did not have to be served individual decisions which would include specific legal grounds for the termination of a judge's term of office.

Upon the failure of this public authority to issue individual decisions on each specific case, the unappointed judges were compelled to seek legal protection by lodging a constitutional appeal and simultaneously filing an appeal to the Constitutional Court. Upon considering the vague and ambiguous procedural circumstances, the Constitutional Court was of the opinion that the unappointed judges and public prosecutors have the right to appeal to the Constitutional Court on the legal grounds contained in Articles 48 and 161 of the Serbian

Constitution, Article 67 of the Judiciary Act and Article 98 of the Public Prosecution Act. Such contradictory legal practice and the conflicting opinions of the High Judicial Council and the Constitutional Court have additionally heated up the current debate in both legal theory and practice on the difference between these two legal instruments.

There are convincing arguments speaking in favour of a clear distinction between these two legal remedies. These arguments are beyond any political appropriacy and they do not allow for these legal remedies to be interchangeable because it may additionally impair the legal safety and certainty. In its stringent interpretation of the Constitution, the Constitutional Court has attempted to eliminate this legal uncertainty.

ŽALBA USTAVNOM SUDU I USTAVNA ŽALBA

Jelena Vučković

Ustav Republike Srbije (2006) i Zakon o ustavnom sudu (2007) predviđaju široku nadležnost Ustavnog suda. Posebno je interesantna, i pokazala se prilično aktuelna, nadležnost Ustavnog suda koja se odnosi na podnošenje posebnih žalbi ovom sudu. Ustav je ove žalbe predvideo u nekoliko slučajeva pri čemu je u dva slučaja upotrebe ove žalbe, izričito isključio pravo na podnošenje ustavne žalbe. Iz toga se može zaključiti da se radi o dva različita pravna sredstva odnosno o različitoj nadležnosti Ustavnog suda. Dok se ustavna žalba izjavljuje protiv pojedinačnih akata i radnji državnih organa ili organizacija kojima su poverena javna ovlašćenja, a kojima se povređuju ili uskraćuju ljudska i manjinska prava i slobode zajemčena Ustavom, ako su iscrpljena ili nisu predviđena druga pravna sredstva (član 170. Ustava), žalba Ustavnom sudu izjavljuje se neposredno na osnovu ustavnih ovlašćenja, i to za zaštitu tačno određenih prava, kao što su: prava sudija, javnih tužilaca i zamenika javnih tužilaca u vezi sa prestankom njihove funkcije, prava narodnih poslanika u vezi sa potvrđivanjem mandata i pravo na pokrajinsku autonomiju i lokalnu samoupravu. Iako je na prvi pogled razlika između ova dva pravna leka sasvim jasna, u praksi se javio problem vezano za upotrebu žalbe ustavnom sudu i ustavne žalbe, povodom slučaja prestanka funkcije sudija, javnih tužilaca i zamenika javnih tužilaca. U velikom broju slučajeva podnošena su oba pravna leka istovremeno u cilju pružanja adektvatne ustavne zaštite. Ustavni sud je stao na stanovište da neizabrane sudije i tužioci imaju pravo na žalbu Ustavnom sudu, čime je implicitno razrešio dilemu koja je postojala u javnosti, da li se radi o razrešenju ili opštem izboru.

Smatramo da pored terminoloških nepreciznosti Ustav neprecizno definiše pravnu prirodu žalbe ustavnom sudu jer se u svim slučajevima žalba ustavnom sudu izjavljuje protiv pojedinačnih akata i radnji, pa se bi se moglo zaključiti da je reč o različitim modalitetima ustavne žalbe.

Ključne reči: *ustavna žalba, žalba ustavnom sudu.*