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THE ROLE OF THE CONSTITUTIONAL COURT IN THE PROTECTION OF THE HUMAN RIGHTS

The protection of rights can be divided into two categories:

1) protection against general rules adopted by legislative power or issued by the executive branch (control of the constitutionality of acts by the constitutional court);
2) protection against specific violation of rights—individual act or failure to act of the executive power.

1.

Control of the constitutionality of acts by the Constitutional Court in Macedonia has a tradition of almost half a century. The first Constitutional Court of Macedonia was established in 1963, in an already established political system of unity of power. However, the theory emphasizes that, compared with the experiences of other countries that have cherished this political system, the establishment of the institution of the Constitutional Court, at this time was a real constitutional innovation and achievement.

New Constitution of the Republic of Macedonia was adopted in 1991 as a result of the effort to make clear break with the past. However, Constitution of Republic of Macedonia from 1991 continues the model of control of constitutionality of acts by Constitutional court. The new political system, based on the principle of separation of powers, was condition sine qua non for creation of new rules and provisions about the Constitutional Court. The Constitutional Court as an authentic and independent institution, according to the idea of the founding fathers, is modeled to be a defender and promoter of the principle of constitutionality and legality. The constitutional provisions of Constitutional Court are grouped in the separate section of the Constitution named "Constitutional Court", indicating that it is a institution separate from the regular judicial system, an institution created for protection of constitutionality and legality of the constitu-

tional order in Macedonia and that is is treated as a civilizational value without whose existence, the rule of law and consistent application of the principle of separation of powers, cannot be ensured.

1.1

Even though conceived to represent an authority that would help the transformation from a "dying" state into a legal state and an authority that would defend the supremacy of the Constitution, the constitutional norms about Constitutional court leave us with the impression that the Macedonian constitution maker has not fully expressed himself. Namely, the matter that relates to the Constitutional court of Republic of Macedonia is *materia constitutionis*, but not *materia legis*. Opposite to the comparative experiences stated in the literature on the constitutional courts, where the principal questions bound to the composition and jurisdiction of this authority are regulated with the constitutions and further elaborated in a law, the Macedonian constitution maker has excluded this possibility. Today the article 113 of the Constitution provides that the mode of operation and procedures at the Court are determined with an Act by the Court. This provision provides explicit inability to regulate the matter with a law, and the legal consequence from its provision in the text of the Constitution, leaves a possibility for such exceptionally important matter to be regulated only by the Rules of procedure. In this context, Treneska-Deskoska shall underline that "the lack of a constitutional grounds for passing a Law for the Constitutional court, leaves to the constitutional judges themselves to decide about many important questions for their own position which is unacceptable since it may lead to infringement of the principle of check and balance" (Treneska-Deskoska 2010: 28). Therefore, it is right to determine that such unfortunate constitutional solution leaves room for the biggest fear in the modern constitutionalism to show up in the Republic of Macedonia in the conditions of a new separation of powers, and transformation of the Constitutional Court in a lawmaker or a constitution maker.

1.2

The principle function of the constitutional court is the normative control of the general legal acts. The basis for this function is the Constitution.

The comparative constitutional experience shows that the subject of control of constitutionality (judicial review) may be: the constitutions of federal units, laws, international agreements and other legal acts (rules of procedure of legislative authorities, regional ordinances or decrees with the force of law). Constitution of Republic of Macedonia affirms that the Constitutional court is competent to decide on the conformity of laws with the Constitution, on the conformity of the collective agreements and other regulations with the laws and the Constitution, in the framework of the normative control of constitutionality of law. The review

of these acts is abstract and repressive. The dispute that is heard by the Constitutional court is one between to legal norms (the constitutional norm and the one of the act that is subject to review), and not between two legal subjects. The decisions of the Constitutional court are final and enforceable. They have an *erga omnes* effect and cannot be appealed.

The legal analysis of the constitutional solution that refers to the normative control of constitutionality of acts, points to the conclusion that the constitution maker has not been consistent to the model of enumeration when the acts that may be subject of review were stated, but has used the term "other regulations (other acts)" (Constitution of the Republic of Macedonia art. 110). This formulation is too broad and refers to the acts of the units of self-government (statutes, decisions, conclusions of the municipal council), bylaws passed by the executive, acts of organizations and institutions that perform public authorizations, acts of educational, health and other institutions and so on. All of the above may be subject to constitutional review, but only if they are general legal acts i.e. if they affect an undetermined number of persons. But the evaluation whether one act is general or not is in power of the Court itself. The Constitutional Court, however, misused the opportunity to declare itself competent to decide on constitutionality of many act. One obvious example is the decision when the Constitutional Court declared itself not competent to decide on the constitutionality of the Conclusion of the Assembly that there is no constitutional base for Parliament to issue a notice for referendum for pre-elections. The explanation of the Court was that the Conclusion of the Assembly was not general act but an act that regulates internal relation. However, the Court did not take into a consideration that the act itself had an erga omnes effect. Although the constitutional solution leaves space for all the legal acts referring to imprecise number of persons to be subject to control of the constitutionality, the practice of the Macedonian Constitutional Court develops the caravaggism, and its decisions represent a reflection of continuous shadow play. The manoeuvring space provided to the Constitutional Court of the Republic of Macedonia by the constitutional formulation "other regulations" enables it different interpretation of the constitutional norm and possibility for it to independently determine whether one legal act has an effect on imprecise number of persons and whether it can be subject to control of constitutionality.

Contrary to the previous case, in 2006 and 2010, the Court has expressed determination in the performance of the function "guardian of the Constitution" via two of its decisions in which the Court established unconstitutionality of some provisions of the Rule of Procedure of the Assembly of the Republic of Macedonia[1]. The above-mentioned decisions point out that the Constitutional Court

[1] U. No 28/2006 and U. No 259/2008 In the Decision from 2006, the Court established unconstitutionality of the procedural resolution according to which the public is excluded

did not have a dilemma whether the Rules of Procedure, as an act of the work of the Assembly of the Republic of Macedonia, represent general legal act. In both cases, the Court has positioned itself as the most adequate constitutional actor who, placed in the centre of the constitutionalism, protects the constitution and ensures that all branches, and in the above-mentioned two cases the legislative authorities, are within the frames of the established constitutional limits.

1.3

The question for the control of constitutionality of the international agreements is another issue about the Constitutional court. Namely, unlike systems that accept the "model of transformation" and which are facing the challenge to decide when to realize the procedure for constitutional review of international norms—when the process of ratification is finished and the international treaty becomes effective or in the previous phases of this procedure, the Constitutional court of Republic of Macedonia faces the dilemma if it is competent to review international agreements. Regarding this issue, the Constitutional court has been inconsistent. In 1996 the Court has determined that the constitutional review of international agreements and treaties, is realized by the Assembly of Republic of Macedonia in the procedure for their ratification (U. no. 230/1996), but five years later, in one of its decisions the court determines the possibility to review the formal and material constitutionality of the law for ratification of the international agreement, since it becomes part of the domestic legal order (U. no. 140/2001).

The demand for harmonization and monolithism of the legal order imposes the need for specific conformity of the law for ratification with the Constitution. Macedonian scholars stress the possibility of realization of preventive constitutional review of the international agreements similar to the examples of many countries and through continued practice of the court for filling the constitutional void.

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from the work of the Assembly by majority votes of the MPs and revokes the part "by majority votes of the total number of MPs" from Article 231, paragraph 2 of the procedural provision. In the explanation of the Decision U. No. 259/2008 the Constitutional Court stated that "when the Rules of Procedure established that a discussion is opened at a session of the Assembly, every MP must have a right to participate in the discussion, whereupon the MP who is not a member of an MP group cannot be deprived from this right. Considering the above-mentioned and accepting the concept of the Rules of Procedures for introduction of MP groups and determining their position, the Court considers that the MP elected through direct elections and to whom the citizens had transferred the sovereignty cannot be deprived of the possibility for him/her to express his/her opinion in terms of the law for which general discussion had not been held, just because he/she is not a member of an MP group"

1.4

The thesis that the constitutional norms for the Constitutional court are too modest, is argumented with the fact that the constitution maker left to the Rules of procedure to regulate the issue for initiation of the procedure for control of constitutionality of law. Namely, it must be underlined that the issue of right of initiative for challenging the constitutionality of a law is extremely important. The authorities who initiate the procedure at the constitutional courts are always precisely determined in the constitution or the constitutional law and they depend on the type of procedure that is to be realized at the court. In the comparative constitutional law the mechanism of constitutional review at the constitutional courts is activated upon proposal by specific state organs, most commonly by the legislative, the executive, the ombudsman or upon the proposal by the regular or the constitutional courts. The theoretical rationale for the said solutions should always be found in the intention of the constitutional court to be created as a final arbiter solely in legal disputes. On the other hand, the inclusion of a constitutional norm that authorizes the citizens to be initiators of the procedure for constitutional review hides the danger for them, as participants in a specific political process, to transform the court in an organ for political decision making, which again actualizes the possibility of judicial activism. In the context of the issue for activation of the mechanism of constitutional review, it is extremely important whether the procedure that is to be realized is part of abstract or concrete review. In case of concrete review, the court may be the only initiator of the procedure for constitutional review, which has a previous issue to solve about the conformity of the legal norm with the Constitution. On the other hand, in case of abstract review, the citizens too may be initiators of this procedure, however the court is the one who is going to initiate the procedure for control of constitutionality of laws.

In Constitution of the Republic of Macedonia from 1991, there is no provision about who may be the authorized initiator of the procedure for review. Such important issue is left to be regulated with a bylaw. The Rules of procedure of the Constitutional court of Republic of Macedonia in Article 12 provides that everyone may file an initiative for the intitiation of the procedure for constitutional review of the laws and review of other bylaws. Such solution for the starting of the mechanism of constitutional review, places the court in a position to independently decide whether to initiate the appropriate procedure. In this context, the provision of article 47 of the Rules of procedure must be underlined, referring to the stopping of the procedure at the constitutional court, in accordance to which if after the determination of the state of facts on the hearing, the basis for the doubt of the constitutionality and legality drops off, the court will stop the procedure. The said solution implicitly induces the conclusion that there must be doubt in the constitutionality and legality at the Constitutional court in order to initiate a specific procedure.

Namely, if the Constitution or a law would regulate which subject may initiate the procedure, the court would be bound to specific action upon the filed request from the authorized initiators. Even though this cannot be determined from the practice of the Constitutional court, but in the case of Republic of Macedonia the court has a strong mechanism for political maneuvering exactly because the court itself passes the final decision for initiation of the procedure for constitutional review, initiated by any citizen.

Such normative positioning of the Constitutional court in Republic of Macedonia leaves the impression that this authority is one of the most powerful in the system of organization of power. Still, even though the practice of this authority to decide upon numerous constitutional issues, especially from 1991 onwards, cannot be neglected, the facts on the influence of this authority in the system show a completely different picture. Namely, the practice of the Constitutional court leaves the impression that it restrains from self-initiated procedures. The reason for this is the need of the court to protect itself from the qualifications of a second legislator.

2.

The second aspect (protection against specific violation of rights –individual act or failure to act of the executive power) is important, not only because such instruments are powerful mechanism for protection of human rights, but because these instruments can also be used as an trigger to initiate (ex officio) procedure for the control of the constitutionality of the general legal act, which was the basis for the adoption of the act by which the violation is committed.

Rudiger Zuck, points out some basic elements of the definition of a constitutional complaint. These are:

1) The constitutional complaint is a specific remedy, it is not a fundamental right per se;
2) The constitutional complaint is a legal instrument for the protection of human rights;
3) It is a legal instrument aimed at public authorities (acts of the legislative, executive and judiciary);
4) Can be used as a means to protect their own, and not someone else's rights;
5) The statement of the applicant of the constitutional complaint that his/hers right has been violated is sufficient to use this instrument (more about the definition read: Тренеска-Дескоска 2006: 270).

Constitution of the Republic of Macedonia, provides for limited jurisdiction of the Constitutional Court to decide on protection of only a certain number of

rights including: rights and freedoms of man and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity and the prohibition of discrimination on the basis of sex, race, religious, national, social or political affiliation (Constitution of Republic of Macedonia art. 110–113). From the stated solution we get the impression that the basic intention of the „founding fathers" of the Macedonian Constitution, was to focus the Constitutional Court on the control of the constitutionality and legality of general legal acts. By such regulation, the constitution maker has left the citizens without a possibility for protection of their rights and freedoms (except for the abovementioned) by the Constitutional Court, in circumstances where they are affected by individual legal acts and therefore took away the possibility of an additional mechanism for detection of unconstitutional legal acts in the system.

The Rules of Procedure of the Constitutional Court of the Republic of Macedonia in part IV under the title "Procedure for protecting the rights and freedoms of Article 110 paragraph 3 of Constitution of the Republic of Macedonia" or precisely through 7 Articles, determines the jurisdiction of the Constitutional Court concerning the protection certain rights and freedoms. The solutions of the Rules of Procedure provide that "every citizen who deems that an individual act or action violated a right or freedom set out in Article 110 paragraph 3 of the Constitution, may require protection by the Constitutional Court within 2 months from the date of delivery of the final or effective individual legal act, or from the day of learning of the taken action which made a breach, but not later than 5 years from the date of its taking" (The Rules of Procedure of The Constitutional Court art. 51). The said provision is important to be analyzed from two aspects: 1) the Constitutional Court manifested extremely restrictive approach to the protection of the already limited number of rights and freedoms, which is evident since the Rules of Procedure are limited to the term citizen, and not "human" as the Constitution provides, and 2) probably fearing the increased workload, the Court provides an additional instrument which proportionally increases the possibility of not to act upon such cases—subjective and objective deadline.

Further, the Rules of Procedure provide that in the application the reasons must be stated for which protection is sought, acts or activities by which the rights and freedoms have been violated, the facts and evidence on which the application is founded, and other information necessary for the decision of the Constitutional Court. The application shall be delivered for response to the authority that passed the individual act or the authority that took the action by which the rights and freedoms are violated, within 3 days of submission. The deadline for response is 15 days (The Rules of Procedure of The Constitutional Court art. 53). The Constitutional Court decides upon the protection of human rights after a public hearing. The parties to the proceedings, the Ombudsman and if necessary other

persons, bodies or organizations are summoned at the public hearing. A public hearing may be held even if one of the participants in the procedure or the Ombudsman is not present, but if properly summoned (The Rules of Procedure of The Constitutional Court art. 55). By the decision for protection of the freedoms and rights shall be determined whether there is a violation and based on that, the Court will overturn the act, prohibit the action that caused the violation or reject the application (The Rules of Procedure of The Constitutional Court art. 56). All of the above is also the reply to how far the Constitution and the Rules of Procedure have gone in terms of the usual definition of a constitutional complaint.

The experience of implementation of constitutional review in other countries that have accepted the above legal remedy determines that the biggest workload of constitutional courts and the largest percentage of decisions made by the courts concern the procedures upon the instrument of constitutional complaint. That is not the case with the Republic of Macedonia. The Constitutional Court of the Republic of Macedonia receives relatively few applications for the protection of freedoms and rights, and statistics indicate that the Court mostly issues a decision for dismissal upon different grounds such as: lack of jurisdiction to decide on protecting the rights of that are not provided with the Constitution (Decision U. br. 29/97), decides only when it comes to protecting one's own and not someone else's rights (same Decision U. br. 29/97), lack of jurisdiction to decide upon violation by an act that is not final or effective (e.g. Criminal indictment as in Decision U. br.168/97), lack of jurisdiction to decide upon the rights and interests of the party in a particular case (Decision U. br. 23/2012, Decision U. br. 89/2012). For a small number of applications the Constitutional Court has decided in merito (e.g. Decision U. br.84/2009 and Decision U. br155/2011).

Finally, the question arises which elements have to be taken into consideration in case of extension of the jurisdiction of the Constitutional Court, through the introduction of the instrument constitutional appeal. In this context, the following issues should be considered: Scope of the rights that will be subject of protection under this instrument, Entities that shall have the right to initiate proceedings, Acts against which this special remedy may be filed, Conditions for admission.

Finally, from all of the stated above it may be concluded that the biggest weakness of the competence of the Constitutional Court of Macedonia is its very limited scope of rights which are protected. The need for additional instrument for the protection of rights and freedoms is never excluded and that if the powers of the Constitutional Court of the Republic of Macedonia are expanded, it should be considered to implement the constitutional complaint. It should be done with extreme care and only upon previous analysis of the normative solutions and experiences from countries that practice this instrument.

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Summary

The Role of the Constitutional Court in the Protection of the Human Rights

„Human Rights Protection by the Constitutional Courts- case study of Republic of Macedonia" is a paper that presents basic conclusions on the development of the principle of constitutionality and protection of the human rights by the constitutional courts.

The protection of rights can be divided into two categories: 1) protection against specific violation of rights –individual act or failure to act of the executive power and 2) protection against general rules adopted by legislative power or issued by the executive branch (control of the constitutionality of acts by the constitutional court)

The Constitutional Court should be one of the principal guardians of the human rights. The wave of democratization and accepting the idea of human rights protection, actualized the need for protection of the human rights by the Constitutional courts. This paper will analyze the constitutional frame of the human rights protection by the Constitutional Court of Republic of Macedonia, and the need for Constitutional complaint as a basic instrument for this protection. The purpose of this paper is to point the weakness of the competence of the Constitutional Court of Macedonia- its limited scope of the rights which are protected and the insufficiency of the instrument of Constitutional complaint.

This paper will also analyze one of the basic competences of the Court – the conformity of the laws with the Constitution and conformity of the collective agreements and other regulations with the Constitution and the laws. The competence of the Constitutional court to decide on constitutionality and legality is very important for protection of rights as well. Finally, this article will point the weaknesses of the constitutional and legal provisions as well as to the problems in the practice of the Court, which should provide protection of the rights.