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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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Justice in the Constitutional Court

LEGAL EFFECTS OF THE CONSTITUTIONAL COURT DECISIONS

The Constitution provides for a wide range of powers of the Constitutional Court. Most of them concern settlement of legal disputes. However, being a body that controls the legislative power in a state based on the rule of law, the Constitutional Court's fundamental powers relate to interpreting the Constitution and reviewing the constitutionality of laws and other acts issued by Parliament and the President. It further on examines compliance with the Constitution of international treaties concluded by Bulgaria prior to their ratification and compliance of laws with basic international law norms and with the international treaties to which Bulgaria is a party. The Constitutional Court, in addition, rules on cases that are not of the nature of legal dispute and resemble non-adversarial proceedings. In such cases the Constitutional Court's decisions produce a different legal effect.

Where the Constitutional Court hears disputes, its activity shares the general characteristics of administration of justice. Its decisions in such cases have a specific effect – they establish the facts and have a *res judicata* effect. For example, where the Constitutional Court rules on the legality of a Member of Parliament's (MP) election other than in the cases of ineligibility or incompatibility, it may not determine which MP is to be stripped off their status and who shall succeed them; the Court simply establishes a violation; it is another body that quashes the MP'c election. In general, in all cases where the Constitutional Court's activity bears the features of administration of justice, its decisions bear the general features of acts of justice administration. They have a *res judicata* effect, namely they establish facts and preclude a further review of the issue at stake. It should be noted however that the nature of the legal disputes tried by the Constitutional Court is specific and it automatically rules out the possibility to equate the legal effect of Constitutional Court decisions to court judgments in civil, criminal or administrative cases. The difference concerns not only the scope of the *res judicata* effect with respect to the addressees, as the Constitutional Court decisions affect not only the parties to the dispute and some other persons but also all public bodies and legal and natural persons. Another notable difference is that the *res judicata* effect of Constitutional Court decisions does not precisely function as protection and a sanction in the strict sense of the word.

The Court in its jurisprudence maintains that in some cases, for example, where the Constitutional Court finds that a law contradicts the general rules of international law (Article 149, para 1, item 4 of the Constitution), its decisions establishing such a contradiction have also a constitutive force. This is so because, unlike the decisions establishing the actual legal circumstances, in such cases the decision itself brings about a change in the legal circumstances. However, since there is no element of judicial exercise of constitutive declarations (potestative rights), it remains an open

question whether the change claimed is a result of the decision or is a natural consequence that occurs automatically by force of the Constitution. To overcome this contradiction, some believe that the change is implicitly contained in the decision. Hence the parallel between the Constitutional Court decisions in such cases and the general constitutive judgments is largely relative.

Considerably more complex is the issue of the effect of the Constitutional Court decisions that establish the unconstitutionality of an act or another resolution of Parliament or the President. The Court's case-law maintains that in those cases that comprise its core competence, the Court does not administer justice. Those concern legal disputes of a more general nature where no rights are being challenged or violated and hence the legal disputes do not involve applying the law to a particular case. The nature of the Court's activity logically affects the effect of its decisions. The legal regulation in this regard however is quite laconic. Pursuant to Article 151, para 2 of the Constitution, the act that has been found unconstitutional ceases to apply as of the day on which the decision comes into force. Jurisprudence posits two basic views regarding the effect of the Constitutional Court decisions. According to the first one, the Constitutional Court decisions that establish the unconstitutionality of an act of Parliament have a classic *res judicata* effect and a constitutive force. They invalidate the unconstitutional act of Parliament, which is similar to the repeal of acts by Parliament. According to the second view, the Constitutional Court decisions have no revoking effect regarding the unconstitutional act of Parliament; the latter is simply not applied. In most cases the Constitutional Court decisions contain an declarative order. In one of its notorious cases of 1995 however, the Court ventured into an interpretation of Article 151, para 2 of the Constitution and concluded that the invalidation of an act of Parliament by establishing its unconstitutionality is tantamount to repealing an act by Parliament in so far as both of them have an equivalent effect, namely the act concerned ceases to apply. One may hardly doubt that the Constitutional provision reflects the willingness to combine constitutionality review and Parliament in its capacity as the highest law-making body.

First, is non-application of an act of Parliament, i.e. the prohibition to apply an act of Parliament identical to repealing an act of Parliament? Does the Constitutional Court decision 'disable' an act of Parliament without repealing it? In my opinion Article 151, para 2 of the Constitution is not conclusive that non-application of an act of Parliament automatically repeals it. The difference between 'invalidate' and 'repeal' cannot be overlooked. The act of Parliament is rather invalidated in the sense that it ceases to apply but is not repealed.

Second, the provision of Article 151, para 2 of the Constitution appears to be the point of clash of two conflicting principles. On the one hand it incorporates the view that Parliament is the supreme body that adopts amends and supplements laws and thus denies the Constitutional Court the possibility to act as a legislature alongside Parliament. On the other hand this provision cannot ignore an intrinsic characteristic feature of the law, namely its binding force, and, thus, it would be a contradiction in

terms to hold that there may be laws of no binding force. Endorsing either view may be regarded as a follow up of the polemic on whether the institutional or functional approach is leading in building the concept of law, including public law. As far as the objective of constitutional review is concerned, it cannot conclusively support the view that non-application of an unconstitutional act of Parliament is identical to invalidating it and hence repealing it since an identical objective may be achieved by applying different constructs and taking different roads. It should furthermore be pointed out that situations where an act of Parliament does exist but does not function, i.e. it is not in force are not unfamiliar in the law. Those situations however are entirely different from the ones where an act of Parliament is found to be unconstitutional and hence cannot purport either interpretation of Article 151, para 2 of the Constitution. This is clearly a new type of a legal construct and it is normal to try to make it comprehensible through known legal concepts. These however are meant for other legal relations so at the end we would reach the inevitable conclusion of an original legal notion at hand.

The issue of the effect of the Constitutional Court decisions that establish the unconstitutionality of acts of Parliament has yet another interesting aspect. This is the so-called reviving effect where a formerly invalidated act of Parliament restores the repealed one. According to this construct, which was elaborated in a 1995 decision of the Constitutional Court, when an act of Parliament which repeals a former one is found to be unconstitutional, as a result the repeal of the former act is nullified and it starts functioning again. (Parenthetically, it appears that the act of Parliament is not repealed but is in some sort of latent state). Since the Constitutional Court decisions have in principle a constitutive force, the reviving of the repealed act of Parliament is actually part of this effect. Finally, the view that the Constitutional Court decisions which find an act of Parliament unconstitutional have a repealing effect gets us to the formula of their reviving effect. Much criticism has been voiced against this legal construct but the Constitutional Court decision that endorsed it is nevertheless a fact.

In recent years the Constitutional Court sparked the discussion by bringing in yet another new aspect. Namely it took the view that laws amending and supplementing acts of Parliament do not have, once into force, an individual leverage but are instead incorporated in the act of Parliament they amend or supplement, save for their transitional and final provisions. This is why unlike the act of Parliament to which it refers, the law amending and supplementing an act of Parliament does not bear a characteristic that could promote it to the level of a single or seperate act of Parliament and hence be an object of a constitutionality review. Therefore, since it is not the law amending and supplementing an act of Parliament but the act itself that is the object of constitutionality review, there is no need to restore the legal position existing prior to enforcing the law amending and supplementing an act of Parliament.

The view of the constitutive effect of the Constitutional Court decisions that establish the unconstitutionality of acts of Parliament came under attack when it was linked to the acquisition of property rights that were previously divested by law. The Constitutional Court decision in this case served as a ground for restoring property

rights and this largely contributed to reinstating the legal construct that an act of Parliament found to be unconstitutional simply ceases to apply; the consequences thereof are a matter to be dealt with by Parliament.

The Constitutional Court decisions establishing the unconstitutionality of acts of Parliament are binding for all state bodies and legal and natural persons. While they remain silent on the issue of challenged or violated rights, normally their legal force bears a more specific significance as compared to those Constitutional Court decisions that resolve legal disputes. The particularities concern not only the addressees to which they refer but also their function of acting as a defense and a sanction. Normally the declaratory effect of these Constitutional Court decisions concerns the preclusion of reviewing matters formerly being dealt with. The fact that the wording of a particular act of Parliament has been revised cannot on its own rule out the admissibility of a new motion for constitutional review. What matters is whether the motion concerns the same matter. A substantial revision in the wording of an act of Parliament however should be a sufficient ground for admissibility of a new motion for constitutional review since in my opinion Article 21, para 5 of the Constitutional Court Act refers to the norm contained in a particular provision rather than the wording of that provision.

The preclusion of a second review may nevertheless give rise to some more complicated cases. In principle the fact that an act of Parliament has been found unconstitutional on procedural grounds has not prevented the Constitutional Court from reconsidering that act of Parliament once it has been adopted by Parliament in the identical wording and dismissing the motion to declare it unconstitutional. The question is whether the Constitutional Court should discontinue the constitutional review once it establishes unconstitutionality on procedural grounds, although the Court is not bound by the grounds specified in the motion. In another recent case the Constitutional Court held that once it had ruled on the merits, a new motion to declare the same act of Parliament unconstitutional would be inadmissible due to the preclusion to reconsider a matter, although the former case was dismissed as a result of the separation of the judges' votes.

The preclusion to consider new motions regarding a matter on which the Court has issued a decision on the merits or an inadmissibility decision puts to the fore yet another question. (Let me say within brackets that the wording of Article 21, para 5 of the Constitutional Court Act is not precise. It reads that '[W]hen the Constitutional Court has ruled with a decision or with a resolution on the inadmissibility of a motion further motions regarding the same matter may not be lodged'. The definite article before 'inadmissibility' implies a reference only to resubmitting a motion, on which the Court has already ruled.) The Constitutional Court has recently dismissed a motion as inadmissible on grounds that the Ombudsman may challenge only acts of Parliament but not resolutions adopted by Parliament. However, if any other of the bodies entitled to approach the Constitutional Court refers the same matter to the Court, should it be dismissed pursuant to Article 21, para 5 of the Constitutional Court Act? Such a

consequence does not appear to be either fair or logical since in essence it restricts the right to approach the Constitutional Court. The Constitutional Court's case-law in this respect goes back to the days when the Ombudsman was not entitled to approach the Constitutional Court. On the one hand the preclusion to reconsider a matter guarantees stability of the relations, but on the other hand it cannot be interpreted identically to the preclusion regarding judicial decisions. The phrase 'a motion filed regarding an identical matter' apparently cannot be interpreted univocally. Next, where a motion is dismissed as unfounded on various grounds, it should be possible to file a new motion regarding the same matter once the omissions have been corrected. In my opinion the regulation is quite imprecise. It is formulated in a manner that is too general and allows a very formal application of the law. It is not clear for example why the founding of new facts could not pave the way for a new motion.

Indeed, Article 21, para 5 of the Constitutional Court Act refers only to the 'matter' of a motion and ignores the fact that motions may have various grounds. Dismissing a motion challenging the constitutionality of an act of Parliament on particular grounds does not preclude a new motion on the same matter but based on different grounds. The Constitutional Court may find an act of Parliament unconstitutional on grounds different from the ones referred to in the motion, but if a motion is dismissed, it cannot be assumed that the Court has considered all possible grounds.

As far as the interpretative decisions of the Constitutional Court are concerned, these do not differ from legal acts in form and content. Interpretation by the Court has a regulating effect and hence these acts are a source of law. What is more, the Court is competent to revoke a former interpretation and render a new interpretation of a constitutional provision.

Regarding the effect of the Constitutional Court's decisions with respect to time, the rules in the Constitution and the Constitutional Court Act are quite straightforward. The decisions enter into force three days following their publication in the State Gazette and, unlike acts of Parliament, it is impossible to determine another date of enforcement. Retroaction of Constitutional Court decisions is not possible, not even by way of exception. Their effect is exclusively *ex nunc*. Those being the general rules, certain exceptions are nevertheless possible. The Constitutional Court decisions which resolve legal disputes like the legality of an MP election or MP ineligibility or incompatibility enter into force on the day the decisions have been rendered but take effect *ex nunc*.

Endorsing the principle of the *ex nunc* effect of the Constitutional Court decisions certainly satisfies the requirement for stability of legal relations. At the same time however it displays a significant drawback, namely that any acts performed in the period between the entry into force of an act of Parliament and the establishment of its unconstitutionality remains in conformity with the Constitution and hence may lead to injustice.

The situation with the interpretative decisions of the Constitutional Court is somewhat more particular. The very nature of interpreting implies a retroactive effect. At the same time however Article 151, para 2 of the Constitution envisages that only Constitutional Court decisions that establish the unconstitutionality of an act or another resolution adopted by Parliament or the President have an *ex nunc* effect. Still, such a conclusion rests on the nature of the interpretation and its purpose, which are the determining factors.