

## CONSTITUTIONAL REVIEW OF INTERNATIONAL AGREEMENTS: COMPARATIVE LAW PERSPECTIVE

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**Abstract.** *After the Constitutional Court of Serbia dismissed the motion for assessment of constitutionality of the so-called Brussels Agreement in December a year ago, the issue of constitutional review of international agreements has been actualized. The aim of this paper is to provide a comparative analysis of legal provisions pertaining to the constitutional review of international agreements as envisaged in the following states: Austria, Germany, France, Spain and Serbia. The starting point is that the international treaty may be the subject matter as well as grounds of constitutional review, depending on its status in the national legal system. Further, we note that the constitutional review of international treaties has some specific features that distinguish it from the review of legislative or other legal act, particularly regarding the effects of the Constitutional Court decisions. Our intention is to analyze the legal provisions in our system by exploring this issue from the perspective of comparative law.*

**Key words:** *constitutional court, constitutional review, international agreement.*

### 1. INTRODUCTION

The principle of supremacy of the constitution is one of the fundamental principles of the rule of law. The supremacy of the constitution and its position as a *lex superior* and *lex fundamentalis* is ensured by establishing special authorities and specific procedures which guarantee the supremacy of the constitution. The Constitutional Court is one of such authorities, which is defined as “a special judicial institution whose main purpose and objective is the protection of the constitution” (Nikolić, 1995:177). In a broad sense, constitutional judiciary is involved in resolving certain constitutional issues in order to protect the constitution. In a narrow sense, constitutional judiciary may be defined as “a power of judicial bodies to set aside ordinary legislation or administrative acts if judges

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conclude that they conflict with the constitution” (Vanberg, 2005:1). Constitutional judiciary as a guardian of the Constitution is set as a counterweight to the possible arbitrary will or aspiration of the public officials to usurp the power and override the constitutional norm. Standing as an obstacle to autocracy and anarchy, constitutional judiciary thus elevates and improves the democratic system. Constitutional review is one of the most important constitutional court competences. It is “the core competence of the constitutional judicature in Europe” (Stojanović, 2014:76).

Constitutional review can be exercised as *a priori (ex ante)* or *a posteriori (ex post)*. It can further be categorized as concrete and abstract. Concrete judicial review will be applied with regard to actual legal cases that raise constitutional questions in the context of ordinary litigation. Abstract review entails specific procedures in a constitutional court (Kokott, Kaspar, 2012: 805).

Constitutional review is absolutely acceptable in terms of domestic law, when the constitutional court is required to review the compliance of laws with the constitution, or the compliance of by-laws with the legislation. Yet, should the same rule apply to international treaties? The aim of this article is to analyze the constitutional review of international treaties. First, we need to clarify that the term “*treaty*”, which refers to a written agreement between two or more states entered into on the basis of public international law.<sup>1</sup> In terms of abstract review, international treaty may be observed as the subject matter or grounds for abstract constitutional review, depending on its rank in the hierarchy of legal acts. If the international treaty is of a “higher” or the same rank as the constitution, it cannot be the subject to review. If the international treaty is of a lower rank than the constitution in the inner hierarchy, there is an issue whether the constitutional court is allowed to control its compliance with the constitution. Given that international treaties become part of the national legal system in the process of ratification, the prevailing opinion is that they may be the basis as well as the subject matter of constitutional review. After all, Hans Kelsen, the inventor of the constitutional judiciary and a strong proponent of the monistic theory, was not against the idea of constitutional review of international treaties. He believed that, if the validity of these acts should be controlled, it should be done by the constitutional court. But, Kelsen asked whether it was in the interest of state’s contractual capacity (*Vetragfähigkeit*) that “its” concluded international agreements should be put at a risk of cassation by the constitutional court<sup>2</sup>.

Constitutional review of international treaties is a kind of normative control which includes the constitutional court assessment of compliance of international treaties with constitutional norms. This kind of control includes some specific features that distinguish it from the constitutional control of legislative acts and by-laws. The distinctive features refer to authorized entities that may initiate the proceedings, the time when it is to be exercised, as well as the legal effect of the constitutional court decisions in case of unconstitutionality of international treaties. The circle of entities that may initiate this type of control is much narrower than the circle of entities that may initiate the “regular” constitutional dispute. Considering the moment when the control of constitutionality is exercised, we may distinguish *a priori* control and *a posteriori* control. Preliminary or preventive constitutional review is performed in respect of the acts which have not entered into force and become applicable yet. Such a control provides for eliminating the unconstitutionality of a legal act before it

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<sup>1</sup> Vienna Convention on the Law of Treaties art. 1 (a), May 23, 1969, 1155 U.N.T.S. 331

<sup>2</sup> Cited: H. Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, Ver in: Vučić, 1995:201

embarks on its legal life, thus contributing to the legal certainty and reliability of the legal system, which are the greatest advantages of the preliminary constitutional control. Bearing in mind that the “regular” control of constitutionality is primarily conducted in the form of *ex post* control, the constitutional review of international treaties is preferably implemented in the form of *a priori* or preventive control. In the proceedings of constitutional review of international treaties, the constitutional court decisions are of a special nature because the constitutional court cannot invalidate or abolish the provisions of the ratified international treaty.

## 2. AUSTRIA

We will start with Austria, which was the first state that established the Constitutional Court in 1920. The Constitutional Court of Austria is the “Guardian the Constitution”, and one of the most important institutions that ensure the supremacy of the Constitution. The most important competence of the Court is to review laws for their constitutionality and to repeal them in case of their unconstitutionality. This is the core of constitutional jurisdiction. This type of constitutional jurisdiction is essentially based on the Vienna School of Law, the most important proponents of which were Hans Kelsen and Adolf Julius Merkel. Therefore, this model of constitutional jurisdiction is known as the “Austrian” or “Kelsen” model. Constitutional review performed by the Constitutional Court is always *ex-post*, apart from exceptional cases.

Since 1964,<sup>3</sup> the Constitutional Court is also called upon to review the lawfulness (constitutionality and legality) of state treaties. Ordinary courts are not entitled to review the legality of, *inter alia*, international agreement or republications of international agreements. Only the Constitutional Court is empowered to exercise this function (Handl-Petz, 2011:67). In examining compliance of treaties with the law, the Constitutional Court may apply diverse provisions depending on the nature of the treaties. Furthermore, the Federal Constitution makes a clear distinction between several “types” of international agreements depending on the mode of their conclusion and approval. Thus, according to Art. 50 para.1 of the Federal Constitutional Law, political agreements and state treaties whose contents modify or complement the existent laws, as well as state treaties which modify the contractual bases of the EU, have to be approved by the National Council. Political agreements are agreements whose content touches upon the very existence of the state, its territorial integrity or its independence (Handl-Petz, 2011:63). They may simply be enacted as ordinary statutes, unless their character is political or unless they amend the existing legislation. In both cases, the approval of the *Nationalrat* is required. Further, if the *Nationalrat* regards the treaties, conventions or agreements as having constitutional effect, they must be enacted as constitutional statutes (Foster, 2003:59).

The Federal Constitution entitles the constituent states of Austria (*Land*) to conclude international treaties, within their own sphere of competence.<sup>4</sup> The executive branch may conclude an international treaty within its sphere of competence without approval of the Federal Parliament. Bearing in mind that the entire public administration is based on the applicable law, the executive branch is subordinate to the legislature and may only take

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<sup>3</sup> Article 140 a

<sup>4</sup> The Land can conclude the treaties with states, or their constitutional states, bordering on Austria (Art. 16 para 1 of the Constitution).

action on the basis of a legal authorization from the legislature. An agreement modifies a legislative act if its content contradicts the existing law (*gesetzändernd*). Another “type” of agreement is the one that supplements the existing law (*gesetzesergänzend*).

In exercising the constitutional review of international treaties, the Constitutional Court applies different rules, depending on the type of treaty. Article 140 of the Constitution applies to the treaties concluded with the sanction of National Council pursuant to Art. 50 and to law-modifying of law treaties pursuant Art. 16 para.1. Bearing in mind that some international treaties have the constitutional law status, the Constitutional Court also observed the conformity with such ranked international agreement. If the Court holds that a statute violates an international agreement with constitutional law status, it has to repeal that statute (Handl-Petz, 2011:68). Thereby, international agreements may be measured against other international agreements or domestic law.<sup>5</sup> Article 139 of the Constitution applies to reviewing the legality of executive orders issued by the federal or state authority. In doing so, Court may also examine whether an executive order is in violation of an international agreement (Handl-Petz, 2011:68). Article 139a stipulates that the Constitutional Court reviews the legality of publication of international agreements. If the Court finds a republication illegal, the treaty has to be abolished.

In the international treaty review proceeding, the applicant and the administrative authority that concluded the treaty shall be summoned for the hearing. The Federal Government is in charge of defending a treaty concluded by the Federal President, and the Governments of the Land is in charge of defending “their” treaties. The Constitutional Court decision shall be rendered (to the extent possible) within one month after the receipt of the request (Art. 59 para.1 Constitutional Court Act). If the provision is found to be unlawful, the decision should determine whether the full content of the treaty or certain parts are unlawful and/or not applied by the bodies in charge of implementing it. The decision shall also be served on the authority that concluded the treaty. Such a decision means that the treaty shall not be applied within the domestic legal system, but it does not affect the validity of the agreement under international law. Therefore, "Austria might incur international responsibility if the Constitutional Court declares a treaty to be inapplicable in the national legal system and Austria is unable to fulfill its international obligations arising under that treaty as a result" (Handl-Petz, 2011:69). The Constitutional Court is not in a position to invalidate international treaty that is against the law; it can only establish its unconstitutionality or unlawfulness.

### 3. GERMANY

The rank of international treaties in the German legal order is determined by the Basic Law (Article 59 para 2 GG). Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation require the consent or participation of the bodies responsible for the enactment of federal law. In case of executive agreements, the provisions concerning the federal administration shall apply *mutatis mutandis*.

Therefore, the international treaties have the rank of ordinary statutes. Their statute ranking may mean that pursuant to the rule *lex posterior derogat legi priori*, the subsequent

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<sup>5</sup> But, not against EU law.

legislative act can derogate the international treaty. However, the courts have proved ready to consider the international treaties as special acts which, pursuant to the rule *lex specialis derogat legi generali*, have primacy over the federal statutes (Frowein, 1996).<sup>6</sup> In addition, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*), as a body of vested with extraordinary authority, has a special responsibility for the implementation of international law in the national legal system. However, the application of international law should not jeopardize the principles of democracy, which is in the German constitutionalism interpreted as strongly dependant on the national political institutions.

Unlike the Austrian Constitution, neither the Basic Law nor the Act on the organization and procedure of the Federal Constitutional Court contain any explicit provisions on the jurisdiction of the Constitutional Court to exercise the constitutional review of international treaties. However, the Court confirmed that such jurisdiction is a result of an explicitly granted jurisdiction to review the conformity of legislation with the Constitution. "The practice of judicial review of international treaties by the Constitutional Court is based on the assumption that under Art 50 GG the content of the treaty will be transformed into German municipal law, which in turn must be applied and enforced by German courts and administrative authorities" (Rupp, 1977: 298).

Namely, the Constitutional Court decides in cases concerning the formal/procedural and material/substantive incompatibility of federal or state law with the Basic Law (so-called *abstrakte Normenkontrolle*). Then, if the Court considers unconstitutional a legislative act whose validity is relevant in its decision-making process, the proceedings shall be stayed and the decision shall be obtained from the Federal Constitutional Court if the matter concerns a violation of the Basic Law (so-called *Konkrete Normenkontrolle*). Finally, the Constitutional Court rules on constitutional complaints, which may be filed by any person alleging that one of his/her basic rights has been infringed by public authority (*Verfassungsbeschwerde*). Having in mind the German doctrine, Article 59 GG specifies that treaty law (*Vertragsgesetz*) is transformed into domestic law by obtaining the status of legislative acts (*Transformationslehre*). The Act which implements the international agreement in the domestic law must be signed by the Federal President and the competent federal minister. The constitutional review of these acts may be exercised before the completion of the process of ratification, i.e. before signing and promulgating the ratification act. Before the promulgation, it is considered that the law does not exist and the review has to be completed prior to promulgation, but after the ratification in parliament.

The Federal Constitutional Court, however, limited the scope of constitutional review to "self-executing" treaties, which are by their nature and purpose immediately applicable by German courts and administrative agencies. The treaties which contain purely political declarations of the contracting parties or otherwise belong to the political reality are not encompassed by this type of review (Rupp, 1977: 299).

In ratifying the treaties, the Federal Republic of Germany enters into international law commitments from which it could not easily withdraw if constitutional violations were established.<sup>7</sup> Bearing that in mind, we may discuss the specific nature of decisions in the proceedings of judicial review of international treaties. Overall, the Federal Constitutional

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<sup>6</sup> Cited in: Đajić, S. (2004: 126)

<sup>7</sup> 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12 from 12.09. 2012. Source: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html)

Court declares an unconstitutional act to be null and void. Nullity also applies retroactively and, legally speaking, it means that the act has never been enacted. In certain cases<sup>8</sup>, the Federal Constitutional Court merely declares a provision to be incompatible with the Basic Law and sets out a date after which it may no longer be applicable. However, the Constitutional Court is not in a position to invalidate the state treaty that has been found to be contrary to the law; it can only establish its unconstitutionality or unlawfulness.

#### 4. FRANCE

The 1958 Constitution of France established the primacy of international law. Treaties and agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to their application by the other party (article 55). Under the Constitution, international treaties are given a supra-legislative level, but the Constitution points to the importance of the principle of reciprocity. Thus, the treaties that may be ratified or approved by an Act of Parliament are as follows: peace treaties, trade agreements, treaties or agreements relating to international organization, treaties on the finances of the State, treaties modifying provisions which are the preserve of statute law, those relating to the status of persons and those involving the ceding, exchanging or acquiring of territory. They shall not take effect until such ratification or approval has been secured (article 53).

One of the major novelties of the 1958 Constitution refers to establishment of the Constitutional Council. The Council exercised "political review", for which reason it was detached from the court system (Stone, 1992: 94). The Council is in charge of reviewing the constitutionality of laws before their promulgation. "This form of judicial review was designed to enforce constitutional supremacy and to resolve disputes concerning the separation of powers." (Aucion, 1992: 444). The Constitutional Council conducted *ex ante* (*a priori*) control, which appeared as mandatory or optional control. Thus, the institutional acts (prior to their promulgation), the Private Members' bills (prior to being submitted to a referendum) and the Parliament rules of procedure (prior to coming into force) shall be referred to the Constitutional Council (Art. 61). All these are examples of mandatory control. Other Acts of Parliament, including the acts on ratification of international treaties, may be referred to the Constitutional Council before their promulgation.

If the Council found the law unconstitutional, it could not be promulgated. The Council decisions on the constitutionality are binding *erga omnes*. This procedure may be initiated upon referral from the President of the Republic, the Prime Minister, the President of either House, or sixty Members of the National Assembly or sixty Senators. The time limit for initiating the proceedings is not specified, but the review may definitely be initiated after signing an international treaty and before its ratification in parliament. The Constitutional Court must decide within one month, or eight days in urgent cases. If the Council considers that an international undertaking contains a clause contrary to the Constitution, there are two solutions: a) the draft treaty may be abandoned; or b) the Constitution has to be revised prior to ratification. This means that the declaration of unconstitutionality leads to amending the constitution, rather than to annulling the treaty.

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<sup>8</sup> This is often the case with tax law.

It is important to note that the Constitutional Council has always refused to introduce treaties into the corpus of constitutionality. The Council does not have to assess the conformity of a new treaty with the “stipulations of a treaty or international agreement” that is already in force (Decaux, 2011: 216). It is only where a new treaty aims directly at a treaty that has already been ratified that the Council has a duty to “determine the scope of the treaty submitted for examination according to international obligations that this treaty intends to modify or complete”.<sup>9</sup> This was the first time that the Council considered that certain clause “threatened the conditions that are essential to the exercise of sovereignty”.

## 5. SPAIN

The Spanish Constitution expressly determines the status of international treaties in the national legal system. Once officially published, validly concluded international treaties are part of the internal legal system (Article 96 para. 2). They are binding upon national courts and administrative authorities. International treaties can be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law. This indicates that international treaties have a higher status than statutes; thus, they cannot be modified by a national law. They cannot be derogated by posterior domestic laws, which has been confirmed by the Spanish Constitutional Court and doctrine (Sorian, 2008: 404). Except for the reciprocity clause, the Spanish constitutional provisions on the incorporation of treaties are very similar to those envisaged in the French Constitution.

Given their rank in the national law, international treaties must be in accordance with the Constitution. In Spain, the supervision of constitutionality of international treaties is under the jurisdiction of the Constitutional Court. Unlike France and Germany, the constitutional revision of international treaties could be exercised as a preventive (*ex ante*) and *a posteriori* review. Preliminary examination could be conducted at the request of the Government or either House (Art. 95 para 2 CE). The aim of this procedure is to avoid the inclusion of international treaties which are not in accordance with the Constitution. Once the request is submitted, the Constitutional Court invites the applicant and the other competent authorities to express their view on the matter within a period of one month. After the expiry of this period, the Constitutional Court delivers its declaration which is binding. The Constitutional Court may at any time request from the bodies that can initiate procedure, other natural or legal persons or other bodies of the State or the Autonomous Communities to furnish any clarifications, additional information and details that it considers necessary, extending the mentioned period to additional thirty days (Art. 78 para 2 Organic Law on the Constitutional Court). The Court has exercised its supervisory function in two cases. In the first case, the Court ruled on incompatibility of article 8B of the European Community Treaty introduced by the Treaty of the European Union (1992) with art. 13.2. of the Constitution.<sup>10</sup> It was concluded that Spain could adhere to the Maastricht Treaty if it

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<sup>9</sup> Decision of 9 April 1992

<sup>10</sup> The case was related to the incompatibility of article 8B of the European Community Treaty introduced by the Treaty of the European Union (1992) with Art. 13.2. of the Constitution pertaining to the attribution of passive suffrage in municipal elections to European Union citizens who are not Spaniards. In its declaration of 1 July 1992, the Constitutional Court admitted that the treaty provision was contrary to the precept of the

previously reformed Article 13.2. of the Constitution, which was done in August 1992. In the second case, the subject matter of examination was the Constitutional Treaty of the European Union, but the Court stated that it was not necessary to amend the Constitution (Declaration 1/2004).<sup>11</sup> If the Constitution is not revised, there are three possible solutions: to abandon the treaty, to renegotiate its conflicting clauses, or to table reservation (if possible).

International treaties fall under the general *a posteriori* system of constitutional review. An action for the assessment of constitutionality can be lodged (within three months from the publication date) by the President of the Government, the Ombudsperson (*Defensor del Pueblo*), fifty Deputies, fifty Senators and the executive collegiate bodies, and the Assemblies of the Autonomous Communities, insofar as the treaty affects their area of autonomy (Art. 32/33 LOT). Judgments handed down in the constitutionality proceedings shall have the force of *res judicata*, shall be binding on all public authorities and shall have consequences of a general nature from the date of their publication in the "Official State Gazette" (Art. 38 LOT). Yet, the effects of such judgment, when applied to international treaties, clash with international rules on this matter (Art. 27 and 46 of the Vienna Convention on the Law of Treaties). The Constitutional Court cannot declare the nullity of an international agreement. Precisely, it is void only for internal purposes. But, if the Constitutional Court issued a decree of unconstitutionality, this judgment would prevent ratification. In addition, *a posteriori* control protects both material (intrinsic) and formal (extrinsic) dimension of the constitutionality of treaties. The preventive control is practically exclusive to the intrinsic or material dimension, covering the extrinsic or formal dimension only of a treaty that intrinsically complies with the Constitution.

"Although according to International law a State cannot invoke its own provision in order to justify its failure to perform the treaty, the manifest violation of a domestic rule of fundamental importance concerning to conclude treaties can be invoked as invalidating its consent, eventually leading to nullity of the treaty" (Art. 27 and 46 Vienna Convention; Brotóns, 2003: 50).

## 6. SERBIA

The Constitution of the Republic of Serbia (2006) is the supreme legal act, which implies that all laws and other general acts enacted in the Republic of Serbia must be in compliance with the Constitution. The Serbian Constitution envisages that the generally accepted rules of international law and ratified international agreements shall be an integral part of the legal order in the Republic of Serbia. Ratified international treaties and generally accepted rules of the international law are part of the legal system of the Republic of Serbia. Ratified international treaties may not be in non-compliance with the Constitution.

The Constitution of the Republic of Serbia assigned a number of new competencies to the Constitutional Court of Serbia, which thus became one of the pillars of the Serbian constitutional system. The Constitutional Court is an autonomous and independent state body which protects constitutionality and legality, as well as human and minority rights

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Constitution, and the constitutional precept had to be reformed in accordance with the procedure set out in Art. 167 before granting parliamentary authorisation to conclude the treaty (Brotóns, 2003: 48).

<sup>11</sup> Source: <http://www.tribunalconstitucional.es/en/tribunal/competencias/Pages/Competencias.aspx>



and freedoms (Art. 166 Constitution). The constitutional review is the core competence of the Constitutional Court, which decides on the conformity of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties, and compliance of ratified international treaties with the Constitution. This means that international treaties may be a subject matter but also grounds for constitutional control. Bearing in mind that a ratified international treaty may not be in non-compliance with the Constitution, the Constitutional Court decides on its compliance with the Constitution. The current Constitution is the first to contain an explicit constitutional norm that anticipates this jurisdiction of the Constitutional Court. The procedure for assessing the constitutionality of the international treaty has the basic characteristics of the abstract constitutional review. An international treaty may be declared unconstitutional due to formal reasons (pertaining to the way in which they come about) or material/substantive reasons (pertaining to their content). The procedure for assessing the constitutionality is initiated on the basis of a motion submitted by an authorized entity or a decision to initiate the procedure. The motion may be submitted by state authorities, territorial autonomy or local self-government, and/or at least 25 members of parliament. The procedure may also be instituted by the Constitutional Court. Any legal or natural person has the right to an initiative to institute a proceeding for assessing the constitutionality and legality (Art. 168 Constitution). In the procedure of assessing constitutionality, the Constitutional Court is not constrained by the request of the authorized petitioner or initiator.

The constitutional review conceived in this way raises a number of questions. Bearing in mind Article 99 of the Constitution, which determines the competence of the National Assembly to ratify international treaties when the obligation of their ratification is stipulated by the law, it follows that there is no constitutional requirement that parliament has to ratify all international treaties. Hence, what is the subject matter of constitutional review: the international treaties that have been ratified by the National Assembly, or international treaties ratified in some other way? If we support the thesis that the term “*ratified international treaties*” applies only to those treaties that have been ratified by the National Assembly, it may lead to the wrong conclusion that international treaties which do not pass the parliamentary ratification process cannot be considered as an integral part of international legal order. Therefore, it is more acceptable to consider all treaties as international treaties, regardless of how they are ratified.

One of the most important issues about the constitutional review of international treaties regards the effect of the decision on establishing that the ratified international agreement is not in conformity with the Constitution. Bearing in mind the general effect of the Court’s decision, the laws or other general acts which do not comply with the Constitution, generally accepted rules of international law and ratified international agreement shall cease to be valid on the day the Court decision is published in the Official Gazette. Yet, does it mean that the court may suspend or annul the ratified international agreement if it is determined to be inconsistent with the Constitution? Clarification is given in the Constitutional Court Act. The provisions of a ratified international agreement that do not conform to the Constitution shall cease to apply in the manner provided by such international agreement or generally accepted rules of international law (Article 58). It can be concluded that the decision is declaratory in its nature; it implies that it can only state the observed unconstitutionality but it cannot annul the obligations arising from the treaty for the state. These issues are regulated in the relevant rules of international law.

Considering the existing jurisprudence of the Constitutional Court, no international treaty has been declared unconstitutional thus far. In fact, in such proceedings, the Court ruled either to dismiss or to reject the initiative. The most significant example of the Constitutional Court decision on this issue refers to the Brussels “First Agreement on Principles Governing the Normalization of Relations”, which was signed between the Government of Republic of Serbia and the Provisional Institutions in Priština.<sup>12</sup> The procedure for assessing the constitutionality was initiated by 25 members of parliament. The petitioner contested the constitutionality of this agreement as an international treaty on both formal and substantive grounds, given the fact that it was concluded with the “state entity which is represented as the Republic of Kosovo”.

However, the Constitutional Court considered the Brussels agreement to be “a political rather than a legal issue”, and refused to assess its constitutionality. The Court found that the “First Agreement” did not meet the requirements of ratified international conventions and applicable law of the Republic of Serbia, stating that: “It is not an act which falls under Article 167 para 1. of the Serbian Constitution; rather, it is by nature nearest to political *modus vivendi*, an intermediate solution termed for the decision about the final status of Kosovo and Metohija that in the light of the relevant rules of international law has no legal force, but it creates a political commitment in the spirit of the so-called soft law.” The petitioner is aware of the fact that this agreement has been made in an older, uncommon, so-called bilateral form of an international treaty, which was practiced until 19<sup>th</sup> century. But, it cannot be an obstacle to the assessment of its constitutionality. Specifically, the agreement has emerged as an informal written agreement between the participants of political dialogue in Brussels, and its content received external form of the general act of the Government, which is designated as “conclusion”, whereas by-laws are legally termed as “decision”.<sup>13</sup> The Agreement was initially the result of political and technical negotiations involving the mediation of the international community. It was later accepted by the competent authorities, the Government and the National Assembly<sup>14</sup>.

However, the constitutional review of international treaties could be implemented as a preliminary (*ex ante*) control. Namely, the Constitution of Serbia (Art. 169) established the assessment of constitutionality of legislative acts before their entry into force. At the request of at least one third of deputies, the Constitutional Court is obliged to assess constitutionality of the legislative act that has been passed but not promulgated by decree. This type of abstract review has been laid down in very restrictive terms and can only be initiated in respect of legislative acts, including the acts on ratification of international treaties; it is conducted only as a control of constitutionality, and not as a control of legality. These proceedings may be initiated only by a member of parliament, but not by other entities that may initiate *ex post* control. The precise time limit for initiating this review has not been explicitly determined but, bearing in mind Art. 169, it is clear that it may be initiated in a short period starting from the adoption of law to its promulgation. Prior review of constitutionality is

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<sup>12</sup> The EU-facilitated dialogue between Belgrade and Priština began in March 2011. Under the auspices of the EU and EU foreign policy chief Baroness Catherine Ashton, the leaders of Serbia and Kosovo signed “The First Agreement on Principles Governing the Normalization of Relations” in Brussels on 19 April 2013.

<sup>13</sup> Expert opinion of Ratko Marković presented at the public hearing before the Constitutional Court of Serbia, held on 24 June 2014. [http://www.pecat.co.rs/2014/06/zasto-je-briselski-sporazum-neustavan/Dissenting opinion of Ratko Marković](http://www.pecat.co.rs/2014/06/zasto-je-briselski-sporazum-neustavan/Dissenting%20opinion%20of%20Ratko%20Markovic)

<sup>14</sup> Dissent opinion of the judge Bosa Nenadić.

an urgent proceeding and the Constitutional Court shall assess the constitutionality of a legislative act within seven days. The Constitutional Court shall notify the President of the Republic on the fact that this procedure is initiated. Nevertheless, this shall not prevent the President to promulgate the law, even before the expiry of the seven-day term. After all, the Constitution stipulates that, if a law is promulgated prior to the decision on constitutionality, the Constitutional Court shall continue the proceedings as requested, in accordance with the regular procedure for assessing the constitutionality of an act. (Art. 169, para. 2).

The short period, during which the Constitutional Court is supposed to decide on the issue, may be a huge obstacle to proper assessment of constitutional review of international treaties. The seven days' time limit is inadequate for this type of control, which could be used in case of flagrant unconstitutionality, primarily in terms of conditions related to the formal review of constitutionality. At the same time, the Constitution provides that, if a law is promulgated prior to the decision on constitutionality, the Constitutional Court shall continue the proceeding but according to the regular proceedings governing the assessment of constitutionality of a legislative act. Therefore, the Constitutional Court decision has the effect of cassation instead of prevention (Marković, 2007: 33).

However, a clumsily designed preventive constitutional review would not be a complete failure if it would be affirmed in practice of the Constitutional Court in relation to the acts on ratification of international treaties. Most of its deficiencies could be significantly reduced. In that context, the provision of Article 169 para. 4 would be of particular importance as it stipulates that the proceedings for assessing the constitutionality may not be instituted against the act whose compliance with the Constitution was established prior to its entry into force. Consequently, if the Constitutional Court determines that the act complies with the Constitution, such a procedure cannot be launched when the act comes into force; "otherwise, the constitutional control will be evaluated twice on the same law" (Marković, 2006). This means that the explicit constitutional prohibition against initiating the subsequent constitutional review proceedings refers to the entire act, not only the provisions that were subject to previous constitutional control (Pajvančić, 2009: 218). It is obvious that the constitutional review of international treaties is optimal only as preventive control; once the constitutionality of the act on ratification of the international treaty is confirmed, it cannot be subsequently challenged due to the international credibility of the state. Thus, the conflict between the Constitution and international treaties can be avoided. In this case, the Constitutional Court decision is of declarative nature; it only declares the observed unconstitutionality but it cannot annul the obligation for Republic of Serbia arising from the international treaty. These issues are further regulated by the relevant rules of international law. Such a control would ensure compliance of international agreement with the Constitution and would preserve the contractual capacity of the state and the application of the rules *Pacta sunt servanda*.

## 7. CONCLUSION

Constitutional review is one of the most important competences of the Constitutional Court. It can be performed *ex ante* or *ex post*. *Ex ante* control pertains to the provisions which have not been put in place yet; *ex post* control pertains to the provisions which have already been established. Given that international treaties become part of the national legal system in the

process of ratification, they could be the subject matter as well as the grounds of constitutional review. Constitutional review of international treaties involves the assessment of their compliance with the Constitution, which is performed by the Constitutional Court.

Constitutional review of international treaties has been envisaged in many constitutions. Bearing in mind its “specific” weight, this type of review should have explicit constitutional character. It is performed as *ex post* control. However, if it is not explicitly identified as jurisdiction of constitutional courts, it could be conducted on the basis of existing regulations on the competence of these authorities. This type of abstract control indicates some specific characteristics that distinguish it from the abstract control of legislative acts or by-laws. These specific features refer to the authorized entities that may initiate the proceedings, the time in which it should be performed, as well as the legal effect of the Constitutional Court decision in case of unconstitutionality. We have analyzed the constitutional review of international treaties from the perspective of comparative law and noticed that there is no uniform solution to this matter. Instead, each state has decided to deal with this issue in its own way. In Austria, the constitutional review of international treaties has an explicit constitutional character but its exercise depends on the “type” of treaty and its rank in the national system. Bearing in mind that some international treaties have a constitutional rank, they cannot be the subject matter of constitutional control. It should be noted that the Constitutional Court is not in a position to invalidate the treaty that is against the law; it can only declare it unconstitutional or unlawful.

Unlike the Austrian Constitution, the Basic Law of Germany has no explicit provisions on the Constitutional Court jurisdiction to review international treaties. But, this authority is exercised by the Constitutional Court in practice, according to the implicit provisions contained in the German Constitution. In Germany, the constitutional review of international treaties is performed as *ex ante* control.

The abstract *ex ante* control is a typical characteristic of the French Constitution (1958), and it is performed by the Constitutional Council. These rules, with certain peculiarities, apply in relation to the international treaties. It must be emphasized that the Council could only declare the unconstitutionality of the treaty, which further leads to amending the Constitution rather than annulling the treaty.

In the Spanish legal system, the constitutional review of international treaties can be exercised as *ex ante* or *ex post* control. Whereas *ex ante* control covers the formal dimension of the Constitution, *ex post* control protects both the substantive and the formal/procedural dimension.

Pursuant to the Serbian Constitution, the Constitutional Court has jurisdiction to rule on the conformity of international treaties with the Constitution. The Court retained *a posteriori* control as a dominant form of control. According to Article 169 of the Constitution, there is also a possibility of instituting *a priori* control, which may apply to the act on ratification of international treaty. The solutions provided in the Serbian legal system are very similar to those provided in Spain. In case of unconstitutionality of the international treaty, the Constitutional Court decision has a declaratory effect, which is also the case in the comparative systems.

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## KONTROLA USTAVNOSTI MEĐUNARODNIH UGOVORA IZ UPOREDNOPRAVNE PERSPEKTIVE

*Princip suprematije ustava je jedan od osnovnih principa na kojima se temelji pravna država. Suprematija ustava i njegovo pozicioniranje kao lex superior i lex fundametalis potvrđuje se ustanovljavanjem posebnih postupaka u kojima će prioritet ustava biti obezbeđen. Jedan od takvih organa jeste ustavni sud. Rešavanje ustavnih sporova o ustavnosti normativnih akata je najvažnija nadležnost ustavnih sudova. Reč je o kontroli ustavnosti, a u izvesnim državama i kontroli zakonitosti normativnih akata u skladu sa ustavom.*

*Imajući u vidu da međunarodni ugovori ratifikacijom postaju deo jedinstvenog unutrašnjeg pravnog poretka, postavlja se pitanje da li međunarodni ugovori mogu biti osnov i predmet kontrole. Posmatrajući navedeno pitanje iz uporedne ustavne perspektive možemo dati potvrđan odgovor.*

*Kontrola ustavnosti međunarodnih ugovora je vrsta normativne kontrole, koja podrazumeva ocenu saglasnosti međunarodnog ugovora sa ustavnom normom od strane ustavnog suda. Kontrola ustavnosti međunarodnih ugovora pokazuje neka posebna obeležja koja je razlikuju od kontrole ustavnosti zakona i drugih opštih akata. To se odnosi na krug subjekata koji mogu da pokrenu ovaj postupak, vreme u kome se vrši ova kontrola, kao i na dejstvo odluke ustavnog suda u slučaju neustavnosti međunarodnog ugovora. Krug subjekata koji mogu da pokrenu ovu kontrolu, po pravilu, znatno je uži u odnosu na krug*

*subjekata koji može da pokrene redovni ustavni spor. Kontrola ustavnosti međunarodnih ugovora može se sprovesti u vidu naknadne i prethodne kontrole, međutim prethodna kontrola može biti posmatrana kao poželjan vid kontrole. Odluka koju ustavni sud donosi u slučaju neustavnosti ugovora, takođe je posebne prirode jer ustavni sud kao posebna pravosudna institucija ne može da poništava ili da ukida odredbe zaključenog međunarodnog ugovora.*

*Kontrola ustavnosti međunarodnih ugovora sadržana je u mnogim ustavnim aktima. Međutim, ukoliko nije izričito utvrđena kao nadležnost ustavnih sudova može se sprovesti na osnovu postojećih propisa o nadležnosti ovih organa. Imajući u vidu "specifičnu" težinu koju ova kontrola nosi sa sobom preporučljivo je da ima eksplicitan ustavni karakter, kao što je to slučaj u Austriji, Francuskoj, Španiji. U Nemačkoj, Osnovni zakon nema takvu izričitu odredbu, ali to nije bila prepreka da Savezni ustavni sud sprovodi ovakvu kontrolu u praksi. U posmatranim sistema kontrola ustavnosti ima posebna obeležja koja su karakteristična za svaku državu. Međutim, zajednička odlika svih sistema jeste da odluka ustavnog suda u slučaju utvrđene neustavnosti može delovati samo unutar datog nacionalnog sistema, ali da ne može automatski voditi anuliranju zaključenog međunarodnog ugovora.*

*Ustavom Srbije (2006) prvi put je eksplicitnom normom utvrđena nadležnost Ustavnog suda da odlučuje o ustavnosti međunarodnih ugovora. Postupak ocene ustavnosti je izvorno postavljen kao naknadni, ali postoji mogućnost primene preventivne kontrole. Istina, preventivna kontrola je vrlo nesporno Ustavom utvrđena, ali ne bi bila potpuni promašaj kada bi se afirmisala u odnosu na zakone o ratifikaciji međunarodnih ugovora. Uporedna iskustva država poput Austrije, Nemačke, Francuske ili Španije mogu biti od pomoći u tome.*

**Ključne reči:** *Ustavni sud, kontrola ustavnosti, međunarodni ugovor.*