

CONSTITUTIONAL COMPLAINT AND MACEDONIAN CONSTITUTIONAL COURT – regulation issues and its reflection in practice -

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Abstract

The paper will deal with the deviations from the legal regulations of the system of protection of human rights by the Macedonian Constitutional Court, including the non-existence of a special law that will regulate the status and organization of the Court. Without going into detailed analysis, this paper, through numbers, will present the poor practice of the Macedonian Constitutional Court, which is unequivocally a direct consequence of the shortcomings that will be identified in the paper.

Key words: *Constitutional Court, constitutional complaint, human rights, constitutionality, legislation.*

I. INTRODUCTION

The Macedonian Constitutional Court, established with the 1991 Constitution, is the successor of the institutional structure of the constitutional judiciary that existed under the socialist Constitutions of 1963 and 1974. In determining the principles for its organization and functioning, the authors of the 1991 Constitution deviated very little from the basic rules of operations of the Constitutional Court, which were defined by the previous socialist constitutions.¹

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¹Art. 233-240 of the SRM Constitution, Official Gazette SRM, no. 15/63; Art. 419-438 of the SRM of the Constitution, Official Gazette SRM, no. 7/74. An exception of the rule for organization and functioning of the Constitutional court, established in both Constitution 1963 and 1974, are provisions for the specialized law for Constitutional court - they are not applied in the 1991 Constitution.

The new Constitution even made a step forward, by re-establishing the basic competence for protection of human rights, which was removed from the Macedonian legal order with the Constitution of the Socialist Republic of Macedonia in 1974.²

Yet, in terms of the scope of protected rights, the 1991 Constitution implemented a modified variation of the competence that existed in the 1963 Constitution. The revival of the procedure for the protection of constitutional rights is a positive step, but it is only a partially positive segment - the model of complaints for constitutional protection of human rights, established in the system for control of constitutionality and legality, can be defined as a separate, unconventional system which, from a comparative point of view, essentially deviates from the basic rules for regulating this constitutional matter.

The specificity of the Macedonian model for constitutional court protection of human rights was recently detected by a group of TAIEX experts.

In the 2018 report of the TAIEX Expert Mission for protection of human rights by the Constitutional Court of the Republic of Macedonia, led by Profesor Jasna Omejec, it is noted that „compared to most European countries, including two other former Yugoslav republics, which also gained independence and sovereignty in 1991 (Croatia and Slovenia), the constitutional justice system in Macedonia differs in two aspects“.³

- The Constitutional Court is empowered to protect a limited number of individual constitutional rights and
- The constitutional provisions for the Constitutional Court are not elaborated in a separate law or a constitutional law.⁴

In this paper, the authors will emphasize several points concerning key normative deviations of the Macedonian Constitutional court system for the protection of human rights and the unsuccessful attempts to overcome them.

II. THE RELEVANT PROVISION THAT REGULATES THE HUMAN RIGHTS PROTECTION SYSTEM

Relevant direct legislation:

- Art. 110 par. 3, item 1 of the Constitution;
- Art. 113 of the Constitution;⁵

² The Republic of Croatia was the only member state of the former joint state of SFRY, which decided, in its Republic Constitution of 1974, to continue the normative continuity of the legal existence of the competence for protection of human rights. Art. 412, par. 6 of the Constitution of SR Croatia, Official Gazette SRC, br. 8/74.

³ Report of the TAIEX Expert Mission for Protection of Human Rights by the constitutional Court of the Republic of Macedonia, Zagreb, 2018, 12.

⁴ *Ibid.*

⁵ Constitution of the Republic of Macedonia (Official Gazette of the RM, no. 52/1991). Amendment I и II from the Constitution of Republic of Macedonia (Official Gazette of the RM, no. 1/1992), Amendment III from the Constitution of Republic of Macedonia (Official Gazette of the RM, no. 31/1998), Amendments IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII и XVIII from the Constitution of Republic of Macedonia (Official Gazette of the RM, no. 91/2001), Amendment XIX from the Constitution of Republic of Macedonia Official Gazette of the RM, no. 84/2003), Amendment XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX и XXX from the Constitution of Republic of Macedonia (Official Gazette of the RM, no. 107/2005), Amendment XXXI from the Constitution of Republic of Macedonia Official Gazette of the RM, no. 3/2009), rectify an error on Amendment XXXI from the Constitution of Republic of Macedonia (Official Gazette of the RM, no. 13/2009),

- Art. 51-57 of the Rules of Procedure of the Constitutional Court.⁶

Relevant indirect (derived) legislation:

- Art. 112 of the Constitution.

1. Detecting the fundamental weakness

1.1. *Immediate regulation*

Based on the summary of the relevant provisions regarding the constitutional complaint system, the 1991 Constitution has no provisions that stipulate procedural conditions, **the significant assumption for initiating the modality for protection of the human rights** - norms that have higher legal power than the laws and other legal acts.

Article 113 of the Constitution delegates to the Constitutional Court the normative authority in its Rules of Procedure, except for the manner of work, which is the basic task of by-law, to regulate the course of the procedure, including the legal remedy for initiating the procedure for the protection of human rights. **The Constitution allows the Rules of Procedure of the Constitutional Court to be a legal act with special authority** - the Constitutional Court has this authority (coming from the Constitution) to independently regulate its manner of work.

Thus, the Constitution allows the Constitutional Court absolute freedom in shaping not only the provisions of its jurisdiction but also those provisions which refer to the entities authorized to initiate the procedure for the protection of human rights, norms with constitutional or legal force, when compared to other legal system.⁷

The regulation of the manner of work, the type of legal procedures, the persons authorized to initiate the decisions of the Constitutional Court and other procedural and material aspects, are all left to incomplete and vague provisions of the Rules of Procedure of the Constitutional Court itself.

The protection of human rights by the Constitutional Court in the Macedonian legal system is a rarity in terms of comparative law. The scope of the rights for which special constitutional court protection is provided is regulated by a constitutional norm, Art. 110 par. 1 item 3. In this segment, in a comparative sense, the legal system does not deviate from the principle of regulating the scope of protected rights with a constitutional norm. However, normative inconsistency and deviation are ascertained in terms of which constitutional rights protection from the Constitutional Court can be requested.

However, normative inconsistency and deviation are ascertained in terms of which constitutional rights protection can be requested of the Constitutional court.

According to the Constitution, the Constitutional Court is competent to protect only three rights, although the basic legal act prescribes a total of 41 rights. Hence, the Constitutional Court protects the freedoms and rights of man and citizen that refer to **the freedom of belief, conscience, thought and public expression of thought, political association and action and**

Amendment XXXII from the Constitution of Republic of Macedonia (Official Gazette of the RM, no. 49/2011), Amendment XXXIII, XXXIV, XXXV and XXXVI from the Constitution (Official Gazette of the RM, no. 6/2019).

⁶ Rulebook of the Constitutional Court, Official Gazette of RM, no. 70/92.

⁷ Дејан Савески. „Процесно-правните аспекти на заштитата на човековите права пред Уставниот суд на Македонија.“ Списание Визион бр. 33, 2019, p. 193.

the prohibition of discrimination of citizens on the grounds of sex, race, religion, national, social and political affiliation.

The protection of human rights rests on famous Art. 110 par. 1 item 3, which enable the Constitutional Court to specify the conditions and the manner of the realization of the three rights with a provision from the Rules of Procedure. Among other things, this assertion refers to legal acts, material actions and omission of public authorities as an object of constitutional control initiated through the request for protection of human rights.

Thus, the Constitutional Court further strengthened its position within the legal system, because the constitutional authority left enough space through the application of the principle of discretion to choose which individual acts it can treat as an appropriate object for constitutional proceedings.

Although it seems to be a matter of several individual rights, it still originates from the normative construction of the Constitution that, in fact, these are the only three rights - a sublime of several separate interrelated aspects, that form only this group of rights.⁸

Thus, the Constitution guarantees a special form of constitutional protection only to a small part of strictly defined freedoms and rights. The capacity of the human rights protection system clearly indicates that the framers of the constitution, at the time of drafting the Constitution, i.e. when determining the competencies of the Constitutional Court, did not opt for a general definition of human rights that would cover all individual rights prescribed by the highest legal norm, but decided to simply list these rights, i.e. applying the *numerus clausus* principle.

It should be noted that other countries also apply the principle of selection of the corpus of individual constitutional rights for which special constitutional protection - *numerus clausus* is provided, such as Germany,⁹ Austria,¹⁰ and Spain,¹¹ but none of the legal systems of the mentioned countries limits the action of the Constitutional Court to the extent of the relationship between the Macedonian legal system and the Constitutional Court.

The subgroup in charge of preparing the draft of the new Constitution from 1991, which was supposed to ideologically and institutionally replace the 1974 Constitution, ascertained the need for a new jurisdiction of the Constitutional Court which will refer to the protection of the rights and freedoms violated by an individual legal act or by an action of a body that is part of the public authority.

The subgroup states in its report made the following statement, "The general intention to reaffirm the position in the legal system of the human being and citizen, as a basic subject of the socio-economic and political system, priority in the protection of constitutionality and legality shall have the freedoms and rights of the human being and citizen."¹²

Based on this subgroup proposed extension of the jurisdiction of the Constitutional Court of the Republic of Macedonia to protect the freedoms and rights of the human beings and citizens guaranteed by the Constitution, when these rights are injured by an individual act or action

⁸ Art. 9, 16, 20 from the Constitution

⁹ Art. 1-18, 19, 20 par. 4, 33, 38, 101, 103, 104 from the German Basic Law

¹⁰ The Austrian Constitution – Art. 2, 7 par. 2, 26, 60, 83 par. 2, 95, 117; Basic law for general citizen rights, 1867, Art. 2, 4 par. 1, 5, 6, 6 par. 1, 9, 10, 13, 18; Saveski, 2019, p. 174-175; Art. 7 of State Agreement guarantee the application of minority languages in communication with public authorities; The law for the implementation of the International Convention for discrimination elimination. *Ibid*

¹¹ Art. 14-30 from the Spanish Constitution

¹² Јордан Арсов. „Улогата на Уставниот суд на Република Македонија во заштита на слободите и правата на човекот и граѓанинот повредени со поединечен акт или дејство“, Правен дијалог, бр. 3, 2011, р. 5.

inflicted in the exercise of public authority, i.e. when they do not provide other judicial protection or protection from other bodies.¹³

Unfortunately, the subgroup's proposal for a comprehensive definition of the jurisdiction of the Constitutional Court to protect all rights defined in the Constitution was not accepted. At the public debate that was held regarding the proposal of the new Constitution of the Republic of Macedonia, the Constitutional Court submitted a new proposal to the Committee on Constitutional Affairs of the Assembly on the Competence for Protection of the Human Rights which was immediately accepted by the competent committee and the Assembly in the process of voting on the new Constitution. The new competence that was stipulated in Art. 110 par. 1 item 3 received its final form – a limited system of protection of only the human rights as described above in this paper.

This means that, in practice, Constitutional Court is the creator of the "most restrictive model regarding the accessibility of the constitutional complaint".¹⁴ This is really contradictory given the fact that in comparative law there are numerous examples where the Constitutional Court with its activism exceeds its constitutional limits of competence for protection of the human rights. The most active in this regard is the German Constitutional Court, which has repeatedly intervened in a number of disputes, regarding the type of acts that may be subject to constitutional review.¹⁵

It should be emphasized that in the research for this paper the authors did not find a single written document that explains the criteria according to which the unprincipled selection was performed, i.e. on which basis only certain rights enjoy special constitutional-judicial protection. It is more than clear that this omission of jurisdiction by itself produced a negative effect on all procedural assumptions that are important for the admissibility of human rights as an instrument not to be regulated by the Constitution.

To overcome this unfavourable situation of the model of protection of human rights, within the attempt to reform the Constitutional Court since 2014,¹⁶ an amendment was proposed referring to the **three essential aspects: the capacity (scope) of protection, the name of the legal remedy for initiating the procedure and the persons authorized before the Constitutional Court, to point out that their guaranteed right has been violated.**

This Amendment XXXIX is divided into three separate paragraphs. For the topic of this paper, paragraph 1 is especially important. Amendment XXXIX provides that the remedy prescribed in the Rules of Procedure called "a request for the protection of human rights"¹⁷ be replaced by a new legal institute to initiate the procedure that will be called "constitutional complaint".

¹³ *Ibid.*

¹⁴ Дарко Симоновић. „Уставна жалба – теоретскоправни оквир“, Анали Правног факултета у Београду, 1/2012, p. 212

¹⁵ Vladimir Đurić. 2000. *Ustavna žalba*, Beograd, p. 145-160.

¹⁶ The Constitutional Court reform process, which began in 2014 and is still officially ongoing, was part of a more complex attempt to intervene in the Constitution. The partial constitutional intervention consisted of a package of seven constitutional amendments, including an amendment to the Constitutional Court. The provisions of the Draft-Amendments sought to define marriage as a union between a man and a woman (Amendment XXIII); establishment and organization of an international financial zone (Amendment XXIV); to change the name of the National Bank of the Republic of Macedonia (Amendment XXV); The State Statistical Office to change its legal status and grow into a constitutional category (Amendment XXVI); changes in the financial area in order to establish precise rules within the budget that referred to the budget deficit and public debt (Amendment XXVII); change in the composition of the Judicial Council, (Amendment XXVIII), and finally implements the constitutional complaint (Amendment XXXIX),

¹⁷ Art. 52 of the Rules of Procedure

The Macedonian constitutional system is unique regarding the legal norm that prescribes the initial instrument of the procedure for the protection of human rights. However, the Macedonian constitutional system is also unusual in terms of its name. In comparative law, there is no other legal mechanism for the protection of human rights which is named with the general administrative term “request”. The term “constitutional complaint” is most often used in the comparative legal systems such as (Serbia, Montenegro, Austria, Germany), or “constitutional lawsuit” (Croatia and Slovenia), “amparo appeal” in (Spain, Mexico, Philippines), or appellation in (Bosnia and Herzegovina).

The 2014 Macedonian reform package, whose integral part was the incorporation of the constitutional complaint, was another disappointment in terms of its legal capacity. It was just an attempt to cosmetically improve the current state of the model for the protection of human rights. The only bright spot was that instead of a tertiary legal norm, the regulation of the constitutional complaint would be left to the Constitution.

But as for the structure of the amendment i.e. of the rights for which the Constitutional Court be called upon to provide protection, it was not substantially different from the current system. The amendment failed to propose a constitutional revision which, with a simple formulation will cover all the rights and freedoms provided by the Constitution. Instead, the principle of simple enumeration was used, the *numerus clausus*.

Conceptually, the method of discretionary selection of the rights for which protection will be provided by the Constitutional Court has been re-applied, without elaborating the justification for such an approach. From a nomotechnical point of view, the proposed amendment was a poor legal solution, nothing but fiction that the number of protected rights had increased, because these were several more complex rights divided into individual segments, thus attempting to show the increased capacity of the rights protection system.

This is exactly what the Venice Commission noted, in its report stating that despite the fact that the list of rights is growing, it is still a closed system.¹⁸ The Commission also found that the small number of protected rights was the cause of a number of complaints against the country before the European Court of Human Rights, which, on the other hand, meant that the introduction of a new legal remedy at the national level will lead to increase cases that the Constitutional Court will have to assess.¹⁹

Amendment XXXIX para. 1 reads:

The Constitutional court decides upon a constitutional complaint filed by a natural and legal person, declared against an individual act or action by a state body, a unit of local self-government or a holder of public authorizations that violate the freedoms and rights of the individual and the citizen, namely: the equality of the citizen in the freedoms and rights, regardless of sex, race, color of the skin, national and social origin, political and religious beliefs, property and social status, right to life, the prohibition of torture, inhuman or degrading treatment, punishment and forced labor, the right to human freedom, the right to presumption of innocence and a fair trial, freedom of belief, conscience, thought and public expression of thought, freedom of speech, public performance, public information and the free establishment of public information

¹⁸ Report of the TAIEX Expert Mission for Protection of Human Rights by the constitutional Court of the Republic of Macedonia, Zagreb, 2018, p. 16.

¹⁹ *Ibid.*, p. 17.

institutions, the freedom and inviolability of letters and all other forms of communication, the security and secrecy of personal data, freedom of religion, freedom of association, etc. the gathering and expression of public protest, the respect and protection of the privacy of personal and family life, the dignity and reputation, the inviolability of the home, and the right to free movement, when other domestic regular or extraordinary remedies are exhausted or not provided for their protection.

The legislator tried to compensate for the omission for quality regulation of the aspects of the work of the Constitutional Court, non-adoption of a special law, non-extension of the competence for protection of human rights, non-introduction of the constitutional complaint and its raising to the constitutional level, with several separate laws. These are The Law on Administrative Disputes,²⁰ Law on the Ombudsman,²¹ Law on Prevention and Protection against Discrimination.²²

These amendments do not extend the scope of protection set out in Art. 110 par. 1 item 3 of the Constitution, nor add a new catalogue of protected rights, because it is by no means possible for a norm of a legal nature, and even from an incompatible law, to upgrade the capacity of a constitutional norm. In this case, the legislature limits the existing subject matter of the Constitutional Court, defining another legal remedy for defence against violations of restrictively guaranteed rights from a violation caused by the adoption of legal acts, actions or omissions by the state bodies.

1.2. Indirect regulation

However, despite the restrictive approach of the Constitution with a constitutional norm to regulate the basic postulates of the system for the protection of human rights before the Constitutional Court, the Constitution does contain several provisions that can be related to this important constitutional jurisdiction. In this sense, the constitutional norms related to the protection of human rights can be divided into two groups.

In the first group is the provision authorizing the Constitutional Court to directly implement the protection of human rights (Art. 110 par. 1, item 3 - see Part 2.2.1), in the **second group is the corpus of provisions regarding the type of decisions and their legal effect for the procedures in which the Constitutional Court** repeals or annuls laws or other general legal acts that are not in accordance with the Constitution. (The Constitutional Court shall repeal or invalidate a law if it determines that the law does not conform to the Constitution - Art. 112, par. 1).

The first provision unequivocally refers to human rights as an object of protection, while the second implicitly leads to decisions to apply their legal effect to the procedure for the protection of human rights.

The claim for indirect application of the provisions of the decisions with an effect for annulment or repeal of a general legal act is also important for initiating a procedure for protection of human rights. This can be seen based on the following explication.

²⁰ Official Gazette no. 62/2006, 150/2010

²¹ Official Gazette, no. 60/03, 114/09, 181/16, 189/16, 35/2018; Decision U no. 111/2007 of the Constitutional Court

²² Official Gazette, no. 101/2019

When the question is raised before the Constitutional Court as to whether a general act is in accordance with the highest legal norm, that is, the Constitution, and in case that the Constitutional Court finds a constitutional-legal disharmony between the constitutional norms and part of the norms of the disputed law or between the constitutional provisions and the law as a whole, **the effect of the cassation decision of the Constitutional Court on the invalid legal norms can be indirectly applied to the individual legal acts that base their legal existence on the cassated norms.**

The scope of the legal effect of the decision depends on the type of decision with which the Constitutional Court will determine the unconstitutionality. In case the Constitutional Court decides on the annulment of a law or some legal norms, then the cassation action covers all individual acts that are based on the provisions of the disputed law from the day of its entry into force (*ex tunc*).

In the second case, if the Constitutional Court decides to repeal a law or some legal norms, then its action will prevent individual legal acts to be based on the content of the cassated provisions in the future (*ex nunc*). In other words, the decision of the Constitutional Court banning the invocation of the repealed provisions does not have the legal capacity to remove from the legal order all the harmful consequences that the individual legal acts created before the decision for their cancellation.

However, for individual legal acts based on an annulled law or part of a law, an additional special rule applies. The legal effect of a decision for annulment of a law or some of its disputed provisions does not apply directly, by legal analogy. Every person against whom an act has been adopted based on a law that has been partially or completely removed from legal life has the right, based on an already made cassation decision, to initiate a special procedure for annulment of the disputed individual act.²³

In such cases, the cassation decision is a legal basis for initiating an independent procedure before a body competent to adopt the annulled legal act. This is the only case in which the Constitution prescribes a provision on the types of decisions and their legal effect that can be related to the procedure for the protection of human rights.²⁴

III. THE CONSEQUENCE OF CONSTITUTIONAL COMPLAINT SYSTEM CAPACITY

1. Overview of the practice for human rights protection - *Period 1991-2019*

Through a study of the rulings of the Constitutional Court, the consequences of the omissions and inconsistencies of the current system for the protection of human rights are immediately evident. The Constitutional Court has no room to develop its practice for one key reason, which is the limited capacity of Art. 110 par. 1 item 3 of the Constitution, and the unavailability for protection of all rights guaranteed by the highest legal norm.

The Macedonian Constitutional Court needs to introduce a new processing instrument for the protection of the rights and freedoms of the Macedonian citizens. The previous practice of the Constitutional Court shows that Court did not do much to protect civil rights and freedoms compared with other Constitutional Courts in Europe.

²³ Art. 81 of the Rules of Procedure.

²⁴ Art. 56 of the Rules of Procedure.

According to the 2009 Review report, the Macedonian Constitutional court deal with only 15 applications for protection of civil rights and freedoms based on Article 110, item 3 of the Constitution. In nine cases the submitters called for protection from discrimination. In three cases the submitters demanded protection of the right to belief, and in one demanded the freedom of public expression. In other cases, the Constitutional court dealt with the right to a fair trial.²⁵

In 14 cases, the Constitutional Court decided not to initiate a procedure for human rights protection because the initiator of the constitutional complaint system asked the Court to behave as an ordinary appeal judiciary authority. This activity is not under the authority of the Constitutional Court. In one case, the Court rejected the application because it was not within the scope of rights protected by the Constitutional Court according to Article 110, par. 3 of the Constitution.²⁶

In the 2010 Macedonian Constitutional Court acted on nine cases related to human rights and freedoms protection. On the 10th of February 2010, the Constitutional court, with Decision U. no. 84/2009, decided that no accepting the candidature for participation in the local election violated the right of political affiliation on the initiator on the constitutional complaint system, Xhavid Rushini.²⁷

In five other cases, the Court decided to reject the cases. In two due to non-competence, in one due to non-existence of procedural preconditions for a decision, and in two cases due to lack of timeliness.²⁸

The number of submitted cases for human rights protection increased in 2011 compared to the previous two years. The Court received a total of 27 cases, of which 23 were filed during 2011, the largest number of cases in the previous five years.²⁹

The Court closed 23 cases for protection of the freedoms and rights in 2011. With the Decision on case U.no.107/2010, the Court rejected the case of the citizen Levko Tanevski, a lawyer from Skopje, for protection of the freedom of public expression of thought.³⁰

In 2012, the Court received a total of 25 requests for citizen's rights protection the largest number in the previous five years. During this year, the Court closed 27 cases, 15 requests, referred to protection from discrimination, 11 requests concerning the protection of the freedom of belief, conscience, thought and public expression of thought, and one case is connected to the right of freedom of political association.³¹

The Court decided to reject the requests for human rights protection in six cases since it did not found that violation of a specific right, or freedom had been committed (Four cases referred to the freedom of thought and public expression of thought, one case referred to discrimination on the grounds of social status, and in one case discrimination on the grounds of religious orientation).³²

²⁵ Tanja Karakamisheva-Jovanovska. „*Constitutional Justice in the Republic of Macedonia, Macedonian Constitutional Court – Legal Symphony or Legal Cacophony?*“, Law Review, Volume 9, Issue 2, 2018, p. 14.

²⁶ Review of the Work of the Constitutional Court of Macedonia for 2010, Skopje (2011) <http://ustavensud.mk/?p=12528> last visit 25th of February 2021, p. 39.

²⁷ Karakamisheva-Jovanovska. op. cit. *Ibid*.

²⁸ Review of the work of the Constitutional Court of Macedonia from 1 January 2011 to 31 December 2011, Skopje (2012) <http://ustavensud.mk/?p=12525> last visit on 25th of February 2021, p. 47.

²⁹ Review of the Work of the Constitutional Court of Macedonia for 2012, Skopje (2013) <http://ustavensud.mk/?p=12522> last visit 25th of February 2021, p. 32-34.

³⁰ Karakamisheva-Jovanovska. op. cit., p.14-15.

³¹ *Ibid.*, p.15.

³² *Ibid.*

In 21 other cases, the Court decided to reject the requests. In 11 cases the main reason was due to non-competence, in eight due to absence of procedural preconditions and in two due to non-timeliness³³

In 2013, the Court decided on 23 requests for the protection of the citizens' rights and freedoms.³⁴

In 2014, 13 requests for protection of human rights and freedoms according to Article 110, paragraph 3 of the Constitution were found. This was a decrease in the number compared to the last three years. In 2014 the Court have resolved 16 cases of which seven were for protection against discrimination, two files were for the protection of freedom of conscience, thought and public expression of thought.³⁵

In 2015, 13 requests for human rights protection were filed. Six of them were for protection against discrimination, three of them were for protection for freedom of thought, and public expression of thought, two cases were for the protection of freedom of expression, and one subject was for the protection of the right of property.³⁶

In 2016, eight requests for the protection of human rights were submitted to the Constitutional Court. Considering the regular flagrant deviation from the deadline of 30 days for mandatory decision-making in the proceedings initiated upon a request for constitutional protection of human rights prescribed by a provision of the Rules of Procedure of the Constitutional Court.³⁷ The court resolved a total of 11 cases (seven were received during 2016, three in 2015, and one case had been archived since 2014). Out of the total number of submitted requests that received a constitutional court final, eight referred to protection against discrimination, and with the other three requests involving the protection of the right of ownership from the Constitutional Court.³⁸

From the report of the work of the Constitutional Court for 2017, it is evident that only five requests for protection of human rights were submitted, which from a comparative point of view of the previous years, is by far the most inactive year when it comes to the protection of constitutional rights. From the submitted requests, a total of four refer to protection against discrimination, three for protection against discrimination in relation to social affiliation, and one request for protection against discrimination on the grounds of religious affiliation.³⁹

In 2018, a total of 11 requests for the protection of human rights were submitted, which is an improvement compared to the previous year. The report does not specify the exact number of submissions seeking protection of a particular constitutional right but comes to the general conclusion that most of the requests relate to protection against discrimination on the grounds of political affiliation, sex, race, religion and national origin, including the right to ethnicity. The

³³ Review of the Work of the Constitutional Court of Macedonia for 2012, Skopje (2013)<http://ustavensud.mk/?p=12522> last visit 25th of February 2021, p. 32-35.

³⁴ Review of the work of the Constitutional Court of Macedonia for 2013, Skopje (2014)<http://ustavensud.mk/?p=12519> last visit 25th of February 2021, p. 8.

³⁵ Review of the work of the Constitutional Court of Macedonia for 2014, Skopje (2015)<http://ustavensud.mk/?p=12516> last visit 25th of February 2021, p. 15.

³⁶ Review of the work of the Constitutional Court of Macedonia for 2015, Skopje (2016)<http://ustavensud.mk/?p=12511> last visit 25th of February 2021, p. 25.

³⁷ Art. 54 of the Rules of Procedure.

³⁸ Review of the work of the Constitutional Court of Macedonia for 2016, Skopje (2017)<http://ustavensud.mk/?p=4933> last visit 25th of February 2021, p. 26.

³⁹ Review of the work of the Constitutional Court of Macedonia for 2017, Skopje (2018)<http://ustavensud.mk/?p=16542> last visit 25th of February 2021, p. 29.

other submissions requested protection of the freedom of thought and public expression of thought, belief, conscience, political association, as well as protection of the right to free access to information, i.e. the right to freely receive and transmit information.⁴⁰

On June 27, 2018, the Constitutional Court issued its second decision finding a violation of a right for which special legal protection is provided. With the Decision, the Constitutional Court ruled for the first time against the material action of a public authority. Namely, the submitters of the request with the stated allegations claimed that by the action of an official from the Ministry of Interior, their right to a peaceful protest was violated. After exhausting the envisaged institutional path that precedes the decision of the Constitutional Court, a Decision was adopted which found a violation of the right to freedom of thought and public expression of opinion and prohibition of discrimination on the grounds of political affiliation.⁴¹

Finally, according to the latest report from 2019, the Constitutional Court acted on 19 requests for the protection of human rights.⁴² As in the previous year, this report only gives information on the number of submitted requests according to the guaranteed constitutional law for which a special form of constitutional protection is required. Most of the cases concern protection against discrimination on the grounds of political affiliation, race, religion and nationality, including the right to ethnicity, and social affiliation. With the other requests, the authorized persons initiated proceedings before the Constitutional Court to protect the freedom of thought and public expression of thought, the right to political association, and the right to property.⁴³

On May 29, 2019, the Constitutional Court issued the third decision where it found a violation of one of the three rights for which, according to the Constitution, it provides legal protection. The request for protection of human rights was filed against several final legal acts adopted during the court proceedings. The applicants stated in the request that by imposing a fine during a court procedure, their right to freedom of thought and public expression of opinion was violated, in terms of Art. 110 par. 1 item 3 and Art. 16 paragraph 1 of the Constitution. The Constitutional Court accepted the stated request, found a violation of a subjective constitutional right and annulled the final acts by which a fine was imposed.⁴⁴

IV. THE MACEDONIAN LEGAL SYSTEM – A MODEL FOR HUMAN RIGHTS PROTECTION WITHOUT LAW FOR CONSTITUTIONAL COURT

In the Macedonian constitutional system, there is no special law that regulates the organization and functioning of the Constitutional Court. Our country is the only one among other countries that are part of the continental legal family that in terms of organization and functioning of the Constitutional Court does not follow the triple hierarchy of legal norms – Constitution, law and bylaws.

⁴⁰ Review of the work of the Constitutional Court of Macedonia for 2018, Skopje (2019) <http://ustavensud.mk/?p=17728> last visit 25th of February 2021, p. 38.

⁴¹ Decision no. 116/2017.

⁴² At the time of writing, the Constitutional Court had not published a report summarizing its 2020 practice.

⁴³ Review of the work of the Constitutional Court of Macedonia for 2019, Skopje (2020): 25. <http://ustavensud.mk/?p=18959> last visit 25th of February 2021, p. 25).

⁴⁴ Decision no. 57/2019.

1. Attempt for Constitutional Court reform

In 2005, the Government, with the draft amendment XXXIV, provided that the types of decisions, their legal action and enforcement, should be regulated by law and the regulation of the internal organization should be left to the Constitutional Court.

The intention was for the proposed amendment to replace Art. 113 of the Constitution.⁴⁵ However, "despite suggestions and encouragement from the Venice Commission for a more ambitious approach regarding this constitutional amendment, at the last moment, the Government of the Republic of Macedonia changed its mind and did not put it in the parliamentary procedure. Thus the possibility of improving the situation with the Constitutional Court was missed".⁴⁶

The proposed amendment to the Constitutional Court was part of a larger attempt to reform the judiciary. In addition to the stated conclusion, the Expert Commission emphasizes that the adoption of a Law on the Constitutional Court must not affect its competencies and that when regulating the functional aspects of its work, the Court should revise the existing Rules of Procedure, which have clearly inadequate provisions with regard to the tertiary legal force to regulate a matter of legal or constitutional nature.

In fact, this was the only attempt to pass a special law to fill the legal gap in the system of legal norms, which occurred in the regulation of the Constitutional Court.

When it comes to the Constitutional Court, any attempt to bring it under a special legal regime will fail. From the very beginning, when the 1991 Constitution was drafted, a group of theorists welcomed the absence of regulation over the work of the Constitutional Court. The promoted stance indicated that the very fact that the Constitutional Court was free from the boundaries set by the legislature and left to shape the rules that will determine the way it works and the development of its practice is a real benefit and "the strongest guarantor for the independence of the Constitutional Court."⁴⁷

The independence of the Constitutional Court in regulating important components, the immunity of constitutional judges, the election of a president, the type of legal remedy for each type of procedure, the course of the procedure, the preliminary examination of submissions, the legal effect of its decisions were all highlighted as a comfort zone that must not be disturbed because otherwise, the Constitutional Court would be subordinate and in a position of dependence on the legislature.

However, when it comes to the violation of the autonomous position, it is clear that the representatives of this position did not take into account the basic principles on which the modern Macedonian constitutional law is based. In order for there to be any threat to the status of the Constitutional Court by a body competent to exercise constitutional control over acts and

⁴⁵Integral content of Amendment XXXIV: 1. The types of decisions of the Constitutional Court, their legal effect and execution are regulated by law; 2. The internal organization and the manner of work of the Constitutional Court are regulated by an act of the Court; 3. This amendment replaces Article 113 of the Constitution of the Republic of Macedonia".

⁴⁶ Denis Preshova. „*The Constitutional Court lost in judicial reforms, Konrad Adenauer Foundation and Institute for Democracy Societas Civilis – Skopje*“, 2018, <http://www.kas.de/mazedonien>.last visit 25th of February 2021, p. 6

⁴⁷ Marija Risteska, Emil Shurkov. *The Transformative Role of the Constitutional Court of Macedonia*, Center for Research and Policy Making, Skopje, 2016, p. 5.

actions or omissions of public authorities, the law for establishing this body should be passed by an absolute majority, and, according to the provisions of the Constitution on the composition of the Assembly.⁴⁸

However since this would be a body of public authority that is directly related to the Constitution, the Law on the Constitutional Court should be passed by 81 MPs or a two-thirds majority. The Constitution equates the entry into force of this law with the revision of the constitutional provisions,⁴⁹ with the law on local self-government,⁵⁰ litigation law, criminal procedure law and other important procedural and systemic laws.⁵¹

Increased involvement of several political entities in approving the provisions of the Law on the Constitutional Court, would in any case reduce the pressure from negative influence and undermining of its position, in relation to the legislative power

According to the circumstances prescribed by the Constitution, all aspects relevant to the work of the Constitutional Court can be regulated only by law, not with constitutional law, because according to the constitutional provisions, the adoption of constitutional law is possible only for the implementation in force of the amendments for constitutional revision.⁵²

The Law on the Constitutional Court would specify the procedures and conditions for the election of constitutional judges and the termination of their function, the content of the immunity and other rights and obligations of judges, specification of the competencies and the procedure before the Constitutional Court, the legal effect of the decisions, the financing of the institution, as well as the issues related to the employment and the status of the judicial staff.⁵³

When talking about the unusual situation with the legal regulations for the Constitutional Court, it should be noted that the absence of a special legal solution, as a negative legal phenomenon, was not present in the period before the entry into force of the 1991 Constitution. At the time when the legal system was based on the provisions of the 1963 Constitution of the Social Republic of Macedonia, the majority of norms for the Constitutional Court were organized according to the rules for a three-tier hierarchy of legal norms. The Constitutional Court was not only *materia constitutionis* but also *materia legalis*.⁵⁴

With the Rulebook, the Constitutional Court was left to independently regulate only the organizational and functional elements of its work.⁵⁵

The Socialist Constitution of Macedonia of 1974 also established legal regulations for the Constitutional Court based on the principle of hierarchy of legal norms, Constitution, law and by-laws, although the legal solution in relation to the subject matter of the regulation was limited, and contained provisions concerning the type of proceedings, the decisions of the Constitutional Court and their legal effect, a fact contained in the name of the law itself.⁵⁶

⁴⁸ Amendment X of the Constitution – replace Art. 69. Official Gazette of the RM, no. 91/01.

⁴⁹ Art. 129-131, Amendment XVIII of the Constitution. Official Gazette of RM, no. 91/01.

⁵⁰ Amendment XVI of the Constitution – replace Art. 114. Official Gazette of RM, no. 91/01.

⁵¹ Amendment XXV of the Constitution – replace Art. 98. Official Gazette of RM, no. 107/95.

⁵² (Art. 133 of the Constitution).

⁵³ Denis Presova.. „*The reform of the Constitutional Court or the reform of consciousness?*“, Reform of the institutions and its significance for the Republic of Macedonia, MANU, Skopje, 2009, p. 176.

⁵⁴ Law on the Constitutional Court of SR Macedonia, Official Gazette of SRM, no. 45/63.

⁵⁵ Rules of Procedure of the Constitutional Court of SR Macedonia, Official Gazette of SRM, no. 41/64.

⁵⁶ Law on the Basis of the Procedure before the Constitutional Court of Macedonia and on the Legal Effect of its Decisions, Official Gazette of SRM, 6p. 42/76.

V. CONCLUSION

Macedonian Constitutional Court is practically invisible when it comes to human rights protection in the system. During the past 30 years of Macedonian state independence, the question of the Constitutional Court reform was relevant on two occasions without success. The first reform attempt was in 2005 when the constitutional amendments for the judiciary and public prosecution were adopted, and the second in 2014 when draft-amendments for the Constitutional Court competence and law regulation were proposed by the government, but due to the opposition boycott of the Assembly and no political will of the relevant parties, the amendments did not pass the parliamentary procedure. The modest practice of the Constitutional Court in the field of the human rights and freedoms protection is a result not only of the restrictive nature of the constitutional and Court's procedural rules but also of the Court backwardness in following the case-law of the European Constitutional Courts as well as the Strasbourg and Luxembourg court. Macedonian Constitution guarantees protection of only three rights and freedoms through the Constitutional Court procedure, which does not provide a legal basis for this Court to be a true guarantor and protector of human rights. The need for this guarantee is obvious due to the meaning and the character of procedural and material aspects of the Court in the constitutional and legal system of the country. The Constitutional Court has an important role in the process of the Constitution. However, the Macedonian Constitutional Court did not achieve this goal, in fact becoming a powerless structure when faced with the power of the executive and the legislative government. The Court fails to win the respect of the public, sometimes acting like "hidden politicians" who do not respect the will of the sovereign citizens. The Macedonian Constitutional Court needs essential structural and procedural reforms as well as the introduction of a new processing instrument for the protection of the rights and freedoms of the Macedonian citizens.

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